I. J. HILL and PATRICIA M. HILL, Named Executrices of an Instrument Offered for Probate as the Last Will and Testament of the Late Jestina A. Jackson Hill, Appellants, *v.* SELINA MALINDA PARKER, Appellee.

APPEAL FROM THE PROVISIONAL MONTHLY AND PROBATE COURT, MONTSERRADO COUNTY.

Argued November 17, 18, 1959. Decided January 15, 1960.

1. Entry of a caveat against the probation of a will does not authorize the suspension of proceedings for probate of the will pending the filing of objections thereto.
2. When a caveat has been entered against the probation of a will, probate proceedings may not properly be conducted without affording objectants an opportunity to appear.
3. A conveyance with unity of interest, time, title and possession will be construed as creating a joint tenancy among the grantees.
4. A joint tenancy cannot be partitioned solely by testamentary disposition of a tenant thereof.
5. Undue influence in the making of a will is influence which compels the making of a testamentary provision through inducing an emotion which the testator is unable to resist.
6. No prescribed form of phraseology need be adhered to in objections to the probate of a will.
7. Courts should not decide substantial issues upon immaterial technicalities.
8. A witness cannot be questioned as to credibility on direct examination unless an issue has been raised as to the credibility of the witness.
9. A hypothetical question may not ordinarily be asked of a non-expert witness on cross-examination.
10. Before a witness may properly be questioned concerning a particular business transaction, a foundation of proof must be established to show the existence of a business relationship between the parties thereto.
11. Notice is required as a prerequisite to the recall of a witness to the stand.
12. After both parties to a trial have concluded presentation of testimony and rested thereupon, the court, in the exercise of sound discretion, may properly deny an application to recall a witness to the stand.

On appeal from a judgment upon a jury verdict denying admission to probate of an instrument offered as a will, *judgment affirmed.*

R. F. D. Smallwood for appellants. *Momolu S. Cooper* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

From the records certified before us, Jestina A. Jackson Hill of the Township of Arthington, Montserrado County, Republic of Liberia, is purported to have executed a last will and testament on March 16, 1939, on which instrument the names of M.J. Moore and Lilian G. Taylor appear as attesting witnesses. It appears further that the said purported testatrix also executed two codicils to the aforesaid will on the same day and date; and a third one was executed in the month of January, 1948. For reasons unknown, neither of these codicils shows the names of any attesting witnesses.

Jestina A. Jackson Hill departed this mortal life in the month of August, 1957. Following her demise, Selina Malinda Parker, daughter of S. M. Parker and niece of the decedent, filed a caveat in the Provisional Monthly and Probate Court, Montserrado County, against any court action on any instrument offered thereat for probate purporting to be the last will and testament of the deceased.

In September of the same year, I. J. Hill and Patricia M. Hill, both of Montserrado County, petitioned the Probate Court for permission to prove and probate instruments purporting to be the last will and testament of Jestina A. Jackson Hill, deceased, which instruments were sealed in two envelopes. Selina Malinda Parker was advised by the court of the petition thus made, but before the objectant filed her objections according to the caveat, the court undertook to proceed by a method altogether strange in the sight of the law by attempting to prove the now contested will in the absence of the caveator; and on November 20, 1957, one James E. Moore was called to the stand and testified to the genuineness of the signatures of the testatrix and M. J. Moore, one of the attesting witnesses. Proof of the will stopped there because no other

witness was available. It seems to be a novelty to observe such procedure in the face of the caveat thus filed and the strong language employed by this Court in *Caranda* v. *Fiske,* 13 L.L.R. 154 (1958)—a case from the same Probate Court. Yet the same Probate Commissioner had the audacity to disregard the principles of law so recently laid down by this Court in that opinion. Still no one knows what effort would have been employed to prove the signatures and handwriting of the purported testatrix and attesting witnesses to the will, who had all died before this time, if the petitioners had been privileged to produce the complement of witnesses required according to law. The further proving of the will being suspended, remained suspended up to the filing of objector's objections, the subject of this case. Such procedure has no authority whatever in our law.

However, under our statutes, even if proof of the will had been completed, the objectant would have still enjoyed the right to file objections before the instrument was offered in probate; and if that right was not granted to her, and no fault was laid at her door, the possibility would have still existed for her to enjoy her right under the law by recourse to this Court. Since the proving of a will against a caveat filed would serve no benefit if the will could be subsequently contested and declared invalid, it makes no sense to have it proved by witnesses before objections are filed and the contest determined.

After the filing of the objections, pleadings progressed up to the surrejoinder, and the case took its ingress into the Circuit Court of the Sixth Judicial Circuit, Montserrado County, for trial by a jury. Law issues were disposed of, and the jury returned a verdict setting aside the will and declaring it invalid. A motion for new trial was thereafter filed by respondent Patricia M. Hill, and was denied by the court. Respondent noted exceptions, and after rendition of judgment affirming the verdict of the jury, the case came before us on a bill of exceptions con-

taining seven counts which we shall deal with later in this opinion.

In our review of the records in this case, a document has claimed our attention which is not a part of the bill of exceptions; but because of the importance which we attach to the said document, we have felt it necessary to make some comments thereon before going further, since it seems to comprise the ground of the said objections. That document is the last will and testament of the late Randolph H. Jackson. According to it, Randolph H. Jackson, the father of the purported testatrix and the grandfather of the objectant, now appellee, devised his property to his three daughters in strong and unambiguous words as follows:

"Second: I give and bequeath to my three daughters, S. M. Parker, Jestina Hill and Eliza R. Jackson, the place I am now living and consisting of sixty acres of land with the improvements formerly known as the estate of my father Leymore Jackson as a homestead for them.

"Third: I give and bequeath all my real estate not disposed of during my lifetime to my three daughters. The real estate at Monrovia, that is, the store on waterside now occupied by P. Z. Company and the retail shop occupied by R. & H., are to be kept rented and proceeds equally drawn after the expense of keeping up the places are deducted.

"Fourth: I give and bequeath to my two daughters, S. M. Parker and Jestina A. Hill, my house on Broad Street known as Jessie Sharpe's house."

The will embodying the foregoing bequest was duly registered and probated without objections on March 2, 1914, in the Provisional Monthly and Probate Court, Montserrado County. It created an estate in joint ten-

ancy because all of the unities required by law to coexist were formed at one and the same time.

> "To create a joint tenancy there must coexist four unities: (1) unity of interest; (2) unity of title; (3) unity of time; (4) unity of possession; that is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time, except in cases of uses and executory devises; and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole." 23 CYC. 484–85 *Joint Tenancy.*

Thus, by the will of Randolph H. Jackson, Jestina A. Jackson Hill, S. M. Parker and Eliza R. Jackson enjoyed devises under the same right and title and became joint tenants of the whole property. After a period of time, Eliza R. Jackson died without heir, and S. M. Parker also died leaving one heir, Selina Malinda Parker. But this heir could exercise no absolute claim in the estate because Jestina A. Jackson Hill still survived; and under the right of survivorship, as the only surviving tenants, she and her niece, Selina Malinda, became possessed of the whole estate. Again, we cite an authority in support of this principle:

> "The ancient English law was apt in its constructions of conveyances to favor joint tenancy rather than tenancy in common; and where an estate was conveyed to two or more persons without any words indicating an intention that it should be divided among them, it was construed to be a joint tenancy." 23 CYC. 485 *Joint Tenancy.*

In joint tenancy we have a very peculiar estate, so peculiar that common law writers exercise every degree of diligence in differentiating the close and technical difference between this estate and one held by tenants in common, and for no other purpose than to clarify the niceties of the law so that the interest of the parties concerned may be conserved to the fullest extent. But estates held by

tenants in common are not so strange because, in them, the right of survivorship does not exist.

At the death of Jestina A. Jackson Hill, she attempted to devise the property held in joint tenancy under the will of her late father, Randolph H. Jackson, to separate and distinct persons, not heirs in any form of any of the tenants in the estate; whereas, Selina Malinda Parker survives her as the only heir to Randolph H. Jackson's estate. Because of this attempt on the part of the testatrix, the objections were raised against the probate of the said last will and testament. But it is well settled that where a joint tenancy exists, on the death of one of the joint tenants, the survivors take the whole estate free from any charges on the property made by the deceased tenant; and on the death of the last survivor, the whole goes to his heirs or personal representatives.

It is also settled law that a joint tenancy cannot be severed by will of one of the tenants. It was our endeavor to clear away all of the ambiguities which may have surrounded the question of the property that was attempted to be devised by the testatrix, and we feel that in our effort to explore all of the phases in connection therewith, we have not failed to make it clear that the property in question was originally owned by Randolph H. Jackson, the grandfather of Selina Malinda Parker, who is now the only surviving heir of the said late Randolph Jackson. Jestina A. Jackson Hill, Randolph Jackson's daughter, and an heir of his estate, did not have the legal right to devise the said property by will so long as her co-tenant, Selina Malinda Parker, survives. Her said will therefore became the proper subject for objections.

The next question that has aroused interest and concern and which we feel should also be considered before entering upon review of the bill of exceptions, is the question of the answer filed by I. J. Hill, one of the respondents to the objections, and one of the petitioners who offered the will in question for probate. The records show substan-

tially that respondents below filed separate answers. Respondent I. J. Hill averred in her answer that, because the allegations set forth in the objections are sound in fact and law, she could not support the purported will, regardless of the fact that she had been nominated therein as an executrix to defend the same. She also alleged in her said pleading that, before the demise of the purported testatrix, she called respondent Patricia M. Hill, and requested her to produce her last will and testament that she had taken away unsolicitedly from the home; and this she alleged further that Patricia M. Hill refused to do until after the demise of the testatrix. Pleading further, she alleged that such an act on the part of the respondent, Patricia M. Hill, convinced her that the will which they had presented to the court for probate, was not the original will of the testatrix, and that she had every right to believe the fact that the signature appearing thereon was not the genuine signature of the purported testatrix. Continuing, she alleged that she is aware of the fact that the homestead property thus attempted by the said will to be devised is the property of the late Randolph H. Jackson, and could not be willed to anybody by the testatrix; and that the fact that testatrix, knowing this particular homestead to be the homestead of her late father, nevertheless attempted to devise the same, is evidence of the fact that undue influence was exercised over her by Patricia M. Hill, one of the devisees under the fraudulent will. Concluding her answer, she further alleged that, since Patricia M. Hill was not related by blood to the purported testatrix, she could not be preferred in law against the legal rights and title of the objector, Selina Malinda Parker, decedent sister's child, who holds equal right, title and possession to the property in question, as the only surviving heir since the demise of the testatrix.

Finally, she alleged that, upon those premises, she felt justified to state that the purported will was made under undue influence—especially so when, during the natural

lifetime of the testatrix, respondent Patricia M. Hill made known the contents of said will to other persons including I. J. Hill. The answer of I. J. Hill, thus filed, forms a part of the records of this case and therefore should not be disregarded in the consideration of the case; and for that reason we have taken the pains to review the allegations made therein, so that a complete outline of the facts surrounding would be made more apparent.

At the hearing of the case below, I. J. Hill took the witness stand for the objectant; and in her statement in chief, testified in these words:

> "Mrs. Jestina A. Jackson Hill was the half-sister of mine. After she moved to Monrovia and was down here for one or two years, she went to my home and said that she had something to tell me. There she took me in the room and told me that she made a will. 'I left you as executrix with Passie M. Hill to assist you. I know that Passie cannot fight against the estate for the Jackson's property, because she is not a Jackson; she is a Hill; but I am leaving a Jackson to fight for my will to be probated. You and Passie must not fall out; you all must not make any palaver, I am telling you the evidence that witnesses my will because I know Malinda is going to protest against that will and she is going to give you all Hell. She is going to throw that will out of court; you and Passie must not fuss.' I in return said to her: 'Ma, why not divide the property and give Malinda her share?' She said: 'I will not divide my father's property.' So we left the conversation. After a length of time, again she went back to me. She said: 'I have asked Passie for my will; Passie said that the will is in the bank, and she can't get it out of the bank.' She then asked me: 'When you put a will in the bank, you can't get it?' She said to me: 'Since Passie refused to deliver the will, let her keep it; but I know that Malinda will give you Hell. Whenever a will is carried to court and is not signed

by June Moore and Madison J. Moore, it is not my will.' "

This statement of I. J. Hill is in complete harmony with the answer she filed in the Probate Court against the probate of the purported will, and is also corroborated by the following testimony of witness Louise Hill:

"Some time ago I was staying with the late Jestina A. Jackson Hill. She got sick. Before she went to the hospital, she called Patricia Hill and told her she must go up river and bring all of her important things down. 'Bring my deed box, my will and all in it.' Patricia went up the river and brought the things down. She did not carry it to the house. Mrs. Jestina A. Jackson Hill called me and said: 'I sent for all of my important things, and when Patricia brought them she never reached here with them.' She said: 'Whenever I ask for my things she gets angry with me. Sometimes for three days she does not put her foot upstairs.' Then she said to me: 'I don't know why she is keeping my things, because they are the Jackson's property, and she is not a Jackson.' She said: 'Malinda is the heir; if she keeps these things I can trust Malinda on her.' She said: 'I tried to make some kind of will; I did not put your name in there, Louise.' She said: 'While I was making this will you were gone to see your people, and Patricia Hill told me that you were dead.' Then she said: 'Of all the children that I reared, none worry me as much as Patricia Hill. All the time she is asking me to adopt her like my own child. If I don't do that, she gets angry.' Then Patricia said one day to me, after she had everything in her hands: 'Every nigger ass will be outside; it is for my daughter and Gwendoline.' Malinda Parker wanted to build a house in the yard, and Patricia said Malinda should not build the place there because the place is belonging to her."

These are the two statements of the half sister of Jestina

A. Jackson Hill and Louise Hill, a girl reared by the testatrix. That is some of the evidence in the records which has not been refuted or negatived by the testimony of any of the witnesses for the respondent, except the respondent's own statement, which also corresponds in some respects.

Now, let us see what Rev. Moore testified to. When on the stand, and asked if he ever signed testatrix's will as an attesting witness, he testified as follows:

"A. I remember, some years ago, when I was passing her residence, she called me in and requested me to sign a document that she said was her last will and testament.

"Q. Say, if you can, whether there was any other attesting witness with you at the time you witnessed said instrument; and if so, who was she or he?

"A. When she showed me this instrument, she told me that my brother, Madison J. Moore, had signed the will, and she requested me to also witness the said will."

The foregoing testimony forms a strong link in the chain of evidence adduced at the trial to establish that the said purported will was not the valid will of the late Jestina A. Jackson Hill. But, before arriving at any conclusion, let us refer to the testimony of respondent Patricia Hill, and of her witnesses before we draw a comparison in the sight of the law, and before we make an effort to determine the rights and wrongs in connection with either of the parties concerned in the contested will proceedings.

Respondent Patricia Hill testified that the late Jestina Hill was her stepmother, who sponsored her schooling, and did other good things for her; and that she told her that she (decedent) was sick and did not know when she would die or whether she would recover from the sickness and go back up the river; therefore she requested respondent to go up the river with her keys, bring her trunk from

under the bed with her deeds, and search in her bed mattress; and there she would find her will wrapped in a piece of cloth. She further testified that she went, and that the first document she brought was not the will, and that her stepmother told her to go back and search until she found the exact will; that she retraced her steps, found the will and brought it down; and that both the will and the deeds were given to her for safekeeping. She testified, further, that on one occasion Malinda Parker went to her and told her she heard that she "had the old lady's will and deeds," and warned her to keep them securely because her interest was also involved. Continuing, she testified that her stepmother also gave her the will of her late father, as well as the agreement for a tract of land on which respondent had a house, admonishing her that, if she did not recover from her state of illness, the will and bank book should be delivered to her lawyer.

On cross-examination, the respondent, Patricia Hill, testified as follows:

"Q. Among the many grounds of objections to the probation of the last will and testament of the late Jestina A. Jackson Hill is one in which it is alleged that you influenced the writing of the will now before the court; you will please state for the benefit of the court what you know about this.

"A. I don't know anything about it because I did not know the will was made until I heard it was read in court; Mrs. I. J. Hill came to the house and informed me about the reading thereof in court. After being queried she said that it was the deceased's own writing. She said Attorney Thorpe had a job reading the will because of the writing.

"Q. Please state for the benefit of the court and jury who was present, as you say, when I. J. Hill stated that the will was in the handwriting of the late Jestina A. Jackson Hill, the purported testatrix.

"A. Mrs. Irene Macintosh, Mr. James E. Moore and Mrs. Ray Hill Horton."

We are wondering now why respondent did not bring to the stand one, if not all, of those persons she testified were present when I. J. Hill intimated to her that the purported will was in the actual handwriting of the late Jestina A. Jackson Hill; especially when I. J. Hill had alleged in her answer that the will in question was not the genuine will of the purported testatrix, and had testified to the same effect on the witness stand. Under those circumstances, it does seem to our minds that the calling of Irene Macintosh, James E. Moore or Mrs. Ray Hill Horton, who were alleged to have been present, surely would have had a considerable degree of weight in the minds of the court and jury to clear away every hypothesis to the contrary. But, as closely as we have perused the records, it is nowhere shown that any one of these three named persons came to the stand as a witness.

The records certify that C. Abayomi Cassell took the stand as a witness for the respondent and identified the signature of the purported testatrix. She had been his client; he knew her handwriting and had seen her write; and, as far as the records go, he was the only witness who identified the signature as such. Moreover, another witness for respondent, one Harold Thomson, Acting Manager of Paterson, Zochonis & Company, took the stand; but it is not shown by the records that he identified the signature of the testatrix as her genuine signature attached to the purported will. He merely identified testatrix's signature attached to a lease agreement which was not the subject matter before the court.

That was the record which went before the trial jury in the case which we have endeavored to summarize, and having made this summary, we shall now proceed to consider appellant's bill of exceptions.

Count "1" of the bill of exceptions states that, in Count "1" of respondent's answer, she raised an issue of law which the trial Judge ruled out in ruling on the law issues, to which she excepted. Refreshing our memory on this point from the records, respondent averred that the ob-

jectant had breached the statutes on pleading and practice by commencing the first count of her objections with the words: "Because said will," and by commencing each succeeding count with the words: "And the said objector," instead of commencing the first count with the words: "Objector objecting to the will," and each succeeding count with the words: "And objector further objecting to the will." On this count, we find ourselves compelled to harmonize our views with those of the trial Judge. The grounds laid are immaterial to the soundness or unsoundness of the objections which go exclusively to attack the validity of the will, especially since there is no set form to be strictly conformed to in matters of the kind. This Court has said:

> "The object of courts of justice is to avoid the turning out of litigants upon immaterial technicalities." *Liberty* v. *Horridge,* 2 L.L.R. 422, 423 (1923).

Count "1" therefore is not sustained.

In consideration of Count "2" which refers to an exception noted on the Judge's ruling sustaining objections interposed by objectant's counsel to a question put to Patricia Hill requesting her to name the persons present when I. J. Hill said that the will was in the handwriting of the deceased, we are of the opinion that the trial Judge correctly sustained the objections taken, because the witness was testifying in her own behalf, and the question did have the nature of cross-examining one's own witness as to credibility when no issue had been raised as to the witness's credibility. Such a question would have been suited on cross-examination. This count is also not sustained.

With respect to Count "3," appellant contends that the trial Judge erred by refusing to sustain her objection to the question put to witness C. Abayomi Cassell, to wit: "I presume that you are one of the legatees under the will which you have just identified; is my presumption correct?" Under our law a witness may be cross-examined on all matters touching the cause or likely to discredit

himself, but he cannot be asked hypothetical questions. Such a question, in the opinion of this Court, did not touch the cause because it did not have a tendency to prove or disprove the contested will; hence, objections were properly taken thereon, and should have been sustained.

We cannot favorably consider Count "4" because a foundation should have first been laid to establish that there did exist a business relation between the testatrix and Paterson, Zochonis & Company, before a question could be rightly put soliciting an answer concerning any business transaction. The court therefore, in our opinion, correctly sustained the objections; and Count "4" is not sustained.

It is the duty of any party before court who intends to recall a witness to the stand to give timely notice thereof and of what he intends to have him prove, so that his adversary may be furnished with sufficient notice as the law requires; and also to obviate a surprise on the opposite party. Taking a recourse to the records, it is apparent that respondent in the first instance requested the recall of witness I. J. Hill, which request the objectant resisted, but which permission the court granted. But after the sheriff made returns that the said witness could not be found, respondent sought to have Patricia Hill's name substituted for I. J. Hill, which request was made after the resting of oral testimony on both sides. The court, conceding the application to be without legal support, rightly denied the application so made. It is our opinion that to grant the application would have been to trifle with justice and the interests of the parties concerned, as well as a dangerous practice that would have a tendency to continue cases on hearing indefinitely; therefore, in the absence of any rule of court authorizing the privilege at that stage, the court below, in the exercise of its sound discretion, correctly ruled denying the said application, which ruling this Court upholds and dismisses Count "5" of the bill of exceptions.

Counts "6" and "7," respectively, being exceptions taken to the verdict of the empanelled jury, the ruling on the motion for new trial and the judgment confirming the verdict, we shall address our attention to these later in this opinion.

When this case was argued before this bar, counsel for appellant, in his very extensive and interesting argument, said that it had not been established in the lower court that the contested will was invalid because of undue influence exercised over the testatrix; nor had the objectant sought to have the entire will vacated because her objections only went to allege that the testatrix had no color of right to devise the homestead property of her late father, Randolph H. Jackson. He also argued that, out of fair legal reasoning, he admitted that the homestead exemption of Randolph H. Jackson, testatrix's father, should not have been included in the will of Jestina A. Jackson Hill, and requested this Court to have the same precluded and the judgment of the court below reversed with that exception; that is to say, with such judgment as should be given in the premises. He argued further that, respondent not being a beneficiary under the contested will, there was no consistency in the objectant's allegation that respondent exercised undue influence over the testatrix. Objectant's counsel argued that the entire will is the subject of the contest because all of the property purported to be devised therein is not the property in fee simple of the purported testatrix, in that all except one tract of land devised to Phebe Branch was held in joint tenancy and the records in the case show convincingly that undue influence was exercised over the testatrix.

At first blush, the argument of appellant's counsel would seem meritorious to the minds of laymen, but another glance might induce a contrary view. Louise Hill testified that Patricia Hill told her: "Every nigger ass will be outside. . . ." She also put in evidence that Jestina A. Jackson Hill told her that, whenever she asked Patricia

for her things, that is to say, her deeds and will, Patricia would get angry with her, the testatrix. And I. J. Hill testified that Jestina A. Jackson Hill, her half sister, told her: "I have asked Passie for my will; Passie said that the will is in the bank and she can't get it out of the bank." She testified further: "She said to me: 'Since Passie has refused to deliver the will, let her keep it, but I know that Malinda will give you Hell.' "

Undue influence is defined by legal authorities as that influence which compels a testator or testatrix to do something against his or her will, from fear, the desire for peace or some feeling which he is unable to resist. If there was no undue influence, then why did the respondent in this case retain testatrix's will without her consent? Moreover, if there was no undue influence, then why did the respondent get angry with the testatrix whenever she called for her deeds and will? And, finally, why did respondent place the will in the bank without the consent of the testatrix?

All these are questions which present themselves and must arrest the attention of this Court in passing upon the records before us. Then again, where is that will which a prelate of the Gospel of Christ, and an honorable gentleman, testified that he signed as a witness upon the request of the testatrix, and which she told him his brother had also signed? On the other hand, the will in contest neither carries the signature of Rev. Moore as an attesting witness, nor does it show on its face that it is in cancellation of any other. Moreover, who testified to prove the handwriting of Lillian G. Taylor, whose signature appears on the contested will, both attesting witnesses having died before the will was offered for probate? To our minds, in the attempt of respondent to prove the signature of the purported textatrix, the handwriting of both witnesses should have also been proved to be genuine by persons who knew the said handwritings and/or had seen them write. All of these are missing links in the chain of

evidence that would go to satisfy us that the will is the genuine will of the testatrix and that she executed it without undue influence.

Taking the circumstances together, we are of the opinion that the objectant built a strong chain of evidence, well connected in all of its aspects; and having carefully scrutinized the evidence submitted and the law controlling, we have arrived at the conclusion that the verdict of the jury submitted in the case was strictly in harmony with the evidence adduced at the trial, and that the judgment confirming the same is sound and well taken. It is therefore our bounden duty to affirm the said judgment with costs against the respondent; and it is hereby so ordered.

Judgment affirmed.