EVEREST TEXTILES COMPANY represented by ADNAN MOHSEN, Libellant/Appellant, v. **DENCO SHIPPING LINES**, represented by its Manager, EUGENE COOPER, Agent for EAST ASIATIC COMPANY (EAC) LTD., and the Vessel M. V. BORINGIA of Rotterdam, by and thru its Captain, Libellees/Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: March 14, 1989. Decided: July 4, 1989.

1. A defendant who pleads the statute of limitations is not bound to admit to all of the averments in the complaint, especially when the defendant is without knowledge or information sufficient to form a belief as to the truthfulness of all the allegations contained in the complaint.

2. The plea of the statute of limitations does not preclude a defendant from raising other defenses that might be available to him.

3. The statute of limitations constitutes an affirmative defense and, when pleaded affirmatively, bars recovery against the pleader.

4. Defense may be pleaded in the alternative, except that they shall be pleaded and set out in separate counts or paragraphs.

5. The plea of the statute of limitations is a question of law to be determined by the court only.

6. A case may be dismissed on motion of the defendant based on the statute of limitations.

7. A trial court has the discretion to decide, on disposition of law issues, only issues it considers not necessary to be tried by jury and to pass to the jury for determination issues it considers requires evidence as mixed question of law and fact.

Everest Textiles Company, by and through Adnan Mohsen of Monrovia, instituted an action of damages in admiralty by attachment against Denco Shipping Lines, represented by its Manager, Eugene Cooper, agent for East Asiatic Company (EAC) Ltd. a/s Copenhagen, Denmark and the vessel *M V. Boringia* of Rotterdam, represented by and thru its Captain and her tackle and other accessories of the Freeport of Monrovia, alleging that it contracted the defendants/libellees to transport to Monrovia, under a bill of lading, a total of ten (10) containers containing sundry and textiles allegedly valued at 483,202.02 pounds; that as a result of the negligence of Denco Shipping Lines, Agent of EAC, plaintiff/libellant sustained losses aggregating an amount of 724,968.36 pounds or $1,087,452.54.

Pleadings having been exchanged and rested, the defendants/ libellees, in the answer, challenged the jurisdiction of the court and set up several other defenses, including that of

the statute of limitations. Along with the answer, the defendants/libellees simultaneously filed a motion to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter and the persons of the defendants, and that the action was time barred. Defendant/libellees contended that, by operation of law, the action should have been instituted within one (1) year, as of the date of delivery or as of the date the goods should have been delivered. Contrarily, the action was instituted after one (1) year and nine (9) months.

Following the hearing of the motion and the resistance, the trial judge ruled, wherein he sustained the motion and dismissed the complaint on the grounds that the action was time barred under the statute of limitations, and that a defendant pleading the statute of limitations is not bound to confess to the truthfulness of all the allegations in the complaint in order to benefit from the defense of the said statute of limitations. The Supreme Court confirmed the final judgment of the lower court and ruled the libellant to cost.

P. Amos George and *Joseph A. Dennis* of the P. Amos George Law Firm in association with *Joseph Findley* appeared for the libellant/appellant. *B. Mulbah Togbah* appeared for the libellees/appellees.

MR. JUSTICE KPOMAKPOR delivered the opinion of the Court.

The question posed by this civil prosecution is not a novel one: when a defendant pleads the statute of limitations, must he admit to all of the averments in the entire complaint, and is he precluded thereby from setting up other defenses?

Everest Textiles Company, represented by Adnan Mohsen, libellant, now appellant, instituted an action of damages by attachment in admiralty against Denco Shipping Lines, represented by its Manager, Eugene Cooper, Agent for East Asiatic Company (E A C) Ltd. A/S, Copenhagen, Denmark, and the Vessel M. V. Boringia of Rotterdam, represented by and thru its Captain to be identified, and her Tackle and other accessories, all of the Freeport of Monrovia, libelees, now appellees. Appellant averred that it contracted with Appellees for the transportation to Monrovia, under a bill of lading, a total of ten (10) containers containing sundry goods and textiles allegedly valued at a substantial amount of money. The complaint averred also that the MV Boringia, of which E. A. C is agent, was carrier of the consignment and that upon the arrival of the consignment at the Freeport of Monrovia, it was discovered that goods to the value of £483,202.02 were missing from the containers. Finally, libelant complained that as a result of the negligence of Denco Shipping Lines, agent of E.A.C, libelant sustained a loss of an aggregate amount of £724,968.36 or $1,087,452.54.

In their answer, libellees challenged the jurisdiction of the court and set up several other defenses, including that of the statute of limitations. According to the records presented to us, in filing its responsive pleading, that is the answer to the complaint, the

libellees/appellees simultaneously moved for judgment dismissing the complaint on the grounds that the court lacked jurisdiction over the subject matter and their persons; and that the action was time barred. The action was commenced on the 16th day of April, 1986, whereas libelant took delivery of the consignment on July 25, 1984, a period of 21 months, or one year and nine months.

In keeping with the practice, the libellant filed its reply and a resistance to the motion to dismiss. In their resistance, libellant contended that the statute of limitations was a plea in bar or an affirmative defense. While conceding that the statute had run prior to its filing of the complaint, libellant insisted in the resistance that the libellees' plea of the statute was bad, in that it failed to admit as true the facts stated in the complaint and attempted to set up other defenses besides that of the statute of limitations. The appropriate statute provides that the failure to commence an action within the time limited therefor shall constitute a defense to the action which shall be pleaded affirmatively in the answer or reply. *See* Section 122(6)(a), Liberian Maritime Law...." The Carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered . . . . " Liberian Maritime Law, Lib. Code 21:132(6)(a).

In compliance with the statute and the practice, the trial court heard and granted the motion to dismiss on June, 24, 1986, thereby prohibiting us from the hearing of the case on the merits. In his ruling, the trial judge found that the libelees admitted receiving ten (10) containers belonging to the libellant for shipment, but denied, however, knowing of either the contents or the value, and therefore they could not admit at the time as to the amount sued for in the complaint. In resisting the motion, the libellant contended that because the plead of the statute was an affirmative plea, a party availing himself of it must first admit the facts averred in the complaint as being true before setting up the statute as a defense against the recovery by the plaintiff.

In ruling on the motion, the trial judge held: "The determinant issue in the case is whether a party must confess to the truthfulness of all the allegations in a complaint in order to benefit from the defense of the statute of limitations. Putting it in another way, does the plea of the statute of limitations preclude the defendant from raising other defenses that might be available, to him?" With this statement of the basic issue by the trial court the parties are in agreement. The judge ruled that while the controlling statute provides that a party wishing to plea the statute of limitations must admit the truthfulness of the complaint, since the plea of the statute is an affirmative plead, it would be absurd, however, to reach the conclusion that the Legislature intended that such a party must admit as true all of the averments of the complaint in its entirety, even though the pleader is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the complaint. We agree with this interpretation and construction of the statute by the trial judge.

In our view, the question precisely is, did the lawmakers intend that a defendant wishing to avail himself of the plea of the statute of limitations, when the complaint alleges that defendant has breached a contract with the plaintiff and that as a result of that breach plaintiff has sustained a loss in the amount of, say $500,000.00, he must first admit as true the allegations in the complaint, even though he knows and has evidence that the possible loss to the plaintiff is less, as in the instant case where the loss is only $50,000.00? It is obvious that the answer to this question is no.

As a general rule, the procedure extant in this jurisdiction is that where factual and legal issues are raised, the trial judge must first pass upon the legal issues. The reason is simple. If, in disposing of the law issues, as in the instant case, the trial judge finds that one of the parties has no valid cause of action as a matter of law, he should dismiss the case and not send it to the jury. In the case at bar, as we stated earlier, the libellant, in its pleading and during the argument before us, conceded that the action of damages was filed after the statutory period had run out, but contended and tenaciously clung to the point that libellees could not plead the statute of limitations as a bar without first admitting as true all the allegations laid in the complaint, and that by pleading the statute of limitations, the libellees were also barred from setting up any other defenses, regardless of how appropriate or legitimate they might be. Libellant has cited several cases, in addition to the statute, in support of this contention and argument. However, without a single exception, these cases cover a period before the Revised Civil Procedure Law was enacted in 1972 and therefore are not controlling. The first case, not analogous to the case at bar, is *Beysolow v. Coleman,* 9 LLR 156 (1946), where, in his answer, the defendant raised the issue of fraud, but not the statute of limitations. This Court held that the trial judge erred when he failed to submit the proof of fraud to the jury.

The next case, *Togai v. Johnson,* 12 LLR 176 (1954), decided issues and circumstances which are different from those in the case at bar. In that case, after a previous trial judge had ruled the case to trial on its merits, his successor heard and determined it anew, ignoring the ruling of his predecessor. This Court held, in reversing and remanding the case, that the procedure adopted by the succeeding judge was improper. The statute of limitations was not invoked as a defense. In *Wright v. Richard,* 12 LLR 423 (1957), the third case, the trial judge failed to dispose of the issues of law in keeping with a previous mandate o f this Court. In remanding the case for a new trial beginning with the disposition of the law issues, the Court said that it was doing so because of the loose and careless manner in which the court below had handled the case. Again, the statute of limitations was not involved, as in the instant case. *Bryant et al. v. Harmon and Oost Afrikaansche Compagnie,* 12 LLR 330 (1956), is the only case that is relevant and to the point. In that case, the defendant raised several defenses, including the statute of limitations and laches. In sustaining a dismissal of the answer, this Court cited the general rule that the statute of limitations constitutes an affirmative defense which must be

pleaded affirmatively. However, we are of the opinion that the reliance upon *Bryant* is misplaced, in that it has been superseded by the 1972 Civil Procedure Law and recent opinions and holdings of this Court. This new law, the Civil Procedure Law of 1972, has extricated the form of pleading recognized and accepted in days gone by.

In *Shaheen v. Compagnie Francaise de l'Afrique Octidentale,* 13 LLR 278 (1956), the fifth case cited by appellant, the facts and circumstances are slightly different from those of the case at bar. In the *Shaheen* case, involving an action of debt, the answer of the defendant was dismissed upon the strength of the reply which attacked it as being inconsistent, contradictory, evasive and not presenting a clear-cut, triable issue. In that case, the statute of limitations was not cited as a defense. The defendant, C.F.A.O., had denied receiving from plaintiff a single cent of the amount sued for and also averred that the company's (defendant) books showed that the amount had been withdrawn by the plaintiff. In sustaining the dismissal of the answer by the trial court in that case, this Court held, at page 293, the following:

"We are of the opinion that an answer which in its several counts, both denies and avoids, is bad for contradiction and inconsistency, and cannot be taken to be sufficiently distinct or intelligible to constitute a proper answer to specific allegations of facts contained in a complaint, since the two positions are contradictory and inconsistent. In this case, the plaintiff alleged that he had deposited with defendants a sum of money for safekeeping. The defendants appeared and filed an answer in which they categorically denied ever having received a single cent of the amount in question, and in the same answer implied that the amount had been received, but that their books showed that it had been withdrawn by the plaintiff. One of these positions must be definitely false, since it would have been impossible for the plaintiff to have withdrawn a deposit which he had never made. We feel that such a position left the judge no other legal or reasonable alternative, than to have th smissed the entire answer as contradictory and inconsistent; thereby placing the defendants on a general denial of the averments contained in the complaint."

The Court concluded the *Shaheen* decision, at page 298, in the following words:

"We are sworn to uphold the statutes which control the determination of cases in our courts. Acting within the specific terms of the statutes is our legal duty."

Finally, libellant cited *Johnson v. Dorsla,* 13 LLR 378 (1959). However, in the *Johnson* case, this Court reversed and remanded the case for a *de novo* trial on the grounds that, unlike the case at bar, "none of the law issues raised in the reply, the amended answer, the demurrer thereto, or the resistance of the defendant to the demurrer, was taken into consideration and passed upon by the trial judge." Of course, in that case, as in the other cases, the statute of limitations was not cited as a defense.

We have reviewed these cases only to clearly establish that they are neither relevant nor controlling of the issues at hand.

Again, suppose in a suit where the plaintiff files his complaint in contract but the transaction is in fact based on debt, would the defendant be legally obliged to admit that the action of contract is the correct form of action simply because he wishes to plea the statute of limitations as his defense? We say no, because this would not only be absurd but contrary to the obvious intent of the lawmakers.

In our opinion, the correct interpretation of the statutory requirement of pleading the statute affirmatively means simply that one may not plead the statute and yet deny the existence of the underlying transaction. In other words, the pleader of the statute may not deny knowing the plaintiff or the existence of the underlying obligation. This was the problem in the *Shaheen* case. The defendant therein denied owing the debt, but contended that the plaintiff had withdrawn the amount.

The most precise and important question presented by this appeal is the permissible extent to which the defendant may deny certain averments in the complaint and yet set up other defenses after he has pleaded the statute of limitations.

An affirmative plea is "one which sets up a single fact, not appearing in the bill, or sets up a number of circumstances all tending to establish a single fact, which if existing, destroys the complainant's case." BLACK'S LAW DICTIONARY (4t h ed. 1968). The answer of the libellees in the instant case meets the requirement of an affirmative plea, as mandated by the Civil Procedure Law, Rev. Code 1:9.8(4), which provides:

"Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

The libellant also contended and argued that appellees were guilty of pleading in confession and avoidance. This contention, however, is not supported by either the records of the case or the authorities. According to Black's Law Dictionary, for instance, a plea of confession and avoidance is "one which admits that plaintiff had a cause of action, but which avers that it has been discharged by some subsequent or collateral matter." This is not the defendant's plea in the instant case.

In *Sherman and Sherman v. Clarke,* 17 LLR 419 (1966), this Court held that a defendant's plea of adverse possession impliedly admitted plaintiffs color of right. In the instant case, appellees' plea of the statute of limitations presupposes and admits the existence of an underlying obligation. Moreover, we disagree with the contention of the libellant that the

libellees should have admitted all the averments in the complaint in order to plead the statute of limitations. Our reliance is the Civil Procedure Law, Rev. Code 1: 9.8 (2), which states:

"Denials. A party shall deny those averments of an adverse party which are known or believed by him to be untrue. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.."

One other basic contention of libellant is that the answer of libellees was not pleaded in keeping with the Civil Procedure Law, in that while the answer contested the trial court's jurisdiction, it at the same time pleaded the statute of limitations. In our opinion, this plead of the libellees is not bad at all; in fact, it is in complete harmony with the Civil Procedure Law which clearly states: "A party may set forth two or more statements of a claim or defense in the alternative. *When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements ..*" (Emphases added.) Civil Procedure Law, Rev. Code 1: 9.6. Relying upon this section of the statute, we hold that in the instant case, one of the independent alternative statements, the challenge to the jurisdiction of the court, was insufficient, but that this of course did not render the other, the statute of limitations, insufficient .

The other basic contention of the libellant is that the trial judge erred when he dismissed the complaint, relying on the statute of limitations, without passing on all the other issues, factual and legal. The practice in this jurisdiction has been, and still is, that all issues of law must first be disposed of before the issues of fact. This is indeed the general rule. In the case *Hilton et al. v. Sherman et al.,* 1 LLR 43 (1867), this Court, commenting on the importance of the statute of limitations, held: "The principle upon which cases are decided by the highest judicial tribunals of the world under the plea of statute of limitations is universally known and so well established in reason that it needs no moment of this Court to give character to it." The Court continued: "The statute of limitations is not intended to debar any persons of their rights, that is, those who are legally disabled, for the statute only commences to run against a party when he has failed to use his legal advantages to the security of his interest."

In his brief, libellant eloquently argued that in an action of damages the facts must be determined by a jury, regardless of the circumstances; that this not having been done, the trial judge committed a serious reversible error when he, in disposing the issues of law, dismissed the suit. We are, however, not convinced by the eloquence of this argument. In another case, *Cassell v. Richardson,* 1 LLR 89 (1876), this Court decided that the statute of limitations defense, cited as a bar to a suit, is a question purely of law, and may be tried and

determined only by the Court. This continues to be the practice even today. The Court concluded in the *Cassell* case that when the statute of limitations is interposed in bar, as in the case at bar, the trial judge commits a reversible error when he submits the case to the jury for determination on the theory that the plea is a mixed question of law and fact. In other words, the plea of limitation is a question of law and the trial of all questions of mere law are for the court's determination.

In still another earlier case, *Smith et al. v. Faulkner et al.,* 9 LLR 161 (1964), at page 170, this Court, elaborating on the plea of the statute of limitations, quoted from Shipman on Equity Pleading as follows:

"Another salient point in this case is the plea of limitations raised in the answer. A lawyer in this Court a few days ago whilst arguing a case said that only dishonest persons, to avoid just claims, take advantage of the plea of the statute of limitations. This may be true as to some persons, but not everybody. There are right and just reasons for the statute, and those reasons are explained by Bouvier, as follows:

`Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defense might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress, hence called statute of limitations ...'"

Lawyers take a delight, when it is in their interest, in citing the statute of limitations as a bar, since it summarily terminates a suit at law. However, when the statute is cited against them, as in the case at bar, they blame their adversaries or the trial court rather than themselves for their negligence.

We will now return to the predominant issue presented by the libellant: The argument that the trial judge committed a reversible error because he allegedly failed to pass upon all of the issues of law raised by the parties has been made in almost every case heard on the trial level. For example, in *Cheng and American International Underwriters (AIU) v. Tokpa,* 29 LLR 22 (1981), where a release was pleaded as a defense, the trial judge considered the pleadings to have raised only one issue, i.e., that the plaintiff had already been compensated by the defendant and that having issued a release, the plaintiff was barred from entering a suit against the defendant. The judge concluded that by ruling that the issue was a question of mixed law and fact, to be proved at the trial by evidence, it was necessary to establish whether or not fraud was perpetrated in obtaining the release and whether the amount involved represented full payment. It was against this ruling that the appellant claimed that the trial judge had committed a reversible error.

In spite of the clear language of our present Civil Procedure Law regarding questions of law and fact, most lawyers in this jurisdiction are constantly arguing for the reversal of judgments of lower courts when, in the view of said courts, the issues or some of them are classified as mixed questions of law and fact. The lawyers continue to preach adherence to the old rule or its interpretation, thereby ignoring the new law and recent opinions of this Court.

While it is true that the authorities are not always in agreement as to what constitutes issues of law and fact, most of them are unanimous in holding that cases should not, in every instance, be remanded simply because "all the law issues have not been disposed of." For this reason and others, some courts have correctly held that trial judges should be left free in deciding for themselves what issue or issues are conclusions of law or fact. In this regard, most courts and law writers hold that only pure issues of law are mandatory for consideration by trial judges.

Cases have often been reversed unnecessarily in this jurisdiction on account of the trial judge's failure to rule on "all of the issues of law" or because of his ruling on some issues as mixed questions of law and fact to be proved at the trial. This practice has certainly been against the interest of the parties and the state, since it has been responsible for long delays of trials and has involved unnecessary expenses, not to mention the difficulties experienced in making witnesses available for a new trial.

To obviate these difficulties and minimize expenditure to all concerned, the doctrine of harmless error was incorporated in the new Civil Procedure Law, Rev. Code 1:1.5. One provision of this law, which courts and lawyers should always remember, is that all errors or defects should be construed, as in the case at bar, to promote the just, speedy, and inexpensive determination of the cause. Civil Procedure Law, Rev. Code 1:1.4.

Eight years ago, just about the same time that *Cheng* was decided, an appellant before this Court, Lamco J. V. Operating Company, contended and argued that the trial judge had failed to rule on all of the issues of law, precisely the same criticism levied against the trial judge in the instant case. The Court held then that under such circumstances the issue would be viewed in the light of the entire record of the case and not on the mere allegations of a party's bill of exceptions or brief. *Lamco .1 V. Operating Company v. Gbeyon Transport Company,* 29 LLR 225 (1981).

In *Lamco J. V. Operating Company v. Verdier,* 26 LLR 445 (1978), at page 448, this Court held, regarding the usual contention of parties that several issues raised in the pleadings had not been passed upon, that it is the practice of the Court today to pass upon those issues it deems meritorious or properly presented. The Court emphasized that it need not pass on every issue raised in a bill of exceptions or brief, and that it acted in keeping with the practice prevailing today when it decided to ignore other issues raised and to address itself only to

those it considered relevant. "There is no need to cite plethora of cases in which this practice has been followed", the Court concluded.

The current statute on the subject commands the courts to decide any issue not required to be tried by jury unless it is referred to a referee. Civil Procedure Law, Rev. Code 1: 23.1. "This statute," said the Court in the *Lamco J. V. Operating Company* case, *supra,"is* to be construed in a manner so as to prevent denial of justice by unnecessary delay, reversal of cases for new trial or mere points of legal technicalities that operate to the advantage of no party but merely obstruct consideration of the merits of a controversy."

It should always be borne in mind, if we may repeat here, that the new Civil Procedure Law, Title 1 of the Rev. Code, is to be construed to "promote the just, speedy and inexpensive determination of every action." Rev. Code 1:1.4. It is our opinion, therefore, that under our statute today, the trial court has the discretion to decide only issues which it considers not necessary to be tried by jury and to pass on to the jury for determination issues which it considers require evidence as mixed question of law and fact. When the trial judge rules that he is of the opinion that the pleadings contain both factual and law issues, a party has no legal right to a ruling which will satisfy his personal desire. For example, in the *Lamco J. V. Operating Company* case, *supra,* the appellant argued that the issue of *estoppel* raised by the appellee was a law issue which the trial judge failed to pass upon. This Court held in that case that by ruling that "the other issues were issues of mixed law and fact, meant that the trial judge regarded *'estoppel'* as an issue that required evidence of the facts and circumstances constituting the *`estoppel'*. On this question, the Court concluded: "We are therefore of the opinion that the trial judge properly considered it a mixed question of law and fact." 29 LLR 225 (1981).

As recently as six years ago, a plaintiff sued the defendant in debt by attachment. In his answer, the defendant denied being indebted to the plaintiff in the amount of $2,600.00, but admitted owing $1,950.00. This is a case in point. The defendant also raised the plea of the statute of limitations, or that plaintiff is guilty of laches and waiver and is therefore estopped and forever barred from instituting the action.

As is true in the case at bar, plaintiff attacked the answer as being a plea in confession and avoidance and asserted that such a plea was contradictory and evasive, and therefore prayed that the answer be dismissed. The primary contention of the plaintiff was that *the statute of limitations is an affirmative plea* which, under our practice, means that *the defendant must always first admit to plaintiffs claim before raising the plea of the statute.* The trial judge dismissed the defenses in the answer and ruled the case to trial on the ground that the defendant had failed to plea the statute affirmatively. On appeal to this Court, the only issue raised in the bill of exceptions and relied upon by the defendant was the statute of limitations. In reversing the trial judge, Mr. Justice Smith, speaking for the Court, with Mr. Chief Justice Gbalazeh dissenting on

other grounds, said that "the statute of limitations was correctly pleaded by the appellant, and therefore, the trial judge should have dismissed the complaint, considering the averments of the appellant's answer . . . ." The Court continued: "The criteria which, in our opinion, control the plea of statute of limitations in this case is not what amount the appellant owes, but rather whether or not the appellant owes the appellee at all." *Paye v. Cooper,* 31 LLR 77 (1983). Our present Civil Procedure Law permits a party to deny all averments which are either unknown to him or which he knows to be untrue. *See* Civil Procedure Law, Rev. Code 1:9.8. Actually, what this Court frowns upon today, relying on the new Civil Procedure Law, is the plea of general denial which both confesses and avoids in the answer or reply. It is therefore our opinion that the trial judge in the instant case was correct when he sustained libellees/ appellees' answer and dismissed the complaint under the statute of limitations. Civil Procedure Law, Rev. Code 1: 9.8 (4)

The desire to modernize the forms of pleadings has not been a unique phenomenon to Liberia. In the United States of America, for example, a substantial number of some of the courts held in the past that pleadings containing inconsistent allegations were defective, at least if they appeared in a single cause of action. *Pavalon v . Thomas Holmes Corporation,* 25 Wis. 2d 540, 131 N.W. 2d 331 (1964). Today, in spite of occasional statements indicating that inconsistent allegations are improper, *Katz v. Peldman,* 23 Cal. App. 3d 500, 504, 100 Cal. Rptr. 367, 369 (1972), virtually almost all courts permit inconsistent allegations, whether separately pleaded or not, if they are made in good faith. A number of states specifically have altered their pleading rules to permit inconsistent pleadings. See *Republic Mortgage Co. v. Beasley,* 117 Ca. App. 303, 160 S.E. 2d 429 (1968).

It has also been said that "sound policy weighs in favor of alternative pleading, so that controversies may be settled and complete justice accomplished in a single action." *McCormic v. Kapmann,* 23 Ill. App. 2d 189,161 N.E. 2d 720 (1959). If liberalizing pleadings were not the law, certainly the provisions of the Civil Practice Act sanctioning pleading in the alternative, "regardless of consistency," would be a legal snare.

As far back as 1974, this Court held, citing the Civil Procedure Law, Rev. Code 1: 9.3(3), that a party may state several defenses in one cause of action, provided such defenses are asserted in separate counts. *See Cooper et al. v. Davis et al.,* 27 LLR 310 (1978). Under the modern practice, a denial of an allegation or allegations, in the nature of a denial and avoidance, is quite proper, especially where it is permitted by our statute. This Court has upheld the general principle that a party may assert as many defenses as he wishes, provided, however, that they are made and raised in the same action and set out in separate counts or paragraphs. *Mourad v. Oost Afrikaansche Compagnie (OAC),* 23 LLR 183 (1974).

Having carefully considered the facts and the laws, it is our holding that the final judgment of the trial court be, and the same is hereby affirmed. The Clerk of this Court is hereby

directed to send a mandate to the court below to the effect of this decision. Costs against appellant. And it is so ordered.

Judgment affirmed.

MR. JUSTICE AZANGO *dissents.*

I have refused to agree with the majority opinion and to append my signature to the judgment in this case because I strongly hold the view that there is a misapplication of the law to the facts in arriving at the conclusion and judgment.

According to the records certified to this Court, on the 16th day of April, 1986, libellant/appellant instituted an in rem admiralty action of damages by attachment against libellees, stating as follows:

1. That it purchased through its Agent Bahtoo Trading Company of 458/8 Barlow Moor, Manchester, M-21 11 BQ England, assorted pieces of goods and textiles loaded in ten (10) containers measuring 10' x 12', which containers containing the said assorted goods and textiles, were shipped through the East Asiatic Company Lines (EAC) from Manchester, England to libellees at Monrovia, on a bill of lading Number 436, dated July 5, 1984, with the freight fully paid, naming the M. V. Boringia as the carrier, as will more fully appear from copy of the bill of lading listing the containers and their numbers of seals, hereto attached and marked Exhibit "A" to form a cogent part of this complaint.

2. That upon inspection of the containers by police officers, port securities and representatives of Lloyd's Agency, it was discovered that goods to the value of £483,202.02 were missing from the containers as will more fully appear from statement of claim dated 13th July, 1984, hereto attached and marked Exhibit "B" to form a part of this complaint.

3. That Denco Shipping Lines, Inc., agent for libellees, on the 18th day of September, 1984, wrote a letter to the Director of Security at the Free Port of Monrovia, to inquire into the extensive loss from these containers. On November 3, 1984, the chief security wrote a comprehensive report indicating that the containers were burglarized after they had been delivered to libellees and that the containers were not burglarized at the Free Port of Monrovia; that is to say, foul play were not done at the Freeport of Monrovia but rather between Manchester and Rotterdam as will more fully appear from copy of said letter with relevant Warehouse Delivery Tallies, numbering 18608 to 18618, also attached to the complaint, marked Exhibits "C' to "'L" as well as report of the chief security at the Free Port of Monrovia, marked Exhibits "M" and "M-1" to form a cogent part of this complaint.

4. That as a substantiation of the report of the Chief of Security of the Freeport of Monrovia, the said libellees made another bill of lading bearing the self same number 436, dated July 5, 1984 and listed the ten (10) containers with separate numbers and seals, contrary to the original numbers and seals delivered to libellees at Manchester and consigned

to Libellant. Copy of the said bill of lading with its concomitant parts containing photographs of the empty containers and National Port Authority Recording Tally are hereto attached, marked Exhibits "N-1" to "N-35" to form a cogent part of this complaint.

5. That for the survey conducted by Lloyd's Agency, he paid £165.33, and with the lost of profit on the goods amounts to £241,968.36, PDS STG, together with the goods lost which amounts to £483,202.02, aggregating £724,968.36 or $1,087,452.54, which, due to libellees' negligence, libellant has had to suffer.

After service of process on libellees, they appeared and filed the following answers:

1. That the trial court has no jurisdiction over the subject matter nor the parties in these proceedings in that the contract, bill of lading, which is the basis of the entire action, expressly indicates that "any claim or dispute arising out of this bill of lading shall be decided according to Danish Law . . . and in the Danish courts to the exclusive jurisdiction of which the carrier and the merchant submit themselves". Having expressly contracted in the manner stated herein above, the libellant is *estopped* from unilaterally attempting to breach this provision of the Contract of Affreightment by instituting these proceedings in the courts of the Republic of Liberia. Libellees request Your Honour to take judicial notice of paragraph 27 of the bills of lading attached to the complaint by libellant as their exhibits "A" and "N". Further, libellees attach, as their exhibit "I", a copy of the original bill of lading issued in London, same being the document on which the consignment was shipped and delivered to libellant and out of which these proceedings grew, for your easy reference.

2. That this action is *time barred* in that the various statues and rules governing maritime transportation universally provide that the carrier and the ship shall be discharged from all liabilities whatsoever in respect of the goods, *unless suit is brought within one year of their delivery or of the date when they should have been delivered* (This period may, however, be extended if the parties so agree after the cause of action has arisen). Libellees contend that this action was commenced on the 16th day of April, 1986, whereas the libellant/consignee took delivery of the said consignment on July 25, 1984, a period of twenty-one (21) months (one year and nine (9) months) between the date on which the consignment was received and the date of the commencement of these proceedings, and there was no extension agreed upon; and further, that no legal action (suit) had been commenced prior to the suit filed before the trial court on the 16th day of April, 1986. Libellees contend that the entire action is time barred and therefore a fit subject for dismissal, and your libellees so pray. Libellees request Your Honour to take judicial notice of the filing date on the complaint and further attach hereto a certificate from the clerk of court clearly indicating that these proceedings were filed on the 1 6th day of April, 1986, marked as exhibit "B". Also attached to the complaint is Lloyd's Survey Report dated August 1, 1985, and libellant/consignee's own letter dated August 2, 1984, addressed to the claims manager of Denco Shipping Lines as well as Denco's letter of

August 4, 1984, repudiating libellant's claim as exhibits 3, 4, and 5 respectively . These documents clearly indicate that the libellant took delivery of the consignment, subject of the proceedings, on the 25' day of July, 1984. At the trial, a writ of *subpoena duces tecum* will be applied for to have the Libellant produce the original of the Lloyd's Survey, which was in their possession. For reliance, see the Danish Merchant Shipping Act, part XII, Section 291 (7), page 37. A relevant portion thereof is hereto attached as exhibit "6". Also see the Liberian Maritime Law, Chapter 4, Carriage of Goods by Sea Act, Sec. 132, paragraph 6(a), page 32; Lloyd's Nautical Year Book; Carriage of Goods by Sea Act, 1971; Hague-Visby Rules, Article III, paragraph 6, page 177 (1986); and paragraphs 9(2) and (3) of the bill of lading. (Libellees' exhibit "7" attached hereto). Libellees request Your Honour to take judicial notice of a Danish Merchant Shipping Act, referred to hereinabove.

3. That the libellant, Everest Textiles Company, has no standing or legal capacity to institute these proceedings in that it is not a registered business as is provided by Liberian Law. Libellees averred that the libellant company was established on July 9, 1984, after filing an application on May 16, 1984, with the Ministry of Commerce, Industry & Transportation, Republic of Liberia, and that a branch thereof was established on August 31, 1984, and since then, the libellant has not renewed its business registration as is provided by law. Consequently, the libellant cannot legally maintain a suit in the name of Everest Textiles Company in 1986. Libellees gave notice that at the trial, a writ of *subpoena duces tecum* shall be applied for to be issued on the Director, Division of Domestic Trade, Ministry of Commerce, Industry and Transportation, Republic of Liberia, to have him produce the ledger books for businesses registered in Liberia covering the period 1984 to 1986, as well as the certificates of registration of Everest Textiles Company for the same period.

4. That these actions were instituted against the vessel MN of Rotterdam and writs of summons and attachment issued against said vessel, but contrary to the writs, the Marshal of the Supreme Court of the Republic of Liberia arrested the vessel MN BORINGIA of Copenhagen, a vessel distinct from that named in the writs. As a result of this legal blunder, the MN "BORINGIA" suffered grave losses for which the libellees hold the libellant responsible to compensate them in the form of damages. Libellees request Your Honour to take judicial notice of the complaint and the writs of summons and attachment.

5. That as to count one of the complaint, same is false and misleading in that at no time did they, libellees, receive from libellant's agent, Bahtoo Trading Company of 458/8, Barlow Moor, Manchester, M-21 11 BQ, England, assorted pieces of goods and textiles, loaded in ten (10) containers measuring 10' x 12 -' for shipment from Manchester, England, to libellees at Monrovia, Liberia, with the "freight fully paid" as has been alleged by the libellant. Libellees say that they received for shipment ten (10) containers measuring 10' x 20", which were said to have contained assorted pieces of goods and textiles and that said containers were accepted at and shipped from Felixtows with a bill of lading to Monrovia via

Rotterdam: At Rotterdam, additional seals of the One-Seal Lock type were placed on the containers as the seals attached by the shipper were unacceptable to the shipping lines. Libellees contend that it is not their procedure to open consignees/shippers' FCL (full container load) containers at the port of embarkation to determine the quantity, type or quality of goods; they simply ship containers as delivered to them and this is why the bill of lading clearly indicates that the containers are "said to contain" a certain quantity of goods. See copy of bill of lading attached hereto as libellees' exhibit "8".

6. That further as to count one of the complaint, it is untrue that the freight was "fully paid" on July 5, 1984, when the bill of lading was prepared as is alleged. Libellees say that the freight was not paid on the consignment in question until July 27, 1984, after the vessel had discharged the cargo at the Freeport of Monrovia, and that it was only at this point that the original bill of lading was released at Liverpool, England, to the Shipper's agent. The copy of the bill of lading which was presented to the libellant in Monrovia prior to the 20th of July, 1984, when the freight had not been paid, was simply a notice of arrival that a vessel on which the goods would be shipped had been identified and to alert him for collecting the cargo. Libellant could not use that document to collect the goods as it was not a negotiable bill of lading. A copy of the freight invoice together with the check paid in satisfaction of the freight on the 20th day of July, 1984, is hereto attached as exhibit "7".

7. That as to count two (2) of the complaint, same should be dismissed, together with the entire action as it is clear that the libellant has transacted with the libellees in bad faith with the primary objective of unjustly enriching himself by perpetrating fraud. Courts of Law and lawyers should not encourage unscrupulous individuals in their dishonest undertakings. Libellees challenged the libellant to produce the Customs Entry showing that he paid duty on goods valued at £483,878.02; this amount in pound sterling does not convert into $73,878.50.

8. That still further on to count two (2) of the complaint, the packing list exhibited by the libellant is also fraudulent in that said list, prepared on the 1st day of July, 1984, contains seal numbers which on that day were not known to anyone, including EAC. The EAC seal numbers on the ten containers in question were known for the first time on July 3, 1984, when the additional seals were placed on the containers at Rotterdam. One can reasonably assume that the packing list was fraudulently back dated after the 19th of July, 1984, when the libelant received the notice of arrival. Further, libellees claimed that libellant obtained two packing lists from Bahtoo Trading Company on the same date, July 1, 1984, for the same order number 2235/M, each carrying the same container numbers and quantities of goods, but there is a variance in the seal numbers. A copy of each of these packing lists is attached hereto as exhibit "10" and "11" to form a cogent part of the answer. Libellees gave notice that writs of subpoena duces tecum will be applied for during the trial to have the libellant produce the originals of these documents which are in their possession.

9. That as to count three (3) of the complaint, same should be dismissed, together with the entire complaint, as the allegations contained therein are baseless, thereby making the conclusion erroneous as is more fully shown herein below:

A. That at no time did Denco Shipping Lines, Inc. write any letter to the Director of Security at the Freeport of Monrovia to inquire into the extensive loss of these containers, as has been alleged by the libelant in his complaint. Libellees say that it was Lloyd's surveyor, an independent entity from libelees, who wrote to the port security requesting an investigation based upon allegations of the libellant relative to the contents of his containers when shipped vis-a-vis its contents upon arrival at Monrovia, Liberia. The contents of Lloyds letters do not in any way admit that there was in fact a shortage, since Lloyd's did not know the actual contents of the containers prior to the survey but simply had to rely on the good faith of libellant which turned out to be most unreliable based on the various fraudulent transactions herein enumerated above.

B. That the NPA Security report could be right relative to the conclusion that the containers were not burglarized at the Freeport of Monrovia, in that one of the seals placed thereon at Manchester was still intact when the containers arrived at the Freeport of Monrovia. However, the report is defective in many respects, one being that the NPA Security relied on the words of libellant to conclude that there was "foul play" between Manchester and Rotterdam without first enquiring whether or not the containers were stuffed with the quantity and quality of goods which the libellant claims they contained. Libelees contend that the shipping lines only accepted responsibility for the containers from the place of acceptance, same being Felixtowe and that in the absence of the full description of the good;; shipped on the invoice, the NPA Security was in error to conclude that the libellant did stuff the containers as indicated. From the various discrepancies surrounding the documentation involved with the subject consignment, one can reasonably conclude that the containers were never stuffed with the quantities of goods as is alleged by the libellant.

C. That the shipping line normally has no knowledge of the content of a container except for what is declared by the shipper to be the content of the container and this is why the carefully packed container said to contain "as inscribed on the bill of lading." The carrier is responsible for the safe transportation and delivery of the container itself and has no way of knowing its exact contents and does not normally interfere with the contents of a full container load (FCL) as were the case with the ten (10) containers of the libellant.

D. That page 4, number 3, finding of the NPA Security report, libellant's exhibit "M" is misleading, in that the London bill of lading, the actual shipping document, does not contain the seal numbers mentioned, as those are the seal numbers found on the internal, non-negotiable copy of the bill of lading issued at Rotterdam.

E. That it might be noteworthy to indicate that the one container number ICSU 333570-8 with seal number 4360 which was received with its contents intact was positioned on the vessel in such a way that although easily accessible, it was difficult for someone to remove the seal and cargo without being noticed. Libellees contend that the original Manchester seals were removed from the containers by individuals under the instructions of libellant while the containers were on the vessel but there were no goods removed therefrom as the libellant in collaboration with the shipper/seller had delivered the containers partly stuffed. A copy of a diagram, indicating the location of the Libellant's containers on the vessel during transportation is hereto attached as exhibit "12".

F. That as to count five (5) of the complaint, same is also false and misleading relative to the allegation that libelees issued two original bills of lading; the only negotiable original bill of lading was that issued in London. The other document which the libellant refers to as a bill of lading was simply a notice or arrival and is non-negotiable copy of bill of lading for manifest purposes only to alert the consignee of the impending arrival of his goods. A review of the bill of lading issued in London, attached as exhibit "1", showed that this was the only document endorsed by the libellant. A statement of the procedure involved in the handling of containers as the ones in dispute as prepared by the East Asiatic Company, Ltd. A/S is hereto attached as exhibit "13".

G. That count five (5) of the complaint should also be dismissed, together with the entire complaint, as same is based on fraud in that libellant, on July 1, 1984, obtained two invoices from his supplier, Bahtoo Trading Company, one numbered 100703 for the amount of $73,878.50 and the other numbered 101402 for the amount of £440,704.99. Both invoices carry order number 2235/M and covered the same ten (10) containers and their alleged contents. Further, libellees say that the libellant paid Liberian Government Duty on the invoices for $73,878.50 and therefore, cannot claim on the greater invoice. This is fraudulent and your libellees say an action commenced in a court of law based on fraud will not be entertained. The court should not aid an individual in the perpetration of his fraudulent acts. Libellees further say one wonders what happened to the 499 invoices between invoice No.100903 and invoice No. 101402 on the same day. A copy of invoice number 101402 is hereto attached as exhibit "14" and libellees give notice that a writ of *subpoena duces tecum* will be applied for at the trial to have libellant produce the original.

H. That libellees say that further at to count five (5) of the complaint, the amount of £241,601.01 as mentioned therein as "loss of profit on goods" is not recoverable in law as same is speculative. Special damages must be specifically pleaded and proven if same is to be cognizable before a court of law. Having failed to establish how the "profit" would have been derived, that claim together with the entire complaint, should be dismissed.

I. That the goods in question were obtained by the libellant under a financing arrangement without a letter of credit. The finance was arranged by a Mr. Sulaiman of Antweip who initially agreed to provide the necessary guarantees. The goods were allegedly supplied by Sagger and Everneed, both of whom have not been paid for the goods to date. The goods in question were basically line ends pieces brought from several mills and trading companies around Manchester, England. Libellees contend that libellant has no standing to institute these proceedings as he has suffered absolutely no loss since indeed he has not paid for the goods. Surprisingly, neither of the two alleged suppliers, Sagger nor Everneed has made any claim against Bahtoo or Mr. Sulaiman, and neither has Bahtoo made any claim against libellant nor their cargo insurers.

J. That even if one were to agree, for argument sake, that the libellant is entitled to recover in these proceedings, libellees submit that its level of recovery would be restricted as is provided in various maritime transportation legislations and regulations which are adopted universally. Libellees say that unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to, or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or two units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."Liberian Maritime Law, Lib. Code 21:123 (6)(a).

K. That if at all libellant is entitled to recovery, said amount would not exceed approximately $7,186.00 US for the ten (10) containers depending upon the rate of exchange to be applied.

That due to the fraudulent acts of libellant when it filed its claim with Denco Shipping Lines, Inc., of Monrovia, Liberia, agent for East Asiatic Company (EAC) Ltd., of Copenhagen, Denmark, on the 2' day of August, 1984, same was promptly rejected on the 4th day of August, 1984. A copy of each of the letter of claim from Everest Textiles, libellant, and the reply thereto from Denco Shipping Lines, Inc., on behalf of EAC are attached hereto as Exhibits "4", and "5" respectively to form a cogent part of this answer. A writ of subpoena duces tecum will be applied for during the trial to have the libellant produce the original letter sent to them by Denco which is in their submission.

L. That the interest prayed for in an amount at the rate of 21% (Twenty-one percent) is not supported by law and therefore same should be denied together with the entire complaint.

M. That due further to the fraudulent acts of libellant, libellees had to expend a considerable sum of money to the tune of $60,000.00 thus far in undertaking investigation in Great Britain, Sierra Leone, Liberia and Denmark as well as lawyer fees, travel expenses and other miscellaneous expenses, which they would not have been obliged to spend had it not been for the dishonest and fraudulent behavior of the libellant. Libellees therefore interposed a counter claim in the amount of Sixty Thousand ($60,000.00) dollars plus interest. Libellees

then give notice that they shall produce evidence at the trial to substantiate their counter claim.

It is my considered opinion that by the averments and contentions in these counts of the answer, it would seem that libellees, having of their own accord raised the issue of fraud, those issues should be tried sitting in admiralty.

On the other hand, even though libellees were not the last pleader, as is required by law and the many opinions of this Court which state that under our practice the party filing the last pleading is entitled to move the court, on any legal defect in the pleading of his adversary, *Horace v. Harris,* 9 LLR 372 (1947), yet, libellees, on the 30t h day of May, 1986, moved the trial court to dismiss libellant's actions of damages by attachment on the grounds stated in their motion, quoted verbatim, as follows:

1. That this court has no jurisdiction over the subject matter or the parties in these proceedings, in that the contract (bill of lading), which is the basis of the entire action, expressly indicates that any claim or dispute arising out of this bill of lading shall be decided according to Danish Law . . . and in the Danish courts to the exclusive jurisdiction of which the carrier and the merchant submit themselves." Having expressly contracted in the manner stated herein above, the libellant is *estoppel* from unilaterally attempting to breach this provision of the contract of affreightment by instituting these proceedings in the courts of the Republic of Liberia. Libellees request Your Honour to take judicial notice of paragraph 27 of the bills of lading attached to the complaint by libellant as its exhibits "A" and "N". Further, libellees attach hereto as exhibit "1" a copy of the original bill of lading issued in London, same being the document on which the consignment was shipped and delivered to libellant and out of which these proceedings grew, for your easy reference.

2. That this action is time barred in that the various statutes and rules governing maritime transportation universally provide that the carrier and the ship shall be discharged from all liabilities whatsoever in respect of the goods unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however be extended if the parties so agree after the cause of action has arisen. Libellees contend that this action was commenced on the 16' (lay of April, 1984, a period of (twenty-one) 21 months (one year and nine months) between the date on which the consignment was received and the date of the commencement of these proceedings. Since there was no extension agreed upon and no further legal action (suit) had been commenced against the libellees prior to the suit filed before this Honourable court on the 16" day of April, 1986, libellees contend that the entire action is time barred and therefore a fit subject for dismissal, and your libellees so pray. Libellees request Your Honour to take judicial notice of the filing date on the complaint and further attach hereto a certificate from the clerk of court clearly indicating that these proceedings were filed on the 16th day of April, 1986, said certificate

marked exhibit "2". Also attached hereto is Lloyds' Survey Report dated August 1984, and libellant/consignee's own letter dated August 2, 1984, addressed to the claims manager of Denco Shipping Lines as well as Denco's letter of August 4, 1984, repudiating libellant's claim, as exhibits "3", "'4" and "5", respectively. These documents clearly indicate that libellant took delivery of the consignment, subject of these proceedings, on the 25t h day of July, 1984. For reliance see The Danish Merchant Shipping Act, Part XIII, Sec.291 (7), page 37; a copy of the relevant portions thereof is hereto attached as exhibit "6". Also see the Liberian Maritime Law, chapter 4, Carriage of Goods by Sea, Section 132, paragraph 6(a), page 32; Lloyd's Nautical Year Book, Carriage of Goods by Sea Act, 1971; Hague Visby Rules, Article III, paragraph 5, page 177 (1986); and paragraph 9(2) and (3) of the bill of lading (Libellees exhibit "1", attached hereto). Libellees also request Your Honour to take judicial notice of the Danish Merchant Shipping Act referred to herein above.

To this motion, libellant filed the following resistance:

1. Libellant avers that libellees' answer upon which their motion to dismiss is based, is woefully defective and bad and a fit subject for dismissal, in that said answer is evasive and contradictory by pleading the statute of limitations. Libelant contends that the statute of limitations is a plea in bar. It is an affirmative defense, and when pleaded the facts stated in the complaint must be admitted as being true but that the statute had run, which should bar Libelant from recovery. The statute of limitations, when specifically pleaded and proved, bars an action. It must therefore admit that the allegation or allegations sought to be avoided are true and then sets up a state of facts sufficient, if proven, to defeat the action. But libellees in this action have undertaken to not only deny the truthfulness of libellant's claim, but in face of the cogent claim of libellant, have attempted to justify their position disclaiming liability by seeking to hide behind the statute of limitations.

2. Libellant avers that libellees' motion to dismiss for want of jurisdiction over the subject matter and the parties is baseless, and without foundation, in that libellant strongly contends that "territorial jurisdiction is given by law and cannot be conferred by consent of the parties." Libellant further contends that the Liberian Maritime Law of January 1, 1981, section 3, page 9, provides: "All causes of actions arising out of, or under this Title are hereby declared and shall be cognizable before the circuit courts of the Republic, sitting in admiralty, but except as otherwise specifically provided in this title, the provision of this section shall not be deemed to deprive other courts of Liberia or elsewhere of jurisdiction to enforce such cause of action."

Libellant legally submits that this provision of the Maritime Law loyally confers jurisdiction upon this Honourable Court. Consequently, no agreement of parties can oust this Honourable court of its jurisdiction over the subject matter and the parties, as count one (1)

of libellees' motion would want this court to do. Libellant therefore prays Your Honour to overrule count one (1) of the motion to dismiss.

Libellant submits that libellees are estopped from raising the issue of jurisdiction since indeed and in fact, they have submitted themselves to the jurisdiction of the court by the signing and filing of a joint petition.

3. Libelant avers that the answer, not having presented a triable issue upon which this court could give judgment, a motion based on that answer has no credence and effect in law. Except in a case where the answer is good and presents a triable issue, a motion based on the answer is void *ab initio.*

4. Libellant says that further as to count one (1) of libellees' motion to dismiss, libellant avers that his attention was not drawn to the fine print on the back of the bill of lading at the time when the carrier (libellees) issued to him his receipt for the goods accepted by the carrier for transportation. Libellant contends that the failure of the libellees to draw his attention to the fine print on the back of the bill of lading at the time the libellees issued same to him as a written receipt for his (libellant's) goods to be transported by libellees makes the contract invalid and unenforceable as a contract, since indeed there was never any meeting of the minds. Libellant contends that a contract is an agreement entered into by the assent of two or more minds by which one party undertakes to give some valuable thing, or to do, or omit some act, in consideration that the other party shall give or has given, some valuable thing, or shall omit or has done, or omitted some act.

5. Libellant submits that a bill of lading being a written receipt for goods accepted to be transported by a carrier, where the attention of the shipper has not been drawn to the fine print printed on the bill of lading, it does not possess the basic requisites of an enforceable contract.

Notwithstanding this state of affairs, libellant prepared and filed a twenty-two (22) counts reply, from which we quote the relevant portions for the benefit of this opinion, as follows:

1. That libellees' answer is woefully bad and legally defective and should be dismissed, in that libellant submits that the statute of limitations, being an affirmative plea which when specifically pleaded and proved bars an action, must admit that the allegations sought to be avoided are true, and then state other facts sufficient, if true, to defeat the action. This not having been done by libellees, that is to say, they not first admitting to the averments contained in the complaint, and then stating other facts sufficient, if true, to defeat the action, renders the answer in its entirety dismissible with costs against the libellees, and libellant so prays.

2. That further to count 4 above, that libellant was extensively injured as a result of the seals on the containers being changed from the original seals resulting into the goods being stolen

therefrom; it was incumbent upon libellees to admit the truthfulness of the allegations contained in the complaint before setting up the plea in bar. Not having done this woefully defeats the answer and renders it a fit subject for dismissal, and libelant so prays.

3. That count one (1) of libellees' answer praying dismissal of this action for want of jurisdiction over the subject matter and the parties is baseless and without foundation, in that libelant strongly contends that "territorial jurisdiction is given by law and cannot be conferred by consent of the parties". Libellant further contends that the "Liberian Maritime Law of January 1, 1981, section 33, page 9, provides: "All causes of action arising out of, or under, this title are hereby declared and shall be cognizable before the circuit courts of the Republic, sitting in admiralty, but except as otherwise specifically provided in this title, the provision of this section shall not be deemed to deprive other courts of Liberia or elsewhere of jurisdiction to enforce such cause of action".

4. Libellant avers that libellees are *estopped* from raising the issue of the arrest by the Marshal of the Supreme Court of Liberia of the vessel M/V Boringia of Copenhagen instead of the vessel MN Boringia of Rotterdam as a recourse to the records (joint petition, letter and telex) in this case will show that the libellees agreed to pay such sum or sums by way of damages, interest and costs, as may be found due from the owners of the M/V Boringia to the libellant, whether by way of agreement, arbitration, award or final judgment of the court of competent jurisdiction. Libellant further submits that the M/V Boringia of Copenhagen is a vessel of the East Asiatic Company (EAC) which is a vessel as co-libellees; accordingly, the arrest of the MN Boringia of Copenhagen is no error on part of the Marshal. The joint petition signed by libellees and filed with the court recognizes the jurisdiction of the court by submitting to it. See hereto attached copies of the joint petition, letter and telex as libelant's exhibits "A", "B" and "C" to form a cogent part of this reply.

5. Libellant avers as to count five (5) of the answer that same is grossly delusive, and ought to be overruled and it so pray. Libellant submits that under the Maritime Law of Liberia, the carriage of goods is a form of bailment, so that a common carrier is liable as an ordinary bailee for negligence; and his liability is not confined merely to such losses as a consequence of his own negligence or want of skill. He is also held responsible for all losses or damages to goods in his charge for the purpose of his employment, though occasioned by unavoidable accident or by any casualty whatever, except those occasioned by Act of God or public enemy: Libellant further contends that it was the duty of the libellees to have delivered the containers in Liberia with the same seals that the containers bore when they were delivered to libelees.

6. Libellant avers as to count 6 of the answer that same presents no triable issue and is irrelevant and ought to be overruled and he so prays. Libellant submits that the time of payment for the containers is not at issue. The issue is whether or not the containers were

delivered to consignee (libellant) in tact according to the bill of lading issued in London, dated July 5, 1984. Whether the payment for the containers was made on July 5, 1984 is immaterial. Wherefore, libellant prays that the said count six (6) of the purported answer be overruled with costs against the libellees.

7. Libellant avers as to count 11 of libellees' answer that same is merely calculated to mislead this Honorable Court and therefore confirms his position taken in count four (4) of his complaint to the effect that the Libellees made another bill of lading bearing the self-same number 436 and dated July 5, 1984, and listed the ten (10) containers with separate numbers and seals, contrary to the original number of the seals delivered to libellees at Manchester and/or London and consigned to libellant.

8. Libellant avers as to count 12 of the answer that same should be dismissed and he so prays. Libellant submits that no fraud has been committed by him as libellees would want this Honourable Court to believe. Libellant submits that it is only that there were separate invoices for the goods contained in the ten (10) containers from the same company (Bahtoo) and libellant could not pay duty on the goods received and not on the lost goods. Wherefore, libellant prays that the said count 12 of the answer be overruled and the answer in its entirety dismissed with cost against the libellees.

9. Libellant avers as to count 13 of the answer that same ought to be overruled and he so prays. Libelant submits that the amount arrived at is not speculative; rather, it is the exact profit libellant would have obtained had the goods arrived at Monrovia intact. Libellant submits that he had already sold the goods from the samples, but the amount received had to be refunded to the purchasers when the goods were not delivered, occasioned by libellees' negligence.

10. Libellant avers as to count 17 that the bank rate of interest at the time the transaction took place in 1984, in respect of the delivery of the goods, was 22%. Libellant gives notice that at the trial he will produce evidence to substantiate this averment.

11. And also because libellant denies all and singular the factual allegations contained in the answer and the law relied upon not specifically herein traversed.

The pleadings having rested, the trial judge entertained the motion and dismissed the entire case. (See judge's ruling). It is from the ruling of His Honour Judge Napoleon Thorpe, granting the motion to dismiss the entire complaint, that libellant has appealed to this Forum for a final review.

In count one (1) of the bill of exceptions, libellant contended:

1. That the trial judge committed a reversible and prejudicial error when in ruling on the motion to dismiss on June 24, 1986, he held on sheet 12 of the said ruling that "the defendant may plead by way of denial and also plead the statute of limitations"; that he relied

on 61 AM. JUR. 2d., *Pleading,* §§ 163 and 164; that the common law will be applied only when our statutes are silent on the issue. The Civil Procedural Law, Rev. Code 1: 2.2 clearly provides that: "The statute of limitations shall be pleaded affirmatively...." which was not done by libellees in their answer. Our Supreme Court, in the interpretation of that statute, has held consistently from 1 LLR to the present that when an answer both denies and avoids the truthfulness of the allegations contained in the complaint, the answer is properly ruled out. Moreover, the statute of limitations, when specifically pleaded and proved, bars an action. It must therefore admit that the allegation or allegations sought to be avoided are true and then set up a state of facts sufficient, and if proven, to defeat the action.

Against these contentions, libellees argued that the trial judge committed no reversible and prejudicial error when, in ruling on the motion to dismiss on the 24th day of June, 1986, he held that "The defendant may plead by way of denial and also plead the statute of limitations". Appellees contended that the trial judge did not rely on the common law as found in 61 AM. JUR. 2d, *Pleadings,* §§ 163 and 164, as the appellant would have this Honorable Court believe; rather, that the trial judge, relied on the case law of the Republic of Liberia, and specifically the case *Cooper et al. v. Dennis et. al.,* 27 LLR 310 (1978), in which the Civil Procedure Law, Rev. Code I: 2.2, had been interpreted by this Honourable Supreme Court. Libellees contended that although a decision of the Supreme Court of the Republic of Liberia may refer to the common law in its interpretation, the decision cannot be regarded as common law. Libellee cited the Civil Procedure Law, Rev. Code 1:2.2, which provides that:

"The failure to commence an action within the time limited therefor shall constitute a defense to the action, which shall be pleaded affirmatively in the answer or reply as required by. Section 9.8 (4)".

Section 9.8 (4) of the Civil Procedure Law, Rev. Code 1, provides: *"Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statue of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense".

Libellees argued further and contended that it could not have been the intent of the Legislature that prior to pleading the statute of limitations, which is an affirmative plea, a party relying thereon mandatorily has to admit to all of the allegations made by his adversary even where he knows those allegations to be false and misleading. Libellees contended that certainly this could not have been the intention of the Legislature when enacting sections 2.2 and 9.8(4) of the Civil Procedure Law, Rev. Code 1. Thus, libellees contended that this Honourable Supreme Court, speaking through Mr. Justice Henries on the question of

affirmative pleading in the case *Cooper et al v. Davis et al.,* (1978) 27 LLR 310, text at page 316, said:

"Much was made of the fact that the appellants in their answer stated several defenses, in addition to denying that they are occupying premises belonging to the appellees. Some of the defenses were estoppel, waiver, laches, statute of limitations. The appellees contended that pleading in such a manner is inconsistent, unless the party so pleading first confesses and then avoids. Since reference has been made to this with respect to the ruling on the law issues, it seems necessary to point out that this Court in *Mourad v Oost Afrikaansche Compagnie (OAC),* 23 LLR 163 (1974), held that in keeping with section 9.3(3) of the Civil Procedure Law, Rev. Code 1, when a party has several claims or defenses which may appropriately be made or raised in the same action, he may state them all, but assert them in separate counts".

Further, in *Clara Town Engineers, supra,* at 213, with respect to determining inconsistency of defenses, it was pointed out that defenses are not inconsistent where they may all be true. Under modern code practice, a denial of allegations of the complaint and an allegation of new matter as a defense thereto in the nature of confession and avoidance are not necessarily inconsistent as not to be pleadable together. The defendant may plead by way of denial and also plead the statute of limitations. 61 AM. JUR. 2d., *Pleading, §§163* & 164. The rational for this, according to this authority, is that "if the statutory allowance of several defenses were to be limited by the strict logic of the old special pleas in bar, all special defenses would be off where the cause of action was denied, for such special defenses are supposed to confess and avoid, although in fact, they may not confess at all". Such an interpretation of the statute should be avoided if there is any other that will give a party his clear right to several defenses. 61 AM. JUR. 2d, *Pleading, §* 163.

Libellees argued and contended further that they did admit receiving ten (10) containers from the libellant for shipment to Liberia under a bill of lading but that they certainly did not and would not have admitted to either the contents thereof or the value thereof, as they had absolutely no way of determining same. Consequently, libellees contended that the trial judge was justified in overruling the libellant's argument regarding pleading in the alternative.

Let us now closely examine the authorities relied upon by the learned judge and counsel for the parties in advocating and determining the issues brought before this Court and compare their applicability to the facts of the case, since the statute of limitations presents issues of law.

Throughout the judicial history of our courts, we have held that a plea specially pleading the statute of limitations in bar to a suit is a question purely of law, and by statute must be determined by the court, independent of a jury. *Cassell v. Richardson,* 1 LLR 89 (1876); *Jackson et al. v. Horace,* 1 LLR 99 (1878). Statutes of limitations are made to prevent undue advantage being taken of parties by delaying actions in a matter unreasonably long. *Smith et al. v.*

Faulkner et al., 9 LLR 161 (1946). In legal parlance, laches is not mere delay but that which works as a disadvantage to another. Further, among the affirmative defenses available to a defendant, when specifically set forth in the answer, are these: fraud, account stated, payment, release, reward, statute of limitations, recission, innocent purchaser, usury, infancy and judgment. These and all other affirmative defenses must be specially pleaded in the answer; otherwise, the defendant cannot usually take proof in reference to them, or, if the proof is taken, he cannot have the benefit of it. It is not an uncommon thing for a defendant to suffer from his failure to set forth in his answer facts constituting an affirmative defense.

In the case *Bryant et al. v. Harmon and Oost Afrikaansche Compagnie,* 12 LLR 330 (1957), this Court relied on 10 R.C.L. 446-47, *Equity,* ∫ 211 and said:

"The statute of limitations being an affirmative plea which when specially pleaded and proved bars an action, must admit that the allegations sought to be avoided are true, and then state other facts sufficient if true, to defeat the action."

Based on that provision of law, this Court also ruled as follows:

". . . the motion to dismiss for want of jurisdiction, without admitting the allegations in petitioner's petition seeks to avoid the same. This is not permissible, because the fundamental principle upon which all complaints, answers, or replies are to be constructed, is that of giving notice to the other party of all facts which it is intended to prove, whether they are consistent with facts already stated to the court or being inconsistent with the present existence of such facts, admit for implying their former existence, or show that, existing they can have no legal effect. *Ibid.*

Relying on the holding in the *Harmon* case, the motion to dismiss for want of jurisdiction, without admitting the allegations in libellant's complaint, sought to avoid the same. This is not permissible.

In the case *Muller v. Republic,* 2 LLR 187 (1915), this Court ruled that in actions of admiralty, pleas of abatement should not be allowed. In order words, the Court basically held that it was a settled principle of admiralty law that courts will not allowed parties to be turned out of court because of legal technicalities, but will permit them to amend their pleadings at any stage of the proceedings. In a previous case, *Dennis v. Republic,* 1 LLR 323 (1898), this Court ruled that suits brought in admiralty will not be dismissed on account of legal technicalities, and where necessary, amendments to pleadings will be allowed, upon application, up to the stage of trial, and sometimes will be allowed even in the appellate court.

Furthermore, in the case *Beysolow v. Coleman,* 9 LLR 156 (1946), this Court ruled and held that "when fraud is alleged, a jury must pass upon the evidence in support of the allegations."

With these cardinal legal guidelines, let us now examine the pleadings, especially the answer of the libellees upon which the application to dismiss the entire complaint on the ground of

time barred or the statute of limitations was based, and to see whether or not the statute of limitations was applicable. Thereafter, we shall then compare the judge's ruling dismissing the action.

Counsel for libellant strenuously argued that libellees' answer was pleaded in violation of the law on how the statute of limitations should be pleaded. This issue was also raised by libellant in count one (1) of his reply. In that count, libellant said that under our law, the statute of limitations shall be pleaded affirmatively in the answer or reply. The libellant contended, however, when the statute of limitations is pleaded, the pleader must first admit that the allegation sought to be avoided are true, and then state other facts sufficient, if true, to defeat the action. Libellant called our attention to the effect that this Court has held consistently over the years in Its interpretation of the law regarding the statute of limitations that when an answer both denies and avoids the truthfulness of the allegations contained in the complaint, then the answer is properly ruled out.

Recourse to counts 3, 4, 5, 6, 7, 8, 9, 10, (A, B, C, D, E) 11, 12, 13, 16 17, and 18 show that not only have libelees raised issues of mixed law and facts, but they have also raised the issue of fraud in counts 4, 5, 6,7, 8, 9, 10, 11, 12,13, 14, 15, 16, 17, 18, 19, 20 and 21 of the reply. All of those pleadings on fraud should have been tried by a jury or the court.

In counts 2 and 3 of the bill of exceptions, libellants have contended that the trial judge committed reversible error when he ruled that the libelee "may plead both by way of denial and the statute of limitations. On the other hand, libellant argued that the statute of limitations, being an affirmative plea, is indicative of the truthfulness of the allegation in that a thing cannot both be and not be, for, according to libelant's complaint, the unilateral issuance of a second bill of lading (Rotterdam) and the unilateral replacement of seals and numbers as confirmed by the Rotterdam bill of lading savors nothing but fraud. Fraud will vitiate any transaction and for which a tort action may be instituted. Libellant further argued that "when fraud is apparent and can be easily proved as is in this case, the statute of limitations will not bar the court from looking into the efficacy of the fraud because the duality of the bill of lading neither gives validity to the fraudulent act, nor lends aid to the statute of limitations."

In their answer, libellees should have admitted that they were negligent in permitting the seals on the containers to be changed, the consequence of which is the great presumption that the goods were stolen from the containers while in the possession of the libellees. This should have been admitted by libellees, after which they could then plead the statute of limitations; but where they elected to disclaim negligence and the proof of fraud was apparent, the trial judge erred when he dismissed libellant's action.

Rather than complying with the requirement of the law, libellees, in response to the libellant's arguments, contended and argued that this Honourable Court ought not to

consider counts "two (2) and three (3) of libellant's bill of exceptions since the same raised issues which were never before the court below, especially the portion thereof which stated that "according to libellant's complaint, it strongly contends that the unilateral issuance of a second bill of lading (Rotterdam) and the unilateral replacement of seals and numbers, as confirmed by the Rotterdam bill of lading savors nothing but fraud and fraud will vitiate any act for which a tort action may be instituted." Libellees contended that nowhere in the complaint or reply did the above quoted phrase appear and that even if it did appear in the complaint or reply, this Court is without authority to review it, since what is before this Honourable Court is the motion to dismiss and the resistance thereto, together with the ruling of the trial judge, delivered on the 24th day of June, 1986. Libellees contended that this Honourable Court therefore must not entertain such a practice as this Honorable Court has held in numerous opinions that it will not entertain issues not raised in the court below and that only such matters as were interposed in the lower court and appeared in the bill of exceptions as records can be taken cognizance of in the appellate tribunal.

Libellees submitted that the trial judge did not commit a reversible error when he referred to libellees' exhibits 2, 3, 4, and 5, attached to libellees' motion to dismiss, as these exhibits were in no way intended to prove the merits of the case, but were simply exhibited to establish the sequence of events and to substantiate the time bar argument by libellees. Document number one was the bill of lading which stated that any claim or dispute arising out of this bill of lading shall be brought within one year of the delivery of goods thereunder as of the date when such goods should have been delivered; document two is a clerk's certificate confirming that the action was filed with the Civil Law Court for the Sixth Judicial Circuit Court on the 16th day of April, 1986; documents 3, 4 and 5 are Lloyd's Survey Report dated August 1, 1984, libellant's letter of August 12, 1984, filing a claim with Denco Shipping Lines, alleging that the goods were short-landed, and Denco Shipping Line's letter repudiating libellant's claim. Libellees contended that these documents were simply intended to establish that the libellant took delivery of the consignment, subject of these proceedings, on the 25th day of July, 1984, and did not institute these proceedings in the Civil Law Court until the 16th of April, 1986.

Libellees further contended that the trial judge did not err when he relied on those documents in determining that the suit was commenced after the one year within which the same should have been brought, especially when the libellant did not deny the genuineness of any of those documents or the dates thereon. Libellees then cited the law that where an essential allegation in a pleading is not denied in the subsequent pleading of the opposing party, the allegation is deemed admitted. Civil Procedure Law, Rev. Code 1:9.8; *Chenoweth v. Liberian Trading Corporation,* 16 LLR 3 (1964); *Liberian Oil Refining Company v Mahmoud,* 21 LLR 201 (1972).

Libellees contended further that their motion to dismiss was filed on the 30th day of May, 1986, exhibiting all of the documents referred to hereinabove and that on the said 30th day of May, 1986, a full set thereof was served on libellant's counsel; that on the 9th day of June, 1986, libellant's counsel filed his resistance and served a copy thereof on libellees' counsel; that a review of said resistance revealed that the libellant made no mention of these documents or the dates thereon, which, under our practice and procedure, was an admission. Libellees said that libellant admitted that the action was commenced out of statutory time, but simply argued that libellees in their answer did not admit to all of the allegations contained in the complaint prior to pleading the statute of limitations.

Moreover, libellees wondered how libellant expected the trial judge to determine whether or not the action was time barred without referring to the uncontroverted dates presented to him, when the statute provides that "The time within which an action shall be commenced shall, except as otherwise specifically prescribed by law, be computed from the time the right to relief accrued to the time the claim is interposed". Civil Procedure Law, Rev. Code 1:2.31. Libellees cited the Court further to the law which states that "A claim asserted in a complaint is interposed when the complaint is filed in a court of record or an oral complaint made to a magistrate or justice of the peace." Civil Procedure Law, Rev. Code 1:2.32. Libellees then contended that the question of time bar, being purely one of law, the trial judge was justified in using the dates on libellees' exhibits 1 through 5 in making his ruling, and that the court therefore did not commit a reversible error.

Libellees also argued and contended that the trial judge did not err and was justified when he ruled dismissing the libellant's action on the time bar issue as the Liberian Maritime Law, Chapter 4, Carriage of Goods by Sea, Section 132, paragraph 6(a), as well as paragraph 9(3) of the bill of lading, which is the contract of affreightment, expressly provide that: "The Carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one (1) year of their delivery or of the date when they should have been delivered." Libellees contended that the goods, subject of this suit, were delivered on the 25t h day of July, 1984, and that these proceedings were not commenced in the Civil Law Court until the 16th day of April, 1986, a period of one year and nine months after the date of delivery. Libellees finally contended and argued that the libellant having failed to commence his action within the statutory time of one year, he was forever barred from recovering. Thus, the trial judge did not err when he ruled dismissing the action.

It is my view that when fraud is apparent, and can easily be proven, as in this case, the statute of limitations will not bar the court from looking into the efficacy of the fraud. Because the quality of the bill of lading did not give validity to the fraud, it should not lend aid to the statute of limitations.

I am also in agreement with libellant's argument that libellees in their answer should have admitted that they were negligent in permitting the seals on the containers to be changed, which resulted in the stealing of the goods from the containers while in the possession of the libellees. Libellees should have admitted that the goods were stolen before, pleading the statute of limitations, but where they elected to disclaim negligence, and the proof of fraud was apparent, the judge erred in dismissing libellant's action. The judge also erred, when in ruling on the issues of law, he dismissed libellant's action upon the plea of the statute of limitations, when libellees did not first admit to the truthfulness of the averments contained in the complaint before pleading the statute of limitations.

It is a general principle of law, that:

"A plea in bar should be direct, and positive and possess the requisite precision and certainty. It must be adopted to the nature and form of the action and be conformable to the count which it answers.

It must either traverse or confess and avoid the matter declared on, and be an answer to any case which might be legally established under the declaration, being sufficient in this respect if it contains, in substance, matters which, if true, will bar the action. It cannot be sustained when it rests for its validity upon a supposed state of facts which may not exist. The plea should raise a material issue, for a plea which raises an immaterial issue and presents no defense to the plaintiffs demand is insufficient. Thus, a plea which merely alleges circumstances of inducement and legal conclusions and presents nothing upon which the plaintiff can take issue is insufficient. A plea to the whole action must answer all the material allegations in the declaration, and if it omits to answer a material part, it is bad. A plea bad in part may be bad in total: 41 AM. JUR, *Pleading, §§* 384-385.

It is further stated that:

"SPECIAL MATTERS of defense should as a rule be specially pleaded." 41 Am. JUR, *Pleading, §144*. According to our statute, Civil Procedure Law, Rev. Code 1:9.4., "in pleading to a proceeding, a party shall set forth affirmatively fraud, statute of fraud, statute of limitations, and any other matter constituting an avoidance or affirmative defense."

The reasonable interpretation of the expression "shall set forth affirmatively" is that the statute commands a positive act or duty to be done. In other words, the pleader may plead any of these defense as reliance, but first he must assert positively, tell with confidence, or aver, declare, establish, confirm, rectify, pronounce, and maintain, as true, the existence of, or make a positive statement of fact affirmatively. It must be recognized that it is a defense, which amounts to something more than a mere denial of the plaintiffs allegation, a defense which sets up a new matter not embraced within the ordinary scope of a denial of the material averments of the complaint; and hence, it is that plea of such defenses necessary to

advise the opposing party as to the nature and scope of the defense. Following the rule, affirmative matters required to be specially pleaded may include defenses of estoppel, contributory negligence, assumption of risk, fraud when set up as a matter of avoidance, mistake, alteration of contract, that the plaintiff is not the real party in interest, excuse for the non performance of a covenant.

The statute of limitations proceeds on the idea that, admitting the case stated in the bill of complaint to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays for or the discovery he seeks 10 R.C.L., *Affirmative Plea,* page 457.

The statute of limitations is a statute commanding a positive act or duty. The pleader must state emphatically and positively, declare, affirm, and confirm the answer "YES". It is then that he can set forth his defense, not by supposition, assumption or conditionally, or taking for granted, in order to draw a conclusion or inference for proof of the point in question.

This Court has also held that the statute of limitations constitutes an affirmative defense, which must not be pleaded hypothetically in order to bar an action.

Furthermore, this Court held in the case *Bryant* et *al. v. Harmon et aL,* 12 LLR 330 (1956), that:

"If a bill states a good cause of action, and the defendant finds that he cannot safely rely on the certainty of disproving its allegation, his only recourse is to set up an affirmative defense; and it is when he is confronted with this necessity that the problem of framing the answer as a pleading assumes its greatest importance. Among the affirmative defenses available to a defendant when specially set forth in the answer are such as these: fraud, statute of limitations, of recission, innocent purchasers, usury, infancy, and former judgment.

These and all other affirmative defenses must be specially pleaded in the answer. Otherwise, the defendant cannot usually take proof in reference to them or, if the proof is taken, he cannot have the benefit of it. It is not an uncommon thing for a defendant to suffer from his failure to set forth in his answer facts constituting an affirmative defense. One who finds himself in this predicament must at the hearing, if not sooner, get leave to file a supplemental or amended answer; and this concession will of course be granted only on the payment of costs.

The statute of limitations, being an affirmative plea which when specially pleaded and proved bars an action, must admit that the allegations sought to be avoided are true, and then state other facts, sufficiently, if true, to defeat the action."

Observing throughout the libellees' answer, we have been unable to find where libellees have first admitted the allegations contained in libelant's complaint before attempting to set out other defenses, such as the statute of limitations, statutes of fraud and fraud.

In other words, nowhere in the motion to dismiss the action or in the answer of libellees have libellees distinctly and positively declared, pleaded, affirmed, confirmed, stated, averred or acknowledged as true the allegations contained in counts one (1) to five (5) of the complaint, before attempting to set up such other statute, facts or law, such as the statute of limitations, statute of fraud, or fraud.

Furthermore, we cannot understand why the learned judge in the first place entertained the motion in the face of the rigid resistance of libellant and the clear and gleaning mandate of this Court in the case *Horace v. Harris,* 9 LLR 372, 374 (1947). In that case, it was held that:

"Under our practice, the party filing the last pleading is entitled to move the court first on any legal defect in the pleading of his adversary. That a party is not permitted to move the court with reference to any legal defect in the pleading of his adversary to which the attention of the court would not have been previously called by some regular pleading".

It is inconceivable that a counsellor practicing in our courts should find himself submitting such a motion in the manner done and with the surrounding circumstances.

Libellant's complaint was filed on the 16t h day of April, A. D. 1986 at 3:35 p.m. According to records, libellees answer was dated and filed on the 30th day of May, A. D. 1986, and simultaneously on the same day and date, libellees filed their motion to dismiss the action. This the appellees did without allowing plaintiff its ten (10) days to file a reply if it so desired, and in spite of their late filing of an answer.

Recourse to the answer shows that although the issue of statute of limitations was raised, the libellees also raised the issues that the court below lacked jurisdiction over the person of libellees and that libellant had no standing to sue. I am of the opinion that libellees should have affirmatively averred that libellant should be entitled to the amount of one million, eighty-seven thousand, four hundred fifty-two dollars and thirty-four cents ($1,087,452.34) as actual loss sustained as a result of their negligence, plus interest on said amount, at the rate of 21%, being at the time what the banks charged. The libellees should also have set up other facts and circumstances as contemplated by the law controlling the statute of limitations. These not having been done, the pleading was bad.

This position of the libellees regarding the motion to dismiss, which was sustained by the trial judge, does not find support in our practice, for this Court has held that the party filing the last pleading is entitled to move the trial court first on any legal defect in the pleading of his adversary. *Gould et al. v. Gould,* 1 LLR 389 (1903).

More importantly, I reiterate that this Court held in the case *Dennis v. Republic, 1* LLR 323 (1898), that "suits brought in admiralty will not be dismissed on account of legal technicalities., and where necessary, amendments to pleadings will be allowed upon application up to the stage of trial, and sometimes will be allowed in the appellate court."

(Emphasis added). It is my view that libellees not having complied with the law controlling the statute of limitations, libellant's action should not have been dismissed. The practice in admiralty differs from that in common law. The former does not require all the technical provisions and accuracy necessary in the latter. The object seems to be to allow every facility to the parties to place fully before the court their whole case, and to enable the court to administer substantial justice before the parties without security of action or turning round in court. It was never designed to allow a party to overcome his adversary by the man-traps-and-spring-guns of covert chicanery, or by the surprise of technicalities of pleading or practice. Further, the party really entitled to the relief is the libelant in admiralty. *Republic v. Sherman, 1* LLR 139 (1881). In actions of admiralty, pleas of abatement should not be allowed. It is a settled principle of admiralty law that courts will not allow parties to be turned out of court for technicalities, but will even permit them to amend their pleadings at any stage of the proceedings.

In view of what I have thus far observed both as to law, facts and circumstances, I fail to see why the majority opinion in this case could not have sustained counts 1, 2, 3, 4, 5 and 6 of libellant's bill of exceptions.

It is a settled principle of law that "in as much as one of the objects of pleadings is to ascertain by the process of eliminating the matters really in controversy between the parties, and in as much as there is an order in which all traversable matters should be pleaded, it seems clear that the proper way in which to consider a set of pleadings is to do so in the reverse order, beginning with the last pleading filed, not with the first and second. This has always been the rule in vogue and a departure therefrom, as in the case now under review, has brought about repeated ineffective appeals at a considerable financial loss to both parties in the controversy."

It is my view that since by legal analysis and close examination of the legal authorities and the facts upon which the learned judge and the parties relied, together with the issue of fraud as are raised by both parties in counts 3, 5, 6, 7, 3, 9, 10 (A, B, C, & D), 11, 12, 16, 17 & 18 of the answer and the factual issues raised in counts 8, 10, 11 (B, C, D, E), 12, 13, 14, 15, 16, 18, 20, 21 and 22 of the reply, respectively, the said issues being both mixed questions of law and facts, the case should have been tried by a jury. And since it is in admiralty the action should not be dismissed, for it is a holding of this Court that when fraud is alleged, a jury must pass upon the evidence in support of the allegations. *Beysolow v. Coleman,* 9 LLR 156 (1946).

I wish to reiterate and re-emphasize here that in admiralty proceedings, pleading in abatement is not allowed. *Muller v Republic,* 2 LLR 187 (1915). In my opinion, the trial judge therefore erred in dismissing the action, especially so when libellees in their answer gave notice that at the trial, a writ of *subpoena duces tecum* would be applied for to be issued on the

Director, Division of Domestic Trade, Ministry of Commerce, Industry and Transportation to have him produce the ledger books for businesses registered in Liberia during the period 1984 to 1986.

With the following observations, I would have thought that the majority opinion and judgment would have sustained counts 1, 2, 3, 4, 5, and 6 of libellant's bill of exceptions, taking into consideration the logical and legal soundness of the arguments, and that they would have reversed the ruling of the trial court and remanded the case with instructions that the lower court resume jurisdiction over the action, since, according to the laws extent, the judge first erred when he entertained the motion to dismiss. As the libellees were not the last pleader, they were accordingly not entitled to file a motion on any defects they found in the answer or the pleadings. I have therefore withheld my signature from the majority opinion and judgment.

MR. JUSTICE JUNIUS *dissents.*

In the Civil Law Court for the Sixth Judicial Circuit Montserrado County, Republic of Liberia, sitting in its June Term, A.D. 1986, Everest Textile Company, represented by Adhan Mohsen, libellant/appellant, instituted this suit against Denco Shipping Lines of Bushrod Island, Monrovia, Liberia, represented by its manager, Eugene Cooper, Agent for East Asiatic Company (EAC) Ltd., A/S Copenhagen, Denmark, and the vessel M.V. Boringia of Rotterdam, represented by and through its Captain to be identified and her tackle and other accessories, all of the Freeport of Monrovia, Liberia, libelees/appellees. In response, libellees filed an 18 count answer with a motion to dismiss. The Libellant filed a 22-count reply along with a resistance to the motion to dismiss. Pleadings rested, arguments were entertained, and His Honour Napoleon B Thorpe, peace be to his aches, ruled dismissing the suit. It is from his ruling that this appeal has come before this Honourable Court of last resort.

Libellant alleged, in substance, that it purchased goods and sundry items, placed them in containers for shipment to Liberia, and delivered them to the shipper, for whom Denco Shipping Lines is agent; but when the containers arrived at Monrovia, a substantial amount of the goods were missing. The counts of the complaint are quoted hereunder:

1. Libellant complains that it purchased, through its agent Bahtoo Trading Company of 458/8 Barlow Moor, Manchester, M-21 "B" England, assorted pieces of goods and textiles, loaded in ten (10) containers measuring 10' x 12', which containers containing the said assorted pieces of goods and textiles were shipped through the (EAC) East Asiatic Company Lines from Manchester, England to libellees at Monrovia on bill of lading number 36, dated July 5, 1984, with the freight fully paid, naming the MV Boringia as the carrier, as will more fully appear from copy of said bill of lading listing the containers and their numbers and seals, hereto attached and marked exhibit "A" to form a cogent part of this complaint.

2. And libellant further complains that upon inspection of the containers by police officers, port securities and representatives of Lloyds Agency, it was discovered that goods to the value of £483,202.02 were missing from the containers as will more fully appear by Statement of Claim dated 15th July, 1984, hereto attached and marked exhibit "B" to form a cogent part of this complaint.

3. And libellant further complains that Denco Shipping Lines, Inc., agent for libellees, on the 18th day of September, 1984, wrote a letter to the Director of Security at the Freeport of Monrovia, to enquire into the extensive loss of these containers. On November 5, 1984, the Chief of Security wrote a comprehensive report indicating that the containers were burglarized after they had been delivered to libellees and that the containers were not burglarized at the Freeport of Monrovia; that is to say, foul play was not done at the Freeport of Monrovia but rather, between Manchester and Rotterdam, as will more fully appear from copy of said letter with relevant Warehouse Delivery Tallies numbering 18608 to 18618 hereto attached, marked exhibits "C" to "I", as well as report of the Chief of Security and Statement marked exhibits "M" and "M-I" to form a cogent part of this Complaint.

4. And libellant further complains that as a substantiation of the report of the Chief of Security of the Freeport of Monrovia, the said libellees made another bill of lading bearing the self-same number 436 and dated July 5, 1984 and listed the ten (10) containers with separate numbers and seals, contrary to the original numbers and seals delivered to libelees at Manchester and consigned to libellant, as will more fully appear from copy of the said bill of lading with its relevant parts containing photographs of the empty containers and the National Port Authority Receiving Tally, hereto attached and marked exhibits "N-1" to "N-3 5" to form a cogent part of this complaint.

5. And libellant further complains that as cost for the survey by Lloyd's Agency, he paid £165.33 and it also incurred a loss of profit on the goods in the amount of £241,601.01 together with the goods lost which amounts to £483,202.02, aggregating £724.968.36 or $1,087,452.54; which losses, due to libelees negligence, libelant has had to suffer."

Against this complaint was filed an 18-count answer which we quote hereunder:

1. Because libellees say that this court has no jurisdiction over the subject matter or the parties in this proceeding, in that the contract, bill of lading, which is the basis of the entire action, expressly indicates that any claim or dispute arising out of this bill of lading shall be decided according to Danish Law and in the Danish courts to the exclusive jurisdiction of which the carrier and the merchant submit themselves. Having expressly contracted in the manner stated herein above, the libellant is estopped from unilaterally attempting to breach this provision of the Contract of Affreightment by instituting this proceeding in the courts of the Republic of Liberia. Libellees request Your Honour to take judicial notice of

paragraph 27 of the bill of lading attached to the complaint by libellant as their exhibits "A" and "N". Further, libellees attach hereto as exhibit "I" a copy of the original bill of lading issued in London same being the document on which the consignment was shipped and delivered to libellant and out of which this proceeding grew, for your easy reference.

2. Because libellees say that this action is time barred in that the various statutes and rule governing maritime transportation universally provide that the carrier and the ship shall be discharged from all liabilities whatsoever in respect of the goods, unless suit is brought within "one year of their delivery or of the date when they should have been delivered. (This period may, however be extended if the parties so agree after the cause of action has arisen)." Libel ees contend that this action was commenced on the 16th day of April, 1986, whereas the libellant/consignee took delivery of the said consignment on July 25, 1984, a period of 21 (twenty-one) months - (one year and nine months) between the date on which the consignment was received and the date of the commencement of this proceeding; and there was no extension agreed upon, and further that no legal action (suit) had been commenced prior to the suit filed before this Honourable court on the 16th day of April, 1986. Libellees therefore contend that the entire action is time barred and therefore a fit subject for dismissal, and your libellees so pray. Libellees request Your Honour to take judicial notice of the filing date on the complaint and further attach hereto a certificate from the clerk of court clearly indicating that this proceeding was filed on the 16th day of April, 1986, marked as exhibit "2". Also attached hereto is Lloyd's Survey Report, dated August 1, 1984, and libellant/consignee's own letter dated, August 2, 1984, addressed to the claims manager of Denco Shipping Lines as well as Denco's letter of August 4, 1984 repudiating libellant's claim as exhibits "3", "4" and "5", respectively. These documents clearly indicate that the libellant took delivery of the consignment, subject of this proceeding on the 25t h day of July, 1984. At the trial a writ of *subpoena duces tecum* will be applied for to have the libellant produce the original of the Lloyds' survey, which is in their possession. For reliance see The *Danish Merchant Shipping Act, Part XIII, Section 291* (7), *page 3* 7, a copy of relevant portions thereof hereto attached as exhibit "6". Also see The *Liberian Maritime Law, Chapter 4, Carriage of Goods by Sea Act, Section 132, Paragraph 6 (a), page 32;* Lloyd's Nautical Year Book, Carriage of Goods by Sea Act, 1971; Hague-Visby Rules, Article III, Paragraph 6, page 177 (1986); and Paragraph 9 (2) and (3) of the bill of lading (libellees' exhibit "1", attached hereto). Libellees request Your Honour to take judicial notice of the Danish Merchant Shipping Act referred to herein above.

3. Because libellees say that the libellant, Everest Textile Company, has no standing or legal capacity to institute this proceeding, in that it is not a registered business as is provided by Liberian Law. Libellant company was established on July 9, 1984, after filing application on May 16, 1984, with the Ministry of Commerce, Industry and Transportation, Republic of Liberia, and that a branch thereof was established on August 31, 1984. Since then, the

libelant has not renewed its business registration as is provided by law. Consequently, the libelant cannot legally maintain a suit in the name of Everest Textile Company in 1986. Libellees give notice that at the trial a writ of subpoena duces tecum shall be applied for to be issued on the Director, Division of Domestic Trade, Ministry of Commerce, Industry and Transportation, Republic of Liberia, to have him produce the ledger books for businesses registered in Liberia, covering the period 1984 to 1986 as well as the certificates of registration of Everest Textiles Company for the same period.

4. Because libellees say that these actions were instituted against the vessel MN "BORINGIA" of Rotterdam and writs of summons and attachment issued against said vessel, but contrary to the writs, the Marshal of the Supreme Court of the Republic of Liberia arrested the vessel MN "BORINGIA" of Copenhagen, a vessel distinct from that named in the writs. As a result of this legal blunder the MN "BORINGIA" suffered grave losses for which the libellees hold the libellant responsible to compensate them in the form of damages. Libellees request Your Honour to take judicial notice of the complaint and the writs of summons and attachment.

5. Because Libellees say that as to count one of the complaint, same is false and misleading in that at no time did they receive from libellant's agent, Bahtoo Trading Company of 458/8 Barlow Moor, Manchester, M-21 11DO, England, "assorted pieces of goods and textiles, loaded in ten (10) containers measuring 10'x12' for shipment from Manchester, England, to libelees, at Monrovia, Liberia, with the freight fully paid as has been alleged by the libellant. Libellees say that they received for shipment 10 containers measuring 10'x20' which were said to have contained "assorted pieces goods and textile" and that said containers were accepted and shipped from Felixtowe with a bill of lading to Monrovia via Rotterdam. At Rotterdam, additional seals of the one-seal-lock type were placed on the containers as the seals attached by the shipper were unacceptable to the shipping line. Libellees contend that it is not their procedure to open consignees' shippers' FCL (Full Container Load) containers at the port of embarkation to determine the quantity, type or quality of goods; they simply ship containers as delivered to them and this is why the bill of lading clearly indicates that the containers are "said to contain" a certain quantity of goods. See copy of bill of lading attached hereto as libellees' exhibit "1".

6. Because libellees say further that as to count one of the complaint, it is untrue that the freight was fully paid" on July 5, 1984, when the bill of lading was prepared, as is alleged. Libellees say that the freight was not paid on the consignment in question until July 20, 1984, after the vessel had discharged the cargo at the Freeport of Monrovia and that it was only at this point that the original bill of lading was released at Liverpool, England, to the shipper's agent. The copy of the bill of lading which was presented to the libellant in Monrovia prior to the 20th of July, 1984, when the freight had not been paid, was simply a notice of arrival that a vessel on which the goods would be shipped had been identified and to alert it to

collect its cargo. The Libelant could not use that document to collect the goods as it was not a negotiable bill of lading. A copy of the freight invoice, together with the check paid in satisfaction of the freight on the 20th of July, 1984, is hereto attached as exhibit "7".

7. Because libellees say that as to count two (2) of the complaint, same is tainted with fraud in that there is no showing in either of the reports mentioned therein that the goods allegedly missing from the container value £483,202.02; on the contrary, libellees say that a packing list shows that the actual value of the libellant's goods is $73,878.50 and it was on this amount that the libellant paid duty to the Government of the Republic of Liberia, as evidenced by Bahtoo Trading Company of Manchester, England, Invoice No. 100903 dated July 1, 1984, as well as the Government of the Republic of Liberia Customs' Consumer Entry Form showing total duty of $23,869.63, hereto attached as Exhibits "8", and "9", respectively. The libellees hereby give notice that they shall apply for writs of subpoena duces tecum during the trial for the originals of these documents to be produced in court by Everest Textiles Company, libellant, as well as on the appropriate Liberian Government officials to have them produce all documents, ledgers, etc., connected with libellees' exhibit "9".

8. Because libellees say further that as to count two (2) of the complaint, same should be dismissed, together with the entire action as it is clear that the libellant has transacted with the libellees in bad faith with the primary objective of unjustly enriching it by perpetrating fraud. Courts of law and lawyers should not encourage unscrupulous individuals in their dishonest undertakings. Libellees challenge the libelant to produce the Customs Entry showing that it paid duty on goods value at £483,202.02; certainly, this amount does not convert into $73,878.50.

9. Because libellees say that still further as to count two (2) of the complaint, the packing list exhibited by the libellant is also fraudulent in that said list prepared on the 1st of July, 1984, contains seal numbers which on that day were not known to anyone, including EAC. The EAC seal numbers on the 10 containers in question were known for the first time on July 3, 1984, when the additional seals were placed on the containers at Rotterdam. One can reasonably assume that the packing list was fraudulently back dated after the 19th of July, 1984, when the libellant received the notice of arrival. Further, libellant obtained two packing lists from Bahtoo Trading Company of the same date, July 1, 1984, for the same order number 2235/M, each carrying the same container numbers and quantities of goods, but there is a variance in the seal numbers. A copy each of these packing lists is attached hereto as Exhibits "10" and "11" to form a cogent part of this answer. Libellees give notice that writs of *subpoena duces tecum* will be applied for during the trial to have the libellant produce the originals of these documents which are in its possession.

10. Because libellees say that as to count three (3) of the complaint, same should be dismissed, together with the entire complaint as the allegations contained therein are baseless, thereby making the conclusion erroneous, as is more fully shown herein below:

A. That at no time did Denco Shipping Lines, Inc. write any letter to the Director of Security at the Freeport of Monrovia to enquire into the extensive loss of these containers, as has been alleged by the libelant in its complaint. Libellees say that it was Lloyds' surveyor, an entity independent from libellees, who wrote to the port security requesting an investigation based upon allegations of the libellant relative to the contents of his containers when shipped vis-a-vis its contents upon arrival at Monrovia, Liberia. The contents of Lloyds' letters do not, in any way, admit that there was in fact a shortage since Lloyds did not know the actual contents of the containers prior to the survey, but simply had to rely on the good faith of libellant, which turned out to be most unreliable based on the various fraudulent transactions herein above enumerated.

B. That the NPA security report could be right, relative to the conclusion that the containers were not burglarized at the Freeport of Monrovia, in that one of the seals placed thereon at Manchester was still intact when the containers arrived at the Freeport of Monrovia. However, the report is defective in many respects, one being that the NPA security relied on the words of libelant to conclude that there was "foul play" between Manchester and Rotterdam without first enquiring whether or not the containers were stuffed with the quantity and quality of goods which the libellant claims they contained. Libellees contend that the shipping lines only accepted responsibility for the containers from the place of acceptance, same being Felixtowe. In the absence of the full description of the goods shipped on the invoice, the NPA security was in error to conclude that the libelant did stuff the containers as indicated. From the various discrepancies surrounding the documentation involved with the subject consignment, one can reasonably conclude that the containers were never stuffed with the quantities of goods as is alleged by the libellant.

C. That the shipping line normally has no knowledge of the content of a container except for what is declared by the shipper to be the content of the container, and this is why the carefully selected words "said to contain" are inscribed on the bill of lading. The carrier is responsible for the safe transportation and delivery of the container itself and has no way of knowing its exact contents and does not normally interfere with the contents of a full container load (FCL) as was the case with the 10 containers of the libellant.

D. That page 4, number 3, Finding of the NPA security report, libellant's exhibit "M", is misleading in that the London bill of lading, the actual shipping document, does not contain the seal numbers mentioned, as those are seal numbers found on the internal, non-negotiable copy of the bill of lading issued at Rotterdam.

E. That it might be noteworthy to indicate here that the one container number IC SU 353570-8 with seal number 43640, which was received with its content intact, was positioned on the vessel in such a way that although easily accessible, it was difficult for someone to remove the seal and cargo without being noticed. Libellees contend that the original Manchester seals were removed from the containers by individuals under the instructions of libellant while the containers were on the vessel, but there were no goods removed therefrom; as the libellant, in collaboration with the shipper/seller had delivered the containers partly stuffed. A copy of a diagram indicating the location of the libellant's containers on the vessel during transportation is hereto attached as exhibit "12".

11. Because libellees say that as to count five (5) of the complaint, same is also false and misleading relative to the allegation that the libellees issued two original bills of lading. The only negotiable original bill of lading was that issued in London; the other document which the libellant refers to as a bill of lading was simply a notice of arrival and is a non-negotiable copy bill of lading for manifesting purposes only, to re-alert the consignee of the impending arrival of his goods. This document cannot be used to clear the goods. A review of the bill of lading issued in London is hereto attached as exhibit "1"; and it was the only document endorsed by the libellant. A statement of the procedure involved in the handling of containers as the ones in dispute, as prepared by the East Asiatic Company Ltd. A/S, is hereto attached as exhibit "13" .

12. Because libelees say that count five (5) of the complaint should also be dismissed, together with the entire complaint as same is based on fraud, in that libellant, on July 1, 1984, obtained two invoices from his supplier, Bahtoo Trading Co., one numbered 100703 for the amount of $73,878.50 and the other numbered 101402 for the amount of £840,704.99, both invoice carry order number 2233/M and covering the same (10) ten containers and their alleged contents. Further, libelees say that the libellant paid Liberian Government duty on the invoice for $73,878.50 and therefore cannot claim on the greater invoice. To allow this is fraudulent, and your libellees say an action commenced in a court of law based on fraud will not be entertained. The court should not aid an individual in the perpetration of his fraudulent acts. One wonders what happened to the 499 invoices between 100903 and 101402 on the same day. A copy of invoice number 101402 is hereto attached as exhibit "14", and libellees give notice that a writ of subpoena duces tecum will be applied for at the trial to have libellant produce the original.

13. Because libelees say further that as to count five (5) of the complaint, the amount of £241,601.10 as mentioned therein as loss of profit of goods is not recoverable in law as same is speculative. Special damages must be specifically pleaded and proven if same is to be cognizable before a court of law. Having failed to establish how the "profit" would have been derived at, that claim, together with the entire complaint, should be dismissed.

14. Because libellees say that the goods in question were obtained by the libellant under a financing arrangement without a letter of credit; the finance was arranged by a Mr. Sulaiman of Antwerp, who initially agreed to provide the necessary guarantees. The goods were allegedly supplied by Sagger and Evernesda who have not been paid for these goods to date. The goods in question were basically "line ends" pieces brought from several mills and trading companies around Manchester, England. Libellees contend that libellant has no standing to institute these proceedings as he had suffered absolutely no loss since indeed he has not paid for the goods. Surprisingly, neither of the two alleged suppliers, Sagger nor Evernesda, has made any claim against Bahtoo or Mr. Sulaiman; neither has Bahtoo made any claim against libellant nor their cargo insurers.

15. Because libellees say that even if one were to agree, for argument sake, that the libellant is entitled to recover in these proceedings, its level of recovery would be restricted as is provided in various maritime transportation legislations and regulations which are adopted universally.

Libellees say that "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit of 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher." *Liberian Maritime Law, Chapter 4, Carriage of Goods by Sea Act, Section 133, (5)(a), page* 34.

The amount recoverable shall not, however exceed 666.67 Special Drawing Rights (SDR) per package or unit or 2 SDR per kilo of gross weight of the good lost, damaged or delayed, which ever is higher. *Danish. Merchant Shipping Act, Section 120 (2), page 12 (1985).* Libellees contend again, arguendo, that if at all libellant is entitled to recovery, said amount would not exceed approximately $7,186.00 US for the (10) ten containers depending upon the rate of exchange to be applied.

16. Because libellees say that due to the fraudulent acts of libelant when it filed its claim with Denco Shipping Lines, Inc., of Monrovia, Liberia, agent for East Asiatic Company (EAC), Ltd. of Copenhagen, Denmark, on the 2n d day of August,1984, same was promptly rejected on the 4t h day of August, 1984. A copy of each of the letter of claim from Everest Textiles, libellant, and the reply thereto from Denco Shipping Lines, Inc, on behalf of EAC are attached hereto as exhibits "4" and "5", respectively, to form a cogent part of this answer. A writ of *subpoena duces tecum* will be applied for during the trial to have the libellant produce the original letter sent to them by Denco, which is in their possession.

17. Because libellees say that the interest prayed for in an amount at the rate of 21% (Twenty-one percent) is not supported by law and therefore same should be denied, together with the entire complaint.

18. Because libellees say that due further to the fraudulent acts of libellant they had to expend a considerable sum of money to the tune of $60,000.00 thus far, in undertaking investigations in Great Britain, Sierra Leone, Liberia and Denmark, as well as lawyer fees, travel expenses and other miscellaneous expenses, which they would not have been obliged to spend had it not been for the dishonest and fraudulent behavior of the libellant. Libellees therefore hereby interpose a counterclaim in the amount of sixty thousand dollars ($60,000), plus interest. Libellees give notice that they shall produce evidence at the trial to substantiate their counterclaim."

Libellees' answer was accompanied by a motion to dismiss, which stated as follows:

1. Because libelees say that this court has no jurisdiction over the subject matter or the parties in this proceeding, in that the contract (bill of lading) which is the basis of the entire action, expressly indicates that "any claim or dispute arising out of this bill of lading shall be decided according to Danish Law. . . and in the Danish courts to the exclusive jurisdiction of which the carrier and the merchant submit themselves." Having expressly contracted in the manner stated herein above, the libellant is estopped from unilaterally attempting to breach this provision of the Contract of Affreightment by instituting this proceeding in the courts of the Republic of Liberia. Libellees request your Honour to take judicial notice of paragraph 27 of the bill of lading, attached to the complaint by libellants as their exhibits "A" and "N". Further, libellees attach hereto as exhibit "1" a copy of the original bill of lading issued in London, same being the document on which the consignment was shipped and delivered to libelant and out of which this proceeding grew, for your easy reference.

2. Because libellees say that this action is time barred in that the various statutes and rules governing maritime transportation universally provide that the carrier and the ship shall be discharged from all liabilities whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. (This period may however be extended if the parties so agree after the cause of action has arisen). Libellees contend that this action was commenced on the 16th day of April, 1986, whereas the libelant/consignee took delivery of said consignment on July 25, 1984, a period of 21 (twenty-one) months - (one year and nine (9) months) between the date on which the consignment reached Monrovia and the date of the commencement of this proceeding. There was no extension agreed upon, and further, no legal action (suit) had been commenced against the libellees prior to the suit filed before this Honourable Court on the 16th day of April, 1986. Libellees contend that the entire action is time barred and therefore a fit subject for dismissal, and your libellees so pray. Libellees request Your Honour to take

judicial notice of the filing date on the complaint and further attach hereto a certificate from the clerk of court clearly indicating that this proceeding was filed on the 16th day of April, 1986, marked exhibit "2". Also attached hereto is Lloyds' Survey Report, dated August 1984, and libellant/consignee's own letter, dated August 2, 1984, addressed to the Claims Manager of Denco Shipping Lines, as well as Denco's letter of August 4, 1984 repudiating libellant's claim as exhibits "3", "4" and "5", respectively. These documents clearly indicate that libelant took delivery of the consignment, subject of this proceeding, on the 25t h day of July 1984. For reliance see The *Danish Merchant Shipping Act, Part XIII, Section 291(7), page 37*. A copy of relevant portion thereof is hereto attached as exhibit "6". Also see the *Liberian Maritime Law, Chapter 4, Carriage of Goods by Sea Act, 1971;* Hague-Visby Rules, Article III, paragraph 6, page 177 (1989); and paragraph 9 (2) and (3) of the bill of lading (libellees exhibit "1" attached hereto). Libellees request Your Honour to take judicial notice of the Danish Merchant Shipping Act referred to herein above."

In response to the answer filed by libellees, libellant/appellant filed this reply:

"1. Because libellant avers that libellees' answer is woefully bad and legally defective and should be dismissed and it so prays. Libellant submits that the statute of limitations being an affirmative plea, which when specifically pleaded and proved bars an action, must admit that the allegations sought to be avoided are true, and then state other facts sufficient, if true, to defeat the action. This not having been done by libellees, that is to say, they not having first admitted to the averments contained in the complaint and then stated other facts sufficient, if true, to defeat the action, renders the answer in its entirety dismissible, with cost against the libelees; and libellant so prays.

2. And also because libellant avers and contends that further to count 1 above, that it was extensively injured as a result of the seals on the containers being changed from the original seal resulting into the goods being stolen therefrom. It was incumbent upon libelees to admit the truthfulness of the allegations contained in the complaint before setting up the plea in bar. Not having done this woefully defeats their answer and renders it a fit subject for dismissal, and libellant so prays.

3. And also because libellant avers that count 1 of libellees' answer praying dismissal of this action for want of jurisdiction over the subject matter and the parties is baseless and without foundation, libellant strongly contends that "territorial jurisdiction is given by law and cannot be conferred by consent of the parties."

Libellant further contends that the *Liberian Maritime Law of January 1, 1981, Section 33,* provides: "All causes of action arising out of, or under, this title are hereby declared and shall be cognizable before the circuit courts of the Republic, sitting in admiralty; but except as otherwise specifically provided in this title, the provision of this section shall not be deemed

to deprive other courts of Liberia or elsewhere, of jurisdiction to enforce such cause of action."

Libellant submits that this provision of the maritime code legally confers jurisdiction upon this Honorable Court. Consequently, no agreement of parties can oust this Honourable court of its jurisdiction over the subject matter and the parties as count 1 of libellees' answer would want this court to do.

Libellant submits that libellees are estopped from raising the issue of jurisdiction since indeed and in fact they have submitted themselves to the jurisdiction of the court by the signing and filing of a joint petition.

4. And also because libellant further avers as to count 1 of libellees' answer, with particular reference to that portion allegedly contracted by the libellant and libellees to the effect that "any claim or dispute arising but of this bill of lading shall be decided according to Danish Law, ... and in the Danish Courts to the exclusive jurisdiction of which the carrier and the merchant submit themselves", that such a contract is illegal and ought to be overruled, and libellant so prays. Libellant submits that according to the law extant, it is a settled rule that any agreement which has the tendency to interfere with and oust the administration of justice is contrary to public policy. Moreover, it is a general rule that agreements ousting the courts of their jurisdiction are invalid. In this light, an agreement which deprives a litigant of the right to control this case before its final determination is void as against public policy. Libellant strongly contends that this provision of the bill of lading has a tendency to oust the Liberian courts of the jurisdiction over causes of action arising out of maritime contracts, and because of this pertinent legal reason, libellant prays that the said count 1 of the answer be overruled.

5. And also because libellant avers as to count 3 of the answer that its business, Everest Textiles Company, is a duly registered business entity, and the mere failure to obtain a license for 1986 before the institution of these proceedings does not in any way divest it of its legal status. Libellant contends that for the revenue loss for the non-renewal of license, as is being suggested by the libellees, the Government of the Republic of Liberia has its method of punishing offenders of its revenues laws. Libellant is merely delinquent in procuring a license this year as are several businesses operating in the country due to the deplorable economic condition prevailing in the country.

6. And also because libellant avers that libellees are estopped from raising the issue of the arrest by the Marshal of the Supreme Court of Liberia of the vessel M/V Boringia of Copenhagen instead of the vessel MN Boringia of Rotterdam as a recourse to the records (Joint Petition, Letter and Telex) in this case will show that the Libelees agreed to undertake to pay such sum or sums by way of damages, interest and costs, as may be found due from the owners of the MN Boringia to the libelant, whether by way of agreement, arbitration,

award or final judgment of a court of competent jurisdiction. Libellant further submits that the MN Boringia of Copenhagen is a vessel as co-libellees. Accordingly, the arrest of M/V Boringia of Copenhagen is no error on the part of the Marshal. The joint petition, signed by libelees and filed with the court recognizes the jurisdiction of the court by submitting to it. See hereto attached copies of the joint petition, letter and telex, marked as libellant's exhibits "A", "B" and "C" to form a cogent part of this reply.

7. And also because libellant avers as to count 5 of the answer that same is grossly delusive, and ought to be overruled and it so prays. Libellant submits that under the Maritime Law of Liberia, the carriage of goods is a form of bailment, so that a common carrier is liable as an ordinary bailee for negligence, and his liability is not confined merely to such losses as are the consequences of his own negligence or want of skill. He is also held responsible for all losses or damages which may happen to goods while in his charge for the purpose of his employment, though occasioned by unavoidable accident or by any casualty whatever, except those occasioned by Act of God or public enemy. Libellant further contends that it was the duty of libelees to have delivered the containers in Liberia with the same seals that the containers bore when they were delivered to libellees.

8. And also because libellant avers as to count 6 of the answer that same presents no triable issue and is irrelevant and ought to be overruled, and it so pray. Libellant submits that the time of payment for the containers is not at issue. The issue is whether or not the containers were delivered to consignee (libellant) in tact according to the bill of lading issued in London, dated July 5, 1984. Whether the payment for the containers was made on July 5, 1984 or July 20, 1984, is immaterial. Wherefore, libellant prays that the said count 6 of the purported answer be overruled with costs against the libellees.

9. And also because libellant avers that as to counts 7 and 8 of libellees' answer, it categorically denies having committed any fraudulent act in this transaction, and therefore confirms its contention as contained in count 2 of its complaint as to the value of the packing list which, according to libellees, is bogus. Libellant maintains and contends that the value of the goods was £483,202.02 and that after the containers had been burglarized, the balance of the goods found in the containers was valued at $73,878.50, on which duty was paid because libellees had deprived libellant of the bulk of his goods. Therefore libellees' exhibit "9" is only a confirmation of the report of the port security and Lloyds' Agency, who happens to be Denco Shipping Lines. Libellant further submits that although libellees charged him with having committed fraud, it is strange to note that since the filing of the claim in 1984, libelees have not charged libellant with fraud until this action was instituted in 1986. Libellant contends that under the law controlling, equitable relief for fraud will be granted only on prompt application and will be denied to a party who failed to seek such relief immediately upon becoming aware of the fraudulent nature of the transaction in question. Because of this legal reason, libellant prays that the said counts 7 and 8 of the

purported answer of the libellees be overruled and the answer in its entirety dismissed with coats against the libellees.

10. And also because libellant avers as to count 9 of the answer that he denies ever committing fraud and accordingly prays that the said count 9 be overruled. Libellant contends that libellees (carrier), upon receipt of the ten (10) containers in Manchester, issued London bill of lading No. 436, dated July 5, 1984, evidenced by libellees' exhibit "I". According to the said bill of lading (receipt for goods delivered to the carrier), the goods were consigned from London to Monrovia, Liberia, with the containers and seals numbers indicated on the said bill of lading, the same being libellees' exhibit "I". From Rotterdam another bill of lading was issued bearing the same number 436, and also bearing the same date, that is to say, July 5, 1984, listing the same containers numbers but bearing different seal numbers. Upon arrival of the containers in Monrovia, the seals numbers on the containers were quite different from those issued in London, which were subsequently changed in Rotterdam. Although the libellees accused libellant of fraud, they have not yet explained the reason for issuing another bill of lading from Rotterdam with the same number 436 and dated the same date of July 5, 1984, as the London bill of lading, notwithstanding the seals numbers being different. One wonders who then could have perpetrated the fraud? See libellant's exhibit "N"... Further, libellees contend that the seal numbers of the containers and seals were known for the first time on July 3, 1984, yet, libellees' exhibit "1", which is a photocopy of the original London bill of lading, was signed by libellees' agent on the D day of July, 1984. Libellant strongly contends that from the time of delivery of the goods, libellees have been in actual possession of the said goods (containers), to the absolute exclusion of libellant.

11. (a) And also because libellant avers as to count 10 of libellees' answer, that same is an adroit attempt on their part to mislead this Honorable Court, for a scrutiny of the letter of September 18, 1984 clearly shows that Denco Shipping Lines Inc. is agent for co-libellee EAC Lines and Lloyds' agent, as is evidenced by the said letter requesting the Director of Port Security, National Port Authority, R.L. to enquire into the ". . .extensive loss from these containers", which containers were referred to in the first paragraph of the letter which is written on Denco Shipping Lines' letterhead.

(b) Libellant submits in respect of court 10 (b) of the answer that by libellees' own admission the containers were not burglarized at the Freeport of Monrovia, thus confirming libellant's contention that the containers were burglarized en route to Monrovia, while still in libellees' custody. Libellant contends that libellees are liable for the "extensive loss" of $1,087.452.54 sustained by him, for, under the law, Libellees are responsible for the safe transportation and delivery of goods received by them for carriage and can only be exempt from liability when an occasion arises by Act of God.

(c) As regards the contention raised in count 10 (c) of the answer, libellant says that a common carrier is liable as an ordinary bailee for negligence, and his liability is not confined merely to such losses as are consequences of his own negligence or want of skill, but he is also held responsible for all losses or damages which may happen to goods while in his charge for the purpose of his employment.

(d) In respect of count 10 (d) libellant categorically denies that the averment contained in his exhibit "M" is misleading.

(e) With regards to count 10 (e) of the answer, libellant denies the averments contained therein and hereby confirms his position that from the time the containers were delivered to libellees, libellant knew nothing about them and had nothing to do with them until they were delivered in Monrovia, with all of the numbers of the seals changed, except one (1).

12. And also because libellant avers that as to count 11 of libellees Answer, same is merely calculated to mislead this Honourable Court and therefore confirms his position taken in count 4 of his complaint to the effect that the libellees made another bill of lading bearing the self-same number 436, dated July 5, 1984, and listed the ten (10) containers with separate numbers and seals contrary to the original number of the seals delivered to libellees at Manchester and/or London and consigned to libellant

13. And also because libellant avers as to count 12 of the answer that same should be dismissed and so prays. Libellant submits that no fraud has been committed by it as libellees would want this Honourable Court to believe. Libellant submits that it is only that there were separate invoices for the goods contained in the ten (10) containers from the same company (Bahtoo) and Libellant prays that the said count 12 of the answer be overruled and the answer in its entirety dismissed with costs against the libellees.

14. And also because libellant avers as to count 13 of the answer that same ought to be overruled and it so prays. Libellant submits that the amount arrived at is not speculative. Rather, it is the exact profit libellant would have obtained had the goods arrived at Monrovia intact. Libellant submits than he had already sold the goods from the samples,. but the amount received had to be refunded to the purchasers when the goods were not delivered, occasioned by libellees' negligence.

15. And also because libellant avers as to count 14 of the answer that the non-payment for the goods as alleged by libellees is not their business; for, it is the sole obligation of the libellant to the companies (Sagger & Evernesda). Wherefore, libellant prays that count 14 of the answer be overruled and the answer dismissed with costs against the libellees, except libellees want to impress this court that libellant has no right to credit.

16. And also because libellant avers as to count 15 of the answer that same ought to be overruled, and it so prays. Libellant submits that when the Liberian Maritime Law was

enacted in 1958, consignment of goods were shipped in packages and the law relied upon by libellees was applicable at the time. But since the passage of the bails and rolls and since each bail or roll is equivalent to a package as is evidenced by libellant's exhibit "N-35", proferted with his complaint, that law is no longer applicable. Libellant further submits that it is inconceivable that a consignee would be required to pay for freight in the sum of $22,040.00 when the recovery value of the consignment (goods) is only $7,186.00. Libellant respectfully requests court to take judicial notice of his exhibit "N-35".

17. And also because libellant avers as to count 16 of the answer that same presents no triable issue and therefore ought to be overruled, and the answer in its entirety be dismissed and it so prays. Libellant admits that he did file his claim and it was tentatively rejected by co-libellee's agent, as a consequence of which libellant instituted this action. Wherefore and in view of the foregoing, libellant prays that the said count 16 be overruled and the entire answer be dismissed with costs against libellees

18. And also because libellant avers as to count 17 that the bank rate of interest at the time the transaction took place in 1984, in respect of the delivery of the goods, was 22%. Libellant gives notice that at the trial he will produce evidence to substantiate this averment.

19. And also because libellant avers as to count 18 of the purported answer that same is uncertain, contingent and speculative and should be overruled and the answer dismissed, and he so prays. Libellant submits that when one plead special damages, it must be specially pleaded and proved, and libellant says that uncertain, contingent and speculative damages cannot be recovered. The libellees have woefully failed and neglected to make profert of any receipt, tickets and other documents covering their alleged travel expenses, and/or counsel fee as is mandatorily required by law to give notice to libellant of what they intend to prove at the trial. Moreover, according to the law extant, counsel fees are not included in computation of damages for injury to personal property and accordingly not recoverable.

20. And also because libellant avers that libellees have not made full and frank disclosure of their fraudulent acts to the court. Libellant had set out the facts and matters in relation to the shipment of the ten (10) containers of textiles from Manchester to Monrovia, Liberia, under a bill of lading issued in London, bearing Number 436 dated 5t h July, 1984, by the Escomde Group Limited for the East Asiatic Co. Ltd. of Copenhagen, Denmark (the libellees). The containers were conveyed by road transport to Felixtowe and then under an intermediary bill of lading on the vessel "ILe DE BATZ" to Rotterdam, where they were transhipped on a second ocean bill of lading, bearing the same number and date issued at Rotterdam, with different seal numbers, but the same containers numbers by the Cornelder's Scheepvoat Maatschappl B.V. of Rotterdam, the Netherlands, for the East Asiatic Co. Ltd., Copenhagen; Denmark (the libellees), under which delivery of the consignment was taken by the libellant.

However, this was not the consignment covered by the London bill of lading, as has been falsely alleged by the libellees in their fraudulent attempt to continue to damage libellant.

21. And also because libellant avers that through its London solicitors, Messrs. Constant & Constant, who have been investigating the possibility and/or rationale of libellees' agents, both in London and in Rotterdam, relative to the two (2) bills of lading covering the same containers and have come up with nothing short of corruption and fraud, it is inconceivable to imagine that a company like EAC Lines would seek to defraud and cheat a small company as libellant and then run to hide behind the statute of limitations. The fact of the existence of the two bills of lading and the disappearance of the cargo from the containers, together with the different seals on the containers at Rotterdam, leaves this Court with no suspicion but that the libellees have been grossly negligent and are attempting to fraudulently damage libelant, since indeed and in truth libelees had absolute custody of the goods, to the exclusion of the libelant, from Manchester to Liberia.

22. And also because libellant denies all and singular the factual allegations contained in the answer and the law relied upon, and not specifically herein traversed".

In response to the motion to dismiss, libellant filed and served the following resistance:

1. Because libellant avers that libellees' answer, upon which their motion to dismiss is based, is woefully defective and bad and a fit subject for dismissal, in that said answer is evasive and contradictory in its pleading of the statute of limitations. Libellant contends that the statute of limitations is a plea in bar. It is an affirmative defense and when pleaded, the facts stated in the complaint must be admitted as being true but that the statute had run which should bar libellant from recovery. The statute of limitations, when specifically pleaded and proved, bars an action. It must therefore admit that the allegation or allegations sought to be avoided are true and then set up a state of facts sufficient, if proven, to defeat the action. But libellees in this action have undertaken to not only deny the truthfulness of libellant's claim, but in that face of the cogent claim of libellant, have attempted to justify their position disclaiming liability by seeking to hide behind the statute of limitations.

2. And also because libellant avers that libellees motion to dismiss for want of jurisdiction over the subject matter and the parties is baseless and without foundation, in that libellant strongly contends that "Territorial jurisdiction is given by law and cannot be conferred by consent of the parties." Libellant further contends that the *Liberian Maritime Law of January 1, 1981, Section* 33, provides that "All causes of action arising out of, or under, this Title are hereby declared and shall be cognizable before the circuit courts of the Republic of Liberia, sitting in admiralty, but except at otherwise specifically provided in this title, the provision of the section shall not be deemed to deprive other courts of Liberia or elsewhere of jurisdiction to enforce such causes of action."

Libellant submits that this provision of the Maritime Law legally confers jurisdiction upon this Honourable court. Consequently, no agreement of parties can oust this Honourable court of its jurisdiction over the subject matter and the parties as count 1 (one) of libellees' motion would want this court to do libellant. Therefore, libellant prays Your Honour to overrule count 1 of the motion to dismiss.

Libellant submits that libellees are estopped from raising the issue of jurisdiction since indeed and in fact they have submitted themselves to the jurisdiction of the court by the signing and filing of a joint petition.

3. And also because libellant avers that the answer not having presented a triable issue upon which this court could give judgment, a motion based on that answer has no credence and effect in law. Except the answer is good and presents a triable issue, a motion based on the answer is *void ab initio.*

4. And also because libellant says that further to count 1 of libellees' motion to dismiss, libellant avers that his attention was not drawn to the fine print on the back of the bill of lading at the time when the carrier (libellees) issued to it (libelant) the receipt for the goods accepted by the carrier for transportation. Libellant contends that the failure of the libellee to draw his attention to the fine print on the back of the bill of lading at the time the libellees issued same to it as a written receipt for it (libellant's) goods to be transported by libelees makes the contract invalid and unenforceable as a contract, since indeed there was never any meeting of the minds. Libellant contends that a contract is an agreement entered into by the assent of two or more minds by which one party undertakes to give some valuable thing, or to do, or omit some act, in consideration that the other patty shall give or has given, some valuable thing or shall omit or has done, or omitted some act.

Libellant submits that a bill of lading being a written receipt for goods accepted to be transported by a carrier, where the attention of the shipper has not been drawn to the fine print printed in the bill of lading, it does not possess the basic requisites of an enforceable contract."

With this ended the pleading. However, it is necessary to state that although this suit was commenced by attachment, the writ of attachment was dissolved by a joint petition filed by both parties to the suit and approved by the trial judge presiding by assignment.

It is from the above quoted pleadings and the arguments heard that the trial judge dismissed the suit on the grounds that it was "time barred". Libellant/appellant excepted to the ruling and announced an appeal. Hence this appeal.

Libellant filed a bill of exceptions containing 6 counts and in addition, libellant filed a brief containing these issues which, when answered, will cover the counts of the bill of exceptions:

1. Appellant submits that appellees' answer was pleaded in violation of the statutes on how the statute of limitations should be pleaded, which issue was also raised by Appellant in count 1 of its reply. When pleading the statute of limitations, the pleading must admit that the allegation sought to be avoided are true, and then state other facts sufficient, if true, to defeat the action.

2. Appellant further submits that the trial judge committed reversible error when he ruled that the appellees could plead by way of both denial of the facts contained in the complaint and the plea of the statute of limitations.

3. Appellant submits that when fraud is apparent and can easily be proven, as in this case, the statute of limitations will not bar the court from looking into the efficacy of the fraud because the quality of the bill of lading does not give validity to, nor lend aid to the statute of limitations.

4. Appellant submits that His Honour, the trial judge committed a reversible error when, in ruling on the issues of law, he dismissed appellant's action upon the plea of the statute of limitations, when appellees did not first admit to the truthfulness of the averments contained in the complaint and then plead the statute of limitations.

5. And also because appellant submits that His Honour, the trial judge, committed a reversible error when, in ruling on the issues of law, he referred to the "size of the containers" when in deed and in fact, there was neither evidence taken of that fact, nor was the size of the containers ever in issue.

6. Appellant submits that His Honour, the trial judge, further erred when he dismissed appellant's entire action as being time barred without due consideration of all the issues of law raised by appellant.

7. And also because appellant submits that the trial judge committed reversible error when in ruling, he passed upon facts and documentary evidence without hearing evidence, contrary to law and procedure, as well as the practice in this jurisdiction. Appellant seriously contends that in an action of damages, the facts must be determined by a jury. This not having been done renders the entire ruling a fit subject for reversal and the request for a new trial granted.

In response to appellant/libellant's issues, enumerated above, appellees/libellees have also raised the issues below for our consideration:

1. Whether or not to satisfy the provision of Liberian law that the statute of limitations should be pleaded affirmatively, a party pleading said statute must admit that all the allegations sought to be avoided are true?

2. Whether the Supreme Court can entertain argument on an issue not raised in the lower court and which has come up for the first time before the Supreme Court?

3. Whether or not on the failure of an opposing party to deny an essential allegation contained in a pleading in the opposing party's subsequent pleading renders such allegation to be deemed admitted?

4. Whether or not a trial judge, when disposing of the law issues raised in a motion to dismiss and the resistance thereto, may, in his ruling on the said motion and resistance, refer to dates in the documents attached to the motion to which no denial or challenge as to their veracity has been made?" Let us now look at the trial judge's ruling. Here is what he said:

"Next, we must treat the other issue raised in libelant's resistance before finally dealing with count two (2) of libelees' motion. As regard (sic) count three of libelant's Resistance, this court says that the question of statute of limitations in bar to a suit involves a question purely of law to be determined by the court; and where such a plea is raised, the court is clothed with authority to decide the legal issue, taking into consideration the relevant facts and evidence presented in support of the plea, (emphasis ours) especially so where a separate motion has been filed independent of the answer of the libelees. Count three of libellant's resistance is therefore overruled. *Smith et. al. v. Faulkner et al.,* 9 LLR 161 (1946), text at page 178."

Even though the judge in his ruling stated that "the plea of limitation to bar a suit involves a question purely of law to be determined by the court and where such a plea is raised, the court is clothed with authority to decide that legal issue, taking into consideration the relevant facts and evidence presented in support of the plea, especially so where a separate motion has been filed independent of the answer of libellees, yet the judge, without hearing evidence, sustained the plea and dismissed the suit, contrary to his own holding. The learned judge referred to the case *Smith et al. v. Faulkner et al.,* 9LLR 161 (1946), Syl. 6, text at page 178.

Taking recourse to the *Smith* case, at page 177, we find the following:

"It is to be observed that the question of laches is addressed to the sound discretion of the court and each case must depend upon its own peculiar circumstances. The circumstances in any given case put forward to constitute laches are, of course, questions of fact, but the conclusion whether on the fact it would be inequitable to enforce the right, and whether the claimant is barred by laches, involves questions of law."

In the *Smith* case, the circumstances constituting laches, and set out in the answer of respondents, were not denied by petitioners and hence may be considered admitted. There was consequently no issue of fact to be proved. However, appellant in this case contended that the question of limitations was one of fact based upon fraud by appellees, and that the

judge erred in ruling thereupon without hearing said facts before a jury. In the case *Beysolow v. Coleman,* 9 LLR 156 (1946), this Court held that "When fraud is alleged, a jury must pass upon the evidence in support of the allegation." In the present suit, both appellees/ libellees and appellant/libellant having raised the issue of fraud in their complaint and answer respectively (see count 16 of appellant's answer and count 3 and 4 of the complaint), the judge was obliged under the law to have the case ruled to trial by a jury.

Considering count 1 of the resistance to the motion to dismiss, as against count 2 of the motion regarding the statute of limitations and the issue of the defect of the answer as being evasive and contradictory, let us look at the contention of the parties in their briefs. Appellees, in their brief relied on the case *Cooper et al v Davis et al.,* 27 LLR 310 (1978), text at page 316, wherein this Court said: "When a party has several claims or defenses which may appropriately be made or raised in the same action, he may state them all but assert them in separate counts." Appellees also relied on the case *Claratown Engineers, Inc. et al. v. Tucker,* 23 LLR 211 (1974) .

It is my opinion that in both the *Cooper* and the *Claratown Engineers* cases, the Court was interpreting Section 9.3(3) of the Civil Procedure Law, Rev. Code 1, as to the form of pleadings, and not Section 9.8(4) which relates to defenses and objections. Nonetheless, the Court did address itself in those opinions to the issue of consistency and repugnancy of pleas. In appellees' brief, counsel seems to suggest that the opinions of this Court gave license to a party to make inconsistent, contradictory and evasive pleadings. This Court has held in several opinions that evasive, inconsistent and contradictory pleas are bad and should not be permitted. In other words, the counsel admits that his pleas are contradictory and evasive, but contends that a party may avail himself/itself of all such pleas in separate pleas or counts, whether contradictory, evasive or otherwise. I believe that such submission is contrary to the holding in the *Cooper et al. v. Davis* and *Claratown Engineers* cases. This is also the rule within our jurisdiction. This Honorable Court has held on numerous occasions and in several Opinions that "An answer which both denies and avoids is dismissible for inconsistency". *Shaheen v. Compagnie Francaise de 1 'Afrique Occidentale,* 13 LLR 278 (1958). Also in the case *Cavala River Company v. Pepple* 3 LLR 436 (1933), at 1, this Court held that "an answer which both denies the truthfulness of the complaint and sets up a plea of justification is evasive and contradictory and is properly ruled out by the trial court." The statutes also prescribe that the plea of limitation should be affirmatively pleaded. Civil Procedure Law, Rev Code 1:2.2 This means that the rules pronounced in the *Cooper* and *Claratown Engineer* cases, the opinions of which were delivered by Justices Azango and Henries, respectively, should be applied affirmatively, not inconsistently and contradictorily.

Even the common law rule holds likewise. It is provided at common law, as follows:

"While it has been stated or held that inconsistent pleadings are permissible, and that inconsistent allegations may be set forth in separate counts or in the alternative, it has also been held that the alternative averments employed in a count must be consistent, and, generally speaking, the different allegations in a pleading should be consistent with one another and not be repugnant. Inconsistent, repugnant or contradictory averments of matters of substance make for uncertainty, neutralize each other, and render the pleading defective, although by court rule the defect may not be fatal. Two averments are inconsistent when proof of one tends to disprove the other, or, if one is true, the other must necessarily be untrue. Thus one may not be permitted to allege that a proceeding is void of one purpose and at the same time allege that it is valid and rely on it for other and different purposes. However, in passing on repugnancy, the pleading must be considered as a whole. A pleading which states the facts and draws therefrom alternative legal conclusion is not open to the objection of inconsistency. 71 C.J.S., *Pleadings,* § 42.

Appellees should not have pleaded the statute of limitations in avoidance of liability and to deny that appellant had a cause of action and at the same time deny the facts relating to their responsibilities as consignees of the good which they actually received and admitted receiving; and the judge should not have dismissed the case, especially where fraud was pleaded.

To me, the next pertinent question is whether the plea of the statute of limitations, is a ground to dismiss a suit in this jurisdiction? That issue is squarely raised by appellant in counts 1 and 3 of the resistance to the motion to dismiss. In these counts, appellant submitted that the plea of the statute of limitations is affirmative and may be raised in an answer as appellees have done in count 2 of their answer. However, appellant contended that appellees having done this in a contradictory manner with other pleas, the answer was fatal and should have been dismissed by the court upon appellant's plea in count 1 of its reply. Furthermore, the plea of the statute of limitations is no ground for the dismissal of a suit in this jurisdiction; it is a plea in bar which, under the laws of Liberia, should be raised in the answer. It is an "affirmative defense which must be pleaded affirmatively and cannot be pleaded hypothetically. Our statute states:

"1. *Time; grounds.* At the time of service of his responsive pleading, a party may move for judgment dismissing one or more claims for relief asserted against him in a complaint or counterclaim on any of the following grounds:

(a) That the court has not jurisdiction of the subject matter of the action;

(b) That the court has not jurisdiction of the person;

(c) That the court has not jurisdiction of a thing involved in the action;

(d) That there is another action pending between the same parties for the same cause in a court in the Republic of Liberia;

(e) That the party asserting the claim has not legal capacity to sue." Civil Procedure Law, Rev. Code 1:11.2(1)

The judge erred therefore in dismissing the suit upon the plea of the statute of limitations after he had overruled count 1 of appellees' motion to dismiss upon jurisdictional grounds.

In view of the foregoing, I strongly feel that the ruling of the judge should be reversed and the case remanded to the lower court for it to resume jurisdiction and commence with the disposition of law issues.