TESTAMENTARY CAPACITY

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IT seems to me to be desirable that, by way of introduction to my remarks this evening, I should make one or two disarming confessions.

The first is that when I was invited to accept the honour of addressing you on the subject of testamentary capacity, with an assurance that it was a topic in which members were interested, I was not aware—nor I imagine was your legal secretary—that it had been dealt with in a paper read by the late Dr. Clarence Godfrey to a meeting of the Society nearly 30 years ago, and published in Volume 1 of its Proceedings. Even on the basis that it is one of those topics to which you ordinarily turn every 30 years, I would not have been prepared to go over the same ground. But when I was made aware of the depth and extent of your knowledge on the subject, I felt some gratification at the fact that the area of discourse to which I was attracted was one which had not been very deeply penetrated in that discussion, and one which I hoped might be of particular and practical interest to our medical colleagues.

The second confession I think it desirable to make is one which I was at first disposed to leave to the end. But then it would become apparent that it was unnecessary to make it. That confession is that I do not pretend to be learned or greatly experienced in this field—not even to the extent of attaining to the usually accepted standard of being able to reproduce verbatim or in less elegant language the ideas of someone who had done most of the thinking on the subject in earlier days. My pretensions must necessarily be confined to the fact that, using this method, I once wrote a book on the branch of the law which embraces this subject, which fortunately was never published—because it was found that better use could be made of the paper during the Second World War, and after the war better use still could be made of the paper.

Having unburdened my soul, let me lighten yours. I do not propose to yield to the temptation to supply you with misleading information as to the origins of the practice of disposing of property by wills. It is an interesting and delightful field much suited to the taste of the antiquarian. So far as Britain is concerned it would take you back to the Anglo-Saxons, and thence to the Romanized Britons, and so to Lear who used to swear by Jupiter and must have lived in Roman Britain. Although Lear's disposition was *inter vivos,* he was a pretty problem in capacity, and might well have profited from the observations of another and later Kent, Chancellor in New York State, who is recorded as saying:—

> "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life, to command the attention due to his infirmities."

But all that is outside my field.

Nor do I wish to attempt to trace out for you the fluctuations from time to time in the application of the definitive standards adopted for testing capacity. You will find that discussed in relation to insanity, in Dr. Godfrey's paper. But it is necessary for my purpose to establish as a foundation the accepted standards required for testing capacity, and to remind you of them, and it may be of interest for you to know how the expression of that standard has changed from time to time. When Henry VIII's Parliament in 1542 permitted the disposal of land by will, it made certain tersely expressed exceptions. No will or testament was to be taken to be good or effectual in the law, if made by any "idiot or by any person de non sane memory". In later times the necessary condition was summed up in the phrase "sound mind, memory and understanding"—lawyers being no doubt aware that memory and understanding are themselves functions of the mind, but in accordance with their conventions being reluctant to save words at the possible expense of ideas. It is now usual to express the standard by reference to the words used by Sir Alexander *Cockburn, C. J.* in 1870 in *Banks v. Goodfellow L. R. 5 Q.B. 549.* These words express principles which were not entirely new then either in England or America. His words were:—

"It is obvious . . . that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert the sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, had the mind been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influences—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."

Perhaps I might add a more recent statement by *Lord Haldane* in *Sivewright v. Sivewright's Trustees 1920 S.S. (H.L.) 63:—*

"The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. The testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act. But, if he does, he is not required to be highly intelligent. He may be stupid, or he may even be improperly, so far as ethics go, actuated by ill-feelings. He may, again, make his will only in the lucid interval between two periods of insanity. The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of a delusion so irrational that is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question,

the will cannot stand, but, in that case, if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of a delusion. The delusion must be shown to have been an actual and impelling influence." (I disregard, for present purposes, the question of onus of proof raised by the words "must be shown to have been", as to which see *In re White 1951 N.Z.L.R. 393* and *Bull v. Fulton 66 C.L.R. 295).*

In accordance with these standards it is generally accepted that the features required to exist at the time of the making of the will are to be classified as:—

Firstly, a rational apprehension by the testator of the nature of the business on which he is engaged, i.e. the disposition of his property in the event of his death;

secondly, an adequate memory as to the nature and extent of the property he has to dispose of;

thirdly, a sound memory of those who by relationship or affection have a claim on his bounty; and

fourthly, a judgment capable of making a choice between their claims free of perversion or irrational prejudice or delusion.

Let me say now that what I am primarily interested to discuss is the classes of witnesses and the nature of the evidence that may be adduced from them, to affirm or deny the presence of these facts in the usually encountered case. My concern is with the mechanics of proof and disproof. It is with what the witness can say and be asked to say, and with what he cannot be asked or permitted to say. In a particular way, the concern is with the evidence that the medical expert can give. I have always suspected that sub-titles are found after the books have been written; and having now found what I want to talk about, I think I should now add to the heading given to this paper, the sub-title "The Evidentiary Aspect". It makes it look much less ambitious.

One thing is clear that no witness, be he layman or expert, can be allowed to answer the direct question—"did the testator have testamentary capacity at the time of the making of the will?" The ultimate objection is that that is the question for the Court to determine. This does not mean that by accepting the answer the Court would be abdicating its function. It would not

be bound to accept the particular answer or any other answer made by witnesses to the question. It could choose among the several answers or reject them all, and so retain its freedom of action and function. The primary objection is that the question seeks evidence of opinion. But of course opinion evidence can be given by experts. But then it can only be given by those experts who by special qualification are presumed to have a knowledge of the particular subject matter which excels the knowledge of those who are not so specially qualified. On one particular subject matter, the law of the land, there is only one expert—the Court. It is the Court's function to ascertain the law. How the law is to be applied to the facts is not a matter for evidence at all—it is another function of the Court. To ask a witness to answer the question whether or not the testator had testamentary capacity is to ask him not merely about the facts to be determined but to act as an expert on the law and to apply the law to the facts. Given the law, his evidence may go a long way to the solution of the final question, but the ultimate question is not for him, whatever his qualifications may be in his own science. (As to this—see *Wigmore on Evidence* 3rd Ed. vol. VII, ss.1937, 1958).

It is obvious from the classification of requirements that I have mentioned above, that some of them are of their nature not required to be testified to by expert witnesses. The testator's own conduct, and his statements, whether volunteered or invoked, will establish whether or not he knew that he was concerned with the making of a will, and his understanding of the business. Similarly his statements, and facts otherwise established, will show the extent and degree of his memory as to the property he has to dispose of. The same applies with respect to his memory of those whom he ought to consider as entitled to his bounty. Of course all this may be supplemented by evidence of a more general nature given by medical or other witnesses as to his physical or mental condition. But it is peculiarly in relation to the fourth requirement which involves an assessment of the capacity of his judgment, and its freedom from perversion, prejudice or delusion, that expert evidence plays its major part. It is into this field that the medical witness may be asked to venture.

The medical witness may be familiar with the testator. He may be his ordinary medical consultant. He may be called in for the occasion, and asked to act as a witness to the will. He may

be asked merely to examine the testator. He may be called upon merely to express an opinion on the observations of others without ever having seen the testator himself.

If he is merely called upon to conduct an examination, there is one thing that he needs to be certain about, and that is that he did examine the testator. I remember one ocasion some 30 years ago when an unfortunate country dentist found himself in some difficulties because he had not been equipped with this knowledge. He had made one visit to the testator and attended to his teeth, and on the strength of this was called upon to give some evidence as to his capacity. His evidence was innocuous enough but my leader decided to be playful. The cross-examination went like this:—

Q. How do you know you examined the testator?
A. I know I did.
Q. Did you know him?
A. No.
Q. Well how did you know that it was the testator?
A. I was asked to examine him. His name was Mr. S.
Q. Was there more than one Mr. S. at this place?
A. Yes.
Q. Well how did you know that he was the testator?
A. He had a long white beard.
Q. In your experience have all testators long white beards?
A. (inaudible).

The testator's usual doctor would not encounter that obstacle, such as it was. He could recount his personal observations and experiences. He could describe the testator's physical condition and his statements. He could express his opinion as to any malfunctioning or disorder of the mind that the testator's physical condition would predispose him to. He could be asked, and might venture upon, answers to questions of a hypothetical nature as to the depth and extent and strength of the testator's memory and understanding. If he were prepared to express such opinions, he would need to be equally prepared to justify them on his particular or general experience, or his qualifications and training. These questions would, if due regard for relevance were preserved, be directed to the presence or absence of the requirements I have mentioned above. The careful witness would have in mind how far he could prudently go notwithstanding

his personal association with the testator, in this particular area of opinion.

The Courts will—or I venture to say ought to—look particularly to evidence of the external manifestations of the testator's capacity testified to by those who have observed them over a period. In the discussion on Dr. Godfrey's paper will be found in Sir Owen Dixon's contribution, an emphasis on "endeavouring to determine the true nature of external acts", and on "outward objective appearances", and also an expression of doubt as to whether "in the settlement of these matters very much significance was attached to modern medical explanations of the deceased's conduct and testamentary eccentricities." This approach is in accord with views expressed as long ago as 1818 in the case of *Kinleside v. Harrison (1812) 2 Phillimore at pp. 457-459.* I venture to quote an extract which is of a general nature—

> "In the first place, it may be observed that a large portion of evidence to capacity is evidence of mere opinion; and upon matters of opinion mankind differ, even to a proverb. In the next place, there is no fixed standard by which each witness fixes and estimates his opinion of capacity; one person, seeing a testator in extreme age, or under extreme sickness, thinks that if he knows those about him, and can answer an ordinary question with respect to the state of his illness, or of his wants, such and similar matters render him capable of giving effect to a disposition by will, however complicated it may be, by the mere formal execution of the instrument; while another person may be of opinion that though a testator is in the ordinary management of his own affairs, can hold reasonable conversation, can fully comprehend all the usual and simple transactions of life, yet if he is unable to take the active management of all his concerns, however complicated those concerns may be, or if he is liable to become confused by entering into intricate transactions, he is totally incapable, and cannot enter into a testamentary disposition, however plain and simple it may be. Now, where opinions are formed by such different standards, it is obvious that much variety must take place.
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> Differences will also arise from other causes: first, from the different abilities of witnesses to form such opinions; secondly, from their different opportunities of seeing the person; and, thirdly, from the different state and condition

of the testator's mind at different times. It is certainly true that the study of the human mind is an abstruse science; the different lines and traits of the understanding are matters which attract the notice and consideration of the intelligent; ignorant persons and enlightened persons will form very different opinions upon subjects of this kind: ignorant persons, servants, and those in their condition, who form their judgments in the conversation of the kitchen circle, are very apt to form erroneous opinions on matters of this sort; and this will be the case, even without throwing in the additional ingredient which takes place in those circles, the loose suspicions and prejudices by which their judgments are often biassed and carried out of their true course. In the next place, from the different opportunities persons have of judging they will form different opinions; persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It frequently happens that the most ignorant are the most confident. In this case we have an under gardener speaking of the deceased, who was always deaf, sometimes nervous, and whom he only sees in the garden, but seldom converses with him, yet venturing to swear truly. I have no doubt in his own opinion, that he is quite certain the deceased was not capable of making a codicil during any part of a particular month, which happened three years before his examination. This kind of opinion is still more various where the testator's capacity is fluctuating, where he is sometimes better and sometimes worse; and this is generally the case with persons labouring under old age, or other infirmities; it is so, even where there is no special attack occasionally operating; accidental cold, or other indisposition, often renders an old infirm person worse one day than another; after a good or bad night a person will be alert or dull; so after a night's sleep, a person may be active and capable of considerable exertion even in matters of business, who, in the afternoon, while the process of digestion is going on, shall appear drowsy and torpid, and not able to rouse himself into action. The humour of a testator will also sometimes make him apparently almost

fatuous, or induce him to rouse himself into exertion, as the occasion is either interesting or disagreeable to his inclinations. Now, these different considerations (and they might be much more spread), while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to weigh such evidence with very great attention—to rely but little upon mere opinion—to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather by the judgment of others. These preliminary observations may, by being applied to the evidence, save the time and trouble of repeating them when the depositions come to be stated."

Citing this authority in *Bailey v. Bailey (1924) 34 C.L.R. 572, Isaacs J.* formulated the proposition agreed in by *Gavan Duffy, C. J.* and *Rich, J.*) that the opinions of witnesses as to the testamentary capacity of the alleged testator are usually, for various reasons, of little weight on the direct issue. He also asserted, relying on *Durnell v. Cornfield (1844) 1 Robinson's Ecclesiastical Cases 455,* that, while the opinions of attesting witneses to the effect that the testator was competent are not without some weight, the Court must judge from the facts they state, and not from their opinions.

It will be observed that these propositions are expressed in terms which are applicable alike to the opinions of those who have observed the testator over a period and those who have observed him specially on one or two occasions. I would imagine however that some distinction would need to be made in favour of those with the longer experience of the testator and the greater opportunity for observing him, all other things being equal. (Our medical colleagues would no doubt have views upon this). One thing of course has to be borne in mind and that is that it is the capacity of the testator at the time of making his will, or at all events giving instructions for it, that is the relevant consideration.

The doctor who is called in to observe the person about to make a will, faces some difficulties and must needs address some warnings to himself. He must remind himself that he is not being called upon to determine whether the proposed testator should be certified to or not. To quote *Langton J.* in *In the Estate of Bohrmann (1938) 1 A.E.R. at p. 276*:—

> "The question of certification depends so largely upon the damage or harm that the affected person may do that it does not really present the acid test of sanity at all. It may be quite true to say that no one could possibly be certified who was not insane. It is not true to say that every person suffering from an insane delusion ought, therefore, to be certified. That distinction must be borne in mind."

The doctor so called in may remind himself of the requirements for testamentary capacity. But this will only direct his attention in the first instance to the strength of the testator's understanding and memory on certain subjects, upon which the doctor may not feel disposed to test the patient, e.g. his will, his property and his relations. If he tests him out on the football results, horse-racing, the stock market or the Common Market, he may well be deluded himself. He may be called upon to assess whether the judgment of the testator is free of perversion, irrational prejudice or delusion. If the proposed testator suffers from some prejudice or delusion those who have called the doctor in may not be over-ready to indicate its existence or its strength. The doctor may be called upon to express an opinion as to whether testamentary capacity is present. Can he give an affirmative opinion, or should he merely observe and record, and confine himself to stating that he sees little or nothing against it? Such evidence given by someone who has not committed himself is very useful to a Court.

But the circumstances may well be such that the Court needs to look to and rely upon opinion evidence of a different character. This may result from the quality of the witnesses otherwise available—or rather their lack of quality. It may be necessary to look to the opinions of somebody who has never seen the testator. This may be peculiarly necessary where the matter in issue relates to a disorder or alleged disorder of the mind unassociated with or not obviously associated with a physical condition, the kind of disorder which calls for identification and interpretation by specialists in that field. If however this specialist evidence is not available, the Court must and can "rely on its practical knowledge drawn from its own experience". *Ball v. Fulton* (supra) per *Williams J.*

Let me quote again from the judgment of *Langton, J.* in the case of *Bohrmann* which I have mentioned above. He was a very experienced Judge in this field.

"When one comes to this question of lunacy, one begins to touch the real issue in this case, and what was dark before became to my mind mainly clearer when I had the valuable evidence of Dr. Gillespie. To a perfect mastery of his subject Dr. Gillespie joins a great lucidity of diction. He presents in the witness box—to me, at any rate—an impartiality which it is rare to find, even amongst experts, and the lucidity with which he dealt with this extremely difficult topic commanded the greatest measure of my admiration. He was an immensely useful witness . . . Dr. Gillespie had never had the advantage of seeing this patient, and the only matter in which he fell for a moment a little short of my expectations was that he would not agree with Mr. Pritt that this was a very considerable handicap. I cannot help feeling that it must be a very considerable handicap. Dr. Gillespie's view—and he always has a reasonable view—was that it was not really a handicap, because he had, instead of it, the great advantage of hearing the views, formed over a number of years, of other persons who were more or less qualified to judge. He attached much greater importance to the evidence of people with whom the testator rubbed shoulders than he did to that of the medical attendants, against whom anybody who was actually suffering from paranoia would be on their guard. He pointed out that, even if he himself had been there, perhaps all the more if he himself, with his great reputation, were there, the patient would be on his guard, and, unless he went disguised, he might fail to obtain any very valuable results from his observation. Nevertheless, I cannot help feeling that, much as I would expect the doctor, in a matter in which he is perhaps far better qualified to judge than I am, it was a handicap not to have seen this man alive and to be obliged to rely upon a vast body of evidence. It was a handicap, I think, to assess—and I have found it, with many years experience, very difficult to assess—this vast body of evidence which he had to assess, before he could arrive at his conclusion. However the conclusion at which he arrived —and, as usual, he was perfectly precise about it—was that this man was a paranoid psychopath, and thus deficient in human affections and in the common instincts of mankind. I think it is for me rather than him to say whether a person so deficient is or is not capable of the discharge of the major

social responsibilities. In one or two of these phrases, there was an echo of legal learning rather than of medical research, and I make no complaint of that. There is no reason at all that the doctor should not study the legal side of the matter and try to bring his evidence, as he did, within the ambit of well known legal decisions."

I quote this extract as a fair example of the way in which Courts will deal with this class of evidence. The case concerned the will of a man who, by reason of the lack of human instinct and common understanding in the matters of affection, was unattractive in his emotional make-up, and who, in addition, suffered under the delusion that the London County Council was persecuting him in the matter of the acquisition of a property which he possessed. It was held that this amounted to a delusional insanity which led to his putting a provision in a codicil to his will, the effect of which was to alter a gift to charities in England so as to make it a gift to charities in the United States. This provision was held invalid. It was only that part of the codicil which was affected by delusion which was so invalidated. The eccentricity of the testator was not sufficient to invalidate the will or codicil as a whole.

A defect of the mind operating with respect to the execution of a will may invalidate the whole of the will or (according to this decision) any part of it, although in this respect it has not escaped criticism. (*2 4 A. L. J. 12*). On the other hand a defect of the mind not operating in respect of the execution of the will will invalidate no part of it. A defect of the mind might render a man unfit to manage his ordinary affairs of business and yet not disqualify him from disposing of his property by will. His mind may be clear enough for the performance of some functions and yet not be clear enough for the performance of others. The demands are different and the criteria are different. Caprice and passion may enter into the making of the will to such an extent as to deny a disposing mind. These elements could not of themselves be used to invalidate a contract. These considerations will be found discussed in *Taylor's Medical Jurisprudence.* An interesting illustration of the distinctions I have been adverting to is to be found in a case decided in England in 1953—*In the Estate of Park deceased (1953) 3 W.L.R. 307, and 1012.* The case concerned a man of 78 who married the cashier of his club and on that day, immediately after the ceremony, made his will. In an

action challenging the will, brought by the executors of an earlier will, the jury found the deceased was not of sound memory and understanding when he purported to make the will, and it was invalidated. In a subsequent action brought by the widow before a Judge, challenging the earlier will on the ground that it had been revoked by the marriage, it was sought by the defendants to nullify the marriage itself on the ground of the deceased's incapacity to contract marriage. The marriage was upheld by the trial Judge and the Court of Appeal, the latter Court disagreeing with the trial Judge's view that a lesser capacity was required to consent to a marriage than in the making of a will, but agreeing that the standard may be different according to circumstances, such, for example, as the complexity of the testamentary provisions. The test for the marriage was—"Was he, at the particular time of the marriage, capable of understanding the nature of the contract into which he was entering or was his mental condition such that he was incapable of understanding it?" It had been said in 1885 that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend". This statement met with no disapproval. But in a simple case, a high degree of intelligence may not be required for the making of a will. Where the trial Judge and the Court of Appeal differed (and it was only in this respect) was in the understanding of these words of *Sir James Hannen* in 1873 in *Boughton v. Knight* (cited 1953 W.L.R. at 1019-20), "Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in *M'Naghten's* case. No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which will be of use to us in considering the points before us. Lord Chief Justice Tindal, in expressing the opinion of all the judges, said—'In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of committing or executing the act the party was laboring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.' That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain

to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very small degree of intelligence is sufficient to enable a man to judge the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life—was the man at the time the act was done of sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into? The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who, being confined to a lunatic asylum, is called upon to give evidence. First, the Judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness — I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention."

In a later case (*Burdett v. Thompson (1873) L.R. 5 P. & D. 72n.)* reported in a footnote to that report, *Sir James Hannen,* in directing a jury, said: "It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. That is very different from

the proposition that it requires a higher degree of soundness of mind to make a will than to do anything else."

It is distinctions such as these created and recognized by the law which raise such obstacles to the most competent and qualified medical practitioner answering directly the question whether the testator had or had not testamentary capacity. They raise difficulties too for the Judge; but he cannot shirk them; he has been trained to discharge his function according to a system which has been found to be useful, and he is there to discharge it accordingly; to a degree his judgment is more empirical than theoretical.

The Court is not really concerned with the classifications into which forms of insanity may be arranged. That exercise may be necessary or useful to the student of medical hygiene. Yet it is not infrequent to find writers of legal textbooks solemly setting out classifications of insanity in relation to testamentary incapacity under the headings of mania, monomania, dementia and amentia, and collecting legal decisions under one or other of these headings. I suppose decisions on insanity must be considered according to some system, but such an examination seems to me rather to lead the mind away from the standards that have to be applied, than to lead to the solutions of the problems which are raised.

That is not to say that the medical witness may not order his mind by reference to classifications with which he is familiar; but ultimately the test that will be applied will be legal standards; and if he cannot bring himself to appreciate and apply those standards in the opinions he expresses, he will best assist in the task by relating his evidence as closely as possible to what he considers to be the ascertained facts and the admissible inferences therefrom, leaving the hazards of conclusions resting upon the shoulders of the Judge to whom the task has been entrusted. This is not to say that opinions emanating from the trained impartial and disciplined mind of the medical expert will not be of the greatest assistance to a Court but it does mean that his mind must have a discipline imposed upon it for the particular circumstances and according to particular standards or tests. No doubt *Langton J.* had those considerations in mind in the case which I have referred to when he observed as to one medical witness:—

"I am afraid I was a little impatient with him at the end,

because I could not get him to direct his mind to the class of question I was putting to him."

I have been emboldened to make these observations by reason of the fact that it is not infrequently found that problems of this kind are examined in Court, and indeed in this Society, according to entirely different points of view, or to be more precise according to different standards or tests.

It has sometimes been suggested that persons about to make wills should have to procure the certificates of two doctors. Presumably these certificates should be to the effect that the proposed testator is of testamentary capacity. It must be remembered that under the existing system of law, testamentary capacity only comes in issue when the will is challenged. To coin an epigram, a testator does not need capacity until his will is challenged. A madman may make an effective will if it pleases everybody. Under the proposed change a will that pleases everybody would be bad for want of two certificates, as it is bad now for want of two witnesses. Two other issues would arise about that suggestion. One would be whether the certificates should be regarded as conclusive if they were to the effect that the testator had testamentary capacity; or on the other hand whether they should be merely of *prima facie* evidentiary value. The other would centre around the question as to what standard or test should be applied by the doctors in arriving at their certificates. The law could hardly contemplate a test or standard being applied other than that which had been laid down by the Courts. How could this be achieved? It might be required that the certificate should deal specifically with the requirements that I have mentioned above. But these are very general in their statement. The fact is that they are of such a nature as not really to be capable of ascertainment except by the process of inquiry upon evidence and determination, such as is applied by the judicial process.

Another suggestion that has been made is that there should sit with the Judge two medical assessors similar to the assessors that sit in the maritime jurisdiction where questions of navigation are involved. But there are differences. The questions that arise in relation to the appropriate way in which ships should be navigated are of a very different kind from those which arise with respect to the way in which a mind should work if capacity is to be regarded as existing for the purpose of making a will. The former is entirely a technical matter; the latter is less obviously so. The latter is a field in which motive, prejudice and

judgment are predominant. The technical element may be more or less obtrusive according to the circumstances. There is an issue upon which minds may differ as to whether the technical assistance that the Court may require might not be as well provided by the present system of expert witnesses taking in their appropriate place among the other witnesses of the circumstances, as by medical experts taking their part in deliberations of the tribunal; it may well be thought that the problem to be solved is not wholly a medical one.

Perhaps I might add one further thought which departs somewhat from the matter I have been concerned with. I am disposed to think—without having the support of any statistical data—that challenges to wills on the basis of incapacity or undue influence, are less frequent than they used to be. In my own mind I associate this trend with the resort that can now be made to Testator Family Maintenance Legislation by disappointed members of the testator's family. It is simpler and cheaper to contend that the testator has left a will without making adequate provision for the proper maintenance and support of some member of his family than to attempt to establish by evidence that he has made no will at all.

The notice dealing with this meeting says that a discussion on the subject "Testamentary Capacity" will be introduced by me. I have endeavoured to bring myself within the terms of that notice. I have endeavoured to introduce a discussion. The rest is for you.

The Chairman, MR. G. H. LUSH, said that following the introduction of Testators' Family Maintenance legislation, it had become even rarer for a disputed will case to be fought out in the Courts. His own experience suggested that if a solicitor or doctor is called in for the first time on the occasion of the making of a will, he might profitably ask himself why it is he who is there, rather than the testator's usual solicitor or doctor. The combination of a new solicitor, a new doctor, and a new housekeeper, almost inevitably meant something was wrong—at any rate if the new housekeeper was the principal beneficiary.

His Honour JUDGE NORRIS pointed out that in the field of criminal law, the tendency of the High Court in recent years had been to say that a man showing signs of madness in a field not connected with the crime ought not to be regarded as wholly responsible for the crime. His Honour wondered whether this

attitude would intrude into the law regarding testamentary capacity.

DR. BUNTINE asked whether the speaker could tell a mere general practitioner the difference between being asked to examine an intending testator from the medical point of view, and being asked to witness the will.

MR. LUSH intervened to say that if the doctor was asked only to witness the will, his function was merely to make sure that the person meant to be signing the will, in fact does so. The witness may be asked later to give evidence as to the condition of the person signing the will, but his main purpose was to record that he was there when the physical act of signing took place.

DR. CURTIS said a distinction should be drawn between psychiatrists, who receive special training and have special experience in gauging mental capacity, and other doctors, who do not. His own opinions as to mental capacity, he considered, were based less on medical knowledge than on common sense, and he thought this must be so with all doctors other than psychiatrists.

MR. JUSTICE ADAM said he had tried several of these cases, and that he had found the natural starting-point to be the will itself. Did it speak to reason? If it did, its supporter was one step ahead, despite any medical evidence that may come. The second point was: what had the solicitor who prepared the will done? Had he troubled to ask the elementary questions concerning the testator's property, relatives, etc. If the solicitor took the trouble to ask these questions, there was rarely any difficulty for the Judge. His Honour said he did rely on medical opinions as to capacity, though with a general practitioner he would test him to see what he considered the proper tests of capacity. Whether the witness was a general practitioner or a specialist, his Honour would always probe the things on which the opinion was based. His Honour said the late Dr. Godfrey used to be asked to listen to the evidence in Court, and then express his opinion. His Honour saw no objection to this.

DR. SINCLAIR said he was as a psychiatrist very despondent, because unconscious motivation played such a part in all this. A man who left all his property to the Boy Scouts almost certainly hated them. Anything written on the paper would be almost the opposite of what the testator really wished.

DR. SPRINGTHORPE said he had come to the meeting determined not to speak, and had failed again. His view was that subject

to the problem of "the lucid interval", many solicitors and all psychiatrists could tell whether an intending testator was being subjected to undue influence. In all his years of practice, he had never been asked to examine an intending testator at the time of making the will. He had always been asked to express opinions later, on what he had been told by others. The real problems were not so much theoretical as practical, and arose from the fact that the difficulties were not anticipated by those concerned at the time. Some kind of preventive measure at the time, would be very much better than asking the psychiatrist to sort out the conflicting evidence months or years later.

DR. CUNNINGHAM DAX recalled that Dr. Godfrey is now best remembered by "Godfrey's Mixture", given to alcoholics at Royal Park. This mixture, he said, poisons, puts to sleep, and deceives. This seemed to produce the ideal state for making a will.

MR. JUSTICE EGGLESTON said that the emphasis on "capable of making a rational judgment" caused considerable difficulty, both because many persons not affected by any mental disorder were not capable of making rational judgments, and because the question where a judgment was rational may depend on the viewpoint of the person judging. The question seemed to be when did an irrational judgment become so irrational that, considered with the other evidence, absence of capacity could be inferred. His Honour also wondered whether the asking by the solicitor of the standard questions might serve, not to establish testamentary capacity, but merely to prevent testamentary incapacity being shown.

MR. LUSH, in calling on the Speaker to wind up the discussion, pointed out to Dr. Curtis that a doctor's views, though not based on psychiatric training, were the views of a trained person having by training and experience some ability in judging the degree of understanding of a patient, and were accordingly likely to be more valuable than those of an untrained person without that experience.

MR. JUSTICE GOWANS: I do not propose to take up much time, but I did say in the course of reading the paper to you that it had been my experience that the problems have been discussed both in Court and in this Society from aspects and according to standards other than those which are laid down by the law. I have not been disappointed by the discussion this evening in that regard. Some of the observations made tonight are directed to the question of what the law ought to be rather than what it is.

I have endeavoured to tell you what the law is, and I believe that what I have told you is in fact in accordance with the standards that have been laid down. I am not really concerned, consequently, with the practice which Dr. Springthorpe usually adopts, or the standards that are applied by my brother Adam in administering the law. When I said that the judgment of the Court was more usually empirical than theoretical, I did not mean it to go that far.

When Judge Norris drew attention to the approach that was made by the High Court to the question of insanity, and particularly, if I understand him correctly, in regard to episodes of delusion in relation to the insanity or otherwise of the accused in a murder case, as distinct from the approach that might be made in the case of testamentary capacity, I am disposed to think that the distinction is a superficial one. It is true, of course, that the High Court and all of us are concerned as far as possible not to err on the wrong side when it comes to a question of whether a man ought to be exculpated from the guilt of murder, or whether on the other hand the necessary absence of capacity should be established as present or absent in the case of the making of a will. Ultimately, I suggest to His Honour Judge Norris, it will be found that the law really lays down the same test in each case; that is, the accused has to establish on the balance of probabilities that he was insane at the time, and that any delusion that he suffered under, affected the acts of which he is accused. As I understand the law now, in spite of what is said by *Lord Haldane* in the case I have referred to, the onus is on the persons who are seeking to uphold the will to establish that a delusion once shown to exist did not affect the making of the will to the extent of depriving the testator of a disposing capacity.

A question was asked by Dr. Buntine as to what was said to a difference in function of the general practitioner who was called upon to examine the patient and the general practitioner who was called upon to witness the will. Mr. Lush has suggested that the doctor who is called upon to witness the will is only called upon to sign his name. May I suggest to Dr. Buntine that if he does sign his name he may well be called upon thereafter to substantiate the testamentary capacity of the testator, not because the mere signing of his name and the attestation of the will necessarily involves that, but because it will probably be said that if he does sign his name to the will he is implicitly warrant-

ing the testamentary capacity of the testator. That is why, in the course of what I was saying earlier in the evening, I suggested that unless a doctor is prepared to vouch for the testamentary capacity of the proposed testator, it would be better for him merely to record what he sees, to observe and record, and to confine himself to the question as to whether he has seen any signs of the testator wanting in capacity, rather than going to the extent of expressing a positive view on the question as to whether capacity exists.

As to Dr. Curtis' contribution, I can only say that I agree with what the Chairman has said and that is that the problem that has faced the Doctor seems to be a problem as to how far he is prepared to go when requested by legal officers who would like him to go further than he ought to go, and that when he says he is rather concerned to determine the matter from the point of view of commonsense, then he must ask himself the question as to whether he has more commonsense than the jury. It seems to me, if the test is commonsense, then the jury is the tribunal, or the Judge, as the case may be, is the tribunal that has to determine the matter according to evidence. It is only when it goes beyond commonsense to the stage of expert opinion, that the opinion of the expert comes into the picture.

I pass over the observations of my brother Adam on the basis that I have told you what I consider to be the law. He has told you the way in which he administers it.

Dr. Springthorpe complained that no mention had been made of the phenomena of the lucid interval. I think he will find when he reads this that there is a reference to that as one of the matters that has to be considered in relation to this whole subject of testamentary capacity. It is particularly included in the excerpts I made from the judgment of *Sir Alexander Cockburn in Banks v. Goodfellow,* but because of the limits I placed upon the subject matter tonight, I did not go into that. I quite agree with him that, of course, it is one of the most difficult problems that has to be faced in relation to testamentary capacity.

One thing I would like to say as to the observations of Dr. Springthorpe, as I understood them, is this, that it is one thing to make your observations of the testator and it is one thing, of course, to get from him what he has to say about the various matters that he ought to bear in mind. The next thing is to balance what he has to say and what you have observed against ascertained data from other sources, and it did seem to me that

Dr. Springthorpe was approaching it mainly from the point of view of examining the testator without regard to the fact that there may be ascertained data which are not referred to or related by the testator, and if we are to apply the tests which have been laid down by the Courts—it is not for me to say whether they are right or wrong, although it is right enough for those outside the law, no doubt, to say whether those are right or wrong—if we are to apply those tests, then we must come to the exercise of balancing what the testator says and appears to know against what are supposed to be the facts.

Well, gentlemen, I think that is all I can say by way of reply, except to thank you for being so merciful.