He insists that the provision in the decree appointing a receiver, providing for the payment of certain claims as preferential, created no vested right; and that, within our ruling in Transportation Co. v. Anderson, 46 U. S. App. 138, 22 C. C. A. 109, and 76 Fed. 164, the decree in that regard was interlocutory, and is not controlling of the subsequent action of the court; and that, within the doctrine declared in Turner v. Railway Co., 8 Biss. 315, Fed. Cas. No. 14,258; Fosdick v. Schall, 99 U. S. 235; Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809; Wood v. Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131; Kneeland v. Trust Co., 138 U. S. 509, 11 Sup. Ct. 426; Thomas v. Car Co., 149 U. S. 111, 13 Sup. Ct. 824; Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. 664,—before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest; and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming, at the request of a trustee, the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income, and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned, and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust. His duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled. He represents the estate, with right to sue to recover demands due to it, with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the Fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. Thom v. Pittard, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters the receiver has no right of appeal, while in respect to others his right to appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates,

or directing a particular management of the trust property, or directing sale of the mortgaged property, or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court, nor interested in the event. Illustrations might be multiplied. The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate. He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. Trust Co. v. Sullivan, 46 U. S. App. 601, 603, 23 C. C. A. 458, and 77 Fed. 778.

The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that, prior to the decree appealed from, the railway had been sold under decree of sale, and had passed out of the possession of the receiver, and into the possession of the purchaser, and that the receiver had not in hand moneys with which to pay the debt adjudged. That this debt was a just claim against the estate is not doubted, and is conceded. No objection is taken to its allowance, nor is it questioned that, under the decree appointing the receiver, it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident, and that the mortgage had preference in payment, because there had been in fact no diversion of income to the payment of interest. Neither the trustee nor the bondholders nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself, in breach of his duty, where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate, which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not right to interfere.

It was held in Farlow v. Kelley, 131 U. S. Append. cci., that the allowance by a circuit court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is

urged that, since the appeal here was allowed by the circuit court according to usual practice, we are bound to entertain it, and to determine the question which the receiver has presented. In some states it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The supreme court, in the case referred to, merely holds that, if leave were essential, it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an appellate court the duty of hearing and determining a moot question. The appeal will be dismissed.

BECKER v. HOKE et al.

(Circuit Court of Appeals, Seventh Circuit. June 19, 1897.)

No. 412.

1. CORPORATIONS—STOCKHOLDER'S BILL FOR RECEIVER—EQUITY JURISDICTION.
A bill by a stockholder for the appointment of a receiver cannot be sustained where it declares no contest concerning property, no dispute of any kind between the parties, and no dereliction in duty by the corporation or its officers, but merely alleges its insolvency, the recovery of certain judgments against it from which it desires to appeal, but which it will be unable to supersede because of its insolvency, and that its assets will be wasted if sold under such judgments.

2. SAME—COLLUSIVE BILL—DISMISSAL.
A bill by one owning an insignificant amount of stock, asking a federal court to appoint a receiver, should be dismissed by the court sua sponte, where it appears on the face of the bill that the same is collusive, and is brought to hinder and delay creditors who have recovered judgments in the state courts, and are there seeking the appointment of a receiver and the setting aside of mortgages and judgments on judgment notes, made by the directors to themselves as individuals.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This is an appeal from a decree of the court below denying the intervening petition of Charles Becker, receiver of the North & South Rolling-Stock Company, appointed by the circuit court of St. Clair county in the state of Illinois, on November 30, 1896. The North & South Rolling-Stock Company is a corporation organized under the laws of the state of Illinois, its principal business being to make, purchase, or lease various kinds of freight cars, and to hire them out to railroads for a compensation. At the times in question it was the owner of 76 stock cars, 242 box freight cars, 100 refrigerator cars, and held under lease 100 refrigerator cars, 156 box cars, and 61 coal cars. John S. Berthold was president of the company, and Curtis M. Jennings was its secretary and treasurer. They were also co-partners in a business carried on at the city of St. Louis, under the firm name and style of Berthold & Jennings. George S. Hoke was a clerk of the firm of Berthold & Jennings, and claimed to be the owner of one share of the North & South Rolling-Stock Company. The capital stock of that company was $300,000, divided into shares of $100 each; its board of directors consisting of three members, Berthold, Jennings, and Hoke. Berthold and Jennings were each the holders of 1,000 shares of the capital stock, but it was alleged that nothing had been paid thereon. Henry O'Hara was also a subscriber for 1,000 shares of the capital stock of the com-

pany, and it is charged that nothing whatever had been paid by him on such subscription. The management of the company was under the control of Berthold and Jennings. On June 24, 1896, Henry O'Hara obtained a judgment in the state court of East St. Louis, St. Clair county, Ill., against the North & South Rolling-Stock Company, for the sum of $60,639.70 and costs of suit. On the 14th day of August, 1896, an execution was sued out upon the judgment, and a demand made of the company for its payment, which was not complied with, nor was any property turned out upon which to levy or satisfy the execution, and the same was returned, "No property found." On the same day, and in the same court, Henry O'Hara obtained a certain other judgment against the North & South Rolling-Stock Company for the sum of $2,620.28 and costs of suit, upon which execution was issued to the sheriff, and under which the sheriff threatened to levy upon and sell the cars of the defendant corporation. On August 11, 1896, the rolling-stock company, by J. S. Berthold, its president, and C. M. Jennings, its secretary, executed to the firm of Berthold & Jennings a chattel mortgage upon 100 refrigerator cars, 16 box cars, 226 box cars, and 76 stock cars, described, to secure three promissory notes, dated August 11, 1896, executed by the North & South Rolling-Stock Company, by its president, Berthold, and its secretary, Jennings, each payable to the order of Berthold & Jennings, one of said notes being for the sum of $20,096.75, payable at six months from that date, with interest at 6 per cent., and each of the other notes being for the sum of $7,682.40, one maturing February 1, 1897, and the other February 1, 1898, each bearing 6 per cent. interest after due. This mortgage was filed for record August 12, 1896. On the same day, the North & South Rolling-Stock Company, by its said president and its said secretary, executed to C. M. Jennings, its secretary and treasurer, the promissory note of the corporation, payable upon demand for the sum $8,260.60, in the form of a judgment note, and this note was indorsed by C. M. Jennings to the firm of Berthold & Jennings. On the same day, that corporation, by the same officers, executed a like note to the order of J. S. Berthold, its president, and for the sum of $8,300, which note was indorsed by Berthold to the firm of Berthold & Jennings. On August 12, 1896, judgment by confession in favor of Berthold & Jennings was entered in the circuit court of St. Clair county, Ill., upon the two notes of $8,300 and $8,260.60, respectively, and execution upon the judgment was issued to the sheriff of the county of St. Clair, who levied the same upon all the property of the North & South Rolling-Stock Company which could be found within the county, including the property embraced in the chattel mortgage. On the 1st day of September, 1896, O'Hara and the Bannantine Galvanized Iron Manufacturing Company (the latter claiming as assignee of O'Hara) filed in the circuit court of St. Clair county, Ill., a bill in the nature of a creditors' bill, setting forth the judgments obtained by O'Hara; the organization of the company, with Berthold as its president and Jennings as its secretary, and their subscription to the stock of the company, and that nothing had been paid thereon; their possession of the funds of the company; the execution by them as officers to themselves as creditors of the chattel mortgage hereinbefore set forth, and the execution of the several notes, and the entry of judgment thereon, as hereinbefore described; that, to obtain an undue advantage over other creditors of the North & South Rolling-Stock Company, Berthold and Jennings, at the time of the execution of the chattel mortgage and notes, paid to themselves, on an alleged indebtedness of their own, out of the funds of the company, a sum in excess of $40,000, and kept the property and effects of the company out of the state, and concealed and covered up, so that the same cannot be reached by execution. The bill prayed that the chattel mortgage be vacated and set aside; that the judgment obtained by Berthold & Jennings be vacated, and the execution thereon be quashed, and that they be required to discover, make known, and surrender all property of the North & South Rolling-Stock Company that could be applied in satisfaction of the O'Hara judgments; that Berthold and Jennings be required to refund and bring into court all money obtained by them as preferences; that disposition may be made thereof as might accord with equity; that they be required to surrender any property that they may have belonging to the company; that they be required to pay whatever may be due by them, respectively, upon the stock held by them,

so far as may be necessary to satisfy the O'Hara judgments; that a receiver be appointed to take charge of the property, funds, and possessions of the North & South Rolling-Stock Company, with the usual powers of receivers; and that an injunction issue to restrain them from selling, transferring, or mortgaging the property of the company, and from removing the same from out of the state; and that they and the sheriff be enjoined from the further enforcement of the execution issued upon the judgment set forth, and for such equitable relief as the nature of the case may require. On October 7, 1897, the North & South Rolling-Stock Company filed its answer to this bill, as did also the sheriff. On the 30th day of November, 1896, the circuit court of the county of St. Clair, upon that bill, appointed Charles Becker, the appellant here, receiver of the property of the North & South Rolling-Stock Company, with the usual powers of receivers in like cases, and he duly qualified as such officer.

On the 10th day of September, 1896, George S. Hoke, who is a clerk in the office of Berthold & Jennings, and holds one share of the capital stock of the rolling-stock company, and who was one of the three directors of the company, filed his bill in the circuit court of the United States for the Southern district of Illinois as a stockholder, setting forth the property of the company; the recovery by O'Hara of his judgments; the issuance of the execution and demand for its payment; the recovery of judgment by Berthold & Jennings; the levy of execution issued thereon upon the property of the company; the execution of the chattel mortgage to Berthold & Jennings; the insolvency of the North & South Rolling-Stock Company; that that company believes the judgments obtained by O'Hara to be excessive, illegal, and unjust, and was seeking to perfect an appeal from such judgments, but was unable to give the necessary bonds; that it had prepared bills of exceptions, which had been presented to the judge of the court who tried the causes; and that, as soon as these bills were signed, the company would sue out writs of error to the appellate court of the Fourth district of Illinois, and expect that the appellate court will reverse both of such judgments; that the cars of the company are not in service, and are not being maintained, and are subject to charges for traffic, storage, and switching charges, and are scattered over the country; that the cars are not equipped with air brakes and automatic couplers, and by law should be so equipped by the 1st day of January, 1898, which will require the expenditure of a very large sum of money which it is impossible for the company to raise. It further represents that, if the sale of the property is permitted upon execution under the judgments, the assets of the company will be sacrificed, wasted, and destroyed, and the interest of the stockholders ruined. This bill was filed against the North & South Rolling-Stock Company, as sole defendant. The prayer of the bill was for a receiver of the property of the North & South Rolling-Stock Company to operate and manage the business of the company, subject to the further orders of the court, and to restrain the North & South Rolling-Stock Company, its officers, agents, and servants, from in any manner interfering with the possession or occupation of the property and business of the company by the receiver so to be appointed. Upon the same day, without the issuance of process, the defendant corporation appeared to the suit of George S. Hoke, and, without answer or opposition from it, the court below entered an order appointing Frederick C. Dodds, one of the appellees, receiver of the property of the North & South Rolling-Stock Company, "subject to all prior liens of any person or corporation, as the same may hereafter be established or determined by the court," directing the receiver to lease the rolling stock, and requiring the defendant corporation to deliver to the receiver all property and effects belonging to it, and restraining the company as prayed in the bill. It will thus be seen that, while the bill in the state court was filed nine days before the bill was filed in the United States court by Hoke, the receiver appointed in the state court was not appointed until nearly two months subsequent to the appointment of the receiver in the United States court. The order or decree of the state court appointing the receiver recognized that fact, which had been brought to its attention, and directed its receiver that, as to all the property in actual possession and custody of the receiver appointed by the circuit court of the United States, the receiver in the state court should apply in due and legal form of law to the

United States circuit court for the release of said property from such possession and custody, "which application he is hereby authorized to make, and to institute and carry on all proceedings, legal and equitable, necessary and proper for that purpose." In conformity with that direction, Mr. Becker, the receiver appointed by the state court, filed his intervening petition in the circuit court of the United States in the suit of Hoke against the North & South Rolling-Stock Company, setting forth substantially the facts herein stated, and representing that the jurisdiction of the circuit court of St. Clair county attached before the filing of the bill by Hoke in the circuit court of the United States, and that the fact of the filing of such bill in the state court was concealed from the circuit court of the United States by Hoke, and was not filed in good faith, but was filed at the instance of the North & South Rolling-Stock Company, and through Berthold and Jennings, for the purpose of preventing the collection of the judgments of O'Hara; and he prayed that Hoke, the North & South Rolling-Stock Company, and Dodds, receiver, might be required to answer the petition, and that the property of the North & South Rolling-Stock Company which had been taken possession of by Dodds, receiver, should be turned over to him, and that all moneys and earnings of the property and cars should be accounted for to him. This petition was answered by Hoke, and by the North & South Rolling-Stock Company, but these answers do not vary the statement of facts as here made. On the 14th day of January, 1897, the intervening petition of Becker, as receiver, was heard in the court below, and on the 6th day of April, 1897, a decree was entered denying the prayer of the petition, and dismissing the same, with costs. An appeal was allowed to this court to review that ruling.

Gustavus A. Koerner, Mortimer Millard, and W. L. Granger, for appellant.

Samuel P. Wheeler, Charles P. Wise, and George F. McNulty, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The argument sought to present for our determination a question both interesting and delicate: Which court—that of the United States or of the state—first acquired jurisdiction of the property of the North & South Rolling-Stock Company? We are relieved from the consideration of that question by other matters which must control our judgment. We are of opinion that the bill filed by Hoke in the circuit court of the United States exhibited no ground for the exercise of the equitable jurisdiction of the court, and that the proceedings of that court thereon are without warrant of law. It would be difficult to classify the bill under any known head of equity jurisdiction. It declares no contest concerning property, no dispute of any kind between the parties thereto. It asserts no dereliction in duty by the defendant corporation or its officers, and no ground to warrant the interference of a stockholder for the protection of his rights. There is no dispute to be adjudged, no right to be asserted, no decree prayed. The court is merely asked to take the property of the defendant corporation under its management during the pendency of a writ of error to be sued out by the company with respect to judgments obtained in another court, because, if such writ should be sued out, the company, by reason of its insolvency, would be unable to supersede the judgments. In other words, it is sought to make a bill in equity operate as a supersedeas bond upon writ of error in a court of another jurisdiction, and to demand that for such