

## EVANS ET AL. vs. PARKS.

In the Circuit Court, on appeal from the judgment of a justice of the peace, a plea by defendant that no cause of action was filed by the plaintiff with the justice before the summons issued, is a good plea to the jurisdiction.

In an action on an open account, where a demurrer is sustained to defendant's plea, and he declines to plead over, the proper practice is for the Court to render an interlocutory judgment against him, and order a writ of inquiry to have the plaintiff's damages assessed—it is erroneous for the Court to render final judgment for the amount of the account on the demurrer.

*Writ of Error to Franklin Circuit Court.*

Thomas C. Parks sued Samuel Evans, before a justice of the peace of Franklin county, in January, 1849, upon a ferriage account for \$13.05. Judgment for plaintiff before the justice for the amount of the account, and appeal by defendant to the Circuit Court—William Hail security in the appeal.

The cause was determined in the Circuit Court in February, 1849, before the Hon. WILLIAM W. FLOYD, Judge.

Evans filed the following plea in the Circuit Court:

“And the said Samuel Evans, in his own proper person, comes

and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that there was no account or cause of action filed with the justice in favor of said plaintiff against him in this suit before the summons issued, and this he, the defendant, is ready to verify; wherefore, he prays judgment," &c. The plea was verified by affidavit.

The plaintiff demurred to the plea, in short upon the record, the Court sustained the demurrer, defendant stood upon the plea, and the Court rendered judgment against him and his security in the appeal, for \$13.05, the amount of the account sued on, without calling a jury to assess damages. Evans and Hail brought error.

F. W. & P. TRAPNALL, for the plaintiffs, relied upon the plea to the jurisdiction and the error of the Court, in rendering final judgment on an account without an inquiry by a jury.

Mr. Justice SCOTT delivered the opinion of the Court.

The record shows that the plea to the jurisdiction was sworn to, filed and demurred to. Its subject matter was sufficient, and was well pleaded. It was, therefore, error to sustain the demurrer.

And the appellant resting upon his plea, and refusing to say any thing further, as the action was upon an open account, an interlocutory judgment only should have been rendered against him, and a writ of inquiry awarded. The Court, therefore, erred in rendering a final judgment, as done. The judgment must be reversed, with instructions to the Court to overrule the demurrer, and permit the appellee to respond to the appellant's plea to the jurisdiction.