

1953

To Examine Testamentary and Testimonial Capacity

W. G. Eliasberg

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

W. G. Eliasberg, To Examine Testamentary and Testimonial Capacity, 44 J. Crim. L. Criminology & Police Sci. 320 (1953-1954)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

TO EXAMINE TESTAMENTARY AND TESTIMONIAL CAPACITY

W. G. Eliasberg

The author is a practicing psychiatrist in New York City and a voluminous writer of psychiatric literature. He is President of the Association for the Psychiatric Treatment of Offenders and he holds degrees in both medicine and psychology.
—EDITOR.

I.

In this paper we propose to investigate the interplay of language and thought with special reference to litigation and trial. The application to criminal procedure, although not explicitly dealt with, is obvious. Examination of the interplay between thought and language enables us to evaluate any testimony; that of the child witness as well as that of the adult; the claim of both the plaintiff and the co-plaintiff, particularly in cases where the implementation by speech is damaged. The method which we follow differs from the procedure in logic and semantics, and our results do not conform with popular prejudices or preconceived theories. A particularly important result is the demonstration of the independence of intelligent actions from linguistic implementation. To what degree such independence exists has to be found in the individual case whenever there is a reason to do so. The application of this in practical cases is demonstrated.

The test introduced in this paper will be useful in cases in which plaintiffs are claiming, either deceitfully and fraudulently, or honestly, that a testator was incompetent and that therefore his will should be set aside. The test described will contribute toward establishing the competence of the testator or his incompetence. Thus it bears upon the claim of the deceitful or the honest plaintiff, as the case may be, and in both criminal and civil procedure.

There are two main groups of cases in which litigation about wills may arise. The one includes the forged will. Immaterial as to whether the testator was able to will, the contention goes that the will does not contain the true stipulations as willed by the testator. The other group is just the opposite; immaterial whether the document is genuine or not, the contention is that the testator, for lack of insight or other deficiencies, was not able to make sensible stipulations. These two basic cases have been mentioned in a note, "New Light on Contested Wills."¹

1. W. ELIASBERG: *New Light on Contested Wills*, J. OF CRIM. L. AND CRIMINOL., 39, 5, Jan.-Feb. 1949. There was also published a discussion mainly of the 1st group, identification of forgeries in a paper—*Contested Wills*; J. OF NERV. AND MENT. DIS., Vol. 113, 4, Apr. 1951. This paper was read at the 106th Annual Meeting of the American Psychiatric Association, Detroit, Mich., on May 1st, 1950.

The present paper will deal, not with adulterations of the document, but exclusively with the examination of "unsoundness of mind of a testator or of a witness."

It should be mentioned in passing, though, that there may be reasons for contesting a will other than adulteration of the document and the incompetency of the testator. Such reasons may be:

- 1.) The purpose of the will runs counter to recognized (and established) purposes of society or statutory law of the state; e.g. a will was recently contested because the bequest would supply funds to teach the overthrow by force of the U.S. government.
- 2.) While the testator desires furtherance of an acceptable aim, he errs by dint of superstition, lack of knowledge and training, insufficient intelligence, etc., to such a degree that carrying out his will to the letter would obviate his purpose.
The factors mentioned here will not necessarily point to "unsoundness of mind."
- 3.) The testator without being "unsound of mind" has yielded to undue influence, duress or coercion.

The incompetency of the witness or the testator may be a.) permanent, b.) temporary (at the time of the setting down of the will or codicils), c.) complete, d.) partial. The examination which will enable the expert to render, with reasonable probability, an opinion on whether or not the testator was "sound or unsound of mind" has to be as complete as possible.

All sorts of evidence that may be available will have to be gathered. This evidence may be of objective documentary order or may be testimony by witnesses. The testimony may stem from lay-friends, relatives, disinterested lay-observers, semi-laymen such as nurses, attendants, semi-specialists such as practitioners, neurologists, psychiatrists, clinical psychologists, etc. Thus the expert, who is called upon to render an opinion, must be conversant with a number of disciplines. He must be able to evaluate testimonial evidence. He must be able to judge whether or not a holograph reveals by its contents or its handwriting established and known signs of neurological or mental disorder whereby neurological disorders may be indicative of mental disorders as e.g. in Parkinson disease, senile arterio-sclerotic brain disease, progressive paralysis, arterio-sclerosis, multiple sclerosis and many others.

In all cases in which obviously, or according to the best available clinical knowledge, the diagnosed or diagnosable disease entails permanent and complete incompetency, the problem will be easy. The difficulties arise when the incompetency is temporary and/or partial. There have been clinical descriptions of temporary spasm of brain arteries which have caused a complete turmoil in the mind of the individual. The

oldest clinical description available seems to be one of 1772.² It is not unusual that the sufferer, greatly perturbed and scared by such an experience, in just this moment wants to put his earthly affairs in order. That such a *désire* should arise in the moment when otherwise the mental abilities are in a disorderly state would point to a temporary and partial disorder and the introspective report mentioned in the footnote bears that out.

More or less permanent and at the same time partial disorder of the mental abilities is the classical concomitant of aphasia, agnosia, apraxia syndromes, caused by external or internal injury to the brain.

The diagnosis in such a case would have to branch out in the following directions: a.) nature of the patho-anatomic disorder of the brain, b.) patho-physiological disorder (with or without already established anatomical lesion as e.g. in cases of acute toxicosis, acute effects of poisons, acute anoxia, etc.), c.) nature of the patho-psychological disorder, d.) influence on the ability to maintain either certain mental functions or the personality³ with its general trends. The differentiation between the pathological destruction of the personality and that of partial functions such as ability to calculate, to write, to read, to speak, to understand, etc., is important for practical purposes, but it is just for practical purposes necessary to understand that the personality will of course react to partial incapacitation and will change in various ways. He will either give in and lower his level of aspiration or will try to overcompensate or will deny the defect, a symptom which has been known as anosognosia.

II.

We will in this paper deal with a mental function which indeed is of central importance for the orientation of the personality as well as for his functioning in the socio-economic and legal world. This function has been called abstraction. But the abstraction of the philosophers and also of the psychologists has very little to do with that abstraction which the person living in a community needs. The abstraction of the philosophers consists of two processes: the strengthening of equal parts of various objects (positive abstraction) and the forgetting about unequal parts (negative abstraction). It is quite clear that this function, important

2. W. ELLASBERG: *Prehistory of Aphasia*, J. OF THE HISTORY OF MEDICINE AND ALLIED SCIENCES, 1950, 1 Pp. 96-101.

3. The joking remark by a psychologist that the super-ego is that part of the personality that is dissolvable in alcohol contains the truth that the personality as such may be basically changed through pathological processes in the brain.

as it is, is not creative at all. It brings order into the given world, it makes the given world manageable and allows of orientation, but it could never transgress the realm of the "givennesses" and their classification. In fact, in children as in adults we may observe and experimentally elicit a function which is quite different from the positive or negative abstractions of equality or inequality, respectively. This function orders the world not according to what is given but what is needed, desired, necessary, ought to be, etc. When a child of three years in an experiment⁴ makes the statement: "The green slips have no cigarettes," or a child of two and a half says "no, nothing, there are none either," the meaning is: "I have found that there is something missing which I thought would be there." This is not a negative abstraction, it is on the contrary a heightened degree of attention paid to the fact that something is missing. I have called this the statement of Non-Existence. If in the zoo a child, standing before the cage of a Lama, says: "This is not a he-goat," it is again a statement which makes sense. While if he would say: "This is not a subway," there would be very little sense.

The tests which have been devised "to measure" the mental capacities of brain-injured, and particularly of aphasic patients, in addition to being oriented exclusively on what we have just described as positive and negative abstraction, start with a wrong concept of the personality of the brain-injured patient. The majority of such patients have suffered a reduction of their level of mentality to the average—if they had not always been at that level. The plain man has never had any training in considering things as entities existing for themselves; he does not think in terms of "abstract concreteness"—e.g. of the isolated concreteness of the picture book. In the world in which he lives things are embodied in social relationships and can be handled and have a purpose. To him, his wife and the children, the fire-insurance-policy, the taxes, the pay envelope, hammer and nail and the like—each have a recognized meaning; but pictures of drums, row boats, scissors, outmoded women's or men's attire, cubes and senseless syllables do not have an equally distinct meaning; they are uninteresting. Children, average folk and dysphasics have no use for such "stuff." But they may nevertheless become interested, as the following test will show, once they see an opportunity to get behind the secret and to get onto the ropes.

4. KARL BÜHLER: *DIE GEISTIGE ENTWICKLUNG DES KINDES*; 6th ed. G. Fischer, 1930, p. 175. W. ELIASBERG: *Psychologie und Pathologie der Abstraktion*. BEIH. Z. ZTSCHER. F. ANGEWANDTE PSYCHOLOGIE. Beih. 35; Verl. J. A. Barth, Leipzig, 1925. W. ELIASBERG: *Speaking and Thinking in a forthcoming issue of the Acta Psychologica*. W. STERN: *PSYCHOLOGIE DER FRUEHEN KINDHEIT BIS ZUM 6. LEBENSJAHR*; 6th ed. Leipzig, Quelle u. Meyer, 1930, p. 372 ff.

The test for creative abstraction was devised to elicit explicit statements, or implicit behavior, which would prove the presence of sensible ideas about the outer world, or sensible behavior within it. If we can prove that an aphasic has such ideas, we can say he has not lost his orientation in the world.⁵

III.

The test was first described in a paper which appeared in 1923,⁶ and later was described comprehensively in the author's "Psychology and Pathology of Abstraction." Slips of paper, of various colors, were prepared. On the reverse side of one slip is something that is intended to be of neutral interest to the child—a cigarette.⁷ Other slips have nothing on their backs. For most subjects, children for instance, the cigarette is truly of neutral interest, except that it is something not found on the remaining slips. And just for the reason that it does not occur on the others, it becomes interesting to the children.⁸

The groups consisted of children from one and a half to two and a half years old; nursery children from two to five, deaf-mute pupils of the first grade of special schools; normal adolescents; intelligent adults with academic degrees (Ph.D. and University Professors); younger adults; aphasic patients (war injuries to the brain) without dementia; adults with higher degrees of dementia without aphasia; adolescents with early acquired dementia; various pathological cases without aphasia and without higher degrees of dementia.

From these manifold groups characteristic facts were found. The general attitude of the young child is matter-of-fact, notwithstanding his suggestibility. The child of two and a half years as a rule notices the positive connection between color and the cigarette. If this is continued with the same pair of colors, the second color will be lifted from the state of negative abstraction,⁹ i.e. from a kind of non-connection into

5. Test material may be ordered from the author.

6. W. ELLISBERG AND FEUCHTWANGER: *Zur psychologischen und psychopathologischen Untersuchung und Theorie des erworbenen Schwachsinnns*; ZTSCHR. F. D. GES. NEUROLOGIE UND PSYCHIATRIE; Berlin J. Springer, 1922.

7. The colors used are bright and glossy or occasionally frosted green, red, blue, yellow, black and white. The colors are not described in detail because at the level with which we are dealing, contrary to the level of W. Koehler's chickens (*Nachweis, einfacher Strukturfunktionen beim Schimpansen und beim Haushuhn*; Berlin, KOENIGL. AKAD. D. WISSENSCHAFTEN, 1918, or E. R. Jaensch's chickens), color structures play no role, either positively or negatively.

8. D. KATZ AND G. REVESZ: *Experimentell-psychologische Untersuchungen mit Huchnern*; ZTSCHR. F. PSYCHOLOGIE, Bd. 50, 1909.

9. A patient without aphasia or dementia, but with troubles of memory, at a time when he had built up the positive connection, was asked about the other colors. He said: "Don't know; haven't paid any attention." At the same time when in this way the negative abstraction was in full bloom, he had no idea about the negative connection. He did not expect anything of the negative color.

some positive noticing that there is no cigarette. This positive noticing is, of course, not in one of the higher levels of consciousness and it is especially not verbalized in the beginning, although the child of two and a half years is able to verbalize. W. Stern quoted an observation of a child of two years and ten months from the author's book "*Psychologie und Pathologie der Abstraktion*": "Yes, I have it," (a slip of the other color) "no", (the first color) "I take", "yes, I have it", "now and where now?" (puts negatives together and says) "no, those don't go." Says Stern: "That a child of not yet three years should verbalize the generalization is very extraordinary." Stern's own children did the same at three years and eight months. (See footnote 4, above.)

It is, however, not so much the generalization of verbalization which we want to stress as it is the formation of positive connections or the expectation of negative connection. If the child with such experience in abstraction, gained in one pair of colors, is offered another pair of colors, he is able to transfer the Either-One-Or-The-Other-Formula¹⁰ with no difficulty whatsoever, i.e. in the next experiment he touches one or two slips; if the first does not work, he will immediately jump to the other color: but here a very characteristic difference can be noted. Those children who are somewhat advanced in verbalization proceed as it has just been described. Those who have not yet reached that stage, have, irrespective of the promptness of their reaction in the first experiment, more difficulties in the transfer of the relation to new fundamentals. Exactly the same was found in all those cases with inhibited inner language, i.e. in the cases of aphasia; not, of course, in stutterers, but very much so in untrained deaf-mutes.

The characteristic then, is that irrespective of the degree of linguistic development or defect, a primordial abstraction is performed in all the cases where there is no dementia. It is the transfer to similar cases that shows differences and this becomes even clearer in the interference-experiments, where one slip upsets the rule. All the normal children are deeply troubled by that but those not linguistically advanced are much more troubled. The effect of the interference lasts much longer with them than with the linguistically advanced children who after a few minutes of cautious and suspicious behavior forget the trouble and work again confidently as though nothing had happened. Here, indeed, a second effect of language comes to the fore. What has been called the lucky gift of forgetfulness is as much helped by language as the function of the transference itself.

10. About apparently similar but differently implemented performance in animals see my paper in *ACTA PSYCHOLOGICA*.

Characteristic results are gained also if the connection between color and cigarettes, which was learned in the preceding experiment, is converted. (Conversion Experiment.)

In manic patients with flight of ideas and in most of the children it becomes clear that the creative process of positive and of negative connection and of transfer N.C. (New Colors) is not bound to the level of attention. In one patient it was particularly interesting to watch how in the middle of a real squall of words the transfer to N.C. was absolutely undisturbed. It could also be noticed that a patient with severe disorders of memory and a Korsakoff picture in connection with multiple sclerosis, was able to establish the positive connection and to have a feeling of certainty which, however, as the patient said, left him the moment he looked at something else. The I.E. (Interference Experiment) helps such a patient: if it is interfered with, the expectation as such is strengthened.

These experiments¹¹ show that logical functions can be undisturbed even if the material to which such functions should apply practically cannot be stored or evoked. In such cases intentional recollection may not be strong enough to enable the patient to recognize the material. The experience in pathological cases, then, militates strongly against a *thought-theory*, (*Denktheorie*) of forgetting. Neither is it the whole story that we forget because we have to think of other things, nor is the ability to forget of such primary importance for thinking, at least not for creative thinking. *It is not necessary to sweep the mind clean first in order to think.*

In 1948 there appeared an experimental investigation on Thinking and Language,¹² the general idea of which was the following: if the dysphasic (aphasic person) suffers from a reduced accessibility of implicit speech cues, such patient should in some way be inhibited in his intelligent performance. Matching each aphasic with a "normal" hospitalized patient the author got the "discouraging" result that there were no differences to speak of in the performances of the dysphasics and the normal patients. Because he is surprised at the result, Meyers himself is inclined to make the most of the objections that could be raised against his method. Thus he is not convinced that the above quoted assumption about the reduced accessibility of speech cues really obtains in aphasics. One might soothe his qualms in this respect: every training record of a true aphasic will prove beyond doubt that it is

11. See W. ELIASBERG, 1925, p. 134.

12. R. MEYERS: *Relation of "Thinking" and Language*. ARCH. NEUROLOGY AND PSYCHIATRY, 60, 2, August 1948.

indeed the linguistic reproduction and nothing else that makes for the symptoms. Another objection that Meyers makes is that introduction of a time bounty would have considerably altered the score, which is certainly true and in perfect keeping with my own findings on slowing down of all processes in brain injured persons, but it does not prove anything against the basic hypothesis of aphasia consisting of reduced accessibility of implicit speech cues. Furthermore, Meyers doubts whether the results gained by him in a multiple-choice test would bear generalization. Again we may not only set him at ease about this, we are definitely in a position, on the basis of experimental evidence, to show what thinking without speech can do and where the thread of thought wears thin, if taken out of the tissue of speech.

The first statement, then, is that irrespective of the available degree of linguistic implementation both positive and negative connections may be found. It is important that the negative connection is not bound to any higher degree of accessibility of speech cues, either.¹³ In the beginning thinking is not governed by doubt, uncertainty, questioning, but by a kind of intuitive grasping of connections. Psychogenesis shows that negation, too, is the emphasis, from a certain angle, on the existence of something—some definite connection. Negation does not originate as in the traditional logic of the concepts, from an autonomous dichotomy of the concepts. However, the transfer of this primary, productive, intuitive insight to similar or resembling situations is very difficult without easy access to speech cues. Children and patients with such difficulties remain bound in their abstraction to the given fundamentals.

This latter limitation, however, seems to hold true only, if the fundamentals of the relation are not structured, have no *Zueinander* as Koehler called it. If the latter is the case, hens and monkeys, and presumably also children, may transpose freely along the rungs of the structure. In our experiments structures were not present and therefore the transposition could have been done only by way of language.

Stoddard¹⁴ has rightly remarked that the mental problem and its solution are no particular pattern of words. Language may even be a hindrance. We have found (See author's work on Abstraction, quoted above) that university professors showed poorer achievements than children of two years ten months, which incidentally militates against the identification of level of performance with intelligence. The various factors in intelligence such as primary abstraction, social and other orientations, individual purposes and implementations and language among them may also counteract each other.

13. More about non-verbalized thought. B. ERDMANN: UMRISSE ZUR PSYCHOLOGIE DES DENKENS, 2nd ed. Tuebingen, I.C.B. Mohr, 1908.

14. D. G. STODDARD: MEANING OF INTELLIGENCE; Macmillan, 1947.

It may be noted that there can be little surprise at the findings of R. Meyers. His multiple choice experiments offer an opportunity for the primary abstraction precisely in its creative phase. Therefore his patients with diminished accessibility of speech cues could perform as well as linguistically non-inhibited patients. These experiments belong to that group that does not offer an opportunity for the transfer of abstraction. It is of course easy to think of a device along the lines of Meyers' apparatus which would offer such an opportunity. In this case one may expect the same difficulties in the transposition as my patients had.

The detail of the difficulties the patients encounter in the N.C. I.E. and C.E. is likely to confirm the general thesis, which is: speech is a help toward all four forms of abstraction of the adult, i.e. the generalizing abstraction, the abstraction of equalities and the negative abstraction, i.e. forgetting abstraction, and finally, obviously also the abstraction by exchange of ideas among interlocutors.

A more intimate knowledge of the workings of language can be gained from the consideration of the method used by the subject in finding a task and in finding the solution for that task. As to the finding of the task we have shown that in this productive stage language is not necessary and may even create hindrances.

Often the solution is not reached because of the perseveration of the method;¹⁵ a tendency which is strong whenever the mind gropes haltingly into an unknown world. Perseveration¹⁶ in the method becomes even stronger, if linguistic volubility allows of ready verbalizations. Language may also be instrumental in establishing personal contacts, as a method of solution, between the subject and experimenter. Least among children and highest among adolescents, this was objectively found to be either helpful or a hindrance according to the attitude of the experimenter. But here again the subject is often not aware of such effects and perseveres with this method, irrespective of whether or not it helps. The subjective and highly verbalized reflection of an educated subject may take on very complex forms. He may think that the experimenter wants to deceive him, he may pay attention to such factors which the children leave in negative abstraction, e.g. difference in size or slight difference in the color, and finally he may persevere with the search of the causal law but in the wrong direction.

On the other hand questioning about certain factors may give the subject a strong lead and is easily grasped.

15. K. KOFFKA: DIE GRUNDLAGEN DER PSYCHISCHEN ENTWICKLUNG. EINE EINFUEHRUNG IN DIE KINDERPSYCHOLOGIE; Verl. A. W. Zickfeldt, Osterwieck, Harz, 1921.

16. ACH, KUHLE, PASSARGE: BEITRAEGE ZUR LEHRE VON DER PERSEVERATION; J. A. Barth, Leipzig, 1926.

In various publications¹⁷ it has been shown conclusively that aphasics may preserve the ability to will.

The application of this test and the keeping of records is recommended in every case where the physician has made the diagnosis of a more or less stable lesion in the brain. The material required is very simple. It consists only of small slips of various colors, of cigarettes and glue. Repetition of the test after four weeks or a few months may be particularly demonstrative. It is the intelligent way in which the patient overcomes the difficulties, finds better solutions and finally works with the abstraction he has gained, that offers convincing evidence of his intelligence, defects in implementation notwithstanding. If we can demonstrate the preservation of general intelligence and orientation, we will be able to state that the patient has the ability to testify in criminal and civil cases and to make general arrangements for disposing of his estate. As to detailed arrangements, there is need for a detailed examination of aphasics, especially in respect to ability to handle figures in a sensible way. Here again it should be kept in mind that patients may be able to use the accepted expressions of politeness but will not be able to come to the core of the matter, if figures are involved. The better the record of such examinations, the better we will be able to serve the court and the parties in ensuing litigation.

17. W. ELIASBERG: *What the General Practitioner Should Know About the Retraining of His Apoplectic Patients*. NEW YORK PHYSICIAN, 29, 3, April 1943. W. ELIASBERG: *Training and Healing After Apoplexy*; CLINICAL MEDICINE, 51, 8, pp. 203-204, 1944.