

11/664, Ovrld. in *Juster v. Hopper*,
13/43-7. (See *Merrill v.*
Mancee 19/649.)

POINDEXTER *vs.* RUSSELL.

Suit before a justice of the peace, appeal to circuit court, and from thence to this court; it does not appear from the transcript that the appeal affidavit and recognizance made and entered into before the justice, were filed in the circuit court—for this cause the judgment of the circuit court is reversed,

the cause remanded with instructions to the circuit court to perfect the appeal if it can be done consistently with the facts, and then to determine the case on its merits, otherwise to dismiss for want of jurisdiction.

Until the appeal affidavit and recognizance are sent up, by the justice and filed, the circuit court has no jurisdiction of the case.

Appeal from the Randolph Circuit Court.

James G. Russell sued Dandridge Poindexter, on an open account, before a justice of the peace of Randolph county, and obtained judgment. The justice states in his transcript that "defendant prayed an appeal, which was allowed, and filed his affidavit and bond," &c., but no appeal affidavit or recognizance appears in the transcript sent to this court.

The case was tried in the circuit court, on appeal, and verdict and judgment for plaintiff; defendant moved for a new trial, which was overruled, and he excepted, and appealed to this court.

CONWAY B., for the appellant.

BYERS & PATTERSON, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

It does not appear from the transcript before us that the affidavit and the recognizance touching the appeal from the justice's court were filed in the circuit court; nor does it appear who was the security in the recognizance.

Until a transcript of all the entries made in the justice's docket relating to the cause, together with all the process and all the papers relating to the suit, are filed by the justice in the clerk's office, the circuit court does not have rightful possession of the appeal and cannot regularly hear, try and determine it. *Digest page 668, secs. 180, 181.*

The judgment in this cause is therefore clearly erroneous and must be reversed and the cause sent back to the circuit court

with instructions to perfect the appeal if it can be done consistently with the truth and then hear and determine the case on the merits, otherwise to dismiss it for want of jurisdiction.

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