INSURANCE COMPANY OF NORTH AMERICA, represented by and thru its Agent, INTRUSCO CORPORATION, Appellant, v. **M. S. BHATTI AND SONS, INC.**, by and thru its Managing Director, M. S. BHATTI, Appellee.

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

Heard: May 11, 1988. Decided: July 29, 1988.

1. Persons who ought to the parties to an action if complete relief is to be accorded between the persons who are parties to such action, or who might be inequitably affected by a judgment in such action shall be made plaintiffs or defendants therein.

2. Parties may be added to an action by order of the court on its own initiative; and a court may cause a summons to be issued on such parties added to a suit on the initiative of the court.

3. A motion for continuance should be denied where it appears to the court that the motion is made for the purpose of delay.

4. The admissibility of documentary evidence, as in the case of evidence in general, is a question for the trial court, to be determined from the circumstances of a particular case. It is therefore the province of the court to decide any preliminary questions of fact which may be necessary to enable it to determine the admissibility of a document.

5. A copy of a writing is not admissible as evidence unless the original is proved to be lost or destroyed or to be in the possession of the opposite party who has received notice to produce or unless it is a copy of some public record of document proved as provided in the Civil Procedure Law, Rev. Code 1: 25.10.

6. The report of a fire outbreak, filed with the Commissioner of Customs, is a public document in the contemplation of the Civil Procedure Law.

7. The refusal of a trial judge, sitting as a judge and a jury, to grant a request to place a mark of identification on a document, is to be construed to mean that the document sought to be identified has no relevance to the issue.

8. A bonded warehouse is a public building under the custody of the Bureau of Customs of the Republic. Hence, documents relating to goods imported and placed

in such warehouse are considered to be in the custody of the Bureau of Customs, and the said agency is thus in a position to determine, without the production of documents by the importer, the quantity of goods in the warehouse at a relevant time.

9. An agreement which violates the provisions of the Constitution or of a constitutional statute or which cannot be performed without violation of such provisions is illegal and void.

10. A party desiring to have an arbitration must apply to a court setting forth in such application the reasons why the issues should be submitted to arbitration, and be supported by an affidavit. The court shall then conduct a summary investigation and determine whether there are proper grounds for submitting the issue to arbitration and make a declaration to the effect.

11. A party making application to a court to submit a matter to arbitration must show (a) the existence of an agreement described in section 64.1 of the Civil Procedure Law; (b) that he is a party to such agreement; (c) the referability of the controversy to arbitration; and (d) the refusal of another party to the agreement to arbitrate such controversy.

12. A party making application to a court to stay an arbitration proceedings shall show (a) that there is no agreement as described in section 64.1 of the Civil Procedure Law; or (b) he is not a party to the agreement; or (c) the controversy os not referable to arbitration; or (d) the adverse party is not a party to the agreement; or (e) the right to proceed to arbitration has been waived by the adverse party; or (f) the agreement has been revoked by either party.

13. A court cannot sua sponte submit an issue to arbitration, with application from one of the parties, since a court cannot do for parties that which they should do for themselves.

14. Under the Constitution, only the Judicial Branch of government, headed by the Supreme Court, is vested with the power to adjudicate judicial matters.

15. While it is true that article 65 of the Constitution provides for administrative investigations of justiciable matters prior to review by a court of competent jurisdiction, the provision does not permit contracting parties to subscribe to an agreement which has the tendency to oust the courts of their jurisdiction.

16. The best evidence which a case admits of must be produced and no evidence is sufficient which supposes the existence of better evidence.

The appellee corporation, M. S. Bhatti & Sons, Inc. secured from the appellant corporation, Insurance Company of North America, an insurance policy for its bonded warehouse and the goods contained therein to the value of $110,000.00. Several months thereafter, the warehouse was engulfed by fire and a substantial portion of the goods contained there were destroyed. A claim filed by the appellee with the appellant for payment of the full amount of the policy was rejected and a offer made instead by the appellant to pay $6,000.00, the appellant contending that much of the goods in the warehouse had been stolen and that theft was not covered under the policy.

When an agreement could not be reached, appellee instituted an action of damages for breach of contract in the Sixth Judicial Circuit Court, Montserrado County. the case was tried by a judge without a jury. Following the submission of evidence and the entertainment of arguments, the trial court entered judgment in favour of the appellee in the amount of $110,000.00 as special damages and $15,000.00 as general damages. To this judgment, appellant noted exceptions and announced an appeal to the supreme Court.

In its bill of exceptions, appellant contended that the trial judge had erred (a) in overruling appellant resistance to appellee's motion to join the Insurance Company of North America as a party defendant to the action; (b) in denying appellant's motion for continuance; (c) in overruling appellant's objection to the identification of two documents by appellee's witness; in admitting into evidence the duplicate copy of a report without any explanation by appellee as to the whereabouts of the original; in ignoring the evidence presented by appellant in the rendition of the court's final judgment, including the fact of theft of the goods which was not covered by the policy, the failure of appellant ro submit the required documents required by the policy for a determination of the exact loss sustained by appellee, the failure of the appellee to maintain a fireproof safe to keep the required documents as stipulated by the policy, and the failure of appellee to exhaust the procedural mechanism of arbitration, as required by the policy.

The Supreme Court held that the appellant's contentions were without merits. The Court held that as to the first contention, the trial judge did not err in overruling appellant's resistance to appellee's motion to join the Insurance Company of North America as the right of joinder was granted by statute if complete relief could only be

secured by such joinder. The Court noted that in such a case, the trial court has the authority to order such joinder not only at the request of a party to the action, but also sua sponte on its own initiative. The Court observed that Intrusco Corporation was only an agent for the appellant and that any judgment against Intrusco would directly and indirectly affect the appellant, and that as such, it was necessary that the appellant be joined as a party to the suit.

The Court also reject appellant contention that the trial judge erred in denying its motion for continuance, holding that the motion was file for the mere purpose of delaying the trial of the case, and that in such instance, as revealed by the records, a trial court should properly deny the motion and the continuance.
On the question of the identification of certain documents, the Court held that the admissibility of documents into evidence was a question for the trial court, to be determined from the circumstances of a particular case. In the instance case, the circumstances warranted the ruling of the trial, and in so ruling, the Court said, the trial judge had not erred. In the same vain, the Court held that as the trial judge acted both as judge and jury, his refusal to place a mark of identification on appellant's document was not an error, such refusal being construed to mean that the judge considered that the document had no relevance to the case.

As to the admission into evidence of a copy of the report on the fire, the Court held that while ordinarily such admission was not permissible unless it could be shown that the original was lost or destroyed or in the possession of the opposite party, such showing was not necessary in the case of a public document. The Court characterized the report, issued by the Bureau of Customs, as public document and declared that the whereabouts of the original was therefore not required to be shown by the appellee. With regards to the contention that the trial judge erred in ignoring the evidence in the case when rendering his final judgment, the Court held that the evidence showed that there was a fire, that goods were destroyed, and that the appellant had failed to compensate the appellee. The Court noted that it was sufficient that the report of the Customs Bureau, which showed that the damage sustained was in excess of the policy value, was introduced into evidence, and that in the face of that report, there no further need for the appellee to present any other evidence showing the actual loss sustained by it.

Lastly, the Court held that the arbitration clause in the policy was a violation of the Constitution since it attempted to oust the courts of the jurisdiction granted them by the Constitution and statutes enacted pursuant to the Constitution. The Court observed that the fact that the Constitution provided for matters to be determined by

administrative agencies before a final determination by the courts does not vest in the parties to any contract the right to subscribe to an agreement which had the tendency to our the courts of their jurisdiction.

Accordingly, and on the foregoing reasoning, the Court affirmed the judgment of the trial court.

Nelson Broderick and Seward M Cooper appeared for appellant. John A. Dennis, Sr., Johnnie N. Lewis and Elijah Garnett Sr. appeared for the appellee.

This is an action of damages growing out of an insurance contract in which M. S. Bhatti and Sons, Inc., a Liberian corporation, on May 8, 1985, insured with the appellant its bonded warehouse containing stocks of general merchandise under policy no. 10LB-2016, for a total coverage of $110,000.00. On the night of October 5, 1985, while the said insurance contract was still in full effect, there was a fire outbreak in the insured's bonded warehouse. as a result of the fire outbreak, the goods of appellee, which were stored in the bonded warehouse, were destroyed. The value of the goods was placed at some $449,434.46. Appellee contacted the Fire Bureau of the Republic of Liberia, the Bureau of Customs at the Free Port of Monrovia, along with the National Police Force, R. L., all of which brought the fire under control. After investigating the fire, the Fire Bureau and the Criminal Investigation Division of the National Police Force prepared and submitted reports as to the extent of the damage done by the fire. On the basis of the said reports, appellee filed a claim with appellant for the coverage of his insurance policy, in the amount of $110,000.00, plus other damages sustained by appellee. The appellant rejected appellee's claim, and instead offered to settle the claim for only $6,000.00, which amount appellee refused to accept.

It is from appellant's refusal to settle appellee's claim under the insurance contract that appellee instituted the instant action of damages for breach of contract in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, on an eleven-count complaint, which we hereunder quote word for word, as follows:

"PLAINTIFF'S COMPLAINT

1. Plaintiff says and avers that it obtained an insurance coverage with the defendant on May 8, 1985 for the sum of $110,000.00 (one hundred and ten thousand dollars). See photocopy of the insurance policy attached and marked exhibit "A", to form a cogent part of the complaint.

2. Plaintiff also says that the policy obtained from the defendant covered stock on general merchandise as is evidenced of plaintiff's "A", attached hereto.

3. Plaintiff further says that on October 5, 1985, there was a fire outbreak at the insured's warehouse, which cost plaintiff $449,434.46. (See photocopy of statement of account hereto attached and marked exhibit "B", to form a cogent of this complaint.

4. Plaintiff says that the loss/fire disaster of the insured's premises was inspected by the Ministry of Finance, Customs and Excise Division, which appraised the loss at $449,434.46. (See photocopy of letter from the Commissioner of Customs and Excise, R. L., hereto attached and marked exhibit "C", to form a cogent part of this complaint.

5. Plaintiff also says that the National Fire Bureau, R. L., investigated the fire incident and reported that the fire was due to electrical short circuit. (See photocopy of the report from the National Fire Service, attached hereto and marked "D", to form a cogent part of this complaint.

6. That the Fire Service report showed that the goods damaged include drunki bed sheets, etc., to the value of $400,000.00 and above.

7. That the defendant agreed and accepted liability but wanted to settle for an amount far below the damage/loss sustained. Plaintiff gives notice that at the trial, it shall produce document to substantiate the averment.

8. Plaintiff also says that the defendant had alleged that the goods were stolen without any evidence to substantiate the averment. (See photocopy of defendant's letter hereto attached and marked exhibit "E" to form a cogent part of this complaint.

9. Plaintiff further says that it entered into a contractual agreement with the Government of Liberia to provide PX services to the soldiers of Liberia which entails the sale of beverages, cigarettes and other consumptive commodities to take care of the soldiers' basic needs.

10. Plaintiff also says that the defendant by letter on June 26, 1986 accepted to insure all fast moving goods of the plaintiff, (See photocopy of letter hereto attached and marked exhibit "F"), which resulted in the plaintiff increasing its volume of goods in

the bonded warehouse. Later, defendant returned the amount advanced without prior notice to the plaintiff, thus leaving the plaintiff with $110,000.00 coverage, even though the stock had been increased.

11. Plaintiff also says that because of the refusal and gross neglects of the defendant to pay or settle its obligation in the amount of $110,000.00, the plaintiff has been unable to order goods and continue to sell to the buyers.

Wherefore, and in view of the foregoing facts and circumstances, plaintiff requests this Honourable Court to award it special damages in the amount of $110,000.00 and general damages in any amount the jury will find fit to compensate the plaintiff from the loss sustained as a result of defendant's refusal to pay the plaintiff to enable it to carry on its normal business which has brought substantial loss to the plaintiff."

The appellant filed a twenty-four count answer alleging in substance that the proof of loss allegedly sustained by the plaintiff violated the procedural mechanism provided for in the insurance contract.

The appellee also filed a twenty-seven count reply and thereafter pleadings rested.

On the 6th day of February, A. D. 1987, His Honour J. Henric Pearson, who was then presiding over the December, A. D. 1986 Term of the Civil Law Court, Sixth Judicial Circuit, disposed of the issues of law and ruled the case to trial by a jury under the direction of the court. The appellant, in the exercise of his right to waive trial by jury under the Civil Procedure Law, Rev. Code 1: 22.1(4), waived jury trial.

Section 22.1(4) states: "The failure of a party to serve a demand for trial by jury of an issue as required by this section and to file it as required by section 8.2 constitutes a waiver by him of trial by jury of such issue unless such demand had been served by another party. If a demand for trial by jury has been made under this section, a party nevertheless waives his right to trial by jury by:

(a) failing to appear at the trial;

(b) filing a written waiver with the clerk; or

(c) orally consenting in open court to trial without a jury.

"A party shall be deemed to have waived the right to trial by jury of the issues of fact

arising upon a claim by joining it with another claim with respect to which there is no right to trial by jury, or of the issues of fact arising upon a counterclaim by interposing it in an action in which there is no right to trial by jury."

The trial judge, after hearing the evidence on both sides, adjudged appellant liable in the action of damages for breach of contract. The court then rendered final judgment awarding $110,000.00 and $15,000.00 as special and general damages, respectively, in favor of appellee. Appellant not being satisfied, with the final judgment, excepted to the same and announced an appeal therefrom to this Court of final resort. A bill of exceptions containing 19 counts was thereafter filed for our review and consideration.

Counts 5, 6, 7, 8, 9 and 10 of the bill of exceptions are nit worthy of our consideration as they relate to the rulings of the trial judge on objections interposed during the trial, and which, in our opinion, are not relevant to the final determination of this case.

In counts one and two of the bill of exceptions, appellant untended that the trial judge committed a reversible error when he overruled appellant's resistance to appellee's motion to join the Insurance Company of North America as a party defendant to the case.

Our Civil Procedure Law, Rev. Code 1: 5.51, on joinder of parties, provides as follows: "Person (a) who ought to be parties to an action if complete relief is to be accorded between the persons who are parties to such action, or (b) who might be inequitably affected by a judgment in such action shall be made plaintiffs or defendants therein."

In the case Franco-Liberian Transport Co. v. Republic and Weeks, 13 LLR 541 (1960), decided January 15, 1960, this Court held that "parties may be added to an action by order of the court on its own initiative." At syllabus 2 of the same case, this Court also stated that "a court may cause a summons to be issued to a party added to a suit on the initiative of the court."

According to the records certified to this Court, Intrusco is merely an agent of the Insurance Company of North America in regard to the Insurance Contract out of which the action of damages grew. In our opinion, whatever judgment is rendered against Intrusco will directly or indirectly affect the Insurance Company of North America, the principal. We therefore hold that the trial judge did not err when he overruled appellant's resistance to appellee's motion to join, counts one and two of

the bill of exceptions are therefore not sustained.

In count three of the bill of exceptions, appellant contended that the trial judge committed a reversible error when he denied appellant's motion for continuance during the 22nd day's jury session, on the ground that the motion was designed to delay and baffle justice.

A careful perusal of the case records reveal that at the call of the case on the 15th day of April, A. D. 1987, same being the 22nd day's jury session, Counsellor Nelson Broderick, for appellant, called the court's attention to their motion filed for continuance of the case to the next Term of the court on the ground that appellant's material witness had been diligently searched for but could not be found, and hence was believed to be "out of the country. Counsel for plaintiff in resisting said motion, contended that the court's bailiff, John Togba, who was alleged to have served the subpoena, denied ever serving said writ of subpoena. According to Bailiff John Togba, it was Counsellor Nelson Broderick who handed the writ to him, the bailiff, on the evening of April 15, 1987, and dictated to the said bailiff the returns to the effect that the witness could not be found, the basis for which the motion was filed. The records further reveal that Counsellor Broderick admitted in open court that he had caused the bailiff to make returns to the writ in the manner stated because he himself knew that the witness was out of the country.

In the case: Sautet v. Payne, 12 LLR 183 (1954), decided on December 10, 1954, this Court held that "a motion for continuance should be denied where it appears to the court that the motion was made for the purpose of delay."

Based upon the admission made by Counsellor Broderick, coupled with the testimony of court's bailiff, John Togba, and the results of the investigation conducted by the trial judge in regard to the returns to the writ of subpoena allegedly served at the request of counsel for appellant to procure the attendance of its materiel witness, the court had no other alternative but to deny same en the ground that same was intended merely to delay and baffle the trial. Count three of the bill of exceptions is therefore net sustained.

Count four of the bill of exceptions attacked the trial judge for overruling appellant's objection to the identification of two documents offered by appellee's witness, M. S. Bhatti, the contents of which documents had not been pleaded.

"Authorities en evidence .in respect to determination of questions of admissibility are

agreed that the admissibility of documentary evidence as in the case of evidence in general, is the question for the trial court to be determined from the circumstances of a particular case. So it is the province of the court to decide any preliminary questions of fact, however intricate the solution, which may be necessary to enable it to determine the admissibility of a document." See R.C.L. (RULING CASE LAW), vol. 17, p. 463.

In light of this, the Court is of the opinion that the trial judge did not err when he overruled the objection. Count Four of the bill of exceptions is therefore overruled.

In count 11 of the bill of exceptions, appellant contended that the trial judge committed a reversible error when he admitted into evidence document marked by court P/5, being duplicate copy of a report, the original if which was said to have been in the possession of the Customs Commissioner who was never subpoenaed.

The Civil Procedure Law, Rev. Code 1:25.6(2), Under Best Evidence Riles, provides that "a copy of a writing is not admissible as evidence unless the original is proved to be lost or destroyed or to be in the possession of the opposite party who has received notice to produce it or unless it is a copy of some public record or document proved as provided in section 25.10 of this chapter."

In the instant case, court's mark P/5 is the report of the fire outbreak, filed with the Commissioner of Customs from -Inspector Eric White of the Bureau of Customs, touching on the damage done to appellee's warehouse as a result of the fire incident on October 5, 1985. P/5 is therefore a public record or document in keeping with the provision of section the Civil Procedure Law, Rev. Code 1: 25.6. Hence, the trial judge did not err in admitting the said document into evidence. Count 11 of the bill of exceptions is therefore not sustained.

Count 12 of the bill of exceptions attacked the trial judge for refusing to place a mark of identification on the documents allegedly referred to by appellant's witness, Gabriel Oniyama. We stated earlier in this opinion that as a general rule, the admissibility of documentary evidence is a question for the trial court to be determined from the circumstances It is the province of the court to decide any preliminary questions of facts which may be necessary to enable admissibility of document, question for the trial of a particular case. It is the province of the court to decide any preliminary questions of fact which may be necessary to enable it to determine the admissibility of such documents.

During the trial of the case in the court below, the judge acted in a dual capacity, both as judge and as jury. Accordingly, where a request was made to place a mark of identification on a document and the judge sitting as both judge and jury, refused to place a mark on same, such refusal of the judge could be construed to mean that the document sought to be identified had no relevancy to the issue. Count 12 of the bill of exceptions is therefore not sustained.

In count 13 of the bill of exceptions, the appellant contended that the trial judge committed a reversible error when, in "Your Honour's final judgment, handed down on June 3, 1987, sheets one through four, 15th day's Chambers' session, you ignored the evidence submitted by defendant."

A careful perusal of this count shows that in the appellant, in its effort to charge the judge with the commission of error, failed to specifically point out the portion of the evidence submitted by appellant which was allegedly ignored by the trial judge. This renders the said charge impossible for us to dwell on. Under these circumstances, count 13 of the bill of exceptions is hereby overruled for want of clarity.

Count 14 of the bill of exceptions charged the trial judge with refusing to dwell on several issues listed by appellant as 14 (a) to (d), namely: (a) that there was theft committed at the bonded warehouse the value of which appellee had failed to submit; (b) that the appellee had failed to furnish appellant the required document upon which a full determination of the loss could have been made; (c) that the appellee had violated the insurance policy by its failure to maintain a fire proof safe in the premises for the purpose of keeping documents and books relating to the business; and (d) that the appellee had failed to exhaust the procedural mechanism agreed to by the parties and contained in the policy.

In our opinion, there are two principle issues presented in Count 14 of the bill of exceptions, found in sub-paragraphs (a) to (d). They are as follows:

(1) Whether or not the appellee can recover against the appellant?

(2) Whether or not the alleged violation of procedural mechanism by appellee was sufficient to warrant the dismissal of appellee's claim?

With respect to issue number one, we note that the evidence adduced at the trial conclusively established that:

(a) The appellee insured with the appellant its bonded warehouse containing general merchandise for a coverage valued 3110,000.00, under Policy No. 10LB-2016.

(b) That the policy was in full force and effect when the fire outbreak occurred and damaged appellee's properties to the tune of $449,434.46. This was confirmed by the Bureau of Customs, the custodian of the warehouse at the time.

Now let us turn to the law. Warehouse system, for our pur-pose, is defined "as a system of public stores or warehouses established or authorized by law, called "bonded warehouse", in which an importer may deposit goods imported, in the custody of the revenue officers paying storage, but not being required to pay the customs duties until the goods are finally removed for consumption in the home market, and with the privilege of withdrawing the goods from the store for the purpose of reexportation without paying any duties." BLACK'S LAW DICTIONARY 1421 (5th ed.).

As stated earlier, the contentions of the appellant as contained in sub-paragraphs (a) to (c) under count 14 of the bill of exceptions are that there was theft committed at the bonded warehouse; that the appellee had failed to submit the value of the goods stolen; that appellee had failed to furnish the necessary documentation to appellant upon which the full determination of the loss could have been made; and that the appellee had violated the insurance policy by his failure to maintain a fire proof safe in the premises in which the documents and books relating to the business should have been kept. According to appellant, the failure by appellee to perform the requirements enumerated in sub-paragraphs (a) to (c) under count 14 of the bill of exceptions, excluded recovery by appellee against appellant.

Firstly, it is noteworthy to recognize that the bonded warehouse, though insured by appellee, was a public building under the custody of the Bureau of Customs of the Republic of Liberia. Secondly, that documents relating to the goods imported by appellee and placed in the bonded warehouse were in the possession of the Bureau of Customs, the custodian of the bonded warehouse. That agency was in the position to determine, without the production of documents by appellee, the quantity of goods that were then in the bonded warehouse at the time of the fire, the quantity of gods stolen from the warehouse, and the respective values thereof.

For the benefit of this opinion, we hereunder quote the letter from the Commissioner of Customs and Excise, Republic of Liberia, dated December 20, 1985, addressed to the General Manager of M. S. Bhatti & Sons, appellee herein, with

respect to the actual cash value of the loss sustained by appellee, as a result of the fire outbreak:

"MF/2-14/360/' 85 Mr. General. Manager
M. S. Bhatti & Sons,
Box 1843
Monrovia, Liberia.

Mr. General Manager:

Acknowledgment is hereby made of your letter dated October 7, 1985, in which you informed this Office of the conflagration in your bonded warehouse on the night of October 5, 1985, at precisely 11:00 p. m.

We have carefully perused the report received from the Inspection and Management Control Division, dated November 11, 1985, and have keenly observed. the following recommendations:

1 That the CIF value of the bonded goods in the warehouse at the time of the fire incident, as reported by the Inspection Division, totaled $328,709.29."

2. Written reports received from the fire Department,; Ministry of Justice confirm the total loss of $449,434.00, including the anticipated profit margin.

3. It is further indicated in the report that the total Government levies on the bonded goods destroyed by the fire was $335,712.20. The report therefore concludes that due to economic loss sustained by M. S. Bhatti and Sons, the levies are recommended waived.

Having carefully reviewed the pints raised in the inspectors reports and also having examined the circumstances surrounding the outbreak of the fire, and the loss sustained, as indicated in the Fire Department Report, we entertain no reservations against the claim.

In this connection, this office hereby approves that Government levies on the goods damaged by the fire outbreak are waived.
Kind regards,
Very truly yours,
Thomas S. Garbo

COMMISSIONER OF CUSTOMS & EXCISE, R. L."

In the absence of any showing by appellant that the Bureau of Customs was contacted for those documents with respect to the quantity of goods stolen, as well as for the goods destroyed by the fire, and that the Bureau of Customs denied ever having same, we cannot uphold appellant's contention in this respect.

Regarding the issue of appellant's failure to provide a fire proof safe for the purpose of keeping the documents and books relating to appellee's business, this contention, in our opinion, cannot also be upheld because of the reason given above.

Regarding sub-paragraph (d) under count 14 of the bill of exceptions with respect to appellee's failure to exhaust the procedural mechanism agreed to by the parties and contained in the policy, to the effect that before any party resorts to court action, he must first request the appointment of appraisers to determine the actual value of loss, we hereunder quote verbatim the relevant portions of the insurance policy requiring the submission to appraisers of disagreements between the parties as to the actual cash value of the goods destroyed or damaged by the fire, or the actual amount of loss, as follows:

"5. That in the event of a disagreement between the insured and the insurance company as to the actual cash value of the goods destroyed or damaged by the fire or the actual amount of loss, the insured or the insurer shall request the submission of the dispute for determination by competent and disinterested appraisers—one selected by the insured, a second selected by the Insurance Company and the third to be selected by the other two or by the court in the event a third cannot be agreed upon. The award made of the actual cash value of the loss shall be binding on the parties and paid by the insurance company."

6. That no party shall institute any legal action against the other unless the procedure outlined above shall have first been complied with."

In the case Grant v. The Foreign Mission of the National Baptist Convention, 10 LLR 209 (1949), this Court held that "since the jurisdiction of the courts cannot be ousted by private agreements of individuals made in advance, a clause in a contract is invalid which provides that if a question relating to the contract cannot be settled satisfactorily by the parties, it shall be referred to a board whose findings the parties agree to accept as final and binding."

Other authorities have said: "Both in England and the United States, it has been decided in a great number of cases and conceded in an equally large number of other cases to be settled law that the jurisdiction of the court can not be ousted by private agreement of individuals made in advance that private persons are incompetent to make such binding contract, that all such contracts are illegal and void as against public policy." 14 AM. JUR., Contracts, § 196.

From the wordings of clause 6 of the procedural mechanism quoted above, one can infer that the contract not only makes it a matter of must but states that it is unconditionally mandatory that the parties are bound to follow the procedural mechanism which, in our opinion, is a direct attempt to deprive the parties to the contract of the rights guaranteed to them by the Constitution of Liberia to have their matter settled impartially by the courts of law, the only Branch of the Government vested with the judicial power of this country. In our opinion, such contracts must be declared void and unenforceable. This view finds support from other legal authorities, as follows:

"It is a general rule that an agreement which violates a provision of a Constitution or of a constitutional statute or which cannot be performed without violation of such a provision is illegal and void." 14 AM. JUR., Contracts, § 158.

In the year 1973, approximately 24 years following the opinion of this Court in Grant v. Baptist National Convention, U. S. A., the Legislature of the Republic of Liberia enacted the new Civil Procedure Law, Rev. Code 1: 64.2, which provides for a procedure to compel arbitration proceedings. Sub-paragraph 1 of the said section allows arbitration based upon a prior agreement between the parties to an action to arbitrate, or where the parties mutually consent to settle a disagreeable issues either as a result of a contractual obligation or an issue growing out of an action pending before a forum, be it judicial or otherwise. Subparagraph (2) of the afore mentioned section provides for procedures to stay arbitration proceedings where a party to an action applies to a tribunal to have an issue submitted to arbitration and the opposing party feels that the grounds for arbitration do not lie, or he sets forth ether reasons as provided under sub-paragraph (2), to buttress his opposition to arbitrate whatever issue or issues which constitute the bone of contention.

Whatever the situation may be, a party desiring to have an arbitration must apply to court setting forth in such application the reasons why the issues should be submitted to arbitration as provided under sub-paragraph 1, and support the same by an affidavit. The court will then institute an investigation summarily and if the court is

convinced that there is proper ground for submitting the issue for arbitration, it shall so declare. Our Civil Procedure Law provides the following:

Section 64.2, sub. paragraph 1, Proceeding to compel arbitration; grounds; form of hearing. "A party making application to the court may obtain an order directing the parties to arbitrate by showing:

(a) The existence of an agreement described in sec. 64.19 and

(b) That he is a party to such an agreement; and

(c) The referability of the controversy to arbitration; and

(d) The refusal of another party to the agreement to arbitrate such controversy."

"Where such issues are raised, the court shall proceed forthwith and summarily to hear and determine the issues raised upon the affidavits submitted in support of and in opposition to the application, except that the court may proceed to try the issues, with or without a jury, where it deems such procedure necessary, and shall order arbitration if the issues are found for the moving party." Civil Procedure Law, Rev. Code 1: 64.2(1).

The same procedure applies in the case of an attempt to stay arbitration proceedings. Where an application is made to the court to compel arbitration proceedings and the opposing party is unwilling or refuses to consent, he shall file an application to the court to stay arbitration proceedings, setting forth those reasons for staying arbitration proceedings as provided under sub-paragraph (2) of section 64.2. By the same token, the court the court shall conduct a summary investigation to determine whether or not the application shall be granted. If the court is not convinced that the issue should be submitted to arbitration, it shall so decide. The law states:

Section 64.2, sub. paragraph 2, Proceedings to stay arbitration, grounds form of hearing, time limitation, provides:

"On application the court may stay an arbitration proceeding commenced or threatened on a showing by an applicant adversely affected thereby that:

(a) There is no agreement as described in section 64,1; or

(b) He is not a party to the agreement; or

(c) The controversy is not referable to arbitration; it

(d) The adverse party is not a party to the agreement; or

(e)The right to proceed to arbitration has been waived by the adverse party; or

(f) The agreement has been revoked by either party."

Where such issues are raised, the court shall proceed forthwith and summarily to hear and determine the issues raised upon the affidavits submitted in support of and in opposition to the application, except that the court may proceed to try the issues raised, with or without a jury, where it deems such procedure necessary. If the determination is made in favour of the adverse party the court may order the parties to arbitrate." Civil Procedure Law, Rev. Code 1: 64.2 (2).

In the instant case, there was no application made to the court to compel arbitration. Needless to say an application to stay arbitration, since there was none to arbitrate. Therefore, the court could not sua sponte submit the issue to arbitration since courts do not do for parties what they should do for themselves.

The Constitution of Liberia provides that: "The judicial shall be vested in a Supreme Court and such subordinate courts as the Legislature may from time to time establish. The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature. Judgments of the Supreme Court shall be final and binding and shall not be subject to appeal or review by any other branch of government. Nothing in this article shall prohibit administrative consideration of the justiciable matter prior to review by a court of competent jurisdiction. "LIB. CONST. art. 65 (1986).

Unto every man, the Constitution of Liberia guarantees the protection of our courts under the due process clause. Due process means an opportunity to be heard in an orderly proceeding adoptable inn the nature of the case. According to the wordings of the Constitution, it is only the Judicial Branch of Government, headed by the Supreme Court of Liberia, that is vested with the power to adjudicate judicial matters. While it is true that there is a clause under Article 65 of the Constitution of Liberia providing for administrative investigation of the justiciable matter prior to review by court of competent jurisdiction, we are of the opinion that this provision does not

permit contracting parties to subscribe to an agreement which has the tendency to oust the courts of their jurisdiction.

Besides, the records further reveal that after the fire incident of October 5, 1986, in the appellee's bonded warehouse, and which resulted in appellee's property being damaged, appellee informed appellant regarding the extent of the damage, evidenced by the report of the Customs Commissioner. Appellant, however, offered to pay $6,000.00, for reasons that the value of the property stolen from the warehouse was not known, the policy did not cover theft committed at the warehouse, and the appellee failed to maintain a fire proof safe in the warehouse.

In our opinion, appellee made a reasonable effort to have the matter settled out of court but that because of appellant's unwillingness to execute its side of the insurance contract, appellee was compelled to institute this action. Hence, the said procedural mechanism clause was no bar to appellee's action, for the said clause attempted to deprive the courts of Liberia of their jurisdiction, which was in violation of the Constitution of Liberia. Count 14 of the bill of exceptions is therefore overruled.

Counts 15, 16, 17, 18 and 19 of the bill of exceptions accused the trial judge of committing a reversible error when he awarded. $110,000.00 and $15,000.00 as special and general damages, respectively, in favor of the appellee since, appellant said, the awards were not supported by the evidence.

Why did the trial judge, in his final judgment, refer to the report of the Bureau of Customs as sufficient evidence of what was in the warehouse of appellee? We have stated earlier in this opinion that the bonded warehouse in which appellee stored its properties was under the direct supervision of the Bureau of Customs, the custodian of the warehouse and all documents pertaining to the goods therein. After the fire incident of October 5, 1986, it was the Bureau of Customs which conducted an investigation regarding the extent of the damage done to the property of appellee and personally informed him of the same. We quoted that letter earlier in this opinion. Under the law, "the best evidence which a case emits of must be produced and no evidence is sufficient which supposes the existence of a better evidence." Civil Procedure Law, Rev. Code 1: 25.51(1).

From what we have said, the Bureau of Customs is the best evidence in this case, and they, having placed the value of appellee's goods damaged during the fire incident at $445,434.46, this evidence, in the opinion of the Court, must be considered conclusive. In the instant case, the appellant having waived trial by jury in the court

below, the curt acted in a dual capacity, that is, as a judge, clothed with the authority to pass upon the legal issues presented by the parties, and, as a jury clothed with the authority to pass upon the factual issues presented by the parties and to accord same whatever credibility the court deemed fit.

In this light, appellant's contention, contained in counts 15 to 19 of the bill of exceptions are baseless and therefore cannot be upheld. However, since it has not been disputed by the appellee that the limit of his coverage under the insurance policy was $110,000.00 and there was no showing in the evidence that he had defaulted in executing his obligations under the contract, as far as payment of the premium under the contract was concerned, we will uphold and affirm the amount of $110,000.00 awarded in favor of appellee as special damages and the amount of $15,000.00, also awarded in favor of appellee as general damages.

WHEREFORE and in view of the foregoing, it is the opinion of this Court that the judgment appealed from be, and the same is hereby affirmed. The Clerk of this Court is hereby ordered to send a mandate to the Court below to resume jurisdiction over the case and enforce its judgment. Costs are ruled against the appellants. And it is hereby so ordered.

Judgment affirmed