THE STATE DEPARTMENT WHITE LIST AND DIPLOMATIC IMMUNITY

In a case now eight years old [1] the Municipal Court of Appeals for the District of Columbia came to grips, for the first time,[2] with the legal significance attaching to the White List [3] issued by the United States Department of State. Subsequent decisions involving the measure of privilege to be accorded lesser diplomats have taken their law, even irrelevantly, from *Trost* v. *Tompkins*. In view of certain *dicta* in the case which reveal a misunderstanding of the purport of the White List, it is of some importance that the statutory authority for the List be examined in an effort to clarify the meaning of the initial precedent.

The White List has its origin [4] in those sections of the Federal statutes relating to the diplomatic immunities of ambassadors, public ministers, and their domestic servants. The first of the sections [5] is the traditional statement immunizing the group from suit. The succeeding section prescribes the penalty for anyone bringing such a suit, deeming him "a violator of the laws of nations and a disturber of the public repose." [6] A final section excepts certain persons from the application of the first two sections, declaring:

> Sections 252 and 253 of this title shall not apply to any case where the person against whom the process is issued is [a clause not relevant here follows]; nor shall section 253 of this title apply to any case where the person against whom the process is issued is a domestic servant of an ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. . . .[7]

It is the second clause of this section which gives rise to the White List and which is here in issue.

A close reading of Section 254, quoted above, with emphasis on its second clause, plainly reveals that the White List can in no way answer the question whether an individual is eligible for the immunity from process traditionally accorded diplomats. Its function is wholly unrelated to that question. Rather, the section is addressed solely to the punishability of those who sue out process against individuals *otherwise* determined to be

[1] Trost *v.* Tompkins (1945), 44 Atl. (2d) 226.

[2] The opinion in the principal case contains the remark, "We find no case wherein the status of this list has been considered. . . ." *Id.* at 228–229.

[3] The White List is to be distinguished from the State Department Blue List. The latter lists the names of high-level diplomats accredited to the United States.

[4] It is ultimately rooted in the British Law on Diplomatic Privilege of 1708. Great Britain, 7 Anne, c. 12, sec. V.

[5] 22 U.S.C.A. (1940), Sec. 252. [6] *Ibid.*, Sec. 253.

[7] *Ibid.*, Sec. 254.

diplomatically immune. It refers to the plaintiff, not the defendant, in an action brought against a member of a diplomat's staff who, having been put on constructive notice of the diplomatic character of his defendant, is thereafter punishable for instituting the suit. Yet, despite the statute's clarity, the opinion in *Trost* v. *Tompkins,* and the comments of those who have examined the case, appear to assume that the White List evidences a right to immunity from process in those whose names are placed on it.

Chief Judge Richardson asserts in the principal case:

> The plain implication of the language used [in Code section 254] is that *to secure* the protection of his servants the ambassador or minister must register them, i.e., furnish their names to the State Department . . . [emphasis supplied].[8]

This is the initial error. It goes unchecked when Professor Preuss, in a note on the case, writes of the White List:

> Since it is apparently prepared without investigation or verification, it is not conclusive evidence of the diplomatic character of those whose names are listed.[9]

Not only is it not "conclusive evidence"; it is no evidence at all of the diplomatic character of those listed.

The false notes struck by *Trost* v. *Tompkins* are echoed in succeeding cases. In *Carrera* v. *Carrera* [10] counsel for the appellant, taking his cue from precedent, contended that ". . . the inclusion of Amable's name on the so-called 'White List' was not sufficient to bring him within the second clause of sec. 254 which would extend to him the protection of sec. 252 and 253," [11] to which the court, without directly attacking the misconception in the argument, replied:

> But in the Trost case the court held no more than that certification of the Secretary of State being absent, a court otherwise having jurisdiction should determine whether the person claiming immunity was properly placed on the "White List."[12]

Here, the tack of the court's reasoning implies that the White List has something to do with the process for obtaining diplomatic immunity. Fortunately, this view was not the dispositive fact of the case, but the failure of *Carrera* to divert the muddied current into its proper channel made possible an easy acquiescence in the judicial attitude now posed by the next court to deal with the question. In *Haley* v. *State* [13] the fact that

[8] Trost *v.* Tompkins, *supra.*

[9] Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case," this JOURNAL, Vol. 41 (1947), pp. 555, 562, note 26.

[10] 174 F. (2d) 496 (1948).

[11] *Id.* at pp. 497–498.

[12] *Id.* at p. 498.

[13] 88 Atl. (2d) 312 (1952).

the name of the defendant in a criminal prosecution was not found on the White List seemed to weigh against him in the determination of his right to immunity, despite the irrelevance of the circumstance. Relying on *Trost* and *Carrera,* the court said:

> While the Federal Cases do not specifically hold that the immunity for domestic servants, under section 252, is dependent upon registration on the White List under section 254, there is strong intimation that such is the case.[14]

It must be noted that none of these cases makes its result turn on observations concerning the White List: the individual holdings are probably correct. But our judicial system is now saddled with three decisions in this little known sector of the law containing *dicta* which cannot be reconciled with logical analysis. And one cannot find comfortable refuge in the maxim *communis error facit jus.*

That there are only three cases in the American reports involving a construction of the punitive sections of the statute is not surprising. Apart from the relative infrequency of litigation relating to diplomatic immunities, one understands the reluctance of a state to punish one of its citizens for doing that which the rest of our judicial system holds to be his right, namely, bringing suit when wronged. A similar uncommonness is observable in the English Reports where no case putting in issue section 5 of the Diplomatic Privileges Act of 1708,[15] the parent and parallel of our Section 254, is recorded. But there, at least, Lord Justice Goddard of the Court of Appeal saw fit to comment on the section in passing, putting the matter right. Having come upon a marginal note by a publisher to Section 5 which read:

> No merchant etc. to have any benefit of this act. Nor the servant of an ambassador unless his name be registered etc.[16]

he was moved to assert:

> This is a striking instance of the inaccuracy of a marginal note. . . . This is not what the section provides. It says that solicitors and others are not to be liable to penalties for proceeding against servants of an ambassador who are not registered, and it has been held that though a servant is not registered he may yet have diplomatic privilege.[17]

Here, at last, the American courts have a guide.

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[14] *Id.* at p. 316.

[15] Cited *supra,* note 4.

[16] Hemeleers-Shenley *v.* The Amazone, Re The Amazone, [1940] 1 All E.R. 269, 273, C.A.

[17] *Id.* at pp. 273–274.