Cross-Examination on Documents*

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As you will see from the notes of the article, I have outlined a series of seventeen propositions. I had intended to deal mainly with the legal aspects of cross-examination on documents but have included something about technique in cross-examination.

The first proposition is that the basic rule of the common law is that a witness cannot be asked any questions about the contents of a document unless it is first shown to the witness and put in evidence by the cross-examiner as part of his case. That rule is alleged to be an application of the "best evidence" rule, and it is found in *The Queen's Case* (1820) Brod & Bing 284; 129 ER 976, which was concerned with the trial of Queen Caroline for adultery, heard in the House of Lords. She was defended by Brougham and during the course of the examination of a witness called Louisa Dumont, Brougham sought to cross-examine her about a letter. Some argument took place. Reynolds QC some years ago when he gave a paper on this topic, which is reported in *Glass, Seminars on Evidence*,[1] p 126, stated that it would appear the decision was formulated without argument by counsel. But it appears from a speech of Brougham in the House of Commons some eight years later that there was a detailed argument before the judges and the Lords, and the judges formulated a rule which is set out in the second proposition; it totally destroyed effective cross-examination.

Now the rules in *The Queen's Case* are accurately set out in a number of propositions in the above report which are contained in various headnotes. I do not think I need read the first and second propositions. But the headnote concerning my first proposition is in this form:—

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* This article was presented as a paper by M H McHugh QC (now Mr Justice McHugh of the New South Wales Court of Appeal) at a Continuing Legal Education Seminar of the New South Wales Bar Association held on 30 March 1983 together with a commentary by R V Gyles QC. Attached to the discussion and commentary is an outline of the main points of Mr Justice McHugh's lecture.

1 Law Book Co.

> If on cross-examination, a witness admits a letter to be of his hand-writing he cannot be questioned by counsel whether statements, such as counsel may suggest, are contained in it, but the whole letter must be read in evidence.
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> In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.

Now it will be seen that the common law rule led to extraordinary consequences. The first was that it effectively destroyed cross-examination, and the second was that it put counsel into evidence. So if you are for the defendant and you wish to cross-examine the plaintiff on a document, you will have to undertake to tender the document in your case and you are immediately in evidence. So there is no question of getting the last address in such a situation.

It would appear that over the next 30 or 40 years the English Bar sought by various devices to circumvent the operation of *The Queen's Case*. One of the standard devices was to put the document in the hands of the witness and say, "Having read that, do you adhere to your statement?" Even that device was overruled by the judges in a series of cases which are reported in the Law Reports in the 30 years following *The Queen's Case*. But at last the legislature intervened. The predecessor of our present s 55 of the Evidence Act was enacted in England and three years later in Australia. Section 55 of the Evidence Act, you will no doubt recall, provides that:—

> 1. A witness may be cross-examined as to—
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> (a) a previous statement made or supposed to have been made by him in writing or reduced into writing, or
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> (b) evidence given or supposed to have been given by him before any Justice without such writing or the deposition of such witness being shown to him.

That was a legislative overruling of the fundamental proposition of *The Queen's Case*, but note, that it applies only to the witness's own document or when his evidence had been reduced into writing in front of a justice.

The section goes on to say that if it is intended to contradict him by such writing or deposition his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him. And then there is an important proviso: provided always that the court may at any time during the trial require the production of the writing or deposition for inspection by the court and may thereupon make such use of it for the purposes of the trial as the court thinks fit.

So the court is given a power to require the production of the writing or deposition and, if necessary, the court could require it to be tendered by cross-examining counsel. I must say that in over 20 years of practice I have never seen any judge take advantage of that proviso. However, the existence of that proviso has given rise to another rule which I refer to later in my notes, namely:—

> That you are not entitled to cross-examine on a document unless you have it in court or it can be readily produced and that it is admissible in evidence.

My third proposition is that a witness may be cross-examined as to a previous statement made by him in writing or reduced to writing or as to evidence given by him before a justice without the writing or deposition being shown to the witness. Further, there is no obligation on counsel to tender that writing or deposition: cf Evidence Act 1898 s 55(1) and also Sir Frederick Jordan's judgment in *Alchin v Commissioner of Railways* 35 SR 498 at 508.

Proposition four is that to take advantage of s 55, the document must be in Court or at least capable of being readily produced: *R v Anderson* (1929) 21 CAR 178. This was an interesting criminal case where counsel cross-examined the accused upon a statement which he was alleged to have made at the time of dissolving his partnership and in which he admitted dishonesty. It turned out that counsel did not have the original document in court, but apparently had a copy of it. The Court of Criminal Appeal, which consisted of Hewitt LCJ and Avery and Talbot JJ, set aside the conviction on the grounds that counsel had acted irregularly. At p 181 in the report it is said:—

> Those questions were put again and again, nevertheless no such statement was in Court and whatever copies of documents there may have been the original of that alleged dock statement was never produced, still it appears that at some point of the cross examination a document was made visible to the jury and questions were put which might have easily conveyed to their minds that whatever the witness might say or deny there was import in the original document to that effect alleged bearing his signature, it is admitted there was no such original or could have any document have been produced in Court.

Proposition five is that the trial judge retains a general discretion to require the production of the document and its tender. Not only does the proviso itself give rise to that conclusion, but there is a reference to two dicta in the cases cited there: *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 509, and *Wood v Desmond* (1958) 78 WN 65 at 67.

In proposition six, reference is made to the case of *R v Jack* (1894) 15 LR (NSW) 196 which has troubled the New South Wales Bar for almost 90 years, and if it represents the law, which I would suggest is very doubtful, even a party to a cause cannot have an identified document put in his hand and then be asked whether he adheres to his testimony, unless the cross-examiner undertakes to

put the document in evidence. There have been many attempts to explain *Jack's* case. There was a very narrow ground on which I think it could have been decided, but unfortunately the judges decided it on a wider ground. What happened was that counsel for the accused was in the act of placing in a Crown witness's hand his deposition, and he said to him, "Look at your own deposition", or he wanted to say "Look at your own deposition and say whether you adhere to what you have said; is not the word 'stab' in your deposition?" Unfortunately the judges clearly decided the case on a much wider ground, and that wider ground was that it was improper for counsel to seek to use the deposition in that way without undertaking to tender it. Windeyer J (at 200) said:—

> When counsel did this he was clearly making use of the depositions in a way which was calculated to create the impression in the minds of the jury that the witness, in giving his evidence at the Police Court, had made use of the word "stab". His Honour was therefore, entirely correct in the course he took, and acted on the law laid down in R v Ridout SMH 3 May 1854, and in cases in England decided before that case. The law laid down and established in that case was, that if cross-examining Counsel makes use of a deposition in this way by putting it into the witness's hands, he must put it in evidence, even though he ostensibly makes use of the deposition for the purpose of refreshing the witness's memory. The reason of the rule is that if the putting in of the deposition were not insisted upon, a false impression might be conveyed to the jury that the witness had sworn something different at the Police Court from the evidence that he was then giving in Court, whereas the deposition and evidence might be exactly the same.

Now with great respect to the judges it seems to me they completely denied the effect of s 55; their thinking was predicated on the law which had been laid down in *The Queen's Case* and in a series of cases which were decided in England between 1820 and 1852. My view is that the decision is clearly wrong and yet it has never been overruled, although in *Maddison v Goldrick* [1976] 1 NSWLR 651 at 660 Samuels J expressed the view that it was an authority which may well be doubted.

Proposition seven is that any witness may be shown a document even though he is not the author and whether or not it is admissible and asked, if having read the document, he still adheres to his testimony. Now the difference between proposition six and proposition seven in those notes I would submit is that in *Jack's* case the document was identified. It was put on the basis that it was a deposition. Counsel said "Look at your own deposition" and he also referred to the contents of the deposition. But there are a series of cases where it has been held that counsel may act in accordance with the terms of proposition seven, and I refer to *R v Orton* [1922] VLR 469, which was a conspiracy trial before a great Victorian judge, Mr Justice Cussen. There is an important ruling in that case which supports the proposition in

proposition seven. Counsel showed the witness a letter upon which was written a handwritten memorandum. The witness was on trial on a charge of conspiracy to defraud by false pretences. One of the false pretences alleged was that the witness stated that he had been told by a man named Shaw that he, Scarborough, wanted the accused to get certain privileges and concessions, and Shaw had written on a letter, "I told Mr Scarborough specifically he could get no privilege or concessions". Objection was taken and Cussen J ruled that question was inadmissible. His Honour ruled that the question should not have been asked in that way; the witness should have been asked to look at the document and then asked to the effect "Having looked at the document do you still adhere to your previous statement?" And that in my submission is the way in which the matter should be approached; you don't identify the document, you don't identify its contents, you put the paper in front of the witness and then say to him "Having looked at the document, do you still adhere to your previous statement?"

There is an interesting illustration of that in a Queensland Criminal Appeal, *R v Bedington* [1970] Qd R 353 at 359-60, where the accused was charged with armed robbery. He was alleged to have admitted to a detective that he had thrown certain car number plates into a river after he saw in a newspaper that the car was wanted and the paper had reported certain numbers in the number plate. When the accused gave evidence, counsel for the Crown cross-examined him about what had appeared in two newspapers for the purposes of establishing that these facts had been in the newspaper, and to give support to the truth of what the detective said the accused had told him. At p 359 of the report the court sets out what the Crown Prosecutor had done. The Crown Prosecutor put in the witness's hands the *Courier Mail* and asked him a series of questions finishing with, "I am not asking you to say anything. I am putting it to you that having read the article in *'The Courier Mail'* on the Saturday morning you had not only found the type of car the police were looking for but you would have found the figures of the registered number? — Yes". "Of that car? — Yes". And it was held that that was improper cross-examination by the Crown. The statement of principle appears a little earlier on p 359 where their Honours say:—

> Nevertheless it must be said that the use made of the newspapers by the experienced prosecutor who conducted the case for the Crown was quite wrong. The limited use which can be made in cross-examination of documents of this kind is or should be well known. A document made by a person other than the witness and not being a document which can be used to refresh memory, may, even if inadmissible in evidence, be put into a witness's hands and that witness may be asked whether having looked at the document he adheres to his previous testimony, but this is the extent to which the

> cross-examiner may go; he may not suggest anything which might indicate the nature of the contents of the document.

Birchnall v Bullough [1896] 1 QB 325 at 326 is an interesting example. In that case the document cross-examined on was inadmissible in evidence because it was an unstamped promissory note and could have not have been tendered. As Bruce J said:—

> Although the document may be inadmissible in evidence, a witness may be called upon to look at it, and having looked at it, to say whether he did not in fact borrow a certain sum of money.

The second part of proposition seven is that the document must not be identified and, if the witness is not the author, no question can be put which suggests the nature of the document or its contents. *R v Sehan* (*Yousry's* case) (1914) 11 CAR 13 at 18 is an interesting illustration of that proposition because again counsel for the Crown had indicated by the nature of his question that the document he had in his hand was a report from the Cairo Police concerning the antecedents of the accused. Counsel, after describing the document, said, "Look at it; do you adhere to your answer?" and it was said by the Court of Criminal Appeal, "Now that was inadmissible in evidence and in our judgment was a wholly wrong method to adopt. Counsel for the prosecution holding documents in his hands which he cannot put in has no right to suggest to the jury in any way what they are."

Also relevant to the second part of proposition seven is *R v Gillespie* (1967) 51 CAR 172, where a conviction for embezzlement was quashed because the accused was asked questions about sales dockets made out by various sales girls when all the sales girls were not called to identify the dockets. In fact some five sales girls were called but the documents were the product of some 12 sales girls. It was held that for counsel to cross-examine on the contents of dockets which had not been proven in evidence was improper, and the conviction was quashed.

Proposition eight, which may be very debatable, is that a party to an action may be *asked* to make admissions as to the contents of a document whether or not made by him if the contents are within his personal knowledge. I cite as authority for that a passage in the judgment of Sir Frederick Jordan in *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 508-9. However, there is an express authority to the contrary effect, *Darby v Ousley* (1856) 1 Hurl & Nor 1; 156 ER at 1093. I might say that proposition eight accords with my experience at the New South Wales Bar over the last 20 years. Without objection parties are frequently asked to make admissions concerning the contents of documents whether or not they are made by that person.

However, *Darby v Ousley* says the contrary. It was an action for libel and the plaintiff sued on a newspaper story which alleged that he was a Papal rebel, a traitor, and an idolator and that he was a member of an association for the conversion of England to the Roman Catholic faith. The defendant pleaded not guilty and justified so much of the libel as imputed that he was a member of the association. The action was tried before one of the greatest English common lawyers, Mr Justice Willes. In the course of cross-examination the witness denied that he was a member of the association or that he had done any act to become a member of it. The defendant's counsel in cross-examination proposed to ask him whether his name was not written in a certain book of that association as a member, and Willes J refused to allow the question to be put. There was a motion for a new trial before quite a strong Court of Exchequer Chamber. Mr Chief Baron Pollock, giving the judgment of the court, said:—

> We are all of opinion that there ought to be no rule. The first ground is the improper objection of evidence . . . The learned Judge ruled that the question could not be put, and that the book itself ought to be produced. We are all of opinion that the Judge was right in point of law . . . The entry of the plaintiff's name in the book had no reference to any former statement made by him, so that the case is not within 17 & 18 Vic s 24.

(That is the predecessor of our present s 55 of the Evidence Act.) His Lordship goes on:—

> The object of the question probably was to show, by the plaintiff's name being in the book, that he was a member of an association, the character and objects of which would justly subject him to the charges and imputations contained in the libel. But whatever was the object, that question could not be put, no notice having been given to produce the book.

His Lordship must have felt very strongly about the legal merits of it because he was not too enamoured of the plaintiff. In the report he says:—

> I as little desire to see the opinions of that class [meaning Roman Catholics] extended as any one in this land, but while they are tolerated, and entertained by those of rank, station, and property in the country, it is scarcely to be borne that, because a person is a Roman Catholic, he is to be asked whether he is bound by the notes and comments in a certain Testament, and then the Jury are to be told that these notes and comments lay down that no faith is to be kept with heretics, and justify the burning them.

Proposition nine is that a party probably cannot be required to *answer* questions about the contents of another person's document unless it is produced. The first case cited in support of that proposition is *R v Banks* (1916) 12 CAR 74 at 75-6. It was a criminal case. The accused was charged with carnal knowledge and he had written a letter to a woman asking her to take care of the girl involved. He was also cross-examined on her reply. The Court of Criminal Appeal did not distinguish between his letter and her reply. It held that the cross-examination was improper, but upheld the conviction under the proviso on the basis that there

was no miscarriage of justice. At p 75 Avery J, giving the judgment of the court, says:—

> There is another objection of a more formidable character, namely, that the contents of the correspondence between the appellant and the woman Smith, were elicited from him. It undoubtedly is open to considerable question whether that cross-examination was strictly regular. The Court thinks that it was not regular to insist that the appellant should give an answer concerning the contents of a letter which was not produced.

The next case in the notes to proposition nine, *Henman v Lester* (1862) 12 CB (NS) 776; 142 ER 1347 at 1352, is a very strong case in favour of proposition nine. The defendant was sued for fraudulent misrepresentation concerning certain products. He was asked in cross-examination whether or not he had been sued in respect of a similar claim in the County Court; that he had resisted it, had given evidence and that the jury had found a verdict for the plaintiff notwithstanding. It was said in the court's judgment, "It was hardly disputed that the inquiry was admissible as going to the credit of the witness, and it is not denied in point of fact that such proceedings did take place in the County Court". In fact the witness answered the question, and in the judgment of the court their Lordships say:—

> The learned counsel were not agreed as to the precise point ruled by the Lord Chief Baron at the trial. I have, therefore, thought it necessary to speak to the learned Judge, who informs me that he only allowed the question to be put, because, the defendant being a party to the cause, his answer, if he thought proper to give one, would be evidence, whether it related to a writing or not, and that the learned Judge did not compel the defendant to give an answer to the question, and indeed gave him the option of answering or not.

Willes J goes on to say in his judgment that apparently counsel misunderstood the ruling. He says "This was not ruled by the learned Judge, nor argued by counsel for the plaintiff; nor is it sanctioned by any member of the Court". And their Lordships go on to say:—

> We cannot say that the learned Judge was wrong in going the length he did, viz allowing the question to be put, even supposing that it could have not been put to a witness who was a third person, without proving the record.

It certainly seems to be an authority for the proposition that the question can be put to the witness, but the court also seemed to be of the view that he cannot be required to answer it.

Proposition ten is that unless the witness is a party, the document can only be used for the purpose of testing the witness's present evidence. That is an important point. If the witness says "X" and he is not a party to the proceedings and you either get him to admit that he has made a prior inconsistent statement, or if he refuses to admit that he has made a prior inconsistent statement, and you tender that prior inconsistent statement, the inconsistent statement does not become evidence in the cause. It can only be used to discredit his evidence. It is a different thing

altogether if the witness is a party; then you can use his statement out of court as an admission.

Hammer v Hoffnung & Co (1928) 28 SR (NSW) 280, is a very good illustration of proposition ten. The defendant called two witnesses both of whom denied on oath that they were employees of the defendant and in fact asserted they were the employees of somebody else. Whether or not they were employees was of great relevance because the plaintiffs sought to make the defendant vicariously liable for their actions. Both witnesses were then cross-examined about previous statements they had made in which they had said they were employees of the defendant. The trial judge told the jury that they could take account of those prior inconsistent statements on the issue as to whether or not they were employees. The verdict having gone to the plaintiff, the defendant appealed. The Full Court of this State set the verdict aside on the ground that the trial judge had improperly directed the jury as to the use they could make of the prior statements. It was important in that case, of course, that the witnesses were not parties; if they had been parties then the statements out of court could have been tendered as admissions against them.

Proposition eleven is that once the witness's attention is drawn to the inconsistent part, the document can be tendered to contradict him if he refuses to admit his previous inconsistent statement. I should say that a question sometimes arises as to whether or not what has been said is inconsistent with the witness's testimony. It has been held in this State in *Carbery v Measures* (1904) 4 SR (NSW) 569, that the test is: Is it clearly inconsistent? It is not sufficient that conflicting inferences may be drawn from the two. You must have, in effect, a collision between the two pieces of material. It has also been held in this State that an opinion may be a statement for the purposes of s 55. This was decided by the Full Court in *Cotton v Commissioner for Road Transport* (1943) 43 SR (NSW) 66. If the witness says "In my opinion this", and at some earlier stage he has expressed another opinion to the contrary effect, that counts as an inconsistent statement for the purposes of s 55.

Proposition twelve is that once the witness admits the inconsistency, the document is not admissible unless he is a party. So once you cross-examine him and he says, "Yes, I admit I made that statement", that is the end of it. You have got what you can out of it. You cannot then tender the document. Two authorities for this proposition are *Nth Aust Territory Co v Goldsborough Mort* [1893] 2 Ch 381 at 385-6 and *Alchin v Commissioner of Railways* (1935) 35 SR (NSW) 498 at 509.

Proposition thirteen is that if the cross-examiner shows the document to the tribunal of fact or directly or indirectly gets any of its contents before the tribunal of fact, he can be required to tender the document. An unreported judgment of Walsh J in the Supreme Court, *Oakes v Gaudron* (23/5/63) is an authority for this proposition. You will find very little authority and, in fact, I know of no reported authority, on this point. But in that particular case counsel, Mr Reimer, who was appearing for the defendant in a highway case, asked a doctor some questions about an X-ray and he did not tender the X-rays. In fact he refused to call evidence. And Walsh J held that he was in evidence.

Such rulings in my experience have been made fairly frequently at *nisi prius*. Sometimes a witness will be shown a plan and asked some questions about it. The rule of thumb test I have always used is: If the transcript is understandable without the tender of the document, then you are not required to tender it, but if the transcript is incomprehensible without the plan or the document or whatever it was, then you are obliged to tender it if your opponent requires you to do so. That may be open to some debate or some refinement, but broadly speaking you put yourself in evidence if you indirectly get the contents before the tribunal.

Proposition fourteen is that if a witness refreshes his memory from any part of a document and counsel cross-examines on that part, he is not required to tender the document. But, if he cross-examines on parts not used to refresh the memory of the witness, counsel can be required to put the document in evidence: cf *Senat v Senat* [1965] P 172, 177.

Proposition fifteen is that opposing counsel can only require the tender of the document during cross-examination. A very important decision by Harris J in the Victorian Supreme Court, which is contrary to the practice which has existed in my time at the New South Wales Bar, is authority for this proposition: *Hatziparadissis v GFC Manufacturing Co* [1978] VR 181 at 183.

Very frequently in New South Wales counsel will say of his opponent "He examined on that document; he has got to tender it". It might be two days later or a month later, or it might be in re-examination of the witness. But Harris J deals with the matter in some detail and he decides as a matter of precise decision that if you do not require the tender of the document during cross-examination you lose your right to insist on the tender.

Proposition sixteen is that if a witness is cross-examined as to part of a document his opponent may prove that part of the document in re-examination together with such other parts of the document as are necessary to explain or modify it: *Meredith v Innes* (1931) 31 SR (NSW) 104, 112.

Proposition seventeen arises from *Burnell v British Transport Commission* [1956] 1 QB 187 at 190, which decides that: If counsel cross-examines on certain parts of a privileged document in his possession, he waives privilege not only to those parts but to the whole document itself. That is a decision of the English Court of Appeal.

Technique in Cross-Examination on Documents

I think it is important when you want to use a document that you close all the gates — that you eliminate all possible explanations that a witness may have to avoid the effect of the document. Also on the question of a witness's signature, it is always necessary to tie a witness down. It is remarkable how often that, despite your instructions that it is the witness's signature, or your opponent's instructions about some witness of yours, that it is his signature, the witness will deny it. So you have to obtain an admission that it is his signature. If you are super cautious you may even ask him to write his signature, go about the matter very carefully, come back to it, show him the actual signature on the document without showing him the contents, and get an admission as to the signature.

A favourite device of witnesses to get out of admitting the effect of documents — particularly when it contains their signature but they have not prepared the body of the document — is to say that they were not aware of the contents. This is a frequent device used when investigators have taken their statements. It is very important in cross-examination to get admissions from the witness that he was aware of the contents of the document. The standard approach is on the line, "You are a careful person?", "Yes"; "And you wouldn't sign a document without reading it?", and so on. It is also extremely important to eliminate explanations of the contents of documents. Every document creates its own problems; it is up to you to think how can this witness explain this away; and long before you obtain the admission, cut off those gateways and explanations.

In practice you will find a witness will say that he has changed his view since the time that letter was written, he did not have all the information in his possession at that time, he relied on other persons, and so on. They are common explanations, and you have to frame your questions so that you cut off those explanations, until finally when you put that particular part of the document to him there is no way out.

Another way a witness will sometimes seek to avoid the effect of documents is to say, "Oh, somebody told me to write it", or "I

really didn't know what was in it", or "I was seeking to get some advantage" or something of that nature. You need to get his admission that when he wrote the document he was not setting out to deceive anybody.

If you are going to use a document to cut down a witness's credit or to secure admissions, it is very important to put carefully each part of the document to the witness. Cross-examine him on each part; draw out all the implications. Get everything you want out of it and, after showing him the part that you want to cross-examine him about, keep the document in your hand. Do not give the witness the whole of the document or let him read the whole of the document or give him an opportunity to see what is coming later.

In paragraph three of the outline I make three points on documents to be used on credit. I think I left out the most important point and that is: if you are to use the document on credit, the first thing is to get the witness hopelessly committed to his sworn evidence. That is the first thing; do not let him explain away his sworn evidence, so that he gets himself in a hopeless situation.

I once saw Mr Justice Larkins in a defamation action do that with the greatest skill and the most destructive force. Evatt QC and I were appearing for a party who was suing for defamation. There was an article which said that he had been put up for a council election by the Labor Party, and the plaintiff claimed that he was an independent candidate. Now Larkins had in his possession the application form or entry form which had been signed by the President and Secretary of the local Labor Party branch. And having got the witness committed to his story that he now had nothing to do with the Labor Party, he then led him along, the witness not knowing where he was going, seeking his explanation as to how he came to nominate and who signed his nomination, and the witness was led to make the most extraordinary statements since he had not the faintest idea who signed his nomination form. The plaintiff said in the witness box, "Oh, I had the application form in my hand and I was walking through the streets of some suburb in northern Sydney and I saw this gathering outside the hall and I went up to them and asked people if they would nominate me. Somebody came out and said he would, and I don't know who they all were". Of course Larkins had already got admissions that he knew the people involved and cut off every possible explanation. Ultimately when the document was produced, there was an absolutely devastating cross-examination. In fact in all my time at the Bar I have never gone

out of court so completely destroyed as I did at the conclusion of that cross-examination on that day.

Then so far as possible, get the witness to admit that each portion is contrary to his sworn evidence. Get him to admit, "You swore this ten minutes ago, and you swore that", then get him to admit to the contrary. If it suits your case, and it usually does, don't ask him which statement is true. J W Smyth QC, who is probably the greatest cross-examiner that the New South Wales Bar ever produced, always had the technique of saying "Which is false?" and it sounds a lot better than saying "Which is true?"

Some judges, I think, quite rightly object to that technique and will make you say "Which is untrue?", but if you can say "Which is false?" and the witness says "What I said five minutes ago is false" it has quite a devastating effect. Of course once you obtain an admission that he has sworn false evidence or he has made a false statement you can pursue him up hill and down dale.

On the other hand you may want to use a document to secure admissions against a party, and you must again make sure that all the gates are closed. And then you must seek admissions as to the facts that you want without using the document. If you get the admissions well and good, particularly if you are thinking of not going into evidence. Then you don't want to have to use the document. In any event if using that technique the witness will not make admissions as to facts, you usually get a double bonus because when you produce his prior inconsistent statement you will usually get him to admit that his evidence was untrue. So you get the admission anyway and you get the bonus of him having given untrue or false evidence on his oath. It is far better getting it that way than the method I have often seen used; the other party is in the box and counsel has a document in his hand and he takes the document over to the witness and says "You said this, and you said that", and the witness says "Yes", "Yes, "Yes". It is true that you get the effect but you may be in danger of going into evidence and you lose the opportunity to get the witness to make contradictions. Again you should put the document to the witness piece by piece.

In some cases, particularly commercial cases, you may want to contradict the very statements in a document. There may be some representation, for example, made in the document. Here of course the ordinary techniques of cross-examination apply. You seek to obtain admissions as to facts and other documents which can ultimately be used to force admissions out of the witness that the statement in the document is untrue.

Also remember, as *Alchin's* case shows, that any document can be used, no matter who produced it, to obtain an admission. I

once saw J W Smyth absolutely destroy a witness when he had nothing to cross-examine the witness on but a *Law Almanac*. A police sergeant had sworn that it was a bright moonlit night at the time an accident happened. Our client was charged with culpable driving and Smyth had said to me a couple of days before, "Go and find out whether it was a bright moonlit night", and I am afraid I was a bit negligent; I had not done it. So as the witness was in the witness box, Smyth turned to me and said "Have you found out if it was a bright moonlit night?" and I said "I'm sorry Jack, I haven't". He seemed somewhat annoyed and said "Well go and get a *Law Almanac*". In those days the *Law Almanac* used to have the moon phases in it and the solicitor went out and got one. Sure enough the moon rose about 11 o'clock in the morning and set about four o'clock in the afternoon, so it couldn't have been a bright moonlit night. That was all Smyth had. So having got the policeman hopelessly committed to swearing it was a bright moonlit night he then took the almanac up to him and in that deadly voice of his he said "Have a look at that, having seen that do you still swear that it was a bright moonlit night?", and the witness, the police sergeant, said "No". Then Smyth said to him "Five minutes ago you swore to me that it was a bright moonlit night, and now you have just sworn that it wasn't a bright moonlit night haven't you?". "Yes", said the witness. "And one is contrary to the other?", "Yes". "Which is false?" and the witness said, "It was false when I swore it was a bright moonlit night." Of course the cross-examination just went on and on. The policeman went red, and finally he was reduced to total speechlessness. It is an interesting illustration of how you can use any document.

The other thing I would suggest is sometimes you may have a document and you may want to use some contradiction in it. But it may be so far on the periphery of the case that the jury and also the judge will get very annoyed with you attempting to use it. Always try and make it relevant in some way; try and frame your question so it seeks to have some relevance. For example, if you are resisting an action for goods sold and delivered, and you know the plaintiff has some conviction for a minor offence (it may be something like breaking and entering or something like that), you get judges and juries offside if you start cross-examining about the previous convictions. People will say "What has that got to do with the goods sold and delivered?" But if you can suggest to the witness that he appreciates that the defence in this claim is that it is a dishonest claim and get him to understand that, and then introduce the conviction in that way, it appears to have relevance. The same with other statements.

Outline of Propositions

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R v Orton [1922] VLR 469 at 470
R v Bedington [1970] Qd R 353 at 359-60
Birchnall v Bullough [1896] 1 QB 325 at 326
Nth Aust Territory Co v Goldsborough Mort [1893] 2 Ch 381 at 385, 386

(ii) But the document must not be identified and, if the witness is not the author, no question can be put which suggests the nature of the document or its contents.
R v Sehan Yousry (1914) 11 CAR 13 at 18
R v Orton [1922] VLR 469 at 470

8 A party may be *asked* to make admissions as to the contents of a document, whether or not made by him, if the contents are within his personal knowledge. 56-7
Alchin v Commissioner for Railways (1935) 35 SR (NSW) 498 at 509

9 But a party probably cannot be required to *answer* questions about the contents of another person's document unless it is produced. 57-8
R v Banks (1916) 12 CAR 74 at 75-6
Henman v Lester (1862) 12 CB (NS) 776; 142 ER 1347 at 1352

10 Unless the witness is a party, the document can only be used "for the purpose of testing the witness's present evidence". 58-9
Alchin v Commissioner for Railways (1935) 35 SR (NSW) 498 at 509
Hammer v Hoffnung & Co (1928) 28 SR (NSW) 280

11 Once the witness's attention is drawn to the inconsistent part, the document can be tendered to contradict him if he refuses to admit his previous inconsistent statement. 59
Evidence Act 1898 s 55

12 But once the witness admits the inconsistency, the document is not admissible unless the witness is a party. 59
Nth Aust Territory Co v Goldsborough Mort [1893] 2 Ch 381 at 385-6
Alchin v Commissioner for Railways (1935) 35 SR (NSW) 498 at 509

13 If the cross-examiner shows the document to the tribunal of fact or directly or indirectly gets any of its contents before the tribunal of fact, he can be required to tender the document. 60
Oakes v Gaudron [(23/5/63) Walsh J]

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14 If a witness refreshes his memory from any part of a document and counsel cross-examines on that part, he is not required to tender that document. But, if he cross-examines on parts not used to refresh the memory of the witness, counsel can be required to put the document in evidence. 60
Senat v Senat [1965] P 172 at 177

15 But opposing counsel can only require the tender of the document during cross-examination. 60
Hatziparadissis v GFC Manufacturing Co [1978] VR 181 at 183

16 If a witness is cross-examined as to part of a document, his opponent may prove that part of the document in re-examination together with such other parts of the document as are necessary to explain or modify it. 60
Meredith v Innes (1931) 31 SR (NSW) 104 at 112

17 If counsel cross-examines on certain parts of a privileged document in his possession, he waives privilege for the whole. 61
Burnell v British Transport Commission [1956] 1 QB 187 at 190

Technique in cross-examination on documents

1 Close the gates — eliminate all possible explanations before using the document 61
— signature
— was aware of contents
— eliminate explanation of contents
— no reason to deceive the recipient of the document.

2 Put the document to the witness piece by piece. 62

3 If the document is to be used on credit: 62-3
(i) so far as possible, get the witness to admit that each portion is contrary to his sworn evidence
(ii) if it suits your case — and it usually does — do not ask which contradictory statement is true but which is false
(iii) then you can pursue the witness concerning the false evidence or the deceit that he has practised on some third party.

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4 If the document is to be used to secure admissions against a party: 63-4

(i) make sure all the gates are closed

(ii) seek the admissions as to the facts without using the document

(iii) if you cannot get the admissions, then put the document to the witness piece by piece

(iv) obtain admissions not only to the facts but as to inferences favourable to you.

5 In some cases, particularly commercial cases, you will want to contradict the statements in a document, eg a representation. Here the ordinary techniques of cross-examination apply. Certain admissions as to facts and other documents which can ultimately be used to break down those statements. 64

Notes and References

1 Equivalent provisions to those in s 55 of the Evidence Act 1898 (NSW) are contained in s 36 Evidence Act 1958 (Vic); s 19 Evidence Act 1977 (Qld); s 29 Evidence Act 1929-1976 (SA); s 22 Evidence Act 1906-1976 (WA); s 99 Evidence Act 1910-1977 (Tas).

2 *Senat v Senat* (1965) P 172 has recently been followed by the Full Court of the Supreme Court of Queensland in *R v McGregor* (1984) Qd R 256. McPherson J emphasizes in *R v McGregor* that the effect of the rule in *Senat v Senat* is that if cross-examination of parts of the document not used to refresh memory takes place, then the *whole document* becomes evidence and not merely those parts that have been cross-examined upon.

3 The principle expressed in *Hatziparadissis v GFC (Manufacturing) Pty Ltd* [1978] VR 181 that opposition counsel can only require during cross-examination the tender of a document cross-examined upon, has been doubted as being inconsistent with *Holland v Reeves* (1835) 7 CAR and P 36; 173 ER 16, 18; cf *R v McGregor*.

Commentary

R V Gyles QC

Can I just say a few words about some practical aspects first, and then return to some of the propositions which you have seen put forward. It may just be helpful, although very basic, to consider the circumstances under which we come to cross-examine on documents.

The first and most obvious time is when we wish to prove a document so as to be able to tender it in evidence. You may have to prove signatures, or in these days of statutory admissibility you may need to prove the pre-conditions under the business records provisions of the Evidence Act to enable the document to be tendered. That is not what we primarily think of when we talk about cross-examination on documents, but it probably still remains the single most important time when we have to do so. The second main purpose is to prove a fact referred to in the document, and often we wish to do that without tendering the document or without being bound to tender it, and without going into evidence for tactical reasons. So we may wish to cross-examine on the document without going into evidence, and of course that has been dealt with in the propositions we have seen. The third main use of cross-examination on documents is of course credit, and we have heard already a number of illustrations of that. Fourthly, in addition to circumstances under which we are forced to tender documents we must always bear in mind the circumstances under which, by cross-examining on a document or using a document, we become bound to produce it to the other side.

Having just reminded you of those perhaps two very trite points, I return to some of the propositions which have been discussed.

I have always thought that the use of a document other than the document of the witness is always unfair unless the witness has seen the document before. Now I have put that argument to various tribunals with remarkable lack of success over a number of years, although it is fair to say I think that a number of judges share that view, and some of them act upon it.

Undoubtedly, the authorities to which you have been referred (*Orton* and the Queensland case of *Bedington*) are reasonably contemporaneous authority for the proposition that you may take the document of somebody else, no matter how irrelevant, and put it to a witness and say, "Now, having read that do you still adhere to the evidence you have given?" The illustration of the

Law Almanac is a classic example of this technique. One may be pardoned for doubting whether the *Law Almanac* would necessarily be the best source of that information. Often a document which really has no credence at all can be put to the witness.

Now as to the witness in a witness box confronted with that situation, what must go through his mind? He knows the barrister on the other side is permitted by the judge to give him that piece of paper, he waits for and sees that his own counsel does not object or if he objects he is over-ruled. One presumes that the witness would think that the other barrister is able to put that into evidence later and its purpose was for him to deny it. The statement or proof of another witness may be put to him, because bear in mind that under this theory, neither your opponent nor the judge ever see the document. You may put to the witness the proof of evidence of another witness and say, "So having read that do you still adhere to your version?" I would venture to suggest that the average witness in those circumstances would assume that the other barrister would need to call that witness, whereas of course we know if this theory be correct he is not only not bound to call the witness he is not bound to show that statement to anybody else. I should have thought that this technique places great pressure on a witness to make an admission which he really is not bound to make and which is unconnected in any probative sense to the document he is shown.

I was delighted therefore to hear reference to the decision of *Darby v Ousley* because that seems to be clear authority for the proposition that I have always thought correct. The other way of looking at it of course, is this: If *The Queen's Case* represents the basic law which says you cannot confront somebody with a document unless it is or it becomes part of the evidence in the case, we then have a statutory exception to that rule laid down in s 55 of the Evidence Act which applies only to statements made by the witness. Now one could think that would leave the position in relation to other documents precisely as it was in relation to *The Queen's Case* and I would suspect — and I have not read *Darby v Ousley* — that they would say that they would simply apply *The Queen's Case* rules to the documents created by a third party.

When you examine some of the authorities which are in support of the proposition that you may put an unacknowledged document to a witness, they really do not have the force that we might otherwise think. The relevant part of *Orton's* case has been read to you and it is really just a short statement without any examination of the problem, as is *Bedington*. In *Birchnall's* case the document was the document of the witness, it was

inadmissible because of the lack of a stamp, so that doesn't really touch this proposition. The *Nth Aust Territory Co* case is not a very clear authority because there, although the court was dealing with a situation in which both the depositions of the witness and the depositions of another party were being referred to, it is unclear to me on which basis the court made that decision. So without entering into a debate about it I wonder if the last word has been written on this subject. Certainly it is true that the practice in this State for very many years, certainly for the whole of my time at the Bar, has been in accordance with the propositions that McHugh has outlined and would be in accordance with the statements in *Orton*. However, as a matter of law I wonder whether it is correct.

Of course what I have just said does not mean that you cannot make use of a third party's documents. Let's take the illustration of the newspaper in *Bedington's* case. In my view it is consistent with principle that a cross-examiner can take a newspaper to a witness and say to him, "Have you seen that document before?" Once he assents to that, then you may ask other questions because the contents of that document become part of the witness's knowledge about which you can ask him further questions, assuming that his answers are either relevant, or relevant either to a fact in issue or as to credit. Once the person admits to knowing the facts or to having read the newspaper article, then you can ask him if he understood it was being said that such and such was the fact, and did he accept that, or not?" Now that, in my view, is not cross-examining on the document as such; it is cross-examining on the witness's knowledge of it.

Similarly in the case about the statement on the Rolls concerning the Catholic. If that witness had seen the Roll would it not have been legitimate to say "Have you seen the Roll kept by such and such?" "Yes"; and "Have you seen your name on it?" "Yes"; "Did you not appreciate that that was alleging that you were a Roman Catholic?" "Yes"; "Did you take any steps to correct it?" "No". Now I would suggest that is admissible cross-examination on credit, and would not be caught by the rule in *The Queen's Case* because the person has made the relevant admission as to his own state of knowledge about the document. And as I understand *The Queen's Case* principle, it is that you cannot get in a document or its contents by the back door, or make use of it by the back door unless you are in a position to prove it.

I would also suggest that when one examines the propositions eight, nine and ten, it is not altogether easy to understand quite how these propositions, which are all supported by authorities, fit into each other. It would be beyond the scope of a lecture like this

to examine that thoroughly, but I have some hesitation how, for example, propositions eight and nine really work out in practise if both are correct.

One other point I wish to raise, in proposition thirteen McHugh says that counsel can be required to tender the document and in other propositions we also have an obligation to tender the document. Now as I understand it, if you cross-examine on part of a document — a discrete part of a document — you cannot be forced to tender the whole document or at least you cannot be forced to tender those parts of it which are clearly separated from any relevance to the part which was cross-examined upon. I do not think the propositions here are intended to cut across that, but that is my understanding of the relevant principle.

May I also have leave to question proposition fifteen. I haven't read that Victorian case, and it certainly is opposed to all practice in our courts over very many years, and I think we must all consider our position about that. Can I just put a caveat on proposition seventeen. The reasoning which led the Court of Appeal to that decision seems to me to be quite inconsistent with the general principles which have been enunciated and certainly applied here over many years. In that case the witness assented to the cross-examiner's propositions about the contents of a small part of a document. Now as I understand it in those circumstances the cross-examiner is not bound to do anything with the document: he has not put it to him, he has had the assent of the witness to the proposition and that is all there is to it. Now Lord Justice Denning (as he then was) said that "In these the privilege was waived because otherwise neither the other party nor the Judge would have access to the document". Now as I understand the principles they would not have had access to the document anyway except under the little-used, if ever used, proviso to s 55. So that in my view the reasoning behind that decision is wrong. Whether or not as a matter of principle the use of part of a document should waive privilege is quite another question; the decision may be right in principle but it is not supported by the reasoning.

M H McHugh QC: I absolutely agree with R Gyles' criticism of the rule of people being shown somebody else's document and then being asked if they adhere to their evidence. I think it is very unfair because I think it has a psychological advantage over the witness for the reasons that Gyles outlined. Secondly, it cannot be justified on the basis of *The Queen's Case,* and although *The Queen's Case* has been subjected to some devastating criticism,

noteably by Wigmore, and anyone interested can see the criticisms in para 1259 of the Third Edition, those criticisms do not affect this particular situation. I agree with Gyles that, although four cases are cited for proposition seven, the first case, *Orton*, is founded on *Birchnall v Bullough* which really deals with the document being inadmissible, it was the witness's own document. It is far from clear to me, as it was to Gyles, as to whether the *Nth Aust Territory Co* case is authority for that proposition. I really do not think it is myself. So I would venture to think myself that *Orton*, although decided over 60 years ago by one of the greatest Victorian judges, is a decision of very doubtful authority. Then *Bedington* in turn was based principally on *Orton*. However, for over 20 years to my knowledge of the New South Wales Bar, witnesses have been shown documents of which they are not the author and whether or not they are admissible, and then asked whether they adhere to their testimony. The matter has never been considered by an appellate court and my view is that if it was, it could not be defended as a matter of principle. I am sorry, I should not say that; *Bedington* of course was the decision of the Court of Criminal Appeal, but it doesn't seem to have been debated in terms of principle; they looked at it in point of authority and I think that the practice is very suspect.

The second point Gyles made was in respect of propositions eight and nine. I should not say the second point he made, but the second point he made about my document. He says that there is some difficulty reconciling them. I must say I entirely agree with that criticism. It seems to really amount to this, that the party may be asked to make admissions (I am leaving aside *Darby and Ousley*) and counsel cannot object to the question being asked, but the witness has a right to refuse to answer, and that is perhaps the reconciliation of the two propositions.

The third matter to which Gyles drew attention is proposition thirteen, and he said if you cross-examine on a document it could only make that part of the document admissible and I accept that.

And finally he referred to proposition fifteen concerning Harris J's decision in *Hatziparadissis v GFC Manufacturing Co,* and again I agree that that is quite contrary to the practice which has long existed in the New South Wales sphere. I don't know whether as a result of that decision there has been any change of practice — I cannot recollect any in the last three years — I suspect there has not been. As for *Burnell's* case, in proposition seventeen I think it can only be justified on the basis of the proviso to the English equivalent to s 55, namely that the judge has the right to demand the production of the document and that is the only basis on which it can be justified.