APPENDIX.

PLINY CUTLER, APPELLANT, *v.* WILLIAM A. RAE.

(7 Howard, 729–738.)

MY attention was called early in this term of the court, by a letter from F. C. Loring, Esquire, Counsellor at Law in Boston, to the declaration in the first sentence of my opinion in the above case, "that this court has decided an important constitutional question of admiralty jurisdiction, without either oral or printed argument."

Mr. Loring's letter was the first intimation I had, that an argument upon the jurisdiction had been filed by him, upon the part of the libellant and appellee in the cause.

Subsequently, my attention was called to Mr. Loring's argument by my brother Nelson, and afterwards it was made the subject of remark in one of the court's conferences, by the Chief Justice.

It is due to myself, to Mr. Loring as counsel in the cause, to the court, and particularly to the Chief Justice, who delivered the court's opinion, that I should say that an argument upon the constitutional jurisdiction was filed by Mr. Loring. The history of the cause in the Supreme Court was as I shall here state.

The case was filed and docketed, January 6th, 1847. On the 16th of February, Mr. Loring and Mr. Fletcher filed their arguments upon the merits, and an order was made to submit the cause upon them. So the case stood until the last term of the court. In 1848, January 24th, the case was again submitted upon printed arguments by the same counsel. In neither was the constitutional question of jurisdiction touched. On the 17th of February, the court passed the following order, I believe upon the suggestion of the Chief Justice:—"In the printed arguments filed in this case, the question of jurisdiction raised by the fourth point stated in the record has not been noticed. The *court desire that point to be [*616
argued by counsel, either by printed argument or orally at the bar, as counsel may prefer." Under this order, Mr. Loring filed his argument upon the jurisdiction. Afterwards, on the 22d of December, 1848, the following letter from B. R. Curtis,

Esquire, to David H. Hall, Esquire, of Washington City, was read to the court by the latter, and was filed with the other papers in the cause.

"BOSTON, *December 20th*, 1848.

"Dear Sir,—In the case of Rae and Cutler in the Supreme Court, respecting which Mr. Fletcher has heretofore corresponded with you, I have to request that you would make known to the court, that the appellant has instructed his counsel not to insist upon the objection to the jurisdiction which appears on the record; and that for this cause the counsel present no argument in support of the exception. The parties in interest are the underwriters, and they feel desirous that the courts of the United States sitting in admiralty should retain jurisdiction in cases of general average.

"If the court should proceed to the merits, will you allow me to ask you to refer them to a case not cited in the argument, of which notice has been given to Mr. Loring, the counsel for the appellee,—*March* v. *Roberson*, 4 Wheat., 360. You will of course make the proper charge for these services, and I will see you are paid.

"Your obedient servant,

"B. R. CURTIS.

"DAVID H. HALL, Esquire, Washington."

On the 26th of the month, the cause was submitted on further argument by Mr. Loring, without argument upon the jurisdiction from the opposing counsel, and on the 2d of March, the judgment below was reversed for want of jurisdiction. See 7 How., 729. Without any fault upon the part of our Clerk, William Thomas Carroll, Esquire, whose care it is to distribute briefs and arguments to the judges, I did not receive Mr. Loring's argument upon the jurisdiction. I aided in the court's consultations upon the case, without knowing that such an argument had been filed, I gave an oral dissent from the judgment of this court dismissing the cause for want of jurisdiction, under that impression. The dissent was afterwards extended, as it appears in the report of the case, in the full belief that the counsel in the cause had disregarded the order of the court, and that the court in deciding the case had yielded the point required by its order. I was misled *617] by the letter from *Mr. Curtis. I am pleased that it was otherwise. My duty growing out of it is the statement I have made. I also think it due to Mr. Loring, and to the court, to request the Hon. Benjamin C. Howard, the Reporter of the court, to print with this communication the argument made by Mr. Loring upon the jurisdiction of the court.

In respect to causes involving constitutional questions being submitted to the court upon printed arguments, my impression has been that such cases were not within the rule. It has not with the judges been mine alone. It has, however, been done twice. The cases have been brought to my notice by the Chief Justice. Once in the case of *Bronson* v. *Kinzie, et al.*, 1 How., 311, upon a written submission with the consent of the court, and again at this term without opposition by any member of it, in the case of *Nathan* v. *The State of Louisiana.*

I shall hereafter consider it to be the understanding of the majority of the court, that the rule permitting cases to be submitted on printed arguments comprehends the submission of such as involve constitutional questions.

JAMES M. WAYNE.

Associate Justice Supreme Court U. States.

December Term, 1849.

Argument for the Libellant upon the Question of Jurisdiction.

The case presented is a claim by the owners of a ship against an owner of the cargo, to recover contribution for an injury *voluntarily done* to the ship on the high seas, for the common benefit, by which the property, from the owner of which contribution is sought, was preserved from destruction by an impending peril.

Whether the facts in evidence make such a case as entitles the owner of the ship to a contribution has been previously discussed, in order to present the question of jurisdiction that must be assumed.

The question now to be considered is, whether such a claim is within the jurisdiction of the District Courts of the United States sitting in admiralty, or, in other words, is a proper matter for admiralty and maritime jurisdiction. The late decisions of this tribunal upon the subject of jurisdiction limit the range of discussion, forasmuch as it must now be considered as settled that the admiralty jurisdiction of the courts of the United States, both as to contracts and torts, is more extensive than *that exercised by the High Court [*618 of Admiralty of England at the time of the formation of the Constitution, and that, in cases of contracts, it embraces those "concerning the navigation and trade of the country upon the high seas and tide-waters, with foreign countries, and among the several states." *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How., 392; *Waring* v. *Clark*, 5 Id., 431; *Peyroux* v. *Howard*, 7 Pet., 324.

The present inquiry is, therefore, limited to the question,

whether general average, or the right to claim contribution for sacrifices, losses, and expenses voluntarily incurred or suffered in the course of a voyage, for the common benefit, is, or depends upon, a contract concerning the navigation and trade of the country.

This definition seems to assume the question. But it is impossible to define general average as a matter or incident pertaining to any thing but a marine voyage. The principle on which it is founded is, at least by the common law, exclusively limited to maritime cases, and no case can be found in which it has ever been applied to facts happening on land unconnected with a ship, its cargo, or freight.

Parallel cases may occur on land; as, for instance, where a building has been blown up or pulled down to prevent the spread of a conflagration; but there is no case to be found in which it has been held that the owner of the building had a claim for contribution for his loss upon the owners of the adjacent buildings whose property was preserved by the sacrifice of his, and there is no authority to be found on which such a claim could be rested.

The case of *Welles* v. *Boston Ins. Co.*, 6 Pick. (Mass.), 182, does not make an exception, because there the action was upon a policy of insurance, brought to recover the value of an article purchased, by the advice of the defendants, for the purpose of preserving the property; and because the defendants were willing to pay a proportion, and actually paid it into court. The question of contribution was not, therefore, raised, discussed, or decided; and, in fact, the court intimated a doubt whether the defendants were liable at all in law, saying, "for a proportion of the sacrifice the defendants are equitably, if not legally, entitled to recover," a sum exceeding which proportion the defendants had paid into court as above stated.

The books in which the subject is discussed have been searched in vain to find a definition of general average or contribution, in which it is not exclusively confined to maritime cases. In those which treat of shipping and insurance, where *this subject is necessarily discussed, this, it may be said, must be expected, and therefore they furnish no weight of authority; but the same definition is to be found in the books which profess to treat of the law at large, and in decisions of common law courts.

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3 Kent Com., 232:—"The doctrine of general average grows out of the incidents of a *mercantile voyage*, and the duties which it creates apply equally to the owner of the ship and of the cargo. General, gross, or extraordinary average means a contribution, made by all the parties concerned,

towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight."

Simonds v. *White*, 2 Barn. & C., 808:—"The obligation to contribute depends not so much upon the terms of any particular instrument as upon a general rule of *maritime law*."

Scai v. *Tobin*, 3 Barn. & Ad., 523:—"The question of liability here (general average) depends *entirely* on the *maritime law*."

Citations to the same effect might be multiplied *ad infinitum*.

The doctrine of general average, growing out of the incidents of a mercantile voyage, and relating exclusively to ship, cargo, and freight, and depending upon the maritime law, necessarily from its very definition pertains to the trade and navigation of the country upon the high seas and tide-waters, and therefore falls within the admiralty jurisdiction, as established by this court in its most recent, as well as in many previous decisions.

General average is sometimes considered as arising out of the contract of affreightment; that is, that there is a contract implied by law between the owners of the ship and the owners of the cargo, by which it is agreed, that, in case it should be necessary for the common benefit that any sacrifice be made of the vessel or cargo, the owners of what is preserved thereby shall contribute to make good that loss. Pothier, Maritime Contracts, Part 1, sect. 3, art. 96:—"Finally, the freighter contracts the obligation of contributing to the common average." And Part 2, sect. 1:—"The merchant who lades goods by the contract of charter party, (or affreightment,) promises the master by the contract to contribute to the common average which may take place during the voyage; and, *vice versâ*, the master virtually promises the merchant shipper, in case his property suffer any average losses for the good of all, to *cause him to receive an indemnity by contribution of the owners of the ship and other merchants. The subject of this contribution is, therefore, dependent on the contract of charter-party, and ought to be considered next to this contract. Average in marine language signifies the loss and damage suffered in the course of navigation. Common average is that suffered for the common safety, and alone admits of contribution." [*620

If the doctrine of general average is to be considered as growing out of the contract of affreightment, it is a part of the contract, and therefore, by the decision in 6 Howard, falls within the jurisdiction of the District Court. It being ex-

pressly decided in that case, that the contract of affreightment is within the jurisdiction.

And while referring to that case, in which it was conceded by counsel, that the Admiralty Court of England would not exercise jurisdiction over a contract of charter-party or affreightment, and upon which assumed fact the division of opinion in the court seemed to arise, it may be remarked that the concession was unnecessary, and not correct in point of fact. There is a case in the first volume of Haggard's Reports, p. 226, *The Elizabeth*, in which the jurisdiction was exercised and sustained by Lord Stowell, in a suit on a charter-party for the charter money. The suit was originally brought in a Vice-Admiralty Court. A protest was made to the jurisdiction, which was overruled, and an appeal taken to the High Court of Admiralty. The appeal not being prosecuted, the defendants moved to have it pronounced deserted and for costs, which was granted.

The question of jurisdiction, it is true, was not argued in the higher court, but the judgment of the lower court was not reversed, as it must have been if the court had no jurisdiction over the subject-matter. See also the case of *The Fly*, 2 Browne's Civil and Adm. Law, 539, which was a suit brought in the admiralty on a charter-party for damages, which was entertained, and relief granted.

These cases fully sustain the proposition of Dr. Browne, that the court of admiralty could not refuse to entertain jurisdiction over a charter-party unless prohibited, and demolish the argument against the jurisdiction of the District Court over contracts of affreightment, which depends entirely on the assumed fact that they were not subjects of admiralty jurisdiction in England.

If, however, the claim for general average is to be considered as a quasi contract, created by implication of law at the time when the voluntary loss or sacrifice is incurred, then, whenever that happens upon the high seas, the locality is maritime, the *service is maritime, and all the elements exist necessary to bring the case within admiralty jurisdiction.

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Indeed, it would be difficult to conceive of a service more purely and exclusively maritime than a jettison for the common safety upon the high seas, and the rights and duties growing out of it necessarily follow the principle.

Salvage is a subject of admiralty jurisdiction in England as well as in this country, and the jurisdiction has never been questioned; but it is extremely difficult to see any respect in which salvage differs from general average, so that one should be without and the other within the jurisdiction.

The service in both cases is maritime, and the object in both is to save property. If to tow a deserted vessel into port, or to take cargo out of her, or to render assistance to a vessel on shore in distress, are maritime services, it is difficult to see why the claim for contribution of an owner whose cargo is jettisoned for the common safety, or of a vessel the masts of which are cut away, or which is voluntarily run on shore for the purpose of saving life, vessel, and cargo, does not equally depend upon a maritime service, and should not be a subject of the same jurisdiction.

Indeed, there is no distinction made between them in the books; they are usually considered together, in the same chapter, as "Salvage and General Average," and are often spoken of together as the "quasi contracts of salvage and general average."

The jurisdiction of the admiralty over this subject may be put upon the ground of the lien which exists on the part of the owner of the thing sacrificed upon the things preserved.

The existence of this lien *in rem* is universally admitted.

1 Emerigon des Ass., p. 651, ch. 12, sect. 43:—"L'Action en contribution est *reele* de sa nature."

Casaregis, Disc. 45, *n.* 34:—"Actio ad petendam contributionem est *in rem* scripta."

Ordonnances de la Marine, liv. 3, tit. 8, sect. 21:—"Si aucuns des contribuables refusent de payer leurs parts, le maitre pourra, pour sureté de la contribution *retenir*, même faire vendre par autorité de justice, des marchandises, jusqu'à concurrence de leur portion."

Laws of Oleron, art. 9:—"When the vessel arrives, the merchants should pay their proportions (of the contribution), or the master may sell or pawn the goods, and use the money so raised to pay the same before the cargo is unladen."

Its existence is also recognized in the courts of common law here, and in England. *Simonds* v. *White*, 8 Barn. & C., [*622 *805; *Strong* v. *New York Fire Ins. Co.*, 11 Johns. (N. Y.), 323; *United States* v. *Wilder*, 3 Sumn., 308; *Scai* v. *Tobin*, 3 Barn. & Ad., 523; *Chamberlain* v. *Reed*, 13 Me., 387; *American Ins. Co.* v. *Coster*, 3 Paige (N. Y.), 323; *Cole* v. *Bartlett*, 4 Miller, 139.

The existence of a maritime lien *in rem* has been held to be a sufficient ground for asserting admiralty jurisdiction, because no other court can enforce it.

Menetone v. *Gibbens*, 3 T. R., 269. Per Lord Kenyon:—"It would be highly inconvenient (if the admiralty had not jurisdiction), because that court proceeds *in rem*, whereas the courts of common law can only proceed against the parties."

Per Ashurst:—"One strong reason for supporting the admiralty jurisdiction is, that in these cases that court proceeds *in rem;* whereas we can give no such relief."

The reasons on which this doctrine is founded are stated in the case of *The Spartan*, 1 Ware, 154:—"There is another ingredient in this case which I hold to be conclusive in favor of the jurisdiction. If there is here an implied hypothecation raised by the law, it can be enforced by no other than an admiralty court.

"It is a right adhering to the thing, a *jus in re* which is to be made available against the thing *in specie*. The course of the common law allows of no process upon the hypothecation by which the subject itself is directly reached, and a satisfac tion for this right extracted from it. If a court of admiralty cannot entertain jurisdiction of the case, then the law has given the right, it has provided the security, but has refused the only means by which it can be rendered with certainty available. It holds out the right, and holds back the remedy. Where the law raises a lien for maritime service, I hold that this court has the power to carry it into effect."

Also by Judge Story, in *United States* v. *Wilder*, 3 Sumn., 311:—"It is a case of general average, where, as in case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances, the general maritime law enforces a contribution independent of any notion of a contract, upon the ground of justice and equity, according to the maxim, *qui sentit commodum, sentire debet et onus.* And it gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire
*623] confidence, that in a great variety of cases, without such a lien, the *shipowner would be without any adequate redress, and would encounter most perilous responsibility."

Another ground on which the jurisdiction may be sustained is, that the subject-matter is within the jurisdiction of the High Court of Admiralty in England.

That court, it is well known, formerly exercised jurisdiction over all contracts and torts of a maritime nature; and its present limited jurisdiction is the consequence of the encroachments of the common law courts.

Some subjects, however, have been left for its jurisdiction: the courts of common law having contented themselves with a concurrent jurisdiction, and among these may be classed the one now under consideration.

That this was originally within the jurisdiction of the maritime courts in England, and on the Continent, cannot be questioned.

It is treated of in the Consulat del Mare, and in all the codes of maritime laws established for the government and direction of the maritime tribunals, some of which contain express directions to the master to appear before the court of admiralty in such cases (Ord. de la Mar., liv. 3, tit. 8, art. 5); and is in its nature so purely of the sea, and so exclusive of the land, that it is not properly within the jurisdiction of any other tribunal; and it is not until within very recent times that courts of equity and common law have entertained jurisdiction over it, the first case at common law being in 1801.

It is highly improbable that there have not been previous disputes and lawsuits growing out of claims for contribution; these suits have not been at law or in equity, because the decisions of these courts are reported, and there are none relating to this subject; if there have been any such suits, and it seems impossible that there should not have been, they must, therefore, have been brought in the admiralty court, the decisions of which, previous to 1798, are not in print.

There is no case to be found in which a prohibition has been granted, or even asked, to prevent the court of admiralty from entertaining a case of this kind.

The negative testimony in favor of the jurisdiction in England is, therefore, very strong; as it appears that the subject is properly a matter of admiralty jurisdiction, and there is no case, and no authority, in or by which it has been questioned.

But there is other proof to sustain the jurisdiction other than that derived from the absence of all denial or question respecting it.

In a book published in London, in 1705, entitled, "A Treatise *on the Dominion and Laws of the Seas," it [*624 is asserted, without qualification, that the jurisdiction of the admiralty court extends to "all cases of gross adventure, all causes of *jactus*, and contributions with average."

2 Browne's Civil and Adm. Law, 122:—"If a party institute a suit in that court on a charter-party for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain it."

There is no case in which a prohibition has been granted where contribution was claimed.

Weskett on Ins., 135. Master may detain goods (in case of average), and juridically sell.

The Copenhagen, 1 Rob. Adm., 289. In this case the question whether there ought to be a contribution was considered by Sir W. Scott, without an intimation of a doubt in respect to the jurisdiction, nor was it incidental to the question of prize; it was a separate suit after the vessel had been restored. The court say expressly, "This is not merely or originally a matter of prize; she came in first from distress," &c. "In this case the trans-shipping, or rather the unloading, of the goods seems to have been for the common benefit of both, and therefore the expense of it seems to have the character of a general average."

It is therefore, so far as the jurisdiction is concerned, a case in point. The subject of general average was entertained, and no prohibition granted, if any was applied for.

The Eleonora Catharina, 4 Rob., 156. The question was entertained incidentally, whether a jettison was made for the common benefit.

The Gratitudine, 3 Rob., 240. In this case the power of the master to bind the ship, cargo, and freight by an express hypothecation, and the remedy in admiralty, are fully sustained. The same principles and reasons apply to the implied hypothecation created by law in cases of general average, and it is so considered and held by the court and the case referred to in illustration.

By the Articles of 16th February, 1633, it was declared, "that if suit shall be in the Court of Admiralty for building, amending, saving, or necessary victualling the ship, against the ship, and not against any party by name, no prohibition shall be granted, though this be done within the realm."

It would be no great straining of the word *saving* to apply it to those cases where the ship was preserved by a sacrifice of the cargo or a part of it, and thereby to bring cases of general average within the express terms of the Articles.

*625] *See decisions in relation to these Articles. *The Hope*, 3 Rob., 216, and *The Trelaconey*, 3 Rob., 216, *n.*

3 Salkeld, 23, "adjudged, that where a master pawns the ship at sea, the admiralty hath a jurisdiction; and that he may pawn to relieve the ship in extremity, for he being constituted master of the ship hath impliedly a power to preserve it in cases of danger." This would seem, from the language used, to apply to cases of extreme danger at sea, and if so, must be limited to the hypothecation created by law in cases of general average. But if it refers to the general power of the master to pawn the ship in foreign parts, it clearly recognizes the principle on which this suit is founded; and the same reasons exist for extending the admiralty jurisdic-

tion over the hypothecations arising by the maritime law from the acts of the master, and those arising from his express contracts.

The jurisdiction founded on an implied hypothecation is familiarly exercised in cases where repairs, &c., are made on foreign vessels, or those of another state. The maritime law gives the lien, and courts of admiralty, in England, as well as in this country, enforce it, on the ground of an implied hypothecation; the service is not the less maritime certainly if rendered while on the sea, and to preserve the ship or cargo, and the existence of the lien in cases of general average has never been questioned.

A case is cited in 1 Molloy, 149, in which a master borrowed money to ransom the ship, and sued the owner for it in the admiralty, in relation to which a prohibition was applied for and refused. It seems difficult to distinguish that case from the present in point of principle. See also cases of prohibition refused in *Anonymous*, Cro. Eliz., 685; *Radley* v. *Egglesfield*, 2 Saund., 260.

The American authorities in favor of the jurisdiction are numerous and direct. The question has not been previously before this tribunal, but the principles upon which it depends are maintained in the cases of *The Gen. Smith*, 4 Wheat., 438; *The St. Jago de Cuba*, 9 Wheat., 409; *Peyroux* v. *Howard*, 7 Pet., 329; *Andrews* v. *Wall*, 3 How., 568; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How., 344.

In the Circuit Courts there has been no express decision on the subject, but no case has been found where the jurisdiction has been questioned.

In *De Lovio* v. *Boit*, 2 Gall., 475, it was held that the jurisdiction extended to all maritime contracts, and as to what were such, "all civilians and jurists agree that in this appellation are included, among other things, charter-parties, affreightments, *marine hypothecations, contracts for [*626 maritime service in the building, repairing, supplying, and navigating ships; contracts and quasi contracts respecting averages, contributions, and jettisons, and policies of insurance."

Cases for the adjustment or recovery of contributions are of familiar occurrence in the District Court of Massachusetts, and probably elsewhere. *Shelton* v. *Brig Mary*, 5 Boston Law Rep., 75; S. C., 6 Id., 73; *Sparks* v. *Kittredge*, 9 Id., 319, in the Massachusetts District; *The Mutual Safety Ins. Co.* v. *Cargo of Ship George*, 8 Law Rep., 361, in the Southern District of New York; S. C., N. Y. Leg. Obs. for June, 1848, p. 260. Other cases have been considered in the Massachu-

setts District Court, to the knowledge of counsel, which are not in print.

American Ins. Co. v. *Coster*, 3 Paige (N. Y.), 323. Process in the instance side of the admiralty court is mentioned as the ordinary mode of enforcing a maritime lien.

Dunlap's Adm. Pr., p 57:—"Cases of general average are legitimate subjects of admiralty jurisdiction, being cases of implied contracts, arising out of the marine contract of shipment. The master has a lien upon the goods saved, to enforce the payment of the lawful contribution. This is the maritime law of Europe and of the United States. The admiralty courts are the proper tribunals to enforce this lien, and adjust speedily the contribution."

If there are any cases or any books in which the jurisdiction of the court of admiralty over cases of general average has been denied, they have escaped my research.

As it must be admitted that the subject is in its nature maritime, and a proper subject for the cognizance of a court of general admiralty and maritime jurisdiction, the only mode by which it could be excepted from the admiralty jurisdiction of the District Court would be to show that the English Admiralty Court would not entertain jurisdiction of it.

That this, if proved, would not be a sufficient argument has been repeatedly held by this court; but at least we might ask from those who deny the jurisdiction over general average, one solitary decision, or at least a dictum of some judge, or elementary writer, or compiler, in support of such denial; but where is it to be found?

Another ground on which the jurisdiction might be placed is that of necessity, expediency, and convenience.

The law gives (it is universally admitted) to the party entitled to contribution a lien, or *jus in rem*, against the property saved or benefited by the sacrifice.

*627] *It is equally certain that this lien cannot be enforced by a court of common law. If it be the owner of the ship who is entitled to a contribution, he may, having possession, retain the goods till his claim is settled, and in this way compel a payment; but if he be the owner of the cargo who is entitled, though he has an admitted lien upon the ship, cargo, and freight, he cannot enforce it in any way; he has no remedy at common law but a personal suit against the other owners; his lien is perfectly valueless, because the common law provides no way of enforcing it.

In fact there is no decision to the point that an action for contribution could be maintained at common law until the year 1801. *Birkley* v. *Presgrave*, 1 East, 220.

And if the question were not to be considered as settled by mere precedents, it might well be doubted whether a court of common law had jurisdiction over the subject of general average any more than it has over salvage. See Abbott on Shipping, p. 557, *n.; Brevoor* v. *The Fair American*, 1 Pet. Adm., 94.

But admitting a concurrent jurisdiction, it is obvious that, apart from the defects of justice which must often be felt from the inability of a court of common law to enforce the lien, there are other serious inconveniences arising out of the necessity of bringing separate suits against each of the parties interested, and the impossibility of settling the general average case by one suit, and from the want of power in a court of common law to compel a discovery and the production of books, papers, &c. *Twizell* v. *Allen*, 5 Mees. & W., 337. And that inconvenience is the more forcibly felt in this country where different parties might elect different tribunals, one the common law courts, another the court of chancery; one might prefer to sue in the Federal, and another in the state courts, there being no court having and exercising a complete jurisdiction over the whole subject-matter.

If relief is sought in equity, all the parties may be joined and served, if within the jurisdiction; but if not, the absent parties and their property cannot be bound,—and the lien is as unavailable in equity as at law. It was expressly decided in *Hallett* v. *Bousfield*, 18 Ves., 187, that the court would not, at the instance of a freighter, whose goods had been sacrificed, enjoin the master from delivering the residue of the cargo till the claim was settled and paid.

The inconveniences of the common law jurisdiction over this matter are forcibly stated in 1 Story's Eq. Jur., 542, § 491, and as arising principally from the inability *to bring all the parties interested before the court in [*628 any suit affecting a complete settlement; but the same objections apply to the jurisdiction of the court of equity, if all the parties interested are not within the jurisdiction; the want of power to enforce the lien is as seriously felt there as in a court of common law, and the slow, tedious, expensive proceedings of a court of equity constitute very formidable objections to the practical exercise of its jurisdiction in cases of this nature; and it is in fact very seldom resorted to. In the reports of the United States and state courts I cannot find a case in which a suit for general average has been brought in equity, and in the English reports only two, one above referred to in 18 Vesey, and another in Shower's Parl. Cas., p. 18.

On the other hand, the court of admiralty has all the advan-

tages of a court of equity in such cases, without any of its disadvantages.

If its process *in personam* be resorted to, it is in fact the same thing, except that its proceedings are much less formal, technical, and dilatory; if recourse is had to process *in rem*, the libellant gets the benefit of the lien and preference to which he is entitled at law and in equity; all persons interested are brought directly before the court; the property, if perishable, may be sold, or it may be delivered to the claimants on stipulation; the process, pleadings, and practice are direct, simple, and summary, the practice being, as it has been said, to proceed "*velis alatis*," or under full sail. The decree covers the whole subject-matter, and being *in rem* is conclusive upon all the parties interested, and the whole world.

It might not be easy to imagine a case more fit and proper for so much of its powers, pleadings, and proceedings as are peculiar to a court of admiralty, than one of general average, especially where there are many parties interested.

Another reason in favor of the jurisdiction on this score is that of uniformity of decisions. The different rules, practices, and customs which prevail in relation to general average, the circumstances which give rise to it, and the mode of adjustment, have been a cause of much confusion and embarrassment, and have been greatly lamented by writers on commercial and maritime law.

If the admiralty cannot entertain jurisdiction over this subject, it must be left principally for the jurisdiction of the state courts and different rules and systems of law in relation to it must arise. The jurisdiction of the Federal courts at law and in equity, being dependent on the citizenship of parties, can-
*629] not always or generally be invoked, and the decisions of these *courts, however highly respected, are not conclusive and binding upon the state courts.

If, on the other hand, the admiralty has a rightful jurisdiction, the great advantages of its process will cause it to be exclusively resorted to for the determination of such cases, and the District Courts being bound by the decisions of this tribunal, a uniformity of principle and decision may be established through all the states, the advantages of which in a commercial nation, and where the case is of daily occurrence, can hardly be overstated.

CHARLES G. LORING,
of Counsel for Libellant.