

6-95 1049

Record No. 1604

In the
Supreme Court of Appeals of Virginia
at Richmond

THOMAS GEMMELL, INCORPORATED,
Plaintiff in Error,

v.

SVEA FIRE AND LIFE INSURANCE CO.,
Defendant in Error.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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THOMAS GEMMELL, INCORPORATED,
Plaintiff in Error,

versus

SVEA FIRE AND LIFE INSURANCE COMPANY, A
CORPORATION, Defendant in Error.

PETITION FOR WRIT OF ERROR.

*To the Honorable Judges of the Supreme Court of Appeals
of Virginia:*

Your petitioner, Thomas Gemmell, Incorporated, a corporation, respectfully represents that it is aggrieved by a final judgment of the Law and Equity Court of the City of Richmond entered against it on the 21st day of September, 1934, in an action on a notice of motion for judgment, wherein Svea Fire and Life Insurance Company, a corporation, was the plaintiff and the petitioner was the defendant. A transcript of the record of the case is presented with the petition.

STATEMENT OF THE FACTS.

The petitioner, Thomas Gemmell, Incorporated, is engaged in doing a general insurance business in the City of Richmond, Virginia. It had represented the plaintiff as its agent until said plaintiff withdrew from doing business in this State. Petitioner continued to collect premiums on insurance written

for the plaintiff before it discontinued doing business in this State. It made settlements monthly of all funds collected.

It was petitioner's custom to send checks on the last day of every month to companies for whom it had collected premiums during that month and whether the remittance was due or not.

On the 28th day of February, 1933, petitioner had on hand funds belonging to the plaintiff amounting to three hundred and fifty-one dollars and fifteen cents (\$351.15). On the evening of that day, February 28th, 1933, petitioner mailed to the plaintiff, at its principal office in New York City, New York, a check for the said sum of \$351.15, drawn on the American Bank and Trust Company, Richmond, Virginia. At the same time, petitioner sent by mail to a number of other companies whom it represented, checks to cover all premiums collected during the month. These checks were also drawn on the said American Bank and Trust Company. All of this mail was posted at the same time. One of the checks was sent to New York City, another to Atlanta, Ga., another to Phila., Pa., and the others to distant cities. All of the said checks were duly received by the respective payees and presented to the said American Bank & Trust Company at Richmond, Virginia, on or before March 3rd, 1933, and duly paid, except the check received by the plaintiff. The check sent to and received by the plaintiff was not presented to said drawee bank until after said bank was closed on March 6th, 1933, under Proclamation of the President of the United States of America.

The petitioner did not learn that plaintiff had failed to present said check to the bank for payment in due course until it received a letter from plaintiff asking to be advised when said bank opened for business. The said bank was not permitted to open. Receivers were duly appointed to take charge of the affairs of said bank. The petitioner had sufficient funds in said bank to pay said check had the check been duly presented for payment. Several months after plaintiff received said check and after the drawee bank closed plaintiff asserted petitioner was liable to it for the amount of said check. The petitioner denied liability and asserted said check was not paid by said bank because of the failure of plaintiff to duly present the same for payment.

On the 26th day of September, 1933, the said plaintiff sued petitioner in the Civil Justice Court of the City of Richmond, Virginia, on the said check, claiming petitioner was indebted to it for the amount of said check. The said check was drawn for the sum of \$351.15. (R., pp. 17, 18.)

The case was duly heard in the said Civil Justice Court of the City of Richmond on the 11th day of October, 1933. The Honorable Gordon B. Ambler was then Judge of said court. After the court heard the parties on the merits of the claim, judgment was entered by the court for the defendant. (R., p. 18.)

In due time the plaintiff *appealed from the judgment against* it to the Law and Equity Court of the City of Richmond, giving bond as required by law. The case was duly docketed in said court. At the regular calling of the docket of said court the *appeal* was set for trial on the 23rd day of February, 1934.

After the jury was sworn to try the issue made on said appeal, and after the plaintiff, the appellant in the appeal, had partly introduced its evidence and failing to further prosecute its appeal, moved the court to permit it to dismiss its appeal, that is, to take a non-suit, which motion the court granted. (R., p. 21.)

On the 27th day of April, 1934, Svea Fire and Life Insurance Company, a corporation, filed its notice of motion for judgment against Thomas Gemmell, Incorporated, this petitioner. This case is between the same parties, on the same cause of action as the case instituted by said plaintiff in said Civil Justice Court of the City of Richmond, which was decided on its merits for the defendant.

The second suit, the case at bar, was set to be heard on the 11th day of May, 1934. The petitioner duly filed pleas of *res adjudicata*, payment, and *nil debit*. During the progress of the trial, the defendant, in support of its plea of *res adjudicata*, introduced in evidence the record, papers and proceedings in the suit brought by the same plaintiff against this defendant in the Civil Justice Court of the City of Richmond (R., p. 17), and it was agreed by counsel for the parties and considered by the court that it was proved by the defendant that the cause of action sued on in the Civil Justice Court of the City of Richmond, and decided in favor of the defendant, is the same cause of action sued on in this case; and that the decision was on the merits of the case. (R., p. 20.) After all the evidence was introduced, the jury found a verdict for the plaintiff for \$351.15. The defendant thereupon moved the court to set aside the verdict of the jury and also made a motion in arrest of judgment on the grounds set out in the record. The motions were overruled and judgment entered for the plaintiff and defendant excepted. (R., p. 22.)

THE MATERIAL POINT IN THE CASE.

The main issue in the case is this: Can the plaintiff in a case tried in a Civil Justice Court against whom judgment was rendered, appeal from said judgment, dismiss the appeal by non-suit and bring another action against the same defendant on the same cause of action?

ASSIGNMENTS OF ERROR.

1. The court erred in rejecting petitioner's plea of *res adjudicata*.
2. The court erred in overruling petitioner's motion to set aside the verdict of the jury and grant it a new trial, and in overruling petitioner's motion in arrest of judgment.
3. The court erred in entering judgment for the plaintiff.
4. The court erred in refusing to enter judgment for the defendant.

ARGUMENT.

As all of the assignments of error are based on the ruling of the court holding that a judgment of a Civil Justice Court is *ipso facto* annulled by an appeal from said judgment, the assignments of error will be discussed as one assignment of error.

The testimony and exhibits in this case on the questions of fact would have made a large record. Petitioner was so strongly convinced that the trial court erred on the issue here made, it felt justified in waiving the assertion of the commission of all errors by the court other than the assignment of the errors herein discussed.

In 16 R. C. L., page 406 (sec. 85), in discussing trials *de novo*, it is said: "Appeals from inferior courts to superior courts for the purpose of trials *de novo* are unknown to the common law." We will, therefore, first refer to such statutes as we have relating to appeals from civil justice courts.

Section 3106, Code 1930, provides there shall be *an appeal from the judgment* of the justice. All such *appeals* shall be tried and judgment rendered as provided by section 6038, but no appeal shall be granted unless and until the party applying for the same have given bond, with sufficient surety to be *approved by the said justice*, to abide the judgment of the court *upon the appeal*, if such appeal be perfected or if not so perfected, then to satisfy the judgment of the justice, judgment against such surety, when the appeal is not perfected, to be entered under section 6028.

Section 6028 provides that the appellee after taking the appeal shall pay to the clerk of the court to which such *appeal* has been taken the amount of the writ tax as fixed by law and four dollars on account of costs in the appellate court, and in the event of his failure to do so, the *appeal* shall stand dismissed, and the *judgment* of the justice affirmed, and the original papers shall be returned to the justice, and he shall enter judgment against any surety given at the time of *appeal* as a matter of course. This section has been enlarged by Acts of the Legislature of 1934, so as to include judgments of justice of the peace, civil justices, civil and police justice or a justice of a municipal court.

Section 6038, Code of Virginia (1930), provides how the *appeal* shall be tried. "Every such appeal *shall be* tried by the court in a summary way, without pleadings in writing, or, if the amount in controversy exceeds twenty dollars, by a jury, if either party requires it. * * * The case shall be determined according to the principles of *law and equity*. If judgment be recovered by the *appellee*, execution shall issue against the *principal* and his *surety*, *jointly* or separately, for the amount of such judgment, including interest and costs, with damages on the aggregate at the *rate of ten per centum per annum*, from the date of that judgment until payment, and for the *costs* of the *appeal*; and the execution shall be endorsed: "no security is to be taken." If the *decision* be *reversed*, the party substantially prevailing shall recover his costs; and such order or judgment shall be made or given as ought to have been made or given by the justice. * * * ." (Italics supplied.)

It will be seen at once that Section 6256 Code of Virginia (1930), providing when a party may be allowed to suffer a non-suit, has no application to *appeals* from civil justices or, "from inferior courts to superior courts for the purpose of trials *de novo*".

After the plaintiff dismissed his action which carried with it the appeal, could the plaintiff have brought the suit at bar before the Civil Justice of the City of Richmond, from whose judgment it had appealed? Had the amount involved been less than \$300.00 and the trial court correct in its ruling complained of, the plaintiff would have been required to have proceeded with this action before the said civil justice (even under the 1932 amendment of section 6256) as the civil justice has *exclusive* jurisdiction in all civil matters where the claims do not exceed \$300.00, exclusive of interest. Sec. 3102b, 6015 Code of Virginia (1930).

Was the trial of the case at bar a trial of the appeal? We submit it was not. Even at the risk of being tedious, we

feel constrained to point out that after the plaintiff dismissed its action, under the provisions of section 6256, there was no statute permitting the action at bar to be tried by the court or jury in a "summary way, without pleadings in writing", and the case, "determined according to the principals of law and equity". There is no surety against whom judgment shall be entered and against whom execution *shall issue* with damages on the aggregate, principal and costs, at the rate of ten per centum per annum, and for the *costs of the appeal*.

In all deference, we submit the provisions of Sec. 6256 have no application to appeals from civil justices, and that the learned trial judge erred in "striking out" petitioner's plea of *res adjudicata*.

Under Sec. 6256, it is too late to grant a non-suit if the case has been submitted to the jury and they have retired from the courtroom, or, if heard by the court, after the case is submitted to the court. *Harrison v. Clements*, 112 Va. 371; *Barrett v. Virginia R. Co.*, 250 U. S. 473, 63 L. Ed. 1092.

In the appeal from the judgment of the civil justice there had been a trial on the merits of the case and a binding judgment entered.

At this point we desire to refer to the case of *Hall v. Ritter Lumber Co.*, 2 Oh. A. 43, as this case construes two statutes of that State which are similar to Sections 6256 and 6038 Code of Virginia (1930). Defendant in error failed an action before a justice of the peace against plaintiff in error, who filed a counter-claim. The plaintiff, lumber company, recovered a judgment before the justice and defendant, Hall, failed on his counter-claim and appealed the cause to the common pleas court.

Thereupon, against the objection of the defendant, plaintiff dismissed its cause of action "without prejudice" which it claimed authority to do under Section 11586, General Code, which provides:

"An action may be dismissed without prejudice to a future action. 1. By the plaintiff, before its final submission to the jury, or to the court, when the trial is by the court." etc.

This section is a part of a chapter relating to proceedings in the common pleas court in actions originating there, but it is claimed is made applicable to appealed cases by Section 10387, General Code, which is as follows:

"When an appeal is taken from a judgment of a justice of the peace, to the court of common pleas, the plaintiff below

shall be plaintiff above, and in all respects, the parties must proceed as if the action originally had been commenced in that court."

The effect of the above section is to make the rules and laws governing procedure in the common pleas court applicable in so far as there is a lack of special provision in the statute for appealed cases.

"We are, therefore, of the opinion that Section 10387 only applies to such cases when they are to proceed in the appellate court, as it only provides how the parties 'must proceed' and says nothing about how they must or can stop.
* * * "

"We find no authority in Chapter 9, above referred to, for a dismissal by the plaintiff 'without prejudice', and finding that Section 11586 is inapplicable, the judgment below is reversed."

The learned trial judge in his memorandum opinion states: "The cases cited by counsel for the defendant in the note of argument are not in point. Such cases almost without exception involve the dismissal of appeals. Here the *appeal* from the Civil Justice Court was not dismissed, but the plaintiff suffered a non-suit which was a dismissal of its case.
* * * When the case on appeal is dismissed the *entire case goes out*. When the *appeal is dismissed* it is an affirmance of the judgment below and the rights of the parties are the same as if no appeal had been taken." (R., p. 14.) (Italics supplied.) We submit, as said by the court, when the plaintiff suffered a non-suit, it was a dismissal of its case—the dismissal of the *case on appeal* dismissed the entire case. If the case goes out, of a necessity, the appeal goes with the case. There can be no appeal without a case. Therefore, when the plaintiff suffered a non-suit, it dismissed its case and its appeal.

"The court having dismissed the *case* the judgment of the justice became final and absolute; and there was no mode provided by our law, by which Hill could afterwards obtain a trial *de novo*". *Hill v. Steel*, 17 Ark. 440.

Jewett Hunter v. Noah Cole, 49 Me. 556:

"It was agreed, in the original action (which was an appeal from the judgment of a magistrate) the appellant pro-

duced no copy of the record of the magistrate, and thereupon, when the case was reached in order for trial, the following entry was made on the docket: 'Action dismissed for want of papers. Judgment below affirmed with additional costs'; * * *

"The court said: * * * 'Perhaps a strict adherence to precise technical language would have required the entry to have been *appeal* dismissed instead of action dismissed: but it would require a pretty nice discrimination to perceive distinction in the practical results of the two entries. They are in substance and effect the same, and were manifestly so intended.' "

We understand, of course, where a case has never been tried, and the plaintiff suffers a non-suit, he may bring another suit on the same cause of action. This is not the issue here. Professor Minor has this to say about non-suits:

"In Virginia, we employ the word non-suit to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial, or at any other time; so that it includes not only the idea of a non-suit proper, but also of a *non-prosequiton*, and of a *nolle prosequi* (*non-pros* and *nol pros*, as they are respectively called)."

"The effect of the non-suit in this comprehensive sense is to *put an end to the pending suit*, without precluding another for the same cause of action, * * * ." 4th Minor (3rd Ed.), page 958. (Italics supplied.)

"A discontinuance is 'in effect a non-suit'. * * * The effect of a non-suit is simply to *put an end* to the present action, * * * ." *Payne v. Bucna Vista Extract Co.*, 124 Va. 296, 311. (Italics supplied.)

We have examined several text books and many cases on the issue involved in this case. The cases from other States are in conflict. The decisions mostly turn on the construction of the respective statutes of the several states. We will cite and quote from a few of the authorities which seem to be pertinent.

In 35 C. J., page 809 (Sec. 520)e. which refers to the effect of the dismissal of an appeal from a justice of the peace, it is said:

"The final and effectual dismissal of an appeal deprives the

appellate court of all further jurisdiction of the cause, and the justice's judgment has the same force and effect as if no appeal had been taken."

The case of *Hill v. Steel*, *supra*, is cited in the footnote with many other authorities, and quotes from the case of *Calhoun v. Kidd*, 150 Ky. 609, 611, 150 S. W. 816. We will later quote from the Calhoun case. The cases referred to in the footnote to the text, deal with dismissals by the court on appeal.

Section (524) (3), page 811 of the same work, deals with voluntary dismissals. The case of *Hall v. Ritter Lumber Co.*, *supra*, is cited.

One of the best considered cases we have found is the old case of *Reed v. Rocap*, 9 N. J. L. 347, cited in the footnote to the text. We quote from this case at length. The court said:

"It is obvious that we can find no precedent to guide us in the decision of this question in the proceedings at common law.

"It is equally certain that our statute furnishes no explicit rule.

"We must, therefore, have recourse to principle, and to such lights as the provisions contained in the statute may afford, to disclose the design and intention of the legislature.

"A party who, as plaintiff, has instituted a suit, may during a certain period of its progress, voluntarily withdraw cease to follow it, and submit to have judgment entered that he doth not further prosecute, which however is always rendered, not at his instance but that of his adversary. The principle on which this permission to withdraw is founded, is that the procedure on the part of the plaintiff is his own, instituted for his own benefit; that in abandoning it he affects or abridges the right of no other person; and as he must pay costs to his adversary, he is thereby deemed, in legal contemplation, to make him indemnify for calling him into court: so long then as he can exercise control over the proceedings without interfering with the established rights of another, he is permitted to do so. But whenever such proceedings have occurred, or the suit has so far advanced that any right of the adverse party has been legally established, or may be abridged by a relinquishment of further proceedings, the power of the plaintiff has ceased.

"Thus, for example, during all the stages of the suit, antecedent to the trial, the plaintiff may, at his pleasure, cease to

prosecute. So even on the trial, when the jury are ready to pronounce their verdict, he may withdraw. But the verdict being rendered against him, his control is at an end. If he even obtain a rule to show cause why a new trial should not be granted, he cannot at his will or by his choice, arrest the further progress of the defendant. Take for illustration the example of a verdict or judgment actually rendered in favor of a plaintiff, but for a less sum than he believes himself entitled to recover. By a rule to show cause, or by writ of error, he may seek relief. He may indeed in both cases voluntarily abandon his suit; but he cannot, in either, obtain what is technically called a non-suit, or in anywise at his own will entitle himself to prosecute his claim in another action as an open and undecided matter. These principles apply with equal force to the case under our consideration. By the verdict and judgment in the court for the trial of small causes, the original defendant has acquired a right, of which, if the plaintiff should be allowed at his mere pleasure to deprive him, the law would be not only inconsistent with itself but unjust and impolitic. By the verdict and judgment the situation of the parties have undergone an essential change. The plaintiff below would doubtless on the appeal be entitled first to exhibit the evidence of his claim; but to a certain extent both parties are actors, and the original plaintiff could not cause at his pleasure the judgment below to be reversed and all further proceedings to cease, without abridging the rights of the other party. If such power be allowed to the plaintiff it would be far better that he should at once, before the justice, annul the judgment, without the useless expense and idle ceremony of the appeal.

“An obscurity in the examination of this subject has arisen from the omission to fix and bear in mind the precise time when the judgment of the justice ceases to exist. Its existence does not cease when the appeal is granted, nor when entered in the Court of Common Pleas, nor when the hearing of the cause in that court has commenced. It ceases only when it is by an act of that court destroyed. It remains until reversed. If the appellant does not appear and prosecute, the appeal is dismissed, the judgment stands. If he does appear and the hearing comes on, the court having heard ‘the documents, proofs and witnesses’, shall, if they find the judgment of the justice correct, affirm it; if incorrect, they shall first reverse it and then give such judgment as the law and fact of the case require; or if the judgment has been rendered for the plaintiff below, and the defendant having appealed, appears, but the plaintiff, then appellee, refuses to appear, or to produce, when the *onus probandi* is on him, evi-

dence to support his demand, the court are in like manner first to reverse the judgment below, and then to render such judgment, of non-suit or otherwise, as the occasion requires. In all cases, however, the judgment remains, and the Court of Common Pleas will not and ought not to reverse it until its legality has been either directly or virtually acknowledged by the party in whose favor it has been rendered, or until such illegality has been ascertained by the court upon an examination of the merits.

"An appeal from the chancellor to the Court of Appeals presents some points analogous to the case before us. The decree appealed from remains in force, its execution only suspended, until disposed of in the Superior Court. On the hearing of the appeal the decree is either affirmed, or is first reversed, and then a new and proper decree made. During the progress of the suit in chancery the complainant would be permitted by the chancellor to withdraw his complaint antecedent to the establishment of any right in favor of the defendant. But if, after an hearing before the chancellor on the merits, a decree is rendered for the defendant, or in other words, the complainant's bill is dismissed, and an appeal is then made by the complainant, the Court of Appeals would not sustain an application in the nature of a motion for non-suit, nor permit the complainant to escape from the decree without first evincing its departure from the principles of equity.

"Our statute, as already remarked, contains no express provision for the present case. Certain parts, however, have a strong bearing upon it. By the condition of the appeal bond the appellant is bound to appear and prosecute the appeal in the court of Common Pleas. Yet, by the procedure now sought to be established, he may, contrary to his obligation, decline to appear and cease to prosecute. He is further bound to stand to and abide the judgment of that court. Does he abide that judgment by withdrawing from it? Further, to entitle himself to appeal after a verdict, the appellant must make oath that he believes he has a just and legal defence to make upon the merits of the case. Does not this requisition clearly show that the purpose of the appeal is to give him an opportunity to be again heard upon the merits of the case, before another tribunal. Why compel him to declare that he has a defence on the merits, if he need not exhibit such defence or bring into view those merits upon the appeal?

"On the whole I am fully satisfied the Court of Common Pleas were right in overruling the motion for non-suit."

The case of *Calhoun v. Kidd*, 150 Ky. 609, 150 S. W. 816, is pertinent. The statute considered is somewhat similar to our statute for the trial of appeals from inferior courts. On page 611 the court said:

“When an appeal is dismissed because not taken in time, or * * * on *motion of the appellant*, before the appellee has been brought into court by service of process or appearance the *effect* of the *dismissal* is to leave the judgment appealed from in full force and effect in the court in which it was rendered. In other words, the status is the same as if no appeal had been prosecuted, and whatever judgment was rendered in the lower court stands in full force and effect in that court.” See cases cited. (*Italics supplied.*)

“When an appeal from the judgment of a justice of the peace is dismissed in the circuit court on motion of the appellant, the circuit court, having jurisdiction, should affirm the judgment, with costs. *C. B. Donaghy & Co., et als., v. Mrs. S. V. McCorkle*, 118 Tenn. 73.”

In the case of *Fort v. Fort*, 118 Tenn. 106, the court, in speaking of an appeal from decree of court of record, at page 112, says:

“The clear deduction from all the authorities in that the appellant has the right to dismiss his appeal upon payment of costs, and the consent of the appellee therefor is not required, nor can they object thereto. This, however, is limited to the *appeal*, and not the *case*. While the appeal may be dismissed, the case cannot be dismissed after judgment is pronounced.”

Plaintiff in the case at bar cannot complain that the court dismissed its case on its motion.

The Missouri case of *Walther, et al., v. Woodson*, decided November 27th, 1916, 190 S. W. 61, is pertinent. The plaintiff appealed. During the pendency of the appeal the defendant settled with plaintiff according to the judgment of the justice. At the time of the trial of the appeal, appellee moved the case be dismissed on the ground of settlement. The court said:

“The appeal on the merits and on the question of costs removed the entire case bodily to the circuit court for *trial de novo*, without regard to any error or imperfection in the judgment below. *Hull v. Beard*, 80 Mo. App. 200. And it va-

cated the judgment, *at least until the appeal was disposed of*; but on *dismissal of the appeal the judgment*, or whatever portion of it is valid, became a finality." (Italics supplied.) *Sublette v. St. Louis, etc., R. Co.*, 96 Mo. App. 113, 69 S. W. 745; *Pullis v. Pullis*, 157 Mo. 565, 587, 590, 57 S. W. 1095. In the *Sublette* case, *supra*, 5th Syl., it is said: "An appeal from a justice's judgment vacates it until the appeal is disposed of; but on dismissal of the appeal the justice's judgment becomes a finality."

In the case of *Reirdon v. Morrison*, 165 P. 1135, 65 Okl. 257, it is said:

"Where a judgment is rendered by a justice court, said judgment appealed to the county court and said appeal dismissed, the judgment of the justice court becomes *res judicata*." 1st Syl.

"Where an appeal is perfected from a judgment rendered by a justice court to the county court, and said appeal dismissed, the judgment rendered by the justice court is restored as if no appeal had been taken." 2nd Syl.

For cases in point, see Justice of the Peace, Cent. Dig., Sec. 645; 24 Cyc. 716e. Dismissal, Withdrawal, or Abandonment. 24 Cyc. 711, 712 (10).

We submit the appellant who sees fit to voluntarily dismiss his case on appeal, should have no greater rights than if his case on appeal is dismissed by the appellate court.

It seems strange to us that any court, in the absence of a clear right under statute, would permit an appellant to vacate and annul a binding judgment against him by any voluntary action on his part.

The case of *Wilmott v. Kolbs*, 158 N. W. 257 (North Dakota), originated in a justice court where plaintiff had judgment for \$35.63. The case was appealed. By agreement of counsel for all parties the action was dismissed by the district court. Later, on motion of plaintiff, the judgment of dismissal was vacated. The Supreme Court of North Dakota reversed the district court. Plaintiff contended that, "the appeal operated in law to wholly vacate and supplant the justice's judgment and consequently there existed no judgment which could be paid to, and satisfied by, plaintiff's counsel. The court said: As we construe our statute the appeal to the district court did not operate to vacate the justice's judgment, but the giving of the *supersedeas* undertaking operated merely to suspend such judgment pending the ap-

peal". Many authorities in support of the opinion and those in support of the rule to the contrary are cited.

The issue in this case materially affects the validity of all judgments of our civil justices, civil and police justices and justices of the municipal courts.

Ever since the creation of these inferior courts the Legislature of this State has shown its intent to abolish the trial of cases by justices of the peace and to enlarge and extend the popularity of the civil justices and civil and police justices. The Legislature has given to the civil justice courts the *exclusive jurisdiction* in all civil matters where the claims do not exceed three hundred dollars, exclusive of interest. Sec. 3102(b) 6015, Code of Virginia (1930). And concurrent jurisdiction with the circuit and city courts of general jurisdiction of any claim to damages for any injury done to the person, which would be recoverable by action at law, if such claims do not exceed three hundred dollars. And in addition the said civil justice courts have concurrent jurisdiction with the circuit and city courts of general jurisdiction in actions at law, except for the recovery of a fine where the amount in controversy does not exceed *one thousand dollars*. Sec. 3102(d), Code of Virginia (1930).

We submit that the Legislature of this State intended and that the common sense administration of justice dictates that some dignity and respect shall be accorded the judgments of the civil justice courts.

This court has held in a number of cases that the *trial* of an appeal from the judgment of a justice shall be had *de novo*. *Southern Ry. Co. v. Hill*, 106 Va. 501, 505; *Copperthite v. Whitehurst*, 157 Va. 480, 488; *Dickerson, et als., v. Commonwealth*, 173 S. E. 543, decided March 22, 1934. In the last-mentioned case, Dickerson and Hawkins were convicted before a trial justice for possession of a still capable of manufacturing ardent spirits, and they appealed to the circuit court. The court held that the appeal from the judgment of a justice or trial justice should be tried *de novo*, which in effect is a statutory grant of a new trial. These cases, as said in *Hall v. Ritter Lumber Co., supra*, provided how the appeal from the judgment of a justice shall be *tried*, but do not say how the appeal, "must or can stop". Where the accused in a criminal case is convicted by the trial justice and appeals, as was done in the Dickerson case, and later desires to avoid a retrial, he moves the appellate court to be allowed to satisfy the judgment of the justice, which is usually granted, and upon his satisfying the judgment the *case is dismissed*. The appellant in such a case would not, of course, be al-

lowed to dismiss his case and thereby vacate and annul the judgment of the justice.

If this court holds that a trial *de novo* means that the mere perfection of an appeal from a civil justice, by that action alone, puts an end to, and wholly annuls the judgment of the civil justice, we admit the trial court was correct in rejecting the plea of *res judicata*.

We submit, to put such a construction on a trial *de novo* would do violence to the intent of Section 6038 Code of Virginia (1930), and the intent of our Legislature. Such a construction would make our inferior tribunals nothing more than moot courts, certainly insofar as the plaintiff is concerned.

The plaintiffs in these courts would secure a fair and impartial trial of their case, and if judgment went against them they could by their own action annul the judgment simply by perfecting the appeal. This construction, as was said in the case of *Copperthite v. Whitehurst, supra*, "would increase litigation and frequently retard, rather than promote, justice". If the plaintiff could non-suit at his pleasure, he would be permitted to harrass a defendant "until patience ceased to be a virtue". He could appeal and give defendant notice to take depositions in New York and when defendant appeared, refuse to take depositions as was done by this plaintiff in the case appealed and non-suited.

We submit, to hold that a trial *de novo* wholly vacates and annuls the judgment of a civil justice, would, as was said in the New Jersey case, make the law not only inconsistent with itself but unjust and impolitic. It would destroy the effect of Section 6038, Code of Virginia (1930). In the footnote to this section, quoting from *Southern R. Co. v. Hill, supra*, it is said: "This section is made necessary by the fact that a justice's court is not a court of record, and, therefore, the *ordinary* procedure governing appeals from courts of record *would be otherwise inadequate* to meet the exigencies of the situation". (Italics supplied.)

We will use in part the illustration in the Copperthite case, *supra*, to show how such a holding would prejudice the defendant in the case appealed: X, a citizen of New York, sues Y, a citizen of Richmond, in the civil justice court of Richmond, judgment is given against X and he appeals from the judgment to the Law and Equity Court of the City of Richmond, after X perfects his appeal he locates Y in New York and sues Y there on the same cause of action. Y could not plead the judgment of the civil justice in bar of the action in New York, if X could show that this court held that the

appeal wholly vacated and annulled the judgment of the civil justice.

In 16 R. C. L., p. 393, 4, Sec. 72, it is said:

“The judgment of a justice of the peace is in the nature of a debt record. * * * The judgment of a justice rendered upon the merits determines, between the parties, their respective rights in the matter in controversy. Neither party can in a subsequent proceeding to enforce it deny or contest the matter of fact ascertained by it, and, where the court has jurisdiction, it is for every purpose, while unreversed, as conclusive between the parties as that of the highest courts. The judgment of a court of competent jurisdiction, whether of record or not, and whether in a proceeding according to the course of the common law, or summary in its character, if upon a point litigated by the parties, is conclusive in all subsequent suits directly involving the same question, until reversed or legally set aside. And, where the second suit is on the same cause of action, it is conclusive as to all matters which could or should have been pleaded in the former action.”

We submit it was error to grant the plaintiff in the case at bar a non-suit of his case on appeal, but he cannot now complain of the action of the trial court as it was on the motion of the plaintiff that the non-suit was granted.

For the reasons stated, petitioner prays that it may be allowed a writ of error to the decision and judgment complained of; that the said judgment may be reviewed and reversed, and that a final judgment be entered in favor of petitioner by this court according to law; and your petitioner will ever pray, etc.

Counsel for the petitioner adopts this petition as his brief and avers that a copy thereof was given in person to Mr. Ralph C. Bethel, opposing counsel in the trial court, on the 14th day of November, 1934.

Respectfully submitted,

THOMAS GEMMELL, INCORPORATED,
By Counsel.

GEORGE B. WHITE,
Attorney for petitioner.

I, George B. White, an attorney at law, practicing in the Supreme Court of Appeals of Virginia, do certify that in

my opinion the said decision and judgment complained of should be reviewed and reversed by this honorable court.

GEORGE B. WHITE.

Received Nov. 14, 1934.

M. B. WATTS, Clerk.

December 29, 1934. Writ of error and *supersedeas* awarded. Bond \$500.

PRESTON W. CAMPBELL.

To the Clerk at Richmond.

Received December 31, 1934.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

Pleas before the Honorable Robt. N. Pollard, Judge of the Law and Equity Court of the City of Richmond, held for the said City at the Courtroom thereof in the City Hall on the 29th day of September, 1934.

Be it remembered that heretofore, to-wit: In the Clerk's office of the Law and Equity Court of the City of Richmond, on April 27th, 1934, came Svea Fire and Life Insurance Company, a corporation, by counsel, and filed its Notice of Motion for Judgment against Thomas Gemmell, Incorporated, which Notice of Motion for Judgment is in the words and figures following, to-wit:

“Virginia:

In the Law and Equity Court of the City of Richmond.

Svea Fire & Life Insurance Company, a corporation, Plaintiff,

v.

Thomas Gemmell, Incorporated, Defendant.

To: Thomas Gemmell, Incorporated:

You are hereby notified that the undersigned will, on the 11th day of May, 1934, at the hour of ten o'clock A. M., of

that day or as soon thereafter as it may be heard, move the Law and Equity Court of the City of Richmond, Virginia, for a judgment and award of execution against you in the sum of Three Hundred Fifty-one Dollars and Fifteen Cents (\$351.15) with interest thereon at the rate of six per centum per annum from the 28th day of February, 1933, until paid, and costs incident thereto, being due to the said
page 2 } undersigned as set out below:

Thomas Gemmell, Incorporated, was agent for the plaintiff, Svea Fire & Life Insurance Company, and as such did sell various policies for fire and life insurance to numerous customers, both in and out of town, for which these customers paid stipulated amounts to Thomas Gemmell, Incorporated, as premiums and in payment of the said policies of insurance. Thomas Gemmell, Incorporated, in pursuance of their activity as agent for said Svea Fire & Life Insurance Company, collected a great number of these premiums. Thomas Gemmell, Incorporated, mailed its check No. 2575, drawn on the American Bank & Trust Company, at Richmond, Virginia, dated February 28th, 1933, payable to the order of said Svea Fire & Life Insurance Company in the sum of Three Hundred Fifty-one Dollars and Fifteen Cents (\$351.15) to cover certain premiums it had collected for its principal referred to herein. This check was duly deposited by the said Svea Fire & Life Insurance Company and handled in the regular course of business, however, it was not paid by the American Bank & Trust Company, due to the fact that they were ordered by the proper authorities to remain closed after March 4th, 1933, and up to the present the said American Bank & Trust Company has not reopened for business. Given under our hand this 21st day of April, 1934.

SVEA FIRE & LIFE INSURANCE CO., INC.,
By Counsel.

FRANK H. ATWILL,
Counsel for Plaintiff.

page 3 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, held the 11th day
of May, 1934.

This day came the plaintiff and defendant, by counsel, and on the motion of the plaintiff by counsel, this case is docketed. The defendant then filed herein a plea of "*res Adjudicata*", plea of "payment" and plea of "*nil debit*".

Virginia:

In the Law and Equity Court of the City of Richmond.

Svea Fire & Life Insurance Company, a corporation, Plaintiff,

v.

Thomas Gemmell, Incorporated, Defendant.

PLEA OF RES ADJUDICATA.

And the said defendant, by its attorney, says that the said plaintiff heretofore, to-wit, on the 26th day of September, 1933, caused a summons to be issued directed to the High Constable of the City of Richmond, Virginia, commanding him to summons Thomas Gemmell, Inc., to appear before the Civil Justice at the Civil Justice Court, Room 416 City Hall, on the 11th day of October, 1933, at 9:30 o'clock A. M., to answer the complaint of Svea Fire and Life Insurance Company, Inc., upon a claim of \$351.15 alleged to be due said plaintiff from said defendant by check, being the identical claim, promise and undertaking in the said notice in this case mentioned. And such proceedings were thereupon had in the said Civil Justice Court, that afterwards, to-page 4 } wit, on the said 11th day of October, 1933, the said plaintiff by the consideration and judgment of the said court, took nothing by his said claim and was adjudged to pay the costs in that behalf expended, whereof the said plaintiff on the merits of his said claim was convicted, as by the record and proceedings thereof, more fully appear; and thereupon the said plaintiff appealed from the said judgment of the said Civil Justice Court to the Law and Equity Court of the City of Richmond. And such proceedings were thereupon had in said Law and Equity Court of the City of Richmond; that afterwards, to-wit, on the 23rd day of February, 1934, the case was being heard by the court and jury, and after the plaintiff introduced its testimony and after the cross examination of its witnesses, the said plaintiff moved the court to allow it to take a non-suit which motion was granted and said plaintiff suffered a non-suit and was adjudged to pay the costs in that behalf expended, whereof the said plaintiff on the merits of its said claim was convicted, as by the record and proceedings thereof, remaining in the said Law and Equity Court of the City of Richmond, more fully appears; which said judgment still remains in full force and effect, in no wise reversed or made void.

And this the said defendant is ready to verify by the said record.

GEORGE B. WHITE,
p. d.

page 5 } Virginia:

In the Law and Equity Court of the City of Richmond.

Svea Fire & Life Insurance Company, a corporation, Plaintiff,

v.

Thomas Gemmell, Incorporated, Defendant.

PLEA OF PAYMENT.

And the said defendant, by its attorney, comes and says that before the commencement of this suit, to-wit, on the 28th day of February, 1933, the said defendant paid to the said plaintiff the said sum of Three Hundred and Fifty-one Dollars and Fifteen Cents (\$351.15), in the declaration demanded, and the said defendant is ready to verify.

GEORGE B. WHITE,
p. d.

page 6 } Virginia:

In the Law and Equity Court of the City of Richmond.

Svea Fire & Life Insurance Company, a corporation, Plaintiff,

v.

Thomas Gemmell, Incorporated, Defendant.

PLEA OF *NIL DEBET*.

And the said defendant, by its attorney, comes and says that it does not owe the said sum of Three Hundred and Fifty-one Dollars and Fifteen Cents (\$351.15) in the said declaration above demanded, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country.

GEORGE B. WHITE,
p. d.

page 7 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, held the 6th day
of August, 1934.

This day came again the plaintiff and defendant, by counsel, and thereupon the plaintiff replied generally to the plea of *res adjudicata* and issue being joined thereon the plaintiff replied generally to the plea of payment and issue being joined thereon as well as on the plea of *nil debit*, came a jury, to-wit: J. E. Hewitt, John M. Gordon, Gilbert F. Parker, B. E. Gooch, B. H. Blakey, J. H. Amos and Edgar M. Andrews, being sworn well and truly to try the issues joined in this case and having heard the evidence and arguments of counsel were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words and figures following, to-wit: "We the jury in the issue joined find for the plaintiff in the amount of three hundred fifty-one dollars and fifteen cents. (\$351.15.)"

Thereupon the defendant by counsel moved the Court to set aside the said verdict as contrary to the law and the evidence and in arrest of judgment, which motion the Court continued for argument to be heard thereon.

page 8 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, held the 21st day of
September, 1934.

This day came again the plaintiff and defendant, by counsel, and the Court having maturely considered the motions of the defendant to set aside the verdict of the jury and the motion in arrest of judgment doth, for reasons stated in writing and now filed and made a part of the record, overrule the said motions; to which action of the Court the defendant, by counsel, excepted. Therefore it is considered by the Court that the plaintiff recover against the defendant the sum of Three Hundred and Fifty-one Dollars and Fifteen Cents, with interest thereon to be computed after the rate of six per centum per annum from the 6th day of August, 1934, until paid, and its costs by it about its suit in this behalf expended.

Memorandum: Upon the trial of this case the defendant by counsel excepted to sundry rulings and opinions of the Court given against it, and on its motion leave is hereby given said defendant to file bills or certificates of exception herein at any time within sixty days from this date as prescribed by law.

Upon the further motion of the defendant, by counsel, it is ordered that this judgment be suspended for a period of

ninety days from this date, in order to enable the said defendant to apply for a writ of error and *supersedeas* upon condition that the said defendant, or some one for it, enter into bond before the clerk of this court in the penalty of Four hundred dollars, with surety to be approved by said clerk and conditioned according to law within ten days from this date.

page 9 } Virginia :

In the Law & Equity Court of the City of Richmond.

Svea Fire and Life Insurance Company

v.

Thomas Gemmell, Incorporated.

MEMO. BY THE COURT.

This is a suit by Notice of Motion for Judgment by the plaintiff, a New York corporation engaged in the business of writing life and fire insurance policies, against the defendant, a Virginia corporation, and formerly a local agent of the plaintiff. The complainant alleges that the defendant being indebted to the plaintiff in the sum of \$351.15 for premiums paid to the defendant on policies of insurance issued by the plaintiff, mailed to the Home Office of the plaintiff in New York City a check for said amount drawn by the defendant on the American Bank & Trust Company of Richmond, dated February 28, 1933, and payable to the order of the plaintiff; that the said check was deposited and handled in the regular course of business by the plaintiff, but due to the fact that said bank was closed and has so remained since March 6, 1933, the said check has never been paid.

On the return day of the said motion the defendant appeared and filed three pleas, to-wit: First, a plea of payment; second, a plea of *nil debet*; and third, a plea of *res adjudicata*.

At the trial the defendant in support of its plea of *res adjudicata* introduced in evidence the papers and proceedings in a suit between the same parties brought in the
page 10 } Civil Justice Court of the City of Richmond and
appealed from that court to this court. I stated to counsel at the time that there being no conflict in the evidence offered in support of the plea of *res adjudicata*, the question raised by the plea was one of law for the court and that the trial could proceed on the other issues and that I would pass on the plea of *res adjudicata* on a motion in arrest of judgment if there was a verdict for the plaintiff.

The trial then proceeded and the evidence was heard by a jury on the issues raised by the pleas of payment and *nil debet*. At the completion of the evidence the court refused an instruction offered by the defendant in support of its plea of payment, and the case was submitted to the jury on the lone issue as to whether the plaintiff had exercised due diligence in presenting the check for payment after its receipt. On this issue the jury returned a verdict for the plaintiff for \$351.15, the amount of the check. The defendant thereupon moved the court to set aside the verdict of the jury as contrary to the law and the evidence, and also made a motion in arrest of judgment on the ground that its plea of *res adjudicata* should be sustained as a matter of law. The case is now before the court on the issues raised by these two motions.

I have carefully considered the evidence and the arguments of counsel, and my conclusions are as follows:

1. The court committed no error in refusing to instruct the jury on the theory that the check was given by the defendant and accepted by the plaintiff in payment of the debt. The evidence was not sufficient to support such an instruction. The only evidence relied on to justify the giving of the instruction was, first, a letter from the defendant to the plaintiff which accompanied the check and which stated, page 11 } “You will find attached check for \$351.15 in settlement of our December account”, and second, the conduct of the plaintiff in retaining the check after payment thereof had been refused.

A check is not an absolute payment of a debt in the absence of an agreement giving it that effect. Ordinarily a check is only a means of payment and the debt will not be extinguished unless and until the check is paid or unless loss be sustained by the drawer in consequence of the neglect of the holder to present the same for payment. If the check is presented in due course and not paid, the right of action which has been suspended by the giving of the check revives, and the holder may sue upon the debt or the check at his option. The words quoted from the letter of the defendant inclosing the check to the plaintiff are in universal use in the business world and they do not carry the technical meaning contended for by the defendant. Standing alone such words cannot by the wildest stretch of imagination be construed as a contract on the part of the plaintiff to accept the check in payment of the debt. Nor should the subsequent conduct of the plaintiff in retaining the check after payment thereof was refused be given such a construction. At this time the entire business

world and more especially the banking situation was in a chaotic condition. The letters which passed between the parties show that the check was retained by the plaintiff in the hope that the bank would be allowed to reopen, and this hope on the part of the plaintiff was not only shared by the defendant but was actually inspired by it, as its letter of March 22, 1933, will show.

2. In my opinion there were no errors committed by the court in the trial of the issue which was submitted to the jury. There were conflicts in the evidence which made it the duty of the court to submit to the jury the question as page 12 } to whether the plaintiff had presented the said check within a reasonable time after it was received. This was done under proper instructions, and the verdict of the jury is conclusive on this point.

3. The only remaining question is the sufficiency as a matter of law of the defendant's plea of *res adjudicata*. This plea alleges that on the 26th day of September, 1933, the plaintiff caused a summons to be issued directing the defendant to appear in the Civil Justice Court of the City of Richmond to answer a complaint of the plaintiff upon a claim of \$351.15 alleged to be due by the defendant; and that such claim is the identical claim mentioned in the Notice of Motion in this suit; that proceedings were had on said warrant in said Civil Justice Court and that on October 11, 1933, it was adjudged that the plaintiff take nothing by his claim and pay the costs of his said suit; that the plaintiff appealed from said judgment to the Law & Equity Court of the City of Richmond; that afterward and while said case was being tried before said court before a jury the plaintiff suffered a non-suit and was adjudged to pay the costs of said suit, whereof the said plaintiff on the merits of its claim was convicted, as by the record and proceedings in said suit more fully appear; that said judgment of the Civil Justice Court of the City of Richmond still remains in full force and effect and in nowise reversed or made void.

The doctrine of *res adjudicata*, briefly stated, is that an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other suits in the same or any other judicial tribunal on the points in issue in the first suit. The judgment alleged page 13 } in the plea to be a bar to this action is one rendered for the defendant by the Civil Justice Court of the City of Richmond. The plea alleges that the plaintiff appealed from said judgment to the Law & Equity Court of the City of Richmond and that subsequently during a trial

in said court the plaintiff suffered a non-suit. The contention of the defendant is that when the plaintiff suffered a non-suit the judgment of the Civil Justice Court was revived and said judgment "still remains in full force and effect and in nowise reversed or made void". If this contention of the defendant is well-founded it follows that its plea of *res adjudicata* would be a bar to this action. Therefore the real question to be determined is, what is the legal effect of a judgment of the Civil Justice Court when an appeal has been perfected from that judgment to a court of record. This question is to be answered by considering the statutes on the subject in the light of the practice which has existed since such courts were established. It would be neither profitable nor practical to review all such legislation. It is sufficient to say that in my opinion it is the import of such statutes to make of no effect all proceedings in the Civil Justice Court when an appeal has been legally perfected in a court of record. The appeal when perfected is equivalent to the institution of a new suit. A writ tax has to be paid by the party taking the appeal. The papers in the Civil Justice Court are required to be forwarded to the clerk of the court to which the appeal has been taken, including the bond given in order to effect the appeal. The condition of such bond is to abide the judgment of the appellate court. The case is tried *de novo* in the appellate court. No provision in the law is made for any procedure thereafter in the Civil Justice Court. The judgment when the case is tried in the court of record is the judgment of that court, and subsequent proceedings thereon are in the appellate court. The situation is not analogous to an appeal from a court of record to the Supreme Court of Appeals. In such cases the appeal is to correct errors of the trial court and the appellate court either affirms or reverses the trial court and send the case back to that court for further proceedings.

The cases cited by counsel for the defendant in the note of argument are not in point. Such cases almost without exception involve the dismissal of appeals. Here the appeal from the Civil Justice Court was not dismissed, but the plaintiff suffered a non-suit, which was a dismissal of its case. There is a difference between dismissing a case on appeal and dismissing the appeal. When the case on appeal is dismissed the entire case goes out. When the appeal is dismissed it is an affirmance of the judgment below and the rights of the parties are the same as if no appeal had been taken. The plaintiff on appeal suffered a non-suit in the first case. This it had a right to do. This amounts to a dismissal of the entire case and did not result in an affirmance of the

judgment of the Civil Justice Court. When the plaintiff instituted its second suit in the same court in which it suffered the non-suit, as it was required by statute to do, there was no "existing final judgment" which could be pleaded in bar of said suit.

It follows from what has been said that a motion to strike out the plea of *res adjudicata* would have been sustained if made, or if the plaintiff had desired to traverse the said plea, then a motion to strike out the evidence offered in support of said plea would have been granted.

An order will be entered overruling both motions of the defendant and entering judgment on the verdict of page 15 } the jury. If the defendant desires to suspend the execution of the judgment, I should be notified at once.

R. N. P.

Sept. 5th, 1934.

page 16 } And now at this day, to-wit: At a Law and Equity Court of the City of Richmond, held the 29th day of September, 1934.

This day came again the plaintiff and defendant, by counsel, and thereupon the defendant tendered to the Court four bills of exceptions, which were received by the Court, signed, sealed and enrolled and ordered to be made a part of the record which is accordingly done.

page 17 } Virginia:

In the Law and Equity Court of the City of Richmond.

Svea Fire and Life Insurance Company, Plaintiff,

v.

Thomas Gemmell, Incorporated, Defendant.

CERTIFICATE OF EXCEPTIONS.

Certificate of Exception No. 1.

I certify that the defendant, in support of its plea of *res adjudicata*, introduced in evidence the record, papers and proceedings in a suit between the same parties, on the same cause of action, brought in the Civil Justice Court of the City of Richmond by the plaintiff, in which, after a hearing on the merits of the case, judgment was entered for the defend-

ant, from which said judgment the plaintiff appealed to this court; that the record, papers and proceedings in said suit are in the following words and figures:

WARRANT.

City of Richmond, to-wit:

To H. C. Farmer, High Constable of said City:

In the name of the Commonwealth of Virginia, I command you to summon the defendant Thomas Gemmell, Inc., if residing in said city, to appear before the Civil Justice at the Civil Justice Court, Room 416, City Hall, on the 11 day of Oct. in the year 1933, at 9:30 o'clock A. M., to answer the complaint of the plaintiff Svea Fire & Life Insurance Co., Inc., upon a claim of Three Hundred & fifty-one
page 18 } dollars and 15 cents, alleged to be due said plaintiff from said defendant by check.

And do you then and there make return of this warrant and how you executed the same.

Given under my hand this 26 day of Sept. in the year 1933.

G. R. CROWDER, J. P.

JUDGMENT.

In the Civil Justice Court of the City of Richmond.

11 day of Octo., 1933.

Judgment for said defendant.

GORDON B. AMBLER,
Civil Justice.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, Svea Fire & Life Insurance Co., Inc., Principal and Henry G. Ferguson Surety are held and firmly bound unto the Commonwealth of Virginia in the sum of twenty-five dollars, to the payment of which we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents. Witness our hands and seals this 19th day of October, 1933. We hereby waive our Homestead Exemption as this obligation. The Condition of the above Obligation is

such that whereas the Civil Justice, of the City of Richmond, Virginia, did on the 11th day of October, 1933, in a certain proceeding pending before said Civil Justice between Svea Fire & Life Insurance Co., Inc., plaintiff, and Thomas Gemmell, Inc., defendant, enter a judgment for the said defendant, and whereas the said plaintiff has prayed an appeal from said judgment to the Law & Equity Court of the City of Richmond, now, therefore, if the said plaintiff shall

page 19 } abide the judgment of the said Court upon the said appeal, if perfected, and if not perfected, shall satisfy the judgment of the Civil Justice aforesaid, then this obligation shall be void, otherwise to remain in full force and virtue.

SVEA FIRE & LIFE INSURANCE CO., INC. (Seal)

By: FRANK H. ATWILL, Atty. (Seal)
HENRY G. FERGUSON. (Seal)

Executed in my presence, and justified before me in my office as to sufficiency of the Estate of Henry G. Ferguson as surety in the foregoing bond, which is hereby approved this 19th day of October, 1933.

GORDON B. AMBLER,
Civil Justice, of the City of Richmond.

Wherefore defendant prays that this, its Certificate of Exception No. 1, may be signed and made a part of the record, which is accordingly done, after due notice to the plaintiff as required by law, this 29th day of September, 1934.

ROBT. N. POLLARD, Judge.

page 20 } *Certificate of Exception No. 2.*

I further certify that counsel for the parties agreed at bar and the court considered that it was proved by the defendant that the cause of action sued on in the Civil Justice Court of the City of Richmond, decided in favor of the defendant, is the same cause of action sued on in this case; that the decision was on the merits of the case; that the plaintiff appealed from the said judgment of the Civil Justice Court of the City of Richmond to this court; that bond was duly given and the appeal was duly perfected; that the appealed case was duly docketed and set for trial; that on the day of the trial of the appeal, and after the plaintiff had introduced a

part of its testimony in support of its claim, said plaintiff moved the court for a non-suit, which motion the court granted and entered an order rendering judgment for the defendant for its cost and \$5.00 damages as provided by statute, which order, in full, is made a part of the record by Certificate of Exception No. 3; that no further action was taken by the court with reference to said judgment of the Civil Justice Court appealed from.

Wherefore defendant prays that this, its Certificate of Exception No. 2 may be signed and made a part of the record, which is accordingly done, after due notice to the plaintiff as required by law, this 29th day of September, 1934.

ROBT. N. POLLARD, Judge.

page 21 } *Certificate of Exception No. 3.*

I further certify that upon the trial of the appeal from the judgment of the Civil Justice Court of the City of Richmond, upon the granting of the motion of the plaintiff for a non-suit, I entered the following order:

“This day came the plaintiff and defendant, by counsel, and thereupon the defendant pleaded *nil debit* and put itself upon the Country and the plaintiff likewise.

And thereupon came a jury, to-wit: Charles Sanders, E. Robinson, E. J. Snook, J. E. White and W. O. McGehee, who were sworn well and truly to try the issue joined in this case and the evidence having been partly heard and the plaintiff failing to further prosecute its suit, on its motion it is ordered that the plaintiff be non-suited paying to the defendant five dollars damaging according to law, together with its costs by it about its defense in this behalf expended.”

Wherefore defendant prays that this, its Certificate of Exception No. 3, may be signed and made a part of the record, which is accordingly done, after due notice to the plaintiff as required by law, this 29th day of September, 1934.

ROBT. N. POLLARD, Judge.

page 22 } *Certificate of Exception No. 4.*

I further certify that the defendant moved the court to set aside the verdict of the jury and grant it a new trial on the ground that the said verdict was contrary to the law and the evidence; and that the defendant also made a motion in ar-

rest of judgment on the ground that its plea of *res adjudicata* should be sustained as a matter of law and that I overruled the said motions and entered judgment for the plaintiff and the defendant excepted.

Wherefore defendant prays that this, its Certificate of Exception No. 4, may be signed and made a part of the record, which is accordingly done, after due notice to the plaintiff as required by law, this 29th day of September, 1934.

ROBT. N. POLLARD, Judge.

page 23 } I, Luther Libby, Clerk of the Law and Equity
Court of the City of Richmond, do hereby certify
that the foregoing is a true transcript of record in the above-
entitled cause wherein Svea Fire & Life Insurance Company
is complainant and Thomas Gemmell, Inc., defendant, and
that the plaintiff had due notice of the intention of the de-
fendant to apply for such transcript.

Witness my hand this 10th day of October, 1934.

LUTHER LIBBY, Clerk.

Fee for record \$8.50.

A Copy—Teste:

M. B. WATTS, C. C.

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