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RECENT DEVELOPMENTS

SERVICE OF SUMMONS UPON FOREIGN GOVERNMENTS THROUGH THEIR DIPLOMATIC REPRESENTATIVES

Plaintiff steamship line, a Greek corporation, filed a libel in personam in Federal District Court for the District of Columbia against the Republic of Tunisia for unpaid demurrage allegedly accrued on plaintiff's ship while it was in Tunisian waters. Summons was issued to the Tunisian government, to be served upon its agent, the Tunisian Ambassador to the United States. Although no evidence established that the Ambassador had personally declined service, defendant United States Marshal returned the summons unexecuted, with the explanation that "the within named principal agent, having Diplomatic Immunity, and being listed on the Diplomatic List of the State Department, cannot be served at Washington, D.C."[1] Plaintiff then sought a writ of mandamus to compel service. The trial court granted defendant's motion to dismiss. On appeal, the Circuit Court for the District of Columbia affirmed. *Held:* Mandamus does not lie to compel a United States Marshal to serve summons upon an agent of a foreign government who is eligible for diplomatic immunity, even though the summons would include the diplomat only in his capacity as agent of his sending state, and not as a party defendant. *Hellenic Lines, Ltd. v. Moore,* 345 F.2d 978 (D.C. Cir. 1965).

Procedural rules require a Marshal to execute service of summons notwithstanding his notice of defenses which the intended recipient may interpose to defeat the action.[2] Nevertheless, a Marshal will not be compelled to execute a service of summons which would violate diplomatic immunity; such a violation, if it resulted in distraint of the person or property of an ambassador or minister would be punishable as a crime.[3] It has been held that the diplomatic immunity of an ambassador is violated by service of process which names him as a

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[1] Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 979 (D.C. Cir. 1965).

[2] Any other rule would make the Marshal a judge of the merits of the case, as he is the only officer authorized to serve summons compelling appearance in federal court. FED. R. CIV. P. 4(c). This rule is sound, since the named defendant may not desire to interpose a defense which might be noted by the Marshal.

[3] § 25, 1 Stat. 117 (1790), 22 U.S.C. § 252 (1964); § 26, 1 Stat. 118 (1790), 22 U.S.C. § 253 (1964).

party defendant,[4] but the question of the effect of service upon an ambassador who is not named defendant, but is served only in his capacity as agent of his government, has not been decided previously.[5] Often, in the face of questions involving diplomatic immunity, the party seeking to establish immunity for himself requests action in his behalf by the United States State Department.[6] Courts, although not always bound to follow State Department advice,[7] have generally adhered to it.[8] It is suggested that by doing so in the present case the court extended the doctrine of diplomatic immunity beyond its proper scope.

Recognizing the novelty of the question presented in the principal case, the court relied heavily upon advice which it solicited from the State Department on its own initiative. A Department letter to the court[9] stated that, in the opinion of the Department, diplomatic immunity would be violated by compulsory service of process upon a foreign ambassador, and catalogued several possible consequences of permitting such service. Included were hypothetical instances of a diplomat feeling constrained to limit his movements in order to avoid finding himself in the presence of a process server, detraction from the diplomat's official duties entailed by the necessity to review legal consequences of a summons, if served, and the embarrassment and humiliation which a diplomat would occasion upon being handed a summons by a process server. Mention was also made of possible retaliatory actions taken in other countries in response to service of process upon a diplomat by United States authorities. The court endorsed these objections and concluded that the broad objectives of diplomatic im-

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[4] Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949).

[5] ". . . [T]here is no general rule of international law, or United States law, expressly or impliedly prohibiting service of process upon a diplomatic agent so long as he is not required to appear in court or is otherwise not prevented from performing his duties." Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 TEMPLE L.Q. 1, 12 (1962). A case with facts similar to those of the principal case, United States *ex rel* Cardashian v. Snyder, 44 F.2d 895 (D.C. Cir. 1930), considered the question of a U.S. Marshal's refusal to serve process upon the Turkish Ambassador in his capacity as agent of his government. The reason given by the Marshal for his refusal was that the diplomatic immunity of the Ambassador precluded such services. Arguments that service was proper were not met by the court, which held that service of process was precluded by the underlying sovereign immunity of the Turkish government.

[6] Examples of the manner in which this is done may be seen in 4 HACKWORTH, DIGEST OF INT'L LAW § 401 (1942).

[7] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 n.34 (1964) (dictum).

[8] See M. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 615 (1954).

[9] Letter of Leonard C. Meeker, Legal Advisor to the State Department, to Nathan Paulson, clerk of the U.S. Court of Appeals (D.C. Cir.), Jan. 13, 1965 (Partially quoted, 345 F.2d at 980-81 n.5).

munity, as envisioned in the preamble to the Vienna Convention on Diplomatic Relations,[10] "to contribute to the development of friendly relations among nations" and "to ensure the performance of the functions of diplomatic missions," required a finding that diplomatic immunity would be violated by service of process in the principal case.

The announced rule of this case represents a broader view of the protection afforded ambassadors and ministers than the usual view of diplomatic immunity appears to warrant. The premises upon which diplomatic immunity is usually predicated are expressed in the Restatement, Foreign Relations Law of the United States, as follows:

> The most widely accepted rationale for diplomatic immunity is that it assures governments that they will not be hampered in their foreign relations by harassment of, and interference with, their diplomatic representatives. Protection of the performance of diplomatic functions requires that those charged with such performance not be subject to intimidation by persons in the receiving state. . . .[11]

The pertinent aspect of diplomatic immunity is, then, that such immunity is essentially designed as a guarantee of *personal* inviolability.[12] It is not evident from the facts of the principal case that the Tunisian Ambassador would have acted in any other capacity than as a conduit between the serving authority and the Tunisian government. The usual hazards to the official dignity of ambassadors contemplated by the doctrine of diplomatic immunity were not present in the principal case.[13] Delivery of a summons or other form of process which requires no action by the ambassador, other than referral to his government, does not appear to differ in any material way from other types of communications given ambassadors. The extent to which his government directs him to take action upon a summons is beyond the purview of diplomatic immunity.[14] When seen in this light, service of summons would not appear to offend even the broad view of diplomatic

[10] Signed at Vienna, Austria, April 18, 1961. See 55 AM. J. INT'L L. 1064 (1962).

[11] RESTATEMENT, FOREIGN RELATIONS LAW § 76, comment *a* at 252 (Proposed Official Draft, 1962).

[12] In Carbone v. Carbone, 123 Misc. 656, 206 N.Y.Supp. 40 (App. Div. 1924), the court vacated service of arrest process, but refused to vacate a summons naming a diplomatic staff member as defendant because no personal distraint was involved. See also, Griffin, *supra* note 5.

[13] For example, distraint of person or chattels of an ambassador, or interference with freedom and performance of official duties. Distinctions have been recognized as existing, in applying the doctrine of diplomatic immunity, between mere service of process and body arrest or seizure of chattels. See Nankivel v. Omsk All-Russian Government, 203 App. Div. 740, 197 N.Y.Supp. 467 (1922).

[14] Diplomatic immunity is a protection extended by the receiving state to the foreign diplomat, and therefore, should not contemplate actions taken by the sending state relative to its own agents.

immunity propounded by the court.[15] It is to be noted, also, that the language extracted from the Vienna Convention upon which the court based its rationale of diplomatic immunity did not, in its original context, purport to serve as a rationale for diplomatic immunity but only as a statement of the reasons for holding the Vienna Convention on Diplomatic Relations.[16]

The holding of the court in the principal case implies that a prospective litigant against a foreign state must seek alternative means to obtain possible satisfaction of his claim. These alternatives may include (1) availability of a non-immune representative of the offending government, (2) willingness of the diplomatic agent to accept service of summons in behalf of his government,[17] and (3) utilization of diplomatic channels of communication to secure a reparation payment.[18] These means of remedy, however, would depend more upon fortuity than upon the merits of the claim. In the absence of such alternatives, the announced rule applies with equal force to United States citizens as well as to other classes of prospective litigants seeking redress of wrongs committed against them by foreign governmental enterprises.

The State Department is accountable, at least in part, for the unfortunate precedent inherent in the present rule. It should be observed that the expressed position of the Department, in its letter to the court, effectively countermands the so-called "restrictive theory" which the Department instituted in 1952[19] to deal with the growing number of cases in which sovereign immunity was being invoked by foreign governments to avoid liability for wrongs committed while acting in a commercial, nongovernmental role. The restrictive theory would withhold Departmental recognition of sovereign immunity in cases involving commercial acts of governments,[20] out of concern for

[15] The view that any compulsory service of process violates diplomatic immunity regardless of who is actually named as defendant is broader than that adopted by courts in other countries. See Perrucchetti v. Puig y Cassauro, Court of Rome, June 6, 1928. Foro Italiano I, 112 (1929). Ann. Dig. Case No. 247 (1927-28). Cited in Reply Brief for Appellant, p. 9, Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965).

[16] Preamble, Vienna Convention on Diplomatic Relations, *supra* note 10.

[17] The court in the principal case indicated that the duty of ascertainment of the possible willingness of the ambassador to accept service of summons lies with the prospective plaintiff rather than with the serving authority. 345 F.2d at 980 n.3.

[18] A dilemma likely to be encountered by those selecting this means is that their failure to obtain judicial relief may have been attributable to the advice of the State Department, as in the principal case. The injured party must then turn to the same Department in order to have his claim presented through diplomatic channels.

[19] Letter of Jack B. Tate, Acting Legal Advisor to the State Department, to Philip B. Perlman, Acting Attorney General, May 19, 1952, in 26 DEP'T STATE BULL. 984, 985 (1952). For evaluations of the operative effects of the Tate Letter, see Comment, 60 MICH. L. REV. 1142, 1145 (1961); 13 SYRACUSE L. REV. 169, 170 (1961).

[20] Merchant shipping, the activity from which the alleged wrong in the principal

denial of justice to parties having legitimate claims against those governments. The defense of sovereign, rather than diplomatic, immunity was the subject of the restrictive theory. However, extension of the umbrella of diplomatic immunity to preclude service of summons upon foreign governments, as in the principal case, has an effect similar to that of sovereign immunity. Effective denial of justice results as surely from an inability to serve process as it does from successful pleading of sovereign immunity.[21] Avoidance of such denials of justice was the purported objective of the State Department in promulgating the restrictive theory.[22] However, the letter given to the court in the principal case evinces a greater concern with hypothetical arguments predicting damage to diplomatic relations if service is carried out, and less concern with substantial justice for prospective plaintiffs, than consistency with the restrictive theory would seem to permit. Furthermore, there is no reason to believe that the prevailing condition of international relations would have been damaged to any greater extent by the denial of diplomatic immunity in the principal case than by the similar denial of sovereign immunity which would have been called for by the restrictive theory.

The United States Supreme Court has recently stated that it is not necessarily obligatory that federal courts follow State Department advice in all matters.[23] The principal case may be one in which the court should not have followed the Department's advice. It is to be noted that the court itself stated that:

> There is little authority in international law concerning whether service of process on a diplomatic officer as agent of his sending country is an "attack on his person, freedom or dignity" prohibited by diplomatic immunity. As diplomatic immunity exempts a person from the legal

case arose, was cited as exemplary of the sort of commercial activity which the State Department felt no longer deserved the advantage of sovereign immunity merely by virtue of the fact that it was government-owned. 26 DEP'T STATE BULL., *op. cit. supra* note 19.

[21] The position taken by the State Department on diplomatic immunity in the principal case would have little effect on litigation if the early, absolute, theory of sovereign immunity prevailed; even in the event service of summons was executed, sovereign immunity could be immediately interposed to defeat the action. However, the present policy of the Department and the courts on the subject of diplomatic immunity would be a controlling factor in the outcome of this sort of litigation, since diplomatic immunity could be used to defeat claims against which sovereign immunity, under the restrictive theory, would not be a valid defense. Griffin, *supra* note 5.

[22] The restrictive theory was promulgated partially in accordance with an international trend toward restriction of the scope of sovereign immunity, and partially in response to recognition of the fact that U.S. nationals were being deprived of justice by unavailability of the legal process due to sovereign immunity. 26 DEP'T STATE BULL., *op. cit. supra* note 19.

[23] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 n.34 (1964) (dictum).

processes necessary to ordered society and often deprives others of remedies for harms they have suffered, courts hesitate to invoke the doctrine in novel situations unless the purpose will certainly be served. . . .[24]

This admission left the court free to grant the writ of mandamus compelling service of summons. It is submitted that this approach would have been preferable as avoiding unwarranted expansion of the doctrine of diplomatic immunity. At trial, cases such as the principal one could still be disposed of upon grounds of sovereign immunity, the appropriateness of the United States as a forum for international disputes, or forum non conveniens,[25] while simultaneously preserving substantial justice for United States litigants. As pointed out in the dissenting opinion, arguments for declining to exercise jurisdiction of United States courts to decide cases such as the principal one should not preclude service of process upon the intended defendant, since the matters of competence or jurisdiction are defenses to be raised at the option of a defendant, and therefore are inapplicable to a question of service of process.[26]

RELIGIOUS FREEDOM AND COMPULSORY BLOOD TRANSFUSION FOR ADULT JEHOVAH'S WITNESS

In two separate instances adult Jehovah's Witnesses were admitted to hospitals with severe internal bleeding. Doctors in each instance determined that blood transfusions were required to save the patient's life. Each patient refused to consent to transfusions because of his religious beliefs. In one case the patient, who had no minor children, was pronounced incompetent, a conservator to consent to transfusion was appointed by the court, and the transfusion was administered. On appeal, the Illinois Supreme Court reversed. *Held:* An adult who has no minor children cannot be compelled to take lifesaving blood transfusions against his religious objection. *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).[1] The other case involved a father of minor children who was a patient in a veterans' hospital. On the hospital's application for an order to authorize the transfusion,

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[24] 345 F.2d at 980.

[25] In the principal case, both of the intended parties to the suit were foreign entities, and the alleged event occurred in foreign waters. The difficulties in procuring witnesses, enforcing judgment, and other similar problems bring forth the question of whether a U.S. court is the proper forum to decide such a dispute.

[26] 345 F.2d at 979.

[1] 34 Geo. Wash. L. Rev. 159 (1965); 44 Texas L. Rev. 190 (1965).