Statement of the case.

STEWART *v.* KAHN.

1. In writs of error under the 25th section of the Judiciary Act of 1789, which gives jurisdiction to this court to review no error but such as appears on the face of the record, &c.—where the writ is to the Supreme Court of Louisiana, the code of which State enacts that—"When the defendant alleges on his part new facts, these shall be considered as denied by the plaintiff: therefore neither replication nor rejoinder shall be allowed," a question was *held* to appear sufficiently on the face of the record when the petition for review in the Supreme Court of the State set out that the question was raised in the court below and decided against, and when the Supreme Court on the question being thus before it decided the case in the same way.
2. The act of June 11th, 1864, "in relation to the limitation of actions in certain cases," is not prospective alone in its operation. Under it, the time which elapsed while a plaintiff could not prosecute his suit by reason of the rebellion, whether before or after the passage of the act, is to be deducted from the operation of any State statute of limitations.
3. The act applies to cases in the courts of the States as well as to those in the Federal courts.
4. Thus construed it is constitutional.

ERROR to the Supreme Court of Louisiana; the case being thus:

On the 10th August, 1860, Bloom, Kahn & Co., of which firm one Levy was a member, all parties being resident traders in New Orleans, gave their promissory note to A. T. Stewart & Co., resident traders of New York, payable March 13th, 1861. Payment was refused on demand at maturity. Very soon after this, that is to say, in April, 1861, the late rebellion broke out, and from the 15th of that month, when its existence was announced by proclamation from President Lincoln, until some time after, May 4th, 1862, at which date the government troops took possession of New Orleans,* the ordinary course of judicial proceedings was so interrupted by resistance to the laws of the United States, that none of the defendants could have been served with process if suit had been brought on the note against them.

On the 11th of June, 1864, Congress passed this act, en-

* See The Circassian, 2 Wallace, 141.

titled "An act in relation to the limitation of actions in certain cases:"

"That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person—

"Or whenever, after such action, civil or criminal, shall have accrued, such person cannot by reason of such resistance of the laws, or such interruption of judicial proceedings, be served with process for the commencement of the action—

"The time during which such person shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

On the 16th April, 1866, the Federal courts being now re-established in New Orleans, Stewart & Co. sued Bloom, Kahn & Co. on the note. These set up what is called in Louisiana "the prescription of five years;" equivalent to that which is elsewhere known as a statute of limitation, barring an action after five years. No replication to this plea was put in. The Code of Practice in Louisiana bars replications generally. This code enacts that

"When the defendant in his answer alleges on his part new facts, these shall be considered as denied by the plaintiff; therefore neither replication nor rejoinder shall be admitted;"

And by the settled practice of the State what was embraced in the defendants' answer was open to every "objection of law and fact the same as if specially pleaded." The plaintiffs therefore were to be considered as denying the validity of the State statute of prescription which the defendants had set up in their plea, and as declaring that in virtue of the act of Congress above quoted it was suspended by the rebellion.

The court in which the suit was brought gave judgment

for the defendants. The plaintiffs then filed a petition in the Supreme Court of Louisiana for a rehearing of the case, and, among other things represented in the petition, that in the court below

"They mainly relied upon the act of Congress entitled 'An act in relation to the limitation of actions in certain cases,' approved June 11th, 1864, as a complete answer to the plea of prescription set up by the defendants."

The petition for rehearing also declared that the plaintiffs had filed a written brief in the said District Court, which the rules of that court required them to file, setting out the said act of 1864. This petition was inserted in the record.

The Supreme Court of Louisiana affirmed the judgment in the court below, in these words:

"This is an action upon a promissory note. The defendants pleaded the prescription of five years. The note fell due on the 13th of March, 1861, and the citations were served on the 18th day of April, 1866. More than five years having elapsed after the maturity of the note before the citations were served on the defendants, the plea of prescription must be sustained. It is therefore ordered, adjudged, and decreed, that the judgment of the lower court be affirmed, and that the appellant pay the costs of the appeal."

The plaintiffs now brought the case here.

Prior to the 5th of February, 1867, there was but one enactment on the subject of bringing judgments from the Supreme Courts of States to this court, the well-known 25th section of the Judiciary Act of 1789.* On the day first above mentioned, however, Congress passed another act on the subject;† following, in most respects, the language of the old act, though changing it in some places and leaving out one whole clause in the old act. The important parts of the two acts are here set out in parallel lines; words in the act of 1789 omitted in the act of 1867 being inclosed in

* 1 Stat. at Large, 85. † 14 Ib. 385.

brackets, and words variant in the two enactments being put in italics:

Judiciary Act of 1789.

"SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court [of law or equity] of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, *or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held* under the United States, and the decision is against the title, right, privilege or *exemption* specially set up or claimed by either party, under such [clause of the said] Constitution, treaty, statute, or commission, may be re-examined and reversed, or affirmed in the Supreme Court of the United States upon a writ of error, . . . in the same manner and under the same regulations, and the writ shall have the same effect as if the

Judiciary Act of 1867.

"SEC. 2. *And be it further enacted*, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, *or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised* under the United States, and the decision is against the title, right, privilege, or *immunity* specially set up or claimed by either party under such Constitution, treaty, statute, commission [or authority], may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error . . . in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree

judgment or decree complained of had been rendered or passed in a *Circuit Court.* [But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the beforementioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."]

complained of had been rendered or passed in a *court of the United States.*"

The case being now in this court, two questions were made:

1. Of jurisdiction in this court.
2. Assuming jurisdiction to exist, the correctness of the judgment below.

Mr. E. T. Merrick, for the dismissal, and in support of the ruling below:

It is *said* in the brief of the opposing counsel, that in the Supreme Court below the plaintiffs set up and insisted upon the act of Congress of 1864, as a bar to the prescription. We remember no such fact. The matter must be decided by the record. Certainly there is nothing of record to show that any question respecting the statute of limitations of the United States of June 11th, 1864, was raised or relied upon before the Supreme Court of Louisiana, as a ground of recovery.* Although the act of 1867 is broader than the act of 1789, it must be construed with it; and thus construed there is nothing which contemplates a writ of error for any other matter or thing than that which appears on the face of the record It was not the intention of Congress by the new act to create any new method of trying cases in error.

* Medberry et al. *v.* The State of Ohio, 24 Howard, 413.

A petition to the Supreme Court stating that a particular statute was relied on in the inferior court, does not prove that it was so relied on; still less does it prove that it was relied on in the court above.

Moreover, if the writ is to have the same effect under the act of 1867, "as if the judgment or decree complained of had been rendered or passed in a court of the United States," it will not benefit the plaintiffs in error, because if this case had been tried in the Circuit Court of the United States, in the absence of bills of exception, there is nothing on which to base an examination of the question; much less to reverse the judgment of the lower court.

On the merits: The act of Congress of 1864, in relation to the limitation of certain actions, was meant to bind the courts of the United States alone. This is to be inferred, because as will be conceded, there is no grant of power in the Constitution of the United States to Congress, to prescribe rules of property or practice for the government of the courts of the several States, and because as to matters not intrusted to the government of the United States, the State courts are considered as courts of another sovereignty.* As Congress cannot create the State courts, as it cannot establish the ordinary rules of property, obligations, and contracts, nor in general, denounce penalties for crimes and offences, in the several States, it cannot prescribe rules of proceeding for such State courts.

On the other hand, there is no inhibition in the Constitution of the United States upon the individual States to pass statutes of limitation even where such statutes of limitation bar the judgments of sister States.†

The act suspended the statutes of limitation, in the cases given, both as to crimes and civil actions. This shows that Congress was legislating for the courts and officers of the United States, over which it has jurisdiction; for certainly a State could not bring a writ of error to this court, to re-

* Ableman *v.* Booth, 21 Howard, 516.

† McElmoyle *v.* Cohen, 13 Peters, 328.

verse a judgment of its own courts, which should hold that a criminal offence was barred by the statute of limitation, notwithstanding the impossibility of arresting the offender, for the cause assigned in the statute?

If our view of the purpose of Congress is not correct, then we deny the power of Congress to pass such an act. If Louisiana was a State of this Union (and this court has not failed to consider it as such, as is shown by the numerous writs of error which it has allowed to the State court, and considered), Congress could not constitutionally repeal or suspend State laws, or any subject-matter reserved to the States.

Mr. S. M. Johnson, contra:

Under the peculiar practice of Louisiana, it is next to impossible to raise in the pleadings constitutional or legal questions. The plaintiffs had a right to urge any denial whatever to the plea of prescription of the defendants, the same as if it had been set up in replication. The statute of prescription must be pleaded, because the law itself makes it optional to invoke it or not; but the question whether such statute is in force or has been suspended, or whether it exists at all or not, may be raised by the plaintiff, without spreading upon the record his grounds of objection.

The defendants pleaded a law of that State, and it was clearly the duty of the court to decide upon the validity of that law. They did decide that it was valid, when confessedly it was not valid. That was their error, and it was an error which deprived us of essential rights, the enforcement of which we had invoked in the courts of Louisiana, and which we are here to insist upon.

Perhaps, therefore, even under the Judiciary Act of 1789, and even if there were no petition in the record showing that the matter turned on the act of 1864, this court might have jurisdiction.

But the petition which is made part of the record does show specifically "the before-mentioned question of the validity or construction" of a statute of the United States; to

Recapitulation of the case in the opinion.

wit, the said statute of 1864. We are thus brought directly within the language even of the act of 1789:

"Where is drawn in question the *validity* of a statute of any State, &c., ... on the ground of their being repugnant to the laws of the United States, and the decision is in favor of such their validity."

But this proceeding in error is instituted under the act of 1867, which is in addition to and amendatory of the act of 1789. The act of 1867 makes a material change in the law of 1789. All that part of the last-named act which required that the matters involved in the case must have been discussed and decided upon in the lower court, and *must appear of record*, is omitted in the act of 1867. The requirement, that questions raised shall appear of record under the act of 1789, was intentionally omitted from the act of 1867, to meet the contingency of a case like this, where the State judges manifestly intended to defeat an appeal to this court by refusal to notice the questions raised in the pleadings.

As to the merits, the case is completely settled by *Hanger* v. *Abbott*,* itself acted upon and in effect affirmed by *The Protector*.†

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana. The record discloses the following case: On the 16th of April, 1866, the plaintiffs in error, citizens and residents of the State of New York, brought suit against the defendants in error in the fourth District Court of New Orleans, upon a promissory note made at New York on the 10th day of August, 1860, by the defendants, under their firm name of Bloom, Kahn & Co., to the plaintiffs, by their firm name of A. T. Stewart & Co., for the sum of $3226.24, payable at the office of A. Levy & Co., in the city of New Orleans, with the current rate of exchange on New York,

* 6 Wallace, 532. † 9 Id. 687

Recapitulation of the case in the opinion.

seven months from date. The plaintiffs, by their petition, claimed also to recover a few dollars for the balance of an account. The note was duly protested at maturity for non-payment. On the 28th of the same month of April the defendant, Levy, filed his answer, wherein he alleged that he knew nothing of the correctness of the note, or account, and demanded full proof. He also pleaded the statutory prescription of that State of five years as a bar to the action. The other defendants, Bloom, Kahn & Adler, answered subsequently. They denied all the allegations of the petition, and also set up the defence of prescription.

A statute of the State provides, that when "new facts" are alleged in the answer, "neither replication nor rejoinder shall be admitted." The facts are "considered as denied by the plaintiff."*

Kahn was examined upon interrogatories, and answered that the defendants' firm was constituted as alleged in the plaintiffs' petition, and that their place of business at the date of the note was Clinton, Louisiana. Another witness testified that he had known the defendant, Levy, since the year 1854 or 1855; that Levy had resided in New Orleans since that time, and was there during the period of the rebellion. At the trial the plaintiffs submitted this testimony, and the note and protest, to the court. It does not appear that any evidence was offered touching the account. The court gave judgment for the defendants. Upon what ground it was given is not disclosed in the record.

The plaintiffs appealed to the Supreme Court of the State. In that court they insisted that the act of Congress of June 11, 1864, entitled "An act in relation to the limitation of actions in certain cases," interrupted the running of the prescription, and entitled them to recover. The Supreme Court affirmed the judgment of the District Court. The record shows they held that "more than five years having elapsed after the maturity of the note before the citations were served

* Code, Art. 329.

on the defendants, the plea of prescription must be sustained." It is clear that the judgment was given solely upon this ground. The case would have been more satisfactorily presented if a bill of exceptions had been taken at the proper time, and the material facts in that way placed upon the record. But enough is shown to develop clearly the action of the Supreme Court of the State, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form and unwarrantably defeat the ends of justice.

Our attention has been called to the second section of the act of Congress of February 5, 1867, amending the Judiciary Act of 1789.* That section is to a great extent a transcript of the 25th section of the prior act. There are several alterations of phraseology which are not material. A change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature.† But at the close of the second section there is a substantial addition and omission. The addition in no wise concerns this case, and need not be remarked upon. The omission is of these words in the 25th section of the original act: "But no other error shall be regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."‡

It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled.§

* 14 Stat. at Large, 385.

† Theriat *v.* Hart, 2 Hill, 381, note; Douglass *v.* Howland, 24 Wendell, 47.

‡ 1 Stat. at Large, 85.

§ Ellis *v.* Paige et al., 1 Pickering, 43; Nickols *v.* Squire, 5 Id. 168; Bartlet *v.* King's Executors, 12 Massachusetts, 537.

Whether the 25th section of the original act is superseded by the second section of the amendatory act is a point not necessary in this case to be determined; for, conceding the negative, the question before us is within the omitted category, is presented by the record, and is the only one we are called upon to consider. It is alike within the section in question of the original and of the amendatory act. In either view there is no jurisdictional difficulty.

In *Hanger* v. *Abbott*,* this court held that the time during which the courts in the States lately in rebellion were closed to the citizens of the loyal States is, in suits since brought, to be deducted from the time prescribed by the statutes of limitations of those States respectively, although the statutes themselves contain no such exception, and this independently of the act of Congress of 1864. In the case of *The Protector*,† the same rule was applied to the acts of Congress of 1798 and 1803, fixing the time within which appeals shall be taken from the inferior Federal tribunals to this court. The case before us was decided prior to the decision of this court in *Hanger* v. *Abbott*, with which it is in direct conflict. But apart from the act of 1864, it would present no ground of Federal jurisdiction. *Hanger* v. *Abbott* came into this court under the 22d section of the Judiciary Act of 1789, or if that section is superseded, under the second section of the amendatory act of 1867. Its determination, therefore, depends necessarily upon the construction and effect to be given to the act of 1864.

The note upon which the suit is founded matured upon the 13th of March, 1861. The prescription of five years expired on the 13th of March, 1866. This action was commenced on the 16th of April, 1866, one month and three days after the period of limitation had elapsed.

The act of 1864 consists of a single section containing two distinct clauses. The first relates to cases where the cause of action accrued subsequent to the passage of the act. The second to cases where the cause of action accrued before its

* 6 Wallace, 532. † Id. 687.

passage. The case before us belongs to the latter class. The first clause of the statute may, therefore, be laid out of view. The second enacts that "whenever, after such action —civil or criminal—such have accrued, and such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us,* that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law.† The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were called to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislation of this character. We are of the opinion that the meaning of the statute is, that the time which elapsed while the

* See *infra*, 511, United States *v.* Wiley, the case immediately succeeding.—REP.

† United States *v.* Freeman, 3 Howard, 565; Same *v.* Babbit, 1 Black, 61; Slater *v.* Cave, 3 Ohio State, 80.

plaintiff could not prosecute his suit, by reason of the rebellion, whether before or after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed — lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction — we cannot doubt the soundness of the conclusion at which we have arrived.

On the 15th of April, 1861, President Lincoln issued his proclamation announcing the existence of the rebellion, and calling for volunteers to the number of 75,000 to suppress it. On the 19th of the same month he issued a further proclamation, announcing the blockade of Louisiana and other States in rebellion. By a proclamation of the 16th of August, 1861, he declared that the States named in it, Louisiana being one of them, were in a state of insurrection against the United States, and forbade all commercial intercourse between them and the other States of the Union. This proclamation was authorized by the 5th section of the act of July 13, 1861. The authority of the United States was excluded from the entire State of Louisiana from the date of the first proclamation down to the month of May, 1862, when the city of New Orleans and a small strip of adjacent territory lying along the Mississippi River below that city was reclaimed from the dominion of the rebels by the military forces of the United States. Even then no court there, State or Federal, was open to the plaintiffs. Levy was there, but the other defendants were elsewhere in the State whither the arms of the United States had not penetrated. But, without pursuing the subject further, here was a period of more than a year to be deducted, according to the act of Congress, from the time necessary, under the State law, to create a bar, and this defeated the prescription relied upon by the defendants.

But it has been insisted that the act of 1864 was intended to be administered only in the Federal courts, and that it

has no application to cases pending in the courts of the States.

The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. All those who could not sue in the courts of the United States, including the loyal men who were driven out by the insurrection and returned after it ceased, and those of the same class who remained at home during the war, would be deprived of its benefits. The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the State, and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the National jurisprudence from the adoption of the Judiciary Act of 1789 down to the present time.

The act thus construed, it is argued, is unwarranted by the Constitution of the United States, and therefore void.

The Constitution gives to Congress the power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the commander-in-chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of law of nations, which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment.* It promotes justice and honesty, and has nothing penal or in the nature of confiscation in its character. It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences. What is clearly implied in a written instrument, is as effectual as what is expressed.† The war power and the treaty-making power, each carries with it authority to acquire territory.‡ Louisiana, Florida, and Alaska were acquired under the latter, and California under both. The act is within the canons of construction laid down by Chief Justice Marshall.§

This objection to the statute is untenable.

The judgment of the Supreme Court of the State is REVERSED. The cause will be remanded to that court, with directions to overrule the plea of prescription, and to proceed in the case

IN CONFORMITY TO LAW.

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* Hanger *v.* Abbott, 6 Wallace, 532.

† United States *v.* Babbit, 1 Black, 61.

‡ American Insurance Company *v.* Canter, 1 Peters, 511.

§ McCulloch *v.* Maryland, 4 Wheaton, 316.