

Case No. 5,849a.

GRUBB v. CLAYTON.

[Brunner, Col. Cas. 30;<sup>1</sup> 2 Hayw. (N. C.) 378.]

Circuit Court, D. North Carolina.

1805.

DISMISSAL OF ACTION—EFFECT OF—LIMITATION TO ACTION BY CREDITORS OF DECEASED PERSONS.

1. A dismissal of a bill, except upon the merits, is no bar to a subsequent bill for the same cause.
2. If there be no administrator of a deceased creditor to bring suit, the act of 1789 requiring creditors in the state to bring their actions within three years cannot operate as a bar.

At law.

PER CURIAM. This cause was instituted formerly in Wilmington superior court. The act of 1715 was pleaded, and thereupon a case was made and stated for the court of conference, who decided that the said Act 1715, c. 48, § 9, was in force. The plaintiff's counsel then replied to the plea, and after the replication the whole bill was dismissed on their motion; that is to say, on the motion of the plaintiff's counsel. The suit was then instituted in this court, and the defendant's counsel have pleaded the former dismissal in bar. We are of opinion that was not a dismissal upon the merits considered of and decided by the court, and therefore that the plea in bar is not good. There is also another plea in bar, namely, Act 1789, c. 23, § 4, by which it appears that this suit was not commenced within three years from the qualification of the executors, though there was an administrator of Grubb in England. Now as there was no administrator in this country, there was no person in being who could demand the debt, of course no creditor to be barred. The words of the act are: "The creditors of any person deceased, if they reside without the limits of this state, shall within three years from the qualification of the executor or administrator, exhibit and make demand," etc., "and if any creditor shall hereafter fail to demand and bring suit for the recovery," etc., "he shall forever be debarred," etc. The plaintiff, therefore, is not within the body of the act. We need not consider whether an exception shall be allowed of, which is not expressly mentioned in the act.

<sup>1</sup> [Reported by Albert Brunner, Esq., and here reprinted by permission.]