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Extraterritorial Powers of the Consular Office

INTRODUCTION

IN CONSIDERING the multifarious powers or functions of the consular office, this fundamental principle must be constantly borne in mind: that no law has, of its own force, any effect, as a law, beyond the territorial limits of the sovereignty from which its authority is derived. The corollary of this principle is that the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another, depends upon what our greatest jurists have been content to call the "comity of nations."¹ With such functions of the consular office as have only an infraterritorial operation, that is, functions which, although performed in the territory of the receiving state, have legal efficacy only in the accrediting state, the authorities of the country to which the consul is deputed have no immediate concern. But the most general familiarity with the nature and ultimate legal effects of some of the more important consular powers discloses the fact that, irrespective of executive order, legislative act, or judicial decree, some of them, either under general international law, or in virtue of comity or of treaty stipulations, are likely to have, to be given, or to pretend to, a genuine or putative extraterritorial legal effect before the courts and authorities of the state in which the consul resides, and thus adversely affect the sovereignty of the receiving state in its relation to the personal and proprietary rights of individuals in any degree subject to its laws.

A study of the most frequently invoked of these powers, constitutes one of the most instructive chapters in the history of international law;

¹ *Fleming v. Page* (1849) 50 U. S. (9 How.) 603; *Ross v. McIntyre* (1890) 140 U. S. 453, 11 Sup. Ct. 897; *Hilton v. Guyot* (1895) 159 U. S. 113, 16 Sup. Ct. 39; *Papayanni v. Russian Steam Navigation Co. (The Laconia)* (1863) 2 Moo. (N. S.) 161, 15 Eng. Reprint 862; *Union Bridge & Construction Co. v. Industrial Commission* (1919) 287 Ill. 396, 122 N. E. 609; *People v. McLeod* (1841) 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

and it is to a factual consideration of these powers that the present article is devoted.

CLASSIFICATION

Under international law there have been and are different official duties incident to the office of consul, varying with time, place and circumstances. No exact or invariable test can, however, be derived from international law, or from the general character of the consular office, by which to determine what services performed by the consul are official consular services, and what are not.² But it may be laid down in a summary way that, apart from special rules established by common agreement between the two states,³ the object of the consular establishment is, in a general sense, to promote the commerce and navigation of the country which it represents;⁴ to assert or defend the commercial and proprietary interests of its citizens or subjects in the courts and before the local authorities of the country to which the establishment is accredited⁵ in causes affected by the application of international law,⁶ and in such cases where its nationals have no other representative and are not present to act for themselves;⁷ to exercise certain administrative functions,⁸ and a sort of voluntary jurisdiction — a power of arbitration in certain kinds of disputes, more especially those relating to matters of commerce, which, though not binding upon the tribunals of the receiving state, are binding upon those of his own country, although these special consular powers depend rather on the municipal laws of his own country than on international jurisprudence.⁹ It should not be assumed, however, from the foregoing résumé, that the exercise of those functions necessarily produces legal effects within the country where the consul resides. Although many of those powers have extraterritorial operation, the majority of them do not.

What we have designated as the extraterritorial powers of the con-

² (1888) 19 OP. ATTY. GEN. 196.

³ FIORE, INTERNATIONAL LAW CODIFIED (Borchard's Translation 1918) §502.

⁴ *Harrison v. Vose* (1849) 50 U. S. (9 How.) 372; 1 LORIMER, LAW OF NATIONS (1883) 287.

⁵ *Hamilton v. Erie R. Co.* (1916) 219 N. Y. 343, 114 N. E. 399; 2 FIORE, NOUVEAU DROIT INTERNATIONAL PUBLIC (1885) §1176; BONFILS, DROIT INTERNATIONAL PUBLIC (5th ed. 1908) §769.

⁶ *The Bello Corrunes* (1821) 19 U. S. (6 Wheat.) 152.

⁷ *The Adolph* (C. C. D. R. I. 1851) Fed. Cas. No. 86; *In re Herrman's Estate* (1924) 159 Minn. 274, 198 N. W. 1001.

⁸ 2 FIORE, NOUVEAU DROIT INTERNATIONAL PUBLIC (1885) §1176.

⁹ 1 HALLECK, INTERNATIONAL LAW (4th ed.) 408; BAKER, FIRST STEPS IN INTERNATIONAL LAW (1899) §11; 1 LORIMER, LAW OF NATIONS (1883) 287.

sular office, may be conveniently classified and considered with reference to (A) Civil Matters; (B) Judicial Matters; and (C) Commercial Matters.

CIVIL MATTERS

Authentication of Foreign Laws and Judicial Proceedings

The authentication of foreign laws and judicial proceedings does not properly come within the competency of the consular office. A consul's certificate is not evidence of acts not official, or within his personal knowledge.¹⁰ Such certificate will be limited to matters strictly competent if he were testifying as a witness.¹¹ Nevertheless, the official acts of a consul under the terms of a statute of the state he represents, even if not absolutely conclusive as to the facts done thereunder, are at least of force to overbalance the mere assertions and opinions of other interested parties; and it is doubtful whether evidence can be received on the part of one of the parties to impeach the validity of the certificate and official act of the consul, unless the evidence offered amounts to proof of fraud or plain dereliction of duty on the consul's part.¹² There is authority to the effect that the certificate of the consul as to official acts is to be treated—to the extent of his authority—as a public document, and as such, as competent evidence against all persons of the facts which he is directed or authorized to certify.¹³ So, a foreign certificate of marriage attested by the consul is admissible in corroboration of oral testimony regarding the fact.¹⁴ But a consul, although intrusted by the law of nations with high and extensive powers, is not, properly speaking, a judicial officer, and his certificate is not competent evidence of facts which are susceptible of proof by depositions or some other judicially acknowledged method.¹⁵ The courts, therefore, will decline to recognize in him any power, under the law of nations, to authenticate the laws,¹⁶ or judicial proceedings,¹⁷ of foreign states. He is not the keeper of those laws or proceedings, and can grant no official copies of them. There appears, then, no

¹⁰ *Brown v. The Independence* (E. D. Pa. 1836) Fed. Cas. No. 2,014.

¹¹ *United States v. Knight* (D. Mont. 1923) 291 Fed. 129.

¹² *Lamb v. Briard* (S. D. N. Y. 1848) Fed. Cas. No. 8,010.

¹³ *Levy v. Burley* (C. C. D. Mass. 1836) Fed. Cas. No. 8,300; *Waldron v. Coombe* (1810) 3 Taunt. 163, 128 Eng. Reprint 65.

¹⁴ *State v. Behrman* (1894) 114 N. C. 797, 19 S. E. 220.

¹⁵ *Foster v. Davis* (1822) 11 Ky. (1 Litt.) 71.

¹⁶ *Church v. Hubbard* (1804) 6 U. S. (2 Cranch) 187; *Stein v. Bowman* (1839) 38 U. S. (13 Pet.) 209; *Levy v. Burley* (C. C. D. Mass. 1836) Fed. Cas. No. 8,300; *In re Anne Dormoy* (1832) 3 Hagg. Ecc. 767, 162 Eng. Reprint 1338; *The Goods of Klingemann* (1862) 3 Sw. & Tr. 18, 164 Eng. Reprint 1178.

¹⁷ *Catlett v. Pacific Insurance Co.* (C. C. D. N. Y. 1826) Fed. Cas. No. 2,317; *Foster v. Davis* (1822) 11 Ky. (1 Litt.) 71.

reason for assigning to his certificate respecting a foreign law or judicial proceeding, any higher or different degree of credit than would be assigned to his certificate of any other fact.¹⁸

Marriages

Marriage is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹⁹ Even if we consider it as only a civil contract, marriage is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law.²⁰ The contract of marriage is local in its nature, and as between persons *sui juris*, the general principle of private international law is that the capacity of the parties and the manner in which it shall be entered into is regulated absolutely by the laws of the place — the *lex loci actus*.²¹ The general principle on this subject, as laid down by Chancellor Kent, is that "the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule and one dictated by just and enlightened views of international jurisprudence."²² It is competent for every nation, therefore, to provide by its own laws that marriages, wherever they take place, unless celebrated in a particular manner, or under particular circumstances, shall be ineffectual to secure the parties claiming them the rights they would have been entitled to had no such disabling legislation existed. This is a subject of internal policy, wholly dependent upon local considerations.²³

Although it has been said by M. Bry,²⁴ and perhaps others, that consuls "peuvent celebrer les mariages contractes par leurs nationaux entre eux, et meme avec des etrangers, si la loi consulaire de leur pays les y autorise et ne trouve aucun obstacle dans la legislation locale," it is now generally admitted, as a principle of public law, that since a foreign sovereign cannot authorize his agents abroad to violate the laws of the jurisdiction in which those agents reside,²⁵ a consul cannot

¹⁸ Church v. Hubbart (1804) 6 U. S. (2 Cranch) 187.

¹⁹ Maynard v. Hill (1888) 125 U. S. 190, 8 Sup. Ct. 223.

²⁰ Andrews v. Andrews (1902) 188 U. S. 14, 23 Sup. Ct. 237.

²¹ WESTLAKE'S PRIVATE INTERNATIONAL LAW (5th ed. 1912) 56; Powell v. Powell (1918) 207 Ill. App. 292; Hynes v. McDermott (1879) 7 Abb. N. Cas. (N. Y.) 98, 111.

²² Secretary of State Buchanan, to Mr. Larkin, July 14, 1846, 2 MOORE'S DIGEST (1906) §515.

²³ Secretary of State Cass, to Mr. Fay, Nov. 12, 1860, 2 MOORE'S DIGEST (1906) 486.

²⁴ BRY, DROIT INTERNATIONAL (1892) 358.

²⁵ United States v. Deutsches Kalisyndikat Gesellschaft (S. D. N. Y. 1929) 31 F. (2d) 199.

exercise any functions producing full legal effects in the country where he resides, except when the exercise of his powers under his national law may be considered as admitted by virtue of the conventions concluded between the two states.²⁶ Hence it follows that, even when the legislation of the receiving state is silent or does not interpose any obstacle in such respect, a consul does not possess the requisite legal capacity *as consul* to solemnize a marriage without the authority of the local government, and it is immaterial whether such consul is or is not a subject of the foreign government. Within recent years the American Institute of International Law has concisely stated its view of this matter in article 4 of Project No. 23, to the effect that: "Consular agents shall exercise their functions in accordance with the laws of the country to which they are accredited."²⁷ There is, of course, no doubt that the power to solemnize marriages either between his own nationals, or between one of his nationals and a citizen or subject of the receiving state, or between a national and a citizen of a third state, may be conferred upon a foreign consul in one of three ways, namely, first, by municipal act of the accrediting state—a power which must be considered as limited, not only when the limitation proceeds expressly from any convention between the two states, but also when the exercise of such power is inconsistent with the respect due to the territorial law; secondly, by treaty or convention; and, thirdly, by the law of the receiving state.²⁸ But unless the consul be thus authorized to officiate at a marriage, he is endowed with no shadow of right or power to undertake the performance of an act which, under general public law, does not inhere in his office. The case of *Loring v. Thorndike*,²⁹ decided in 1862, seems to take a different view of the law on this subject. In that case it appeared that one Thorndike, of the state of Massachusetts, and one Katharine Bayerl, of Mayence, Grand Duchy of Hesse-Darmstadt, Germany, were temporarily residing in the Free City of Frankfort. They agreed to get married, and were advised by magistrates, counsel and other persons skilful in the law that the proper mode of entering into the marriage relation was the solemnization of it before the consul of the United States at Frankfort on the Main. The consul gave them the same advice; and the marriage was accordingly so celebrated. One of the objections raised to the validity of the marriage before the consul was that, "American consuls are not authorized to solemnize marriage." There was no express authority in the law of the city of Frankfort giving foreign consuls the right to solemn-

²⁶ FIORE, INTERNATIONAL LAW CODIFIED (Borchard's Translation 1918) §503.

²⁷ 20 AM. J. INT. LAW SUPP., October, 1926.

²⁸ (1856) 7 OP. ATT. GEN. 342.

²⁹ (1862) 87 MASS. (5 Allen) 257, 261.

ize marriages; neither was there any provision in American law conferring on consuls such authority. There was, too, much conflict of opinion by expert witnesses in Germany whose depositions were introduced at the trial, in regard to the legal effect of the law of the City of Frankfort on marriages between foreigners resident there. So, the validity of the marriage was made to depend entirely on the view that the court might take of the power of the consul to celebrate marriages under the general law of nations. In holding that the law of the city did not apply to foreigners, and in sustaining the validity of the marriage, the Supreme Judicial Court of Massachusetts said: "The consul then declared that their marriage was legal and valid. And in addition to this he informed them that he had married many American gentlemen to American or German ladies; and that these marriages solemnized and registered by the consul, as was done in this case, had always been regarded by the Frankfort and German authorities as valid. In the full belief that they were thus lawfully married, they thenceforward lived together as husband and wife, during the life of Mr. Thorndike." In reading the opinion of the court in this case, we cannot fail to be impressed with its inconclusive and unsatisfactory character as a judicial exposition of a legal question of such vast importance. There is no discussion of the range of consular competency in respect to the celebration of marriages, which, after all, was the controlling question, as was so clearly indicated in the objection of counsel in the court below. The true doctrine, we believe, has been set forth by Secretary of State Fish:³⁰ "A consular officer of the United States is not authorized to perform the marriage ceremony in a foreign country of which he is a resident, unless it is performed within the precincts of a legation of the United States, or of a consulate, which has by treaty or custom the privilege of extraterritoriality, or unless he is expressly authorized to do so by the laws of the country in which he resides; nor are such officers invested by the laws of the United States with any of the functions or duties pertaining to ministers of the Gospel." The widest latitude permitted to American consuls abroad on the subject of marriage is found in the act of Congress of 1860,³¹ which provides: "Marriages in presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. And such consular officer shall,

³⁰ Secretary of State Fish, to Mr. Christensen, Dec. 10, 1872, 2 MOORE'S DIGEST (1906) §240.

³¹ Title 22 MASON'S UNITED STATES CODE (1927), FOREIGN RELATIONS AND INTERCOURSE §72; R. S. 4082.

in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State, there to be kept; such certificate shall specify the names of the parties, their ages, places of birth, and residence." Notwithstanding that marriages may be performed in the *presence* of the consuls, who are officially to attest the fact pursuant to the statute,³² yet, the marriage will not be valid unless the ceremonies prescribed by the *lex loci actus*, are observed.³³

In the United States the regulation or dissolution of the marriage relationship, with its corresponding incidents, is reserved to the several states.³⁴ If the celebration of a marriage is of such social and public interest as to warrant the state in adopting regulatory measures, it cannot be doubted that its dissolution, with its attendant legal and social consequences, is of equal interest and importance to the community, and should not be countenanced except as provided by local law. No writer of authority in the field of international law has ever been known to put forward the claim that a foreign consul can, as an incident of his office, assume the judicial character requisite to dissolve or annul a marriage. It may be that treaty or convention, or the law of the receiving state, if otherwise constitutional, may clothe him with this extraordinary power. But this attempt would be an unnecessary and dangerous experiment, and if granted at all, should be granted in the clearest terms possible. No intendment or implication should be invoked to endow this species of functionary with a power not only alien to the commercial and administrative character of his office, but plainly in derogation of the territorial and personal supremacy of the receiving state.³⁵ At least one state in the American union, namely, Ohio, has provided by statute³⁶ that: "In all actions . . . for divorce . . . where the defendant is the subject of a foreign nation and a non-resident of the country in which the action is filed, the plaintiff must state said facts, together with the time and place of marriage, in the petition; and when the same is filed, it shall be the duty of the clerk of the court to forthwith mail by registered letter a copy of said petition to the nearest consular representative of said foreign nation residing within this state." The object attempted to be accomplished by statutes of this sort is a salutary one; and if the consul should transmit the information to his own government, and such government

³² Secretary of State Fish, to Mr. Logan, Minister to Chile, Aug. 19, 1874, 2 MOORE'S DIGEST (1906) §240.

³³ Kent v. Burgess (1840) 11 Sims. 361, 59 Eng. Reprint 913.

³⁴ Andrews v. Andrews (1902) 188 U. S. 14, 23 Sup. Ct. 237.

³⁵ 2 CALVO, DROIT INTERNATIONAL (1888) §806.

³⁶ OHIO ANN. CODE (Throckmorton 1930) c. 3, §11979-2.

should, in turn, notify the defendant of the pendency of the suit, it will enable a non-resident alien having rights of property to safeguard in the state, to defend either personally or through a representative. This, it would logically seem, is the fullest extent to which the interposition of the consular office should be invoked.

Protection of Individual Interests³⁷

One of the most important governmental agencies for the protection of nationals in foreign countries is the consular service. While the consul has no diplomatic or representative character, and his political functions are very limited, the considerable number of consuls and their location in the more important commercial centers results in a closer relation between a consul and his fellow-nationals abroad than is possible for a diplomatic officer. Treaties and custom, therefore, confide to the consul a wide range of protective functions, short of the presentation of diplomatic claims or the making of representations to the central government.³⁸ The consul can, then, take any proper and necessary measures to protect the interests of his nationals in his district, and to secure to them an opportunity to assert and maintain their claims to property,³⁹ especially when such nationals are absent,⁴⁰ unknown,⁴¹ or minors.⁴² He has plenary authority to claim or institute a proceeding *in rem* or *in personam*, where the rights of property of his fellow-nationals are in question, without a special procuration from those for whose benefit he acts, and the steps he may take in this respect, will be considered as presumptive of his authority to act in their behalf.⁴³

The exercise by the consul of this intercessory right was questioned at a very early stage in our national existence in the case of *The Bello Corrunes*.⁴⁴ The case involved a claim in admiralty by the Spanish consul for the restitution of a vessel, the property of Spanish subjects, unlawfully captured by citizens of the United States while a state of amity existed between this country and Spain. In support of the validity of the capture it was contended by the Attorney-General of

³⁷ See Puente, *Right of Consular Protection of the Estates of Deceased Nationals* (1929) 23 ILL. L. REV. 635, for exhaustive discussion.

³⁸ BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1916) §183.

³⁹ *In re Herrman's Estate* (1924) 159 Minn. 274, 198 N. W. 1001.

⁴⁰ *The Adolph* (C. C. D. R. I. 1851) Fed. Cas. No. 86; *Robson v. The Huntress* (C. C. E. D. Pa. 1851) Fed. Cas. No. 11,971; *Gernon v. Cochran* (D. S. C. 1804) Fed. Cas. No. 5,368; *In re Succession of Rabasse* (1895) 47 La. Ann. 1452, 17 So. 867.

⁴¹ *The Antelope* (1825) 23 U. S. (10 Wheat.) 66.

⁴² *In re Bristow* (1909) 63 Misc. Rep. 637, 118 N. Y. Supp. 686.

⁴³ *Hamilton v. Erie R. Co.* (1916) 219 N. Y. 343, 349, 114 N. E. 399.

⁴⁴ (1821) 19 U. S. (6 Wheat.) 152.

the United States that the consul of Spain had no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot, therefore, have been invested with a special procuration; that he was not invested with a general authority for that purpose, *virtute officii*, nor was there any evidence in that particular case that the consul was the agent, consignee, or correspondent of the owners, who are sometimes permitted to claim for their principal when the latter is absent from the country; that great public inconvenience and mischief might follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property for which they may interpose a claim as belonging to their fellow-subjects. In support of the claim of the consul it was argued by two of the most eminent members of the American bar, Messrs. Webster and Wheaton, that the consul, from the necessity of the case, had a right to interpose a claim for the property of his fellow-subjects, brought into our ports; that there was no necessity of a special procuration from those for whom he claimed because it did not follow that the property would be actually delivered into his hands until the respective rights of the owners were determined, and a special authority produced from them to receive distribution; that it would also frequently be impossible for the consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The Supreme Court, in upholding the contentions of counsel for the Spanish consul, said:

"On the first point made by the Attorney-General, this court feels no difficulty in deciding, that a vice-consul duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall in any instance extend to the right to receive, in his national character, the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed." ⁴⁵

⁴⁵ 19 U. S. (6 Wheat.) at 168.

It would seem to be a very sane and logical deduction that if a consul has the plenary authority to interpose claims for the restitution of property of his nationals, especially when those nationals are either absent, unknown or minors, that the authority implies a discretionary right to do everything necessarily incident to the settlement of the claim for restitution, and that it would entail the right to dispose of, control or convert the property into another form.⁴⁶ Nevertheless, it was held by the court of last resort of the state of New York in the case of *Hamilton v. Erie Railway Company*,⁴⁷ that while international law vests the consuls with the right "to interpose claims for the restitution of property belonging to the subjects of their own country, I have found no rule of international law or judicial decision indicating that it authorizes or permits them to dispose of, control or convert into another form the uninvaded and secure property of their living countrymen. The decision and opinion in *The Bello Corrunes* (6 Wheat. 152, 168) upholds the contrary conclusion. It is clear, I think, that the general law of nations does not sustain as valid the settlement with the appellant of the consul-general and this conclusion is assured by the fact that the counsel for the appellant does not invoke here that law." The reasoning of the court in this case is not, in our judgment, very clear or satisfactory. While on the one hand the court says that it has found "no rule of international law or judicial decision" which authorizes a consul to dispose of, control or convert into another form the property of his non-resident nationals, it cites, on the other hand, the authoritative and conclusive opinion of the Supreme Court of the United States in *The Bello Corrunes*, as upholding a "contrary conclusion." Then, as though not quite content with this inconsistency, the court proceeds to say that it was "clear" that the general law of nations does not sustain the settlement made by the consul in that case. It should be said at this juncture that the case of *The Bello Corrunes* is not only a "judicial decision" of the highest authoritative nature, but it has also settled, with peculiar definiteness, the rule of international law insofar as the United States is concerned, in regard to the plenary authority of the consul to interpose claims for the restitution of property on behalf of non-resident nationals. Since, moreover, as was pointed out by the Court of Appeals of New York in *Valarino v. Thompson*,⁴⁸ the ascertainment and definition of what is international law is primarily the function of the federal courts, the case of *The Bello Corrunes* should be taken as the proper expression

⁴⁶ State *ex rel.* Bybee v. Hackmann (1918) 276 Mo. 110, 207 S. W. 64.

⁴⁷ (1916) 219 N. Y. 343, 351, 114 N. E. 399, 402.

⁴⁸ (1853) 7 N. Y. 576.

of the rule of international law on the subject of consular claims for restitution of property or assets pertaining to their nationals.

One of the consul's most usual duties is to address the local authorities on behalf of his fellow-citizens accused of crime or imprisoned; to support these persons in their right to due process of law; to secure all necessary information concerning their welfare, and to visit them, if proper. Being often nearest to the scene of action, the protective function is frequently exercised in the first instance, by the consul rather than by the diplomatic representative.⁴⁹ It was the official opinion of Secretary of State Seward, communicated in 1862 to the American minister to Colombia,⁵⁰ that: "It seems to us only reasonable that when any person being a prisoner alleges, with apparent probability, that he is an American citizen, that the acting political authorities in New Granada should allow him to be visited by the consul of the United States, to the end that, the fact of his citizenship being verified, the consul may lend his good offices or bring his case before this government. In such a case it would be proper for you to bring the subject formally to the notice of the authorities, if you had been duly received, and if not then to do it informally while the question of your admission to your position is in abeyance."

An interesting situation arose in 1895. The American consul at Havana, in compliance with instructions from his government, made representations to General Martinez Campos, the Governor General of Cuba, touching the prolonged confinement of certain American citizens without trial and in contravention of existing treaty engagements between the United States and Spain, to which the Governor General replied that consuls are not invested with diplomatic functions, and, therefore, could not rightfully present official remonstrances in affairs of government, but could only address themselves confidentially to the authorities for the purpose of inquiry in order to report to their government. In reporting the matter to the Spanish minister at Washington, Secretary of State Olney announced the views of his government in the following irrefutable manner:

"The position so taken by General Martinez de Campos has naturally occasioned this Government much surprise. The right of consuls to intervene with the local authority for the protection of their countrymen from unlawful acts violative of treaty or of the elementary principles of justice is so generally admitted as to form an accepted doctrine of international law. . . . The Governor-General appears to confound the legitimate representations of consular agents when the rights of their countrymen may be assailed with the diplomatic action of an accredited envoy. If so he clearly forgets that diplomatic relations can only take place directly

⁴⁹ BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1916) §183.

⁵⁰ 5 MOORE'S *DIGEST* (1906) 101.

between sovereigns, and that this Government could not by any channel, even through you as the envoy of Spain, or through its own envoy at Madrid, address the Governor-General of the Island of Cuba as a sovereign authority. It is simply as the local depositary and delegate of the sovereign power that the consul addresses him, and then only for the purpose and to the extent fixed by usage as defined in the Spanish-German treaty. Such correspondence is not and cannot be diplomatic in any sense. Its object is to furnish a ready and convenient method of adjusting the questions at issue on the spot, thereby averting resort to those necessary diplomatic channels which the intercourse of sovereign powers provides."⁵¹

Protection of National Interests

Though a consul does not enjoy any political functions,⁵² and cannot, by virtue of his office, and without special authorization therefor, exercise any act of sovereignty,⁵³ or vindicate the prerogatives of his government,⁵⁴ so as to enable him to interpose a claim for a breach of his sovereign's neutrality,⁵⁵ or to claim immunity from judicial proceedings for the property of his sovereign,⁵⁶ it is equally well settled that a consul possesses a clear right to address the local authorities in remonstrance against any infraction of the treaties and conventions between his government and the receiving state: a right which unquestionably includes initial representation by the consul upon that subject. Even when the question of the violation of the treaty stipulations by the local authorities may ultimately become the theme of diplomatic negotiation, that circumstance does not deprive the consul of the right nor absolve him from the duty of initiating such inquiries and remonstrances as the interests intrusted to his keeping may from time to time require.⁵⁷

A power which has been frequently exercised by foreign consuls and which we may properly bring under this head, is that of initiating proceedings on behalf of their governments for the extradition of fugitives from justice under certain treaties and section 5270 of the

⁵¹ 2 For. Rels. (U. S. 1895) 1210.

⁵² Seidel v. Peschkaw (1859) 37 N. J. L. 427.

⁵³ The Hope (1813) 1 Dods. 226, 165 Eng. Reprint 1292.

⁵⁴ The Anne (1818) 16 U. S. (3 Wheat.) 435; Von Thodorovich v. Franz Josef Beneficial Association (E. D. Pa. 1907) 154 Fed. 911; Seidel v. Peschkaw (1859) 27 N. J. L. 427.

⁵⁵ The Anne (1818) 16 U. S. (3 Wheat.) 435. The Vrow Anna Catharina (1803) 5 C. Rob. 15, 165 Eng. Reprint 681, maintains a contrary view; although it should be noted that no objection was raised by opposing counsel to the consul's interposition.

⁵⁶ Transportes Maritimos do Estado v. Tietjen & Lang Drydock Co. (The Sao Vicente) (1922) 260 U. S. 151; The Secundus (E. D. N. Y. 1926) 13 F. (2d) 469. These cases have apparently overruled that of The Conserva (E. D. N. Y. 1889) 38 Fed. 431.

⁵⁷ Secretary of State Olney, to Mr. Dupuy de Lome, Spanish Minister, Oct. 11, 1895 (2 For. Rels. (U. S. 1895) 1213).

Revised Statutes of the United States.⁵⁸ This right was questioned in the case of *In re Adutt*,⁵⁹ where counsel for the defendant made the point that there was no evidence before the court of any demand or requisition by the Austro-Hungarian government upon the government of the United States for the extradition of the prisoner. The court overruled the objection, but in doing so availed itself of the occasion to remark, somewhat impertinently:

"I need not here enter into a recital of the conflicting decisions upon this point, except to say that it would seem to have been decided against the petitioner in *Re Kaine*, 14 How. 103, and in *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. Rep. 1240. It would, I think, in the protection of individual liberty, be more seemly to require that the initiative of proceedings for extradition should rest with the government of the United States, upon demand of a foreign government, than that they should be allowed to be instituted by a consul of a foreign government without authorization of our own government, and would also, I think, better comport with the dignity of the government, and of judicial proceedings; but I feel concluded by the decisions to which I have referred, and am therefore unable to sustain this objection."⁶⁰

However, shortly afterwards, the Supreme Court of the United States in the case of *Ornelas v. Ruiz*,⁶¹ which involved the application of the Republic of Mexico for the extradition of the petitioners by complaints made under oath by its consul at San Antonio, Bexar County, Texas, under section 5270 of the Revised Statutes of the United States, utterly — and properly, we believe — disregarded the judicial impertinency of the lower court in the *Adutt* case, and proceeded to restate its traditional position, as follows: "The official character of this officer must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf. *Wildenhu's Case*, 120 U. S. I."⁶²

It may, therefore, be said, that where a complaint for the arrest on extradition proceedings of one charged with a criminal offense com-

⁵⁸ 31 STAT. 656. This section provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged."

⁵⁹ (C. C. N. D. Ill. 1893) 55 Fed. 376.

⁶⁰ 55 Fed. at 377.

⁶¹ (1896) 161 U. S. 502, 16 Sup. Ct. 689.

⁶² 161 U. S. at 507, 16 Sup. Ct. at 690.

mitted in a foreign country recites that the complainant is a consul of such country, and the official title of complainant is attached to his signature, it sufficiently appears that the proceeding is on behalf of such government, and evidence of special authority for such act should not be required.⁶³

The law will not only permit a consul to protect, as against third parties, the interests of the country he represents, within the limits above described, but will also protect such country from any act or conduct of its consul, whether directly or collaterally called in question, injurious to it. The fiduciary relation which a consul sustains to the government he represents debars him from taking any advantage of his position for his own personal gain. It is a cardinal principle of our jurisprudence that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.⁶⁴ Contracts to bribe or corruptly influence officers of a foreign government—be those officers in the career or merely honorary—will not be enforced in the courts of this country when they contravene our laws, our morality or our policy, even when permissible under the laws of such government.⁶⁵ The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane.⁶⁶ Hence, a consul's

⁶³ *In re Grin* (C. C. N. D. Cal. 1901) 112 Fed. 790, on appeal: *Grin v. Shine* (1902) 187 U. S. 181, 193, 23 Sup. Ct. 98, 103, wherein the Court said: "No evidence was required that the Russian consul had authority to make the complaint. All that is required by §5270 [U. S. Comp. Stat. 1901, p. 3591] is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government, based upon depositions in his possession, although under the first article of the treaty the accused can only be *surrendered* upon a 'requisition' of the foreign government, and by art. 6, such requisition must be made by the 'diplomatic agent of the demanding government,' and in case of his absence from the seat of government, by the 'superior consular officer.'"

⁶⁴ *Tool Co. v. Norris* (1864) 69 U. S. (2 Wall.) 45. In *United States v. Hartwell* (1867) 73 U. S. (6 Wall.) 385, 393, the Supreme Court of the United States said: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties."

⁶⁵ *Oscanyan v. Winchester Repeating Arms Co.* (1880) 103 U. S. 261.

personal contractual engagements for profit, with private parties, to use the influence of his official position to secure for such parties the award of the contracts of his government, are inherently vicious, repugnant to our morality, and, as such, unenforceable in our courts.⁶⁷

JUDICIAL MATTERS

Capitulations

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch over the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding, in the opinion of some writers, what are termed the Middle Ages. During those Ages these commercial magistrates, generally designated as consuls, possessed to a considerable extent, a representative character, sometimes discharging judicial and diplomatic functions. In non-Christian countries these consuls were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over western Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern to Christian nations. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals.⁶⁸ While in the western parts of the world alien merchants mixed in the society of the natives, access and intermixtures were permitted, and they became incorporated to almost the full extent; in the East, from the oldest times, an immiscible character had been kept up; foreigners were not admitted into the general body and mass of the society of the nation; they continued strangers and sojourners as all their fathers were — *Doris amara suam non intermiscuit undam*; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they were held to derive their character from that of the association or factory under whose protection they lived and carried on their trade.⁶⁹ The laws and usages of these eastern countries were so at variance with all the princi-

⁶⁷ *Trist v. Child* (1874) 88 U. S. (21 Wall.) 441.

⁶⁸ *Oscanyan v. Winchester Repeating Arms Co.* (1880) 103 U. S. 261.

⁶⁹ *In re Ross* (1890) 140 U. S. 453, 11 Sup. Ct. 897.

⁶⁹ *The Indian Chief* (1801) 3 C. Rob. 12, 165 Eng. Reprint 367.

ples, feelings and habits of European Christians,⁷⁰ and the barbarous and cruel punishments inflicted in those countries, together with the frequent use of torture to enforce confession from parties accused, made it a matter of deep interest to Christian governments to withdraw the control of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials.⁷¹ The indulgence or weakness of the eastern potentates has permitted the Christians to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominion they come.⁷² Treaties conferring extraterritorial jurisdiction upon consuls were essential to the peaceful residence of Christians within those countries, and the successful prosecution of commerce with their people.⁷³ The "usages of the Franks" begin in what are known in international law as the "capitulations," granting rights of extraterritoriality to Christians residing or traveling in Mohammedan countries. Some ingenious writers have attempted to trace these capitulations far back to the capture of Constantinople in 1453 by the Turks,⁷⁴ but their accepted foundation in international law is in the treaty of 1535 between Francis I. of France and Suleiman II. of Turkey, which guaranteed that French consuls and ministers might hear and determine civil and criminal causes between Frenchmen without the interference of a *Cadi* or any other person. After this treaty went into effect, the French took under their protection persons of other nationalities not represented by their own consuls,⁷⁵ and from then on the generic term "Franks" came gradually to be applied to all participants in the privileges extended to French nationals, and has been preserved in the laws, treaties and public documents of the United States.⁷⁶ It should be observed at this point that though the Ottoman Porte or any other ruler granting extraterritorial rights to resident foreigners could give and has given to the Christian powers authority to administer justice to their own nationals according to their own laws, it neither has professed to give nor could give to one such power jurisdiction over the subjects of another power. Those powers have been left at liberty to deal with each other as they have thought fit, and if

⁷⁰ *In re Ross* (1890) 140 U. S. 452, 11 Sup. Ct. 897; *Advocate-General of Bengal v. Ranee Surromoye Dossee* (1863) 2 Moo. (N. S.) 22, 15 Eng. Reprint 811; *Dainese's Case* (1879) 15 Ct. Cls. 64, *aff'd*, 91 U. S. 13.

⁷¹ *In re Ross* (1890) 140 U. S. 453, 11 Sup. Ct. 897.

⁷² *Advocate-General of Bengal v. Ranee Surromoye Dossee* (1863) 2 Moo. (N. S.) 22, 15 Eng. Reprint 811.

⁷³ *In re Ross* (1890) 140 U. S. 453, 11 Sup. Ct. 897.

⁷⁴ 1 FERAUD-GIRAUD, JURISDICTION DANS LES ECHELLES 29 *et seq.*

⁷⁵ 2 FERAUD-GIRAUD, JURISDICTION FRANCAISE DANS LES ECHELLES 76.

⁷⁶ *Dainese's Case* (1879) 15 Ct. Cls. 64.

the nationals of one country desired to resort to the tribunals of another, there could be no objection to their doing so with the consent of their own sovereign and that of the sovereign to whose tribunals they resorted.⁷⁷ It is proper to observe that the régime of the capitulations is rapidly vanishing from the realm of international diplomacy.

In Christian Countries

The general rule of public international law has long since become established that each independent state is sovereign in itself, and has more or less complete jurisdiction of all persons being, matters happening, contracts made, or acts done, within its territory.⁷⁸ This jurisdiction is coextensive with the state's territory, and with its legislative power, and is necessarily exclusive and absolute.⁷⁹ Any restriction upon it, deriving validity from an external source, would imply diminution of the state's sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation, within its own territory, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.⁸⁰

Bearing these principles clearly in mind, we can say that while it is undoubtedly true that, historically, even in Europe, the consul was originally an officer of large judicial as well as administrative and commercial powers, exercising entire municipal authority over his nationals in the country to which he was accredited, the changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the faculties and duties of the consular office.⁸¹ The judicial powers of consuls are now regulated, in great measure, *first*, by the laws of their own country,⁸² subject, of course, to the general principles of international jurisprudence,⁸³ the most important of which is that the exercise of such powers must not be inconsistent with the respect due to territorial law;⁸⁴ *secondly*, by treaties subsisting between the governments re-

⁷⁷ *Papayanni v. Russian Steam Navigation Co. (The Laconia)* (1863) 2 Moo. (N. S.) 161, 15 Eng. Reprint 862.

⁷⁸ (1854) 7 OP. ATT. GEN. 18.

⁷⁹ *United States v. Bevens* (1818) 16 U. S. (3 Wheat.) 336.

⁸⁰ *The Schooner Exchange v. McFaddon* (1812) 11 U. S. (7 Cranch.) 116.

⁸¹ *Dainese v. Hale* (1875) 91 U. S. 13.

⁸² *Ibid.*

⁸³ 1 HALLECK, INTERNATIONAL LAW (4th ed.) 408.

⁸⁴ FIORE, INTERNATIONAL LAW CODIFIED (Borchard's Translation 1918) §504. 2 MARTENS, DROIT INTERNATIONAL (1886) 116, says: "Cette règle a été adoptée dans les États européens à mesure que l'on y a reconnu la nécessité de respecter le principe de la territorialité des lois et de la juridiction."

spectively accrediting and receiving the consuls;⁸⁵ and, *lastly*, by the law of the state to which they are accredited.⁸⁶ A consular court duly empowered to sit in any of these modes, is, nevertheless, a court of limited jurisdiction.⁸⁷ It has no jurisdiction except that conferred by the enabling act, and will be presumed to be without jurisdiction of a cause unless the contrary affirmatively appears.⁸⁸ The suggestion that foreign consuls can exercise judicial functions in the receiving state on principles of comity and reciprocity has not found favor with the courts. The theory of territorial sovereignty has been too long established as a principle of international law to admit of derogation or impairment in judicial matters except by treaty or express legislative enactment of the receiving state.⁸⁹ Secretary of State Madison, in a circular dated July 1, 1805, admonished consuls and commercial agents of the United States abroad, that: "To remove a misconception which seems to have partially taken place, you are advised that no judicial authority belongs to your office, except what may be expressly given by a law of the United States and may be tolerated by the government in whose jurisdiction you reside. On the contrary, all incidents of a nature to call for judicial redress must be submitted to the local authority, if they can not be composed by your recommendatory intervention."⁹⁰ The same opinion has been stated, perhaps more forcefully, by a leading continental jurist⁹¹ in these words: "C'est un principe incontesté que le droit de rendre la justice sur le territoire d'un Etat constitue un acte de souveraineté, qui ne peut être exerce que par les délégués de cet Etat. — Les consuls ne peuvent donc rendre, en pays étranger, même entre leurs seuls nationaux, de véritables jugements ayant force exécutoire, a moins que l'exercice de la juridiction contentieuse ne leur soit expressément conféré, et par les lois le leur propre Etat, et *par le gouvernement du pays où ils résident.*"

Under customary international law, then, consuls do not possess

⁸⁵ (1830) 2 OP. ATTY. GEN. 378; *In re Ross* (1890) 140 U. S. 452, 11 Sup. Ct. 897.

⁸⁶ *In re Aubrey* (C. C. E. D. La. 1885) 26 Fed. 848.

⁸⁷ *In re Ross* (1890) 140 U. S. 482, 11 Sup. Ct. 897; *Husar v. United States* (C. C. A. 9th, 1928) 26 F. (2d) 847.

⁸⁸ *Neuss, Hesselein & Co. v. Van Der Stegen* (C. C. A., 9th, 1926) 10 F. (2d) 772.

⁸⁹ *In re Aubrey* (C. C. E. D. La. 1885) 26 Fed. 848; *Papayanni v. Russian Steam Navigation Co. (The Laconia)* (1863) 2 Moo. (N.S.) 161, 15 Eng. Reprint 862; *Quong Ham Wah Co. v. Industrial Accident Commission* (1920) 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190; (1830) 2 OP. ATTY. GEN. 378.

⁹⁰ 5 MOORE'S DIGEST OF INTERNATIONAL LAW (1906) §717.

⁹¹ BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* (1908) §770; 2 OLIVART, *DERECHO INTERNACIONAL PUBLIC* (4th ed.) 551.

any judicial powers;⁹² and no country can lawfully confer on its consular officers contentious jurisdiction over its nationals abroad, even by the consent of parties, or convert such consuls into courts of judicature of any kind, without the permission of the government to which they are accredited.⁹³ The acts of such consuls or the proceedings of such putative courts, in derogation of the jurisdiction of the receiving state, without the permission of such state, would be void when called in question in the tribunals of the state,⁹⁴ and should not, at any stage, be recognized and respected by the local authorities.⁹⁵ Yet, foreign consuls can, as *arbiters* only, exercise in civil and commercial cases where the facts are exceptional—and even in such cases to a very limited extent⁹⁶—a sort of *voluntary* jurisdiction—a power of arbitration which, though not binding upon our tribunals, are binding upon those of the accrediting state. But these special powers of consuls belong rather to the municipal laws of their own states than to international law.⁹⁷ In criminal matters the rule is inflexible that consuls can exercise, at the most, only a *police* and not a *judicial* authority.⁹⁸

Although ordinarily a consul is not a judicial officer,⁹⁹ he is, under the municipal law of certain countries, considered, for purposes having legal effect only with respect to the persons and interests of the country from which he is sent, as possessing the character of a magistrate,¹⁰⁰ and, as such, duly and properly authorized to take acknowledgments¹⁰¹ and depositions¹⁰² when such practice is not in contravention of the law of the state to which he is deputed.¹⁰³

COMMERCE AND NAVIGATION

To watch over the commercial interests of their countrymen is, in the words of a noted jurist,¹⁰⁴ "l'attribution premiere et essentielle des

⁹² *Dainese v. Hale* (1875) 91 U. S. 13; *The William Harris* (D. Me. 1837) Fed. Cas. No. 17, 695; *Waldron v. Coombe* (1810) 3 Taunt. 162, 128 Eng. Reprint 65.

⁹³ *Glass v. The Sloop Betsey* (1794) 3 U. S. (3 Dall.) 6; *In re Aubrey* (C. C. E. D. La. 1885) 26 Fed. 848; *The Flad Oyen* (1799) 1 C. Rob. 135, 165 Eng. Reprint 124.

⁹⁴ *In re Aubrey* (C. C. E. D. La. 1885) 26 Fed. 848; *The Flad Oyen* (1799) 1 C. Rob. 135, 165 Eng. Reprint 124.

⁹⁵ *Dainese v. Hale* (1875) 91 U. S. 13; *In re Aubrey* (C. C. E. D. La. 1885) 26 Fed. 848.

⁹⁶ 1 PIELLEVE, *PRECIS DE DROIT INTERNATIONAL PUBLIC* (1894) §586.

⁹⁷ 1 HALLECK, *INTERNATIONAL LAW* (4th ed.) 408.

⁹⁸ 1 PIELLEVE, *PRECIS DE DROIT INTERNATIONAL PUBLIC* (1894) §586.

⁹⁹ (1857) 8 OP. ATTY. GEN. 380.

¹⁰⁰ *Scanlan v. Wright* (1833) 30 Mass. (13 Pick.) 523; *Savage v. Birkhead* (1838) 37 Mass. (20 Pick.) 167, 172.

¹⁰¹ *Stewart v. Linton* (1902) 204 Pa. 207.

¹⁰² *Savage v. Birkhead* (1838) 37 Mass. (20 Pick.) 167, 172.

¹⁰³ *The Goods of Henry Fawcus* (1884) 9 P. D. 241.

¹⁰⁴ BRY, *DROIT INTERNATIONAL PUBLIC* (1892) 356.

consuls." It is their duty, in general, to report to their government on the commercial, maritime and industrial condition of their district, and to suggest possible ways and means of improving the commercial interchange of the two countries. They should interpose on behalf of their nationals, merchants and seamen, to obtain for them the plenary enjoyment of whatever rights they may be entitled to under the treaties, the law of nations, or the rules of international comity.

In principle, consuls have no political functions to discharge in the state to which they are accredited. They can, however, report to their government on any political matters likely to be of interest to it; but his part is "tout d'observation, et non d'action en matière politique."¹⁰⁵

Under International Law

It is well to pass now to a more detailed consideration of the part played by the consul in matters of *navigation* of a litigious character. The law is well settled in England and the United States, that independently of treaty stipulations, there is no constitutional or legal impediment or objection upon principles of public law, to the assumption of jurisdiction by courts of admiralty over a case involving differences, whether *in rem* or *in personam*, between the master and crews of foreign vessels within our territorial jurisdiction, even when the cause of action arises on the high seas.¹⁰⁶ In thus assuming jurisdiction, the courts proceed upon the idea that comity towards the nation to which the vessel belongs requires it.¹⁰⁷ "The refusal," observed Mr. Justice Story,¹⁰⁸ "might indeed well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right." To the assumption of this jurisdiction—which is, in all cases, entirely discretionary¹⁰⁹—the consent or approval of the consul or other representative of the country

¹⁰⁵ BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* (1908) §771.

¹⁰⁶ *Ex parte Newman* (1871) 81 U. S. (14 Wall.) 152; *The Jerusalem* (C. C. D. Mass. 1814) Fed. Cas. No. 7,293; *Davis v. Leslie* (S. D. N. Y. 1848) Fed. Cas. No. 3,639; *Bucker v. Klorkgeter* (S. D. N. Y. 1849) Fed. Cas. No. 2,083; *The Becherdass Ambaidass* (D. Mass. 1871) Fed. Cas. No. 1,203; *The Amalia* (D. Me. 1880) 3 Fed. 652; *The Kaiser Wilhelm der Grosse* (S. D. N. Y. 1909) 175 Fed. 215; *The Ester* (E. D. S. C. 1911) 190 Fed. 216; *The Golubchick* (1840) 1 W. Rob. 143, 166 Eng. Reprint 526.

¹⁰⁷ *The New City* (D. Wash. 1891) 47 Fed. 328; *The Herzogin Marie* (1861) Lush. 292, 167 Eng. Reprint 126.

¹⁰⁸ *The Jerusalem* (C. C. D. Mass. 1814) Fed. Cas. No. 7,293.

¹⁰⁹ *The Belgenland* (1885) 114 U. S. 355, 5 Sup. Ct. 860; *The Amalia* (D. Me. 1880) 3 Fed. 652; *The Lady Furness* (E. D. N. Y. 1897) 84 Fed. 679; *The Ester* (E. D. S. C. 1911) 190 Fed. 216; *The Golubchick* (1840) 1 W. Rob. 143, 166 Eng. Reprint 526; *The Herzogin Marie* (1861) Lush. 292, 167 Eng. Reprint 126; *La Blanche v. Rangel* (*The Nina*) (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38.

to which the vessel belongs, is not absolutely necessary,¹¹⁰ and the court can exercise it notwithstanding a request to the contrary by the consul.¹¹¹ Says Dr. Lushington, in the case of *The Golubchick*,¹¹² which is, perhaps, the best considered judgment in the reports under this head:

"In support of the protest it has been urged, that the Court has no jurisdiction, save by consent of the ambassador, consul, or minister of the country to which the vessel belongs. This notion, I am aware, has prevailed in these Courts with respect to cases of this kind, but I must confess, that I have always felt considerable difficulty upon the point; and for this reason, that if the Court does not possess an inherent jurisdiction over the subject-matter, it is not possible that the consent of an individual could confer any such jurisdiction. I think, therefore, that the proper mode of considering the question is this: the Court must possess original jurisdiction over the subject-matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British Court of judicature. . . . Now upon general principle, I apprehend that this Court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then be consistent with the principles of justice, that the exercise of this right should depend entirely upon the consent of a foreign minister or consul, who should be authorized to prohibit the Court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other Courts? In other Courts of this country, I have no doubt that the mariners might have instituted an action *in personam* against the master without reference to any consent at all. Why, then, should not proceedings be competent on their part in this Court against the ship? For by the general maritime law, the ship is the primary security for their wages. Is it just or proper, that the consent of the foreign representative should be necessary to put this Court in motion, and should not be necessary in a Court of Common Law? How is it possible there can be any such difference between them?"

And Lord Romilly, in following the judgment of Dr. Lushington, sums up the position of the British Privy Council in *La Blanche v. Rangel*

¹¹⁰ *Ex parte* Newman (1841) 81 U. S. (14 Wall.) 152; *Bucker v. Klorkgeter* (S. D. N. Y. 1849) Fed. Cas. No. 2,083; *Patch v. Marshall* (C. C. Mass. 1853) Fed. Cas. No. 10,793; *The Herzogin Marie* (1861) Lush. 292, 167 Eng. Reprint 126; *La Blanche v. Rangel* (*The Nina*) (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38.

¹¹¹ *The Lady Furness* (E. D. N. Y. 1897) 84 Fed. 679. In *The O'Berburgermeister Von Winter* (1870) 18 W. R. 357, 359, *affirmed* in 18 W. R. 443, Mr. Justice Townsend said: "It has been argued by Dr. Boyd that there was no evidence brought before me to prove that Mr. Runge was the consul of the place, but if there had been any doubt of this, it should have been denied by the plaintiffs, and in the absence of any such denial I must hold, in accordance with the usual presumption of law, that he has been duly appointed to the office, and I have also his own positive allegation to that effect, in his affidavit."

¹¹² (1840) 1 W. Rob. 143, 146, 166 Eng. Reprint 526, 528.

(The Nina),¹¹³ thus: "The Foreign Consul has not the power to put a veto on the exercise of its jurisdiction by the Court of Admiralty." The doctrine of these cases is particularly applicable in instances where the questions involved properly belong to the *communis juris*.¹¹⁴

But there are times when the points in dispute are so connected with and dependent on the municipal law and regulations of the country to which the vessel belongs, that a court of admiralty would be very imperfectly acquainted with them, and, in consequence, would be incompetent to render impartial justice. It then becomes necessary, as a general rule, that notice of the intended proceedings be given first to the consular or diplomatic representative of the government of that country;¹¹⁵ and if the official sanction of such representative is withheld, upon reasonable grounds being shown,¹¹⁶ as for instance, that the matter in controversy has been adjusted by him,¹¹⁷ or, that the parties to the controversy have agreed not to resort to foreign tribunals,¹¹⁸ or, that the seaman after submitting the controversy to the decision of the consul has, without reason, or from improper motives, disregarded his award,¹¹⁹ then the court, though not absolutely bound to do so, will respect his wishes, and in the absence of special circumstances,¹²⁰ will decline to exercise its authority.¹²¹ It is not that the

¹¹³ (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38.

¹¹⁴ *The Belgenland v. Jensen* (1885) 114 U. S. 355, 5 Sup. Ct. 860; *The See Reuter* (1811) 1 Dods. 22, 165 Eng. Reprint 1219.

¹¹⁵ *Ex parte Newman* (1871) 81 U. S. (14 Wall.) 152; *The Golubchick* (1840) 1 W. Rob. 143, 166 Eng. Reprint 526; *The Herzogin Marie* (1861) Lush. 292, 167 Eng. Reprint 126; *The Agincourt* (1877) 2 P. D. 239.

¹¹⁶ *La Blanche v. Rangel (The Nina)* (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38; *The Oberburgomeister Von Winter* (1870) 18 W. R. 443. In *Lynch v. Crowder* (S. D. N. Y. 1849) Fed. Cas. No. 8,637, District Judge Betts said: "The principle which the court has repeatedly announced, and to which it is always disposed to adhere, is to decline taking cognizance of suits by foreign seamen when the voyage is not completely broken up or terminated, or the seamen have been wrongfully separated from the ship, or placed in a state of destitution here. The rule is founded upon the common interest all commercial nations have in preserving the services of their seamen to the vessel during the whole period of their engagement, and especially to secure their return home with the ship to the place of their allegiance."

¹¹⁷ *Camille v. Couch* (E. D. S. C. 1889) 40 Fed. 176; *The New City* (D. Wash. 1891) 47 Fed. 328.

¹¹⁸ *Bucker v. Klorkgeter* (S. D. N. Y. 1849) Fed. Cas. No. 2,083; *The Pawashick* (D. Mass. 1872) Fed. Cas. No. 10,851.

¹¹⁹ *Townshend v. The Mina* (E. D. Pa. 1868) Fed. Cas. No. 14,121.

¹²⁰ *The Becherdass Ambaidass* (D. Mass. 1871) Fed. Cas. No. 1,203; *The Lillian M. Vigus* (S. D. N. Y. (1879) Fed. Cas. No. 8,346; such as, the likelihood of a failure of justice (*The Albani* (E. D. Pa. 1903) 169 Fed. 220), or, where the voyage is broken up or at an end (*Bernhard v. Creene* (D. Ore. 1874) Fed. Cas. No. 1,349).

¹²¹ *The Belgenland* (1885) 114 U. S. 355, 5 Sup. Ct. 860; *Jelly v. Tiddeman* (S. D. N. Y. 1848) Fed. Cas. No. 7,256a; *Bucker v. Klorkgeter* (S. D. N. Y. 1849) Fed. Cas. No. 2,083; *The Becherdass Ambaidass* (D. Mass. 1871) Fed. Cas. No.

representative can, by his own *ipso dixit*, settle the question in dispute, but it opens a serious question as to how far the Court of Admiralty should exercise its jurisdiction when such exercise would bring it into opposition and interference with the jurisdiction of a foreign tribunal.¹²² There is an excellent summary of the law in the case of *The Belgenland*,¹²³ wherein Mr. Justice Bradley, said:

"For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or, where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catharina*, 1 Pet. Adm. 104; *The Forsoket*, Id., 197; *The St. Oloff*, 2 Id., 428; *The Golubchick*, 1 W. Rob., 143; *The Nina*, L. R. 2 Adm. & Eccl., 44; S. C. on appeal, L. R. 2 P. C., 38; *The Leon XIII*, 8 Prob. Div., 121; *The Havana*, 1 Spr., 402; *The Becherdless Ambaidass*, 1 Low., 569; *The Pawashick*, 2 Id., 142."

This view seems to prevail in other countries also. In 1843 the Government of Chile announced its position with respect to the extent of consular jurisdiction over the crew of a vessel of the country he represents. The case was that of a seaman named Conil, of the French brig *Teodore Eugenio*, then at anchor at Valparaiso, who brought criminal proceedings in the local courts against the pilot of the brig for an alleged assault on him by said pilot while on board the vessel. The French consul, on being advised of the action of the seaman, submitted a protest to the Government of Chile against the assumption

1,203; *The Ester* (E. D. S. C. 1911) 190 Fed. 216; *The See Reuter* (1811) 1 Dods. 22, 165 Eng. Reprint 1219; *The Golubchick* (1840) 1 W. Rob. 143, 166 Eng. Reprint 526; *The Herzogin Marie* (1861) Lush. 292, 167 Eng. Reprint 126; *La Blanche v. Rangel* (*The Nina*) (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38. In *Willendson v. Forsoket* (D. Pa. 1801) Fed. Cas. No. 17,682, the court said: "It is my duty, from motives of justice, and reciprocal policy, to discourage foreign seamen under engagements to perform their voyage, from breaking their contracts, with any views of obtaining higher wages, or from other unjustifiable motives, quitting the service in which they are engaged. Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country."

¹²² *The Oberburgomeister Von Winter* (1870) 18 W. R. 443.

¹²³ (1885) 114 U. S. 355, 363, 5 Sup. Ct. 860, 864.

of jurisdiction by the courts of that country, and on February 4, 1843, the Minister of Foreign affairs announced the position of his government thus: "The conclusion which the government arrives at is that, with respect to matters affecting the order and discipline of a foreign vessel; the local courts would be acting contrary to the common law at present considered as binding upon Christian countries, if they should assume jurisdiction of the complaint of seamen against captains or any other persons forming part of the crew of the vessel."¹²⁴ In such cases, however, at least in the United States and England, the jurisdiction will attach when the foreign representative expresses to the court his desire that it take jurisdiction of the controversy, thus devolving on the admiralty court the jurisdiction of the tribunals of his own country.¹²⁵ This devolution of jurisdiction must be understood, not as conferring on the admiralty court a jurisdiction alien to its constitution, but rather as removing from the path of the court a practical impediment to the exercise of a jurisdiction which it possesses concurrently with the admiralty courts of the state to which the vessel belongs.

At this juncture we must indulge a slight, but necessary, departure from our main line of reasoning. An attempt, chiefly sentimental, we apprehend, has been made by inferior American tribunals to create an exception to the rule above stated, in favor of American citizens voluntarily in the service of foreign merchant vessels. Thus, in 1902, a federal district court in the case of *The Falls of Keltie*¹²⁶ declared—undoubtedly without having seriously considered the question: "I do not think that the courts of any nation will refuse to hear the complaints and enforce the rights of its own citizens or subjects against foreign ships. Certainly this court has no right to refuse its process when demanded by any citizen of the United States." The cases endeavoring to create this exception in favor of our citizens, have proceeded in direct defiance of recognized legal principles of long standing and of unimpeachable judicial precedents. To illustrate: the case of *La Blanche v. Rangel* (The Nina),¹²⁷ in the British Privy Council in 1867, involved a claim for wages by a British subject, one La Blanche, who was also a seaman on the Portuguese vessel The Nina. One of the grounds urged upon the court why the protest of the consul against

¹²⁴ 1 CRUCHAGA, NOCIONES DE DERECHO INTERNACIONAL (3d ed.) 495.

¹²⁵ *Reynolds v. The Simoon* (S. D. N. Y. 1863) Fed. Cas. No. 11,733; *The Sirius* (N. D. Cal. 1891) 47 Fed. 825; *The See Reuter* (1811) 1 Dods. 22, 165 Eng. Reprint 1219; *The Evangelistria* (1877) 2 P. D. 241.

¹²⁶ (D. Wash. 1902) 114 Fed. 357, 358. To the same effect: *The Karoo* (N. D. Wash. 1892) 49 Fed. 651; *The Alnwick* (S. D. N. Y. 1904) 132 Fed. 117; *The Neck* (D. Wash. 1905) 138 Fed. 144.

¹²⁷ (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38; *Reg. v. Anderson* (1868) L. R. 1 C. C. 161, 8 Eng. Rul. Cas. 1.

the assumption of jurisdiction should be overruled was that the plaintiff was a British subject; but the court, in answer to that contention, said that it was the nationality of the vessel, and not the nationality of the individual seaman suing for his wages that must regulate the course of procedure. But even prior to the decision of this high British tribunal, Dr. Lushington, in delivering his judgment in 1840, in the case of *The Golubchick*,¹²⁸ which involved a claim for wages by Spanish seamen against a Russian vessel, expressed the true doctrine in his usually clear style, thus:

"In the course of the argument, a discussion has been raised by the counsel in the cause, whether the seamen promoting the proceedings are to be considered as Spanish subjects, or whether for the purposes of this suit they are to be regarded as subjects of the Russian government. Now, upon this point, I entertain no doubt whatever; it is, I conceive, a settled doctrine of law, that when a subject of one country enters into the service of a ship belonging to the subjects of another country, he must be considered *pro hac vice* to be a subject of that country to which the vessel belongs."

If the cumulation of national judicial precedents count for anything, as it should, the courts trying to create this exception should have disposed of the reasoning of our own courts of admiralty in the cases of *The Amalia*,¹²⁹ in 1880, which expressly acted on the authority of *The Nina*, and held that "the nationality of the vessel, and not the nationality of any of her crew, asking the interposition of the court, should regulate the action of the court, and all of the crew of this ship, for the purpose of this investigation, must be deemed Swedish subjects, notwithstanding it appears that some of them are in fact citizens of other nationalities"; *The Burchard*,¹³⁰ in 1890, in which the libellants were American citizens; and *The Marie*,¹³¹ in 1892. All these cases, whether British or American, were decided prior to the decision in *The Falls of Keltie*, *supra*, although they seem to have completely escaped the attention of the district judge in that case.

The doctrine of these cases is accepted, without reservation, in the recent case of *The Ester*,¹³² decided in 1911, wherein the district judge said:

"When Osterkamp [who was a German subject] was duly enrolled as a seaman on a Swedish vessel, and signed the articles of employment on that vessel, he became for the time being, for all purposes of considera-

¹²⁸ (1840) 1 W. Rob. 143, 150, 166 Eng. Reprint 526, 529. See also *The Endraught* (1798) 1 C. Rob. 21, 165 Eng. Reprint 82.

¹²⁹ (D. Me. 1880) 3 Fed. 652, 653.

¹³⁰ (S. D. Ala. 1890) 42 Fed. 608.

¹³¹ (D. Ore. 1892) 49 Fed. 286.

¹³² (E. D. S. C. 1911) 190 Fed. 216, 219.

tion by the tribunals of this country in his relations to the ship, a citizen of the Kingdom of Sweden. *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581; *The Marie* (D. C.) 49 Fed. 288."

But from the point of view of American jurisprudence, the most conclusive refutation of the doctrine here assailed, is found in the case of *In re Ross*,¹³³ decided in 1891, in the Supreme Court of the United States, a few years before this impolitic exception saw the light of day. It was the case of one Ross, a British subject, serving as a seaman on the American vessel *Bullion*. While in the port of Yokohama, he perpetrated a murder on board the vessel, for which he was tried in the American consular court in Japan, was convicted and sentenced to death. His sentence was subsequently commuted to life imprisonment; and while so confined, he sued out a writ of *habeas corpus* to secure his discharge from confinement on various grounds, one of which was, in the language of his counsel, that, "The treaties of the United States with Japan, and the laws passed by Congress in pursuance thereof, expressly restrict the jurisdiction of the consular courts to citizens of the United States. It does not appear that Ross was a citizen of the United States."¹³⁴ In disposing of this particular objection in a masterly opinion, Mr. Justice Field remarked:

"The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain. . . . The position taken by our government is expressed in a

¹³³ (1891) 140 U. S. 453, 11 Sup. Ct. 897.

¹³⁴ 140 U. S. at 460.

communication from the Secretary of State, to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted 'is in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore,' he continued, 'the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman on its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States.'"¹³⁵

This doctrine announced so ably by Mr. Justice Field was declared by District Judge Deady, in *The Marie*,¹³⁶ to apply "equally well to an American citizen who ships as a seaman on a foreign vessel."

In short, the exception sought to be foisted into the unimpeachably established general principle, is in derogation of sound and long accepted legal doctrine; it proceeds on sympathetic rather than on judicial grounds; and it shows in this respect no appreciable comprehension of the true rule of maritime law as enunciated by the highest and most enlightened tribunals of England and the United States, and by the political department of the latter.

The case of *The Two Friends*,¹³⁷ decided by Lord Stowell, in 1799, in the British Court of Admiralty, has been taken as countenancing such an exception. In reality the case involved the following singular state of facts: the claimants were British subjects, and members of the crew of a captured American ship which had been recaptured from the French by her own crew. To their libel for salvage, a protest to the jurisdiction of the court was interposed, and on passing upon this protest, that eminent judge said:

"In the first place, I am satisfied that these persons are not to be considered as American sailors. They are British-born subjects returning to their own country, without any engagement or intention to go back to America, and without having any domicile there, and merely working their passage homeward on board this ship. They are, then, not at all in the condition of American subjects; neither are they so to be considered in this act, even if hired as mariners on board this American vessel. For this act was no part of their general duty as seamen, they were not bound by their general duty as mariners to attempt a rescue, nor would they

¹³⁵ 140 U. S. at 472, 11 Sup. Ct. at 903.

¹³⁶ (D. Ore. 1892) 49 Fed. 286, 288.

¹³⁷ (1799) 1 C. Rob. 271, 165 Eng. Reprint 174.

have been guilty of a desertion of their duty in that capacity, if they had declined it. . . . As to the situation and character of persons engaged in such attempts, it is certainly to be regarded an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a member of the crew of the ship, or in discharge of any official duty, either ordinary or extraordinary. The opposition, therefore, to the jurisdiction of the Court fails in its foundation of fact, that these are American seamen." 138

The first impression that we receive from this opinion is admittedly that Lord Stowell entertained the notion that the bare fact that these British subjects were serving as seamen on an American vessel could not impress upon them, in the British view of the law, a foreign national character for any purpose connected with the ship — a position which, if taken by itself, has not received, as we have seen, the approval of a subsequent admiralty judge, or of the British Privy Council.¹³⁹ But we feel that, in making that unguarded assertion, Lord Stowell — who was too well versed in admiralty law not to have perceived the fatal weakness of his statement as a principle of law — had in mind, primarily, the consequent legal effect of the original capture on the claimants' contract of employment on the ship, and their peculiar relation to and legal effect of the act of recapture. Considering his eminent legal talents and his undimmed reputation as an admiralty judge, it is reasonable to assume that he was aware that extraordinary events may and do occur whereby a seaman's connection with the vessel is often dissolved *de facto* or by operation of law,¹⁴⁰ as, by making the crew either civil or military prisoners through capture of the vessel by the enemy,¹⁴¹ even though no prize crew is placed on board the vessel;¹⁴² that in effecting a recapture, the seaman acts beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach.¹⁴³ Hence, he was entirely correct in holding that the seaman's participation in the recapture was an act "perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship, or in the discharge of any official duty, either ordinary or extraordinary."¹⁴⁴ It is only as we consider Lord Stowell's observation in the case of *The Two Friends*, in the light of

¹³⁸ 1 C. Rob. 277, 165 Eng. Reprint 176.

¹³⁹ *The Golubchick* (1840) 1 W. Rob. 143, 166 Eng. Reprint 526; *La Blanche v. Rangel (The Nina)* (1867) L. R. 2 Adm. & Eccl. 44, 2 P. C. 38.

¹⁴⁰ *Hobart v. Drohan* (1836) 35 U. S. (10 Pet.) 117.

¹⁴¹ 2 HYDE, INTERNATIONAL LAW (1922) §773; 2 OPPENHEIM, INTERNATIONAL LAW (3d ed. 1921) 114; *The Warrior* (1862) Lush. 476, 167 Eng. Reprint 214.

¹⁴² *The Alexander* (D. Mass. 1813) Fed. Cas. No. 164, *affd.* in 12 U. S. (8 Cranch) 169.

¹⁴³ *Hobart v. Drohan* (1836) 35 U. S. (10 Pet.) 108.

¹⁴⁴ 1 C. Rob. 278, 165 Eng. Reprint 176.

the specific legal consequences of the capture on the seamen's contract of employment, and their relation to the recapture, that we can resolve, sympathetically, any doubt that might be entertained as to what he meant, without imputing to him a lack of familiarity with the elementary rule that, "The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves."¹⁴⁵ But were we to assume that Lord Stowell intended to take the position that has been attributed to him as a result of his loose language in the case under criticism, our answer would then be that that position has been repudiated by a subsequent admiralty judge of eminent qualifications, and has also been overruled by the Privy Council; and, in addition, that the Supreme Court of the United States has sanctioned the contrary view in a case where the question was squarely presented.

Under Treaties

At the outset it should be said that the Most-Favored-Nation clause in a treaty cannot serve to confer on the consul of a foreign power with which we have such treaty, the same exclusive jurisdiction to adjust differences between master and seamen as are or may be granted in express terms to consuls of another power by special convention.¹⁴⁶ In the present state of the law, a foreign consul can exercise no jurisdiction within the territory of the United States, except by force of treaty stipulations,¹⁴⁷ and such jurisdiction should never be admitted or rested on implications only. But so competitive has become the struggle for commercial supremacy; so much has that supremacy depended upon the unhampered navigation of the merchant vessels of a nation; so great would be the loss to that nation if its vessels were to be subjected to the consequences of legal proceedings in foreign lands upon any differences, however trivial, that might arise on the high seas or in foreign ports between the commanders and crews of its vessels; and so conducive to the interests of commerce it has been found to require seamen to submit their differences to the expeditious and inexpensive adjustment by the consuls of the country to which the vessels belong, or to await their return to a home port,¹⁴⁸ that practically every commercial nation today provides by treaty against consequences so pernicious to its mercantile interests. For instance, some of the treaties stipulate that the consuls of the respective countries "shall have exclusive charge of the internal order of the merchant

¹⁴⁵ *In re* Ross (1891) 140 U. S. 453, 474, 11 Sup. Ct. 897, 903.

¹⁴⁶ *Weiberg v. The St. Oloff* (D. Pa. 1790) Fed. Cas. No. 17,357.

¹⁴⁷ *In re* Aubrey (E. D. La. 1885) 26 Fed. 848.

¹⁴⁸ *Johnson v. Machielsne* (1811) 3 Camp. 44.

vessels of their nation, and shall alone take cognizance of any differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port, or when a person of the country or not belonging to the crew shall be concerned therein."¹⁴⁹ Others provide that the respective consuls "shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities unless the conduct of the crews, or of the captain should disturb the order or tranquillity of the country; or the said Consuls, Vice-Consuls or Commercial Agents should require their assistance to cause their decisions to be carried into effect or supported."¹⁵⁰ Still others provide that the consuls "shall alone take cognizance of questions, of whatever kind, that may arise, both at sea and in port, between the captain, officers, and seamen, without exception."¹⁵¹

The general object sought to be accomplished by these varying forms of stipulations is substantially the same, namely, to reserve all disputes that might possibly arise between the masters and crews of foreign vessels, to the exclusive cognizance of the consuls of the corresponding countries. The differences contemplated by these treaties include as well those resulting in proceedings *in rem* as in proceedings *in personam*. Any other construction would emasculate or completely destroy the very substance of the stipulation, and defeat its obvious purpose, which is, to confine masters and seamen to the decisions and mandates of their consuls.¹⁵² The wording of these treaties is such as to leave no discretion to the local authorities in the matter, so that they cannot interfere, save in the cases expressly excepted therein.¹⁵³

But it has been doubted whether a tort action is such a "difference"

¹⁴⁹ Art. XI, Consular Convention with Sweden, June 1, 1910, III TREATIES AND CONVENTIONS, 2847; also Art. VIII, Consular Convention with France, Feb. 23, 1853, 1 MALLOY 531; Art. XIII, Consular Convention with Germany, Dec. 11, 1871, 1 MALLOY 554; Art. XI, Consular Convention with Belgium, Dec. 5, 1868, 1 MALLOY 84.

¹⁵⁰ Art. XIII, Treaty of Commerce and Navigation with Sweden, July 4, 1827, 2 MALLOY 1752; also Art. X, Treaty of Commerce and Navigation with Prussia, May 1, 1828, 2 MALLOY 1498; Art. VIII, Treaty of Commerce and Navigation with Russia, Dec. 18, 1832, 2 MALLOY 1517.

¹⁵¹ Art. XI, Consular Convention with Italy, May 8, 1878, 1 MALLOY 980.

¹⁵² *The Elwine Kreplin* (E. D. N. Y. 1872) 9 Blatchf. 438, 8 Fed. Cas. No. 4,426.

¹⁵³ *Tellefsen v. Fee* (1897) 168 Mass. 188, 46 N. E. 562.

or "question" between the master and seaman as to exclude the jurisdiction of the local tribunals. The case of *The Salomoni*,¹⁵⁴ construing article XI of the treaty of 1878 between the United States and Italy,¹⁵⁵ was one of the first in this country to hold that the differences or questions contemplated by these treaties do not include tortious acts, such as an unjustifiable and cruel assault by the master upon a seaman on board ship while in port. "The treaty, it seems," said the learned district judge, "does not indicate a criminal assault upon the seaman, within the territorial jurisdiction of the court, as a matter of exclusive consular jurisdiction; and, in that humane protection which courts have always extended to seamen, a denial of jurisdiction in the admiralty court is held to be a matter of too serious import to be rested on implication. *Weiberg v. The St. Oloff*, 2 Pet. Adm. 433."¹⁵⁶ It is evident that the assumption of jurisdiction in the case of *The Salomoni* was, as the court so strongly intimated, based more upon humane considerations than upon a proper construction of the terms of the treaty. We fully recognize, of course, that it is sometimes difficult even for courts to be indifferent to considerations of humanity; but they should be constantly reminded, particularly in matters affecting foreign national interests, of the wise observation of Lord Stowell in the case of *The Mentor*,¹⁵⁷ that, "it must be on legal grounds only that I can give him redress; and if there are legal grounds that impose upon the Court an incapacity of affording redress, I may lament it, but I cannot give relief, upon mere grounds of humanity: humanity is only the second virtue of Courts; justice is unquestionably the first." The federal district court in the case of *The Ester*¹⁵⁸ expressed itself with perfect legal correctness and judicial propriety in a case somewhat similar to *The Salomoni*, *supra*, when he said:

"However shocking to our sense of humanity and justice may be the apparent consequences to the seamen of brutality and indifference to their rights when shown by the master of a foreign vessel in port, it is not more cruel in reality than the exercise of such brutality and indifference upon the high seas or in the home port of the vessel, and provided it does not amount to a disturbance of the peace and the tranquillity of the port in which the vessel is lying, or is the perpetration in the port of cruelty and maltreatment forbidden by law and which will be restrained and punished from a criminal aspect, there is no more reason on the ground of humanity alone for the courts of that state to take jurisdiction of a civil claim for indemnity, than there would be if it was exercised on the high seas or in the vessel's home port. If, therefore, by treaty it

¹⁵⁴ (S. D. Ga. 1886) 29 Fed. 534.

¹⁵⁵ 1 MALLOY 980.

¹⁵⁶ 29 Fed. at 537.

¹⁵⁷ (1799) 1 C. Rob. 179, 165 Eng. Reprint 141.

¹⁵⁸ (E. D. S. C. 1911) 190 Fed. 216.

is stipulated that all the relations among and controversies between the crew including the master, officers, and seamen on board a foreign vessel, whether on the high seas or at a port in a foreign state, are to be treated as matters territorially within the jurisdiction of the country to which the vessel belongs, and to be remitted to the consuls, consular officers, or tribunals of that country, then it would not appear to be in the power of any court to disregard the law as embodied in the treaty stipulation because of the court's opinion that under the peculiar circumstances of the case the applicant will be bereft of justice unless this court awards it to him. The responsibility for such consequences rests upon the law-making, not the judicial, department of the government." ¹⁵⁹

Another case substantially like that of *The Salomoni*,¹⁶⁰ and reaching the same conclusion, is *The Baker*,¹⁶¹ construing article XIII of the treaty of December 11, 1871, between the United States and Germany,¹⁶² which gave the German consuls here jurisdiction over "differences of every kind" which may arise between master and seamen. The libel was for tortious damages on account of negligence. In that case the court said:

"It is difficult to see how the framers of this treaty could have used the language quoted with the intention of including suits brought against the owners of a vessel or against the vessel itself upon the ground of negligence, inasmuch as such a cause of action is not a difference between the captain, officers, or any member of the crew. An action for negligence might bring into question contradictions or differences in the statements of occurrences by the various officers or members of the crew concerned in the transaction; but the creation of a consular court, with power to try negligence suits, would be a matter of so much importance that it would seem to have been necessarily in the minds of the framers of the treaty. They would just as certainly have stated specifically the jurisdiction of a consular court with reference to such causes of action, if that jurisdiction had been intentionally conferred." ¹⁶³

The court, in holding that a tort action against the vessel was not such a "difference" between the captain and seaman as came within the terms of the treaty, was, we believe, unmindful of the principle of law that the master is, in a very extensive sense, the agent of the owners;¹⁶³ that any action against the vessel is a matter of concern to the master as agent, which he is bound to defend on behalf of the owners; and that from the moment the master becomes, as such agent, a party to the litigation, there is a "difference" between him and the member of the crew suing. The use of the clause, "of every kind,"

¹⁵⁹ 190 Fed. at 226.

¹⁶⁰ (E. D. N. Y. 1907) 157 Fed. 485.

¹⁶¹ 1 MALLOY 554.

¹⁶² 157 Fed. at 486.

¹⁶³ *Gernon v. Cochran* (D. S. C. 1804) Fed. Cas. No. 5,368; *Merritt v. Walsh* (1865) 32 N. Y. 685; *The St. Cloud* (1863) Brown & L. 4, 8 L. T. R. (N. S.) 54.

immediately following the word "differences," serves only one manifest purpose, namely, to amplify the range of controversial matters properly cognizable by the consul under the treaty.¹⁶⁴ Moreover, these treaties should be construed with the utmost liberality; and since they are entered into primarily for the common advancement of the individual interests of the contracting parties, the interests of civilization, and the promotion of international amity, should not be read as rigidly as documents between private persons governed by a system of technical law.¹⁶⁵

In construing the term "differences," in the treaties of 1827,¹⁶⁶ and 1910,¹⁶⁷ between the United States and Sweden, we once more quote, *in extenso*, from the opinion of the district judge in the case of *The Ester*,¹⁶⁸ which is, in our judgment, the soundest and fullest exposition of the law to be yet found in the reported cases.

"Do these stipulations," said he, "on the face of them exclude this court from taking jurisdiction of the present case? This depends upon the construction of the word 'differences,' as used in the treaties. Does that word cover the case of a tort, such as in the present case, where the claim is based upon personal injury arising from the alleged negligence of the captain? It is not the case of a malicious or cruel assault upon the person of the seaman by the master or any of the officers of the ship, or even of any of his fellow seamen. It is not the case of cruelty in his treatment from starvation, bad provisions, or other maltreatment. It is a case of the claim of a seaman made for injury caused to him by falling down an unguarded chute or hatch in a vessel, which might have taken place on the open seas or elsewhere, as well as in the port. . . . Inasimuch, however, as the rights of the seamen, based upon negligence shown towards him by the master in his management of his vessel, would appear logically to be a matter contemplated by a treaty—that is, that the country making the treaty would intend to hold that all claims of the seaman against the master for injury received by reason of the management of his vessel by the master during the relation of master and seaman should be dealt with from the standpoint of the law and maritime discipline of that country—it seems a better view would be to read these stipulations to the effect that the word 'differences' does include 'controversies' based on torts in the sense of personal injuries occurring through the negligence of the master. Under this view the jurisdiction of this court would be excluded by the terms of the treaty."¹⁶⁹

The words "judge and arbitrator" employed in some of the

¹⁶⁴ *The Elwin Kreplin* (E. D. N. Y. 1872) Fed. Cas. No. 4,426, *aff'd.* (1871) 81 U. S. (14 Wall.) 152.

¹⁶⁵ PUENTE, *INTERNATIONAL LAW AS APPLIED TO FOREIGN STATES* (1928) 228-29 and authorities therein cited.

¹⁶⁶ Art. XIII, 2 MALLOY (1910) 1753.

¹⁶⁷ Art. XI, III *Treaties and Conventions* (1923) 2849.

¹⁶⁸ (E. D. S. C. 1911) 190 Fed. 216.

¹⁶⁹ 190 Fed. at 227.

treaties,¹⁷⁰ must, it is true, be given their ordinary signification, as implying the investigation of facts upon evidence, the exercise of judgment as to the effect to be given thereto, and a determination therefrom; in short, as indicating an intention not to deprive the seaman of a full and fair hearing of his cause by the consul.¹⁷¹ But, even when the proceeding before the consul does not conform to our ideas of the requisites of a judicial proceeding, the courts of the United States cannot prescribe to a foreign consul the forms and mode of procedure which he must adopt when he acts as a judge or arbitrator between the master and crew under the treaties. Circuit Judge Woodruff, in the case of *The Kreplin*,¹⁷² has stated, with considerable simplicity and force, what is believed to be the proper position for the courts to adopt in such matters. "Must he" (the consul), said the court, "follow the practice, and be governed by the rules, governing trials and arbitrations under our laws? Must our consuls in Prussia follow the rules and practices of the courts of that Kingdom? If so, then the district court here was sitting as a court of error, to review the judgment or award of the Prussian consul. What can this court say are the formal requisites of a Prussian arbitration? It is manifest, by the reservation of the right to resort to the judicial tribunals of the home country, without being concluded by the decisions of the consul, that the proceeding before him as an arbitrator or judge was intended to be summary, and its conduct left very much in his discretion; and, especially, it is manifest, that the nations respectively intended to confide in their consuls, and temporarily entrust to him the adjustment of differences between officer and crew of their vessels in the port of the other, and it was not intended that the courts of such other nation should sit in judgment upon the form of regularity, or the justice, of the acts of the consul, or interfere therewith in any manner. It was deemed safe and proper to leave to such consuls this temporary administration of the interests of their seamen abroad, assured that they would act with fairness and integrity therein, but yet giving the right of full and final investigation and adjudication at home, where home laws, home remedies, and home modes of investigation could be resorted to."

It will be noted that the treaties, in providing that the consuls shall have "exclusive charge of the internal order" of the vessels of their country, without the interference of the local authorities, make it per-

¹⁷⁰ Art. XIII, Treaty with Sweden, July 4, 1827, 2 MALLOY 1752; Art. X, Treaty with Prussia, May 1, 1828, 2 MALLOY 1498; Art. VIII, Treaty with Russia, Dec. 18, 1832, 2 MALLOY 1517.

¹⁷¹ *The Elwin Kreplin* (E. D. N. Y. 1870) Fed. Cas. No. 4,427, *rev'd.* (E. D. N. Y. 1872) Fed. Cas. No. 4,426.

¹⁷² (E. D. N. Y. 1872) Fed. Cas. No. 4,426.

missible for those authorities to interfere where the differences on board ship are of a nature to disturb the "peace and public order in port, or on shore,"¹⁷³ or, the "order or tranquillity of the country."¹⁷⁴ It is evident that under these clauses, the commission of a murder or some other felonious act on board a foreign ship within our territorial jurisdiction, is a matter of such public interest as to fully warrant the local authorities in considering it as a breach of the "peace and public order," or, "order or tranquillity," of the country, and to put into operation the machinery of the law for the apprehension and trial of the offender, notwithstanding the claim of a foreign consul to jurisdiction over the matter under any of these treaties. The degree of gravity of the offense is the determining factor whether the consul has or has not jurisdiction of the matter. If the thing done—the "disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which, from their gravity, awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. "In such cases," said Chief Justice Waite of the Supreme Court of the United States, in the important case of *In re Wildenhus*,¹⁷⁵ "inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads, and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a 'disorder,' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a 'disorder' which will 'disturb tran-

¹⁷³ Art. XIII, Treaty with Germany, Dec. 11, 1871, 1 MALLOY, TREATIES, CONVENTIONS (1910) 554; Art. XI, Consular Convention with Sweden, June 1, 1910, 1 MALLOY. *op. cit. supra* 2849.

¹⁷⁴ Art. X, Treaty with Prussia, May 1, 1828, 2 MALLOY, *op. cit. supra* note 173, 1498; Art. XIII, Consular Convention with Sweden, July 4, 1827, 2 MALLOY, *op. cit. supra* note 173, 1752.

¹⁷⁵ (1886) 120 U. S. 1, 18, 7 Sup. Ct. 385, 390.

quillity and public order on shore or in the port.' The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that, if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it."

As we have seen, the treaties under discussion provide that except as therein specified, the consuls shall exercise their jurisdiction over differences between master and crews, "without the interference of the local authorities." But, assume that the controversy arises within the jurisdiction of a federal district court where there is no consul: Should the court take jurisdiction, on that account alone, in disregard of the express terms of the treaty? The case of *The Amalia*¹⁷⁶ answers the question in the affirmative, and holds that "a court of admiralty would require, in a treaty, the most positive, absolute prohibition against assuming jurisdiction in such a case, and would insist on language which would not admit of any doubtful signification, before it would acknowledge that its authority to protect the seaman was thus abrogated." This decision, we apprehend, is founded on at least two obvious misconceptions. In the first place, it reads into the treaty — contrary to a well settled rule of statutory construction — an exception or limitation not properly deducible from its express terms; and, secondly, the exception or limitation announced, would make it necessary for foreign powers to maintain consular officers in every federal judicial district in the United States, when, in point of fact, the consular district over which the consul presides, may and often does embrace more than one judicial district, making it unnecessary that the consul should maintain an official residence in every judicial district within his jurisdiction. Where there is no consul within the judicial district in which the libel is brought, the better rule would be for the court to transfer the cause to the nearest consular officer outside the district, and thus avoid the occasion for repugnant exceptions or limitations by construction to treaties manifestly intended by the contracting governments to have no other limitations than those expressly stipulated therein. This practice would also dispel any doubt that the equities of the seamen

¹⁷⁶ (D. Me. 1880) 3 Fed. 652, 655.

would not be attended to by his own consular officer, as provided by the treaty.¹⁷⁷

Desertion of Seaman

From the earliest historical period, the contract of the sailor has been treated as an exceptional one and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, “to rot in her neglected brine.” Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. It is for these very cogent reasons that the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles,¹⁷⁸ and that treaties have heretofore existed among the leading maritime powers,¹⁷⁹ stipulating that their respective consular officers shall be “authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country.” Seamen become, under the terms of these treaties, obligated to their ships from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.¹⁸⁰ In order to carry out these stipulations and also provide the procedure to be followed, Congress enacted in 1864, an act,¹⁸¹ which provided that the consular officers of foreign powers with which we had such treaty engagements, “may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping-articles, roll, or other proper paper of the vessel, to the effect that the person in question is of the crew or ship’s company of such vessel; and further stating and certifying that such person has withdrawn himself,

¹⁷⁷ See *The Ester* (E. D. S. C. 1911) 190 Fed. 216.

¹⁷⁸ *Robertson v. Baldwin* (1896) 165 U. S. 275, 17 Sup. Ct. 326.

¹⁷⁹ Art. IX, Treaty with Russia, Dec. 18, 1832, 2 MALLOY, *op. cit. supra* note 173, 1517; Art. IX, Convention with France, of Nov. 14, 1788, 1 MALLOY, *op. cit. supra* note 173, 494.

¹⁸⁰ *Tucker v. Alexandroff* (1901) 183 U. S. 424, 22 Sup. Ct. 195.

¹⁸¹ (1864) 13 STAT. 121.

or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official seal." Under this salutary legislation, only a federal marshal could make an arrest on the requisition of the consul.¹⁸² But in 1915 Congress enacted¹⁸³ what, from the point of view of commerce and navigation, was an ill-advised piece of legislation, to the effect that in its judgment "articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels," ought to be terminated, and to that end the President was "requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions." There has thus been, insofar as the United States is concerned, a gradual elimination of those provisions in treaties with foreign powers as had to do with the arrest of deserting seamen—an unfortunate governmental action, unquestionably.

Finally, consular officers are frequently charged by treaty, with the direction of all operations relative to the salvaging of vessels of the respective countries wrecked upon the coasts of the other.

CONCLUSION

The conclusions of substantive law relative to the extraterritorial powers of consular officers, which we are authorized to draw from the foregoing discussion, may briefly be stated as follows:

That consuls have no power, under international law, to authenticate the laws or judicial proceedings of foreign states, unless so authorized to do by convention or statute;

That consuls have no right to officiate in the celebration of marriages;

That, independent of treaty provisions, they are not endowed with judicial functions;

¹⁸² *Dallemagne v. Moisan* (1904) 197 U. S. 169, 25 Sup. Ct. 422.

¹⁸³ (1915) 38 STAT. 1184.

That consuls have the power, under international law, to protect the rights *in rem* or *in personam* of their nationals, whenever those rights are called in question, without the necessity of a special procuration from those nationals;

That they are authorized to interpose with the local authorities (though not with the general government, unless there is no diplomatic officer present at the seat of government) in case of the violation of the treaties of their country by the local authorities; but they do not possess the right to vindicate the sovereign prerogatives of their government;

That they have, under the treaties, exclusive charge of the internal order of the merchant vessels of their nation, and of all differences arising between the master and crews of such vessels; and, in certain countries also, under the treaties, the additional right to reclaim deserting seamen of such vessels.

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