# REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

# COURT OF APPEALS

OF

# VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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## LATHAM *v.* LATHAM.

*Friday, April 23d,* 1802.

The heir cannot maintain an action of trespass for a trespass committed on the quarantine lands of the widow, before assignment of dower.*

Robert Latham, jun. brought trespass against Robert Latham for breaking his close, containing thirty acres, treading and consuming his grass and cutting down his trees. Pleas, *not guilty*, and *the act of limitations*. Issue. Upon the trial of the cause, the plaintiff filed a bill of exceptions to the Court's opinion, stating, that the defendant moved the Court to direct the jury that, in a case of intestacy, the heir could not be in possession of any part of the tract of land on which the mansion-house stood, although the same should not be a part of the plantation, or enclosed land; and that the Court directed the jury that the heir could not be in possession until the dower was assigned. That the plaintiff then offered to prove the trespass on certain woods, part of the tract of land on which the mansion-house stood; but the Court directed that no testimony to prove such trespass, during the life of the widow, [182] could be given. Verdict and judgment for the defendant; and the plaintiff appealed to the District Court,

* See the statute giving a widow the use of the mansion-house, and plantation adjoining it, rent free, until her dower is assigned, 1 R. C. of 1819, p. 403, § 2; and the same right, modified,—Code of 1849, p. 475, § 8.

A plaintiff in ejectment may recover, although a widow is entitled to dower in the land, if it *has not been assigned:* for, till such assignment, she has no right of *possession*, and the recovery is *subject to her title*. *Chapman* v. *Armistead*, 4 Mun. 382.

Or, he may recover against the widow herself, if it do not appear that the land was assigned as her dower, or that it was attached to her deceased husband's mansion-house. *Moore* v. *Gilliam*, 5 Mun. 346.

Widow obtains a decree against infant heir, directing commissioners to assign dower, which she neglects to have done for a year; meantime remaining in the mansion-house, and letting the heir's agent cultivate the land. After dower is assigned, she receives a third of the rent of the plantatien for that year, claiming no more; but afterward sues for the other two-thirds. HELD, she cannot recover them. *Grayson and wife* v. *Moncure*, 1 Leigh, 449.

Wife's parting with her dower-right, is sufficient consideration for a subsequent deed conveying other property for her benefit. *Harvey* v. *Alexander*, 1 Rand. 219. *Taylor* v. *Moore*, 2 Rand. 563.

Widow is not entitled to dower in land which husband had mortgaged before marriage. Her only claim is to dower in the equity of redemption. *Heth* v. *Cocke and wife*, 1 Rand. 344.

One sells and conveys land; and on the same day the buyer conveys it to trustees, to secure payment of the purchase money. The buyer's widow has no title to dower in the land, as against the trustees or their vendee. *Gilliam* v. *Moore*, 4 Leigh, 30.

Widow has no title to dower in lands of which her husband, when he died, had but a reversion, or remainder expectant on a life estate. *Blow* v. *Maynard*, 2 Leigh, 30; *Cocke's ex'or.* v. *Phillips*, 12 Leigh, 248.

where the judgment of the County Court was affirmed; and from the judgment of affirmance, the plaintiff appealed to this Court.

WILLIAMS, for the appellant.

The Court below erred in supposing, that the heir could not maintain trespass before the widow's dower was assigned. For the act of 1705, *Old body of laws*, p. 31, § 8, [3 Stat. Larg. 374,] only means, at most, such lands as would be useful to the widow; that is to say, the messuage and cleared land, but not the wood-land; as that, instead of being useful, would be burthensome and expensive. But the Court interrupted the enquiry prematurely. For the parties were at issue upon the point, whether a trespass had been committed within five years or not; and, therefore, the plaintiff ought to have been allowed to shew an injury within that period. It does not appear from the bill of exceptions, but there might have been some agreement between the heir and widow, so as to avoid the necessity of proving an assignment of dower; and, perhaps, this would have been shewn, if the Court had not abruptly put an end to the enquiry.

F. T. BROOKE, contra.

The Court merely decided on the points submitted to them; that is to say, 1st. Whether the heir could enter on the quarantine lands? 2d. What was included within the quarantine? As to the 1st, it is clear that at common law, trespass could not be maintained by the heir within the forty days; and, therefore, not in this country until the assignment of dower. As to the 2d, it ought not to be confined to the arable land; for, without the wood-land, the other would be useless to her. The Court will not suppose, that there was any other evidence than what is set forth in the bill of exceptions; and, therefore the cases supposed by Mr. Williams are unimportant. The act of limitations does not admit any thing, as the declaration does not state the whole case.

WILLIAMS, in reply.

The Court will not presume that no other case exists than that may by the bill of exceptions; but will rather intend, that the part excepted to only is stated. It is [183] not true, that the heir could not, at common, maintain trespass within the forty days. The plea is entire, and the parts not separable. Of course, when the defendant says he did not

commit the trespass within five years, he admits he did it at some time; and the Court ought to have permitted the plaintiff to prove at what time: Whereas, their opinion is, that the plaintiff could not prove a trespass until the assignment of dower was established.

*Cur. adv. vult.*

LYONS, Judge, delivered the resolution of the Court, that the judgment of the District Court should be affirmed.

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## CURRY *v.* BURNS.

*Wednesday, May 12th,* 1802.

*Quære.* Whether the Court of Chancery can grant a bill of review to a decree of the Court of Appeals, or of a County Court, upon new matter being discovered after the decree was made?*

Burns filed a bill in Chancery in the County Court of Berkeley, stating, that on the 13th of March, 1756, he obtained a warrant from the proprietor's office for 400 acres of land, and paid the usual office fees. That by virtue of the said warrant, Baylis, one of the proprietor's surveyors, surveyed 214 acres, and returned a plat thereof to the office; for which survey and return, the plaintiff likewise paid the usual fees; and, in order to obtain a deed, was always ready and willing to pay the *composition* and other customary fees, which he actually offered to the proprietor about the month of May, 1770, and demanded a deed; but the same was refused. That Curry obtained a deed from the said proprietor's office for 140 acres, part of the
[184] said 214 acres, on the 20th of August, 1768; and had recovered a judgment in ejectment therefor against the plaintiff; who prays an injunction, and for general relief.

* If a decree has been affirmed by the Court of Appeals, a Bill of Review ought not to be allowed for any error apparent on the face of the proceedings; but if new matter be produced, not known to the applicant at the time of the decree, the Chancery Court may grant a bill of review. *McCall* v. *Graham et al.* 1 H. & M. 13.

Bill of review lies only after a final decree. *Bowyer* v. *Lewis,* 1 H. & M. 554; *Banks* v. *Anderson,* 2 H. &. M. 20; *Ellzey* v. *Lane's ex'x. id.* 589;

What are or are not proper grounds for a bill of review. *Triplet* v. *Wilson, &c.,* 6 Call, 47; *Randolph's ex'ors.* v. *Randolph's ex'ors.,* 1 H. & M. 181; *Quarrier* v. *Carter's rep.* 4 H. & M. 242; *Braxton* v. *Lee's heirs,* 4 H. &. M. 376; *Winston* v. *Johnson's ex'ors,* 2 Mun. 305; *Franklin* v. *Wilkinson,* 3 Mun. 112; *Jones* v. *Pilcher's devisees,* 6 Mun. 425; *Dunbar's ex'ors.* v. *Woodcock's ex'or.* 10 Leigh, 629.