THE PRODUCTION OF BOOKS AND PAPERS IN CIVIL CASES.

The right of the people to be secure from unreasonable searches and the seizure of their papers is so firmly established in this country, and so seldom violated that the importance of the constitutional provision is often lost sight of in litigation of civil matters. In fact, it is not infrequent that demands are made by one side, in the most informal way, for the production of papers from the other and for *subpoena duces tecum* for the purpose of securing papers from strangers for use as evidence, and without any regard to the constitutional provisions. However, when these are invoked the court scrupulously observes them.

The fourth amendment to the Federal Constitution and Article II, Section 11, of the Bill of Rights of Missouri contain similar language, and these form the bases of most of the decisions concerning the method and procedure for obtaining the production of books and papers for use at the trial of a cause, and if the granting of the order, or the *subpoena duces tecum* would constitute an unreasonable search or seizure it would be denied.

So jealous are the courts of these rights that an order upon adverse parties or a *subpoena duces tecum* will not issue upon an oral application, nor can the clerk issue such subpoena as he usually does in the case of a *subpoena ad testificandum.* The application must be made to the court, and in writing, and verified by affidavit, and it is upon the inspection of such petition that the court determines the right of the party to have the papers produced. Owyhee Land Co. v. Tautphus, 109 Fed. Rep. 547; 48 C. C. A. 535.

The method of obtaining the production of papers from parties to a suit is usually regulated by statute (R. S. Mo. 1909, Sec. 1944 *et seq.*), and third parties are brought in with their papers upon *subpoenas duces tecum,* though it has been

held that the papers of a party to a suit may also be obtained by a *subpoena duces tecum.* Murray v. Elston, 23 N. J. Eq. 212; Bonstell v. Lynde, 8 How. Pr. 226. However, whether an order is made on a party to a suit or a *subpoena duces tecum* is issued for a stranger, the same tests are applied to the petition, and in each instance it must show that the constitution would not be violated, else the seizure would be deemed unreasonable. The same rules apply also to petitions for the inspection of papers, and so far as the authorities reveal it, applies also to search warrants. This article is confined, however, to the production of books and papers in civil cases.

To begin with, it must be shown by the petition that the papers are material evidence and relevant to the issues. Hale v. Henkel, 201 U. S. 43; Owyhee Land Co. v. Tautphus, *supra;* Pegram v. Carson, 18 How. Pr. 519; Bas v. Steele, 3 Washt. C. C. 381.

It is not enough that the petition states that the petitioner believes the papers are material. Husson v. Fox, 15 Abb. 464; Pegram v. Carson, *supra;* Central R. Co. v. 23rd St. R. Co., 53 How. Pr. 45. Nor is it sufficient that the petition alleges merely that such books and documents constitute material evidence necessary at the trial. State *ex rel.* Ozark Co-operate Co. v. Wurdeman, 176 Mo. App. 540. Nor is it sufficient that the petition states merely that said papers "contains evidence relating to the merits of the action." Jenkins v. Bennett, 40 S. C. 393; U. S. v. Terminal Ry., 154 Fed. 268. Such a statement is held to be merely an opinion. Jenkins v. Bennett, *supra.* It is not enough to show that the papers would probably furnish the desired information. Dickie v. Austin, 4 Civ. Prac. R. 123. "Securing the production of papers and documents for the purpose of finding out if they contain information favorable to the party demanding them has been denominated a fishing examination, and is always regarded as an oppression and as such is always denied." Elliott on Evidence, Sec. 1410.

The petition must show the facts which will enable the Court to determine for itself, whether or not the papers are material. All of the cases with one exception hold that facts must be stated which show the papers to be material or relevant to the issues, so that the Court can upon inspection of the petition determine whether or not they are material, and unless those facts are stated in the petition it will be denied. Phelps v. Prothero, 2 De Gex & S. 290; Crocker Wheeler Co. v. Bullock, 134 Fed. 241; Dancel v. Goodyear Shoe Machinery Co., 128 Fed. 753; Brooklyn Ins. Co. v. Pierce, 7 Hun 236; Morrison v. Sturges, 26 How. Pr. 177; U. S. v. Terminal R. R., *supra;* Phelps v. Platt, 54 Barb. 557. In Morrison v. Sturges, *supra,* the Court said: "To obtain a discovery of books and papers under the provisions of the statutes, it is not enough to show that the party is advised or believes that the paper contains material evidence. Facts must be shown to support such belief. Nor is it enough that the paper may or will furnish information to obtain evidence which may be material. The paper itself must contain the evidence." In Phelps v. Platt, *supra,* it is said: "The affidavit for the discovery neither specifies nor refers to, any particular entry, nor to any particular paper, nor does it state any fact or circumstances to show the materiality or necessity of an inspection of all these books and papers," and the application was denied.

The books and papers must be described with particularity. In Elliot on Evidence, Sec. 700, it is stated the books and papers must be described with such definiteness that there can be no misunderstanding as to what papers are desired. It will not do to simply call for a large number of papers or to have the petition or *subpoena duces tecum* so indefinite that the party served would have to determine for himself what papers are desired. The leading case on this subject is that of Hale v. Henkel, 201 U. S. 43. In that case a large number of documents and papers were called for and simply described by classes, "all understandings, agreements, arrangements or contracts between various corporations." The

Court held the *subpoena duces tecum* too sweeping in its terms and unreasonable. In *Ex parte* Brown, 72 Mo. 83, a *subpoena duces tecum* requiring a party to produce all telegrams between certain parties within fifteen months, was held too indefinite, and in State v. Bragg, 51 Mo. App. 334, one which required the production of all prescriptions of a druggist within thirty days, and in State v. Davis, 117 Mo. 614, one which required prescriptions of a druggist for the past year, were held too general, and it was further held they violated Article II, Section 11, of the Bill of Rights.

In Lee v. Angas, L. R. 2 Equity Cases 59, the order requiring the production of all papers, books, accounts, letters and telegrams relating to the affairs of the plaintiff between the years of 1830 and 1862, and this *subpoena duces tecum* was held too indefinite and "too wide."

In U. S. v. Hunter, 15 Fed. 712, the witness was required to produce all telegrams received and sent from an office between November 6th and 20th. The Court said: "The subpoena should describe the telegrams required to be produced as described in the application, either naming the parties sending or receiving, if stated, and the subject matter to which they are supposed to relate, or if the parties are not known, then the subject matter and the time or periods between which they were sent and received."

In Elting v. U. S., 27 Ct. of Claims, 158, the writ required the witness to bring before the Commissioner all books, papers, documents and records relating to things done in his office by any of the parties to the suit and "which shall in any wise bear upon their claims for spoliations by the French in this court, or which may be prosecuted under the Act of January 20, 1885," and in quashing this writ the Court said that this would not only involve judgment and discretion but a study of the pleadings in seventeen cases as there were seventeen parties involved. The writ was vacated.

The only case which approved a *subpoena duces tecum* in general terms that appears to be digested is that of the United States v. Babcock, 3 Dill. 566, an opinion by Judge Dillon concurred in by Judge Treat. In that case it was held "The papers are required to be stated or specified only with that degree of certainty, which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial." The Supreme Court of Missouri, in the case of *Ex parte* Brown, 72 Mo. 83-96, declined to follow the Babcock case, and the Supreme Court of the United States, in the case of Hale v. Henkel, *supra, cited* the case of *Ex parte* Brown with approval, so that the Babcock case is no longer an authority.

When a *subpoena duces tecum* is issued for a party to produce books, he can be required to show only those portions which relate to matters in issue, and it is his privilege to have the rest of the book sealed up so that strangers may not search the portions of the book which are not relevant and not called for by the subpoena. Titus v. Cortelyou, I Barb. 444; Pynchon v. Day, 118 Ill. 9; Robbins v. Davis, 1 Blatchf. 238 Fed. Cas. No. 11,880; Elder v. Bogardus, 1 Edm. Sel. Cas. 110.

There is only one place at which a stranger can be required to produce books or papers unless otherwise provided for by statute, and that is at the trial of the case itself. In many instances *subpoenas duces tecum* have been issued for the production of books and papers before a notary or a commissioner to take depositions. The subpoena, of course, was issued by the court upon a petition, but the subpoena itself required the witness to bring the paper before the notary. The right of the court to compel the production of books and papers at the taking of depositions was questioned in a case pending in the St. Louis Circuit Court, and when a motion to quash the subpoena was overruled the Supreme Court, on application for a writ of prohibition, held the portion of the

subpoena requiring the production of the books and papers void, for the reason stated above. State *ex rel.* McCulloch v. Taylor, 268 Mo. 312. The same ruling was had in the case of State *ex rel.* Stroh v. Klene, 276 Mo. 206, both decided by the court *in banc.*

When a *subpoena duces tecum* has been improvidently issued, the remedy is for the witness to file a motion to quash the subpoena, and should he be unsuccessful in this, prohibition will lie. State *ex rel.* Stroh v. Klene, 276 Mo. 206, and State *ex rel.* Ozark Cooperage Co. v. Wurdeman, 176 Mo. App. 540.

DOUGLAS W. ROBERT.