

Riddle v. Moss.

fore, of opinion, that the circumstance of removal is not sufficient to take the case out of the statute.

It is objected, that the plea of the statute of limitations is not good, unless the defendant answer also, and deny the debt, or aver it to be paid. But if this be a valid objection, it ought to have been taken, at the time of offering the plea, and before the issue was joined. It is now too late. If it be a good objection, in cases within the general *jurisdiction of a court of equity, yet it is not valid, in a case like the present, which is really a case at law as between the present parties. [206

The court is of opinion, that the plea is a good bar, and that the decree should be affirmed.

Decree affirmed.

 RIDDLE v. MOSS. (a)
Competency of witness.

The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs, in case the judgment should be against him.

ERROR to the Circuit Court for the district of Columbia. This was an action of debt on a joint bond, given by John Welch, as principal obligor, and the defendant Moss, as his surety. The suit abated as to Welch, by the return of the marshal, that he was no inhabitant of the district. The defendant, Moss, pleaded specially certain facts in avoidance of the bond as to him alone; upon which issue was joined; and upon the trial, the defendant Moss offered as a witness the said John Welch, the principal obligor, who was permitted by the court below to testify for the defendant, and upon his cross-examination confessed, that he had made over to Moss all his property, as security to indemnify him against the event of this suit. The plaintiff took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error to this court.

E. J. Lee and Jones, for the plaintiff in error.—Welch was clearly an interested witness. By relieving Moss from this suit, he would relieve his property from the lien which Moss held upon it. If the plaintiff recovered against Moss, the latter could immediately recover judgment against Welch for the whole debt, together with the costs of this suit. *Laws of Virg.*, Rev. Co. 292; *Buckland v. Tankard*, 5 T. R. 578; Bull. N. P. 283; 5 Burr. 2727; 3 Atk. 402; 1 Day 81. *Welch is also interested to the amount of his legal fees for attendance as a witness. It appears upon the record, that he was regularly summoned, and is by law entitled to demand of Moss one dollar and a quarter *per diem*. If the plaintiff should be defeated, he will retain this to his own use, but if the plaintiff should recover judgment, he will have to refund it to Moss. [297

C. Lee, *contra*.—The defence set up by Moss did not affect Welch's liability upon the bond. He was bound at all events. He was not a party to this suit. Neither the verdict nor judgment could affect him. He would be

 (a) March 6th, 1812. Present, all the judges.

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obliged to pay either Riddle or Moss, and it was immaterial to him, which of them should recover against him. If the plaintiff should be defeated by Moss, he would sue Welch, and recover judgment, with costs; so that it was immaterial to him, whether he paid costs to one or the other. He, therefore, stood indifferent as to interest. In chancery, one defendant is a good witness for another, and it would be as good a rule at law. Courts of law have, of late, inclined to refer all cases of doubtful interest, to the credibility, rather than to the competency of the witness. The interest should be immediate and direct, in order to exclude the witness. 3 Esp. Rep. 60.

The statute of Virginia, which gives to a surety a remedy against his principal, does not alter the case. He had an equal remedy before. In the case of *Pawling v. United States*, 4 Cranch 219, the point was made by a bill of exceptions to the refusal of the district court of Kentucky to admit a co-obligor as a witness, but was not decided, the judgment having been reversed upon other grounds.

March 10th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The court is of opinion, that Welch, the co-obligor, was interested, and was, therefore, an incompetent witness. *It was a consideration of some importance, *208] that he had given Moss a deed of trust of his effects to indemnify him against this suit; but the principal circumstance was, that Welch's liability would be increased, to the extent of the costs of this suit, if the judgment should be against Moss. (a)

Judgment reversed.

SHEEHY v. MANDEVILLE. (b)

Action on promissory note.—Variance.

A note payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable; the variance is fatal.

Upon executing a writ of inquiry, in Virginia, in an action of *assumpsit* upon a promissory note, it is necessary to produce a note corresponding with that stated in the declaration; but it is not necessary to prove the note.

The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria.

This cause having been sent back to the circuit court, by the mandate of this court, at February term 1810 (6 Cr. 253), commanding that court to render judgment for the plaintiff on his first count, and to award a writ of inquiry of damages, upon executing that writ of inquiry, the plaintiff produced the following note.

(a) The same point was also decided in the case of the *Governor of Virginia v. Evans and others*, at this term; which was the case of a bond with collateral condition. It was a joint action; and all the defendants were taken, but pleaded separately.

(b) March 6th, 1812. Present, all the judges.