The Art Of Cross Examination

In 1961 J.W. Smyth Q.C. gave a lecture in the Bar Association Common Room on cross-examination. The transcript of his address has resided in the top drawer of many barristers, to be thumbed through regularly, a constant reminder of how this master of cross-examination explained his art.

Might I say at the outset that cross examination is something in respect of which it is very difficult indeed to formulate principles. It is something that you do more or less intuitively — that you learn to do by experience, and so forth. There is perhaps one aspect of it, however, which may comfort some of you. You do not have to be a mental giant to be proficient at it. Brains are not necessarily a handicap, but it may comfort you to know that some of the brainiest in the legal profession have not, in fact, been good cross examiners. Perhaps it means that one needs some lower standard of intelligence to excel in that particular department. However that may be, the difficulty is to know how and where to begin because, as I indicated, it is to me, at all events, difficult to formulate principles. It is something you cannot learn from a book.

Perhaps I should begin first by telling you what, in my view, is the equipment that you need if you desire to become a good cross examiner. First of all, you must possess certain attributes, which if you do not have them initially, you should endeavour to acquire them.

1. The most important of these attributes is a capacity for hard, solid, conscientious work, for which there is no substitute, I can assure you, in this profession.
2. You should be reasonably well endowed with plain commonsense.
3. You should have, or it is a great advantage to have, a vivid imagination, and a good memory.
4. You should be a psychologist and be not without some worldly experience, because without it you can never hope to understand human nature particularly its frailties and imperfections, an appreciation of which plays an important part in your approach to the problem of cross examining a witness.
5. You must have or develop a keen appreciation of the probabilities. In respect of any situation or transaction, concerning which evidence is being led, because whoever can succeed in making his side's version appear more probable is more likely to win.
6. You must be observant and keep your wits about you in court, otherwise you cannot hope to follow the ever-changing pattern of a case, or turn an unexpected development to your advantage.

In most situations I would suggest that a pleasant manner is more effective than an unpleasant one. Courtesy will more often than not pay off better than rudeness. An even tempered cross examiner will be more likely to achieve results than one who allows his feelings to take control. No doubt there are other desirable attributes, but if you possess or acquire the foregoing, or the majority of them then I think you may be assured that you are off to a flying start. Finally on this aspect you must acquire, and when you have become more experienced you will have acquired, that sixth sense which will tell you when danger lurks in pursuing a particular line of cross examination, or in the asking of a particular question, and I think those of you who have had experience will agree that many an otherwise efficient piece of cross examination has been wrecked by going too far, or asking too risky a question.

Now assuming those attributes, or at least some of them, there are at least five more essentials, and they are these:

(1) A clear appreciation of the issues in the case;
(2) A complete knowledge of your own facts and an appreciation of where the weaknesses of your case are likely to lie;
(3) An anticipation of your opponent's case and what its weaknesses are likely to be;
(4) A knowledge of the relevant law and, as I shall illustrate later, this can be of the utmost importance; and
(5) A sound knowledge of the laws of evidence, because, after all, they are your tools of trade.

Thus armed, the next step, so it seems to me, is to know and appreciate what it is that you are setting out to do. In other words, what are the objects of cross examination. It is easy to state but I have so often observed that cross examiners seem to overlook or fail to appreciate what it is that they are trying to do.

Now, the objects of cross examination, I would suggest, may be broadly stated as follows:

(1) The securing of evidence from your opponent's witnesses which will support, or make more probable than not, your own case, or some aspect of it.
(2) The destruction, or cutting down, of your adversary's case.

If you keep those two objects firmly in your mind you will not go far wrong in setting about the task of cross examination.

In my view the first of those two objects is the more important and for these reasons. First of all, because an admission in your favour from a witness on the other side is, in general, far more potent than any evidence you are able to elicit from your own witnesses by examination in chief, and secondly, because you will find out that in the very process of seeking to secure favourable admissions from an unwilling witness, his efforts to avoid you will result in his giving the appearance of hedging and being evasive, thereby reflecting on his credit.

The second purpose of cross examination, namely the destruction or cutting down of your adversary's case, again, so it seems to me, falls into two categories:-

(1) The securing of admissions from the other side's witnesses which will destroy, or weaken his case; and
(2) When it becomes necessary — and as I shall illustrate later it is not always necessary — the destruction or imparing of the credit of your adversary's witnesses.

I would like to emphasise at this stage the importance of what I regard as the primary object of cross examination and the first part of the second object, because I sometimes think that many cross examiners appear to regard the destruction of the credit of the witnesses on the other side as their major purpose. Well, normally, I would suggest nothing could be further from the truth. I can assure you that if I am able to secure favourable answers from a witness who happens to possess a criminal record, then I would never breathe a word about his unsavoury past, because if you are getting help from him, if you are getting admissions that assist your case, or cut down the case to support which he has been called, then why destroy him. There is no need to. He may be your most valuable witness. I would suggest that as a general rule — but, of course, there are always exceptions — try the witness out first, to see whether he can help you, whether willingly or unwillingly, by either making admissions that favour your case, or which damage the other side's case before you step into him. It is for those reasons that I defer what few observations I have to make on cross examination as to credit simpliciter to a later stage, and propose to concentrate at the outset on cross examination's primary purpose and that part of its secondary purpose which is confined to destroying or damaging the other side's case.

How does one set about it, or perhaps, more specifically how does one prepare oneself for the task? That is the thing that will, no doubt, trouble some of the younger of you, and this is largely a matter of what best suits the individual. We are all different, and there is one observation I want to make at this stage. Never try to copy anyone else's style. You will only succeed in imitating his weaknesses and his imperfections. If your own style is no good and you cannot make it good, then it is not much good trying, but I would suggest that whatever may be your personal style, develop it, improve it where you can, eliminate its imperfections where you can, and you will do far better than trying to imitate some other Counsel you have witnessed in action.

Now the main thing, I think, is to keep your mind flexible, because as you are all aware a case changes so rapidly. If you set out with a prepared cross examination of any particular witness, or you allow your ideas to become too fixed, then nine times out of ten, you are foredoomed to failure. For instance, it will sometimes happen that in your brief, if it happens to consist of more than a backsheet, you will find a document that you think will enable you to smash the other side's case. If you rely on that and say to yourself "This is all I need" you will very often find that that document loses all its significance by reason of the nature of the evidence led on the other side. The same thing is likely to happen to you if you attempt to plan your cross examination, say, of the main witness, by writing out, or trying to write out the questions that you propose to ask him.

I suppose, at this stage, I could give you an illustration of what used to be done by a very eminent leader of the Bar, now deceased, S. E. Lamb, K.C. who was a first class cross examiner, but he had, at times, by reason of the method he adopted, some disappointments. He had a huge table and it was his practice in planning a cross examination to cover it completely with sheets of brief paper by means of drawing pins. He would then, commencing at the top, write out his initial question. Under that would then appear alternate questions according to whether the witness answered "yes" or "no" to the immediately preceding question until the final result resembled a genealogical tree. I have actually seen this — and he would say quite proudly to you "I'll start here" — pointing to the top of the tree — and "I've got him there" pointing to the last question at the bottom. That worked very well, provided the witness in the middle of it did not say in answer to a question "I don't konw". Then, of course, the whole scheme collapsed. So, gentlemen, I would suggest to you, do not try that method. It just doesn't work unless you are very lucky; quite apart from the enormous amount of work it involves, it also makes your cross examination inflexible, a feature which should be avoided at all costs. What I do myself so far as I am able to analyse it, and that is not easy, is first of all to work out all the matters which it will be necessary for me to prove in order to succeed, together with every circumstance which I think will tend to make those matters more probable than not. Now that is the foundation. I make a brief note of these, usually quite indecipherable, even to myself at times, and as each witness goes into the box, having listened to his evidence, I set out to try and get from him, if I can, some support for one or more of those matters. So long as you have firmly in your mind the final answer that you hope to get in respect of any topic, then you will find that the questions, the answers to which lead step by step to the result, will readily suggest themselves to you. It is a strange thing that you can sit in your Chambers and you can try and work it out, but you just cannot. On the other hand when you are on your feet and you have the stimulus of being in the midst of a cross examination, and you know what it is you are seeking to get it is amazing how the questions will flow. Furthermore if you approach the problem in the way in which I suggest you will learn to appreciate when it is dangerous to proceed further. You get the red light, so to speak. You are asking your series of questions, in the hope that you will get this final result, and then you detect something in the witness, or there is something in what he says, or the way in which he answers a question which tells you it is too dangerous to go any further and you drop it. You might come back later, perhaps, from a different angle, but it is most necessary that you should develop that sixth sense of knowing when to say to yourself, "Thus far, and no further on that topic". If you see that perhaps something dangerous may come out, then you quickly switch to some other topic, so as to distract the attention of not only the witness but also of your opponent from the particular thing that you fear.

Whilst on this aspect, and I shall give some illustrations later, a lot will depend on how you frame your questions. This is of vital importance, and it is something that with experience will come to you after a while. In general, your questions should be short, should admit of an answer

"Yes" or "No" and should be so framed as to encourage the answer you want. Always remember that the average witness will answer your question in the way which will tend to show him in the most favourable light. Witnesses are peculiar beings that way. Therefore, I suggest always endeavour to frame your questions so as to make a witness feel that to answer contrary to what you want may tend to make him appear foolish, or lacking in some recognised standard of behaviour or outlook.

Now perhaps I should proceed to deal with what you should be doing, and thinking, before you rise to cross examine. You already have firmly in your mind what you hope to achieve from the various witnesses that enter the box. You know your own case backwards, or you should, and it is your own fault if you do not, both as to the issues and facts, together with any material you have as to credit. You have in a tentative sort of a way, not in the way in which I indicated in the illustration, but in the back of your mind, mapped out, as I emphasise in a tentative way only, the way in which you propose to deal with the main witness, for instance, the plaintiff or the defendant, or witnesses that you anticipate may be called. You should have done this in your Chambers. That is something which you carry with you into Court.

Now, as I indicated earlier — and this, in my view, is most important — you should be observant. I have so often seen my adversary with his head down, industriously writing, apparently fearful that he may miss one word of the witness' evidence in chief. The result of that is that he meets the witness for the very first time when he rises to cross examine. It is far more important that you should watch the witness closely. You can still make notes of what occurs to you as important and rely on your memory for the rest. Watch his reactions, note where he hesitates or appears uneasy, as these constitute likely points of attack. Try and form some assessment, as best you can, of his makeup, for instance "Is he a conceited man"? "Is he likely to be of the hedging type"? "Is he likely to lose his temper if I hit him on a raw spot?" "Is he garrulous"? "Is he the irresponsible type"? "Is he shrewd"? "Is he stupid"? and so on. You are not always right you know. I have made some awful mistakes in my assessment of witnesses. You must however try to form some idea. You will learn a lot if you watch him closely, his eyes particularly, his facial expression, his mannerisms, his gestures. I can assure you that cases can be lost if you relax or do not pay close attention at this vital stage.

Perhaps I could best illustrate that by two instances within my knowledge. One concerns the late Jack Shand, Q.C., than whom I suppose there has never been a better or more efficient cross examiner. He was appearing in an admiralty case in which the critical issue was whether one or two vessels involved in a collision had given two blasts on her whistle, indicating an intention to turn to port. It was asserted by one side and strenuously denied by the other. A witness who was apparently quite independent was called and it was vital that he should be discredited. He claimed that he was standing on a wharf over at Mosman, I think, it happened in the Harbour — and he

Mr Ray Maher entering Central Court today with his counsel, Mr J. W. Smyth, QC, (left) and his assistant Mr Neville Wran. *(Daily Mirror, January 28, 1965.)*

swore most convincingly that he distinctly heard those two blasts. Shand was watching him very closely as he gave his evidence. When he rose to cross examine he began to fiddle with his papers, as was not unusual with him, pretending to be looking for a document. Keeping his head well down he asked "Where were you standing when you heard these two blasts of the whistle?" The witness stood looking intently at him. There was no reply. Then in a much louder voice he asked the same question, there still being no reply. On the third occasion he literally shouted the question, by which the time the witness noticed that everybody was looking at him and becoming somewhat uneasy said "What did you say Mr. Shand?" The next question was, "You are stone deaf, aren't you"? The witness said "Yes Mr. Shand". The way in which he had achieved that result was that as he was watching the witness he noticed that the witness' lips were moving as though they were forming the words that were being addressed to him by the examiner in chief. He thereupon came to the conclusion, which could of course have been quite wrong, but in this instance was not, that this man was a lip reader and was, therefore, deaf. So the other side's case collapsed.

Another illustration was when the late Bill Monahan, K.C., who was a very shrewd and capable cross examiner, was appearing for a plaintiff in a case where a horse drawn vehicle had been tied to some posts out in Leichhardt somewhere. There was a flash of lightning and a very loud and prolonged clap of thunder, with the result that these horses bolted and injured the plaintiff. The defence was that every care had been taken in tying up the horses, it had been done in the proper fashion, that what had happened was more or less an act of God. The defence was getting along quite nicely on that basis. Then the defendant called a witness on some formal matter to prove employment or something of that sort — nothing to do with the main facts in issue — Monahan noticed that the witness was wearing a returned soldiers badge. The matter being purely formal, Counsel on the other side was surprised when Monahan rose to cross examine. The cross examination went something like this:

"Q. I see you are a returned soldier.

A. Yes Mr. Monahan.

Q. What unit were you in?

A. I was in the artillery.

Q. What were you in the artillery?

A. I was a driver.

Q. You would ride the horses, would you? (Artillery being horse drawn in those days, as you know).

A. Yes.

Q. I suppose you would have to take your horses up into the front line.

A. Oh, yes.

Q. And you would have to put them fairly close to your battery, because you would never know when you would have to advance or retire?

A. That's right.

Q. I suppose an artillery bombardment would make a lot of noise?

A. Oh yes a tremendous amount of noise.

Q. I suppose sometimes you lost horses in action?

A. Yes.

Q. Then you would have to replace them with fresh horses?

A. Yes.

Q. And with the wastage of horses you would be bringing in horses that were not accustomed to front line conditions?

A. Oh yes that was going on all the time.

Q. I suppose when a bombardment started your horses would sometimes bolt and get away?

A. Oh no Mr. Monahan, if you tied them up properly the never got away."

The defence was shattered!

Those are two illustrations of the importance of keeping your eye on the witness and trying to find out something that will give you a lead in.

Now, as I indicated earlier, it is also necessary that you should be a psychologist, and form some assessment of the essential characteristics of the witness if you can, including, as I will indicate in a moment, even such things as racial characteristics or points of view, if he be a foreigner. There was one excellent illustration of that and this was a cross examination by the late S. B. Lamb, although it was not one of the rehearsed kind that I quoted earlier. He was appearing in a case, I think for the Commonwealth prosecuting a Chinese woman for some breach of the Customs Act. The whole case for the prosecution, or the major part of it depended on an alleged oral confession. The defence claimed that that was nonsense, that this woman could not speak English, and indeed they called witnesses before she went into the box to establish that she didn't know any English at all. She was called by the defence and give evidence in denial through an interpreter. Finally Lamb rose to cross examine. He cross examined her through the interpreter up hill and down dale — he asked who her husband was, what was the name of her grandfather, how many children she had, and so this went on for some two hours. He was getting nowhere fast, and then he sat down. The defendant with an obvious look of relief on the face started to walk from the box, and just as she was almost down, he said "Just one more question". She returned to the box. He said in a perfectly nonchalent manner addressing the question directly to her "Your two children are girls, are they not?" She said in English "No, boys". There he used psychology as applied for instance to the Chinese, who are always proud when their children are sons, and so I understand rather diffident about admitting they are daughters. However, that is how he got her, and so the defence collapsed.

Now whilst on this subject of securing admissions, you must take care that your witness does not elude you at the last moment. You must, therefore, eliminate every conceivable explanation that he can give, no matter how ridiculous it may appear on its face, as any explanation however poor it may be, or sound, can sometimes go down particularly before a jury. It has been said that you would liken a witness to a man standing in a paddock completely surrounded by a fence, in which there are a number of gates, each of which is a possible escape route to him. So before you start you ask yourself "What possible explantion that he can give, which will give him a way out, when I confront him with my final question". Each possible explanation that he can give represents a gate, and you must go around and methodically close each one,

not giving him any hint as to what you are up to. If you have been careless and left one gate open, you will find that nine times out of ten that is the gate he will slip out, and thus elude your grasp. The late George Flannery K.C. was an adept at this type of cross examination. I can remember on one occasion his spending two solid days cross examining a witness and asking, in many instances, what appeared to be the most ridiculous questions to the great annoyance of the presiding Judge. Any uninformed listener would have thought he had gone off his head. But when he put the final question, the answer to which was vital to his case, the witness had no alternative but to say "Yes". There was no possible explanation or way out. He had to agree.

Now, I do not wish to trespass on the territory of my friend Reynolds, Q.C. who will be lecturing to you next week on the art of cross examination on a document. This is a most important aspect of cross examination but I do not think he will mind if I just use one aspect of cross examining on a document, to illustrate my last point to you. Is is obvious that if you confront a witness too soon with a document, which if true destroys him, he may escape by saying, for instance, one of the following. He may say "It is not my writing". He might say "It is not my signature" or he may say "I didn't read it before I signed it", or he may simply say bluntly that it is untrue and give some specious explanation as to his reason for signing something which he knew to be untrue, or there may be other possible explanations, depending on the nature of the document and the circumstances of the case which may occur to you. What I would suggest is that you then start to close the gates, or at least try to. If you feel there is any likelihood of his denying that he wrote the document, pick out from the document a few innocuous words which give him no clue to the document or any hint that you have it, or refresh his mind on it, preferably words that have some peculiarity in formation, or, in an appropriate case, spelling, and ask him to write the word, or the number of words, three times quickly one after the other, so that he gets little or no opportunity of disguising his handwriting. Then get his signature, say, three times. This will give you the opportunity of comparing it with the original that you hold, not letting him see or suspect what you are doing. Then go to something else altogether, as though that avenue is finished. Then later on you might ask some such question as this "You claim to be an honourable man, do you not" — they usually so claim — to start off with anyway — and then you ask "As an honourable man, you wouldn't tell a deliberate lie on an important matter would you?" The answer is always "No". Then you ask "Much less would you sign your name to a deliberate lie?" The answer is almost invariably "Certainly not" with just the slightest tinge of indignation in it. Then maybe you can wander off on to some other topic altogether, as though you have finished with that aspect. And then you come back and you might ask something like this "I suppose you claim to be a reasonably careful man" and the answer is usually "Yes". And then you say "As a reasonably careful man you wouldn't put your name to a document without knowing what was in it, would you?" And he usually will say "No, I wouldn't". Then you take up the document, fold it in such a way that he cannot see the contents but merely the signature. You approach him and say "That's your signature, isn't it?" and he says "Yes". If you cannot do the rest, then there is something wrong with you.

I will give you another illustration of closing the gates which I recall after a long period of years, because it happened to me within my first two years at the Bar. I have never forgotten it. One of my floor mates who now is rather high in our profession, was engaged in a somewhat lengthy divorce suit. It had been going for three days, when he was offered a more lucrative brief, a matter of considerable importance in those days, although perhaps not so important to the young fellow of today. However, he prevailed upon me to carry on for him, and foolishly I agreed, the main reason being that I did not have anything else to do anyway. So over I went with the case in progress for three days. The case for the petitioner husband, for whom I was appearing, was in its concluding stages and indeed, concluded that afternoon. The evidence briefly had been that the petitioner and his two witnesses had caught the respondent wife with the co-respondent in flagrante delicto on the rear seat of a car in a secluded spot near Wollongong on a Saturday night, the date being given, of course, at a time around about 10 p.m. During the afternoon the respondent wife entered the box and proceeded to give evidence that on this very night she had attended a certain picture theatre at Wollongong naming it, accompanied by no less than eight independent witnesses, that they witnessed a certain programme and she gave some detail of the pictures that she saw. After

The Federal Attorney-General Mr Hughes, (as he then was), (left), with Mr Smyth and Mr Deane (as he then was), (right), appearing on opposite sides in the Concrete Pipes *case.*

the pictures they all repaired to the coffee lounge nearby and had a cup of coffee. Then her eight companions strolled with her along the street which led to her front gate and left her at about half past eleven. Well, of course, it is obvious that if that were true then not only was I sunk but it looked as though my client and his two witnesses had an excellent change of standing trial for perjury. So with my heart in my boots I returned to my chambers accompanied by my very despondent instructing solicitor. I said "Well this doesn't look too good. I think you had better ring this picture show and check what programme was on that night". He said "They wouldn't be that damn silly, would they". "Maybe not", I said, "But we'll check". The next morning a delighted solicitor turned up to tell me that this particular programme had been shown at the particular theatre on the previous Saturday, not on the Saturday in question but the same programme had, in fact been screened at a different theatre in the same district, about two or three miles away on the relevant night. I then got hold of a friend of mine in the picture game and got a detailed description of both pictures so that I would know what it was all about. We obtained from the agency for country newspapers copies of all newspapers roundabout the relevant date. You can see that the Respondent's possible ways out were to say that she was mistaken as to the programme or as to the theatre she attended. It was also essential that she should not be able to account for her movements on the previous Saturday or the subsequent Saturday or at least have no one to provide her with an alibi. I will not bore you with the details, but those were the things that I had to rule out. I got the respondent hopelessly committed to this particular programme at this particular theatre. There was no argument about it and she could not remember where she was the previous Saturday or the subsequent Saturday. I asked her no more. Then each of the eight witnesses was dealt with in the same way. They fixed that it could not have been the Saturday before or after — one of them was on night shift for instance. Somebody else was at Aunt Mary's birthday party and so on. Then finally I put the Respondent back in the box and said "Have a look at this" showing her the programme as advertised in the newspaer for the relevant night. She looked at me like a startled rat and it was not long before she gave in. She was obliged to admit that she had been speaking of the previous Saturday. This is an illustration of what I mean by closing the gates. If I had gone up to her and said "Look here, you said you were at the theatre and saw this programme on this night. Have a look at that". She would say "Yes, that is right. Yes, I remember now that was the theatre that we went to (mentioning the other theatre)". Or she might have said, "No, I was mistaken as to the programme" or something of that sort. She would have got out of it somehow, and then all the other witnesses, no doubt — I am not suggesting anything wrong, of course — would have given an entirely different version of what happened on that particular night. There is another important thing that flows from the illustration I have just given — don't take anything for granted. It does not matter how probable anything may look that comes out on the other side that you did not expect — check it. Think to yourself when you go back to your Chambers "Now, how can I get rid of that — how can I controvert it". And if you give those sort of things a bit of thought, it is amazing what ideas will come to you.

Now speaking generally, I am firmly of the view that the subjective method of cross examination is more often than not the most effective. I have often heard Counsel saying to witnesses, one after the other "I put it to you that you did this" or "I put it to you that you said that", and getting nowhere fast. On the other hand, if you probe the mind of a witness it will be much more effective. Cross examine him on his thoughts, his reactions, his reasons for doing something, his standards and so forth, always framing your question in such a way as to evoke a favourable answer. I sometimes liken it to arguing with a person who cannot argue back. You have only to give that a moment's thought to realise how advantageous it is. How much more successful, for instance, would you be at home if you could manoeuvre your wife into that situation. When you come to think about it what you are doing is putting propositions to a witness, which he is almost compelled to agree with, because they sound so reasonable. He would feel a bit of a fool if he disagreed with them, or might think that it would look as though he was not too honest or not too honourable or not too truthful. If you frame your questions in that way, then I think you will find that you will do much better than getting up and trying to blast the witness out of the witness box. If I may also add on that aspect there is room for that type of cross examination in virtually every case and if you can learn to do it well you will find that you get vastly different results. You will also find that when you are able to do it well, you will be in a situation where you can address the tribunal almost exclusively on what the other has said. This puts you in the very strong position of arguing or basing your argument upon what you can fairly claim to be common ground. There is no dispute about it you would point out, the other side admits it. If you find that you can give the whole of your address, or base the whole of your address on the facts on what you have secured in cross examination you may say to yourself "Well, I haven't done such a bad job."

I have brought along an illustration of it which occurred in an ordinary negligence case, cases in which category now constitute some 80% to 85% of the work of the Supreme Court. If you can apply it to that sort of case, a collision case, how much more effectively can you apply it in a fraud case, a libel case and so on.

The illustration that I would like to give you is a quite recent case, namely *Williams v Smith 76 W.N. 158.* Do not be misled. My name appears in the report, but I was not responsible for the cross examination — my friend Lusher conducted the trial, and if I may say so it is an excellent piece of subjective cross examination. Indeed, although the jury found against him — as they often do in this sort of case — it was so good that we got a two to one majority in our favour in the Full Court. I must say we went down like tacks in the High Court, but that in no way detracts from the excellence of the cross examination. I think it would pay you to study it as it will give you in graphic form the ideas I am seeking to convey. There is quite a good bit of it — but perhaps I could read a short excerpt so that you will see what I mean. The circumstances of this case were these. The plaintiff was coming down Bulli Pass at 20 to 25 m.p.h. on a motor cycle in a thick fog, his range of vision being no more then 12 feet. He admitted, in cross-examination that if

he had only been travelling at 10-15 m.p.h. he could have stopped in time to avoid our car, which happened to be on its wrong side of the road at the time. Having agreed that he could only see 12 feet, he was then asked as follows:-

"Q. If there was a piece of wood, or log on the road, you would have no chance of doing much about that, would you — of avoiding it, if you could see only 12 feet ahead?

A. No.

Q. You would have no chance would you?

A. No.

Q. So if there was a rock on the road, or some obstruction of that sort, with a view of only 10 or 12 feet in front of you, at that speed that you were travelling, you would have no chance of avoiding it, would you?

A. No.

Q. The real fact of the matter is that you had no chance of avoiding this other motor vehicle either, did you?

A. No."

And later,

"Q. You have already said that you would not have been able to take any evasive action if there had been an obstruction on the road — you have already said that, haven't you?

A. Yes

Q. Supposing you had been coming down that hill at 10-15 m.p.h. don't you think you would have been in a much better position to avoid this accident that you were in fact?

A. Yes.

Q. You certainly would have, wouldn't you?

A. Yes.

Q. Because if you had been travelling at 10-15 m.p.h. you would have had much more time than you had, would you not?

A. Yes.

Q. Without any difficulty at all?

A. Yes."

He agreed that in those circumstances "it would not have been difficult to get out of his road".

"Q. So that if the motor vehicle had been stopped on the road in front of you, right across the centre of the road (which was the evidence for the defendant) you could have avoided that at 10 or 15 m.p.h. could you not?

A. Yes without any difficulty had it been stopped.

Q. Without any difficulty had it been stopped.

A. Yes."

There you have a very good illustration of what I mean by, in a sense, putting propositions to the witness — getting him to agree to them, and gradually leading him to the situation in which he ultimately found himself.

There is another illustration, perhaps, which I could give you — and that is a case which I was in myself some years ago: *Christianson v Gildav, 48 S.R. 352.* I was sitting in my Chambers one afternoon when a Solicitor came up with a panic-stricken look on his face and said "Look, are you doing anything tomorrow"? I said "No. What do you want?" He said "Look, I am in a bit of difficulty, I have a case here, I am appearing for the insurance company. We don't think the company is really liable. the defendant, the insured, has cleared out. We don't think he gave us proper notice, but we are not going to just let it go by default, because the damages might be enormous. I'm sorry we have let the matter go a bit. All I can tell you is the fellow was injured in a winch on a boat. He lost his hand apparently. We don't know when it happened, where it happened, or how it happend. So would you just do your best to keep the damages down." I replied "Thanks very much." After he had left and I had read the entire contents of the brief, namely the issues, I began to think about it. I thought "Well it is something to do with a boat apparently so I had better have a look at the Navigation Act." At this point I would remind you of something I said earlier, namely know the relevant law because very often it can be of the utmost assistance to you in cross examination, as it turned out to be in this case. As I say I had a look at the Navigation Act. I saw that "master" means "every person, except a pilot, having command or charge of any ship". On browsing through the Act I came across Section 96 which said "Every master of a British ship who knowingly takes such ship to sea from any port in New South Wales, in so unseaworthy a state that the life of any person is likely to be thereby endangered shall be guilty of a misdemeanour" unless he proves certain exceptions which had no relevance in this case. I had a look at the cases as to what unseaworthiness meant and found that if you have a defective winch that makes your ship unseaworthy. I was faced at the trial, of course, with the usual alleged admission by the defendant when the plaintiff swore that some time before the accident he said to the defendant "Look here, boss, that winch is dangerous. Somebody will lose their hand or be killed". The boss said "Yes, yes, that's right Bill, but look we are busy at the moment, the weather's good. Wait until we get a bad day and we are in port, and we'll fix it up" but of course said Counsel for the plaintiff "unfortunately it was never done". Then we heard the story of how this man had spent 30 years of his life on this trawler. He knew nothing else. There was nothing else he could do without his hand, and so the damages mounted. The first thing I had to establish obviously was that he was the master. So I said "I suppose you would have been the most experienced man in this crew". He replied "definitely". I then said "Naturally you would be in charge of the vessel" to which he replied "Yes". That made him the master beyond a doubt. At a later stage I asked and — you will see it in the report if you care to look — "Did you consider the way in which it was left" (that is the winch), "that it might be dangerous?" He answered "Yes definitely" (with my opponent thinking "another thousand on the damages, I suppose"). Then I asked "And even dangerous to life" to which he replied "Yes". Then I said "There is no doubt about that". He said "Yes" and finally I asked "And you knew that all along" and his answer was "Yes". I may say that I tried to get him outside the three mile limit, thinking I might be able to put up some argument on common employment but unfortunately an adjournment intervened and never have I seen a ship come inshore so quickly when we resumed. It ended up he was only a mile and one-half off shore, so that closed up that avenue. However, at the end of the evidence I successfully moved for a verdict on the ground *ex turpi causa actio non oritur* — the defendant being a man who was injured in the course of and by reason of the committing by him of a crime. How can he sue? This submission appealed to the learned trial Judge, and we succeeded. However, the

argument in the Full Court was in much more capable hands, and was put on the sounder ground that on the plaintiff's case the effective cause of the injury was the plaintiff's own negligence. So we held the verdict. That indicates to you that no case is ever hopeless. Don't just throw your hands up and say "I can only do the best I can". Give it a lot of thought and it is amazing what will occur to you.

I am afraid there is not much order in this, because it is a difficult subject to put in any real sequence. I think I should now direct your attention to the advantages to be derived in some circumstances from cross examining on the surrounding circumstances. In many cases it is quite futile to cross examine directly a witness on what he has said happened or was said in the hope that he may be induced to depart from his earlier version. A case in court is really a little play and it is divorced, and often very skilfully divorced, from the reality of the situation and the surrounding circumstances. If you cross examine the first witness on those surrounding circumstances, framing your questions in one way to encourage particular answers and then cross examine the next witness framing your questions to encourage answers tending in another direction, you will amaze yourself very often at the conflict you have thus created. Then you are able to go to the jury and say "How can you believe these fellows?" You say "One says this and the other fellow says the opposite". To develop the matter a little further you might with a later witness put something that you have got from an earlier witness in such a way as to encourage him to answer in the negative. For instance having led up to it with an appropriate series of questions to encourage the answer you want you might put to him what the earlier witness has sworn without of course indicating that the latter has done so. You would say "Look, I am suggesting to you this" (giving the earlier witness' evidence on the point) "is what happened". He answers "certainly not". You then ask "that is utterly false, is it?" He replies "Absolutely" little realising that he is damning a witness on his own side. You will find this quite a useful method in cross examining police witnesses of which I have had some little experience. You can cross examine them up hill and down on what their statement says, and if you get them to budge one inch it only means that they have been careless. It is not due to any skill on your part. You can cross examine them, perhaps, on these lines. Didn't you put your heads together in preparing this statement. The very words of their evidence are identical. You will find however that they have never seen one another since the arrest — they have never talked to one another, and it is quite a surprise to them that they have used the same words but that was purely accidental. Of course, that might help a bit before a jury, but a Magistrate merely looks at you in pained silence. He knows perfectly well what goes on. But where you will get them very often, is cross examine them on what happened just before or just after. What they said to one another as they were walking up to arrest the innocent man and what they said to one another when they got back to the station and so on. You will find that very often you will get an amazing conflict, and in that way, particularly before a jury, you can completely and utterly destroy their story.

It has been said, and again I am afraid there is not much continuity in this, that you never ask a question unless you are sure of the answer. Well that must not be taken too literally. I can remember one occasion of which Jack Shand told me where a very eminent King's Counsel, since deceased whom I shall not name although I don't suppose he would mind now, who was brilliant in arguing constitutional matters, construction of documents and so forth, excelled in appellate work in the High Court and elsewhere, but had never had a great deal of common law experience. By some strange chance one day a brief arrived on his table to appear for the defendant in a libel action, it being part of his instructions that "this case is going to depend entirely on cross examination of the Plaintiff". So he thereupon set about directing his mind to this question of cross examination. He wrote out a series of questions, and then after giving them as much deep thought as he would have given to the construction of a Statute or a Will, decided that the first one was too risky. He crossed it out. He kept going and finally was left with two questions which he thought were the only ones which could be asked of the plaintiff with safety. By the time the Solicitor heard this he panicked, seized the brief and took it around to Jack Shand telling him what had happened. The sequel was that Shand cross examined the plaintiff for three days, belted the daylights out of him and secured a verdict for the defendant which only shows that whilst caution is desirable ultra caution can lead to disaster. So you will see that the maxim never to ask a question unless you are sure of the answer is stated somewhat too broadly. You cannot be absolutely sure of what the answer is going to be. The only thing I suggest to you is do not be negligent, if a question is risky or the risk is not worth it, do not ask it. Let it go. If you frame your questions in the way in which I have suggested, you can almost bank on that answer being the right one because you do not rush in, you proceed warily step by step, step by step — very short steps at times — and you will be unlucky if your cross examination ends up on the rocks.

I think it has also been said, and this is important, that the art of cross examination is to know when not to ask a question, and that applies in two ways. First of all, not to ask any questions at all, and secondly not to ask particular questions. When a witness has said nothing to hurt you and there is nothing you can hope to elicit from him, you are a fool if you ask him anything, because every question asked in cross examination has some element of risk.

Another thing you will find, and I am only putting these briefly, witnesses will dodge your question and this is where your memory comes in. They will sidestep the question. You must not let them get away with that. Ask the same question in exactly the same words again, then if he does it again, ask him precisely the same question again and again and again until he says "yes" or "no". Then if you like, go back and pick his answers up one by one and kick him to death on those. You will get a lot of useful material if you are not put off by a witness evading your question. Another thing is try and avoid putting yourself in the situation of having to ask for the question to be read. It is far better to make him see that you are relentless, that you are going to get an answer if you stay there all day and you will find that you will finally get it.

As to the question of credit, I have already indicated to you that your cross examination having as its object the main purposes that I indicated earlier, will in most cases give you all you need, if you want to destroy a witness. He does not have to have a string of convictions. You can, in your cross examination of him, destroy his credit by showing him to be evasive, by bowling him out every now and again in a lie, by reminding him of what he has said half an hour ago and by getting him to agree that what he is saying now is diametrically opposed to what he has said earlier by getting him to tell you which of the two versions is true and then asking why he told a falsehood in the other and so on. What I have just said again emphasises the importance of good memory.

Another thing which, perhaps, I could put shortly to you is how to use a conviction. I have seen this sort of thing happen. Some chap is bringing an action for goods sold and delivered, if you like, or work done and materials provided, and cross examining Counsel gets up before a jury and says "Look here, isn't it a fact that you were convicted of break, enter and steal, three years ago". The fellow says "I have been trying to live that down ever since. I was hoping that wouldn't be brought out". The jury more probably than not will become antagonistic thinking no doubt "What on earth has that got to do with whether or not this man ought to be paid for the work he has done? I don't care whether he is a criminal or not. If he does work for anybody, why shouldn't he be paid". And so you have done more harm than good. The way I suggest you might go about it, and this is only one way, you might proceed somewhat on these lines:

"Q. Of course, you appreciate that the suggestion here is that you are outrageously overcharging for this work?
A. Yes, that is what you say.
Q. And that you are charging for work that you didn't do?
A. Yes.
Q. That would not be very honest if it were so, would it?
A. No.
Q. And that you are charging for work that was done badly?
A. Yes, that is what you say.
Q. As a mater of fact you are not very particular how you make your money, are you?
A. What do you mean?
Q. Don't you know?
A. No.
Q. What would you think of a man who was convicted of breaking, entering and stealing. That would indicate that he is a dishonest man, wouldn't it?
A. Yes.
Q. That is precisely what happened to you, wasn't it?
A. Yes."

You see the difference. The important thing is to make the asking of question concerning a man's criminal record or unsavoury past appear to have some relevance to the case being tried. Otherwise you give the appearance of slinging mud for mud slinging's sake and juries do not like that.

Perhaps I can give you another illustration from my own experience of how to use material which on its face might appear to be utterly worthless. I was appearing in a case in which everything depended on the credit of the principal witness on the other side being destroyed. The only material I had was that the witness on being arrested in a baccarat school on two occasions had on each given a false name to the police. If I had asked "Is it not a fact that you were arrested on two occasions for being on premises used for the playing of baccarat" and then upon receiving an affirmative answer had followed it up by asking "And on each occasion you gave a false name to the police did you not?" he probably would have replied with a smile "Well everybody does that". The jury would no doubt have laughed their heads off at my expense and would have thought perhaps that the witness was not such a bad chap. The cross examination in fact proceeded on these lines:-

"Q. You are a bit of a liar when it suits you are you not?
A. What do you mean?
Q. Do you mean to say that you don't know?
A. No idea.
Q. What would you call a man who when apprehended in the course of committing a crime gave a false name to the police. You would call him a liar would you not?
A. Well yes I suppose so.
Q. And that is precisely what you did on no less than two occcasions?
A. Yes.
Q. So you are a liar when it suits you are you not?
A. Yes."

The cross examination then proceeded to point out to him that it suited him to say this or that in this very case and in the end he went to pieces. I refrain from telling you what my opponent said to me when he discovered the nature of the "crime" committed by his witness.

Finally, I would like to make a few remarks on what should be your demeanour as a cross examiner. I am firmly of the opinion again subject to exceptions in particular circumstances, that a persuasive approach is more often than not far more effective than the hectoring bullying shouting method. In the first place if you violently attack a witness or you are rude to him, he is immediately on the defensive and on his guard. If you approach him in a persuasive manner — I do not mean that you grovel — he is much more likely to agree with the propositions that you are putting to him. Many a devastating cross examination has been conducted without the cross examiner raising his voice. Demeanour is of more importance than is sometimes realised. I am reminded in this regard of a somewhat amusing incident which occurred some years ago. The late Andy Watt K.C. was opposed to the late David Maughan K.C. both very able Counsel and both first class cross examiners. They were, however, rather different types. Watt was tall, smooth and courteous. I do not wish it to be thought that I am suggesting that Maughan was discourteous — far from it — but he was not by any means tall and was inclined to get a little peppery at times, particularly if his witness happened to stray off line during examination in chief. Maughan called a witness whom he had not met in conference and who did not know Maughan. After he had given evidence he was excused from further attendance and when he met his mates outside who were still waiting to give evidence, one of their number said "How did you

go Jack?" He replied "Very good. When I went into the box the little chap on the other side got up and snapped a few questions at me but I can tell you he did not get a thing out of me. He got very cranky with me and sat down very angry. Then our fellow got up — a very nice chap he was too. I was shrewd enought to see what he wanted and I must have answered all his questions the right way because I could see he was very pleased with me". Obviously the witness had got his sides mixed up but you see what I mean when I say that demeanour is of the utmost importance.

Finally on this aspect do not show your feelings. If you have a reverse do not give the slight indication on your face of how sick you really feel although you do not have to tell me how your stomach will be reacting.

There is just one thing I should like to add. Do not come back to your Chambers boasting of the splendid cross examination you carried out in Court that day. You will employ your time far more usefully if you reflect upon the mistakes you undoubtedly will have made to ensure that you do not repeat them in the future. The only difference between yourself and your more experienced colleague is that he will make less mistakes than you. You will make mistakes almost every time you carry out a cross examination as you will almost inevitably ask some risky question or in your enthusiasm will have gone just a little too far. Only be reflecting on your mistakes will you avoid falling into error or at all events the same error on subsequent occasions. □

The Interstate Lawyers' Lament

Bennett QC is said to be primarily responsible for the "lyrics" of this ditty with the assistance of sundry other non-Banana-benders. Sang to the tune of "Waltzing Matilda", it premiered on 12 March at a dinner for the Chief Justice of Queensland at the Southport Yacht Club. With the out-of-Staters' capacity for verse and spelling thus displayed, it's little wonder they don't want us up there!

Once a Sydney counsel
Squatted up in Jupiters
Hoping to earn a brief fee
and he sang as he basked
With joy beside the swimming pool
"Queensland must give
Reciprocity."

Up jumped the barrister
Mounted on his hi-igh horse
Flanked by solicitors
One, two, three
And he sang as he told
The court of his appearance
"Queensland must give
Reciprocity."

I am a lawyer
From the Northern Territory
I am a neighbour of yours, you see
You can deal with dingoes,
Crocodiles and Mick Dundees,
So why not for me
Reciprocity?

Up there in Darwin
We have a firm of M.F.&.C.
With Queensland connections
Don't you see?
Well, the locals complain
That they'll lose their work and hence their fee.
If it's O.K. for thee,
Why not also for me?

I come from Canb'ra
Home of the Hi-igh Court
I understand
The bureaucracy.
I know how to get
P'licemen to co-operate.
Please grant to me
Reciprocity.

Down in Victoria
We shout with euphoria
At the very thought of
Reciprocitee.
So please, please, you Queenslanders,
Get rid of your gerrymanders
So we can steal your clients
With impunitee.

I come from Tassie
Home of trout, apples and cheese.
We never overcharge
Or load counsel's fees.
We love your state,
Your weather, your city.
Please, please, please
Reciprocity.

Down went the counsel
To the court in Canberra
To plead that Australia
Is one big countree.
And the High Court then spoke
With ra-are unanimity
"Queensland must give
Reciprocity."

CHORUS
Welcome to Queensland
Welcome to Queensland
Tourists up here
Spend their money with glee
But try for yourself
To earn an honest dollar
And we'll send you packing
Without any fee.

FINAL CHORUS
Welcome to Queensland
Welcome to Queensland
We're waiting for counsel
From far off Sydney.
'Cos we'll find a way
No matter what your judges say
You'll never have
Reciprocity.

(Cartoon and verse published with the kind permission of the Queensland Law Society Journal).