RAYMOND CONCRETE PILE CO., Appellant, *v.* SARAH HOWARD AWAR, by and through her husband, FAID AWAR, Appellee.

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

Argued January 8, 9, 1973. Decided February 2, 1973.

1. In civil cases, if the rule of sequestration of witnesses can be said to apply to parties, the application therefor addressed to the discretion of the court must be timely raised.
2. A court's failure to specify grounds for overruling objections to immaterial questions is not reversible error.
3. The charitable nature of the act resulting in damages does not excuse the tortfeasor.

The appellant requested the appellee to dump some earth in his yard from trenches it had cut while laying pipeline. As a result the appellant's property was damaged. An action was commenced, and the defendant argued that the plaintiff had absolved it of liability for damages at the time she requested the service. The jury returned a verdict for the plaintiff and an appeal was taken from the judgment. Judgment *affirmed.*

M. Kron Yangbe and *Toye C. Bernard* for appellant. *James G. Bull* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

This case comes up to us on appeal from the Civil Law Court for the Sixth Judicial Circuit, Montserrado County.

From the record certified to us by the trial court, it appears that during excavation for the laying of sewer pipes by Raymond Concrete Pile Company near the

premises of the plaintiff in this action, Sarah Howard Awar, her fence and yard were damaged. She apprised Raymond Concrete Pile Company, the defendant, of the damage, but seemingly unable to make any progress with the defendant company she retained the services of the Bull law firm to protect her interest and get relief for the damage allegedly sustained by her.

The Bull law firm, by and through counsellor James G. Bull, consequent upon being retained by the plaintiff, addressed a letter to the defendant on December 5, 1969, claiming damages of $2,500.00, based upon an estimate made for the plaintiff by Edward Sweidy, a civil engineer and contractor. Raymond Concrete Pile Company on December 13, 1969, by a letter signed by Peter Foy, Area Controller, replied to the Bull law firm that their client's claim had been referred to the company's insurers, the International Trust Company of Liberia, and besides averring that any damage to plaintiff's property was not deliberately done, expressed regrets for whatever inconvenience she may have suffered. The letter will be quoted later on in this opinion. The plaintiff got in touch with defendant's insurers, but it seems that insurers disclaimed liability for any damage done to plaintiff's property. When no understanding could be reached, plaintiff filed an action for damages against defendant for $2,500.00 on April 14, 1970, complaining that defendant, while laying pipes on the side street where plaintiff's property is located, caused damage to her yard and fence in the amount of $2,500.00, as per estimate of repairs submitted by S.C.C. Contractors, which she made profert with her complaint.

On April 18, thereafter, defendant filed a special appearance, giving notice that it would contest the jurisdiction of the court over its person, and on the same date filed its formal appearance. On April 27, 1970, defendant filed an answer of two counts. The second count

was a general denial, and the first count stated that the plaintiff had requested removed earth to be dumped in her yard, and the accident occurred at that time.

We would like to mention two points of interest in respect to the answer filed by defendant. The first is that the action was instituted on April 14, 1970, and the return of the sheriff shows that the writ of summons was served on the defendant on the same day. The answer filed by defendant shows that it was dated April 24, 1970, but the affidavit to the answer shows that it was sworn and subscribed to on April 27, 1970, which obviously was the day the answer was filed, three days after the statutory time for filing. Although plaintiff did not raise the issue in her reply we mention these facts to pinpoint what is becoming a grave situation, the carelessness of lawyers in the conduct of their client's causes.

On May 6, following, plaintiff filed a reply to defendant's answer, containing a general denial and making reference to a letter addressed to counsel.

"The Bull Law Firm,
Suite 228,
Bank of Liberia Bldg.,
Monrovia, Liberia.

"Gentlemen:

"In response to your message of 5th December, 1969, we must inform you that we have made the subject of your client's claim against our Company a matter of a report to the International Trust Company of Liberia, Pan Am Bldg., Monrovia. May we suggest that, in this connection, you contract Mr. Richelieu Dennis of this Company.

"Our Claim Number is No. 69-133(44). We feel certain that an amicable settlement of this matter can and will be reached.

"Please assure your client, Mrs. Howard Awar, that

our action regarding her property was in no respect deliberate, and we regret whatever inconvenience she may have suffered.

"Very truly yours,
Raymond Concrete Pile Company, Ltd.,
of Lib.,
PETER FOY,
Area Controller."

During the September 1970 Term of the Civil Law Court for the Sixth Judicial Circuit, on October 8, 1970, the case was called for trial. The trial judge passed on the issues of law and immediately proceeded with the trial. A jury was empaneled; witnesses testified; argument was heard pro et con; the trial judge charged the jury which after deliberation returned with a verdict in favor of plaintiff, awarding her the damages prayed for in her complaint. Defendant excepted to the verdict and filed a motion for a new trial which was resisted and denied. Final judgment was rendered confirming the verdict of the jury. Whereupon defendant announced an appeal to the Supreme Court and took all the required steps to perfect its appeal. This appeal is before us on a bill of exceptions comprising six counts.

Before traversing the bill of exceptions we think it necessary to briefly review the evidence adduced at the trial.

Plaintiff testified to the damage done to her yard and fence because of the excavation carried out by defendant. She stated that a representative of the company surveyed the damage when attention was called to it and advised her to send in her claim for whatever damage was done. It was then that she had an estimate made of the damage and her counsel sent her claim to defendant; that later the manager of the company himself called at her home and told her he had come to inspect the damage done to her premises, and after taking him around he told her that they were going to see about it. It was after this in-

spection that the company answered counsellor Bull's letter, by letter dated December 13, which has been referred to above.

It is indeed interesting that during the cross-examination of this witness, defendant did not ask her a single question on the note allegedly written by her to somone named Charlie asking him to dump dirt in her yard and assuming responsibility for any damage done. It is more interesting because defendant relied on that note to absolve it from liability, and yet did not think it necessary to question her thereon.

The other witnesses for the plaintiff were the engineer who made the estimate of damages to plaintiff's property, who testified to having made the estimate and identified it, and counsellor Bull who testified to having received the letter of December 13, 1969, from defendant, which he identified.

After presenting testimony plaintiff offered in evidence the letter of December 13, 1969, and the estimate of damages made by the engineer. Defendant's counsel did not object to the estimate of damages being admitted into evidence but objected to the letter being admitted on various technical grounds.

The Court correctly overruled the trivial objections and admitted the document into evidence. As to an objection on insufficiency of identification the inconsistency of defendant is clearly shown when it did not ask plaintiff to identify the note allegedly written by her to someone named Charlie.

The witnesses for the defense were Mr. Oswald Wallace, Superintendent of the sewage system for Raymond Concrete Pile Company, counsellor James Doe Bigson, and Peter Foy, Area Controller of Raymond Concrete Pile Company.

Mr. Wallace testified that plaintiff had asked the company to give her some fill to put in her yard, and as they were working near her premises it was no problem to do

so, but as is usual when such requests are made the persons making them are required to sign an "oath" absolving the company of liability. Plaintiff had done so by the note written to Charlie.

"Dear Operator Charlie:

"Please dump some dirt in my yard, any damage will be mine. Thanks.

"SARAH HOWARD.

"19/7/69."

He also stated that although the note was written to Charlie it was handed to him directly. He further stated that he could not reconcile himself to the fact that his Company was responsible directly or indirectly for the damage done to plaintiff's fence. He was asked about the letter his company had written to plaintiff's counsel on December 13, 1969.

"A. Who signed the letter, each and every claim of this size or indeed smaller would be automatically referred to our insurers INTRUSCO. Whether or not we were responsible. This procedure is taken to protect the insurers as well as ourselves in any subsequent action. As to the wording of the letter, I did not write it, I did not sign it, so I don't think that I can be held responsible for it. However, I do in essence agree that this letter says what we are saying."

Counsellor James Doe Gibson identified the signature of plaintiff. He was competent to do so, according to him, because of some previous lease transaction which he had handled for a client involving plaintiff. We refrain from further comment on this witness's testimony as the record speaks for itself.

Mr. Peter Foy was asked about the letter of December 13, 1969, written and signed by him.

"A. I came to Liberia on November 1, 1969. The alleged damage of Mrs. Awar is some time around April and July of 1969. It is a standard

practice of Raymond Concrete Pile International Company upon receipt of a letter regarding a claim to acknowledge receipt of said letter and refer the matter to our insurance underwriter, International Trust Company Limited of Liberia. My reply to the Bull Law Firm was simply a courtesy letter advising said Law Firm that the claim was being referred to our insurance underwriters."

He identified the note allegedly written by plaintiff to Charlie, which has already been referred to, because he found it in the files of the Company.

He was asked another question.

"Q. Please tell the court and jury, as Area Controller of the company, what is Raymond's position as to its responsibility of the damages complained of by the plaintiff, Sarah Howard Awar.

"A. It stands to reason that if some one asks a favor from this Company and in the process of fulfilling her request, this Company cannot be held responsible for any damages allegedly sustained."

Considering that this witness was the writer of the letter of December 13, 1969, his answer depicts a state of mind that not only has little regard for ethical behavior but can be termed perfidious.

The bill of exceptions, besides relating denial of a motion for a new trial and exceptions to the judgment as well as to specific rulings in the course of the trial, stressed that the plaintiff was not sequestered before testimony was offered.

It is true that the record reveals that plaintiff's witness Edmund Sweidy, testified before plaintiff did and that she was present in court when the witness commenced his testimony. Let it be remembered that this witness only testified to the fact that plaintiff had requested him to make an estimate of the cost to repair the damage done

to her fence and yard, and that he had done so and given it to her. Let it also be remembered that the plaintiff had used this estimate as the basis of her claim as well as her action against defendant.

Defendant in its brief as well as in its counsel's argument at this bar relied strongly on the opinion of this Court in *Togai* v. *Johnson,* 14 LLR 187, 190 (1960), in which Mr. Justice Pierre spoke for the Court on this issue.

> "A witness who, after having been qualified to testify on one side, remains in court and listens to the testimony of others on the same side, is thereby disqualified and his testimony should be excluded. This procedure of our practice should have all the more impressed itself upon the trial judge since, in this case, the witnesses concerned were servants of the defendant. It is inconceivable that such a procedure could have been regarded as being fair to both sides."

The opinion states further that when appellant's counsel objected to defendant's witnesses being in court while he was testifying, his objection was disallowed by the trial court.

Appellant has also relied upon the Civil Procedure Law, L. 1963–64, ch. III, § 2106, though we cannot see the application to the issue.

> "Every person called as a witness shall swear or affirm that he will testify truthfully before being allowed to give evidence in any action."

In the cited case relied upon by appellant it must be remembered that it was defendant who testified in the presence of his witnesses and not witnesses for the defendant testifying in his presence.

Admittedly it is our practice and procedure that once witnesses have been qualified they should be sequestered and we agree with the Court's opinion as stated on the point. We do not hold, however, that the two cases are analogous, because it does make a difference when a party

in interest, especially a plaintiff who has instituted an action, is permitted to hear his witness' testimony in whole or in part, and a defendant who testifies in the presence of his witness. In other words, a different situation is created where a party testifies in the presence of his witness, as opposed to witnesses testifying in the presence of parties after they have all been qualified.

There is no applicable statute, and this is the first time the issue of whether the general rule of sequestration as practiced in this jurisdiction applies to parties.

The weight of authority seems to be that a sequestration of witnesses is not a matter of right but is invoked in the discretion of the Court, though generally witnesses, except parties, will be excluded from the courtroom while others testify.

> "On motion, in civil and criminal cases, witnesses will generally be excluded from the courtroom while others are undergoing examination in the same case; this, however, is not a matter of right, but within the discretion of the court. This may extend to a medical expert witness; it is too late if the request be made after some testimony has been received. Some of the cases seem to regard exclusion as the usual practice. If a witness violates an order of exclusion, the party calling him will not be deprived of his evidence, it affects only his credit." BOUVIER'S LAW DICTIONARY, *Witness.*
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> "The court has the right, in the trial of a case, to exclude witnesses from the courtroom, but there is no doctrine requiring the witnesses to be excluded in all cases. In a few jurisdictions the exclusion of proposed witnesses from the courtroom during the examination of other witnesses is a matter of right on proper application. But the great majority of jurisdictions follow the early English rule that exclusion, separation, sequestration of witnesses, or 'putting witnesses under the rule,' as the procedure is variously termed,

is a matter not of right but of discretion on the part of the trial court. Reasons for the majority view are the rule that trials should be open to the public, the fact that witnesses have an interest in the course of the litigation and the danger that the rule might be used to unnecessarily delay and obstruct trials. It has been said that the discretion to exclude witnesses is a sound judicial discretion, and that courts should not arbitrarily refuse to enforce the rule nor should litigants or lawyers be permitted to require it arbitrarily.

"The propriety of the exercise of discretion to refuse enforcement of the rule must be determined in the light of the circumstances of the particular case. In a civil case, refusal of a request for separation of witnesses is not arbitrary where it is based upon the reason that the request is not made until after the opening statement has been made. Under the majority rule, a motion to exclude witnesses in a civil case need not be granted where no particular reason for the motion, such as conspiracy exists or is alleged. The majority rule applies to criminal prosecutions. A separation of the witnesses in a criminal case is seldom denied when requested, however, especially in a trial for felony; and it has been held error to allow witnesses for the prosecution to be present and hear each other's testimony against the objection of the defendant, where such witnesses are near relatives, or are or have been so associated that it is probable that some of them may be under the influence of another witness who is interested in the prosecution. In some jurisdictions the trial court's discretion as to the exclusion of witnesses is not reviewable by an appellate court, although in other jurisdictions, where the trial judge, in a proper case, refuses exclusion without good cause, his action will be reviewed and held an abuse of discretion. Where 'the rule' is invoked as to witnesses, the mode and manner of its enforcement is con-

fided largely to the discretion of the court, and the exercise of that discretion will not be disturbed except in clearest cases of abuse." 53 AM. JUR., *Trial,* § 31.

"It has been said that where the rule regarding the exclusion of witnesses from the courtroom is invoked, unless some good reason is shown, all of the witnesses should be included. There are, however, some exceptions to the rule which are generally recognized. For example, the rules do not apply to a party to the action, although there may be several parties on one side of the case. The same is true of one directly interested in the result of the trial. It is also said that the rule is inapplicable to an attorney for one of the parties, even though he is also represented on the trial by other attorneys; but the action of the trial court in excluding one of the attorneys for a party has been upheld." 53 AM. JUR., *Trial,* § 32.

Another point of difference which strikes us between *Togai* v. *Johnson* and this case is that it appears in the former that the trial court's attention was called to the irregularity while the defendant was testifying, whereas in this case the trial court's attention was not called to the situation while plaintiff's witness was testifying, but only when plaintiff took the stand. Obviously it was counsel's intention to cause a mistrial.

We do not perceive any reason to relent the practice of sequestration of witnesses generally in this jurisdiction, but neither do we intend to blind ourselves to reason and exclude all exceptions to the rule when justice demands it. It is, therefore, our holding that in the case of parties to suits being present while their witnesses are testifying the precedure should be timely objected to, and when so objected to the court should be permitted to use its judicial discretion in disposing of such objections.

In the instant case, taking all the facts into consideration, not only do we feel that the trial judge did not commit reversible error, but even if we excluded the plaintiff's

testimony the end result of the case could hardly be affected. Count one of the bill of exceptions is, therefore, overruled.

With respect to count two of the bill of exceptions, it has been held that in passing on multiple objections to the introduction of evidence a trial court should clearly indicate which objections are sustained and which are overruled. *Yamma* v. *Street,* 12 LLR 356 (1956). That is the general rule. It has also been held that a court's failure to specify grounds for overruling objections to immaterial questions is not reversible error. *Johnson* v. *Republic,* 15 LLR 88 (1962). It is our view that the issue in count two of the bill of exceptions falls under the latter rule, and it is, therefore, not sustained.

We do not deem count three of the bill of exceptions worthy of comment.

Count four of the bill of exceptions having already been dealt with in our traversal of the evidence, we do not feel it is meritorious and, therefore, it is overruled.

The evidence having shown appellant's admission of damage done to appellee's property, though it was not deliberate, expressing the hope that an amicable settlement would be reached, and appellant having failed to show by the evidence that it did not do any excavating near appellee's property, but rather the contrary, we do not feel that the judge erred in denying the motion for a new trial and rendering final judgment in appellee's favor. Clearly the verdict was not contrary to the weight of evidence. Nor can appellant's contention that the damage to appellee's property was not deliberate, excuse it from responsibility for the damage and liability therefor, as is manifest by our Injuries Law.

> "Injury defined. A tort or injury is an unlawful damage. Every act prejudicial to the interest of another is an injury unless it is warranted by law." 1956 Code 17:1.
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> "Intent not necessary element of injury. An act

> may constitute an injury even though the actor did not intend to injury the person affected. An injury may be committed due to negligence, carelessness, or unskilfulness rather than any injurious design on the part of the injurer." *Id.*, § 2.

In view of what has been stated herein, it is our holding that the judgment of the trial court be and the same is hereby affirmed and the Clerk of this Court is hereby commanded to send a mandate to the court below to resume jurisdiction and enforce its judgment. Costs ruled against appellants.

Affirmed.