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INTERNATIONAL LAW - TREATY INTERPRETATION - IMMUNITY OF CONSUL FROM CIVIL SUIT

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INTERNATIONAL LAW — TREATY INTERPRETATION — IMMUNITY OF CONSUL FROM CIVIL SUIT — Tarcuanu, the vice-consul in charge of the Roumanian consulate in New York City, was served with a summons in a civil suit. This case involves his motion to have the summons vacated because of article 2 of the treaty of 1881 [1] between the United States and Roumania, the pertinent part of which says: "The consuls-general, consuls, vice-consuls and consular agents of each of the two high contracting parties shall enjoy reciprocally in the States of the other, all the privileges, exemptions and immunities that are enjoyed by officers of the same rank and quality of the most favored nation." In this situation the most favored nation was France. Article 2 of the treaty of 1853 [2] between the United States and France provides in part: "The consuls-general, consuls, vice-consuls, or consular agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime. . . ." *Held*, motion to vacate denied. The treaty of 1853 does not give immunity from civil suit. The court intimated, however, that it would give immunity from civil arrest.[3] *United States v. Tarcuanu*, (D. C. N. Y. 1935) 10 F. Supp. 445.

The court opens by stating the well-recognized proposition that consuls do not enjoy immunity under international law [4] as do diplomats.[5] It then goes on to assume that the most-favored-nation clause gives the Roumanian consul privileges equal to those enjoyed by the French consul.[6] The third and final step, which is the actual basis of the decision, involves the scope of the phrase, "personal immunity except in the case of crime." There being no American case authority to aid them, the court quotes from various commentators. One of these states that there are no treaties of the United States that relieve a consul from liabiliy to suit;[7] he feels that this is strong evidence of a belief that such immunity would be undesirable. This conclusion, moreover, is supported by the

[1] 23 Stat. L. 711, art. 2.

[2] 10 Stat. L. 993, art. 2.

[3] The opinion really involves three steps, but this note is limited to a discussion of the last one which is the real basis of the decision; the two initial steps have merely been mentioned since a detailed examination of them would not be appropriate here.

[4] This difference in character between these two types of representatives is recognized by the Consular Regulations of the United States. See 2 FELLER and HUDSON, DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS 1289 (1933). The recognized basis for this distinction is that the consul is not primarily concerned with international political relations; he is more apt to deal chiefly with private transactions and is thus a less important figure on the international scene.

[5] For an explanation of the reasoning underlying diplomatic immunity see Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," 10 N. Y. UNIV. L. Q. REV. 170 (1932).

[6] This step raises several questions not in point here; for our purpose it will suffice to say that an examination of the authorities leads one to agree with the correctness of the court's conclusion as to the effect of this clause. See Washburn, "The American Interpretation of the Most Favored Nation Doctrine," 1 VA. L. REV. 257 at 282 (1914).

[7] STEWART, CONSULAR PRIVILEGES AND IMMUNITIES 154-155 (1926).

opinion of a German court that has had to face a similar set of facts.[8] There a treaty gave a Spanish consul "personal immunity"; the court held that these words only gave immunity from arrest and refused to extend their meaning so as to give immunity from civil suit. Although this is admittedly not authority for an American court, it is somewhat indicative of the interpretation we may expect here. It is also helpful to test this result by the guides used by our courts in construing treaties. The general rule reads, "treaties are to be liberally construed." A more accurate statement of the same doctrine is found in the case of *Hauenstein v. Lynham*[9] in which the court says: "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred." However, a liberal interpretation should not permit the inclusion of any privilege claimed. This limitation seems to follow inevitably from the language the court uses in the case of *Tucker v. Alexandroff*,[10] where it was said: "we have no right to enlarge . . . powers upon the principles of comity so as to embrace cases not contemplated by the treaty." It then becomes necessary to determine whether such an immunity, as is claimed in the present case, was contemplated by the treaty. It is generally conceded that the purpose of these treaties is to give the consul as much freedom from local restraint as is consonant with an orderly society; this is done so that he may be left free to perform his duties. For this reason we can agree with the court's intimation that the treaty does give immunity from civil arrest. Also for this same reason we must agree with the actual decision of the case; for to carry this immunity further and say that a consul cannot be sued civilly would be to give the consul a privilege that is not necessary to assure the full performance of his functions since a civil suit should in no way hamper him in the discharge of his consular obligations. Thus it seems safe to say that this immunity was not contemplated by the contracting nations. Any decision going as far as the defendant has urged would hardly be justifiable even under the guise of liberal interpretation. A contrary holding would have been a definite and unwelcome innovation in that it not only would have been out of line with the purpose of the treaty but also would have overridden an important distinction between diplomats and consuls that so far has been carefully maintained.

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[8] McNAIR and LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES FOR 1927-28, Case No. 265, pp. 383 et seq.

[9] 100 U. S. 483 at 487 (1879).

[10] 183 U. S. 424 at 436, 22 S. Ct. 195 (1902).