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-

ion and by a special order, reserved the rights of all parties till they could be passed on by this court.

The first question which meets us is whether this appeal shall be regarded as from an injunction granted by an interlocutory order under the seventh section of the act establishing this court, or whether it is to be taken hold of as from a final decree. The record states that the order was preliminary; but, of course, this is not effectual, as it is for this court, and not for the circuit court, to determine that question in all cases, and the determination is to be governed by the essence of what is done, and not by the appellation given to it. If this is to be regarded as an appeal under the seventh section, there might yet be some matters concerning which this court could take jurisdiction, as, for instance, the fact that the injunction order holds the papers after they pass from the custody of the court; but it may be doubted whether we can be given jurisdiction by an injunction entered under color for that purpose, or by one purely nominal, concurrent with proceedings before a master, or the appointment of a receiver, or the impounding of papers or moneys pending litigation, if as effectual without the injunction as with it. The power of the circuit court to control proceedings before a master, or to make effective a receivership, or in impounding papers or moneys, is in the main ample, both theoretically and practically, without any injunction; and if, in such case, we should dissolve a superfluous injunction, we may be permitted to touch only the surface, and required to leave unaffected the substance of the order appealed from. As, however, the order in this suit places a part, and perhaps the whole, of the contents of this trunk absolutely beyond the control of the court, it seems to dispose of a part or the whole of the matter in controversy so effectually that we are forced to accept as a final decree so much as directs a distribution, notwithstanding the difficulty of determining, as between cases apparently analogous, on which side of the line this at bar properly falls, in accordance with the practice and principles of the supreme court. It seems to us the case is more akin to *Forgay* v. *Conrad*, 6 How. 201, *Thomson* v. *Dean*, 7 Wall. 342, *Railroad Co.* v. *Bradleys*, Id. 575, *Hill* v. *Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. Rep. 690, and *Grant* v. *Railroad Co.*, 50 Fed. Rep. 795, than to *Pulliam* v. *Christian*, 6 How. 209, or *U. S.* v. *Girault*, 11 How. 22. In *Barnard* v. *Gibson*, 7 How. 650, *Forgay* v. *Conrad*, *supra*, was referred to, and distinguished from the ordinary cases with reference to the right of appeal from a decree for an injunction in patent causes before the master's accounts are taken. It was also cited with apparent approval in *Hill* v. *Railroad Co.*, *supra*. Inasmuch as in the case at bar the papers which may be delivered the complainant, or the original defendant, under the order appealed from, may go effectually beyond the control of the other party claiming them, or even be destroyed, before an appeal can be taken to this court from any decree which entirely disposes of the suit, the necessity of our taking jurisdiction is as apparent as it was in any of the cases cited, or in *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 9 Sup. Ct. Rep. 265. Therefore we conclude to hold the appeal as one from a final decree, with reference to so much of

the order as directs distribution to the complainant and the defendant Beal of any part of the contents of the trunk.

We have no doubt that when this court properly takes jurisdiction on appeal from a final decree it has power to go beyond a mere reversal, and to enter such decree as should have been entered by the court below on the whole case as appearing in the record; nor have we any doubt that it is likewise its duty to review all the interlocutory proceedings of every character, using the term in the largest sense, with reference to which objections have been seasonably made and insisted on. Therefore we consider first the order of the court below making the attorney of the United States for the district of Massachusetts a party defendant. In accordance with the broad principles of *Florida* v. *Georgia*, 17 How. 478, we presume the United States would generally be allowed to intervene summarily, or by a supplemental information or bill, for protecting property rights involved in a pending suit in equity; but in this case the petition of the district attorney, asking to be made a party, does not state the grounds on which he bases it. It is gathered from the record at various points that his purpose is to reach for use in criminal proceedings certain papers said to be in the trunk in controversy. For such purpose we think the proper course was for him to obtain at the outset a *subpœna duces tecum* from the court where the criminal proceedings were pending, to be framed in accordance with the rules of criminal procedure, and thereafterwards to make summary application to the court which had impounded the papers covered by the subpœna. We are unable to see that, for any purpose connected with criminal proceedings, it was necessary or proper that the attorney of the United States be made a party to the pending bill, or that the law authorizes him to thus prejudice either the original parties to the suit or the United States. These suggestions, however, we will leave for further consideration in the event the necessity therefor arises, holding for the present that, in the absence of a subpœna or other alleged specific right, the attorney of the United States has no standing in this suit.

So far as shown by the record the title of the complainant to the trunk and its contents is clear, and no facts were proven which suggest the contrary, or which are sufficient to authorize the court to defeat at the outset his presumed purpose in bringing this bill, namely, to obtain the trunk and its contents free from public or private inspection, as is his right if the same are his property. We are unable, however, to enter on this account a decree for the complainant, by reason of the exclusion by the court below of the testimony of Edward W. Hutchins as to the nature of the papers which he had inspected. Whether or not this evidence, if admitted, would have overcome in any particular the facts now shown by the record, we, of course, have no method of determining. Nor can we determine whether the evidence should have been admitted; nor have we the jurisdiction to direct in detail what course the circuit court should pursue for the purpose of ascertaining whether or not it is admissible. It is enough for us to say that, as evidence was offered which, if admitted, might possibly have shown that the com-

plainant was not entitled to the entire contents of the trunk, and was rejected in such way that the record does not disclose the nature of the proposed proof, we are unable to enter a decree dismissing the bill; and to say also that the question of the admission of this evidence is to be determined primarily by the circuit court as all like matters are disposed of. It is for the judge of the circuit court to ascertain by private examination of the witnesses, or in such other way as the rules of law permit, whether or not the evidence is *prima facie* admissible; and if he is satisfied that it is, we know of no rule of law which debars the defendant of his right to prove facts relevant to the case by Mr. Hutchins, if the complainant has, either purposely or unguardedly, permitted Mr. Hutchins to so far inspect the contents of the trunk as to know what it contains in any part. In short, we know of no rule of law which, so far as concerns the admission of the testimony offered, differs from that applicable to causes in general; with reference to all which the court will always see to it that private transactions are not unnecessarily exposed to the public gaze, though it will not shrink from permitting them to go into the record when the necessities of justice require it. We do not hold that it is not, in proper cases, within the power of the chancellor to substitute in lieu of himself a suitable master or referee for the purpose of ascertaining *prima facie* whether or not testimony offered is entitled to be heard; but we do hold that, on the state of this record, without some proof beyond what is here disclosed, the court should not inspect, nor permit an inspection of, the contents of the trunk, either private or public, and thus perhaps defeat the very purpose of the bill. We draw a broad distinction between the right of the circuit court to pass on the admissibility of the testimony of Mr. Hutchins, offered and ruled out, and to determine this preliminary question privately, and its right, on the other hand, to order an inspection of the contents of the trunk, either private or public; and we limit this distinction to the case as shown, without undertaking to deny that there are possibilities that, under some circumstances, an inspection may become necessary for the ends of justice. An inspection, however, if ever ordered, should be only in cases of real necessity, when the other proofs make it clear that private rights cannot be determined without it; nor should it be made without positive evidence that there are papers of doubtful ownership, nor without some evidence of their identity and character. No inspection should be permitted, in suits of this character, merely because the defendant is unable to prove his case without it, nor because of mere doubts, suspicions, or suggestions, nor, as we repeat, except there is a clear emergency demanding it. It is true that in a limited sense the party who seeks the aid of equity to obtain possession of private papers submits himself to the court; and yet it is to be remembered that the main object of going into equity may be, not to obtain the papers themselves, but to secure the privacy to which the owner of them is entitled, and which he may not be able to protect except with the aid of the chancellor; and it is not permissible that the chancellor should defeat at the outset—unless under extreme circumstances—any portion of the relief

which the complainant seeks, and which, perhaps, may be more effectually denied by permitting the privacy of his papers to be violated than by any refusal to give possession of them.

The rules laid down by us are in harmony with those applied to proceedings for production of private papers in suits in equity, or in proceedings at law under Rev. St. § 724; for either of which it is necessary to show, not only that specific papers exist and are in the possession of the party against whom the order is asked, but also that they are pertinent to the issue. The record in this case fails in all these particulars. The secrets of the party against whom an order of production may run are so well preserved by the law that he seems to be at liberty to seal up such portions as he is willing to make affidavit are privileged or irrelevant. The form of such affidavits appears in Seton, Decrees, (4th Ed.) 136, (10.) When the affidavit contains statements at variance with each other, or the documents, so far as made known, show a discrepancy, the practice seems to be that the court may get at the truth by compelling a discovery, and, if necessary for that purpose, may unseal the documents and examine them. It is said, however, that this exception to the general rule does not apply when the affidavit is merely suspected, or "even if open to every possible suspicion." *Bowes* v. *Fernie*, 3 Mylne & C. 632. Coming closer to the case at bar, it is said that interlocutory production and inspection will not be ordered on the motion of a plaintiff in equity, if in this way he would practically obtain the object of his bill. This was so ruled by Sir JOHN LEACH in *Lingen* v. *Simpson*, 6 Madd, 290. This case is explained in *Chichester* v. *Marquis of Donegal*, 4 Ch. App. 416–419, where it was said that the production would have enabled the plaintiff to have gotten a great portion of the custom of the defendant, and thus to have accomplished on an interlocutory order the main purpose of the suit. In the case at bar the bill alleges that the contents of the trunk are "private property," and "personal in their nature;" and the prayer is that the defendant may be enjoined from permitting the papers to be inspected, and that also, pending the prosecution of the suit, he may be enjoined "from showing them, or any of them, or allowing them, or any of them, to be inspected." Therefore to permit an inspection, as ordered by the circuit court, would perhaps defeat the purpose of the bill as effectually as the production asked and refused in *Lingen* v. *Simpson*, *supra*. These principles and cases relating to the ordinary practice concerning production of private papers are not brought in here as strictly applicable, but they illustrate the tenderness with which courts guard against unnecessary exposure.

The order admitting the attorney of the United States a party defendant is reversed, and his petition to be so admitted is dismissed, without costs, and without prejudice to any rights of him or the United States in any other proceeding. The order entered February 25, 1892, appointing a master, is reversed, and the case is remanded for further proceedings in accordance with this opinion, so far as it appertains. The complainant recovers the costs of this appeal against the original defendant, Beal.

NEW YORK & N. RY. CO. v. NEW YORK & N. E. R. CO.

(*Circuit Court, S. D. New York.* May 31, 1892.)

1. INTERSTATE COMMERCE — CARRIERS — CONNECTING LINES — "EQUAL FACILITIES" — PLEADING.
   Section 3 of the interstate commerce act, as amended by the Laws of 1889, provides (1) that every common carrier shall provide equal facilities for the interchange of traffic with connecting lines; and (2) that there shall be no discrimination in rates and charges between such lines. A petition, presented by a line affected, averred that petitioner was deprived by respondent of equal facilities with a competing connecting line for interchange of traffic, a discrimination in rates, the withdrawal of a joint through traffic, and a threat to close a through route via petitioner's line. *Held* a charge, not only of discrimination in rates, but of failure to provide equal facilities for interchange of traffic, and to bring before the commission the determination of both offenses.
2. SAME — CHANGES OF SCHEDULE.
   Under the charge of a denial of "equal facilities" for the interchange of traffic the conduct of respondent in so arranging the running of its trains that greater facilities for interchanging, forwarding, and delivering freight were afforded to a competing connecting line than to petitioner, was proper to be shown to the court in a proceeding to enforce an order of the commission, though no question of the hours of running trains was presented to the commission in express terms.
3. SAME — EFFECT OF CONTRACT FOR FACILITIES.
   The offending line, being a separate, independent company from the favored line, owning no stock therein, neither having built, bought, nor leased it, conducted its business, nor received its earnings, could not escape the inhibition of the statute by a mere contract for the interchange of traffic. The effect of such contract could not be to make the one line a mere extension of the other.
4. SAME — EFFECT OF COMBINATION OF CARRIERS.
   Though the offending line and the favored line, being members of a "terminal company," a combination of carriers by which the terminus of the favored line was connected with New York, were a legal unit within section 1 of the act (24 St. at Large, p. 379) providing that it shall "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, * * * when both are used under a common control * * * for a continuous carriage or shipment from one state," etc., it was not thereby relieved from its obligations under the act to all roads connecting directly with itself, of which petitioner was one.

In Equity. Application by the New York & Northern Railway Company to compel obedience on the part of the New York & New England Railroad Company to an order of the interstate commerce commission in respect of discrimination against petitioner in affording freight facilities. Heard on motion to dismiss the petition. Motion denied.

Sherman Evarts, for complainant.

Wager Swayne, for defendant.

LACOMBE, Circuit Judge. This is an application on petition of the New York & Northern Railway Company, as a person interested, to enforce obedience to an order or requirement made May 6, 1891, by the interstate commerce commission, and is presented under section 16 of the interstate commerce act, as amended by chapter 382 of the Laws of 1889. Upon the return day of the order to show cause, heretofore granted, defendant filed its answer, and, before any proofs were taken, moved to dismiss the petition. Such a motion must be determined upon the assumption that the averments of the petition and the findings of fact of the commission (made by the statute *prima facie* evidence) cor-

rectly set forth the matters therein stated. It seems undesirable at this stage of the case to summarize generally the facts thus assumed to be true, as subsequent evidence taken in this court may modify such assumptions. The section invoked by the petitioner upon its application to the commission reads as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 13 provides that any person (or) corporation complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to the commission by petition, which shall briefly state the facts. Under that section this petitioner applied to the commission, and, after taking proofs, obtained the order or requirement it is now seeking to enforce.

The respondent contends that the second clause of section 3, above quoted, enacts two different and independent subjects as grounds of complaint against carriers; the one being the denying reasonable, proper, and equal facilities for the physical interchange and prosecution of traffic between a company's line and connecting lines; the other being discrimination in respect to rates and charges between such connecting lines. A similar construction is adopted in the opinion of the commission, which holds that the provision "embraces the imposition of an affirmative duty to interchange and forward traffic between connecting lines, and a prohibition that there shall be no discrimination in rates and charges between such connecting lines." Respondent further contends that the charge and allegations before the commission dealt only with one of these subjects, and that, therefore, any order of the commission requiring the respondent to cease and desist from any violation which is embraced within the other subject would not be a "lawful" order; and apparently also insists that the judgment of the commission was in fact confined to discrimination in rates and charges. An examination of the record, however, does not support this contention. The petition which was presented to the commission charged that the respondent was depriving petitioner of reasonable, proper, and equal facilities (as compared with those afforded to the Housatonic Railroad, a competing connecting line) for the interchange of traffic between petitioner and respondent,

and for the receiving, forwarding, and delivering of property to and from the line of said petitioner and the line of the respondent. In support of such charge it averred, not only a discrimination in rates, and the withdrawal of a joint through tariff which had been theretofore in force and operative between the parties, but also that respondent had threatened to close the through route via petitioner's line altogether, and had refused to accept freight at all on through bills, thus compelling the shippers to attend at Brewsters,—the point of connection,—to transfer and rebill their goods. This was plainly a charge, not only of a discrimination in rates, but of a failure to discharge the affirmative duty to interchange and forward traffic with the equal facilities, required by the first subdivision of the second clause of the third section, above quoted. The petition prayed for an order directing the respondent to grant equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of property to and from the line of petitioner and that of respondent, as were here afforded to the Housatonic Railroad. The commission found that there had been a refusal to afford facilities for the interchange of interstate traffic, and the receiving, forwarding, and delivering of the same, reasonable, proper, and equal to the facilities afforded to the other connecting road; that the respondent was "guilty of the discrimination charged in the complaint, in its rates and charges for the interchange of interstate traffic, and in the arrangements it makes for through lines for the freight traffic." And the order or requirement of the commission commanded the respondent to desist from discriminating against petitioner (1) by refusing to make such arrangements with, or afford such facilities to, the petitioner for the interchange, at the point of connection, of interstate traffic, and for the receiving, forwarding, and delivering of such traffic, as are reasonable and proper and equal to arrangements made or facilities afforded by it for interchange between respondent's line and the other connecting road; and also (2) from discriminating in respect to rates and charges, etc. The decision of the commission manifestly disposed of both subjects of complaint, and it seems quite plain from the record that both subjects were before them.

Since the service of the order the respondent has restored the joint through tariff. It has also desisted from refusing to accept freight on through bills, but has so arranged the running of its trains that the facilities for interchange, forwarding, and delivering are (as is alleged) substantially no better than before, and not equal to those afforded to the competing line. The respondent contends, however, that such acts may not be shown before this court, acting summarily under section 16 in review and enforcement of the order of the commission, because no question of the hours of running trains was presented to the commission. It is manifest that equal facilities may be refused quite as much in one way as in the other, and both grounds of complaint relate to the subject-matter of physical interchange and prosecution of traffic, instead of to a discrimination in rates. To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which impose such obligations upon the shippers as to transfer and rebilling as would