LEVY *v.* STEWART.

Though by the articles 3505 and 3506 of the civil code of Louisiana it is provided that bills and notes are prescribed in five years from their maturity, and that this prescription runs against minors, interdicted persons, and persons residing out of the State,

Held, that the term of the late rebellion interrupted, on the principles announced in *Hanger* v. *Abbott* (6 Wallace, 534), and in the later case of *The Protector* (9 Ib. 687), the running of the prescription in favor of a creditor who during the war resided in one of the loyal States.

ERROR to the Circuit Court for the District of Louisiana; the case being thus:

Levy, of Louisiana, gave, in August, 1860, to Stewart, of New York, three promissory notes, at six months each. They were dated on different days in the month just named and payable at New Orleans, on the corresponding days of February, 1861. Very soon after the maturity of the notes the rebellion broke out. On the 19th April, 1861, proclamation of blockade was made of the Southern coast and war soon became flagrant. However, the city of New Orleans was taken possession of by the government forces 6th May, 1862, and the Circuit Court of the United States reorganized there 24th June, 1863. The notes had been duly presented before the war, at maturity, and payment refused. Stewart now, July 27th, 1868, sued on them in the court below. The defendant pleaded what is known in Louisiana as the prescription of five years, under sections 3505 and 3506 of the civil code of the State; a plea in good degree resembling that known in most States as a plea of the statute of limitations. This prescription, however, under the code runs against minors, interdicted persons, and persons residing out of the State; herein being unlike the statutes of limitations in most of the States, or that of James I, from which most of these were copied, where the rights of such persons are specially saved. A plea alleging new facts being considered by the Louisiana practice as denied, without replication or rejoinder, the plea here was to be regarded as open to every objection of law and fact, the same as if specially pleaded.

Argument for the plaintiff in error.

It was in proof that the defendant resided in Bayou Sara, in the parish of West Feliciana, or at Clinton, in the parish of East Feliciana, at the dates at which the notes sued on were given and matured, and that he continued to reside there during the war.

That he had an agent in New Orleans during the war, and made one or two visits to New Orleans towards the close of the war.

That the plaintiffs resided in the city of New York during the whole of the above-mentioned time.

That the plaintiffs brought suit on the same cause of action on the 4th day of March, 1868.

That the defendant made a compromise and settlement of the suit with the attorney, who had brought it as the attorney at law of the plaintiffs; that in consequence of the said compromise and settlement the attorney discontinued the suit on the 8th of May, 1868.

That the attorney had no authority from the plaintiffs to enter into the compromise, or make the settlement, or discontinue the suit; and that the plaintiffs repudiated his acts in the case so soon as informed of them, and afterwards brought the present suit.

On the foregoing facts the court overruled the plea of prescription and gave judgment for the plaintiff.

The defendant excepted to the decision of the court, on the ground:

First, that the bringing of the first suit, May 4th, 1868, did not interrupt prescription; and,

Second, that by the decisions of the Supreme Court of Louisiana, the highest court in the State, the civil war did not interrupt prescription, and that the courts of the United States are bound to follow the decisions of the Supreme Court of Louisiana upon the law of prescription of the State of Louisiana.

Mr. P. Phillips, for the plaintiff in error:

The first suit, which was commenced the 8th May, 1868, and which was discontinued, can have no effect upon the

plea, for the code expressly provides, article 3485, that when a plaintiff, "after making his demand, abandons or *discontinues* it, the interruption shall be considered as having never happened."

The question then is, what effect was produced by the war on the law of prescription, when the suit is brought in Louisiana on a contract payable in Louisiana? Before considering which question of law a point of fact—a part of *the case*, in truth, though not referred to in the record—must be settled. That question of fact is,—when, for the purpose of a suit by Stewart against Levy, did the war end? It ended, we suppose, in April or May, 1865.

By proclamation of the 29th of April, 1865,* all restrictions upon commercial intercourse with so much of the State of Louisiana as lies east of the Mississippi River, and were within the lines of military occupation, were removed. *Bayou Sara and Clinton, the residence of the defendant, were at that date within the lines, and they lie to the east of the river.* This is matter of indisputable fact, personally known to all residing thereabouts, and is part of the public history of the war.

By another proclamation of the 10th of May, 1865,† it is declared that armed resistance to the authority of the government in the insurrectionary States may be regarded as virtually at an end.

We assume, then, that for the purpose of a suit the war terminated in May, 1865. With that assumption we proceed.

As the District Court of the United States was reorganized in New Orleans in 1863, there was no impediment in the way of the plaintiff, and he may have brought his suit at any time from that period to February, 1866, before the prescription of five years would have expired. From the close of the war to this latter period there were still nine months in which the parties could have brought their suit. This they did not avail themselves of, but took their first action three years after the termination of the war.

* 13 Stat. at Large, 76.

† Ib. p. 757.

Now, was this in time? We submit that it was not.

There are two well-established propositions which would seem to show this:

1. That a fixed and received construction of a State statute, by the highest court of the State, is as effectual as if written into the statute by direct legislative declaration.

2. That this court has repeatedly held that the construction of the State statute of limitations is conclusive; and that they will not only adopt the construction given by the State court, but will follow any change of construction that may be made by the State court.

On these propositions the language of the court is this:*

"The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A refusal in the one case as well as in the other, has the effect to establish in the State two rules of property."

"If the construction of the highest judicial tribunal of a State forms a part of its statute law, as much as an enactment by the State legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute, and why should not the same rule apply when the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it?"

Now the five year prescription is construed by the Supreme Court of Louisiana in *Rabel* v. *Pourciau.*† It is there declared that the maxim "*contra non valentem agere, non currit prescriptio,*" does not apply to this peculiar prescription which runs against "minors, interdicted persons, and absentees."

The court further hold that war was an impediment which would excuse the party from acting while the war lasted. But if after this impediment was removed, there still re-

* Green *v.* Neal, 6 Peters, 298.

† 20 Louisiana Annual, 131.

mained the "*tempus utile*" in which the creditor could have sued before the expiration of the five years, he was bound to act within that time. This "*tempus utile*" is fixed by the decision at six months.

And this is the doctrine of many eminent French jurists. Troplong on the subject quotes a decree of the Court of Cassation, 1st August, 1829, to the effect that war does not suspend prescription when the creditor had the means of exacting his debt in another place than that declared in a state of blockade. He then says as a logical consequence, if the impediment proceeding from war or pestilence occurs in an intermediate time, and not a time bordering on the expiration of the prescription, it ought not to be taken into account, since when the creditor is free to act he has all the time that is necessary to compel his debtor to pay, for where would be from that time the "*force majeure*," which alone authorizes the suspension of prescription? By way of illustration, he says:*

"I reside in a city which is blockaded for the period of one year, and twenty years remain to avoid the thirty years prescription of my right: would it not be ridiculous to attempt a justification of negligence in not acting during this period and demanding that this period of siege should not be counted as part of the thirty years? What '*force majeure*' has paralyzed me, since for twenty years I could at any moment have avoided this impediment?"

We must pay strict attention, says he, to the fact that a hindrance founded on war is not written in the law, that it is never legalized but by an act of "*force majeure*," shown to the satisfaction of the judge, and that he should never admit it but when sustained by an irreparable and invincible obstacle. He adds:

"When the creditor has had sufficient time (*tempus utile*) to redress himself, '*force majeure*' is a vain allegation, and the time thus lost, so easy to repair, just as the time of an apoplexy, or

* Droit Civile Expliqué de la Prescription, vol. 2, p. 258.

fever, or grief. The time of prescription is in fine regulated by law, with sufficient latitude and favor, so that it is not necessary that each (every) day should be '*absolument utiles.*'"

But, independently of this, the decision already quoted of *Rabel* v. *Pourciau*, cited, is *sustained by fifteen cases*, reported in 20th and 21st Louisiana Annual;* and if any construction can be considered as part of the local statute, this must be. As thus construed, it should be enforced by this court. The appellee had nine months after the war terminated and before the prescription expired. Nor is there anything hard in this view. Prescription it must be remembered is governed by the law of the forum; in other words the law of the State in which the suit is brought. When we therefore ascertain what that law is, it governs all judicial proceedings, whether the same are instituted in the State courts or the courts of the United States administering justice in that State. A citizen of another State suing a citizen of Louisiana on a Louisiana contract, can have no cause to complain, if the law applicable to the limitation of his right to sue is the same as is applied to suits between her own citizens.

Messrs. S. M. Johnson and C. F. Peck, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Statutes of limitations exist in all the States, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times.† They are regarded as statutes of repose arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.

* See specially Durbin *v.* Speller, 20 Louisiana Annual, 219; Payne & Harrison *v.* Douglass, Ib. 280; Durand *v.* Hienn, Ib. 345; Marcy *v.* Steele, Ib. 413; Norwood *v.* Mills, Ib. 422; Lemon *v.* West, Ib. 427; Watts *v.* Bradley, Ib. 523.

† Story, Conflict of Laws, § 576.

Exceptions are to be found in all such statutes; but cases where the courts of justice were closed in consequence of insurrection or rebellion are not within the express terms of any such exception, contained either in the original act or any other of later date.

Express exceptions of the kind, it is conceded, do not exist, and if none can be implied, then all debts due from one belligerent to another, as well as executory contracts involving commercial intercourse with the enemy, are practically discharged, as, if the war is of much duration, prior claims will be barred by the local statute of limitations.

Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent.

Absolute suspension of the right to sue and prohibition to exercise it exist during the war by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts.*

Peace, it is said, restores the right and the remedy, but it cannot restore the remedy if the war is of much duration, unless it be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim.

On the twenty-seventh of July, 1868, the plaintiffs in the court below commenced an action of assumpsit against the present plaintiff on three promissory notes, signed at New York and made payable at New Orleans. One, dated August 6, 1860, due six months after date, for sixteen hundred and eighteen $\frac{55}{100}$ dollars; another, dated August 23, 1860, due six months after date, for fourteen hundred and fifteen $\frac{59}{100}$ dollars; and the other, dated August 20, 1860, due six months after date, for four hundred and forty-two $\frac{17}{100}$ dollars, all of which notes, at maturity, were duly presented for

* The William Bagaley, 5 Wallace, 405; Jecker et al. v. Montgomery, 18 Howard, 111; The Hoop, 1 Robinson, 200.

payment, which being refused, they were duly protested for non-payment. Process was duly issued, and being served, the defendant appeared and pleaded as a defence the prescription of five years as established by the civil code of the State.

New facts alleged by the defendant in his answer are considered as denied by the plaintiff in the State courts without any replication, and the same rules of practice have been adopted in the Circuit Courts. Matters in avoidance, therefore, alleged in the answer, are open to every objection of law and fact the same as if specially pleaded.*

Viewed in that light, as the pleadings must be, the issue between the parties was the same as it would be in jurisdictions governed by the common law, where the plaintiff replied denying the allegations of the answer, or pleaded specially that the operation of the prescription was suspended during the late civil war, and that the plaintiff did commence his suit within five years next after the cause of action accrued.†

Testimony was taken and the parties were heard, but the court, neither party requesting a jury, overruled the plea of prescription, and entered judgment for the plaintiffs. Subsequent to the judgment a statement of facts was filed, signed by the judge and the parties, which consists of the pleadings, the notes and documents offered in evidence, the entries in the minutes of the proceedings, the judgment of the court, together with a statement of the evidence introduced. By the statement it appears that the defendant, at the dates at which the notes were given, and when they matured, resided at Bayou Sara, and that he continued to reside there during the war of the rebellion; that he had an agent in New Orleans during that period, and that he made one or two visits there towards the close of the war; that the plaintiffs resided throughout that period in the city

* Daquin *v.* Coiron, 3 Louisiana, 392; Muse *v.* Yarborough, 11 Id. 533; Swilley *v.* Low, 13 Louisiana Annual, 412; Bank *v.* Allard, 8 Martin, N. S. 141.

† Riley *v.* Wilcox, 12 Robinson's Louisiana, 648; Code, article 329.

of New York; that on the 4th of March, 1868, they brought a suit for the same cause of action; that the defendant made a compromise and settlement of the same with the attorney who instituted the suit, whereby the suit, on the eighth of May following, was discontinued; that the attorney, in making the settlement and in discontinuing the suit, acted without authority, and that the plaintiffs repudiated his acts in the case as soon as they were informed of the same, and afterwards brought the present suit.

Exceptions were taken by the defendant to the rulings and decision of the court upon three grounds, as follows: (1.) Because the bringing of the first suit did not interrupt the prescription established by the laws of the State. (2.) Because the civil war did not interrupt the prescription under the rule established by the decisions of the Supreme Court of the State. (3.) Because the courts of the United States are bound to follow the decisions of the Supreme Court of the State in respect to the law of prescription, as applied to such causes of action.

Different views, however, were entertained by the Circuit Court, and judgment was rendered for the plaintiffs. Whereupon the defendant sued out a writ of error and removed the cause into this court.

Much discussion of the first response made by the plaintiffs to the defence of prescription as set up by the defendant in his answer is unnecessary, as the court is of the opinion that the decision of the case must turn upon the second response of the plaintiffs to that defence, which is, that in computing the five years since the cause of action accrued the period during which the courts of the State where the defendant resided were closed in consequence of the late civil war must be deducted.

Regulations exist in some of the States that where a first suit is abated and a second suit is brought within a prescribed time the statute of limitation shall cease to run from the date of the first suit, but the court is not referred to any such enactment as applicable in this case, and it is believed that none such exists, as the code of the State provides that

if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.*

Grant all that, still the question remains to be considered whether the alleged prescription was not interrupted by the fact that the courts of the State where the defendant resided were closed by the late civil war for such a period of time that the bar was not complete when the present suit was commenced.

Proclamation of blockade was made by the President on the nineteenth of April, 1861, and on the thirteenth of July in the same year Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.†

On the twentieth of August, 1866, the President by his proclamation of that date proclaimed that the insurrection was at an end and that peace, order, and tranquillity were fully restored in all the States.‡

Permanent military possession of New Orleans, it is conceded, was taken by our forces at a much earlier period, and it is also true that the Circuit Court was organized there at the date specified in the statement of facts, but that portion of the State where the defendant resided still remained within the lines of the insurrectionists, and of course the courts of the State were closed so far as respects the rights of the plaintiffs in this case.§

Throughout the entire period between the dates of those proclamations the courts of the State were closed to the plaintiffs and they were totally incapable of instituting any suit for the enforcement of their claim.‖

Exceptions, not mentioned in the statute of limitations,

* Code, article 3485. † 12 Stat. at Large, 257–258.

‡ United States *v.* Anderson, 9 Wallace, 70; 14 Stat. at Large, App. 7.

§ The Venice, 2 Wallace, 258.

‖ The Hoop, 1 Robinson, 200; Wheaton's Law of Nations, by Lawrence, 544, 877; Esposito *v.* Bowden, 4 Ellis & Blackburne, 963; Griswold *v.* Waddington, 16 Johnson, 438.

have sometimes been admitted, and this court decided in the case of *Hanger* v. *Abbott*,* that the time during which the courts of the States in rebellion were closed to the citizens of the rest of the Union is to be excluded in suits, since brought, from the computation of the time fixed by the statutes of limitation within which suits may be brought, though no such exception is expressly admitted in the limitation act. Neither laches nor fraud can be imputed to the creditor in such a case, as the inability to sue becomes absolute by the declaration of war wholly irrespective of his consent or opposition. When the contract was made he was competent to sue, but the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy, as was said in that case, is suspended by the two governments and by the law of nations not applicable at the date of the contract, and which comes into operation in consequence of an event over which he has no control.†

Recent decisions of the Supreme Court of the State are referred to by the defendant in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes.‡

None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim "*contra non valentem agere non currit prescriptio*" is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because "they are prescriptible against minors and interdicted persons as well as others," which the chief justice of that court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs.

Suppose that the rule of that court cannot be adopted,

* 6 Wallace, 532.

† The Protector, 9 Id. 689.

‡ Rabel *v.* Pourciau, 20 Louisiana Annual, 131; Lemon *v.* West, 20 Id. 427; Smith *v.* Stewart et al., 21 Id. 75.

still it is insisted by the defendant that the suspension of the prescription ceased when the rebellion came to an end; that the suit was instituted too late, as it might have been commenced within five years next after the cause of action accrued, and certain continental authorities are referred to where that rule is apparently maintained.*

Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of *Hanger* v. *Abbott*,† is more consonant with justice and more in accordance with the analogies of our law than the one suggested by those commentators.

Even the Supreme Court of the State which refused to adopt that rule admits that the law ought to be so, but proceeds to show from certain prior decisions of this court that it is not so, not one of which is an authority to support the proposition for which they were invoked.

Evidently the case before the court is controlled by the decision in the case of *Hanger* v. *Abbott* and *The Protector*,‡ and the court as now constituted adheres to those decisions.

Creditors' debts due from belligerents are suspended during war, but the debts are not annulled. They are precluded during war from suing to recover their dues, but with the return of peace we return the right and the remedy.§

Where a debt has not been confiscated during war the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period.

JUDGMENT AFFIRMED.

* 2 Troplong, De la Prescription, 258, &c.

† 6 Wallace, 534.

‡ 9 Id. 687.

§ Chitty on C. and M. 423; Wheaton's Law of Nations, by Lawrence, 541; Vattel, book iii, c. 6, § 77.

NOTE.—The four cases which now immediately follow, to wit, *Garnett* v. *United States*, *Mc Veigh* v. *Same*, *Miller* v. *Same*, *and Tyler* v. *Defrees*, arose under two certain acts of Congress passed in 1861 and 1862, during the late rebellion, and popularly known as the Confiscation Acts. Along with one or two others they were argued at the last term; but after being taken into advisement, were at the close of it ordered to be re-argued at this. They were now fully argued very much together. In the first of them nothing relating to confiscation was reached; the case going off on a point of jurisdiction. In the judgment in none of them did the Chief Justice or Mr. Justice Nelson participate; both being absent from the court from the causes mentioned in the memoranda of the Term.

GARNETT *v.* UNITED STATES.

Where a case has been tried in the District Court of the District of Columbia, the judgment or decree rendered therein must be reviewed by the Supreme Court of the District, before the case can be brought before this court for examination.

ERROR to the Supreme Court of the District of Columbia; the case being this:

By an act passed in 1801,* there was organized for the District the "Circuit Court of the District of Columbia, vested with all the powers of the Circuit Courts of the United States." It had "cognizance of all crimes and offences committed within said District, and of all cases in law and equity," &c.

By act of 1802,† it was provided that the chief judge of the District of Columbia should hold a District Court in and for the said District, "which court shall have and exercise within said District the same powers and jurisdiction which are by law vested in the District Courts of the United States."

On the 3d March, 1863,‡ by act of that date the courts of the District were reorganized.

The first section of that organic act established a court,

* 2 Stat. at Large, 105. † 2 Ib. 166. ‡ 12 Ib. 762.