RANDOLPH MILLER et al., Appellants, *v.* HELEN PARKER et al., Appellees

APPEAL FROM THE MONTHLY AND PROBATE COURT FOR MONTSERRADO COUNTY.

Heard: May 5 & 6, 1982. Decided: July 9, 1982.

1. The bill of exceptions must state distinctly the grounds on which exception are taken.
2. All instruments, in property cases, which convey property to two or more persons, without any qualifying words indicating intention of creating tenancy in common, should be construed to mean joint tenancy with its peculiar doctrine of survivorship, and not a tenancy in common.
3. Rulings of the trial judge to which no exceptions are noted cannot be reviewed on appeal.
4. No party may assign as error, the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the reasons of his objection.
5. Where a party excepts to the entire charge of the trial court to the jury without specifying the parts of the charge he is excepting to and the grounds therefor, the Supreme Court will disregard the exceptions.
6. The procedure of appointing a lawyer to take the ruling for the absent party, should be followed only in the absence of a notice to the party or lawyer.
7. The withdrawal of a petition for certiorari by the petitioner without reservation to refile, constitutes a waiver of the points therein contained, and a bar to the appellate court entertaining the same on appeal.
8. Where property is willed by a testator and becomes operative by probation, no heir, lineal or collateral, of the testator can legally assert any claim to the subject property under the Testator.
9. Although a clause in a Will refers to the property devised as a homestead, the absence of evidence to prove the existence of homestead, does not revert the property to the testator, his lineal or collateral heirs.
10. Where a bill of exceptions attacks the factual phase of the verdict and the final judgment, the Supreme Court shall review the entire evidence adduced at the trial to ascertain whether the final judgment is supported by the evidence.
11. Where the attesting witnesses are available and testify to the genuineness of the signature of the testatrix, their own signatures, and identify same, the writing shall be admissible and secondary evidence such as handwriting expert shall be unnecessary.
12. Where, however, the subscribing witnesses are unavailable, recourse to secondary evidence to prove the execution and authenticity of a writing will be justified, and proof may be established by circumstantial evidence.
13. Where forgery is alleged, the claimant cannot rest on the statement of fact in the declaration as proof of the truthfulness, but must produce evidence to substantiate

the allegation.

These proceedings grow out of a final decree of the Monthly and Probate Court for Montserrado County, in which the Last Will and Testament of the late Melinda Jackson Parker was ordered admitted into probate over the objections of appellants, lineal and collateral heirs of the late Randolph H. Jackson. From the facts of the case, Randolph H. Jackson, prior to his death, executed a Last Will and Testament in which he devised certain properties to his three daughters, namely Sara Jackson-Parker, Jessina A. Hill, and Eliza R. Jackson Pritchard.

Eliza R. Jackson Prictchard died leaving no heirs of her body. Later S. M. Jackson-Parker also died and her share of the property went to her sole surviving heir, Melinda Jackson-Parker. Subsequently, the last of the three children, Jessina A. Hill died leaving no surviving heir. Prior to her death, Jessina Hill executed a Last Will and Testament in which she devised her share of the property to J. J. Hill, which upon presentation to the probate court, after Jessina Hill's death, was objected to by Melinda Jackson-Parker. The Will was set aside and the Supreme Court on appeal held that the property willed to the three daughters was held in joint tenancy, and that Melinda Jackson-Parker being the last survivor of the three tenants, became the sole owner.

Having been declared the sole owner by the Supreme Court, Melinda Jackson-Parker prior to her death, executed a Last Will and Testament devising the property she had acquired. After her death, the Will was presented to the Monthly and probate court for admission into probate to which appellants herein objected. The probate court declared the Will genuine to which objector excepted and announced an appeal to the Supreme Court.

The Supreme Court, taking note of its prior opinion that the Will of the late Randolph H. Jackson, devising the property created a joint tenancy and that Melinda Jackson-Parker being the last survivor took the property in its entirety, ruled that Melinda Jackson-Parker had the right to devise the property by will. Concluding that the only issue to determine is whether or not the signature on the purported will is that of Melinda

Jackson-Parker, the Supreme Court *affirmed and confirmed* the decree of the probate court.

M. Fahnbulleh Jones appeared for the objectors/appellants. *Roland Barnes* appeared for respondents/appellees.

MR. JUSTICE YANGBE delivered the opinion of the Court

The late Randolph H. Jackson, of the settlement of Louisiana, Montserrado County, was a father of three daughters, namely: S. M. Jackson-Parker, Jessina A. Hill, and Eliza R. Jackson-Pritchard, all of whom their father pre-deceased.

On the 18th of April, A. D. 1910, Randolph H. Jackson executed a last will and testament in which he devised real and personal properties to his three daughters. The will was duly admitted into probate and registered in 1914. Only the realty devised to the three children of the testator is in contention in this case. In April, A. D. 1919, Eliza R. Jackson-Pritchard and her four children got drowned in Grand Cape Mount County, Republic of Liberia, leaving the other two children, S.M. Jackson-Parker and Jessina A. Hill. Later, S.M. Jackson-Parker also died, leaving her share of the property with her daughter, Melinda Jackson-Parker as the only heir.

After the death of Jessina A. Hill, Melinda Jackson-Parker apparently suspected that the will of her aunt, Jessina, was being offered for probate; therefore, Melinda filed a caveat in the Monthly and Probate Court for Montserrado County, and consequently when the last will and testament of Jessina A. Hill was presented to court by I. J. Hill, the stepdaughter of Jessina A. Hill, Melinda Jackson Parker interposed objections thereto on the ground: 1) that the testatrix had no fee simple title to the property; hence, she could not legally will same; and 2) that the Will of the late Jessina A. Hill had been executed under undue influence. The case was sent to the People's Civil Law Court, Sixth Judicial Circuit, Montserrado County, for trial by jury. After a due trial, the trial jury returned a verdict, setting aside the Will. Subsequently, the verdict was confirmed in a final judgment, but an appeal was announced therefrom to this Court, and

this Court, in its opinion, affirmed and confirmed the judgment of the trial court, declaring the real property that was willed to the three daughters of the late Randolph H. Jackson as joint tenancy, and that Melinda Jackson-Parker was the last survivor of the three tenants as per the will of Randolph H. Jackson. Therefore, according to the Opinion, Melinda Jackson-Parker became the sole owner of the entire fee *Hill and Hill v. Parker,* 13 LLR 556 (1960).

On the 20th of April, A. D. 1978, Melinda Jackson-Parker executed a last will and testament devising the self-same land she had acquired from her grandfather, and after her death it was presented to the monthly and probate court for admission into probate, to which objectors/appellants objected. The grounds of objections were essentially the same grounds of objections interposed to the last will and testament of Jessina A. Hill by Melinda Jackson-Parker, which grounds have been earlier stated in this opinion.

After the probate judge had disposed of the issues of law tendered in the pleadings, the case was forwarded to the People's Civil Law Court, Sixth Judicial Circuit, Montserrado County, for a trial by a jury in keeping with law and procedure.

During the June A. D. 1981, Term of the People's Civil Law Court aforesaid, presided over by His Honor M. Fulton W. Yancy, Jr., the case was called for trial by jury. The jury was duly empanelled to try the single issue of fact ruled to trial by the Probate Judge. After the production of evidence on both sides, the court charged the jury, who thereafter retired to the room of deliberation to consider their verdict. Subsequently, the jury returned with a verdict declaring the will genuine, and said verdict was ordered recorded by the court below. However, before the trial judge could proceed further, the objectors/ appellants petitioned the Chambers Justice of this Court for a writ of certiorari, but said petition was later withdrawn before it could be heard, and Judge Yancy by influx of time had lost jurisdiction; and upon a mandate emanating from the Chambers Justice, the court below was ordered to resume jurisdiction over the matter and proceed in keeping with the law. Consequently, His Honour Frank W. Smith, the presiding judge by assignment

over the People's Civil Law Court, ordered the clerk of the court to dispatch all the record in the case to the probate judge for a final decree to be entered in accordance with the statute, to which ruling objectors/appellants noted exceptions. Accordingly, the records were sent to the probate court and final decree was rendered from which the objectors/appellants appealed to this Court of denier resort for review.

The salient issues raised in the bill of exceptions for our review and determination are hereunder summarized as follows:

(a) Whether the probate judge was right when she overruled and dismissed all the other issues of law raised in the objections and ruled the case to trial on the single issue, that is, as to whether or not the signature of Melinda Jackson-Parker, appearing on the will, was her genuine signature?

(b) Whether a handwriting expert as witness should be allowed by the trial court to take home a disputed will for technical analysis?

(c) Whether a party may except to the entire charge of the trial court to the jury without specifying the grounds of objections?

(d) After receipt of the mandate of the Chambers Justice to resume jurisdiction in the case and to proceed according to law, was Judge Smith in order when he ordered the clerk to send the record including the verdict to the Probate Court for the probate judge to enter a decree in the case that was presided over by Judge Yancy during the 1981 June Term of that Court?

(e) What is the effect of a withdrawal of a petition for remedial writ in a case that is pending in the trial court?

(f) Whether the property of the late Randolph H. Jackson which he willed to the three children devolved upon them as joint tenants or tenants in common?

We shall now proceed to pass upon the contentions of the parties hereinabove summarized and resolve the issues raised.

Counsel for objectors/appellants in his history of the case stated, among other things, that:

"The probate judge in passing on the pleadings overruled

all those issues except that of the allegations that the signature appearing on the will was not the genuine signature of Melinda Jackson Parker and that the signature was forged. The judge ruled based upon the opinion in the case *Hill v. Parker,* 13 LLR 556 (1960). The case was then forwarded to the People's Civil Law Court for the Sixth Judicial Circuit, in keeping with the law."

Yet, at the end of count one of appellants' brief, they also contended that:

"These issues of law should have been fully and legally passed upon by the probate judge. But in the opinion of your appellants they were not legally passed upon in the ruling of the law issues."

Counsel for appellants cited in support of this contention *Reeves et. al. v. Knowlden,* 11LLR 199 (1952) and *Johns and Witherspoon v. Johns,* 11 LLR 312 (1952), to the effect that the probate court should have disposed of all the issues of law, which suggests that the judge failed to pass upon all the issues of law raised by the parties.

There is an obvious conflict in the history of the case of appellants. With regard to count one of the brief and in the bill of exceptions, a question was propounded from the Bench during the argument as to which of these contentions the Court should accept, i.e. whether the probate judge failed to pass upon the issues of law or not, or whether the ruling was in counsel's opinion erroneous. Counsel for appellants answered in the affirmative and stated that all the issues of law raised in the pleadings were decided by the probate judge. Therefore, we shall now pass upon the point of contention raised in count one of the brief.

The appellants have merely stated in count one of the bill of exceptions that the probate judge ruled out and dismissed all the other issues on law that had been raised without specifying same for us to review.

This Court has held that a bill of exceptions must state distinctly the grounds on which the exception is taken. It is improper, therefore, to place upon the Court the burden of searching the records in order to discover the exception taken

and the grounds therefor. *Sampson and Johnson v. Republic,* 11 LLR 135,138 (1952). The holding in this case also finds support in a recently decided case *of Keller v. Republic,* 28 LLR 49 (1979) Supreme Court's Opinion, March Term 1979.

Accordingly, count one of the brief is not well taken; hence same is overruled as far as it relates to the alleged failure of the probate judge to pass upon all the issues of law.

Relevant portion of the ruling of the learned probate judge, on pages 5 and 6 thereof, as far as the nature of the estate of Randolph H. Jackson and the rights of Melinda Jackson-Parker are concerned, reads as follows:

> "objectors argued that the mere statement by Randolph H. Jackson in his Will, that the sixty acres in Louisiana is a homestead for his three daughters, does not make the said property a homestead as to give Melinda Parker the right to will said land to strangers; that said land should go to the Jackson Family. We hold that the Will of Randolph Jackson is not in issue, and therefore, cannot be made a proper object for attack.
>
> Our further comment on the will of Randolph Jackson which both parties have made profert of in support of their contentions, especially the contention that the Supreme Court has settled the issues relating to the position of Melinda Parker and the estate of Randolph Jackson, is that the said Will having created a joint tenancy in the three daughters, S. M. Parker, Jessina Jackson Hill and Eliza Jackson, left no question unanswered as to who should inherit after the death of the three joint tenants; for under the doctrine of joint tenancy the survivor takes the whole. In the case at bar, we are in no position to rule differently from the ruling of the Supreme Court in the case *Hill and Hill v. Parker,* 13 LLR 556 (1960). The last survivor takes the whole to herself to the exclusion of all persons. In the face of that decision just cited, we hold that the only issue of fact for the jury to determine is whether or not, the signature that appears on the purported last will is that of Melinda Jackson-Parker."

Thus, from the ruling of the probate judge as quoted herein-

above, the legal authority of the probate court for overruling the issue that no fee simple title vested in Melinda Jackson-Parker, is crystal clear. Therefore, the probate judge correctly opined that she had no legal authority to hold differently from the opinion of the Supreme Court cited by her, and that the Will of the late Randolph H. Jackson was not in issue.

Assuming that the will of Randolph H. Jackson was the subject of objections, we quote hereunder clauses two, three, and four of the Will by which the testator disposed of the realty in question:

3. I give and bequeath to my three daughters, S.M. Parker, Jessina 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, Seymore Jackson, as a homestead for them.
4. I give and bequeath all my real estate not disposed of during my life time to my three daughters. The Real Estate at Monrovia, that is, the store on the Waterside now occupied by P. Z. & Co. and the retail shop occupied by W & Hare, to be kept rented and proceeds equally divided after the expense of keeping up the places, are deducted.
5. I give and bequeath to my two daughters, S. M. Parker and Jessina A. Hill, my house on Broad Street, known as Jessis Sharp & House.

None of these quoted clauses of the will indicates as to how the three daughters should hold the land willed to them, except that the will conveyed a fee simple title.

The authority cited in *Hill and Hill v. Parker* referred to hereinabove is:

> "The ancient English law was apt in its constructions, to favor joint tenancy rather than tenants 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."

Counsel for appellants contended that the Last Will and Testament of the late Randolph H. Jackson created a tenancy in common and not a joint tenancy; therefore, he asked us to recall

the opinion of this Court declaring same to be joint tenancy. At this juncture, it is significant to reiterate that the will of the late Randolph H. Jackson is not assailed in this case. The learned counsel also correctly admitted that in this jurisdiction, there are two views controlling the doctrine of joint tenancy and tenancy in common: one is the English and the other is the American rule; hence, the question that now presents itself before us is, which one of the said rules has been adopted and followed in Liberia?

In Richardson v. Stubblefield and Collins-Jones, 6 LLR 107 (1940), this Court held that the common law provisions for joint tenancy remain in vogue in this jurisdiction and that our courts must in all cases interpret a joint conveyance, unlimited by any qualifying words, as one creating an estate in joint tenancy with its attendant doctrine of survivorship, and not a tenancy in common.

The reason for suggesting a recall of the opinion of this Court in *Hill v. Parker*, 13 LLR 556 (1960), cited earlier in this opinion was not stated, and the learned Counsel for appellants did not cite any authority to justify the request for the recall. Therefore, having adopted the English view on the subject of joint tenancy and tenancy in common in Liberia, over forty-two years, we have no reason to depart from the interpretation of all instruments, in proper cases, which convey property to two or more persons without any qualifying words indicating an intention of creating tenancy in common, to be construed to mean other than a joint tenancy with its peculiar doctrine of survivorship and not a tenancy in common. Consequently, we have no valid reason to recall the opinion of this Court as suggested.

The minutes of the trial court, as found on sheets 6, 7, 8, and of 29th day's jury session, July 29, 1981, show that a request was made by counsel for the appellants to allow their expert witness to take home the will and other documents bearing the genuine handwriting of the testatrix and her disputed signature, for the purpose of technical analysis. The request was resisted and denied by the trial court. No exceptions were noted thereto. Notwithstanding the provisions of the Civil Procedure Law, Rev. Code 1: 51.7, and several holdings of this Court on the effect of

failure of a party to note exceptions to alleged adverse rulings or decisions of the trial court, counsel for appellants has raised the issue in the bill of exceptions. In the absence of any exception being noted to the ruling of the trial judge denying the request, we have no legal authority to review same. Consequently, count two of the bill of exceptions has no legal basis. *Richards v. Coleman,* 5 LLR 56 (1935).

The statute provides that no party may assign as error, the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the reasons for his objection. Civil Procedure Law, Rev. Code, 1: 2.9, 22.9; *Liberia Mining Company v. Zwannah,* 19 LLR 73 (1968); and *Scott v. Republic,* 18 LLR 13 (1967).

Counsel for appellants has generally excepted to the charge of the court to the jury without any specification and without stating the grounds therefor in keeping with our law. Therefore, we have no other alternative but to ignore the contentions.

Appellants have argued that when the trial jury returned with its verdict in which it was stated: "Respondents are not liable", in the absence of counsel for appellants and without appointing a lawyer to take the said verdict for the appellants, the trial judge recharged the jury, and they again returned to the room of deliberation. Counsel for appellants also contended that he excepted to the instructions of the judge.

We wonder how was it possible for counsel for objectors/ appellants to have noted exceptions to the recharge of the court to the jury when he contended that the jury returned with its verdict in his absence. Certainly it was not possible for the appellants to have excepted to the recharge, especially when they claimed that the jury returned in their absence. However, the records do not show that an exception was noted, and the record also does not show that a lawyer was appointed by the court for that purpose in keeping with Civil Procedure Law, Rev. Code 1: 51.6.

The procedure in this jurisdiction has been that in the absence of a lawyer at the rendition of a ruling or judgment, the court usually appoints a lawyer to take the ruling for the absent party,

and this procedure obtains even in the appellate Court. We hold that this procedure should be followed only in the absence of notice to the party or lawyer; in this case, however, no notice was served.

In our opinion, in the absence of notice to counsel to be present and receive the verdict or for the recharge to the jury, the trial court should have appointed a lawyer to note an exception, thereby reserving the point for appellate review.

Counsel for appellants realized the adverse effect of this act of the judge by not deputizing a lawyer to take the ruling for him; therefore, he sought appellate review when he petitioned this Court for a writ of certiorari, which was issued and served. But the petitioners in the certiorari proceedings, for reasons not disclosed by the records, unconditionally withdrew the petition for certiorari, and as a result, the Chambers Justice did not hear and decide the petition.

It is the right of a party to withdraw a cause with or without reservation, and we cannot, therefore, question the wisdom of the petitioners for not permitting the Court to pass upon the issues.

The withdrawal of the petition for certiorari by the appellants, in our opinion, constituted a waiver of the points therein contained. Therefore, the appellate court is precluded from entertaining same on a regular appeal, *Horton v. Horton,* 14 LLR 57(1960), since certiorari serves the same function as a regular appeal; that is, to review and correct alleged irregularities committed during the trial while the case is pending. Civil Procedure Law, Rev. Code 1:16.24; and *Attia v. Rigby,* 2 LLR 9 (1908).

The trial records, as found on sheet 7, 30th day's jury session, July 30, 1981, show that his Honour Judge Yancy ordered the clerk to record the verdict of the empanelled jury on that date, and that the only thing His Honour Judge Smith did was he ordered the clerk to forward the verdict and other relevant documents to the probate judge to render a decree in keeping with law and the mandate of the Chamber Justice. Therefore, we have no evidence to the effect that Judge Smith did order the verdict recorded as contended by the appellants.

We have already dealt with the procedural aspect of the

appeal as raised by the parties; we will now consider the evidence adduced at the trial to determine the merits of the allegations disclosed by the records.

The Will was further objected to on the grounds that: (a) the respondents/appellees had no heritable blood from the testatrix, Melinda Jackson Parker; (b) Melinda Jackson-Parker having died without leaving heirs, her mother's share of the property she inherited from her maternal grandfather, Randolph H. Jackson automatically reverted to the collateral heirs of Randolph H. Jackson; (c) the property which the three children acquired by Will from Randolph H. Jackson was never partitioned among the three children. Therefore, appellants argued, no stranger could legally claim heritable relationship and inherit the realty from Melinda Jackson-Parker.

There are many major points the objectors/appellants may have ignored, among which is the fact that Randolph H. Jackson, the original owner of the property in litigation, willed same to his three daughters already named herein above and the will became operative after his death when it was probated in 1914. Therefore, no heir, lineal or collateral, of the late Randolph H. Jackson could logically and legally assert any claim to the subject property under the late Randolph H. Jackson. The significant uncontroversial fact is that none of the appellants is claiming under any of the three children who are the only devisees of the late Randolph H. Jackson, and they are not claiming under Melinda Jackson-Parker who inherited the property from her mother, S. M. Jackson Parker. Furthermore, the appellees assert their rights to the property in issue upon the strength of the will executed by Melinda Jackson Parker. Therefore, the contention of lack of heritable relationship of appellees to Melinda Jackson-Parker is not relevant.

We come now to the contention which is not challenged and which deserves our comments, and that is the property, now subject of objections, was held and enjoyed by the three devisees named in the will of the late Randolph H. Jackson and was not partitioned among the three children. This contention buttresses the position of this Court in *Hill v. Parker,* 13 LLR 556 (1960), cited *supra.*

With regard to joint tenancy, we find the following in American Jurisprudence, at section 16:

> "Any act of a joint tenant which destroys one or more of its necessarily co-existent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. The act of one joint tenant in severing his interest in the property by alienation severs the joint tenancy to that extent, so that if there were but two tenants, the joint tenancy is terminated. Termination of the joint tenancy also results of necessity where all but one several joint tenants convey their interests to a stranger. However, if there are three or more tenants, a conveyance by one to a stranger will severe the joint tenancy only as to the share conveyed, which will be held by the grantee as a tenancy in common while the other joint tenants continue to hold their interest in joint tenancy. If the conveyor reconveys to his conveyor, the joint tenancy interest of the latter does not revive and he holds only as tenant in common. . . ."

Therefore, in our opinion, the fact that the property was held and enjoyed together by the three children, predicated upon the will of the late Randolph H. Jackson, without being partitioned among them, does not destroy the tenancy thus created under the will.

Although clause two of the Will of the late Randolph H. Jackson refers to a portion of the property he devised to the three daughters as a homestead, and there is no evidence that a homestead was created in accordance with the Act of 1888 - 1889, it does not affect the joint tenancy that was devolved upon the three daughters, nor does the absence of evidence to prove the existence of homestead exemption, revert the property to Randolph H. Jackson, his lineal or collateral heirs.

During the trial, appellants asked the trial court to qualify four witnesses, the first of whom was the handwriting analyst, Foday Korneh. A request was made for the expert witness to take home the documents bearing the signature of the deceased for two weeks, which the court below denied, but the appellants failed to take any exception. Earlier in this opinion, we passed upon such negligent failure and the implications thereof.

Our distinguished colleague, Mr. Justice Mabande, in his dissenting opinion has opined that this Court should have reviewed this issue and reverse the ruling of the lower court denying the request. He has also raised the issue that this Court should confine itself to the points raised in the bill of exceptions.

As we have already observed above, there was no exception noted by the appellants to the ruling denying the request and, therefore, according to the Civil Procedure Law, Rev. Code 1: 51.7, coupled with the long line of opinions of this Court, in the absence of any exception being noted during trial, the appellate court should not take cognizance of such contentions. This procedural phase of appellate review was recognized by the learned Justice in his dissenting opinion when he held that we should confine ourselves to the issues raised in the bill of exceptions. Yet, he maintains that we should have reviewed the ruling of the trial judge denying the request in the absence of exception noted to same. This, in our opinion, renders the dissenting opinion inconsistent and not supported by the very statute and opinions of this Court relied upon by the dissenting Justice.

With further reference to the request for the handwriting expert to take home the will for two weeks in order to analyze same, which the dissenting Justice considered as denial of due process, *Rule 7 of the Revised Rules of Circuit Courts* frowns upon postponement of cases during trial to obtain evidence. Here is the relevant portion of said rule:

> "Witness for either side must be duly summoned, and evidence thereof must in every case be shown by the Sheriff's returns, before the case is ready for hearing...."

This provision of the rule quoted herein above was not taken into consideration by the dissenting Justice when he hastily arrived at the conclusion that the objectors/appellants were not accorded fair opportunity to be heard.

It is stated in the dissenting opinion that the grounds of the appeal before us are only procedural and that we went beyond the contentions raised in the bill of exceptions.

A relevant portion of count eight of the bill of exceptions reads as follows:

> "objectors say that Your Honour rendered final judgment

confirming and affirming the illegal verdict and ordered the purported last will and testament of Melinda Jackson Parker admitted into probate....."

This quoted count of the bill of exceptions, from all indications, attacked the factual phase of the verdict and the final judgment; therefore, it is necessary to review the entire evidence adduced at the trial with the view of ascertaining whether the final judgment of the trial court is supported by the evidence in order to do justice to the parties concerned. Seemingly, this is another oversight on the part of the Justice who has dissented in this case.

The next witness for the appellants was Georgia McGill, one of the appellants. She testified to the effect that she never saw the deceased, Melinda Jackson Parker write, but that she saw the note she had written her family.

The third witness was Lurime Sharp Crawford Coleman. This witness told the court that Melinda Jackson Parker did not own any property, nor did she make a will; and that the property was owned by James Sharp. The witness identified the document marked by court P/1 as bearing the original signature of the Testatrix. However, on the cross-examination, she said that she did not have any business transaction with the late Melinda Jackson Parker; that she knew her signature because she was appointed administratrix of Joseph Sharp Estate. After this witness was discharged, the appellants rested oral evidence and asked the court to take judicial notice of the document marked P/1, and they rested evidence in toto.

The appellees produced two witnesses, Daniel Draper and Robert Barclay, who testified in essence that the testatrix had signed the will in their presence and upon her request they also signed the will in her presence and in the presence of each other, in the office of Counsellor Daniel Draper, located in the Bank of Liberia Building in Monrovia. Both attesting witnesses also recognized and identified the signature of the Testatrix as well as their respective signatures appearing on the will bearing court's mark P/1. The testimony of the attesting witnesses are in harmony with the Decedents Estates Law, Rev. Code 8: 113.4. Whereupon, the appellees rested oral evidence and offered the

will bearing court's mark P/1 in evidence, which was duly admitted and the case submitted to the court.

The general rule of law on this subject is that, except where the statutes have changed or modified the rule, generally in the case of attested instruments, proof of execution or authenticity must be made by the subscribing witnesses if available.

As a general rule, unavailability of the subscribing witness will justify use of secondary evidence to prove execution and authenticity of a writing.

A *prima facie* case of execution or authenticity is generally required or is sufficient to render the writing admissible. Proof may be established by circumstantial evidence.

Testimony by an attesting witness that he was present, saw the execution of the writing, and attested the same is generally held sufficient to render the writing admissible. 32 C.J.S., Secs. 739, 741 & 742.

In the case in point, the attesting witnesses were available and testified to the genuineness of the signature of the testatrix, their own signatures and identified same; therefore, secondary evidence such as the handwriting expert was unnecessary.

The objectors have alleged forgery of the signature of testatrix to the will, but have failed to produce evidence to substantiate the allegations of forgery.

In *Hill v. Hill,* 13 LLR 257, 268(1958), this Court held that "the want of proof will defeat the best laid action; the statement of facts in a declaration, however clearly and logically they may be set forth, cannot be taken as proof of the truthfulness."

Proof of the allegations stated in the objections are wanting; therefore, we do not hesitate to consider same as not supported by the record in point of fact. Accordingly, the decree of the lower court is hereby affirmed.

The Clerk of this Court is instructed to send a mandate to the trial court to resume jurisdiction over the matter and enforce its decree. Costs are ruled against the appellants. And it is hereby so ordered.

Decree affirmed.

MR. JUSTICE MABANDE *dissents.*

The issues presented by this appeal are solely procedural and not factual as misconceived by the majority. The factual consideration of the case is not supported by the records.

This Court, in the exercise of its appellate powers over a civil case, is limited to a review of only the issues raised in the bill of exceptions as supported by the records and coached in the briefs of the litigants. A determination of any other issue is outside the realm of its appellate power. *Bryant v. African Produce Company*, 7 LLR 93 (1940).

The evidence in support of the genuineness of the signature of the testator are equally impeached by the evidence contradicting the same. Where there is an equilibrium of the weight of the evidence, the verdict in support of one side cannot convincingly support a judgment.

Accordingly, where the evidence of opposing litigants presents equal weight of credibility, each party has the burden of convincingly offsetting the evidence of the other. The party with the burden of proof who fails to produce a preponderance of proof in his favour must suffer his neglect. Only a preponderance of evidence establishes a civil claim. Civil Procedure Law, Rev. Code 1: 25.5(2).

In this case the objector produced an expert witness whose qualification was without challenge established by the trial judge. The denial of opportunity to the expert witness to have produced his expert testimony is violative of the doctrine of fair and impartial trial. Where an expert witness requests the court to take a specimen of the evidence to the laboratory for testing, such opportunity must be freely accorded him and a court is not to indefinitely suspend a jury trial already in progress. If the specimen is a valuable the loss of which may impede the claim of a party, its safe return may be secured by a bond or some valuable property pledged by the party producing the expert witness and the witness himself. In case of a will, a certified copy of the will should be procured by the court and if the expert loses the original, the loss of such evidence should be counted against the litigant producing the witness. The denial of the

testimony of the expert witness in the case is surely a deprivation of the due process of law.

Concerning the charging of the jury by the trial judge, a charge or recharge of the jury on any issue must be with due notice to both party litigants. A party has a legal right to be adequately notified and given sufficient opportunity to attend every step of the trial. A denial of this privilege is in fact a deprivation of a party's right to have his day in court. Without the free exercise of this right, no person can be bound by a judgment against him.

I am of the opinion that the recharge of the jury on any issue without notice to a party and an opportunity to attend deprives him of his right to object and challenge the charge and consequently his right to a fair and impartial trial. *Johnson-Maxwell v. Tulay and Dennis,* 29 LLR 355 (1981), decided July 30, 1981.

In view of these gross trial irregularities, I have voted to have the judgment set aside for a new trial to be conducted in consonance with the principles of fair and impartial trial. I therefore dissent.