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LIMITATIONS ON THE DOCTRINE OF DIPLOMATIC IMMUNITY.

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THE GENERAL RULES OF IMMUNITY

That branch of international law which treats of the intercourse of states includes the rules of diplomatic practice. Of this narrower topic one phase consists of the principles of diplomatic immunity. Bitter disputes, often quite serious, have arisen over the claims of diplomats under the doctrine of immunity; several of these disputes have been decided by the common law courts of England and America. Nor have cases of this nature ceased to arise¹. It is therefore worth the while of the members of the legal profession to understand the chief legal privileges of diplomatic officers in the state to which they are accredited. Accordingly, some brief considerations of the doctrine of diplomatic immunity, together with a few possible exceptions to the usual dogmatic statements are herewith set forth².

The "Printed Personal Instructions to the Diplomatic Agents of the United States" for 1885 contains this statement: "A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and cannot be sued, arrested or punished by the law of that country."³ The "Instructions to Diplomatic Officers" for 1897 declare that "the personal immunity of a diplomatic agent extends to his household and especially to his secretaries."⁴ "Household" includes attaches, wife and family

¹ Witness the recent dispute between the Swiss Minister to the United States and the late Justice W. B. Lamar.

² The present paper has treated the subject in hand from the standpoint of English and American private law. Judicial decisions are almost entirely relied upon since this material is the most valuable for the practising attorney. The first few paragraphs of the paper attempt to summarize the rules and theory of diplomatic immunity as found in any standard text, in order to refresh the reader's memory.

A discussion of the waiver of immunity has been omitted that it may be the subject of another article.

³ Wharton, Francis: Digest of International Law, I., 644.

⁴ Moore, J. B.: Digest of International Law, IV. 648.

of the officer, and his servants. To clarify these general rules of the law of nations and to make them a part of the private law of their respective countries, Parliament and Congress have passed statutes on the subject of diplomatic immunity. The Act of Congress of 30th of April, 1790 (now U. S. Rev. Statutes No. 4063)⁵ which copied the English Act of 7th Anne Ch. 12, provides in substance that "the person of any public minister of any foreign prince or state authorized and received by the President, or any domestic or domestic servant of such minister" is exempt from process, and the serving of such process is declared void in every respect. The person serving or suing out such process is to be imprisoned or fined at the discretion of the court.⁶ Judicial construction of these acts has provided a loophole in their apparently rigid provisions. That the acts are not mandatory in the sense of changing the old law of nations, but merely declaratory of that old law for the purpose of penalizing offenders, has been held both in England⁷ and America⁸ to be the true intent and meaning of the statutes. Hence if certain exceptions to this rule of the immunity of diplomatic agents appear in the public law, then the acts cannot be interpreted as abolishing these exceptions.

The two theories upon which the doctrine of immunity has from time to time rested have each helped to shape the corollaries of the main proposition. Personal inviolability, the general term for the earlier theory, was held to mean that the agent, being the direct representative of the sovereign, an affront to the agent was an insult to the sovereign. The Roman courts⁹, Vattel¹⁰ and even Kent¹¹ supported this reasoning. Exterritoriality, the later theory, asserts that the agent while actually present in the state to which he is accredited, is legally still residing in the state which he represents and so cannot be reached by legal process. Early and Mid-Nineteenth

⁵ Revised Statutes of the United States, Section 4063.

⁶ Section 4064, *Ibid.*

⁷ *Novello v. Toogood*, 1 B. & C. 149; *Viveash v. Becker*, 3 M. & S. 234.

⁸ *Davis v. Packard*, 7 Peters 276; *Holbrook v. Henderson*, 6 N. Y. Super. Ct. 619.

⁹ *Hunter: Roman Law*, p. XLVIII.

¹⁰ "A respect due sovereigns should reflect upon their representatives and chiefly upon their ambassadors as representing their masters person in the first degree." Vattel in "Droit des Gens," 54, 4th ch., 9th par. 81, quoted in Halleck, *International Law*, I, 278, Edition by Baker.

¹¹ "Kent, however, believed the doctrine to rest upon both lines of reasoning, i. e., exterritoriality as well as inviolability. Kent, James; Commentaries, III, 28.

Century writers were loath to accept unreservedly this newer point of view; Halleck especially dissented.¹² In 1874, however, the Department of State in the Jay case said through Fish, the Secretary: "The tendency of opinion in regard to the immunities of diplomatic agents is believed to be strongly toward restricting them to whatever may be indispensable to enable the agents to discharge their duties with convenience and safety. *The extreme doctrine of immunity which was necessary in an age of barbarism and for the intercourse of uncivilized nations has happily yielded to the progress of Christianity and modern civilization.*"¹³ To this second theory the American Government has committed itself, as will be further seen by subsequent quotations, and with this adoption of a more liberal line of reasoning has come a loosening of the rules consequent upon the theory.¹⁴

Exemption extends to both the criminal and civil process of the state to which the agent is accredited. The criterion for exemption from criminal process is thus stated by Wharton: ". . . this extritoriality ordinarily protects the diplomatic agent also from prosecution from crime; unless the crime be of so outrageous a character and conspicuous as to forfeit his privileges or disturb the peace of the country of his residence."¹⁵ Caleb Cushing while Attorney General of the United States, said: "If the crime committed affects individuals only the government of the country is to demand his recall. . . . *If the crime affects the public safety of the country the government may, for urgent cause, either seize and hold his person until the danger is over, or expel him from the country by force.*"¹⁶ This last statement develops very clearly, for America at least, one limitation upon the general rule of immunity from legal process.

¹² "It is proper to distinguish between the inviolability of the public minister and the legal fiction of his extritoriality. . . . The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and to his office and from which it cannot be severed." Halleck; International Law, I, 278, Edition by Baker.

A judicial discussion of the nature of the privilege is found in *Schooner Exchange v. McFaddon*, 7 Cranch 116, Marshall, C. J.

¹³ Mr. Fish, Sec'y of State to Mr. Jay, Min. to Austria. Quoted in Moore, J. B.; Digest of International Law, IV, 648. Italics are author's.

¹⁴ This statement is also borne out by the subsequent quotations in this paper from the correspondence in the Jay case and from J. B. Moore's Digest of International Law.

¹⁵ Wharton, Francis; Digest of International Law, I, 644.

¹⁶ 7 Op. 367, Cushing 1885, quoted in Wharton, Francis; Digest of International Law, I, 648. Italics are author's.

Civil exemption includes all actions arising *ex contractu* or *ex delicto*. The rule that neither the real nor personal property of the members of the diplomatic mission may be taken by either a writ of attachment or execution¹⁷ supplements the statement of the general principle. That the exemption extends also to the agent's dwelling house, goods and the archives of the mission is understood to mean that "these cannot be entered, searched or detained under process of local laws or by local authority."¹⁸ The reason for this and all subsequent principles of exemption from civil and criminal process was happily phrased by Fish: "The true test of privilege from suit is whether the exercise of the municipal authority in question is an unwarrantable and unreasonable interference with the freedom with which the functions of the diplomatic representative must be performed."¹⁹ What constitutes an "unreasonable interference" is the problem raised by these words.

DOES EXEMPTION EXTEND TO COMMERCIAL VENTURES?

The vast majority of civil cases in the courts (both British and American) today are suits for the recovery in more or less direct form of money. The present era is one of commercial ventures, corporate and otherwise. Diplomatic agents and their official families are not impervious to the American commercial spirit. Many of them still consider the United States a get-rich-quick land. May a suit be entertained against a diplomatic officer as the result of a commercial venture outside of his sphere of duties? Instances of such ventures by the lesser members of a mission—or perhaps by the secretaries or servants—are not rare and several interesting cases are recorded, where, the scheme ending disastrously, the creditors brought suit to recover their due amounts. The inflexible rules previously noticed would seem to seal the fate of such creditors' suits. The more liberal theory of immunity shows its workings at this juncture, however, for together with the "true test of privilege" may be coupled another statement by Fish, "The practical application

¹⁷ This is true because as previously seen, such writs are declared void by Sec. 4063 Rev. Statutes of the U. S.

¹⁸ Instructions to Diplomatic Officers of the U. S., quoted in Moore, J. B.; Digest of International Law, IV, 648.

¹⁹ Mr. Fish, Sec. of State to Mr. Jay, quoted in Wharton, Francis; Digest of International Law, I, 642.

of the doctrine among Christian people should be confined to cases of the greatest importance. *An envoy is not clothed with diplomatic immunity to enable him to indulge with impunity in personal controversies or to escape from liabilities to which he otherwise might be subject.* The assertion of these immunities should be reserved for the more important and delicate occasions and should never be made use of when the facts of a particular case expose the envoy to the suspicion that private interest or a desire to escape personal or *pecuniary* liability is the motive which induced it.²⁰ Here is a second limitation on the doctrine; it would seem also, a more important limitation. It will bear further examination.

Consider the following hypothetical case as a basis for future discussion: A, a citizen of X state, is duly appointed and properly received as the minister to Y state. At the capitol of Y he is provided with a residence the property of and furnished by X. After a few months residence in Y, A discovers his salary to be insufficient for his needs. He therefore buys, for the purpose of speculation, 100 shares of stock in the C. D. & E. Railroad whose lines operate in Y. Not daring to use his own name in this transaction, A secures B, a citizen of Y, to act as agent for him. A wreck occurs on the line of the railroad shortly after the purchase by A, and the peculiar facts of the wreck lead to an investigation by public authorities. It is shown in the course of this investigation that the stock of the road is not fully paid up. The stockholders of the corporation are, by the law of Y, liable only for the amount of their stock subscription. The report of the investigating committee brings a receivership for the company and the receiver now sues the stockholders to secure complete payment of their holdings. A, it is discovered, owes 25% of his original subscription. The true owner of the stock having been discovered, the receiver, ignoring B, sues A to recover the 25%. What decision should be given under the present law? If the suit cannot be maintained can the receiver by another action obtain the stock certificates which A holds?

Several English decisions make clear the British position on the first of these questions. In *Magdalena Steam Navigation Com-*

²⁰ Mr. Fish, Sec'y to Mr. Jay, quoted in Moore, J. B.; Digest of International Law, IV, 648. Italics are the author's.

*pany v. Martin*²¹, a case almost directly in point, Martin was Envoy Extraordinary and Plenipotentiary of the Republic of Guatemala and New Granada to England, and as such was received by the Crown. The reception occurred previous to 1856. The Magdalena Steam Navigation Company, on November 3, 1856, was fully registered under the Joint Stock Companies Act of England, which Act made the company a modified form of partnership having shares of stock. Martin secured 100 shares of stock in the company and held them as a properly authorized stockholder. The company on March 10, 1857, voted to wind up its business and to levy an assessment of £6 on each share of stock. Martin was notified of the assessment but refused to pay and remained in default. Action was thereupon brought by the company to recover the £600 owing from Martin. The defendant replied in person, alleging his official character and claiming exemption from the suit because of his privilege of immunity which had not been waived. Very complete arguments were made by the counsel for both parties. The main contention of the plaintiff was that the defendant by engaging in trade in England had forfeited his right to immunity. In support of this contention plaintiff's counsel cited Coke's famous statement: "If a foreign ambassador, being *prorex*, committeth any crime which is *contra jus gentium* . . . he loseth the privilege and dignity of an ambassador as unworthy of so high a place and may be punished here as any other private alien . . . and so of contracts that be good *jure gentium*, he must answer here."²² It was admitted by the plaintiff that under ordinary circumstances the ambassador's residence and personal property were exempt from seizure, but that by engaging in trade, he had forfeited that right. The decision, which was read by Lord Campbell, may be summed up in these words of the opinion: "The question raised by this record is whether the public minister of a foreign state, accredited to and received by Her Majesty, having no real property in England and *having done nothing to disentitle him to the privilege generally belonging to such*

²¹ 2 ELLIS & ELLIS, 94 (1859). Though not the first decision on this phase of the law, the Martin case is perhaps the most important.

²² Coke, *Edward*; *Institutes of the Law*, IV, 153.

public minister,²³ may be sued against his will in the courts of this country for a debt, neither his person nor his goods being touched by the suit, while he remains such minister. He (the defendant) says by his plea to the jurisdiction of the court that by reason of his privilege as minister he ought not to be compelled to answer. We are of the opinion that his plea is good and that we are bound to give judgment in his favor.”

The Martin case, though decided before the era of corporations and commercial adventures in corporate enterprises, was nevertheless followed in the decision of *Parkinson v. Potter*.²⁴ There the question was of the exemption of an ambassador from the payment of certain parochial rates for the keeping of the poor of the parish. Justice Wills giving the opinion of the court, said: “Reliance was placed on *Taylor v. Best*.²⁵ . . . It is true that Maule, J., expressed doubts as to whether an ambassador in England could claim complete exemption from all English process. *But that doubt was removed and pronounced to be ill-founded in the considered and elaborate judgment of the Court of Queen’s Bench in Magdalena Steam Navigation Company v. Martin*.²⁶ . . . There is therefore nothing in English law which contravenes the doctrine of immunity as laid down by the writers of international law.” The same court in *Mursus Bey v. Gadban*,²⁷ approved the Martin case in these words: “He did not assert (speaking of the argument of counsel), for this would have been useless, that Mursus Pacha could have been effectively sued while he was de facto ambassador at London, for the case of *Magdalena Steam Navigation Company v. Martin*, which has never been doubted, settled that he could not, as during that period he was exempt from the jurisdiction of the courts of this country.” The doctrine of the Martin case seems, therefore, to be soundly impressed upon the minds of the English bench. The Island Kingdom consequently has an absolute rule that no diplomatic agent may be sued on any contract, express or implied, which arises out of a business venture—in fact this last clause seems to be totally imma-

²³ Italics are the author’s. That the act of Martin was not considered sufficient to cause a forfeiture of privilege may be inferred from this statement.

²⁴ 16 Q. B. D. 152 (1836).

²⁵ An earlier case. 14 C. B. 487.

²⁶ Italics are the author’s.

²⁷ 2 Q. B. D. (1894) 354.

terial. The receiver of the C. D. & E. Railroad could not, in England, recover the assessment from A.

No case bearing directly on this point appears to have been decided in the American courts.²⁸ Notes on the subject are found in *Corpus Juris*, the *Harvard Law Review* and other standard works.²⁹ *Magdalena Steam Navigation Company v. Martin* is treated as final and is cited in nearly all the American cases that in any way touch this topic. *Parkinson v. Potter* and *Taylor v. Best* are also cited, showing by inference the approval of American law writers.

The second point of the hypothetical case brings to light certain further limitations on the exemption. Moore writes: "If a diplomatic representative holds in a foreign country real or personal property aside from that which pertains to him as minister, it is subject to the local laws."³⁰ The same principle may be found by inference in another quotation from the same source: "Immunity from local jurisdiction extends to a diplomatic representative's dwelling house and goods and to the archives of the mission."³¹ Three things are here mentioned as exempt—nothing more. Moore has taken both of these statements directly from the "Instructions to Diplomatic Officers" of 1897 issued by the State Department. To the same effect, *Corpus Juris* holds that ". . . an ambassador does not forfeit his privileges by engaging in trade. But the application of this rule does not prevent the property embarked by him and accruing to him in his capacity of tradesman³² from being subject to seizure at the instance of creditors. . . ."³³ Consequently it appears to be true in America at least that any property either real or personal which the agent may hold aside from the mansion house, goods and archives, may be taken by the creditors of the representative. *Parkinson v. Potter* for England sanctions this principle. "In *Novello v. Toogood*,"³⁴ says the court, "it was

²⁸ Dicta on this rule is to be found in *United States v. Benner*, 24 Fed. Cas. 1084; *Holbrook v. Henderson*, 6 N. Y. Super. Ct. 619; *State v. De la Foret*, 11 S. C. L. 217; *Schooner Exchange v. McFaddon*, 7 Cranch 116.

²⁹ 2 *Corpus Juris* 1302-1306; 31 *Harv. L. Rev.* 803. A note is also to be found in the *Consolidated Statutes of the United States*, (1913) under Sec. 4063 and 4064, R. S.

³⁰ Moore, J. B.; *Digest of International Law*, IV, 646.

³¹ *Ibid.*

³² Italics are the author's.

³³ 2 *Corpus Juris* 1303.

³⁴ 1 B. & C. 149.

held that the goods of a chorister in the service of the Portugese ambassador were not privileged from distress for the poor rates. But in that case the servant was carrying on the business of a lodging house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges by engaging in trade in the country to which he is accredited, *yet the immunity of his goods does not extend to his stock-in-trade.*"³⁵ The receiver of the C. D. & E. Railroad has a right to recover the 100 shares of stock.

The method by which the stock is to be secured, however, constitutes a very real problem. If they were boldly seized without any attempt at legal process, then strangely enough the problem would be solved. Then, too, a suit or a seizure might be allowed under some legal process where "this can be accomplished without personal service on him (agent), without infringing his dignity as an ambassador and without interference with the proper discharge of his duties."³⁶ But, presuming that a judgment is secured against the agent, the statutory provisions previously noticed forbid the issuance of any writ against him; an execution would therefore be impossible.³⁷ Assuming, however, that the statutes are merely declaratory of the public law, and that the sources of this public law³⁸ allow the taking of property not connected with the actual duties of the representative, then it logically follows that the court should rule that the receiver of the C. D. & E. Railroad may take the 100 shares of stock upon a writ of execution, following *Novello v. Toogood* and similar cases. This conclusion is the only true one that can be drawn from the premises.

Courts are loath to make such decisions, however, because of the fear of international prejudices following a suit and execution where even the name of a diplomatic agent appears. To avoid this dis-

³⁵ 16 Q. B. D. 152. Italics are the author's.

³⁶ 2 Corpus Juris 1303.

³⁷ It is interesting to note the rule that if a judgment is secured against a diplomatic representative, it is not "nugatory, for the inability is only temporary." 21 Harv. L. Rev. 803. But the inability lasts until the agent is no longer a representative, which in many cases is after he has returned to his own country. The court giving the judgment is then powerless to enforce it, unless the stock-in-trade is left behind; that is not likely to happen.

³⁸ That is, judicial decisions, State Department Instructions, opinions of the executive officers, etc., such as are noticed above.

agreeable feature, as well as to conform to the rule against personal service, it is the suggestion of this paper that some form of a proceedings in rem be worked out, to secure the stock-in-trade, even though such proceedings might smack of confiscation. At any rate, such action would avoid the statutes of 1790 and 7th Anne, and provide a practical remedy for the creditor.

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