

CONSULAR COURTS OF THE UNITED STATES IN CHINA.

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

TRANSMITTING

A copy of certain regulations, orders, and decrees issued by the Commissioner of the United States at China.

JULY 17, 1856.—Referred to the Committee on Foreign Affairs and ordered to be printed.

To the Senate and House of Representatives :

I transmit a copy of a letter of the 27th of November, 1854, from the commissioner of the United States in China, and of the regulations, orders, and decrees which accompanied it, for such revision thereof as Congress may deem expedient, pursuant to the sixth section of the act approved August 11, 1848.

FRANKLIN PIERCE.

WASHINGTON, *July 15, 1856.*

UNITED STATES LEGATION,
Shanghai, November 27, 1854.

SIR: In pursuance of the sixth section of the act of Congress entitled "An act to carry into effect certain provisions of the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries," passed and approved August 11, 1848, I have the honor to transmit certain regulations, orders, and decrees issued and published by me, under the provisions of the said act of Congress, the same to be laid before Congress for revision.

I have the honor to be, with great respect, your obedient servant,

ROBERT M. McLANE.

His Excellency FRANKLIN PIERCE,
President of the United States.

Regulations for the Consular Courts of the United States of America in China.

In pursuance of the fourth section of the act of Congress, approved August 11, 1848, entitled "An act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries," I, Robert M. McLane, Commissioner of the United States of America to the empire of China, do hereby decree the following rules and regulations, which shall have the force of law in the consular courts of the United States of America in China.

First. When a citizen of the United States, who is a resident of China, absconds or is concealed, or who is about to depart, or has departed, leaving property, a creditor who is a resident of China, to whom he owes any debt, or who has against him any claim which may be the subject of a civil action, whether of debt or damage, may, on application to the United States consular court, and on filing therein a sworn statement of the facts on which he grounds the application, procure his real and personal estate to be attached in his own hands, or in the hands of any third person, who shall thenceforth hold the same subject to the further order of the court, and when perishable, or from any other sufficient cause in the discretion of the court, sell the same. But should any vessel be so attached, it may be released on satisfactory security being given to hold the value thereof subject to the further order of the said court, and from the time of such attachment, all sales or assignments by the debtor, shall be declared by the court to be void, and the court may at any time take possession of all such property, and appoint a special receiver or trustee to hold the same subject to its order. The object of the said process of attachment being to compel appearance or to hold the property of the debtor in pledge to pay the debt or damage recovered in the action, to which it must be used as ancillary; and every person within the jurisdiction of the said consular court having goods, effects, or credits of the defendant debtor in his possession, may be summoned as trustee and defendant in the case, and the property in his hands attached are held to respond to the final judgment of the suit, or released at the discretion of the court, on a hearing prayed for by the said principal debtor or trustee defendant, in whose hands the said property may have been attached. The trial shall be proceeded with six months after publication thereof, and notice by mail to the defendant debtor, if absent; unless it shall be alleged and proven to the satisfaction of the court that the said debtor defendant had absconded or concealed himself from creditors or the jurisdiction and process of the court, or that he had died after his departure from his residence in China, in which latter case the suit shall not abate, but shall be proceeded with to final judgment, six months after the publication of the death of the debtor defendant, and the appointment of an administrator of the property attached and held subject to the order of the said court. But no person is to be adjudged to have property in his

possession belonging to a debtor defendant, by reason of having drawn, accepted, made, or endorsed any negotiable bill, draft, note, or any other security.

Nor by reason of any money or other thing received or collected by him as marshal or receiver, or other officer of execution, or other process or order of a consular court.

Nor by reason of any money in his hands for which he is accountable as a public officer.

Nor by reason of any money due by him to the principal debtor defendant, unless due absolutely and without depending on any contingency.

Nor by reason of any debt due from him on judgment, so long as he is liable to execution on that judgment.

Nor as guardian, for the debts of his ward.

Stocks, choses in action and debts acknowledged due, may be attached; so a legacy, mortgage, &c. In enforcing the process of attachment within the jurisdiction of the consular court, the common law of the States is suggested as a satisfactory guide and rule for the government of the United States consul, or United States commissioner, as the case may be, and the process of attachment hereby instituted is intended to embrace, in some respects, the process of both foreign and domestic attachment, as known to the common law of the States; it may therefore be sued out not only against a debt presently demandable and clearly due, but also against a debt not due. But no process of attachment shall issue against the property of any other defendant debtor than is described in this decree, as an absconding or concealed debtor, or when about to depart, or who has departed, from China, leaving property behind him, and no judgment or decision shall be rendered in such ancillary action not expressly authorized by this decree. The common and statute law of the several States being referred to only as incidental rules to guide the court in the exercise of the special jurisdiction hereby conferred. Nothing herein contained is intended to interfere with the equity jurisdiction of the consular courts, under which injunctions may issue to restrain defendant debtors from disposing of their property, and under which receivers are appointed to hold or collect property subject to the further order of the court. The process by attachment, being a special process, unknown to the common law and laws of the United States, whether permitted as a principal or ancillary process, must be strictly pursued.

Second. After judgment, process of attachment may issue on the sworn statement of the plaintiff, in the discretion of the consul or commissioner, against the property of the defendant debtor, whether in his own possession or in the possession of another person, and that whether the said defendant debtor be absent or present within the jurisdiction of the consular court; and the property so attached, when proven to be the property of the defendant debtor, may be taken under the order of the court to satisfy the said judgment.

Property thus attached after judgment shall be subject to the same rules, and liable to the order of the court, in the same manner as when attached before trial in a process of attachment ancillary to the main trial, subject to the same limitations prescribed in the several excep-

tions set forth in this decree, and when liable to attachment under these rules to be taken possession of by the court, or left in the hands of the defendant debtor or garnishee, as the court may be pleased to direct.

The court may, at any time in its discretion, require security from the plaintiff on filing a sworn statement for the process of attachment, as a guard against vexatious and frivolous allegations, making parties defendant appear as garnishees, when there was no reasonable ground to suppose that property belonging to the principal defendant debtor was in the possession of said garnishee.

ROBERT M. McLANE,
Commissioner of the United States to China.

Assented to:

SHANGHAI, *July 31, 1854.*

ROBERT C. MURPHY, *Consul United States of America.*

Assented to:

AMOY, *August 9, 1854.*

T. HART HYATE, *Consul United States of America.*

D. N. SPOONER, *United States Vice Consul at Canton.*

NOTE.—The attachment binds all the estate, real and personal, of the debtor, from the time it issues, and the attaching creditors acquire priority according to the order of time, except in the case of a debt attached, not due and presently demandable, which should be shared rateably by all creditors who may attach it before it falls due. This process of attachment, when issued by the consular courts in China, should be confined to the resident creditor, but shall not interfere with the equity proceeding of injunctions against estates of resident or non-resident debtors, in their own hands or in the hands of resident garnishees, on a bill filed in behalf of a resident or non-resident creditor; and all equity proceedings shall be on bill and answer, whether for the discovery of evidence in a suit pending or for relief in the consular court sitting as a court of equity.

The consuls will hold a court once in every month, to be opened on the first Wednesday of each month, at which session all cases shall be tried that may have been brought and entered on the consular record one week prior to the holding of next court.

The consul may, at his discretion, hold special courts as heretofore.

The consul may, in person, serve all processes of the court, or appoint special officers for that purpose, in the absence of a marshal.

The presence of counsel in consular courts shall be under the exclusive control and discretion of the consul.

ROBERT M. McLANE,
Commissioner of the United States to China.

AUGUST 25, 1854.

Regulations for the Consular Courts of the United States of America in China.

In pursuance of the fourth section of the act of Congress, approved August 11, 1848, entitled "*An act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries,*" I, Robert M. McLane, commissioner of the United States to the empire of China, do hereby decree the following rules and regulations, which shall have the force of law in the consular courts of the United States in China :

First. When a citizen of the United States who is a resident in China wishes to discharge himself from debt, he may present an application in writing, verified by his oath to the United States consular court at the port where he resides, setting forth the fact of his insolvency, the amount, kind, and particulars of his property, and the amount, nature, and particulars of his debts, specifying the names and residence of his creditors in China, so far as they are known or can be ascertained by him, alleging that he has not given a preference to any of them, and asking a discharge from his debts.

Upon receiving the application, the court may make an order, requiring the creditors of the insolvent to show cause to the court why the application of the insolvent should not be granted; and at such time, and after such lapse of time as the court in its discretion shall designate, it may proceed to hear the application.

If a creditor appear and deny any of the material allegations of the application or allege that the applicant has given a preference to any of his creditors over the other, or has fraudulently contracted the debt to such creditor; or that such debt arose from a fraudulent misapplication of the property of another by the applicant; or that the applicant, if he be a merchant, has not kept proper books of account, the court may either try the question of fact thus alleged, or if requested by the applicant, order it to be tried by three referees, should it be possible to find suitable persons, citizens of the United States, and in the trial of this question it shall be competent for the court to cause the books and accounts of the applicant to be submitted for examination.

If such demand or allegation be not made by any creditor, or if being made is found on the trial to be untrue, the court may make an order declaring the applicant an insolvent debtor, and appointing a receiver of his property, who shall take and hold the same for rateable distribution among his creditors, and upon the final report of the receiver, showing the collection and conversion into available assets of all the property of the insolvent, and the payment thereof rateably to creditors whose debts were proved to be due and owing before his application, the court may order that the insolvent be discharged from all such debts, provided they be debts of the following kind :

Debts due to persons who were residents of China at the time of the application.

Debts contracted in China.

Debts due to creditors who have received a dividend from the receiver.

But such order of discharge shall in no case discharge a debt arising out of a fraudulent misapplication of the property of another, or when the debt has been fraudulently contracted; and such order of discharge shall in no case effect the liability of another person, who is liable jointly with the insolvent for the debt in question.

Second. When a citizen of the United States who is a resident in China, or any subject of the emperor of China, or the citizen or subject of any other State or nation, that may have the right to bring suit against a citizen of the United States in the United States consular court in China, has a claim arising on contract, and already due, against any citizen of the United States residing in China, may apply to the United States consular court where the debtor resides to declare him insolvent, and close his affairs, in any of the following cases:

When he has fraudulently contracted the debt to such creditors.

When he has concealed, removed, or disposed of some part of his property, or is about to do so, with intent to defraud his creditors.

When an execution against his property has been returned unsatisfied in whole or in part.

When a promissory note made by him, or a bill of exchange drawn or accepted by him, while engaged in the business of a merchant, broker, factor or banker, and owned by the creditor, has fallen due, and has remained unpaid, and under protest, for at least ten days before the application of the creditor, without notice from the debtor, that he has a good and valid defence to such note or bill, accompanied by an offer of good security for the payment of any judgment that may be recovered thereon.

The application of the creditor must be in writing, verified by his affidavit, or that of another person knowing the case is within the class of debts described in this decree, and asking that a receiver of his property, wherever it may be found, shall be appointed, and his affairs closed.

Upon receiving such application, the court may make an order requiring the defendant to show cause, at a specified time and place, why the application should not be granted; and if then, or at any time afterwards, there appear to be danger of the defendant disposing of his property, to the prejudice of the application, the court in its discretion may grant an injunction against any disposition thereof, whether in the hands of the debtor or any other persons.

The court at its own direction as to time, and notice of the order to the debtor, to appear and show cause, shall proceed to hear the application.

If the debtor appear and deny any of the material allegations in the application, the court must order the question of fact to be tried by three referees, unless the debtor waives such trial by referees, or unless it be impossible to secure the service of three suitable persons, citizens of the United States; in either case, the court may itself try the question; and in the trial of this question it shall be competent

for the court to cause the books and accounts of the applicant to be submitted for examination.

If such denial be not made, or if made, be found in the trial to be untrue, the court may make an order declaring that the debtor is an insolvent debtor, and appoint a receiver of his property. The court may compel the transfer and delivery by the insolvent debtor, or by any other person, of his property.

The receiver must immediately give public notice of his appointment, in such manner as may be directed by the court, and for such time as the court in its discretion may order, and from the time of his appointment he is vested with all the property of the insolvent debtor in China, which, when converted into available assets, shall be applied under the order of the court, rateably, to the payment of creditors whose debts were proved to be due and owing before the application of the creditor.

Third. When a defendant debtor, by virtue of the existing laws of the United States, shall be imprisoned for debt in China, by reason of fraud being proved against him, in concealing or embezzling his property, so that execution cannot reach it, he may at any time apply in writing to the United States consular court, verified by his oath, setting forth the fact of his imprisonment, the amount, kind, and particulars of his property, and the amount, nature, and particulars of his debts, with the names and residences in China of his creditors, so far as they are known and can be ascertained by him, and asking for his discharge from imprisonment.

He must at the same time prove by affidavit or admission in writing, that a copy of the application, with notice of presenting the same at a specified time and place, has been served on the judgment creditor, upon whose execution the insolvent is imprisoned.

The application is to be heard in the same manner as other motions for a declaration of insolvency, and if it be shown to the satisfaction of the court that the allegations of the application are true, that the applicant is insolvent, that he does not conceal any of his property, and that he has not given preference to a creditor for an antecedent debt, by any payment or disposition of his property, the court may make an order declaring that the applicant is an insolvent debtor, and appointing a receiver of his property.

Upon a certificate of the receiver with an inventory or schedule that the insolvent has transferred and delivered to him all the property specified therein, with all books, instruments, and papers relating thereto, and after due notice to the judgment creditor, the court may make an order discharging the insolvent from his imprisonment; but such discharge shall not affect the judgment, nor any other remedy for the collection thereof, other than against the person of the insolvent.

The receiver must proceed in the conversion of the property into available assets, and after satisfying the judgment, distribute the same rateably among the creditors existing at the time of the application.

The receiver of the court, in all the foregoing proceedings, is at all

times subject to the control of the court, and from the time of his appointment he is vested with all the property of the insolvent.

Fourth. When a creditor shall appear before the United States consular court, and allege in writing, verified by his oath, that he has reason to believe an execution defendant against whom he has a judgment is concealing or embezzling his property, so that execution cannot reach it, the consul may, in addition to the imprisonment of the execution defendant, as provided by existing decrees, seize the books and accounts of said execution defendant, and submit the same to three referees, or himself try the question contained in the allegation of the creditor.

Fifth. When a sum of money is actually due from a citizen of the United States residing in China upon a bond conditioned for the payment of money only, or upon a promissory note, or bill of exchange, and suit is brought in the United States consular court for the recovery of such money debt actually due, the plaintiff can have an immediate attachment against the property of the defendant debtor, in his own hands or in the hands of another person, upon giving security to pay all damages if he fails to make out his case. But the defendant may avoid and discharge said process of attachment by giving security to the satisfaction of the court, to pay the amount of any judgment that may be obtained against him.

Sixth. Touching the form of writs and processes from the United States consular court, and the pleadings in the same, simplicity and brevity should be insisted upon, and no complaint or answer which may be submitted by plaintiff or defendant shall be rejected for want of form if the same be expressed in plain and intelligible language, and all writs of attachment or injunction issued from the United States consular court, shall simply notify all concerned that the United States consul, in virtue of his judicial authority, has attached the property real, personal and mixed of the defendant A B, to abide the further order of the United States consular court in the matter of a suit therein pending; which notification may be served by the marshal or consul or any one authorized by him to serve the same; and in the matter of an injunction the consul need simply issue his notification or writ, addressed to the party to be enjoined, setting forth what it is that the court enjoins and commands.

The following forms are recommended in the practice of the United States consular court, when the same may apply, and in other cases, such an approach to the same as may seem judicious:

UNITED STATES CONSULAR COURT, ——— 1, 1855.

I hereby notify all concerned, that in virtue of the judicial authority in me vested as United States consul, that I do by this writ, issuing out of the United States consular court, attach all the property, real, personal, and mixed, of the defendant A B, to be held subject to the further order of said court in the matter of a suit therein pending in which C D is the plaintiff.

This writ should be served upon the defendant debtor and upon every and all parties who may be supposed to have property belonging to him in their possession, and the consul, marshal, or any deputy of either may serve the writ and endorse thereon the service.

In the case of an injunction the notification may be more particular, and addressed to the individual in whose hands property may be enjoined or who may be individually forbidden to dispose of the same; but in this and all other orders of the court the names of the plaintiff and defendant in the case, to which such order of the court is ancillary and incident, should be expressed.

Seventh. To guard against substantial errors and defects in the proceedings of the United States consular court, in addition to the appeals and new trials now authorized by the decrees regulating the proceedings of the United States consular court, a prayer for a new trial shall lie to the United States consular court or to United States commissioner, when any error or defect, be it a matter of fact or law, arises upon the face of the proceedings.

Such new trial may be prayed for at any time before the execution of the judgment, and all that shall be necessary to secure the same will be a prayer to the court, by the defendant, that judgment be stayed until the proceedings of said court in the particular case at issue be reviewed by the court itself, in a new trial thereof, or, at the option of the plaintiff, until the United States commissioner shall have reviewed the said proceedings, when he shall issue such order concerning a new trial thereof as may appear to him necessary to secure a just and proper administration of justice in conformity with the law of Congress of 11th August, 1848, and the decrees and regulations made in pursuance thereof.

On the filing of such prayer by the defendant, the consular court may, at its discretion, demand security for the payment of all costs and damages that may be awarded for the delaying of the execution, as also for those that may accrue in the new trial.

If there be no United States commissioner in China, then said proceeding may be reviewed by the person who for the time being is charged with the duties of United States commissioner, and the prayer filed by the defendant, asking for a review of the proceedings of the United States consular court in a new trial shall express fully and clearly the exceptions taken by said defendant to the proceedings of said United States consular court, and whether he wishes the same to be reviewed by the United States consular court, or submitted to the United States commissioner, or, in his absence, to the person charged with the duties of the United States commissioner.

In the foregoing regulations, as well as in those heretofore decreed, reference has been made to the equity jurisdiction of the United States consular court, such jurisdiction does not differ in substance from its common law jurisdiction, though when acting as a court of equity, it is authorized to adopt a different mode of administering justice, pursuing the well established rules of equity proceedings, in the mode of *proof, trial, and relief*.

As to the mode of *proof*, when facts are believed to rest only in the knowledge of the party sued, it is in the power of the equity judge to

purge his conscience upon oath with regard to the truth of the transaction alleged injurious to the rights of the plaintiff, and if he refuses to answer on oath the sworn complaint of the plaintiff, judgment may be given by default.

As to the mode of *trial*, it shall be by a sworn bill of complaint and a sworn answer, and if testimony is required it may be taken in writing by a commissioner appointed by the court to take the same in answer to special interrogatories, filed in court by the party who desires to have the testimony taken and furnished to the opposite party.

As to the mode of *relief*, it may be made particular and specific, obliging a party to execute his contracts while the action at law obliges him to pay damages for not executing it.

New trials and appeals shall lie from the equity jurisdiction of the United States consular court, as from the common law jurisdiction of the same.

The United States consular court may exercise equity jurisdiction, where the subject matter complained of be a matter of—

1. *Accident* and *mistake*; 2. *Account*; 3. *Fraud*; 4. *Infants*; 5. *Specific performance of agreements*; 6. *Trusts*.

These constitute the principal subjects of acknowledged equity jurisdiction.

“By *accident* is meant where a case is distinguished from others of a like nature, by unusual circumstances;” as, for instance, in the case of bonds or deeds when lost or destroyed, the contents thereof may be proved in equity, and new bonds or deeds may be ordered to be made, or the lost obligations enforced; so in equity, the boundaries of land where the boundaries have been lost or never existed, in consequence of a unity of possession by different parties, may be defined; so penalties and fines incurred by accident may be relieved against and remitted by the equity court.

Mistakes in a deed or contract, founded on a good consideration, may be rectified by the order of the equity court, and a conveyance, defective in form, may be corrected by its order.

In matters of *accounts*, “mutual dealings and demands between parties, which are too complex to be accurately investigated by trial at law, may be adjusted in equity.”

As to *fraud*, no matter what the case may be, if fraudulent and dishonest conduct is alleged by the plaintiff, the equity court may entertain the complaint, investigate the fraud, and apply such a remedy as the common law and laws of the United States and decrees made in pursuance thereof may authorize.

As to *infants*, the court of equity has plenary jurisdiction to appoint guardians where none legally exist, and to assume a general guardianship in its own right.

As to *specific performance of agreements*, an equity court may always enforce an agreement for the purchase of real estate, and generally an equity court will always consider that which is agreed to be done *as already done*, and enforce the doing of the same.

As to *trusts*, equity will superintend and protect the creation of trusts, whether vesting in the trustee real or personal estate, and

take jurisdiction of trusts, whether resulting from an express deed or the force of circumstances and the situation of parties, which latter are implied trusts.

So all matters concerning *lunatics, administration of estates or insolvency*, should be disposed of under the equity jurisdiction, and generally, in all matters where some impediment exists to a fair decision of a case at common law, process may issue for the equity jurisdiction to assist; as, for instance, in compelling a discovery of evidence, which may enable the court of law to decide accordingly to the real facts and justice of the case.

The United States consular courts, whether exercising a common law or equity jurisdiction, should be governed both in its practice and proceedings by the provisions of the law of 1848, in virtue of which it derives all the judicial power it possesses; and by the 4th section of that act it is provided that such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, the common law, and the decrees and regulations of the commissioner of the United States to China, issued in pursuance of the 5th and 6th sections of the said law of the 11th August, 1848. By the expression "laws of the United States," is intended acts of the Congress of the United States; and by "common law," is intended that law which is to be found in the decisions of the courts of justice of the United States, both Federal and State courts, as distinguished from that law which is to be found in the statute law of the United States and the several States.

These decisions are to be found in the numerous volumes of American reports, known as the reports of cases decided in the courts of the United States and of the several States of the American Union, and they embrace the common law of England so far as the same has been judicially noticed as evidence of the common law in the administration of justice in the United States.

The commentaries of Kent and Story on American law, and the American addition of Blackstone's commentaries on the laws of England, are referred to as further evidence and explanation of the common law; and no practice or proceeding, and no final judgment, not expressly authorized by the laws of the United States or the common law as thus defined, or by the decrees of the United States commissioner to China, should ever have place in a United States consular court in China, whether the same be exercising a common law or equity jurisdiction.

ROBERT M. McLANE,
U. S. Commissioner to China.

SHANGHAI, October 2, 1854.

Assented to :

ROBERT C. MURPHY,
Consul U. S. of America.

D. N: SPOONER,
U. S. Vice Consul at Canton.

CALEB JONES,
U. S. Consul at Foo-Chow.

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