

Case No. 1,296.

{6 McLean, 21.}<sup>1</sup>

BENEDICT V. MAYNARD ET AL.

Circuit Court, D. Michigan.

June Term, 1853.

PLEADING—VERIFICATION—AMENDMENT—PROOF.

1. Under a rule of court, if the signature of the parts to the instrument on which the action is brought, is denied by plea, the plea must be sworn to, or the signature is admitted.
2. A motion to make the affidavit, when the cause is called for trial, refused.
3. The affidavit should be made at the time the plea is filed.
4. The instrument being admitted, by the pleading, it may be read, as it appears upon its face.

[At law. Action by Lewis Benedict against Maynard and Morgan on an instrument of guaranty. Verdict for plaintiff. For decision on demurrer to the declaration, see Case No. 1,295.]

Barstow & Lockwood, for plaintiff.

Hawkins, Fraser & Emmons, for defendants.

OPINION OF THE COURT. This action is brought on a covenant to pay money. On the cause being called, a motion was made by defendants to add an affidavit, denying their signatures, which was opposed by the plaintiff's counsel. The court overruled the motion. The affidavit should have accompanied the plea when filed. To permit it now to be filed, would be a surprise on the plaintiff; he alleges his witnesses, by whom the instrument can be proved, have not been summoned, as the execution of the instrument was not denied. The instrument being offered in evidence, objection to it was made, that there was a variance between it and the one stated in the declaration, in this: that Maynard in the instrument, appears to have signed it as president; the word president appears to have been stricken out. The oyer gives the signature without the designation of president. It was also objected that the instrument was drawn for several individuals who have not executed it. The signatures, as they appear on the face of the instrument, are admitted by the pleading.

If the defendants desired to take advantage of any defect of execution, they should have pleaded non est factum, and filed, with the plea, an affidavit of its truth. The word president being stricken out, the court will presume, from the admission of the pleading, that it was so stricken out, at or before it was signed.

The plaintiff proposed to read the declaration and oyer, and not produce the original instrument; but the court said it was unnecessary; the original instrument was admitted by the pleading, and the instrument was truly set forth in the declaration, and copy of the instrument annexed to it.

With the assent of the parties, the jury found a verdict for \$9000. Judgment.

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<sup>1</sup> {Reported by Hon. John McLean, Circuit Justice.}