mine and report the true actual capacity, and not what the distillery will produce in the distiller's proposed mode of running it. There is, therefore, no well-founded objection to the conclusiveness of the survey in this case, and as the tax assessed and collected was in accordance with the survey, the plaintiffs have no right of action to recover it back.

Nor is there any such hardship as is suggested. We have seen that a report of the surveyor's determination of producing capacity is by the law required to be placed in the hands of the distiller before he commences business. If dissatisfied with it, he may apply to the commissioner for another survey. He is thus informed of the extent of his liability to taxation. He has, therefore, little reason to complain, when he commences distilling, and does not produce at least eighty per cent. of what his distillery can produce, as determined by the survey, if he is taxed according to a standard which is not false, and of which he had thus early notice.

JUDGMENT AFFIRMED.

THE LOTTAWANNA.

1. It is error and ground of reversal for a Circuit Court to affirm a decree in admiralty of the District Court, and at the same time dismiss the appeal.
2. Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the District Court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution.
3. A creditor by judgment in a State court, of the owners of the vessel, even though he have a decree *in personam* also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty.
4. Where an appeal is taken to the Circuit Court from the decree of the District Court in a proceeding *in rem*, the property or its proceeds follows the cause into the former court.

APPEAL from the Circuit Court for the District of Louisiana; the case—divested of irrelative incidents, with a great number of which, as seen in the record, it had come here confused and perplexed—was thus:

Statement of the case.

In the year 1819 this court, in *The General Smith*,* decided, as the profession has generally understood, that in respect to repairs or necessaries furnished to a ship in the port or State to which she belongs, no lien is implied unless it is recognized by the municipal law of the State; declaring the rule herein different from that where the repairs or necessaries are furnished to a foreign ship; in which case the general maritime law gives the party a lien on the ship itself for his security.

In view of this decision most or all of the States enacted laws giving a lien for the protection of material-men in such cases.

In the year 1833, in the case of *The Planter* (*Peyroux* v. *Howard*),† the converse of the rule in *The General Smith* was laid down, and process against a vessel in her home port was used and supported, the State law giving a lien in the case.

In 1844, this court, acting in pursuance of acts of Congress which authorized it to adopt rules of practice in the courts of the United States in causes of admiralty and maritime jurisdiction‡ (and adhering to the practice declared as proper in the cases mentioned), adopted the following Rule of Practice:

"RULE XII.

"In all suits by material-men for supplies, repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master and owner alone *in personam;* and the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, and other necessaries."

On the 1st of May, 1859, a new twelfth rule was adopted as a substitute for the one above given. It was thus:

* 4 Wheaton, 443. † 7 Peters, 324.

‡ Acts of May 8th, 1792 (1 Stat. at Large, 275), and of August 23d, 1842 (5 Id. 516).

Statement of the case.

"RULE XII.

"In all suits by material-men, for supplies or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship or freight *in rem*, or against the master or owner alone *in personam*. And the like proceedings *in personam*, *but not in rem*, shall apply in cases of domestic ships for supplies, repairs, or other necessaries."

The reasons for the substitution of this latter rule for the former one are stated by Taney, C. J., in the case of *The Steamer St. Lawrence*,* to have been that in some cases the State laws giving liens, and the constructions put on them by State courts, were found not to harmonize with the principles and rules of the maritime code, and embarrassed the Federal courts in applying them.

With the case of *The General Smith*, and others following it, unreversed, and with the substituted twelfth rule in force, two sailors, on the 30th December, 1870, filed libels in the District Court, at New Orleans, against the steamer Lottawanna, claiming wages. The libel alleged that the vessel when they shipped was in the port of New Orleans and was making voyages between that port and various ports and places on the Red River and its tributaries, and it was thus, and inferentially, to be gathered that New Orleans was the home port of the vessel.

By consent of the owners the vessel was subsequently sold under an order of court, and the proceeds, $10,500, were brought into the registry.

In the meantime about forty different persons intervened, claiming in the aggregate $35,000. Some were sailors, claiming wages. That *their* claims were a lien on the fund was conceded. But the majority of the claims (in amount $32,804) were for stores, materials for repairs, or for labor and supplies of different sorts furnished to the vessel in the port of New Orleans; the port which, as above said, was apparently her home port, though the fact that it was so was

* 1 Black, 529.

nowhere distinctly asserted, nowhere in any way denied, and nowhere in any way proved.

Among the interveners claiming a share of the fund for supplies furnished to the vessel, in the port of New Orleans, were two firms, Wilson & Co. and Chaffee & Brother; the former claiming $3091 and the latter $10,896.

None of the interveners alleged in direct terms that they had any maritime lien on the vessel, or its proceeds, or prayed for process to enforce such a lien; though the libels of some of them contained a prayer that the court would decree the payment of the intervener's claim *with privilege* on the vessel or its proceeds.

There was also a firm, Bell & Kennett, who claimed the whole fund in the registry. This firm had had something to do with the vessel, and had sued its owners and got judgment against them in one of the State courts of Louisiana; the Sixth District Court for the Parish of Orleans. On this judgment they issued execution and attached the funds in the registry of the District Court. They also had decrees *in personam* against the owners in the admiralty.

A report of a commissioner appointed by the District Court to report distribution showed, that after deducting costs of the marshal, registrar, &c.,

The net proceeds of sale in the registry were . . .	$9,405
That the sailors' wages (the only *admitted* admiralty liens) amounted to	2,629
Leaving a balance of	$6,776

The question was, to whom was this balance to be paid? Bell & Kennett claimed the whole of it, under their attachment in execution.

Wilson & Co., Chaffee & Brother, and the other interveners at New Orleans, for supplies furnished in that port, opposed this claim, and—asserting that on an account *justly* taken between the said Bell & Kennett and the owners of the vessel, it would appear that the former were indebted to the owners, and not the owners to them—were not willing even that Bell & Kennett should come *pari passu* on the fund; much less that they should sweep it all away.

Statement of the case.

The commissioner divided the sum ratably between all the interveners, including with them Bell & Kennett. The owners opposing this, he made a second report, remarking that the only admiralty liens in the case were the claims for sailors' wages (which had now been paid), and that the claims of Wilson & Co., Chaffee & Brother, and the other interveners were not such liens; that though where the owners did not oppose such distribution, a fund in the registry might properly be distributed to material-men, &c., claimants on it for supplies furnished to the ship, who yet had no admiralty lien *in rem*, yet that it could not be so distributed if the owners did oppose the distribution, this principle being settled by the cases of *The Maitland*,* and *The Neptune*,† and not departed from except in the case of remnants unclaimed by the owner. The commissioner concluded, therefore, that nothing could be done but pay the fund either to the owners, or to the sheriff of the parish of Orleans to answer his execution and attaching process; and this last he recommended as the more just disposition of the money.

Upon the case coming before the District Court on exceptions to this report, that court, December, 1871, decreed that the interveners mentioned by the commissioner should be dismissed, and that the fund should be paid, as the commissioner had suggested, to the sheriff, to answer the process issued in the suit of Bell & Kennett against the owners.

From this decree of the District Court the interveners took the case to the Circuit Court, and moved in the District Court that the money in the registry there should be transferred to the registry of the Circuit Court. This motion the District Court denied, and the moneys were paid over to Bell & Kennett. In the Circuit Court objection was made, as also it had been made before, to the regularity of the appeal, on account of some matters of form. The Circuit Court affirmed the judgment of the District Court, but at the same time dismissed the appeal.

* 2 Haggard's Admiralty, 254.

† 3 Id. 130; S. C. on appeal, 3 Knapp, 711.

From this decree Wilson & Co. and Chaffee & Brother brought the case here by appeal; Bell & Kennett being the appellees.

Reference has been made in the opening part of this statement of the case, to the decision in the case of *The General Smith*, decided A.D. 1819, and other cases; and to the two different twelfth rules in admiralty.

In different cases coming here about eight years ago,*— especially in *The Moses Taylor* and in *The Hine* v. *Trevor*,— this court decided that the grant of admiralty jurisdiction given by the Judiciary Act to Federal courts is exclusive, that State statutes which attempt to confer on State courts a remedy for *marine* contracts or torts by proceedings strictly *in rem*, are void. And on the 6th of May, 1872, *after the present suit was brought*, the twelfth rule of 1859, itself an amendment of the rule of 1844, was thus amended anew:

"In *all* suits by material-men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

The twenty-sixth rule in admiralty (having no connection, however, with any of the preceding matters, but yet adverted to in the argument), says:

"In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bonâ fide* owner, and that no other person is the owner thereof."

Messrs. J. A. Grow and L. M. Day, for the appellants:

1. The claims of all the interveners were for materials, supplies, repairs, and other necessaries furnished to the boat, undoubted admiralty contracts.

Though under the twelfth rule in admiralty adopted by

* The Moses Taylor, 4 Wallace, 411 (December Term, 1866); The Hine *v.* Trevor, Ib. 555; and see the Rock Island Bridge, 6 Id. 213; The Belfast, 7 Id. 624; Leon *v.* Galceran, 11 Id. 185.

this court in 1859 they could not have proceeded *in rem* against this boat, if New Orleans was her home port, yet it is very questionable whether New Orleans was so. No person filed any claim for the vessel, or her proceeds, according to the twenty-sixth admiralty rule. Consequently there was no one entitled to be heard as owner, nor is there any evidence in the record to show where the owners reside. But the twelfth rule, as made in 1859, was altered in May, 1872, by this court, and the persons who intervened could now undoubtedly proceed *in rem*, no matter where the owners reside. The history of the decisions and rules applicable to the matter shows that the court has always meant to protect *by a lien, enforceable somewhere*, persons furnishing supplies in the home port as much as those furnishing them in a foreign port. *The General Smith*, and *Peyroux* v. *Howard* (*The Planter*), enabled such persons to enforce in the admiralty liens *when given by the State law*, and as liens were given by the law of all the States the protection was complete. But this administration of State lien laws through admiralty courts was found to cause trouble, as explained by Taney, C. J., in *The Steamer St. Lawrence*, and in 1859 the new twelfth rule of practice relegated in effect the furnishers in home ports to their home courts, where they were still abundantly protected. But *The Moses Taylor*, and *The Hine* v. *Trevor*, in December Term, 1866, decided that this was unlawful. Furnishers in home ports were thus left quite unprotected so far as a capacity to enforce a lien was concerned. They could not under the twelfth rule of 1859 sue in the admiralty; nor under the two cases just mentioned enforce admiralty liens in State courts. What in these circumstances did this court do? Availing itself of the power given to it by Congress it enacted the twelfth rule of May, 1872. It plainly meant by this rule to give a remedy *in rem* to furnishers in home ports, and to annul *The General Smith*, and *Peyroux* v. *Howard*. The law and rules of this court, as they now exist, must govern, and not those that existed when the suit was brought.*

* The Peggy, 1 Cranch, 103.

But this court had jurisdiction to distribute these proceeds among the interveners, even if the vessel was in her home port, and the parties not entitled to proceed *in rem*. So well settled is this principle that text-books declare it as elementary. Parsons* says:

"Where a vessel, or other property against which a suit is brought, is sold, and brought into the registry, the power of the court to distribute these proceeds is unquestioned."

And again:†

"When a lien is waived by intendment of law, or lost by neglect to enforce it within a proper time, it has been held that the claim may be enforced against the proceeds."

But the interveners have admiralty liens; they are material-men, and though not entitled to process *in rem* in consequence of the twelfth rule in admiralty, as it existed when this suit was brought, they still all intervened for claims founded upon admiralty contracts, which would create an implied maritime hypothecation and lien.

In *The Steamer St. Lawrence*, this court allowed a material-man a lien for supplies furnished in the home port of the vessel after the repeal of the original or first twelfth rule in admiralty; not on the ground that a State statute gave it, as the State could not confer jurisdiction on the Federal courts, but on the ground that the party had an admiralty contract, and that his proceedings were begun before the repeal of the first twelfth rule.

And in *The Kalorama*, and *The Custer*,‡ this court held that it was no objection to the assertion of an admiralty lien against a vessel for supplies, that the owner was present and ordered them.

2. The proceeds in the registry cannot be attached by the process issued from a common-law court.§ In *The Albert Crosby*,‖ Dr. Lushington said:

* On Shipping and Admiralty, vol. 2, p. 231. † Ib. 233.

‡ 10 Wallace, 204.

§ 2 Parsons on Shipping and Admiralty, 235.

‖ 1 Lushington's Admiralty, 44.

"I should certainly interfere by attaching any person who would meddle with any registrar."

3. The District Court should have transferred the proceeds of the sale of the steamer Lottawanna to the registry of the Circuit Court. If the cause was one proceeding *in rem*, the *res* involved (or the proceeds if converted into money), passed from the District Court to that of the Circuit Court.*

We therefore ask of this court that the decree of the District and Circuit Courts be reversed; that the claim of Kennett & Bell be dismissed; that they deposit in the registry of the Circuit Court the amount which they received, with interest; that the claims of the appellants be recognized as admiralty liens against it, and that the money be paid over to them in proportion to their respective claims.

Messrs. Durant and Hornor, contra:

1. The point decided by the District Court in its confirmation of the commissioner's report was, that where interveners in admiralty have no admiralty lien the proceeds of the sale of the steamboat will not be distributed, if there is any opposition to such distribution. That was quite right as the cases cited by him show. It is clear that the powers and jurisdiction of a bankruptcy or of an equity court would be engrafted upon our admiralty courts, were they to attempt to make distribution of the proceeds of the sale in their registries, in the mode contended for by appellees, in all cases in which a surplus should result. Suppose, for example, that a vessel should be libelled at her home port upon a claim for maritime wages of $50, and should be sold for $20,000, and the proceeds in the registry, amounting to $19,950, should be claimed by creditors of the owners who had no admiralty liens, it is obvious that by indirection the creditors would be extending and enlarging the jurisdiction of the admiralty court so as to embrace causes which could not have been enforced directly and in the first instance as against

* The Collector, 6 Wheaton, 194; Davis *v.* Seneca, Gilpin, 34.

Restatement of the case in the opinion.

the vessel. This would be a great abuse of the admiralty jurisdiction. The admiralty judge, when there is no admiralty lien, can only proceed to the distribution of the surplus in the registry when an act of Congress directs him so to do.*

2. Holding the money of the owners in the registry of the admiralty liable to the garnishee process under execution, of the same or any other admiralty court, is within the necessary incidental jurisdiction of the admiralty. The analogy is perfect between the present case and that of *Jones* v. *Andrews*.†

Mr. Justice CLIFFORD delivered the opinion of the court.

Complicated, as the record is, it will be impossible to state the questions presented for decision, in a manner to be understood, without referring to the original proceedings in the District Court, as the suit, when it was commenced, was a libel *in rem* filed by two mariners, J. D. Cox and J. N. Geren, against the steamboat Lottawanna, her tackle, apparel, machinery, and furniture, in a cause of subtraction of wages, civil and maritime.

Prior to the institution of the suit the allegation is that the steamer had been engaged in commerce and navigation between the port of New Orleans and various other ports and places on Red River and its tributaries, and that the libellants, during that period, were duly employed by the master as the pilots of the steamer, and that they continued in that employment for the respective periods and at the monthly wages specified in the libel. They also allege that they faithfully performed their respective duties, as such pilots, and that there is due to them the respective sums charged in the schedule exhibited in the record. Wherefore they pray for process against the steamer, &c., and that she may be condemned and sold to pay their respective claims.

Pursuant to the prayer of the libel a warrant was issued,

* McLane *v.* United States, 6 Peters, 404.

† 10 Wallace, 327.

Restatement of the case in the opinion.

and the return of the marshal shows that he seized the steamer and that he published a monition, citing and admonishing the owners, and all others claiming any right, title, or interest in the steamer, to appear, on a day therein named, at the District Court, and show cause, if any they have, why the prayer of the libel should not be granted. Subsequently, on the same day, the libellants filed a petition in the District Court, representing that the steamer was expensive to keep and perishable, and prayed for an order that she might be sold.

On the same day, also, Moses Morgan filed an affidavit in the case, stating that he owned three-fourths of the steamer, and that he had no objection that she should be sold, and the record shows that the court immediately passed an order that the steamer be sold by the marshal, he giving legal notice of the sale, and that the proceeds be deposited in the registry, subject to the further order of the court. Nothing is exhibited to show that there was any irregularity in the sale, and it appears that the proceeds, amounting to ten thousand five hundred dollars, were deposited in the registry of the court.

Before the other owner of the steamer, Philip Work, appeared, seventeen libels of intervention were filed in the court against the proceeds of the sale of the steamer, embracing some forty interveners, with claims for wages as mariners, and claims for materials for repairs, and for stores and supplies, and for money loaned for the steamer, or for the individual owners, and to pay for debts contracted by the master, or owners, for repairs and supplies during a period of two or more years.

On the fourth of February, 1871, more than a month after the original libel was filed, Philip Work appeared and filed a claim that he was the owner of the other undivided fourth part of the steamer, and he excepted to all of the libels of intervention except the one filed by the mariners, being the libel of intervention first named in the record, and upon three grounds, and prayed that the interventions might be dismissed: (1.) Because the court was without jurisdiction,

ratione materiæ, of the matters alleged in the several libels. (2.) Because the court was without jurisdiction to entertain the interventions or to adjudicate thereon, for the reason that all of the owners of the steamer, at the date of the several causes of action set forth, were citizens of that State and resided in the city of New Orleans, at which port the steamer was registered and enrolled. (3.) Because the respective interveners did not, on filing their libels, give stipulations, with sureties, to abide the final decree rendered in the case, and to pay costs, as required by the rules in admiralty proceedings.

Intervention was subsequently claimed by other parties and other directions were given, which it becomes important to notice, in order to have a full view of all the material proceedings in the District Court.

Libels *in personam* were also filed by the appellees and by John Chaffee and Charles Chaffee, who are the last-named appellants. By the transcript it appears that the libel of the appellees was filed on the sixth of February, 1871, and that the libel of the said appellants was filed on the following day. Service of the original monition was made January first, 1871, and on the seventh of February succeeding the court passed an order that the delay allowed by law having expired, and no answer having been filed, that all persons interested in the property seized be pronounced in contumacy and default, and that the libel in the principal case be adjudged and taken *pro confesso*.

On the thirteenth of the same month the court entered a decree in favor of the libellants, as follows: that J. D. Cox recover the sum of one thousand three hundred and six dollars, and that J. N. Geren, the other libellant, recover the sum of six hundred and seventy-four dollars and twenty-eight cents, from which decree neither the libellants nor the owners of the steamer have ever appealed.

On the third of March, 1871, subsequent to the said decree, Jesse K. Bell filed a libel of intervention, claiming the sum of two thousand two hundred dollars, as paid by him on two claims for fuel furnished to the steamer by the per-

sons named in the libel. Leave was granted to the applicant to file the libel, and on the same day the court passed an order that the cause be referred to a commissioner to report upon a tableau of distribution, and to classify the various claims according to law, giving all parties a right to take further evidence before the commissioner.

Since that time further libels of intervention have been filed as follows, to wit: one by J. Sharp McDonald, on the eighteenth of the same month, for five hundred and forty boxes of coal; another by Thomas Onley & Co., on the thirty-first of the same month, for services, the account being approved by the master and by the mate; and one other by Christian & Hyatt, on the second of May in the same year, for stationery furnished for the use of the steamer.

Besides the libel filed by the two pilots, a libel *in rem* was also filed by the mate against the steamer, on the thirtieth of December, 1870, for the balance due him for wages, and the record shows that the court, on the tenth of February next after the commencement of the suit, entered a decree in his favor for the amount claimed and taxable costs.

Morgan and Work failed to answer the suit *in personam* of Kennett & Bell against them, and the court, on the twentieth of November, 1871, passed an order that the libel be taken *pro confesso*, and that a decree be entered in favor of the libellants, and three days later it was ordered that the suit be consolidated with the record in the original suit *in rem* against the steamer.

Different proceedings took place in the suit *in personam* commenced by Chaffee & Brother, as Joseph Morgan appeared on the same day and confessed judgment in favor of the libellants for the sum of ten thousand eight hundred and ninety-six dollars and fifty-six cents, with eight per cent. interest from the twenty-third of January preceding. Judgment was accordingly rendered in their favor against Morgan for that amount. Work made default, and a decree, dated June 1st, 1871, was entered against him for the same amount in favor of the same libellants.

Report in due form was made by the commissioner, on

the fourth of May in the same year. He decided that none of the creditors, presenting claims for repairs and supplies, had any right to libel the steamer in her home port, and recommended that the proceeds in the registry of the court be distributed as follows: First, that all legal costs be paid in full. Secondly, that all claims of the seamen for wages be paid in full. Thirdly, that all claims for labor, supplies, and materials for repairs, be paid *pro rata*, according to the schedule of claims annexed to the report.

Exceptions of various kinds were filed to the report of the commissioner: (1.) That certain claims were allowed which were not due from the owners of the steamer, or were, in whole or in part, improperly classified as claims for stores or for supplies and repairs. (2.) That the schedule improperly includes claims not having any maritime lien on the steamer or the proceeds in the registry of the court, nor entitled to any preference by attachment or otherwise. (3.) That the compensation charged by the commissioner is excessive.

Pending the hearing of the exceptions to the report of the commissioner the court passed an order that the claims for costs and the claims of the seamen for wages should be paid, and it appears that the order was promptly carried into effect, but the residue of the report was finally referred back to the commissioner for further proceedings. In the meantime the appellees here, having obtained judgment against the owners of the steamer in their suit *in personam*, sued out a garnishee process from the sixth District Court of the State, and attempted to attach the proceeds as money in the hands of the clerk of the District Court. All parties were again heard by the commissioner, and, on the fourth of June following, he made a supplemental report. In his second report, he decided that, where there is a maritime lien upon the vessel, the lien will attach to the proceeds in case the vessel is sold, and the proceeds are paid into the registry of the court, but where there is no maritime lien upon the vessel, that the proceeds should not be distributed, if the owners make opposition to the application, unless the appli-

cants prove that they have some *legal or equitable interest* in the subject-matter, and the commissioner being of the opinion that the interveners had no maritime lien, reported that the proceeds remaining in the registry of the court could not be distributed for their benefit in this case, and recommended that the court order either that the proceeds be paid over to the owners of the steamer or to the sheriff who seized the same in the hands of the clerk acting as registrar, under the garnishee process.

Seasonable exceptions were filed to the report by many of the interveners opposed in interest to its conclusions, including the last-named appellants. Due notice having been given, the parties were heard, and the court entered a decree that all the interventions in the cause, founded on claims which are not liens in admiralty, be dismissed at the cost of the respective parties. All such parties, including the last-named appellants here, claimed an appeal to the Circuit Court, and the record shows that the appeal in their behalf was duly allowed, and that they filed an appeal bond, executed to the owners of the steamer and the appellees in this court. Certain other interveners also petitioned for an appeal, and the court passed an order granting it, without requiring any additional bond, in consequence of which omission the present appellees, on the twentieth of December following, moved the District Court to set aside and dismiss the last-named appeal, and the record shows that the court, on the twenty-fifth of January following, granted the motion and vacated and annulled the appeal.

Seamen's wages and costs having been paid, the interveners whose appeal was allowed moved the court, on the eleventh of January, 1872, that the fund in the registry of the court be transferred to the Circuit Court, which motion was for a time held under advisement. During that period the District Court, on the sixth of February following, entered a decree that the proceeds in the registry of the court be applied, first, to the satisfaction of the judgment of the present appellees against the owners of the steamer; and,

second, that the balance, if any, be paid over to Chaffee & Brother, seizing creditors, next in rank.

Application for an appeal by Chaffee & Brother was made on the following day, and on the twenty-sixth of the same month the court overruled the motion to transfer the fund into the Circuit Court, and the last-named motion for an appeal, and ordered that the fund be paid over as directed in the order previously given upon that subject. Chaffee & Brother, however, were among the petitioners for the appeal which was previously allowed by the court, and their names appear in the bond which was filed to prosecute the appeal, but they were libellants *in personam* and not strictly interveners in the original suit prosecuted *in rem* by the two pilots.

Copies of all the material orders, directions, and proceedings in the original suit, and in the several suits of *Allen* v. *The Steamer*, *Kennett & Bell* v. *The Owners*, and *Chaffee & Brother* v. *The Owners*, were sent to the Circuit Court under the certificate of the clerk of the District Court, together with copies of all documents filed and of the minutes of all the evidence introduced in those several cases, and the case was entered in the Circuit Court, on the twenty-ninth of May, 1872, under the title of *J. D. Cox et al.* v. *The Steamer*, which is the title of the original suit in the District Court, from which no appeal was ever taken, either by the libellants or the owners.

Appearance was entered by Kennett & Bell, and they moved to dismiss the appeal for the following reasons: (1.) Because the appeal was discharged in the District Court, which is not sustained by the record. (2.) Because the bond filed is irregular and not such as the law requires; and the Circuit Court having affirmed the decree of the District Court granted the motion to dismiss.

Immediate application for an appeal to this court was made by the present appellants, which was allowed by the Circuit Court, and the petitioners gave bond with surety to the present *appellees et als.* to pay all such damages as they

may recover against the appellants, in case it should be decided that the appeal was wrongfully obtained.

Irrespective of the question whether the appeal is regular or irregular it is quite clear that the decree of the Circuit Court must be reversed, as one part of it is repugnant to another part. Plainly, if the appeal was regular, it was error to dismiss it; and if it was so irregular that it became the duty of the court to dismiss it, the Circuit Court had no jurisdiction to affirm the decree of the District Court. Cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars, may be removed from the District Court into the Circuit Court by appeal, and the provision is that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in case of writs of error.* Jurisdiction in such cases is given to the appellate court by the appeal or writ of error, as the case may be, which ceases to exist, even if regular, when the appeal or writ of error is dismissed, or if not regular in essential particulars, then jurisdiction does not attach for the purpose of affirming the decree upon the merits.† Argument to support these conclusions is not necessary, as they are self-evident, but inasmuch as the case must be remanded for a new hearing, it becomes necessary to examine some of the questions which the anomalous proceedings present for consideration.

Most of the claims of the interveners were for stores, materials for repairs, or for labor and supplies furnished to the steamer, either at the request of the master or at the request of one or both of the owners, in the home port of the vessel. More than half a century ago this court decided, in *The General Smith*,‡ that where repairs and supplies are furnished to a ship in her home port, or in a port of the State to which the ship belongs, that no maritime lien is implied, nor any other lien unless it is given by the local law, by which the rights of the parties in such a case is altogether governed.

* 2 Stat. at Large, 244. † 1 Id. 84. ‡ 4 Wheaton, 443.

Where necessary repairs have been made or necessary supplies furnished to a foreign ship, or to a ship in a port of a State to which the ship does not belong, the general maritime law, as all agree, gives the party a lien on the ship itself for his security, which may be enforced in the admiralty by a proceeding *in rem;* but the court decided, in the case before mentioned, that as to such repairs and supplies furnished to a ship in her home port, or in a port of the State to which the ship belongs, the case is governed by the local law, and that no lien arises unless given by the local law. All the Federal courts were governed by those rules for years, and little or no difficulty arose in practice, as most or all of the States enacted laws giving a lien for the protection of material-men in such cases, and this court adopted a rule authorizing a proceeding *in rem* against domestic ships, "where by the local law a lien was given to secure the payment of contracts in such cases for supplies, repairs, or other necessaries." Since that time, however, that rule has been repealed and a new one adopted in its place, which does not authorize a proceeding *in rem*, except where there is a claim founded on a maritime lien against a foreign ship, or against a ship in a foreign port, or the port of a State other than that to which the ship belongs.* Attempts were made by the States to obviate the embarrassment which grew out of the repeal of that rule, and the adoption of the new rule withdrawing the use of the process *in rem* from the District Courts to enforce the payment of claims for repairs and supplies furnished to domestic ships, but this court decided in several cases that the State legislatures could not create a maritime lien, nor could they confer jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem* as practiced in the admiralty courts.†

* The Lulu, 10 Wallace, 192; The Belfast, 7 Id. 644; Leon *v.* Galceran, 11 Id. 191; Steamboat Co. *v.* Chase, 16 Id. 533; The St. Lawrence, 1 Black, 522.

† The Moses Taylor, 4 Wallace, 430; The Hine *v.* Trevor, 4 Id. 571; The Belfast, 7 Id. 644; Steamboat Co. *v.* Chase, 16 Id. 534; Leon *v.* Galceran, 11 Id. 192.

Opinion of the court.

Much embarrassment has existed ever since the old twelfth admiralty rule was repealed, as the new rule makes no provision to enforce the payment of contracts for repairs and supplies furnished to domestic ships, except by a libel *in personam*. Repeated judicial attempts have been made to overcome the difficulty, none of which have proved satisfactory, because they failed to provide a remedy in the admiralty by a proceeding *in rem*. Inconveniences of the kind have been felt for a long time, until the bench and the bar have come to doubt whether the decision that a maritime lien does not arise in a contract for repairs and supplies furnished to a domestic ship is correct, as it is clear that the contract is a maritime contract, just as plainly as the contract to furnish such repairs and supplies to a foreign ship or to a domestic ship in the port of a State other than that to which the ship belongs.* Such a remedy is not given even in the latter case, unless the repairs and supplies were furnished *on the credit of the ship*, and it is difficult to see why the same remedy may not be given in the former case if the repairs and supplies were obtained by the master on the same terms.† These and many other considerations have had the effect to create serious doubts as to the correctness of the decision made more than fifty years ago,‡ that a maritime lien does not arise in such a case.

Expressions, however, to the same effect are found in other opinions of this court, and inasmuch as the question is not satisfactorily put in issue in the pleadings in this case, and does not appear to have been directly presented to the Circuit Court by either party, the court here is not inclined to enter more fully into the consideration of it at the present time.

None of the interveners alleged *in direct terms* that they had a maritime lien upon the steamer or the proceeds in the

* Abbott on Shipping, 143, 148.

† 5 American Law Review, 612; 7 Id.; The St. Lawrence, 1 Black, 529; The Harrison, 2 Abbott, United States Reports, 78; The Belfast, 7 Wallace, 645, 646.

‡ The General Smith, 4 Wheaton, 443.

registry of the court. Many libels of intervention were filed subsequent to the sale of the steamer, and some of them contain a prayer that the court will decree the payment of the claim of the libellant, *with privilege* on the steamer or the proceeds, but in no case does the libellant allege in terms that the contract set forth in the libel constitutes a maritime lien upon the steamer or the proceeds in the registry of the court, nor does the libellant pray for process to enforce any such lien.

Doubtless the maritime lien is, in many cases, well described *as a privilege* in the thing, but the State law, which cannot be enforced in the admiralty, also gives material-men a privilege or lien in such cases, and *in view of that fact* it may well be questioned whether the allegation in the libels is sufficient to apprise the owners of the specific nature of the interest which the libellants claim in the proceeds, as the rule of decision in the Federal courts has been for many years that a maritime lien does not arise in such a case. Any person having an interest in the proceeds may intervene *pro interesse suo*, but he ought to allege enough to apprise the owner of the nature of the interest claimed.*

Most or all of the claims were referred to a commissioner to report a tableau of distribution, and no exception was taken to the order of the court appointing the commissioner. He decided that none of the claims, except those for seamen's wages, constituted a maritime lien, and none of the libellants excepted to the report upon that precise ground. On the contrary they seem rather to have acquiesced in that part of the report; and in the view adopted by the district judge, that it was competent for him to decree that the respective claims should be paid out of the proceeds in the registry of the court, irrespective of the question whether the claimants had or had not any maritime lien or other legal interest in the same. Such must, it would seem, have been the view of the district judge, as he ultimately

* 43 Admiralty Rule, Revised Code of Practice, Art. 3273-4; Revised Statutes of Louisiana, 604.

confirmed the report and directed the proceeds to be paid to two claimants, both of whom were libellants *in personam* and judgment creditors of the owners. By confirming the report he decided that none of the libellants whose claims were for repairs and supplies had any maritime lien, but in the decree ordering the payment of the two claims, he departed from the report of the commissioner, as the latter decided that, inasmuch as opposition was made by the owners, the proceeds could not be distributed among the interveners who had no maritime liens. Apparently the district judge must have been of the opinion that the proceeds were subject to his order of distribution among the creditors of the owners, or that the two claimants acquired some right or interest in the proceeds, either by their judgments against the owners or by virtue of the proceedings under the garnishee process against the clerk as the registrar of the District Court.

Beyond doubt maritime liens upon the property sold by the order of the admiralty court follow the proceeds, but the proceeds arising from such a sale, if the title of the owner is unincumbered and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner.*

Subsequent to the seizure any person may enter an appearance to protect any interest he may have in the property, or he may commence a second or subsequent suit to enforce any claim he may have against it, or he may take legal measures to prevent the release of the property under arrest, or to prevent the payment of the proceeds out of the

* Brown *v.* Lull, 2 Sumner, 443; Sheppard *v.* Taylor, 5 Peters, 675; The Europa, Browning & Lushington, 87, 91; The Amelie, 2 Clifford, 448; Same Case, 6 Wallace, 30.

registry.* Defence may be made to a suit *in rem* by any person who has an *interest* in the thing seized; as for example, a mortgagee may appear and defend a salvage or wages suit, or the assignee of a bankrupt owner may appear and contest any claim against the property of the bankrupt, or underwriters, if they have accepted the abandonment, may also appear and defend against any claims adverse to their interest in the property, but a person who has merely a collateral interest in some question involved in the suit and has no actual concern in the subject-matter of it, cannot be allowed to intervene in the proceedings.†

Where the property is already under arrest and a second or subsequent suit is instituted, it is not necessary to take out a second warrant of arrest, as a citation *in rem* is sufficient, instead of a warrant, commanding the marshal to cite all persons who have, or claim to have, any right, title, or interest in the property, to enter an appearance in the cause on or before the day therein named, the service of which is sufficient to protect the rights of the intervener. Notice to the owners in some form must be given in such cases, else the decree will not conclude the owners.‡

Decided cases may be found which afford some support to the proposition that the proceeds in the registry of the court, if the lien claims are all discharged, may be distributed equitably among the intervening creditors of the owners, but the court is of the opinion that the rule that the proceeds in that state of the case belong to the owner is correct in principle, and that the weight of authority is in its favor, notwithstanding those cases, of which *The John*§ is the one most frequently cited. But in that case there was no opposition by the owners, nor was the question much considered. Directly opposed to that case is the case of *The Maitland*,‖ in

* 43 Admiralty Rule; Williams & Bruce's Admiralty Jurisdiction, 229.

† Conkling's Practice (5th ed.), 570; Stratton *v.* Jarvis, 8 Peters, 4; The Killarney, Lushington, 430; Williams & Bruce's Admiralty Jurisdiction, 199; The Julindur, 1 Spinks, 75; The Louisa, Browning & Lushington, 59; The Caledonia, Swabey, 17; The Mary Anne, 1 Ware, 108.

‡ Nations *v.* Johnson et al., 24 Howard, 205; 43 Admiralty Rule.

§ 3 Robinson, 290. ‖ 2 Haggard's Admiralty, 253.

which the admiralty court refused to follow it, remarking that there is no solid distinction between original suits and suits against the proceeds, where there is opposition. Mere remnants, if *unclaimed by the owner*, may stand upon a different footing, and it is upon that ground that the admiralty courts have sometimes decreed the payment of small *unclaimed* sums to a creditor of the owner having a clear equity, to prevent the same from being indefinitely impounded in the registry of the court. Exactly the same point was decided, in the same way, in the case of *The Neptune*,* in which all of the authorities to that time were carefully examined. Where the ship is sold the proceeds are in the hands of the court, which holds the fund in trust, and the court in the following case added that the owner is in some sense entitled to the same, but finally decided that inasmuch as he cannot obtain the fund without the order of the court, that it cannot be attached under the garnishee process.†

Supplemental suits in the nature of a suit *in rem* may unquestionably be entertained in favor of parties having *an interest* in the proceeds, as was held by this court in the case of *Andrews* v. *Wall*,‡ in which this court said that such suits may be entertained to ascertain to whom the proceeds belong and to deliver the same over to the parties who establish the lawful ownership to the property, as in the case of the sale of a ship to satisfy claims for seamen's wages, or for a bottomry bond, or for salvage services, or to discharge a lien for repairs and supplies, the rule being that after the original demand is paid if a surplus remains in the registry, the court may determine to whom the same belongs. Other lien claims are also mentioned for which the ship may be sold, but it is unnecessary to recapitulate them, as those enumerated are sufficient to explain the principle adopted by the court.§

Different views have in some few instances been adopted

* 3 Knapp's Privy Council, 111.

† The Wild Ranger, Browning & Lushington, 88. ‡ 3 Howard, 573.

§ United States *v.* Casks of Wine, 1 Peters, 547; Schuchardt *v.* Ship Angelique, 19 Howard, 241.

by the District Courts, but the right of the court to decree that third persons who could not have proceeded against the property *in rem* may recover a proportion of the proceeds to satisfy their claims against the owner, in a case where the owner appears and opposes the application, seems to be repugnant to every sound principle of judicial proceeding, and it is certainly opposed to the great weight of authority.*

Reference is sometimes made to the case of *Place* v. *Potts*,† as supporting the opposite rule, but the court here is not able to regard the case as having any such tendency, as the judgment in that case in the court of original jurisdiction was founded almost entirely upon the decision of the admiralty judge in the case of *The Dowthorpe*,‡ which is nothing but a simple apportionment of the different liens upon the ship and freight.

Suppose that is so, still it is contended that the appellees acquired the right of preference in the fund by virtue of the proceedings under the garnishee process, as more fully set forth in the record; but the court is entirely of a different opinion, for several reasons:

1. Because the fund, from its very nature, is not subject to attachment either by the process of foreign attachment or of garnishment, as it is held in trust by the court to be delivered to whom it may belong, after hearing and adjudication by the court.§

2. Because the proceeds in such a case are not by law in the hands of the clerk nor of the judge, nor is the fund subject to the control of the clerk. Moneys in the registry of the Federal courts are required by the act of Congress to be

* 2 Parsons on Shipping, 231; The New Eagle, 2 W. Robinson, 441; Gardner *v.* Ship New Jersey, 1 Peters's Admiralty, 226; Clement *v.* Rhodes, 3 Addams, 40.

† 8 Exchequer, 705; Same Case, 10 Id. 370; Same Case, 5 House of Lords Cases, 383.

‡ 2 W. Robinson, 90.

§ The Albert Crosby, 1 Lushington, 101; The Wild Ranger, Browning & Lushington, 8; 1 Chitty's Archbold's Practice (11th ed.), 702.

deposited with the Treasurer of the United States, or an assistant treasurer or designated depositary, in the name or to the credit of such court, and the provision is that no money deposited as aforesaid shall be withdrawn except by the order of the judge or judges of said courts respectively, in term time or vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk.* Regulations substantially to the same effect have existed in the acts of Congress for more than half a century, and within that period it is presumed that no proceeding to attach such a fund by a creditor of the owner has ever been sustained.†

3. Judgments were never a lien upon personal property, unless made so by attachment under mesne process, which is all that need be said in respect to the proposition that the appellees acquired a right of preference to the proceeds in the registry of the court by virtue of their judgment against the owners.

Mention should also be made of another error, which ought if possible to be promptly corrected. Where an appeal is taken from the decree of the District Court in a proceeding *in rem* to the Circuit Court, the property or proceeds thereof follows the cause into the Circuit Court, where it remains until the litigation is ended, as it does not follow the cause into the Supreme Court.‡ Application was made to the District Court to send up the proceeds, and the record shows that the court overruled the same, which is a plain error and one which ought to be promptly corrected, unless the proceeds have been paid over as directed by the court, and if so, they should be recalled, if practicable, and restored to the registry, and then sent up to the Circuit Court, as the Circuit Court in such cases executes its own decree.

Imperfectly tried, as the case has been, the court here is of the opinion and directs that leave be given to both parties

* 17 Stat. at Large, 1. † 3 Id. 395.

‡ The Collector, 6 Wheaton, 194; The Seneca, Gilpin, 34; The Grotius, 1 Gallison, 503; Montgomery *v.* Anderson, 21 Howard, 388; Conklin's Practice (5th ed.), 569.

to amend their pleadings, and if need be to take further proofs. Error was also committed by the Circuit Court in affirming the decree of the District Court, as it is plain it should have been reversed. For these reasons the decree of the Circuit Court is in all things REVERSED, and the cause remanded for further proceedings

IN CONFORMITY TO THIS OPINION.

CORNETT *v.* WILLIAMS.

1. Under the act of July 2d, 1864, providing that in civil actions in courts of the United States there shall be no exclusion of any witness, "because he is a party to or interested in the issue tried;" witnesses may, other things allowing, testify (without any order of court) by deposition. And if not satisfied with a deposition which they have given, have a right, without order of court, to give a second one.
2. What evidence so far tended to prove, on the part of a person who, during the late rebellion, removed his slaves from loyal parts of the country to parts in rebellion, a purpose to sell them in these last, and justified a charge on an assumption of possibility, that the jury might find the purpose to have existed. This matter passed upon.
3. When, under the what is known in Texas as its "Sequestration Act," a person has brought suit to recover land, and the marshal, in pursuance of the writ of sequestration, takes possession of the land, it is in the custody of the law. But when replevied (as the said act allows it to be), it passes from the possession of the law into the possession of the party replevying.
4. The rule established by this court as to the introduction of secondary evidence—that it must be the best which the party has it in his power to produce—is to be so applied as to promote the ends of justice and guard against frauds, surprise, and imposition. The court has not gone to the length of the English adjudications, that there are no degrees in secondary evidence. Hence, where the records of a court were all burnt during the rebellion, what appeared to be a copy of an officially certified copy was held properly received; the certified copy, if any existed, not being in the party's custody or plain control, and there being no positive evidence that it existed, though there was evidence tending to show that it did. There is nothing in the act of Congress of March 3d, 1871 (16 Stat. at Large, 474), providing for putting in a permanent form proof of the contents of judicial records, nor in the statute of Texas of 11th