

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.,) was delivered by

MEREDITH, C.J.:—The appellant had filed an affidavit as to documents sufficient to satisfy the order on production. Some months afterwards he was examined for discovery, and was interrogated as to his having executed a certain document, referred to as exhibit 6, upon which the plaintiffs rely for the purpose of establishing their case. So far from there being any admission by the appellant that he had ever had in his possession or then had such a document, according to his recollection as then stated he never signed any such document. In these circumstances it appears to us that no case was made for requiring the appellant to make a further and better affidavit on production.

The affidavit, as I have said, was a sufficient compliance with the order, and, unless it was shewn, either from documents which were produced by the appellant which referred to other documents which were not produced, or from his admissions, that he had other documents, a further and better affidavit on production ought not, according to the practice, to have been required to be made. Contentious matter cannot be used for the purpose of obtaining an affidavit of that kind, nor can a party be cross-examined upon his affidavit on production; and, as was determined by Mr. Justice Moss, in one of the cases referred to (*Dryden v. Smith*, 17 P. R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly,—cross-examine upon an affidavit on production.

As to the other part of the order, that requiring the appellant to attend for further examination, we do not see how it can be supported. The respondents deliberately closed their examination, and no case was made, either upon the notice of motion or upon the material before the learned Judge, for directing further attendance,—if it be within the power of the Court to compel a party who has once attended for examination and made sufficient answer to such questions as were put to him, to attend again, which was disputed by Mr. McCarthy, and as to which we say nothing.

We think, therefore, that the order of the learned Chancellor must be reversed, with costs here and below to the appellant in any event of the action.