THE DEVELOPMENT OF THE COMMERCIAL CONSULATE.

"International commerce would have withered without the protecting shadow of the Consulate." Phillimore, *International Law*, ii, 261.

The revocation by the British Government of the *exequatur* of the Greek consul in Cyprus on the ground of alleged improper political activities brings once more into prominence an institution of which the history of ancient Greece herself furnishes a prototype in the person of the *proxenos*, who, in one State, watched over the financial and economic interests of another, and gave advice and assistance to its citizens temporarily resident in the territory in which his office was exercised. The *proxenos* seems to have been originally self-elected,[1] but afterwards Athens and the other Greek States made their own nominations. In Sparta, the appointment rested with the King or the people. Illustrious names appear in the roll—Pindar represented Athens at Thebes, Thucydides at Pharsalus. Alcibiades and Demosthenes were, each in his day, among the *proxenoi* of Sparta and Thebes respectively at Athens. Sometimes, the office was hereditary and exercised by a whole family:

> O stranger of Athens, said Megillus of Lacedæmon, in Plato's *Laws*.[2] You are not perhaps aware that our family is, in fact, a *proxenos* of your State. It is probably true of all children that, when once they have been told that they are *proxenoi* of a certain State, they conceive an affection for that State, even from infancy, and each of them regards it as a second motherland, next after his own country.

The analogy, however, between the Hellenic *proxenos* and the modern consul was far from being complete. He was a citizen of the State, in which he resided. The State that appointed him had little, if any, control over his operations, and no means of compelling him to discharge his functions or of punishing him if he failed to perform them. His own State had its full claim upon him as a citizen.

The modern institution owes its origin to the domestic consulates established in the mercantile cities of Southern Europe, and exercising over the bodies of their own national merchants that elected them a conventional, judicial and administrative authority, particularly in matters relating to commerce and navigation. The officers to whom these powers were committed were known as *Juges-*

[1] Thucydides, 3, 70.
[2] Plato's *Laws*, 642B.

Consuls or *Consuls Marchands.* In the turmoil and insecurity that followed the disruption of the Western Empire, the domestic consulate gradually acquired an ex-territorial character. The urgent needs of national merchants, trading in other lands, were safe depositories for their merchandise, and tribunals for the settlement of their disputes independent of the law and the jurisdiction of the foreign countries in which they were residing.[3] The first of these needs was supplied by the establishment of "factories," along the coast of the Mediterranean, and, later on, in Syria and Palestine. The second was satisfied by the extension of the domestic consulate to other lands. In the wake of the "factory," followed the consular judge. The process was facilitated by the then prevalent conception of law as personal and not territorial—a conception which foreign potentates, and especially the Muhammadan conquerors of the East, were prepared to, and did, recognize. Thus there grew up on the Mediterranean littoral, in the ports of the Baltic and in the East, with which the Crusades had brought Europe into closer contact, a juridical system in which representatives of the guilds and merchant traders under "various titles, according to the custom of various countries, Governors, Protectors, Ancients, Aldermen (in the Hanse towns), Syndics, Jurats, Prévosts, Capitouls, Echevins, . . . administered justice to their fellow-countrymen according to their national laws, and maintained the privileges conceded to them in all matters, especially as to the use of the weights, measures and coins of their respective countries."[4]

At this stage in the history of the office, the consul enjoyed all the immunities of the modern Ambassador. Between the middle of the 16th and 17th centuries, however, a gradual change came over the face of the situation. The Peace of Westphalia in 1648 affirmed with emphasis the sovereignty of independent States. Territorial jurisdiction superseded, in large measure, the mediæval theory of personal law. Permanent legations were established throughout Europe. And so the Consulate fell from its high estate in the realm of international law, was bereft, except in the East, where it formed the centre of the rapidly developing ex-territorial system, of the attribute of jurisdiction, and shrank into the narrow proportions of "commercial agency."[5] With ex-territorial jurisdiction, we are not here concerned. A series of decisions, English,

[3] Phillimore, *International Law,* Vol. II, 259.

[4] Phillimore, *ad loc cit.,* pp. 260, 261. And see *Holdsworth, History of English Law,* Vol. V, pp. 53; Nys, *Droit International,* II, 294 *et seqq.*

[5] See the reply of the Genoese Senate to the States-General of Holland, cited in Calvo, I, 509.

French and American, at once excluded the Consul from the ranks of "public ministers" and gave the reason for doing so.

In 1717, one Barbuit received a commission as "agent of commerce" from the King of Prussia to Great Britain. It was accepted by the Lords Justices as the English King, George I, was abroad, but expired on his death in 1720, and was not renewed till 1735. Barbuit's commissions were directed, not to the King of England, but generally "to all the persons whom the same should concern," and they defined his duties in the following terms:

> to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain: to present letters, memorials and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon: and thereby his Prussian Majesty required all persons to receive writings from his hands, and to give him aid and assistance.

During a period of nearly twenty years, Barbuit lived in England, and traded as a tallow-chandler. A bill for debt was filed against him in 1725. He retorted by exhibiting a cross-bill, in which he styled himself "merchant." The cross-bill was dismissed, and an account was decreed against him on the bill. Ten years later he was attacked for non-payment. Then for the first time, Barbuit wreathed himself in his supposed diplomatic immunities and claimed the privilege of an Ambassador to be free from arrest. The case came before the Lord Chancellor Talbot in 1737.[6] Although the circumstances were obviously very unfavourable to Barbuit's contention, the Lord Chancellor considered it seriously, and rejected his plea:

> The privilege of a Public Minister, he said, is to have his person sacred & free from arrests, not on his own account but on account of those he represents: and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner, by agents, when they cannot meet themselves.

Barbuit, however, was not "entrusted to transact business between the two Crowns," his commission was "to assist his Prussian Majesty's subjects here in their commerce": this gave him "no authority to interfere with the affairs of the King," and made "his employment to be in the nature of a consul," who "is not entitled to the *jus gentium* belonging to Ambassadors."[7]

[6] Cas. *temp.* Talbot, 281.

[7] For later English authorities in the same sense, see *Triquet* v. *Bath* (1764) 3 Burr. 1478; *Heathfield* v. *Chilton* (1767) 4 Burr. 2016; *Clarke* v. *Cretico* (1808) 1 Taunt. 106; *Viveash* v. *Beecher* (1814) 3 M. & S. 284 at p. 297; *Engelke* v. *Musmann* [1928] A.C. 433.

In 1842, the same principle was laid down in France in the case of M. Carlier d'Abaunza, Marquis of Fuente Hermosa.[8] D'Abaunza, who was a Spaniard by birth, had lived in Paris since 1833. In 1840 he had been appointed Consul-General for Uruguay there. Before obtaining, however, the *exequatur* of the French Government, he was arrested for debt. He claimed exemption in virtue of his consular office. The Civil Tribunal of the Seine overruled the claim in the following language:

> Si les agents diplomatiques jouissent de certaines immunités, c'est parcequ'ils représentent leur gouvernement vis-à-vis d'un autre gouvernement: mais . . . les simples consuls ne peuvent sous ce rapport prétendre à aucune assimilation, puisqu'ils ne sont que des fonctionnaires délégués pour protéger et régler les intérêts privés de leurs nationaux.

This ruling was affirmed by the Cour Royale of Paris, which relied, however, on the absence of the *exequatur* as an additional ground for rejecting the claim. But there was no ambiguity in the decision of the Cour Royale of Aix in 1843, in the case of M. Soller, the Spanish consul there, who sought exemption, in virtue of his consulship, from giving evidence as a witness in a criminal trial:

> Si les ambassadeurs sont, indépendants de l'autorité souveraine du pays dans lequel ils exercent leur ministre, ce privilege n'est pas applicable aux consuls. Ceux-ci ne sont que des agents commerciaux.[9]

The American doctrine on the subject is to the same effect:

> A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes . . . he is not entitled to be considered as a Minister or diplomatic agent of his sovereign.[10]

Under the weight of this jurisprudence, the authority and dignity of the consul were reduced to very modest dimensions. Except where he is also a *chargé d'affaires,* he is furnished not with credentials (*lettres de créance*) but with a mere commission (*lettre de provision*). For the exercise of his functions, he requires the permission (*exequatur*) of the sovereign of the country to which he is deputed. As his office is, in the absence of treaty obligations, a result of mere international comity, a refusal to receive him is not a breach of international law, and the *exequatur* may at any time be revoked, where a consul abuses his position by intermeddling in the internal affairs of the country of his temporary residence or by otherwise misconducting himself. As recently as 1922, the British Government withdrew the *exequatur* of the consul, and the recognition of the vice-consul, of the United States at Newcastle,

[8] Calvo, *Droit International,* I, p. 520.
[9] Calvo, I, 521.
[10] *The Anne,* 3 Wheaton, 435.

on the ground that they were endeavouring to divert shipping from British to American vessels.[11]

Revocation may be followed by expulsion. Thus, in 1863, M. Pierre Mandato, who had been Papal Consul-General at Naples, while Francis II occupied the throne of the Two Sicilies, and had continued to act as such after the incorporation of that Kingdom with Italy, was expelled by the Italian Government for supposed complicity with acts of brigandage, and for the clandestine delivery of passports to persons who repaired to Rome in support of the Bourbon reactionary movement there. In 1844, the French expelled from Tahiti, a Mr. Pritchard, the British Consul, for alleged hostility to the French protectorate. Again, the consul is, generally speaking, amenable to the civil and criminal jurisdiction of the country in which he resides, *a fortiori* where he is engaged in trading in that country.[12]

But, in spite of these depressing conditions, the commercial consulate still retains some of the original brightness of its diplomatic descent. The consul has the right to exhibit the arms and flag of the State that appoints him. He is immune from personal taxes, from jury service and from liability to have soldiers quartered in his house. The archives and muniments of the consulate are inviolable. Moreover, the whirligig of time has, as usual, brought its revenges. In addition to his staple functions as the promoter of the commerce and industry, the superviser of the navigation and the general protector of the subjects of the country that he represents, and his functions *ad hoc,* in the execution and attestation, of notarial documents, the issue of passports, and, under certain laws, the celebration of marriages, the consul has acquired a voluntary jurisdiction of his own, of which municipals take account,[13] over disputes between the master and the crew or the passengers of merchant vessels of the deputing State. With the vast development, in recent years, of international and inter-dominion intercourse, Consular Reports have gained transcendent importance. International law has recognised[14] that the commercial consul is not an ordinary foreign resident but a foreign representative for whose safety and freedom, in the exercise of his accepted functions, the State that receives him is bound to do its best to provide. An

[11] The charge was ultimately not insisted upon. Oppenheim, *International Law,* 4th Edition, I, p. 660, *n.z.*: and see other cases cited in Calvo, I, 508.

[12] *The Indian Chief* (1801) 3 Rob. Ad. 12.

[13] *The Nina* (1867) L.R. 2 A. & E. 44; *The Leon XIII* (1883) 8 P.D. 121.

[14] See the case of *Mallén* (*British Year Book of International Law,* 1928, p. 160).

increasing number of States now define and enhance by treaty the position of their consuls abroad, and the modern tendency, in many directions, is to associate, not necessarily to incorporate, the hierarchy of the consulate—consul-general, consul, vice-consul and consular agent—with the permanent diplomatic service.

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TERRORISM IN INDIA.—A sinister sidelight on the problems before the Round Table Conference was cast by Lord Lothian's speech in the House of Lords on Tuesday on terrorism in India. No one will suspect the new Under-Secretary of any lack of sympathy with Indian aspirations. He has, in fact, been working unceasingly in the Conference for a reasonable settlement such as the mass of Indian opinion could accept, but his description of the situation in India, and Bengal in particular, and his denunciation of the terrorism designed to make self-government or any other form of government impossible was couched in language strong enough to satisfy even Lord Brentford, who initiated the debate. The Government propose to exercise, and are amply justified in exercising, exceptional powers in Bengal. Freedom of the Press is a principle to be defended almost when it seems past defence. But in parts of India it is past defence altogether, and the responsible editor who instigates unbalanced students to murder deserves even heavier punishment than the criminal himself. Sir John Anderson, the newly-appointed Governor of Bengal, will have as heavy responsibilities on his shoulders as any man in the Empire, but he has had some experience in Ireland of coping with defiance of the law and he will carry the confidence as well as the good will of his countrymen with him to India.—The *Spectator*.