

## CHAPTER 35

### RECOVERY OF EVIDENCE

#### Application and interpretation of this Chapter

**35.1.**-(1) This Chapter applies to the recovery of any evidence in a cause depending before the court.

(2) In this Chapter, "the Act of 1972" means the Administration of Justice (Scotland) Act 1972(a).

#### Applications for commission and diligence for recovery of documents or for orders under section 1 of the Act of 1972

**35.2.**-(1) An application by a party for-

- (a) a commission and diligence for the recovery of a document, or
- (b) an order under section 1 of the Act of 1972(b),

shall be made by motion.

(2) At the time of enrolling a motion under paragraph (1), a specification of-

- (a) the document or other property sought to be inspected, photographed, preserved, taken into custody, detained, produced, recovered, sampled or experimented on or with, as the case may be, or
- (b) the matter in respect of which information is sought as to the identity of a person who might be a witness or a defender,

shall be lodged in process.

(3) A copy of the specification lodged under paragraph (2) and the motion made under paragraph (1) shall be intimated by the applicant to-

- (a) every other party;
- (b) in respect of an application for an order under section 1(1) of the Act of 1972, any third party haver; and
- (c) where necessary –
  - (i) the Advocate General for Scotland (in a case where the document or other property sought is in the possession of either a public authority exercising functions in relation to reserved matters within the meaning of Schedule 5 to the Scotland Act 1998, or a cross-border public authority within the meaning of section 88(5) of that Act); or
  - (ii) the Lord Advocate (in any other case),

and if there is any doubt, both.

(4) Where the Lord Ordinary grants a motion made under paragraph (1), in whole or in part, in an action before calling of the summons, he may order the applicant to find such caution or give such other security as he thinks fit.

(5) The decision of the Lord Ordinary on a motion under paragraph (1) in an action before calling of the summons shall be final and not subject to review.

(6) The Advocate General for Scotland or the Lord Advocate or both, as appropriate, may appear at the hearing of any motion under paragraph (1).

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(a) 1972 c.59.

(b) Section 1 of the Administration of Justice (Scotland) Act 1972 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73), section 19 and Schedule 2, paragraph 15.

### **Optional procedure before executing commission and diligence**

**35.3.-**(1) Subject to rule 35.3A (optional procedure where there is a party litigant or confidentiality is claimed), this rule applies where a party has obtained a commission and diligence for the recovery of a document on an application made under rule 35.2(1)(a).

(2) Such a party may, at any time before executing the commission and diligence against a haver, serve on the haver an order in Form 35.3-A (in this rule referred to as “the order”).

(3) The order and a copy of the specification referred to in rule 35.2(2), as approved by the court, shall be served on the haver or his known agent and shall be complied with by the haver in the manner and within the period specified in the order.

(4) Not later than the day after the date on which the order, and any document recovered, is received from a haver by the party who obtained the order, that party-

- (a) shall give written intimation of that fact in Form 35.3-B to the Deputy Principal Clerk and every other party; and
- (b) shall-
  - (i) if the document has been sent by post, send a written receipt for the document in Form 35.3-C to the haver; or
  - (ii) if the document has been delivered by hand, give a written receipt in Form 35.3-C to the person delivering the document.

(5) Where the party who has recovered any such document does not lodge it in process within 14 days of receipt of it, he shall-

- (a) forthwith give written intimation to every other party that that party may borrow, inspect or copy the document within 14 days after the date of that intimation; and
- (b) in so doing, identify the document.

(6) Where any party, who has obtained any such document under paragraph (5), wishes to lodge the document in process, he shall-

- (a) lodge the document within 14 days after receipt of it; and
- (b) at the same time, send a written receipt for the document in Form 35.3.-D to the party who obtained the order.

(7) Where-

- (a) no party wishes to lodge or borrow any such document under paragraph (5), the document shall be returned to the haver by the party who obtained the order within 14 days after the expiry of the period specified in sub-paragraph (a) of that paragraph; or
- (b) any such document has been uplifted by another party under paragraph (5) and that party does not wish to lodge it in process, the document shall be returned to the haver by that party within 21 days after the date of receipt of it by him.

(8) Any such document lodged in process shall be returned to the haver by the party lodging it within 14 days after the expiry of any period allowed for appeal or reclaiming or, where an appeal or reclaiming motion has been marked, from the disposal of any such appeal or reclaiming motion.

(9) If any party fails to return any such document as provided for in paragraph (7) or (8), the haver shall be entitled to apply by motion (whether or not the cause is in dependence) for an order that the document be returned to him and for the expenses occasioned by that motion.

(10) The party holding any such document (being the party who last issued a receipt for it) shall be responsible for its safekeeping during the period that the document is in his custody or control.

(11) If the party who served the order is not satisfied that-

- (a) full compliance has been made with the order, or
- (b) adequate reasons for non-compliance have been given,

he may execute the commission and diligence under rule 35.4.

(12) Where an extract from a book of any description (whether the extract is certified or not) is produced under the order, the court may, on the motion of the party who served the order, direct that that party shall be allowed to inspect the book and take copies of any entries falling within the specification.

(13) Where any question of confidentiality arises in relation to a book directed to be inspected under paragraph (12), the inspection shall be made, and any copies shall be taken, at the sight of the commissioner appointed in the interlocutor granting the commission and diligence.

(14) The court may, on cause shown, order the production of any book (not being a banker's book or book of public record) containing entries falling under a specification, notwithstanding the production of a certified extract from that book.

### **Optional procedure where there is a party litigant or confidentiality is claimed**

**35.3A.**-(1) This rule shall apply where-

- (a) any of the parties to the action is a party litigant; or
- (b) confidentiality is claimed for any document in the possession of a haver.

(2) Rule 35.3 (optional procedure before executing commission and diligence) shall not apply where paragraph (1) of this rule applies.

(3) The party who has obtained a commission and diligence for the recovery of a document on an application made under rule 35.2(1)(a) may, at any time before executing it against a haver, serve on the haver an order in Form 35.3A-A (in this rule referred to as "the order").

(4) The order and a copy of the specification referred to in rule 35.2(2), as approved by the court, shall be served on the haver or his known agent and shall be complied with by the haver in the manner and within the period specified in the order.

(5) Not later than the day after the date on which the order, and any document recovered, is received from a haver by the Deputy Principal Clerk, he shall give written intimation of that fact to each party.

(6) No party, other than the party who served the order, may uplift any such document until after the expiry of 7 days after the date of intimation under paragraph (5).

(7) Where the party who served the order fails to uplift any such document within 7 days after the date of intimation under paragraph (5), the Deputy Principal Clerk shall give written intimation of that failure to every other party.

(8) Where no party has uplifted any such document within 14 days after the date of intimation under paragraph (7), the Deputy Principal Clerk shall return it to the haver who delivered it to him.

(9) Where a party who has uplifted any such document does not wish to lodge it, he shall return it to the Deputy Principal Clerk who shall-

- (a) give written intimation of the return of the document to every other party; and
- (b) if no other party uplifts the document within 14 days after the date of intimation, return it to the haver.

(10) Any such document lodged in process shall be returned to the haver by the party lodging it within 14 days after the expiry of any period allowed for appeal or reclaiming or, where an appeal or reclaiming motion has been marked, from the disposal of any such appeal or reclaiming motion.

(11) If any party fails to return any such document as provided for in paragraph (9) or (10), the haver shall be entitled to apply by motion (whether or not the cause is in dependence) for an order that the document be returned to him and for the expenses occasioned by that motion.

(12) The party holding any such document (being the party who last issued a receipt for it) shall be responsible for its safekeeping during the period that the document is in his custody or control.

- (13) If the party who served the order is not satisfied that-
- (a) full compliance has been made with the order, or
  - (b) adequate reasons for non-compliance have been given,

he may execute the commission and diligence under rule 35.4.

(14) Where an extract from a book of any description (whether the extract is certified or not) is produced under the order, the court may, on the motion of the party who served the order, direct that that party shall be allowed to inspect the book and take copies of any entries falling within the specification.

(15) Where any question of confidentiality arises in relation to a book directed to be inspected under paragraph (14), the inspection shall be made, and any copies shall be taken, at the sight of the commissioner appointed in the interlocutor granting the commission and diligence.

(16) The court may, on cause shown, order the production of any book (not being a banker's book or book of public record) containing entries falling under a specification, notwithstanding the production of a certified extract from that book.

#### **Execution of commission and diligence for recovery of documents**

**35.4.**-(1) The party who seeks to execute a commission and diligence for recovery of a document obtained on an application under rule 35.2(1)(a) shall-

- (a) provide the commissioner with a copy of the specification, a copy of the pleadings (including any adjustments and amendments) and a certified copy of the interlocutor of his appointment;
- (b) fix a diet for the execution of the commission in consultation with every other party;
- (c) instruct the clerk and any shorthand writer; and
- (d) be responsible, in the first instance, for the fees of the commissioner, his clerk and any shorthand writer.

(2) The interlocutor granting such a commission and diligence shall be sufficient authority for citing a haver to appear before the commissioner.

(3) A haver shall be cited to appear at a commission for the recovery of documents by service on him of a citation in Form 35.4-A-

- (a) by registered post or the first class recorded delivery service; or
- (b) personally, by messenger-at-arms.

(4) A certificate of citation of a haver-

- (a) under paragraph (3)(a) shall be in Form 35.4-B; and
- (b) under paragraph (3)(b) shall be in Form 35.4-C.

(5) There shall be served on the haver with the citation a copy of the specification and, where necessary for a proper understanding of the specification, a copy of the pleadings (including any adjustments and amendments).

(6) The agent for a party, or a party litigant, as the case may be, shall be personally liable, in the first instance, for the fees and expenses of a haver cited to appear at a commission for that party.

(7) The parties and the haver shall be entitled to be represented by counsel or other person having a right of audience, or an agent, at the execution of the commission.

(8) At the commission, the commissioner shall-

- (a) administer the oath *de fidei administratione* to the clerk and shorthand writer appointed for the commission; and
- (b) administer to the haver the oath in Form 35.4-D, or, where the haver elects to affirm, the affirmation in Form 35.4-E.

(9) The report of the execution of the commission and diligence, any document recovered and an inventory of that document, shall be sent by the commissioner to the Deputy Principal Clerk.

(10) Not later than the day after the date on which such a report, any document recovered and an inventory of that document are received by the Deputy Principal Clerk, he shall give written intimation to the parties that he has received them.

(11) No party, other than the party who served the order, may uplift such a document until after the expiry of 7 days after the date of intimation under paragraph (10).

(12) Where the party who served the order fails to uplift such a document within 7 days after the date of intimation under paragraph (10), the Deputy Principal Clerk shall give written intimation of that failure to every other party.

(13) Where no party has uplifted such a document within 14 days after the date of intimation under paragraph (12), the Deputy Principal Clerk shall return it to the haver.

(14) Where a party who has uplifted such a document does not wish to lodge it, he shall return it to the Deputy Principal Clerk who shall-

- (a) give written intimation of the return of the document to every other party; and
- (b) if no other party uplifts the document within 14 days of the date of intimation, return it to the haver.

**Execution of orders for production or recovery of documents or other property under section 1(1) of the Act of 1972**

**35.5.**-(1) An order under section 1(1) of the Act of 1972 for the production or recovery of a document or other property shall grant a commission and diligence for the production or recovery of that document or other property.

(2) Rule 35.3 (optional procedure before executing commission and diligence) and rule 35.4 (execution of commission and diligence for recovery of documents) shall apply to an order to which paragraph (1) applies as they apply to a commission and diligence for the recovery of a document.

**Execution of orders for inspection etc. of documents or other property under section 1(1) of the Act of 1972**

**35.6.**-(1) An order under section 1(1) of the Act of 1972 for the inspection or photographing of a document or other property, the taking of samples or the carrying out of any experiment thereon or therewith, shall authorise and appoint a specified person to photograph, inspect, take samples of, or

carry out any experiment with or on, any such document or other property, as the case may be, subject to such conditions, if any, as the court thinks fit.

(2) A certified copy of the interlocutor granting such an order shall be sufficient authority for the person specified to execute the order.

(3) When such an order is executed, the party who obtained the order shall serve on the haver a certified copy of the interlocutor granting it, a copy of the specification and, where necessary for a proper understanding of the specification, a copy of the pleadings (including any adjustments and amendments).

### **Execution of orders for preservation etc. of documents or other property under section 1(1) of the Act of 1972**

**35.7.**-(1) An order under section 1(1) of the Act of 1972 for the preservation, custody and detention of a document or other property shall grant a commission and diligence for the detention and custody of that document or other property.

(2) The party who has obtained an order under paragraph (1) shall-

- (a) provide the commissioner with a copy of the specification, a copy of the pleadings (including any adjustments and amendments) and a certified copy of the interlocutor of his appointment;
- (b) be responsible for the fees of the commissioner and his clerk; and
- (c) serve a copy of the order on the haver.

(3) The report of the execution of the commission and diligence, any document or other property taken by the commissioner and an inventory of such property, shall be sent by the commissioner to the Deputy Principal Clerk for the further order of the court.

### **Confidentiality**

**35.8.**-(1) Where confidentiality is claimed for any document or other property sought to be recovered under any of the following rules, such document or other property shall, where practicable, be enclosed in a sealed packet:-

- rule 35.3 (optional procedure before executing commission and diligence),
- rule 35.4 (execution of commission and diligence for recovery of documents),
- rule 35.5 (execution of orders for production or recovery of documents or other property under section 1(1) of the Act of 1972),
- rule 35.7 (execution of orders for preservation etc. of documents or other property under section 1(1) of the Act of 1972)

(2) A motion to have such a sealed packet opened up or such recovery allowed may be made by-

- (a) the party who obtained the commission and diligence; or
- (b) any other party after the date of intimation by the Deputy Principal Clerk under rule 35.3(5) or 35.4(12) (intimation of failure to uplift documents).

(3) In addition to complying with rule 23.3 (intimation of motions), the party enrolling such a motion shall intimate the terms of the motion to the person claiming confidentiality by registered post or the first class recorded delivery service.

(4) The person claiming confidentiality may oppose a motion made under paragraph (2).

### **Warrants for production of original documents from public records**

**35.9.**-(1) Where a party seeks to obtain from the keeper of any public record production of the original of any register or deed in his custody for the purposes of a cause, he shall apply to the court by motion.

(2) Written intimation of a motion under paragraph (1) shall be given to the keeper of the public record concerned at least 2 days before the motion is enrolled.

(3) Where it appears to the court that it is necessary for the ends of justice that a motion under this rule should be granted, authority shall be given to such keeper, on production of a certified copy of the interlocutor granting the motion, to produce or exhibit, as the case may be, the original register or deed to the court.

(4) The expense of the production or exhibition of such an original register or deed shall be met, in the first instance, by the party who applied by motion under paragraph (1).

### **Warrants for transmission of processes**

**35.10.**-(1) A party who seeks to lodge in process any process in the custody of the Keeper of the Records, or any process depending or which depended in any inferior court in Scotland, may apply by motion to the court for a warrant to authorise and direct the Keeper of the Records or the clerk of the inferior court, as the case may be, on production of a certified copy of the interlocutor granting the motion, to transmit that process to the Deputy Principal Clerk.

(2) A party who enrolls a motion under paragraph (1) shall give written intimation of the motion to the Keeper of the Records or the clerk of the inferior court, as the case may be, at least 2 days before the motion is enrolled.

(3) The Deputy Principal Clerk shall grant a receipt for any process transmitted to him under an order made under paragraph (1) and lodge it in the process of the cause.

(4) No process transmitted under paragraph (1) may be borrowed.

(5) After a process transmitted under paragraph (1) ceases to be required, the Deputy Principal Clerk shall return it to the Keeper of the Records or the clerk of the inferior court, as the case may be.

### **Commissions for examination of witnesses**

**35.11.**-(1) This rule applies to a commission-

- (a) to take the evidence of a witness on a ground mentioned in section 10(b) of the Act of 1988 (a);
- (b) in respect of the evidence of a witness which is in danger of being lost, to take the evidence to lie *in retentis*; or
- (c) on special cause shown, to take the evidence of a witness on a ground other than one mentioned in sub-paragraph (a) or (b).

(2) An application by a party for a commission to examine a witness shall be made by motion; and that party shall specify in the motion the name and address of at least one proposed commissioner for approval and appointment by the court.

(2A) A motion under paragraph (2) may include an application for authority to record the proceedings before the commissioner by video recorder.

(3) Where a motion under paragraph (2) is made in an action before calling of the summons-

- (a) the applicant shall give written intimation of the motion to every other person named in the instance; and
- (b) the decision of the Lord Ordinary shall be final and not subject to review.

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(a) 1988 c.36.

(4) The interlocutor granting such a commission shall be sufficient authority for citing the witness to appear before the commissioner.

(5) A witness shall be cited to give evidence at a commission by service on him of a citation in Form 35.11-A-

- (a) by registered post or the first class recorded delivery service; or
- (b) personally, by a messenger-at-arms.

(6) The certificate of citation of a witness-

- (a) under paragraph (5)(a) shall be in Form 35.11-B; and
- (b) under paragraph (5)(b) shall be in Form 35.11-C.

(7) The agent for a party, or a party litigant, as the case may be, shall be personally liable, in the first instance, for the fees and expenses of a witness cited to appear at a commission for that party.

(8) At the commission, the commissioner shall-

- (a) administer the oath *de fidei administratione* to the clerk and any shorthand writer appointed for the commission; and
- (b) administer to the witness the oath in Form 35.4-D, or, where the witness elects to affirm, the affirmation in Form 35.4-E.

(9) In a cause involving the collision of ships, such an application shall be granted on condition, where necessary, that the applicant shall, at least 24 hours before the evidence is taken, lodge in process a preliminary act which the commissioner shall be entitled to open before the witness is examined.

(10) Where a commission is granted for the examination of a witness, the court may, on the motion of any party and on cause shown, dispense with interrogatories.

### **Commissions on interrogatories**

**35.12.**-(1) Where interrogatories have not been dispensed with, the party who obtained the commission to examine a witness under rule 35.11 shall lodge draft interrogatories to be adjusted at the sight of the clerk of court.

(2) Any other party may lodge cross-interrogatories to be adjusted at the sight of the clerk of court.

(3) The interrogatories and any cross-interrogatories, when adjusted, shall be extended and returned to the clerk of court for approval.

(4) The party who has obtained the commission shall-

- (a) provide the commissioner with a copy of the pleadings (including any adjustments and amendments), the approved interrogatories and any cross-interrogatories and a certified copy of the interlocutor of his appointment;
- (b) instruct the clerk; and
- (c) be responsible, in the first instance, for the fee of the commissioner and his clerk.

(5) The commissioner shall, in consultation with the parties, fix a diet for the execution of the commission to examine the witness.

(6) The executed interrogatories, any document produced by the witness and an inventory of that document, shall be sent by the commissioner to the Deputy Principal Clerk.

(7) Not later than the day after the date on which the executed interrogatories, any document and an inventory of that document, are received by the Deputy Principal Clerk, he shall give written intimation to each party that he has received them.

(8) The party who obtained the commission to examine the witness shall lodge in process-

- (a) the report of the commission; and
- (b) the executed interrogatories and any cross-interrogatories.

### **Commissions without interrogatories**

**35.13.**-(1) Where interrogatories have been dispensed with, the party who has obtained a commission to examine a witness under rule 35.11 shall-

- (a) provide the commissioner with a copy of the pleadings (including any adjustments and amendments) and a certified copy of the interlocutor of his appointment;
- (b) fix a diet for the execution of the commission in consultation with the commissioner and every other party;
- (c) instruct the clerk and any shorthand writer; and
- (d) be responsible, in the first instance, for the fees of the commissioner, his clerk and any shorthand writer.

(2) All parties shall be entitled to be present and represented by counsel or other person having a right of audience, or agent, at the execution of the commission.

(3) The report of the execution of the commission, any document produced by the witness and an inventory of that document, shall be sent by the commissioner to the Deputy Principal Clerk.

(4) Not later than the day after the date on which such a report, any document and an inventory of that document are received by the Deputy Principal Clerk, he shall give written intimation to each party that he has received them.

(5) The party who obtained the commission to examine the witness shall lodge the report in process.

### **Evidence taken on commission**

**35.14.**-(1) Subject to the following paragraphs of this rule and to all questions of relevancy and admissibility, evidence taken on commission under rule 35.12 or 35.13 may be used as evidence at any proof or jury trial of the cause.

(2) Any party may object to the use of such evidence at a proof or jury trial; and the objection shall be determined by the court.

(3) Such evidence shall not be used at a proof or jury trial if the witness becomes available to attend the diet of proof or jury trial, as the case may be.

(4) A party may use such evidence in accordance with the preceding paragraphs of this rule notwithstanding that it was obtained at the instance of another party.

### **Letters of request**

**35.15.**-(1) This rule applies to an application for a letter of request to a court or tribunal outside Scotland to obtain evidence of the kind specified in paragraph (2), being evidence obtainable within the jurisdiction of that court or tribunal, for the purposes of a cause depending before the Court of Session.

(2) An application to which paragraph (1) applies may be made in relation to a request-

- (a) for the examination of a witness,

- (b) for the inspection, photographing, preservation, custody, detention, production or recovery of, or the taking of samples of, or the carrying out of any experiment on or with, a document or other property, as the case may be,
- (c) for the medical examination of any person,
- (d) for the taking and testing of samples of blood from any person, or
- (e) for any other order for obtaining evidence, for which an order could be obtained in the Court of Session.

(3) Such an application shall be made by minute in Form 35.15-A with a proposed letter of request in Form 35.15-B.

(4) It shall be a condition of granting a letter of request that the agent for the applicant, or a party litigant, as the case may be, shall be personally liable, in the first instance, for the whole expenses which may become due and payable in respect of the letter of request to the court or tribunal obtaining the evidence and to any witness or haver who may be examined for the purpose; and he shall consign into court such sum in respect of such expenses as the court thinks fit.

(5) Unless the court or tribunal to which a letter of request is addressed is a court or tribunal in a country or territory-

- (a) where English is an official language, or
- (b) in relation to which the Deputy Principal Clerk certifies that no translation is required, then the applicant shall, before the issue of the letter of request, lodge in process a translation of that letter and any interrogatories and cross-interrogatories into the official language of that court or tribunal.

(6) The letter of request when issued, any interrogatories and cross-interrogatories adjusted as required by rule 35.12 and the translations (if any), shall be forwarded by the Deputy Principal Clerk to such person and in such manner as the Lord President may direct.

#### **Applications for requests that evidence be taken under the Council Regulation**

**35.16.-** (1) In this rule -

‘the Council Regulation’ means the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>(a)</sup><sup>c</sup>

‘Member State’ has the same meaning as in Article 1(3) of the Council Regulation;

‘requested court’ has the same meaning as in Article 2(1) of the Council Regulation.

(2) This rule applies to an application under the Council Regulation for a request to a requested court in a Member State other than the United Kingdom for the purposes of a cause depending before the Court of Session.

(3) An application to which paragraph (2) applies shall be made by minute in Form 35.16-A with a proposed request in form A (request for the taking of evidence) or form I (request for direct taking of evidence) set out in the Annex to the Council Regulation.

(4) It shall be a condition of granting an application for a request that the agent for the applicant, or a party litigant, as the case may be, shall be personally liable, in the first instance, for any reimbursement required by the requested court in respect of any fees paid to experts and interpreters and the costs occasioned by the use of any requested special procedure in executing the request for evidence, or the use of requested communications technology at the performance of the taking of evidence; and that he shall consign into court any such sum as is required by the requested court as deposit or advance towards the costs of executing the request.

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<sup>c</sup> (a) O.J. L 174, 27.06.2001. P.1.

(5) Unless the requested court is in a country or territory -

- (a) where English is an official language, or
- (b) in relation to which the Deputy Principal Clerk certifies that no translation is required.

then the applicant shall before the issue of the request, lodge in process a translation of the request and any interrogatories and cross-interrogatories into the official language of that country or territory.

(6) Where an application under this rule has been granted, the request shall be forwarded by the Deputy Principal Clerk to-

- (a) the requested court; or
- (b) the central body or component authority designated by the other Member State to be responsible for taking decisions on requests to take evidence directly.

(7) The Deputy Principal Clerk shall, as soon as reasonably practicable after receipt of any communication from the requested court, send written intimation of that communication to the parties.

(8) If a request is made to take the evidence of a witness directly in another Member State, the Deputy Principal Clerk shall intimate to the witness who is to give evidence, a notice in Form 35.16-B and the witness shall return Form 35.16-C to the Deputy Principal Clerk, within 14 days after the date of intimation of the notice.”.