JOHNSON STEEL STREET-RAIL CO. *v.* NORTH BRANCH STEEL CO.

(Circuit Court, W. D. Pennsylvania. November 12, 1891.)

WITNESS—SUBPŒNA DUCES TECUM.

The president of a corporation which is a party to a suit in equity may be compelled, by *subpœna duces tecum*, to produce drawings of the company material to the issue.

Sur Rule for Attachment of A. J. Moxham.

John R. Bennett, for rule.

George I. Harding and *P. C. Knox*, opposed.

REED, J. The difference between this rule and that in the case of John Fulton, (48 Fed. Rep. 191,) is that Mr. Moxham is the president of the plaintiff company, as well as the patentee named in the patent in suit, and the drawings and templates called for by the *subpœna duces tecum* are those in the possession of Mr. Moxham, or of the plaintiff company. The general rule seems to be settled that a party to the suit, or the officer of a corporation party, may be subpœnaed to bring such documents as are material to the issue. In *Murray* v. *Elston*, 23 N. J. Eq. 212, it is said that a party to a suit can be compelled by a *subpœna duces tecum* to produce papers and documents to be used on the trial as evidence, the court saying that, on general considerations of expediency and policy, it is difficult to perceive why documents and books whose production would elucidate the issues involved in the suit should be more guarded or inaccessible in the hands of parties than in the custody of others, but that the statute of New Jersey making parties competent witnesses put the matter beyond doubt. In *Bischoffsheim* v. *Brown*, 29 Fed. Rep. 343, the court said:

"Parties to suits in equity, as well as in suits at law, are now competent witnesses in the courts of the United States, by statute, and may now be examined at the instance of their adversary. As a witness a party can be compelled, by a *subpœna duces tecum*, to produce books, documents, and papers in his possession, the same as any other witness. *Merchants' Nat. Bank* v. *State Nat. Bank*, 3 Cliff. 201. He is bound to obey the writ, and be ready to produce the papers in obedience to the summons."

In the case of *Edison Electric Light Co.* v. *U. S. Electric Lighting Co.*, 44 Fed. Rep. 294, and 45 Fed. Rep. 55, Judge LACOMBE required the production of documents by the officers of the corporation plaintiff, upon a *subpœna duces tecum*. In *Wertheim* v. *Railway, etc., Co.*, 15 Fed. Rep. 716, the court held that the officers of a corporation might be compelled, by a *subpœna duces tecum*, to produce books and documents of the corporation, material to the issue. For the reasons set forth in the opinion in the matter of rule upon John Fulton, the witness must, in my judgment, produce before the examiner all drawings, in his possession or that of the plaintiff company, of rolls used in the manufacture of rails by or for the plaintiff, or the witness, as called for by the subpœna, down to the date of the patent in suit. When this is done, and the costs of this application are paid, the rule will be discharged.

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WITNESS—CONTEMPT—SPECIAL EXAMINERS.

On an examination before a special examiner a witness will be compelled, by proceedings in contempt, to answer questions that seem to be material to the issue.

Sur Rule for Attachment of George Hamilton for contempt.

John R. Bennett, for rule.

George I. Harding and *P. C. Knox*, opposed.

REED, J. In my judgment the witness Hamilton should answer the questions submitted to the court. They related to a period prior to the date of the patent in suit, and seem material and relevant to the issues of anticipation, and prior and public sale and use, raised by the defendant. In the case of *Robinson* v. *Railroad Co.*, 28 Fed. Rep. 340, Judge BUTLER said:

"In applications such as this [to compel witnesses before an examiner to answer] the court generally inclines towards the application, and requires an answer wherever it seems probable the testimony may be relevant. Care, however, must be exercised to avoid any unnecessary and improper inquiry into private affairs."

—And such I understand to have been the view entertained by him in the case of *Dobson* v. *Graham*, cited by plaintiff's counsel from a copy of the record in that case. The defendant should, however, confine his examination to the period prior to the date of granting the patent in suit. The ultimate decision, as to the effect and materiality of the testimony, of course rests with the circuit court for the eastern district, in which the case is pending, and I simply pass upon the questions so far as involved in this application, and upon a partial presentation of the case. When the witness answers the questions and pays the costs of this application the rule will be discharged.

ENGLISH *et al.* *v.* SPOKANE COMMISSION CO.

(*Circuit Court, D. Washington, E. D.* November 2, 1891.)

SALE—BREACH OF WARRANTY—WAIVER—ACCEPTANCE OF GOODS.

In an action for the price of goods, where the seller claims damages for breach of warranty, it is a question for the jury whether he waived his claim for damages by accepting the goods after he had the opportunity to inspect them and discover their defective condition.

At Law. On motion for new trial.

Jones & Voorhees, for plaintiffs.

Turner & Graves and *A. G. Avery*, for defendant.