

between the principal contractor and the railroad company, it was doubtful whether complainant and others engaged in the construction of the road were principal or subordinate contractors, and asked that their liens be declared first liens, or for such other or different relief as might seem meet. *Held*, that the bill might be treated as one to enforce a subcontractor's lien, and hence as a compliance with the statute.

16. COLLECTION OF TAXES—TENNESSEE STATUTE.

The statute of Tennessee relative to taxation of railroads (Acts 1875, c. 78, Mill. & V. Code, §§ 669-708) provides that state taxes may be collected by the comptroller by distress and sale, and, on failure to obtain satisfaction out of the personal property, by sale of the real property and franchises; and also that the collector of taxes of any county shall collect the amount due to the county as now provided by law, in case of delinquents. *Held*, that these provisions constitute an exclusive mode of collection of railroad taxes, and that as, at the time of the passage of the act, the general tax laws provided no penalty for delinquents, no such penalty could be imposed on a railroad delinquent in payment of taxes, notwithstanding a penalty had been imposed by subsequent legislation for delinquents under the general laws.

17. PRACTICE—ALLOWANCE TO COUNSEL.

Where a bill has been filed to foreclose a mortgage on a railroad, and persons holding liens on the road afterwards file a general creditors' bill to ascertain and clear all liens on the road prior to the mortgage, making the mortgagees and all other lien holders parties, it being necessary to a successful sale of the property that the various liens should be ascertained and cleared off, and such creditors' bill being consolidated with the foreclosure suit, the plaintiffs in such creditors' bill are entitled to an allowance for counsel fees out of the fund derived from the sale of the road for their services in filing the bill and bringing in all lien claimants.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a suit by the Central Trust Company of New York to foreclose a mortgage given by the Marietta & North Georgia Railway Company, with which was consolidated a suit by V. E. McBee and others against the Central Trust Company and others to restrain the prosecution of the foreclosure suit and of other claims against the property on which they claimed liens, and praying for a sale and payment of their claims from the proceeds. All creditors were directed to file their claims in the consolidated cause, and numerous lien claimants accordingly filed intervening petitions. A motion to dismiss the bill of McBee et al. for want of jurisdiction was denied. 48 Fed. 243. A decree for sale and distribution was made, from which cross appeals were taken by the Central Trust Company and the lien claimants, and which was reversed on the Central Trust Company's appeal. 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. After further hearing in the circuit court a new decree was entered, from which both the Central Trust Company and some of the lien holders again appeal.

This is a second appeal in this case. The opinion of the court on the former appeal is reported under the name of Central Trust Co. v. Bridges, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. The controversy relates to the priority of liens on a railroad running from Knoxville south towards Marietta, in Georgia, 118 miles, and known at the time of its construction as the Knoxville Southern Railroad. The Marietta & North Georgia Railway Company of Georgia owned a narrow-gauge railroad running north from Marietta towards the North Carolina and Tennessee lines. Persons interested in its stock, especially R. M. Pulsifer and George R. Rager, conceived the plan of making

it a standard-gauge road, and extending its line to Murphy, N. C., and thence to Knoxville, Tenn. Accordingly contracts were made between the railroad company and George R. Eager, by which the latter agreed to carry out the proposed improvement in Georgia as principal contractor, receiving his pay in first mortgage bonds of the company. The mortgage under which these bonds were issued contained a provision that they should be used to pay for the construction of the road in Georgia and North Carolina at not exceeding \$16,000 a mile, and in Tennessee at not exceeding \$20,000 a mile. The mortgage was executed in 1887, and at that time the Marietta & North Georgia Railway Company had no authority to build or mortgage a railroad in Tennessee. About the same time, however, the same persons organized the Knoxville Southern Railroad Company to build and operate what was intended to be and was the Tennessee extension of the Georgia Company's railroad. The Knoxville Company made a contract in 1887 or 1888 with a corporation of New Hampshire known as the North Georgia Construction Company as principal contractor to build the road in Tennessee. Eager was president of this construction company, and a large owner of its stock. The city of Knoxville agreed to subscribe for \$275,000 of the stock of the Knoxville Southern Railroad Company on condition that the railroad should be completed in time to permit the running of trains from Marietta to Knoxville by August 13, 1890. Much work was done on the Knoxville road during the year 1888. From the fall of that year until the spring of 1890 the work was substantially suspended. R. M. Pulsifer, a large stockholder in the railroad company and in the construction company, died late in 1888, and this seemed to stay the further prosecution of the work. The construction company, for all the work it did, received its pay in bonds of the Marietta & North Georgia Railway Company, issued under the mortgage already referred to, although that company did not own the road being constructed, and had no authority to mortgage it. The construction company, in 1889, assigned to Eager all its rights under its contract, and all its liabilities, and in April, 1890, a contract was made between the Knoxville Southern Railroad Company, acting by Arthur, its vice president, and George R. Eager, for the construction of the entire railroad. The contract was dated back to August, 1887, and was thus made doubtless to overreach the time during which the building had proceeded under the contract of the North Georgia Construction Company. This contract was spread on the minutes of the meeting of the stockholders of the Knoxville Southern Railroad Company of May 29, 1890, and was ratified and approved. The contract provided that the Knoxville Company would mortgage its road to secure the bonds of any other company issued to Eager to pay him for the construction of the road. Accordingly, at a meeting of the stockholders of the Knoxville Company of July 14, 1890, the directors and officers were directed to execute a mortgage to the Central Trust Company to secure all the bonds of the Marietta & North Georgia Railway Company issued to pay for the building of the Knoxville Southern Railroad not exceeding \$20,000 a mile. The meeting at which the mortgage was authorized does not appear to have been advertised in the Knoxville, Nashville, and Memphis papers. Before August 13, 1890, trains were running from Marietta to Knoxville, and the subscription of the city of Knoxville became absolute, and was paid in bonds of the city. In November, 1890, the Marietta & North Georgia Railway Company and the Knoxville Southern Railroad Company were consolidated, in accordance with the laws of Georgia and Tennessee, under the name of the former company.

In the construction of the Knoxville Southern Railroad, with but one or two exceptions, all the claims of contractors and material men for work done or material furnished before 1890 were paid. When the road went into the hands of a receiver, in January, 1891, there were left unpaid upwards of \$300,000 of claims by contractors and material men. Substantially all the contracts under which these claims arose were made after the execution of the contract between Eager and the Knoxville Company in April, 1890, and the work and materials were all furnished thereafter. In October, 1890, Eager became slow in his payments, and suits were begun by subcontractors. Many of these suits were prosecuted to judgment in the state courts of Tennessee against Eager as principal contractor and the railroad company as garnishee. In November, 1890, in a manner described in the opinion on the

former appeal, Eager secured a judgment as principal contractor for \$375,000, and subsequently assigned this judgment to S. B. Luttrell, trustee, for the benefit of all the subcontractors and material men to whom he was indebted. Of the men who did work or furnished materials for the construction of the railroad, McBee & Co., J. W. Wilson, W. McD. Burgin, W. B. Crenshaw, J. H. Odell, James H. Moses, and George Bruster were the only lien claimants who did not take judgment against Eager as principal contractor and the railroad company as garnishee in the state courts. On January 12, 1891, the Central Trust Company filed its bill in the circuit court of the United States for the Northern district of Georgia against the Marietta & North Georgia Railway Company to foreclose the mortgage of 1887. The next day a similar and ancillary bill was filed against the same company in the court below, the circuit court of the United States for the Eastern district of Tennessee. The next day, McBee & Co., J. W. Wilson, and W. McD. Burgin filed a bill in the same court to establish their liens against the Knoxville Southern Railroad, to marshal the liens, and to sell the railroad. To this bill they made parties the Knoxville Southern Railroad Company, the Marietta & North Georgia Railway Company, and all the contractors, including Eager, and all the material men having claims against the road, so far as they knew them. They attacked the validity of the mortgages of 1887 and of 1890 and the consolidation. The foreclosure bill and that of McBee & Co. et al. were consolidated, and a receiver was appointed. It was ordered that the McBee bill be treated as a general creditors' bill, and that all persons having claims against the Knoxville Southern Railroad Company be brought in by due advertisement. Subsequently the Central Trust Company filed an amended bill, setting up the Knoxville Southern mortgage of 1890, and praying foreclosure under that. The Central Trust Company and the two railroad companies filed answers to the McBee bill, in which they averred that the work for which liens were claimed had been done for George R. Eager, principal contractor, and not for the Knoxville Southern Railroad Company; and that, as nothing was due from the company to Eager, no lien could be asserted against the railroad. The contract relied on specifically was that dated August 20, 1887, and actually executed in April, 1890. Thus was evolved a controversy, which was referred to a master to hear and determine, between the bondholders on one side and the contractors and lien holders on the other, and in which the main question was whether the work done and material furnished by the lien claimants had been done for George R. Eager, principal contractor, or for the Knoxville Southern Railroad Company. The master reported that, although Eager represented himself to be a contractor, and actually did the work under a contract, his contracts were nevertheless the contracts of the railroad company, because he was the largest stockholder of the company, and the directors were his tools and employés, quick to do his bidding. This view was confirmed by the circuit court, and all the claims were decreed to be liens against the road as principal contractor's liens, and in no way dependent on or limited by the amount owing, if anything, from the railroad company to Eager. In its decision on the former appeal this court differed from the court below and the master, and held that Eager was a principal contractor with the railroad company under the contract dated August 20, 1887, and that all who had taken judgment against him as principal contractor were in fact subcontractors, and could only assert liens as such against the railroad company to the extent of the company's indebtedness to him. This court also held that Eager's judgment against the Knoxville Company was fraudulently obtained, and that it did not furnish even prima facie evidence of the amount due him. The case was accordingly remanded to the circuit court for two purposes: First, for the hearing and determination on further evidence of the amount due from the Knoxville Southern Railroad Company to Eager; and, second, for the hearing and determination on further evidence of the question whether McBee & Co., J. W. Wilson, W. McD. Burgin, W. B. Crenshaw, J. H. Odell, James H. Moses, and George Bruster had contracted directly with the railroad company or with Eager. By consent of counsel, the claim of Kellar & Findlay to the extent of about \$1,800, though it had been included in a judgment for a much larger amount against Eager as principal contractor, was resubmitted to the master for decision as to whether this part of their claim was not properly to be treated as a

direct debt of the railroad company. The master reported that the railroad company was not indebted to Eager at all, and that of all the persons whose claims had been referred to him for determination only McBee & Co., and they only to the extent of half their claim, had a valid debt and lien directly against the railroad company. The court below sustained the exceptions to the master's report, and held that all the claimants above named were principal contractors with the railroad company, and that the railroad company was indebted to Eager as follows:

Unissued stock.....	\$103,020 00
Interest thereon from Jan. 1, 1890, to date of filing bill in this cause .....	6,438 75
On account of permanent line around the W.....	55,145 04
On account of cattle guards, water tanks, and stock gaps.....	9,850 00
Interest from Aug. 13, 1890, to Jan. 16, '91.....	245 88
On account of slides.....	14,142 90
On account of expenses of engineering.....	51,072 82
Interest from Aug. 13, '90, to Jan. 16, '91.....	1,276 80
On account of Goodlin lot.....	293 01
Interest from Aug. 13, '90, to Jan. 16, '91.....	7 30
On account of steam shovel.....	5,100 00
Interest from Aug. 13, '90, to Jan. 16, '91.....	127 50
On account of extra mileage, four side tracks, and "Y".....	45,000 00
Interest from Aug. 13, 1890, to Jan. 16th, '91.....	1,125 00
<b>Making a total of.....</b>	<b>\$292,855 00</b>

All said items were allowed as proper credits in favor of said George R. Eager, and against the Knoxville Southern Railroad Company; but against said amounts it was adjudged that the said Knoxville Southern Railroad Company was entitled to credits as follows:

For completion of the bridge over Little Tennessee river .....	\$5,500 00
For strengthening trestle at the W.....	2,500 00
For rights of way which are yet unpaid for, and adjudged in this proceeding.....	2,142 93
	<u>\$ 10,142 93</u>
Leaving a balance of.....	\$282,712 07
Due to George R. Eager, but from the foregoing sum there was deducted the sum of.....	27,834 67
Being the amount above adjudged to be due to the said V. E. McBee & Co., James M. Wilson, Wm. McD. Burgin, and Kellar & Findlay, and leaving the final balance due to the said George R. Eager from the Knoxville Southern Railroad of.....	\$254,877 40

The decree of the court was appealed from by the Central Trust Company, and many errors were assigned. Cross appeals were taken by the subcontractors from the decree on the ground that the amount adjudged to be owing by the Knoxville Southern Railroad Company to Eager was too small. Another question presented by the record on the Trust Company's appeal is whether, under the railroad tax law of Tennessee, the county and state are entitled to collect 10 per cent. penalty upon the delinquent taxes due from the railroad company.

The contract executed in April, 1890, and dated August 20, 1887, between Eager and the Knoxville Southern Railroad Company contained, among other recitals, this: "Whereas, the Knoxville Southern Railroad Company is desirous of contracting for the making and construction of its railroad, and is willing to that end, in order to accomplish the purpose of its organization, to pledge and employ in the payment therefor all of its property and franchises, and whereas George R. Eager is able and willing to enter into contract for the construction of railroads and other works." The first clause of the contract provided that: "The party of the second part agrees to build

and complete the railroad of the party of the first part, and the party of the first part agrees that the party of the second part shall and may build said railroad, commencing at a point on the south side of the Tennessee river, where the road of the Knoxville Belt Railroad Company and the said road connects, within one mile of the city limits of Knoxville, in the state of Tennessee, to a connection with the Marietta and North Georgia near where the Hiwassee river crosses the North Carolina and Georgia state line, in accordance with the specifications hereto annexed, upon such route as has been or may hereafter be designated by the party of the first part. Second. The party of the second part agrees to furnish the money to pay for right of way, depot grounds, except the terminals at Knoxville, which it may be necessary for the first party to acquire for the convenient uses and operation of the railroad herein agreed to be constructed, and to pay the expenses of all legal or other proceedings that may be necessary therefor. And it is mutually agreed that all works, materials, and plants heretofore constructed, equipped, and provided, either by the party of the first part or by the party of the second part, now in use in or about the construction or operation of the railroad of the party of the first part, as and shall be deemed for all purposes of this agreement, as works, material, or plants heretofore constructed, equipped, or provided under agreement by the party of the second part, provided that the party of the second part shall be at liberty to replace any or all of such works, material, or plant with others conforming to the terms of this agreement, and thereupon such works, material, or plant so replaced by other shall be and remain the property of the party of the second part. Third. The party of the first part agrees, whenever requested to do so by the party of the second part, to survey and lay out its road or roads as hereinbefore agreed to be constructed, and to acquire by purchase or condemnation or otherwise such rights of way, depot grounds, and other real estate as may be necessary or convenient for the construction, use, or operation of the said road or roads." By the fourth clause the railroad company agreed to execute a mortgage to "secure the payment of bonds of the party of the first part, or to secure the payment of bonds of any other company taken or used by the said Geo. R. Eager as a part of his compensation for the building of the road of the party of the first part, or any portion thereof, under this or any contract to the amount of \$20,000 per mile for each and every mile of constructed road, and to make and execute any other or further deeds, conveyances, or mortgages or instruments as counsel learned in the law selected by said Eager may advise as necessary or proper to secure any first or other mortgage bonds issued to aid in the construction or equipment of said road, or to pay any expenses connected therewith, or with the management or operation of said road, or with the marketing of said securities." The fifth paragraph provided that: "The party of the first part shall pay to the party of the second part, for the said railroad constructed and to be hereafter constructed by the party of the second part as aforesaid, all the first mortgage bonds of the party of the first part to be issued under or secured by the said mortgage, namely, \$20,000 per mile, also full-paid shares of the capital stock of the party of the first part to the amount of \$20,000 per mile of said railroad, excepting that there shall be deducted from the total amount of said capital stock such amount thereof as shall be required to be issued to fulfill the terms of the conditional subscription by the city of Knoxville, or any other subscription that may be made to said railroad company by any county or community. The stock herein mentioned shall be paid whenever and as each mile of the road is graded, and the party of the second part shall be entitled to demand, and the party of the first part agrees to deliver to the second party, full-paid capital stock to the amount of \$20,000 per mile as each mile is graded. The bonds herein mentioned shall be paid whenever each mile of road is built and ready for the operation of trains." The sixth paragraph of the contract was an assignment by the railroad company of all the stock subscriptions to Eager, and of all the funds in its possession at that time, in further payment of the work and services to be performed. The seventh paragraph provided that the entire railroad contracted to be built should be fully constructed and furnished in accordance with the stipulations, with all the appurtenances therein con-

tracted for, to the party of the first part, before the 13th day of August, 1890. "But the party of the second part shall have the right at any time to deliver to the party of the first part any portion of the railroad or railroads as completed, and, as soon as any portion of the road or roads herein contracted to be built shall be delivered to the party of the first part, the same shall be operated by the said party of the first part, through its officers and agents, to be appointed with the consent of the party of the second part, and the said party of the second part shall receive all the earnings and shall pay all the expenses of operating such completed portion until the entire construction and delivery of the road under the provisions of this agreement."

Butler, Stillman & Hubbard, Henry B. Tompkins, and Tillman & Tillman, for Central Trust Co.

W. L. Ledgerwood, for state of Tennessee and Monroe county.

W. P. Washburn and Jerome Templeton, for McBee & Co. et al.

Green & Shields, J. W. Caldwell, and Templeton & Cates, for interveners.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Of the questions left open by the decision on the former appeal, the principal one now to be determined is that of the amount owing by the Knoxville Southern Railroad Company to George R. Eager. The first important point of difference between the parties is in respect to the liability of Eager under the contract to furnish the railroad company with a complete equipment of rolling stock. The master reported that Eager was bound to supply rolling stock, and that, not having done so, he was chargeable with the sum required for the purpose. The circuit court sustained the exception to this view, and held that the contract did not impose such an obligation on Eager. We concur with the court below. In the recital the desire of the railroad company to contract "for the making and construction of its railroad" is referred to. In the first clause Eager agrees to build and complete the railroad, and the company agrees that he may build it according to specifications (which never appear to have been made). In the second and third clauses reference is made to the "railroad herein agreed to be constructed." By the fifth clause the payment under the contract is to be for the railroad "constructed and to be hereafter constructed," and the bonds which constitute the final payment are to be paid "whenever each mile of road is built and ready for the operation of trains." These expressions are utterly inconsistent with the idea that Eager was bound to furnish the rolling stock in addition to completely constructing the road. The second half of the second clause inserted manifestly for the purpose of merging the contract of the North Georgia Construction Company in this one of Eager does refer to "all works, materials, and plants heretofore constructed, equipped, and provided, now in use in or about the construction or operation of the railroad," but this clause does not necessarily include rolling stock, though it may not necessarily exclude it. Rolling stock is usually not

referred to either as "works" or "plant" or "materials." Works and plant which must be furnished in the building of a road are as necessary in the operation of the road as rolling stock, so that "operation" does not necessarily imply that the works, plant, or materials referred to were rolling stock. In the fourth clause of the contract the company agrees to execute a mortgage to secure the bonds to be issued as compensation for Eager's building the road, and also to issue additional mortgages necessary to secure any first or other mortgage bonds issued to aid in the construction or equipment of the road. Just what the bonds were which the additional mortgages were expected to secure is not quite clear. Certainly so obscure a sentence cannot be held to impose on Eager an obligation to equip the road, when the clause in which his obligations are defined excludes such an idea. But it may be suggested that the feature of the contract by which all the available assets of the company were to be delivered to him to pay for his work, leaving nothing to the company to buy rolling stock, made it reasonable and probable that he should furnish the rolling stock, and requires this effect to be given to the contract, if possible. This road was built as an extension of the Marietta & North Georgia Railway, with an immediate consolidation in view, and it would not be unreasonable to suppose that the parties to this contract looked to the latter road for aid in this respect. The agreement in the fourth clause of the contract that the company would give an additional mortgage to secure bonds issued to aid in the equipment of its road suggests that the parties then had some plan for the issuance of other bonds by the Marietta & North Georgia Railway to pay for equipment of this road, also to be secured by mortgage on this road. However this may be, the court cannot disregard the plain limitations imposed by the language used, and expand an agreement to build and construct into an agreement to construct and furnish rolling stock.

The main argument of counsel for the trust company is based on the language of the certificates of the chief engineer of the Marietta & North Georgia Railway Company upon which Eager obtained his bonds from the Central Trust Company and an agreement for the negotiation and sale of the bonds between one Hambro and the Marietta & North Georgia Railway Company represented by Eager in which it was provided that bonds should be delivered by the trust company at the rate of \$20,000 per mile only on the presentation of such certificates. The certificates were to the effect that five miles of road had been constructed, and the necessary and proportionate amount of rolling stock had been furnished. We do not see how the Hambro agreement and the certificates of the engineer of the Marietta & North Georgia Railway Company can vary the construction of the contract between Eager and the Knoxville Southern Railroad Company. The latter was not a party to the Hambro agreement, and its engineer did not issue the certificates. It only bound itself to secure by mortgage on all its property the bonds issued for its construction.

It may be that, as between himself and the bondholders under the Marietta & North Georgia mortgage, Eager, if he had furnished equipment, would be estopped to assert title to it, or a claim for it in priority to the mortgage; but such an estoppel, arising dehors the written contract between him and the Knoxville Southern Railroad Company, could not affect his subcontractors and the material men. *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520. They had the right to rely on the contract as defining the extent of Eager's lawful claims against the Knoxville Southern Railroad Company, and as furnishing the fund for the payment of their liens, when duly fixed in accordance with the statute. The contract was their security. *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737. Whether this contract dated August 20, 1887, is one which might have been set aside as not securing to the Knoxville Southern Railroad Company that which in good conscience it should have had because of Eager's fraud and undue influence in obtaining it, is a question not before us for decision. It is the contract upon which both the railroad companies and the Central Trust Company have planted themselves in their pleadings, and it is the contract upon which this court has supported their claim that Eager was the principal contractor, and that all the other claimants were subcontractors under him. The Central Trust Company cannot use the contract for one purpose and repudiate it for another. The contract provided that the bonds should be paid when each mile of road was built and ready for the operation of trains. By its terms Eager agreed to construct the railroad, not to equip it. The construction of the road does not include its equipment, and any such interpretation of the contract would be making a new agreement.

It is said, however, that the circuit court of appeals of the Fifth circuit has decided in the case of *Central Trust Co. v. Hiwassee Co.*, with respect to a similar contract, that Eager was obliged to furnish the equipment. The case is reported in 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850. An examination of the opinion does not bear out what is claimed for it. The controversy there arose over the title to certain rolling stock between Eager's assignee and the bondholders. It appeared that Eager had furnished the rolling stock to the Marietta & North Georgia Railway Company, and that on the faith of the company's owning it Eager had obtained the bonds under the Hambro agreement. It was held, although his contract with the railroad company might not have required him to furnish the equipment, that, as against the bondholders, he, and therefore his assignee, were estopped to assert title to the rolling stock, and defeat the lien which the bondholders would have on it as the property of the railroad company. The controversy there was, of course, very different from here, and has no bearing upon the question at bar.

The second important question with reference to the indebtedness of the company to Eager is whether he can claim any recovery now for the deficiency in the amount of stock in the Knox-



ville Southern Railroad Company which should have been issued to him under the contract. We had occasion to consider this claim in our first opinion. The judgment of \$375,000 in favor of Eager was founded on an agreement arrived at in the stockholders' meeting of the Knoxville Southern Railroad Company, wherein Eager and all the other lien claimants were represented, by which agreement the value of \$300,000 par value of the shares of the capital stock of the Knoxville Southern Railroad Company was fixed at \$275,000. This was at a meeting on the 29th of November, 1890. We held in the former opinion that the amount of stock due to Eager was at the time worthless, and that the fixing of its value at \$275,000 was a mere fraudulent device to make Eager's claim against the company sufficiently large to pay all the subcontractors under him, and fasten a lien to that extent upon the corpus of the railroad company, prior to that of the bondholders. It now appears that the deficiency in stock due to Eager was more than \$600,000, instead of \$300,000. He had already received, however, \$1,500,000 par value of the stock. The court below, overruling the master, who found the claim for stock to be worthless, held that Eager was entitled to this stock on the 1st of January, 1890; that at that time its value was 15 cents upon the 100, and that Eager should be allowed a credit of \$103,020 therefor. We think this finding cannot be supported for several reasons. First, there is no sufficient evidence in the record to show that the stock had any market value on the 1st of January, 1890. That which was introduced to show it, was of a very flimsy character. More than this, it is by no means clear that on the 1st of January, 1890, Eager, who, at that time had 12,000 shares of the stock, had graded more than 60 miles of the road. Under the contract, therefore, he had all the stock he was then entitled to. Again, Eager made no demand upon the company for the stock, and was not entitled to recover in damages, except from the time he made his demand, and such demand was refused. When he did make a demand, in November, 1890 (if it can be treated as a demand in good faith), it is conceded that the stock was absolutely worthless. But it is said that the capital stock of the company was only \$1,500,000, so that the company on January 1, 1890, was not able to issue the stock, and therefore a demand was not necessary. The charter provided that the capital stock might be increased by a vote of the directors, and there is nothing to show that, if Eager had requested the increase of the stock, the directors and stockholders would not have secured such increase by amendment of the charter, or such other step as might be necessary. On the contrary, it is manifest that they would have done so if Eager had really in good faith requested it.

The next item in the claim of Eager against the company is on account of the permanent line around the W. The railroad company, in order to secure certain subscriptions, was obliged to complete its line and have trains running upon it from Marietta, Ga., through to Knoxville, on the 13th day of August, 1890. Part