ANDREWS *v.* CONGAR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 38. October Term, 1880. — Decided November 8, 1880.

If a person, not a party to a promissory note, writes his name on the back of it when the note is made, the law in Illinois regards him as a guarantor, unless the contrary is shown; but the law in Missouri regards him as *prima facie* a joint maker.

In a suit against a joint maker of a promissory note a charge to the jury that he was only a guarantor works no injury to him.

Under the practice in Illinois if one is sued as guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff need not prove the execution of the note itself as well as the guaranty.

When a contract is within the scope of the business of a partnership, each partner is presumed to be the agent of all, and it is immaterial what the secret understanding of the parties may have been as to the powers of each.

There was no error in the ruling that if the maker of the note which forms the basis of the controversy in this case could not use an account on its books as a set-off against the note, the defendants as guarantors could not.

THE case is stated in the opinion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

There are nineteen errors assigned on this record, but those relied on in the argument present in reality but four questions. These are:

1. Whether the court erred in charging the jury that "if a person not a party to a note, that is to say, not the payee or maker, writes his name on the back of the note at the time the note is made, the presumption is that he has assumed the liabilities and responsibilities of a guarantor; this presumption, however, is liable to be rebutted by the proof."

2. Whether, under the practice in Illinois, which is regulated by statute, if one is sued as a guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff must prove the execution of the note itself as well as the guaranty.

3. Whether the defendants should have been permitted to prove that there was an agreement between themselves as partners, that neither of them should assume any liability on behalf of the firm out of the line of its regular business without the consent of the others,

and that one of the defendants did not know that the liability sued on was incurred until long after the notes were made and indorsed, and that since he learned it he has always repudiated it.

4. Whether it was wrong for the court to instruct the jury that if, as between the plaintiff and the maker of the note, the maker could not use an account on its books as a set-off against the note, the defendants as guarantors could not.

As to the first question. The charge as given states correctly the law of Illinois, as settled by the highest court of the State in a long series of decisions. *Cushman* v. *Dement*, 3 Scammon, 497; *Stowell* v. *Raymond*, 83 Illinois, 120. The contract, however, was made in Missouri, and was to be performed there. In that State the rule is that he who writes his name on the back of a note, of which he is neither the maker nor the payee, is *prima facie* liable as a joint maker. *Powell* v. *Thomas*, 7 Missouri, 440; *Schneider* v. *Seiffman*, 20 Missouri, 571; *Otto* v. *Bent*, 48 Missouri, 26; *Baker* v. *Block*, 30 Missouri, 225. For this reason it is insisted that the contract is governed by the laws of Missouri, and that the jury should have been so instructed. Admitting this to be true, it is difficult to see how the plaintiffs in error have been harmed by the charge of which they complain. They claim to have been presumptively joint makers of the note, while the court told the jury they were guarantors only. Clearly the charge as given was more favorable than the one contended for. A recovery could have been had against them as joint makers under the common counts.

The court, however, after stating what the presumption from such an indorsement was, went on to say, "the law authorizes the holder of a note to write over the name thus written across the back of the note any agreement consistent with that made between the parties at the time the name was placed there; that is to say, if the party did actually, at the time he put his name on the back of the note, stipulate for any liability short of a guaranty, or different from that of guarantor, then the holder of the note had no right to write a false guaranty over the name." Then, after calling attention to the facts which had been shown in evidence, and the claims of the respective parties, it was said: "If you are satisfied that the defendants in this case put their names upon the note at the time it was made, with the express understanding that they were to be liable as indorsers, that is, liable after the plaintiff had used due diligence to fix their liability as indorsers, then the defendants are not liable in this

action: but if, on the contrary, you are satisfied from all the evidence in the case that the defendants intended to become liable to pay the debt if the maker did not, that is, that they would stand in the relation of sureties and guarantors, substantially as the contract is now written over their names, then the defendants are liable." And again, after referring to a condition which it was proved the plaintiffs in error had incorporated into the obligation they assumed, and which it was insisted should have been expressed in the guaranty as written over their signature, the court said: "If you are satisfied that the positive performance of this part of the agreement was thus waived or abrogated by mutual consent of the plaintiff and defendants before the guaranty was written, then no mention need be made of it." In this way, as it seems to us, the case upon this point was fairly put to the jury, and the plaintiffs in error were given the benefit of every circumstance they relied on to establish their defence. If the presumption arising from their indorsement had been overcome by the evidence, the jury were told in express terms to find accordingly.

As to the second question. A statute of Illinois provides that "no person shall be permitted to deny on trial the execution or assignment of any instrument in writing . . . upon which any action may have been brought . . . or is admissible in evidence under the pleadings, when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." Ill. Rev. Stat. (Hurd, 1883), c. 110, § 34.

This action was brought on a guaranty, a copy of which was filed. The affidavit only made it necessary to prove the execution of that instrument. That was done, and that of itself was equivalent to proof of an admission by the guarantors of the due execution of the note. Whether this admission was one that could be contradicted, need not now be determined. It was certainly sufficient until overcome.

As to the third question. There is nothing in the case to show, or tending to show, that the execution of the guaranty was not in the line of the regular business of the partnership. On the contrary, it does appear that the partners were the owners of a majority of the stock in the corporation that made the note, and that the note and guaranty were given with a view to the protection and improvement in value of that stock. The transaction was one which appears to have been entered into for the common benefit of all the partners.

Under such circumstances, it was of no consequence what the secret understanding of the partners may have been as to the powers of each. The contract being within the scope of the partnership business, each partner is presumed to be the authorized agent of all.

As to the fourth question. A simple statement of the facts is all that is necessary to dispose of this question. The plaintiff was the president of the corporation, maker of the note guaranteed. On the books he was charged with moneys paid to him from time to time and credited with a salary and interest on his investment in stock. After he went out of office his successor settled with him and paid the balance found to be his due. The books were thereupon balanced. The plaintiffs in error sought to set off against their liability as guarantors of the note, the items which appeared on the debit side of the account, without any regard to the credits. As to this, the court instructed the jury that they "must be satisfied that the company itself could use the same set-off against the note before the defendants could avail themselves of it, and that if they were satisfied from the evidence that the plaintiff's account stood balanced on the books of the company as kept, then the defendants could not set up the account as a set-off to the note without showing fraud or mistake in striking such balance." There can be no doubt as to the correctness of this ruling.

This covers substantially all there is in the case. The other errors assigned are unimportant and need not be considered specially.

The judgment is affirmed.

Mr. George Herbert for plaintiffs in error. *Mr. Charles Hitchcock* for defendant in error.

GIBBS *v.* DIEKMA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 88. October Term, 1880. — Decided December 13, 1880.

An objection on the ground of the non-joinder of parties who are proper but not indispensable parties cannot be made for the first time in this court.

This court has power to adjudge damages for delay on appeals as well as writs of error, and this power is not confined to money judgments.

The case is stated in the opinion.

Mr. Chief Justice Waite delivered the opinion of the court.

The contract with Risdon embraced the lands specifically described