PAULDING SUPERIOR COURT

John B. Adair
William Adair
Permelia Tolbert
John Bone in right of his wife Sarah
James C. Lane in right of his wife
John Bone Jr in right of his wife

CAVEAT TO WILL

vs

James L. Adair

We the jury agree that this is Boseman Adair Will.

***2** Upon cross-examination, he testified that he wrote the will in his office, because his writing fixtures were convenient there, and he could write it better there than at testator's house. Witness never had any correspondence with testator on the subject of his Will before James L. Adair called on him as above stated, to write the Will; he wrote the Will as directed by James L. Adair. To the question, whether he thought testator was, at the time, of sound and disposing mind and memory, witness said, "That is a tight question."

Much other testimony was introduced both by propounder and caveators, but the foregoing is sufficient to understand fully the exception taken to the rulings of the Court, and to its refusal to charge as requested, and the opinion of this Court upon the errors assigned.

The Jury found in favor of the Will, and counsel for caveators moved for a New Trial upon the following grounds:

1. Because the verdict was contrary to Law and the evidence.

2. Because the Jury found contrary to the charge of the Court.

3. Because the Court erred in failing to charge the jury as requested by counsel for caveators, "that the presumption is strong against a party preparing a Will, who takes a benefit under it, and although it will not be declared void on that account, strong evidence of intention in such a case will be required."

4. Because the verdict of the Jury does not find the issue submitted to them, in favor of, or against either party. (The verdict was in the following form, "We the Jury agree that this is **BozemanAdair's** will.")

5. Because the Court refused to allow the Jury to be polled upon the motion of counsel for caveator.

The Court refused the motion for a New Trial, and caveator excepted, and assign said refusal as error.

West Headnotes

New Trial 275 ⇐39

275 New Trial
275II Grounds
275II(C) Rulings and Instructions at Trial
275k39 k. Instructions. Most Cited Cases
A new trial will be granted, when a case is submitted to the jury without any instruction upon the main point in it, by an unintentional omission of the judge and an unintentional omission of counsel to correct.

Wills 409 ⇐302(3)

409 Wills
409V Probate or Contest of Will
409V(M) Evidence
409k299 Weight and Sufficiency
409k302 Execution, Existence, and Genuineness
409k302(3) k. Knowledge of Testator as to Contents of Instrument. Most Cited Cases
A will prepared by one who takes a large benefit under it cannot be set up without strong proof that the testator understood its provisions.

CHISOLM & WADDELL; MILLER & PARROTT, for plaintiffs in error.
IRWIN & LESTER, *contra.*
By the Court.-STEPHENS, J., delivering the opinion.
***3** There is one ground on which we think a New Trial ought to have been granted in this case: the failure of the Judge to charge as requested, that where, as in this case, the Will is prepared by one who takes a large benefit under it, the Will cannot be set up without strong proof that the testator understood its provisions and assented to them. That this charge as asked is sound Law, and that it was applicable to the case, are propositions not disputed in the argument. The real controversy touching this point, was as to the proper construction of the Bill

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of Exceptions. The Bill of Exceptions states that the charge was asked and was not given. A note to it adds that the Court recognized it as law, and after concluding his general charge, inquired of counsel whether there were any other points on which they desired a charge, and that they replied there were none. This note does not vary the original statement that the charge was asked and was not given. It does say that the Court *recognized* it as Law, but it does *not* say that he *charged* it as law. The Court's recognition of Law becomes a guide for the Jury when expressed to them, and not before. Then the charge was not given. Was it waived? The exact truth of the case is, that it was not waived, but *forgotten* by the Judge and by the counsel. If the Judge had thought of it, he would have given it, for he recognized it as law. If counsel had thought of it, they would have suggested it, when requested to suggest any other points not covered by the general charge, for their case turned on it. Our conclusion is, that the case was submitted to the Jury without any instruction upon the main point in it, by an unintentional omission of the Judge; the omission commited by him, and not corrected by the counsel, because they happened to slip into a like momentary trick of the memory. The case was not tried on its merits. The failure, if the fault of anybody, was as much the fault of the Judge as of the counsel; and we think he ought to have granted a New Trial on account of it. There is no need to express any opinion upon the other grounds of error, for they involve no general principle, and cannot recur upon the new hearing. As to the point upon the weight of evidence, we will remark, that in our judgment, the evidence was such as not to authorize the Court to set aside a verdict which might have been found either way, if the case had been legally and fully submitted to the Jury.

Judgment Reversed.

Ga. 1860.
Adair v. Adair
30 Ga. 102, 1860 WL 2096 (Ga.)

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