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

purpose a court of the United States should become the manager of the business of the corporation. A new nomenclature must be adopted to properly designate the bill in question. We know of no better name by which to characterize it than a bill to hinder and delay creditors.

The indisputable facts disclose, also, that this suit in the United States court is manifestly, and upon the face of the bill, collusive. If any right is asserted by this bill,—and we are unable to discover any,—it was a right which could properly be asserted by the corporation. No effort is stated to procure proper action by the directors, of which the complainant was one, nor is a failure therein asserted, and the bill contains no allegation negativing collusion. The ninety-fourth rule in equity requires that these things should be stated. These necessary averments are doubtless wanting, for the reason that they could not truthfully be asserted. The complainant is the owner of one share of the capital stock out of 3,000, and is one of the directors of the company. He is the clerk of Berthold & Jennings, the other directors, and the owners of two-thirds of the capital stock of the company, and who have, as officers of the company, with the knowledge and consent of Hoke, executed to themselves, as individuals, a mortgage upon all the property of the company, and also judgment notes which have passed into judgment and the property of the company levied upon thereunder; and all this subsequent to the obtaining of judgments by O'Hara, and, as is asserted by the bill in the state court, for the purpose of hindering, delaying, and defrauding him in the collection of his debt. He asks that these liens be recognized. It is a significant fact, also, that the bill contains no reference to or mention of the creditors' bill that had previously been filed in the state court. There can be no question that the suit is collusive and vexatious. We cannot forbear to say that this proceeding is not deserving of judicial sanction. It is not to be tolerated that the courts of the United States shall be thus used. It cannot be permitted that a conflict between courts of federal and state jurisdiction—always to be deprecated, and to be avoided, if possible—may thus be projected to further the supposed interest of desperate litigants. The courts of the United States will not sanction such proceedings, nor become party to an unwarranted conflict with the courts of another jurisdiction. Upon its face, the bill is without equity to sustain it, and should have been dismissed by the court sua sponte. It presented no case for the exercise of equitable jurisdiction, and no warrant or justification for the appointment of a receiver.

It is objected that the appellant had not obtained leave of the court appointing him to prosecute this appeal. We had occasion in Bosworth v. Association (decided at the present session) 80 Fed. 969, to consider the question of the right of a receiver to appeal. This case is distinguishable from that, in this: that the receiver here is not the appointee of the court from whose decree the appeal is taken. If it be necessary that in all cases a receiver should obtain the authority and the direction of the court appointing him to appeal in any case pending in another jurisdiction, and if it be true

that the appellees here can properly object for want of such leave, we do not doubt that the authority conferred by the order of appointment to apply to the circuit court of the United States for the restoration of the property to the rightful jurisdiction of the state court, and to carry on all proceedings necessary and proper for that purpose, is ample to warrant this appeal, which was, in fact, allowed by the court below. The decree is reversed, and the cause is remanded, with directions to the court below to grant the prayer of the petition, and to direct its receiver to release and turn over to the appellant, as receiver, all the property of the North & South Rolling-Stock Company which at any time has come to his possession as such receiver, and to account for and pay over to the appellant, as such receiver, all moneys in his hands or property received by him as earnings of the property and railroad cars of which he at any time has had possession, under the order of the court below.

HOOK v. AYERS et al.[1]

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 320.

1. PLEDGES—CHANGE OF POSSESSION.
   The intent to pledge does not constitute a pledge, but there must be delivery to the pledgee; and therefore, where bonds held by the president of a railroad company for the company never passed from his control, there was not a pledge of them to a syndicate of which he was a member, though he may have intended to pledge them to secure loans made by the syndicate to the company, there being no actual delivery of them to the trustee of the syndicate who held the notes of the company.
2. SAME—EQUITABLE PLEDGE.
   To apply the doctrine of equitable pledge, there must be a contract from which it sufficiently appears that the particular property was designed by the debtor to be subjected to the payment of the debt.
3. SAME—AUTHORITY OF RAILROAD PRESIDENT.
   The president of a railroad company cannot so contract with himself, in another capacity, without the sanction or knowledge of the directors and stockholders, that an equitable pledge upon the property of the company can be enforced to the detriment of creditors.
4. ESTOPPEL.
   Members of a syndicate who sold their interest therein to another member, with knowledge that he claimed that certain bonds in his possession were held in trust as collateral for a claim of the syndicate, *held* estopped to deny that the bonds are so held. Woods, Circuit Judge, dissenting.
5. SAME—NOTICE TO PARTNER.
   An estoppel resting upon two members of a firm by reason of an individual transaction cannot bind the firm of which they are members, as notice to a partner, to bind the co-partnership, must be with reference to a transaction within the scope of the co-partnership.

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

This cause was before this court upon the appeal of the present appellant, and is reported in Hook v. Ayers, 24 U. S. App. 202, 12 C. C. A. 554, 63 Fed. 347, and 24 U. S. App. 487, 12 C. C. A. 564, 64 Fed. 660, to which reference is made for the facts as then developed. The decree was reversed, and the cause remanded for further proceedings in accordance with the opinion of

[1] Rehearing denied June 17, 1897.

the court. Upon filing the mandate of this court, Marshall P. Ayers, Augustus E. Ayers, and John A. Ayers, the appellees, filed in the court below, and by leave of that court, their amended cross bill in substance charging the same equitable pledge asserted in their original cross bill; the recovery of a judgment by them against the Jacksonville Southeastern Railway Company upon the loan mentioned in the cross bill; the issuance of an execution thereon, and its return unsatisfied; that William S. Hook, the president of that railway company, as such president received from the Louisville & St. Louis Railway Company the 247 bonds issued by that company to the Jacksonville Southeastern Company, had delivered 125 of them to the appellees as security for advances made, and had unlawfully, without authority of the railway company, the owner of them, and in fraud of the rights of the creditors of the road, appropriated the other 122 to his own use, and subsequently made a gift of them to his wife, Mary B. Hook. William S. Hook answered to this cross bill, denying, as he had before denied, the alleged equitable pledge of the 122 bonds to the appellant, asserting "that said one hundred and twenty-two bonds were sold by the Jacksonville Southeastern Railway Company, or, more accurately speaking, were pledged by said company as security for money obtained by it, and applied by it to the payment of its debts, and in support of its operating expenses; that said bonds were pledged to secure indebtedness due from said company to the complainants Marshall P. Ayers, John A. Ayers, and others, and with the full knowledge and consent of the said complainant Augustus E. Ayers; that afterwards the said Marshall P. Ayers and John A. Ayers sold all their interest in said one hundred and twenty-two bonds to this respondent, and received the price agreed upon for the same by them; that this respondent paid the said Marshall P. Ayers and John A. Ayers for their respective interest in said bonds the sum of three thousand dollars, the bases for the whole of said bonds being thirty thousand dollars; that such payments were made by respondents and received by the two complainants in the months of June and July, 1889. Respondent says that said sale was made with the full knowledge of the fact by the complainant Augustus E. Ayers, and that said complainants are estopped to set up any claim to said bonds, or any part of them. But, if the complainants in the cross bill shall be held to be entitled to set up any claim to said bonds as judgment creditors, then they must redeem said bonds, and must pay the amount of money for which the same were at that time and have since been held by respondent, with interest upon the same at the rate of six per cent. per annum." Mary B. Hook, the appellant, also separately answered the amended cross bill; confirming her answer to the original cross bill, and resting her title to the 122 bonds upon the rights of her husband, William S. Hook, from whom she received the bonds as a gift. Further testimony was thereupon taken with respect to the transactions at issue, but the facts, so far as necessary to be stated, are embodied in the opinion upon the former appeal, and in this opinion. The court below decreed, as it had before decreed, that the proceeds of the sale of the Louisville & St. Louis Railway should be applied first to the payment in full of the 125 bonds pledged to the appellees, and thereafter, if any proceeds remained, to the payment of the 122 bonds claimed by Mary B. Hook, the appellant.

Thomas Worthington (Isaac L. Morrison, of counsel), for appellant.

William Brown, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

We held when this case was previously before the court that the appellants, as pledgees of the 125 bonds, were not entitled to an equitable lien upon the remaining 122 bonds. That ruling is res judicata. The amended cross bill presents the appellees in the character of judgment creditors, so that they are now entitled

to question the transaction by which Mary B. Hook claims to have acquired the ownership of the remaining 122 bonds, unless they are estopped by the transaction between William S. Hook and two of the appellees with respect to the sale to Hook of their interest in the Chicago, Peoria & St. Louis Syndicate, or, if not technically estopped, unless the firm is bound by notice of this transaction. Our attention will first be directed to the question whether there was in fact any valid pledge of the 122 bonds by the Jacksonville Southeastern Railway Company to William S. Hook, or to any other person, for the benefit of the syndicate. The cross bill proceeds upon the theory that these bonds never passed from the custody of the railway company, and are still its property. The answer asserts the pledge, and assumes the burden of its proof. The fact of the pledge, if one there was, rests wholly upon the testimony of William S. Hook and Marcus Hook. So far as the evidence discloses, there was no action by the directors of the company authorizing such pledge, nor any knowledge by them of the intention of Hook, as president, to make such pledge, except as herein stated. Nor is there any written pledge of any kind, nor any entry in the books produced from which such pledge could be inferred, except possibly the entry of October 1, 1889, in the books of the syndicate company, by which, after the purchase of his fellows' interest in the syndicate, William S. Hook charged to himself, at a stated sum, these 122 bonds, which transaction cannot be sanctioned, and is not defended by counsel. William S. Hook testifies that in December, 1887, at the time of the pledge of the 125 bonds to the appellees, he stated to Augustus E. Ayers, one of the appellees, that he intended to hold the 122 bonds to secure the syndicate for advances made by the Chicago, Peoria & St. Louis Company; that "at practically the same time" he deposited the 122 bonds with the American Exchange National Bank of New York, subject to the order of T. J. Hook & Co. This claimed deposit was by an order on the trust company in New York, which was trustee under the mortgage securing the bonds. T. J. Hook & Co. was William S. Hook, and none other. The transaction, therefore, was in plain English, this: William S. Hook, as president of the Louisville & St. Louis Railway, delivered its bonds to the trustee under the mortgage for countersigning and delivery to William S. Hook as president of the Jacksonville Southeastern Railway. William S. Hook, as president of the latter company, ordered the trustee to deliver them to the American Exchange Bank, to be held subject to the control and direction of William S. Hook. This firm of T. J. Hook & Co. was engaged in no business except that of keeping this bank account with the American Exchange National Bank, and the only person interested in it was William S. Hook. The Jacksonville Southeastern Railway Company was not indebted to the firm of T. J. Hook & Co. Mr. Hook declares the firm never purchased these bonds; never held them, except upon his own motion, as custodian, to protect advances made by the Chicago, Peoria & St. Louis Syndicate to the Jacksonville Southeastern Railway Company. It does not appear

that in December, 1887, any advances had been made by the syndicate to the Jacksonville Southeastern Railway; nor does it appear when any such advances were made, except that on May 31, 1888, William S. Hook, as president of the Jacksonville Southeastern Railway Company, executed to the Chicago, Peoria & St. Louis Railway Company a promissory note for $65,000 on account of money advanced and expended in the construction of the Louisville & St. Louis Railway. This note was delivered to Marcus Hook as treasurer of the Chicago, Peoria & St. Louis Railway Company, and with and as collateral to the note of the latter company for a like amount, and, by the direction of William S. Hook, passed from Marcus Hook as treasurer to Marcus Hook individually, "to be held as trustee for the benefit of the syndicate." Soon after the execution of these notes, the members of the syndicate executed receipts for the dividend declared by the syndicate, but received no money therefor; and Marcus Hook declares that at that time he explained to each member of the syndicate that he held these notes, and that they were secured by the 122 bonds "which were under my control as collateral." He never had control or possession of them. He had only been authorized by William S. Hook to sign checks in the name of T. J. Hook & Co. These bonds never passed beyond the control of William S. Hook, or out of his custody. In June, 1889, William S. Hook purchased the interest of the other members of the syndicate; and thereafter, in October, 1889, he directed an entry upon the books of the syndicate or the company controlled by the syndicate, crediting upon the $65,000 notes the sum of $61,000, as the value of the 122 bonds which at the time were in the bank in the city of New York subject to the order of T. J. Hook & Co. It may be that William S. Hook intended to hold these 122 bonds as security for such advances as the syndicate should make to the Jacksonville Southeastern Railway Company. But the intent to pledge does not constitute a pledge. It was ruled in Casey v. Cavaroc, 96 U. S. 467, that delivery and possession are of the essence of a pledge, and without them no privilege can exist as against third persons. There must be delivery to, and possession by, the pledgee. Christian v. Railroad Co., 133 U. S. 233, 10 Sup. Ct. 260. Story, in his treatise on Bailments (section 297), observes:

"Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver; and the pledgee acquires no right of property in the thing."

It is clear, upon this record, that there never was any delivery of these bonds to Marcus Hook as trustee. The only possible control or right that he had to deal with them was as the agent and servant of William S. Hook, under his authority to sign checks in the name of T. J. Hook & Co. He does, indeed, declare that he stated to the members of the syndicate that these bonds were under his control; but, as matter of fact, the bonds were at all times, from their inception down to the time when he says he gave them to his wife, in the custody and under the control of William S. Hook. The delivery of these bonds to the trust company by the

company making them was a delivery to the Jacksonville Southeastern Railway Company, and to William S. Hook as its president. The deposit of them in the New York bank to the credit of T. J. Hook & Co., which was an alias of William S. Hook, did not dispossess the company of these bonds. He still held them as president of the company, and they remained under his control. Whatever his intention with respect to a pledge of the bonds, it was never effectuated by any action of the owner of them, or by delivery of them to Marcus Hook, the trustee of the syndicate, who held in trust the notes of the two railway companies. There was no delivery to him of the bonds. They never passed from the possession or control of William S. Hook, and his possession of them was the possession of the Jacksonville Southeastern Company. Nor do we discover sufficient ground to apply the doctrine of equitable pledge. That doctrine rests upon the idea that the possession of the thing remained with the owner, and that by some executory contract, expressed or implied, a right or interest in the thing has been created, which equity will recognize and enforce, upon the maxim that equity will regard as done that which ought to be done. There must, however, be a contract from which it sufficiently appears that the particular property was designed by the debtor to be subjected to the payment of the debt. Here was no such contract. William S. Hook asserts that he declared his intention to hold the bonds as security for advances which might be made by the syndicate. He says that he took them into his personal possession by subjecting them to the order of T. J. Hook & Co. This act, however, was not authorized by the railway company. Nor can it be permitted that as president of the company, and without the sanction of its directors and shareholders, he may contract with himself to the detriment of its creditors and shareholders. If the company, by its directors, had sanctioned the acts of William S. Hook with respect to those bonds, there might be sufficient shown to call for the application of the doctrine invoked. It would, however, be dangerous to declare that one in a representative capacity may so contract with himself, without the knowledge or acquiescence of those whom he represents, that an equitable pledge upon the property of the company could be asserted and enforced. It was so simple a matter to have procured such declaration of pledge, either legal or equitable, which a court of equity would recognize, that the want of such action casts suspicion upon the transaction, and especially in a case in which an officer of the corporation is dealing with himself. So far as we can discover, there existed merely an intention on the part of William S. Hook that the bonds should be pledged to the syndicate, unaccompanied by any act of the debtor company. The intention to pledge was that of the creditor, not of the debtor, and upon that there cannot properly be invoked the doctrine of an equitable pledge.

We are next to inquire whether the appellees are estopped to assert that these bonds are the property of the Jacksonville Southeastern Company. Marshall P. Ayers and John A. Ayers were members of the syndicate, and disposed of their interest therein

to William S. Hook with knowledge that he claimed the 122 bonds to be held in trust as collateral security for the claim of the syndicate. They received the money of William S. Hook with that knowledge. He parted with his money to them, relying, as they well knew, upon holding these bonds as collateral security to the debt he purchased. We said before, possibly obiter, and the majority of the court is still of opinion, that they are estopped by their contract of sale. That the claimed pledge of the bonds is ineffectual as against creditors and shareholders cannot weaken the effect of the estoppel. The supposed pledge fails through defective action, which, so far as their own rights are concerned, Marshall P. Ayers and John A. Ayers could perfect, and did sanction by taking the money of William S. Hook with knowledge of his claim. These two men cannot therefore now be heard to question a transaction which they have thus approved, and in the avails of which they have participated. The sale of the interest in the syndicate transferred the debt and that which secured the debt. We do not attempt to vary, or in fact vary, the terms of the written contract. It is not the case of an independent oral agreement inconsistent with the stipulations of the written contract. It is merely the application of the doctrine of estoppel, by which one who has participated in the avails of a transaction which is incomplete, and cannot therefore bind creditors, shall not be heard to deny the transaction. And by the application of this doctrine the contract is not impugned, but is made effectual as against Marshall P. Ayers and John A. Ayers to the purposes intended by and expressed in it, to wit, the transfer of their interest in the debt, and in the supposed collateral, and to no greater extent. But how can the estoppel that rests upon the two conclude the firm of which they were members? The transaction had relation to the individual business of the two members of the firm, and was in no way related to the co-partnership business. We know of no principle in the law of estoppel by which the firm can be thus concluded. It is urged, however, that if the principle of estoppel cannot be applied here, since two of the co-partners had notice of William S. Hook's claim to hold these 122 bonds as collateral to the syndicate debt, that was notice to the firm. The doctrine that a partnership is bound by notice to one of the partners results from the agency of the partner, and because of his duty to communicate his knowledge to his partners. But notice to a partner, to bind the co-partnership, must be with reference to a transaction within the scope of the co-partnership business, and not the knowl edge derived by one co-partner in the transaction of his private business; for, in respect to private matters, there exists no duty upon one to communicate his information to his co-partners. Duncklee v. Mill Co., 23 N. H. 245; Bank v. Savery, 82 N. Y. 291. It is, however, said that Augustus E. Ayers had notice prior to the sale to William S. Hook of his intention to hold these bonds as security for advances which the syndicate might make to the Jacksonville Southeastern Company, and that with such knowledge he stood silent, not objecting, and therefore should be concluded.

There was no duty resting upon Augustus E. Ayers, as a creditor of the Jacksonville Southeastern Railway Company, to enter his objection to the carrying out of the intentions of William S. Hook with respect to these bonds. Whatever William S. Hook might do, he did at his peril. Owing him no duty in this regard, Augustus E. Ayers cannot be estopped by his silence. There is no evidence in this record that he knew of the sale by his partners of their interest in the syndicate, and, if he did, we are unable to perceive that such knowledge would conclude him with respect to any just claim of the firm as creditor of the Jacksonville Southeastern Railway Company. He did not actively consent to any appropriation of the bonds by William S. Hook. If, knowing of Hook's claim to the bonds, he was silent when Hook dealt with his partners for their interest, that silence induced no action. He made no representation, he concealed no fact which he was bound to communicate to Hook; nor did the latter part with any valuable thing upon the faith of his silence. It may seem inequitable to permit a recovery by this firm, in view of the fact that two of its members received the money of William S. Hook when they knew that he claimed these bonds as security for the debt which he purchased. It might be possible—we do not, however, so decide—to recognize this equitable consideration, if we had before us evidence of the condition of the co-partnership, and the relative interests of the partners. The record, however, is silent upon that subject. We have no data upon which to work out the equity, if we were permitted so to do.

The decree under consideration would seem to be predicated upon an erroneous basis, because it recognizes the claim of the appellant, but subrogates her rights to those of the appellees. Our conclusion denies her right to the bonds in controversy, and asserts them to be the property of the railway company. In the distribution of the proceeds of the sale, these bonds should not share with those held by the appellees, because the latter are held as collateral to the debt of the company. The decree, however erroneous in theory, conforms to the prayer of the amended cross bill, and in that regard is favorable to the appellant, and cannot be impugned by her. It is not opposed by the appellees. The decree must therefore be affirmed.

WOODS, Circuit Judge. Concurring fully with the principal opinion in other respects, I cannot agree that upon the facts disclosed there is an estoppel against Marshall P. Ayers and John A. Ayers, any more than against Augustus E. Ayers. They made no representations in respect to the ownership of the bonds. They were ignorant of the facts, and it was only upon the representation of William S. Hook, who knew all the facts, that they were led to believe, if they did believe, that the bonds had been pledged as collateral to the debt of the Jacksonville & Southeastern Railway Company to the syndicate of which they were members. If there was fraud or deception in the transaction, Hook was the wrongdoer, and they were the victims. He had full knowledge.