LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

December 23, 1932.

Hon. F. W. Hare,

Monroeville, Ala.

Dear Judge Hare:-

Re: Newberry vs Consolidated Indemnity & Insurance Company:-

We herewith enclose copy of our brief in support of our demurrer to the plea in abatement in the above cause. In order to refresh your recollection, we want to briefly outline the history of this case.

You will recall that after the suit was filed, we obtained a judgment by default upon failure of the defendant to appear or plead. Within a thirty day period, the defendant filed a motion to set aside this judgment on the ground that a plea in abatement had been forwarded to the Clerk. The motion to set aside the judgment was continued until a later date for hearing. After the matter was argued, and while the motion was still retained by the Court, the Clerk found the plea in abatement, which had been misplaced in his office. When your Honor was informed by the Clerk that he had found the plea in abatement, you granted the motion to set aside the judgment and allowed the plea in abatement to be filed as of the date that it was received by the Clerk. The plaintiff thereupon demurred to the plea in abatement. Some time after the filing of the demurrer, counsel for plaintiff obtained notice from the defendant's attorneys that an amended plea in abatement had been filed. An examination of a copy of this plea forwarded to us by defendant's attorney disclosed that it was filed with leave of Court. No order of Court, however, was ever entered allowing the filing of an amended plea in abatement. Plaintiff's attorneys, believing that an order had been entered allowing the defendant to amend its plea in abatement, demurred thereto and, upon examining the file on a subsequent date and finding that no order had been entered allowing the amendment, plaintiff's attorneys filed a motion to withdraw the demurrer to the amended plea and to

strike the amended plea from the file, on the ground, among others, that the same was not filed by leave of Court.

At the time that this case was set for hearing before you in Monroeville some time ago, Mr. Rushton indicated he thought the record was so complicated that it would probably be better to withdraw his amended plea in abatement without prejudice to his rights to refile the same and argue the pleadings as if they stood upon the demurrer to the original plea in abatement. We do not know that Mr. Rushton still wishes to proceed in this manner, but assume he will advise you as to whether or not he wishes to withdraw his amended plea without prejudice, when he forwards to you a list of his authorities.

As you will note from the brief, it is the contention of the plaintiff that the demurrer to the original plea in abatement is well taken. The plaintiff also maintains that there is no provision in the State of Alabama for the amendment of pleas in abatement; that such pleas were not admissible at common law and, except as changed by statute, the pleadings in the Courts of Alabama are still governed by the common law. We feel that our brief fully sets forth our position on these various matters, however, and will not go further into the matter in this letter.

Very truly yours,

MAHORNER & MAHORNER.

BY James G. Mahorner.

JGM.C
Cy. to Rushton, Crenshaw & Rushton,
Montgomery, Alabama.

J. E. NEWBERRY

vs

CONSOLIDATED INDEMNITY & INSURANCE COMPANY

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEMURRER TO PLEA IN ABATEMENT.

At the time of writing this brief defendant's counsel have advised that, in order to keep the record straight, they consider the most orderly procedure would be to consider the amended plea in abatement as not having been filed and to argue the matter on the demurrer to the original plea in abatement. We surmise, therefore, that defendant's counsel will withdraw the amended plea in abatement without prejudice to their rights to refile the same, in the event that the demurrer to the amended plea is sustained and the Court is of the opinion that they could amend the plea in abatement.

THE DEMURRER TO THE PLEA IN ABATEMENT IS WELL TAKEN, IN THAT SAID PLEA FAILS TO GIVE THE PLAINTIFF A BETTER WRIT.

One of the essential and fundemental requirements of a plea in abatement is that it should give the plaintiff a better writ, or, in other words, should point out the true facts, in order that if the suit does abate, the plaintiff will have sufficient facts upon which to bring his action in the

proper forum at a later date. The original plea in abatement filed herein simply states that the defendant corporation was not doing business in Baldwin County at the time of the institution of this suit. The plea entirely fails to state in what County the defendant had an agent or was doing business at said time. This, we submit, is a substantive defect in the plea as to which the demurrer is well taken.

In 49 C. J. "Pleading, Page 237, Par. 278, it is stated:

"A plea or answer in abatement should point out specifically the precise defects in such a way that plaintiff may be enabled to correct them. It should, in other words, give plaintiff a better writ or declaration."

In Edwards vs L. & N. R. R. Co. 202 Ala. 463, 80 Sou, 847, the Supreme Court held that a demurrer was properly sustained to the plea in abatement, which denied jurisdiction of the Court in which the cause of action was filed, on the ground that the cause of action accrued to the plaintiff in an adjoining precinct and not in the Justice precinct wherein the suit was filed. The demurrer was interposed on the ground that said plea did not show sufficient facts to show the Court was without jurisdiction. The demurrer was sustained and the Supreme Court held properly so, stating in their opinion at page 464:

"It is a well-recognized rule that a plea in abatement is bad unless it gives the plaintiff a better writ. Lewis vs International Ins. Co., 198 Ala. 411, 73 South.629; Mohr vs Chaffe & Co. 75 Ala. 387

Section 4267 of the Code of 1907 provides that suits of this character must be brought before a justice of the peace of the precinct in which the lands or tenements are situated, but contains the following provision:

'If the office is vacated, or such justice, mayor, or intendent, is disqualified, from any other cause, from sitting, then by the justice of some adjoining precinct.'

The suit was brought in the adjoining precinct, and the plea fails to allege there was a justice in St. Elmo precinct qualified to try the cause. We are therefore of the opinion the demurrer was properly sustained."

In Fields vs Walker 23 Ala. 155, the Supreme Court held that the lower Court properly sustained a demurrer to the second plea of the defendant in the Court below. The opinion of the Court, stating its grounds for so holding states at Page 163:

"This plea was evidently intended as a plea to the jurisdiction of the court, and must, therefore, be regarded a plea in abatement, since all pleas to the jurisdiction are pleas in abatement. In this aspect the plea is bad, both in its form and matter. In form, because it neither points out what other court has jurisdiction, nor does it conclude with the prayer, 'whether the court will or ought to take further cognizance of the plea aforesaid', both of which are necessary in pleas to the jurisdiction, when pleaded in superior courts, or courts of general jurisdiction.

3 Chit. Pl. 894;
Rea vs Heyden 3 Mass. 24;
1 Chit. Pl.144;
Mosely vs Hunter 3 Iredell 403."

In Mohr vs Chaffe Bros. & Co. 75 Ala. 387, it was held (3 h.n.)

"While, under the statute, a plea, whether in bar or in abatement, is sufficient, if the facts are so stated that a material issue can be taken thereon, the rule still prevails that a plea in abatement must give the plaintiff a better writ, this being, in such plea, essentially matter of substance."

The above authorities are further supported by decisions of the United States Supreme Court and many other Alabama cases and cases from the majority of the other States.

In Ex Parte Dunlap 96 Sou. 441, 209 Ala. 453,

it was held that,even though the Code of 1927, Sec. 451, looked with some favor on pleas in abatement, the Courts do not favor them any further than is necessary.

In Beck vs Glenn 69 Ala. 121, at 126, the Supreme Court gave their reasons for not favoring pleas in abatement in the following excerpt:

"Pleas in abatement are dilatory, and are disfavored by the law on this account. They are required to be filed as soon as practicable, so as to prevent the unnecessary accumulation of costs occasioned by protracted delay, and to guard against the hazard of a bar by the statute of limitations, in the event of an abatement of the action on some technical ground not touching the merits."

THE AFFIDAVIT TO THE PLEA
IN ABATEMENT IS INSUFFICIENT.

The Secretary of defendant corporation in making affidavit to the plea in abatement states; "he has read the within and foregoing plea and that the matters and things therein stated as facts are true and those stated upon information and belief he verily believes to be true." It is evident from this statement in the affidavit, read in connection with the body of the plea, that it is impossible for anyone to say what matters and things are stated in said plea as facts and what are stated on information and belief. Such an affidavit is entirely insufficient and, for this reason, the demurrer to the plea is well taken.

In 49 C.J. "Pleading" 597, Par. 855, it is stated:

"The great object enforced by the statute in prescribing what is essential to verification is to make it appear on the face of a pleading and its verification what matters therein contained are set forth according to the knowledge of the party making such pleading, and what matters are stated according to information and belief only. ****If a pleading shows distinctly what allegations are made on personal knowledge and what on information and belief, it is sufficient for the verification to state that the pleading is true, of plaintiff's own knowledge, except as to those matters stated on information and belief, and as to these the affiant believes it to be true; and this is so even where the verification is required to be positive, if the allegations made from personal knowledge are separable from those made on information and belief and are sufficient in themselves to entitle the party to the relief prayed for. But this form of affidavit is not sufficient where the pleading does not make the distinction between allegations on knowledge and those on belief."

"Where some or all of the allegations of a pleading are not expressly specified as made either on personal knowledge or on information and belief, it cannot be presumed that they are of one kind rather than the other, and hence a verification to the effect that the facts stated by the pleader of his own knowledge are true and that those stated on information and belief affiant believes to be true, is bad, inasmuch as it does not embrace such undesignated allegations."

In Ellis vs Drake 83 Sou. 281, 203 Ala. 457,458, the Court states:

"Pleas in abatement must be verified by affidavit, unless they are as to matters of record. Section 5332, Code of 1907; Gaston vs State 88 Ala. 459,7 South. 340; 4 Mayf. Dig. 498. The plea stated the facts in positive terms, but the affidavit of the attorney was merely as to his belief of facts, and was insufficient under the previous rulings of this court.

Empire Guano Co. vs Jefferson Fertilizer Co.154 Ala. 409, 45 South. 657;
M. & M. R.R.Co. vs Ala.Mid. R.R.Co. 123 Ala.145,26 South. 324;
Niehaus & Co. vs Cook 134 Ala. 223,32 South.728;
Sellers vs State 162 Ala. 35,50 South 340;
Holman vs State 144 Ala. 95,39 South.646.See also 31 CYC. 540-544.

The demurrer taking the point was properly sustained.
McCoy vs Harrell 40 Ala. 232.

We respectfully submit that the affidavit to the original plea in abatement is entirely insufficient to meet the requirements of the Code and for this reason the demurrer is well taken.

THE COURT SHOULD NOT PERMIT THE FILING OF AN AMENDED PLEA IN ABATEMENT.

The general rule with reference to permitting amendments to pleas in abatement is expressed in 49 C.J. "Pleading" 531, Par. 704, in the following language:

"While in some jurisdictions, in some instances by virtue of express statutory permission, a plea in abatement is amendable, although the same liberality is not exercised toward such amendments as is exercised with reference to amendments of pleadings to the merits, in other jurisdictions, because of the lack of favor with which dilatory pleas are viewed, no amendment may be had of such a plea."

In Ellison vs Mounts 12 Ala. 472, the defendant filed a plea in abatement to the attachment. The lower court refused to receive the plea over the plaintiff's objection to its reception as not having been filed in time. The Supreme Court, while not entirely adopting the view of the lower Court, affirmed their decision, the reason therefor being given in their opinion in the following language:

"In Cobb vs Force Bros. & Co. 6 Ala. 468, it was determined that a plea which unites two distinct matters of abatement is bad. This decision was reaffirmed in Cobb vs Miller, Ripley & Co. 9 Ala. 499. We have repeatedly held that pleas in abatement do not come within our statutes of amendment, and are not amendable according to the principles of the common law. As, then, the plea which the defendants filed

was bad, and might have been stricken out on motion, or adjudged bad on demurrer, and could not have been amended, they are not prejudiced by the rejection of the evidence they offered to the court."

It is to be noted from the opinion of the Supreme Court above given that the Court definitely and conclusively states that the Statute of Amendments in this State does not apply to pleas in abatement. This decision has never been reversed in this State, in so far as we have been able to find by a diligent search, and we respectfully submit is still the law and that under such decision no amendment to pleas in abatement should be permitted.

In Roberts vs Heim 27 Ala. 678, it was held that pleas in abatement are not viewed with favor and are construed most strongly against the pleader. The rule requires that every inference,however slight, should be repelled.

In Spencer vs Aetna Indemnity Co. 231 Ill. 82, 83 N.E.102, the Court held that where a defendant filed a plea in abatement alleging a prior suit in a foreign jurisdiction, he was not entitled to file an amendment thereto and where the Court erroneously allowed an amendment a judgment refusing to treat it as valid was correct, though it was reached through an erroneous process of reasoning. In the above case, the original plea was verified by an affidavit in which the affiant stated the affidavit was true "to the best of his knowledge and belief." The amended plea stated the plea was"true in substance and in fact." The Court indicated

that the affidavit to the original plea was clearly insufficient.

THE AMENDED PLEA IN ABATEMENT NOT HAVING BEEN FILED WITH LEAVE OF COURT SHOULD NOT BE CONSIDERED.

Section 9513 of the Code of Alabama of 1923 provides that the Court must permit amendments to pleadings. There is no provision in the statute authorizing amendments without leave of Court. Under such circumstances, we submit that the Court should not consider the amended plea in abatement as having been filed.

In 49 C. J. "Pleading" 471, it is stated that "except where an amendment may be made as of course, a pleading may be amended only by leave of Court****".

The same text, page 471, Sec. 593, states:
"An amendment os a pleading as of course, when not authorized by statute or rule of court, is a mere nullity and may be disregarded by the adverse party, or stricken out on motion."

We respectfully submit, therefore, that the amended plea in abatement should not be considered as having been filed.

Respectfully submitted,

Mahoney & Mahoney.

SUMMONS AND COMPLAINT. (Box 608-2) 87181 MARSHALL & BRUCE CO. NASHVILLE

The State of Alabama, Baldwin County

CIRCUIT COURT

To Any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon Consolidated Indemnity and Insurance Company, a corporation,

to appear in the Circuit Court of Baldwin County, Alabama, at the place of holding the same and plead, answer, or demur, within thirty days from service hereof to the complaint of J.E. Newberry.

Witness this 15th day of March, 1932

D.W. Richerson, Clerk.

IF THE DEFENDANT FAILS TO APPEAR AND PLEAD, ANSWER OR DEMUR WITHIN THIRTY DAYS AFTER SERVICE THE PLAINTIFF MAY TAKE JUDGMENT BY DEFAULT.

COMPLAINT

Plaintiff VS. Defendant

And the Plaintiff claim of the Defendant

Dollars, due

CODE 1923—9417

Original

No.

RECORDED

The State of Alabama

.....County

CIRCUIT COURT

J.E.Newberry

.....Plaintiff.....

vs.

Consolidated Indemnity

and Insurance Co.

.....Defendant.....

Summons and Complaint

Filed this 15th day of

March, 19 32

T.C. Simmons

Clerk.

Mahorner & Mahorner,

Plaintiff's Attorney.

Serve Copies on
Insurance Commissioner
Montgomery
On this 28th day of April
1932 came a jury on visit
& enquiry and assessed the
plaintiffs damages at the
sum of $21063,41-00 dollars

(BLANK NO. 2.) MARSHALL & BRUCE CO., NASHVILLE

H.H. Walker
Foreman

Received this MAR 15 1932 day

of 19.....

....., Sheriff.

Executed this ..... day

of....., 19....., by

leaving a copy of the within Summons and Complaint with

.....Defendant.....

.....

Sheriff.

EXECUTED BY SERVING
A copy of the within on
Charles C. Green
as Supt. of
Insurance for Ala.
March 16-1932

Sam H. Stearns
Sheriff Montgomery County.
By L.B. Rangeley
(County Service)

The State of Alabama,

.....COUNTY

To the Sheriff of.....County:

Whereas, the Plaintiff..... in the within stated cause ha..... made affidavit and given bond as required by law, you are hereby required to take the property mentioned in the complaint into your possession, unless the Defendant..... give..... bond payable to the Plaintiff..... with sufficient surety in double the amount of the value of the property, with condition that if the Defendant

.....

cost in the suit,.....
within thirty days thereafter, deliver the property to the Plaintiff....., and pay all costs and damages which may accrue from the detention thereof.

....., Clerk.

J. E. NEWBERRY, Plaintiff vs CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation, Defendant	I I I I I I I	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. AT LAW.

1. The plaintiff claims of the defendant Fifty Thousand ($50,000.00) Dollars damages for this, to-wit; that the defendant on or about the 10th day of April A. D. 1930, being then liable as surety upon a bond for the performance of that certain contract, dated August 1, 1929, between Frank Moseley, Inc., and the Town of Robertsdale, Baldwin County, Alabama, wherein the said Frank Moseley, Inc., a corporation, had agreed to construct a certain sanitary sewerage disposal system in and for said Town of Robertsdale and on which said contract said Frank Moseley, Inc., had defaulted, agreed with the plaintiff that if he would take charge of the work under said contract and complete the same that said defendant would pay to the plaintiff the amounts provided in and by said contract to be paid the contractor for the performance of said work, whereupon the plaintiff took charge of the installation of said sanitary sewerage disposal system and completed the work thereunder in compliance with the specifications contained in said contract between the Town of Robertsdale and Frank Moseley, Inc., hereinabove referred to, and the Town of Robertsdale, Alabama, finally accepted said work so done by the plaintiff and in compliance with the terms of said contract the said Town of Robertsdale did on, to-wit, the 19th day of October A. D. 1930, deliver certain bonds of said town in the aggregate principal sum of $29,000.00, plus $13.61, in cash, to the defendant in final settlement of the amount due for

performance of the work, as provided in said contract.

The plaintiff respectfully shows and represents that the defendant has not paid him any amount for the performance of said work, except that, during the progress of the work, the defendant paid to the plaintiff $1500.00, and on or about the 31st day of October, 1931, the defendant paid an aggregate total amount of $9,977.98, on account of a certain judgment rendered in this Court in the suit of Jesse L. Dias et al., plaintiff, against the Town of Robertsdale, J. E. Newberry and Consolidated Indemnity and Insurance Company, as defendants, which said judgment was on account of certain claims of sub-contractors and of materialmen accruing out of the performance of the work under said contract, but that said defendant has not paid any further sums to plaintiff on account of said work and that the balance of said $29,013.61, after deducting the credits hereinabove set forth, is still due and unpaid.

2. Plaintiff claims of the defendant the further sum of $50,000.00, for this, to-wit; that the defendant on or about the 10th day of April A. D. 1930, being then liable as surety upon a bond for the performance of that certain contract, dated August 1, 1929, between Frank Moseley, Inc., and the Town of Robertsdale, Baldwin County, Alabama, wherein the said Frank Moseley, Inc., a corporation, had agreed to construct a certain sanitary sewerage disposal system in and for said Town of Robertsdale and on which said contract said Frank Moseley, Inc., had defaulted, agreed with the plaintiff that if he would take charge of the work under said contract and complete the same that said defendant would pay to the plaintiff the amounts provided in and by said contract to be paid the contractor for the performance of said work, whereupon the plaintiff took charge of the installation of

said sanitary sewerage disposal system and completed the work thereunder in compliance with the specifications contained in said contract between the Town of Robertsdale and Frank Moseley, Inc., hereinabove referred to, and the Town of Robertsdale, Alabama, finally accepted said work so done by the plaintiff and in compliance with the terms of said contract the said Town of Robertsdale did on, to-wit, the 19th day of October A. D. 1930, deliver certain bonds of said town in the aggregate principal sum of $29,000.00, plus $13.61, in cash, to the defendant in final settlement of the amount due for performance of the work, as provided in said contract.

The plaintiff respectfully shows and represents that the defendant has not paid him any amount for the performance of said work, except that, during the progress of the work, the defendant paid to the plaintiff $1500.00, and on or about the 31st day of October, 1931, the defendant paid an aggregate total amount of $9,977.98, on account of a certain judgment rendered in this Court in the suit of Jesse L. Dias et al., plaintiff, against the Town of Robertsdale, J. E. Newberry and Consolidated Indemnity and Insurance Company, as defendants, which said judgment was on account of certain claims of sub-contractors and of materialmen accruing out of the performance of the work under said contract, but that said defendant has not paid any further sums to plaintiff on account of said work and that the balance of said $29,013.61, after deducting the credits hereinabove set forth, is still due and unpaid.

Plaintiff further alleges that it was provided by the contract between Frank Moseley, Inc., and the Town of Robertsdale that the contractor should be paid monthly in notes bearing 7% interest, these to be redeemed upon completion of the work in cash or 7% special assessment bonds,

and that the defendant promised and represented to the plaintiff that it would turn over to the plaintiff the notes of the Town of Robertsdale given in compliance with the terms of said contract, in order that the plaintiff might use said notes to obtain funds with which to assist him in carrying out the work required by said contract, but plaintiff alleges that said defendant failed, neglected and refused to turn over said notes to the plaintiff, except that the defendant loaned to plaintiff $1500.00, on receiving from the Town of Robertsdale, in compliance with the terms of said contract, a certain note payable to the order of defendant, dated May 9, 1930, in the amount of $17,153.05, payable at Robertsdale State Bank ten days after demand and bearing interest at 7% per annum from date, but plaintiff shows that said amount of $1500.00, was totally inadequate to provide plaintiff with funds with which to finance the work necessary under said contract and that as a proximate result of defendant's neglect and refusal to turn over said note of $17,153.05, and such other notes as may have been received from the Town of Robertsdale by the defendant, to the plaintiff, in order that he might use the same and obtain funds for carrying out said work, plaintiff was forced to sell at a sacrifice various of his goods, materials and equipment, in order to obtain finances to complete the work under said contract and that by reason of such forced sales of equipment and materials plaintiff was damaged in a large sum of money, all as a proximate result of the breach of said agreement by defendant.

3. Plaintiff claims of the defendant $50,000.00, on account stated between plaintiff and defendant on, to-wit; the 23rd day of January, 1931, which sum of money, with interest thereon, is still unpaid.

4. Plaintiff claims of the defendant $50,000.00, for work and labor done for the defendant by the plaintiff from to-wit, the 10th day of April, 1930, to, to-wit, the 23rd day of January, 1931, at its request, which sum of money, with interest thereon, is still unpaid.

Mahoney & Mahoney
Plaintiff's Attorneys.

Plaintiff demands a jury trial.

Mahoney & Mahoney
Plaintiff's Attorneys.

LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

June 6, 1932.

Hon. F. W. Hare,
Judge, Circuit Court,
Monroeville, Ala.

Dear Judge Hare:-

Re: Newberry vs Consolidated Indemnity and Insurance Company:

We have just received copy of letter to you, dated June 4, 1932, from Messrs. Rushton, Crenshaw & Rushton with reference to the above case.

We have also received from Mr. Richerson a letter to the effect that the plea in abatement had been found in a chancery file. We do not agree with Mr. Rushton that the finding of the plea puts an entirely new face on the situation. The fact remains that this plea was never filed in this case. We obtained and displayed to your Honor a certificate of the Clerk to that effect, when you entered the default against the defendant. The records of this case show that judgment on the default was duly and regularly entered and that the attorneys for the defendant have filed a motion going into the merits of their defense in an endeavor to set aside this judgment. Certainly, by such a motion they waived any right to depend on a plea in abatement. Neither do we agree with Mr. Rushton that the plea in abatement is good under G. M. A. C. vs Home Finance Company cited in his letter. The plea in abatement in the G. M. A. C. case stated more facts than the one Mr. Rushton has filed. For instance, it not only stated that the Company was not doing business in the County at the time suit was filed, but also that they were not doing business in that County at the time the cause of action arose, which would take it out of Section 10471 of the Code of 1923.

If Mr. Rushton wishes to depend upon his plea in abatement and wants to obtain an order from the

Court filing it as of April 14th, we think it would be better, in order to keep the record straight, that he make a formal motion for such order. We would like to be heard on any motion that is filed and if any such motion is filed, we would also wish to be heard on the effect, which it would have on Mr. Rushton's pending motion to set aside the judgment, not only as constituting a waiver of the motion to set aside the judgment, but also as a reason for denying the motion to set aside the judgment, in that it would disclose that the defendant does not intend to meet the conditions upon which this Court has indicated that it would consider setting aside the judgment and granting a new trial.

Very truly yours,

MAHORNER & MAHORNER.

BY J. G. Mahorner

JGM.C

Cy. to Rushton, Crenshaw & Rushton,
Montgomery, Ala.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

June 4, 1932

Hon. F. W. Hare, Judge,
Circuit Court,
Monroeville, Alabama.

Dear Judge:

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Company

The enclosed letter from Clerk Richerson at Bay Minette puts an entirely new face on the situation. It seems to me that my client ought not to be penalized for the error of the Clerk. I believe that the plea in abatement is good under G.M.A.C. v. Home Finance, 218 Ala. 681, 120 So. 165, and I am therefore asking that an order be made filing the plea in abatement as of April 14, the day after the day on which it was mailed in this office, and that the case stand for hearing on the plea.

If my memory serves me, the carbon of the original plea which was executed on April 7 was attached to an affidavit and is filed with the Clerk at Bay Minette and I am therefore having another copy of the plea sent to you for your consideration. If you think a further motion is necessary to restore it to the docket I will, of course, be glad to make it setting out the facts, the only new one of which, however, is the discovery of the plea in the Newberry case in a chancery file.

Very truly yours,

Marion Rushton

CC: Messrs. Mahorner & Mahorner,
Attorneys at Law,
Mobile, Alabama.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

May 27, 1932

Hon. F. W. Hare, Judge,
Circuit Court,
Monroeville, Alabama.

Dear Judge:

The enclosed amendment sets out as succinctly as possible the situation between Newberry and the Consolidated as stated verbally to the court yesterday.

Clearly, if these facts are established to the satisfaction of the jury the judgment for $21,000 will be materially changed, if not entirely eliminated.

I am sending a copy to Messrs. Mahorner & Mahorner. I understand that while they admit nothing, they are willing to submit it upon the complaint as amended.

I wish to thank you for your courtesies to me yesterday.

With regards, I am

Sincerely yours,

Marion Rushton

Enc.

T. W. RICHERSON
REGISTER AND CLERK OF THE CIRCUIT COURT
BALDWIN COUNTY
BAY MINETTE, ALA.

JUNE 2, 1932.

Messrs. Rushton, Crenshaw & Rushton,
Attorneys At Law,
Bell Building,
Montgomery, Alabama.

My Dear Mr. Rushton:

While running through a Chancery file I ran across your plea filed in the Newberry case. Your letter was also attached to it and the dates correspond with the dates you stated to me that it was mailed.

I have written Mr. Mahorner and also sent copy of plea and told him of my mistake, now I want to apologize to you for being the cause of your being in an embarrassing position when you were here last month.

Hoping that no damage has been done which cannot be repaired,

I am yours very truly,

T W Richerson
By T W R Jr

LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

June 4, 1932.

Hon. F. W. Hare,
Judge of Circuit Court,
Monroeville, Ala.

Dear Judge Hare:-

We appreciate your forwarding us the original amendment to motion to set aside the judgment in the Newberry case. We have examined same and return it herewith.

It is agreeable to us that you should rule on this motion without further argument. It is our understanding, however, that any order entered granting the motion will be conditioned on payment of costs to this time by the defendant and also on the defendant's filing its pleas to the merits without leave to file any plea in abatement. We would also appreciate your fixing the time in the order within which the defendant shall file its pleas. Upon entering the order, we would appreciate your forwarding us copy.

With kind regards, we remain

Very truly yours,

MAHORNER & MAHORNER.

BY J. G. M.

MM.C

LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

June 2, 1932.

Judge F. W. Hare,

Monroeville, Ala.

Dear Judge Hare:-

Re: Newberry vs Consolidated Indemnity and Insurance Company:

We have your note advising Mr. Rushton stated he sent us copy of the amendment to the motion. We received this copy of the amendment. However, we would like to examine the original amendment, in order to make sure that the affidavit etc., is in due form.

We will return the motion to you immediately upon completing our examination. For your convenience in replying, we enclose self-addressed envelope.

Very truly yours,

MAHORNER & MAHORNER.

BY J. G. M.

JGM.C

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

June 14th, 1934.

Mrs. M. A. Stone, Clerk,

Circuit Court,

Bay Minette, Alabama.

Dear Mrs. Stone:

Re: J. E. Newberry v. Consolidated; Killingsworth v. Consolidated, and any other matters that may be pending against Consolidated Indemnity & Insurance Company

We have been informed by the Bureau of Liquidations, Conservations and Rehabilitations of the State of New York, whose address is 111 John Street, New York City, that the Consolidated Indemnity & Insurance Company was placed in liquidation pursuant to an order of the Supreme Court dated May 29, 1934, and we have been instructed by the liquidator to withdraw our appearance in any causes now pending and to inform the Court of the situation.

Very truly yours,

Rushton Crenshaw Rushton

CC: Judge F. W. Hare,
Bay Minette, Alabama.
Messrs. Mahorner & Mahorner,
Mobile, Alabama.
Mr. Elliot G. Rickarby,
Robertsdale, Alabama.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

March 1st, 1935.

Mr. Robert S. Duck, Clerk,

Circuit Court of Baldwin County,

Bay Minette, Alabama.

Dear Sir:

Please re-enter our appearance for the Consolidated Indemnity & Insurance Company in the case of J. E. Newberry against that company and inform us what is its present status. You will find that upon the issuance of an order by the New York court placing the Consolidated in receivership, we withdrew our appearance. We are now instructed by the liquidator to re-appear in the matter and to carry it to a final conclusion.

Very truly yours,

Rushton Crenshaw & Rushton

J. E. NEWBERRY, Plaintiff vs CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation, Defendant		IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

Comes now the plaintiff in the above entitled cause and says that defendant's amended plea in abatement filed herein on, to-wit, the day of March A.D. 1933, is bad in substance and plaintiff demurs thereto upon the following several grounds, each ground being applied separately and severally to said plea.

1. Said plea states no ground or cause for abatement of this action.

2. Said plea fails to disclose sufficient facts to enable plaintiff to obtain a better writ.

3. Said plea fails to show that Montgomery, Alabama, was the only place wherein defendant was doing business or had an agent at the time of the institution of this suit.

4. It affirmatively appears from the allegations of said plea that the defendant has ceased to do business in the State of Alabama and, as a consequence, defendant is now liable to be sued in Baldwin County, Alabama.

5. It does not affirmatively appear from the allegations of said plea that Charles C. Greer was the only agent, which defendant had in Alabama at the time of the institution of this suit.

6. It affirmatively appears from the allegations of said plea that the defendant is not doing business in Alabama and Section 232 of the Constitution only provides for suits, when such foreign corporations

are doing business in this State.

7. For aught that appears from said plea, the defendant was doing business in Baldwin County, Alabama, at the time the cause of action sued on arose.

8. It affirmatively appears from Section 10471 of the Code of Alabama the venue of a suit against a foreign corporation is properly laid in the County, where it was doing business by agent at the time the cause of action arose and it does not affirmatively appear from the allegations of said plea that the defendant was not doing business in Baldwin County, Alabama, by agent at the time the cause of action sued on herein arose.

9. Because said plea fails to deny that the work and labor done and materials and supplies furnished, for the value of which this suit is instituted, was done and furnished in Baldwin County, Alabama.

10. Because it appears from the allegations of said plea in abatement, when read in connection with the allegations of the complaint in this cause, that the defendant is estopped from pleading that this action was not properly instituted in Baldwin County, Alabama.

11. Because from aught that appears in said plea in abatement, the defendant was doing business in Baldwin County, Alabama, at the time the cause of action herein arose and, if so, said defendant is estopped from pleading that this action was not properly instituted in Baldwin County, Alabama.

12. Because it affirmatively appears from said plea in abatement read in connection with the complaint herein that the defendant was doing business in Baldwin County, Alabama, at the time the cause of action herein arose, and hence the defendant is estopped from pleading that this action was not properly instituted in said County.

13. Because it affirmatively appears from the allegations of said plea in abatement read in connection with the complaint filed herein that the defendant has waived any rights given to it to be sued in any specific county by Sec. 232 of the Constitution of Alabama.

14. It affirmatively appears that the verification to said plea in abatement is made by one of the attorneys of record and it does not appear that said attorney has any personal knowledge of the facts therein alleged.

15. The statement in the verification to said plea that the attorney making said affidavit "has become acquainted with and knows the facts stated in the within and foregoing plea in abatement" is not sufficient to show any personal knowledge on the part of affiant of the facts stated in said plea in abatement.

16. Because from aught that appears from said verification, affiant's purported knowledge of the facts alleged in the plea in abatement may have been gained through hearsay.

17. It affirmatively appears from the plea in abatement read in connection with the complaint herein that the defendant became responsible for the performance of the work on which the action herein was brought, and employed the plaintiff to perform said work; that the defendant was necessarily doing business in Baldwin County, Alabama, at the time the cause of action herein arose and that it has waived any rights it may have had to have been

sued elsewhere than in B aldwin County, Alabama, and is estopped from pleading that this suit is not properly maintained in Baldwin County, Alabama.

18. It affirmatively appears from the records and files herein that said plea in abatement was waived by the defendant.

19. The defendant having entered into the merits of this case on its motion to vacate judgment herein entered cannot now depend upon said plea in abatement.

20. An amended plea in abatement is not allowable under the laws of the State of Alabama.

Mahoney & Mahoney
Attorneys for Plaintiff.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

March 1st, 1933.

Hon. F. W. Hare,
Courthouse,
Bay Minette, Alabama.

Dear Judge Hare:

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Company

Your letter dated the 25th arrived yesterday and we hasten to send you herewith an additional plea in abatement which we think will cover your ruling.

Of course, the Superintendent of Insurance of Alabama is the agent referred to in the amended plea, and he is the Honorable Charles C. Greer, whose address is State Capitol, Montgomery, Alabama. Because of the shortness of time I have verified the plea in my own name. In fact, I know more about the business of this company in southern and middle Alabama than anybody else, I suppose. I am sending a copy of the plea to New York for verification up there and beg leave to file it as soon as the mails will return it to me. ~~in that form also~~

It will be impossible for me to get to Bay Minette tomorrow and I think you are acquainted from the briefs which I have already filed in the matter with the authorities on the subject.

You will find that service in this case was perfected on Mr. Greer in the first instance and doubtless the plaintiff's attorneys have been aware all along of his agency under the qualification statutes, and, of course, of his address.

Please note an exception to your Honor's ruling sustaining the demurrer to the original plea in abatement and to the sustaining of the demurrer to the amended plea filed July 9th, 1932. I take it that the plea as now amended will be sustained against any demurrer which has as yet been filed.

We are sending a copy of this letter to Messrs. Mahorner & Mahorner.

Very truly yours,

Marcus Rushton

Enc.

CC: Messrs. Mahorner & Mahorner,
Attorneys at Law,
Mobile, Alabama.

J. E. NEWBERRY,		
Plaintiff		IN THE CIRCUIT COURT
vs		
CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation,		OF BALDWIN COUNTY, ALABAMA.
Defendant		

Comes now the plaintiff in the above entitled cause by his undersigned attorneys and says that defendant's plea in abatement purporting to have been filed herein on, to-wit, the 14th day of April, 1932, is bad in substance and plaintiff demurs thereto upon the following several grounds, each ground being applied separately and severally to said plea in abatement.

1. The allegations in said plea fail to disclose the county wherein the defendant was doing business at the time of the commencement of this suit.

2. The allegations of said plea do not show that the defendant was not doing business in Baldwin County, Alabama, at the time the cause of action herein arose.

3. The allegations of said plea are insufficient to show the venue of said suit as elsewhere than in Baldwin County, Alabama.

4. It affirmatively appears that the venue of this suit is in Baldwin County, Alabama, under Section 10471 of the Code of 1923.

5. It does not affirmatively appear that the proper venue of this suit is not Baldwin County, Alabama, under Section 10471 of the Code of 1923.

6. Said purported plea in abatement is insufficient, in that it has not been signed by the defendant.

7. The verification to said plea in abatement

is insufficient.

8. The purported verification of said plea is insufficient in failing to show that it is not made simply upon information and belief.

9. The purported verification of said plea is insufficient in failing to state that the facts alleged in said plea are true in substance and in fact.

10. It affirmatively appears from the records and files herein that said plea in abatement was waived by the defendant.

11. It affirmatively appears from the certificate of the Clerk herein that said plea in abatement was not filed within the time allowed for pleading and, accordingly, said plea should not be received under Rule Twelve of the Circuit Court.

12. The defendant having entered into the merits of this case on its motion to vacate judgment herein entered cannot now depend upon said plea in abatement.

Mahoney & Mahoney.
Attorneys for Plaintiff.

9612

RECORDED

T.W. R.

Demurrer to Plea in abatement

Filed June 29th 1932

P.W. Hare

Judge

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

June 23, 1934.

Mrs. M.A.Stone, Clerk,

Circuit Court,

Bay Minette, Alabama.

Dear Mrs. Stone:

I hand you herewith certified copy of the order in the Consolidated Indemnity & Insurance Company matter. Please show it to Judge Hare whenever any of the Consolidated cases are called.

Yours very truly,

Marion Rushton

At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, in the Borough of Manhattan, City, County and State of New York, First Judicial District, on the 29th day of May, 1934.

Present:

HON. ERNEST E. L. HAMMER,

Justice.

IN THE MATTER

of the

Application of the PEOPLE OF THE STATE OF NEW YORK, by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business and affairs of the

CONSOLIDATED INDEMNITY AND INSURANCE COMPANY.

Upon reading and filing the order to show cause dated the 24th day of May, 1934, and duly granted by Mr. Justice J. F. Carew, one of the Justices of the Supreme Court of the State of New York, in the First Judicial District; the petition of George S. Van Schaick, Superintendent of Insurance of the State of New York, duly verified on the 24th day of May, 1934, and the exhibits thereto attached, (Exhibits A, B and C); the affidavit of John E. Watson, duly sworn to on the 24th day of May, 1934; the affidavit of service of said order to show cause and of the papers upon which it was granted, duly sworn to by Charles S. Beller, on the 25th day of May, 1934; the affidavit of William P. Habel, duly sworn to on May 28th, 1934; and upon the order of rehabilitation dated the 10th day of May, 1934, heretofore granted against the Consolidated Indemnity and Insurance Company; and it appearing that all further efforts to rehabilitate the Consolidated Indemnity and Insurance Company would be futile and that it is to the best interests of all persons concerned that the Superintendent of Insurance of the State of New York be directed to liquidate the business and affairs of the Consolidated Indemnity and Insurance Company; and the motion to liquidate having been duly brought before this Court by the order to show cause aforesaid; after hearing John J. Bennett, Jr., Attorney General of the State of New York (Joseph C. H. Flynn of Counsel) representing the Superintendent of Insurance of the State of New York in support of said motion and there being no opposition; after due deliberation, upon filing the opinion of the Court, it is hereby

ORDERED, that the petition of George S. Van Schaick, Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted; that the said Superintendent, or his

successor in office, is hereby directed forthwith to take possession of the property and to liquidate the business of the Consolidated Indemnity and Insurance Company, pursuant to Article XI of the Insurance Law of the State of New York; that the said Superintendent is hereby vested with full title to all property of said company; and that he, or his successor, is hereby directed to deal with the property and business of the said company in his own name as Superintendent of Insurance; and it is further

ORDERED, that the said Consolidated Indemnity and Insurance Company is insolvent; and it is further

ORDERED, that the Superintendent of Insurance as Liquidator of the Consolidated Indemnity and Insurance Company promulgate the making and entry of this order by a liquidation notice:

(1) demanding that persons indebted to said company pay their indebtedness to the Liquidator;

(2) directing persons having property or records of the Consolidated Indemnity and Insurance Company to assign, transfer and deliver them to the Liquidator, and to submit all books or records relating to the Consolidated Indemnity and Insurance Company to the Liquidator or to his agents for examination and copying at all reasonable times;

(3) instructing persons who have claims against the Consolidated Indemnity and Insurance Company to present same by sworn proofs of claims to the Superintendent of Insurance as Liquidator or to his Special Deputy at a place specified in said Liquidation notice within six (6) months from the date of entry of this order and not later than December 1st, 1934; and it is further

ORDERED, that such liquidation notice be published in the New York Law Journal commencing on the 8th day of June, 1934, and thereafter twice a week for three successive weeks, and by mailing within sixty (60) days after the entry of this order a copy of such notice addressed to the known persons who have claims against the Consolidated Indemnity and Insurance Company at such addresses as may be disclosed by the available home office records of the company, but that the Liquidator shall not be required to mail such notice to those who may have a claim arising under bonds, policies or other obligations of the Consolidated Indemnity and Insurance Company which were marked closed on the books and records of said company on the date of the entry of the order of liquidation herein, nor shall the Liquidator be required to send notice by mail to employees insured under fidelity bonds where the employer pays the premium and such employees have no interest in or claim thereon; and it is further

ORDERED, that such liquidation notice contains the mandate of this Court and is sufficient notice to all persons interested in the Consolidated Indemnity and Insurance Company and that claims presented may be determined and assets distributed without further notice to persons failing to comply with said liquidation notice; and it is further

ORDERED, that all persons are hereby enjoined and restrained from

(1) transacting any business of the Consolidated Indemnity and Insurance Company;

(2) dealing with the property or records of said company;

(3) obtaining, or allowing the obtaining of, preferences, judgments, forfeitures, penalties, fines, attachments or other liens or levies against the estate of said company under the control of the Liquidator;

(4) bringing or further prosecuting any action, suit, special or other proceeding against the said company or its estate or against the Liquidator thereof;

(5) interfering in any way with the Liquidator in his title, possession, or management of the property of said company; and it is further

ORDERED, that in order to give additional notice to any persons who may have claims against the said Consolidated Indemnity and Insurance Company arising out of the active obligations, but whose names are unknown or whose addresses are so defective that letters transmitted by mail would probably not reach them, and in lieu of mailing notice to those interested in the bonds, policies or other obligations of the Consolidated Indemnity and Insurance Company which were marked closed on the books and records of the said company on the date of the entry of the order of liquidation, further notice be given by publication in the following cities where the Consolidated Indemnity and Insurance Company had branch offices or important agencies by publication of such notice in one newspaper in each of said cities once a week for three successive weeks beginning the 15th day of June, 1934, such newspapers to be selected by the Superintndnt of Insurance in his discretion:

Washington, D. C.	Albany, N. Y.
Chicago, Ill.	Buffalo, N. Y.
Baltimore, Md.	Rochester, N. Y.
St. Paul, Minn.	Syracuse, N. Y.
Kansas City, Mo.	Cleveland, Ohio
Bayonne, N. J.	Columbus, Ohio
Jersey City, N. J.	Philadelphia, Pa.
Newark, N. J.	Pittsburgh, Pa.
Trenton, N. J.	Norfolk, Va.
	Richmond, Va.

and it is further

A COPY

ORDERED, that the corporate charter of the Consolidated Indemnity and Insurance Company is hereby annulled and the said corporation dissolved.

Albert Manville CLERK

Enter,

E. E. L. H.,

J. S. C.

NO FEE

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY,

ALABAMA.

Now comes the defendant, Consolidated Indemnity & Insurance Company, a corporation, and by leave of the Court first had and obtained, and appearing specially and for no other purpose, shows unto the Court as follows:

That the Consolidated Indemnity & Insurance Company is a foreign corporation, incorporated under the Laws of the State of New York, with its principal office and place of business in New York City, in the State of New York, and that at the commencement of this action it was not doing business in Baldwin County, Alabama, nor was it doing business by agent in Baldwin County, Alabama, but that it was doing business in Montgomery, Alabama, and at the time of the commencement of this action had an agent therein, who was the Superintendent of Insurance of Alabama, the Honorable Charles C. Greer, and that it was qualified to do business under the Laws of the State of Alabama, and still is so qualified, but has discontinued the doing of business in Alabama, and that the said Charles C. Greer, as Superintendent of Insurance, is the only agent which it has in Alabama.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY,

By Joseph L. Brent
Its Vice President.

Reuben Cheshire & Reuben

Attorneys for Defendant

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Before me, Rose Richmond a notary public in and for said county in said state, personally appeared Joseph P. Keenan, known to me, who first being duly sworn, deposes and says that he is Vice President, an officer of the Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause and as such is authorized to make this affidavit; that he has read the within and foregoing plea and has knowledge of the facts therein stated and that the facts therein stated are true and all statements made therein are true according to his personal knowledge.

Joseph P. Keenan

Sworn to and subscribed before me this 4th day of March, 1933. In Witness Whereof, I have hereunto set my hand and seal of office.

Rose Richmond
Notary Public

ROSE RICHMOND, NOTARY PUBLIC
N. Y. Co. Clks. No. 416, Reg. No. 4 R 567
Commission expires March 30, 1934

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

Now comes the defendant, Consolidated Indemnity & Insurance Company, a corporation, and appearing specially and for no other purpose, shows unto the Court as follows;

That the Consolidated Indemnity & Insurance Company is a foreign corporation, incorporated under the laws of the State of New York, with its Home Office in New York City, in the State of New York, and that at the time of the commencement of this action it was not doing business in Baldwin County, Alabama, nor was it doing business by agent in Baldwin County, Alabama.

_____

Attorneys for Defendant.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Before me,_____, a notary public in and for said state and county, personally appeared _____, known to me, who, being by me first duly sworn, deposes and says that he is _____ an officer of Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause, and as such is authorized to make this affidavit; that he has read the within and foregoing plea and that the matters and things therein stated as facts are true and those stated upon information and belief he verily believes to be true.

_____

Sworn to and subscribed before me
this _____ day of _____, 1932.
In Witness Whereof, I have hereunto
set my hand and seal of office.

_____

Notary Public

T. W. RICHERSON
REGISTER AND CLERK OF THE CIRCUIT COURT
BALDWIN COUNTY
BAY MINETTE, ALA.

JUNE 26, 1932.

Messrs. Mahorner & Mahorner,
Attorneys At Law,
Merchants Nat'l Bank Bld'g.,
Mobile, Alabama.

Dear Sirs:-

I have a certain drawer in my desk in my office in which I place, pleas, demurrers, answers, summons & complaints and all other papers which have not been recorded and this plea referred to was found in that drawer by my assistant, where it had gotten under the flap of a chancery file, and said Plea was marked as follows:- "FILED APR. 14TH, 1932," which day was the date on which it was filed, as I can cheerfully make affidavit that it was NOT marked filed after it was found in said drawer.

Judge Hare made an order June 22, 1932, that the Judgement by Default be set aside. I am sorry this occurred and when your son was here preparing to mail the papers to the Judge for judgement, I looked in this particular drawer and failed to find the Plea at that time.

Yours truly,

T. W. Richerson

C L E R K.

LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

June 25, 1932.

Mr. T. W. Richerson,

Bay Minette, Ala.

Dear Sir:-

Re: Newberry vs Consolidated Indemnity and Insurance Company:

Some time ago, you wrote us that the plea in abatement, which Mr. Rushton stated he sent in the above case, had been found by you in a Chancery file in your office with the letter of Mr. Rushton attached, showing it to have been mailed on April 13th. We 'phoned to you on April 14th, the day on which you now state this plea was received. Accordingly, the matter should have been in your mind on that date. We are, therefore, at a loss to understand how you could have overlooked receipt of this plea. For our information, we would appreciate your advising us as to the specific date on which you marked the plea filed as of the 14th of April. We hardly feel that, in view of your having misplaced the plea on that date and not having indicated its filing on your docket, that you did in fact on April 14th, stamp the plea as filed by you, but surmise that after you found the plea in the wrong file, showing it to have been received by you on April 14th, you on the day it was found marked it filed as of the 14th of April.

Please advise us, therefore, as to the date on which you did mark the plea filed as of April 14th, and advise us whether you will be willing to make an affidavit as to the marking of the plea on the date that you specified. We trust that you will let us have immediate reply to this letter.

JGM.C

Very truly yours,
MAHORNER & MAHORNER.

LAW OFFICES OF
MAHORNER & MAHORNER
1101-6 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

MATTHIAS MAHORNER
JAMES G. MAHORNER
BERNARD T. MAHORNER

May 19, 1932.

Hon, F. W. Hare,

Monroeville, Ala.

Dear Judge Hare:-

J. E. Newberry vs Consolidated Indemnity and Insurance Company:

We are in receipt of copy of your letter to Messrs. Rushton, Crenshaw & Rushton in the matter of their motion in the above case and have written them that it will be agreeable to us to argue the motion before you on May 26th, at 2 P. M. at Bay Minette.

We have received a copy of the motion to set aside the judgment, which was sworn to by Mr. Rushton. In the event that Mr. Rushton forwarded you any further affidavits or papers other than this motion, we would appreciate your forwarding such additional papers to us for our examination.

Very truly yours,

MAHORNER & MAHORNER.

BY M M Mahorner

MM.C

I send you the original
fill in this case.
Please bring same to
Bay Minette the 26th.
I have agreed with Mr. Rushton
to have motion at 2 P.M.
instead of 2 P.M.

Yours very truly
F. W. Hand

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

MONTGOMERY, ALABAMA

May 17, 1932

Hon. F. W. Hare,
Monroeville, Alabama.

Dear Judge Hare:

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Company

This suit was, as you will probably remember, brought to trial without any defense on behalf of the company at Bay Minette and judgment on writ of inquiry was written up on April 28 for $21,063.41.

I handled the case for the defendant and on April 13, three days before pleading time had run out, mailed a plea in abatement to Mr. Richerson, the Clerk at Bay Minette. He told me yesterday that he was awfully busy at the time, that he did not remember having received it and that he had no record of it in his office. The letter was mailed on our regular stationery in an envelope containing our return address and I am sure that Mr. Richerson must have received it and misplaced it as he has one or two other papers to my knowledge.

At any rate, the situation is not irremediable because thirty days has not expired since the judgment was taken. I am making motion for a new trial and setting out the exact facts at considerable length supported by my own affidavit and that of members of my office staff. I am also writing Mahorner & Mahorner as per enclosec copy.

Please act on the motion at once by setting it down for some day certain which suits your convenience, and send the motion, together with the order to Clerk Richerson.

Very truly yours,

Marion Rushton

Encs.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING
MONTGOMERY, ALABAMA

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

May 17, 1932

Messrs. Mahorner & Mahorner,
Attorneys at Law,
Mobile, Alabama.

Gentlemen:

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Company

We represent the defendant in this matter and quite by accident learned a few days ago that judgment by default with a writ of inquiry had been taken by you at Bay Minette on April 28th. The writer who handled the matter had on April 13, 1932, mailed to T. W. Richerson, Clerk of the Circuit Court at Bay Minette a special plea in abatement, setting up the fact that the Consolidated Indemnity & Insurance Company did not do business in Baldwin County, Alabama, at the time the suit was filed, and accompanied by a letter in words and figures as follows:

"Hon. T. W. Richardson,
Clerk of the Circuit Court,
Bay Minette, Ala.

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Co.

Dear Sir:

Please file the enclosed plea in abatement and enter our appearance for the defendant, and inform us when the case will be called.

Very truly yours,"

While Mr. Richerson says that he never received this letter and plea, it was mailed and in an envelope which would have brought about its return to us in the event he did not re-receive it. We do not know how much experience you have had with Mr. Richerson, but our experience has been and the condition of his office when we were there yesterday rather bears out the conclusion, that he does not handle his papers in a very orderly

fashion. He said that a term of criminal court was on at the time and that he was so busy with other things that he may have overlooked this matter.

At any rate, the Consolidated Indemnity & Insurance Company has already paid out on Newberry's account something very close to $11,000 and therefore does not feel that it is indebted to him in any amount, much less the large sum of $21,000. Accordingly, we made a motion to set aside the verdict and judgment and for a new trial, copy of which we enclose. We are sending this motion with supporting affidavits to Judge Hare by tonight's mail. He will doubtless want to set it down for hearing at some time and we are writing to inform you gentlemen of our position in the matter and to ask you what date you would suggest that Judge Hare set for hearing the matter.

We entertain the hope that perhaps you might agree that the judgment ought to be set aside, but we know that Newberry feels very much aggrieved about the way the Home Office has conducted the affair and we hardly hope that you will, even if you felt so inclined, be able to get your client to agree that a new trial ought to be granted.

With regards, we are

Very truly yours,

Enc.

RUSHTON, CRENSHAW & RUSHTON
ATTORNEYS AT LAW
BELL BUILDING

RAY RUSHTON
H. F. CRENSHAW
MARION RUSHTON

FILES CRENSHAW, JR.
J. C. CRENSHAW

MONTGOMERY, ALABAMA

April 13, 1932.

Hon. T. W. Richardson,
Clerk of Circuit Court,
Bay Minette, Ala.

Re: J.E.Newberry v. Consolidated Indemnity & Insurance Co.

Dear Sir:

Please file the enclosed plea in abatement and enter our appearance for the defendant, and inform us when the case will be called.

Very truly yours,

Rushton Crenshaw Rushton

9612

TWENTY-FIRST JUDICIAL CIRCUIT
OF ALABAMA
F. W. HARE, JUDGE
L. S. BIGGS, CIRCUIT SOLICITOR
M. R. FARISH, COURT REPORTER
MONROEVILLE, ALABAMA

February 25, 1933.

Messrs. Mahorner & Mahorner,
Mobile, Alabama.

Gentlemen: Re: Newberry vs. Consolidated Indemnity & Ins. Co.

I have before me the file in the above case and it appears to be submitted to me on demurrer to plea in abatement filed on April 14th., 1932, and possibly also on motion by the plaintiff to withdrew demurrer filed to the amended plea in abatement with the view of an objection on the part of the plaintiff to filing any amended plea in abatement by the defendant. I am of the opinion that both pleas in abatement are demurrerable for failure to give the plaintiff a better writ. The first plea makes no pretense to give a better writ and the second plea can hardly be called a pretense in that direction.

I expect to be in Bay Minette on March 2nd., to settle pleadings for the April session of court and unless you gentlemen are present at that time it is my intention to enter an order sustaining demurrer to the original plea in abatement, and also permitting the filing of an amended plea in abatement, noting an objection and exception by the plaintiff to this ruling, and then sustain demurrer to the amended plea filed July 9, 1932.

This will leave the defendant without any pleading unless the plea in abatement is again amended. As I understand the law this is an absolute right on the part of the defendant.

I trust you gentlemen will make arrangements to have this case at issue on next Thursday or have such final ruling on the pleadings as will give either party a right to appeal. I am also writing this identical letter to Messrs. Rushton, Crenshaw & Rushton.

Yours very truly,

FWH:MRF.

J. E. NEWBERRY, Plaintiff	IN THE CIRCUIT COURT
vs	OF BALDWIN COUNTY, ALABAMA.
CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation, Defendant	MOTION TO WITHDRAW DEMURRER TO AMENDED PLEA IN ABATEMENT.

Comes now the plaintiff in the above entitled cause and respectfully shows and represents unto the Court that on, to-wit, the 1st day of August A. D. 1932, plaintiff's attorneys received a copy of a purported amended plea in abatement from attorneys for defendant; that it was recited in said copy of said amended plea that the same was filed by leave of Court first had and obtained; that this was the first notification of any kind that attorneys for plaintiff had as to the filing of any such amended plea; that attorneys for plaintiff thereupon wrote a letter to the Judge of this Court asking if he had entered an order allowing such amended plea to be filed, and not having heard from the Court within a reasonable time thereafter relied on the representation in said plea that leave of Court had first been had and obtained and filed a demurrer to said amended plea; that thereafter attorneys for plaintiff were in Bay Minette and examined the file of this case and not finding any order wrote to the Judge of this Court and attorneys for the defendant asking if any order had been obtained allowing the filing of said amended plea in abatement; that attorneys for the defendant by letter, dated September 12, 1932, advised attorneys for plaintiff that no order had been obtained permitting said amended plea to be filed; that plaintiff did not intend to waive any irregularity in the filing of said amended plea by the demurrer filed thereto but, as aforesaid, filed said demurrer

in reliance upon the representation contained in said plea and a copy forwarded to plaintiff's attorneys that an order had been entered allowing said plea to be filed.

WHEREFORE, plaintiff respectfully moves this Honorable Court to be allowed to withdraw its demurrer to said amended plea in abatement.

Mahoney & Mahoney
Attorneys for Plaintiff.

9612

RECORDED

J. E. NEWBERRY,

Plaintiff

vs

CONSOLIDATED INDEMNITY &
INSURANCE COMPANY, a corporation.

Defendant

.....

MOTION TO WITHDRAW DEMURRER TO
AMENDED PLEA IN ABATEMENT.

.....

Filed Sept 16th 1932
T. W. Blackmon
Clerk

Copy mailed Burleson,
Knight & Burleson
Montgomery
Ala.

Mahorner & Mahorner.

J.E.Newberry

v.

Consolidated Indemnity & Insurance Company, a corporation

In the Circuit Court of Baldwin County, Alabama.

Now comes the defendant, Consolidated Indemnity & Insurance Company, a corporation, and by leave of the Court first had and obtained, and appearing specially and for no other purpose, shows unto the Court as follows:

That the Consolidated Indemnity & Insurance Company is a foreign corporation incorporated under the laws of the State of New York with its principal office and place of business in New York City in the State of New York and that at the time of the commencement of this action it was not doing business in Baldwin County, Alabama, nor was it doing business by agent in Baldwin County, Alabama, but it was doing business in Montgomery County, Alabama, at that time and had an agent therein, and was qualified to do business under the laws of Alabama.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A CORP.

BY Joseph B. Levine

Its Vice President

Rushton, Brumbaugh & Rushton

Attorneys for Defendant.

STATE OF NEW YORK,

COUNTY OF NEW YORK.

Before me, Rose Richmond a notary public in and for said county in said state, personally appeared Joseph B. Levine, known to me, who first being duly sworn deposes and says that he is Vice President, an officer of the Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause and as such is authorized to make this affidavit; that he has read the within and foregoing plea and has knowledge of the facts therein stated and that the facts therein stated are true and all statements made therein are true according to his personal

knowledge.

Rose Richmond

Sworn to and subscribed before me this 6th day of July, 1932,

in witness whereof, I have hereunto set my hand and SEAL OF OFFICE,

Rose Richmond

State of New York, County of New York, } ss.:

No. 9243 SERIES D Form 1

I, DANIEL E. FINN, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, DO HEREBY CERTIFY, That

Rose Richmond

whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 7 day of July 193 2

Daniel E. Finn

Clerk.

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY,

ALABAMA.

DEMURRER TO COMPLAINT

Now comes the defendant and not waiving its plea in abatement heretofore filed, but expressly insisting upon the same, nevertheless, because of the ruling of the Court, appears as to the merits in the cause and demurs to the complaint therein heretofore filed, and each count thereof, separately and severally, and for grounds of demurrer assigns the following:

1. Said count is vague, indefinite and uncertain in that it does not allege the terms of the contract between the plaintiff and defendant which is the basis of the action, either in substance or in haec verba.

2. Said count is vague, uncertain and indefinite in that it does not allege wherein the contract alleged to have existed between plaintiff and the defendant was breached.

Lusk & Lusk

Attorneys for the Defendant

J. E. NEWBERRY, Plaintiff vs CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation, Defendant	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

Comes now the plaintiff in the above entitled cause and excepts to the ruling of the Court entered herein permitting the defendant to file an amended plea in abatement, and further excepts to the allowing of said amended plea in abatement to be filed without notice to the plaintiff of application for leave to file said amended plea.

Attorneys for Plaintiff.

J. E. Newberry
vs
Consolidated Indemnity
& Insurance Co.

RECORDED
as #

Exceptions & Ruling
of the Court

Filed Aug 8/1932
T. M. Meriwether
Clerk

J. E. NEWBERRY, Plaintiff vs CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation, Defendant		IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

Comes now the plaintiff in the above entitled cause by his undersigned attorneys and says that defendant's amended plea in abatement filed herein is bad in substance, and plaintiff demurs thereto upon the following several grounds, each ground being applied separately and severally to said amended plea in abatement.

1. The allegations of said plea do not disclose whether defendant was [illegible] only doing business in Montgomery County, Alabama, at the time of the institution of this suit.

2. The allegations of said plea do not show that the defendant was not doing business in Baldwin County, Alabama, at the time the cause of action herein arose.

3. The allegations of said plea are insufficient to show the venue of said suit as elsewhere than in Baldwin County, Alabama.

4. It affirmatively appears that the venue of this suit is in Baldwin County, Alabama, under Section 10471 of the Code of 1923.

5. It does not affirmatively appear that the proper venue of this suit is not Baldwin County, Alabama, under Section 10471 of the Code of 1923.

6. Said purported plea in abatement is insufficient, in that it has not been signed by the defendant.

7. The verification to said plea in abatement is

insufficient.

8. The purported verification of said plea is insufficient in failing to show that it is not made simply upon information and belief.

9. The purported verification of said plea is insufficient in failing to state that the facts alleged in said plea are true in substance and in fact.

10. It affirmatively appears from the records and files herein that said plea in abatement was waived by the defendant.

11. It affirmatively appears from the certificate of the Clerk herein that said plea in abatement was not filed within the time allowed for pleading and, accordingly, said plea should not be received under Rule Twelve of the Circuit Court.

12. The defendant having entered into the merits of this case on its motion to vacate judgment herein entered cannot now depend upon said plea in abatement.

13. The defendant herein waived the matter pleaded in abatement by applying to the Court for leave to amend its original plea in abatement.

14. An amended plea in abatement is not allowable under the laws of the State of Alabama.

15. It affirmatively appears from the record and filesherein that the plaintiff had no notice from the defendant of its motion for leave to file an amended plea in abatement.

16. The authority of the official taking the affidavit of defendant's officer, who signed the verification, does not sufficiently appear.

Mahoney & Mahoney.
Attorneys for Plaintiff.

J. E. Newbury
vs
Consolidated Accumulative
& Insurance Co -

RECORDED
ASM
INDEXED

Objections to Petition
in Abatement
Received and
Filed Aug 8th 1932
D. W. Bergmann
Clerk

Demurrer to Amended
Plea in Abatement.

J. E. Newberry,)
Plaintiff,)
Vs.) In the Circuit Court, Baldwin
Consolidated Indemnity &) County, Alabama.
Insurance Company, a cor-) At Law.
poration,)
Defendant.)

MOTION FOR NEW TRIAL.

On this motion it is made to appear to the Court without dispute that the summons and complaint were served on defendant's agent on March 16th, 1932, and that on April 13th. defendant's attorneys forwarded by mail to the Clerk of this Court a plea in abatement for filing in the cause with a request that they be notified by the Clerk when the case would be called for trial. It appears that the Clerk did not acknowledge receipt of the letter and plea, and said plea was not filed with the papers in the cause. On April 25th, 1932, there being no plea in the file, and the defendant being adjudged in default, plaintiff took judgment by default for over $20,000.00. On May 18th, 1932, defendant filed its motion for a new trial alleging the foregoing facts, among others, and said motion was set down for hearing on May 26th, 1932. At the hearing on said date the Court was satisfied from the proof by affidavits, etc., that the facts alleged in said motion were ~~ture~~ true and correct, but in view of the certificate of the Clerk made at the time of the default judgment that no plea had been filed in the cause, the Court felt that the judgment should not be set aside and new trial granted for the purpose of a dilatory plea, but only on a sworn statement showing that defendant had a good defense on the merits; whereupon the motion was continued for thirty days to allow defendant to amend its motion to show such defense, if any it has, which amendment to the motion was filed on May 28th, 1932. In the meantime it is made to appear to the satisfaction of the Court that the plea in abatement sent the Clerk by the defendant on April 13th. was in fact recieved by the Clerk in his office on April 14th, before default because of failure to plead within 30

days, and was in fact marked filed by the Clerk on said April 14th, 1932, but by him through mistake, and without any fault on the part of the defendant, actually placed in another file of papers on the Chancery ~~seid~~ side of the Court. The judgment by default was taken wrongfully and under a mistake of fact. Through a mistake of an officer of the Court the defendant was denied the right of the benefit of a lawful plea, or at least the legal right to file a plea in abatement,--whether good or bad,-- and this without any fault or blame on his part, and without any negligence on his or his attorney's part. This, to my mind, is unjust.

It is, therefore, ordered and adjudged by the Court that the default judgment heretofore entered by the Court in this cause be, and the same hereby is, set aside, vacated and held for naught, and the cause restored on the docket for trial in the regular course as if no such judgment by default had been rendered and entered of record, and this with the right to the defendant to be heard on its plea in abatement.

This June 22nd, 1932.

F. W. Hare
Judge.

RECORDED
925

Order Granting New
Trial

Filed June 24th 1932
T. H. Richmond
Register

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

Now comes the defendant, Consolidated Indemnity & Insurance Company, a corporation, and appearing specially and for no other purpose, shows unto the Court as follows:

That the Consolidated Indemnity & Insurance Company is a foreign corporation, incorporated under the laws of the State of New York, with its Home Office in New York City, in the State of New York, and that at the time of the commencement of this action it was not doing business in Baldwin County, Alabama, nor was it doing business by agent in Baldwin County, Alabama.

Lustler Ceeeshaw Lustler
Attorneys for Defendant.
Address: 12th Floor Beel Bldg
Montgomery, Alabama.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Before me, Rosalie M. McGannock, a notary public in and for said state and county, personally appeared ARTHUR H. HAYUM, known to me, who, being by me first duly sworn, deposes and says that he is SECRETARY an officer of Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause, and as such is authorized to make this affidavit; that he has read the within and foregoing plea and that the matters and things therein stated as facts are true and those stated upon information and belief he verily believes to be true.

Arthur H. Hayum
SECRETARY

Sworn to and subscribed before me
this 7th day of April, 1932.
In Witness Whereof, I have hereunto
set my hand and seal of office.

Rosalie M. McGannock
Notary Public

ROSALIE M. McGANNOCK
NOTARY PUBLIC
NEW YORK COUNTY No. 41
COMMISSION EXPIRES

J. E. Newberry

vs

Continental

Insurance Co

Deer in Waterwood

Filed Apr. 14/932

D. M. Rieman

Clerk

RECORDED

J. E. NEWBERRY,	I	
Plaintiff	I	IN THE CIRCUIT COURT OF
vs	I	
CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation,	I	BALDWIN COUNTY, ALABAMA.
Defendant	I	AT LAW.

Comes now the plaintiff in the above entitled cause and respectfully shows unto the Court that the defendant herein has been duly served with process more than thirty days prior to the making of this motion and that said defendant has not filed herein any appearance, plea, demurrer, or any other pleading and is now in default.

WHEREFORE, plaintiff respectfully moves the Court for an entry of a judgment by default against said defendant, with writ of inquiry.

Mahorner & Mahorner
Attorneys for Plaintiff

RECORDED

J. E. Mulberry

vs.

Consolidated

Indemnity &

Insurance Co.

Motion for

judgment by

default with a

writ of inquiry.

Filed April 19, 1932

T. W. Rickman

Clerk

J. E. NEWBERRY,	I	
Plaintiff	I	IN THE CIRCUIT COURT OF
vs	I	
CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation,	I	BALDWIN COUNTY, ALABAMA.
Defendant	I	AT LAW.

I, T. W. Richerson, Clerk of the Circuit Court of Baldwin County, Alabama, do hereby certify that it appears from the records and files in my office that the defendant, Consolidated Indemnity and Insurance Company, a corporation, was duly served with process herein on the 16th day of March A. D. 1932, by service of process in compliance with the laws of the State of Alabama on the Commissioner of Insurance of the State of Alabama, and that said defendant has not filed any appearance, plea, demurrer, or any other pleading in this cause up to and including the time of the execution of this certificate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 19th day of April, 1932.

T. W. Richerson

Clerk Circuit Court, Baldwin County, Alabama.

RECORDED
Oct

J E Mullaney

vs

Consolidated Mining & Smelting Co.

Certificate of Clerk

Filed Sept 19 A.D. 1932

T B Richmond
Clerk

J. E. NEWBERRY,	
Plaintiff	
vs	IN THE CIRCUIT COURT OF
CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation,	BALDWIN COUNTY, ALABAMA.
Defendant	AT LAW.

This cause coming on to be heard, upon motion of plaintiff for judgment by default against the defendant, and it appearing to the Court that the defendant has been duly served more than thirty days next preceding the filing of said motion and has failed to appear, plead or demur within the time allowed by law and the rules of practice of this Court, it is ORDERED and ADJUDGED that a judgment by default be and the same is hereby entered against the defendant, Consolidated Indemnity and Insurance Company, with writ of inquiry in favor of the plaintiff to a jury for the purpose of having plaintiff's damages assessed, and the Clerk of the Circuit Court of Baldwin County, Alabama, is hereby directed to enter said judgment by default with writ of inquiry on the record of this cause.

DONE AND ORDERED at Bay Minette, Alabama, this 25th day of April, 1932.

D. W. Hare

Judge.

agt

Order

Filed Apr 25/932
T M Dickinson
Clerk

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALA.

Now comes Consolidated Indemnity & Insurance Company by leave of the Court first had and obtained and amends its motion to set aside the judgment in this cause heretofore rendered and to grant a new trial, and shows unto the Court as follows:

That its defense to the merits of said suit is based upon the following facts: That on or about March 8, 1930, the plaintiff entered into a contract with the defendant to complete the construction of the Robertsdale sewers in accordance with a contract previously made between the Town of Robertsdale and Frank Moseley, Inc.; that under this contract plaintiff was to perform all work according to the terms of the original contract for the construction of the sewers and was to pay all the expenses of completing said work and to receive all of the payments or securities due from the Town of Robertsdale on account of the construction completed by said Newberry; but that under Clause 6 of the contract between plaintiff and defendant "in the event of any default on the part of the party of the second part (Newberry), party of the first part (the Consolidated Indemnity & Insurance Company) should have the right at its option to withhold any and all estimates or securities received and all compensation for work done until said default is remedied," etc.

That the first payment, or rather security, issued by the Town of Robertsdale was a promissory note payable ten days after demand at the Bank of Robertsdale for $17,153.05, dated May 9, 1930; that at the time of the issue of this note the Town of Robertsdale did not have $17,153.05 in the special assessment

account upon which it was drawn and that the note was really not a negotiable instrument but was merely a memorandum of the amount of work done; that Newberry was unable to raise any money upon it at his bank and that during the month of June 1930 at his insistence the defendant loaned him $1500 on the security of said note, or rather certificate of work done, and the said plaintiff hypothecated said note and all other payments made or to be made by the Town of Robertsdale as security for the payment of said sum; that no other notes or securities were issued by the Town of Robertsdale until January 1931 when the Town of Robertsdale made claims against said Newberry for damages and unpaid charges aggregating the sum of $2373.64, which Newberry was unable to pay and that Newberry and his attorney consenting, the bonds were issued and deposited with a bank at Robertsdale but attached to a draft on the defendant for the said sum; that the draft and the bonds were forwarded to the defendant and the draft paid by it and it in turn surrendered the $17,153.05 note to the Town of Robertsdale and held the bonds as security for the payment of $1500 which it had made and for the payment of $2373.64 which it then made and for such future payments as it seemed it would be necessary for it to pay to laborers and materialmen because of a suit which had theretofore been begun by summons and complaint in the Circuit Court of Baldwin County, Alabama, in a cause styled Felix L. Dias, et al v. J. E. Newberry, Consolidated Indemnity & Insurance Company and others and upon which suit it did in September 1931 pay out the further and additional sum of over $9,000.00 as in the complaint alleged.

That the Consolidated Indemnity & Insurance Company was never obligated to deliver to Newberry anything other than the notes and securities delivered to it by the Town of Robertsdale and that when said notes and securities were issued Newberry already was in default in that he had not paid numerous laborers

and materialmen, and he pledged said notes and securities to the said Consolidated Indemnity & Insurance Company under the conditions and at the time above stated.

That the Consolidated Indemnity & Insurance Company has made all possible efforts to sell said bonds at a price which would reimburse it for the liens which it has against them and to leave some amount over for the said plaintiff, but that it has been impossible to do so; that the said bonds are now in default as to principal in the sum of $5,000 and for the first two semi-annual 7% interest payments and they have been turned over to attorneys for collection.

That the sums which were collected by the Town of Robertsdale under the special assessments for which the bonds are security have been lost or rendered unavailing in the failure of the Robertsdale State Bank and of the Farmers & Merchants Bank of Foley and that the Consolidated Indemnity & Insurance Company has never collected any sum whatever upon said security.

Consolidated Indemnity & Ins Co
by Rushton Crenshaw Rushton
Attorneys for Defendant

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Margaret Simpson, a notary public in and for said state and county, personally appeared Marion Rushton, who on oath, first being duly sworn, deposes and says that he is one of the attorneys for the Consolidated Indemnity & Insurance Company, defendant in the above styled cause; that he has read the within and foregoing amendment to the motion for a new trial and that the matters and things therein stated as facts are true and those stated upon information and belief he verily believes to be true.

Marion Rushton

Sworn to and subscribed before me this 27th day of May, 1932.

Margaret Simpson
Notary Public

J. E. NEWBERRY, Plaintiff vs CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a corporation, Defendant		IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. AT LAW.

Comes now the plaintiff in the above entitled cause and respectfully excepts to the order of this Honorable Court, dated the 22nd day of June, 1932, vacating judgment heretofore entered herein and reserving the rights of the defendant to be heard on its plea in abatement, and further excepts to each and every of the findings of fact as contained in said order.

Mahorner & Mahorner
Attorneys for Plaintiff

203-H

Exceptions

Filed June 25th
1932 - F. W. Hare
Judge

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

Now comes the defendant Consolidated Indemnity & Insurance Company, a corporation, and appearing specially for the purpose of this motion and not otherwise moves the Court to set aside the verdict and judgment in this cause heretofore granted on, to-wit, April 28, 1932, and to grant a new trial of said cause, and for ground of said motion shows unto the Court as follows:

That the complaint in this cause was filed on March 15, 1932, in the office of the Honorable T. W. Richerson, Clerk of the Circuit Court of Baldwin County, Alabama, and served upon the Honorable Charles C. Greer, as statutory agent of the defendant, Consolidated Indemnity & Insurance Company, on March 16, 1932, by the sheriff; that the firm of Rushton, Crenshaw & Rushton, Montgomery, Alabama, was employed to defend the case on behalf of the Consolidated Indemnity & Insurance Company and that it prepared a special plea in abatement and on April 4, 1932, sent the same to the defendant at its New York office to be executed; that this plea in abatement was executed before Rosalie W. McCormack, a notary public, on April 7, 1932, and mailed to Rushton, Crenshaw & Rushton, Montgomery, Alabama, on the same date; that on April 13, 1932, not having received said plea, Mr. Marion Rushton of the firm of Rushton, Crenshaw & Rushton, wired the Consolidated Indemnity & Insurance Company, as follows:

> "Newberrys suit at Bay Minette must be answered by fifteenth Please execute plea in abatement sent you April fourth and return by Air Mail"

That at 11:10 A.M., April 13, Rushton, Crenshaw & Rushton received the following telegram from the Vice-President of the Consolidated Indemnity & Insurance Company:

"Newberry papers mailed you on Monday Stop
Regards
J. B. Levine"

That the said plea in abatement together with the letter of transmittal dated April 7, 1932, arrived on said April 13, shortly after the receipt of said telegram and that it was immediately mailed to the Honorable T. W. Richardson, Clerk of the Circuit Court, Bay Minette, Alabama, by said Rushton, Crenshaw & Rushton, accompanied with the following letter written by S. A. Kreider, a stenographer in their office:

"Hon. T. W. Richardson,
Clerk of the Circuit Court,
Bay Minette, Ala.

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Co.

Dear Sir:

Please file the enclosed plea in abatement and enter our appearance for the defendant, and inform us when the case will be called.

Very truly yours,"

That said accompanying letter, together with the plea, was mailed in the United States Mail on April 13 at about noon, duly stamped and addressed to "Hon. T. W. Richardson, Clerk of the Circuit Court, Bay Minette, Alabama," in an envelope bearing the return address of Rushton, Crenshaw & Rushton, Montgomery, Alabama; that neither said letter nor the enclosed plea has ever been returned to said Rushton, Crenshaw & Rushton and that unless the same were received by the said T. W. Richerson, as Clerk, it must have been lost in the mails.

That the Clerk of the Court at Bay Minette does not customarily acknowledge letters with promptness and that he usually informs out of town counsel, if at all, when cases are set only a short time before the actual call of the case, and

that the failure to acknowledge receipt of the letter dated April 13, 1932, was not unusual.

That defendant was informed of the judgment taken not earlier than May 4, 1932, and that it has not had an opportunity to present the defense by way of plea in abatement or to the merits which it has and which in the opinion of counsel ~~was~~ are a good defense; that it has already paid out on account of the said J. E. Newberry a sum in excess of Nine Thousand ($9,000.00) Dollars on account of the very transaction out of which this suit arises and that it is not indebted to the said J. E. Newberry, but on the contrary the said J. E. Newberry is indebted to it in a large sum; that by agreement it is holding $29,000 principal sum of the special assessment bonds of the Town of Robertsdale, Alabama, as security to indemnify itself for the amounts paid out by it on account of the said J. E. Newberry and that it has attempted to sell said bonds so that it might realize enough money to reimburse itself and to pay the balance, if any, to the said J. E. Newberry, but that the citizens of the Town of Robertsdale affected by said special assessment have not paid any sum whatever of said bonds to the said defendant and that what sums have been paid into the treasury of the Town of Robertsdale have been lost by deposits in the Robertsdale State Bank and the Farmers & Merchants Bank of Foley, and that said defendant holds no sum in any nature whatsoever nor has it ever received any money on account of its relations with the said J. E. Newberry.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY,

By Rushton Crenshaw Rushton

Its Attorneys

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Margaret Simpson, a notary public in and for said state and county, personally appeared Marion Rushton, who on oath first being duly sworn, deposes and says that he has read the within and foregoing motion; that he is one of the attorneys for the Consolidated Indemnity & Insurance Company and has authority to make this affidavit; that the matters and things stated in the foregoing motion as facts are true and those stated upon information and belief he verily believes the same to be true.

Marion Rushton

Sworn to and subscribed before me
this 17th day of May, 1932.

Margaret Simpson
Notary Public

Received & filed this May 18th 1932.
Set specially for hearing at Bay Minette, Alabama, on Thursday, May 26th, 1932. at 2 P. M.

T. M. Hare
Judge.

The above motion is ordered continued for 30 days. This May 26, 1932

T. M. Hare
Judge

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Margaret S. Jones, a notary public in and for said state and county, personally appeared Marion Rushton, known to me, who first being duly sworn, deposes and says that he is the attorney of record for the Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause; that no executive officer of the Consolidated Indemnity & Insurance Company is now resident in the State of Alabama, and that it will be impossible before March 2nd, 1933, for any officer of said company to verify the above plea in abatement filed in this case; that affiant, as attorney of record, has become acquainted with and knows the facts stated in the within and foregoing plea in abatement, and has authority to verify said plea in abatement on behalf of said Consolidated Indemnity & Insurance Company, and that the facts stated therein are true.

Marion Rushton

Sworn to and subscribed before me
this the 1st day of March, 1933.

Margaret S. Jones
Notary Public

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Ella Frances Beale, a notary public in and for said state and county, personally appeared Margaret Simpson, who on oath first being duly sworn, deposes and says:

I am a stenographer in the office of Rushton, Crenshaw & Rushton, Montgomery, Alabama.

I remember on the morning of April 13, 1932, Mr. Marion Rushton dictated to me the following telegram, which I sent to the addressee therein mentioned:

"April 13, 1932

Consolidated Indemnity & Insurance Company,
475 Fifth Avenue,
New York City.

Newberry suit at Bay Minette must be answered by fifteenth Please execute plea in abatement sent you April fourth and return by Air Mail

Marion Rushton"

That the file in the office of Rushton, Crenshaw & Rushton shows that a Postal Telegraph telegram was received in the following words and figures:

"MY6 8-FA NEWYORK NY APRIL 13 1120A
RUSHTON CRENSHAW & RUSHTON-
BELL BLDG MONTGOMERY ALA-
NEWBERRY PAPERS MAILED YOU ON MONDAY STOP
REGARDS-
J B LEVINNEE. 1110AM."

Margaret Simpson

Sworn to and subscribed before me

this 17th day of May, 1932.

Ella Frances Beale
Notary Public

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Margaret Simpson, a notary public in and for said state and county, personally appeared S. A. Kreider, known to me, who on oath first being duly sworn deposes and says:

I was on April 13, 1932 a stenographer employed in the office of Rushton, Crenshaw & Rushton, Attorneys at Law, Montgomery, Alabama.

Mr. Marion Rushton of that firm at about noon dictated to me the following letter:

"Hon. T. W. Richardson,
Clerk of Circuit Court,
Bay Minette, Ala.

Re: J. E. Newberry v. Consolidated Indemnity & Insurance Co.

Dear Sir:

Please file the enclosed plea in abatement and enter our appearance for the defendant, and inform us when the case will be called.

Very truly yours,"

and gave me a plea in abatement to send in said letter. This plea in abatement was the original of the attached plea in abatement and the letter together with the said plea in abatement was mailed by me at about noon April 13, 1932, in United States Mail with first class postage attached, to T. W. Richardson, Clerk of the Circuit Court, Bay Minette, Alabama.

S. A. Kreider

Sworn to and subscribed before me,
this the 17th day of May, 1932.

Margaret Simpson
Notary Public

J. E. NEWBERRY,

Plaintiff,

v.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, A Corporation,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

Now comes the defendant, Consolidated Indemnity & Insurance Company, a corporation, and appearing specially and for no other purpose, shows unto the Court as follows:

That the Consolidated Indemnity & Insurance Company is a foreign corporation, incorporated under the laws of the State of New York, with its Home Office in New York City, in the State of New York, and that at the time of the commencement of this action it was not doing business in Baldwin County, Alabama, nor was it doing business by agent in Baldwin County, Alabama.

Rudd & Cranshaw Rushton
Attorneys for Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Before me, Rosalie N. McCormack, a notary public in and for said state and county, personally appeared ARTHUR H. HAYUM, known to me, who, being by me first duly sworn, deposes and says that he is SECRETARY an officer of Consolidated Indemnity & Insurance Company, a corporation, defendant in the above styled cause, and as such is authorized to make this affidavit; that he has read the within and foregoing plea and that the matters and things therein stated as facts are true and those stated upon information and belief he verily believes to be true.

Arthur H. Hayum
SECRETARY

Sworn to and subscribed before me
this 7th day of April, 1932.
In Witness Whereof, I have hereunto
set my hand and seal of office.

Rosalie N. McCormack
Notary Public

ROSALIE W. McCORMACK
NOTARY PUBLIC
NEW YORK COUNTY No. 41
COMMISSION EXPIRES MARCH 30, 1933