INSURANCE COMPANY OF AFRICA/ INTRUSCO CORPORATION, by and thru its President, VINCENT McCANN, Appellant, *v.* **FANTASTIC STORE,** by and thru its proprietor, AHMED H. AHMED, Appellee.

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

Heard: October 22 & 23, 1984. Decided: November 22, 1984.

1. A brief is the basis for a counsel's arguments in the Supreme Court; it should therefore convey to the Court the essential facts of the client's case.

2. The Supreme Court only reviews cases upon the contentions raised in the bill of exceptions, which is a complaint against the trial judge, arranged by counts, each count being limited to a specific issue or contention.

3. A brief filed with the Supreme Court must contain a statement of the issues and the points to be argued, with legal authorities supporting the same.

4. A bill of exceptions must show with particularity the alleged legal errors made by the lower court. It is not enough to state merely that the trial judge sustained or overruled the objections and that exceptions were noted thereto.

5. A *subpoena duces tecum* requires only that a witness produces to court during trial named documents in possession of the witness and which are pertinent to the issue in a pending controversy.

6. A *subpoena duces tecum* is different from a *subpoena ad testificandum*, the latter being to have a witness testify in general and the former being to have the witness produce the requested documents.

7. The general rule is that upon the examination of a witness in chief, the examining attorney is not to ask leading questions. Indeed, leading questions should generally be confined to cross-examination and excluded on direct examination. Accordingly, a

party may lead the witness of his adversary but not his own.

8. A leading question is not always answerable by either "yes" or "no". Thus, although not answerable by a "yes" or "no" response, the question is leading if it suggests the response which the question desires.

9. A trial judge has the right to question a witness on any statement made by the witness, as may be needed to clarify the judge's mind and to help him understand the facts or evidence, as would enable him to charge the jury and determine the applicable law. Therefore, the asking of such question is not a demonstration of interest in the trial.

10. An answer is a pleading by which a defendant in a suit at law endeavors to resist the plaintiff's demand by allegation of facts, in denial or in confession of allegations in the complaint, and allegation of new matters in avoidance to pre-vent recovery by plaintiff.

11. However, it is double pleading, not allowed under the rule of pleadings in this jurisdiction, when the answer denies and at the same time alleges new matters in avoidance. Accordingly, an answer which both denies and avoids is dismissible for inconsistency. In such a case, the defendant will be ruled to a general denial of the allegations in the complaint.

12. A plea in confession and avoidance is permissible because it admits that plaintiff has a cause of action but avers that the defendant is discharged by some subsequent or collateral matter.

13. General damages are such as the law implies or presumes to have occurred from the wrong complained of, for reason that they are its immediate, direct and proximate result, or such as necessarily resulted from the injury or the wrong.

14. The jury has the authority to consider all the claims of the plaintiff, stated in the complaint.

15. A verdict may be set aside and a new trial awarded where the verdict is contrary to the weight of the evidence or where it is in the interest of justice to do so. Rev. Code I: 26.4.

16. The Supreme Court has no authority whatsoever to review the exercise of discretion by the trial judge in denying a motion for new trial, unless the exercise of discretion is shown to have been abused to the prejudice of the defendant.

17. "Preponderance of evidence" is not determined by the number of witnesses one produces, but by the greater weight of evidence, determined by the manner of testifying.

18. It is the duty of the empaneled jury to determine the probative value of the evidence and decide on their credibility in determining the greater weight of such evidence.

19. The Supreme Court cannot consider any argument not conforming to the bill of exceptions or any issue to which no exceptions were noted at the trial.

20. Generally, a policy insuring against loss by fire covers every loss, damage or injury to the insured property of which the fire is the proximate cause. It includes every loss necessarily following from the occurrence of the fire if it arises directly and immediately from the perils or the surrounding circumstances.

23. Where a policy of insurance provides for furnishing of proof by the insured, there is no duty on the part of the insured to furnish such proof unless specifically demanded by the insurer to do so.

Plaintiff/appellee instituted an action of damages against the appellant for breach of contract, claiming in the complaint special damages of $250,000.00, being the total insurance coverage under the insurance contract, for stock alleged to have been located on the premises, and general damages as determined by the jury. Appellee's premises, the contents of which had on January 17, 1983 been insured with the appellant for one year, was gutted

by fire on the night of March 22, 1983. The cause of the fire was stated by the Liberian Fire Service as being "mysteriously originated". The Criminal Investigation Division of the Liberia National Police stated the cause to have been electrical short circuit.

After notifying the appellant of the damages, appellee submit-ted its claim and demanded payment of the amount of $250,000.00. Appellant disputed the amount and rejected the appellee's claim. Also, in further response to the claim, appellant demanded the appointment of an appraiser to assess the damage to appellee's premises as provided by the insurance policy. Appellee refused to agree to the appointment of an appraiser. Notwithstanding, appellant did sent an appraiser to the premises to assess the damage. The report of the appraiser placed the value of the damage at no more than $14,000.00, excluding the damage caused by theft, looting and water. Thereafter, appellant offered to pay to the appellee the amount of $25,000.00 to settle the claim out of court but this was rejected by the appellee. When no agreement could be reached, and upon being notified by appellant that the claim was being denied, appellee commenced the current damages action.

A trial was had and a verdict returned by the jury in favor of the appellee. The verdict in which the jury awarded $250,000.00 as special damages and $200,000.00 as general damages was confirmed by the trial court in its judgment, following the denial of appellant's motion for a new trial.

On appeal, the appellant argued that the trial court deprived it of the right to introduce evidence in its defense by its dismissal of the factual counts contained in appellant's answer; that the trial court erred in sustaining certain questions and objections put to various witnesses; that the trial judge not only exhibited bias in questioning appellant's witnesses but also erred in confirming the verdict which was both contrary to the weight of the evidence and excessive. Appellant also contended that the appellee was barred from commencing the damages action as appellee had failed to comply with certain pre-conditions stated in the insurance policy.

The Supreme Court rejected appellant's contentions and, in doing so, upheld the judgment of the lower court. The Court held that the dismissal by the trial judge of certain factual counts contained in appellant's answer did not prejudice appellant's right as it was still able to produce witnesses to testify in its behalf and in support its defense.

On appellant's contention that the trial judge had exhibited bias in questioning appellant's witnesses, the Court held that the trial judge had the right to question appellant's witnesses so as to enable him to gain a greater appreciation of the evidence and to equip him to properly charge the jury, noting that such questioning was not a demonstration of interest or bias by the trial judge in the trial of the case.

In also dismissing appellant's contention that appellee had failed to comply with the preconditions of the insurance policy regarding the submission of proof of loss, the Court said that although such provision was contained in the insurance policy, the appellee had no obligation to furnish appellant with proof of loss, unless such statement was specifically demanded by appellant following the damage.

Finally, the Court said that while a verdict may be set aside and a new trial awarded where the verdict is contrary to the weight of the evidence, in the instant case, there was a preponderance of the evidence to warrant the verdict by the jury, as triers of the facts. The trial judge, in the exercise of his discretion, the Court said, was therefore correct in denying the motion for a new trial and in affirming the verdict of the jury. In such a case, it said, the Supreme Court has no right whatsoever to review the exercise of that discretion, unless the trial judge is shown to have abused the exercise thereof to the prejudice of the defendant. The verdict, the Court said, would therefore not be disturbed. Accordingly, the *judgment* of the circuit court was *affirmed.*

Peter Amos George and *Joseph Dennis* appeared for the appellant. *Toye C. Barnard* appeared for the appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

The following is a synopsis of the facts in this case as disclosed by the records on appeal for our review, to wit:

On January 17, 1983, appellant insured appellee store and storeroom, known as Fantastic Store, against fire, for a period of one year–January 1983 to January 1984–under policy No. 10ICA 102699. Under this policy, appellee store, including its stock of garments and

cosmetics on the ground floor of the two storey building on Center Street, Monrovia, Liberia, was insured for $150,000.00. The stock of ready-made clothes and shoes for ladies, gents and children was also insured for $100,000.00. Thus, the total stock in the store and in the storeroom was insured for a total value of $250,000.00. The policy was said to be a new policy, taken up for the period stated above, after expiration of the previous policy taken by the appellee with the appellant.

Between the hours of seven and eight o'clock on the night of March 22, 1983, fire broke out in the Fantastic Store. According to the reports of the Criminal Investigation Division (CID), Liberia National Police Force, and that of the National Fire Service of Liberia, the Fantastic Store, located on Center Street, was destroyed completely as a result of the fire, and the storeroom in the back of the store where the bulk of goods were stored, was also burnt completely. The goods seen not burnt were either damaged by heat or extinguishing water -- the substance used by firemen in quenching fire. The cause of the fire could not be actually pinpointed due to the firefighting operation and looting. Therefore, the cause of the fire was termed by the National Fire Service to be "mysteriously originated". The CID's investigation revealed that the fire started from a glass show case in which a fluorescent bulb was installed, and which resulted in an electrical short circuit. The estimated loss in terms of dollars was set at about $285,000.00 by the National Fire Service.

Appellant was notified of the fire incident and appellee submitted its claim covering the insured value of the stock named in the policy in the amount of $250,000.00. Appellant rejected the claim which resulted in the exchange of several communications. These communications form a part of the records in this case. In an attempt to settle the claim out of court, appellant made an offer of $25,000.00 but the same was rejected by appellee. Consequently, an action of damages for breach of contract was instituted in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, by appellee against the appellant. In the action, appellee prayed for the recovery of the insured value of the stock and for general damages for inconveniences suffered as a result of appellant's failure and refusal to meet its obligation under the insurance contract. Pleadings having rested, the case was heard during the September 1983 Term of the Civil Law Court. Following the disposition of legal issues and trial, the case ended with a unanimous verdict finding appellant liable and awarding appellee the insured value of the stock in the amount of $250,000.00 as special damages, plus general damages of $200,000.00. To this verdict, appellant excepted and filed a

motion for new trial, which was resisted, heard and denied by the court. Final judgment confirming and affirming the verdict was entered, from which appellant announced an appeal and filed a nine-count bill of exceptions for our review.

Before we proceed to discuss appellant's bill of exceptions, it is worthy to mention that appellant's brief listed no particular issue of contention which it desired this Court to pass upon. Nor has any of the nineteen counts of its brief made reference specifically to any of the counts in its bill of exceptions to enable us to follow the trend of the argument of its counsel in support of the matters complained of and contained in the bill of exceptions.

A brief is the basis for an argument and it is the vehicle of a counsel to convey to the appellate court the essential facts of his client's case. It must embody the points of law applicable to the facts which the counsel desires to establish, together with the arguments and legal authorities upon which he rests his contentions. This Court only reviews cases upon the contentions as raised in the bill of exceptions, which is a complaint against the trial court, arranged by counts, each limited to a specific issue or contention. Therefore, the brief filed by counsel must be arranged into counts referring and relating specifically to each of the counts of the bill of exceptions, to show what the counsel intends to prove by his argument. The brief must present clearly the issues in point as contended in the bill of exceptions, which issues are decisive of the contention. Under the Supreme Court Rules, a brief shall contain: (1) a statement of the issues; and (2) the points to be argued, with legal authorities supporting the same. Such legal authorities shall be quoted to the extent necessary to give the Court a clear understanding of what is held by those authorities. *See* Rule 7 of the Supreme Court Rules, at 42-43.

Counts two, three, four and five of the nine-count bill of exceptions refer to and contain several exceptions taken to the rulings of the trial court on objections interposed during the trial. These exceptions, in our opinion, are not decisive of the questions as to whether or not there has been a breach of the insurance contract and whether or not there is a right to recover. However, we have nevertheless selected for discussion four of the several questions to which objections were interposed and ruled upon by the trial court, simply to point out the reason why we hold that these exceptions are not decisive of the controversy, and to further show the reason why we must here sustain all of the several rulings of the trial court against which appellant has complained in those counts.

One of the exceptions taken and listed in count two of the bill of exceptions is as follows:

"(2) And also because defendant avers that the plaintiff's witness having given testimony contrary to that of the plaintiff on the stand, the defendant on the cross-examination propounded the following question to the witness, M.G. Railey: 'Not being on the scene when the plaintiff arrived, you are not in the position to state the cause of his being carried off by police officers as you have said, am I correct?' Plaintiff objected on the ground 'misstatement of the fact' and Your Honour sustained said objection and defendant then and there excepted".

The question in this count, to which appellee objected on the ground of "misstatement of the fact" and sustained by the court, was put to the appellee's witness by the appellant on the cross- examination.

In our opinion, appellant, who claimed that the testimony of the witness was contrary to that of the appellee, should have stated with particularity and shown in the bill of exceptions, among other things, the date and sheet number on which the appellee's witness gave "contrary" testimony and what the appellant intended to prove or disprove by this question for the information of the Court. He was not to leave the burden on the Court to search through the record for such information. This Court has held in several opinions that a bill of exceptions in a case on appeal must show with particularity the alleged error of the lower court. *Quai v. Republic,* 12 LLR 402 (1957). It is not enough to state merely in the bill of exceptions that the trial judge sustained or overruled the objection and that exceptions were noted thereto. The legal error allegedly made by the trial judge must be pointed out with particularity for appellate review. Moreover, it is our opinion that the relevancy of this particular question is too remote to perceive its materiality to the case in point, and hence we must sustain the ruling of the trial judge thereon.

The other exception taken against the trial court's ruling and listed in count three of the bill of exceptions is as follows:

"(3) And also because defendant submits that plaintiff produced witness Charles Ananaba who testified that he is employed by the International Trust Company Insurance Branch,

Intrusco Corporation, as claims manager. On the cross-examination defendant propounded to him the following question: 'Mr witness, I pass you these documents which you have produced to court, please tell the court and jury your reason for refusing to pay the claim demanded by the plaintiff?' Plaintiff objected as follows: 'Travelling without the scope of the cross examiner to which no testimony have been produced. 2. The witness being a special witness only to produce the original documents said to have been in his possession, he cannot be questioned on why the communications were prepared by the writer or their contents'. Your Honour sustained said objections to which defendant then and there excepted. (*See* sheet 5, October 27, 1983, 32nd day's session)."

The question in this count was put to appellee's witness while being cross-examined on the witness stand under a writ of *subpoena duces tecum* to produce to court the originals of certain documents which were said to be in the possession of the appellant company.

In our opinion, the trial judge was legally correct to sustain the objection because a *subpoena duces tecum* only requires a witness to produce to court during trial named document or documents in his possession or control that are pertinent to the issues in a pending controversy; it is different from a *subpoena ad testificandum*, issued on a witness to testify in general. The said witness, not being a general witness, and he having produced the documents without testifying to their contents, the trial judge was legally correct to sustain the objection.

We quote yet another contention as listed in count four of the bill of exceptions:

"(4) And also because defendant submits that he, in his own defense, put on the stand witness Charles Ananaba. After his testimony in chief, defendant propounded the following question: 'Mr. witness, you in your statement in chief have placed on record that the plaintiff was insured with your company. Please tell this court and jury whether or not it is based on this policy that you were supposed to pay the claim?' Plaintiff objected: '1. Cross examination of one's own witness'. Your Honour sustained said objection and defendant then and there excepted".

The question treated in the count quoted *supra* was put to the appellant's own witness and the trial judge sustained the objection, to which ruling appellant noted exception.

Here again, the error complained of by the appellant is not stated in the bill of exceptions. Why the ruling is claimed to be erroneous is not explained in the bill of exceptions to enable this Court to decide the issue. In our opinion, and as we understand the question, it suggests the desired answer and it is based on what the witness had already testified to. The object of direct examination is to elicit from a witness matters left out in his testimony in chief and not to cross-examine him on what he has testified to. The general rule is that upon the examination of a witness in chief, the examining attorney is not to ask leading questions. A party may lead the witness of his adversary but not his own witness. Leading questions should generally be confined to cross-examination and excluded on direct examination. A leading question is not always capable of being fully answered by "yes" or "no"; yet, although not answerable by either yes or no, it is leading if it suggests the response which the question desires. 58 AM. JUR., *Witnesses,* §§ 568 and 569. This question not being within the scope of direct examination, the ruling of the trial judge is sustained.

Count five of the bill of exceptions in which appellant contended that the trial court committed reversible error is quoted as follows:

"(5) And also because defendant submits that throughout the trial, the court had not examined one witness, but upon his introduction of witness Anthony T. Sumo, who testified actually as to what he saw when he entered the plaintiff's store with the fire fighters, the court was moved to pro-pound to him the question: 'Mr. witness since you have said that the fire penetrated the cartons and went on the other side of the store before the door was burst open, please explain for the benefit of the court and jury how come you arrived at such conclusion?' By this question, defendant maintains Your Honour blatantly demonstrated to the court and jury your interest in the case and how you were leaning on the side of the plaintiff because it is not the position of the court to entrap a witness. Defendant objected on the grounds: 'Misquotation of the records and asked for the mere purpose of entrapping the witness'. Your Honour overruled said objections without reason, and to the prejudice of the defendant; he then and there excepted. (*See* sheet 11, October 30, 1983, 35th day's jury session)."

The question referred to in this count was asked by the trial judge after appellant's witness had testified to fire penetrating cartons and going through the other side of the store before

the door was burst open.

According to the appellant in this count of the bill of exceptions, the trial judge had by this question blatantly demonstrated his interest in the case, was leaning on the side of the appellee, and had propounded the question merely to entrap the witness. Appellant therefore interposed objection on the grounds of misquotation of the records and asked merely to entrap the witness. The judge overruled the objections. To this ruling, appellant excepted.

In our opinion, a trial judge has the right to question a witness on any statement made by him to clarify his mind; for, the judge must understand the evidence and the facts to enable him to fully charge the jury and determine for himself the applicable law to the facts in evidence. Therefore, it cannot be a demonstration of interest in the trial case for the judge to ask questions. In fact, it was necessary for the trial judge to ask this question since it was not asked on the cross-examination or by the jury for the witness to clarify how and by what means he came to know that the fire penetrated the cartons to the other side of the store before the door of the store was burst open for him to enter. We therefore hold that the trial judge correctly overruled the objection.

Coming back to count one of the bill of exceptions, it is contended therein that the trial court was in error when in ruling on the issues of law, it limited appellant to only counts two and seven of the answer and ruled out counts one, three, four, five, six, eight and nine in which it was contended, among other things, that appellant was not the appellee's insurer under policy No. 10ICA 102699. It is also averred in the said counts that appellee was barred from maintaining an action against the appellant because of the provisions of the insurance contract which appellee on its part failed and neglected to perform. Counsel for appellant, in his argument before us, contended that by the trial court ruling out these counts of the answer, the report of the claims adjuster proferted to the answer as exhibit "A" and which was a purely factual issue to be left with the jury to decide upon its credibility, appellant could not testify to said report and offer it into evidence. Our colleagues who disagree with our view and who therefore dissent are of the opinion that the trial judge was without authority to pass on factual issues in the disposition of law issues raised in the pleadings. Accordingly, they say, the case should be remanded for a new trial. We shall say more on this issue later. In the meantime, let us take recourse to the appellant's answer.

In count one of the answer, appellant averred that "it is not liable to plaintiff" and described as "false and untrue that it insured plaintiff under policy No. 10ICA 102699", because Intrusco Corporation, the appellant, "is a separate company from the Insurance Company of Africa".

In count two of the answer, appellant averred that the policy does not cover theft and that the reports of the CID and the Fire Service described the cause of the fire as "mysteriously originated", which showed clearly that appellee had burned its own store because it was heavily indebted to its creditors.

Appellant averred and contended in count three of the answer that: 1) Appellee's claim was not certified by a competent insurance adjuster; and 2) that upon report that appellee had suffered a fire hazard, by mutual consent of appellee and appellant, an international insurance adjuster was asked to inspect the scene of the fire. The adjuster had submitted a report marked appellant's exhibit "A" to the answer, which report stated that there was looting and theft and that some of the goods were not affected by the fire. Moreover, that only one corner of the store was affected by the fire and many empty boxes were found unaffected by the fire.

Count four of the answer is a repetition of the averments in count three, and it is added therein that the compartment of the building allegedly containing dry goods to the value of $100,000.00 was never touched by the fire.

In count five of the answer, it is contended that appellee can only recover the losses sustained upon proof of loss which is absent from the claim submitted.

Count six of the answer avers that appellee is guilty of waiver and therefore cannot maintain any action against the appellant, having failed to submit a "proof of loss" statement, sworn to and signed by appellee as provided by the insurance contract.

In count seven of the answer, it is averred that appellee's failure to surrender its store keys to the Fire Service Bureau suggested its involvement in the cause of the fire. Appellant also asserted in said count that under the policy appellee should have protected its property from further damage.

It is averred in count eight of the answer that the proprietor of the appellee store was arrested by soldiers and his car taken from him during the fire incident because he had refused to surrender the keys to the premises, alleging that the keys were with his store boy and at the same time alleging that the keys were in his car which had been taken away by the soldiers. These two statements, appellant alleged, indicated appellee's involvement in creating the fire that caused the damages which amounted to only $14,000.00, according to the report of the appraiser.

In count nine of the answer, appellant averred that inconvenience not having been shown in the complaint; general damages could not be recovered.

The foregoing constitutes the substance of appellant's answer to appellee's complaint, counts two and seven of which were ruled to trial and the rest of the counts overruled. For the benefit of this opinion, we hereunder quote count one of the answers verbatim, as follows:

"Because defendant avers that she is not liable to the plaintiff; in that, the allegations contained in count 1 of the complaint asserting that the above named defendant insured the plaintiff under policy No. 10ICA 102699 is false and untrue; in that, the plaintiff is insured by Insurance Company of Africa as is evidenced by plaintiff's exhibit "A" attached to his complaint. A judgment obtained against defendant, therefore, cannot be enforced because defendant is a separate company from ICA, the defendant merely issued the receipt for the payment of the premium. Defendant therefore prays dismissal of this action".(Sic).

In its answer appellant has denied being appellee's insurer and stated that as such it is not liable to appellee under policy No. 10ICA 102699 -- the policy under which appellee is claiming. Appellant also averred in its answer that it is a separate company from the Insurance Company of Africa which insured the appellee. Yet, in the same count, it admitted merely issuing the receipt for premium paid by appellee without stating in what capacity it did issue the receipt. Still in count three of the said answer, appellant sets up defenses that appellee's complaint failed to state the breach and the injury suffered from such breach; that appellee's claim was not certified by an insurance adjuster; that by mutual consent of the appellee and the appellant, an international insurance adjuster was engaged to inspect the scene of the fire and that his report, marked appellant's exhibit "A", shows that only one

corner of the store was affected by the fire, and that many empty boxes were seen completely unaffected by the fire.

In counts six and seven of the answer, as in the other counts, appellant, who denied being appellee's insurer or being liable to appellee, also contended that the complaint be dismissed because no "proof of loss", certified by an insurance adjuster, was submitted to appellant within sixty (60) days; and further, that the fact that the cause of the fire was declared mysterious by the police report suggests that the appellee burnt its own store because it was heavily indebted to its creditors, etc.

Strictly speaking, an answer, as defined by Black's Law Dictionary, 4th ed., is a pleading by which the defendant in a suit at law Endeavour's to resist the plaintiff's demand by an allegation of facts, either denying the allegations of plaintiff's com-plaint or confessing them and alleging new matters in avoidance, and which defendant alleges should prevent recovery on facts alleged by plaintiff. But it is double pleading, which is not allowed under the rule of pleadings, where the answer denies and at the same time alleges new matters in avoidance, as is done in the appellant's answer in the instant case. Plea of confession and avoidance is permissible under the rule of pleadings because it admits that the plaintiff had a cause of action but avers that it has been discharged by some subsequent or collateral matter. BLACK'S LAW DICTIONARY 1310 (4th ed.).

In the case *Shaheen v. Compagnie Francaise De L'Afrique Occidentale,* 13 LLR 278 (1958), and also in several other opinions, this Court has held that an answer which both denies and avoids is dismissible for inconsistency; and that where an answer both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint. The fact that appellant in this case has denied being appellee's insurer or being liable to appellee under the insurance policy, it being a separate and distinct company from the Insurance Company of Africa, and at the same time alleging new matters in avoidance, were sufficient reasons for the trial court to dismiss the entire answer for inconsistency under the strength of count five of appellee's reply. And we so hold.

Having already discussed counts 1-5 of the nine-count bill of exceptions and sustained the several rulings of the trial court in connection therewith, we shall now proceed to discuss the remaining four counts thereof.

In count six of the bill of exceptions, appellant charged the trial judge with having inflamed the minds of the jury when in his charge he told them that appellee, while testifying, stated that he was "confused and excited" when indeed no such statement was made by the appellee in his testimony. Appellant further alleged in this count that the trial judge named the special damages of $250,000.00 which he asked the jury to award appellee. Appellant referred us to sheet 13 of the minutes of court, 36th day's jury session, November 1, 1983, where the judge is alleged to have so charged the jury.

Recourse to sheet 13 of the 36th day's jury session of court, November 1, 1983, shows that while exception was noted by the appellant to the judge's charge, nowhere on that sheet did the judge make mention of appellee's testimony or any amount for that matter.

However, on sheet three of the minutes, 31st day's jury session of court, October 26, 1983, the jury propounded the following question to the appellee's proprietor:

"Q. Mr. witness, when you arrived at the building and saw smoke from the building while getting down from the car, why did you not take the keys along knowing fully well that your store was locked?

To which the witness answered:

"A. When I parked, they right away took the car from me because I was totally confused and did not know why they rushed on me. After they took the car from me before they asked me for the key" (emphasis supplied).

From this answer of the appellee to the jury's question, it is our opinion that the trial judge, in his summary of the evidence to the jury, did not err when he referred to appellee having testified to confusion and excitement. Consequently, the reference by the trial judge to the appellee's said condition could not have in any way inflamed the minds of the jury, as contended by the appellant.

In the same count six of the bill of exceptions, appellant has charged the trial judge with having told the jury what amount of special damages they should return. For the benefit of

this opinion, we quote a relevant portion of the judge's charge, as contained on sheet 12 of the minutes of court, 36th day's jury session, November 1, 1983, as follows:

" . . . If, as in your understanding of this case, the plaintiff has not proven a case, then you bring a verdict of not liable for the defendant; but if, on the other hand, and arguments of all of the lawyers on both sides and our explanation to you, if you come to a conclusion that the plaintiff has proven a cause of action against the defendant, you should say that the defendant is liable and to pay the amount of $250,000.00 to the plaintiff as special damages and to also award the plaintiff any amount that you see fit for any other inconvenience suffered according to your understanding as general damages to the plaintiff . . . ."

In our opinion, the complaint having alleged special damages in the amount of $250,000.00 and appellee having prayed for general damages for inconveniences suffered by appellant's failure and refusal to pay the claim, it was quite proper for the trial judge to refer to the amount which is the subject of the action and to instruct the jury to award any amount they deemed fit as general damages if, in their opinion, appellee had proven its case. Count six of the bill of exceptions is therefore not sustained.

In count seven of the bill of exceptions, appellant alleged that because of the bias charge of the trial judge, the empaneled jury deliberated for only twenty minutes and returned a verdict awarding appellee general damages of $200,000.00, when general damages are not recoverable in action growing out of contract.

Appellee averred in its complaint that by the failure and refusal of the appellant corporation to honor appellee's claim, in violation of the fire insurance policy, appellee had suffered losses, damages and inconveniences. It therefore prayed for general damages for the inconveniences suffered, to be fixed by the court in any amount the jury may award.

General damages, as defined by Black's Law Dictionary, 4th edition, at 468, are such as the law itself implies or presumes to have occurred from the wrong complained of, for reason that they are its immediate, direct and proximate result, or such as necessarily result from the injury, or such as did in fact result from the wrong, direct and proximate, and without reference to the special character, condition, or circumstances of the plaintiff.

In our opinion, therefore, appellant having insured appellee's stock against fire and received the premium therefor in full, and fire having occurred and caused total loss to the appellee in keeping with the respective reports of the CID and the National Fire Service, which reports were submitted to appellant with appellee's claim, the refusal of the appellant to pay the claim which resulted in appellee seeking legal redress to recover from appellant is not only a breach of the policy, but also a serious and wrongful act on part of the appellant. This act has caused inconvenience to the appellee in its business transaction and has resulted in the loss and damage complained of. These circum-stances having been averred in appellee's complaint, the trial court was not in error when, in summing up the evidence to the jury, it made reference to the claim of the appellee. Equally so, the trial jury had the authority to consider all the claims of the appellee as stated in its complaint, and to award or not to award damages.

Count seven of the bill of exceptions is therefore not sustained.

Appellant contended in count eight of the bill of exceptions that the trial court denied its motion for a new trial and that it was error for the trial court not to have granted the motion on the grounds stated therein.

In the five-count motion for a new trial, appellant averred that the verdict of the empaneled jury was manifestly contrary to and against the weight of the evidence, and gave as its reasons the following:

1. That there was not a preponderance of appellee's evidence.

2. that a document intended to be admitted into evidence must be testified to by two or more witnesses and not one;

3. that in a breach of contract case, only the amount of the contract is recoverable;

4. that the trial judge had named an amount to the jury in his charge;

5. that the appellee did not prove any cause of action;

6. that the insurance contract was not considered in its entirety;

7. that the appellee did not furnish proof of loss and therefore the jury was without authority to award $250,000.00 as special damages and $200,000.00 as general damages; and

8. that the verdict is excessive, in that, general damages were awarded in addition to the amount of
contract which is the only amount recoverable under the law of contract.

This is the substance of appellant's motion for new trial which, as is contended in the bill of exceptions, the trial judge should have granted.

Under our civil statute, a verdict may be set aside and a new trial awarded where the verdict is contrary to the weight of the evidence or where done in the interest of justice. Civil Procedure Law, Rev. Code 1:26.4.

The post-trial motion for new trial in this case totally fails to clearly point out the evidence, whether for or against, which is capable of over-weighing the unanimous verdict of the empaneled jury, as would have justified its disturbance by the trial judge. Instead, the averments of the motion are best suited for a bill of exceptions. In our opinion, therefore, the trial judge did not abuse his discretion when he ruled denying the motion. This Court has no right whatsoever to review the exercise of such discretion of the trial judge unless it was shown to have been abused to the prejudice of the defendant. *Killix v. Republic,* 8 LLR 173 (1943). Count eight of the bill of exceptions is therefore not sustained.

We now come to the last contention of the appellant as expressed in count nine of the bill of exceptions. In that count, appellant contended that the verdict of the empaneled jury was not based on a preponderance of evidence. What is meant by a preponderance of evidence? Appellant had earlier contended in its motion for a new trial that the evidence of the appellee was not preponderate, and that a document, in order to be admitted into evidence, must be testified to by two or more witnesses and not by a lone witness. Perhaps the lone testimony of a witness is what appellant regarded as not being a preponderance of evidence. The phrase "preponderance of evidence", as often used by lawyers, may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not

necessarily mean the greater number of witnesses but the opportunity for knowledge and information possessed. The manner of testifying determines the weight of the testimony. It rests with that evidence which, when fairly considered, produces the stronger impression and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto but does not mean greater number of witnesses. *See* BLACK'S LAW DICTIONARY 1344-1345 (4th ed.).; *Garver v. Garver,* 52 Colo. 277, 165-166 Ann. Cas. 191 3d. 674; *S. Yemamoto v. Puuget Sound Lumber Company,* 84 Wash. 411; and *Heerdink v. Kohmescher*, 94 Ind. App. 296.

In our opinion, the fire insurance policy along with the reports of the Criminal Investigation Division and the National Fire Service, as well as the bulk of communications exchanged between appellee and appellant, having been put in evidence, it was the duty of the empaneled jury to consider their probative value and decide on their credibility to determine the greater weight of the evidence adduced by the parties so as to reach a conclusion. The contention of appellant that there was no preponderance of evidence is therefore not sustained.

We have fully discussed the nine-count bill of exceptions which is the foundation of the appeal, have found ourselves not in agreement with any of the contentions raised therein, and we have so ruled on them respectively. As stated earlier, appellant did not present any specific issues in its brief based on the bill of exceptions for this Court to pass upon. We cannot, under the law, consider any argument not conforming to the bill of exceptions or any issue to which no exceptions were noted at the trial. *Johnson v. Powell,* 4 LLR 221 (1934).

One of the arguments put forth before us by counsel for appellant, but which was not specifically raise in the bill of exceptions for our consideration, was that the fire insurance policy did not cover theft. We are not in agreement with this contention and here is the relevant law on the point and on which we rely:

"Generally speaking, a policy insuring against losses by fire covers every loss, damage, or injury to the insured property of which fire is the proximate cause. It includes every loss necessarily following from the occurrence of a fire, if it arises directly and immediately from the peril, or necessarily from the surrounding circumstances, the operation and influence of which could not be avoided. It may be a burning by slow or by rapid combustion, and if the policy makes no distinction between them, a loss by either is covered by its general terms. It

has been held that a fire, within the meaning of a fire insurance policy, may be one of gases as well as one of wood, coal, or other solid substance.

Moreover, it is not essential, in order to bring a loss within a fire insurance policy, that the property insured be ignited or consumed by fire, for in a proper case, a fire policy may, for example, cover damage from heat from a hostile fire; damage from breakage, theft, water, etc., in an attempt to save the property; damage from an explosion caused by a fire or to stop a conflagration; damage produced by a short circuit or electricity caused by fire . . . ." 44 AM. JUR. 2d., *Insurance,* § 1350.

Under the authority thus quoted, the argument of appellant that the contract does not cover theft as a result of looting is not taken.

Another argument put up by appellant's counsel which was not included in the bill of exceptions is that the appellee failed to submit proof of loss within sixty days, which failure bars appellee from recovering against the appellant. This argument, in our opinion, is flimsy in the face of the reports of the Criminal Investigation Division and the National Fire Service of the Republic of Liberia, each of which showed that the insured property was completely destroyed by the fire. Appellant did not deny that there was a fire outbreak in the appellee store on March 22, 1983; nor is there any testimony denying that appellee store was insured by appellant against fire under policy No. 10ICA 102699, for which premium had been paid in full covering a period of one year. Furthermore, there were several communications, including six letters written by the appellant to the appellee's counsel between the months of March and June, 1983, which formed part of the appeal records, but none of these communications contain any request for proof of loss. Under the law of insurance, if a policy provides for furnishing of such proof by the insured, there is no duty on part of the insured to furnish such proof unless required to do so. In such case, a demand by the insurer is generally required before it can assert any advantage because of the insured's failure to furnish proof of loss or a particular item thereof. 44 AM. JUR. 2d., *Insurance*, § 1456.The argument of appellant that appellee neglected and failed to submit proof of loss as a condition precedent is therefore untenable under the circumstances.

Yet another point of interest which counsel for appellant argued before us, and which, along with the other points already discussed, were not included in the bill of exceptions, but

which we find necessary to discuss and pass upon for the benefit of the future, is that according to the police report the fire was described as being "mysteriously originated". According to appellant, this suggested foul play on part of the appellee and therefore bars recovery. Since the records are short of any evidence that appellee burnt the store which, if done, a criminal action of arson would have been instituted, the argument is not taken.

One last and final discussion is on the argument of appellant's counsel, in which he strenuously contended and requested that we remand the case. That argument has swayed our colleagues and forms the principal reason for their dissent. The argument is that the trial judge passed on a factual issue when he overruled count three of appellant's answer in which reference is made to an adjuster's report (appellant's exhibit "A" to its answer), and that this deprived appellant of the opportunity to establish its non-liability.

We have already discussed the answer in its entirety and are firm in our conclusion that the trial judge should have dismissed the entire answer for inconsistency. Under the rule of pleadings, an answer which both denies and at the same time alleges matters in avoidance is dismissible for inconsistency. Further-more, the dismissal of any count of appellant's answer, or even if the entire answer was dismissed and appellant ruled to a bare denial of the allegations contained in appellee's complaint, that did not deprive the appellant from putting witnesses on the stand to establish that it was not appellee's insurer and, therefore, that it was not liable to appellee under the insurance policy aforesaid, as alleged in count one of the answer. Appellant was not deprived of the opportunity to produce its adjuster to testify to the effect that the damages estimated by him as the result of the fire incident was only $14,000.00, that the store was not completely burnt, and that all of the goods were not damaged. Also, in spite of the dismissal of some counts of its answer, appellant was not deprived of the opportunity of showing why it assumed responsibility and consented to pay only the amount of $14,000.00 recommended by its insurance adjuster, especially when it claimed not to be appellee's insurer and therefore not liable to it. Nor did the dismissal of some of the counts of appellant's answer and the limiting of it to only counts two and seven thereof deprive it of showing at the trial, and during the argument before us, that the fire incident was not the proximate cause of the looting and stealing. We also hold that the dismissal of any count contained in appellant's answer could not have prevented the appellant company from establishing that Fantastic Store was burnt down by its owner. Appellant cannot benefit from the mere allegations in its answer, in which it contended that

appellee burnt its own store because it was heavily indebted to its creditors, which action would have barred recovery, especially when appellant assumed responsibility to pay $14,000.00 for the loss resulting from the fire incident as recommended by its insurance adjuster. We are of the strong opinion that remanding this case for new trial commencing with the disposition of law issues will not cure the inconsistency of the answer. More-over, a new trial will not excuse the appellant company of liability to appellee for the loss sustained following the fire incident.

There is no showing in the records on appeal that the loss sustained by appellee, as a result of the fire, was not consequential and remote; nor has the appellant so contended. Under the law of insurance, it is held that:
"Insurers against fire are answerable for direct and immediate, but not for consequential and remote, losses from the peril insured against. The words of a policy 'direct loss or damages by fire' means loss or damage occurring with fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. But to render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property be actually ignited or consumed by fire. Thus, recovery has been allowed in a number of cases although it appeared that the fire never reached the insured property. Insurance against loss by fire includes loss where the cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion, if the original effective cause was not itself made a subject of separate insurance in the contract between the parties". 44 AM. JUR. 2d., *Insurance*, § 1349.

It having been shown that the appellant did insure appellee's stock against fire and that there was a fire outbreak which resulted in the damage reported to appellant by its adjuster, which report included the looting and theft alleged to have been committed, we strongly hold that there is no need for a remand under the authorities quoted *supra*; for, remand will serve no useful purpose.

In view of the careful analysis we have made of this case and the applicable laws cited in support of our conclusion, it is our holding that the appellant company is liable to appellee; and hence, the verdict of the empaneled jury should not be disturbed. The judgment of the court below is therefore hereby *confirmed* and affirmed with costs against the appellant. And it

is hereby so ordered.
Judgment affirmed.

MR. JUSTICE KOROMA *dissenting.*

I have withheld and refused to affix my signature to the majority opinion in the exercise of a right which is healthy under our judicial system, but which I am often reluctant to take advantage of because of several reasons. Among such reasons is the fact that a dissenting opinion often exposes to the public inadvertencies, circumspection or over sights on matters of law and fact in the majority opinion, and that such exposure has the tendency of eroding the public confidence in the system of which the dissenter is an integral part. Notwithstanding, when I am on this Bench, under the solemn oath to faithfully execute the office of Associate Justice of the Republic of Liberia and, to the best of my ability, preserve, protect, defend and enforce the laws of this land, and above all, to serve my God and my conscience, the right and choice to do otherwise is zero. I shall therefore proceed to lay bare the facts in this case and apply the laws controlling for the judgment and benefit of the reading public, our system and posterity. I commence to undertake this exercise with the history of the case.

On January 17, 1983, the appellee in this case insured his business with appellant under policy No. 101CA 102699. The policy, which was for a period of one year, covered the following items:

(a) $150,000.00 or 100% on stock of garments and cosmetics on the ground floor of a two storey concrete building located on Center Street, Monrovia.

(b) $100,000.00 or 100% on stock of ready made clothes and shoes for gents, ladies and children contained in the storeroom in the back of the store.

Between 7:00 and 7:15 p.m., on March 22, 1983, passersby and bystanders observed smoke coming from under the door of the appellee's store, indicating the presence of fire therein. Some interested party called the Fire Service Bureau following which fire fighters immediately arrived on the scene. According to the report of the Liberia National Fire Service, which constitutes part of the records in this case, the fire fighters arrived on the

scene at 7:19 p.m., brought the fire under control at 7:45 p.m., and extinguished the fire at 8:00 p.m. A day following the fire incident, the proprietor of the Fantastic Store wrote and informed the appellant about the fire. Thereafter, the claims manager of the appellant company visited the store and asked Mr. Ahmed H. Ahmed, the proprietor of Fantastic Store, to obtain clearances from the National Fire Service and C.I.D. It appears from the records certified to this Court that several meetings were held and several communications exchanged between the appellee and appellant in an attempt to arrive at a compromise. All of these efforts proved abortive. Consequently, on August 23, 1983, the appellee instituted this action of damages for breach of contract, praying for special damages in the sum of $250,000.00, being the total value of the stock insured, as well as general damages to be measured by the jury.

In a nine-count answer, the defendant in the court below denied plaintiff's right to recover against it setting forth in said answer several legal and factual reasons. Pleadings progressed and rested with a sixteen-count reply filed by the plaintiff. In the reply, plaintiff prayed for the dismissal of the answer for want of legal and factual sufficiency.

His Honour Eugene L. Hilton passed upon the issues of law in the pleadings and ruled the case to trial by jury on the entire complaint, the reply, and counts 2 and 7 of the answer. A jury trial was also held under the direction of the court, presided over by His Honour Eugene L. Hilton. At the conclusion of the trial, the jury brought in a verdict, declaring the defendant liable to plaintiff in the amount of $250,000.00 as special damages and $200,000.00 as general damages. A final judgment was entered upon this verdict after a motion for new trial had been filed, resisted and denied. The defendant having taken an appeal from this judgment, this case has come before this forum on a nine-count bill of exceptions.

The questions which I now address myself to are properly raised in counts 1, 5, 6 and 7 of the bill of exceptions. Others are buried in the facts produced at the trial. The first question is whether or not a trial court has any legal authority to rule out factual matters properly raised in a pleading in an action of damages, when passing upon the issues of law in the pleadings? My answer to this point being emphatically no. I rely upon the holding of this Court made throughout its existence. In *Reeves v. Knowlden,* 11 LLR 199 (1952), this Court held that "All issues of law raised in the pleadings must be ruled upon before any issue of

fact may properly be referred to the jury."

In count eight of the appellant's answer, it contended that the appellee facilitated a damage totaling $14,000.00 when the proprietor refused to submit the store keys to the fire officers to open the store and extinguish the fire. In the count, the defendant also alleged that the plaintiff's proprietor had made and signed a statement in the office of the National Fire Service as to the whereabout of the keys to his store at the time he arrived on the scene. That statement, along with the written statements of two eye witnesses at the scene of the fire on March 22, 1983, were referred to in count eight of the answer and proferted as exhibits "C" "D" and "E". In dismissing this count, along with the exhibits, the court, relying upon 29 AM JUR 2d, *Evidence*, stated thus:

"At common law, as a preliminary to the introduction in evidence of private writings other than documents coming within the rule administering ancient documents, so called, without proof other than that they came from a proper custody, their execution must be proved and their authenticity established. A writing standing alone does not of itself constitute evidence; it must be accompanied by competent proof of some sort from which the jury can infer that it is authentic and that it was executed or written by the party by whom it is purported to be written or executed. Therefore the said statement, not having been notarized and witnessed, count 8 of defendant's answer is hereby overruled...."

What a ruling! The common law cited does not, in any way, synchronize with what a court is required to do in disposing of issues of law in a pleading. For there is nowhere in the law, common or statutory, where it is required that evidence must be notarized to establish its authenticity before it is ruled to trial. As a matter of law, evidence is introduced at the trial of the factual issues ruled to trial and not at the disposition of the issues of law. Proof of authenticity of writing is established at the trial of the facts or upon oath before the trial. Our statute not being silent on the issue of proof or authenticity of documents, it is inconceivable why the trial judge cited common law as reliance, knowing fully well that when our statute speaks the common law is forever silent. Under our statute, either party may examine the other under oath, before or at the trial, to determine whether any relevant document is in his handwriting. Civil Procedure Law, Rev. Code 1 :25.17(1)(2)(3)(4) and (5). The dismissal of count 8 of the defendant's answer, while passing upon the law issues, which count contained numerous facts that should have been sent to the jury for credibility and

effect, and the reliance of the court upon common law when our statute is not silent on the issue, is a breach of trust of what a judge ought to know about the law, a deprivation of the right that should be afforded a party in a court of justice to prosecute or defend his cause, and a reversible error.

The majority holding on the dismissal of count eight of the defendant's answer at the disposition of the law issues is that the evidence sought by the documents pleaded were testified to by witnesses. Therefore, they say, the defendant suffered nothing. I am in complete disagreement with my colleagues because their position has no statutory support. No law in Liberia authorizes a judge to apply common law to any case before a court of justice in preference to a statutory law vocal on the point. What is not legally done is not done at all. Hence the trial judge committed a prejudicial and reversible error.

The next issue of prime importance raised in the bill of exceptions, that is, count five of the bill of exceptions, is that the trial judge openly demonstrated his interest in the case to the jury by asking questions intended to entrap a witness for the defendant. That despite objection to such question on the ground of merely intended to entrap the witness; the trial judge overruled the objection and compelled the witness to answer the question. For the benefit of this dissenting opinion, I am herein quoting the first two questions put by the court to defendant’s witness, Sergeant Anthony T. Sumo, the defendant’s objection to one of such question, and the witness’s answers to them:

COURT'S QUESTIONS:

Q. Mr. Witness, do you want the court and jury to under-stand that after you burst the store, the fire brigade was there together with you yourself and the fire burnt the carton and penetrated it?

A. The carton was already penetrated before opening the store.

Q. Mr. Witness since you have said that the fire penetrated the carton and went on the other side of the store before the door was burst open, please explain for the benefit of the court and jury how you come to arrive at such conclusion?

OBJECTION: GROUNDS: (1) Misquotation of the records, and (2) asked for the mere purpose of entrapping the witness.

THE COURT: Objections overruled. To which defendant excepts.

A. As I told the court, I was present when the door was burst, fire brigade entered and put this identical fire off.

In *Dennis v. Reffell,* 7 LLR 332 (1942), this Court held that:

"The trial judge may at any time during the progress of the examination ask the witness such questions as he deems necessary to elicit the whole truth for the benefit of himself and the jury, and in so doing he is not bound by the rule excluding leading questions. But if, against objections, he asks improper questions, it is the duty of the appellate court to correct the error."

Predicated upon this citation, I can safely say with judicial certainty that this Court, in the exercise of its appellate jurisdiction, has the right to decide upon what is an improper question. In this respect, I hold the view that improper questions are questions asked by the court merely intended to entrap a witness, questions asked by the court which demonstrate the court's interest in the parties and its partiality against the other party, and questions asked by the court which exhibits a lack of intelligence.

In the instant case, Sergeant Anthony T. Sumo, who was being questioned by the court as to how he arrived at the conclusion that the fire burnt a carton and penetrated it, had said in his general testimony that while coming from his office between 7:00 to 7:30 on the night of the fire incident, he saw smoke coming from under the door of the Fantastic Store; that a Lebanese man from the Fantastic Store came on the scene and was asked for the keys to open the store, but he said that the keys were with his store boy; that following this, a fellow who lives in the area ran in his yard and brought an ax which he and others who were present, used to burst open the door to the store; that following the bursting of the door, the fire brigade, which was present, sprayed the fire with water and put it out. The witness also stated that when the door was burst open, he saw the carton with lady slippers and sandals burning which the fire had penetrated; that a Lieutenant of the Fire Service ordered his men

to bring the burning carton outside, which they did; and that the said carton, with the burnt slippers, was put in the fire brigade truck and carried by the fire service men. Finally, the witness testified that he left the scene and went along with the fire service truck.

Based upon this testimony, the court asked the witness the question now under review. I am of the opinion that the question was lacking in intelligence and consequently intended to confuse and/or entrap the witness. It is not the office of the trial court to entrap a witness, needless to say that a court should ever ask a question merely intended to entrap a witness. The court, not being a party to any suit before it for trial, should always stand impartially between the litigants until the conclusion of the trial. "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must posses the disinterestedness of a total stranger to the interest of the parties involved in the litigation." *Dennis v. Reffell,* 7 LLR 332, 340 (1942). "The judge of a court is not merely appointed to an office, but he is also elevated to a dignity. As such, he is dedicated and consecrated to the adjudication of the rights of litigants, and hence must avoid any course of conduct which would cause his impartiality to be questioned. It is of great importance that the courts should be free from reproach, or the suspicion of unfairness, as the judiciary should enjoy an elevated rank in the estimation of mankind. Hence, even though the parties may be disposed to waive any objection to a disqualified judge deciding a cause, the interest of the public will not permit such an objection to be waived." *Ware v. Republic*, 5 LLR 50 (1935).

The issue of the trial judge's interest and his demonstration of partiality in the case under review is tied up with the issue raised in counts six and seven of the bill of exceptions. In those counts, the appellant strongly maintained that it was error on the part of the trial judge to name an amount as special damages for the jurors to bring if they found the defendant liable. Recourse to the said charge, I find the following:

"Mr. Foreman, ladies and gentlemen of the empaneled jury, according to the evidence by the defendant and the plaintiff, if it is your understanding of this case that the plaintiff has not proven a case, then you bring a verdict of not liable for the defendant, but if on the other hand and according to your understanding together with the pleadings and arguments of all the lawyers on both sides and our explanation to you, if you come to a conclusion that the plaintiff has proven a cause of action against the defendant, you should say that the defendant is liable and to pay the amount of $250,000.00 to the plaintiff as special damages

and to also award to the plaintiff any amount that you will see fit for any other inconveniences suffered according to your understanding as general damages. And therefore Mr. Foreman, ladies and gentlemen of the empaneled jury, you are charged to retire to bring a verdict of not liable in favor of the defendant according to your understanding of the facts and the laws explained to you. Please note if you find that the defendant is liable and you do not know how to write the dollars, please inform the officer at your door to come back to the court and we shall explain to you...."

This charge does not stand impartially between the parties. It is leaning heavily on the side of the plaintiff against the defendant. Consequently, the trial judge who delivered the said charge could not have been leaning anywhere else except on the side of the plaintiff. Words being the index of the mind, one can clearly read the mind of the trial judge in the wording of the charge to the jury.

Special damages are specially pleaded and specifically proven at the trial by a plaintiff who claims to be damaged by a defendant. When the proof and extent of damage are established by preponderance of evidence, it is enough for a judge to say in his charge to the jury to bring a verdict in harmony with the evidence they have heard and the law controlling the case, which he must explain as it relates to the case. Beyond this, for the judge to name the amount of special damages and instruct the jury to say that the defendant is liable and to pay such an amount to the plaintiff is indeed a pure demonstration of interest and bias. The proper office of a trial jury is to pay keen attention to the production of evidence on both sides of a case, ask questions when necessary to get a thorough understanding of the facts or evidence produced at the trial, listen to the argument of the facts, listen to the summary of the facts and the explanation of the law by the trial judge as it relates to the case, retire into their room of deliberation, weigh the evidence, and vote upon a verdict that is in harmony with the evidence. No law provides for a judge to dictate to the jury as to what amount they should bring as special damages or how they should write dollars in the verdict. If a trial jury, duly selected, sworn and empaneled, cannot read and does not know how to write figures, then it is difficult to say what criteria the court used in the selection of such jurors. To suggest to a trial jury in a charge to them that if they come to a conclusion that the plaintiff has proven a cause of action against the defendant, they should say that the defendant is liable and should pay the amount of $250,000.00, and to further suggest to them that if they do not know how to write the dollars, they should transmit this to the court to teach them

how to write it, are not the proper office and function of an impartial judge. Such acts on the part of the trial judge in this case did not be-speak of the principle of neutrality which is the hallmark of every judge. I therefore believe that the trial judge, by virtue of this charge, did demonstrate interest in the case and consequently inflamed the minds of the jurors and influenced the verdict of the trial jury.

The final issue which the appellant raised and which it strongly argued before this Court is whether or not a cause of action did accrue to the appellee under the insurance contract which outlined the rights of both parties, the insured and the insurer. Ancillary to this is whether or not the appellee did establish a case against the appellant to warrant the damages awarded said appellee.

In order to fully traverse this issue, I shall take recourse to common law and the evidence adduced at the trial. Contract, as generally defined by American Jurisprudence, is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty. So far as bilateral promises are concerned, it has been said that a contract is a transaction in which each party comes under an obligation to the other and each reciprocally acquires a right to what is promised by the other. A contract is not a law, nor does it make law; it is the agreement plus the law that makes the ordinary contract an enforceable obligation. 17 AM JUR 2nd., *Contracts,* § 1.

Predicated upon this definition of a contract and based upon the fact that the action filed against the defendant is one of contract or an insurance agreement or policy, I can safely say, without reservation, that each party, upon the legal conclusion of said contract, immediately acquired a reciprocal right to what was promised by the other. This being true, and taking into legal consideration that a promise is not simply measured in terms of material gains but also in terms of acts to be performed which are incidental to other reciprocal acts or benefits, I shall proceed to examine the insurance contract for the sole purpose of pin-pointing the promises made by each party and to know what was the degree of performance.

I quote lines 90 to 140 of the insurance policy, proferted with the complaint and upon which the action is based, for therein lie the requirements in case loss occurs, as in the case under review:

REQUIREMENTS IN CASE LOSS OCCURS

" The insured shall give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities and cost, within 60 days after the lose, unless such time is extended in writing by this company; the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title used, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof which were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the description and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company, and subscribed the same, and, as often as may be reasonably required shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

APPRAISAL

"In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire, and failing for 15 days to agree upon such umpire, then on request of the insurer or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item, and, failing to agree, shall submit their differences only to the

umpire. An award in writing, so itemized, of any two, when filed with this company, shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

It appears that partly based upon this portion of the insurance contract, the plaintiff in the court below wrote the defendant on March 23, 1983, being the next day after the fire incident, that his store, which had been insured by the defendant, had burnt, and that he was claiming the total value of the insurance policy. Further, it appears that in giving the insurer notice of the fire and submitting his claim, the insured did not submit an inventory of the damage but rather simply demanded the cash value of the policy. In this respect, Intrusco Corporation, by and through its claims manager, Charles L. Ananaba, on March 31, 1983, addressed the below quoted letter to Mr. Ahmed of Fantastic Store:

March 31, 1983
"Mr. Ahmed Ahmed
Fantastic Store
P. O. Box 2394
Monrovia, Liberia
Re: Claim No. 515 P 10884
Dear Mr. Ahmed:
We do not agree with you on the actual cash value of the loss or the amount of your claim for the value of loss which resulted from the fire incident of March 23, 1983.
To this we request a joint appraisal of the loss amount as provided by the below stated terms of the policy:

123 Appraisal. In case the insured and this company
124 shall fail to agree as to the actual cash value
125 or the amount of loss, then on the written
126 demand of either, each shall select a competent
127 and disinterested appraiser and notify the other
128 of the appraiser selected within twenty days
129 of such demand. The appraisers shall first
130 select a competent and disinterested umpire;
131 and failing for fifteen days to agree upon such

umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss of each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two appraisers, when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

In keeping with the foregoing we have selected Insurance Adjusters (Liberia) Inc. as our appraiser. You are to submit the name of your appraiser within twenty days after receipt of this letter so both appraisers can select an umpire before proceeding to determine the actual cash value of the loss.

Our decision to determine the value of loss should in no way be construed as a waiver of the conditions of the contract or stop us from asserting our rights under the policy.

Very truly yours,
Charles L. Ananaba
MANAGER-CLAIMS

CLA/jtn
cc: Mr. Boris Keval
Insurance Loss Adjuster (Lib) Inc."

The answer to said letter is also herein quoted:

"Mr, Charles L. Ananaba
Manager-Claims
Intrusco Corporation
80 Broad Street

Monrovia, Liberia

Re: Claims No. 515 P 10884

Fantastic Store

Dear Mr. Ananaba:

Your letter dated March 31, 1983, addressed to Mr. Ahmed Ahmed, proprietor of Fantastic Store, in connection with the above subject matter, has been referred to our office. In this connection, Mr. Ahmed has retained us to represent his interest regarding his claim.

At this stage of the matter, we do not see the necessity of engaging the services of an insurance adjuster. The fire incident took place on March 22, 1983; your office was advised by Mr. Ahmed on March 23, 1983. The Fire Service Officers were on the scene of the incident. We understand the police authorities were also on the scene. We have been informed that you have also inspected the store and have seen the damages done by the fire.

The business was insured for an amount of $250,000.00. If you should claim that the value of the loss is less than the amount for which the goods were insured, the burden of proof rests upon your corporation to establish this. Since the fire incident Mr. Ahmed has not visited the store alone and therefore he has not in any way interfered with the evidence.

In view of the above it is our contention that there is no disputable issue at the present that would warrant the employment of the services of an appraisal by our client.

According to our client, the total amount of loss sustained is above $280,000.00. But since he was insured for $250,000.00 his claim is limited to this amount. We would therefore appreciate it were your Corporation to be good enough to compensate our client for the amount of the insured value of the goods and thereby avoid a protracted litigation.

With kindest regards,

Very truly yours,

Toye C. Barnard

COUNSELLOR-AT-LAW

TCB/GGM

cc: Mr. Ahmed Ahmed"

Based upon the content of the answer herein above quoted, the claims manager of Intrusco Corporation again addressed a letter to the insured, by and through his lawyer. I herewith quote said letter:

"Toye C. Barnard Law Firm
152 Carey Street
P. O. Box 3911
Monrovia, Liberia
Attention: Mr. Toye C. Bernard
Counsellor-At-Law
Re: Insured: Fantastic Store
Our File No. 512 P 10884

Dear Counsellor Barnard:
We acknowledge receipt of your letter dated April 20, 1983 with reference to the above captioned fire loss. Our request for a joint appraisal is in accord with the terms of the insurance contract provided as a means of resolving disagreement on the amount of loss. The appraisal is limited to the resulting fire loss and doesn't comprise loss that is a direct result of theft by looters. The policy specifically excludes theft, whether during or after the fire.

As previously brought to the attention of your client, the theft loss that occurred at the premises cannot form part of the claim, considering the documentary evidence in our possession which include photographs of the theft being committed by the looters, statements by witnesses verifying the theft incident and a complete inventory of the salvaged stock which shows a considerable decrease in the volume of stock as compared to the actual fire damage, salvage, and photographs of the contents of the store prior to the loss. We also have photographs of the salvage and the entire interior of the store which show that the fire did not cause total damage.

We reserve all our rights under the policy and reaffirm our position that the appraisal should by no means be construed as a waiver of any condition of the contract.

Very truly yours,
Charles L. Ananaba
MANAGER-CLAIMS
CLA/jtn".

There are other communications in the file of this case which I could quote for the benefit of this dissenting opinion. However, I have not felt the necessity to do so since all of them, put together, constitute a confirmation of the futility of the exercise to get the insured to comply with the terms and conditions of the insurance contract incidental to the assertion and recovery of a claim. Thus, the action of damages for breach of contract was instituted against the insurer by the insured predicated upon the strength of a contract which terms and conditions the insured had adamantly and unyieldingly refused to honor. Legal authorities have much to say on this issue and I begin with a quote from the common law:
"As definitive of the rights and liabilities created there-under, liability policies frequently contain a clause commonly known as a "no action" clause, the purpose of which, generally speaking, is to withhold any liability on the part of the insurer until the happening of certain contingency" 44 AM JUR 2d., *Insurance,* § 1585.

Further:

"Property insurance policies contain provisions for the submission to non-judicial appraisers or arbitrators of the issue of the amount of a loss under the policy. These provisions exhibit a wide variety of particular terminology, but most of the cases deal with one of two broad types.

These may, for convenience of reference, be referred to as the 'shall' type and the 'request' type. The former is so worded as to make it relatively easy to construe the language as making an appraisal a condition precedent to an action on the policy under certain conditions, usually a disagreement between the parties as to the amount of a loss suffered by the insured.

As far as an appraisement is concerned it has been said that such an appraisal provision of a fire insurance policy is an integral part thereof and cannot be avoided by the insurer on the theory that it is separate and not part of the policy. It has also been held that in an action

against an insurer upon a policy providing for arbitration upon the written demand of either party, the complaint should not be dismissed upon granting the defendant's motion to refer the matter to arbitration; a stay of proceedings pending arbitration is the exclusive remedy". 44 AM JUR 2d., *Insurance,* § 1707.

Also

"According to some cases, where compliance with a clause for arbitration or appraisal in case of disagreement as to the amount of loss is made a condition precedent to recovery and the maintenance of an action upon the policy, the duty to procure or to make a demand for such arbitration or appraisal is upon the insured." 44 AM. JUR. 2d., *Insurance,* § 1711.

Based upon these citations and the communications ex-changed between the insured and the insurer, it cannot be said that a cause of action had accrued when the insured filed the action of damages for breach of contract, because he had not complied with the requirements laid down in the insurance policy agreement upon the strength of which agreement he had filed the action. An insured is not *ipso facto* entitled to recovery of the value of a policy which is contingent upon the happening and/or performance of certain acts. The happenings and/or performances of such acts are the obligatory undertakings of the parties, set up in the promises which constitute the substance of the policy agreement to which each party has reciprocal rights. Hence, an insurance contract which contains the ingredients of contingencies cannot be read and applied one-sided. In the case *Intrusco Corporation v. Dennis,* 31 LLR 69 (1983), this Court said:

"In determining the intention of the parties to an insurance policy, the policy should be considered and construed as a whole, and if it can reasonably be done, that construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions. All parts and clauses must be construed to determine if and how far one clause is modified, limited, or controlled by others.

Seeming contract must be construed without disregarding words or clauses used, or inserting words or clauses not used. Such meaning should be given to all parts of the policy as will carry out and effectuate to the fullest extent the intention of the parties. Accordingly, in deter-mining the meaning of a provision of a liability policy with respect to liability for

interest on a judgment recovered against the insured, the court is not limited to consideration of the provision alone, but must construe the policy in its entirety, endeavoring, if possible, to ascertain the mutual intention of the parties as it existed at the time of the execution of the instrument." 43 AM JUR. 2d., *Insurance*, § 263.

In my opinion, the trial court completely disregarded this point of law, applicable particularly to the insurance policy in this case when it confirmed the verdict of the trial jury which is based solely upon a simple provision of the policy - that of the cash value of the said policy.

There was no other proof established of the cash value of the property allegedly burnt and/or damaged beyond the policy itself which was offered into evidence. Rather, emphasis was placed on one simple consideration, that is, the cash value of the policy. With the insured's entire mind, body and soul set on only the cash value of the policy, it never occurred to him that under the practice and procedure in Liberia, special damages are specially pleaded and specifically proven at the trial by preponderating evidence, and that it is only upon the weight of such evidence that the trial jury should base its verdict.

It is therefore my opinion that because of the several prejudicial and reversible errors committed by the trial judge at the disposition of the law issues and in his charge to the trial jury, the judgment in this case should be reversed and the case remanded. Further, that the insured, having failed and neglected to comply with the terms and conditions of the insurance policy agreement, the case should be remanded so that he can be made to comply therewith, especially since, under the law, he cannot vitiate his own act and benefit thereby. Accordingly, since the majority of my colleagues hold a contrary view, I have withheld my signature from the majority opinion and filed this dissent.

MR. JUSTICE YANGBE *dissents.*

The record in this case is pregnant with numerous reversible errors and patent irregularities which are the subjects of the bill of exceptions. The several errors occurred in this case from the disposition of the issues of law up to and including the rendition of the final judgment. I would like to note here that a trial judge searches for truth and the appellate court searches for errors that are assigned. I will therefore strive to pin-point and discuss (a) some of the many errors committed by the court below, featured in this case, and which I consider to be

major, and (b) the arguments of the appellee in defense of the trial judge relative to the errors made by him. The prime object of this exercise, therefore, is to fortify the position that I have taken in this case.

Appellant has contended that while the court below was deciding the issues of law, the trial judge improperly ruled out several counts of the answer which contained facts, thereby not affording appellant the opportunity to produce witnesses to testify to the contents of the documents proferted with the answer and marked as exhibits "C", "D", and "E" respectively. In count fifteen of the reply, appellee maintained that the documents referred to in count eight of the answer were not notarized. This is the sole reason assigned by the trial judge for ruling out count eight of the answer. Here is what, among other things, the trial judge said:

"A writing standing alone does not in itself constitute evidence; it must be accompanied by competent proof of some sort from which the jury can infer that it is authentic and that it was executed or written by the party by whom it was purported to be written or executed . . . ."

This conclusion of the judge was unauthorized and pre-mature, in that, at that stage, the court was only passing upon issues of law and not issues of facts which had not been legally and properly placed before it. The practice in issue here is that documentary evidence proferted with a pleading is mere notice to the opposite party of what is intended to be proved at the trial. At the trial of facts, same must be testified to by witnesses, and marked and confirmed by the court, upon application of the party seeking such admission. At the close of oral evidence and upon application duly made, the court may admit same into evidence. Only there and then may the jury or the court, in a proper case, pass upon the authenticity and due execution of the documentary evidence. It seems to me that the learned judge was aware of this cardinal procedure when he held that the writing "must be ac-companied by competent proof of some sort from which the jury can infer...." Yet, he inconsistently ruled out the documentary evidence because, according to him, there was no competent proof of execution and the authenticity thereof had not been established at the stage of the disposition of the issues of law. Here is what the procedural statute provides:

"Handwriting may be proved by the oath of a person acquainted with the handwriting of the

person whose it is alleged to be, either from having seen him write or from having corresponded or transacted business with him; or it may be proved by comparison with undoubted writings of the person proved not to have been written after the dispute arose or under suspicious circumstances."

Either party may examine the other under oath before or at the trial to determine whether any relevant document or signature is in his handwriting. If a party whose signature is on a document the other party seeks to prove refuses or neglects to answer an interrogation on this matter, except in pursuance of his constitutional right not to be compelled to give evidence against himself, it shall be considered an admission that it is his writing. If any party shall deny that the handwriting is his and if the document has the name of a subscribing witness annexed to it, such witness shall be produced or his absence accounted for by showing his death or removal beyond the process of the court or other fact rendering his attendance impracticable. In such a case, if the witness cannot be produced, it shall be necessary to prove both his handwriting and that of the party." Civil Procedure Law, Rev. Code 1 : 25.17 (1), (2) & (3).

If the trial judge had given appellant the opportunity to bring witnesses, by ruling count eight of the answer to trial, the authors of the documents or those who are acquainted or have corresponded with the authors of the writings, would have been brought to testify to the due execution and authenticity of same under the best evidence rule and the law, cited *supra,* as well as the Civil Procedure Law, Rev. Code. 1 :25.6. In *Dagber v. Molley*, 26 LLR 422 (1978), this Court held that:

"The judge is charged with the responsibility of passing on issues of law and the jury that of passing on issues of facts. . . . . A judge cannot base his ruling upon document which has not been formally admitted into evidence by the court as forming part of the record in the case. . . ."

There was also an action of injunction between the same parties in the case cited herein above. In both the injunction suit and the main action mentioned above, the trial court ruled out the facts without any hearing of the evidence. Consequently, this Court reversed the judgments in the two cases and remanded the same to the trial court for new hearings. A case in point is *Delta Corporation Incorporation v. Bank of Credit and Commerce International,* decided in the current term of this Court. In that case, a final judgment was rendered by the debt

court judge for Montserrado County. Subsequently, a writ of execution was issued and certain goods seized. As a result, a bill of information was filed in the debt court. In the bill of information, the informant alleged that he was not a party to the action of debt and that he was the owner of the seized property. The judgment creditor opposed the information, also on factual grounds. The trial judge, instead of conducting an investigation, and thus affording the parties an opportunity to produce evidence in support of their respective allegations, denied the information, stating as the sole ground that the court could not review the judgment that was previously rendered by it. On appeal to this Court, sitting in its October A. D. 1984 Term, the case was heard. The hearing having been entertained on the 10th of October 1984, this Court, on the 15th day of October, 1984, entered a ruling on the minutes of the Court, reversing the ruling of the debt court and remanding the case, with specific instructions to the debt court judge to immediately resume jurisdiction of the case and require the parties to produce evidence in support of the respective averments of facts set forth in the information and the resistance thereto.

In *Nicols v. Liberia Electricity Corporation*, 31 LLR 315 (1983) and *Neufville v. Killen,* 31 LLR 587 (1983), both decided at the March, A. D. 1983 Term of this Court, we ordered a remand because of improper conduct and gross irregularities committed during the trial by the judge. The holdings in those cases find support in *Lawrence v. Republic of Liberia,* 2 LLR 65 (1912) and *Yancy v. Republic of Liberia,* 4 LLR 3 (1933).

It is needless to mention that this Court is within the common law arena in which we abide by precedents, unlike Civil and Napoleon Codes under which precedents have no legal significance. Consequently, the procedure that was adopted in those cases, cited *supra,* should also obtain here; and acting thereon, we should remand this case. Additionally, in *The International Trust Company of Liberia v. King,* 20 LLR 438 (1971), with similar facts and circumstances, this Court took the same position by remanding the case.

Count fifteen of the reply, which was sustained as against count eight of the answer, reads:

"Further to count eight of the answer, plaintiff says that exhibits "C" & "D" mentioned in defendant's answer were written by the same person; only the purported signatures are different. Plaintiff submits that these exhibits should not be given credence as they are not notarized or witnessed, neither do they indicate in any manner whatsoever that plaintiff was

involved in causing the fire. . . ."

These are the hard facts, mixed with law, and from the tenor of the reply which I have quoted hereinabove, it is quite clear that count eight of the answer, which it traversed, contained facts that were not ruled to trial by the trial judge. Obviously, these facts were not proved or disproved. It is superfluous to mention that at a trial the parties are precluded from introducing evidence on any point that was not ruled to trial, and the jury is forbidden from drawing conclusion from facts not ruled to trial. Our law states that:

"When a jury is sworn, the complaint and subsequent pleadings not ruled out are read and explained and the oral evidence marshaled so as to enable the jury to draw their conclusion from the facts and render a true and valid verdict; to be valid must be for which they were sworn." *The Board of Trustees of Monrovia College and Industrial Training School v. Coleman,* 3 LLR 404 (1933).

Therefore, the main point at issue is whether the trial court was procedurally correct, when passing on issues of law, to rule out, decide or pass on facts? The answer to this question is certainly no. The relevant section of our procedure law reads thus:

"The court shall decide any issue not required to be tried by a jury..." Civil Procedure Law, Rev. Code 1:73.1.

Also, this Court has opined:

"All questions of law raised in the pleadings must first be disposed of by the trial court", *Wolo v. Wolo,* 8 LLR 36 (1942).

In this vain, appellant has argued that one of the documentary evidence improperly ruled out by the court was the report of the insurance adjuster, Mr. P. B. Kowal. In the report, it was estimated that the entire loss sustained by appellee, as a result of the fire, was $14,012.00.The correctness of the report of the adjuster was denied in counts six and seven of the reply. This is another factual defense the trial judge ruled out while passing on the issues of law, and which should have been ruled to trial. The contents of these documentary evidence, although pleaded in the answer, were not ruled to trial, and therefore the jury did not pass

upon them. Accordingly, they have no evidentiary value in the records in this case. In such a case, the Supreme Court cannot give credence to them for reason that the Court lacks original jurisdiction to do so, except on a point of procedure, which is to remand the case for trial *de novo*.

In count six of the answer, as well as count one of the brief, appellant pleaded and argued the principle of waiver. In that count, the appellant argued that the insurance policy provided that the insured must, within sixty days from the date of the occurrence of the accident, tender to the company proof of loss, signed and sworn to by the insured as to certain facts. This requirement is indicated on lines 91 to 123, on page 9 of the insurance policy, which policy is the basis of this suit. The court below, while deciding the issues of law, ruled in these words:

"Plaintiff in rebutting counts five and six of the answer says that defendant had received sufficient notice and that he was not legally bound to furnish proof of loss unless specifically requested by the defendant. Therefore, counts 14 and 11 of the plaintiff's reply are hereby sustained as against counts 6 & 5 of the answer".

The judge below held that as appellee was not required to provide proof of loss, there was therefore no legal duty imposed on the insured to furnish such proof of loss.

Here again, the court had completely ignored the contract-- the foundation of the suit-- which expressly required that an appraiser or adjuster be named to assess the damage. What is worse is that the judge decided the facts prior to the hearing of the evidence. That act was a clear invasion of the province of the jury which alone were the triers of facts. The existence or non existence of the condition precedent in the contract is not a controversial point, because same was not denied in the reply and during the arguments before us. Rather, appellee maintained that he did give notice of proof of loss. Unfortunately, this important factual point was prematurely decided by the trial court without any factual basis. In the pleadings, the parties raised the question of whether notice was or was not given, as required by lines 91 to 123, as found on page 9 of the insurance contract. In a situation like this, the authorities provide that:

"the sufficiency of proofs of loss, when disputed, is ordinarily a question of fact for the jury,

if there is evidence upon which to support a finding in favor of sufficiency." COUCH ON INSURANCE 2d, Vol. 14, § 49:502, at 78.

Under normal circumstances, there is no need to dwell on the evidence adduced in this case because of the several errors and irregularities I have pointed out and the previous holdings of this Court in similar cases. However, because of the views expressed by the majority in affirming the judgment of the court below, I have decided to traverse the evidence adduced on both sides in this case to determine whether the evidence is sufficient to warrant affirmation of the judgment.

According to the insurance policy that was admitted into evidence, there are certain preconditions which, as we said earlier, are not denied.

There is no evidence in the records before us that any of the preconditions mentioned in the portion of the insurance policy mentioned above had been complied with as required by the policy. There are letters evidencing exchanges between the parties with reference to the occurrence of the fire incident, the presentation of the claim of the plaintiff/appellee, proposals and counter proposals as to the conduct of an investigation of the scene of the fire, and a request for clearance from the defendant/ appellant to reopen the store. But there is no notice of proof of loss, sworn to by the insured, which contained the list of damaged and undamaged goods, the actual loss as a result of the fire, the place of commencement of the fire, according to the belief of the insured, and an inventory. Consequently, in my view, this action was prematurely instituted.

It was also testified to by witnesses that the actual loss sustained as a result of the fire incident was about $10,000.00. Policemen as well as soldiers who went on the scene when the fire was observed, testified that when the plaintiff/appellee arrived on the scene of the fire, he refused to surrender the keys to the store that was burning; that this was reported to the Ministry of National Defense; and that the officer of the day demanded the keys to the store from plaintiff/appellee. The refusal of plaintiff/appellee's proprietor to surrender the keys resulted in his arrest and detention. Moreover, as a result of the refusal to surrender the keys, the soldiers and police had to burst the store door open in order to enter the store and extinguish the fire completely. The box in the corner of the store that was still burning was then taken away and carried to the Fire Brigade Station.

Another crucial issue, as disclosed by the evidence, relates to the insurance contract, dated January 17, 1983 and the face value of $250,000.00 covering the goods that were insured. The fire, as we know, occurred on March 22, 1983. During the trial, the plaintiff was asked whether, from the date of the insurance contract to the date of the fire, he had sold any item from the store which was covered by the insurance contract? His answer was in the affirmative.

According to the insurance contract, *supra,* the insured was required to separate the damaged goods from the undamaged goods, with the price of each set being indicated on the list. This was not done. Therefore, in my opinion, it is unfair and not in keeping with the policy for the plaintiff/appellee to be awarded the total face value of the policy, without taking into consideration the items that were sold subsequent to the date of the policy and prior to the fire incident.

There was also testimony to the effect that when the door of the store was burst with an axe by the security officers, a group of persons rushed inside the store and stole several items.

Under the policy, mentioned *supra,* it was the responsibility of the insured to protect his property from theft, and the insurer is not answerable in damages for any loss sustained as a result of such theft. The question which then arises is, what were the goods and the value thereof that were stolen, and which are deductible from the $250,000.00, the value of the property that was originally insured, and which were in the store? There is no answer in the records before us to this vital question. Consequently, in my opinion, there is no basis, legal or factual, to sustain the award by the jury in this case. The legal authorities on insurance have this to say on the issue:

"There is authority that where an insurance policy makes the furnishing of proof of loss a condition precedent to the enforcement of the policy, and the proof has neither been furnished nor waived; there can be no recovery on the policy, even in the absence of prejudice to the insurer. However, there is authority that in the absence of a specific provision in a policy indicating an intention that the furnishing of proof of loss shall be a condition precedent to recovery, the courts will read such condition into the policy or that in the absence of an express forfeiture provision in the policy, the failure to make proof in the

time required thereby merely postpone the time of bringing suit, and if proof is subsequently made, the insured may recover, provided of course, limitations on the action have not expired. This rule has been held to obtain even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof." COUCH ON INSURANCE 2d, Vol. 14, § 49:418, at 35.

The mere letters exchanged between the parties herein and alluded to earlier in this opinion, do not of themselves dispense with the requirements of furnishing formal proof of loss. The relevant law states:

"While both the notice and the proof of loss serve a common purpose of informing the insurer of the loss for which a claim is made, it is clear that the two are distinct and that by hypothesis a proof of loss is more than a mere notice of loss. Consequently, the fact that the insured has given notice does not dispense with the requirement as furnishing formal proofs of loss. That is to say, a mere notice does not ordinarily supply the place of formal proof.

Where a fire policy requires notice of loss, a complete itemized inventory and sworn proofs showing origin of fire, interest of plaintiff, etc., the giving of notice and filing of inventory do not dispense with the necessity for complying with the other conditions precedent, namely, formal proofs showing the required facts. COUCH ON INSURANCE 2d., Vol. 14, § 49:391.

The majority opinion upholds the ruling of the court below in which the court not only decided the facts, but also ruled out facts on the ground that appellant should have produced witnesses to testify to those facts that were ruled out during the disposition of the issues of law. One of the puzzling points of the majority decision is whether it means that pleadings in courts of record must be dispensed with since a party on trial may introduce witnesses on points of fact not ruled to trial. Should this be done without first repealing the Civil Procedure Law by the proper authority, and how can this Court review a case on appeal in the absence of pleadings, as suggested in the majority opinion? Certainly, we have no authority, and contrary to this Court's decision in *Board of Trustees of Monrovia College and Industrial Training School v. Coleman, supra,* to deliberately depart from practice supported by law, to satisfy any given situation.

The majority holds that appellant was not deprived of the opportunity to show why it assumed responsibility and accepted to pay only the sum of $14,000.00, recommended by the insurance adjuster, in spite of the dismissal of some counts of its answer.

The offer that was made to pay $14,000.00 or more, and which was rejected, was to avoid court litigation, the legal effect of which is discussed hereunder. Notwithstanding, it is vital to mention here that the adjuster made a written report showing the result of his investigation of the scene of the fire. That report put the plaintiff/appellee loss at no more than $14,000.00 dollars. However, the report was prematurely and unauthorizedly rejected by the court while the issues of law were being decided and prior to production of evidence. Therefore, neither the adjuster's report nor the adjuster himself could have been produced or could have testified in accordance with the procedure laid down by this Court in *Board of Trustees of Monrovia College and Industrial Training School v. Coleman,* cited earlier in this opinion, and as per the principle of best evidence rule.

It was proven by witnesses for appellant, and not rebutted by appellee, that "in the assessment report, the man told us and the store owner that the amount of the damage that was covered under the policy was $14,000.00." Further, "our investigation revealed that Mr. Ahmed asked the Fire Service to say in their report that the damage to his store was in the amount of $205,000.00. With this and the fact that Mr. Ahmed refused to surrender a proof of loss statement, which is a notarized sworn statement concerning his knowledge and belief as to the reason why the fire started, and the actual amount of the damage connected with the scene of the fire. . . . . We disagreed."

The Witness also testified as follows:

"After this, we began to count the amount of materials, that is, goods around the area that was affected by the fire damage; the stock of goods was around $10,000.00, and we informed Mr. Ahmed that if he is going to claim under the policy, his claim will have to be for such an amount. Mr. Ahmed then asked to see me privately. He told me that I should try to help him to increase the amount and he would pay me for doing so. I informed Mr. Ahmed that this was not possible. . . . . ." "Also, when we got inside, I walked around the store and I noticed that the fire was only on the right hand corner as you entered just as Lieutenant Sajie had told me. So we noticed that the entire store was all scattered with shoes actually in the mid

selling area of the store. Damage as a direct result of the fire was small ...." "I asked if the fire went around in the store, he answered, 'no'. The loss we discovered. . . . the insured, when asked to surrender the keys to the Fire Service to go and put the fire out, he refused to give the keys, and instead said that he left the keys with his store boy which clearly indicated that this gentleman did not intend to protect the property from further damage as provided by the policy. Also when we did not come to an agreement as to the amount of damage and the amount payable under the policy, we requested an appraiser as provided by the policy. Again, the insured did not comply with the provision of the policy, as to its (insured's) appraiser to determine the value of the loss payable under the contract." (*See* sheets 2, 3, & 4 of the minutes of October 20, 1983).

The above are parts of the testimony of the witnesses for appellant which were entirely ignored in the majority opinion.

Appellee has argued further that a bill of exceptions is a com-plaint against a trial judge and the foundation of an appeal. Therefore, the rule governing pleadings, that is, the complaint, answer and reply, should control the same. It also argued that the counts of the bill of exceptions in this case contain several issues which should have been pleaded separately in numbered paragraphs. He cited for reliance the Civil Procedure Law, Rev. Code 1 :9.3.

This argument has reminded me to think whether a bill of exceptions is a pleading to which a demurrer is applicable? Under our system of appellate procedure, after the filing of an approved bill of exceptions by a losing party in a trial court, the case is virtually removed therefrom and the trial court automatically loses jurisdiction. Consequently, there is no room thereafter to exchange pleadings in the trial court or at the appellate level, save to prepare briefs and argue the same, predicated upon the averments in the bill of exceptions.

Assuming that a bill of exceptions is a pleading to which a demurrer can be applied, it is only a specification of the exceptions made to the judgment, decision, order, ruling or other matters excepted to during the trial and relied upon for the appeal, together with a statement of the basis of the exceptions. Civil Procedure Law, Rev. Code I :51.7.

In my opinion, there is nothing in this section that prohibits the presentation of two or more pertinent issues in a single count or in a numbered paragraph, as provided in section 9.3,

idem; nor is there any reason to infer that chapter 9 of the Civil Procedure Law, Rev. Code 1, which governs pleadings in the trial court, should also govern appellate procedures, as far as it relates to a bill of exceptions. Here is the relevant section of the statute which appellee cited:

"All averments of claim or defense shall be made in numbered paragraphs. Each paragraph shall be limited as far as practicable to a single set of circumstances. A paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense shall be separately stated and numbered whenever a separation facilitates the clear presentation of the matters set forth".

Therefore, the test is whether the inclusion of more than one issue in one count facilitates the clear presentation of the matter stated to the court. Given the foregoing, I do not believe that appellant violated the statute on bill of exceptions to warrant this Court overruling any count in the bill of exceptions on that ground.

As the argument progressed before us in this case, appellant, in answer to a question from the Bench, admitted that the sum of $25,000.00 was offered by the appellant as a compromise, but the amount was rejected by the appellee. The refusal to accept the $25,000.00 as a compromise is made manifest in a letter dated June 21, 1983, addressed to Mr. Vincent McCann, vice president of the appellant company. Although the offer of $25,000.00 is not relied upon by the appellee as an admission, in order to clarify the legal significance of the offer and its rejection, I have decided to discuss same in this opinion. In C. J. S. § 43, p.767, it is provided that:

"The effect of setting aside the compromise is to place the parties in the original position; and all rights which are transferred, released, or created by the agreement are revested, restored, or discharged by the avoidance. In case judgment is rendered on the original demand, m on setting aside a compromise, defendant is entitled to have credit for any payments made to and retained by plaintiff."

And in 15 AM JUR 2d., *Compromise and Settlement*, § 4, at 938, it is also provided that:
"The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. This view is applicable in courts of equity as well as

in courts of law. The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. In pursuance of the policy of the law to encourage the settlement of controversies out of court, the courts have treated a party's offer of compromise as an effort to obtain peace rather than as an admission of the validity of another party's claim, and an unaccepted offer of compromise is inadmissible as evidence of such an admission. Similarly, where the two parties are engaged in lawsuit arising out of a transaction which involved other persons, the fact that one party made a compromise with a third person cannot be received in evidence as an admission of the party's liability.

The desire to uphold compromises and settlements is based upon the various advantages which they have over litigation. The resolution of controversies and uncertain-ties by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyer, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy".

In view of the refusal on part of appellee to accept the $25,000.00 as a compromise, the offer is not an admission of liability nor binding. Therefore, appellant has the right to contest the action.

For the reasons above expressed, I have withheld my signature from the judgment confirming that of the lower court, and have taken the utmost pleasure in preparing and filing this *dissent* to the decision by the majority of my distinguished brethren.