

Ogden v. Blackledge.

to be received by Charles Christie is to be the same with that received by a seaman on board the *Blaireau*. In everything not contrary to the principles herein contained, the decree of the circuit court is affirmed, and the cause is remanded to the said circuit court to be further proceeded in, according to the directions given. The parties are to pay their own costs."

\*272] \*OGDEN, administrator of CORNELL, v. BLACKLEDGE, executor of SALTER.

*Constitutional law.—Declaratory act.—Statute of limitations.*

The 9th section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claim within seven years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary.

A legislature cannot declare what the law was, but what it shall be.<sup>1</sup>

The act of limitation was suspended, as to British creditors, during the war.<sup>2</sup>

Ogden v. Witherspoon, 2 Hayw. 227, affirmed.

THIS was a case certified to this court from the Circuit Court of North Carolina, under the act of congress of 29th April 1802, § 6 (1 U. S. Stat. 159), which provides for the event of an opposition in the opinions of the two judges, who are by law to hold the circuit court. The certificate was in the following form, viz.:

United States of America : North Carolina District.

At a circuit court of the United States, begun and held at Raleigh, for the district of North Carolina, on Wednesday, the 29th of December, in the year of our Lord, one thousand eight hundred and two, and in the 27th year of American independence. Present, the Honorable John Marshall and Henry Potter, Esquires.

Robert Ogden, Administrator *de bonis non*, with the will annexed, of Samuel Cornell, v. Richard Blackledge, Executor of Robert Salter, deceased.

State of the pleadings. This is an action of debt, upon a bond given by the defendant's testator, to the testator of the plaintiff, on the 2d day of March 1775. The defendant, among other pleas, pleads in bar an act of the general assembly of the state of North Carolina, passed in the year 1715, entitled, "an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of \*intestate estates," the 9th section of which was in the following words: "And be it further enacted, that creditors of any persons deceased, shall make their

<sup>1</sup> A declaratory statute cannot have the legal effect of taking away a vested right, or of changing the rule of construction as to a pre-existing law. *Salters v. Tobias*, 3 Paige 338. The legislature has no power to impair the obligation of a contract by a declaratory act. *Reiser v. Saving Fund Association*, 39 Penn. St. 137; *Haley v. Philadelphia*, 68 Id. 45. Where a statute has received a judicial construction, a remedial act will always be construed to extend only to future cases. *Lambertson v. Hogan*,

2 Id. 22. And see *Dale v. Medcalf*, 9 Id. 108; *Gordon v. Inghram*, 1 Grant 152; *Schell v. Michener*, 2 W. N. C. 224, 379.

<sup>2</sup> So, the statute does not run, during a period of civil war, as to matters of controversy between citizens of the opposing belligerents. *Hanger v. Abbott*, 6 Wall. 532; *Levy v. Stewart*, 11 Id. 244; *Stewart v. Kohn*, Id. 493; *United States v. Wiley*, Id. 508; *Brown v. Hiatt*, 15 Id. 177; *Adger v. Alston*, Id. 555; *Batesville Institute v. Kauffman*, 18 Id. 151.

Ogden v. Blackledge.

claim within seven years after the death of said debtor, otherwise such creditors shall be for ever barred."

To which plea, the plaintiff replies, in substance, that the plaintiff's testator was, at his death, a British subject, and the debt within the true intent and operation of the fourth article of the treaty of peace concluded between the King of Great Britain and the United States. To this replication, the defendant demurs, and the plaintiff joins in demurrer.

This case coming on to be argued, at this term, it occurred as a question, whether the act of assembly, recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action. On which question, the opinions of the judges were opposed. Whereupon, on a motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court, to be finally decided: it is ordered, that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided; to wit:

1st. That Samuel Cornell, the plaintiff's testator, was, and until his death continued to be, a subject of the King of Great Britain; and the defendant's testator was, and until his death continued to be, a citizen of North Carolina.

\*2d. That the defendant's testator died in the year one thousand seven hundred and eighty; and the defendant, in the same year, was [\*274 qualified as executor.

3d. That the plaintiff sued out his writ in this suit, on the fifth day of October, in the year of our Lord, one thousand seven hundred and ninety-eight.

United States of America: North Carolina district.

{ Seal of Circuit Court N. Carolina. }	I William Henry Haywood, clerk of the circuit court for the district of North Carolina, do hereby certify the foregoing to be a copy from the minutes. Given under my hand and seal of office, at Raleigh, on the fifth day of January, in the year of our Lord, one thousand eight hundred and two.
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W. H. HAYWOOD, Clerk. (a)

*Harper and Martin*, for the plaintiff.—The only question in this case is, whether the plaintiff is barred by the 9th section of the act of assembly of North Carolina, passed in 1715. (Iredell's Digest of the Laws of N. Carolina, p. 30.)

1. The first inquiry involved in this general question is, whether that section was repealed, before its operation upon the present case. We contend, that it was repealed: 1st. By the act of assembly of North Carolina, passed in April 1784, c. 23, p. 492, (b) which makes a \*different provision on the same subject. Its preamble refers to the 9th section of [\*275

(a) This being the first case under the late act of congress, the certificate and statement are copied as a precedent, which may be of use in future practice.

(b) A supplemental act to an act entitled an act for proving of wills, and granting administration, and to prevent frauds in the management of intestates' estates.

Ogden v. Blackledge.

the act of 1715, and the 2d section makes the estate liable to creditors, without being subject to limitation or time," which is a negative mode of expression, and clearly repeals the former provision in the act of 1715. But even without such negative words, a statute may be repealed by a subsequent act, which makes a different provision on the same subject. 4 Bac. Abr. tit. Statute. And although the act of 1784 mentions only administrators, yet it evidently applies to executors also. Indeed, the term administrators comprehends executors, for every executor is an administrator; they both plead *plene administravit*, and the only difference between them is, that one is created by the act of law, and the other by the act of the party. Even the statute of treasons, 25 *Educ. III.*, stat. 5, c. 2, in which it is declared to be petit treason, "where a servant slayeth his master," has always been construed to comprehend a servant who kills his mistress, or his master's wife; *à fortiori*, in a remedial statute shall the term administrator include executor. If the 9th section of the act of 1715 was repealed by the act of 1784, the former was no bar to the plaintiff's action; for the seven years had not elapsed, after the death of the defendant's testator, before the repeal took place. 2d. But if the act of 1784 did not operate as a repeal, yet it is contended, that the act of 1789, c. 23 (Iredell's Digest, p. 676), clearly repealed the clause of limitation in the act of 1715. The 6th section enacts, "that \*276] all \*laws and parts of laws that come within the purview and meaning of this act, are hereby declared void and of no effect." The only question upon this law is, whether the 9th section of the act of 1715 comes within its purview and meaning; and to show that it does, it is only necessary to read and compare the two acts together. (a)

1. Whereas, it is enacted in the ninth section of the said act, "that creditors of any person deceased shall make their claims in seven years after the death of such debtor, otherwise, such creditor shall be for ever barred; and if it shall happen, that any sum or sums of money shall hereafter remain in the hands of any administrator, after the term of seven years shall be expired, and not recovered by any of kin to the deceased, or by any creditor in that time, the same shall be paid to the churchwardens and vestry, to and for the use of the parish where the said money shall remain." And as there are no churchwardens and vestry to make claim in such cases—

2. Be it therefore enacted, &c., that as soon as an administrator shall have finished his administration on such estates, and no creditor shall make any further demand, the residue of such estates shall be deposited in the treasury, and there remain, without interest, subject to the claim of creditors and the lawful representatives of such decedent, without being subject to limitation or time.

3. And be it further enacted, &c., that the treasurer is hereby authorized and empowered, in all such cases, to demand payment of such administrator, and on refusal or delay, to give notice in thirty days to appear and show cause why he refuses or delays payment, and on non-appearance, to enter up judgment, and thereupon proceed to execution for the purposes aforesaid.

(a) An act to amend an act entitled an act concerning proving of wills and granting letters of administration, and to prevent frauds in the management of intestates' estates.

§ 4. And be it further enacted, &c., that the creditors of any person or persons deceased, if he or they reside within this state, shall, within two years, and if they reside without the limits of this state, shall, within three years, from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts and claims of every kind whatever, to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery

Ogden v. Blackledge.

But the legislature of North Carolina passed a law in 1799 (c. 26), which declares, in substance, that notwithstanding the 6th section of the act of 1789, the 9th section of the act of 1715 was not repealed. This, however, cannot affect the present case, for this action was \*brought in October 1798, before the law of 1799 was passed. But even if it had been [\*277 brought after the law of 1799, that act could not alter the past law, and make that to have been law which was not law at the time. To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial.

THE COURT stopped the counsel, observing that it was unnecessary to argue that point.

The act of 1789, by making a provision on the same subject, differing from that of 1715, would have repealed it, without the express clause of repeal contained in the 6th section. Should it be said, that although the 9th section of the act of 1715 may be repealed, yet the present action is within the 4th section of the act of 1789, and barred thereby; the answer is, that the defendant has not pleaded that act in bar, and the court will not notice a limitation unless pleaded.

2. The second inquiry involved in the general question is, whether, if the act of 1789 repealed the limitation of 1715, the latter had operated upon this case, before the repeal.

The defendant's testator died in 1780. The plaintiff's testator was a British subject, and his right of action was suspended, not only by the act of assembly of North Carolina, passed in 1777, c. 2, § 101 (Iredell's Digest, p. 318), (a) but by the law of nations, which prohibits an alien enemy from

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of his, her or their debt as above specified, within the aforesaid time limited, he, she or they shall be for ever debarred from the recovery of his, her or their debt, in any court of law or equity, or before any justice of peace within this state.

There is a saving to infants, persons *non compos*, and *femes covert*, and a proviso that the delay shall not be a bar, if it is at the special request of the defendant.

§ 6. And be it further enacted, that all laws and parts of laws that come within the purview and meaning of this act are hereby declared void and of no effect.

An act to explain an act passed in one thousand seven hundred and eighty-nine, entitled an act to amend an act concerning the proving of wills and granting letters of administration, and to prevent frauds in the management of intestates' estates, passed in one thousand seven hundred and fifteen, and for other purposes.

Whereas, doubts have been entertained whether that part of the ninth section of the said act passed in one thousand seven hundred and fifteen, which requires the creditors of any person deceased, to make their claims within seven years after the decease of such debtor, or be for ever barred, is or is not repealed by the said act, passed in one thousand seven hundred and eighty-nine.

§ 1. Be it enacted, &c., that the said act, passed in the year one thousand seven hundred and eighty-nine, shall not be considered as a repeal of that part of the ninth section of the act passed in the year one thousand seven hundred and fifteen aforesaid; but that the same shall be deemed, held and taken to be in full force.

(a) An act for establishing courts of law, and for regulating the proceedings therein.

§ 101. Provided, that no person who hath taken, or shall take, part with the enemies of America, or who hath or shall refuse, when lawfully required thereto, to take the oath of allegiance and abjuration required by the laws of this state, or who hath or

Ogden v. Blackledge.

maintaining any \*action in the courts of the nation with whom his sovereign is at war : and his right of action was not restored until the act of assembly of 1787, c. 1 (Iredell's Digest, p. 607), declared the treaty with Great Britain to be the law of the land, and directed the courts to decide accordingly. (a)

By the 4th article of the definitive treaty of peace, creditors are to meet with no lawful impediment to the recovery of their debts. The limitation therefore, could not begin to run, before the removal of all such lawful impediments. The treaty was ratified on the 14th of January 1784, and even calculating from that date, only five years had elapsed before the repeal.

It may be remarked also, that this same Samuel Cornell is one of the persons expressly named in the act of confiscation of October 1779, c. 2 (Iredell's Digest, p. 479), and therefore, it cannot be contended, that he was not one of the persons whose rights of action were suspended by the act of 1777, c. 2. At the time of the repeal, the plaintiff was entitled to bring and maintain his action. No right had then vested in the defendant, under the act of limitations, and therefore, the principle does not apply, that the repeal shall \*279] not divest a right. \*Acts of limitation do not absolve the debt ; they only bar the remedy. *Quantock v. England*, 5 Burr. 2628. They are nothing more than legal impediments. The replication of the treaty was therefore, good.

March 6th, 1804. CUSHING, J., delivered the opinion of the court, which was entered on the minutes as follows :—This court having considered the question, whether an act of assembly recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action ; which question, in consequence of an opposition in the opinion of the judges of the circuit court for the district of North Carolina, was certified to this court to be finally decided, is of opinion, that the act of assembly recited in the said plea is, under all the circumstances stated, no bar to the plaintiff's action, the same having been repealed by the act of 1789, c. 23, at which time, seven years had not elapsed from the final ratification of the treaty of peace between Great Britain and the United States ; that being the period when the act of limitations began to run against debts due by citizens of the United States to British creditors.

shall remove from this state, or any of the United States, to avoid giving their assistance in repelling the invasions of the common enemy, or who hath or shall reside, or be, under the dominion of the enemies of America, other than such as are detained as prisoners of war, nor any person claiming by assignment, representation or otherwise, by or under any such person, shall have or receive any benefit of this act ; but all right of commencing and prosecuting any suit or suits, action or actions, real, personal or mixt, shall be and is hereby suspended, and shall remain suspended, until the legislature shall make further provision relative thereto.

(a) An act declaring the treaty of peace between the United States of America and the King of Great Britain, to be part of the law of the land.

1. Be it enacted, &c., that the articles of the definitive treaty between the United States of America and the King of Great Britain, are hereby declared to be part of the law of the land.

2. And be it further enacted, &c., that the courts of law and equity are hereby declared, in all causes and questions cognisable by them respecting the said treaty, to judge accordingly.