of which were stored upon the premises of the Norfolk & Western Railroad Company at Lambert's Point, Va., and 2,000 in the city of Roanoke, Va. On the 2d day of February, 1895, the receiver, at the instance of certain supply lien creditors, filed a petition stating substantially the foregoing facts, making as parties defendant thereto said Crocker Bros. and persons claiming to be supply lien creditors. The cause was referred to a master, to take an account of the property, real and personal, of the Roanoke Iron Company, the liens thereon, and their priorities. As to the 6,000 tons of iron, the master reported that Crocker Bros. were to be deemed factors, who had made advances on the iron in their possession and had a factors' lien upon the same; which lien, however, the master reported, was subordinate to the lien given by a statute of Virginia to supply creditors. Code Va. 1887, § 2485. Crocker Bros. excepted to this finding of the master, and the exception was sustained, the court holding that Crocker Bros. held the legal and beneficial title to the iron, and that the iron company had a right to an account from Crocker Bros., and, on such account, a demand for the balance of money appearing due thereon,—the balance being the result after reimbursing the loans and payment of the expenses. It further determined: "When the iron is disposed of, Crocker Bros. must account with the receiver for the net balance which remains, and it will be applied by him to the payment of creditors according to their legal or statutory priorities." Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co., 81 Fed. 439. In accordance with this decision, Crocker Bros. disposed of the iron, and rendered their account to the receiver, charging therein the sum of $4,574.12, attorney's fees and expenses incurred in defending their title to the said 6,000 tons of iron against the claims of the supply lien creditors. This contention is based on, first, that clause of the contract which provides that Crocker Bros. shall be allowed "expenses of any nature incidental to distributing and delivering the iron." This is not an unusual provision in contracts of this character, and its purpose and scope are clearly shown by its terms. It contemplates the usual and ordinary expenses arising out of the business transaction in hand. There is nothing in the contract indicating that the parties contemplated that the title to the iron might be called in question, and Crocker Bros. required to defend their right thereto. It was not anticipated that the Roanoke Iron Company would become insolvent; that insolvency would be followed by the extraordinary proceedings attending the appointment of a receiver,—the marshaling of assets, and the ascertainment of debts and their priorities, with the litigation incident to conflicting claims and the contentions of creditors for the priority of their liens. It would be a strained construction of the contract to hold that attorney's fees and other expenses incurred in litigation of this character are embraced within the terms, "expenses of any nature incidental to distributing and delivering the iron."

Nor is the second ground taken in the argument, that Crocker Bros. were acting as agents or trustees of the iron company, and therefore entitled to charge their principal or cestui que trust with counsel fees expended in defending the title to the property, tenable. If they were agents or trustees for the iron company after the delivery of the iron, they were so only as to the surplus coming to the company after the

payment of the advances and expenses due them. The company had by its contract parted with its control of the iron as the principal owner, or as having any interest therein except as to the surplus. There was no controversy over the surplus. Crocker Bros. were not called upon in any way to protect that by employing counsel. It was their own interest in the iron that they were protecting, and this amounted to many thousands of dollars. It was to secure this, and realize further sums by a sale of the iron, that induced them to defend their title to the same. It was their individual interest, and that alone, that was subserved by the litigation.

A third ground upon which Crocker Bros. rest their claim for an allowance of attorney's fees is the fact that an injunction was granted restraining them from making sale of the iron pending the decision of the question whether the iron belonged to them or was subject to the liens of the supply creditors. They insist that they are entitled to recover attorney's fees as part of the damage occasioned them by the injunction. The authorities quoted to sustain this position relate to actions at law on injunction bonds, and it is sought to apply the same doctrine to an injunction in equity granted on application of the receiver, where no injunction bond is required. This position is not tenable. In Oelrichs v. Spain, 15 Wall. 211, the supreme court says: "In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included. So, in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected." The parties in this respect are upon a footing of equality. The court perceives nothing in this case to justify it in departing from the principle so often announced in cases of receivership, where counsel fees are asked to be paid out of a fund under control of the court. The general principle is that a litigant must pay his own counsel fees, and he cannot recover them in the shape of costs from his adversary, nor can he put the burden of their payment upon others entitled to participate in a fund under the control of a court of equity. An exception is made where he has by his services produced the fund, and where his interest is the same as that of others who are benefited by his efforts. The reason for the exception is thus stated by the supreme court in Trustees v. Greenough, 105 U. S. 527: "He has worked for them as well as for himself; and, if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." The rule as thus stated has been followed by the federal courts in a number of cases: Railroad Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870; Meddaugh v. Wilson, 151 U. S. 333, 14 Sup. Ct. 356; Trust Co. v. Condon, 14 C. C. A. 314, 67 Fed. 84. The claim of Crocker Bros. for attorney's fees and other expenses incurred in connection with the litigation in this cause will be disallowed.

MORGAN'S L. & T. R. & S. S. CO. v. MORAN et al.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1898.)

No. 552.

1. RAILROADS—SALE UNDER FORECLOSURE—RIGHTS OF PURCHASERS.
Where a decree for the sale of a railroad in foreclosure proceedings requires the purchasers to pay all valid claims outstanding against the receiver, growing out of the operation of the road by him, such payments are a part of the purchase price, for which the purchasers receive full equivalent in the property conveyed; and they are not entitled to be subrogated to the rights of the holders of claims against the receiver so paid, as creditors of the mortgagor company.

2. SAME—RIGHTS OF MORTGAGEES—EFFECT OF DECREE AS ADJUDICATION.
At suit of a creditor of a railroad company claiming an equitable lien on its property, a receiver was appointed, who took possession of all its property. A cross bill was filed by a mortgage trustee, under which the mortgage was foreclosed. By the final decree the road was ordered sold, and the outstanding claims against the receiver first paid from the proceeds. Certain lands owned by the railroad company, but not used in connection with its road, had been taken possession of by the receiver, and, because of a dispute between the parties as to the liens thereon, the receiver had been directed by the court to keep the proceeds arising from sales of such lands in a separate fund; and it was determined by the decree that neither the complainant nor cross complainant were entitled to a lien upon the lands or fund, but each was given leave to levy on any property in the hands of the receiver, not subject to their liens, to satisfy any deficiency remaining due after sale of the road. *Held*, that such decree was an adjudication, binding upon the mortgage trustee and the bondholders whom it represented, as to the fund from which claims against the receivership should be paid, and which precluded the bondholders from afterwards asserting a lien upon the land fund upon the ground that they were subrogated to the rights of the holders of such claims, who should have been paid from that fund.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Upon a bill filed by the Morgan's Louisiana & Texas Railroad & Steamship Company seeking to enforce an alleged equitable mortgage and lien, claimed to be paramount to all other liens, joint receivers were appointed in April, 1885, by the United States circuit court for the Northern district of Texas, of the property of the Texas Central Railway Company. Subsequently the Farmers' Loan & Trust Company of New York, which had previously made answer to the bill, filed a cross bill, and prayed for a foreclosure of two certain mortgages or deeds of trust represented by it, for default in the payment of interest on the bonds secured thereby; and such proceedings were subsequently had as that on April 12, 1887, a final decree was rendered, finding the mortgage bonds represented by the trust company to be a first lien upon the property mortgaged, and that the Morgan Company had an equitable lien upon the same property to an amount exceeding $750,000, "in all respects subsequent and subsidiary and junior to the lien of the mortgages or deeds of trust made to the Farmers' Loan & Trust Company." Contingent upon the nonpayment within a short time named of the amount due the trust company, a sale of the railroad property was ordered. By subdivisions 19 and 22 of the decree it was provided as follows: "(19) And it is further ordered, adjudged, and decreed that if the proceeds of the sale of the property above directed to be made shall not be sufficient to satisfy the sum herein adjudged in her favor of the Farmers' Loan & Trust Company, trustee, and in favor of Morgan's Louisiana & Texas Railroad & Steamship Company, the said complainant, Morgan's Louisiana & Texas Railroad & Steamship Company, and the said cross complainant, the Farmers' Loan & Trust Company,