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

of the Knoxville Southern Railroad lay through and over mountainous country. In crossing Bald Mountain it was found that the work of constructing an easy grade would consume more time than could be given if the subscription contract with the city of Knoxville was to be fulfilled. It was therefore deemed best to build what was called a "W," and at some later period to construct a permanent line on easier grades. The W was accordingly constructed, and Eager received his pay by mileage upon that line, but he also constructed about one-third, or three miles and a half, of a permanent line, which would give the company a much easier mode of getting around Bald Mountain. He never has received any pay for the part of the permanent line which he built. This will be of great advantage to the company and to the purchaser at the foreclosure sale. It is now in the hands of the receiver, and the title to the right of way is in the Knoxville Southern Railroad Company, or its grantee, the new Marietta & North Georgia Railway Company. It must be presumed that so much of the permanent line as was built was built with the consent of the railroad company, and that the change from the permanent line to the W was with its acquiescence. Clearly, the permanent line around the W must be treated as an extra not paid for by bonds delivered under the contract. We think that it is such an addition to the value of the railroad company, over and above the line which Eager agreed in his contract to build, that he ought at least to have credit for its actual cost. It is a part of the railroad, and, when completed, will be part of its main line. The amount due for its actual cost is $55,145.04.

A credit for cattle guards, water tanks, and stop gaps, amounting to $9,850, was allowed by the court below to Eager, but these, we think, were all a part of the complete construction of the railroad, for which Eager was paid in the bonds delivered to him under his contract. The same is true of slides. It may be that, where a contractor is building for a railroad company certain work, under carefully drawn specifications, and there are unusual slides, it is customary to allow him for the same; but the present is an unusual contract. It covers the complete construction of the road, and the company places everything in the hands of Eager to assist him, and gives him the widest discretion in reference to the way in which he shall build the road. In such a case we think it reasonable to hold that he assumes the additional cost arising from natural causes.

The next item is that of the expenses of engineering. There is nothing in the contract imposing upon Eager the duty of paying the expenses of the engineering of the road. The railroad company had a chief engineer duly appointed, and it had four or five assistant engineers under him, whom Eager paid. The services which they rendered were services which would ordinarily be paid by a railroad company in the construction of a railroad, and there is nothing in the contract to show that it was expected that Eager should meet these expenses. He did meet them be-

cause the company had no funds to draw upon at the time, but we think that under the contract he may be properly credited with the amount paid by him therefor. This sum is $51,072.82. It was paid out of the proceeds of the bonds delivered to him in fulfillment of the company's contract with him, and may be fairly said, therefore, to reduce the amount actually paid him for his work by the company.

It is conceded that on account of the Goodlin lot there is $293.01 due to Eager.

The court below allowed $45,000 for side tracks and Y's built by Eager, on the theory that under his contract he was entitled to $20,000 per mile of track laid in their construction. The master reported that their actual cost was but $16,000, and that he was inclined to the opinion that they were properly a part of the completed road which Eager was bound to construct. Eager's contract was to build a completed road, ready for the operation of trains. Y's are but the equivalents of turntables, and are thus indispensable in the operation of a railroad. It is impossible to run trains upon a single-track railroad, 100 miles long, without side tracks. We are satisfied from the evidence that both the Y's and the side tracks were only part of the necessary construction of the completed road, and were paid for by the bonds delivered to Eager at the rate of $20,000 per mile of main track. There were no specifications, and he took a lump job for a completed road. Under these circumstances, the item for side track and Y's cannot be allowed.

A claim is made on account of a steam shovel, of $5,100, which was in the possession of the railroad company when this suit was begun, and passed thence into the hands of the receiver. Eager would have no claim against the company on construction account for such a shovel, and could certainly not claim any lien under the statute against the company for furnishing it. The statute allows liens only for work of construction and materials therefor, and for engineering and superintendence, but not for tools or machinery for construction. Mill. & V. Code, § 1774. If Eager delivered this shovel to the company, its delivery simply created a debt which was not a debt of construction, and could not give rise to a lien.

In addition to the foregoing items a claim was made before the master and before the court below in favor of Eager for the amount paid by him to take up and cancel interest coupons upon the bonds of the Marietta & North Georgia Railroad Company. The amount claimed was $164,000. It was disallowed both by the master and the court below. It is brought here for our consideration by cross appeal and proper assignment of error. As has already been stated, the Knoxville Southern Railroad Company was an extension of the Marietta & North Georgia Railroad Company. The Marietta & North Georgia Railroad Company issued all the bonds for the construction of both roads at the rate of $20,000 per mile for the construction of the Knoxville Southern and at

a somewhat less rate per mile for the construction of the Marietta & North Georgia Railroad. In the issuance and delivery of the bonds to Eager under the Knoxville Southern contract, the Marietta & North Georgia Company really acted as the agent of the Knoxville Southern Railroad Company. While Eager was building the Knoxville Southern Railroad the interest upon the bonds of the Marietta & North Georgia Railroad Company began to fall due. By agreement between the president of the Marietta & North Georgia Railroad Company and Eager, the latter took up, paid, and canceled all the interest coupons of the bonds which were presented for payment. The coupons thus falling due, and which might have been presented for payment, amounted in all to $164,000. As a matter of fact less than this number were presented; how many less the record does not definitely show. It does appear from the record, however, by Bradley's testimony, exactly how many interest coupons Eager paid and canceled of those bonds which were delivered to him under the Knoxville Southern Railroad contract, to wit, $36,290.01 down to July 1, 1890. This sum Eager testifies was paid out of the proceeds of the bonds for the construction of the Knoxville Southern Railroad Company. We do not think that Eager is entitled upon his Knoxville Southern Railroad contract to credit for interest paid by direction of the Marietta & North Georgia Railroad Company on bonds issued by that company, and not used in the construction of the Knoxville Southern Railroad. Such payment was made under what must be regarded as an independent agreement, by which an indebtedness was created in favor of Eager against the Marietta & North Georgia Railroad Company. But we do think that there may be properly credited to Eager on his Knoxville Southern contract the sum paid by him under direction of the agent of that company out of the proceeds of the bonds delivered to him to take up coupons on previous bonds delivered to him under the same contract. These interest coupons were obligations of the Knoxville Southern Railroad Company, and a contract between the agent of that company and Eager, by which the latter paid them out of the proceeds of new bonds, reduced pro tanto the amount paid to Eager under the contract for the construction of the road.

There are other items, some of which were allowed to Eager by the court below and others of which were rejected. We think that they were all for work required of Eager under the contract, and cannot be made the basis for any claim in his favor against the railroad company.

Eager must be debited with the amount required to elevate the bridge over the Little Tennessee river; also for the amount required to strengthen the trestles built by him, and for the amounts due for rights of way which in his contract he agreed to pay for and did not, and which are adjudged in these proceedings against the railroad company and in favor of the owners. The account would therefore stand as follows:

Credits.

On account of the permanent line around the W		$ 55,145 04
On account of engineering		51,072 82
On account of Goodlin lot		293 01
On account of interest coupons on bonds		36,290 01
		$142,800 88

Debits.

To amount required to elevate Little Tennessee river bridge	$5,500 00	
To amount required to strengthen trestles	2,500 00	
To amount required to pay for rights of way adjudged in these proceedings against the R. R. Co	2,142 93	
		10,142 93
Balance due Eager		$132,657 95

These matters constituted a running account between Eager and the railroad company, and, in view of the fact that he did not really complete all the work under his contract until about December 15, 1890, we do not think that interest should be calculated on the balance until that date. The amount due to Eager is the fund out of which his subcontractors who have perfected liens are to be paid. This was the limit in the aggregate of subcontractor's liens upon December 15, 1890. They were liens superior to the bonds. They should bear interest, or, what is the same thing, the fund from which they are payable should bear interest until paid. The security and priority of the lien attach as well to interest as to principal. The aggregate of the subcontractor's claims exceeds by at least 50 per cent. the fund due Eager, even with interest, so that in the distribution no interest need be calculated on the claims after December 15, 1890, for the share applicable to each will not be varied by adding interest to all claims for the same period from December 15, 1890, to the date of the decree. But the limit in the aggregate of the liens fixed on the property must be increased by interest until satisfaction. This is not a case where the distribution is to be made pro rata between the lienholders and the bondholders, in which case, of course, interest is not to be calculated upon the claims after the time of the sequestration of the property for sale and distribution, so long as the claims cannot be paid in full. Bank v. Armstrong, 16 U. S. App. 465, 8 C. C. A. 155, 59 Fed. 372. In the distribution of the proceeds of a common security between liens of different priorities, we know of no principle by which interest can be stopped on the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment, and the decree should therefore include interest on the amount herein found due Eager from December 15, 1890, until it shall be entered.

We come now to the claims made by McBee & Co., J. W. Wilson, W. D. McD. Burgin, Kellar & Findlay, W. B. Crenshaw, J. H. Odell, J. H. Moses, and George Bruster. These claimants aver that they dealt directly with the Knoxville Southern Railroad

Company, and that they are entitled to liens as principal contractors for the work which they did, or the material which they furnished, directly against the railroad without regard to the indebtedness of the railroad company to Eeager. With respect to Crenshaw, Odell, Moses, and Bruster, we think they may properly recover the amounts due them directly from the railroad company. They acted as assistant engineers under Walton, the chief engineer of the company. They sue for their salaries as such. The amount which they did receive was paid, it is true, by Eager, but we have found that it was the duty of the company, under the contract, to pay the engineering expenses. In paying and employing these men, therefore, Eager was not arranging and paying for work to be by him done under the contract, but he was pro tanto acting as agent for the company in arranging and paying for work which was imposed by the contract on the company. The amounts due to these four claimants are not disputed, and they are entitled to interest on the same from the time they became due until the date when the decree shall be entered below. It is objected that these assistant engineers have not taken the necessary statutory steps to perfect their liens as principal contractors. The statute (Acts 1883, p. 296, c. 220; Mill. & V. Code, § 2774) gives a lien on the railroad for engineering and superintendence, which is to continue in force for six months after the performance of the work, and until the termination of any suit commenced within the time for its enforcement. Section 2 provides as follows:

"That the lien created under section 1 of this act may be enforced by a suit against the railroad company in the circuit court of the county or district where the work or some part thereof was done, or the material or some part thereof was delivered. The plaintiff shall set out in his declaration, with reasonable certainty the work done, the amount of indebtedness claimed therefor, and the nature and substance of the contract, and such suits shall be docketed and conducted as other suits in said court."

The work of engineering done by these claimants was continued nearly to January, 1891. On April 13, 1891,—within six months thereafter,—they filed petitions in this cause, to which both the railroad company and Eager had already been made parties. Crenshaw's petition, of which those of the other three are duplicates, was as follows:

"Your petitioner, W. B. Crenshaw, a citizen of Knox county, Tennessee, which is in the Northern division of the Eastern district of Tennessee, respectfully shows to the court that the Knoxville Southern Railroad Company, a body corporate, and a defendant herein, is justly indebted to him in the sum of $716.39, with interest from January 15, 1891, as follows: Said Knoxville Southern Railroad Company, as shown by the bill filed in these causes, undertook to construct, and did construct, between the 23d day of August, 1887, and the 1st of January, 1891, a line of railroad extending in a southeasterly direction from Knoxville, in Knox county, Tennessee, in the Northern division of the Eastern district of Tennessee, to Blue Ridge, Georgia. The contract for the construction of the entire line of said road, which was about 100 miles in length, was let by said company to its codefendant, George R. Eager, as principal contractor. Your petitioner is a civil engineer by profession, and as such was employed under said Eager for the performance of professional work, and did perform professional work as such civil engineer.

during the construction of said line of railroad, and for said work said railroad company and said principal contractor became indebted to petitioner in a considerable sum of money, and are indebted to him for said service in the amount above shown. Petitioner shows that he has made demand upon said company and upon said Eager for the payment of said sum, and by both of them payment has been refused. On the 15th day of January, 1891, complainant, according to the statutes of Tennessee, filed his notice of lien against said Knoxville Southern Railroad Company, and he will exhibit the original notice, with the acknowledgment of service by said company thereon, in the progress of this cause, if the same shall be needed or called for. Petitioner is advised that he has the right to come into this cause, and to be made a party thereto, for the purpose of setting up and proving his claim. He is further advised that his said claim constitutes, under the statutes of Tennessee and the laws of the land, a lien upon said Knoxville Southern Railroad, superior to all claims except those which are, by the statutes of Tennessee, expressly made equal to it. He is advised that said lien is superior to all claims, except claims for work and labor done and material furnished to said railroad company or said principal contractor, and is of equal dignity and effect with all claims of the kinds last named. Petitioner is advised that his lien exists, whether said Eager was really principal contractor for said railroad company or not, and he prays that your honors will so determine and decree, in view of the fact that his work and labor was done in the construction of said railroad. He prays that he may have a decree for the amount above shown to be due him, and that said decree declare his said claim to be a lien upon said Knoxville Southern Railroad, and that said lien be enforced by your honors by proper orders and proceedings."

The petition was evidently framed in the alternative to establish a lien in favor of the petitioner, either as principal or subcontractor, as the court might determine that Eager had been agent of the company, or merely a contractor in employing the petitioner. We have found that in employing and paying the engineers, Eager was merely acting for the company, and not as a contractor, and therefore conclude that this petition must be construed to be an intervening suit to establish a principal contractor's lien against the railroad in the custody of the court, and that it is sufficient for the purpose. It follows that Crenshaw, Odell, Moses, and Bruster must be decreed to have liens on the proceeds of sale for their claims and interest from January 15, 1891, the date of the receivership to the date of the decree.

McBee & Co. were a firm composed of V. E. McBee and J. W. Morgan. They did bridge-building work on the Knoxville Southern Railroad under two contracts. One was a contract for the construction of the bridge over the Little Tennessee river, for which they were to be paid at a certain price per lineal foot of material used; and the other was a contract under which they did all bridge work assigned them, in consideration of the payment of the men employed, the furnishing of the material, and a certain stipulated salary to Morgan for superintendence. Both McBee and Morgan state that the original contracts were made by them with Eager, but they say that they thought he was the president of the Knoxville Southern Railroad Company, and that he gave them to understand that he was dealing with them in this capacity. Their evidence upon this point is obscure and labored. McBee testifies that shortly after the oral agreements Eager sent him a written contract for signature, in which Eager,

and not the railroad company, was named as the party of the first part; that he at once sent the contract back to Eager by his secretary, Foster, with directions to decline signing a contract made with any one but the railroad company. Foster says that he went to Eager with the contract, and stated this as McBee's chief objection; that he made an interlineation in lead pencil in the proposed contract, striking out Eager's name as a party, and inserting that of the Knoxville Southern Railroad Company; that Eager readily consented to the change, and the interlined typewritten draft of the contract was left with him to prepare a new one. Eager denies ever representing to McBee that he was the president of the railroad company, and says that it was distinctly understood between them that he was dealing with them as principal contractor. He denies that either McBee or Foster ever objected to contracting with him as such. He says, and it otherwise appears, that he never filled any office in the Knoxville Southern Railroad Company. Moreover, he produces the letter of McBee, acknowledging the receipt of the draft of contract, McBee's letter which Foster brought with him when he came to object to the form of the contract, and the original draft of the contract, with Foster's lead-pencil interlineations. From these it appears beyond controversy that McBee received the form of contract on the 14th of May; that he did not return it by Foster until about the middle of July; that in the letter returning it he complained, not that the contract was with Eager, but only that the specifications were burdensome; and, finally, that the interlienations made by Foster in the contract not only did not involve a substitution of the railroad company for Eager as a party, but that in one of them Foster had written the name of Eager as such party. The case made by the testimony of McBee and Morgan is so shattered by this documentary evidence as seriously to impair the credibility of their statements with reference to a subsequent conversation held by them with W. B. Bradley, president of the Knoxville Southern Railroad Company, in which they say Bradley, on behalf of the railroad company, in consideration of their not withdrawing their men from the unfinished bridge, agreed that the railroad company should be directly liable to them for the amount due and to become due. Bradley was at the same time president of the Knoxville Southern Railroad Company and superintendent of construction under Eager. On the 30th of October, 1890, McBee, Morgan, and one McNeely, a stenographer of McBee, went to see Bradley about their pay. Bradley says that he told them that Eager was then in the East for the purpose of raising funds. He denies that he ever said to them that the railroad company would see to it that they were paid. McNeely, one of McBee's witnesses, says that by direction of McBee, without Bradley's knowledge, he took notes of the conversation, and had them when examined in chief, but before his cross-examination he had lost them. It further appears that some weeks after this Morgan signed a receipt for about $3,000 as a payment on account by George R. Eager, contractor, and that he had signed a similar receipt in the

previous July. In addition, there are produced in evidence accounts for work, presented by McBee & Co.'s timekeeper, against the North Georgia Construction Company, Eager's predecessor as principal contractor, as late as December, 1890. The master reached the conclusion that McBee's original contracts were with Eager as principal contractor, but that Bradley did give McBee to understand that the railroad company would see his firm paid. Were the question material, we should have difficulty in supporting the latter finding, for the circumstances strongly corroborate Bradley, and impeach McBee and Morgan. But it is not necessary for us to decide the point. The master reported that Bradley, as president, had no authority as president, by agreement or otherwise, to impose on the railroad company Eager's obligations under the McBee contract, and in this we fully concur. The board of directors had made a contract with Eager for the complete construction of the road, as McBee and Morgan well knew, and such a contract necessarily excluded any authority on Bradley's part to make a new contract for part of the same work with some one else. It is true that in some cases the contract of the president of a railroad company is held binding upon the company, though no express authority be shown, because from the performance of it by the other party to the benefit of the company, and within the knowledge of the directors, without objection by them, their acquiescence is presumed. Pennsylvania R. Co. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770; Indianapolis Rolling-Mill v. St. Louis, Ft. S. & W. R. Co., 120 U. S. 256, 7 Sup. Ct. 542. Here, however, the work was presumably done by subcontract with Eager; therefore no presumption of acquiescence by the directors in a new contract with McBee & Co. could be indulged. The master, while finding that Bradley had no authority to make a new contract with McBee & Co., nevertheless held the company liable for the work done after the conversation of October 30th on principles of estoppel. We cannot concur in this result. There was no holding out by the railroad company that Bradley had authority to make such a contract. Indeed, as already stated, McBee knew that Eager was the principal contractor, and might well infer that Bradley had no power to make the company liable for what was due only from Eager. For these reasons, we conclude that McBee & Co. were only subcontractors under Eager. The master reported the amount due to McBee & Co. on their contracts to be $18,615.87, with interest from December 16, 1890, while the court below found the amount to be $23,187.44. The discrepancy arises chiefly from the fact that the court allowed McBee & Co. the freight on material used by them from the point of purchase, while the master held that they were only entitled to free transportation from the termini of the railroad under construction. We think the master was clearly right. There is substantially no competent evidence to sustain the claim that the freight beyond the termini of the road was to be borne by Eager. McBee's claim must therefore be reduced to the amount found by the master.

The next claim is that of J. W. Wilson. He was chief engineer of the Knoxville Southern Railroad from 1887 to May 21, 1890, when he was succeeded by Walton. He did substantially no work as such after the fall of 1888. He did, however, buy ties, which were used in the construction of the railroad company. These ties were furnished before his resignation as engineer. He says that he furnished these ties to the company, and not to Eager, and that he never heard of Eager as contractor until a short time before trains were running on the road. He is manifestly mistaken in his evidence. As many as three bills for ties presented by Wilson to Eager, as principal contractor, and receipts of money from Eager as such in payment of them signed by Wilson, are produced in evidence. They leave no doubt that in selling ties he was dealing with Eager, and not with the railroad company. It is said, however, that Wilson has recovered a judgment against the railroad company, as principal contractor, for the full amount of his claim. This is true, and, though the judgment was rendered by default, there was no fraud in the procuring of it, and it is therefore conclusive upon the railroad company. The judgment is not, however, evidence of any indebtedness against the railroad company, such as to give Wilson's claim priority of lien over the bonds in a controversy with the bondholders. This is settled by the case of Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590. Reference was made to this case in the previous opinion in disposing of the claim that Eager's judgment was conclusive upon the bondholders. With respect to Eager's judgment, it was not found necessary to apply the principle announced in the case of Hassall v. Wilcox, because the circumstances under which Eager's judgment had been obtained were so plainly fraudulent as to make it not even conclusive against the railroad company. It was then contended on behalf of those lien holders who had taken judgment in the state courts that Hassall v. Wilcox did not apply in this case, because the mortgage to the bondholders had not been issued in accordance with the statutes of Tennessee, and did not confer upon their trustee the legal title. The objection to the validity of the mortgage was that notice of the meeting of the stockholders at which it was authorized had not been advertised in the newspapers at Memphis, Nashville, and Knoxville, as required by the General Statutes of Tennessee (Mill. & V. Code, § 1277), under which the issuance of mortgages by railroad companies is authorized. Section 1277 is as follows:

"Railroad companies existing under the laws of this state, or of this state and any other state or states, whose original charter of incorporation was granted by this state, are empowered to issue bonds, and secure the payment thereof by mortgage upon their franchises and property in any state, or upon any part of such franchises and property, or to issue income or debenture bonds and such guaranteed, preferred and common stock as may be determined upon by the stockholders; provided, the same be approved by the votes of the holders of three-fourths in amount of the entire stock of said company at a regular or called meeting of the stockholders of said company; and that sixty days' notice be given in a Memphis, Knoxville and Nashville daily newspaper of the time, place and purpose of the meeting."

We are clearly of opinion that the provision as to notice is for the protection of the stockholders, and that, until some stockholder objects to the validity of the mortgage on the ground that he had no notice of the meeting and its object, this cannot be used by other persons to invalidate it. It appears by the record that at the time the mortgage to the Knoxville Southern road was made there were 12,051 shares represented at the meeting out of a total of 12,053. For this reason we think the mortgage or deed of trust given did confer the legal title upon the Central Trust Company as trustee. It therefore follows from Hassall v. Wilcox that Wilson's judgment against the railroad company, to which the Central Trust Company was not a party, does not bar the trust company, as mortgagee and trustee for the bondholders, from contesting the validity of his claim against the railroad company, so far, at least, as to defeat its priority as a lien over that of the bonds.

Burgin's claim is for work done in 1888–89 in the construction of the Knoxville Southern Railroad. The documentary evidence shows beyond a doubt that he did this work for the North Georgia Construction Company, and not for the railroad company.

Nor is there any doubt that Kellar & Findlay were knowingly rendering their services as subcontractors to Eager as principal contractor. The evidence is overwhelming upon this point, and they reduced their entire claim to judgment against Eager as principal contractor, and the railroad company as garnishee, in the state court. Their claim was really covered by the decision of this court on the former appeal, and it has only been re-examined on this appeal by consent.

A careful review of all the evidence presented at the former appeal and of that adduced on the second hearing below strongly confirms the conclusion announced in our former opinion that the work of constructing the Knoxville Southern Railroad was done under the North Georgia Construction Company and George R. Eager as principal contractors, and that no work of any kind except the engineering was done for the railroad company on direct contracts with the railroad company. The evidence to the contrary consists chiefly of opinions and impressions of interested witnesses, whose memories are shown to be defective by the uncontrovertible documentary evidence produced from the records of Eager's office and of the railroad company.

Having thus decided that McBee & Co., Wilson, Burgin, and Kellar & Findlay were subcontractors under George R. Eager, principal contractor, it remains to consider whether they have taken the proper steps under the Tennessee statute to fix their liens as such. Eager recovered a judgment against the railroad company for $375,000 in a suit to enforce his lien as principal contractor. He assigned that judgment to S. B. Luttrell, trustee, for the equal benefit of his subcontractors and material men. In our former decision we held that this judgment was fraudulently procured, and could not be even prima facie evidence of the validity of such a claim in this suit. To the extent to which

we have upheld Eager's claim in this case, we may concede, without deciding, that Eager and his assignee might avail themselves of the formal steps taken by him to fix his lien under the statute, and therefore that he would be entitled to a principal contractor's lien for the amount already found due to him, and thus, that his subcontractors, as beneficiaries under his assignment to Luttrell, might share the benefit of his lien, whether they took the necessary statutory steps to fix their liens as subcontractors or not. But a subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. Green v. Williams, 92 Tenn. 220, 21 S. W. 520. It is independent of and superior to his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien. The claims of the subcontractors who have perfected their liens in this case far exceed in the aggregate the amount due to Eager, and therefore he could take nothing by his lien, and could pass nothing by the assignment of it to Luttrell. It follows that only those subcontractors can share in the fund due from the railroad company to Eager who took the necessary statutory steps to perfect their liens.

The third section of the railroad lien act of 1883 provides that the subcontractor, in order to secure a lien against the railroad company, "may give notice in writing to the railroad company, setting out the work done or material furnished, and the amount claimed therefor, and thereupon the amount that may be due or owing from the railroad company to the principal contractor (not exceeding the sum claimed) shall be bound and liable in the hands of the railroad company for the payment of the amount so claimed, and shall constitute a first lien in favor of the claimant, superior to all other liens upon the company's railroad, and shall continue in force for a period of ninety days from the date of service of such notice, and until the termination of any suit commenced within that time to enforce it. * * * The claim provided for in this section may be enforced against the railroad company as garnishee, and the principal contractor as debtor in the circuit court." Of the four claimants whose liens are under consideration, Kellar & Findlay filed a notice with the railroad company, and seasonably began suit in the state court, and took judgment for their entire claim against Eager as the principal debtor and the railroad company as garnishee. They therefore are entitled to share in the fund found due to Eager as principal contractor, with the many persons who, as subcontractors, took similar judgments in the state courts, and whose names are given in the decree of the court below from which this appeal is taken. It is objected, however, both against Kellar & Findlay's rights to a subcontractor's lien and against all but one of the subcontractor lien claimants below, that their liens have not been perfected because an attachment was not issued against the property of the railroad company during the suit. This objection applies to all the lien claim-

ants except the South Tredegar Iron Company, which did issue an attachment both against the property of Eager and that of the railroad company. But it is untenable. The statute does not provide that an attachment shall issue in suits to enforce railroad liens. It is true that under the mechanic's lien law of Tennessee (Mill. & V. Code, § 2747) the lien must be enforced by attachment, but this is because the section expressly requires it. Dollman v. Collier, 92 Tenn. 660, 22 S. W. 741. There is no such provision in the railroad lien law. The lien of the principal contractor is to be enforced merely by suit, and the form of the declaration is prescribed in the statute. The lien of the subcontractor may be enforced by suit against the principal contractor as principal debtor and against the company as garnishee. But there is not a suggestion in the statute that attachments are necessary to the perfecting of the lien. We think, therefore, that all who took judgments in the state courts against Eager as principal debtor and the company as garnishee have valid liens as subcontractors, and are entitled to share pro rata in the amount found due from the company to Eager.

A more difficult question remains for decision. It is whether McBee & Co., Wilson, and Burgin have taken the necessary steps to secure a subcontractor's lien for the amount found due them from Eager. McBee & Co.'s work was not completed until December, 1890. On December 31, 1890, their counsel filed with the railroad company the following notice:

"To the Knoxville Southern Railroad Co.: You are hereby notified that we, the undersigned firm, have a balance due us of the sum of twenty-one thousand one hundred and fourteen and 84-100 ($21,114.84) dollars due by account for material furnished and labor done in building the bridge of said railroad across the Little Tennessee river; said railroad being the same constructed by you from Knoxville, Tennessee, southwardly through the counties of Knox, Blount, Monroe, McMinn, and Polk, to the line between Tennessee and Georgia, and we rely on our lien under sections 2774–2783, inclusive, of the Mill. & V. Code of Tennessee, as security for said money. We claim to have been in said work contractor with you, but give this notice because we understand you claim we are subcontractors under George R. Eager, and that said sum is due from him as principal contractor. In any event, we look to you for payment.

"This Dec. 31, 1890. V. E. McBee & Co.

"(V. E. McBee. J. W. Morgan.)

"By Washburn & Templeton, Attys."

On January 2, 1891, they filed a suit in the circuit court of Monroe county, Tenn., against the Knoxville Southern Railroad Company. There were two counts in the declaration. The first was based on a contract averred to have been made directly with the railroad company, and the second count was based on a subcontractor's lien averred to have been made with Eager as principal contractor. The second count further averred that the company was largely indebted to Eager. Eager was not made a party to this suit. In January, 1893, the suit was finally dismissed at plaintiff's costs. It is probable that such a suit could not now be relied on to preserve the lien, because it was dismissed, and because Eager was not a party to it, as the statute seems to require. But

certainly, if the notice of December 31, 1890, quoted above, was not sufficient, the second count of the declaration would serve the purpose of the notice, and was a compliance with the statute in this regard. By the terms of the statute, the fund then owing from the railroad company to Eager became bound to McBee & Co. by the service of the notice, and the lien, by virtue of the statute, was then fixed to continue for 90 days, and to be prolonged thereafter by a suit brought within the 90 days to enforce it. The question remains, therefore, was such a suit brought by McBee & Co.? It must be a suit to enforce the subcontractor's lien, and must, of necessity, make the principal contractor a party. The bill of McBee & Co. in the court below was filed January 15, 1891, within 90 days from the foregoing notices. It averred that the Knoxville Southern Railroad Company was indebted to the complainant, McBee & Co., for work and material furnished directly to the company. It further averred that Eager occupied various capacities in relation to the Knoxville Southern Railroad Company, being at one time its principal contractor, and at another time its agent, at another time its president; and that it was matter of doubt whether the persons engaged in the construction of the road, and whose claims were unpaid, were creditors of Eager or creditors of the railroad company. The bill attacked the validity of both mortgages; asked that all the persons having claims for work and material furnished in the construction of the road be made parties defendant; that Eager, who had recovered a judgment against the road for $375,000 for work and material done by him in the construction of the road, be made a party, and that he be compelled to set up the contract, if any existed between him and the railroad company. The Marietta & North Georgia Railroad Company and the Central Trust Company were also made parties. By an amended bill complainants reiterated the averments of their original bill, and further charged that Eager was the Knoxville Southern Railroad Company, and that all contracts made with him were made with the Knoxville Southern Railroad Company, and therefore that all persons furnishing work and material to him were entitled to claim as principal contractors. The prayer of the bill was that the claims of the complainants and all the creditors made defendants should be adjudged to be first liens on the property of the railroad company, that the mortgages to the trust company should be set aside and held to be invalid, and "for all such other further and different relief" as might seem meet and proper to the court. The answers of the two railroad companies and the trust company denied the invalidity of the mortgages, averred that Eager was a principal contractor, and that all the material claimed to have been furnished by complainants and the other intervening lien claimants had been furnished to him as principal contractor, and were claims against him, and not the company. While the bill and amended bill in terms charged that the debts for which liens were asked had been contracted directly with the railroad company, we are of opinion that, taken in connection

with the notice already served upon the railroad company by McBee & Co., which notice is referred to in the bill, the difficulty set forth in the bill of determining whether Eager was principal contractor or not, the fact that Eager was made party to the bill, and finally the prayer for all other and different relief which might seem proper to the court, the bill may be treated as a suit in the alternative either to enforce a principal contractor's lien, or, if that should not be upheld, then to enforce a subcontractor's lien. Certainly, upon such a bill and such a prayer, the circuit court may, under the liberal rules of equity practice, adjudge and enforce a subcontractor's lien in favor of complainant without requiring an amendment of the bill. If so, then it is clearly a suit to enforce a subcontractor's lien, for otherwise the court could not enforce it. Moreover, we think this conclusion to be in accordance with the liberal construction which the supreme court of Tennessee has placed upon all proceedings under the lien laws in favor of the meritorious contractor. Reeves v. Henderson, 90 Tenn. 521, 18 S. W. 242. Analogous cases may be found in Pomeroy v. Lumber Co., 33 Neb. 240, 44 N. W. 730; Buckley v. Taylor, 51 Ark. 302, 11 S. W. 281; and Reed v. Norton, 90 Cal. 590, 26 Pac. 767, and 27 Pac. 426. For these reasons we hold that McBee & Co. did perfect their lien and bring suit within the required time to enforce it, and that they are now entitled to share in the fund found due to Eager, as subcontractors.

With respect to Wilson's claim, we cannot find that he is entitled to a lien as subcontractor. The ties which he seeks to recover pay for were furnished before his resignation as chief engineer on May 21, 1890. There is no express limitation in the statute for the filing of notice by the subcontractor with the railroad company of his claim against the principal contractor. The limitation is upon the time within which suit must be brought after the filing of such notice, to wit, 90 days. It would seem, however, to be an indispensable step under the statute that such a notice shall be filed by the subcontractor with the railroad company before any claim for a subcontractor's lien can be asserted. Wilson filed no notice of any kind with the railroad company, and we must therefore hold that he did not perfect his lien as subcontractor in accordance with the statute.

The question whether McBee & Co., Wilson, and McD. Burgin have perfected subcontractors' liens is not one which affects the bondholders in this case. The fund out of which all the subcontractors are to be paid is the fund due to Eager, and the distribution thereof is a matter of indifference to the bondholders. The question is one which only affects the other subcontractors who have perfected their liens. Each of them is entitled to object to any other person's sharing in the fund who has not taken the steps which the statute prescribes for the fixing of such a lien. When, therefore, it appears that Wilson did not file any notice with the railroad company of his claim as a subcontractor, it becomes impossible to sustain his lien as such. His claim is a meritorious one, and we regret the necessity of a ruling which shall exclude

him from a share in the fund for subcontractors. The same result must be reached with reference to Burgin. Burgin's work was all done in 1888 and 1889. For more than 18 months he took no steps whatever to perfect either a principal or subcontractor's lien. He filed no notice of any kind with the railroad company, and cannot be allowed to share in the subcontractors' fund.

Reference is made in the brief of counsel for the trust company to the alleged error of the master and the court below in allowing certain right of way claims reduced to judgment in favor of Dunn & Patty and Hegdon & Chastain. There is no sufficient assignment of error to require our examination of the validity of these claims, but, even if there were, we think that the court below properly allowed them.

A question presented on this appeal is whether, under the tax laws of Tennessee, applicable to railroads, the state and the county are entitled to collect 10 per cent. penalty because of the delinquency of the railroad company in paying the taxes admitted to be due. The collection of delinquent taxes on railroad companies is regulated by chapter 78, Acts 1875, p. 100, entitled "An act declaring the mode and manner of valuing the property of railroads for taxation and the amendments thereto," which are codified in chapter 5, tit. 5, pt. 1, Mill. & V. Code, §§ 669-708, inclusive, entitled, "Of the assessments and taxation of railroad companies." After the special provisions for assessing railroad property, section 704 provides as follows:

"The taxes so assessed in behalf of the state shall be due as other taxes, and if the same be not paid to the comptroller within the time allowed other taxpayers he shall proceed to collect the same in the manner following: He shall issue a distress warrant against the company for the amount thereof, to any sheriff in the state, whose duty it shall be to levy the same upon any personal property of the company to be found in his county, and sell the same as other property of like character is sold for taxes.

"No. 705. In the collection of said taxes, the comptroller is hereby empowered to do all acts and things, which any collector of revenue is authorized to do by law; and should he fail to realize the taxes and costs from the sale of personal property or otherwise, he is authorized and empowered to expose to public sale to the highest bidder, all the property of such defaulting railroad company lying and being in this state, together with its franchises after giving thirty days notice of the time and place of sale in some newspaper published in the city of Nashville; and to make a deed of conveyance thereof to the purchaser.

"No. 706. It shall be the duty of the governor to issue his warrants to any of the sheriffs along the line of said railroad, authorizing and commanding the sheriffs to put such purchaser into full and complete possession of such road and all its property and the sheriff shall execute the same.

"No. 707. The collector of taxes for any county shall collect the amount due to the county as is now provided by law in case of delinquents."

We think this is an exclusive mode prescribed by statute for the collection of railroad taxes. The comptroller of the state is authorized, when he cannot collect the taxes by the sale of personal property without judicial process, to expose the realty to public sale to the highest bidder, and to make a deed of conveyance thereof to the purchaser. For delinquent county taxes the collector was required to collect the amount due the county "as is now provided by law in