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 Executors of CRUDEN v.
 NEALE. N.C.Super.L&Eq. 1796.
 Superior Courts of Law and Equity of North
 Carolina.
 Executors of CRUDEN
 v.
 NEALE.
 May Term, 1796.

*1 THE plea in substance stated, that the plaintiff in the year removed himself from this state to avoid giving his assistance in the then war carried on against the King of Great-Britain, and attached himself to the enemy, &c. and the plea concluded with praying judgment, whether he should be answered, &c. To this there was a demurrer and joinder.

Counsel for the plaintiff--It will not be denied, and is admitted by the pleadings, that the plaintiff previous to the revolution resided in this country; after the establishment of the present form of government he can be considered but in one of these two lights, as one who refused to become a member of the new government, continuing his allegiance to the King of Great Britain, or as a citizen. When a change of government takes place from a monarchical to a republican government, the old form is dissolved.--Those who lived under it, and did not choose to become members of the new, had a right to refuse their allegiance to it, and to retire elsewhere. By being a part of the society subject to the old government, they had not entered into any engagement to become subject to any new form the majority might think proper to adopt. That the majority shall prevail is a rule posterior to the formation of government, and results from it. It is not a rule binding upon mankind in their natural state. There every man is independant of all

laws, except those prescribed by nature. He is not bound by any institutions formed by his fellow-men without his consent. The plaintiff here is not stated by the plea ever to have become a citizen or member of North Carolina. The fact is, that he never was a citizen. Had that fact been stated, we should have replied to it. As he still remained a subject of the King of Great-Britain, then, although the intervention of war suspended his right to commence an action in our courts, that was but a temporary obstacle, ceasing with the war which caused it; his right revived when the war ended. The clause upon which this plea is formed is, the 101st section of 1777. ch. 2. "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 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 or 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." This is but a declaration of the Legislature so far as regarded British subjects, of what the law of nations was; and it was intended to operate no longer than the law of nations would have operated to the exclusion of the plaintiff from our courts, namely, during the continuance of the war. The clause says, the plaintiff's right shall be suspended until the Legislature shall make

further provisions relative thereto; and it must be admitted there is not any express provision made by the Assembly since; but being made with a view to the continuance of the war, and this state having afterwards made one of the United States who entered into a treaty for the termination of that war, it follows, that all the acts of our Legislature made for the purpose of distressing the enemy, or to prevent their strengthening themselves, were thereby *ipso facto* repealed. Though the state represented in the Assembly have not by that Assembly expressly passed an act of repeal, yet the state represented elsewhere, has agreed to and ratified a public act, which does away all the consequences arising from a state of warfare--of which the plaintiff's disability to sue in this court, is one. Where that body with whom is lodged the sovereign power to make a treaty of peace, makes such treaty in a constitutional manner, it is an act of the Legislature as to the purpose of repealing all former acts of every state Legislature to the contrary. It is an act of the people of all the states, done by those who are constitutionally empowered to do it; and all acts opposed to that state of things introduced by the treaty must cease--or each state may still treat as enemies those with whom the treaty directs a restoration of the rights of peace. Can a man be entitled to the rights of an alien friend, and yet not be allowed to sue in our courts? Can any man who lived under the dominion of the King of Great-Britain during the time of the late war, be entitled to sue in this court, if that clause is not repealed by the treaty? But if this law is not repealed by a discontinuance of the war by means of the treaty and a restoration of peace, yet certainly as to British subjects it is repealed by the fourth section of the treaty of peace--creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money

of all *bona fide* debts heretofore contracted. By this article British creditors have a right to recover their debts, and they cannot recover them but by means of suits to be instituted in our courts. This article, with the rest of the treaty, by an express act passed in 1787, is made part of the law of the land; and if the operation of the treaty is inconsistent with the 101st section of the court law, it follows that that section is repealed so far as the inconsistency reaches; and then the plea is not tenable, and ought to be overruled by the court. But suppose the plaintiff was a citizen of this state, then how is this 101st section to be viewed, upon a comparison with the constitution of this state then just established? If he was a citizen, and attached himself to the enemy, and aided them in their attempts to subjugate the country, he was guilty of high treason--the consequence would be the loss of his right to institute an action. Judgment of death, forfeiture of estate, and a disability to apply to his country for relief against the injustice of others in civil cases, will be the consequences of the fact stated in the plea--but can such a fact be presumed? Can it be averred against a man who has not been convicted of it? Can it be tried indirectly in a civil action? These questions cannot be answered in the affirmative. Then this plea should have stated the fact with such circumstances as were necessary to establish it. It should have set forth the record of the plaintiff's conviction and attainder. Where a man becomes a citizen of a free country, his right to demand justice and a redress of wrongs, becomes at the same time one of his most essential privileges. He cannot enjoy safety and the protection of the laws without it. Without it he is not free, for what is freedom but security rendered by law to the individual. It is not denied but that every citizen may forfeit his right to protection by enormous

transgression against the laws of his country, where they have exacted such a forfeiture as a part of the punishment. A citizen of North-Carolina may forfeit his right of protection by the commission of high treason, but whether he has committed high treason or not, can no otherwise be ascertained but according to the rule of the constitution which declares, sec 9. that no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used. And sec. 12. that no freeman ought to be taken, imprisoned or deprived of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of life, liberty or property, but by the law of the land. A citizen of this country before he can be subject to the punishment of treason, or to the disabilities consequent upon it, must be convicted by a jury of his neighbourhood, upon the previous accusation of a grand jury of his neighbours: also upon a trial before a court appointed by law, for the purpose of seeing that he has every legal advantage the law entitled him to. He is not to be deprived of his liberty, or of his rights essential to its enjoyment, but by the law of the land--and what is the law of the land? Such acts of the Legislature only as violate none of the rules laid down in the constitution--such as allow the citizen the privilege there secured to him--acts inconsistent with the rights of freemen as declared in the constitution, which take away their constitutional privileges, which in short deprive a man of his life, or of the means of protection by an application to the laws of his country for redress of wrongs, without a previous trial by jury and a conviction by them, are not laws of the land--such are acts not authorized by the constitution--they have no claim to the obedience or support of the citizens as laws--they are void. And if the section in question

can be made to bear no other construction than that of taking away a citizen's right to sue, before trial and conviction in a constitutional way, for the offence to which such deprivation is annexed as a punishment, then I humbly contend that it is void in itself, and of course this plea framed upon it, of no validity to hinder the plaintiff from maintaining his action.

West Headnotes

War and National Emergency 402
 **10(2)**

[402](#) War and National Emergency

[402I](#) In General

[402k10](#) Effect of War on Pre-Existing Civil Rights, Liabilities, and Remedies

[402k10\(2\)](#) k. Actions and Remedies. [Most Cited Cases](#)

One who was disaffected to the government during the Revolutionary War, and who removed and joined the enemy, may nevertheless sue in North Carolina.

E contra--It was argued that the 101st section of 1777. ch. 2. was intended to reach farther than the law of nations would of itself have extended--the disability to sue created by that would have ceased with the war--the Legislature intended that persons who had resided here, and been fostered and protected by this country, and who afterwards in the time of its distress, ungratefully attached themselves to its enemy, should as they separated themselves, remain so, unless in such special instance where, at a future day, the Legislature might be induced to make a special interference. With this view the disabilities are to continue until the Legislature shall otherwise provide. All subsequent Legislatures have been of the same opinion, none of them have ever passed any act of repeal--this act is yet in force unless

repealed by the treaty of peace: but in truth the treaty does not repeal but rather confirms it. The fifth article provided, that persons of other descriptions than that of British subjects, or of persons resident in districts in possession of his Majesty's arms, who have not borne arms against the United States; which includes all such persons as have left the country and attached themselves to the enemy, shall have liberty to go to any part of the United States, and there to remain twelve months unmolested, in their endeavors to obtain the restitution of such of their estates, rights and properties, as may have been confiscated--this is all that is stipulated in their favour. They are to be received as supplicants for the restitution of their rights--these rights are not to be restored but by the free consent of the Legislature. This part of the treaty admits the validity of the laws depriving them of their rights. It is confirmatory of the acts on that head. If they have been subjected to the disability of commencing suit, this treaty stipulates no more for them, than that they shall have an opportunity of interceding for its removal. If persons of the plaintiff's description are entitled to recover their debts contracted *bona fide* before the end of the war, yet that is not incompatible with the plea. He may be entitled to the debt, and as yet have no remedy for it. It is not new in law to have a right without remedy. The sovereignty of the country, from motives of policy and public utility, frequently deny a remedy to acknowledged rights--sometimes for a short time only, sometimes forever. In these instances, their right to do so?? has never been questioned. They have a right to be guided in the adoption of public measures by a regard to the public happiness, and to deny upon that ground to an individual what it would seem just to allow him in common with other citizens, merely because it is promotive of the public advantage to deny

him a remedy in a case thus circumstanced. The sovereign power of every country are the proper judges of the case where such remedies ought to be denied. A debt barred by the act of limitation, is an existing debt, not extinguished by length of time, and capable of acquiring a remedy upon easy terms--yet the law denies a remedy upon motives of policy. An infant may contract a debt, and a creditor be entitled to a remedy against him--here the transaction is not void--the debt exists, and the slightest assent to the contract when of age, revives it. In the case of outlawry, the outlaw for any injury done to his person, is entitled to a satisfaction, but not to any remedy till his outlawry be removed. Where a treaty is made between two nations against confiscation of debts in the event of war, the citizens of the one nation have a right to their debts against the citizens of the other; but the sovereign power may deny them a remedy, and frequently will deny it even after the war, until the cause be removed. Many other examples might be given. So that if it be taken that the plaintiff is one of those persons who is entitled to his debt under the 4th article of the treaty that is not conclusive to prove him entitled to come into this court for it, before a repeal of the 101st section of the court law. The Legislature had the power to continue the suspension of his right even until this time, and in doing so they may have acted upon very sufficient reasons.

Per curiam

*2 It is not stated in the plea, nor clearly admitted at the bar, whether the plaintiff was ever a citizen of this country, or only resided here in the time of the formation of the new government--if he only resided here, and never became a citizen he is to be considered as a British subject; and that perhaps may make his case very different from that of a citizen who attached himself

to an enemy, and took up arms against the country--Counsel for the plaintiff--he never was a citizen--the counsel on the other side cannot say he was--the plea does not state him to have been a citizen at the time of his departure.

Per curiam

We will take time to consider of the plea, and give judgment sometime before the end of the term.--After a few days they gave judgment.

Per curiam

All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs. The 101st section of 1777. ch. 2. is certainly repealed as to all British subjects, by the 4th article of the treaty; which is to be regarded as law paramount, the acts of any state Legislature to the contrary, until that treaty shall become suspended by the sovereign authority entrusted with the power to suspend it. Each department of government empowered to do a sovereign act relative to the affairs of the government, must in doing that act establish what the whole people, and every state, must be bound by as done by competent authority. It is also repealed by 1787. ch. 1. declaring this article to be a part of the law of the land. As to British subjects, it is very much to be doubted, whether the mere act of terminating the war by a treaty of peace, did not repeal this clause. That restores them with regard to this country, to the condition of alien friends, and to all the rights belonging to that character, one of which is, the right of commencing a prosecution. It is incompatible with a state of national friendship, and is a cause for war, if the citizens of another country are not allowed

to sue for and obtain a redress of wrongs in our courts. But however this may be, British subjects by the 4th article of the treaty, are to be entitled to recover their debts, and this they cannot do without instituting suits. *Quando aliquid conceditur, conceditur ut Id, sine quo non pervenitur ad illud.* The plaintiff is not stated by the plea to have been a citizen, we cannot say he was--but say he was a citizen, the laws may suspend the right of suing for a certain time, or until a certain period, either to all the citizens with respect to certain cases, as was done in 1783; or to a description of citizens coming under particular circumstances, as citizens for instance who had notoriously joined the enemies of the country. It would have been equally impolitic to have suffered them to recover in the time of war, although they could not be arrested so as to be convicted of treason, as to have suffered a British subject to recover. The reason for excluding the latter, applied with equal force to the exclusion of the former. The fact of joining the enemy, upon a plea in disability might be ascertained by a jury as well as any other fact. This would not be ascertaining a fact for the purpose of punishing the party for his treason, but for the purpose of excluding him for the present from our courts of justice. In the same manner as the fact of being an alien enemy is found, and operates when found. This clause seems to have been made with a view to the war then carrying on, to prevent those inimical to us from getting into their possession any of the wealth of the country, which might enable them to fight us with more advantage. Considering it in this light, it would seem as if the clause itself should expire with the war, the terminating that being a providing otherwise within the words of the act, and that termination effected by those who were vested with power to do that act of sovereignty that was absolutely binding

upon every state, notwithstanding any particular act of the state Legislature to the contrary remaining unrepealed by the state Legislature. But there are sundry acts of the Legislature, which have repealed this clause with respect to the greater number of citizens who had fallen under its operation--by 1783. ch. 6. all manner of treasons, misprisions of treason, felony or misdemeanor, committed since the 4th July, 1776, are pardoned and put in total oblivion: but that act is not to pardon or discharge, ?? give any benefit to persons who have taken commissions, or have been denominated officers, or acted as such, or to such as have attached themselves to the British and continued without the limits of the state, and returned within twelve months before the passing the act: and nothing in that act is to be so construed as to bar any citizen from his civil action for the recovery of debt or damages. By this act all the citizens of the state are pardoned all treasons and misdemeanors, except those who have borne offices in the enemy's service, or having been in their service as private men, had not returned within 12 months before the passing the act. Now if a disability to sue is inflicted as a punishment for attaching himself to the enemy, then the pardoning of that must of course take away the disability. *Quando sub tollitur causa, sub tollitur etiam effectus.* Then the 101st section is repealed as to all citizens but those of the two descriptions mentioned in the act. By 1784. ch. 20. all persons who attached themselves to the enemy, or aided them in the prosecution of the war are disabled to hold sundry offices specified in the act; and there is a proviso annexed, that that act shall not be so construed as to permit the return to the state, of any person who acted as an officer after being a resident of the state, or w??o had not submitted to the laws of the state before the ratification of the definitive

treaty. The Legislature supposed and therefore probably intended that the general implication arising from this act would be, that all persons therein described would be entitled to all the rights of citizens except those denied them in the act and of course the right to return to this state, unless hindered by an express clause, which they have made as to officers only. If such general implication was intended, and is restrained only as to officers, it follows that all other persons are restored to all the rights of citizenship, except the right of being elected to certain offices; and then the 101st section of 1777. ch. 2. is repealed as to all but those who had borne commissions in the enemy's service and particularly as to one description of persons who were continued subject to it by the act of 1783, namely, those who had attached themselves to the enemy and remained without the limits of the state, and had not returned twelve months before the 18th of April, 1783. To the same effect with the act of 1784, is the act of 1785. ch. 11. Supposing the plaintiff to have been a citizen who attached himself to the enemy, without having borne a commission in their service, or having borne a commission to have submitted to the laws of the state before the ratification of the definitive treaty, he is entitled upon the construction of all these acts, now to institute his suit--and this plea does not state, either that he bore a commission, or that he did not submit to the laws of the state before the ratification of the definitive treaty. It is unnecessary to consider how far the section in question is repealed by the termination of the war, independent of any particular acts of the Legislature--for if the plaintiff was a citizen, then make the worst of the case, and by the acts mentioned, the 101st section is repealed as to him--it not being pretended that he is to be distinguished by either of the disqualifying characters before mentioned.

If he was a British subject, then his right to sue for antecedent debts is revived by the 4th article of the treaty, and this is such a debt.--Let the plea in abatement be overruled, and the defendant answer over.

*3 There were several cases depending in this court upon the same pleas, and upon this opinion of the court being given, the pleas were withdrawn and the defendants pleaded in chief.

At Hillsborough, October, 1796, the three first causes on the argument docket, were standing upon pleas in abatement and demurrer thereto for the same cause, and the pleas were overruled *per* Williams and Haywood, without argument, upon the authority of the foregoing decision. Also at Fayetteville, 1796, a client of Mr. Williams, who had joined the enemy in the time of the late war, and who had given notice of moving for a writ of error, was suspended by a plea in disability--that plea was now overruled, and he was set at liberty to proceed.

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