ORIGINAL

(6)

IN THE HIGH COURT OF AUSTRALIA

WING & ANOR.

V.

MONCRIEFF & ANOR.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Monday, 15th November, 1954.

J. J Gourley, Govt. Print., Melb.

C.7163/51

WING & ANOR.

v.

MONCRIEFF & ANOR.

ORDER

Appeal dismissed with costs.

WING & ANOR.

v.

MONCRIEFF & ANOR.

JUDGMENT. DIXON C.J.

WING & ANOR.

v.

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I have had the advantage of reading the reasons prepared by Kitto J. and agree in them.

But I desire to add that, notwithstanding the fact that the reasons given by Myers J. from whom the appeal comes contain such specific estimates of the degree of credit his Honour attached to many of the witnesses, I think that a proper application of the familiar rules governing appeals on questions of fact must preclude the success of the appeal. In this Court there has been a recent recapitulation of the sequence of decided cases containing formulations of these rules: Paterson v. Paterson, 1953 A.L.R. 1095. At the same time if our decision were to be guided simply by the evidence as it appears upon the printed page I must say that, considered as a whole, it leaves me with a strong impression that in April 1951 the testatrix no longer possessed a sound disposing mind. In saying this I put aside the testimony of Mrs. Moncrieff, on which I should not be prepared to place reliance. I do not think that to adopt the conclusion that at that time the testatrix no longer had testamentary capacity implies any reflection on Mr. Bennett who prepared her will. In a case of this kind where an old woman whose faculties are fast declining makes a will it is very common indeed for quite intelligent witnesses to give strikingly different pictures of the deceased and of her physical and mental condition, a thing which is amply illustrated by the evidence in this case. All a court can do is to consider their respective opportunities of forming discerning judgments, the circumstances in which they have observed the deceased and the grounds upon which the negative conclusions have been formed as well as the grounds of the affirmative impressions and then to weigh the whole evidence and so arrive at a general conclusion. It was the first and last occasion upon which

Mr. Bennett saw the testatrix and however satisfied he may have been about the sufficiency of her mental powers, the impression he formed must be considered with the whole evidence given at the hearing of the suit. The result has been to leave me quite unconvinced as to her testamentary capacity.

The learned judge from whom the appeal comes had all the additional advantages of seeing and hearing the witnesses of whom he formed various estimates. Although much inclined to find as a definite fact that the testatrix did not possess testamentary capacity, his Honour in the end placed his judgment on the burden of proof. He did so because of certain evidence given by two doctors whom he saw no reason to disbelieve. Of that evidence his Honour said that it did seem to indicate that the testatrix was capable of a rational and intelligent appearance in carrying on a simple conversation. His Honour proceeded:

> "Whether it went any further, I do not know. I have the gravest doubt whether, even in her best moments in March, she ever would have had the capacity to make a will. In spite of the evidence given by the two doctors, I have felt inclined at times during the hearing of this case to come to the conclusion that she undoubtedly did not, at any time in March or thereafter, have any capacity whatever. Nevertheless, I do feel a lingering doubt about coming to that conclusion, but I feel - indeed I am perfectly convinced- that there is no evidence which would induce me to come to the conclusion that she did have capacity at that time."

In spite of the very well constructed argument that was carefully developed in support of the appeal, it seems to me impossible for this Court to overturn the conclusion the learned judge thus expresses. It is essentially a matter of fact. The onus of proof is, of course,upon the propounder of the will. Once it appears that the competency of a testatrix is really in question the burden is upon those seeking to prove the will to establish by a preponderance of proof that she was of sufficiently sound mind, memory and understanding to make a valid will. I do not see how his Honour can be said to have erred in his reliance on the burden of proof. The appeal should be dismissed with costs.

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The appellants succeeded upon all the issues raised by the defence in this action except the issue whether the alleged testatrix was of sound and disposing mind, memory and understanding when she signed the will which the appellants propounded. It was signed on 12th April 1951. In reference to two of the issues, Myers J. said: "I am quite satisfied that the will was properly executed and that prior to execution it was read over to the testatrix and to that extent knowledge and approval by her is also proved." He dismissed the allegations of undue influence with these words: "There is no evidence whatever of undue influence." The issue of testamentary capacity was dealt with by a rather complex statement which I think ought to be quoted in full. It is as follows: "In spite of the evidence given by the two doctors, I have felt inclined at times during the hearing of this case to come to the conclusion that she undoubtedly did not, at any time in March or thereafter, have any capacity whatever. Nevertheless, I do feel a lingering doubt about coming to that conclusion, but I feel - indeed I am perfectly convinced - that there is no evidence which would induce me to come to the conclusion that she did have capacity at that time. It may be a quibble on my part in refusing to come to the conclusion that she was in fact incapable, but I

still do feel that I could not, or at all events should not, on the evidence say that she was definitely incapable. What I do feel is that the plaintiffs have very far from discharged the onus resting on them. I do not feel satisfied - I feel that there is a mere shred of evidence that she could have had capacity at the relevant time, but it is very far from enabling me to form the opinion that she had." The respondents do not dispute the findings as to the execution knowledge and approval of the will or undue influence. The question argued in the appeal is whether Myers J. should have arrived at the positive conclusion that the testatrix was capable of making a will when she signed the will propounded by the appellants. Viscount Dunedin said in Robins v. National Trust Co., 1927 A.C. 515 at 519: "Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will. Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity." The question of when the onus would determine the issue is discussed in that case. Viscount Dunedin said: "But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing evidence comes to a determinate conclusion the onus has nothing to do with it and need not be further considered." The onus which lies on the party propounding a will is not to prove testamentary capacity

beyond reasonable doubt. The standard of proof is discussed in Worth v. Clasohm, 86 C.L.R. 439 at 452-3. The Court said this: "After anxious consideration of the whole case we are of opinion that there is no sufficient reason for denying that a testatrix who appeared to so many competent observers to be completely sane, and made a completely rational will, lacked a sound disposing mind. A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution. It appears to us that there is ample ground for that belief in this case. Accordingly we must allow the appeal and substitute for the judgment below an order establishing the will." It is evident from the statement containing the learned judge's conclusion on the issue of testamentary capacity that he attached great weight to the medical evidence affirming testamentary capacity. The evidence forced him to doubt that the testatrix was at the relevant time incapable of making a will. Nevertheless he said that there is no evidence which would "induce" him to affirm testamentary capacity at the relevant time. It

seems to me that he required evidence of a higher degree of certitude to affirm testamentary capacity than he attributed to the evidence which the appellants adduced, even though that evidence precluded him from making a positive finding against them. The degree of certitude which he attached to that evidence was high, for he said that he could not, or at all events he should not by reason of that evidence find that the testatrix was definitely incapable. If the evidence was of this weight, it is not easy to see how it did not weigh down the scales in the appellant's favour. It appears to me that a possible explanation is that in requiring evidence that would "induce" him to find testamentary capacity, he was applying too high a standard of proof for such a case. The distinction between being satisfied that the testatrix was not incapable and of not being satisfied that she was capable appears to me a fine one. I think this distinction is not a satisfactory basis upon which to determine the case. I do not feel sure that from the practical point of view it is possible to make a distinction between the learned judge's categorical statement that the evidence of testamentary capacity stood in the way of his finding testamentary incapacity and a determinate conclusion in favour of the appellants upon the issue. Viscount Dunedin discussed in Robins v. National Trust Co., 1927 A.C. 515 at 521, a finding bearing a resemblance to what Myers J. said as to the evidence showing testamentary capacity. His Lordship said this: "Learned counsel laid stress on the fact that the trial judge expressed the result of his view in a negative fashion: 'The evidence does not make me think that there was anything which would show the incapacity of the testator.' And he argued that that was no positive finding of capacity as the authorities require. The learned judge was not dealing with onus. He was stating a result in ordinary English, and to say that the above sentence was not a positive finding of capacity seems to their Lordships

as out of the question as to say that if one said of a man that he was not dead on a certain date there was no finding that he was alive." Myers J. however said that he felt that the appellants' proof fell short of what was needed to discharge the onus which lay upon them to prove testamentary capacity at the relevant time. If that is correct the contrary evidence prevailed and the result would be a positive finding negativing testamentary capacity. But that is a finding which the learned judge was concerned to say that he neither could nor should make. With respect, I think that the learned judge's statement which is quoted above involves contradictory conclusions and it is open to the construction that he applied a standard of proof higher than that applicable to proof of testamentary capacity. The trial in my opinion was unsatisfactory because there is no determinate conclusion on the issue of testamentary capacity which I think there should have been unless the evidence pro and con was found to be so evenly balanced that the onus became the determining factor.

The evidence is lengthy and contradictory and the learned judge expressed unfavourable opinion as to a number of witnesses on either side. The case is a very difficult/one and it is obvious that it was considered with great care. He said that he was quite satisfied with Mr. Stewart's evidence as to the manner in which the will was executed and felt it to be correct. But it does not appear that any weight was attached to this evidence so far as the issue of testamentary capacity was concerned. Mr. Stewart is a solicitor and is/an attesting witness of the disputed will. This witness gave the following evidence:

> "Q.: That is your signature on the first and second pages? A.: Beneath Mr. Bennett's on each page.
>
> Q.: At what stage did you come into Mr. Bennett's office on that day? A.: He rang through to my office.

Q.: You had a message asking you to go in, and you went in? A.: I went into the room.

Q.: Who were in the room then? A.: Mr. Bennett, his secretary and four other people to whom he introduced me, a Mrs. Crossman, a Mr. Wing, a Mr. Pym and Mr. Crossman.

Q.: Following the introduction what happened? A.: Mr. Bennett said to me 'I have taken instructions from Mrs. Crossman for her will, and I confirmed those instructions with her after I had asked these other gentlemen to leave the room, and it is now a matter of executing the will, but before we do that I will go through it with Mrs. Crossman'.

Q.: And were you then present from that time up until the signatures were put on the document? A.: Yes.

Q.: Prior to the signatures being put on the document will you tell me what was done about the will and the contents of the will? A.: Mr. Bennett handed to Mrs. Crossman the original of the will retaining a copy himself.

Q.: Did you sit down or did you stand up or what happened? A.: No. I was standing up.

Q.: Do you remember where the lady was sitting? A.: Mr. Bennett was sitting at his desk there (indicating); I was standing at the side of it here (indicating); Mrs. Crossman was on the far side in front of Mr. Bennett.

Q.: She was sitting down, was she? A.: Yes.

Q.: And he was sitting down? A.: Yes. The other three gentlemen were sitting next to Mrs. Crossman.

Q.: What happened then? A.: He handed to her the original of the document, retained a copy himself and read through his copy, and as he came to each clause he summarised it for her.

Q.: Can you remember exactly what he said in summarising at that stage? A.: No. I recall one clause - the maintenance clause for the infants - I remember him explaining the effect of that and why it was there, and as he made these explanations he asked her did she understand them and was that what she wanted, and she said 'Yes'.

Q.: And as he read, and from what you could see, did she appear to understand? A.: Yes.

Q.: And when she replied did she appear to understand then? A.: Yes.

Q.: And when he had gone through the will, what happened? A.: He then said "It now has to be signed', and he indicated to Mrs. Crossman where it had to be signed, on each page.

Q.: And did Mrs. Crossman sign in your presence?
A.: Yes.

Q.: She signed first? A.: Yes.

Q.: On each page? A.: Yes. And then the document was handed to Mr. Bennett and he signed on each page, and then I signed.

Q.: You all signed in each others presence? A.: Yes.

Q.: You left before the others did you? A.: Yes. As soon as that had been done I left the room.

Q.: Had you seen this lady before that date? A.: No.

Q.: And have you seen her since? A.: No.

Q.: As far as you could see, in the limited time that you had there, was there anything that you noticed about her mental condition? A.: She was certainly an elderly lady. She was shaky in the hand.

Q.: As she was signing? A.: Yes, but there were no signs of any mental defects so as not to fully understand what was being said to her.

Q.: That is what you understood when you were present? A.: Yes.

Q.: And when Mr. Bennett spoke to her did she acknowledge him each time he spoke to her? A.: Yes."

The respondent's case was that since early in March 1951 the alleged testatrix was suffering from senile dementia. The effect of the evidence which they tendered if it stood alone is that for some time before 12th April 1951 she exhibited a morbid excess of the mental and physical decline characteristic of very advanced old age, with total loss of memory, of the power of attention, of the ability to converse and indeed of all her faculties. She was then about 76 years of age. The most extreme evidence of her condition was given by the builder who saw her at her daughter's house at the end of March 1951 or early in April as he said. This evidence gives a disgusting picture and if true is very discreditable to Mrs. Moncrieff. Consistently with relying upon such evidence, the respondents raised doubts whether the alleged testatrix was the person who played the part of testatrix in Mr. Bennett's office at the execution of the disputed will. If the respondent's evidence was right the alleged testatrix was then in such an advanced state of mental and physical disease that she could not sign her name, remember what it

was or who were the members of her family or converse with anybody. Myers J., however, was satisfied that she signed the will and from Mr. Stewart's evidence he presumed that she knew and approved its contents. He further said that it is "perfectly rational and perfectly fair". But it appears to me that no other weight was attached to Mr. Stewart's evidence of what took place when the will was signed. The learned judge attached weight to the evidence of the two incidents indicative of mental disorder which occurred on two evenings early in March and to the builder's evidence but left out of consideration Mr. Stewart's evidence. I think that his evidence could be a determining factor in the case because notwithstanding the incidents in March and the builder's description, the learned judge could not bring himself to finding testamentary incapacity. In my opinion the appellants are entitled to have Mr. Stewart's evidence put on the scale with any other reliable evidence affirming testamentary capacity.

Another unsatisfactory feature of the trial is that the reason why Mr. Bennett's evidence was not accepted cannot be ascertained. The learned judge mentions various hypotheses of a subjective character which might induce him to disbelieve Mr. Bennett's evidence but he has not, as far as I can see, disclosed the precise reason upon which he refused to accept it. The demeanour of the witness is not explicitly stated to be a reason; lack of credit is not given as the reason. There is no ground for the assumption that Mr. Bennett had any part in the scheme, which the learned judge condemned, to get the testatrix to make a new will in the office of Mr. Bennett's firm. If Mr. Stewart's evidence is correct it is not to be assumed that Mr. Bennett was aware that the alleged testatrix was in such a condition that she was incapable of giving instructions for the will. Mr. Bennett's evidence, so far as the transcript reveals,

did not suffer in cross-examination. Indeed the main concern of the cross-examiner was whether the person for whom he drew the will was really the testatrix. Mr. Bennett's evidence as to the execution of the will is in no way at variance with Mr. Stewart's evidence. I think that Mr. Bennett's evidence should also be put on the scale with the other evidence of testamentary capacity unless there is found to be some proper ground for disbelieving it.

Myers J. drew from the evidence of Dr. Davis, Dr. Hennessy and other witnesses these conclusions: there were occasions in March when she was able to conduct herself in an apparently intelligent and sensible manner so far as simple transactions and conversations were concerned. He repeated that the evidence of the two doctors "indicated that she was capable of a rational and intelligent appearance in carrying on a simple conversation." Dr. Davis is a specialist in neurology. He examined the testatrix on 12th March 1951. Dr. Hennessy last saw her on 1st March. It is evident that she had begun to deteriorate mentally and physically in March. After May 1951 the deterioration became severe and in the end her affairs were administered in lunacy. The question which arose is whether between 12th March 1951 and 12th April her mental faculties had declined to such a degree that on that date she had no testamentary capacity. It seems to me that the evidence of what took place at the execution of the will would have a strong bearing upon that question. But, as I have said, Mr. Stewart's evidence was not taken into account. The evidence of what took place when the instructions for the will were received would also have a strong bearing on the question. I think Mr. Bennett's evidence should be taken into account unless it is not considered to be trustworthy for some reason that can be explicitly stated and is good in law.

Because of the doubt expressed by Myers J. that the testatrix was incapable, and because of the strong

evidence which he accepted of "competent observers" called as witnesses that at the relevant time she was capable, I think that the case should not be left in the situation in which it was left by the learned judge. The competent observers include the two solicitors, Mr. Stewart and Mr. Bennett, two medical doctors, both of whom Myers J. said he accepted "as witnesses of truth" (one is a specialist in neurology) and two bank officers. There is a very strong body of evidence answering the extreme case made by the respondents. It is with some hesitation that I arrive at a conclusion different from the trial judge who saw and heard the witnesses. But taking the evidence of capacity accepted by the learned judge and adding thereto the evidence of Mr. Stewart, to which I think he attached no importance on that issue, I think that according to the criterion quoted above in Worth v. Clasohm the issue should be decided in the appellants' favour. The learned judge, in my opinion, gave no satisfactory reason for rejecting Mr. Bennett's evidence. His evidence, if accepted, would be decisive. But, even without taking it into consideration, there is in my opinion sufficient cogent evidence of testamentary capacity to discharge the onus of proof placed upon the appellants.

I would allow the appeal.

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This is an appeal from an order of the Supreme Court of New South Wales (Myers J.) dismissing a suit in which a document dated 12th April 1951 was propounded for probate as the last will of one Florence Isabel Crossman deceased. Probate was refused on the ground that the appellants, who sought probate as the executors named in the document, had not discharged the onus of satisfying the Court that the deceased was of sound mind memory and understanding when she executed the document. The deceased was then 76 years of age, and she died a little over a year later, on 11th July, 1952.

The deceased had made two wills previously, one in September 1946 and the other in June 1948, both having been prepared for her and witnessed by a solicitor, a Mr. Shields of the firm of Asher, Old and Jones. The document of 12th April 1951, however, was prepared by a different solicitor, a Mr. Bennett of the firm of Walter Linton and Bennett, who had not previously acted for the deceased. The main differences between the will of 1948 and the document of 1951 concerned a property numbers 3 to 5 Spit Road Mosman, which the deceased owned and in which a printing business was conducted. The business belonged to a company, W. E. Crossman Pty. Limited, the principal shareholder in which was the deceased's son W. E. Crossman. The 1948

will had appointed as sole executrix a daughter, Mrs. Daisy Florence Moncrieff, and had directed that the property abovementioned should not be sold during the lifetime of the deceased's husband (who was eleven years older than the deceased) without his written consent. The document of 1951 appointed as executors the son, W. E. Crossman, and a brother of the deceased, one W. E. G. Wing, and in addition to authorising the executors to retain the Spit Road property it directed that whilst retaining it they should be at liberty to continue letting it to W. E. Crossman Pty. Limited notwithstanding the fact that the son W. E. Crossman was the principal shareholder and a director thereof. As relations between Mrs. Moncrieff and W. E. Crossman had been for a long time far from cordial, it was obviously a matter of considerable business importance to W. E. Crossman that the document of 1951 and not the will of 1948 should take effect as the deceased's last will.

W. E. Crossman on previous occasions had employed as his solicitor the senior partner in Mr. Bennett's firm, Mr. Walter Linton, and it was to Mr. Linton that he took the deceased, together with her brother W. E. G. Wing and her brother-in-law one R. E. Pym, for the purpose of having a new will prepared for her and executed. Mr. Linton was unable to attend to the matter when they called and he referred them to Mr. Bennett. Mr. Bennett prepared the document now propounded, and it was then and there duly executed by the deceased as a will, the attesting witnesses being Mr. Bennett and a Mr. Stewart who was a solicitor employed by the firm. Both these gentlemen gave evidence at the hearing. Mr. Stewart described the deceased as an elderly lady, shaky in the hand, but giving no signs of any mental defects. His opportunity for observation, however, was limited, and his evidence shed no real light on the issue of mental capacity. Mr. Bennett, on the other

hand, gave evidence which, if accepted, would have established the will. He gave a circumstantial account of taking instructions from the deceased herself, explaining to her the document which he prepared in pursuance of the instructions, and witnessing the execution of that document as a will. He described the deceased's appearance, her utterances and her general demeanour; and, according to his evidence, though she was very old, shaky and frail, and had to be assisted by being held by the arms when she walked, she answered intelligently the questions he asked her concerning her family and the dispositions she desired to make, and he saw nothing to indicate that she did not understand what he said to her. The trial judge, however, felt himself uneasy and unconvinced during this evidence. He said that he did not know whether the nature of Mr. Bennett's evidence was due to an error in recollection or a failure in recollection or whether it was due to any other cause, but it left him in a state in which he did not feel that he could accept it. The Court is asked on this appeal to say that there was no sufficient justification for this attitude on the part of the learned judge; but careful consideration of Mr. Bennett's evidence and of the observations of counsel upon it has failed to reveal any ground upon which a court of appeal could undertake to hold that his Honour should have found the evidence more convincing than he did.

The evidence which weighed most with his Honour was that given by five medical men, all of whom were accepted as witnesses of truth. Two were called by the plaintiffs, namely Dr. Davis and Dr. Hennessy. Dr. Davis, a specialist in neurology, saw the deceased on 12th March 1951, having been specifically asked by the son W. E. Crossman to examine her mental condition. He made no notes and emphasised in his evidence that he was speaking more than

two years after the event. He put to the deceased a few "simple questions as to the day, the date, the day of the month, the month of the year", and he tried to trick her into making wrong statements on these matters. Her answers satisfied him, he said, that she was "in fact in contact with the outside world". He considered her mental condition quite adequate, and thought her able to conduct her ordinary business affairs. He did not remember what he had been told about her, though he knew there was some dispute about her mental condition. The plaintiffs' other medical witness was Dr. Hennessy, a general practitioner who disclaimed any knowledge of psychiatry. He had been the deceased's doctor for about five years up to 1st March 1951. He attended her on 24th and 27th February and 1st March 1951 for a bowel complaint, and on those occasions she appeared to know who he was and to understand him, and she spoke to him quite normally. He did not recount any conversation he had with the deceased, or describe either its nature or extent beyond saying that he spoke to her "in the normal way you do to a patient". He noticed nothing abnormal about her mental condition, but his examination of her was purely physical and he did think that she was detiorating physically.

The defendants' medical witnesses were Dr. Tivey, Dr. Marsden and Dr. Edwards. Dr. Tivey, whose evidence was taken on commission, was a general practitioner who had known the deceased since 1927. He attended her in June 1944 when he found her to be suffering from intra-cranial arterial disease. Her mental faculties were afterwards normal, however, until Dr. Tivey attended her on 2nd March 1951 and noticed a grave deterioration in her mental state. The opinion he then formed was that she was suffering from senile dementia due to vascular degeneration. He saw her again on 7th March 1951. He then found her completely confused and unable to answer simple questions, and thought

that she did not understand what was said to her. His next visit was on 16th March, and he still considered she was suffering from cerebral vascular degeneration which he described in his evidence as a progressive and not a reversible process. He did not see her again until after the crucial date, but on three subsequent occasions, in August 1951, November 1951 and January 1952, he observed no improvement. The other two doctors gave evidence at the trial, and they were both psychiatrists. Dr. Marsden's evidence did not weigh very heavily with the trial judge. His Honour, although not doubting the accuracy of the doctor's observations or his truthfulness, did not feel happy about his opinion, because of his attitude in cross-examination. He visited the deceased on 19th May 1951 and 3rd July 1951. He said she was confused and disorientated for time place and person, and her interest and attention could not be held. She told him that she did not know that Mrs. Moncrieff was her daughter and that she did not recognize Mr. Moncrieff as her husband. Most of her replies were monosyllabic and virtually incoherent. "Everything", he said, "was disconnected and disjointed; improper sequences between nouns, verbs, etc." He conceded, however, the possibility that she could have been unwilling to answer his questions or to co-operate with him. In view of this possibility, and the impression the doctor gave in the box, it seems wise to put his evidence on one side, as the learned judge appears to have done.

On Dr. Edwards' evidence, however, his Honour placed great reliance. He examined the deceased on only two occasions, the first of which was 16th May 1951, more than a month after the execution of the document propounded as a will. He said that the deceased "was demented, that is to say she was suffering mental degeneration of a severe grade due to some organic changes in the brain". A passage

from his evidence should be quoted: "She gave her age as 72, although she was authoratively stated to be 76. She had no idea whatsoever of the day, date, month or year. She did not know the suburb in which she was living nor how long she had lived there. She did not know how many children she had - six or seven she thought. She stated that two of her children had died a couple of weeks ago. She denied that it was her sister who had died about five weeks previously. She was unable to name her children, and when asked the name of her daughter, who was actually there, turned to her and said to her "Daisy, what is your name?" When she was asked the number of brothers and sisters, she said to her daughter, "How many have we got?" She said that her daughter's brother would be her own brother. She did not know her daughter's surname. When pressed she said it was Daisy Florence. Although she had previously said that she did not know the number of brothers, later she said she had 11 brothers and sisters. Within half a minute she again could not say how many. Asked the identity of her grandson, she said it was her nephew. She insisted that I had come to buy the house although the fact that I was a doctor who had come to examine her had been made clear to her a few minutes before."

Dr. Edwards added that on the second occasion, which was 5th July 1951, the deceased's condition was unchanged. He described her dementia as a progressive disease, and expressed the opinion that she would not have been capable of intelligently giving instructions for the preparation of a will within a month prior to his first visit. He said he was certain that she would have had severe dementia on 11th April. It will be necessary to refer again to Dr. Edwards' evidence, but at this point it is convenient to observe that the learned trial judge thought him a completely honest and convincing witness; and had his

Honour not believed, because of the evidence of Dr. Davis and Dr. Hennessy and others, that on occasions in March 1951 the deceased "was able to conduct herself in an apparently intelligent and sensible manner so far as simple transactions and conversations were concerned", he would have been prepared to make a positive finding on Dr. Edwards' evidenoe, coupled with that of Dr. Tivey, that she lacked testamentary capacity on 12th April 1951. He refrained from going so far and was content to say that he was not satisfied that she had capacity at that time, but he made it clear that this was because he believed that apparently rational conduct had in fact occurred and because this belief led him to conclude that Dr. Edwards' diagnosis was not wholly correct. Nevertheless he found that the deceased "was suffering from a mental disorder which, in March, had reached a severe state".

In the argument in this Court a strenuous attempt was made by counsel for the appellants to establish that the trial judge's acceptance of the evidence of instances of sane conduct and his rejection of Dr. Edwards' diagnosis insofar as it was inconsistent with that evidence should have resulted in a refusal to find incapacity by reason of the evidence either of Dr. Edwards or of Dr. Tivey. It is therefore necessary to consider what was the rational conduct that was proved, and how far that conduct invalidated Dr. Edwards' opinion.

As already stated, Dr. Davis proved that on 12th March 1951 the deceased was able to give rational answers to simple questions about the date and so forth; and Dr. Hennessy proved that on 24th and 27th February and 1st March 1951, in the course of such examination and conversation as his attention to her for a purely physical ailment may have involved, she appeared to be mentally normal. Then two shopkeepers gave evidence. A Mr. Cole, a grocer, said that

the deceased for some years until early in March 1951 purchased groceries from him and supplied him twice a week with cigarettes and tobacco which she apparently had a means of obtaining. She was a keen shopper, able to work out prices, and always appeared to Mr. Cole to be rational. A Mr. Dryden, a greengrocer with whom the deceased dealt constantly over a period of years, regarded her as a very keen buyer in 1950 and 1951. While the learned judge accepted these witnesses as truthful, he thought it likely that they had faulty recollections. Two bank officers were called, but their evidence, though truthful, was, as his Honour said, not very helpful. A Mr. Spencer, who had known the deceased for some years, testified to two simple conversations which he had with her in March or April 1951. The sum total of all this evidence is that in or about March 1951 the deceased was able on more or less frequent occasions to speak rationally in answer to simple questions or remarks and to present an appearance of normality. Now, Dr. Edwards fully recognized the possibility of this kind of thing. He said that it was possible for a patient to be in the condition he attributed to the deceased and yet for her degree of confusion to vary "to a very very slight extent". He said that she could have unrelated flashes of memory, and although her reasoning powers would be very gravely impaired it would be possible to carry on a simple conversation with her in which she could take part on a very simple level. The possibility that anybody might be deceived as to her mental condition was not dismissed by Dr. Edwards; he said that that would depend on the nature and extent of the interview. He considered that she would acquiesce or deny

in answer to a leading question, without necessarily understanding the purport of the question. However, he denied categorically that she could have "lucid intervals", explaining that he meant intervals in which she would be completely aware of everything she was doing. Asked whether she would have been capable of transacting any business in an intelligent way, he replied that she might be able to go out and get a pound of chops or something like that; but he said that, if she checked the change she got, it would not indicate that she was not demented, "because a routine can be carried out even by a patient demented". (Dementia he defined as a derangement of the mind due to irreversible organic changes in the brain). He said he was quite certain that for two months before he saw her she could not exercise her judgment; and when asked to explain this, he said: "She could not bring to bear any decision - her memory, and the ability to build up all her knowledge in such a way as to draw reasonable conclusions."

One matter which may have troubled the trial judge was that when the questions put to the deceased by Dr. Davis and the answers which the deceased gave were stated to Dr. Edwards, he conceded that they would indicate that the mental condition of the deceased was very much better than when he saw her, and it would cause him to revise his opinion about her earlier condition. His Honour's conclusion that Dr. Edwards' diagnosis was not wholly correct he expressed in expanded form by saying that "there must have been some error in the diagnosis of Dr. Edwards or in his views of the nature of the disease from which the testatrix was suffering or possibly of the extreme stage which he believed the disease had reached". But the full extent to which his Honour felt that he should qualify his acceptance of Dr. Edwards' evidence because of the other evidence which he believed was made clear in the following

to which reference has already been made passage in his judgment: "I do believe that there were occasions in March when she was able to conduct herself in an apparently intelligent and sensible manner so far as simple transactions and conversations were concerned. Nevertheless .... it is apparent to me that she was suffering from a mental disorder which, in March, had reached a severe state". And he went on to deal with three incidents, which occurred on 6th, 8th and 11th March, and to other evidence, all of which seemed to him "to indicate clearly that this woman was at times, at all events, not in possession of her faculties at all." After recognizing that the evidence of Dr. Davis and Dr. Hennessy indicated that she was "capable of a rational and intelligent appearance in carrying on a simple conversation", he expressed his ultimate view by saying: "Whether it went any further, I do not know. I have the gravest doubt whether, even in her best moments in March, she ever had the capacity to make a will." (March here is probably a mistake for April, but if March was intended his Honour must have had at least as much doubt about April).

It is clear from the passages quoted that his Honour did not find that the condition of the deceased was one of general incapacity with lucid intervals in the sense of intervals in which she had a degree of soundness of mind sufficient for the making of a will. His conclusion means that, when all the evidence is weighed, Dr. Edwards' opinion as to the deceased being in a state of continuous dementia in March and April was most probably correct, notwithstanding that, contrary to what Dr. Edwards thought was possible, the deceased was able on occasions during those months to act and to speak, within narrow limits, in such a manner as to give the impression of rationality.

This was a conclusion of fact based very largely upon the impression which Dr. Edwards made as a witness, and reached only after a careful consideration of the light thrown upon the problem, not only by the evidence of the other medical witnesses, but also by the accounts given by lay witnesses of conduct on the part of the deceased which told its own story. There is no purpose to be served by going in detail through the non-medical evidence which tends to support his Honour's conclusion, but it should be mentioned that Mr. Kleppe's evidence, which related to the first week in April, seemed to his Honour to be very convincing evidence of the deceased's state of "complete mental incapacity". So it was, if the witness was telling the truth. The judge who heard him believed him, and the attempt to discredit him during the argument of this appeal was entirely without foundation.

In the result it must be held that there was ample justification in the evidence for the view which his Honour took, and that no sufficient ground has been shown for disturbing his decision.

The appeal should be dismissed.