INTRODUCTION

This Introduction is very much designed as an 'optional extra'. The main text of the book should work perfectly well as a practitioner text without regard to it. However, I was desirous to explain at some point how the book came about and to raise a few points which, from my own experience of dealing with the materials, tend to float across one's mind as a matter of curiosity; and which are not unhelpful on occasion in interpreting the cases and casting runes for the future. I also wished (albeit very briefly) to highlight some fundamental changes which seem to be in the course of being made and some areas which I feel may prove lively in the next few years—if, of course, the right cases come along . . .

The genesis of the book

The idea for this book arose out of the numerous occasions when I was instructed either to act as an examiner or as UK counsel in an examination in aid of foreign proceedings, and I sought to find the materials I needed in anticipation of any problems which might arise during the course of the hearing. It occurred to me then that while there is more than one excellent book dealing with the documentary aspects of evidence and a major practitioner work on evidence generally, none of them really grappled in great depth with the issues which can arise. While you could find what you wanted from them given enough time and following of footnotes, they were not easy to use at short notice. After several struggles to find (and re-find) the key materials I was left with an impression that it would be useful to have a short book devoted to the subject. This impression was reinforced when I later came to spend some time defending and challenging letters of request. From both sides of the battlefield it was pretty apparent that many letters of request are drafted with scant attention to the law on the subject—and that much trouble could have been avoided if only that short book existed.

Hence I built up a messy collection of knowhow and authorities and talks, which gradually turned into a first draft of this book. It was during this process that I began to consider whether it might not be said that these forms and remedies, which have deep historical roots and which have informed the limits of the jurisdictions, might not be on the brink of making some quite significant changes. In this context it is interesting to look at exactly how these various jurisdictions emerged, and how they have historically operated.

The origin of the subpoena

The first area for consideration is that of the subpoena, as it was known until the Civil Procedure Rules (CPR). The old notes to the Rules of the Supreme Court hinted at the antiquity of the remedy, but there is little material for tracing it back; there has, for example, apparently never been a book about subpoenas. This surprising fact may be partly explained by the facts, which emerge from a bit of digging, that the writ of subpoena is one of the earliest forms of writ developed by the English court, having its origins in the 12th or 13th centuries and almost certainly in the Court of Chancery. In fact the term '*sub poena*' (under penalty) almost certainly has even earlier roots, deriving from the trial by ordeal procedure, but it first appears recognizably sometime in the 12th to 13th centuries. Plucknett suggests[1] that its origins were in the administrative system under Edward I—the threat of penalty against officials appears in the Close Rolls in 1232. Towards the end of his reign matters had developed so that in proceedings in Chancery the petition would pray that the person we now call the 'defendant' should be brought before the Chancery to be examined and dealt with appropriately, and his presence might be enforced by what was in effect a writ of subpoena—that is, an order that he should appear before the Chancery on pain of forfeiting a sum of money.[2] By the 14th century it was appearing more generally in the courts. In one common law matter in 1302 Justice Berewick ordered an infant to be brought before the court 'under pain of (forefeit) of 100 pounds'.[3]

By 1350, the writ *certis de causis* (a writ to appear before Council 'for certain causes') began having the clause subpoena routinely attached. The resultant writ *quibusdam certis de causis* is at least as old at 1346.[4] While the subpoena approach was attacked in the early 15th century on at least two occasions, the petitions were rejected, and it can be seen from this that even by this stage the procedure was clearly established.[5]

Thus in its earliest format the subpoena was part of the mechanism which ensured the issues between plaintiff and defendant were tried effectively, but it focused on the importance of having the parties present. Third parties were not at that stage

[1] T F T Plucknett, *A Concise History of the Common Law* (5th edn, 1956) 683.

[2] W S Holdsworth, *A History of English Law* (4th edn, 1936) vol 2, 342. The bill was supported by counterbalancing pledges by the plaintiff to cover the defendant's damages if the plaintiff did not prove his case: Holdsworth 343.

[3] YB 30 & 31 Edward I 194–5 (Rolls Series); Holdsworth 336.

[4] Plucknett 683–4 referring to J F Baldwin, *Select Cases before the King's Council, 1243–1582* (Selden Society, 1918) vol 35, xxxviii.

[5] Plucknett 188; Rot Parl iv 84, 156.

routinely within its sights. In general litigation was a matter for the parties only. At common law witnesses were not compellable and no process issued against them.[6]

Quite how the *subpoena duces tecum* and the *subpoena ad testificandum* then took on their recognisable form and attached themselves to third parties who were deemed necessary for the trial of the action is uncertain, but it seems likely that it was shortly after this period. In *Pearson v Iles*[7] it was noted by Lord Mansfield that the courts of Westminster Hall proceeded against witnesses who wilfully absented themselves as for a contempt before the Perjury Act 1562.[8] Further, while in *Amey v Long*[9] it appears to have been common ground that the *subpoena duces tecum* is not referred to prior to the time of Charles II,[10] Lord Ellenborough CJ forcibly expressed the view that it must be of similar antiquity to the *subpoena ad testificandum*:

> 'The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law which receives and acts upon both descriptions of evidence and could not possibly proceed with due effect without them. It is not possible to conceive that such courts should have immemorially continued to act upon both without great end notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favour of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing for so many centuries, must have employed the same as, or similar means to, those which we find them to have in fact used from the time of Charles II at least. . .'

Therefore, from at least the 16th century, the English courts have regarded it as a proper part of the court's business to enforce the attendance of those who were, through their evidence or their documents, necessary for the fair trial of a matter before the courts.

Further, the basis upon which that line was drawn seems not to have been much varied over the years. We can see this starting with the leading modern case of *Rio Tinto Zinc Corporation v Westinghouse Electric Corp*[11] which itself refers back for the principles on discovery to *Burchard v Macfarlane, ex p Tindall*[12] and on particularity of documentary requests to *Lee v Angas.*[13] These themselves trace back through to

[6] Plucknett 435.
[7] (1808) 9 East 473.
[8] 5 Eliz c 9 (1563) which established a process to compel witnesses in civil proceedings and made perjury by them a crime.
[9] [1803]–[1813] All ER Rep 321.
[10] At which point there are instances to be found in Clerk's Manual 31, Thesaurus Brevium 804, and Officina Brevium 385.
[11] [1978] AC 547.
[12] [1891] 2 QB 241. Referred to in *Rio Tinto Zinc Corporation v Westinghouse Electric Corp* by Lord Fraser, 642, Lord Keith, 652.
[13] (1866) Law Rep 2 Eq 59.

Attorney-General v Wilson[14] which itself regards the principles as being long settled. The line, as described in *Lee v Angas*, is clear: 'if production were enforced upon a subpoena in this general form, witnesses having nothing whatever to do with the case might be subjected to a most harassing duty. No person is to be subjected to the performance of duties not incumbent upon him by any legal or moral obligation, nor to penalties for non-compliance'.

This links in to the development of the 'mere witness' rule, which may be described as the logical underpinning of this approach to subpoenas.

That rule[15] was of great antiquity, being discernible in the judgment of Lord Hardwicke in *Plummer v May*,[16] where he said that a person could not be made a defendant to a bill of discovery 'who is merely a witness, in order to have a discovery of what he can say to the matter, . . . But as against a party interested, the plaintiff is entitled to have a discovery from him, if he is charged to be concerned in the fraud'. It derived from the practice in the Court of Chancery of issuing a bill of discovery to which the person addressed would be a defendant (even if he was not the party against whom the petitioner ultimately wished to prove its case). A defendant from whom discovery was sought either by a bill of relief or by a bill of discovery could object to giving the discovery on the ground that he had no 'interest' in the proceedings, but was a 'mere witness' and ought not to be compelled to give his evidence before the hearing.

The justification for the rule, as the House of Lords found in *Norwich Pharmacal*, was 'the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later'.[17]

It can be seen, therefore, that the mere witness rule and the rules which developed from it in relation to subpoenas effectively held a line which said:

- Litigation is essentially a game for the parties.
- A third party can be compelled to give evidence if that evidence is needed to prove the case at the trial.[18]
- But a third party cannot otherwise be compelled to bother himself with other parties' quarrels. In particular, he cannot be made to assist in lines of enquiry or hunt for documents which may or may not prove useful to one or other of the parties.

[14] (1839) 9 Sim 526.
[15] As explained by Lord Cross in *Norwich Pharmacal v Customs and Excise* [1974] AC 133.
[16] (1750) 1 Ves Sen 426.
[17] It is on the basis of this distinction that the judgment in *Norwich Pharmacal* rests—see Chapter 4.
[18] Or, as the *Norwich Pharmacal* rule ultimately established, to enable a trial to take place.

That is effectively the line which the rules on witness summonses and letters of request still hold today, but (as I highlight below) the line is under strain in the light of modern developments.

Evidence for foreign proceedings—the development of the jurisdiction

It appears that from quite an early stage Chancery (and the Court of Exchequer on its equity side) claimed and exercised an inherent power to issue commissions to take evidence abroad and to appoint examiners, both in aid of suits in the exclusive jurisdiction and in aid of actions at law.[19] The commissions issued in equity appear to have been limited to examination upon written interrogatories, in accordance with the general Chancery procedure of not allowing witnesses viva voce except by special order.[20] Thus in *Attorney-General v Laragoity*[21] the report contains notes of a number of similar cases going back to the year 1699 in which such relief had been granted. In addition it was possible for the High Court of Chancery to make an order for discovery or for the examination of witnesses abroad in connection with actions pending before the common law courts at Westminster.[22] Because of the volume of such applications to the Court of Chancery in support of common law proceedings, the Evidence on Commission Act 1831 was introduced, giving the courts of common law a similar power to take evidence on commission. In 1852 a new procedure was introduced by the Judicature Chancery Act: taking evidence by special examiner. This new procedure rapidly gained favour and reports of evidence on commission are very rare thereafter.[23]

Perhaps unsurprisingly, the governments of several countries objected to the examination of their subjects in their own countries by examiners appointed by the English court; on one occasion indeed a special examiner in Germany was seized and thrown into prison by the local authorities (who considered it a contempt of court for any but their own officials to administer an oath in their territory) and was

[19] W E Hume-Williams and A R Macklin, *Taking Evidence on Commission* (2nd edn, 1903) ch 1; J N Pomeroy, *Equity Jurisprudence* (3rd edn, 1907) 213–14.

[20] H Maddock, *Principles and Practice of the High Court of Chancery* (3rd edn, 1837) vol 2, 405–15, 529–34. See also J Fonblanque, *A Treatise of Equity* (5th edn, 1820) vol II, book VI, ch 1, section 2.

[21] (1816) 2 Price 172.

[22] See, e.g., *Thorpe v Macauley* (1820) 5 Madd 218 where an order for the examination of witnesses abroad was made. See also *Macaulay v Shackell* (1827) 1 Bli NS 96, 130, per Lord Eldon LC: 'if a plaintiff brings an action against a defendant, in the Court of King's Bench, and if that defendant wants a discovery, he must, of course, go to a court of equity. If he wants a commission to examine witnesses, he must likewise go to a court of equity, unless the plaintiffs will consent that he shall have such a commission . . .'.

[23] Hume-Williams and Macklin 2–5.

'with some difficulty extricated by the representatives of Great Britain'.[24] The letter of request procedure was introduced to meet this difficulty. The concept was and remains that the English court addresses a request to the foreign court, seeking its assistance by conducting an examination of the witness who is within the jurisdiction of the foreign court. To this end RSC Ord 37, r 6A was introduced in 1884 providing:

> 'If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission.'

The specimen letter of request prescribed by the RSC requested the foreign court to summon the witness, and to cause him 'to be examined upon the interrogatories which accompany this letter of request (or viva voce)'. The court was also asked to identify all books, letters, papers, and documents produced upon the examination.

Meanwhile, in the other direction (focused on obtaining evidence for foreign courts) in 1856 the Foreign Tribunals Evidence Act was enacted, followed thereafter by the Evidence by Commission Acts 1859 and 1885.[25] Here the shape of the jurisdiction to assist foreign courts by means of compelling evidence began to take on a recognisable shape with s 1 of the 1856 Act providing:

> 'Where, upon an application for this purpose it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly . . . it shall be lawful for the said court or judge, by the same order, or for such court or judge or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order.'

Interestingly in terms of drafting history it appears that the phrase 'civil or commercial matter' which now finds its place both in the Hague Convention and Regulation (EC) 1206/2001 (the Taking of Evidence Regulation) is first to be found in the Foreign Tribunals Evidence Act 1856.[26] The origins of the Act

[24] Hume-Williams and Macklin 58–9.

[25] Which dealt with obtaining evidence in support of proceedings elsewhere in the British Dominions.

[26] The Evidence by Commission Acts 1859 and 1885 do not contain the phrase 'civil or commercial matter', presumably because they were designed to operate within Her Majesty's Dominions, with powers of extension to other (also mainly common law) territories over which Britain exercised jurisdiction. The former Act applied to 'any action, suit or proceedings' and the latter, with differing effect, to any 'civil proceeding' and 'any criminal proceeding.'

are unclear; it has no direct treaty base, although it may have been inspired by the Treaty of Paris, with many protocols governing international relations and cooperation, concluded earlier in 1856.[27]

One final point of historical interest is the involvement of the Treasury Solicitors in some letters of request. It appears that prior to 1907 the practice in England and Wales, on receipt of a letter of request, was that an application had to be made to the English court by a person duly authorized on behalf of the foreign court or tribunal. This gave rise to dissatisfaction on the part of the French authorities because if an English court wanted evidence from a witness resident in France, it issued a letter of request, which was forwarded through the Foreign Office to the French government. Thereafter the French government and French courts took all necessary action to obtain the evidence and return it, through diplomatic channels, to the English court. Thus in France there was no requirement for an application to the French courts by a person authorized by the English court. The French therefore took issue with what they saw as a lack of reciprocity, specifically in 1906 when the French Ambassador in London wrote to the Foreign Office with a letter of request from a French court, and expressed the hope that it could be executed in the same way that the French courts had executed recent English letters of request. This letter prompted the Foreign Office to ask the Lord Chancellor's Department to devise some means by which complete reciprocity could be secured, not only between England and France, but also other countries with whom the same difficulty arose. The result was the addition of a new rule to the then RSC, i.e. RSC Ord 37, r 60, which provided that in such circumstances the Senior Master should transmit the request to the Treasury Solicitor who would take the necessary steps to give effect to it.[28] As will be seen in Chapter 6 below, this involvement of the Treasury Solicitors has taken deep root.

The future

Turning from the historical perspective to something more forward-looking, one of the major points which has struck me in the course of writing this book is that there may be an emerging seismic shift in the way that the role of the witness is perceived. As I have indicated above, historically witness summonses and letters of request stem from a common source—and indeed from an underlying view about the role of the witness in the justice process. Thus the tightly demarcated rules which have

[27] *Re State of Norway's Application (No. 1)* [1987] QB 433, 474–5, per Kerr LJ. It appears likely that the phrase has roots in the French jurisprudence which maintains a duality between civil and commercial matters: ibid 473.

[28] *Treasury Solicitor's Guide to Letters of Request*, para 1.4–1.5 <http://www.tsol.gov.uk/Publications/Scheme_Publications/letter_of_request.pdf>.

developed to govern witness summonses and letters of request[29] can be seen to reflect an underlying view of the English courts that witnesses should not be drawn into other peoples' litigation unless they are necessary for the trial.

However, in reviewing the jurisdictions and the newer developments, it becomes apparent that there are a number of fault lines appearing which threaten the view which justifies the rules. The 'mere witness' rule itself, once an absolute rule, has suffered two substantial body blows in recent years. The first is the development of CPR r 31.17 which effectively demolishes the 'mere witness' principle, however tightly the safeguards may be drawn in its operation.[30] The second is the development of *Norwich Pharmacal* relief from its limits as more of a corollary than an exception to the 'mere witness' rule into a much broader and more flexible jurisdiction which seems (in particular as regards the broadening resulting from the divorce from the requirement for the information to be required for a trial, and the greater range of information which can be sought) hardly to be rooted in the 'mere witness' rule at all.

Parallel with these blows comes the development of an essentially administrative European jurisdiction which is not hedged about with the checks and balances of the old letter of request jurisdiction, and which seems to offer ample scope for European litigants at least to gain much more ample evidence from English witnesses prior to trial than would be the case if they litigated in England: pre-action depositions and disclosure may be available, disclosure from a witness will almost certainly be so and none of this is likely to be hedged about with the safeguards or policed by the challenges which have hitherto protected witnesses from involvement in proceedings short of trial.[31]

At the same time there seems also to be the beginnings of a similar shift in the English courts' views, at least to a certain extent: for example, the domestic authorities have weakened their line on correcting documentary requests when more than a 'blue pencil' is required,[32] and in some cases in the context of establishing the existence or otherwise of documents.[33]

All of this tends to suggest that the drift of the law is moving away from the rigour of the traditional approach as reflected in the well-established rules for witness summonses and letters of request, towards a view that a witness may be required and compelled to assist in the litigation of others whenever it is necessary or even convenient for the interests of justice that he should do so, and well short of the final trial of the action. It may well be, therefore, that there will in the near future be

[29] See Chapters 1–3.
[30] As to this and *Norwich Pharmacal*, see Chapter 4.
[31] See Chapter 6.
[32] See paragraphs 3.22–3.23.
[33] See paragraphs 3.29–3.31.

challenges to those rules which may change their long-established shape in some respects. It certainly seems illogical (for example) that disclosure from a witness can be compelled almost without limit in support of European litigation, and to some extent in support of English litigation, but those seeking documents in support of litigation elsewhere, or even in support of arbitrations in England must comply with the full rigour of the subpoena rules.

On a less grand scale this expansionist view of the witness's role, and the court's role in assisting litigation bids fair to bring some interesting movement in compelling evidence in aid of foreign arbitration proceedings, and in further expansion both of *Norwich Pharmacal* and possibly CPR Part 71 in the next few years.

All in all, I suspect there may be interesting times ahead.

Thanks

Finally, I would like to thank a number of people who have been instrumental in getting this book off the ground. First and greatest of these is, of course, my husband, Nigel Eaton, who blithely assured me that writing this book would take me no time at all. Without this material misrepresentation (upon which I trustingly relied) there would certainly be no book; and without his encouragement throughout I am sure I would never have got through to the end. Secondly, I must thank the team at OUP: Jessica Huntley and Vicki Pittman, who have been wonderfully encouraging (and patient with my ignorance) and Joanna Dymond, who took my call in the first place! I would also like to thank Senior Master Whitaker for taking time out of his busy schedule to talk to me about the practicalities from his perspective, and allowing me to use his proforma order as an appendix, and to Alvin Aubeeluck in Foreign Process Section for helping me out with a number of queries. Thanks also to Mr Justice Andrew Smith for making me think so hard about the authorities in the course of *Smith v Philip Morris* and for agreeing to write the Foreword to this book, and to Paul Stanley QC and David Scorey, who each put me on to some very interesting material. And, of course, thanks to Tia, whose assistance in typing was invaluable (even if I did delete all those q s and x s she added as she walked across the keyboard) . . .

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