CHALLENGING *SUBPOENAS DUCES TECUM:* IS THERE A THIRD PARTY VIEW?

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1. The Theory of *Subpoenas Duces Tecum* and the Third Party Position

Introduction

To those without the disposition and experience of Baron Brampton it is somewhat surprising to think that as recently as June, 1981 Mr. Justice Cantor was in a position to say:

> I have not been referred to any judgment in which an attempt has been made to lay down or to postulate the principles upon which and those circumstances in which the Court would set aside a subpoena upon the application of a witness who is a stranger to the litigation on the ground that it is an abuse of the process of the power to compel him to produce his documents.[1]

Not only is there no judgment dealing comprehensively with those principles, and indeed very few judgments of appellate courts in the area at all, but the commentators also have appeared to regard this ground as too sterile for their attention.[2] The position of third parties is, however, so often seen to be of principal importance, and in a number of cases of transcendent importance, to the litigation that it merits some analysis.

A review of the authorities suggests two general conclusions. First, it is clear that the judicial formulation and expression of the rights of third party witnesses has changed little over the last 150 years. The courts have always been anxious to be seen to be protecting the legitimate private rights of third party witnesses from the subpoena process. Secondly, it is equally clear that those rights have little relevance to the subpoena cases which now arise. The contemporary concern of the courts is to police abuse of the subpoena process by the litigating party, in the interest of the process itself. The rights of third party witnesses are subordinated to the public interest of the preservation of the integrity of the court's process, and are affected only as an indirect and secondary consequence.

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[1] *R.* v. *Barton* [1981] 2 N.S.W.L.R. 414 at 419.

[2] Notwithstanding comments such as those of Moffitt, P. in *National Employers Mutual General Insurance Associated Limited* v. *Waind* [1978] 1 N.S.W.L.R. 372 at 379 that it is a "field of law which lacks precise authority", the only extracurial writing appears to be in Chapter 1 of Glass, *Seminars on Evidence* — a chapter written by Moffitt, P.

The History and the Principles

For an understanding of the present law on *subpoenas duces tecum*, and on the position of third party witnesses in particular, it is necessary to take a step back in time and to consider the operation of the writ. The history of the writ has been traced by courts as far back as the reign of Charles II[3] and by Wigmore to 1375 and the reign of Edward III.[4] For it was early recognised that it was "utterly impossible to carry on the administration of justice without such power":[5]

> 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.[6]

From the days of its first use the writ has issued *ex debito justitiae*.[7] Indeed, it has recently been commented that it now issues like confetti.[8] Of further importance is the fact that a *subpoena duces tecum* is a peremptory order demanding immediate obedience.[9] As Sir Frederick Jordan put it in an oft quoted passage:

> If duly served with such a writ and provided with the proper conduct money the person served must obey it and bring to the Court the documents mentioned in the subpoena if he has them, unless he procures the writ to be set aside as oppressive; and he must produce to the Court the documents brought unless he satisfies the Court that some good reason exists why they should not be produced: this he is always at liberty to do if he can.[10]

Accordingly, in the absence of a direct attack on the subpoena the witness must obey the command unless he has a reasonable excuse, the legality of which the court and not the witness must judge.[11]

Failure to comply with the order attracts not only the contempt

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[3] *Penn-Texas Corp.* v. *Murat Anstalt No. 2* [1964] 2 Q.B. 647 at 662; *Summers* v. *Moseley* (1834) 2 C. & M. 477; *Amey* v. *Long* (1808) 9 East 473. The first reported case is said to be *The King* v. *Dixon* (1765) 3 Burr. 1687.

[4] *Wigmore on Evidence* (3rd ed. 1940) at s. 2190.

[5] *Summers* v. *Moseley* (1834) 2 C. & M. 477 at 489 *per* Bayley, B. And see *Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals* 1960 4.

[6] *Amey* v. *Long supra* n. 3 at 484 *per* Lord Ellenborough, C.J.

[7] *Holden* v. *Holden* (1857) 7 DeG.M.& G. 396; *Reg.* v. *Vickery* 12 Q.B.D. 478; *Hill* v. *Dolt* (1857) 7 DeG.M.& G. 397; *Raymond* v. *Tapson* (1882) 22 Ch.D. 430; and see *Commissioner for Railways* v. *Small* (1938) 38 S.R.N.S.W. 564; *Soul* v. *I.R.C.* [1963] 1 W.L.R. 112.

[8] *Bank of New South Wales* v. *Withers* (1981) 34 A.L.R. 21 at 41 *per* Sheppard, J. and see Part 37 Rule 6 of the Supreme Court Rules.

[9] "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase".: *U.S.* v. *Bryan* 339 U.S. 323 at 331 (1950) *per* Vinson, C.J.; and see *Reg.* v. *Greenaway* (1845) 7 Q.B.D. 126, *Lane* v. *Registrar of the Supreme Court of New South Wales* (1981) 34 A.L.R. 222; *Rochfort* v. *Trade Practices Commission* (1982) 43 A.L.R. 659.

[10] *Commissioner for Railways* v. *Small supra* n. 7 at 573-574.

[11] *Amey* v. *Long supra* n. 3; *Reg.* v. *Russell* (1840) 3 Jur. 604; *Pearson* v. *Fletcher* 5 Esp. 90; *Ex Parte Reynolds; In Re Reynolds* 20 Ch. D. 294. The same rule applies in the Federal Courts of the United States: *Dancel* v. *Goodyear S.M. Co.* 128 Fed. 753 (1904); *Fairfield* v. *United States* 146 Fed. 508 (1906).

jurisdiction of the court,[12] and in this regard the courts have not been reluctant on occasion to incarcerate delinquent witnesses;[13] but also exposes the witness to possible independent proceedings by the party issuing the subpoena in respect of both the subject matter of the main proceedings, or its equivalent,[14] and for lost costs.[15] Perhaps more importantly from the viewpoint of the party at whose request the subpoena was issued, disobedience will operate as a prohibition upon the introduction of secondary evidence of the documents the subject of the subpoena:[16] for it is only in cases of a legitimate refusal or neglect to produce that secondary evidence becomes admissible.[17]

Partly for the reason that the writ issued as of right, and partly for the reason that it operated as a peremptory demand carrying serious sanctions, the courts have guarded jealously against abuse;[18] and as noted by Sir Frederick Jordan, a witness is always at liberty to apply to the court to have the subpoena set aside.[19] The application is made by motion under Part 37 Rule 8[20] and the witness will be protected as to costs if successful.[21] The grounds for such applications and the principles governing them form the primary focus of this paper. They fall conveniently within three categories.

The first is characterised by the use of the subpoena process by a party for an extraneous purpose. This is dealt with in Part Four. Secondly, a witness is entitled to challenge a subpoena on the basis of oppression, and this is dealt with in Part Three. Thirdly, a body of doctrine has developed relating to what is and what is not relevant possession by a witness of documents. This is dealt with in Part Two.

To ensure comprehensive treatment of the rights of third parties[22] in relation to *subpoenas duces tecum*, Part Five will be devoted to a short

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[12] See s. 13 Evidence Act, 1898 (N.S.W.) and *Price* v. *Hutchinson* (1870) L.R. 9 Eq. 534; *In Re Barnes* [1968] 1 N.S.W.R. 697; *Ullathorne, Hartridge & Co. Ltd.* v. *Green* (1901) 27 V.L.R. 22. For a similar position in the United States Federal Courts see: Federal Rules of Civil Procedure Rule 45 (f) and *Blackmer* v. *U.S.* 284 U.S. 421 (1935); *U.S.* v. *Ryan* 402 U.S. 530 (1971); *Alexander* v. *U.S.* 201 U.S. 117 (1906).

[13] *James* v. *Cowan; In Re Botten* (1929) 42 C.L.R. 305; *Doe d. Butt* v. *Kelly* (1835) 4 Dowl. 273.

[14] *Rowell* v. *Pratt* [1938] A.C. 101; *Crewe* v. *Field* (1896) 12 T.L.R. 405.

[15] *Couling* v. *Coxe* (1848) 6 Hare. 703; *Masterman* v. *Judson* 8 Bing. 224; *Mullett* v. *Hunt* 1 C. & M. 752; *Davis* v. *Lovell* 4 M. & W. 678.

[16] *Lloyd* v. *Mostyn* (1842) 10 M. & W. 478; *Ashburton* v. *Pape* [1913] 2 Ch. 469; *Reg.* v. *Hankins* (1849) 2 C. & K. 823; *Hibberd* v. *Knight* (1848) 2 Exch. 11; *Newton* v. *Chaplin* (1850) 10 C.B. 356; *Doe d. Loscombe* v. *Clifford* 2 C. & K. 448; *Doe d. Bowdler* v. *Owen* (1837) 8 C. & P. 110.

[17] *Doe d. Gilbert* v. *Ross* (1840) 7 M. & W. 102; *Ditcher* v. *Kenrick* (1824) 1 C. & P. 161; Phelps v. *Prew* (1854) 3 B. & E. 430; *Reg* v. *Llanfaethly* 2 E. & B. 940; *Marston* v. *Downes* 1 Ad. & E. 31; *Bate* v. *Kinsey* 1 C.M. & R. 33; *Penn-Texas Corp.* v. *Murat Anstalt No. 2 supra* n. 3.

[18] "The Court has a right to protect Her Majesty's subjects from the practice and process of the Court being simply used to torture them and not for the purpose of justice." *In Re Mundell; Fenton* v. *Cumberlege* (1883) 52 L.J.Ch.N.S. 756 at 758 *per* Pearson, J.

[19] *In Re Smith; Williams* v. *Frere* [1891] Ch. 323; *Macbryan* v. *Brooke* [1946] 2 All.E.R. 688; *Commissioner for Railways* v. *Small supra* n. 7; *Lane* v. *Registrar of the Supreme Court of New South Wales supra* n. 9. In the United States Federal Courts a witness may apply under Rule 45(b) for an order quashing or modifying a subpoena where it is oppressive or unreasonable or for an order for advancement of costs of complying.

[20] See *A Debtor (No. 3 of 1909); Ex Parte Goldstein* [1918] 1 K.B. 558; *Rex.* v. *Investors' Review Limited; Ex Parte Wheeler* [1928] 2 K.B. 644.

[21] *Steele* v. *Savoury* [1981] W.N. 195; *cf. Dewley* v. *Dewley* [1971] 1 N.S.W.L.R. 264.

[22] Independent immunities based upon substantive rights such as trade secrets and confidential information shall not be separately discussed, primarily for the reasons given in relation to privilege.

description of the statutory formalities governing the issue and operation of subpoenas. For the same reason Part Six will touch briefly upon the immunity of a witness to a *subpoena duces tecum* based upon privilege. Privilege enjoys no unique place in the law relating to *subpoenas duces tecum*: it is an immunity operating in the same manner and applying in the same way to all forms of evidence. It also properly forms the subject of an independent area of learning. The substantive principles may be found in the standard works on evidence. Moreover, the essence of a privilege objection is not a challenge to the subpoena *per se*, but is focussed rather on the subpoenaed documents themselves. Accordingly, privilege strictly falls outside the primary analysis of the paper.

The Expressed Policy

Before passing to the discussion of the substantive law it is instructive, and on one view imperative, to consider the policy considerations of the law. Whilst the present rules on subpoenas may have had their genesis in those policy considerations, it is not at all clear that the cases now being decided have any relationship to those policy factors.

As the Court of Appeal explained in *National Employers Mutual General Insurance Association Limited* v. *Waind*[23] there are three distinct stages involved in the subpoena process, and the respective interests of the litigating parties and the third party witness differ at each stage. First, there is the command of the subpoena to the witness to bring the documents to court. The witness may at this time object to the subpoena itself; which is the essential concern here and which is said to involve competing interests of the witness and the party issuing the subpoena. It does not, as a matter of theory, involve the interests of the other litigating party.[24] It is also at this stage that the witness makes any claim to privilege. That again is a matter between the witness and the party issuing the subpoena. That the opposing party is afforded no interest in this debate as well can be seen from the rule preventing that party from appealing a decision overruling a privilege claim of a witness:

> But it by no means follows that, because the Court will review the decision at Nisi Prius when the judge has refused to compel the witness to produce his documents, his decision must be reviewed when he has compelled the production. The parties stand in a very different situation in the two cases. The party who calls for the evidence has an interest in the production of it; but the opposite party has no interest in the privilege of the witness, and cannot complain of legitimate evidence being brought against himself. If a Court will review a decision disallowing the privilege that will be for the sake of the witness: I do not see how it can be for the sake of the party.[25]

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[23] [1978] 1 N.S.W.L.R. 372.

[24] *Cf. Rochfort* v. *Trade Practices Commission supra* n. 9.

[25] *Doe d. Earl of Egremont* v. *Date* (1842) 3 Q.B.D. 609 at 618-619 *per* Patterson, J.; and see *Marston* v. *Downes supra* n. 17; *Rowell* v. *Pratt supra* n. 14; *cf. Rochfort* v. *Trade Practices Commission* (1981) 37 A.L.R. 439; *Phelps* v. *Prew supra* n. 17. The rule in the United States appears to be the same: *People* v. *Gonzales* 56 Cal. App. 330 (1922); *Parker* v. *Board of Dental Examiners* 216 Cal 285 (1932).

Secondly, after the production of the documents to the court and upon the application of the party, there is the decision of the judge as to the preliminary use of the documents, including access for inspection.[26] The crucial question then became one of relevance of the documents to the proper conduct[27] of the litigation.[28] The witness is entitled *vis-a-vis* the party issuing the subpoena to object to access and inspection.[29] Again this involves, in theory, competing interests of the witness and of the party issuing the subpoena: the opposing party has no direct interest, although the practice seems to be to allow him to make submissions at this stage on the aspect of relevance.[30]

Thirdly, there is the use of the documents in the substantive litigation. This is a matter purely *inter partes*: it is covered by the usual rules of evidence and accordingly shall not be discussed separately.

From this framework it can readily be seen that the major area of policy conflict is in striking a balance between the public right of the litigating party to obtain documents in the hands of third parties, in the interests of the proper administration of justice;[31] and the private rights of those third parties.[32]

The public right considerations have echoed down through time from economic and legal philosophers of the nineteenth century:

> Upon business of other peoples everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor to be passing by in the same coach while a chimney sweeper and a barrow-woman were in dispute about a half penny worth of apples and the chimney sweep or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No most certainly.[33]

to leading commentators of the twentieth century: "When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private".[34]

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[26] *Reg.* v. *Greenway* (1845) 7 Q.B.D. 126 and see Part 37 Rule 10 of the Supreme Court Rules.

[27] For discussion of what is meant by proper conduct see *infra*.

[28] *Re Marra Developments and the Companies Act* [1979] 1 N.S.W.L.R. 345; *Commissioner for Railways* v. *Small supra* n. 7; *National Employers Mutual General Insurance Association Limited* v. *Waind* [1978] 1 N.S.W.L.R. 372.

[29] *McAuliffe* v. *McAuliffe* (1973) 4 A.C.T.R. 9; *Re Marra Developments and the Companies Act supra* n. 28. In the Federal Courts of the United States once the witness objects to inspection and copying the party is obliged to obtain a court order: Rule 45(d)(1).

[30] *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 28.

[31] *Lucas Industries Limited* v. *Hewitt* (1978) 18 A.L.R. 555; *Bank of New South Wales* v. *Withers supra* n. 8; *Summers* v. *Moseley supra* n. 5; *Rochfort* v. *Trade Practices Commission supra* n. 9.

[32] *R.* v. *Barton supra* n. 1.

[33] Jeremy Bentham, "Draught for the Organisation of Judicial Establishments" in Bowring; *The Works of Jeremy Bentham* Vol. 4 321.

[34] *Wigmore on Evidence* (3rd ed. 1940) 66. And see *Baird* v. *Cochran* (1818) 4 S. & R. 397 at 400 *per* Tilgham, C.J.: "From the nature of society, it would seem that every man is bound to declare the truth when called upon in a court of justice. The general welfare will be best promoted by considering the disclosure of truth as a debt which every man owes his neighbour, which he is bound to pay when called upon and which in his turn he is entitled to receive"; *American Express Warehousing* v. *Doe* [1967] 1 Lloyds Rep. 222; *Ex Parte Fernandex* (1861) 10 C.B.N.S. 339; *Amey* v. *Long supra* n. 3; *Lane* v. *Registrar of the Supreme Court of New South Wales supra* n. 9.

On the other hand, in the interests of the third party witness:

> . . . this duty exists for the individual to society, so also he may fairly demand that society, so far as the extraction of it is concerned, shall make the duty as little onerous as possible.[35]

Courts have repeatedly asserted that third parties are entitled to their privacy and to their right not to be required to busy themselves seeking, identifying, and producing their documents to the court.[36]

Notwithstanding the inclination of the courts to continue to speak in terms of resolution of these competing interests, a close analysis of the applicable doctrines shows that the public interest is always paramount, that there is seldom a real question today of conflict, and that under the guise of resolving the expressed conflict the courts are, in reality, simply guarding against abuse of process by the litigating party.

2. Custody, Possession or Control

The Principles

> One who is dumb cannot be in default for not testifying orally, and one who has no lawful control over a document cannot properly be liable to produce it.[37]

The command of the *subpoena duces tecum* requires the witness to produce documents within his custody, possession or control.[38] There is no legal obligation, and indeed there can be no moral obligation, to produce documents in respect of which the witness does not have that relevant possession.[39] Whilst this requirement has never been doubted, there has been a sharp division of opinion on the correct meaning and ambit of relevant possession. It is readily apparent that it will be in only the most exceptional case that any question of the conflicting interests of the party at whose request the subpoena was issued and of the witness will arise when possession is in issue. For if the fact is that the witness does not have possession in the relevant sense, then, *ceteris paribus*, he is amenable to the process. If the fact is that the witness does not have possession in the relevant sense then that possession must lie with some other person. The witness incurs no obligation to produce; but the party would then, in the

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[35] Wigmore, *op. cit. supra* n. 34 at 67.

[36] *Pollock* v. *Garle* [1898] 1 Ch. 1; *The Central News Co.* v. *The Eastern News Telegraph Co.* (1884) 53 L.J.Q.B. 236; *Morgan* v. *Morgan* [1977] 2 All E.R. 515; *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 28; *Lee* v. *Angas* (1866) L.R. 2 Eq. 59; *McAuliffe* v. *McAuliffe supra* n. 29; *In Re Mundell: Fenton* v. *Cumberlege supra* n. 18; U.S.: *U.S.* v. *Babcock* (1876) 3 Dill. 566; *F.T.C.* v. *American Tobacco Co.* 264 U.S. 298 (1924).

[37] Wigmore, *op. cit. supra* n. 34 at 119.

[38] No man is obliged "to sue or labour in order to obtain the possession of any instrument for the purposes of its production afterwards by himself, in obedience to the subpoena": *Amey* v. *Long supra* n. 3 at 483 *per* Lord Ellenborough, C.J.; and see *Rochfort* v. *Trade Practices Commission supra* n. 9.

[39] The practice has always been, where possession is in question, to swear the witness and take evidence as to the matter, permitting cross-examination as appropriate: *Penn-Texas Corp.* v. *Murat Anstalt No. 2 supra* n. 3; *Rex.* v. *The Ihabitants of Netherthong* (1814) 2 M.& S. 337; *Davis* v. *Dale* (1830) 1 M. & M. 514; *Perry* v. *Gibson* (1834) 1 Ad. & E. 48; *Summers* v. *Moseley supra* n. 5; *Rex* v. *Brooke* (1819) 2 Stark. 472; *Rush* v. *Smith 1 C.M. &* R. 94. Compare: *Munroe* v. *U.S.* 216 Fed. 107 (1914); *Edison Light Company* v. *United States Lighting Company* 44 Fed. 294.

usual case, be at liberty to issue a subpoena addressed to that other person and still achieve his objective. Thus viewed the cases dealing with possession are really cases illustrating misuse of process: by the litigating party endeavouring to compel a third party to do that which it is not within his power to do. There is no policy question of accommodating the interests of the witness and the interests of the litigating party.

The truly important possession cases are those where the party on whose request the original subpoena issued would not be at liberty to issue a fresh subpoena should it be found that the original witness to whom the subpoena was addressed was not the appropriate recipient. This can occur where the court finds that relevant possession of the documents is with some person, often a litigating party, who has an independent immunity to the subpoena process. The original subpoena has been challenged and set aside, the party issuing the subpoena is not entitled to address a new subpoena to the person found to be in possession, and further that party normally is not entitled or in a position to adduce secondary evidence of the contents of the documents sought.[40] It would be unrealistic to think that these cases should be treated other than as a reflection of the activation of the theoretically dormant interest of the opposite litigating party.

Legal Possession v. Corporeal Possession

At the beginning of the nineteenth century a rule had been adopted to the effect that it was no excuse for a witness served with a *subpoena duces tecum* to say that the legal custody of the documents belonged to another, if those documents were in his actual possession. That was decided by the Kings Bench sitting at Nisi Prius in 1808 in *Amey* v. *Long*,[41] and was confirmed as a matter of practice by Gibbs, C.J. in 1816 in *Corsen* v. *Dubois*:[42]

> Undoubtedly the practice should be settled; and the rule as it strikes me ought to be this: the solicitor who has the custody of any papers, and is regularly called upon by a *subpoena duces tecum* should produce them. I think it ought to be so, though the legal custody may belong to others. I do not say that the solicitor has an unconditional power over them, but he ought to produce them subject to qualifications.[43]

Under this general rule a party is entitled to subpoena an agent for his principal's documents: for the possession of the agent is the possession of the principal.[44] Accordingly, a steward of a borough was obliged to produce public documents relating to the borough.[45] A bank was obliged to produce

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[40] See e.g. *Rochfort* v. *Trade Practices Commission supra* n. 9; *Penn-Texas Corp.* v. *Murat Anstalt No. 2 supra* n. 3.

[41] *Supra* n. 3; and see *Roberts* v. *Simpson* 2 Stark. 203; *Doe* v. *Dale* 6 Jur. 990.

[42] (1816) Holt 239 at 240; and see *Rochfort* v. *Trade Practices Commission supra* n. 25 at 450 *per* Ellicott, J.

[43] A similar rule appears to have been adopted in the United States: *Mattie T.* v. *Johnson* 74 F.R.D. 498 (1976); *cf. Schwimmer* v. *U.S.* 232 F. 2d 855 (1956); *Bough* v. *Lee* 29 Fed. Supp. 498 (1939). There has also been a suggestion that formal notice should be given to the owner of the documents: *Alma-Schuhfabrik Ag.* v. *Rosenthal* 25 F.R.D. 100 (1960).

[44] *Murray* v. *Walker* (1839) Cr. & Ph. 114; *Rochfort* v. *Trade Practices Commission supra* n. 9.

[45] *Rex.* v. *Woodley* (1834) 1 M. & R. 390; *The Yougal* (1838) F. & F. 385.

documents of its customers lodged with it for safekeeping, notwithstanding an express agreement with the customers that there would be no delivery except with their consent.[46] A solicitor was obliged to produce the documents of his client, in the absence of an independent claim of privilege.[47] It should be noted, however, that the rule has never been construed so as to allow a party to subpoena an employee of the agent and not the agent himself for the principal's documents.[48]

It shall be seen, however, that the rule stated in such absolute terms has not survived the passage of time. Inroads and qualifications in a number of important areas have now denuded the rule of much of its meaning.

Corporations

Difficulties often arose in endeavouring to obtain by subpoena documents from companies. It is the correct, and now almost universal, practice to address a subpoena to the company "by its proper officer".[49] For reasons that are not apparent from the face of the reports, in both *Reg.* v. *Stuart*[50] and *Crowther* v. *Appleby*[51] the secretary of the company, rather than the company itself, was called upon to produce the company's books. In both cases the Board of Directors passed a resolution effectively forbidding the production of the books. The secretary was not compelled to produce in either case. Apart from the master/servant difficulty,[52] it is clear that the company should have been subpoenaed and not the secretary.[53] The distinction between legal custody and actual possession is drawn sharply by the board's resolution in each case.

Joint Possession

The problem assumes a slightly different form in cases in which the claim is made that the witness subpoenaed holds the documents, not in his exclusive possession, but jointly with others. Here, the courts have consistently adhered to the view that it is neither appropriate nor permissible to address a subpoena covering documents held jointly by a number of persons to less than the full complement of joint holders:[54]

> In one sense it is in his possession (actual corporeal possession) but when possession for the purpose of production is spoken of, that is to say a right and power to deal with it, actual corporeal is not meant but legal possession in respect of which the party is authorised to deal with

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[46] *Rex* v. *Daye* [1908] 2 K.B. 333; *Rochfort* v. *Trade Practices Commission supra* n. 25.

[47] *Reg.* v. *Hankins* (1849) 2 C. & K. 823; *Corsen* v. *Dubois supra* n. 42. And for an attorney under a power of attorney: *Hibbert* v. *Knight* (1848) 2 Exch. 11.

[48] *Rex* v. *Daye supra* n. 42; *Rochfort* v. *Trade Practices Commission supra* n. 9.

[49] *Re Lindsay Toole & Co. (Wool) Pty. Ltd. (In Liquidation)* (1966) 84 W.N. Pt. 1 N.S.W. 318; *Smorgon* v. *F.C.T.* (1976) 13 A.L.R. 481; *Penn-Texas Corp.* v. *Murat Anstalt No. 2 supra* n. 3; *Rochfort* v. *Trade Practices Commission supra* n. 9.

[50] (1885) 2 T.L.R. 144.

[51] (1873) L.R. 9 C.P. 23.

[52] See *infra* pp. 387-391.

[53] *Cf.*: *Hale* v. *Henkel* 201 U.S. 43 (1906); *Wilson* v. *U.S.* 221 U.S. 361 (1911); *U.S.* v. *American Tobacco* 146 Fed. 557 (1906).

[54] *Kearsley* v. *Phillips* (1882) 10 Q.B.D. 36; *Edmonds* v. *Lord Foley* 30 Beav. 282; *Murray* v. *Walker supra* n. 44; *Williams* v. *Ingram* (1900) 16 T.L.R. 434; *cf. Walburn* v. *Ingilby* (1832) 1 M. & K. 61.

> the property in question; and I have no doubt but that on this answer the defendant does state that his father is in the joint legal possession with himself; and that the books therefore are not under his direction or control, not being in his sole possession, that is, his sole legal possession although they may be corporeally in his actual possession.[55]

Two reasons are proffered for this rule. First, no-one shall be obliged to do that which he cannot do. Secondly, the joint holder not made subject to the subpoena, and not therefore in any way before the court, has an interest in the subject matter of the order; and a court will not make an adjudication adverse to that interest in the absence of that holder.[56]

The general principle is most readily illustrated in the partnership cases. Where one partner in a bank was subpoenaed to produce partnership documents, without the inclusion of his partners in the subpoena, the court refused to compel production.[57] Similarly in the case of law firms: it is a valid exception to take that one partner alone has been subpoenaed for firm documents.[58] Conversely, it has been held that where each partner had a duly executed copy of the partnership deed and one partner was subpoenaed for it, the objections of the other partners to production were immaterial.[59]

The Master/Servant Dilemma

By far the most interesting, and certainly one of the most litigated, issues on relevant possession concerns that of the possession of a servant. A number of principles can be identified readily as accepted and settled. An equal number remain in continuing dispute.

Since the early 1800s it has been entrenched doctrine that a servant shall not be compelled to produce his master's documents under a *subpoena duces tecum* where the master has expressly forbidden such production.[60] So a clerk in the Legacy Duty Office was not obliged to produce documents in answer to a subpoena where the Comptroller refused to permit it.[61] Similarly, where the Board of Directors of a company resolved to forbid the production of company documents by the secretary in answer to a subpoena, the secretary's disobedience was excused.[62] The only caveat that has been sounded is that there must be no collusion or contrivance between the master and the servant to prevent the production of the documents.[63]

The nineteenth century also produced an unequivocal position with respect to masters' documents generally. Apart from two cases relating to

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[55] *Reid* v. *Langlois* (1849) 1 M. & C. 627 at 636 *per* Lord Cottenham, L.C.

[56] *Taylor* v. *Blundell* (1841) C. & R. 104.

[57] *Attorney-General* v. *Wilson* (1839) 9 Sim. 526; *cf. Karakam Venkaiya* v. *Bhupalam Pedda Mullasappah* (1868) 4 Mad. 142.

[58] See *Rochfort* v. *Trade Practices Commission supra* n. 25.

[59] *Forbes* v. *Samuel* [1913] 3 K.B. 706.

[60] *Cf. U.S.* v. *International Business Machines* 71 F.R.D. 88 (1976) where a board resolution denying access of certain corporate officers to documents was ineffective.

[61] *Austen* v. *Evans* (1841) 9 Dowl. 408; and see *Eccles & Co.* v. *Louis. & Nash. Railroad Co.* [1912] 1 K.B. 135.

[62] *Crowther* v. *Appleby supra* n. 51; *Reg.* v. *Stuart supra* n. 50.

[63] *Walburn* v. *Ingilby supra* n. 54; *Reg.* v. *Stuart supra* n. 50.

records of a borough,[64] neither of which is unquestionably a strict case of a master/servant relationship, there does not appear to be any reported decision in which a servant has been obliged to produce under subpoena documents of his master. A clerk could not be subpoenaed for his master's books,[65] a steward for his employer's documents,[66] a clerk of the peace for the records of the session,[67] nor a clerk of a defendant in bankruptcy proceedings for incriminating papers.[68] It was never made a precondition of the immunity that the servant either obtain, or indeed even seek, his master's prohibition of or objection to the production.

The twentieth century heralded a number of complications. In *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*,[69] decided in 1912, attachment proceedings were brought against a servant for failure to comply with an order made under s. 1 of the Foreign Tribunals Evidence Act 1856. In all relevant respects, the order had the same operation and effect as a *subpoena duces tecum*. The servant occupied a senior position in a mercantile office and enjoyed the considerable confidence of his master. He refused to comply with the order for production of his master's documents without seeking his master's authority or direction. By a majority, the Court of Appeal held that the attachment proceedings should be dismissed. That holding was consistent with the nineteenth century cases discussed above.

Vaughan-Williams, L.J., speaking "without laying down any positive rule of law as to the production of documents entrusted to a servant",[70] held that it was simply a case of a servant who was not justified, *vis-a-vis* his master, in producing the documents in evidence. It was immaterial that his master's authority had not been sought, as an inference could be drawn that the production would violate his duty to his master.

Buckley, L.J.'s judgment was based upon the quite different ground, that the documents were in the servant's control merely in his capacity as a servant; and it was incumbent upon the party at whose instance the order was made to bring the master before the court if it wished to compel the production of his documents.[71]

Kennedy, L.J. dissented, and contained in that dissent was the expression of the rudiments of a difficult analytical problem. His Lordship conceded that if the master had expressly forbidden production *cadit quaestio*. However, the mere relation of master and servant was not, of itself, a sufficient excuse for noncompliance with the subpoena:

> There is no authority so far as I know for the proposition that it is always the implied duty of a person who says that he is in possession

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[64] *The Yougal supra* n. 45; *Rex* v. *Woodley supra* n. 45.
[65] *Re Higgs; Ex Parte Leicester* (1892) 66 L.T. 296.
[66] *Earl of Falmouth* v. *Moss* (1822) 11 Price 455.
[67] *Wetmore* v. *Harding* (1878) 2 P. & B. 338.
[68] *In Re Leighton and Bennett* (1866) L.R. 1 Ch. 331.
[69] *Supra* n. 61.
[70] *Id.* 145.
[71] As the proceedings were for attachment, His Lordship held further that it was incumbent upon the plaintiff to prove that the master was willing to produce the documents.

> of documents merely as a servant to disobey the order of the Court in such a case for their production.[72]

Kennedy, L.J. then reasoned that, for the purposes of the present principle, the meaning of "servant" was equivocal; and that it was necessary in each case to look to whether or not the servant was bound to act only upon the orders of the master. On the facts, the production of documents would have been within the servant's discretionary powers, and accordingly he had no excuse for non-production.

The dissent of Kennedy, L.J. has been adopted by the High Court in *Rochfort* v. *Trade Practices Commission*[73] as the correct statement of the law. That case also repays analysis. In proceedings brought by the Trade Practices Commission against a number of major transport companies, for injunctions and to impose penalties under the Trade Practices Act 1974, the Trade Practices Commission subpoenaed Rochfort for documents of the National Freight Forwarders Association ("NFFA"), an unincorporated trade association. Rochfort was the secretary and executive director of the NFFA. Strictly, he was an employee, not of the NFFA, but of a related association, the Australian Road Transport Federation ("ARTF"). A number of the defendants were members of the NFFA. Rochfort challenged the subpoena on the basis of *Eccles*.[74] The High Court, affirming the decision of the Full Federal Court,[75] held that the subpoena had to be complied with.

Gibbs, C.J. recognised that even though a servant may have access to documents, he cannot be required to answer a subpoena by obtaining the documents improperly: legal means must be available. However, after observing that the importance of *Eccles* was overrated, his Honour held that mere proof of a master/servant relation was not a sufficient excuse. The question in each case is whether the servant has such possession, custody or control of the documents that he may bring them to Court in obedience to the subpoena without violating his duty to his master.[76] On the present facts, his Honour concluded that there was possession in a full and unqualified sense and that Rochfort could produce the documents without violation of his duty.

Mason, J., with whom Wilson, J. agreed, conceded that in the usual case the subpoena should be addressed to the employer and not the employee: for the primary responsibility in relation to the documents remains that of the owner. Situations exist however in which the employer's interest is to be subordinated; where it is impractical to subpoena the employer the Court will insist on production by an employee or agent. Here, in the special case of an unincorporated association, it was not necessary nor

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[72] *Supra* n. 61 at 152.

[73] *Supra* n. 9.

[74] It was vital to the T.P.C. that the documents be obtained from Rochfort, as a subpoena addressed to the NFFA would be met with a privilege claim based upon self-incrimination, the proceedings being penal in nature and a number of the defendants being members of the NFFA. See *infra* p. 403.

[75] *Supra* n. 25.

[76] If the witness brings the documents to Court this may show that he is entitled to do so and their production will be called for. A similar test was propounded by Wilson, J. at 671.

proper to subpoena all the NFFA members or the executive committee; and as Rochfort had the immediate physical ability to produce the documents and the requisite express and implied powers with respect to the documents by virtue of his office he was required to answer the subpoena.[77]

Murphy, J.'s decision turned on the rather novel proposition that a witness is obliged to answer a subpoena, whether or not he has possession of or power over the subpoenaed documents, unless another identified person has such possession or power and as a practical matter can be subpoenaed to produce the documents. In the instant case, as the membership of Rochfort's employer was amorphous and indeterminate he personally was obliged to answer the subpoena.

In contrast to the judgments of Smithers and Sheppard, JJ. in the Full Federal Court, the High Court recognised and endeavoured to maintain the conceptual distinction between the grounds for objection to the subpoena open to Rochfort. As Rochfort's employer had no interest in the documents subpoenaed, the only question which should have arisen was whether Rochfort or the NFFA had possession of the documents in the relevant sense. Thus, strictly viewed it is not a case involving the master/servant relation, and should be treated accordingly.[78]

The real importance to the law of the *Eccles* decision is that it exposes the analytical basis for the rules implicit in the nineteenth century cases. As in the joint possession cases,[79] there are two bases upon which a servant would be justified in applying to set aside a subpoena.

First, a servant cannot be obliged to violate the duty owed to his master: this was the basis of Vaughan-Williams, L.J.'s judgment in *Eccles*, and appears to have been the basis for the decision in *Re Higgs: Ex Parte Leicester.*[80] It was also confirmed *obiter* in *Crowther* v. *Appleby*[81] and recognised in *Rochfort.*[82] In the ultimate analysis, the validity of an objection to a subpoena on this basis must become an empirical question. The early cases in which the production of documents, without the authority or consent of the master, was excused paralleled the then state of the law of employment. It was implicit, or assumed, that production by the servant would violate his duty. Today it appears that courts will undertake a forensic examination of the servant's duties to determine his immunity on this basis. In any event, there is little of theoretical interest in the topic.

Secondly, if the documents are not in the servant's possession in the relevant sense, then he is not obliged to produce them: this was the basis for Buckley, L.J.'s decision in *Eccles*, and is generally supported on the

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[77] Failure to obtain a master's approval for the production was not a material circumstance.

[78] An argument that Rochfort was a servant of the NFFA because the ARTF was a member of the NFFA was rejected by the Full Federal Court and was not referred to by the High Court.

[79] *Supra* pp. 386-387.

[80] *Supra* n. 65.

[81] *Supra* n. 51.

[82] *Supra* n. 25 at 451 *per* Ellicott, J.; *supra* n. 9 at 661 *per* Gibbs, C.J.; *supra* n. 9 at 665 *per* Mason, J.

authorities.[83] The problem, of course, is in deciding when a servant has possession in the relevant sense. The courts of the last century had no difficulty: the possession was always the possession of the master.[84] If the master's documents were required, then the subpoena was to be addressed to the master. Kennedy, L.J. perceived this approach as "encumbered by undue technicality"[85] and resolved to give the litigating party more latitude in the subpoena process.

It is an unfortunate fact that such a view has been perpetuated and given credibility by the High Court. It is difficult to imagine a more unsatisfactory case than *Rochfort*. The Court transgressed the basal principle of not adjudicating upon the interest of a person (NFFA) without affording that person the opportunity of a hearing. That is the essence of the prohibition on addressing subpoenas for masters' documents to servants. *A fortiori*, where the trial court found that Rochfort, was not the servant of the NFFA. The NFFA, and not Rochfort, was in possession of the documents. The accommodation made by the Court, purportedly for the exigencies of justice, must be viewed as a condonation of an abuse of process.[86]

Liens

The final area in which the question of possession plays an important role in the subpoena process can be dealt with shortly. As a lien is essentially a right to retain possession of documents or goods, as against the true owner, pending discharge of an obligation owed by the owner to the lienor;[87] it is crucial in the normal case to the existence of that right that the lienor retain possession *vis-a-vis* the lienee. Accordingly, the courts have held that it is a sufficient answer to a *subpoena duces tecum* that the witness has a lien on the documents, as against the party issuing the subpoena.[88] Thus a solicitor is immune from subpoena by a former client where a lien exists for unpaid costs;[89] and a broker with a lien on an insurance policy for unpaid premiums is protected from subpoena by the assured.[90]

The privilege is good not only against the lienee, but also against those claiming through him.[91] It has been held to be valid as against an assignee,[92]

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[83] *Earl of Falmouth* v. *Moss supra* n. 66; *Crowther* v. *Appleby supra* n. 51; *Reg.* v. *Stuart supra* n. 50; *Rochfort* v. *Trade Practices Commission supra* n. 9.

[84] *Crowther* v. *Appleby supra* n. 51; *Earl of Falmouth* v. *Moss supra* n. 66.

[85] *Rochfort* v. *Trade Practices Commission supra* n. 25 at 451 *per* Ellicott, J.

[86] Although Mason, J. at 668 recognised that requiring production would deny any privilege claim that the NFFA members may have had, in His Honour's view this was the inevitable consequence of the way in which the NFFA chose to arrange its affairs.

[87] See *In Re Hawkes; Ackerman* v. *Lockhart* [1898] 2 Ch. 1; *Pelly* v. *Wathen* (1851) 1 DeG.Mac& G. 16.

[88] Procedurally, lien objections are often treated as privilege objections: see *infra* p. 402.

[89] *Furlong* v. *Howard* (1804) 2 S. & L. 115; *Ross* v. *Laughton* (1813) 1 V. & B. 349; *Lockett* v. *Cary* (1864) 10 Jur. N.S. 144; *In Re Rapid Road Transit Co.* [1909] 1 Ch. 96; *cf. Fowler* v. *Fowler* (1881) 50 L.J.Ch. 686.

[90] *Cf. Hunter* v. *Leathley* (1830) 10 B. & C. 858.

[91] For an illustration of the rule applying in the Federal Courts of the United States see *U.S.* v. *Tilden* 10 Ben. 566 (1879); *Davis* v. *Davis* 90 Fed. 791 (1898); *The Flush: Appeal of Thompson* 277 Fed. 25 (1921).

[92] *Lockett* v. *Cary supra* n. 89.

a receiver of an estate,[93] an assignee in bankruptcy,[94] trustees under a marriage settlement,[95] and an official manager.[96] In all cases of a valid objection being taken on this ground, secondary evidence is admissible.[97]

It is equally well settled that a lien on documents will be no answer to a subpoena taken out by a party not subject to the lien: "No man . . . can give a lien . . . of a higher nature than the interest he himself has in the deeds".[98]

Close questions arise where a liquidator of a company subpoenas the files of the company's former solicitors. The better view appears to be that, as the liquidator claims on behalf of the creditors as well as on behalf of the company, the lien will not excuse production.[99]

3. Oppression

The Principles

Oppression has always been recognised as a ground upon which a witness is entitled to apply to the court to set aside a subpoena. In this context courts have used the word "oppression" generically. The cases can be collected conveniently in three categories. The first involves the oppressive use of a subpoena in a temporal sense. The second involves the use of a subpoena to obtain discovery against a third party. The third involves the rule prohibiting a subpoena being cast in terms which are so wide and indeterminate as to be oppressive: this question often shades into a question of relevance.

Of the three categories of cases, it is only the last of which it may be said that a contemporary court is required to demarcate between the interest of the witness subpoenaed and the interest of the litigating party. The former two categories must sensibly be viewed as cases in which the legitimate purposes for which a *subpoena duces tecum* may be used have been transgressed. Although judges continue to speak of the temporal cases in terms of oppression, properly considered, they are cases involving abuse of process. Similarly, once the policy decision to disallow discovery by subpoena against third parties is admitted, the second category of cases also becomes an illustration of excesses of use of process.

The Temporal Cases

There was an early current of opinion that a *subpoena duces tecum*

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[93] *Warburton* v. *Edge* (1839) 9 Sim. 508.

[94] *Ross* v. *Laughton* (1813) 1 V. & B. 349.

[95] *Re Gregson* (1858) 26 Beav. 87.

[96] *In Re Cameron's Coalbrook etc. Railway Company* (1857) 25 Beav. 1; and see *Colegrave* v. *Manley* T. & R. 400; *Griffiths* v. *Griffiths* 2 Hare 587; *Lord* v. *Wormleighton* (1822) Jac. 580; *Vale* v. *Oppert* (1875) L.R. 10 Ch. 340.

[97] *Doe d. Gilbert* v. *Ross* (1840) 7 M. & W. 102; *Newton* v. *Chaplin* (1850) 10 C.B. 356; *Marston* v. *Downes supra* n. 17.

[98] *Pelly* v. *Wathen supra* n. 87; *Baker* v. *Henderson* (1830) 4 Sim. 27; *Commerell* v. *Poynton* (1818) 1 Swan 1; *Furlong* v. *Howard supra* n. 89.

[99] *In Re South Essex Estuary & Reclamation Co.; Ex Parte Paine and Layton* (1869) L.R. Ch. App. 215; *In Re Cameron's Coalbrook etc. Railway Co. supra* n. 96; *cf. In Re Moss* (1866) L.R. 2 Eq. 345; *Ex Parte Yalden* 4 Ch. 129; *In Re Hawkes* [1898] 2 Ch. 1; *In Re Anglo-Moravian Hungarian Junction Rly. Co.* 1 Ch. D. 130.

could not be used to obtain documents from a third party prior to trial.[100] The function of the writ was viewed strictly as a method of obtaining evidence at the trial. A witness was always at liberty to apply to the court to set the subpoena aside as premature if it was oppressive in the circumstances.[101] There is also early authority indicating that a failure to give proper notice of the day of the sittings upon which the trial shall be heard will result in the characterisation of the subpoena as oppressive and will excuse noncompliance.[102] Similarly, if perforce of temporal factors the subpoena would not be effective by any possibility, and would be oppressive to the witness, a court will not insist upon its obedience.[103]

As a practical matter, the temporal problems have now fallen largely into abeyance. If a litigating party wishes to have a subpoena made returnable prior to the date of the trial, he may simply apply to the court for an order under Part 37 Rule 2. Such orders are issued as of course, and indeed often without application. Courts also retain jurisdiction to ratify the issue of a subpoena which is made returnable prior to the date of trial.[104] Finally, general provision is made in Part 36 Rule 12(1) for the court to make orders for the production of documents to the court on any trial, hearing, or other occasion.[105]

Discovery Against Third Parties

Notwithstanding some recent judicial reservations concerning the normative aspects of the rule,[106] it has uniformly been accepted that a *subpoena duces tecum* cannot be used by a party to obtain, in effect, discovery against independent third parties.[107] The description of documents in the subpoena cannot be couched in such a way as to be tantamount to a notice for discovery. Two reasons can be discerned for the rule.

First, a party is no more entitled to use a subpoena than he is to use interrogatories for the purpose of endeavouring not to obtain evidence to support his case, but to discover if he has a case, or to fish to find something out.[108] As Lord Halsbury so cryptically described it: a subpoena will be vitiated where "inspection and discovery . . . is sought, not proof".[109] This

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[100] *Elder* v. *Carter; Ex Parte Slide and Spur Gold Mining Co.* (1890) 25 Q.B.D. 194; *Burchard* v. *Macfarlane; Ex Parte Tindall* (1891) 2 Q.B. 241; *American Express Warehousing* v. *Doe* [1967] 1 Lloyds Rep. 222.

[101] *Macbryan* v. *Brooke supra* n. 19; *In Re Manville House Limited* [1939] 1 Ch. 32; *cf. Lucas Industries Limited* v. *Hewitt supra* n. 31.

[102] *London and Globe Finance Corp.* v. *Kaufman* (1900) 48 W.R. 458.

[103] *Blandford* v. *De Tastet* (1813) 5 Taunt. 260.

[104] *Lucas Industries* v. *Hewitt supra* n. 31; *Trade Practices Commission* v. *T.N.T. Management Pty. Limited et al.* Oct. 1981 Bowen, C.J. unreported.

[105] *Cf. American Express Warehousing* v. *Doe supra* n. 100.

[106] *Ibid.*

[107] *Seyfang* v. *Searle & Co.* [1973] 1 Q.B. 148; *Elder* v. *Carter: Ex Parte Slide and Spur Gold Mining Co. supra* n. 100; *Straker* v. *Reynolds* (1889) 22 Q.B.D. 262; *Penn-Texas Corp.* v. *Murat Anstalt supra* n. 3; *McAuliffe* v. *McAuliffe supra* n. 29; *Lane* v. *Registrar of the Supreme Court of New South Wales supra* n. 9; *Spencer Motors Pty. Limited* v. *L.N.C. Industries Limited* [1982] 2 N.S.W.L.R. 921. *Finnie* v. *Dalglish* [1982] 1 N.S.W.L.R. 400.

[108] *Hennessey* v. *Wright* 24 Q.B.D. 445; *Commissioner for Railways* v. *Small supra* n. 7; *Lucas Industries Limited* v. *Hewitt supra* n. 31; *American Express Warehousing* v. *Doe supra* n. 105; *Walling* v. *J. Friedman & Co.* 4 F.R.D. 384 (1945); *Hercules Powder Co.* v. *Rohm & Haas Co.* 3 F.R.D. 302 (1944).

[109] *Burchard* v. *Macfarlane; Ex Parte Tindall supra* n. 100.

does not, however, impose a requirement that the litigating party have knowledge of the contents of a document before issuing a subpoena for that document.[110]

> Secondly, and more importantly:
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> A stranger to the cause ought not to be required to go to the trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant.[111]

This argument has been regarded consistently by the courts as an immutable barrier to allowing discovery against third parties: the real vice is seen to reside in the imposition of a "most harassing duty"[112] upon the witness to make a decision as to the relevance of his documents to the litigation.[113]

Width of Description

Although a subpoena may specify the nature of the documents required, and contain no demand upon the witness to form any judgment as to relevance, a witness shall be entitled to have the subpoena set aside if, having regard to the description and number of documents required and in all the circumstances, its operation is unduly burdensome on him. The standard formulation of the rule is found in the judgment of Sir Frederick Jordan in *Commissioner for Railways* v. *Small*:

> If (the subpoena) be addressed to a stranger, it must specify with reasonable particularity the documents which are required to be produced. A *subpoena duces tecum* ought not to be issued to such a person requiring him to search for and produce all such documents as he may have in his possession or power relating to a particular subject.[114]

At the pragmatic level, the relevant test has been framed as follows: "whether in all the circumstances including the identity and situation of the recipient, the class of documents is sufficiently clearly identified".[115] It would, however, be folly to presume that the rule proscribed comprehensive descriptions of documents in subpoenas,[116] or indeed the description of documents in general terms without identifying particular documents.[117]

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[110] *Re Marra Developments Limited (No. 2)* [1979] A.C.L.R. 153; and see *Polaroid Corp.* v. *Commerce Int'l Co.* 20 F.R.D. 394 (1957); *East 65th Street Corp.* v. *Ford Motor Co.* 27 F. Supp. 37 (1939).

[111] *Commissioner for Railways* v. *Small supra* n. 7 at 573 *per* Jordan, C.J.

[112] *Lee* v. *Angas supra* n. 36 at 63 *per* Sir W. Page Wood, V.C.

[113] *R.* v. *Barton supra* n. 1; *Burchard* v. *Macfarlane: Ex Parte Tindall supra* n. 100; *Lee* v. *Angas supra* n. 36; *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2. *Finnie* v. *Dalglish supra* n. 107.

[114] *Supra* n. 7 at 573; and see *Clay* v. *South Rly. Co.* 284 F. 2d. 152 (1960).

[115] *R.* v. *Barton supra* n. 1 at 428 *per* Cantor, J.

[116] *Id.*

[117] "A degree of generality in the description of documents may according to the circumstances be compatible with reasonableness": *Lucas Industries Limited* v. *Hewitt supra* n. 31 at 570 *per* Smithers, J.; *Re Marra Developments (No. 2) supra* n. 110.

The problem with expressing the rule in the terms contained in Sir Frederick Jordan's formulation is that it concentrates on the subpoena *ex facie*, to the exclusion of any question of oppression in the general sense, having regard to the burden placed upon the witness in answering the subpoena. For it appears to be the currently held view that the oppression ground may be established on the face of the subpoena, or after evidence by the witness demonstrating the onerous burden in fact cast upon him.[118] A comprehensive description of documents in the subpoena may not vitiate the subpoena *ex facie*, but if there is oppression in fact, in the effort and expense of the search for and production of those documents, then the court will not insist upon compliance.[119]

A reasonable degree of latitude, however, is allowed to the party at whose instance the subpoena is issued; in both the *ex facie* cases and the cases upon evidence: "it is necessary to consider the demand as expressed in the subpoena in the light of (the) circumstances".[120] Accordingly, expressions such as "referred to therein",[121] and "relating to"[122] are treated as permissible; whereas such indeterminate expressions as "predecessor in title",[123] and "companies owned or controlled"[124] offend the rule. Similarly, a subpoena to a bank to produce all cheques drawn on a particular branch over a period of one year would be objectionable;[125] whereas a detailed and highly technical subpoena may be supportable if addressed to a large company, with an efficient business record system, trained staff, and with employees with knowledge of the issues in the case.[126]

The courts appear to have set their face against allowing the interest of the litigating party to prevail in all cases over the interest of the witness, where the subpoena is issued in a legitimate form, for a legitimate purpose, but where an onerous burden is placed upon the witness as a consequence of time and expense in answering it.[127] Upon first principles, and provided the subpoena is otherwise unobjectionable, the witness should not, in these circumstances, be excused from non-compliance: for every dispensation is a further obstacle to the ascertainment of the truth of the matter, and should only be tolerated in the most exceptional case. This is more definitely the position now, following the recent amendments to the subpoena rules. As a

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[118] *R.* v. *Barton supra n. 1; Re Marra Developments (No. 2) supra* n. 110; *Lucas Industries Limited* v. *Hewitt supra* n. 31. And see *Goodman* v. *U.S.* 369 F. 2d. 166 (1966); *Horizons Titanium Corp.* v. *Norton Co.* 290 F. 2d. 421 (1961).

[119] *R.* v. *Barton supra* n. 1.

[120] *Lucas Industries Limited* v. *Hewitt supra* n. 31 *per* Smithers, J. and see *Alliance Petroleum Australia (NL)* v. *Australian Gas Light Co.* (1982) 44 A.L.R. 124.

[121] *In Re Westinghouse Electric Corp.; Uranium Contract Litigation M.D.C. Docket No. 235* [1977] 3 W.L.R. 430; *Spencer Motors Pty. Limited* v. *L.N.C. Industries Limited supra* n. 107.

[122] *Burchard* v. *Macfarlane; Ex Parte Tindall supra* n. 100; *Spencer Motors Pty. Limited* v. *L.N.C. Industries Limited supra* n. 107.

[123] *Lucas Industries Limited* v. *Hewitt supra* n. 31.

[124] *R.* v. *Barton supra* n. 1.

[125] *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2.

[126] *Lucas Industries Limited* v. *Hewitt supra* n. 31; *Alliance Petroleum Australia (NL)* v. *Australian Gas Light Co. supra* n. 120. And see *Miller* v. *Sun Chemical Corp.* 12 F.R.D. 181 (1951); *Wagner Manufacturing Co.* v. *Cutler-Hammner Inc.* 10 F.R.D. 480; *Fox* v. *House* 29 F. Supp. 673 (1939).

[127] *Cf. Hecht* v. *Pro-Football Inc.* 46 F.R.D. 605 (1969).

result of the decision in *Bank of New South Wales* v. *Withers*,[128] Part 37 Rule 9 was inserted to confer on the court power to order the party who requested the subpoena to pay to the witness the expense or loss incurred in complying with the subpoena.[129] A further procedural protection was conferred on witnesses by the provision of minimum times within which subpoenas may be served.[130] In these circumstances, it is difficult to deny that the better view is that an otherwise legitimate subpoena imposing an onerous burden upon the witness must be obeyed.

Residual Discretion

In addition to the relatively well defined rules governing oppression set out above, some courts have arrogated to themselves a residual discretion to protect documents, and to set aside subpoenas where they perceive it to be in the interests of fairness.[131] This development is most vividly illustrated in *Morgan* v. *Morgan*,[132] where the Family Court refused to compel a witness to produce admittedly relevant and vital documents on the basis that the interest of the witness in the privacy of his papers was paramount. The decision cannot be supported. It has no basis in authority, and is fundamentally contrary to principle. The sooner the notion of residual discretion receives its quietus the better for principle, and for the administration of justice.

4. Extraneous Purpose

The Principle

From the earliest reported decisions on *subpoenas duces tecum*, the courts have considered closely any submission that the subpoena may be used for a purpose extraneous to the proper conduct of the instant litigation. As the *subpoena duces tecum* was always perceived as a crucial instrument for the administration of justice, it was necessary to control strictly its use and to preserve its integrity. It was also realised at an early stage, that the invasion of private rights occasioned by the operation of the subpoena demanded a certainty as to the legitimacy of the purpose for which the subpoena may be invoked.

The law can best be discussed by separating cases in which the court has found that a subpoena was used for an illegitimate and unjustifiable purpose, from cases in which the permissible ambit of purpose was endeavoured to be expounded. Although abuse of process is the heart of the courts' concern in challenges to *subpoenas duces tecum* generally, and may be of principal importance to the witness; it will be suggested that once the proper test of legitimacy is divined, the cases involving alleged extraneous purpose have nothing to do with the competition between the interests of the witness and the interests of the litigating party.

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[128] *Supra* n. 8; and see *Dewley* v. *Dewley supra* n. 21.

[129] Rule 45(b)(2) of the Federal Court Rules of Civil Procedure (U.S.) provides for orders to be made in advance for the witness's costs of production.

[130] Part 37 Rule 7(7).

[131] *Senior* v. *Holdsworth; Ex Parte I.T.N.* [1975] 2 W.L.R. at 1001 *per* Scarman, L.J.

[132] [1977] 2 All E.R. 515.

Spurious Purposes

The most patent case in which a subpoena may not be employed to obtain documents from a third party occurs where there has been an express or implied statutory exclusion of the process.[133] This is a reflex of the principle that where a statutory method is prescribed for the achievement of a particular objective, it is impermissible to endeavour to achieve that objective through the subpoena process. This principle is also the basis of the rule preventing the substitution of the subpoena process for discovery against a party.[134]

It has already been shown that it is an abuse of process to endeavour to obtain discovery against a third party by the use of a *subpoena duces tecum*.[135] Similarly, the courts have prohibited the use of a *subpoena duces tecum* to compel a witness to produce documents in court, and then have him sworn so as to make him a witness in the cause.[136]

A subpoena also cannot be used for the purpose of imposing a restraint upon the use of documents. Thus, where documents were subpoenaed for an interlocutory hearing which had been completed, the court varied the order to allow one party to use those documents in the performance of his statutory functions.[137] Along similar lines, it has been held that it is impermissible to use a subpoena with the object of enforcing forfeiture of a lease,[138] or to impose a penalty.[139]

Moreover, an order founded upon the mere suggestion that the litigating party may derive some benefit, or that it may tend to his convenience and the saving of expense, will not be sustained.[140] *A fortiori*, where the documents subpoenaed have no reference to the proceedings in the litigation.[141] It was the original view of the courts that the relevance or otherwise of the documents subpoenaed was a matter for the litigating parties alone, and not for the witness:[142] "As the party has no concern with privilege proper, so the witness has no concern with anything but privilege".[143] The witness was bound to attend according to the exigency of the writ; whether the instrument required to be produced was or was not, in his opinion, material. That view was subject to some amelioration in 1909, when the Prime Minister and the Home Secretary were subpoeaned in a

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[133] *Rex* v. *Hurle-Hobbs* [1945] K.B. 165; *Hedges* v. *Burchell* (1913) 17 C.L.R.; *Penn-Texas Corp.* v. *Murat Anstalt No. 2 supra* n. 3.

[134] *Steele* v. *Savoury* [1891] W.N. 195; *Newland* v. *Steer* (1865) 13 L.T. 111; *Selby* v. *Fraser* (1857) 5 W.R. 341.

[135] *Supra* pp. 393-394.

[136] *Rush* v. *Smith* (1834) 1 C.M. & R. 93; *Perry* v. *Green* (1834) 1 Ad. & E. 48; *Summers* v. *Moseley* (1834) 2 C. & M. 477.

[137] *Corporate Consultants International Limited* v. *Commissioner of Taxation* (1980) 80 A.T.C. 4612.

[138] *Earl of Powis* v. *Negus* [1923] 1 Ch. 186; *Earl of Mexborough* v. *Whitwood Urban Council* [1897] 2 Q.B. 111; *Seddon* v. *Commercial Salt Co.* [1925] Ch. 187.

[139] *W.M. Collins & Sons Pty. Limited* v. *T. & T. Mining Corp. Pty. Limited* (1971) 64 Qd. R. 427; *Bray on Discovery* (1st ed. 1885) 345.

[140] *The Central News Company* v. *The Eastern News Telegraph Company* (1884) 53 L.J.Q.B. 236.

[141] *In Re Smith; Williams* v. *Frere supra* n. 19; *In Re Mundell; Fenton* v. *Cumberlege supra* n. 18.

[142] *Scholes* v. *Hilton* (1842) 10 M. & W. 15; *Ashton* (1683) 1 Vern. 165. *Cf. People's Bank* v. *Brown* 112 Fed. 652 (1901); *Bevan* v. *Kreiger* 289 U.S. 459 (1933).

[143] Wigmore *op. cit. supra* n. 4 at s. 2196.

breach of the peace and unlawful assembly proceeding.[144] Whilst faint recognition was given to the then current view, the subpoenas were set aside as not having been issued *bona fide* for the purposes of obtaining relevant evidence.

In a number of later cases courts have appeared willing to set aside a subpoena when the witness can demonstrate that the process cannot operate to compel the production of any relevant and admissible evidence.[145] The test of relevance adopted in this context is very liberal: if an issue may arise to which the documents may relate then the subpoena will be valid.[146]

Finally, it should be noted that a witness retains the right to make submissions to the judge on the question of relevance, when an order for access is sought.[147]

The final, and theoretically most compelling, extraneous purpose case is that of the use of a subpoena for the purpose of a collateral action; such purposes have been regarded universally as spurious.[148] So an order for the production of documents ancillary to, and in defiance of an order in, a collateral action will be set aside.[149] A subpoena to compel the production of incriminating documents for use in other bankruptcy proceedings will not be allowed.[150] And a subpoena for private and collusive proceedings, or designed to give publicity to documents, will not be tolerated.[151]

The Legitimate Purpose Test

To identify the current test on legitimacy of purpose of *subpoenas duces tecum* is no simple task. The matter has become the subject of divergent, and rather strongly held, views. The resolution of the question, in part, turns upon the construction of the Rules. "Subpoena for production" is defined in Part 37 Rule 1 to mean "an order in writing requiring the person named to attend as directed by the order and produce a document or thing for the purpose of evidence . . ."

On the one hand, there is authority that a subpoena may only be used for obtaining documents for admission into evidence at the trial.[152] The paradigm exposition of this view is contained in the judgment of Blackburn, C.J. in *McAuliffe* v. *McAuliffe*:

> The law does not compel a person not a party to the action and not called as a witness to make a document which belongs to him available

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[144] *Rex* v. *Baines* [1909] 1 K.B. 258.

[145] *A Debtor (No. 3); Ex Parte Goldstein* [1917] 1 K.B. 558; *R.* v. *Hove Justices; Ex Parte Donne* [1967] 2 All E.R. 1253; *Hollard* v. *Sammon* (1972) 4 S.A.S.R. 1; *R.* v. *Wiltshire Appeal Tribunal; Ex Parte Thatcher* (1916) 86 L.J.Q.B. 121. Accord: *Canuso* v. *City of Niagara Falls* 7 F.R.D. 162 (1945); *Chase National Bank* v. *Portland General Electric Co.* 2 F.R.D. 484 (1949).

[146] *R.* v. *Barton supra* n. 1 at 420.

[147] *Re Marra Developments Limited (No. 2) supra* n. 110.

[148] *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2.

[149] *In Re North Australian Territory Company* (1890) 45 Ch. 87; *In Re a Debtor No. 472 of 1950; Ex Parte Dwirsky* [1958] 1 W.L.R. 283.

[150] *Laing* v. *Barclay* (1821) 3 Stark. 38.

[151] *R.* v. *Barton supra* n. 1.

[152] *McLeod* v. *Phillips* (1905) 5 S.R.N.S.W. 503; *R.* v. *Cheltenham Justices; Ex Parte Secretary of State for Trade* [1979] 1 All E.R. 460; *McAuliffe* v. *McAuliffe supra* n. 29.

> to a party unless the document is itself admissible in evidence upon proof by a witness other than the person requested to make it available.[153]

The question in that case was whether documents could be obtained on subpoena for use in cross-examination, and also for material upon which to base a decision to call or not to call a particular witness. Both purposes were disapproved. This view is lent some credibility by a strict and literal reading of the Rules.

Three criticisms may, however, be made of the view. First, the authorities said to support the position do not justify the conclusion in relation to subpoenas.[154] Secondly, the utility of the subpoena process would be greatly constricted, and the ascertainment of the truth severely shackled, if the view were strictly adhered to. Thirdly, the preponderance of authority is in favour of a more liberal approach to the purposes for which subpoenas may be invoked.

On the other side of the division of opinion, the appropriate purpose test has been posited in differing terms: "to further a legitimate forensic purpose";[155] "some probability, to say the least of (the documents) being useful for some purpose between the parties";[156] "for the proper conduct of the litigation";[157] "that requisite for the purposes of justice".[158]

It is clear, in each case, that the test contemplates a usage of subpoenas outside that of merely obtaining documents for admission into evidence.[159] Indeed, the use of documents obtained on subpoena for the purpose of cross-examination, or ancillary to the examination, of a witness was a predicate in each case for the test expounded. In *In Re Emma Silver Mining Co.*,[160] and in *In Re Lisbon Steam Tramways Company*[161] documents were subpoenaed for the express purpose of contraverting evidence given in chief, by cross-examination based upon those documents. Similarly, in *Lucas Industries Limited* v. *Hewitt*[162] one of the expressed reasons for upholding the early return of the subpoena was to facilitate cross-examination, through the availability of the documents subpoenaed. Finally, the Court of Appeal in *National Employers Mutual General Insurance Association Limited* v.

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[153] *Id.* at 12.

[154] *Elder* v. *Carter; Ex Parte Slide and Spur Gold Mining Co. supra* n. 100 (Order 37 Rule 7 case); *Burchard* v. *Macfarlane; Ex Parte Tindall supra* n. 100 (production of documents ancillary to the examination of a witness); *O'Born* v. *Commissioner for Government Transport* (1960) 77 W.N.N.S.W. 81.

[155] *Maddison* v. *Goldrick* [1976] 1 N.S.W.L.R. 651 at 666 *per* Samuels, J.A.

[156] *Phelps* v. *Prothero* (1848) 2 DeG. & Sm. 274 at 290 *per* Sir J.L. Knight Bruce.

[157] *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2 at 384 *per* Moffitt, P.

[158] *Ibid.* And see *Shotkin* v. *Nelson* 146 F. 2d. 402 (1944) (production of documents relative to the inquiry).

[159] This also appears to be the position in the United States: Advisory Committee Note to 1970 amendments to Rule 45(d)(1) 48 F.R.D. 543; *Boeing Airplane Co.* v. *Loggeshall* 280 F. 2d. 654 (1960); *U.S.* v. *DuPont Nemours & Co.* 14 F.R.D. 341 (1953); *Virginia Metal Products Corp.* v. *Hertford Accident & Indemnity Co.* 10 F.R.D. 374 (1950).

[160] (1875) L.R. 10 Ch. 194.

[161] [1875] W.N. 54.

[162] *Supra* n. 31.

Waind,[163] after an extensive review of the principles and the practice in New South Wales, confirmed:

> So far as factual matters are concerned the proper conduct of the litigation can only be that which fairly leads to the introduction of all such evidence as is material to the issues to be tried, and the testing of that evidence by the accepted procedures of the court.[164]

Whilst it seems in accord with basic principle that this latitude be afforded to the litigating party, it is probable that individualistic discretionary attitudes will continue to have a practical influence on the law in this area. The reason for this lies in procedure. Argument on the use to which subpoenaed documents may be put, which in turn reflects upon the use to which the subpoena itself may be put, often occurs after the documents have been produced to the court, and thus come within the discretionary province of the judge.[165] Because the resolution of the question is then properly a matter of judicial discretion, it is more likely to be the subject of inconsistent and ad hoc applications of principle, and to be subject to the concomitant limitations upon appellate review; which otherwise, in the general case, would ensure the application of a cohesive and uniform standard.

5. Statutory Formalities

The Principle

A number of formal requirements are prescribed in Part 37 of the Supreme Court Rules for the use of subpoenas. Failure to comply with those formalities will, in the usual case, either justify the witness in not complying with the subpoena, or entitle the witness to apply to the court to set it aside.

Form

The subpoena must conform to the prescribed form, or be in such form as the Court may otherwise direct.[166] In attachment proceedings strict compliance is insisted upon.[167] In an application to set a subpoena aside however, the attitude is more liberal, and the court will allow subpoenas which contain mistakes, that are not fundamental or misleading, to stand.[168]

Conduct Money

No witness may be obliged to produce documents unless a sum sufficient to meet his reasonable expenses in complying with the subpoena is paid or tendered to him at the time of service, or not later than a reasonable time before the date on which production is required.[169] The old

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[163] *Supra* n. 2.

[164] *Id.* 384 *per* Moffitt, P.; and see *Spencer Motors Pty. Limted* v. *L.N.C. Industries Limited supra* n. 107.

[165] *Phelps* v. *Prothero supra* n. 156; *Re Marra Developments Limited and the Companies Act supra* n. 28; *Commissioner for Railways* v. *Small supra* n. 7; *McAuliffe* v. *McAuliffe supra* n. 29; *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2.

[166] Part 37 Rule 2.

[167] *Vaughton* v. *Brine* (1840) 9 Dowl. 179; *Doe d. Clark* v. *Thompson* (1841) 9 Dowl. 948.

[168] *Page* v. *Carew* (1831) 1 Cr. & J. 514; *Wakefield* v. *Gall* (1817) Holt, N.P. 526; *cf. Kane* v. *Kane* (1867) 16 W.R. 99.

[169] Part 37 Rule 3. On witnesses expenses generally see Part 37 Rule 9 and *Dewley* v. *Dewley supra* n. 21; *Bank of New South Wales* v. *Withers supra* n. 8.

authorities followed the rule strictly, and insisted upon the witness's general right to be paid or tendered an amount sufficient for going to, staying at, and returning from the place of trial.[170] The present Chief Justice, however, has made the following comment on insufficiency of conduct money tendered to a witness, on the service of a summons under s. 81 of the Bankruptcy Act 1966: "(the witness's) clear duty was to have attended at the court and asked that she be supplied with further conduct money".[171]

Service

The rules governing service of subpoenas have recently been amended to extend to witnesses some procedural protection from the increasing harassment of untimely service of subpoenas. Unless dispensation is obtained from the court,[172] a *subpoena duces tecum* may not be served later than five days before the return date.[173] The subpoena must be served personally[174] or if it is addressed to a corporation served in accordance with Part 37 Rule 7(6) on a designated officer of the corporation, or in accordance with the provisions made by, or under, any Act.[175]

Although the failure of the litigating party to comply with the rules as to service has been said to justify a witness in not complying with a subpoena,[176] it is clear that once a witness attends in obedience to such a subpoena he cannot be heard to complain of any procedural irregularity in service.[177] This does not mean, of course, that he will not be provided with a reasonable time within which to collect and produce the documents called for by the subpoena.

Banker's Books

Finally, bankers are afforded a privileged status under the subpoena rules. A *subpoena duces tecum* addressed to a bank must permit the bank to produce proof of its books in accordance with Part IV of the Evidence Act 1898: otherwise its validity may be impugned.[178]

6. Privilege

The Principle

As noted earlier, privilege does not have an independent existence in its application to *subpoenas duces tecum*. The same principles apply in relation to all forms of evidence. Moreover, the privilege claim typically ad-

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[170] *Belgrave* v. *Hertford (Earl)* (1576) Cary 62; *Edmonds* v. *Pearson* (1827) 3 C. & P. 113; *Newton* v. *Harland* (1840) 1 M. & G. 956; *Brocas* v. *Lloyd* 23 Beav. 129; *In Re Working Men's Mutual Society* (1882) 21 Ch. D. 831.

[171] *Re Wyatt* (1969) 15 F.L.R. 374 at 377.

[172] Part 37 Rule 7(1).

[173] Part 37 Rule 7(7), and see *Jackson* v. *Seager* 2 D. & L. 13; *Barber* v. *Wood* (1838) 2 M. & R. 172; *George* v. *Bolington* (1558) Cary 41. *Cf.* Part 37 Rule 7A for subpoenas to medical experts.

[174] Part 37 Rule 2. Unless the recipient is a party and his solicitor consents to accept service: Part 37 Rule 4. And see *Barlow* v. *Baker* (1576) Cary 54; *Small* v. *Whitmill* (1736) 2 Stra. 1054.

[175] *Cf.* Part 37 Rule 5 for service on a medical expert.

[176] *Hammond* v. *Stewart* (1781) 1 Str. 510; *Bank of New South Wales* v. *Withers supra* n. 8.

[177] *Auten* v. *Rayner (No. 2)* [1960] 1 Q.B. 669; *Wisden* v. *Wisden* (1849) 6 Hare 549; *Lawton* v. *Price* (1868) 16 W.R. 666.

[178] Part 37 Rule 5; and see *Bank of New South Wales* v. *Withers supra* n. 8.

mits the exigency of the writ itself: properly viewed, it is not a further ground for impugning validity of process. It is also a substantive area of law in itself. Accordingly, the treatment of privilege shall be procedural and illustrative only.[179]

Procedure

As a matter of practice, the objection to production on the basis of privilege is taken after the witness has attended court with the documents in obedience to the subpoena.[180] The documents are produced to the court, subject to the objection. The privilege claim is not made on motion; the grounds for the objection are taken on oath "so that the court may judge of their sufficiency, for if the witness produces the document he produces it to the court and not to the parties".[181] The party at whose instance the subpoena was issued is entitled to cross-examine the witness.[182] Although it is a matter which remains within the discretion of the judge, the practice nowadays is that a witness may be represented by counsel.[183]

Some Illustrations

Members of the Houses of Parliament have always been entitled to decline to attend in answer to a subpoena, and to maintain that refusal throughout the current session of the House. This privilege applies to *subpoenas duces tecum* as well as to *subpoenas ad testificandum*.[184]

Of great importance in the nineteenth century, and the centre of much litigation, was the privilege against the production of title deeds.[185] The privilege was held variously to apply to deeds to real property,[186] warrants of attorney,[187] wills,[188] and composition deeds.[189] If the claim was properly founded the party would be left to rely upon secondary evidence, if available.[190] With the increasing use of public registration of title, the privilege in relation to subpoenas has lost much of its earlier practical importance.[191]

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[179] While as a practical matter, from the viewpoint of a witness, there is no difference between a privilege claim and a challenge to the subpoena itself, from the viewpoint of the party there may well be an important difference with respect to the admissibility of secondary evidence.

[180] *James* v. *Cowan; In Re Botten supra* n. 13; *Miles* v. *Dawson* (1795) 1 Esp. 405; *Commissioner for Railways* v. *Small supra* n. 7; *National Employers Mutual General Insurance Association Limited* v. *Waind supra* n. 2.

[181] *O'Born* v. *Commissioner for Government Transport supra* n. 154.

[182] *Griffith* v. *Ricketts* (1849) 7 Hare 299; *Pickering* v. *Noyes* (1823) 1 B. & C. 262; *Pocock* v. *Pocock* [1950] O.R. 734; *Reg.* v. *Russell* (1840) 3 Jr. 604.

[183] *Commissioner for Railways* v. *Small supra* n. 7; *Senior* v. *Holdsworth; Ex Parte I.T.N. supra* n. 131; *Coonan* v. *Richardson* [1947] Q.W.N. 19; *Wilkinson* v. *Wilkinson* (1901) 1 S.R.N.S.W.Eq. 285; *McLeod* v. *Phillips* (1905) 5 S.R.N.S.W. 503; *cf. Christie* v. *Ford* (1957) 2 F.L.R. 202; *Doe d. Rowcliffe* v. *Earl of Egremont* (1841) 2 M. & R. 386.

[184] *R.* v. *Barton supra* n. 1; *Di Nardo* v. *Downer* [1966] V.R. 351; *R. (Tolfree)* v. *Clark, Conent, and Drew* [1943] 3 D.L.R. 684.

[185] *Rex* v. *Inhabitants of Upper Bodington* (1826) 8 Dowl. & Ry. 726; *Roberts* v. *Simpson* (1817) 2 Stark. 203; *Hodson* v. *Warden* 1 D. & L. 286.

[186] *Doe d. William Loscombe* v. *Clifford* (1847) 2 C. & K. 498; *Pickering* v. *Noyes supra* n. 182.

[187] *Miles* v. *Dawson* (1795) 1 Esp. 405.

[188] *Doe d. Bowdler* v. *Owen* (1837) 8 C. & P. 110; *Doe d. Carter* v. *James* (1837) 2 M. & R. 47.

[189] *Harris* v. *Hill* (1822) 3 Stark. 140.

[190] *Phelps* v. *Prew supra* n. 17; *Lockett* v. *Cary supra* n. 89; *Ditcher* v. *Kenrick supra* n. 17.

[191] Indeed in the United States, with a system of compulsory registration of title to land, no separate head of privilege has developed: *Wigmore op. cit. supra* n. 4 at s. 2211.

The right to claim legal professional privilege, in respect of documents made the subject of a *subpoena duces tecum*, is of immense practical importance. With the single exception of a recent English criminal decision, in which subpoenaed documents were not protected by a privilege claim for they tended to show the defendant's innocence,[192] the claim, if properly made, has always been upheld.[193]

Courts are often faced with the conflict of the public interest in the administration of justice, reflected through the *subpoena duces tecum*, and the public interest in maintaining confidentiality in matters of state, reflected through Crown privilege. From documents on the Crimean War,[194] to tax returns,[195] to cabinet documents,[196] to deportation files,[197] to police records,[198] to papers on dried fruit,[199] the privilege claim, if properly made, has been upheld uniformly.[200]

Finally, in a "Criminal or Penal Caufe, the Defendant is never forced to produce any Evidence; though he fhould hold it in his Hands in Court".[201] The privilege is equally applicable, and important, to witnesses who hold a belief, based upon reasonable grounds, that they may be subject to such proceedings. The self-incrimination objection must be taken by the witness, and not by his counsel.[202] The privilege is that of the witness and cannot be claimed on the ground that the document tends to incriminate another.[203] And, as indicated by Lord Mansfield, the privilege applies to both criminal,[204] and penal[205] proceedings. In relation to *subpoenas duces tecum*, it has been held to be good in cases of fraud,[206] and in prosecutions under the Stamp Act,[207] and in respect of penalty proceedings under the Trade Practices Act 1974.[208] It extends to any documents that may form a link in the chain of evidence;[209] but it provides no immunity to documents which may expose the witness to penal proceedings in a foreign state.[210]

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[192] *Reg.* v. *Barton, supra* n. 1.

[193] *Grant* v. *Downs* (1976) 135 C.L.R. 674; *National Employers Mutual General Insurance Association Limited* v. *Waind* (1979) 24 A.L.R. 86.

[194] *Beatson* v. *Skene* (1860) 6 Jur. Pt. 1 N.S. 780; *Reg.* v. *Lewes Justices: Ex Parte Home Secretary* [1973] A.C. 388.

[195] *R.* v. *Snider* [1953] 2 D.L.R. 9; *Wilkinson* v. *Wilkinson supra* n. 183; *McLeod* v. *Phillips supra* n. 183.

[196] *Lanyon Pty. Limited* v. *Commonwealth of Australia* (1973) 3 A.L.R. 58.

[197] *Haj-Ismail* v. *Minister of Immigration & Ethnic Affairs* (1981) 36 A.L.R. 516.

[198] *Ex Parte Attorney-General of N.S.W.; Re Cook* [1967] 2 N.S.W.L.R. 689; *Haj-Ismail* v. *Madigan* (1982) 45 A.L.R. 379.

[199] *James* v. *Cowan; In Re Botten supra* n. 13.

[200] And see *Christie* v. *Ford supra* n. 183; *O'Flaherty* v. *McBride* (1920) 28 C.L.R. 283; *Broome* v. *Broome* [1955] P. 190; *Ex Parte Brown; Re Tunstall* (1965) 84 W.N. Pt. 2 N.S.W. 13.

[201] *Doe d. Haldance & Urry* v. *Harvey* (1784) 4 Burr. 2484 at 2489 *per* Lord Mansfield.

[202] *Thomas* v. *Newton* M. & M. 48; *R.* v. *Adey* 1 M. & R. 94; *R.* v. *Kinglake* (1870) 22 L.T.R.N.S. 335.

[203] *Rochfort* v. *Trade Practices Commission supra* n. 9.

[204] *Ex Parte Reynolds; In Re Reynolds* (1882) 20 Ch. D. 294; *R.* v. *Purnell* (1749) 1 W.B.I. 37; *Roe* v. *Harvey* (1769) 4 Burr. 2484.

[205] *W.M. Collins & Sons Pty. Limited* v. *T. & T. Mining Corp. Pty. Limited* (1971) 64 Qd. R. 427; *Cavendish* v. *Cavendish* [1926] P. 10; and see *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.* [1978] 2 W.L.R. 81.

[206] *R.* v *Dixon* (1765) 3 Burr. 1687.

[207] *Whitaker* v. *Izod* (1809) 2 Taunt. 115.

[208] *Trade Practices Commission* v. *T.N.T. Management Pty. Limited et al. supra* n. 104.

[209] *The King of Two Sicilies* v. *Willcox* (1851) 15 Jur. 214.

[210] *Ibid.*

7. An Observation on Contemporary Subpoena Cases

It is implicit in the judgment of Moffitt, P. in *National Employers Mutual General Insurance Association Limited* v. *Waind*,[211] and was the strongly held view of Wigmore,[212] that the essence of all the learning on subpoenas is abuse of process.

When the original premise is accepted, that society has demanded, as a paramount obligation, a testimonial duty from its citizens, in the interests of the ascertainment of truth and the proper administration of justice; it follows, as the night the day, that conflict will not arise in the enforcement of that obligation, but will arise rather, in policing abuse of the right concomitant to that obligation. In derogation from that paramount obligation, the law identified early the exceptions, and their scope, which were tolerable, and indeed necessary for the obligation to have credibility and to survive. Those exceptions were primarily the privilege immunities,[213] and have changed little in formulation over time. The competing interests, both public and private, were then settled.

All the learning on the custodianship of documents, extraneous purposes, and oppressive use must be considered as the courts' enforcement of the boundaries outside which the right of a litigating party to issue a subpoena, and hence, as an Hohfeldian consequence, the obligation of a witness to comply with a subpoena, cannot exist. This is not simply the obverse or a reflex of the private rights of third party witnesses. For, on this view, there can be no question of the court striking a balance between the private interest and the public interest.

With the single exception of one wavering and indeterminate area, the courts have been dogmatic in insisting upon the paramountcy of the public interest. It is folly to think, and it would be intolerable were it the case, that the law on *subpoenas duces tecum* now involved a balancing of the interests of third party witnesses, with the interests of the litigating party and of the public. That law concerns no more than the protection of the public interest, by ensuring strict adherence to the permissible limits within which the subpoena process may be utilised. Those limits were settled long ago, and are no longer litigated.

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[211] *Supra* n. 2.
[212] *Op. cit. supra* n. 4 at s. 2190.
[213] See *In Re Equitable Plan Co.* 185 F. Supp. 57 at 60 (1960).