VIANINI (LIBERIA) LTD., by and through its Resident Manager, J. CAMPINELLI, Appellant, *v.* HENRY W. McBOURROUGH et al., Appellees.

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

Argued May 23, 1966. Decided July 1, 1966.

1. Matters properly constituting the subject of a general denial need not be specified in the answer, and the defendant's failure so to specify is insufficient ground for disallowance of cross-examination as to such matters on trial of the action.
2. Where irregularities and erroneous rulings by the trial court as to the admissibility of evidence have prejudiced the rights of parties to a full and fair trial and the verdict rendered by the jury is not supported by the evidence on the record, the case will be remanded for new trial.

In an action for damages for injury to personal property wherein the trial court rendered judgment upon a verdict of the jury awarding special damages to the plaintiff, the *judgment* was *reversed* and the cause *remanded* for new trial.

G. P. Conger Thompson and *Clarence L. Simpson* for appellant. *Peter Amos George* for appellees.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

Culled from the records presented before us on appeal, these facts present themselves. On the 8th day of April, 1964, Henry W. McBourrough et al. of Sinkor, Monrovia, plaintiffs, sued out an action of damages for injury to personal property against the within-named appellant in the June term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County. Pleadings in the case progressed as far as the surrejoinder and rested. Defendant's answer comprised the following four counts:

"1. Because defendant avers that the complaint is indistinct as to proper parties because the plaintiffs from the inspection of the complaint are merely 'Henry W. McBourrough et al. of Sinkor, Monrovia, c/o DPWU, plaintiffs.' It is not shown in said complaint who are the others. Defendant submits that all persons having a joint interest shall be made parties and joined on the same side as plaintiffs or defendants. This not having been done, said complaint is indistinct as to proper parties and a fit subject for dismissal.

"2. And also because defendant says that Counts 1 through 5 of the complaint are merly averments or allegations setting forth ownership and other aspects of the damage done to the vehicle, the subject of these proceedings, naming the amount of damages claimed by said plaintiffs, which are special in their nature and should not only be alleged but proven at the trial.

"3. And also because as to Count 6 of said complaint, defendant says that counsel's fees are not reckoned in estimation of damages, either in an action *ex contracto* or *ex delictu*.

"4. And also because defendant denies each and every allegation of law and fact contained in said plaintiff's complaint and not made a matter of special traverse in this answer."

The appellee argued before this Court that the appellant's failure to set forth specifically in his answer all of his available affirmative defenses should have barred any question to the witnesses on cross-examination on any matter that would tend to introduce affirmative answers. In consequence of defending his position in that regard, he objected to all such questions coming from the defendant on the cross-examination, and the trial judge adopted this view and sustained all such objections interposed by the plaintiff even though such questions went directly to cross-examine the witnesses on matters touching the cause and on which the witness had deposed. We have not been

able to agree with the trial judge for proceeding as he did; however, we will herein cite the law which he is supposed to have relied upon. It reads thus:

> "In his answer the defendant shall set forth all available affirmative defenses and all other matters constituting excuse or avoidance in accordance with the provisions of Sections 258 above." 1956 CODE 6:294.

This provision is plainly applicable only when special matters are pleaded, which was not so in the present case; hence we are not in agreement with the position taken by the court below.

At the conclusion of the jury trial, a verdict was brought in favor of the plaintiffs awarding special damages in the sum of $4,700 although plaintiffs had sued out their action for $5,375, without proving any grounds for special damage in the least.

On this verdict and judgment, the defendant excepted and brought his appeal before this Court of dernier resort on the following two-count bill of exceptions:

> "1. Because defendant avers that whilst plaintiffs' witness Joe Mars, the driver of plaintiffs' truck, was on cross-examination, the following question was propounded to him: 'Mr. Witness, is it not a fact that on the day when you were driving the truck in question, a jeep was before you and you undertook at high speed to overtake the said jeep, and it was then that you struck Vianini's truck and it was damaged?' To this question plaintiffs objected on the grounds: 'Soliciting matters of an affirmative nature not specifically pleaded in the answer and ruled to trial'; which objection, the court sustained and the defendant excepted. Defendant submits that the question was well within the pale of the cross-examiner, particularly so when the witness was the driver of plaintiffs' truck and the question was one directly touching the cause and likely to discredit the witness.

"2. And also because defendant further avers that the following question was asked the same witness for the plaintiffs, while on the cross-examination: 'Mr. Witness, is it not a fact that it was at this time that your truck also damaged Vianini's truck by knocking the wheel off?' To this question plaintiff objected on the ground: 'Soliciting affirmative matter not specifically pleaded.' Defendant submits that this question was borne out by the previous question which the witness answered, that question being: 'On this particular occasion when you were driving your truck and Vianini's driver was driving his truck, is it not a fact that you all met head on and that is when the damage occurred?' "

Before entering upon the soundness or faulty aspect of the counts of the bill, we would like to make a comment right here. Very strangely, although appellant's bill of exceptions embraces only two counts, yet in her brief filed for argument she has included ten counts and thereby traversed exceptions taken on other occasions in the records which have not been included in the said bill. This is a procedure that has no precedent in our practice. All exceptions taken during the trial of a case and not made a part of the bill of exceptions are considered to be waived and this Court has been very vocal on this point in many cases including *Ledlow* v. *Republic*, 2 L.L.R. 569 (1926), in which Mr. Chief Justice Johnson, speaking for this Court said at 2 L.L.R. 570:

"We have repeatedly held that only such rulings of the court below in the progress of a case will be considered as are excepted to in said court; and further, that exceptions not embodied in the bill of exceptions for appellants, will of course be regarded as waived."

Therefore we are authorized to address our attention only to these two counts of the bill of exceptions and nothing more.

John Mars must have been plaintiffs' star witness in this case. He testified on all facts in connection with the case; and on the cross-examination he was subject to have been crossed on all matters touching the cause, and not even only on those to which he had testified, because the law contemplates an examination of his motives, inclinations, interest, and means by which he came into possession of such facts. According to Count 1 of the bill of exceptions, this right was denied the defendant's counsel by the trial judge; and this was reversible error. This was the driver who drove plaintiffs' truck at the time of the collision on which the plaintiffs claimed their damages. He testified that whilst turning a curve in Congotown, defendant's driver ran his vehicle into plaintiffs' truck. We are of the opinion that the question referred to in Count 1 of the bill of exceptions was proper and should have been answered. The law on the pleading of special defenses was not applicable and the trial judge erroneously disallowed the question. Count 2 of the answer explicitly denied the truthfulness of all the allegations averred in Counts 2 through 5 of the plaintiffs' complaint. Moreover, defendant pleaded a general denial. This was not a question intended to introduce new facts of an affirmative nature. It is a well known principle of law that it is the evidence given in any case that determines the issues of fact. *Taylor* v. *Worrell,* 3 L.L.R. 14 (1928).

Count 1 of the bill of exceptions is therefore sustained. Count 2 of the bill of exceptions, in our opinion, is controlled by the same principle of law; but before arriving at a conclusion thereon, we shall again turn our attention to the records before us in this case. The plaintiffs sued out and claimed special damages. Our law makes it mandatory, also with buttress of the common law, that when special damages are alleged, they must be proved in all of their aspects at the trial. In this case, it has seriously attracted our attention that in no place was the slightest effort made

to prove the market value of the allegedly damaged vehicle at the time of the impact, nor was it shown that an inspection was made of the two vehicles on the scene of the impact. We are still at a loss to know how and in what manner the petty jury as judges of the facts were persuaded on the evidence given in the case that the plaintiffs' cause had been so clearly proven as to authorize the award of special damages in the sum of $4,700. The evidence is void of an on-the-spot investigation to determine which of the two vehicles did damage to the other; nor was there any proof of special damages. These and other irregularities could not legally be brushed aside in the administration of transparent justice without prejudice to the interests of the defendant.

It is a principle of law as old as our practice that the admissibility of all evidence is the province of the court but its credibility and effect are solely within the province of the jury; and in that connection, the law requires such facts to be apparent and not hypothetical. In all civil matters, the law requires that the evidence must preponderate. As Mr. Justice McCarthy, speaking for this Court, said in *Taylor* v. *Worrell*, 3 L.L.R. 14 (1928), at 3 L.L.R. 14:

> "For it is the evidence that determines the issues of fact in all litigation, and where it appears that a court, tribunal or officer proceeded without the proper evidence for both parties, it creates an irregularity in the trial, and no judgment should be pronounced thereon."

On such principles of law, we have no alternative than to sustain Count 2 of the bill.

In summary, having carefully inspected and reviewed the records brought before us and observed the irregularities in the trial in the lower court, it is our unanimous opinion that the case is a fit subject for remand; and we do hereby order the same remanded with instructions to the court below that a new trial is to be conducted on the facts involved. The judgment in the former trial is hereby re-

versed with costs against the appellees; and the clerk of this Court is hereby ordered to send a mandate to the court below ordering the judge to proceed into a jury trial on the facts. And it is hereby so ordered.

Reversed and remanded.