public authority and the Crown and turned to an examination of the relevant provisions with the object of ascertaining whether the Crown had such an interest in the recovery of possession in question that the lack of protection of 'the shield of the Crown' in favour of the Commissioner would involve interference with the immunity of the Crown itself. For this determination attention is turned to the provisions of the statute or statutes under which the public authority acts, relating to the subject matter at hand, e.g. to the financial provisions when the claim is one of priority for debts (*Re Oriental Holdings Ltd.*[18]); to the property provisions when the question involves payments of rates (*The Grain Elevators Board case*[19]) or recovery of possession of prescribed premises (*Victorian Railways Commissioners v. Herbert*[20]). In the *Bank voor Handel* case[21], the House of Lords took the view without dissent that the Custodian of Enemy Property was a servant of the Crown, but this was not considered sufficient to grant him immunity from the taxation of money which he held. A further issue was involved, namely whether the money was held beneficially for the Crown so that to tax it would interfere with the Crown's immunity.

It is submitted that restrictions on the claim for Crown privileges and immunities by public authorities is of such practical importance in these days when public and private enterprise are working in the same fields, that the decision of the majority of the High Court in *Wynyard Investments Pty. Ltd. v. Commissioner for Railways* is an untimely obstacle in the way of both the development of recent Australian trends and of the acceptance of the high persuasive authority of the House of Lords in the *Bank voor Handel* case. It is further submitted that the minority view in this case is more acceptable than that of the majority being in line both with theoretical approach and practical requirements.

GRETCHEN M. BARTLAU

[18] [1931] V.L.R. 279.
[19] (1946) 73 C.L.R. 70.
[20] [1949] V.L.R. 211.
[21] [1954] A.C. 584.

EVIDENCE – PRIOR INCONSISTENT STATEMENTS – IMPEACHMENT OF WITNESS BY HIS PROPONENT

Reg. v. Hunter[1]

The applicant was convicted of larceny at the Court of General Sessions. At the trial the accused's brother was called by the Crown and gave evidence to the effect that certain articles could not have been stolen property as the Crown alleged. This testimony, if true, was material evidence in support of the defence but it was in conflict with a statement which the witness had made to the police prior to the trial. The Crown Prosecutor sought and, after the

[1] [1956] V.L.R. 31. Supreme Court of Victoria; Martin, O'Bryan and Dean JJ.

examination of the witness on the *voire dire* as to the making of the prior statement, obtained leave to and did cross-examine the witness generally, the trial judge being of the opinion that he was adverse. The applicant sought leave to appeal against conviction on the ground that the trial judge was wrong in allowing cross-examination of the Crown witness. Leave to appeal was refused, the Court being satisfied that there is neither rule of law nor any established practice which prohibits a trial judge from considering a prior inconsistent statement as part of the material to establish the fact that a witness is adverse. Further, once a witness has been adjudged adverse, he may be cross-examined not only to prove that he has made a prior inconsistent statement, but also generally, with a view to showing that his evidence is biased and untrustworthy.

The decision involves a repudiation of the reasoning in the recent decision of *Bassett v. Ferguson*[2] in which Sholl J. decided: (a) that the only material available to a judge in determining whether or not a witness is adverse is that witness's demeanour and the subject matter of the evidence he gives in the box, and (b) that, assuming the witness to have been held adverse, his proponent may cross-examine him only within the limits of s. 32 of the Evidence Act 1928, that is to say, to prove that the witness has made at other times a statement inconsistent with his present testimony.

In deciding that a trial judge may consider evidence of prior inconsistent statements in determining adverseness of witnesses, the Court was guided principally by the early New South Wales case of *Russell v. Dalton*[3] and by two English cases[4] in which the practice has been followed. In *Russell v. Dalton*[5] Windeyer J. said: 'If the judge could only determine whether a witness was hostile by his demeanour it seems to me that the object of the statute[6] would be defeated by a witness of cool demeanour, such as would deceive the presiding judge. The best evidence of a witness being hostile is that he deceives the attorney of the side that calls him as to the evidence which he is about to give.'[7] Although the Full Court in the present case did not attempt to define exhaustively all the matters of which the trial judge may take cognizance in determining adverseness of witnesses, it did by implication recognize that there are some limitations and that if they are exceeded the trial judge's discretion in deciding that a witness is adverse may be the subject

[2] [1952] V.L.R. 481.
[3] (1883) 4 L.R. (N.S.W.) 261.
[4] *R. v. Harris* (1927) Cr. App. R. 144, and *R. v. James* (1953), unreported, noted in (1954) *Criminal Law Review* 55.
[5] (1883) 4 L.R. (N.S.W.) 261, 266.
[6] *Scil. Common Law Procedure Act*, 1857 (N.S.W.) s. 11.
[7] It was decided in *Greenough v. Eccles* (1859) 5 C.B. (N.S.) 786 that 'hostile', as used by Windeyer J. in this passage is synonymous with 'adverse' as used in s. 32 of the Evidence Act 1928 (Vic.)—see n. 8.

of an appeal, although his discretion will only be interfered with in very exceptional circumstances.

With respect, it is submitted that in this regard the decision is eminently sensible. A judge who is asked to make a ruling based on his discretion should not be unduly limited in the matters he should take into consideration in reaching his conclusion. Provided that it is not sought in the future to extend this decision so as to permit a judge to consider a fantastically wide range of matters, it must undoubtedly have the effect of giving a court a better opportunity of arriving at the truth.

In the second limb of their decision, the Court decided that s. 32 of the Evidence Act[8] is not a code covering every case in which a witness proves adverse and replacing the law which existed prior to the passing of that section. Although the section does not speak of cross-examination, it does permit counsel to prove, by leave of the Court, that a witness he has called has made a prior inconsistent statement. Sholl J. in *Bassett v. Ferguson*[9] treated this as allowing examination by means of leading questions *only* for the purpose of proving such prior inconsistent statement, and therefore if a witness had made no such statement he could not be impeached. The Court in the instant case came to its conclusion after examining the state of the common law before the passing, in 1854, of the statute[10] from which s. 32 was derived.[11] Before 1854, a party could not discredit his own witness by adducing general evidence of his bad character or of bias, interest or corruption, but might nevertheless contradict him by adducing other evidence relevant to the issue.[12] The witness might also be 'cross-examined'[13] by leave if considered adverse by the judge. Whether or not the witness could in addition be discredited by his proponent's producing independent testimony of a prior inconsistent statement was problematical. It was this last position which the statute was designed to meet; it did not do away with the power of a trial judge to give leave to a party to

[8] S. 32: 'A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but may contradict him by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of such court prove that he has made at other times a statement inconsistent with his present testimony . . .'

[9] [1952] V.L.R. 481, 483.

[10] 17 & 18 Vic. c. 25. Common Law Procedure Act, 1854 (Eng.).

[11] For a useful summary of the common law and a survey of the relevant cases prior to *Bassett v. Ferguson* see Snelling, 'Impeaching One's Own Witness' (1954) 28 *Australian Law Journal* 70, where the reasoning in *R. v. Hunter* was to a large extent anticipated. See also *Phipson on Evidence* (10th ed., 1952).

[12] Nokes, *An Introduction to Evidence* (2nd ed., 1956) 134; and see also *Greenhough v. Eccles* (1859) 5 C.B. (N.S.) 786, 804.

[13] In strictness, one does not *cross*-examine one's own witness. However, for convenience and brevity the expression is used here to denote 'interrogation of one's own witness by means of searching questions put in a leading form'.

cross-examine a witness he had called who, in the opinion of the judge, had proved adverse.[14]

The Court also appeared to consider that such cross-examination is not limited to matters material to the issue, but may go to credit.[15]

There are two ways in which the testimony of a witness may be discredited apart from calling relevant evidence to contradict that testimony. It may be impeached by cross-examination of the witness himself, or by calling evidence suggesting that the witness should not be believed on his oath. Since *R. v. Hunter* has clarified the law with respect to 'cross-examination' of one's own witness, it may be asked whether there is any logical reason for continuing, by s. 32 of the Evidence Act, to prohibit the latter method of impeachment.[16] Wigmore[17] suggests that there is no acceptable explanation for preserving the rule, 'the remnant of a primitive notion'.[18] If the correct reason for its retention be, as Wigmore concludes, that a party calling a witness ought not to have the means to coerce his witness,[19] it is difficult to see why evidence adduced as to bias, interest or corruption has any real effect. 'Neither bias nor interest', writes Wigmore, 'are disgraces, the fear of which could be used to disgrace a witness, and as for corruption . . . it ought never to be left unmasked.' Wigmore submits that the admission of such evidence could really only concern a dishonest witness and that there is no real reason why such witness should not be exposed. If he is not exposed by the party calling him it is very likely that the

[14] 'The words [of the Criminal Procedure Act 1865 s. 3 (28 & 29 Vic. c. 18) re-enacting Common Law Procedure Act 1854 permitting contradiction of one's own witness by other evidence if he is adjudged adverse] suggest that this cannot be done unless the judge is of that opinion. This is not, and never was, the law.' Stephen, *Digest of the Law of Evidence* (5th ed., 1899) 211.

[15] Their Honours could find no authority for the proposition stated in Roscoe, *Civil Evidence* (20th ed., i. 170, that a right of cross-examination obtained by virtue of a witness having shown inconsistency should be limited to matters germane to the issue. However, this was purely *obiter* and the matter was not very thoroughly investigated.

[16] Morgan, *Basic Problems of Evidence*, March 1954 (Series of lectures published by the American Law Institute) i. 63-5, poses the problem and presents a concise summary of the American law on the subject.

[17] *Wigmore on Evidence*, (3rd ed., 1940) ss. 899-901.

[18] The Model Code of Evidence, as accepted and promulgated by the American Law Institute in 1942 eliminates (by r. 106) the rule against impeaching one's own witness, including the proponent of the witness, through examination as to any conduct and any other matter relevant to the issue of his credibility as a witness.

[19] It is submitted that the reason for the rule given in *Phipson on Evidence* (10th ed., 1952) 493, viz. that a party producing a witness guarantees his credibility, is not now tenable in face of the arguments submitted in such American textbooks as *Wigmore on Evidence* (3rd ed., 1940) s. 899, and *McCormick on Evidence* (1st ed., 1955) s. 38. See also (1950) 11 *Ohio State Law Journal* 364, 368; (1939) 4 *University of Chicago Law Review* 69. For a collection of other periodical literature on the subject, see McCormick, *op. cit.* s. 38, n. 1.

opposing side will do so and it therefore becomes merely a question as to which of the two parties may expose him. There is no reason of moral fairness which forbids the party calling him to do this.

R. v. Hunter has elucidated a hitherto confused part of the law of evidence which has not been assisted by a clumsily drafted section in the Evidence Act. If it further stimulates thought along the lines above set out to remove artificialities based on historical circumstances, its value will be handsomely increased.

CLIVE TADGELL

REAL PROPERTY – TRANSFER OF LAND ACT 1954 – EQUITABLE MORTGAGE – BY DEPOSIT OF CERTIFICATE OF TITLE – MORTGAGOR IN DEFAULT – REMEDY OF MORTGAGEE

Ryan v. O'Sullivan[1]

The plaintiff sought a declaration that certain land, the certificate of title for which the defendant, the registered proprietor, had deposited with him as security for moneys lent, was subject to an equitable mortgage in his favour, and that the land was charged with the sum lent by him to the defendant; he also claimed an order that the mortgage be enforced in default of payment by foreclosure. The defendant entered an appearance but made default in delivering a defence. Upon motion for judgment in default of defence, the declaration sought and an order for foreclosure were granted.

Dean J. assumed that an equitable mortgage had arisen in favour of the plaintiff from the deposit of the certificate of title.[2] His judgment proceeded in two stages. First, he considered whether the appropriate form of relief for an equitable mortgagee of land under the general law was an order for foreclosure or an order for sale. His Honour decided that since the decision of James L.J. in *James v. James*,[3] following the earlier but inadequately reported case of *Pryce v. Bury*,[4] it was settled that the proper order in such a case was for foreclosure. Dean J. then had to decide whether the general law principles applied to land under the Transfer of Land Act 1954. Under s. 79 of the Transfer of Land Act, foreclosure of a registered

[1] [1956] V.L.R. 99. Supreme Court of Victoria; Dean J.

[2] In *Bank of New South Wales v. O'Connor* (1889) 14 A.C. 273, 282, Lord Macnaghten said that the general rule was that a deposit of documents of title without either writing or any word of mouth would create in equity a charge *(sic)* upon the property to which the documents relate to the extent of the interest of the person who makes the deposit. In *London Chartered Bank of Australia v. Hayes* (1871) 2 V.R. (Eq.) 104, 108, and *Patching v. Maunsell* (1881) 7 V.L.R. (Eq.) 6, 10, the deposit of certificates of title was held to be of similar effect.

[3] (1873) L.R. 16 Eq. 153.

[4] (1854) 2 Drew 41.