

C. A.

1889

July 29, 30.

PRICE *v.* MANNING.

[1887 P. 2040.]

Practice—Witness—Right to cross-examine—Adverse Litigant.

A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge. Whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by the party calling him.

Dictum of Best, C.J., in Clarke v. Saffery (1) disapproved.

IN this action the counsel for the Plaintiff during the hearing before Mr. Justice *Kay* called the Defendant as a witness to prove a point in his case. The Defendant was then cross-examined by his own counsel. In his re-examination, the Plaintiff's counsel put questions to him in the nature of cross-examination, treating him as a hostile witness. Mr. Justice *Kay* refused to allow this to be done.

On the appeal by the Plaintiff,

P. F. Stokes, for the Appellant, contended that the Judge was wrong in disallowing the questions, as the Defendant was of necessity a hostile witness, and in that case the Plaintiff had a right to cross-examine him. He relied on *Clarke v. Saffery* (1); *Taylor on Evidence* (2); *Roscoe on Evidence* (3).

Marten, Q.C., and *V. R. Smith*, for the Defendant.

Their Lordships dismissed the appeal, which does not require a report. In the course of his judgment,

COTTON, L.J., said—

The Plaintiff contends that having called the Defendant as a witness he was entitled as of right to cross-examine him, and in support of this contention *Clarke v. Saffery* is relied on. But in my opinion that is a matter in the discretion of the Judge. He

(1) Ry. & Mood. 126.

(2) 7th Ed. p. 1178.

(3) 15th Ed. p. 156.

sees the witness and can determine from his manner whether he is so hostile that the Plaintiff should be allowed to cross-examine him. In *Clarke v. Saffery* (1) Chief Justice *Best* is reported to have said that "if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as a matter of right, cross-examine him." But in *Bastin v. Carew* (2), reported in the next page, Chief Justice *Abbott* said that in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted. In my opinion whether the Plaintiff should be allowed to cross-examine this witness was a matter in the discretion of the Judge, and the Judge has exercised his discretion, and we ought not to interfere with the exercise of that discretion.

C. A.
1889
PRICE
v.
MANNING.

FRY, L.J.:—

I am entirely of the same opinion. It has been urged before us that although the Plaintiff called the Defendant he had the right to cross-examine him. Mr. Justice *Kay* refused to accede to this view, and in my opinion he did right. The Plaintiff had no right to cross-examine the witness he had called, he could only do so with the sanction of the presiding Judge. It is quite true that in *Clarke v. Saffery* Chief Justice *Best* appears to have laid down that a plaintiff calling a defendant is entitled as of right to cross-examine him. In that case the Vice-Chancellor had directed an issue to try whether a commission in bankruptcy in which the defendant was petitioning creditor had been concocted between the defendant and the bankrupt, and gave the plaintiff leave to examine on the trial both the defendant and the bankrupt. In the course of the trial the plaintiff's counsel called the defendant, and an objection was taken by the defendant's counsel to the mode of examining the defendant. Chief Justice *Best* said "there is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shews himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination." Then follows the passage to which the Lord

(1) Ry. & Mood. 126.

(2) Ry. & Mood. 127.

C. A. Justice *Cotton* has referred. I doubt whether the judgment is quite accurately reported as making Chief Justice *Best* lay down the rule contained in the last paragraph of his judgment. If it is accurate I differ from it, as not being in accordance with the practice of the Courts. So far as my experience goes such a right does not exist, but it is in the discretion of the presiding Judge whether the cross-examination should be allowed.

1889
PRICE
v.
MANNING.
—

LOPES, L.J.:—

Whether the witness called by one party is a litigant or non-litigant it is a matter of discretion in the presiding Judge whether the witness has shewn himself so hostile as to justify his cross-examination by the party calling him. This rule applies in a case where an opponent is called as a witness. What was said by Chief Justice *Best* in *Clarke v. Saffery* (1) is not in accordance with the practice of which I have had thirty-six years' experience. What was said by Chief Justice *Abbott* in *Bastin v. Carew* (2) is in accordance with the general practice. I have mentioned the point to the Master of the Rolls and to the Lords Justices *Lindley* and *Bowen*, and their view of the practice is the same as mine.

Solicitors: *A. G. Ditton: Badham & Williams.*

(1) Ry. & Mood. 126.

(2) Ry. & Mood. 127.

M. W.