CALDWELL EXR. *vs.* MCVICAR.

McVicar sued Caldwell's executor, on an obligation for the payment of money, made to the plaintiff by Byrd, as principal, and Caldwell and others, securities; the defendant plead usury, and that his testator was discharged by failure of the plaintiff to sue Byrd, the principal, on notice to do so, &c., giving him day of payment, &c.; defendant proved that in a separate suit against Byrd, plaintiff had obtained judgment for the amount of the obligation; and read in evidence an instrument by which he released Byrd from all liability to the estate of his

testator from all debt, interest, and constructively, of any costs that he might have to pay for Byrd, on account of his testator being his security on said obligation, and then offered Byrd as a witness to prove his pleas: HELD, That Byrd was a competent witness under the circumstances—that he was not a party to the suit, and in no way interested in its event.

HELD, further, that though the executor might have laid himself liable for devastavit by executing the release in question, he nevertheless had the power to execute it, and that it was valid.

If it be law that a party to a negotiable instrument is an incompetent witness to invalidate it, the rule does not apply as between the original parties to the instrument but only in cases where the instrument has been transferred on the faith of the signature of the party offered as a witness.

Appeal from Pulaski Circuit Court.

DEBT, by James McVicar against James H. Caldwell, as executor of Charles Caldwell, deceased, in Pulaski Circuit Court, on a writing obligatory, executed to plaintiff on the 16th November, 1841, by R. C. Byrd, as principal, and Wm. J. Byrd, William Field, and defendant's testator, as securities, for $1,200, due 1st June, 1843.

Defendant filed three pleas: 1st, Usury: 2d, That when the obligation sued on became due, Byrd, the principal therein, was solvent; defendant's testator gave plaintiff notice to sue thereon, and he neglected so to do until Byrd became insolvent:

3d, That the plaintiff gave day of payment to the principal, on a valuable consideration, without the consent of defendant's intestate.

Plaintiff took issue to the first and second pleas, and demurred to the third, which demurrer the court sustained. Plaintiff obtained final judgment, and defendant brought error; this court reversed the judgment, deciding the third plea to be good, &c., and remanded the case. See *Caldwell's ex'r. v. McVicar,* 4 *Eng. Rep.* 418.

After the cause was remanded, (in January, 1850,) the plaintiff filed three replications to defendant's third plea: 1st, a denial of the matter of the plea: 2d, that the money alleged in the plea to have been paid by Byrd for day of payment, was merely a pay-

ment on the obligation: and 3d, that the agreement for giving day of payment was not in writing. To which replications issues were taken, and the case submitted to the court sitting as a jury.

Plaintiff read in evidence the obligation sued on.

Defendant, to sustain the issues on his part, proved by the record, that plaintiff, on the 28th May, 1845, in the same court, recovered a judgment against R. C. Byrd, the principal in said obligation, upon and for the full amount thereof, in a separate suit against him, which remained in full force; and in connection therewith defendant read in evidence the following release, executed by the plaintiff to said R. C. Byrd:

"I, James H. Caldwell, as executor of the last will and testament of Charles Caldwell, late of the county of Saline, deceased, do hereby acquit, release, and forever discharge Richard C. Byrd, now of the county of Jefferson, of from and against all and every suit, claim, or demand of any, and every sort, nature or description, of, for or in respect of a certain writing obligatory made by the said Richard C. Byrd, as principal, and William J. Byrd, Charles Caldwell, and William Field, as securities, in favor of James McVicar; bearing date the 16th day of November, 1841, for the sum of twelve hundred dollars, payable on or before the first day of June then next ensuing, bearing interest at the rate of ten per cent. per annum from date until paid, and expressed to be for value received, and from and against all recourse by or in favor of said estate of said Charles Caldwell, deceased, for said sum of money and interest or any part thereof, upon and against Richard C. Byrd, his heirs, executors, or administrators, now or at any time hereafter. As witness my hand and seal, at said county of Jefferson, this 16th day of March, A. D. 1846.

J. H. CALDWELL, [SEAL.]
Executor of Charles Caldwell, deceased.

The defendant then introduced Richard C. Byrd as a witness in his behalf, who testified in support of the pleas, but the plaintiff moved to exclude his testimony on the grounds, 1st, that it was not in the power of defendant to release the said Byrd so as

to remove his interest in the event of the suit; and 2d, that being the principal maker of the obligation, he was not a competent witness to invalidate it. The court sustained the motion, and excluded Byrd's testimony, and defendant excepted. Finding and judgment for plaintiff, and appeal by defendant.

WATKINS & CURRAN, for the appellant. The rule excluding a party to negotiable paper from giving evidence to invalidate it, never did apply, as between original parties. 3 *Wash. C. C. Rep.* 7. 4 *Serg. & Rawle* 397. 3. *Cranch* 283. 1 *Serg. & Rawle* 102. 11 *Mass.* 498. 2 *Hawks* 235. 5 *Pet. R.* 51. 11 *Pet R.* 86. This question is settled by this court in the case of *Tucker v. Wilamowicz,* (3 *Eng. R.* 157,) recognizing the case of *Jordainet v. Ashbrook,* which overruled the case of *Walton v. Shelby.*

That an executor has the right or power to execute such a release, see, 3 *Phill. Ev.* 1.560. *Seymours ad. v. Beach,* 4 *Vermont Rep.* 493, 501. *Murray v. Blackford,* 1 *Wend. Rep.* 583.

S. H. HEMPSTEAD, contra. The executor had no power to release Byrd; consequently the release was void. At common law an executor cannot release or cancel a bond due to the testator, nor release a cause of action which accrued before or after the testator's death without committing a *devastavit.* (*Toller on Executors* 424. *Cro. Eliz.* 43. *Hobart* 266.) The powers given to executors under our statute, (*ch.* 4, *Digest,*) do not embrace the power attempted to be exercised in this case.

It is a rule of law founded in public policy, that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument. *Walton v. Shelby,* 1 *Term Rep.* 300. *United States v. Dunn,* 6 *Peters* 51. *Bank of Metropolis v. Jones,* 8 *Peters* 12. *Henderson v. Anderson,* 3 *How. S. C. R.* 73. *Parker v. Lovejoy,* 3 *Mass.* 565. *Churchill v. Sutter,* 4 *Mass.* 156. *Putnam v. Churchill,* 4 *Mass.* 516. *Thayer v. Crossman,* 1 *Met.* 416, *Allen v. Halkins,* 1 *Day* 17. 2 *Hayw.* 127; *id.* 298. *Canty v. Sumpter,* 2 *Bay* 93. 2 *Phill. Ev. by Cowen & Hill, note* 78, *p.* 71.

This question does not seem to be conclusively settled in the case of *Tucker v. Wilamowicz*, which is overruled, in principle, by the cases of *Humphries v. McCraw*, (4 *Eng.* 107,) and *The State v. Jennings*, (5 *Eng.* 447,) where the admissions of a vendor or an assignor are declared to be incompetent.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question of Byrd's competency as a witness is the only matter presented by the record in this case. The counsel for the appellee relies upon the case of *Walton et al. v. Shelby*, 1 *Term Rep.*, and others subsequently decided but based upon the authority of that case. The Supreme Court of the United States, said in the case of *The United States v. Leffler*. (11 *Pet. R.* 93,) "The first (objection) is that the witness should not have been received because his evidence went to prove his own turpitude. And in support of this objection, we were referred, in the first place, to the case of *Walton et al. v. Shelby*, 1 *Term Rep.* 296. It was indeed decided in that case that a party who had signed any instrument or security (without limitation as to the character of the instrument) should not be permitted to give evidence to invalidate it. It was said that every man who is a party to an instrument gives credit to it; that it was of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper and then giving testimony to invalidate it. And the civil law maxim, *nemo allegans suam turpitudinem audiendus est*, was relied on. This case was followed a few years after by that of *Bent v. Baker*, 3 *Term R.* 27, in which it was said that the rule must be confined to negotiable instruments, and in 1798, the case of *Jordaine v. Ashbrook*, 7 *Term Rep.* 661, overruled the case of *Walton v. Shelby*, even in regard to them by deciding that in an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation. And such is the doctrine which has since been held in England. In this court in the case of *Bank of the United States v. Dunn*, 6 *Pet.* 51, it was decided that no man who was a party to a negotiable

instrument, should be permitted by his own testimony to invalidate it. The principle thus settled by this court goes to the exclusion of such evidence only in regard to negotiable instruments, upon the ground of the currency given to them by the name of the witness called to impeach their validity; and does not extend to any other cases, to which that reasoning does not apply; the case of *The Bank v. Dunn,* then would be sufficient to defeat the objection which has been made to the witness although he executed the bond, and although it was the bond of a public officer. The second objection is that the witness was directly interested in the event of the suit. This objection may be viewed in two aspects: 1st, as it respects the interest of the witness arising from his liability to his co-obligors, who were his sureties. 2dly, As it respects his interest as being, as it is contended, a party upon the record, and as such liable to a joint judgment with the other defendants, Jacob and Isaac Leffler. In relation to the first of these aspects, it is certainly true, that in general a principal obligor cannot be a witness for his co-obligors, who are his sureties in the bond sued upon even although he be not a party; this is well settled both upon principle and authority: amongst other cases it was so decided by this court in the case of *Riddle v. Moss,* 7 *Cranch* 200; upon the plain ground that he is liable to his sureties for costs in case judgment should be rendered against him. Now although that was once the position of this witness, yet it was not such at the time he was examined; for it appears by the bill of exceptions that, before his examination, his sureties had executed a release in the most ample form, of all claim against him arising out of their relation to him as sureties upon the bond, embracing every thing which could be recovered against them, including costs. There is then no interest in the witness in the event of the cause arising from his supposed liability over to his sureties, the defendants."

This court, in the case of *Tucker v. Wilamowicz,* 3 *Eng. Rep.* 166, said, "without going into a discussion of the authorities cited by counsel, from a careful examination of them, we are prepared to adopt the rule as laid down by the Supreme Court of New

York, in the case of the *Bank of Utica v. Hillard*, 5 *Cow.* 153, "that every person not interested in the event of the suit, nor incapacitated by his religious tenets, nor by the commission of an infamous crime, is a competent witness. All other circumstances affect his credit only." We may say with the Supreme Judicial Court of Massachusetts, in the case of *Fox et al., ad. v. Whitney's admrs.*, 16 *Mass. Rep.* 120, that even admitting the doctrine of *Walton v. Shelby*, as narrowed down by later decisions, to be still received as sound law, yet the principles, on which that decision rests, do not apply to the present case, because the instrument in suit, although negotiable in form, was not in fact negotiated, but remains in the hands of the original promisee, and the suit is now brought by him. No currency has been given to the bond, and there is no innocent indorsee to be prejudiced. The contest is between the original parties to the illegal bargain; and the competency of the witness must depend altogether upon the question, whether he is interested in the event of the suit or not. There can be no pretence that the witness, Byrd, is a party to this suit and that upon that ground he is incompetent. He is not named as a party in any part of the pleadings. He could not have made a motion in the cause. He had no day in court. The suit was simply one against the appellant as executor of Charles Caldwell; one of the sureties in the bond. He cannot be excluded therefore as a party of record.

The next question, is, whether he is incompetent on account of interest in the event of the suit. It is in proof that the appellee had a regular and valid judgment against Byrd for the full amount of the bond now in suit, that said judgment was recovered in a separate suit against him, and that the same was in full force and unreversed at the time he was introduced as a witness, and it further appeared, that the appellant as executor of the said Charles Caldwell, had executed and delivered to said Byrd a full release and discharge from and against all and every suit, claim or demand, of any and every sort, nature or description, of, for, and in respect of the said bond, and from and against, all recourse by or in favor of said estate of said Charles Caldwell, deceased,

for the sum of money therein expressed, and interest or any part thereof upon and against said Byrd, his heirs or administrators, then or at any time thereafter. We consider it clear that under the circumstances, Byrd could not be said to be in any manner concerned or interested in any judgment that the appellee might recover against the appellant, so far as the principal and interest of the bond were involved as in case of such recovery against his security and payment by him, he could only be required to refund, and he could be required to do the same thing in effect without such judgment, by payment of the judgment against himself, in case that he possessed the means of such payment. To him it would not be a matter of consequence whether he should be bound for a judgment to the appellee or to one of his sureties in case the amount of each should be the same. The case would be altogether different as to the costs that might be recovered against the surety. This amount could not have been included in the judgment against Byrd, and consequently must be regarded as a separate and distinct matter from it. In that sum, whatever it might be, the witness would consequently have an interest, and as a matter of course, he would to that extent desire a failure of the suit.

But it is objected that the appellant, in his capacity of executor, had no power to make the release so as to remove the interest of the principal obligor. This defect of power is said to rest upon the fact that such an act would subject the executor to an action for a devastavit. Suppose it to be conceded that the legal effect would be to subject the executor to an action for the full amount released, how could this affect the question of power? If he should feel disposed to do an act which would subject him to damages, it would most unquestionably be his right to do so, and having taken the responsibility, he could not reasonably complain if the law should be meted out upon him. But how this could operate to affect his power to do the act, it would be difficult to conceive. We entertain no doubt therefore that, whether the consequence of the act be to subject him to an action for a devastavit or not, is not at all material so far as the question

of power is concerned, and that consequently the release, if sufficient in other respects, cannot be disregarded because of such defect of power. This brings us to the last point in the case, and that is as to the legal sufficiency of the release. We have already seen that under the circumstances of this case, that the witness was interested in the event of the suit against Caldwell so far as the matter of costs was concerned, and as a matter of course, if the release is not sufficiently comprehensive to embrace such costs, his interest to that extent still remains, and whether great or small would render him incompetent to testify in behalf of his surety. (See *United States v. Leffler,* 11 *Peters* 94, and *Riddle v. Moss,* 7 *Cranch* 200.) The release in the case of *The United States v. Leffler,* was "of all claim against him, (witness,) for any money or thing which he might be liable to pay them or either of them, by reason of any recovery or judgment that might be had against them, or either of them on said bond, and also for any costs incurred or to be incurred by them or either of them, by reason of any suit upon said bond." The release in this case is, "from and against all and every suit, claim or demand of any and every sort, nature or description, of, for, or in respect of a certain writing obligatory, made by the said Richard C. Byrd, as principal and William J. Byrd and said Charles Caldwell and William Field, as securities, in favor of James McVicar, bearing date the 16th day of November, 1841, for the sum of twelve hundred dollars, payable on or before the first day of June then next ensuing, bearing, interest at the rate of ten per cent. per annum from date until paid, and expressed to be for value received, and from and against all recourse by or in favor of said estate of said Charles Caldwell, deceased, for said sum of money and interest or any part thereof, upon and against Richard C. Byrd, his heirs, executors or administrators, now or at any time hereafter." The release is not very technically drawn, yet it is believed, in its legal effect, to embrace not only the principal and interest of the bond, but also any thing that could flow incidentally from it. The security not only releases the witness from and against all and every suit, claim or demand of any and every sort, nature or

description of, and for the bond in question, but he also releases all such suits, claims or demands which he might have the right to bring or make in respect to said bond. The point now to be determined is whether a suit by the surety against Byrd for the costs of this suit, could be considered as a suit brought or a claim made in respect of the bond now in suit. We think there can be no doubt but that such would be the construction given to the words of the release. The subject matter of such suit being incidental to the suit upon the bond, we think it clear that it would fall within the expression "in respect of," and would consequently be embraced within the scope of the release. We are therefore satisfied that the executor possessed the power to execute the release, and that the release itself is sufficiently comprehensive to embrace every matter or thing that could in any manner show an interest in the witness, and consequently he, having no interest in the event of the suit, was perfectly competent to testify in behalf of the appellant. This being the only question raised by the record, there is an end of the investigation.

From the view which we have taken of this case, it is manifest that the court below erred in excluding Byrd, as a witness. The judgment of the Pulaski Circuit Court herein rendered, is consequently reversed, set aside, and held for nought, and the cause remanded, to be proceeded in according to law, and not inconsistent with the opinion herein delivered.