of the enemy at the time they were captured, and their capture was a deadly blow at their power to carry on the war.

There is nothing in the finding of the court, nor in the record, nor is it suggested by counsel in argument, to show that these owners were not domiciled in the rebel States. It would be reasonably supposed from all that *is* known, that such was the case; and in favor of the award and decree below it will be presumed that the arbitrators had evidence of that fact.

It does not appear, therefore, that in holding these vessels liable to capture and condemnation, and lawful prize of war, the arbitrators violated any principle of law.

But it is quite clear that in awarding the value of these vessels to the captors as prize, and in addition forty per cent. of that value for salvage, they did violate law and justice.

This is too apparent to need argument, and is seen on the face of the award; and the decree of the Supreme Court of the District as to the $46,600 awarded as salvage is REVERSED, and in all other particulars it is affirmed, and the case is REMANDED to the Supreme Court of the District of Columbia, with directions to reform its decree in this particular, and for such further proceeding as may be necessary, in conformity with this opinion.

REVERSED AND REMANDED ACCORDINGLY.

FOX *v.* SEAL.

1. Under the joint resolution of the legislature of Pennsylvania, passed January 21st, 1843, and which declares that "it shall not be lawful for any company incorporated by the laws of the Commonwealth and empowered to construct any railroad, canal, or other public internal improvement, while the debts thereof, incurred by the said company to contractors, laborers, and workmen employed in the construction or repair of said improvements remain unpaid, to execute a general or partial mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or

Statement of the case.

delay their said creditors, without the written assent of said creditors first had and obtained, and that any such mortgage or transfer shall be deemed fraudulent, null, and void, as against any such contractors, &c., as aforesaid;" an unpaid contractor, laborer, or workman, employed in the construction of a railroad in Pennsylvania, has a lien of indefinite duration on such road, which lien has precedence over every right that can be acquired by or under any mortgage made after the debt to the contractor was incurred.

2. Such lien is not merged in any judgment got by the contractor against the company for his debt, nor by any proceedings in or judgments in scire facias, primary or subsequent, upon such judgments. In whatever shape the debt may be, it has the benefit of the privilege given it by the legislative resolution.

3. If the company mortgage their road after the contractor has got a judgment against it for his debt, such contractor is not bound, on a scire facias brought by him to revive his original judgment, to give notice to a mortgagee as a terre-tenant. A mortgagee is not a terre-tenant.

4. Under the act of the Assembly of Pennsylvania of April 4th, 1862, which, reciting the above-quoted joint resolution of January 21st, 1843, enacts "that whenever any incorporated company, subject to the provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of said resolution, it shall and may be lawful for any contractor, laborer, or workman employed in the construction or repair of said company, *having obtained judgment* against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any incorporated company, claiming to hold or own said real or personal estate," all that is required to enable the contractor, &c., to proceed by scire facias, as contemplated by the act, is that such contractor, &c., have a judgment against the indebted company which gave the mortgage. It is not necessary that the judgment be a lien.

5. Where, on the intervention of a contractor having a lien such as is given by the above-mentioned joint resolution of 1843, a court, on proceedings in foreclosure of a mortgage of the road made subsequently to the date of the lien, orders a sale "subject to any lawful claims or rights which may exist prior or paramount to said mortgage," and the sale is made accordingly, the lien is not divested; whatever might be the case were the lien that of a judgment.

6. Nor will such a lien be divested by a statute authorizing a railroad company to borrow money and to pledge its income and property to secure the payment. A repeal of the joint resolution will not be inferred, by the grant of such a power simply.

ERROR to the Circuit Court for the Western District of Pennsylvania; the case being thus:

On the 21st of January, 1843, the legislature of Pennsylvania passed the following

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JOINT RESOLUTION TO PROTECT LABORERS AND CONTRACTORS.

"*Resolved*, That it shall not be lawful for any company incorporated by the laws of this Commonwealth, and empowered to construct, make, and manage any railroad, canal, or other public internal improvement, while the *debts* and *liabilities*, or any part thereof, incurred by the said company to *contractors*, laborers, and workmen employed in the construction or repair of said improvement remain unpaid, to execute a general or partial assignment, conveyance, *mortgage*, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay their said creditors, without the *written assent* of the said creditors first had and obtained; and any such assignment, conveyance, *mortgage*, or transfer, shall be deemed *fraudulent*, *null*, and *void*, as against any such *contractors*, laborers, and workmen, creditors as aforesaid."*

This joint resolution being in force, the legislature of the same State, in the year 1850, incorporated the Hemphill Railroad Company; a company authorized to make a railroad from a town called Greensburgh, in the interior of Pennsylvania, to the western boundary of the State.

The act of incorporation gave the company no power to borrow money or mortgage the road. But a subsequent act—one of April 12th, 1851—empowered the company to borrow money and "to pledge the property and income of the company in order to secure the payment thereof."

With these acts in force, the company, in 1853 (May 27th), entered into a contract with a contractor named Fox to do the work on the projected road; and he did it. In the following year, 1854, the company became embarrassed and requested Fox to stop working; which he also did.

Not getting paid, he brought suit February 16th, 1855, in the Circuit Court of the United States, at Pittsburg, against the company, and on the 23d of November, 1860, got judgment against it for $33,500; this *judgment* constituting, by the law of Pennsylvania, a lien against the company's real estate for five years from its date, and no longer;

* Pamphlet Laws of 1843, p. 367.

and the law of the State requiring notice to be given to terre-tenants, when there are terre-tenants, and the plaintiff in the judgment desires to revive the judgment as against them.

On the 27th of June, 1855—that is to say, between the day when Fox brought his suit and that when he got judgment—the debt to Fox being still unpaid, and he having given no assent, written or other, thereto,—the company executed a mortgage on the whole of their road, franchises and property, real and personal, to one Seal, as trustee, to secure the payment of bonds to the amount of $1,000,000, to be issued by the company, and which were immediately afterwards issued; the bonds having twenty years, that is to say until 1875, to run. The mortgage was duly recorded in all the counties through which the road ran, and Seal, the trustee, took possession of the road and worked it until the time of the sale, hereafter mentioned. Interest on the bonds becoming due, and not being paid, suit was instituted in the Supreme Court of Pennsylvania, to foreclose the mortgage and to sell the road, its franchises, and other property, real and personal. Fox hereupon applied by petition to be allowed to intervene *pro interesse suo* in the suit for foreclosure; or if this should not be granted, that he might be paid out of the proceeds of the sale. His petition contained a full history of the origin, character, and amount of his claim against the Hemphill Railroad Company. The court rejected his petition on both its parts; and a sale was made under the proceedings in foreclosure; the sale, however, being made (in consequence of Fox's petition) "*subject to any lawful claims or rights which might exist prior or paramount to the said mortgage.*" The purchaser was another corporation, named the Pittsburg, Wheeling, and Baltimore Railroad Company. This sale was made March 30th, 1871.

Between the date of the above-mentioned mortgage and the sale under it, that is to say on the 4th of April, 1862, the legislature of Pennsylvania passed an act to enable contractors, laborers, workmen, &c., better to get the enjoyment of the lien which the joint resolution of January 21st, 1843,

already quoted, had given them. This act was in these words:

"*Whereas*, it frequently happens that incorporated companies, by assignment, conveyance, mortgage, or other transfer, divest themselves of their real and personal estate, in contravention of the provisions of the resolution of January 21st, 1843; therefore,

"*Be it enacted*, That whenever any incorporated company, subject to provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer, or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any *incorporated company, claiming to hold or own said real or personal estate*, to be served in the same manner as a summons, upon the defendant, if it can be found in the county, and upon the person or persons, or incorporated company claiming to hold or own such real estate; and if the defendant cannot be found, then upon the return of one *nihil* and service as aforesaid, on the person or persons, or company claiming to hold or own as aforesaid, the case to proceed as in *other* cases of scire facias against terretenants."*

We should here mention that while some of these things were going on, that is to say in 1867 (January 29th), and while Seal was in possession of the road as trustee, Fox had issued a scire facias against the Hemphill Railroad Company to revive the judgment which he had got against it in 1860; the lien of which *judgment* had of course, under the law of Pennsylvania as already stated, expired in 1865. To *this* scire facias no one was made a defendant but the original defendant, the Hemphill Railroad Company. Judgment was entered on this scire facias March 14th, 1867.

He now, February 23d, 1871—thirty-seven days before the sale of the road, and while Seal was yet in possession of it—issued a scire facias *to revive judgment* and *quare executio*

* Pamphlet Laws of 1862, p. 235, § 1.

non on the judgment just now mentioned as obtained in 1867, and in this second scire facias he made Seal a codefendant with the original defendant, the Hemphill Railroad Company, and, as soon as the sale of the old road to the Wheeling, Pittsburg, and Baltimore Railroad Company had been made, brought in *that* company as another codefendant; this being effected August 12th, 1871, and he meaning in all which he did to act in conformity with what was directed by the act of the Pennsylvania Assembly of 1862, quoted on the preceding page.

These two last-named parties, that is to say Seal and the Wheeling, Pittsburg, and Baltimore Railroad Company pleaded to this last scire facias.

The pleas were:

Payment;

That the mortgage was not made in contravention of the joint resolution of 1843;

That the plaintiff was not a creditor within the scope of that joint resolution;

That any lien or claim which the plaintiff ever had, had expired prior to his bringing the present suit.

And, on issue taken, &c., the question, divested of the technicalities of pleading and evidence, was whether the real and personal estate of the old Hemphill Railroad Company, which under the proceedings in foreclosure instituted by Seal had passed to the Wheeling, Pittsburg, and Baltimore Railroad Company, was liable to the debt to Fox as ascertained by the judgment of the Circuit Court on which the scire facias to revive, &c., had issued.

The plaintiff, to establish his case was about to offer certain pieces of documentary and record evidence separately, when the court directed that he should offer the whole in a body, and in connection. He now did this; offering the record of the mortgage (the same being without any written assent by him to it); the record of the proceedings in foreclosure and sale, with the order preceding it that it should be made subject to any lawful claims or rights prior or paramount to the mortgage; the joint resolution of the Penn-

sylvania legislature of January 21st, and the act of Assembly of April 4th, 1862; the records of his own suit of 1855, ending in judgment in 1860; the record of the scire facias of 1867, to revive it; this to be followed up with evidence of the nature and date of origin of the claim on which the original judgment was got; to wit, that it was that of a contractor in the construction of the railroad prior to the date of the mortgage; that the mortgage, if not postponed to his claim, defeated it; that he was not a stockholder in the Hemphill Railroad Company, &c., &c.

The defendants objected to the evidence as irrelevant and incompetent, and the court rejected it; the plaintiff excepting to such action. Judgment having been given for the defendants, the plaintiff brought the case here.

For the reader's convenience, the dates of some of the important facts occurring in the history of the case are here set forth chronologically:

1843, January 21st, joint resolution of the legislature.

1850, May 15th, Hemphill Railroad Company incorporated.

1851, April 12th, act of legislature authorizing a mortgage by it.

1853, May 27th, Fox's contract made.

1855, February 16th, Fox's suit brought.

1855, June 27th, mortgage made to trustees, and trustees take possession.

1860, November 23d, Fox obtains judgment.

1862, April 4th, act of the legislature.

1867, January 29th, scire facias to revive, against the Hemphill Railroad Company only.

1867, March 14th, judgment on this scire facias.

1871, February 23d, scire facias to revive judgment, *et qu. ex. non* against the Hemphill Railroad Company and the trustees also; the present suit.

1871, March 30th, sale of the railroad.

1871, August 12th, the Pittsburg, Wheeling and Baltimore Railroad Company brought in on motion as codefendants.

Argument for the bondholders of the railroad company, &c.

Mr. J. W. Kirker, for Fox, the contractor, the plaintiff in error:

The record and documentary evidence offered by the plaintiff, and rejected by the court, was the only competent evidence to prove the facts which were the obvious purpose of the offer. They were relevant and competent evidence, and were put in issue by the defendant's pleas. They tended to prove facts which were material and necessary for plaintiff to establish to entitle him to a verdict.

Divesting the matter of the technicalities of pleading, and evidence under pleadings, it is obvious that the questions were—

1. What was the effect of the joint resolution of 1843? We assert that it gave to Fox, the contractor, a lien, indefinite in point of time, on the railroad's estate, and prior to that of the mortgage to Seal. The purpose of the resolution is plain; its language explicit and incapable of any meaning but one. So far as the Hemphill Railroad Company was concerned, this lien was independent of any sci. fas. or other proceedings. It was a lien created by the sovereign will of the legislature; a body which could make liens of perpetual duration though no line of record should indicate their existence. And this sort of lien it meant to make, and made.

2. It was only after the company originally owning the road had divested itself of its estate, in contravention of the joint resolution, and when the lien creditor, after such divestiture, desired to have fruition of his lien, that he was bound to bring in anybody as a new party. In the present case, after the road passed to the Pittsburg, Wheeling, and Baltimore Railroad Company, then that company had to be brought in under the act of April 4th, 1862, and it was brought in.

Mr. Hill Burgwin, for the trustees of the bondholders and both railroad companies, contra:

1. *The joint resolution of* 1843 *does not protect the plaintiff's claim as against the mortgage now in controversy.*

At the time when the joint resolution of 1843 was passed, a railroad company had no power to execute such a mort-

gage as this, covering its franchises and all the property essential to their exercise. Therefore this mortgage was not within the provision of the resolution. But if it were, the supplement of 1851 to the charter of the Hemphill Railroad Company expressly authorized this mortgage, and so operated as a repeal *pro tanto* of the resolution of 1843.

The supplementary act of 1851 provides that the said company shall have power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and to secure payments thereof may pledge the property and income of said company. The railroad itself was certainly a part of the property of the company, and so was their franchise of using and enjoying it. The income of the company was derived from such franchise, and an authority to mortgage the income was an authority to mortgage the subject from which it is derived. A grant of the profit of land passes the land itself, for what is the land but the profits thereof?* The manifest object of the act was to enable the company, by a pledge of their road and its income, to secure the principal and interest of the bonds, which they were by the same section authorized to issue. To hold otherwise would render the power conferred entirely nugatory. The words are few, but pregnant, and were evidently meant to confer the fullest power to pledge the entire property and income of the corporation to accomplish the purpose in view.

The contract of Fox was made in 1853, two years after the execution of this mortgage had been authorized by special law.

The joint resolution of 1843 could never, we submit, have been intended to avoid transfers made in good faith, and for a valuable consideration. If we assume that it was intended to avoid them, its effect would be that no one could make any purchase from a railroad company of real or personal property, without taking it subject to a secret lien which by no reasonable diligence could be ascertained or defined.

* Coke Littleton, 46.

Nor only so, but such lien is unlimited as to time. Such far-reaching and inequitable results will not be allowed to obtain if any other reasonable one presents itself. It would be against both the letter and the whole spirit of adjudged law that they should obtain.

In *Cincinnati City* v. *Morgan*,* it is said by this court:

"To acquire as against all mortgages and incumbrances, a lien by statute upon the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give a lien."

In *Commonwealth's Appeal*† it is said by the Supreme Court of Pennsylvania, from a district in which State this case comes:

"Our legislature discountenances all liens and incumbrances from transactions that do not appear of record."

And again:

"The law abhors all secret liens."

And in *Kauffelt* v. *Bower*,‡ in the same State, a well-considered case, Gibson, J., says:

"We cannot intend that latent incumbrances were designed to be tolerated, when we find even those which appear of record considered in some measure as clogs on the freedom of alienation so congenial to our habits."

We rather suppose that the joint resolution of 1843 was really meant by the legislature of Pennsylvania to be no more than a re-enactment *pro tanto* of the statute of 13 Elizabeth and to invalidate a subsequent transfer only when there was an actual or constructive intent to hinder, delay, or defraud a creditor.

Perhaps it was to meet the just objection to parol liens, now asserted on the other side as legitimately coming from the resolution of 1843, that the legislature, by its act of April, 1872, provided in effect that in order to a contractor's

* 3 Wallace, 275.

† 4 Pennsylvania State, 165.

‡ 7 Sergeant & Rawle, 64–74.

availing himself of the benefit of that resolution, as against a terre-tenant, he must obtain a judgment against the company, and then revive by scire facias against the terre-tenant. And this brings us to our next ground of the defence.

2. *Any rights which the plaintiff may have had originally, have been lost by failure to pursue them in the proper mode and within the proper time.*

It is evident that it was intended by the act of 1862, to assimilate the proceedings to enforce a claim under the resolution of 1843, to those under the laws limiting the lien of judgments and providing for their revival against terre-tenants. The resolution of 1843, seeming to give a secret parol lien with no means to enforce it, the act of 1862 provided first, that the claim be made of record by judgment against the company, and thereby (and as we assert, then first) become a lien; and second, that such judgment having the properties of other judgments, expire as to its lien against terre-tenants, unless revived by scire facias against them within five years.

Testing the claim of the plaintiff by these principles, it is to be observed, that his original judgment against the Hemphill Railroad Company was entered November 23d, 1860, more than five years after suit brought; that the scire facias was not issued till 29th January, 1867; that no one was made party defendant but the Hemphill Railroad Company, although the trustees had been in actual possession of the road under the mortgage for ten years, and not until February 23d, 1871, more than eleven years after the original judgment obtained, fifteen years after the trustees had taken actual possession of the road for the mortgage bondholders, was any notice given to them, or attempt made to revive the judgment or enforce this claim as against them.

Now, it is settled in Pennsylvania,* that "a scire facias, to revive a judgment against a terre-tenant cannot be maintained on a judgment on a scire facias against the original

* Zerns *v.* Watson, 11 Pennsylvania State, 260.

lien debtor alone, obtained after the title of the terre-tenant had accrued." This proposition in itself presents a complete bar to the plaintiff's present action.

If, then, the plaintiff had intended to avail himself of the act of 1862, against *bonâ fide* terre-tenants in actual possession, with their mortgage for $1,000,000 on record in every county through which the road extended, it was his duty within the period limited by law to revive as against them the judgment he had obtained. Having failed to do so, they and every person proposing to purchase one of these bonds had a right to presume that his claim as against the property described in the mortgage had been abandoned. For instance, the bonds—twenty-year bonds, issued in 1865—being, of course, in the market, say in 1870, the purchaser ascertains that the trustees have been in possession of the road fourteen years, working and maintaining it for the bondholders, that no proceedings have been had under the act of 1862, to charge the property of the company in their hands, with the claims of contractors, and yet if the plaintiff's claim can be enforced, he is to find that the bonds which he purchases in good faith, on the foregoing facts of the case, are to be postponed to a claim which originated about eighteen years before. Such liens are infinitely removed from every sort of lien which the law of Pennsylvania, and indeed of any State in this Union, tolerates.

The real parties in interest here are the bondholders under the mortgage. Bonds such as these form a large part of the commercial securities in the stock exchange. They pass from hand to hand by delivery, upon the faith of the mortgage which secures them. They have been protected and guarded in the hands of *bonâ fide* holders for value by many decisions of this court, and those of the different States. It is of the greatest importance that their circulation be not checked by the fear of secret liens not to be discovered by any reasonable diligence.

In conclusion:

The petition of Fox to intervene in the proceedings in the Supreme Court of Pennsylvania, and have the order of sale

modified so as to protect his alleged claim was dismissed. The court, however, *suo motu*, modified the order. But this order thus made provided nothing more nor less than the law of itself would have provided, viz., that if there were any paramount liens which such a sale would not divest, then the purchaser would hold subject to such. If it meant more than this, then the court had no right to make it. The claim of plaintiff either was or was not a prior and paramount lien to that of the bondholders. If it was, and not liable to be divested by sale under the mortgage, then the order of court was unnecessary, except as a notice or precaution to bidders. If it was not, then the court could not make it so by this order to the prejudice of the bondholders. Their rights as against the plaintiff's claim were fixed and defined in law, and if the latter was either invalid or lapsed, the court could not validate or revive it as against them. And also, if the legal effect of the proposed judicial sale under decree of foreclosure would be to divest the plaintiff's supposed lien, the court could not, by such order, interfere with and prevent such legal effect. The duty of Fox was to look to the proceeds of the sale, and he had no right to look to anything else.

Reply:

The resolution of 1843 has not been repealed by the charter of incorporation of the Hemphill Railroad Company and the supplemental act of 1851. Because the intention to repeal—

1st. Is not expressed.

2d. Cannot be inferred by necessary implication.

An ancient statute will be impliedly repealed by a more modern one, *only* when the latter is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative.

The exercise of the power to mortgage, conferred upon the Hemphill Railroad Company, is limited and regulated by the general laws of the State of Pennsylvania relating to mortgages made by railroad companies and other corpora-

tions. Both of these acts are *affirmative*, and the substance is such that *both* may stand together. The charter and supplement of 1851 confer on the company the mere power to mortgage. The resolution of January 21st, 1843, regulates and limits the exercise of that power.

The whole argument about *secret liens* and *ab inconvenienti* generally, comes to nothing in the face of a *plain* expression of legislative will, such as we have described the joint resolution of 1843 as being, and as it truly is.

Mr. Justice STRONG delivered the opinion of the court.

We think there was error in the rejection of the evidence offered by the plaintiff. Some of it may have been immaterial to the issues pending, but the court directed that all the record and documentary evidence be embraced in one offer, and then rejected it all. In effect the objections urged by the defendants were treated as a demurrer, and the offer was overruled because the evidence was regarded as insufficient in law to sustain the action.

If the rights of the plaintiff have not been lost by failure to prosecute them in the proper mode, and in due time, the joint resolution of 1843, in our opinion, protects him against the mortgage, and all persons claiming thereunder.*

That the plaintiff's testator was a contractor with the Hemphill Railroad Company, and that the debt due to him was incurred by the company for the construction of their railroad, it was the direct tendency of the evidence offered to prove, and these facts are uncontroverted now. That debt, therefore, was within the protection, whatever that may be, of the resolution. What, then, was the nature and extent of that protection? It is unnecessary to assert that the company was rendered incapable of making a mortgage, or any transfer of its property, so long as the debt due to its contractor remained unpaid. But the language of the resolution is too clear to admit of question that the legislature intended to give to an unpaid contractor a priority of claim

* See the joint resolution set out, *supra*, p. 426.—REP.

to the company's property, over every right that could be acquired by a mortgagee, or acquired under a mortgage, if the mortgage was made after the debt to the contractor was incurred. It was at least intended that the property, into whosesoever hands it might come, should remain subject to a paramount claim of the contractor so long as the debt due to him remained unpaid. That this was substantially giving to him a lien of indefinite duration seems quite plain. It was not a "*jus in re*," nor a "*jus ad rem*," but it was a charge upon the property, a right to prevent any disposition of it, by which it could be withdrawn from the creditor's reach, and therefore in a very legitimate sense an equitable lien. The resolution in effect declared that while his claim against the company exists, a subsequent mortgage or transfer cannot be set up to defeat the contractor's resort to the property and his superior right to have it applied to the payment of the debt due him. It is true the mode of that resort is not prescribed. It can only be by suit, judgment, and execution, but whenever judgment and execution are obtained, the lien is made to precede the lien of any mortgage or the effect of any conveyance; more accurately, it has the effect it would have were there no mortgage or conveyance in existence. The property may be levied upon and sold, and the proceeds of the sale may be applied to the satisfaction of the debt due the contractor, without possible interference by the mortgagee, though the mortgage preceded the judgment in time. We cannot regard the resolution as no more than a partial re-enactment of the statute of 13th Elizabeth invalidating mortgages and transfers only when there is an actual or constructive intent to hinder, delay, or defraud creditors. If that was all the resolution intended it was unnecessary and unmeaning. But it declares null and void every mortgage *the effect* of which is to defeat, *postpone*, endanger, or delay contractors, laborers, and workmen. The mortgage may be good as against other creditors, but it is a nullity as to them.

It has been argued that it is against the policy of Pennsylvania to allow secret liens, or liens not of record, or liens

on land created by parol, and undoubtedly there are evils attendant upon the allowance of such incumbrances. But that is a matter for legislative consideration. The supposed policy of the State cannot, in a judicial tribunal, prevail over a plain statute. And notwithstanding the disinclination judges have manifested to sustain liens not of record, there are many such liens known to the statute laws of that State and upheld by the courts. A mechanic, or materialman, is given a lien, and he is not required to put his claim on record until within six months after his work has been done, or his materials have been furnished. Yet his lien has priority over every lien (other than a mechanic's) which attached to the building or curtilage subsequent to the commencement of such building. So liens are given by statutes to laborers, miners, and clerks, and they are valid against subsequent mortgages, though the liens do not appear upon any record.* It is not, then, against the policy of the State to create a statutory lien in favor of laborers or workmen.

And if we have correctly interpreted the legislative resolution of 1843, if the debt due from the Hemphill Railroad Company to the plaintiff's testator was a lien upon the property of the company from the time it was created, so far, at least, as to have priority over any subsequent mortgage or conveyance, it is plain the lien would have continued a prior incumbrance, so long as the debt it was given to secure remained, had there been no such subsequent mortgage. But the express declaration of the resolution is that the mortgage shall have no effect as against such a debt or claim. And this must mean that neither the mortgage itself nor any sale made under it shall have the effect of defeating, postponing, endangering, or delaying the contractor; for if a sale made under the mortgage discharges the contractor's lien and removes the property from his reach, effect is given to the mortgage itself, and precisely the effect which the statute denied to it.

We are thus brought to the question whether the lien or

* Act of March 30th, 1859, Pamphlet Laws, 318.

claim which the plaintiff's testator had upon the property, real and personal, of the Hemphill Railroad Company, as a security for the debt due him, and which was paramount to the mortgage made to the company, has been lost or extinguished. And we think it has not. The debt remains due and unpaid. In 1855, Fox, the contractor, commenced a suit for its recovery, and he obtained a judgment in 1860. That judgment did not extinguish the right which he had from the time the debt was incurred to have the property of his debtors first applied to the satisfaction of the debt. It did not cause to be merged in itself the original lien, any more than a judgment obtained upon a bond secured by a mortgage absorbs the lien of the mortgage. In whatever shape the debt was it had the benefit of the statutory privilege. It matters not then that more than five years elapsed after the judgment was recovered before it was revived, for if it be conceded that the lien of the judgment expired, that of the debt remained.

And if the lien of the judgment recovered in 1860 ceased at the end of five years from the time of its rendition, still it is undeniable that the revived judgment of 1867 gave a new lien which followed the property into whosesoever hands it came, until the present scire facias was sued out in February, 1871. The only possible answer to this is that before the revived judgment of 1867 was obtained, the property of the Hemphill Railroad Company had passed from its ownership, had become vested in its mortgagees, and that the trustees of the mortgage were not notified of the scire facias, or made parties to it. To this there are two replications, each of which, in our opinion, is quite sufficient. The first is that the company was, by the resolution of 1843, deprived of the power to make a mortgage or any conveyance by which its property could be withdrawn from the reach of the plaintiff, and the mortgagees or trustees could acquire no rights which the mortgagors were unable to confer. The second replication is that the mortgage to Seal and others was not a grant of the ownership of the property described in it. It was but the creation of a lien for the security of

the bonds issued under it. True, the trustees of the bondholders, pursuant to its provisions, took possession of the mortgaged property in 1857, and carried on the business of the company until 1871, but even as against them the company remained the owners of the road, subject only to a lien to secure the payment of the mortgage debt. The trustees were not terre-tenants. They were mere occupants. Terre-tenants, against whom, by the laws of Pennsylvania, it is necessary that a scire facias to revive a judgment be sued out, in order to preserve its lien, are those who have seizin of the land, those who are owners, or claim to be owners by title derived from the defendant in the judgment. There can be no terre-tenant, such as intended by the act of 1798,* who is not a purchaser, mediately or immediately, from the debtor while the land was bound by the judgment.† Such has always been held to be the law in Pennsylvania, and such are terre-tenants in England.‡ A mortgagee has never been regarded as a terre-tenant entitled to notice of the revival of a judgment. There has therefore been no failure or neglect in this case to make the necessary parties to all the judicial proceedings commenced by the plaintiff or his testator. The law did not require notice of the scire facias sued out to revive the judgment of 1860, to be given to the trustees of the mortgage, and if the lien of that judgment had expired, the revived judgment fastened a new lien upon the property. That lien was a security for the debt which, by the resolution of 1843, was made paramount to the mortgage, and against which, while it remains unpaid, the mortgage cannot be set up.

This, however, relates to the ordinary judgment lien, but it is not essential to the plaintiff's case, as exhibited by the evidence he offered, that the judgment which he now seeks to enforce is a lien upon the property claimed and held by the trustees of the mortgage and by the Wheeling, Pitts-

* 3 Smith's Laws, 331.

† Dengler *v* Kiehner, 13 Pennsylvania State, 41; Chahoon *v.* Hollenback, 16 Sergeant & Rawle, 432; In re Dohner's Assignees, 1 Pennsylvania State, 104.

‡ 2 Saunders, 9, Note 8.

burg, and Baltimore Railroad Company. It would be were it not for the legislative resolution of 1843, and for the enactment of April 4th, 1862. But the first of these, as we have seen, made the debt due to the contractor, itself a lien without a judgment, and prescribed no limits to its duration. The second (the act of April 4th, 1862), manifestly recognized the existence of such a lien, and pointed out a mode for making it available to the creditor. This will be seen by reference to the act itself.*

This act makes special provision for such cases as the present. Under it all that is necessary to enable a contractor, laborer, or workman to proceed by scire facias against a person or company claiming to hold or own the real or personal estate of the debtor to such contractor, laborer, or workman, by virtue of a mortgage made in contravention of the resolution of 1843, is that he has obtained a judgment against the indebted company which gave the mortgage. It is not required that his judgment shall be a lien on the property. And plainly it was not intended that such a lien must exist. The resolution of 1843 prohibited transfers, assignments, and mortgages of personalty as well as of realty, and a judgment creates no lien upon personalty. But the resolution recognizes the right of a contractor to follow both into the hands of a claimant or owner holding under such an assignment, transfer, or mortgage, without regard to the question whether the property is real or personal. It, therefore, recognizes the existence of a lien in favor of those protected by it, independent of the lien of any judgment they may recover. This must be so, for if it is essential to a right to proceed by scire facias against the property in the hands of a grantee of the indebted company that the judgment of the creditor shall be a lien upon that property, what is to be said of the case where the indebted company has conveyed before the recovery of any judgment? In such a case the judgment can be no lien. Yet it will not be claimed the property could not be followed by scire facias against

* See it set out, *supra*, p. 428.—REP.

the grantee. And if it could, it must be, not because of the lien of the judgment, but because of the lien of the debt, a lien which, as there is no statutory limitation to it, remains so long as the debt remains unsatisfied.

Such being, in our opinion, the true meaning of the joint resolution of 1843, and of the act of the legislature of 1862, the evidence offered by the plaintiff and rejected by the court should have been received. It tended to prove, *inter alia*, that the plaintiff's claim was within the protection of the joint resolution; that the mortgage under which the defendants hold was invalid as against him; that his case was embraced in the remedial act of 1862, and that the defendants had bought under a decree of foreclosure of the mortgage, which expressly directed that the property should, notwithstanding the sale, remain subject to the claim of the plaintiff.

It has been contended, however, in support of the ruling of the court below, that the sale which was made of the property in March, 1871, under a decree of the Supreme Court of Pennsylvania in the suit to foreclose the mortgage, divested the plaintiff's lien, and that thereafter his only remedy was a resort to the proceeds of that sale. This might be so if the only lien he had was that of his judgment. But, as we have endeavored to show, he had a lien independent of his judgment and prior to the mortgage. The decree of the Supreme Court ordered the property to be sold subject to that. The plaintiff petitioned to be allowed to intervene "*pro interesse suo*" in the suit for foreclosure, or, if that was not allowed, that he might be paid out of the proceeds of sale, but his petition was refused, and the court ordered that the purchaser at the sale should hold the whole of the estate and property, real, personal, and mixed, of the Hemphill Railroad Company, "subject to any lawful claims or rights which may exist prior or paramount to said mortgage." The plaintiff's lien, therefore, was undisturbed by the sale, and, hence, he had no right to look to the proceeds of the sale for payment.

This disposes of the case.

Statement of the case.

It is hardly necessary to add that the act of the legislature of April 12th, 1851, empowering the Hemphill Railroad Company to borrow money and pledge its property and income to secure the payment thereof, cannot be regarded as exempting that company from the operation of the resolution of 1843.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

RAILWAY COMPANY *v.* MCSHANE ET AL.

1. The *Railway Company* v. *Prescott* (16 Wallace, 603) modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from State taxation.
2. But affirmed so far as it holds that lands, on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from State taxation.
3. Where, however, the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.

APPEALS from the Circuit Court of the United States for the District of Nebraska; in which court the Union Pacific Railroad Company filed a bill to enjoin one McShane and other persons, severally treasurers of different counties in the said State, through which the road ran, and in which it had lands, from the collection of taxes assessed upon them. There were also cross-bills.

The case was thus:

An act of July 1st, 1862, creating the Union Pacific Railroad, enacted*—

"SECTION 3. That there is hereby granted to the said company for the purpose of aiding in the construction of said railroad . . . and to secure the safe and speedy transportation of

* 12 Stat. at Large, 489.