RECORDER OF DEEDS: Required to produce original records at trial on order of subpoena duees tecum.

June 7th, 1939.

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Hon. Ernest C. Martin,
Recorder of Deeds,
Pettis County,
Sedalia, Missouri.

Dear Sir:

We desire to acknowledge receipt of your letter of March 7th, 1939, requesting an opinion, which is as follows:

> "Is the Recorder of Deeds required, when subpoenaed with a duces-tecum subpoena, to take the permanent records out of the county's vault and introduce them as evidence in the various courts in the state?"

In considering this question we should observe the following sections:

Section 3045, R. S. Mo., 1929, reads as follows:

> "The record of such re-recorded conveyances shall impart notice to the same extent and shall be admissible in evidence with like effect as the original record."

Section 3049, R. S. Mo., 1929, reads as follows:

> "Where any such instrument is acknowledged or proved, certified and recorded, in the manner herein prescribed, and it shall be shown to the court by the oath or affidavit of the party wishing to use the same, or of anyone knowing the fact, that such instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence, without further proof."

Section 3050, R. S. Mo., 1929, reads as follows:

> "Neither the certificate of the acknowledgement nor the proof of any such instrument nor the record nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted."

Section 3051, R. S. Mo., 1929, reads as follows:

> "If the party contesting the proof of any such instrument shall make it appear that such proof was taken upon the oath of an incompetent witness, neither such instrument nor the record thereof shall be received in evidence until established by other competent proof."

Section 3057, R. S. 1929, reads as follows:

> "Copies of such instruments, or of the record of the same, duly certified by the recorder of the county in which the same may have been recorded, shall, upon proof of the loss or destruction of the original instrument, be read in evidence, with like effect and on the same conditions as the original instrument."

From the first four of the above sections it appears that the Legislature contemplated the production of either the record, the transcript of the record, or a certified copy of any instrument which had been recorded and subsequently lost. Section 3057, supra, however, makes it appear that a copy of any lost instrument or of the record of the same, either of which must be duly certified by the Recorder, shall be read in evidence without the production of the original record in your office. It would appear, therefore, that as a practical matter, an application for a subpoena duces tecum requesting you to produce your original records, should be refused by the judge before whom the application is made, if a certified copy can be obtained.

In this connection, the case of State ex rel Miller v. O'Malley, 342 Mo. l. c. 646, states:

> "It may be conceded further that the court's action in issuing or denying a subpoena duces tecum is discretionary or judicial, as opposed to ministerial. For the court must pass upon: the relevancy and materiality of the evidence sought to be brought in, * * * * * *; and the hardships entailed in producing it; * * * * and, of course, the legal question whether it is subject to subpoena."

It is our opinion that whenever you are served with a subpoena duces tecum requiring you to appear with the originals of certain records, you must do so, but as a practical suggestion, it would appear that a conference with your Circuit Judge, and the production of this opinion, would result in his refusing applications for the production of your original records in the future.

Respectfully submitted,

ROBERT L. HYDER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH/RV