

POTTER v. BEAL *et al.*

(Circuit Court of Appeals, First Circuit. June 11, 1892.)

No. 20.

**1. APPEALABLE ORDERS—FINALITY OF DECREE—HOW DETERMINED.**

The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree.

**2. APPEAL—REVIEW—MODIFICATION OF JUDGMENT—CIRCUIT COURT OF APPEALS.**

On appeal from a final decree the circuit court of appeals has authority to go beyond a mere reversal, and enter such a decree as should have been rendered by the court below on the whole case, as shown by the record; and it is its duty to review all interlocutory proceedings, of every character, to which reasonable objection has been made and insisted upon.

**3. APPEALABLE ORDER—INSPECTION OF PRIVATE PAPERS—FINAL DISPOSITION.**

A national bank president, against whom an indictment was pending for violating the banking laws, brought a bill against the receiver of the bank to obtain possession of a trunk alleged to contain private papers. To this proceeding the United States district attorney was made a party defendant on his own petition, for the purpose of claiming the papers, in order that they might be laid before the grand jury. After hearing, a decree was made appointing a special master to make a private examination of the trunk, with directions to turn over to the complainant any papers belonging to him, and to the receiver such papers as belonged to the bank, and were not material to the prosecution against the president, and to reserve for further consideration such as concerned bank transactions, and were material to the prosecution. *Held* that, in so far as the decree directed papers to be turned over to the president and the receiver, it was final and appealable, since such papers might thus pass entirely beyond control of the other party claiming them.

**4. EQUITY—PARTIES—PRODUCTION OF PAPERS.**

It was improper to make the district attorney a party defendant for the purpose of procuring the papers to be laid before the grand jury. The proper course was for him to obtain a *subpoena duces tecum* from the court in which the investigation was pending, and then to make summary application to the court which had impounded the papers.

**5. CONSTITUTIONAL LAW—UNREASONABLE SEARCH—INSPECTION OF PRIVATE PAPERS.**

Under the circumstances, the order made by the court for an examination of the papers by a special master was in violation of the fundamental and constitutional rights of the litigants as to the method of trial.

**6. SAME—METHOD OF EXAMINATION.**

It appearing that before the bill was brought, the trunk had been opened by consent of the president of the bank and the receiver, and certain papers taken out in the presence of third persons, one of whom thereby obtained some knowledge of its contents, it was in the power of the court to ascertain by private examination the nature of the evidence thus to be had, and, if it proved *prima facie* admissible, to allow public testimony thereof to be given.

Appeal from the Circuit Court of the United States for the District of Massachusetts. Reversed.

In Equity. Bill by Asa P. Potter, president of the Maverick National Bank of Boston, against Thomas P. Beal, receiver thereof. Complainant alleges, in substance, that he deposited in the vaults of the bank certain personal and private papers, books, and documents, which were never the property of the bank, and that some of the papers were then in a trunk, to which he held the key; that the trunk was in the vault when the bank was closed by order of the comptroller, and that the receiver has since held it, and refused to pass it to the plaintiff; that the papers are personal in their nature, and necessary to a settlement of his private affairs; that he is charged with violations of the law, and that the government attorney is about to issue a summons calling the receiver before the grand jury with the papers in question; that he is

without adequate remedy at law, and therefore seeks the interposition of equity. The relief sought is (1) an order that the books, papers, and other documents be delivered to plaintiff; (2) that defendant Beal be enjoined from using the same before the grand jury; and (3) such other relief as may be just.

At a preliminary hearing Frank D. Allen, the United States district attorney, appeared on behalf of the government. At this hearing, which was merely on the evidence contained in the sworn bill, the prayer for a preliminary injunction was denied, and the receiver was directed to lodge the trunk with the clerk of the court, who was ordered to keep the same in its then condition until otherwise ordered. Afterwards the district attorney, on his own petition, and against plaintiff's objection, was made a party defendant, and filed a motion that the trunk be opened and delivered to the government and the grand jury, in order that all material evidence therein contained might be used in the investigation. The receiver thereafter filed his answer, alleging that the trunk came into his possession as a part of the assets of the bank; that he is advised and believes that it is his duty to examine its contents, and ascertain whether it contains property of the bank, or memoranda, books, papers, or accounts concerning its affairs. Whereupon plaintiff asked for a further hearing, that evidence might be introduced as to the nature of his possession. This hearing was had February 23, 1892, and plaintiff called one Work, a cashier, whose evidence tended to show that the trunk was kept in the bank, and not elsewhere, as the private trunk of Mr. Potter, but the witness had no knowledge of its contents; that Mr. Potter and one Kellogg, the clerk of the bank, and a secretary to Mr. Potter, and no other persons, had access to the trunk. Neither Mr. Potter nor Kellogg was called as a witness. It appeared also that the trunk, while in possession of the receiver, was opened several times by agreement, and there were taken out certain insurance policies on Mr. Potter's house, as well as certain deeds of Florida lands which one Hanson held in trust as security to certain notes held by the bank. At these times Mr. Edward W. Hutchins, counsel for the receiver, was present. He was called as witness by plaintiff, and on cross-examination stated that he then saw into the trunk, and obtained some knowledge of its contents. He was then asked to state what were some of its contents, but the question was objected to and ruled out, and he was allowed to make no statement of its contents, though he testified that on those occasions he, as well as the receiver, took part in the examination of the trunk without any objection, so far as he knew. After the conclusion of this hearing, on February 25, 1892, the court delivered an opinion, which is reported in 49 Fed. Rep. 793, and made the following order:

"With a view of ascertaining the rights of the parties to this bill in a manner not unreasonable and not in conflict with the provisions of the constitution, it is ordered that Hon. John Lowell, of Boston, be, and he hereby is, appointed master to examine the contents of the trunk referred to in said bill. That Mr. Howe, of counsel, pass the key to the clerk of this court,

and that the clerk open the trunk in the presence of the master and no other person; and that, after examination by the master, in the presence of no one, such papers, documents, and other things, if any, as are the property of the Maverick Bank, and are not material to the issue suggested in the motion of the district attorney in this matter, after being first shown to the plaintiff, be delivered to the defendant Beal by the clerk. *Second.* That such, if any, as are private, and are not the property of the Maverick Bank, together with such as do relate to Maverick Bank transactions, and are necessary and material to be introduced by Mr. Potter in his own behalf, be forthwith delivered to his counsel, Mr. Howe. *Third.* That such, if any, not included in the clauses above, as relate to Maverick Bank transactions, and in the judgment of the master are or may be material to the issue suggested in said motion of the district attorney and the proper presentment of the government's case, be sealed, returned to the trunk and the safe custody of the clerk, and that the clerk relock the trunk in the presence of the master, return the key to Mr. Howe, and hold the trunk and such contents until further directed. That the master, without further characterization, report whether or not he finds papers and documents within the classes named, and what disposition has been made thereof. The examination contemplated by this order is to be considered as part of the preliminary hearing, or, in other words, in aid thereof, and is designed to enable the parties to lay evidence before the court in a private and reasonable manner, the nature of the case being such that it would be unreasonable to ask or permit it to be done in a public manner. Upon report, the parties will be further heard as to the proper use and disposition of such, if any, papers and other things as are material to the government's case. The examination herein provided for is to be private, and no publicity whatever is to be given to it except such as is conveyed through the report of the master, of the character indicated. Before the examination contemplated by this order, the parties and their counsel may, in the presence of each other, or separately, if they so agree, make such explanation to the master as they desire as to the character of the papers, and until such examination and report, or until the foregoing order is vacated or modified, all parties are strictly enjoined from interfering in any way with the trunk or its contents."

From this order, plaintiff took the present appeal.

*Henry D. Hyde, M. F. Dickinson, Jr., and Elmer P. Howe, for appellant.*

*Edward W. Hutchins, Henry Wheeler, and Frank D. Allen, for defendant Beal.*

*Frank D. Allen, U. S. Atty., pro se.*

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

**PUTNAM, Circuit Judge.** The order of the circuit court provides that, without proof, and without hearing the parties, except the explanation authorized by it, the master shall make a secret, private examination of the contents of the trunk in question in this case; not for informing the court or counsel, but for distribution. He is directed to divide the contents into three parts, delivering one to complainant, one to the original defendant, Beal, and returning the third into court for the purpose of further consideration. This so clearly violates the constitutional and fundamental rights of litigants as to the method of trial, that it is to be presumed the learned judge who entered the order had reason to understand it would be accepted by all interested as a matter of convenience; though to provide for all contingencies, he, both in his opin-