HAMMOND *vs.* FREEMAN.

The certificate of an officer before whom a deposition is taken, must show that it was reduced to writing in his presence, otherwise it cannot be read. *Digest, p.* 433, *sec.* 13.

Where notice of the time and place of taking a deposition is served by a person other than an authorized officer, the affidavit to such return required by statute [*Digest, p.* 799, *s.* 23,] cannot be made before a justice of the peace who is the attorney of the party taking the deposition.

A. made a note payable to the order of B., who endorsed it to C., and C. endorsed it to a Bank. The Bank obtained judgment against A. and C. on the note, and C. paid it. In a suit by C. against A. for the money so paid by him, proof of the payment is sufficient, without producing a transcript of the judgment.

But as the liability of A. to C. depends upon the endorsement of B. to him, the note and endorsement must be produced in evidence, and a copy will not suffice, unless the loss of the original be shown.

Where there are issues to two pleas on record, and verdict upon one only, against defendant, final judgment cannot be given until the other issue is determined.

Appeal from the Madison Circuit Court.

This was an action of assumpsit, brought by Henry Freeman against Job Hammond, determined in the circuit court of Madison county, at the May Term, 1847, before the Hon. W. W. FLOYD, judge.

Plaintiff declared for money paid, laid out and expended by him to, and for the use of defendant, at his request.

The declaration was filed by W. D. Reagan and J. B. Costa, attorneys for plaintiff.

Defendant pleaded non assumpsit, and set-off, to the first of which pleas plaintiff took issue, and to the second replied, and defendant took issue.

The cause was submitted to a jury, and they returned a verdict as follows: "We, the jury, do find that the defendant did undertake and promise in manner and form as charged in the first count of the within declaration, and assess the plaintiff's damages to the sum of $873.32." And judgment was rendered in favor of plaintiff for that sum.

Pending the trial, defendant took a bill of exceptions, from which it appears that to sustain the issue on his part, plaintiff offered to read to the jury the deposition of W. L. Mitchell, taken before a justice of the peace in the State of Georgia. To the reading of this deposition defendant made several objections, which will be stated below, but the court overruled them, and permitted the deposition to go to the jury.

Deponant states, that on the 20th day of August, 1840, at Millidgeville, Job Hammond made his promissory note, by which he promised to pay to the order of one William P. Hammond, three hundred and sixty days after that date, the sum of six hundred dollars, at the Central Bank of Georgia, and delivered said note to the said William P. Hammond, who on the day and year first aforesaid, for a valuable consideration, endorsed said note to Henry Freeman, who for a like consideration endorsed said

note, on the day and year first aforesaid, to the Central Bank of Georgia. Here deponant exhibits a copy of said note and endorsements, taken, as he states, from the original, which had been placed in his hands for collection by said bank, as her attorney.

Deponant further states, that said note was not paid at maturity. That afterwards he, as attorney for said bank, brought suit on said note in the superior court of Franklin county Georgia, and at the April term of said court, 1843, obtained judgment on said note in favor of said bank against the said Job Hammond and Henry Freeman, for the sum of $600 debt, $79.75 interest, and $12.37½ costs of suit. That said Job Hammond left the State of Georgia without paying said bank any part of said judgment, and that the said Henry Freeman, on the 18th April, 1843, paid him as the attorney of said bank, the sum of $400 on said judgment; and on the 25th September, 1843, said Henry Freeman paid him as such attorney, the further sum of $289.50, and had since paid to the clerk of said court $10.37½ costs of suit; and to the sheriff his costs of $1.87½, making all the costs $12.37½.

The justice of the peace makes the usual certificate, that said deposition was sworn to and subscribed before him, stating the time and place, but omits to state that it was reduced to writing in his presence.

The notice of the time and place of taking said deposition was served on defendant by a private person, and he made oath to his return of service before John B. Costa, one of plaintiff's attorneys, as a justice of the peace.

Defendant objected to the reading of said deposition to the jury, upon the following grounds:

1st. There was no sufficient notice of the time and place of taking said deposition served on defendant.

2d. A copy of said note, and not the original, is exhibited in said deposition.

3d. The original note is not exhibited in the deposition.

4th. Said deposition is not subscribed by the justice at the bottom of each half sheet.

5th. It does not appear that the depositions was reduced to writing in the presence of the justice: and

6th. Because the certificate of the justice is defective and insufficient in other respects, &c.

But the court overruled the objections, and defendant excepted, and appealed.

FOWLER, for appellant. In behalf of Hammond it is contended that the deposition, as well as each and every part thereof, was utterly inadmissible as evidence:

And 1st. The statute requires that the deposition "shall be reduced to writing in the presence of the person or officer before whom the same shall be taken." *Rev. Stat. p.* 326, *sec.* 13. 3 *Bibb* 232, *Logan vs. Steele.*

2d. John B. Costa, being the attorney of Freeman in the cause, it was not competent or legal for him to administer the affidavit of service of the notice. 3 *Atk. Rep.* 813, *Case No.* 301, *in the matter of Hogan, a lunatick.*

The contents of the deposition ought to have been excluded by the court below:

1st. Because it wholly fails to show that the consideration for the contract proceeded from the defendant's request, either express or implied; and consequently discloses no title in the plaintiff below. 1 *Saund. Pl. & Ev.* 148.

2d. And no person can be permitted in law to make another his debtor without his assent. 1 *Saund. Pl. & Ev.* 148. 8 *Term. Rep.* 310, *Exall vs. Partridge.* 1 *Term. Rep.* 21, *Stoker et al. vs. Lewis et al.* 1 *Saund. Rep.* 264, *note* 1. 5 *Ark. Rep.* 657, *Bertrand vs. Byrd.* 1 *Selw. N. P.* 66, 67.

3d. Even if Freeman was in law and in fact the surety of Hammond, and as such compelled to pay the money for him, yet in this suit he was bound to prove the execution of the note,

and that he became surety at Hammond's request. 2 *Stark. Ev.* 58, 59.

4th. And as judgment had been rendered, he was also bound to produce the record of it. 2 *Stark. Ev.* 59.

5th. The best evidence to be had must always be given. 1 *Esp. N. P.* 144. *ib.* 780. *Gilbert's Ev.* 16. *Buller's N. P.* 293. 1 *Stark. Ev.* 69. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.*

6th. The reason of the rule is, that no such evidence shall be admitted, that from its very nature, supposes better evidence behind in the possession of the party; and the failure to produce it creates the presumption that there is something in it which would operate against the party, if produced, and therefore the secondary evidence is wholly inadmissible. 1 *Stark. Ev.* 69. 2 *Esp. N. P.* 780. *Gilbert's Ev.* 16. *Buller's N. P.* 293, 294.

7th. No parol evidence of any fact or agreement shall be admitted as evidence where there is written evidence thereof, in the party's possession, or under his control. 1 *Stark. Ev.* 318. 2 *Esp. N. P.* 780.

8th. And where a witness mentions any matter which has been reduced to writing, the writing itself must be produced, if not proved to be lost, or the evidence of such matter of fact must be rejected. 2 *Esp. N. P.* 780, 782. 4 *Ark. Rep.* 579, *Hawk vs. Walworth.*

9th. And a reference in a deposition to a paper by giving a copy of it is insufficient; the original itself should be produced. 1 *Tenn. Rep.* 394, *Carissa vs. Edwards.*

And in this case the witness having stated that a judgment had been rendered, and that the original note was in his possession, the evidence was utterly incompetent without their production to the court and jury.

E. H. ENGLISH, contra.

OLDHAM, J. The certificate of the justice of the peace before

whom the deposition read in evidence upon the trial of this cause, was taken is defective in not showing that the examination of the witness was reduced to writing in the presence of the justice, as required by the *Rev. St. Ch.* 48, *sec.* 13.

The affidavit of service by the person serving the notice, was made before John B. Costa, a justice of the peace, and who was one of the attorneys for the plaintiff. It should not have been read in evidence. *Taylor vs. Hath,* 1 *J. R.* 340.

It was not necessary that the plaintiff below should have produced the judgment referred to in the deposition. The money was paid by him as the endorser of a note drawn by Hammond, and the latter was liable, whether the former paid it with or without suit. Hammond's liability to Freeman, depended upon the endorsement of the payee to the latter and for that purpose the note and not a copy, without establishing the loss of the original, should have been introduced in evidence. Freeman having endorsed the note to the bank and afterwards paid it, was restored to his rights as endorsee and holder.

There were two issues formed by the pleadings; one upon the general issue, and the other upon the plea of set-off. The jury found the first issue for the plaintiff, but did not determine the other; the court was not warranted in rendering final judgment until all the issues raised upon the record were determined. *Hicks vs. Vann,* 4 *Ark. R.* 526. *Reed vs. the State Bank,* 5 *Ark. R.* 193.