REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of "Virginia: with Select Cases, relating chiefly to Points of Practice, decided by "the Superior Court of Chancery for the Richmond District. Volume III. by "William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts "and books, to the authors and proprietors of such copies, during the times "therein mentioned;" and also to an act, entitled, "An act, supplementary to an "act, entitled, an act for the encouragement of learning, by securing the copies "of maps, charts and books, to the authors and proprietors of such copies, "during the times therein mentioned, and extending the benefits thereof to the arts "of designing, engraving and etching historical and other prints."

WILLIAM MARSHALL,

(L. S.) Clerk of the District of Virginia.

Claiborne and Wife *against* Henderson and others, and Henderson and others *against* Claiborne and Wife.

Before our act of Assembly, (of 1785, which took effect the first day of *January*, 1787,) giving a widow dower of a *trust* estate, she was not dowable of an *equitable* estate.

ON cross appeals from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Judge of that Court.

This cause involving the important question whether a widow was dowable of an *equitable* estate of inheritance *before* the operation of our act of Assembly, expressly giving her dower in a *trust* estate,(1) which has been determined in the negative, in *England*, as *Blackstone* says, "more from a cautious adherence to some hasty prece-"dents than from any well grounded principle,"(2) was argued on the 25th, 27th, 28th, and 29th of *October*, 1806, on the general doctrine; and again on the 19th, 22d, 23d, and 25th of *April*, 1808, on the particular question submitted by the Court, whether from the facts disclosed, the husband was not seised of a *legal* estate, although there was no proof that he ever received a *deed* from the person of whom he purchased.

William Claiborne, and *Frances*, his wife, late *Frances Black*, brought their bill in the High Court of Chancery, claiming dower of a tenement in the town of *Alexandria*, as of the estate of *William Black*, Mrs. *Claiborne's* former

(1) This act first passed in 1785, and took effect the first day of *January*, 1787. It declares that "where any person to whose use, or in trust for "whose benefit another is or shall be seised of lands, tenements, or hereditaments, hath or shall have such inheritance in the use or trust, as that, if "it had been a legal right, the husband or wife of such person would "thereof have been entitled to curtesy or dower, such husband or wife shall "have and hold, and may, by the remedy proper in similar cases, recover "curtesy or dower of such lands, tenements, or hereditaments." See *Rev. Code*, vol. 1. c. 90. s. 16. p. 159.

(2) 2 *Black. Com.* 337.

husband. The original bill was filed, in *November*, 1786, and stated the principal circumstances; but the dates and names of the parties defendants were left *blank*. In *July*, 1791, another bill was filed specifying more particularly the grounds of their claim, and making *Alexander Henderson* and others, executors and trustees of a certain *Thomas Kirkpatrick*, and *Dennis Ramsay*, a purchaser of the lot in question, defendants. The complainants charge that *Black* purchased the lot No. 26. with its appurtenances, in the town of *Alexandria*, of a certain *Allen M'Rae*, and paid him the purchase-money; that a conveyance was made by *M'Rae* to *Black* for the same, and confided to a certain *William Ellzey*, attorney at law, for the purpose of having it recorded in the proper Court, but this was never done; that *Black* afterwards sold the lot to a certain *Thomas Kirkpatrick*, and in 1773, conveyed it to him by deeds of lease and release, which were duly recorded in the General Court; that at the time of the purchase and sale of the said lot by *Black*, the complainant, *Frances*, was his wife, and neither joined in the conveyance, nor does her name appear in any part of it; that *Black* departed this life in *January*, 1782, having first made his will, but the complainant, his widow, relinquished all benefit under it, within nine months after his death, and adhered to her legal title of dower in his estate; and that the complainants intermarried in *April*, 1783. The bill concluded with stating the death of *Kirkpatrick*, the appointment of *Henderson* and others his executors and trustees, the sale of the lot by them to *Ramsay*, the annual rents of the lot, and the refusal of the defendants to allow the complainants' claim of dower; and prayed an assignment of dower out of the lot, and one-third part of the profits since the death of *Black*. *Henderson* answered, and admitted that he was appointed, together with several others, trustees and executors of *Kirkpatrick*, but disclaimed all interference with his estate, having, in open Court, renounced the executorship. He denies any knowledge of the purchase charged to have been made by *Black* from *Allen M'Rae*, or of the conveyance from

MARCH, 1809.

Claiborne v. Henderson.

Black to *Kirkpatrick*; but states that the executors of *Kirkpatrick*, finding the legal estate in the lot to be in *Allen M'Rae*, procured from his only surviving son, *John M'Rae*, a deed for the same, in the year 1786. This answer was filed in *October*, 1792; and, in *April*, 1800, the complainants filed a supplemental bill referring to their former bill and the answer of *Henderson*, and stating, as additional circumstances not known before, that *Kirkpatrick* died sometime in the year 1785, having previously made his will, by which he conveyed the *residuum* of his estate, comprehending the lot in question, to his executors, in trust, for the benefit of his sisters; that the conveyance from *Allen M'Rae* to *Black* having been lost, the executors of *Kirkpatrick*, obtained a deed from *John M'Rae*, the heir at law of *Allen M'Rae*, written by *Henderson*, one of the executors of *Kirkpatrick*, reciting the conveyance from *Black* to *Kirkpatrick*, but alleging that it did not appear that *Allen M'Rae* ever made any deed to *Black* for the lot, although *they all well knew that such deed had been made.* This bill further charged that *Ramsay* had relinquished the possession of the lot, with the approbation of the executors, and that it was then occupied by *William Wilson* and *James Kennedy*, who became possessed thereof *since the exhibition of the original bill of the complainants;* and who are made parties to the supplemental bill.

The answer of *Ramsay*, states that, in *September*, 1785, he purchased part of the lot in question at a public sale, made by the executors of *Kirkpatrick;* but finding the title to be defective, he gave it up to them; and did not know at that time that there was any dispute about their title. *James Kennedy* answered, and admitted that he purchased the lot from the attornies in fact of *Kirkpatrick's* executors, in *September*, 1795, and sold one-half of it to *William Wilson*, upon which they jointly built a valuable house, and that the first intimation he had of a dispute in the title was from the *subpœna* which the complainants served upon him. The answer of *Wilson* accords with that of *Kennedy*. The answer of *John Gibson*, one of the acting executors of *Kirk-*

patrick, denies that *Black* ever had a *legal* title in the lot. On the contrary, he infers from some letters of *Black*, dated in 1767, addressed to *Kirkpatrick* and others, and from an account and memorandum taken from the books of his testator, (which were annexed to the answer,) that *Black* never had a deed for it; from which documents it also appears that so far from suggesting that any deed had ever been obtained, or had been lost, *Black* requested payment of the purchase-money from *Kirkpatrick*, (amounting to 150*l.*) and offered any reasonable security for a title, if the executors of *M'Rae* had not already made a conveyance; that payment was refused by *Kirkpatrick*, in 1767, on the ground of *Black's* not being able to make a title; but that the money was paid in 1772; that the lot was sold at public auction by *William Ellzey* and *William Grayson*, agents of *Black*, in *June*, 1766, payable in *June*, 1767, and that *Kirkpatrick* had tendered the money, at the last mentioned date, both to the principal and agents; and demanded a conveyance; which not being made, he considered himself discharged from the interest, which, however, was afterwards allowed. This answer further states, that the defendant never heard any thing of the title of *Black*, but from the suggestions of the complainants' bills; and that the deed from *Black* to *Kirkpatrick*, in 1773, was merely intended to convey the *equitable* title of the former. He expresses his belief that in 1766, when the equitable title of *Black* was sold to *Kirkpatrick*, the complainant *Frances* was not the wife of the said *Black;* and that he knows of no title to the lot, except what is derived from the contract of *Allen M'Rae*, and the execution thereof to the representatives of *Kirkpatrick*, by *John M'Rae*. *Alexander Henderson* also answered the supplemental bill, and denied any agency in procuring the deed from the heir of *Allen M'Rae* to the trustees of *Kirkpatrick*. He repeats the declaration made in his former answer, that he never intermeddled with the affairs of *Kirkpatrick*, and states his information and belief that in the year 1766, when *Black* sold to *Kirkpatrick*, he had not then intermarried with the complainant *Frances*.

MARCH, 1809.

Claiborne v. Henderson.

John M'Rae, who was called on, in the supplemental bill, to disclose whatever information the books and papers of his father, *Allen M'Rae*, would give on the subject, declared in his answer, that he never had found among the papers of his father any writing or memorandum from which he could infer that a deed had ever been executed to *Black* for the lot in question; nor had he ever understood, except from the complainants' bill, that such conveyance once existed. From the intimacy and friendship which he had been informed always subsisted between his father and *Black*, and from their correspondence on the subject, he is confident that in the year 1760, there was no conveyance; and from 1764 to 1766, he believes a conveyance was not desired, but suspended in order to be made to a purchaser, who seems to have been sought for within the latter period. To the answer of *John M'Rae* is annexed two letters of *Black* to *Allen M'Rae*. In the one, bearing date the 22d of *May*, 1760, *Black* speaks of his lot in *Alexandria*, and requests *M'Rae at any time soon* to speak to a Mr. *Johnston* to draw a conveyance from *M'Rae* to *Black* for it. In another, dated the 3d of *November*, 1764, *Black* acknowledges the receipt of a letter from *M'Rae*, inclosing *Kirkpatrick's* account, which he says he could not agree to, nor would he take the rent offered by *Kirkpatrick* for the time he occupied the house; that, unless *Kirkpatrick* would give 15*l.* per annum, he might give up the lot as soon as he pleased; *and if the place could not be sold to any advantage then*, and *Kirkpatrick* or any other would agree to take it on a reasonable rent for any time, he would consent to have certain improvements made, and advance 100*l.* in part thereof. Of the expediency of selling at that time, *Black* requested the opinion of *M'Rae*, and adds, by way of postscript, that, since writing, he had received of Colonel *Lee*, in part of rent due from *Kirkpatrick*, the sum of 27*l.* 17*s.* 6*d.*

From the depositions and exhibits filed in the cause, together with the bills and answers, it appears that *Black* intermarried with the complainant *Frances*, on the 11th of

February, 1762. On the 23d of *January*, 1782, his will is dated; and his widow, by an instrument in writing, dated the 14th of *May*, 1782, and reciting his death on the 26th of *January*, preceding, renounced the provision made for her by the will of her deceased husband. At what time the complainant *Claiborne* intermarried with the widow of *Black* does not appear, except from the allegations of the second bill, which state the marriage to have taken place in 1783. *Black* appears to have been in possession of the lot in 1760, under a purchase from *Allen M'Rae*, but the consideration paid does not appear; nor is there any writing evidencing the purchase, except *Black's* own letters; which purchase, however, was not denied by any of the parties, and is proved by general reputation to have taken place. From 1760 to 1766, *Black* received the rents from *Kirkpatrick* to whom he sold the property, at the last mentioned date: the purchase-money was paid by *Kirkpatrick* in 1772, (after having refused payment in 1767, on account of the want of a title,) and in 1773 *Black* executed a deed to *Kirkpatrick* for the lot, with the usual covenants, which was acknowledged and recorded in the General Court; *but Mrs. Black the present female complainant was not a party; nor does it appear that Black ever had a deed himself.* *Kirkpatrick* died on the 13th of *January*, 1785, having by his will, dated on the preceding day, devised the lot in question to trustees for the benefit of his sisters. In *September*, 1785, *Ramsay* purchased it at public sale, but afterwards relinquished the possession to the executors, on account of the defect in the title. In *September* or *October*, 1795, it was again sold, and purchased by *Kennedy*, who sold one-half to *Wilson;* they pulled down the house standing thereon, and built another valuable one, in which they used the materials of the old house. This suit was brought for dower in the lot, against the trustees and purchasers, all of whom deny notice of the complainants' claim.

MARCH, 1809.

Claiborne v. Henderson.

The Chancellor, (the late Mr. *Wythe*,) after an elaborate opinion, in which he supposes that our act of 1785, giving a widow dower in a trust estate, was a declaration by the Legislature of what a Court of Equity ought to have done before the passing of the act, pronounced a decree by which he sustained the jurisdiction of the Court, and appointed commissioners to assign the complainants' dower in the lot, and to take an account of the profits, *declaring at the same time, that a widow ought not, against a purchaser, to recover profits of her dower, from a time earlier than the day when her count or bill was filed in Court; and that, against the* PROFITS *which the demandants might recover, the tenants were entitled to a discount of so much (on account of what the demandant Frances received for her dower and distributive share of her former husband, William Black's slaves and goods, chattels and credits) as is equal to one-third part of the damages which might be assessed for his breach of the covenant contained in his deed (of* 1773*) to Kirkpatrick;* for ascertaining which damages an issue was directed.

The complainants appealed because the decree did not give them dower *from the death of William Black, without any deduction;* and the defendants appealed because *any dower whatever* was decreed.

Botts, for the original defendants in equity, contended that the estate of *Black*, in the lot in question, was merely an *equitable* one, of which a widow cannot be endowed. All *equitable* estates may be resolved into *trusts;* which are of three kinds: 1st. Such as are raised by a Court of Equity, without the aid of a deed. 2dly. Such as are implied by Courts of Equity, upon a deed. 3dly. Such as are expressly declared by deed. The present case falls within the *first* class of *trusts*. *Allen M'Rae* was a *trustee* for *Black*, without deed expressing or leading to a use.

There is no case in the *English* books, presenting a claim to dower in an estate possessed by the husband under the first class of trusts. The silence of the reporters and

elementary writers on the effect of such a demand, proves that the Courts and the profession concurred in the opinion that it could not be supported. Questions of dower upon such of the second and third classes of trust estates, as were not executed by the statute of uses, have been frequently agitated in the *English* Court of Chancery; and, with the exception of one or two cases, which have been since overruled, it was determined that the widow was not entitled to dower; although her claim was certainly much stronger, where the *equitable* title of her husband was secured by deed, than where it was not. [Here Mr. *Botts* cited the following authorities. 3 *Black. Com.* 432. 2 *Black. Com.* 132. *Christian's* note (11). *Ibid.* 337. *Christian's* note (13). 1 *Bro. Ch. Ca.* 326. *Dixon* v. *Saville* and others. 2 *Bac. Abr. Gwil.* ed. 361. 371. *Prec. in Cha.* 336. *Bottomley* v. Lord *Fairfax*. *Cas. temp. Talbot*, 138. *Attorney-General* v. *Scott*. *Rep. temp. Finch*, 368. *Exton* v. *St. John*, cited 9 *Vin.* 226. pl. 54. 9 *Vin.* 229. pl. 12. 1 *W. Black. Rep.* 138. in *Burgess* v. *Wheate*. *Pow.* on *Mortg.* 717. 4th ed. 3 *P. Wms.* 229. *Chaplin* v. *Chaplin*. 2 *Atk.* 526. *Godwin* v. *Winsmore*. *Perkins*, s. 373. 366. 369. 368. 6 *Co.* 34. a. *Fitz-William's* case. *Co. Lit.* 31. b. *F. N. B.* [150.] 2 *Tuck. Black.* 131. note 15.]

At law, the right of dower is confined to a seisin of an estate of inheritance in the husband; either an *actual* seisin by possession and *title*, or a *constructive* seisin by legal title and right of possession.(*a*) Courts of Equity have never extended those rights beyond the legal limits; and, on principle, the same rules ought, and do prevail in both Courts.(*b*)

It being clear, then, that this demand would have been resisted by the *English* Courts, the next inquiry is, whether any of our own statutes recognised their rules of decision. By the act of 1705,(*c*) it is declared that a widow shall be endowed as "prescribed by the laws and constitutions

(*a*) 2 *Black. Com.* 127. 131. *Co. Lit.* 31. a. *Lit.* s. 681. s. 36.

(*b*) 3 *Black. Com.* 432. *Cases temp. Talb.* 138, 139, 140. *Attorney-General* v. *Scott*.

(*c*) 1 *Virg. Laws*, ed. 1769. p. 31. s. 8.

MARCH, 1809.

Claiborne v. Henderson.

"of the kingdom of *England.*" The act of 1785,(*a*) which passed after the supposed right of the complainant, *Frances*, accrued, contains a strong expression in favour of the claim of dower in the second and third classes of trusts before defined; but that law can act prospectively only;(*b*) and does not apply to the first class of trusts.

(*a*) *Sess. Acts*, c. 62. and *Rev. Code*, vol. 1. c. 90. s. 16. p. 159.

(*b*) 1 *Wash.* 159. *Turner* v. *Turner*. 3 *Call*, 122. *Commonwealth* v. *Beaumarchais*.

Had not the law been solemnly settled against the right of the widow, in this case, her claim must have been repelled by the Court, even if it had been against the heir: for either the heir or his ancestor might have elected to vacate the purchase, or sue *M'Rae* for breach of contract in not conveying the legal estate. Such an action would have affirmed the legal estate in *M'Rae*, discharged of all equity: nor could the Jury have deducted the value of the widow's right from the amount of compensation for the entire breach. How then could the supposed title to dower, be reconciled to this right of election? Upon the same principle which is to give the complainant dower, the wife of *Ramsay* (who bargained for the lot, and relinquished the contract) is entitled.

The maxim that *what ought to have been done, shall be considered as actually done*, will be relied on by the opposite counsel; but it has no application to the present case.(*c*) Even if it did apply, no one could take benefit of it, but *Black* or his heir. This maxim, though comprehensive in its terms, is of very limited application. A testator *ought* to subject his real estate to the payment of his debts; and Lord *Mansfield* has said that he sinned in his grave, if he did not: yet if he failed to do what he ought to have done, a Court of Equity could not, by the magic of the maxim, consider it as having been done, and decree the land to be sold for the payment of his debts.

(*c*) 1 *Fonb.* 413, 414.

But if the complainant *Frances* could be endowed against the heir of her late husband, or against a purchaser *with notice*, she cannot recover against a purchaser who has united the legal and equitable estates without notice of the marriage, or against the vendee of such purchaser,

though such vendee should have had notice.(*a*) Notice, to bind a purchaser, as all the cases agree, ought to be express. The *blank* bill filed in this case, was not a notice, either implied or expressed, *of any thing*, or *to any one*.

It would be iniquitous for the complainants to recover against the tenants, who have paid full value for the land, upon a clear legal title, deduced without making *Black* a link in the chain. If any be bound to the widow, they are the representatives of her husband. But her claim against them would be opposed to all equity. She has enjoyed in her family the proceeds of sale; or those proceeds have increased the personal estate of her husband, of which she has had her distributive share, *not for life only*, as the dower would have been, *but forever*. Ought she to have one-third of the land, and one-third of the money also, for which it sold?

(*a*) 2 *Fonb.* 152. 1 *Wash.* 217. in *Hooe & Harrison* v. *Pierce*. *Ibid.* 336. 339. *Southall* v. *M'Keand*, &c.

The allowance of the present claim would be productive of incalculable mischief. The wives of speculators who bought, sold, and exchanged with such rapidity as to make it burthensome to their traffic to take conveyances as they went along, would rob the innocent holders, of dower-rights, in succession, to the ruin of their estates. The widow of every assignor of a land-warrant, or a survey, would be entitled to dower. The whole capital of a married speculator would be many times exceeded, by the drafts of his widow upon those on whom he had imposed: and many estates would be cut up into parcels of dower, so as to leave nothing but fragments and reversions!

On the question whether a parol bargain and sale, before the statutes of frauds, would not have vested the legal estate; *Mr. Botts* argued, that before writing came into general use, feoffments by parol were adopted from necessity. But to give notoriety to the transaction, the ceremony of livery of seisin was resorted to. On the same principle, the common law regarding the importance of a public investiture, would not permit dignities to pass without instal-

MARCH, 1809.

Claiborne v. Henderson.

lation, nor rectories or vicarages without induction. These acts were so essential to the alienation, that, without them, the new possessor was merely a tenant at sufferance. Courts of Equity, indeed, very early raised a use, upon a parol bargain and sale for valuable consideration, by giving the *profits* of the estate to the bargainee, or decreeing a conveyance as the occasion required. Then came the statute of uses of 27 *Hen.* VIII. c. 10. which, by transferring the possession to the use, would have been productive of all the evils of a parol feoffment without livery of seisin, by the introduction of simple and private parol alienations; but in the same session of Parliament, the statute of enrolment 27 *Hen.* VIII. c. 16. passed, which declared that a use should not be executed by the statute, unless the conveyance were by deed indented and enrolled in one of the King's Courts of *Westminster*. Our act of 1710,(*a*) expressly declares that *no estate of freehold* shall pass, but by deed in writing, indented, sealed and recorded, as by that act prescribed. Language could not have been used more effectually to annul a bargain and sale, without writing, indenting, sealing and recording. The exception in the 4th section, that the contract shall be binding between the parties, though the deed were not recorded, relates to the cases of *deeds* only.

(*a*) *Laws Virg.* ed. 1733. p. 257. and 17 9. p. 142.

But if the plaintiffs had any remedy, it was at law; and the failure to except to the jurisdiction of the Court of Equity, cannot confer jurisdiction.

Edmund J. Lee, on the same side, argued the cause very fully, and very ably; but as all the principal points and authorities touched on by him, were necessarily considered in Mr. *Botts's* arguments, we have been compelled to condense, and exhibit the subject, as far as possible, in one distinct view.

Randolph, for complainants, said he would consider the argument of Mr. *Botts*, as founded on three positions, 1st. That a Court of Chancery has no jurisdiction in cases of

dower, generally. 2dly. The want of dowability in Mrs. *Claiborne*. And 3dly. The nature and extent of the relief.

As a complete answer to the first objection he would only refer to the general learning on the jurisdiction of a Court of Equity, laid down by *Mitford*, (p. 109.) in which it will be found that not only in cases of *dower*, but of *account* and *partition*, Courts of Equity will entertain jurisdiction, although relief, but perhaps not so effectual, might be had at law. As to *precedent;* it has been done for years in this country, and sanctioned by this Court, particularly in the case of *Braxton* v. *Coleman*, which was a naked case of dower. Claiming dower in an equitable estate, it was proper for us to go into a Court of Equity.

The second objection is, that Mrs. *Claiborne* is not dowable of an equitable estate. This objection will be examined on principles of law and equity, as well as of natural justice.

The matrimonial union creates an identity of husband and wife, both in law and equity. They are one in affection and devotion to each other. And as the personal property and labour of the wife go to the husband, *natural justice* gives her a claim to part of their joint acquisitions. By separating herself from all others, she has no other mode of acquiring a livelihood but by her husband. Although it is admitted that the municipal law must govern, yet its principles are not to be strained against such a claim. Even *Blackstone*, in the passage quoted, (2 *Black. Com.* 337.) expresses his surprise that dower had not been allowed out of a trust estate; and suggests that this has arisen more from a cautious adherence to some hasty precedents than from any well-grounded principle.

But it is said that the act of 1705, confers a right of dower according to the rules of the common law only. On a reference to that act, it will be found that a widow is to be endowed according to the "laws and constitutions of "*England;*" implying the introduction not only of the rules of the common law, but the principles of equity. The

MARCH, 1809.

Claiborne v. Henderson.

oath of a Judge of the General Court in Chancery, before the revolution was, that he should do equal right according to equity and good conscience, "and the laws and usages "of *Virginia.*" He admitted that by the common law there must be seisin of the husband in deed or in law, to entitle the wife to dower; and because there was no seisin of a use at common law, the wife was not dowable of a use. So, while equity was immature, and after uses were turned into trusts by the statute, perhaps, the same doctrine prevailed. These circumstances, when the *English* books are examined, will solve all the mighty difficulty.

But *equity* very early adopted a principle, "that what "ought to have been done, shall be considered as actually "done." On this principle, Sir *Joseph Jekyl*, Master of the Rolls, so long ago as the year 1732, in the case of *Banks* v. *Sutton*, (2 *P. Wms.* 700.) decided that the wife was dowable of a *trust* estate. It is indeed afterwards said, that it is now settled, there can be no dower of a trust estate of inheritance, or of an equity of redemption of a mortgage in fee,(1) and to prove this the following cases are relied upon. 3 *P. Wms.* 229. *Chaplin* v. *Chaplin.* *Cas. temp. Talb.* 138. *Attorney-General* v. *Scott.* 2 *Atk.* 525. *Godwin* v. *Winsmore.* 1 *Black. Rep.* 138. *Burgess* v. *Wheate*, and 1 *Bro. Ch. Rep.* 326. But none of these authorities forbid dower in such a case as ours; and a note to *Cox's* edition of *P. Wms.* (vol. 3. p. 232.) to a report of the case of *Chaplin* v. *Chaplin*, clears up the difficulty and supports the authority of *Banks* v. *Sutton.* Courts of Equity will be found to have decreed dower of a trust in general; or where there is an equitable interest acquired, and no intention shewn by the purchaser to exclude the wife of dower, or to have left it upon general principles of equity. The principle laid down in *Banks* v. *Sutton*, has never been overruled; viz. that the wife is dowable of a trust estate unless there is an express intention to exclude

(1) See note to 3 *P. Wms.* 719. *Cox's* ed. Also note to page 139. of *Cases temp. Talb.* 3d ed.

her. All the cases referred to by the counsel on the other side may be reconciled on this principle. And the *English* law may be stated to be, that where the husband holding an equitable estate, does not make a deed of trust to deprive the wife of dower, she is entitled to it.

If the House of Lords, the dernier resort in *England*, has not sanctioned the decree of the Chancellor in opposition to the Master of the Rolls, in the case of *Banks* v. *Sutton;* or if the decisions of the *English* Courts are contradictory, this Court is left free to preserve the holy rights of the widow. Or if the decisions of their Courts are against us, we are not bound by them so far as to sanction iniquitous attempts to starve the wife. But by what laws is this question to be decided? Whether by laws prior or posterior to the revolution? If it is to be decided by laws prior to the revolution, then the Judges of the General Court acting under the influence of an oath to do right according to the *laws and usages of Virginia*, (which words are inserted in the oath of a Chancellor since the revolution,) have already settled the question. In the case of *Dobson* v. *Taylor*,(1) in the old General Court, *April*

(1) *Dobson* v. *Taylor*, *April* General Court, 1755. Equity

(*John Randolph's* MS. Reports, p. 77.)

Qu. If a woman is dowable of an equitable estate in her husband. By 2 *W.* 110. baron may be tenant by the curtesy of an equitable estate, and by 2 *W.* 634. *Banks* v. *Sutton*, and 638. same author, dower is more favoured than curtesy, because the former is not only a legal but an equitable and moral right. The reason of these cases is on two rules, viz. lands are looked on as money and *e converso*, and what is agreed and ought to have been done is looked on as done. *Attorney-General* v. *Scott*, *Talb.* 138. Ld. *Hardw.* in *Atk.* 526. says this is law, woman not dowable of a trust because before the statute she was not of a use, and since the statute trusts are the same as uses. *Sed nota*, that case is not dependent on the rules *ante;* the legal estate was in trustees and was to remain forever so, and the husband could only have the *usufruct;* but where there is an agreement to convey to the husband at a certain time, so that the legal estate ought to be consolidated with the equitable estate, there it shall operate as if it had actually been done. So that a woman is not dowable of an equitable estate that is to remain so forever, but may of one where that equitable estate ought to have been turned into a legal one

MARCH, 1809.

Claiborne v. Henderson.

1755, it was decided that where the husband had an equitable estate, which ought to have been turned into a legal one; the wife shall have dower; because that is to be taken as having been done which ought to have been done; although, if the legal estate had been vested in trustees, it would have been otherwise. This case was decided ac-

The circumstances of this case were, *Taylor* agreed to convey to *Anderson* his houses in *Newcastle*, on the 1st *March*, 1750, for the consideration of 1,000*l.* to be paid at respective times; the first payment was to be on the 1st *April*, 1751. *Anderson* died after the time *Taylor* was to convey, and his wife in prospect of this dower in the houses, parted with her thirds in other lands that *Anderson* sold. After *Anderson's* death, (who was insolvent,) the question was, as *Taylor* had not conveyed, whether the wife of *Anderson*, one of the defendants, was dowable of this equitable interest.

Contra. *Attorney-General* and *Power.* They relied on the case of *Littlepage* v. *Fauntleroys*, determined this Court, where it was decreed that the wife was not dowable of an equitable estate. But in that case, there was no positive agreement to convey, and if there had been a conveyance, it was uncertain of what estate, whether of an estate of inheritance; and the Court seemed to think (the woman who claimed dower) her husband had an estate only by the curtesy, and the wife could have no dower out of the life-estate, any more than a man can be tenant by the curtesy of a dower. The difference then is obvious between the two cases.

Power cited *Finch*, 368. but for what purpose, *quære*. *Attorney-General* relied on the hardship. *Answer.* It was *Taylor's* own fault in not taking security of *Anderson*. *Objection.* This is a trust created by husband which bars dower. 2 *W.* 708. *Answer.* Out of this trust it appeared husband *intended dower*. And that case is where the legal estate is conveyed to trustees before marriage on purpose to bar dower; but this right accrued after marriage. *Objection.* Widow ought to pay her proportion of the debt out of her thirds. *Answer.* Only in case of mortgages which are specific liens, and those only that are made before marriage.

Decreed. Houses to be sold, and the widow to have half of a third *of* the purchase-money, as it was of houses, *which were* more perishable than lands; had they been lands, she could have had only one-third of a third of the purchase-money. *Unanimous*, except *P. Randolph.*

Pend'eton, in favour of the dower, cited 3 *W.* 232. and that the dowress was (in relinquishing her dower to the lands *Anderson* sold) a purchaser. 1 *Vern.* 294.

Attorney-General pressed hard that a creditor's security should not be taken from; but we thought that *Taylor* was not entitled to equity because he had not done equity, viz. conveyed as he ought to have done.

cording to the *usages* of our country. This settled the law in *Virginia*, and was not carried, by appeal, to the King in Council. Such have been the laws and usages of *Virginia* ever since. To the laws of *Virginia* we must refer, and not to the subtility to be drawn from the *English* books.

But it is asked, what if *Black* had brought an action for damages for a breach of contract in not conveying the lot; would his wife have been entitled to dower in those damages? It is answered, that we are not to go into supposed cases. The fact is, that *Black* was always pressing for a title. If a right vested in equity, the wife is entitled to dower, and the husband cannot deprive her of it without her own consent, by a privy examination.

It is also objected, that those under whom the defendants claim had no notice of the marriage of *Black*. To the honour of the country it may be said that every man who has arrived at the age of maturity, may be presumed to be married. From the practice of the citizens of this Commonwealth to marry at an early age, there was ground of inquiry. Purchasers in this country, invariably do inquire, whether the vendor is a married man or not. If, in this instance, it was omitted, it was *crassa negligentia;* and then, according to a well established rule of equity, the defendants cannot avail themselves of the want of notice. This is a sufficient answer to all the long train of authorities adduced by the counsel on the other side respecting notice.

The purchase money paid as a consideration for the lot, having been enjoyed by the family of Mr. *Black*, is made another objection to the demand of his widow for dower. If Mrs. *Black* has to refund, it must be by making the executors and devisees of *Black* parties. Why have not the defendants proceeded in that way?

As to the dormancy of this claim; it may be remarked that a widow cannot immediately know, after the death of her husband, the situation of his affairs.

MARCH, 1809.

Claiborne v. Henderson.

With respect to the last point, how far the complainant is entitled to dower out of the improvements? I will not undertake to say what may be the opinion of the Court in relation to improvements made *before* notice of the claim; but the case of *Bowyer* v. *Lewis*, in this Court,(MS.) has settled the law, that as to improvements made *after* notice, no deduction is to be made.

Warden, on the same side, argued that, although there was no direct proof of the existence of a deed from *Allen M'Rae*, to *Black*, yet, under the circumstances of this case, it ought to be presumed; and that it had been lost or destroyed. *Black* was in possession from 1760 to 1766, when the lot was sold by his agents; and in 1773 he executed a deed to *Kirkpatrick*, by which his right, as derived from *M'Rae*, was recognised. In 1764, *Kirkpatrick* himself was a tenant under *Black*, who intermarried with the present complainant in 1762, and in 1782 died. During the latter year, his widow renounced the provision made her by the will of her late husband; and in the year 1783, married the complainant *Claiborne*. *Ramsay* relinquished the purchase of the lot in 1785, because he could not obtain a deed from the *heirs and executors of Kirkpatrick* jointly: and in 1795, *Kennedy* and *Wilson*, the subsequent purchasers, not only had *presumptive* notice, arising from the pendency of this suit, but *actual* notice of the claim of dower; as may be fairly inferred from the circumstance, that *Wilson* received a deed from the heir of *M'Rae*, which recites the purchase of *Black* from *Allen M'Rae*, his sale to *Kirkpatrick*, and the receipt of the purchase-money by *M'Rae*. The marriage of *Black* with the present complainant *Frances* might have been known from common fame; or at least, it was the duty of the purchasers to make inquiry as to that fact. The purchase and subsequent improvements were therefore made in their own wrong.

Every *reason* of the law, which gives a wife dower of a *legal* seisin, in her late husband, because she cannot compel a seisin in *deed*, applies, with equal force, to this case. Here

Black had a seisin in deed, and a *right* to a legal title; but his wife could not *compel* him to accept a conveyance. A bare right to possess, is a seisin in law,(*a*) which will not entitle the husband to curtesy; but where there is an actual possession, and a right to a legal title, the wife ought to have dower, for the same reason that she is entitled, from a possession in law only.(*b*)

(*a*) 2 *Black. Com.* 127.

(*b*) *Co. Lit.* 31. a.

All the authorities cited on the other side to prove that a deed is necessary to transfer a legal estate, may be answered with this remark, that they do not affect the present question, which is, whether, in a Court of *Equity*, a widow can recover dower of an *equitable* estate.

No case has been cited which comes up to the present. Some hasty precedents, indeed, have denied the widow dower out of a *trust* estate;(*c*) but in all those cases the husband, had put the estate out of him before marriage, and vested it in trustees, for the express purpose of depriving the wife of dower.

(*c*) 2 *Black. Com.* 337.

That the widow of a disseisor is entitled to dower is proved by many authorities;(*d*) and shews that it is *possession* claiming property, and not a *conveyance* of title, which is essential to this right.

(*d*) 1 *Roll. Abr.* 677. 9 *Vin.* 232. 3 *Com. Dig.* 573.

The pendency of the suit, though in a Court of Equity, was notice to all the world, and bound all subsequent purchasers.(*e*)

(*e*) 1 *Cha. Ca.* 151. 15 *Vin.* 127. 1 *Cha. Ca.* 301.

It is no argument against the claim of dower, to say that the money for which the lot was sold, was enjoyed in the family of *Black*, and increased the personal fund out of which the complainant might be endowed; because there is no case of a sale during coverture, where this does not happen; and yet it was never before set up as a bar to dower.

The position that a widow cannot be endowed against a purchaser who has united the legal with the equitable estates, without notice of the marriage, or against the vendee of such purchaser, though he had notice, is not supported by the authorities cited. But supposing the doc-

MARCH, 1809.

Claiborne v. Henderson.

trine to be correctly laid down, still it has no application to the present case, where the purchases were made *pendente lite.*

As to the objection, that the widows of speculators, who buy land to sell again, and never take a title to themselves, and of the holders of land-warrants, will be entitled to dower if the doctrine for which we contend be correct, it has no weight. If the husband has had actual seisin, as in our case of an *equitable* estate of inheritance, neither law nor reason will deprive the wife of dower. But of land-warrants, or *waste* land, the husband cannot be said to be *seised.* They are perhaps considered as mere chattels; and no person can be seised of the land which they represent, till they are carried into a grant.

Saturday, March 18th, 1809. The Judges pronounced their opinions.

JUDGE TUCKER. *William Black*, sometime about the year 1760, purchased of *Allen M'Rae*, a lot with some buildings thereon, in *Alexandria;* the consideration paid by *Black* does not appear; but that it was a purchase, for a valuable consideration, seems not to have been questioned. In *February*, 1762, *Black* intermarried with the complainant, Mrs. *Claiborne:* at this time he appears to have been in actual possession of the lot, which was in the occupation of *Thomas Kirkpatrick* who paid him rent for it, and in 1766 became the purchaser of it, from *Black*, who executed a conveyance for it to him on the 5th of *May*, 1773, in which he states (as I think) the purchase of the lot from *M'Rae*, and adds a covenant that himself was then seised of a good and indefeasible estate in fee-simple, therein. This deed was acknowledged by *Black* and recorded in the General Court; and it was contended, at the bar, there was no evidence that *Kirkpatrick* ever received it, or agreed to it; but as he afterwards paid *Black* for the lot, (after some delay,) there appears to be no ground for this objection. *Kirkpatrick* dying, devised this lot to *Henderson* and others in

trust to divide it between his sisters; *Henderson* in his answer denies that he accepted the trust: some of them sold the lot to *Dennis Ramsay*, who states in his answer that finding some defect in the title, he gave it up to the executors (the trustees) again. After this (I presume) *Kennedy* bought the lot at public sale, in *September*, 1795. *Wilson* bought it of him. The buildings have been greatly improved; a part of the old being pulled down. *Black* died in *January*, 1802. In 1786, *John M'Rae*, as heir at law of *Allen M'Rae*, from whom *Black* purchased, but never had any conveyance, as far as appears, conveyed the lot to *Fitzpatrick's* executors and trustees, (among whom *Henderson* is named.) *Gibson*, one of the trustees, in his answer says that he as surviving trustee and executor of *Thomas Kirkpatrick*, relinquished his powers and duties to *William Wilson*, by whom (it would seem) the lot was delivered up to public sale and bought by *Kennedy*.

1st. The first and principal question made in this cause is whether Mrs. *Claiborne*, the widow of *Black*, is, under all these circumstances, entitled to her dower in this lot, of which there is no proof that *William Black*, her husband, ever obtained *any conveyance* from *Allen M'Rae* of whom he purchased the same, although the fact that *Black* had peaceable possession thereof, and received the rents of *Fitzpatrick* by the hands of *Allen M'Rae*, (who in that respect appears to have acted as his agent) for many years, during his marriage, seems pretty clear.

The counsel for the defendants below, contend that *Miam Black* never had any *legal* estate in the lot, but merely an *equitable* one, of which his widow cannot be endowed. I shall inquire into the correctness of this position, as it respects the nature and quality of *William Black's* estate. That *William Black purchased* the lot in question of *Allen M'Rae*, for a *valuable consideration* is not disputed; that he paid *M'Rae* for it is not disputed; that he *entered into the possession* of the lot with *M'Rae's* consent is not disputed; that he *received the rents* for several years, is, I think, proved; that he was absolutely entitled to a conveyance in

MARCH, 1809.

Claiborne v. Henderson.

fee-simple is not disputed: that he ever received any conveyance for it is *denied*, and is certainly doubtful; perhaps the presumption is *against* it. That his possession, perception of the rents, and sale of the lot to *Kirkpatrick*, all happened during the time he was married, is satisfactorily proved to my mind. That he executed, and *Kirkpatrick* accepted, the deed which was acknowledged in the General Court for the lot, I do not doubt. All these facts will deserve consideration, in an inquiry into the nature and quality of his estate in the lot during his marriage with the complainant.

By the common law, lands and tenements might pass by alienation, either *with* or *without* deed.(*a*)

(*a*) *Co. Litt.* 9. a. 121. b. *Litt.* s. 59, 60. 183. *Gilb. L. Uses*, 87.

And such alienation *without deed*, or even WRITING, might be made by feoffment with livery of seisin;(*b*) or by bargain and sale;(*c*) or by lease, for life, for years, or at will; or to one for life or years, with remainder over in fee-simple, fee-tail, or for life.(*d*) And such alienations by PAROL *only*, might also be made to *uses;* as to *A.* to the use of *B.* in fee-simple, fee-tail, or otherwise.(*e*) And such uses might either be *express*, as when declared either *before*, *at*, or *after* the time of making the estate;(*f*) or *implied* in law, where no such declaration as before mentioned, was made: for where a man made a feoffment in fee *without any consideration*, the law construed the feoffment to be made to his *own* use, merely; but if there were a *valuable consideration paid*, and no use expressed, the law said it should be to the use of the *bargainee*, or *feoffee*, and his heirs.(*g*) And if a man by verbal agreement, in consideration of money, or the like, sold his land to another, or agreed and promised that the bargainee should have it for any time, *a good* use did *arise at common law;* and it was moreover held that a bargainee of land, for a *valuable consideration*, could not be seised of land to *any other* use but *his own*.(*h*) These alienations by PAROL though in great measure fallen into *disuse* were not *invalidated* in *England* until the statute of frauds and perjuries, 29 *Car.* II. c. 3. (which never was in force in *Virginia*,) was made; which

(*b*) *Co. Litt.* ubi supra. *Sheppard's Touchstone*, 480. 484. (5th ed.)
(*c*) *Ibid.* 218.
(*d*) *Litt.* s. 59, 60. *Shep. T.* 128.
(*e*) *Shep. T.* 480. 482. 484.
(*f*) *Shep. T.* 477. 493.
(*g*) *Shep. T.* 477, 478.
(*h*) *Shep. T.* 484. 8 *Co.* 94. 2 *Inst.* 675. *Dyer*, 229. 12 *Mod.* 162, 163. *Gilb. L. Uses*, 271. 2 *Fonb.* 33. 21.

provides against conveying lands, or hereditaments for more than three years, or declaring any trust of them, otherwise than by writing; and likewise invalidates all *parol* contracts for the sale of lands.(*a*) And if a man in consideration of so much money to be paid at a day to come, bargained and sold lands, the use passed presently; and after the day the party had an action for the money; for it is a SALE, by the money paid either presently or afterwards.(*b*) Before the statute 1 *R.* III. c. 1. the *feoffees to uses* had not only all the *estate* in the land, but also all the *power* to give and dispose of it, insomuch, that *cestui qui use*, although the estate was created and expressly declared to be for his benefit, was nevertheless held to be a trespasser, if he entered upon the land, against the feoffee's will. And though that statute enabled the *cestui qui use* to dispose of the lands, without his feoffee's consent, and declared all acts done by him in respect to such disposition to be good, not only against himself and his heirs, but also against his feoffee in trust, yet it was held that all the power over the land still remained in the *feoffee* in trust, until the *cestui qui trust* had made such a disposition of it as the statute authorised. A consequence was, that the feoffees in truth, many times contrary to the trust reposed in them, by secret conveyances, defrauded the *cestui qui use*, and prevented his disposing of the land as authorised by the statute; and sometimes there was fraud in both; for when *cestui qui use* by himself without the feoffees, by force of the statute and the feoffees by themselves without *cestui qui use*, by the common law had both, severally, *absolute power* to make a disposition of the same land, sometimes *cestui qui use*, by his secret estates, prevented the feoffees, and sometimes the feoffees, by the like secret estates, prevented the *cestui qui use*, so that they played at double hand, and thereby beguiled the true intent of the statute.(*c*) To prevent this mischief, among others, the statute of uses, 27 *Hen.* VIII. c. 10. was made, whereby it was declared "that "where any person or persons *stand* or *be* seised, or at any "time thereafter shall happen to be seised of and in any "lands, tenements, rents, services, reversions, remainders.

(*a*) *Har. Co. Litt.* p. 48. note 1. and 3. *Shep. T.* 204. 493.

(*b*) *Dyer*, 337. a.

(*c*) 1 *Co.* 132.

MARCH, 1809.

Claiborne v. Henderson.

"or other hereditaments, to the USE, confidence, or TRUST "of any other person or persons, or of any body politic by "reason of any *bargain*, *sale*, feoffment, *fine*, *recovery*, "*covenant*, *contract*, *agreement*, will, or *otherwise by any* "*means whatsoever:* that in every such case, all and every "such person and persons, and bodies politic, that have or "hereafter shall have any such *use*, confidence, or "trust, in fee-simple, fee-tail, or for term of life, or for "years, or otherwise; or any *use*, confidence, or *trust* in "remainder, or reversion, shall from thenceforth stand and "be SEISED, deemed and *adjudged* in *lawful seisin*, estate "and possession of and in the same lands, &c. with their "appurtenances, to all *intents*, constructions, and *purposes* "*in the law*, of and in such like estates, as they had, or "shall have in use, trust, or confidence of or in the same. "And that the *estate*, *title*, *right*, and *possession* that were in "such person or persons that were or hereafter shall be "seised of any lands, tenements, or hereditaments, to the "*use*, confidence, or *trust* of any such person or persons, "or of any body politic, be from henceforth clearly deem-"ed and adjudged to *be in him* or them that have, or here-"after shall have such *use*, confidence or *trust*, after such "quality, manner, form and condition, as they had before in "or to the *use*, confidence, or trust, that was in them." We are told, 1 *Co. Rep.* 132. that this statute (27 *Hen.* VIII. c. 10.) was not made to extinguish or eradicate uses, but that it had advanced them by making the *cestui qui use* the absolute owner of the land instead of the feoffee in trust; that before the statute, the office of the feoffee was to execute the estate according to the use, but that the statute hath taken away that office, and executes the possession to the use, and takes *away all the trust and power out of the feoffees;* so that since the statute there is neither *trust* nor *confidence* reposed in the feoffees; of whom it was said *non possunt agere, aut permittere aliquid*, in prejudice of the *cestui qui use*. To this I will add that as far as I am able to discover, this statute availed not, either to extinguish, or invalidate *conveyances* at common law, any more

than *uses*; for to me it appears, that it matters not whether a *use* was created by deed or *without* deed, or by feoffment by *parol*, with livery of seisin, or by *bargain*, *sale*, *contract*, or *agreement* in writing, or by parol; or if such use were *created* or brought into existence in *any other manner whatsoever*, *or by any means whatsoever*, NO MATTER WHAT, the statute instantly transferred the estate, right, title, and possession of the feoffee to *uses*, or of the person making any such *bargain*, *sale*, *contract*, or *agreement*, to the persons for whose *benefit*, whether *expressed*, or *implied in law*, such *feoffment*, *bargain*, *sale*, *contract*, or *agreement* was made or intended by the parties, according to such intention, or to that of the law, in those cases where no consideration whatever was paid, or where a *valuable consideration* was paid by the purchasers, or vendee of the land, provided the feoffee to uses, at the time of making the feoffment, or the feoffee to uses at any time after; or the *bargainor*, *seller*, or *vendor* of the land, at the time of the *bargain*, *sale*, *contract*, or *agreement*, or at any time after, during the continuance of the term or estate meant, intended, or agreed to be created, had in himself a SEISIN of the lands, intended to be conveyed, bargained, sold, or transferred. So that the *cestui qui use*, or *purchaser* for a *valuable consideration*, gained not a possession *in law* only, but a *seisin in fee*, not a *title to enter into the land*, but an *actual* LEGAL *estate*.(*a*)

(*a*) *Bac. Law Tracts*, 338.

It is true that Lord *Bacon*, in his reading on this statute, seems to reject the words *agreement*, *will*, or otherwise, in the purview of the act, as having no operation; or at least not such as I have supposed above. And his reason seems founded upon the use of the word *will* in the statute; whereas, as he remarks, lands were not at that time, nor until seven years after, (32 *H.* VIII. c. 1.) devisable. But great stress is laid in the preamble upon cases created by *parol wills* of lands, before that time; and though lands were not *generally* devisable at that time, yet they were certainly devisable by custom, in many parts of *En-*

MARCH, 1800.

Claiborne v. Henderson.

gland.(a) And since the Legislature by the preamble of the statute, appear to have been informed of the evil of secret uses so created, and to have intended to remedy it, wherever it might occur, I see no reason for rejecting the word *will*, any more than any other operative word in the statute. A further reason why the word will, in the statute is not to be rejected as having no operation, arises from the purview of the 11th sect. of the statute, which declares "all true and just wills before made, or which "should be made by any person, who should die before "the first day of *May*, following, of lands, &c. shall be "good and effectual in law after such fashion, manner and "form, as they were commonly taken and used at any time "within forty years before." Now this clearly proves that the Parliament did intend to provide for cases where uses might have been created by will: and that being the case, there is no reason for rejecting the words "*agreement*, "or otherwise," with which it is connected. *See also Butler's note on Co. Lit.* p. 277. a. & b. I should certainly distrust my own judgment in differing from so great an authority, had I not Lord *Coke* on my side, who says expressly, that in some Cities and Boroughs, lands may pass as chattels, by *will nuncupative*, or *parol*, *without writing*: to which his commentator, Mr. *Hargrave*, subjoins the following note, "But now by the 29th of *Car.* II. c. 3. a will "of lands devisable by custom is not good, unless it be in "writing, signed and attested in the same manner as a will "of lands devisable by statute." *Co. Lit.* 111. *Ib.* n. 3. The same commentator adds, "through the medium of "uses, the power of *devising* was continually exercised "with *effect* and *reality*. But at length this practice "was checked, not *accidentally*, but *designedly*, by the "27 *H.* VIII. which, by transferring the *possession*, or "*legal* estate, to the use, *necessarily* and compulsively "consolidated them into one, and so had the effect of "wholly destroying all distinctions between them, till "means to evade the statute were invented." *Ib.* 111. b. n. 1. The same learned commentator likewise says else-

(a) *Lit.* s. 167. *Co. Lit.* 111.

where. "Before the statute of uses, *equitable* estates of "freehold, might be created through the medium of trusts, "without livery, and by operation of that statute, *legal* "estates of freehold may now be created the same way. "Those who framed the statute of uses, evidently foresaw "that it would render livery unnecessary to the passing of "a freehold, and that a freehold of such things as do not "lie in grant, *would become transferable by* PAROL *only*, "*without any solemnity whatever*. To prevent the incon- "veniences which might arise from a mode of conveyance "so uncertain in the proof, and so liable to misconstruction "and abuse, it was enacted in the *same* session of Parlia- "ment, that an estate of freehold should not pass by bar- "gain and sale *only*, unless it was by indenture *enrolled*." See stat. 27 *H.* VIII. c. 16. *Harg. Co. Lit.* 48. a. n. 3. To this I shall add the opinion of Ch. J. *Holt*, and the whole Court, in 12 *Mod.* 162, 163. who says, "if a bargain "and sale were made of a man's lands on the payment of "money, the use would have raised, *without deed*, by *parol*. "So, where there was a *transmutation of possession*, there "NEEDED NO DEED, but only the bare appointment of the "party." And again. "If a man for money aliened and grant- "ed his land to one and his heirs, by this a use was raised by "construction, and it amounted to a bargain and sale; and "so it is in *Fox's* case, 8 *Co.* 94. a." On the case here mentioned by Lord *Holt*, I shall just remark, that it was decided in 7 *Jac.* I. three years after the epoch to which our law refers, as to the obligation of *British* statutes in this Commonwealth; and that the question upon which it was decided arose in 31 *Eliz.* a few years only before.

To these authorities I shall add that of Lord *Coke*, in 2 *Inst.* 675. who says "it was resolved by the opinion of the "Justices of *both* Benches, that a bargain and sale for a "*valuable* consideration of houses or lands in *London*, &c. "by WORD ONLY, is sufficient to PASS the same; for that "houses and lands in any City, &c. are exempted out of the "act of 27 *H.* VIII. c. 16. concerning enrolments of deeds: "and at *common law*, such a bargain and sale by WORD

MARCH, 1809.

Claiborne v. Henderson.

"ONLY, raised a use. And the statute 27 *H.* VIII. c. 10. "doth transfer the use into possession;" for which he cites *Dyer*, 229. *Chilbern's* case, 6 *Eliz.*

Having had occasion to mention the statute of enrolments, 27 *H.* VIII. c. 16. whereby it was declared, "that no "manors, lands, tenements, or hereditaments, (except in "Cities, Boroughs, or towns corporate, wherein the mayors "or other officers have authority to enrol deeds,) shall "pass or change from one to another by reason *only* of any "bargain and sale thereof to be made, whereby any estate "of inheritance or freehold shall be made, or take effect "in any person or persons, or any use thereof to be made, "except the same bargain and sale be made by writing in-"dented, sealed and enrolled in one of the *King's Courts* "*of Record at Westminster*, or else within the County or "Counties where the same lie, or be, before the *Custos Rotu-*"*lorum*, and two Justices of the Peace," &c.

I shall now observe, that this statute never was in force in this country; 1st. Because the provision of it, as to enrolling deeds in the King's Courts at *Westminster*, was either wholly impracticable, or highly inconvenient; 2dly. That in this country there never was any such an officer as the *Custos Rotulorum* mentioned in the statute; 3dly. That the exception in respect to Cities, Boroughs and corporate towns, proves that even in *England* it was not a universal law of the realm: consequently, was not brought over hither by our ancestors. Whereas the statute of uses, was a universal law of the realm, made in aid of the common law, and, as such, was not only brought over by our ancestors, but was recognised by our Convention at the period of the revolution: consequently, whatever construction upon the statute, and the common law as altered thereby, was proper in *England*, in cases not within the statute of enrolments, or might now be made there, if the statute of frauds and perjuries, 29 *Car.* II. c. 3. and other supplementary statutes had not been made there, may now be made in this country, except so

far as the law has been altered by our own Legislature, either before or since the revolution.

The point which I conceive to be proved by the authorities before cited, and the reasons in support of them, is, that a bargain and sale of lands in *Virginia*, for a *valuable consideration* by WORD only, is (unless there be some act of the General Assembly to the contrary) sufficient to PASS the same; for that at *common law*, such a bargain and sale, by *word only*, raised a use, and the statute of 27 *H.* VIII. c. 10. transferred the use into possession: not a possession in *law* only, but (in the words of Lord *Bacon*) a *seisin in fee*; not *a title to enter* into the land, but an *actual estate*. *Bac. Law Tracts*, 338.

A bargain and sale of lands may be defined *a real contract on a valuable consideration*, for *passing* or transferring them *from one to another*.(*a*) And when made by WORD only, it is no way distinguishable, that I can discover, from a *contract*, or *agreement*, to the same purpose. The effect, where founded upon a *valuable consideration*, being the same under the statute, which executes *bargains*, *sales*, *contracts*, and *agreements*, in the same manner as it executes a feoffment, fine, recovery, or covenant: the former *estate*, right, title, and possession of the vendor, being instantly vested in the vendee, who by virtue of the statute has the *lawful seisin*, *estate*, and *possession* thereby vested in him to all intents, *constructions*, and *purposes* in the law. If then the last words of the statute be not perfectly nugatory, the moment that a bargain and sale for a valuable consideration was concluded between the parties the estate of the vendor was annihilated, and that of the vendee absolute to all intents and purposes in law.

(*a*) *Shep. Touch.* 218. *Butler's* note in *Co. Lit.* 275. a.

Let us inquire then, if by any act of the Legislature of *Virginia*, antecedent to our act to prevent frauds and perjuries, passed in the year 1785, the statute of uses hath been in this respect repealed.

The first act upon the subject, which I have been able to find, is that of 1710, c. 13. (edition of 1733,) whereby it is enacted, "that no lands, tenements, or other heredita-

MARCH, 1809.

Claiborne v. Henderson.

" ments shall pass, alter, or change from one to another " whereby an estate of inheritance in fee-simple, fee-tail, " general or special, or any estate for life or lives, or any " greater or higher estate shall be made or take effect in " any person or persons, or any use thereof to be made by " bargain and sale, *lease* and *release*, *deed of settlement to* " *uses of feoffment*, *or other instrument*, unless the same be " made by writing indented, sealed and recorded in the " records of the General Court, or of that County where " the lands shall lie," &c.

This act is a transcript from the statute of enrolments, 27 *H.* VIII. c. 16. but extends its provisions still further, by requiring that not only deeds of *bargain* and *sale*, (the only conveyance mentioned in the statute,) but that deeds of lease and release, which were invented and brought into use to evade it, and deeds of settlement to *uses* of *feoffment*, or other *instruments*, should be executed, acknowledged, or proved, and recorded in the same manner. But in the year 1734, c. 6. the Legislature found it necessary to amend the act, after reciting so much of it as I have transcribed above, they say that it " was intended as a security " to purchasers and creditors, but by the *strict* wording of " it, had been construed to destroy all deeds-poll, though " they be recorded, and to make void all conveyances not " recorded, even between the parties, *though in respect to* " *them*, recording be unnecessary; yet ways had been " found out, and of late much practised, by making mort- " gages, marriage settlements, and deeds in trust, for long " term of years, (which are not provided against,) to de- " fraud both creditors and purchasers, and so to elude the " ONLY DESIGN of the act." It then declares all conveyances theretofore *bona fide* made by deed-poll or otherwise, valid and binding between the parties and their heirs, though not before acknowledged, or proved and recorded, and then proceeds thus; " AND FOR A GREATER SECURITY " TO CREDITORS AND PURCHASERS, Be it enacted by the " authority aforesaid, that all *bargains*, *sales* and other con- " veyances whatsoever of lands, tenements, and heredita-

"ments, whether they be made for passing any estate of "freehold or inheritance, or for term of years, and all "deeds of settlement upon marriage, wherein either lands, "slaves, money, or personal thing, shall be settled or cove- "nanted to be left or paid at the death of the party, or "otherwise, and all deeds of trust whatsoever shall be "*void*, as to all *creditors*, and *subsequent purchasers*, un- "less they be acknowledged, or proved and recorded, ac- "cording to the directions of the said act: but the same, "*as between the parties*, *shall*, notwithstanding, BE VALID "AND BINDING."

It seems to me very material to remark, that there is *no such proviso* in the statute of enrolments: from which, as I have before observed, our act of 1710 is literally a transcript, with the addition of some other words, which do not vary the sense of the statute, but extend it only to other conveyances besides deeds of bargain and sale, nor is there any such provision in the statute of frauds and perjuries. Under the former, a deed of bargain and sale not enrolled according to the statute, is VOID between the PARTIES, as well as *others*. Under the latter, a parol release, or livery of seisin by parol only, has the effect of conveying only an *estate at will*, except leases for a term not exceeding three years, &c.

Whatever doubt might have been entertained upon the *strict wording* of the first act, whether it had not invalidated all bargains, sales, contracts, and agreements concerning lands, though made for a valuable consideration, and *bona fide*, unless perfected and consummated by deed indented, sealed, acknowledged, or proved and recorded, pursuant to the act, this interpretation which the Legislature has given us of its own will, intent and meaning, is sufficient to convince my mind that it was neither its intention to repeal the statute of uses, as to the effect of any bargain, sale, covenant, contract, or agreement *between the parties*, nor to require any other solemnity in the transfer of lands from one to another, as far as regarded the right, title, interest, estate, possession and seisin of the

MARCH, 1809.

Claiborne v. Henderson.

lands as between the *parties* THEMSELVES, than was requisite or necessary before the passing of the act. For it could never be the intention of the act to let loose men from their contracts made for a *valuable consideration*, nor to drive them into a Court of Chancery to have them carried into execution and effect, (the very thing which the statute of uses meant to prevent,) when that statute did of itself execute, and carry into *absolute effect*, every *such* contract, by transferring the *use* created or implied by the terms of the contract, into a *legal estate*, *possession* and *seisin*. And though as against creditors and after-purchasers the estate so created and transferred, may be defeasible, or void, for want of a *deed recorded*, yet as between the parties it is valid, *ab initio*: for a thing may be void for one purpose, and not to another;(a) and until it is made to appear that a creditor or purchaser is affected, the estate as created by the act of the parties, and the operation of the law upon that act, is a *legal estate*, and *valid to all intents and purposes between them*. And to this effect is *Hob.* 166. as to fraudulent conveyances made by jointresses, or tenants in dower, upon the stat. 11 *H.* VII. which he tells us were good against the party, though void as to some others.

(a) *Hob.* 165.

Perhaps it may be supposed that the words "*bargains*, "*sales*, *and other conveyances*," which are declared to be valid and binding between the parties, though void as to creditors and subsequent purchasers, extend only to *conveyances* in *writing*. To my apprehension, the word "*bargains*," as well as the word "*sales*," which are used as separate and distinct descriptive terms in this amendatory act, cannot be interpreted to designate that particular species of written conveyances, called a *deed of bargain and sale*. They are used in a more *general* and comprehensive sense, and signify a real contract for a valuable consideration, for passing and transferring lands from one to another;(b) and *as between the parties themselves*, there was every reason for carrying them into complete effect as before, by virtue of the statute of uses: more especially where there was an actual transmutation of possession,

(b) *Shep. Touch.* 218. *Harg. Co. Litt.* 3.

though no deed or writing was ever made between the parties.

Again, if the exception in the statute of enrolments (from which our act of 1710, c. 13. is a literal transcript, with the addition only of some other kinds of conveyances, besides a deed of bargain and sale as before remarked) as to Cities and Boroughs, left the conveyances at common law, and the operation of the statute of uses, upon uses at common law, in full force and effect in *London*, &c. as was adjudged in *Chilbern's* case, *Dyer*, 229. so that a bargain and sale, by word only, made of lands or houses in *London* for a valuable consideration, would be sufficient to *pass* the same; I ask, whether the exception in the act of 1734, as to the operation of the act of 1710, whereby all bargains and sales, and other conveyances whatsoever, are declared to be valid and binding between the *parties*, is not as strong as the other? For where s the difference whether the exception be as to the acts of *certain persons*, or to acts done in *certain places?* Considering then the act of 1734, c. 6. as containing an exception from the general provisions of the act of 1710, c. 13. whereby all bargains, sales, and other conveyances whatsoever, were, as between the parties themselves, left upon the same footing as before the making of the former of those acts, I consider a parol bargain and sale of lands in *Virginia*, for a valuable consideration, as between *the parties themselves*, as standing precisely upon the same ground under those acts, as a parol bargain and sale of lands or houses in *London* before the statute of frauds and perjuries, 29 *Car.* II. c. 3. which required all conveyances and contracts for the sale of lands, to be made in writing. These two acts were consolidated in the year 1748, c. 1. with this additional circumstance, that the last mentioned act declares all bargains, sales, and other conveyances whatsoever, valid and binding, not only between the parties themselves, but THEIR HEIRS. And as it was during the period that this last act was in force that *Black* purchased, and *M'Rae* sold the lot in question

MARCH, 1809.

Claiborne v. Henderson.

for a valuable consideration, which purchase and sale was moreover attended with an actual *transmutation of possession*(a) from the seller to the buyer, I am of opinion that whether *M'Rae* did or did not execute a conveyance for the lot to *Black*, the latter acquired a LEGAL *estate*, *seisin* and *possession* of the lot in question under the statute of uses; valid and binding against *M'Rae* and his heirs, under the provisions contained in the act of 1748, c. 1. and defeasible ONLY by the *creditors* of *M'Rae* or *bona fide purchasers* from him.

(a) See 12 *Mod.* 162. before referred to, p. 337.

In the last argument of this cause, it was objected by the counsel for the defendant, that a woman was not dowable of a use at common law. *Perk.* s. 349. The same author says, s. 457. that there shall be no tenant by curtesy of a use; yet the Court of Chancery in *England* has decided otherwise as to that point. Sir *Jos. Jekyll*(b) supposes it probable that the other books, where the same thing is said may be taken from the same authority: and that this might possibly be said with regard only to a demand of dower at *law*, and not in a Court of Equity. And as to the preamble to the statute of uses, he further observes, that there is room to think that the words, "that by uses men lost their tenan-"cies by the curtesy, and women their dower," ought not to be taken in a general sense, for the uses complained of were such as were created by fraudulent assurances, and were secret; but supposing all uses, before the statute, were thought to bar tenants by the curtesy and dower, even in equity, as well as law, yet it will not follow at this time of day, (*and in this country*,) that trusts or equitable interests are now to be considered here as they were *then* in *England*. For the statute of uses having converted the use created by the bargain and sale for a valuable consideration, into a *legal* estate, and seisin, in the bargainee; and the statute of enrolments requiring that the bargain and sale should be in writing, never having been in force in *Virginia*, the bargainee became instantly seised of a *legal* estate, of which his wife might have been endowed, without any necessity for a deed, as I have before

(b) 2 *P. Wms.* 646.

shewn, and not merely of a use, or equitable estate; and although my construction of our acts of 1710, 1734, and 1748, in supposing that as between the parties themselves, and their heirs, no deed or written conveyance whatsoever, was necessary to pass lands, should be erroneous, still I think it undeniable, that *before* the passing of these acts of Assembly the estate of the purchaser for a valuable consideration actually paid, accompanied with actual possession of the lands, was *complete* in law; and thereafter the wife of the purchaser would have been *legally* entitled to dower in the lands; which differs the case essentially from that of a *use*, before the statute of uses. If then the operation of our acts of Assembly be this; that what would have constituted a complete *legal* title and estate in lands, *before* the passage thereof, be now turned into a mere equitable title; will equity refuse to the wife, that which she before was *legally* entitled to demand; and if she possessed power over the actions of her husband, might, by the aid of a Court of Equity, have reduced to a *legal* title, according to the requisitions of the statute during her coverture; but having no such power, is obliged to postpone the demand of her right, until the determination of her coverture? Change the parties, and equity will act as handmaid to the claim of the husband to his curtesy, though he might, during the life of the wife, have enforced the execution of a legal title. And will she refuse her aid to the weaker sex, where the right is the same, and the reason stronger?

It was also contended, at the bar, that *Black* never was *seised* of the lot. But what is a seisin? I mean a seisin in deed, or in *fact*? Does it mean either more or less than the actual possession of an estate of freehold, or inheritance? Whether acquired by *livery* of *seisin*, or by a man's own *entry* at common law; or by the seisin or actual entry of his feoffee, or trustee to uses, under the statute of uses. We are told by an ancient author, that an hour's *actual possession* quietly taken, confers a *seisin de droit, and de claime*, whereof no man can disseise him that hath taken such possession, but that the party claiming in opposition

MARCH, 1809.

Claiborne v. Henderson.

thereto must be driven to his action.(*a*) The word *seisin*, according to the opinion of Lord *Thurlow*, will extend to being seised of an estate in equity.(*b*) And Lord Ch. Baron *Gilbert*, in *Coventry* v. *Coventry*, at the end of *Francis's* maxims, expressly says, "in all cases where an agreement "is entered into in contemplation of a *valuable* consideration, "when *that* is *performed*, it is but justice and conscience that "the purchaser should have an immediate right and owner-"ship in what he hath so purchased; and therefore a Court "of Equity, *before the execution* of *any legal conveyance*, "looks upon the party to be in *immediate possession* of "such estate, and to have a power of *devising* and *giving* "it *away*." Is it not in proof that *Black* received the rents of this lot from *Kirkpatrick* several years before he sold it to him? Nay more, that *M'Rae* acted as his agent in the receipt of them for him? If so, what further evidence of an actual peaceable possession by *Black* can be required? Is there not further proof were it necessary? viz. the deed from *Black* to *Kirkpatrick*, (accepted no doubt by the latter, as he afterwards appears to have paid the money for the lot, which he at first objected to,) in which the former expressly covenants that he is seised of an indefeasible estate in fee-simple in the lot. I concur with the Chancellor in thinking that *Kirkpatrick*, by this deed, was estopped from denying that *Black* was actually *seised in fee*. Suppose *Black* had been only a tenant for years, or at will, and had made a feoffment in fee of the lot, his wife would have been entitled to dower. For by the feoffment he would have gained a fee (though but for an instant) by disseisin, and the feoffee was bound thereby.(*c*) For where a husband *tortiously* gains an instantaneous *seisin*, as against the person benefited by, and deriving an estate in virtue of, such tortious act, the wife is entitled to dower, and the feoffee can never plead that the husband was never seised.(*d*) Now *Black* was either the owner of the lot, or a disseisor, and either way the purchaser from him, with a covenant that he was seised in fee-simple takes an estate to which his wife had title of dower. For although *Black's* estate might have

(*a*) *Perkins*, 457, 458.
(*b*) 2 *Bro. Ch.* 271.

(*c*) *Harg. Co. Litt.* p. 32. b. n. 3.

(*d*) See *Gwyl. Bac.* vol. 2. 132, (6th vol. 413. of old edit.) *Ibid.* 100. Sir *W. Jones's Rep.* 317. *Matthew Taylor's* case cited.

been a *defeasible* one at law, yet as he was never ousted during the coverture, his wife shall be endowed against the purchaser.(*a*) But if my conclusions from the operations of the statute of uses be just, *Black* had an indefeasible estate in the lot, at the time that he sold to *Kirkpatrick*, even against *M'Rae* himself. For having attained peaceable possession in consideration of money paid, his title was perfect without any deed; for the moment the bargain and sale for a valuable consideration was concluded, *M'Rae* became seised to *his use*, and the statute transferred the *seisin and possession to him*. And when in virtue thereof he had actually *entered*, there was *juris et seisinæ conjunctio*.

(*a*) 2 *Bac. Ab.* 127, 128.

The case of *M'Clean* and *Copper* in this Court,(*b*) may be considered as against me. But there is a wide distinction between the two cases. In that, *Arrell* entered in 1776, upon lands to which he had no other title than a title-bond to *Rigdon*, *assigned to Arrell* in *February*, 1775, by *Rigdon's* widow, claiming the land under a residuary devise in her husband's will; neither of whom are found to have ever possessed the land. A bond to *convey* is *prima facie* evidence that *no* conveyance or title has been made either by deed or otherwise. *Arrell* never had any other than an equitable title: First, such a bond never could be considered as a conveyance, but was evidence to the contrary. Secondly, such a bond was not assignable at law. Thirdly, neither the husband or his widow are found ever to have had possession of the land, so as to make a legal conveyance to *Arrell*. Fourthly, *Arrell's* entry, though said to be made in consequence of the bond, was not at the time of the assignment, but a year after. Whereas *Black* purchased from *Allen M'Rae*, whose title and possession are not disputed, and was either put into possession by him in consideration of money paid, or else he entered with *M'Rae's* approbation and consent, as it clearly appears he afterwards received and paid over the rents for *Black* as his agent. These circumstances constitute a wide difference between the two cases. It has more than once, I believe, been decided in this Court that parol marriage agreements respect-

(*b*) 3 *Call*, 370.

MARCH, 1809.

Claiborne v. Henderson.

ing lands, were valid even *after* the act of 1748, c. 1. against all subsequent purchasers of the lands, except such as were for a *valuable* consideration. *Thornton* v. *Corbin*, 3 *Call*, 384. is expressly so. This is a strong case in support of my construction of *other parol* agreements upon a *valuable* consideration executed by delivery of actual possession.

Another point insisted on by the counsel for the defendants was, that if Mrs. *Black* were dowable against the heir, or against a purchaser with notice, she cannot recover against a purchaser who has united the legal and equitable estates without notice of the marriage; or against his vendee, though he had notice. But it must be recollected that all this objection goes to dower in an *equitable* estate. Now I have shewn that *Black's* estate was not merely an equitable but a *legal* estate. And this Court has expressly declared that though *equitable* rights may, in favour of fair *bona fide* purchasers for valuable considerations, and without notice, be lost by a sale, *legal rights never can*, unless there be frauds, (which is not alleged in this case,) for in cases of *legal rights* the principle of *caveat emptor* properly applies.(*a*) And the very page (2 *Black. Com.* 132.) referred to for the purpose of defeating the plaintiff's claim, informs us, that where dower is allowable, it matters not though the husband alienes the lands during the coverture, for he alienes them liable to dower.(*b*) And cases are not wanting where Courts of Equity have interposed to the prejudice of a purchaser without notice of the plaintiff's title as dowress.(*c*)

(*a*) 1 *Wash.* 217.

(*b*) See also *Co. Litt.* 32. a.

(*c*) 2 *Fonb.* 147. n. *Williams* v *Lamb.* 3. *Bro. Ch.* 264. there cited. See also 1 *Fonb.* 22. n. 137. n.

A third objection (the 5th contended for by the counsel for the defendant) is, "that if the plaintiff had remedy, *it* "*was at law;* and that the failure of exception to the ju- "risdiction of a Court of Equity cannot confer jurisdic- "tion." *Mitford*, a writer often cited and relied on in this Court, says, that in some cases, as in matters of account, partitions of estates between tenants in common, and *assignment of dower*, a Court of Equity will entertain jurisdiction of a suit though remedy might *perhaps* be had in the Courts of Common Law. That in the case of dower the

widow is often much perplexed in proceedings upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower, &c. that Courts of Equity having gone the length of assuming jurisdiction in the cases before mentioned, seem by degrees to have been considered, as having on these subjects a concurrent *jurisdiction* with the Courts of Common Law, in cases where *no difficulty* would have attended the proceeding in these Courts.(*a*) The authority of this passage in *Mitford*, though not supported by any case cited in the treatise, was acknowledged by Lord Ch. J. *Loughborough*, in *Mundy* v. *Mundy*, 2 *Ves.* jun. 129. In this country, the practice in the County Courts has, I believe almost invariably, been to assign dower upon a bill in equity. The reason probably was, that by that means, dower was assigned, and distribution of the slaves and personal estate made, by one set of commissioners, appointed for that purpose by the Court. Here indeed no such reason occurs. But the loss of a deed from *M'Rae* to *Black* is made the foundation of one (or perhaps all) of the bills. The supplemental bill filed in *April*, 1800, alleges, that the plaintiffs had a short time before that discovered that the surviving defendants to their former amended bill, had attempted to elude their claim by procuring a conveyance from *John M'Rae*, styling himself son and heir of *Allen M'Rae*, for the lot, and that they had afterwards conveyed the same to the other defendants. This deed is admitted (or perhaps insisted on) by all the defendants in their answers.

(*a*) *Mitford's Pleadings in Chancery*, 109, 110, 111.

Though probably as little disposed to favour the undue extension of the jurisdiction of Courts of Equity as any Judge that has set upon this bench, *this circumstance alone* is sufficient to induce me to decide in favour of that jurisdiction in this particular case. For, to what purpose could a conveyance from the heir of *Allen M'Rae* have been obtained by the defendants? Clearly to prove, by deducing a title from *M'Rae*, instead of *Black*, that she had no title to recover dower at law, on the presumption that *Black* never had a legal title from *M'Rae;* and thus to bar her from a

MARCH, 1809.

Claiborne v. Henderson.

recovery either at law, or in equity: for if that deed could operate as an equitable bar, much more might it be set up as a legal one. It was accordingly insisted on in the argument that the defendants did not claim under *Black*, but *M'Rae*. This conduct of the defendants, whatever other ground of objection there might have been to sustaining the bill, does in my opinion invalidate every thing that can be said against the jurisdiction of the Court. And the Court being possessed of the causes, will proceed to decree relief, without turning the party round to another tribunal; unless indeed one circumstance should make it necessary to award an issue to be tried at law to determine the fact of the complainants' marriage. See *Curtis* v. *Curtis*, cited 2 *Ves.* jun. 126. where it is said that the marriage being denied, Ld. *Bathurst*, Chancellor, sent the parties to law to try that.

It was, however, contended at the bar, that this was a mere *trust*, which the statute of uses could not execute. If this observation was intended to distinguish it from a *use* at common law, I conceive it has been already sufficiently answered. For before the stat. 27 *H.* VIII. c. 10. a use, confidence, or trust, were the same. And, as I have already shewn, a bargain and sale of lands for a valuable consideration, though made by *parol* only, raised a good use at common law.(*a*) Will the calling it a *trust* change the nature of it, or prevent the operation of the statute? Ld. Ch. J. *Holt* tells us otherwise: a use, which at common law was a *trust* of a freehold, or inheritance, is executed, as he tells us, by the statute which mentions the word *trust*, as well as *use*; and trusts at common law and uses are *equally executed* by the statute.(*b*) We are moreover told, that whatever was, or would have been a trust at common law is since the statute of uses executed.(*c*)

(*a*) *Shep.* 484. 2 *Inst.* 675.

(*b*) 2 *Salk.* 679. 2 Lord *Raym.* 876—878. 1 *Eq. Ca. Abr.* 383.

(*c*) 1 *Vent.* 232. cited 2 *Salk.* 679. *in marg.*

We are told that there are three ways of creating a use or trust, which the statute *cannot* execute; 1. Where a use is limited upon a use. 2. Where a term of years is created, and limited in trust. 3. And lastly, where lands are limited to trustees to *pay over* the rents and profits to another. 5 *Bac. Abr.* 379. old ed. 1 *Eq. Ca. Abr.* 383. 2

Fonb. 15, 16. and 2 *Black. Com.* 335, 336. where the origin, foundation, and reasonableness of these several distinctions are briefly examined. To these we may add trusts arising by operation of law, which it has been said, have been but of *two* kinds: 1st. Where the conveyance has been taken in the name of one man, and the purchase-money paid by *another;* or, 2d. Where the owner of an estate has made a voluntary conveyance of it, and made a declaration of the trust with regard to one part of the estate, and has been silent with regard to the other part of it. These, it is said, have been the two only instances of a trust allowed, to arise by operation of law, since the statute of frauds, 29 *Car.* II. unless there had been a plain or express fraud. 5 *Bac. Abr.* 390. old ed. Mr. *Gwyllim* in his edition, suspects the fidelity of the reporter in this passage, and actually enumerates several other cases of *resulting trusts* in equity. But not one of them that bears the smallest resemblance to the present case: I shall therefore pass them over; and it would be misspending time to shew more at large, that none of the cases enumerated above, bear the smallest analogy to it. Consequently, the position assumed by the counsel for the defendant, that this was one of those trusts which the statute of uses *could not* execute, appears to be unfounded, both from negative and positive authorities.

As to the cases in which dower has been refused out of a trust estate, neither the cases of Lady *Radnor* v. *Vanderbendy*, *Show. Parl. Cas.* 69. nor *Colt* v. *Colt*, cited 2 *P. Wms.* 640. 1 *Ch. Rep.* 254. nor *Bottomly* v. *Fairfax*, *Prec. in Ch.* 336. nor *Brown* v. *Gibbes*, same book, 97. nor *Chaplin* v. *Chaplin*, 3 *P. Wms.* 229. nor *Attorney-General* v. *Scott*, *Cases temp. Talbot*, 138. nor *Godwin* v. *Winsmore*, 2 *Atk.* 525. nor *Dixon* v. *Saville*, 1 *Bro. Ch. Rep.* 326. nor *Wray* v. *Williams*, *Prec. in Ch.* 151. more fully stated in 1 *P. Wms.* 137. nor *Swannock* v. *Lyford*, *Amb. Rep.* 6. nor any other case in which the widow has been refused dower in equity, that I have been able to meet with, bear any analogy to the

MARCH, 1809.

Claiborne v. Henderson.

present. But the case of *Dobson* v. *Taylor*, cited from the reports of a gentleman as eminent at the bar in his day, as most of those who have succeeded him in practice in this country,(*a*) is a case resembling, and even stronger than the present. The circumstances of that case were: *Taylor* agreed to convey to *Anderson* his houses in *New-Castle*, on the first of *March*, 1750, for the consideration of 1,000*l.* payable at respective times. The first payment was to be *April* 1, 1751. *Anderson* died after the time *Taylor* was to convey, and his wife in prospect of this dower in the house, parted with her thirds in other lands which *Anderson* sold. After *Anderson's* death, (who was insolvent,) the question was, as *Taylor* had not conveyed, whether the wife of *Anderson* was dowable of this equitable interest. And it was decreed unanimously, with the exception of only one of the Court, that the widow was entitled to her dower therein.(*b*) And there the former General Court of this country, whose decisions have always been held and treated with respect by the Judges of this Court, in all cases where no contrary decision has taken place here, has with me the greatest weight, as settling this question near sixty years ago, in favour of the widow's right of dower in lands *bona fide* purchased for a valuable consideration, agreed for by the husband, and with the consent of the seller, entered into by the purchaser, and held by him though no deed for the same was ever executed.

(*a*) *John Randolph's* MS. *Rep.* 77.

(*b*) *April General Court*, 1755, MSS of *John Randolph*, Esq. p. 77.

Whether the Court in the decision of that case, proceeded upon the ground that the estate of a purchaser for a valuable consideration, is after entry and peaceable possession taken and held by him, with the consent of the seller, a *legal*, or merely a *trust*, or *equitable* estate, is immaterial in my mind. If the Court considered it in the latter point of view, I think it probable they thought, that where there was an agreement to convey to the husband at a certain time, so that the legal estate ought to be consolidated with the equitable estate, there it should operate as if it had actually been done. So that a woman should be

dowable of an equitable estate, where that equitable estate ought to have been turned into a legal one; as was argued by the counsel in that case. And this seems probable, as the purchaser died insolvent before any actual payment was made, though possibly bond for the purchase-money had been given. If equity, as defined by the writers on that subject, stands for the whole of *natural justice*;(a) if natural justice respects not the difference of persons or of sexes; if marriage be a civil contract; *Bro. Ch.* 249. made upon a valuable consideration; 2 *P. Wms.* 636. if trust estates are to be governed by the same rules, and are within the same reason as legal estates; 1 *P. Wms.* 109. if it will be productive of the greatest uncertainty, if the rules of property be not the same in all Courts; *Ibid.* 109. if dower be more favoured in law, and reason, than curtesy; 2 *P. Wms.* 644. "I cannot but wonder with the able and "enlightened Master of the Rolls, (Sir *Joseph Jekyll*,) "how it ever came to be thought, that a tenant by the "curtesy, was entitled to relief in equity, more or farther "than a dowress; and particularly that a tenancy by the "curtesy *might* be of a trust estate, BUT NOT DOWER; "which is no less than a direct opposition to the rule and "reason of the law, allowing dower of a seisin in law, but "not a tenancy by the curtesy, because the wife cannot "gain an actual seisin, but the husband may; which reason "holds in a trust estate, for the wife cannot gain or compel a trustee to convey the legal estate to the husband, "but the husband himself may; therefore, if any distinction "is to be made, dower (one would think) ought to be preferred to curtesy." 2 *P. Wms.* 638. This reasoning is more convincing to my mind, than all the oracular responses that have been made to it since. *Vide* 1 *Black. Rep.* p. 160, 161. per Lord *Mansfield*. And I am happy to feel the confidence I repose in this train of reasoning, supported and confirmed by the first tribunal in this country sixty years ago; a tribunal which, as long as it existed, had the aid of as great talents at the bar, as any that ever assisted the deliberation of any Court in this quarter of the globe; and

(a) 1 *Fonb.* 9.

MARCH, 1809.

Claiborne v. Henderson.

was composed of men, who probably understood the laws, usages, and constitutions of this country, better than any Judge in any other country whatsoever: nor ought it to pass without notice, that the oath of a Judge in Chancery for more than a century past, enjoins him to decide according to the *laws* and *usages* of VIRGINIA, not of *England*.(a) They found themselves, happily, under no necessity of conforming their better judgments to the practice of conveyances, as we are told by Lord *Camden*, *Amb.* 681. was the case with the House of Lords, in the decision of Lady *Radnor* v. *Vanderbendy*. If such a circumstance will justify that tribunal for departing from the general principles of law and equity, much more will a knowledge of the circumstances and USAGES in *this country*, support and justify the decision of the General Court, in conformity to these principles.

(a) *Vide Laws Virg.* 1705. c. 19. 1753. c. 1. 1794. c. 64.

In this country mortgages and deeds of trust are every day's practice; and they are generally made in fee-simple. But I have scarcely ever known an instance of a reconveyance made by the mortgagee or trustee, although the mortgage or trust debt may have been fully satisfied and paid. If the widows of mortgagors are not dowable in such cases, there are few widows in *Virginia* who may not be denied their dower in estates which have long been disincumbered, the *legal* title to which may still remain in some trustee, or mortgagee, or their heirs, although the possession has never been out of the mortgagor.(b) The counsel for the defendants have likened this to the case where a man previous to his marriage, makes a conveyance whereby he departs with the inheritance, in order to bar his wife of dower, as is said to have been done by Sergeant *Maynard*,(c) urging that *Black* in not requiring a deed to be made to him at the time of the purchase, but having sold the property, shewed he intended his wife should not have dower. How far the case to which this is likened may be a good bar of dower, if such a conveyance were made in contemplation of a marriage, it will be time enough to decide when it happens. But the evidence arising from *Black's* own let-

(b) See *Prec. in Cha.* 134. *Tarrant* v. *Hitchin.*

(c) *Show. Par. Cas.* 71.

ters to *M'Rae*, (annexed to *John M'Rae's* answer,) proves the contrary to this supposition of the defendant's counsel, and leaves no room for such a conclusion as he has drawn. He was *anxious* to obtain a deed.

The next point which I shall notice, is the 3d objection on the part of the defendant. That the Court of Chancery had no jurisdiction at the time of the decree, over real estate in the District of *Columbia*, to effect an allotment of dower.

The act concerning the District of *Columbia*, 6 *Cong.* c. 86. (2 *Sess.* c. 15. s. 1.) continues the laws of *Virginia* in force in *Alexandria*. And section 13. provides for execution of judgments and decrees in suits then depending in the Courts of *Virginia* and *Maryland*. And our law of 1792, c. 151. s. 53. authorises the issuing from the Court of Chancery, writs of *habere facias possessionem*, or any judicial process which may issue from any Court of Common Law, according to the nature of the case. Consequently, if the plaintiff in this case be decreed to have her dower in the lot, the acts of Congress points out the method how that decree might be carried into effect without difficulty according to the law of *Virginia*. Besides, as to those parties who reside within the S ate, there can be no doubt that the Court can enforce its decree, as if the cession to the *United States* had never been made. Upon the point of Mr. *Henderson's* liability, I conceive that having renounced the executorship, and the trust connected with it, his having drawn the conveyance, (even if that fact were proved,) which I think is not the case, was not such an act as would make him liable, either as an executor or trustee, and consequently that as to him the bill ought to have been dismissed. But that in other respects the principles of the decree should be affirmed.

Judge ROANE. This is a bill exhibited by the appellee to recover dower in a lot in the town of *Alexandria*; to which the appellee, Mrs. *Claiborne*, claims title, as widow and relict of *William Black*, deceased. Prior to the year 1760, the

MARCH, 1809.

Claiborne v. Henderson.

said *William Black* purchased the said lot from *Allen M'Rae*, for which he paid a valuable consideration, but received no conveyance; nor is it even shewn that the purchase was evidenced by any writing. In *January*, 1762, he intermarried with the female appellee: in 1766, he contracted to sell this lot to *Kirkpatrick*, for which in *May*, 1773, he passed to him deeds of lease and release; and in 1782, *Black* died, having, by his will, which his widow duly renounced, made a provision for her, of property other than the lot in question, of which lot, also, no mention whatever was made in the will. *Black* was possessed of the lot in question *before* and after his marriage with the appellee, and until he sold it to *Kirkpatrick*, for a valuable consideration, by him duly received. The appellants *Henderson* and *Gibson* are sued as surviving trustees and executors of *Kirkpatrick*, who directed the property in question to be divided between certain devisees. *Kennedy* purchased the lot of the said executors and the *heirs of Kirkpatrick* in *September*, 1785, and then sold a moiety of it to *Wilson*; neither of whom had any notice of the present claim, except such as may be construed to have arisen from the pendency of the present suit; and *Ramsay* had been a previous purchaser, but had relinquished his purchase, conceiving there was a doubt about the title. In 1786, *John M'Rae*, the son and heir of *Allen M'Rae*, conveyed the lot of which the legal title was still in him, to the executors of *Kirkpatrick*, by a deed reciting the sale by *Black* to *Kirkpatrick*, and in consideration of *5s.* which executors conveyed the same to *Kennedy* and *Wilson* in 1795; and afterwards a defect being discovered in their deed, in relation to the NUMBER of the lot, a deed was renewed to them for the same by *John M'Rae*.

The appellees, justly sensible of the objection which lay against a claim of dower in a trust estate, or a mere equitable title, alleged in their bill that a *deed had been* duly made by *Allen M'Rae* to *William Black* for the lot in question shortly after the purchase; which being confided to *Ellzey* to have it recorded, was by him lost: they pray a discovery as to this point, and that the said deed may be

set up by the Court of Equity. Although there is no *iota* of proof that such deed ever existed, this allegation would, if it were otherwise necessary, (which it is not, under the established doctrines on this subject,) suffice, perhaps, to repel the objection to the *jurisdiction* of a Court of Equity to sustain a suit for dower.

There is no position in the law more undeniable than that a vendor of land, after a contract for a purchase, and before a conveyance is executed, is a *trustee* for the vendee. This is so established a principle, that although almost every page of the reports in equity act upon it as a *settled* doctrine, it is perhaps not easy to find *modern* authorities laying down the position in so many words: it is certain, however, that it has been considered as an established principle at least as early as 13 *Car.* II. as may be seen in the case of *Davie* v. *Beversham*, *Rep. in Chancery*, vol. 3. p. 2. This position emphatically applies to the case before us, in which, so far from being a conveyance *executed*, there is not even a written memorandum, stating the terms of the purchase, or the extent of the *interest* contracted for. This case then is that of a claim of dower by the widow of a *cestuy que trust* of lands, the *legal* estate in which remained in another.

From the evidence in the cause it appears, that in 1760, (*before Black's* marriage,) he wished a conveyance of the legal estate to be made to *himself:* (see his letter to *Allen M'Rae* of *May* 22, 1760:) but there is no testimony whatever that he wished this to be done *after* his marriage: on the contrary, from the time of his contract with *Kirkpatrick*, he appears to have wished the deed to be made directly to *Kirkpatrick;* thus avoiding the trouble, circuity, and risk attending the procurement of his wife's relinquishment of dower, after an intermediate conveyance to himself. [See his letter of *November* 3, 1764, and his two letters of *July* 20, 1767, stated in the record.] The answer of *John M'Rae*, also, who was possessed of and had searched all his father's books and papers, states his belief, that from the year 1764 till 1766, a conveyance was "probably not desired by

MARCH, 1809.

Claiborne v. Henderson.

"*William Black*, but suspended in order to be made *immediately to a purchaser*, who seems during this period to "have been sought for." The evidence of intention therefore arising out of these circumstances falls very strongly within the reason of a distinction taken, as a general one, (but since exploded,) by Sir *Joseph Jekyll* in the case of *Banks* v. *Sutton*; namely, that although a wife is dowable of a trust created by a stranger, she is not dowable of one created by her husband; because in the latter case, (otherwise in the former,) the husband is presumed to have intended to bar her dower. On no other ground than the existence of such an intention in the case before us, can the abandonment by Mr. *Black*, of his purpose to obtain a deed to *himself*, from and after the time of his marriage be rationally accounted for.

If, therefore, it is not necessary (under the later and more approved decisions) for the appellants to array this evidence of intention against the claim of the appellees, there is certainly, on the other hand, no ground of intention existing in the present case, which can be brought to act in their favour. The question then must be decided as a general one.

But for the elaborate decree of the Chancellor, in the case before us, and the opinion just delivered by the Judge who preceded me, I should have deemed it unnecessary to have consumed much time, in deciding a case so plain; for I hold it to be extremely clear, that, prior to our act of 1785, a woman was not dowable of a trust estate. These respectable opinions have imposed on me the task of investigating the subject somewhat at large; and it may not be unuseful, in a case of such importance, to state the authorities and reasons which have confirmed my former opinion. I will first refer to some adjudged cases upon this subject, and then notice the corroborative opinions of some elementary writers of high respectability. The cases which I shall cite have been some of them, considered *en masse*, inapplicable to the case before us, by the Judge who has gone before me. I differ from him, however, in this

particular, as far as I do in respect of the *authority* and *application* of the case of *Dobson* v. *Taylor*, notwithstanding the encomium he was pleased to pronounce on it, and the Court who decided it.

With this preliminary observation I proceed to examine some of the cases and authorities. In the case of *Bottomly* v. *Fairfax*,(a) it was held that if a husband before marriage conveys an estate to trustees in such a manner as to put the *legal estate* out of him, though the *trust* be limited to him and his heirs, of this trust-estate his wife shall not be endowed. It is not easy to discern a difference between that case and the one at bar, unless it be said (in conformity to the distinction before noticed to have been taken and since exploded) that the trust in the case at bar was created by a *stranger*, and in the case of *Bottomly* v. *Fairfax* by the husband himself: but it is certain that, in *both* cases, the trust was created by the husband: in the last case, it is true, by making a positive conveyance in trust; in the case at bar, by merely omitting to procure a *legal* conveyance. The husband, however, is the efficient person in both cases, and the difference does not exist in substance but merely in form. If that exploded distinction could ever have justly applied to any case, it must have been to one wherein the husband was merely *passive*, one in which the "*trust descends or comes*" from another (see *Godwin* v. *Winsmore*, *post*) who could not be presumed to have intended to *bar dower*. That is not the case, in the present instance: but if the husband were even considered as merely *passive*, touching this estate in its origin, the before mentioned testimony shews, that from and after his marriage, he came forward and wished (by waiving a conveyance to *himself*) to keep up the *trust-estate*, until it became a *legal* one in his vendee, *Kirkpatrick*, by an immediate conveyance to him from his vendor *M'Rae*.

(a) *Prec. in Chn.* anno 1712.

The case of *Banks* v. *Sutton*,(b) decided by Sir *Joseph Jekyll*, Master of the Rolls, in 1732, was in substance as follows. *Hancock* mortgaged land in fee to *Ward*. *Hancock* afterwards devised his real and personal estate to Sir *W. Ellis*,

(b) 2 *P. Wms.* 701.

MARCH, 1809.

Claiborne v. Henderson.

in trust, to pay debts and legacies, &c. and then to settle on *Robert Sutton and his heirs, on his attaining the age of twenty-one years*, a moiety of his estate. *Hancock* died. *Ellis* entered on the lands, and possessed the personal estate; paid off the mortgage, and took assignment of it to himself, &c. *Robert Sutton* attained the age of twenty-one, and married: the estate was *not settled* on him; and after his death, his widow was decreed her dower in the trust-estate, and in the equity of redemption of the mortgage. That case was very elaborately argued by the Master of the Rolls, but has been since *overruled*. If, however, it were not so, it would be no authority against the present appellants. As to the dower in the *general trust-estate*, it was decreed on the ground that that estate had been created by a *stranger*, (*Hancock*,) from which circumstance it was argued that no intention to bar dower could be inferred; and also on the ground that a *time* was limited for conveying the legal estate, viz. *Robert Sutton's* attaining twenty-one years of age, and had arrived in the life-time of the plaintiff's husband; and it was decided that the principle, that what was agreed to be done should be construed as if it were done, sustained the claim of the widow. In both these respects that case is different from our's; (but if it were not so, both those grounds of decision have been overruled;) for 1st. In our case no time was limited (nor had arrived, during the marriage) for the legal conveyance to be made; and 2dly. The trust-estate was here created by the *husband*, originally; or if this be not so, his intention to *dispense with a legal conveyance to himself*, commenced with his marriage, and continued during the whole period thereof. Admitting, therefore, that this decision (in *Banks* v. *Sutton*) was correct, as applying to that particular case, it would not embrace the case before us. This is made more manifest by the following passage in the opinion of the Master of the Rolls: "but after all these "reasons and authorities, I must declare that I would not "take upon myself to determine whether a wife should

"have dower out of a trust of inheritance, where it is "created *not by the husband*, but by some other person," (he had previously said that, of a trust created by the *husband*, the wife shall not have dower,) "and *no time limited* "for conveying the *legal* estate: when that comes to be the "case it will be time enough to do it; but the present dif- "fers very much from the *common case of trust-estates*, in "that there *is a time limited* for conveying the legal estate, "and *that time come* in the life of the plaintiff's husband." As to his decision, that the wife was dowable of the equity of redemption of the mortgage in fee, that is not the case before us; it is, however, but another side of the same question, (for a mortgagor in fee, after the mortgage money is paid, is a *cestuy que trust* of the inheritance,)(*a*) and has since been often overruled.

(*a*) 1 *Bac. Gwyll. edit.* 185.

In the case of *Chaplin* v. *Chaplin*, in 1733,(*b*) it was decided by Lord Chancellor *Talbot*, *after much debate and consideration*, that the wife of a tenant in tail *in trust* of a rent (created by a *stranger*) was not entitled to dower in it. After taking up the case of *Banks* v. *Sutton* and the cases therein cited, and giving answers to (or overruling) them all, he proceeds to say, "that a woman is no more dowable of a "*trust* now than she was of a *use* before the statute; that "it had been the constant practice of conveyancers, agreea- "bly thereto, to place the *legal* estate in trustees *on purpose* "*to prevent dower*; wherefore it would be of *most dan-* "*gerous consequence* to titles, and throw things into confu- "sion, contrary to former opinions and the advice of so "many eminent and learned men to let in the claim of "dower upon *trust-estates*; that he took it to be *settled* that "the husband should be tenant by the curtesy of a trust, "though the wife should not have dower thereof; for "which diversity as he could see no reason, neither should "he have made it; but since it had prevailed, he should "not alter it; that there did not appear to be so much as "*one single case*, where, *abstracting from all other circum-* "*stances*, it had been determined there should be dower of "a trust;" and he dismissed the bill so far as it claimed

(*b*) 3 *P. Wms.* 229.

MARCH, 1809.

Claiborne v. Henderson.

dower in the trust in question. The reporter adds, in a note, that afterwards, in the case of *Shepherd* v. *Shepherd*, (*March*, 1735, 1736,) heard before Lord *Talbot*, the same point coming in question, the *Attorney-General* and Mr. *Fazakerley*, who were of counsel with the widow, apprehended it to have been so clearly *settled* by the above resolution, that they both declined speaking to it.

In the case of the *Attorney-General* v. *Scott*, (in 1735,) before the same Chancellor,(*a*) it was decided that the widow of a *cestuy que trust* of an estate in fee which was mortgaged was not entitled to dower. The case of *Banks* v. *Sutton* and others being cited, the Lord Chancellor said, "The question is very considerable, and very proper to be "*settled*. Dower is properly a legal demand, and here the "estate is limited to trustees and their heirs, to the use of "them and their heirs; so that it is actually *executed* in "the trustees, and whatever comes after can only be "looked upon as an *equitable* interest: for there cannot be "a *use* upon a *use*. The question therefore is, whether the "*feme* of the devisee shall be entitled to dower *at law*? "No dower was of a *use* before the statute; it being entirely a legal demand;(*b*) and then how can she be dowable of a *trust* after the statute, since no difference can be "assigned between a *trust* now and a *use* before the statute, "and Courts of Equity must follow the same rules *now* as "to *trusts*, as prevailed before the statute as to *uses*. How "the difference now received between tenant by the curtesy and tenant in dower ever came to be established I cannot tell; but that *it is established* is certain; nor have I "heard of ANY CASE cited to the contrary, but that of "*Fletcher* v. *Robinson*," (a case much relied on in *Banks* v. *Sutton*, and overruled in the case of *Chaplin* v. *Chaplin*,) "which was determined upon another reason that does not "affect the present case. That of *Bottomly* v. *Fairfax* (*ante*) "is an exact authority that a woman shall not be endowed "of a *trust*, and the received practice of inserting trustees to "bar dower would otherwise be of no signification. For "me, therefore, to do a thing merely upon the authority of

(*a*) *Cases temp. Talb.* 138.

(*b*) *Vernon's case*, 4 *Co.* 1.

"an *obscure* case, (*Fletcher* v. *Robinson*,) which does not "seem to have been determined upon that point neither, "and that might, perhaps, shake the settlements of 500 fa- "milies, is what I cannot answer to my conscience."

When the Lord Chancellor *here* says that he has not "*heard of any case*, cited to the contrary," it is evident that he did not consider the case of *Banks* v. *Sutton*, as going to the *general doctrine*; and thus his construction thereof accords with the ideas I have before stated upon that subject.

The case of *Godwin* v. *Winsmore*, in 1742,(*a*) before Lord Chancellor *Hardwicke*, was a bill by a widow for a *customary* estate. The husband's father bought the lands which were conveyed to him and *D.* and the heirs of the father: the father dies after devising the lands to the husband in tail: *D.* survived the husband: the bill was dismissed; and, by the Lord Chancellor, "it is an *established* "*doctrine* now that a wife is not dowable of a trust-estate: "indeed a distinction is taken in *Banks* v. *Sutton*, in re- "gard to a trust where it *descends or comes* to the husband "from another, and is not *created* by himself; but I think "*there is no ground for such a distinction*, for it is going on "suppositions which hold on both sides; and at the latter "end of the report Sir *Joseph Jekyll* seems to be very diffi- "dent of himself, and rested chiefly on another point of "equity; so that it is no authority in this case. But there "is a late authority, in direct contradiction to the distinc- "tion above taken in *Banks* v. *Sutton*, before Lord *Talbot*; "the case of the *Attorney-General* v. *Scott*." (*ante*.)

(*a*) 2 *Atk.* 525.

In the case of *Casborn* v. *Inglis*, (1737,)(*b*) Lord *Hardwicke* held, that if a woman seised of land, mortgages it, and marries, and the mortgage be not redeemed during the coverture, the husband shall be tenant by the curtesy: he admits the distinction before noticed between curtesy and dower, and says that "if any *innovations* were to be made, "it would be the nearest way to right, to *let in* the wife to "dower of a trust-estate, and not" (as was contended) "to "exclude the husband from being tenant by the curtesy of

(*b*) 1 *Atk.* 603.

MARCH, 1809.

Claiborne v. Henderson.

"it." And in *Dixon* v. *Saville*, in 1783,(*a*) it is directly decided that where the husband died *seised* of the premises in fee, the estate being mortgaged in *fee* before the marriage, and still continuing so, the wife is not entitled to dower. It was so decided, notwithstanding the husband had made no provision for his wife, except by giving her a carriage and horses, thinking, as his counsel argued, that his wife would be entitled to dower: and the Chancellor very briefly said that the "law was so much SETTLED that he "thought it wrong to discuss it, and that the argument in "the cases cited" (on behalf of the wife) "has generally "sprung from *compassion*." In that case the argument from *compassion* eminently existed and yet was overruled; whereas, in our case, the wife had, by the will of her husband, an *ample* provision, which, however, she rejected, and is now in possession of her legal share of his estate. In that case, too, the husband was not only *seised* of the land during the coverture, but *died seised;* whereas, in the case at bar, although the husband was entitled to the land during the coverture, he did not *die seised*, but on the contrary had sold it for a valuable consideration duly received; a part of which, either in the shape of real or personal estate, the appellees are probably at this moment enjoying. That case then is stronger than the one before us, and would seem to be a conclusive authority.

(*a*) 1 *Bro. Ch. Rep.* 326.

As to the case of *Dobson* v. *Taylor*, *April* General Court, 1751,(*b*) it was eminently a case of *compassion*. The wife of *Anderson*, in consideration of this dower in the equitable interest, parted with her *thirds* in other lands sold by her husband; whence it was argued that the wife was a *purchaser* of the interest in question; and, besides, her husband had died *insolvent*, so that she would have been *wholly destitute of support* had she not prevailed in this instance. It is also to be remarked that *Anderson*, the husband, died "*after the time Taylor was to convey*" the houses, which is a circumstance very much relied on by the Master of the Rolls, in the case of *Banks* v. *Sutton*, as before mentioned; whereas, in the case before us, *no time was limited for the*

(*b*) *MS Rep. by J. Randolph.*

conveyance, nor consequently had arrived during the coverture. In these respects, however, the case of *Dobson* v. *Taylor* is widely different from the case before us: respecting this case I can say with Lord *Talbot*, in the case of *Chaplin* v. *Chaplin*, (*ante*,) that "it is not a case in which "*abstracting from all other circumstances*, it has been de- "termined that there should be dower of trust." Admitting, therefore, the authority of the old General Court, to establish the law *on this subject*, in derogation of the decisions of the Court of *dernier resort*, in *England*, and admitting also the correctness of the decision as it applied to *that* particular case, (neither of which admissions am I at present prepared to make,) it does not follow that that decision is a conclusive authority for the appellees, in the case before us.

On the subject of precedents, I will beg leave to say, that it has never been pretended that the decisions of the old General Court have been considered conclusive as to rules of property, except in relation to subjects peculiar to *Virginia*, (slaves for example,) or, perhaps, on other subjects where there has been a series of uniform decisions in that Court, establishing the rule, and none of which have been reversed by the Court of *dernier resort* in *England*. The most that has been contended for is, to place those decisions on as high ground as the decisions in the Courts of *Westminster-Hall* in *England*: (See the opinion of Judge *Pendleton*, in *Wallace* v. *Taliaferro*, 2 *Call*, 489.) but, as *a series of uniform decisions* by those Courts, would undoubtedly overrule a solitary decision by one of them, (which *by being single* has perhaps not grown into a rule of property,) and, especially, when it is distinguishable from the other cases in *particular* and material circumstances; so, undoubtedly, would such a series of decisions by those Courts overrule a *single* decision of the latter class made by a coequal Court in *this* country, whatever may be the case of *single* and *recent* decisions which have neither been long acquiesced in, nor grown into rules of property. The sanction of *this Court* in relation to "uniform decisions which establish

MARCH, 1809.

Claiborne v. Henderson.

"rules of property" has been given in many cases; of which those of *Minnis, Executor of Aylett*, v. *Aylett*,(a) and *Boswell* v. *Jones*,(b) and which are strong, are at present recollected. As to the ideas of the *English* Courts on this subject of precedents, it will be seen that Lord Chancellor *King* declared in *Chauncey's* case,(c) that he was not for breaking in upon a general rule, although *he* did not *himself* see the propriety of it: that, in *Dawes* v. *Ferrers*,(d) the Lord Chancellor interrupted the plaintiff's counsel, saying he would never suffer the bar to dispute what was *the foundation and landmarks of the law;* though what they contended for might be reasonable if it were then to be *first adjudged*, yet, whatever the law was, provided it were known and certain, it would be well for the subject, though in some particular instances, it might be unreasonable; that in *Dormer* v. *Parkhurst*,(e) it was said to be the less evil to make a construction even contrary to the rules of the common law, than to overthrow 100,000 titles; and that in *Evelyn* v. *Evelyn*,(f) it is held that "successive determinations "make the law." To these I will add the doctrine of Judge *Blackstone* on this subject;(g) "that precedents and rules "must be followed, unless flatly absurd and unjust; for al- "though their reason be not obvious at first view, yet we "owe such a deference to *farmer times* as not to suppose "that they acted wholly without consideration." These are a *few* of the innumerable instances to be found in the books, of a reverence for decisions, and rules of property which have been established by the concurrent decisions of successive Judges, and acted under, for a long series of time. They ought to be adhered to as the *sine qua non* of all certainty and stability in the law, the private opinion of any single Judge to the contrary notwithstanding.

(a) 1 *Wash.* 302.
(b) *Ibid.* 322.
(c) 1 *P. Wms.* 410.
(d) 2 *P. Wms.* 2
(e) 3 *Atk.* 5.
(f) *Ibid.* 140.
(g) 1 *Black. Com.* 70.

I come next to the corroborative opinions of certain elementary writers, of high respectability.

In the treatise of equity, on which *Fonblanque* has annotated, which was published in 1737, and is a work of great merit, it is said, (vol. 2. p. 103.) that dower is not allowed

out of a *trust estate*, nor was it anciently of a *use*, though no manner of reason can be given for it if it were *res integra;* but that the authorities *are clearly so*, and it would overturn many settlements to make an alteration in it; and in the *notes* by *Fonblanque* it is said to be now *settled* that there shall be no dower in a trust-estate of inheritance whether created *by the husband or a stranger;* and that it will not differ the case, if the husband has even *obtained a decree directing the trustees to convey to him the legal* estate; and in *Ryal* v. *Rowle*,(*a*) it is said by Lord *Hardwicke*, that the only case in which as to rules of property, Courts of Equity do not follow the law is that a woman is not dowable of a trust-estate. In 1 *Fonb.* 414. it is said that money decreed to be laid out in land is considered as land, (on the principle that what is agreed to be done shall be considered as done,) *inter alia*, so as to be subject to the curtesy of the husband, but it will not entitle a woman to dower.

(*a*) 1 *Vesey*, 357.

In 2 *Black. Com.* 128. it is said that tenant in dower is where the husband *is seised* of an estate of inheritance, &c. and, again,(*b*) the Courts now consider *trusts* either when declared or resulting by implication as *equivalent* to the *legal* ownership, &c. except that they are *not yet subjected to dower;* more, the author adds, from a cautious adherence to some *hasty precedents* than from any well grounded principle. It is true that I have seen no good reason assigned for the exclusion of the case of dower: but the foregoing cases shew that the law on this subject, if it arose originally from hasty precedents, has since been *established* by the solemn and deliberate adjudications of some of the greatest Chancellors who ever held the seals in *England.* These numerous and uniform decisions, would seem to conclude this question. But, before I dismiss the subject, I will beg leave to avail myself of the testimony of a late writer of our own country respecting it. In the new edition of *Black. Com.* vol. 2. p. 128. the editor, after transcribing, in his note, the act of 1785, upon this subject, adds, "in cur- "tesy the law seems to have always been that a husband

(*b*) *Ibid.* 137.

MARCH, 1809.

Claiborne v. Henderson.

"might be tenant by the curtesy of a *trust-estate*, in some "cases where a wife would not be endowed of such an es- "tate: for, if the wife, make a mortgage in fee before mar- "riage, (*Casborn* v. *Inglis*, *ante*,) the husband shall be te- "nant by the curtesy of the equity of redemption; but, if "the husband had made a mortgage in fee, and afterwards "married, the wife could not be endowed of this equity of "redemption."(*a*) Again, in p. 131. after again inserting the act of 1785, he adds, "IN CONSEQUENCE OF THIS ACT it "would seem that a wife might NOW be endowed of a *trust-* "*estate* in some cases where it was formerly held, that she "could not be endowed." The editor then states several cases of trust-interests, in which he supposes she is *now* dowable, and in which it had been formerly decided otherwise; and adds, "In the case last cited, (*Godwin* v. *Winsmore*, *an-* "*te*,) Lord *Hardwicke* lays it down as an *established doctrine*, "at that day that a wife is not dowable of a *trust-estate*, "and that she was not dowable of a *use* before the statute "of 27 *Hen.* VIII." and in p. 337. after again transcribing the act of 1785 on this subject, the editor adds, "BY THIS "ACT the question frequently agitated in the *English* "Courts of Equity, viz. whether a widow be dowable of "a trust-estate, seems to be decided." If any thing further was necessary to shew that *by* the act of 1785, the law on this point was *altered*, that aid might be derived from the terms of the act itself. They are that "where any person, "to whose use, or in trust for whose benefit another *is or* "*shall be* seised of lands, tenements, or hereditaments, "hath or shall have such inheritance in the use or trust as "that, if it had been a LEGAL *right*, the husband or wife "of such person would have been entitled to curtesy or "dower, such husband or wife shall have and hold, and "may, by remedy proper in similar cases, recover curtesy "or dower of such lands, tenements, or hereditaments." (*V. L.* 1785. c. 62.)

(*a*) 1 *Bro. Ch. Rep.* 328. *Dixon* v. *Saville.*

This statute, in its nature *prospective*, does not purport to be a *declaratory* act; the character of which is that, "for "avoiding all doubts and difficulties, it *declares* what the

"common law is and *ever hath been.*"(a) It does not attempt the vain purpose, as some of our acts have sometimes done, by express words, to impugn and reverse the ANTECEDENT decisions of the Courts. It merely goes to *alter* the law in question, as to all those cases in which the rule as antecedently settled, might be at variance with the standard set up by this act.

(a) 1 *Black. Com.* 86.

Sensible as I am that this great question, shaken by the decree in the present case and the opinion just delivered, ought for the public good to be fairly met and promptly decided, I have thus chosen to go somewhat at large into it. I am not *sure* that this was *absolutely necessary* in order to sustain the case of the appellants in the present instance. Several subordinate points were made, which it will not be necessary for me to decide, (nor have I duly considered them,) unless the opinion of the Court were adverse to my own upon the principal question. This Court having imposed upon it the immense responsibility of settling the law of the country, (as well as deciding the causes of the suitors,) I am sensible that great mischief may result, as well from deciding *too much*, as from taking *too wide a range* in relation to what ought properly and necessarily to be decided. For this reason, I shall pass by, for the present, several topics which were urged in the argument, and several which are contained in the Chancellor's decree. In that decree, however, there is one topic which I cannot entirely pretermit.

The decree states, that *English* Chancellors, for reasons *peculiar* to that country, or *not existing* in this, have denied the application of the maxim, "that what is agreed to be "done shall be considered as done," to the claim of *dower*, though they have admitted it to favour an estate by the *curtesy*. That venerable Judge may have known the *peculiar* reasons, which existed in *England*, and do not exist here, supporting the distinction as in that country, although the preceding authorities shew that the eminent Chancellors and writers I have quoted, were *ignorant* of such reasons. They took it up, as I shall, as a rule of property,

MARCH, 1809.

Claiborne v. Henderson.

which has been *established*, and which it is essential to the peace of the nation should be adhered to. If, however, in the darkness in which I am enveloped, as to the reasons of the rule, I should indulge myself in conjecture, I should say, without hesitation, that the reasons were perhaps more *strong* in favour of the claim of dower in *trust-estates* in *England* than in this country. In this *new* country where many people hold their lands by *patent* rights, where the deeds of conveyance are usually extremely *simple*, and conveyances in trust very rare, it is evident that widows would more generally be entitled to dower (under the existence of the principle in question) in our country than in *England*. In that country, settlements in trust, with all the *paraphernalia* of conveyancing, appear every day in all their variety: the right by patent is obsolete through lapse of time, and the simple modes of conveyance are comparatively rare. The *interests* of dower therefore called much more loudly for a change of the rule in that country than in this. But, while, for the foregoing reasons, in this country, the observance of the rule in question would but seldom have deprived a widow of her dower in lands *permanently owned* by her husband, the relaxation of it, prior to the commencement of the act of 1785, and *its* operation since, would, *perhaps*, in many cases where imperfect titles to lands not intended by the husband for *permanent* ownership have passed, or may pass, through *many hands*, as a species of merchandise, and on the transfer of which the husband has received, or may receive, a valuable consideration, which has enured, or may enure, to the benefit of the wife, (as in the case before us,) clog those transfers with innumerable claims of dower, and otherwise be productive of infinite litigation and injustice.

The position taken by the Judge who preceded me, that the paying for this land, and gaining possession of it by *Black*, conveyed to him a *legal* estate in the premises, is at least a *new idea* in this country; it is at least a *new discovery*. While hundreds of bills in equity have been brought to coerce *deeds*, under like circumstances, it is pre-

sumed that no man, for the last century at least, has supposed that he could recover land in ejectment, on such a title. That *common error*, under which all the Judges, all the lawyers, and all the people of this country have so long acted, must outweigh all speculations to the contrary, however ingenious and elaborate. In the language of *Blackstone*, "we owe such a deference to other Judges and former "times, as not to suppose that they acted wholly without "consideration." This consideration ought to weigh in this case, were the words of the act even less imperious than they are. In a case so plain it is difficult to quote authorities. I believe however, that I have *one* which fully applies to the case before us.

In the case of *Rowton* v. *Rowton*,(a) the fact was, that the son, whose widow claimed dower, had removed to a tract of land *at the express instance of his father*, possessed it several years during the coverture, and *laid out money* and labour in improvements, and died in possession of it. It was not denied, and cannot be, that this consideration is entirely equivalent to that of *money paid*. Notwithstanding the circumstances aforesaid, the father actually recovered the premises from the widow of the son after his death, in the District Court of *Prince Edward*, on the ground that the LEGAL estate was in him. This decision was *acquiesced* in, and not appealed from as at law; but a bill in equity was brought to establish the right of the widow in equity, and let her in for dower. The transaction having happened *subsequent* to the act of 1785, the widow claimed her dower *only* under the provision of that statute. Three of the Judges overruled her claim; but it was on the ground of no contract having been proved on the father, as they thought, for more than a LIFE estate in favour of the son: two other Judges thought that the son had an EQUITABLE estate in fee, on the testimony, and, on that ground, were in favour of the dower under the act of 1785. It never entered, however, into the head of any man at the bar, or on the bench at that time, that the son had a LEGAL estate in the premises. The counsel in opposition to the claim of

(a) 1 *Hen & Munf.* 92.

MARCH, 1809.

Claiborne v. Henderson.

the wife, stated that it was not even ASSERTED by his adversary that the son had the *legal* estate in the premises; nor was it asserted by any of the adverse counsel, although *some* of them are at least as learned in the black letter as is necessary. The same counsel also admitted that, *under the act of* 1785, the widow was entitled to dower, provided it should appear that her husband had such *an equity in a fee-simple estate as would authorise a Court of Equity to* DECREE THE LEGAL ESTATE; which, however, he denied to be proved in the cause: it never entered into his head that it would be contended that the son had in fact the *legal* estate, by reason of the *promise*, the *possession*, and the *consideration* paid for the same. In deciding the case the Judge who has just spoken, *disclaimed*, in effect, the position he now advocates, by not contending for it then; by contending, on the contrary, that these circumstances entitled the son to "*a* "PERFORMANCE *of the father's promise*," in a manner the most beneficial for himself and family.

Judge *Carrington*, who concurred in opinion with Judge *Tucker*, says, (after viewing the testimony in the same light with him,) "thus I think an EQUITABLE title to hold the "land in fee-simple was vested in the son."

I consider this case as a strong authority on this point; it was eminently a case of *compassion;* for the wife was "abandoned to want and distress" by the decree of the Court. No lawyer and *no Judge* contended that the son had *more* than an *equitable* estate in the premises; and the case would probably have been given up on the part of the widow, but for the intervention of the act of 1785; and yet there was an *agreement for a fee*, (according to the opinion of two Judges,) *long possession* during the coverture, and money and labour laid out and expended. It did not, however, occur to the *counsel* in that case, (more than in the case before us,) that these circumstances gave a *legal* estate to the son, in the total absence of a deed or other writing. In coming to this conclusion, the two Judges in this case, like their predecessors in former times, no doubt had the

act of 1734, now relied on, before them, as well as the act of 1710; and when we consider that that act has never been relied on for the purpose now contended for, through a long course of time, either by the bench or bar, it affords a strong presumption that the construction now set upon it, by the Judge who preceded me, is not to be maintained.

The words of the act of 1710, which I suppose to be so imperious, are, "that no lands, tenements, or hereditaments "shall *pass*, alter, or change from one to another, whereby "an estate of inheritance in fee-simple, fee-tail, &c. shall be "made or take effect in any person or persons, or any use "thereof to be made by *bargain and sale*, lease and release, "&c. or other instrument, UNLESS THE SAME BE MADE BY "WRITING indented, sealed and recorded," &c.(*a*) Is it possible that any words can be more conclusive than these, to shew that no estate of inheritance *passed* from *Allen M'Rae* to *William Black*, for want of *a writing indented and sealed*, and that, consequently, his wife was not entitled to dower.

(*a*) Old code of *Vir. Laws*, edit. of 1733, p. 257.

Such is decidedly my opinion upon the *general* question. Some objections arising out of this particular case deserve, however, to be briefly noticed.

It is said that the *acceptance* by *Kirkpatrick* of the deed from *Black*, of *May* 1773, estops him and those claiming under him, from objecting that *Black* had not the legal title. I answer that equity is not fond of estoppels, especially in a case which is so far from being a case of *compassion*, that the widow would in fact get *double portions*. But could that deed be construed to have that effect? It indeed amounts to a complete *covenant*, on the part of *Black*, to assure a perfect title; but it is remarkable that the deed itself does not *deduce* the title down to *Black*, but stops at *Allen M'Rae*, having deduced the title no further. I consider, therefore, that BOTH parties understood at the time that the legal title was not *then* in *Black*, but in *M'Rae*, although *Black* covenanted to procure and convey one; and this idea is fully supported by the testimony.

MARCH, 1809.

Claiborne v. Henderson.

It has been said by counsel, that the appellees in this case might elect to consider *Black* as a *disseisor*, and that the wife of a disseisor is entitled to dower. I shall not stop to inquire whether this position be tenable or not; but it is evidently in conflict with another ground of title set up in this case, which is, that the purchase in this case for a valuable consideration, accompanied with possession, conveys a LEGAL title. This idea of election is also reprobated by the appellees' own statement in their bill, that they had actually received a *deed* for this land, which, by accident, has been lost. Both these grounds and pretensions are entirely incompatible with the idea of a *disseisin*, which is defined to be "a *wrongful putting out* of him that is seised of the freehold."(*a*)

(*a*) 3 *Bl.* 145.

I have thus viewed this claim of dower as one which (however founded in morality and justice) must, *as to the extent thereof*, be regulated by the rules of law; and that we are as much at liberty to violate those rules, in relation to the *portion of interest* claimed for dower, as in relation to the *nature* and *quality* of the estate out of which it is to issue: I have considered that the law on this subject is *settled*, perhaps beyond the power of *any* single case, and certainly beyond the power of the *single* and *varying* case of *Dobson* v. *Taylor*, to affect or alter: that the case before us, so far from being a case of *compassion* on the part of the widow; so far from presenting the instance of a widow destitute of all other means of support, as was the fact in the case of *Dobson* v. *Taylor*; presents the spectacle of an application to a *Court of Equity* for DOUBLE *portions*; for, while the appellees are actually enjoying the price given as an equivalent, they demand also their share of the thing for which that price has been received: I have supposed that great and unforeseen clogs and mischiefs would result from carrying this doctrine to the extent contended for on the part of the appellees, in relation to a country in which lands held by equitable title only, pass, in some sense, as a species of merchandise; while, at the same time, the widows are entitled to their share, under the act of distributions, of *the*

price for which such lands have been sold; and it is also true that almost all lands intended for *permanent ownership*, are in this country held by perfected *legal* titles; and that, however this may be as a matter of policy, and, whatever may be the true construction of the act of 1785, on this subject, that act has neither altered, nor had the Legislature power to alter the law, as it related to pre-existing cases.

On a long and deliberate consideration of the case, I must therefore declare it as my opinion that the decree in question is erroneous, and ought to be REVERSED, and the bill of the appellees DISMISSED.

Judge FLEMING. Two questions are presented in this case:

1st. Whether *William Black* had a legal estate in the lot No. 26. in the town of *Alexandria*, during his coverture with the appellant, Mrs. *Claiborne?* and if not,

2dly. Whether she is dowable of the equitable estate?

With respect to the first point, it is laid down, *Co. Litt.* 9. a. and 121. b. and in other cases which have been cited, that corporeal hereditaments, which lie in livery and seisin, either in deed or in law, may pass to a purchaser for a valuable consideration, without deed; and it was argued, that as *William Black* purchased the lot in question of *Allen M'Rae*, paid the purchase-money, and, by his agent, received rents for the same, it amounted to a seisin in law, and vested the legal estate in him, and consequently, that having the title so vested, during the coverture, his widow was instituted to dower therein.

This position may be correct at common law, but it appears to me that our act of Assembly of 1748, which was then in force, and which I conceive to be imperative, has effectually overruled the doctrine. By that act it is declared that "no lands, tenements or hereditaments, within the "then colony, shall pass, alter, or change from one to ano-"ther, whereby any estate of inheritance in fee-simple, fee-"tail general or special, or any estate for life or lives, or

MARCH, 1809.

Claiborne v. Henderson.

"any greater or higher estate, shall be made or take effect "in any person or persons, or any use thereof to be made, "by bargain and sale, lease and release, deed of settlement "to uses of feoffment, or other instrument, unless the same "be made by writing, indented, sealed and recorded, in the "records of the General Court, or of that County where "the land mentioned to be passed or granted shall lie, in "manner following, that is to say, to be recorded within "eight months, where the party making the same resides "within the colony, and not admitted to record unless ac- "knowledged in court, by the grantor in person, to be his "or her act and deed, or else that proof thereof be made, in "open Court, by the oaths of three witnesses at the least. "And all deeds, conveyances, &c. not made and recorded "according to the directions of the said act, declared void, "as to creditors and subsequent purchasers, but are never- "theless valid and binding between the parties and their "heirs, although not recorded." But there being no proof that any deed or writing ever passed between *M'Rae* and *Black*, for conveying the said lot, it appears to me that the latter never had a *legal* title to the same, and consequently, that neither he, nor any claiming title under him, could have maintained an ejectment to recover possession thereof, but must have resorted to a Court of Equity to perfect the title. And having an equitable title only, we are next to inquire whether the widow be instituted to dower in the premises?

There have been some contrariety of opinions on the subject amongst the Judges in *England*, and a distinction taken between cases where dower is claimed against the heir, and against a purchaser, in favour of the latter. The principal case that seems to favour the claim of the appellants, is that of *Banks* v. *Sutton*;(a) but that case has been long since overruled in a number of instances; and it seems now well settled that a wife shall not be endowed either of a trust estate of inheritance, or of an equity of redemption of a mortgage in fee. And Lord *Hardwicke*, in giving his opinion in the case of *Godwin* v. *Winsmore*,(b) observed

(a) 2 *P. Wms.* 701.

(b) 2 *Atk.* 325.

that there was no ground for the distinction taken by Sir *Joseph Jekyll*, in the case of *Banks* v. *Sutton*, in regard to a trust, where it descends or comes to the husband from another, and where created by himself, as in the case of *Bottomly* v. Lord *Fairfax*.(a) And his Lordship cited the case of the *Attorney-General* v. *Scott*, before Lord *Talbot*, as overruling the case of *Banks* v. *Sutton;* also *Chaplin* v. *Chaplin*,(b) and other cases that have been cited. And in a late case of *Dixon* v. *Saville*,(c) it was decided by the Lords Commissioners, *Loughborough*, *Ashhurst*, and *Hotham*, unanimously, that a widow is not dowable of an equity of redemption; and this in a case too, where a very trifling provision was made for the widow, by her husband's will, which is not the case in the cause now before the court, as Mrs. *Claiborne* now enjoys a very handsome dowry in her late husband's estate; and the contest is now between her and fair purchasers, for valuable considerations, without actual notice of her intermarriage with *William Black*. Indeed there has not been, that I recollect, a single case adduced, where a woman has been endowed of a mere equitable estate in the husband.

(a) *Prec. in Cha.* 336.

(b) 3 *P.Wms.* 234.

(c) *Bro. Ch. Cas.* 326.

On these grounds then, and on these authorities, I am of opinion that the decree is erroneous, and ought to be reversed, and the bill of the complainants dismissed with costs.

By a majority of the Court, the decree of the Chancellor reversed, and the bill DISMISSED.