JAMES PAGE, Appellant, v. **SAMUEL B. COOPER**, Sr., Appellee.

APPEAL FROM THE DEBT COURT FOR MONTSERRADO COUNTY.

Heard: May 3, 1983. Decided: July 6, 1983.

1. A plea in confession and avoidance is purely an affirmative plea which is permissible in our jurisdiction; it is not a denial and avoidance to render the plea inconsistent.

2. Where a statute of limitations is of general application, the burden of showing that it does not apply to a particular case is usually on the party who denies the bar of the statute.

3. If the plaintiff's initial pleadings disclose upon their face that his claim is barred by statute of limitations, the defendant may assert the defense specifically by answer or plea.

An action of debt was instituted by Appellee Samuel Cooper, Sr. for rental arrears in the amount of $2,600.00. Appellant, in his answer, denied being indebted to appellee in the amount sued for, but indicated that in 1977, he owed appellee rental arrears in the amount of $1,950.00, but that appellee having elected to wait for over three years is barred by the statute of limitations.

Appellee did not deny appellant's plea of the statute of limitations but contended that the answer raised a plea in confession and avoidance, which according to him, is contradictory and evasive, and hence dismissible.

The trial court ruled that appellant did not raise the statute of limitations affirmatively, and accordingly ruled the case to trial. From a final judgment rendered in favor of appellee, appellant announced an appeal to the Supreme Court.

The Supreme Court held that the statute of limitations was affirmatively pleaded by appellant and that the trial court erred by not sustaining it and in dismissing the action. The Court said that a plea in confession and avoidance is an affirmative plea which is permissible in our jurisdiction, and that it does not amount to a denial and avoidance to render it inconsistent. In reversing the judgment against the appellant, the Court noted that under the statute, a party should deny the averments of an adverse party which are unknown or believed by him to be untrue. It observed that if the party is without knowledge or information sufficient to form a belief as to the truth of an averment made by his adversary, he should so state. That statement, it said, would have the effect of a denial.

The Court acknowledged that where defendant's answer in an action of debt contains both a general denial and a plea in confession and avoidance, the answer may be dismissed for being inconsistent, evasive and self-contradictory, and for that matter hypothetical where the statute of limitations is invoked. Those situations, the Court said, did not exist in the instant

case. Hence, the statute having been pleaded affirmatively, the Court ordered the judgment reversed.

Nelson Broderick appeared for the appellant. Stephen B. Dunbar appeared for the appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

According to the records certified to us from the court below, an action of debt by attachment was instituted in the Debt Court for Montserrado County by the plaintiff, appellee herein, against the appellant in February 1981, praying for recovery of the amount of $2,600.00 plus interest, which amount is alleged to represent rental arrears owed the appellee by the appellant as tenant at will for thirteen (13) months, that is, from July 1976 to July 1977, inclusive. For the benefit of this opinion, we deem it appropriate to quote hereunder count one of the two-count complaint; it reads as follows:

"Because plaintiff says that defendant is justly indebted to him in an amount of two thousand six hundred dollars ($2,600.00) covering rental for one of his houses situated at Lakpaze, Sinkor, Monrovia, from July, A. D. 1976, up to and including July, A. D. 1977, thirteen months, at a monthly rental of two hundred dollars ($200.00), as can be seen from profert herewith made and marked exhibit "A".

And plaintiff gives notice that a writ of subpoena duces tecum shall be prayed for on defendant to produce the original at the trial."

The exhibit "A" referred to and attached to the complaint is a letter from Appellee's counsel, dated January 23, 1981, addressed to and reminding the appellant to settle his rental arrears with the appellee. There is no other exhibit filed with the complaint.

On the 27th day of February, 1981, the defendant, appellant herein, filed an answer in which he raised the plea of statute of limitations, contending that the appellee was barred from recovering because the three year period within which appellee should have sued for the alleged rental arrears had elapsed; therefore, the action should be dismissed.

Appellee filed a reply attacking the appellant's answer for raising a plea in confession and avoidance, contending that such a plea is contradictory and evasive, and that therefore the answer was a fit subject for dismissal. The appellee also contended that the statute of limitations was an affirmative plea and, therefore, the appellant should have first admitted appellee's claim before raising the plea.

The trial judge heard the law issues raised in the pleadings and ruled dismissing counts 6 and 7 of the answer which raised the plea of statute of limitations, holding that appellant did not plea the statute affirmatively. The case was then ruled to trial on its merits. Counsel for appellant noted exception to the ruling, but did not appear in court for trial on the day the case was assigned; consequently, the court proceeded to hear appellee's side of the case and

rendered final judgment. Appellant excepted to the final judgment of the court and has brought this case up on appeal for review on a two-count bill of exceptions.

The only issue raised in the bill of exceptions and argued in the briefs by counsel for both parties is, the question of the statute of limitations raised in the appellant's answer. Appellant contended and strongly argued that the appellee was barred from maintaining an action of debt against the appellant because the statutory period of three years after the right of action accrued to the appellee had elapsed. Counsel for appellant cited for reliance the Civil Procedure Law, Rev. Code 1:2.15, which reads as follows:

"An action to obtain payment of a debt or for a breach of a contract not based on a written instrument or acknowledgment, whether such contract is express or implied in fact or in law, shall be commenced within three years of the time the right to relief accrued."

On the other hand, counsel for appellee contended and strenuously argued that the plea in confession and avoidance is an inconsistent plea; that the statute of limitations not having been affirmatively pleaded, that is, by appellant firstly admitting that he owed the appellee rental arrears as alleged in the complaint before pleading the statute of limitations, the trial judge was correct in dismissing the counts in which the issue was raised. For the benefit of this opinion, we also quote hereunder counts 1, 6 and 7 of the answer which embody the issue; they read, as follows:

1. Defendant denies that he is indebted to plaintiff in the sum of $2,600.00 claimed in count 1 of his complaint as rental for plaintiffs house situated at Fiama, 21' Street, Sinkor, Monrovia, but rather that defendant was indebted to plaintiff in the sum of $1,950.00 at $150.00 per month, which was verbally agreed upon between plaintiff and defendant as rental for the subject premises.

6. Defendant says that because plaintiff refused to accept the rental payment for the house when defendant offered to pay it in 1977, but stated that he did not care for the money but what he wanted was for defendant to vacate his house, he cannot over three years now demand payment because as a matter of law the claim is now stale and unenforceable.

7. Defendant raises the plea of statute of limitations and says that plaintiff is guilty of laches and waiver and he is estopped and forever barred from instituting this action of debt for rental payment which was due over three years ago" (sic).

By reason of the above-quoted averments of the appellant's answer, appellee contended in his reply and his counsel argued before us that the answer is a plea in confession and avoidance; that it is contradictory, evasive and hypothetical in respect of the plea of statute of limitation.

The Bench is divided on this issue, and the minority holds that the statute of limitations was hypothetically pleaded, in that, the appellant did not admit being indebted to the appellee in

the whole amount of $2,600.00 sued for; instead, he admitted owing appellee only $1,950.00, thereby admitting and at the same time denying appellee's claim in part, which made appellant's answer hypothetical. Our distinguished colleagues who have dissented from us hold the view that the trial court was correct to have dismissed counts 6 and 7 of the answer; that the appellant should have appeared and participated in the trial to establish by evidence that he owed appellee only $1,950.00 instead of $2,600.00 as sued for.

We, the majority, hold the view that the statute of limitations was correctly pleaded by the appellant and, therefore, the trial judge should have dismissed the complaint, considering the averments of the appellant's answer as quoted supra, which clearly showed, and as also borne by appellee's own complaint, that the right of action accrued to appellee in 1977. Therefore, under our statute, appellee should have brought this suit within three years after July 1977. The action of debt having been instituted in February 1981, that is to say, quite four years and seven months after July 1977, the statute of limitations rested the case purely on the question of law and, therefore, nothing else was left to be established by evidence at the trial as held by our dissenting colleagues. We strongly maintain that the appellant's answer is in keeping with our statute controlling presentation of defenses and objections in responsive pleadings.

The criterion which, in our opinion, controls the plea of the statute of limitations in this case is not what amount the appellant owes, but rather whether or not the appellant owed the appellee at all. If, for example, a defendant is sued for one million dollars and in his pleading he admits owing only one hundred dollars, this will not render the defendant not liable to the plaintiff. And so, it is not the question of how much is owed that controls, but whether or not the appellant is indebted to the appellee.

Under our statute, a party pleading shall deny those averments of an adverse party which are unknown or believed by him to be untrue. "If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny the remainder" (emphasis ours). Civil Procedure Law, Rev. Code 1:9.8(2). The appellant in traversing count one of the complaints in his answer was, therefore, correct to have, in good faith, specified what was true and deny what was not true. Hence, the averments do not split appellee's complaint as to render the appellant's plea as being hypothetical; nor can the said averments of the answer be said to defeat the plea of the statute of limitations, which plea is supported by the fact as stated in count one of the complaint and counts six and seven of the answer, that the right of action accrued to appellee in July 1977, and that he elected to wait until February 1981, quite four years and seven months, before bringing the action of debt.

The argument of counsel for appellee, which our dissenting colleagues are in agreement with, is that the answer of the appellant raises a plea in confession and avoidance, and hence contradictory, evasive and hypothetical. We have neither found any hypothesis in the plea of the statute of limitations as raised by the appellant nor have we found the answer contradictory and evasive. We must therefore assume that these words were merely employed by the appellee's counsel without realizing their inapplicability to the issue in this case, and simply because they are frequently used by lawyers in legal and court documents. We are also of the opinion that the appellee also misconstrued and misapplied the phrase: "plea in confession and avoidance", which is an affirmative plea and permissible under our statute. It appears also that the said phrase is being confused with the phrase: "denial and avoidance", a plea which is inconsistent and renders an answer a fit subject for dismissal.

We hold the view that only where defendant's answer in an action of debt contains both a general denial and a plea in confession and avoidance, can the answer be dismissed for being inconsistent, evasive and self contradictory, and for that matter hypothetical where the statute of limitations is invoked. In the case at bar, the appellant specifically averred in his answer that the rental he owed the appellee in 1977 was not $2,600.00 as alleged but rather $1,950.00, which amount he offered the Appellee but that the appellee refused to accept same and elected to wait until the statutory period of three years within which he should have initiated the debt action had elapsed; therefore, appellant contended that the appellee is barred by the statute of limitations from recovering.

The plea in confession and avoidance is purely an affirmative plea which is permissible in our jurisdiction; it is not a denial and avoidance to render the plea inconsistent. In the Butchers' Association and Kaba v. Turay, reported in 13 LLR 365 (1959), this Court held that: "Where an answer pleaded by the defendant in an action of debt contains both a general denial and a plea in confession and avoidance, the answer is dismissible, evasive and self-contradictory." The line which must be drawn here in this case is that the answer does not contain both a general denial and the plea in confession and avoidance to render the plea of statute of limitations as raised by the appellant hypothetical; but where the answer only raises the plea in confession and avoidance, such a plea is allowed, especially where the statute of limitations is invoked. The plea in confession and avoidance, which counsel for appellee argued renders the invocation by appellant of the statute of limitations hypothetical, is defined as: "One which admits that plaintiff had a cause of action, but which avers that he has been discharged by some subsequent or collateral matter." For reliance, BLACK'S LAW DICTIONARY 1310 (4 th ed.), under plea in confession and avoidance, at 1310.

According to Civil Procedure Law, Rev. Code 1:9.8(4), it is provided that:

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress,

estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

It is, therefore, our considered opinion and holding that there being no general denial with both confession and avoidance raised in the appellant's answer, the trial judge should have sustained appellant's answer and dismissed the complaint under the statute of limitations.

The learned counsel for appellee, with whom our distinguished dissenting colleagues are in agreement, argued that the statute of limitations was hypothetically pleaded by the appellant. Regrettably, however, we have found no support, neither is there any assumption nor any theory set up in the plea of the statute of limitations to qualify said plea as being hypothetical. The statute of limitations may only be deemed hypothetically pleaded where there is hypothesis in the plea. BLACK'S LAW DICTIONARY 877 (4th ed.) defines hypothesis as a supposition or assumption or theory set up to constitute a coherence and a specific situation as to indicate a probability. In the instant case, the appellant averred in his answer, in clear and simple language, that from July 1976 to July 1977, inclusive, he was owing appellee rental arrears in the sum of $1,950.00 at $150.00 per month, which amount he offered to pay but which appellee refused to accept; that appellee was barred from recovering because the statutory period of three years within which said action should have been brought has elapsed.

It is worthy to note here that throughout the appellee's reply, he did not deny that the right of action accrued to him in 1977 when he filed an action of summary proceedings to have appellant evicted from appellee's premises without asserting any claim for rental due. There is also no averment in appellee's reply to show why he permitted the statute to run against him. It is held by law writers that, where the statute of limitations is of general application, the burden of showing that it does not apply to a particular case is usually on the party who denies the bar of the statute. 34 AM. JUR., Limitation of Action, § 451. In fact, appellee did not deny in his reply that the statute ran against him, and what is not denied is deemed admitted. Civil Procedure Law, Rev. Code 1: 9.8(3).

The bar of the statute of limitations is ordinarily a matter of defense to be asserted by the defendant in avoidance of the plaintiffs action, and generally the plaintiff is not required to anticipate such defense and plead facts showing that the statute is not applicable or has not run, unless the plaintiffs pleading shows upon its face that the statutory period of time has elapsed, in which event he may properly, and in some cases is required to, in order to avoid attack on his pleading by demurrer, plead facts taking the case out of the statute. If the plaintiffs initial pleadings disclosed upon their face that his claim is barred by the statute of limitations, the defendant may, according to the practice in many states, raise the issue by

demurrer; otherwise, he should assert the defense specifically by answer or plea. 34 AM. JUR., Limitation of Actions, § 422.

In the instant case, although the appellee's complaint which he filed in February 1981 showed on its face that the amount sued for represented rental arrears from July 1976 to July 1977, inclusive, yet he did not make any attempt in his two-count complaint to show why he permitted the statutory period within which he should have brought the action to elapse before doing so, nor did he deny in his reply that the statute operated against him to prevent his recovery in the debt action.

Having carefully reviewed the issue and applying the legal principles thereto, it is our opinion that the statute of limitations was correctly pleaded, and the trial judge should have therefore dismissed the complaint.

In view of our holding and the law citations supra, the judgment of the trial court is hereby reversed with costs against the appellee. And it is so ordered.

Judgment reversed.

MR. CHIEF JUSTICE GBALAZEH dissents.

We are in agreement with the majority on the facts and circumstances of this case as outlined in their majority opinion. We are also in agreement with our learned colleagues on the legal authorities cited by them in their majority opinion. We are, however, in complete disagreement with them on the reasoning and conclusion of their findings. Hence, we have decided to withhold our signature from their judgment.

We therefore feel it is important to state from the outset that whatever differences of opinion have been expressed in our dissenting opinion, have not been on the question of the statute of limitations as the majority tends to imply but rather upon the interpretation of the statute of limitations in the light of our statutes governing pleadings and construction. The single issue, therefore, presented for the determination of this case is, when does the statute of limitations attach and how is it pleaded?

The statute of limitations, like any other statute, attaches under special conditions as outlined in the act governing it. In our jurisdiction, the general rule of law is that unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause of action accrues. Civil Procedure Law, Rev. Code 1:2.15; Freeman v. Liberian Supply Company, 19 LLR 438 (1970). It has often been said that this rule is never questioned, but that the difficulty lies in determining when the cause of action is to be deemed as having accrued and also in determining as to how the rule should be invoked. Hence, to answer the first part of the issue posed, we say here that the statute of limitations is invocable and attaches only where the right of action has accrued in favour of the party relying on it as

against the party filing a complaint. 54 C. J. S., Limitation of Action, § 108; 51 AM. JUR. 2d., Limitations of Action, §§ 22, 138, 482, 606, 709, 937.

As regards the second part of the question, which appears to be the main bone of contention in these proceedings, the general rule at common law and in this jurisdiction is that a statute of limitations being an affirmative defense must be invoked with affirmative words and declaration. Such affirmative declaration at common law must be in the form of a demurrer. In our jurisdiction, the statute must be specifically and affirmatively averred in the pleadings and the Act or statute relied upon must be quoted. In other words, at common law, a demurrer is not available to raise the defense of limitations where the bar of the statute of limitations does not clearly and affirmatively appear on the face of the petition, declaration or complaint. 54 C.J.S., § 345, at 472 and Bryant et al. v. Harmon and Oost Afilkaansche Compaignie, 12 LLR 330 (1956). From all these legal principles, we can plainly see that the statute of limitations as a bar to an action must be pleaded in a special and particular way as a ground for the demurrer. Courts of common law are warned not to consider anything outside the pleadings when ruling on the sufficiency of a demurrer or an answer, raising the defense of limitations.

After this brief analysis of the legal jurisprudence appertaining to the limitations of actions, let us now have a glance at the findings made by our distinguished colleagues in their majority opinion. The plaintiff, now appellee, filed an action of debt against the defendant, appellant herein, to recover the sum of $2,600.00. The defendant, appellant herein, in his answer acknowledged this indebtedness but disputed the correctness of the sum, claiming to owe the plaintiff only $1,950.00, a sum he was not willing to pay because of the operation of the law, that is, the statute of limitations. Thus, what we are chiefly concerned with here is the interpretation given by our learned colleagues to the statute of limitations and not with the statute of limitations per se nor the merits of the case as the majority appear to have done.

Now, to be more specific with the case, the appellant, defendant in the trial court, clearly and unequivocally admitted his indebtedness to the appellee, except that he reduced it to a level not contemplated in the appellee's complaint. If the appellant had stopped there, then the appellee would have been compelled to prove only that portion that was disputed by the appellant. But the appellant went further than that. He also invoked the statute of limitations as a ground for not honoring his financial obligations. This Court has time and again held that the statute of limitations must be pleaded with categorical affirmativeness, particularity and preciseness. In pleading the statute with particularity, the pleader must demur to the allegations; meaning that he must first of all admit all properly pleaded facts and then invokes the statute to bar the action alleged. In this case, the defendant, therefore, should have first of all admitted his indebtedness to the plaintiff in the full amount as alleged in the complaint.

Then, as a second move, invoke the statute to bar the plaintiff's rights. Under such circumstances, the court will only have one task, the task of determining whether or not the action was filed out of the statutory period. And if the answer was "yes" then the action would be thrown out in favour of the defendant. But by admitting only a portion of the claim and then pleading the statute of limitations, appellant herein, not only failed to meet the standards of pleading imposed by our laws but also directly split the plaintiff's complaint into two parts. The trial judge was, therefore, correct in dismissing the defendant's answer for being hypothetical and speculative. For our distinguished colleagues to have endorsed the appellant's action of reducing the plaintiffs claim and then pleading the statute of limitations, they have not only joined the appellant in splitting the appellee's complaint but also defeated the purpose of the Act Browne v. Republic, 22 LLR 121 (1973). One wonders what would have happened if the appellant had only disputed the sum and said nothing more!

We want to make it crystal clear here that we are not concerned here with whether or not the defendant owed the plaintiff the sum of $2,600.00 as alleged nor are we concerned with the question of whether or not the complaint was filed outside the time stipulated by the statute of limitations. This is not the purpose of this opinion. What we are concerned with here is simply this, why didn't the appellant just limit his indebtedness to $1,950.00 and leave the plaintiff to prove the balance or alternately acknowledge the full amount and then invoke the statute of limitations to give him a complete protection? This is what our law of pleadings requires of him and since he failed to fulfill this requirement, he cannot validly seek the protection of the statute.

A look at the appellant's answer, tends to give the impression that the appellant was not too sure of the firmness of his ground; hence, deviation to circumlocutory and speculative devices to frustrate the appellee's claim which appear to be genuine. This Court, as a court of last resort, should be very careful in interpreting our statutes, as failure to do so would result in the abuse of the statutes, not to mention the defeating of the principal purposes for which the statutes are intended. Our case law on the limitation of actions and how it should be pleaded is too rich to be questioned by this Court. Bryant et al v. Harmon et al., 12 LLR 330 (1956); Wesley and Good v. Dwalubor 19 LLR 282 (1969) and Browne, et. al, v. Republic, 22 LLR 121 (1973).

Incidentally, the provisions of Civil Procedure Law, Rev. Code, 1:9.8 (4) 109-110, quoted by the majority, indirectly support our stand. The provisions call for an affirmative defense!

In view of the points of law and the reasoning plainly elucidated herein, it is our considered opinion that the judgment of the trial court should have been affirmed and this appeal be dismissed accordingly.

The clerk of this Court is therefore hereby instructed to file this dissenting opinion as a constituent part of the records in this case.