Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

The revisory jurisdiction of this court over the judgments of State tribunals, is defined by the twenty-fifth section of the Judiciary Act of 1789. It is there provided that the citation must be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. But the citation in the case before us, was signed by a district judge. This was without authority of law, and the citation was, therefore, without effect. The case therefore is not properly in this court, and the writ of error must be

DISMISSED.

COPPELL v. HALL.

1. A contract made by a consul of a neutral power, with the citizen of a belligerent State, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.
2. During the late rebellion the President alone had power to license commercial intercourse between places within the lines of military occupation, by forces of the United States, and places under the control of insurgents against it. Hence the general orders of the officer of the United States, commanding in the department, could give no validity to such intercourse.
3. Where suit is brought upon a contract which is void as against public policy and the laws, a party who pleads such invalidity of it does not render the plea ineffective by a further defence in "reconvention;" a defence of this sort, to wit, that, if the contract be valid, he himself takes the position of a plaintiff, and makes a claim for damages for its non-performance.

IN error to the Circuit Court for the Eastern District of Louisiana.

The case was this:

During the late civil war the city of New Orleans was in military occupation of the United States forces, and most of the neighboring cotton region around, in military possession of rebel enemies.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Statement of the case.

In this state of things, a circular of the treasury, of July 3, 1863, declared it to be the intention of that department to allow no intercourse at all beyond the national and within the rebel lines of military occupation. "Across these lines," was its language, "there can be no intercourse, except that of a character exclusively military."

A treasury regulation also said:

"Commercial intercourse with localities beyond the lines of military occupation by the United States forces, is strictly prohibited; *and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States.*"

This regulation was made under an act of Congress,* which, forbidding all commercial intercourse between territory proclaimed by the President to be in insurrection (which the territory about New Orleans had been, though New Orleans was not), and the citizens of the rest of the United States, and enacting that all merchandise coming from such territory into other parts of the United States, should be forfeited, authorized the PRESIDENT to permit such intercourse, in such articles, for such time, and by such persons as he might deem proper; *providing*, however, that such intercourse, so far as licensed, should be carried on *only in pursuance of rules and regulations prescribed by the Treasury Department.*

By the general orders of the Military Department of the Gulf, however, dated March 7 and September 3, 1863, the trade of the Mississippi, within that department, was permitted, subject to such restrictions only as should be necessary to prevent the supply of provisions and munitions of war to the enemy. The products of the country were authorized to be brought to New Orleans, and other designated points within the military lines of the United States, and to be sold by the proprietors or their factors.

In this state of orders, civil and military, George Coppell,

* Act of July 13, 1861, 12 Stat. at Large, 257, § 5.

a British subject, and acting British consul, at New Orleans, and trading there (William Mure being the consul), made a contract, through one *James Gonegal*, with a certain Hall, a citizen of Louisiana, residing like Coppell in New Orleans, but both being, at the time of the contract, in rebel territory, by which Hall agreed to "furnish" the said Coppell with a large number of bales of cotton, all of it being then in rebel territory, and owned chiefly by one Mann, also a citizen of Louisiana, resident apparently in the rebel region of it; cotton being at the time an article specially sought for by both combatants; shielded and preserved by each while it was in his own possession, and destroyed when found, without an ability on his own part to capture it, in possession of the other. By this contract, Coppell on his part agreed "to cause said cotton to be *protected* and *transported* to New Orleans, and *disposed of* to the best advantage, paying to said Hall, first, the actual cost of it, with two-thirds of the net profits, &c., without commissions, retaining *one-third* of the profits as his compensation." Coppell now marked a large part of the cotton with his private mark, and soon afterwards issued certificates (the marks and other designations of the cotton being set forth on a document appended), in this form:

HER BRITANNIC MAJESTY'S CONSULATE FOR THE STATE OF LOUISIANA:

Know all persons to whom these presents shall come, that I Wm. Mure, Esq., her Britannic Majesty's consul for the city of New Orleans and State of Louisiana, *do hereby certify* that on the day of the date hereof personally appeared before me *Mr. James Gonegal*, who being by me duly sworn, says, that the twenty bales cotton, as described on the document hereunto attached, *is the property of and belongs to a British subject, and is duly registered as such at this consulate.*

Given under my hand and seal of office, at the city of New Orleans, in the State of Louisiana, the eighth day of October, one thousand eight hundred and sixty-three.

GEORGE COPPELL,
H. B. M.'s Acting Consul.

Under these "protections," and escaping destruction from either government or rebels, the cotton remained on Mann's estate, in the rebel region, and in his and Hall's charge, until the rebel forces there surrendered to the government. The whole region coming thus again under the control of the United States, and it becoming easy to transport cotton from the surrounding country to New Orleans, and there to dispose of it to advantage at a rate of factorage much less than one-third the profits, Hall and Mann declined to furnish Coppell with the cotton. Coppell, thereupon, in the court below, by petitions, in which, referring to the contract as made "under the permission" expressed in military general orders, and alleging that he had been able and desirous to bring the cotton to New Orleans at the time of the contract, and that Hall and Mann had prevented him, to his damage $50,000; now demanded possession of the cotton "for the purposes enumerated in the agreement," or if he should be adjudged not entitled to such possession, then to have damages.

The defendants set up that the contract was null and void; as being in violation of public policy of the laws of the United States, and of the neutrality which Coppell, as a British subject, was bound to maintain. But that "*if*" it should be determined that the contract was valid, then that they, the said respondents, "assuming the positions of *plaintiffs* in reconvention," averred that Coppell was indebted to them in damages $70,000, for not having transported the cotton to New Orleans under British protection, and sold it during the war; every of which things it was alleged that he was unable to do, and none of which he had ever attempted or offered to do. And they prayed that he "might be cited to appear and answer this *reconventional* demand."

Coppell replied, that he was the consul of Her British Majesty; that he did protect the cotton from all seizures which his agreement included; and that, as soon as the military situation permitted, he was ready and willing to perform all the stipulations of his agreement, and tendered the neces-

Argument for the owner of the cotton.

sary means for the transportation of the cotton to New Orleans; which tender the defendants declined.

The court below charged:

1. That Hall and the plaintiff, both residing in New Orleans, the contract was valid under the law of nations.

2. That the military orders, then in force, authorized and gave validity to the contract.

3. That the demand for reconvention, set up by the defendants, "cured any nullity or illegality in the contract, if any existed, and that, under the pleadings, the plaintiff might recover, notwithstanding such illegality."

And judgment having been given for the plaintiff for $29,644, the case was brought by the defendants here.

Messrs. Evarts and Ashton, for the plaintiffs in error:

I. The court in effect instructed the jury:

1st. That a British subject, domiciled at New Orleans, could make a valid contract, during the war, with a citizen of the United States, by which such British subject should agree to cover and protect, with his neutral British name, cotton situated in the hostile territory within the rebel lines; and,

2d. That a contract between such citizen and a British consul at New Orleans, by which the latter agreed to issue false certificates that such cotton was British property, with a view to its protection within the rebel lines, was a valid contract, enforceable in a court of the United States by that British consul.

It needs no argument to disclose the error of such rulings. We should suppose no one would have the hardihood to doubt that such a contract was absolutely void, as against public policy, and as in contravention of the belligerent rights of the United States.* Nor do we believe that this court will tolerate, for one moment, the monstrous doctrine, that the issuing, by a British consul residing in our jurisdiction, of false and fraudulent papers, asserting that property

* Patton *v.* Nicholson, 3 Wheaton, 204.

in the enemy's country belonged to British subjects, is a consideration which will sustain a contract between that consul and a citizen of the United States.*

II. The military orders did not authorize the contract sued on. At the date of the contract all commercial intercourse with territory beyond our lines of military occupation in Louisiana was strictly prohibited, except with the license of the President. And no officer of the government, save the President, had any authority to permit such intercourse to be carried on by the plaintiff, and therefore no authority except that of the President could take from such a contract as this the "*sting of disability.*"†

Independently of which, they were not meant to be relied on. If they had been, the cotton would have needed no British protection.

III. As to the effect of the further defence of "reconvention," *if* the first defence failed. The ruling of the court, on this point, exhibits a total misapprehension of the character, foundation, and policy of the rule *ex turpi causa non oritur actio.*

Every contract stipulating for the performance of an illegal act, or founded upon an illegal consideration, is rendered void by the power, and to conserve the policy, of the law; and this altogether independently of the will or wish of the parties concerned. An English judge declared, "*You shall not* stipulate for iniquity." Lord Mansfield said, that it is not for the sake of a *defendant* that the objection is ever allowed that a contract is immoral or illegal, but is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice of the case.‡

Mr. Durant (*who filed a brief for Messrs. Sullivan, Billings, and Hughes*), *contra:*

1. It is settled beyond controversy that two members of

* Bartle *v.* Coleman, 4 Peters, 187.

† The Reform, 3 Wallace, 632; The Sea Lion, 5 Id. 647; The Ouachita Cotton, 6 Id. 521.

‡ Tool Company *v.* Norris, 2 Wallace, 45; Craig *v.* Missouri, 4 Peters, 436.

Recapitulation, in the opinion, of the case.

the same community may make any transfer of personal property within the enemy's lines, not based upon, nor looking to communication with the enemy. Coppell, either as British consul or British subject, had then the right to enter into this contract. Communication with the enemy was negatived by the presumption of law, which presumes the protection to be legal when it was reasonably possible. In aid of this presumption it should be observed (as the fact was within common knowledge), that the military occupation of the region in which this cotton was situated frequently and rapidly changed, the Federal forces to-day advancing beyond, and in a short time falling back on the hither side of this region, and the Confederate forces receding and advancing correspondingly, so that communication with persons in charge of the cotton would be strictly lawful at one time, and the effect of that communication might be at another time to prevent the destruction of the cotton by the enemy's forces.

The restraints upon the defendant in error, as British subject or consul, were even less than those springing from his domicile, *i. e.*, viewed as a member of the community of New Orleans; for the announced attitude of his government, in the proclamation of Her Britannic Majesty, of May 31, 1861,* had not in the least added to the ordinary duties of neutrals, nor imposed any additional restraints upon her subjects.

2. The military general orders were the governing law of a region wholly occupied by military force, and were a sufficient permission for what was done.

3. The parties sued had, by their reconventional demand, taken the position of plaintiffs in the suit. *They* set up the contract, and claimed damages for its alleged violation. By taking that attitude they had waived their exception of illegality, and both parties alike stood upon the contract.†

Mr. Justice SWAYNE delivered the opinion of the court.

It appears from the record that this action was founded

* Lawrence's Wheaton's International Law, p. 698.

† 1 Story's Eq. Jurisprudence, § 296; Batty *v.* Chester, 5 Beavan, 103.

Recapitulation, in the opinion, of the case.

upon a contract entered into on the 14th of September, 1863, between Hall, one of the plaintiffs in error, and Coppell, the defendant in error. It was agreed that Hall should furnish Coppell 1169 bales of cotton,—789 bales at B. L. Mann's place, about one mile from Arcola station on the Jackson railroad, 47 bales at Gilman's, near Tangepahow, and the residue in the parish of St. Helena, East Feliciana, and in Williamson and Amity counties, Mississippi. Coppell agreed to cause the cotton to be "protected" and transported to New Orleans, and disposed of to the best advantage, paying to Hall the actual cost of the cotton and two-thirds of the net profits, "after deducting freights, taxes, &c.," without commissions, retaining one-third of the profits as his compensation. It was further agreed, that if any of the cotton should be stolen, burned, or otherwise destroyed, Hall should be exonerated to that extent; and that Coppell should pay Hall, or cause him to be paid at Arcola, sums approximating to the value of his interest, as the cotton was removed; such sums to be indorsed on the notes given by Coppell to Hall; one for $318,350.00, and the other for $57,000.00, both bearing even date with the contract.

Coppell was the plaintiff in the court below. His petition avers: That he is a subject of Great Britain, and a resident in that kingdom; That Hall, the plaintiff in error, resides in the city of New Orleans, and Mann, the other plaintiff in error, at Arcola station, in Louisiana; That Hall and Mann delivered to him 1189 bales of cotton, of which 789 bales were on the plantation of Mann, at Arcola, and the remainder at various other places mentioned in a schedule annexed to the petition; That he caused the 789 bales to be branded with his initials and his private mark; That he had appointed Mann his agent to take charge of the cotton in his name and for his benefit, and that Mann acted as his agent accordingly; That, by reason of the war, he was unable to bring the cotton to market, but that he had expended large sums and much time and labor in "protecting" it; That, at the time of entering into the contract, he executed the two notes mentioned, which were to be held by Hall as

Recapitulation, in the opinion, of the case.

security for the proceeds of the cotton, and that these notes were still in the possession of Hall; That he was then able and desirous to bring the cotton to New Orleans for sale, and had made a demand for it on Hall and Mann, but that they had neglected and refused to deliver it, to his damage in the sum of $50,000.

He subsequently filed an amended petition, in which he sets forth: That the contract between himself and Hall was entered into by the permission of the major general commanding the Department of the Gulf, expressed in general orders — Coppell being then engaged in business in New Orleans, and Hall living in that city; That the notes, mentioned in the contract, are held by Hall and Mann, or have been transferred by them to other parties; That, on the 14th of September, 1863, Mann sold and delivered to Hall 1169 bales of cotton, then on the plantation of Mann; and that Hall, in part execution of his contract, designated and transferred this cotton to Coppell; That Coppell "protected" the cotton, and that Mann continued to hold it in trust for him and Hall, until the Confederate armies, under the command of General Richard B. Taylor, surrendered to the forces of the United States, when Mann and Hall, colluding to defeat the trust, refused to allow Coppell to bring the cotton to New Orleans, according to the contract; That this cotton is the same which was sequestered in this suit, and that he is entitled to the possession of it.

The original and supplemental answers of Hall and Mann set up the following defences: That the cotton was situated in territory under the control of the rebel authorities, and that the contract was entered into there; that the object of the contract was the protection of the cotton, within the rebel lines, by Coppell, as the British consul, and its transportation to New Orleans during the war then raging; that the contract was thus in violation of the laws of the United States; of the neutral obligations of the plaintiff, as British consul and a resident of the United States; and of public policy; and was null and void; that the plaintiff lost all right and interest in the contract by leaving Louisiana before the

Recapitulation, in the opinion, of the case.

restoration of peace, and that the defendants were thereby released from all liability upon the contract; that, if the contract should be held valid, the defendants claimed damages, by way of reconvention, for breach of the contract by the plaintiff, in neglecting to remove the cotton to New Orleans, and to sell it as he had agreed to do.

In reply to the reconventional demand, the plaintiff replied that he was the consul of her British Majesty; that he did protect the cotton from all seizures which his agreement included; and that, as soon as the military situation permitted, he was ready and willing to perform all the stipulations of his agreement, and tendered the necessary means for the transportation of the cotton to New Orleans; which tender the defendants declined.

Upon this state of the pleadings the cause proceeded to trial. The parol evidence is not as fully set out as should have been done; but the controlling facts sufficiently appear.

The plaintiff gave in evidence the military orders of the department commander of the 7th of March and the 3d of September, 1863. By these orders the trade of the Mississippi, within the Department of the Gulf, was permitted, subject to such restrictions only as should be necessary to prevent the supply of provisions and munitions of war to the enemy. The products of the country were authorized to be brought to New Orleans, and other designated points within the military lines of the United States, and to be sold by the proprietors or their factors "for the legal currency of the United States, without restriction or confiscation." New Orleans was then in the military possession of the United States.

The cotton was all within the rebel lines. This state of things continued until the surrender of the rebel forces under General Taylor. Consular certificates were given by the plaintiff, each setting forth that the cotton therein referred to was "the property of a British subject."

In the progress of the trial numerous exceptions were taken by the defendants. Some of them relate to the rejection of testimony; the residue to instructions given or

Recapitulation, in the opinion, of the case.

refused. The view which we take of the case renders it necessary to consider only those which relate to the legality of the contract. They are the 2d, 7th, 8th, and 9th. The 2d, 8th, and 9th, taken together, show that the court, in instructing the jury, substantially affirmed the following propositions:

That the demand for reconvention, set up by the defendants, "cured any nullity or illegality in the contract, if any existed, and that, under the pleadings, the plaintiff might recover, notwithstanding such illegality."

That the military orders, then in force, authorized and gave validity to the contract.

That Hall and the plaintiff both residing in New Orleans, the contract was valid under the law of nations.

It appears, by the 7th bill of exceptions, that the defendants prayed the court to instruct the jury, that if the cotton, referred to in the contract, was at the time of its sale situated in territory which was under the permanent control of the Confederate forces, the same was enemy property; and that if it was in the contemplation of the parties that the plaintiff, acting as British consul at New Orleans, or as a British subject resident in New Orleans, should extend British protection over said cotton, and should "issue his official certificates, as British consul, that the cotton was the property of a British subject, for the protection of the same within lines occupied by the enemy during the war; and that such protection formed a part of the consideration of the contract; then the contract was contrary to the laws of the United States, to the law of nations, to public policy, and to good morals, and that said contract was, therefore, null and void." The court refused to give this instruction. The reason assigned for the refusal was, "that the proof was that both parties were residents and domiciled in New Orleans; and that the court could not charge upon a supposed case which did not exist."

It does not appear to us that this objection to giving the instruction asked was well taken. Conceding the fact that the parties did both reside in New Orleans, the instructions

met exactly the exigencies of the case. If the defendants were right as to the legal views upon which they insisted, the instruction should have been given. If they were wrong in those views, it was properly refused. The point thus presented will be considered in connection with those arising upon the instructions which were given.

Consuls are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the exequatur which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.* A trading consul, in all that concerns his trade, is liable in the same way as a native merchant.† The character of consul does not give any protection to that of merchant when they are united in the same person.‡

By the terms of the contract, Hall was to "furnish" the cotton to Coppell. It was all within the rebel lines, and was, therefore, enemy property. Coppell was to cause it to be "protected." If there could be any doubt about the meaning of this phrase as used in the contract, it is dispelled by the conduct of Coppell in issuing the consular certificates, that the cotton which they covered respectively was "the property of a British subject." He was to receive the cotton in the rebel territory, to make an advance upon it there, to transport it to New Orleans, and there to sell it for the benefit of the contracting parties. The contract was one of factorage. Aside from the question of illegality, it is clear that no title passed to Coppell. He was to have, and had no share in the acquisition of the cotton by Hall. His duties were to protect it; to receive it; to advance money upon it; to transport it; to sell it, and to account to Hall for his share of the proceeds.

* Dana's Wheaton, § 249; 1 Kent's Commentaries, 53.

† 2 Phillimore's International Law, ccli.

‡ The Indian Chief, 3 Robinson, 27; Arnold v. The U. S. Insurance Co., 1 Johnson's Cases, 363.

It was doubtless expected that the insurgent authorities and the insurgent population would respect the rights of the "British subject." If the surging tide of war should sweep back the rebel arms, and the national forces should penetrate to the localities of the cotton, the custodian would be ready, in every instance, to produce the consular certificate.

These certificates, even if issued in good faith, were nullities, and could give no immunity; yet it might well be hoped that the authorities of the United States, instead of seizing the cotton *jure belli*, and disposing of it according to the act relating to captured and abandoned property, would *ex gratia* waive their rights, and yield up the property to the ostensible British owner, whose claim was fortified by such a muniment of title. The parties intended to delude and defraud the United States. The means used were the certificates issued by the consul.

When the contract was entered into the rebellion had become a civil war of large proportions. Important belligerent rights were conceded to the insurgents by the government of the nation. The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy.* When international wars exist all commerce between the countries of the belligerents, unless permitted, is contrary to public policy, and all contracts growing out of such commerce are illegal. Such wars are regarded not as wars of the governments only, but of all the inhabitants of their respective countries. The sovereign may license trade, but in so far as it is done, it is a suspension of war, and a return to the condition of peace. It is said there cannot be, at the same time, war for arms and peace for commerce. The sanction of the sovereign is indispensable for trade. A state of war *ipso facto* forbids it. The government only can relax the rigor of the rule.†

During the late civil war the subject was regulated by

* The Prize Cases, 2 Black, 687; Mrs. Alexander's Cotton, 2 Wallace, 417; Mauran *v.* The Insurance Company, 6 Wallace, 1.

† Dana's Wheaton, § 316; 1 Kent's Commentaries, 68; The Hoop, 1 Robinson, 196.

Congress. The 5th section of the act of July 16th, 1861, authorized the President to proclaim any State, or part of a State, in a condition of insurrection, and it declared that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States should be unlawful so long as hostilities should continue, and that all goods and merchandise, coming from such territory into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, should be forfeited. It was enacted in a proviso that the President might permit commercial intercourse with any part of such territory "in such articles, and for such time, and by such persons" as he might deem proper, and that "such intercourse, so far as by him licensed," should be "carried on *only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.*"

On the 10th of August, 1861, the President issued a proclamation declaring the inhabitants of the rebel States—including Louisiana and Mississippi—in a state of insurrection. Certain local exceptions, not necessary to be stated, were made.

By a proclamation of the 31st of March, 1863, it was declared that the inhabitants of the same States, with certain local exceptions, of which New Orleans was one, were in a state of insurrection, and that all commercial intercourse, not licensed according to the act before mentioned, "between those States, the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States," was unlawful, and that all products, goods, and chattels coming from any of the insurrectionary States, "with the exceptions aforesaid," or proceeding to "any of said States, with the exceptions aforesaid, without the license and permission of the President through the Secretary of the Treasury, would, together with the vessel or vehicle conveying the same, be forfeited to the United States."

By a circular from the Treasury Department of the 3d of July, 1863, it was declared to be the purpose of the department: "3d, to allow no intercourse at all beyond the na-

tional and within the rebel lines of military occupation; across these lines there can be no intercourse, except that of a character exclusively military."

Amongst the treasury regulations framed under the act of 1861, in force when the contract was entered into, was the following:

"VII. Commercial intercourse with localities beyond the lines of military occupation by the United States forces, is strictly prohibited; and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States."

The military orders set forth in the record were unwarranted and void. The President alone could license trade with the rebel territory, and when thus licensed, it could be carried on only in conformity to regulations prescribed by the Secretary of the Treasury. The subject was wholly beyond the sphere of the power and duties of the military authorities.* These orders may be laid out of view. They can in no wise affect the case.

The stipulations in the contract as to everything Coppell was to do in the rebel territory was contrary to public policy, to the law of nations, to the act of Congress, to the proclamation of the President, and to the regulations of the Treasury Department.

The protection to be given, if effectual, might have deprived the United States of pecuniary means to the extent of the value of the cotton. Withholding from one scale affects the result as much as putting into the other. The objection rests upon the same principle as insuring enemy property. This is condemned by all publicists who have written upon the subject, including as well the earliest as the latest. Valin,† Emerigon,‡ and Bynkershock,§ are no less emphatic than Wheaton‖ and Phillimore.¶ Such, also, is the rule of

* The Reform, 3 Wallace, 632; The Sea Lion, 5 Id. 647; Ouachita Cotton, 6 Id. 521.

† Liv. 3, tit. 6, art. 3.

‡ Vol. 1, 128.

§ 2 Jurisprudentiæ Pub., ch. 21

‖ Dana's Wheaton, § 317.

¶ Vol. 3, 109.

the common law.* Such contracts are not only illegal and void, but repugnant to every principle of public policy. The law will not permit the citizen, in the perils of war, to subject himself to such a temptation to swerve from his duty to his country. In *Bell* v. *Potts* it was held to be illegal for a British subject, in time of war, without a license, to bring, even in a neutral ship from an enemy's port, goods purchased by his agent resident in the enemy's country, after the commencement of hostilities. In *Antoine* v. *Morshead*† an alien in an enemy's country during war, drew a bill on a British subject, resident in England, and, after peace, sued for the amount of the bill. The same rule was reluctantly applied by Chief Justice Gibbs. It was held that the plaintiff could not recover. If the course of the transaction had been reversed, the result would have been the same. The same rule would have been applied in the British courts.

The payment of money by a subject of one of the belligerents, in the country of another, is condemned, and all contracts and securities looking to that end are illegal and void.‡

The adjudications of this court have always proceeded upon the same principles.

In the case of *Brown* v. *The United States*, Mr. Justice Story said that "no principle was better settled than that all contracts made with an enemy during war were utterly void."

In the case of *The Rapid*,§ the facts were, that an American citizen bought English goods in England before the war, and deposited them on an island belonging to the English, near the province of Maine. Upon the breaking out of the war he sent the Rapid from Boston to the island to bring away the goods. Upon her return she was captured by an American privateer. The goods were condemned as lawful prize. It was held that the vessel, while thus engaged, was

* Brandon *v.* Nesbitt, 6 Term, 23; Potts *v.* Bell, 8 Id. 548; Furtado *v.* Rogers, 3 Bosanquet & Pull. 191.

† 6 Taunton, 237.

‡ Griswold *v.* Waddington, 16 Johnson, 459, 460.

§ 8 Cranch, 155

trading with the enemy, and that the goods had acquired the character of enemy's property. Mr. Justice Story, in delivering his opinion in the court below, said: "That not only all trading, in its ordinary acceptation, but all communication and intercourse with the enemy were prohibited. That it was in no wise important whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped. That the contamination of forfeiture was consummate the moment the property became the object of illegal intercourse."

In the case of *The Julia*,* the vessel was condemned only because, on sailing from Baltimore to Lisbon, and returning, she had carried a license from a British admiral, issued within our territory by a British agent.

In *Griswold* v. *Waddington*, Kent, C. J., said: "The law had put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and to prolong the calamities of war."

The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for

* 8 Cranch, 181.

the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.*

The court below erred in refusing to instruct as prayed, and in the instructions given.

The judgment below is REVERSED, and the cause will be remanded to the Circuit Court, with directions to issue a

VENIRE DE NOVO.

COCKS *v.* IZARD.

A bill in equity, by the owner of real estate, sold at public judicial sale, will lie against a person who, at such sale, has made untrue representations, which prevent other persons from bidding, and by which he has so, himself, got the property at an undervalue. The original owner is not confined to seeking relief through the summary modes, such as motion to set aside the sale, which it was within the power of the court from which the execution issued, to grant. *Slater* v. *Maxwell* (6 Wallace, 276), affirmed.

APPEAL from the Circuit Court of Louisiana.

During the late rebellion, one Anderson, by a proceeding in what was known as "the Provisional Court of Louisiana"—a court established by proclamation of the President, in October, 1862, when the insurrection which had prevailed in Louisiana, had temporarily subverted and swept away the judicial authorities of the Union, and which, by the terms of its constitution, was to last only until "the restoration of the civil authority"—brought some sort of suit against one Cocks.

The suit proceeded to execution; and, on execution, the marshal of the said Provisional Court exposed to public sale certain real estate owned by Cocks, in New Orleans, and worth $15,000. Cocks was a resident of Mississippi,

* Morck *v.* Abel, 3 Bosanquet & Puller, 35; Armstrong *v.* Toler, 11 Wheaton, 258; Collins *v.* Blantern, 1 Smith's Leading Cases, 630, and notes.