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

case of delinquents." This refers us back to the general tax laws which were in force at the time of the enactment of the railroad tax law, and it is conceded that there was then no statutory provision for penalties of any sort on delinquent taxes, or for the payment by the delinquent of the fees of the collector in addition to the tax. The use of the word "now" prevents us from giving an ambulatory construction to the reference to the general tax laws, and from holding that every amendment of the general tax law respecting the collection of taxes must effect an amendment in the railroad tax law. It follows that, although at present, under the general tax laws, 10 per cent. penalty is imposed for delinquent taxes, and although there may be no good reason for distinguishing between taxes to be collected from railroads and those from other taxpayers, we are limited by the language of the statute, and must decide that there is no authority for imposing a 10 per cent. penalty on delinquent railroad taxes. The state comptroller is given power to enforce the collection of state taxes against railroads without judicial process, and this may explain why it was not thought necessary to provide a penalty for delinquent railroad taxes, it being supposed that by the extraordinary remedy afforded him he could prevent any such delinquency. It is true that the remedy cannot be enforced so long as roads are in the possession of receivers of the federal courts, but this was a defect in the statute, which the legislature has thus far failed to remedy, and which we cannot supply. The assignment of error by the trust company to the allowance by the court below of this 10 per cent. penalty must be sustained.

Error is assigned to the following clauses in the decree of the court below.

"It is further ordered and decreed by the court that the bill of V. E. McBee & Company and others is an original bill, and the same is declared to be a general creditors' bill, and that the prosecution of the suit of the Central Trust Company was properly enjoined under the same, and that the complainants in said bill No. 922, and all the interveners whose claims are above set forth, are entitled to have the Knoxville Southern Railroad sold in said cause of V. E. McBee & Company and others. * * * It is further adjudged and decreed that the counsel representing the claimants in the original bill of V. E. McBee & Company et al. vs. Knoxville Southern Railroad Company et al., viz. Washburn and Templeton, are entitled to compensation out of the general fund arising from the sale of said road for their services in bringing said railroad to sale, and administering the assets of said insolvent railroad company, and a lien is declared upon said fund in their favor; but the amount of said compensation is left unadjudicated, to be fixed and determined after the sale of said railroad shall have been reported to the court."

We see no error in these provisions. The bill of the trust company was merely a bill to foreclose a mortgage. It was indispensable to a successful sale of the property that it should be cleared of the liens growing out of its construction. The complainants who filed the creditors' bill and brought in all the lien holders did a work in the administration and distribution of the assets of the railroad company beneficial to all concerned. For services in filing the bill, therefore, and bringing in all lien claimants, it was not im-

proper for the court to order a fee paid to complainants' counsel out of the fund realized from the sale. Trustees v. Greenough, 105 U. S. 527; Railroad Co. v. Pettus, 113 U. S. 116, 122, 5 Sup. Ct. 387; Hobbs v. McLean, 117 U. S. 567, 582, 6 Sup. Ct. 870; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728; Meddaugh v. Wilson, 151 U. S. 333, 14 Sup. Ct. 356. But the compensation must be limited to the service in filing the bill and assembling the creditors. After the creditors were brought in, two hostile camps were formed, the bondholders in one and the lien claimants in the other. Services rendered by counsel in the litigation thereafter, in which the case, after two trials below, has been brought twice to this court, must be paid for by their own clients, and not by the bondholders.

This naturally brings us to the question of costs. As we have sustained assignments of error on the appeal and the cross appeal, we shall divide the costs of appeal between the bondholders on the one hand and the lien claimants as a class on the other. The half to be paid by each side shall be deducted from the fund awarded to them from the proceeds of sale before distribution. The order with respect to the costs in the court below will be that each party shall pay his own costs. All costs incurred in the bringing in of defendants and the service of process upon them shall be taxed to the proceeds of sale. The compensation of the special master shall be paid one-half by the bondholders and one-half by the lien claimants out of the funds awarded to the two sides respectively, before distribution. The expenses of the receivership and the sale must, of course, be paid from the general fund arising from the sale.

We have been asked to prepare the decree in this court for entry in the court below, but this is impracticable. We have considered all the assignments of error to the decree appealed from, and we hope we have made this opinion sufficiently specific to render easy the drawing of a proper decree. The decree of the circuit court is reversed, with instructions to enter the same decree, modified in accordance with this opinion.

PICKHARDT et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

No. 83.

CUSTOMS DUTIES—CLASSIFICATION — BURDEN OF PROOF—GALLEIN AND COERULINE.

Certain imports of gallein (being a dyestuff producing blue and purple shades, and consisting of two parts pyrogallic acid, which is derived from nutgalls or other vegetable matter, and one part phthalic acid, which is derived from coal tar) and of coeruline (which produces green shades, and is made by boiling gallein in sulphuric acid) were classified by the collector as coal-tar colors or dyes not specially provided for, under paragraph 18 of the act of October 1, 1890. *Held*, the evidence being contradictory, that the importer had not sustained the burden resting upon him to overthrow the correctness of the collector's classification, and show that the dyestuffs were dutiable, as claimed in his protest, under paragraph 61, as "other paints and colors, * * * including lakes, crayons, * * * not specially provided for."