

F. H. SALEH, Appellant *v.* JAMES
MONTGOMERY, Appellee.

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

Argued April 11, 1972. Decided May 19, 1972.

1. Instructions to a jury not based on the evidence presented is reversible error.
2. Though, generally, exceptions to the judge's charge to the jury must be specific, where the entire charge is objectionable to counsel a general exception made at its conclusion is sufficient.
3. Special damages must be specifically pleaded and proved, and similarly the jury's verdict must separately state the amount awarded as special damages in addition to the general damages found.
4. Recovery for damages will be denied where losses were passively suffered which could have been averted by reasonable effort or where damages were increased by activity when prudence required that such activity cease.

Appellee had purchased a refrigerator from appellant, and it broke down within the time of the seller's warranty claimed to have been received. The seller denied the allegation of warranty and refused to return the repaired article until payment was made for repairs. At the trial the court failed to charge the jury on the special damages sought and the need to specify in its verdict the elements of the award. Instead, a verdict and award for plaintiff buyer was returned, in the amount of \$3,415.00, based in good part apparently on the alleged loss of income per diem of \$50.00 for more than sixty days, in which plaintiff had made no efforts to mitigate his business losses resulting from a lack of refrigeration. An exception had been taken by appellant to the entire charge to the jury. The court affirmed the jury's verdict by rendering judgment, from which an appeal was taken. The Supreme Court *reversed* the judgment and *remanded* the case to the lower court.

MacDonald Acolatse for appellant. *Momo Jones* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellee purchased from appellant a refrigerator costing \$365.00 for use in a shop. About six months after the purchase, the refrigerator stopped working. The appellant was informed, and he took it away to be repaired. It is not clear who was to be responsible for paying for the repairs. Each party contended that the other was responsible. The appellee also contended that appellant had given him a guarantee for eight months, which was denied by the appellant. Nevertheless, the refrigerator remained, and is still, in the possession of appellant. It is as a result of this dispute as to who should be responsible for the repairs to the refrigerator, that the appellee brought an action of damages against the appellant in the Sixth Judicial Circuit Court for Montserrado County. The case was heard, the jury brought in a verdict awarding appellee \$3,415.00, which was upheld by the judge in his final judgment. The appellant took exceptions to the verdict and judgment and appealed to this Court.

Appellant's bill of exceptions consists merely of his exceptions to the court's charge to the jury, the verdict of the jury awarding the plaintiff \$3,415.00 in damages, and the final judgment which upheld the verdict. The exceptions will be considered in the order in which they appear.

With respect to the exceptions to the court's charge, appellant contended in his brief that the charge was reversible because the court made mention of a guarantee, which the court had said in a ruling earlier should be ignored.

"1. Although the witness did refer to an interview

before Judge Krakue with him and the defendant on the question of the guarantee of duration of the ice-box in question which motivated the cross-examination on this score, we feel it proper to ignore anything that comes up before the judge assigned to preside over this court when he had nothing before him, the case not then being filed.

"2. And even had the case been filed at the time, the judge without a jury has no function to pass on anything in this respect that could be binding on any party."

No exceptions were taken to this ruling. In other words, the appellant contended that only the appellee testified to a guarantee, and since the judge had ruled that this question be ignored, he should not have charged the jury on this point in the manner which he did.

"Plaintiff with witnesses testified to the effect that he bought an ice-box from the defendant in the value of \$350.00; that he had a guarantee on the duration of this ice-box, that is to say, how long it was guaranteed to last. You heard the plaintiff's statement on this score. The plaintiff further said that within the time guaranteed, and about two months earlier than the expiration thereof, the said ice-box ceased to operate which resulted in plaintiff returning it to the defendant for either the refund of the money, the repair thereof or a new one. That the defendant although accepting the ice-box which he held in his possession for sixty-seven days, contended that because he did not guarantee the service thereof, he was not responsible to meet either of these three conditions."

It is our opinion that the judge erred in instructing the jury on a matter which he had earlier ruled should be ignored because such instruction tended to mislead the jury, to the detriment of the appellant. Such an error in the case at bar cannot be deemed to be harmless.

"The scope of an instruction in a particular case,

whether civil or criminal, is to be determined not alone by the pleadings therein, but also by the evidence in support of the issues, and even though an issue is raised by the pleadings, it is not proper to give an instruction thereon where there is no basis for it in the evidence. An instruction not based on the evidence is erroneous in that it introduces before the jury facts not presented thereby, and is well calculated to induce them to suppose that such state of facts in the opinion of the court is possible under the evidence and may be considered by them. The foregoing principle is applicable to instructions based on excluded evidence, or evidence withdrawn by the party offering it, although an instruction is not necessarily erroneous because it is based on incompetent evidence." 53 AM. JUR., *Trial*, § 579.

The trial court's obligation to conduct a trial with the utmost impartiality extends to the giving of instruction to the jury. The purpose of the judge's charge is to furnish guidance to the jury in their deliberations and to aid them in arriving at a proper verdict insofar as it is competent for the court to assist them. Therefore, when a judge rules that certain statements or evidence should be ignored or excluded, it is improper for him to refer to such statements or evidence in his charge to the jury.

On the question of appellant's exception to the court's charge, appellee argued that instead of making a general exception to the whole charge as was done in the case at bar, appellant should have excepted to each point of the charge to which he objected. To support his contention, appellant cited the Civil Procedure Law, L. 1963-64, ch. III, § 2209(1), particularly the penultimate sentence.

"1. Prior to retirement of jury. At the close of the evidence or at any earlier time during the trial any party may request in writing that the court instruct the jury on the law as set forth in his requests.

The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall in such instance instruct the jury in writing after the arguments are completed. The court shall instruct the jury on every issue of law arising out of the facts even though no requests to charge thereon have been submitted by counsel. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The appellant countered this argument by saying that his objection was to the entire charge which contained only issues of fact and, therefore, it was unnecessary to state an exception to each point. It is clear that, under the foregoing section, a party may ask the court in writing to instruct or charge the jury on the law stated in his requests. Before their argument to the jury, the court shall inform counsel of its action upon the requests and shall instruct or charge accordingly the jury in writing after the arguments are completed. Even if there are no requests to charge submitted by counsel, the court shall instruct the jury on every point of law arising out of the fact.

It is our opinion that the penultimate sentence of that section contemplates a situation in which the court charges the jury on several issues of law arising out of the facts, and in which a party objects to one or more of the several instructions. In such a case it is incumbent upon the party who objects to such instructions to state specifically that portion of the court's instruction to which he objects. In a case where the judge fails to instruct the jury on certain points, he should state distinctly his objection to the charge, pointing out those matters on which the judge should have charged, but did not charge.

The purpose of the statutory requirement that objections to instructions be specific is to point out to the court wherein the alleged error lies.

"A general exception to the giving of a charge or instruction which is correct as to any proposition of law embraced therein is ordinarily regarded as insufficient to present any question for review, and the same is true of a simple exception to the giving of a series of instructions any of which are correct. Likewise, conversely, a single exception to a refusal to give several requested instructions, or a general exception to a refusal to give an instruction or charge embracing several distinct propositions any of which are unsound, is ordinarily deemed insufficient to raise any question for review." 3 AM. JUR., *Appeal and Error*, § 382.

It is also our opinion that where a party contends the court's entire charge is incorrect, a general or single exception made at the conclusion of the charge is sufficient.

"Although a general objection may be sufficient where the instruction is fundamentally or inherently wrong or erroneous, usually the objection must specifically and definitely point out the particular ground or grounds on which it is based and the instruction, instructions, or portions thereof which it is claimed are wrong or erroneous . . . and a general objection to the instructions, or to the charge as a whole, is not available on appeal, where some of the instructions or parts of the charge are correct." 4 C.J.S., *Appeal and Error*, § 306.

Writers are agreed that a general exception to a charge as a whole is untenable if any portion of the charge is correct.

On the issue of the jury's verdict awarding appellee \$3,415.00, at the rate of \$50.00 a day for sixty-seven days, the appellant contended that the verdict was contrary to the weight of the evidence; that appellee requested special

damages but failed to prove them, in that although he testified that the shop in which the ice-box was placed yielded \$50.00 per diem, he did not prove how much the ice-box contributed thereto, and whether whatever it contributed was from the sale of ice or drinks or a combination of the two. None of the appellee's witnesses testified to what amount the refrigerator itself contributed to income per day. It is not clear from the record whether Sundays and holidays are included in the sixty-seven days, and whether the shop sold items that needed no refrigeration, but could possibly be included in the \$50.00 income per diem. The verdict itself does not indicate what the amount of \$3,415.00 represents, that is to say, whether it relates to special damages only or a combination of general and special damages. Special damages must be specifically pleaded and proved. Merely alleging an injury and claiming damages therefore is not sufficient; the plaintiff must prove the injury complained of, and that he has been damaged to a sum commensurate with the amount claimed as damages. *Itoka v. Noelke*, 6 LLR 329 (1939); *Jos. Hanson & Soehne (Liberia) Ltd. v. Tuning*, 17 LLR 617 (1966). The trial court neglected to properly charge the jury on the matter of special damages. Under the circumstances, count two of the bill of exceptions is sustained.

In passing, it should be observed that the appellee made no effort to mitigate or minimize damages by having the refrigerator repaired himself. It is a general rule that recovery for damages will be denied where persons against whom wrongs have been committed passively suffer economic loss which could have been averted by reasonable effort, or increase by activity such loss where prudence would require that such activity cease. It should also be pointed out that the ice-box which appellant took away to be repaired is still in his possession.

The special damages not having been proved, the jury's

verdict is contrary to the evidence adduced at the trial, and, therefore, the judgment is reversed and the case remanded with instructions that special damages be proved. Costs to abide final determination of this matter. It is so ordered.

Reversed and remanded.