REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1812.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. I. By WILLIAM MUNFORD."

IN CONFORMITY to the act of 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."

CHARLES CLINTON,
Clerk of the District of New-York.

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will (it must be obvious to every one) he was pretermitted, solely, for want of knowledge in the father, when he made his will, or at the time of his death, that the mother was in a state of pregnancy. Any other supposition would be against every principle of justice, natural affection, and humanity. Nature has implanted in the *birds* of the air, and in the *beasts* of the field, a strong affection, and tender regard for their own offspring. And, had the marriage promise been sufficiently proved, as stated in the bill, I might, perhaps, have been of opinion that, in *equity*, it ought to operate in favour of any *issue* that might be the fruit of the marriage; for such *issue* must, undoubtedly, have been in the contemplation of the parties to the contract at the time of making it: and I should have made a long pause, before I could have decided in favour of the appellants, to the exclusion of the appellee from any part of the estate, rights and interests of his father. And such have been the impressions of our Legislature on the subject, that, so long ago as the year 1785, in the "*act concerning wills and the distribution of intestates' estates*," ample provision is made for *posthumous* children, and such as are pretermitted in any last will and testament, though in life at the death of the testator.(*a*)

(*a*) 1 *Rev. Code*, c. 92. s. 3.

I am of opinion, upon the whole, that the decree is correct, and ought to be affirmed.

Thursday, November 8.

Chapmans *against* Chapman.

A record of one suit cannot be read as evidence in another, on the ground that the *defendant* and *one of* the *plaintiffs* in the latter suit were parties to the former, and that the same point was in controversy in both; *another plaintiff*, and the person under whom both the said plaintiffs *jointly* claim, not having been parties to such former suit.

UPON an appeal from a decree of the late Judge of the Superior Court of Chancery for the *Richmond* District, in

2. In such case, the circumstance that the "*writings and evidences*" in the former suit *were read* at the hearing of the latter, without any exception taken *at that time* appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his *answer* having objected to the admission of the *verdict and other proceedings* in the former suit, but *offered* to agree that the *depositions only* might be read; to which offer no assent appeared on the part of the plaintiff.

a suit brought by *Nathaniel Chapman* against *George Chapman*, sen. his uncle, and revived, on the death of the said *Nathaniel*, by a bill of revivor on behalf of *George Chapman*, jun. and *John Chapman*, his brothers and *co-heirs*.

The original bill stated that *Nathaniel Chapman*, grandfather of the plaintiff, and a second *Nathaniel Chapman*, heir at law of that grandfather, had successively died seised and possessed of a very considerable real and personal estate; and that, upon the death of the latter, the same descended to *Pearson Chapman*, whose eldest son and heir at law the plaintiff was: that *Constant Chapman*, widow of the elder *Nathaniel*, (whose children were the second *Nathaniel*, the said *Pearson*, *George* the defendant, and sundry daughters,) prevailed on the said *Pearson* to convey to the said defendant, by three deeds, a tract of land in *Fairfax* County, some lots in the town of *Alexandria*, and a tract of land, lying in *Fauquier* County, called the *Pig-Nut* tract; by promising to secure to him, either by will or deed, as much, or nearly as much, of the estate which then was at her disposal, as she should leave to the said defendant; that these deeds expressed the "consideration of *natural love and affection*, and of ten shillings current money, paid to the said *Pearson* by the said *George*;" but the *actual*, or *principal* consideration was the *promise* aforesaid; that two of the three deeds were acknowledged by the grantor, in open Court, in the year 1766, and duly recorded, but the third (which was for the *Pig-Nut* tract) was acknowledged in the presence of *two* witnesses only; that, having seen his mother's will, giving *nearly all* her estate to her son *George*, the defendant, the said *Pearson* obtained that deed, and suppressed it; that the defendant had sued the said *Pearson* in the County Court of *Fauquier*, to compel a renewal of that deed; and that suit abating by the death of *Pearson*, brought another in the High Court of Chancery against *George Chapman*, jun. his devisee; that, in the year 1793, *George Chapman*, jun. claiming as devisee, commenced an action of ejectment, for the said *Pig-Nut* tract of land, in the District Court

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of *Dumfries*, against the said *George Chapman*, sen. who thereupon filed an amended bill, in the High Court of Chancery, praying an injunction to stay proceedings on the ejectment; which was granted upon the condition of confessing a judgment at law, and relying upon his equitable title alone; (in which bill of injunction he alleged that the number of witnesses to the deed for the said *Pig-Nut* tract, not being sufficient to have it admitted to record, it was returned to *Constant Chapman* to get it more fully authenticated, and was, for that purpose, by her delivered to her son *Pearson* the grantor; under a solemn assurance from him that he would acknowledge it in the presence of a third witness, and return it to her; instead of doing which, he had destroyed it, on the pretext that he had found a will, executed by her, wherein she had violated her promise, made him when he executed those deeds; having left him no part of her estate, or, at most, a very inconsiderable legacy;) that the said *George Chapman*, jun. the devisee as aforesaid, answered, and stated the said *Pearson's* motive for executing the deed which he had afterwards suppressed; that, after taking much testimony on both sides, the Court directed an issue to be tried to ascertain whether the said *Constant* made the promise before mentioned; and the Jury found that she did; that, thereupon, the Chancellor dismissed the said bill of injunction, and *George*, the devisee, obtained possession by virtue of the judgment in ejectment; which decree of dismission was affirmed by the Court of Appeals.

The bill proceeded to state that the record in the said suit between *George Chapman*, sen. and *George Chapman*, jun. *so far as the same concerns the said promise*, had an intimate connection with the present suit; the present defendant having been a party thereto, and having had an opportunity of cross-examining all the witnesses: it therefore prays that the said record, with all the exhibits in that suit, may be taken as part of this bill, and that all matters contained therein, *tending to the establishment of that promise*, may be received as proper evidence in this cause; averring

that the *promise* so found by the Jury in *that* suit was never complied with, but fraudulently broken by the said *Constant Chapman;* and therefore that the said deeds were obtained from him by *fraud.*

The prayer of the bill was for a *full answer to the premises*, a surrender of the deeds, and general relief.

The defendant *answered* very fully; admitting the possessions, deaths and intestacies of the two first *Nathaniel Chapmans*, and the descent on *Pearson Chapman;* but denying that *Constant Chapman* made the promise mentioned in the bill; and alleging that *Pearson Chapman* could not have seen his mother's will before he refused to return the deed for the *Pig-Nut* tract; for the refusal was in 1766, and the will was made in 1767. He *objected to the admission of the verdict, and proceedings in the former cause*, as evidence in *this;* but was "*willing to consent* that all *depositions* in the said suit should be read by mutual consent; a right being retained to either party to examine such of the same witnesses as are now alive, and to exhibit other new testimony." *No such consent appears to have been given on the part of the plaintiff.*

To this answer there was a general replication; after which the plaintiff died intestate, and the suit was revived by his co-heirs above mentioned; the bill of revivor, praying "that the suit and the proceedings therein stand revived in their names, and be in the *same plight* and condition they were in at his death;" and seeking also a discovery of rents and profits. The defendant answered this bill; discovering, in general, the rents and profits, and averring that they arose principally from the possessor's improvements. Commissions were awarded, (without any replication to the last answer,) and some depositions were taken.

The cause came on finally to be heard, "*on the writings and evidences formerly read in the cause between two of the parties*," (*George Chapman*, sen. and *George Chapman*, jun.) "and on the the present bill and answer;" on consideration

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whereof the Chancellor *dismissed the bill with costs;* from which decree the plaintiffs appealed.

This case was argued by *Warden* and *Wickham*, for the appellants, and *Botts* and *Wirt*, for the appellee. Many points were made, and elaborately discussed: but the decision of this Court having turned on one point only, and that being sufficiently illustrated by the ensuing opinion of Judge TUCKER, (with which the other Judges agreed,) the arguments of counsel are omitted.

Saturday, November 30. The Judges pronounced their opinions.

Judge TUCKER, after stating the case, proceeded as follows.

A preliminary question in this case is, whether the record, verdict, depositions and exhibits in the before-mentioned suit between *George Chapman*, the uncle, defendant in the present suit, and *George Chapman* the nephew, *one* of the parties complainant in the present suit, originallly brought by his elder brother *Nathaniel*, and now revived in the names of *himself* and his brother *John*, as co-heirs of *Nathaniel*, are to be considered as evidence in this cause, or not.

The general rule as to giving verdicts and judgments in evidence(*a*) is, that they are not to be admitted but between *parties*, or *privies;* to which general rule there are some few exceptions, one of which is that, where a fact to be proved is such whereof *hearsay* and *reputation* are evidence, a special verdict between other parties stating a *pedigree* would be evidence to prove a descent; for, in such a case, what any of the family, who are dead, have been heard to say, or the *general reputation* in the family, entries in family books, &c. are allowed.(*b*) But this is not such a case: *hearsay* was never yet permitted as evidence to prove a *promise*, or the *consideration* upon which a deed

(*a*) See *Pegram v. Isabel*, 2 *H. & M.* 200.

(*b*) *Bull. N. P.* 231. 233.

was made. The *general* rule, then, must prevail. A corollary from that rule is, that nobody can take *benefit* by a verdict, that would not have been prejudiced by it, had it gone contrary.(*a*) According to the general rule and its corollary, *Nathaniel Chapman* could not avail himself of the verdict between his younger brother, then in full life, and his uncle; for he was not his heir, nor did he claim the lands *under* him. Neither could he be prejudiced by that verdict between those parties; because he claimed as heir to his father *Pearson Chapman*, whose heir his younger brother was not, nor, as the laws then stood, could be. Consequently, had there been no abatement of the suit, the record and verdict in the former suit, between *George* the uncle, and *George* the brother, could not have been admitted as proper evidence in this suit. Is the case altered by the abatement, and the revivor in the names of *George* the brother and *John* his brother, as heirs of *Nathaniel?* I conceive not. Whatever right *George* the brother might have, in an *original* suit between himself and his uncle *George*, to avail himself of that verdict, he is to be regarded, in the present suit, only as ONE OF SEVERAL HEIRS of his brother *Nathaniel*, ALL of whom *collectively*, represent that brother as his *heirs*, or more properly as his HEIR; according to the known rule of law that *all* the *heirs* in PARCENARY *make but* ONE HEIR.(*b*) As, therefore, he comes to revive and continue the suit *jure representationis*, the suit must remain in the same plight and condition, according to the prayer of his bill of revivor, as if his brother *Nathaniel*, the original complainant, were still alive.

(*a*) *Hard.* 472. *Gilb. Evid.* 34, 35. *Viscountess Pembroke* v. *Currier.*

(*b*) *Co. Litt.* 163.

Again; whatever *personal* right *George* might have to avail himself of that verdict, that right was not communicable to another, not claiming as a *privy* under him. Therefore *George*, in a joint suit brought by himself and his brother *John*, who does not claim *under* him, but *independently* of him, cannot be entitled, from the bare circumstance of their being joint complainants in the same suit, to commu-

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nicate to that brother the benefit of that verdict, to which *John* was neither a party, nor privy; and by which he could not possibly have been prejudiced. Therefore, taking the matter either way, I think the record in the former suit inadmissible as evidence in this cause. This case appears to me to be much stronger than that of *Payne* v. *Coles*, lately decided: in the decision in that case I cheerfully acquiesce, and think it furnishes an additional reason for my present opinion.

As to the *depositions;* the offer by the defendant to admit them to be read, alone, without the verdict or other parts of the record, not being accepted by the complainant, who insisted on the whole being admitted as evidence, the matter remains as if no such offer was made; and the same reasons will apply for rejecting *them*, as for rejecting the verdict.

I am therefore of opinion that the decree be affirmed.

Judge ROANE would have assigned his reasons for affirming the decree, had they not all been anticipated in the opinion just delivered. He contented himself, therefore, with expressing his concurrence; observing that the record of the former suit was not admissible as evidence in this; and, *that* being excluded, there was no evidence to prove the promise, alleged in the bill to have been made by *Constant Chapman*, on which the plaintiffs' claim is founded. Of course, the bill was properly dismissed.

Judge FLEMING. It is the unanimous opinion of the Court that the decree dismissing the bill be AFFIRMED.