1792. duced to ſhew, that if a cauſe be removed from an *inferior* court in *England*, into the *King's Bench*, the judgment will bind *generally*.

THE COURT thought, that the *firſt* point had been fully decided, in the two caſes cited by the counſel for the plaintiff, from *P. Wms.* and *Dallas's* Reports. The *ſecond* they held under conſideration, in order to enquire, what had been the practice in other counties; and, being ſatisfied in that reſpect, in *September* term, they were all of opinion, that a judgment in the *Supreme Court*, in a cauſe removed thither from any inferior court, was a lien on all the lands which the defendant had in the State.*

Having been of counſel in this cauſe, *Juſtice* BRADFORD gave no opinion.

April Term, 1792.

ROSS *et al.* Executors *verſus* RITTENHOUSE.

IN this cauſe a verdict was taken for the plaintiff, ſubject to the opinion of the Court on a caſe ſtated. After argument, the Judges recapitulated the facts and arguments of counſel, and delivered their opinions *ſeriatim* in the following terms:

M'KEAN, *Chief Juſtice*: This caſe is, in brief, as follows:— The *Britiſh* ſloop *Active* had been captured as prize on the high ſeas, in *September*, 1778, and was brought into the port of *Philadelphia*, where ſhe was libelled in the Court of Admiralty of the State, held before *George Roſs*, Eſq. the then Judge, on the 18th day of the ſame month. The four perſons, for whoſe uſe this action is brought, claimed the whole veſſel and cargo, as their excluſive prize; but *Thomas Huſton*, maſter of the brig *Convention*, a veſſel of war belonging to the State of *Pennſylvania*, claimed a moiety for the States, himſelf, and crew; and *James Joſiah*, maſter of the ſloop *Gerard*, a private veſſel of war, claimed for himſelf, owners, and crew,

* Mr. *Hale Graham*, an eminent conveyancer, held, that theſe judgments in the *Supreme* court did not bind lands *generally*; and it has not been uſual for perſons living in the country, to apply to the *Prothonotary* of this court for liſts of judgments; which Mr. *Bird*, on being asked by the Court, confirmed.

crew, a fourth part, allowing a fourth for the four perſons before named. *All the claimants were citizens of the United States.* 1792.
The libels were tried by a Jury, on the 15th of *November*, 1778, and a general verdict given, in the proportions above mentioned, which was confirmed by the ſentence of the Court. *Gideon Umſtead* and the other three perſons, were *American* mariners on board the *Active*; they had riſen upon the maſter, and confined him and the other mariners in the cabin, where a conteſt was kept up for the command of the veſſel. The *Convention* and *Gerard* came up with her, and the queſtion was, whether the four *American* mariners had ſubdued the reſt of the crew before theſe veſſels came in ſight; that is, whether hoſtilities had then ceaſed? The jury were of opinion, they had not, and gave the verdict accordingly.

Gideon Umſtead and the three other mariners appealed from the ſentence, to the Court of Appeals of the *United States*, which, on the 15th of *December* following, reverſed the ſentence of the Judge of the Admiralty, and decreed the whole to the appellants. The Judge refuſed obedience to the decree of reverſal, and paid a moiety of the net proceeds of the prize into the treaſury of the State, taking a bond of indemnity from the defendant in this action, as treaſurer of the State, upon which bond this action is brought. The Executors of Judge *Roſs*, the obligee, having been previouſly ſued in the Court of Common Pleas, for the county of *Lancaſter*, in this State, for the money ſo paid, and judgment being obtained againſt them by *default*, without any *knowledge* of the defendant.

Thereupon ſeveral queſtions have been made, which may be ſtated as follows:

1ſt. Had the Court of Appeals juriſdiction to inveſtigate facts, after a trial and general verdict by a Jury, and to give a contrary deciſion, without the intervention of another Jury?

2d. Had the Court of Common Pleas of *Lancaſter* county juriſdiction in the action by *Umſtead* and others, againſt the Executors of the Judge; or ſhould not the decree of the Court of Appeals have been carried into execution by that Court, or the Court of Admiralty, without the aid or interference of any common law court?

3d. Can an action be maintained on this bond, the condition whereof is virtually to diſobey the Court of Appeals, and the laws of the land, if that Court had of right a power to decide contrary to the general verdict of a Jury? And, can the plaintiffs, without having defended, or given notice to the preſent defendant of the ſuit in the Court of Common Pleas, ſupport an action on this bond?

I conceive it proper to premiſe, that I took notice at the time this action was firſt brought to trial in this Court, "that when

1792. the buſineſs was before the Court of Appeals of the *United States*, in *December*, 1778, I had the honor to be Preſident of that Court; but declined ſitting on account of my connection with this State as Chief Juſtice, and otherwiſe; and that the ſame reaſon ſtill ſubſiſted. That the next thing to giving a righteous judgment, was to endeavor to give general ſatisfaction; which circumſtance might not probably be attained by our deciſion of the preſent controverſy, both Court and Jury being in ſome meaſure intereſted, as they were all citizens of *Pennſylvania*. For theſe reaſons, I expreſſed a wiſh, that ſome mode might be adopted for trying the cauſe in the Supreme Court of the *United States*." This propoſition was then aſſented to, and a Juror withdrawn; but, it ſeems, our expectations have been diſappointed, and we are obliged, at laſt, to decide the controverſy.

To determine the firſt queſtion, we muſt take into conſideration the act of *Congreſs* for erecting tribunals competent to determine the propriety of captures, paſſed the 25th *November*, 1775, the fourth ſection of which is in theſe words:

" That it be, and hereby is recommended, to the ſeveral " Legiſlatures in the *United Colonies*, as ſoon as poſſible, to e- " rect Courts of Juſtice, or give juriſdiction to the Courts " now in being, for the purpoſe of determining concerning " the captures to be made aforeſaid, *and to provide, that all " trials in ſuch caſe be had by a Jury, under ſuch qualifications as to " the reſpective Legiſlatures ſhall ſeem expedient.*" The ſixth ſection provides; " that in *all caſes* an appeal ſhall be allowed " to the *Congreſs*, or to ſuch perſon or perſons as they ſhall ap- " point for the trial of appeals, &c."

The act of General Aſſembly, paſſed the 9th of *September*, 1778, intitled " an act for eſtabliſhing a Court of Admiralty," allows appeals from that Court in all caſes, unleſs from the determination or finding of the facts by the Jury, which was to be without re-examination or appeal.

The *Congreſs* on the 15th of *January*, 1780, reſolved *(inter alia)* " that the trials in the Court of Appeals be according to " the uſage of nations, *and not by Jury.*" This has been the *practice* in moſt nations, but the law of nations, or of nature and reaſon, is in arbitrary ſtates enforced by the *royal* power, in others, by the *municipal law* of the country; which latter may, I conceive, facilitate or improve the execution of its deciſions, by any means they ſhall think beſt, provided the great univerſal law remains unaltered. Now, why may not a fact, reſpecting the capture from an enemy by citizens of the ſame State, and in which queſtion no foreign nation, or perſon, is concerned, be determined by a Jury, as well as in other caſes? This mode of aſcertaining a fact done on the high ſeas, to wit, who were the captors of a prize, when the

the contending parties are all citizens, or ſubjects of the ſame country, ſeems to be as reaſonable, as in diſputes about property, acquired on land. I confeſs, I do not ſee how the law of nations is counteracted, or infringed by it.

In *England*, if piracy was committed by a *ſubject*, it was held a ſpecies of treaſon, being contrary to his allegiance by the ancient common law; if by an *alien*, it was held to be felony. Formerly it was cognizable by the Admiralty Courts, which proceed by the rules of the civil law; but the ſtatute 28 *Henry* 8. *c.* 15. eſtabliſhed a new juriſdiction for this purpoſe, which proceeds according to the courſe of the Common Law. Here is a precedent of an act of Parliament changing the common mode of trial in Europe, and introducing the trial by Jury, which remains in force and practice to this day. If this can be done, where life is the ſtake, *a fortiori*, it may be done in matters of *meum et tuum*.

It, then, appearing to me, that the *Congreſs* and Legiſlature of *Pennſylvania* had power and authority to make the alteration, in the mode of trial of facts litigated between citizens, it remains to be enquired, whether the verdict in the preſent caſe was capable of re-examination by the Court of Appeals, without *another Jury*. The genius and ſpirit of the Common Law of *England*, which is law in *Pennſylvania*, will not ſuffer a ſentence or judgment of the loweſt Court, founded on a *general verdict*, to be controuled or reverſed by the higheſt juriſdiction; unleſs for error in matter of law, apparent upon the face of the record. 3 *Blackſt.* 330. 379. 1 *Wils.* 55. This is enforced by the act of Aſſembly of the 9th of *September*, 1778, in clear and expreſs words, in the very caſe under conſideration; which act was paſſed in compliance with the act of *Congreſs* of the 25th *November*, 1775, and allows an appeal in all caſes, unleſs from the verdict of a Jury; having a reference to the ſubject matter, and meaning that the facts ſhould not be re-examined, or appealed from; but that an appeal might be made notwithſtanding, with reſpect to any error in matter of law. The advantage of *viva voce* evidence over written, in the inveſtigation of truth, will hardly be controverted at this day in the *United States*; and the Court of Appeals had not the opportunity of ſeeing the witneſſes on the trial, or of ſo well knowing the credit due to them, reſpectively, as the Jury.

For theſe reaſons, and others, which I ſhall omit for the ſake of brevity, I am ſorry to be obliged to ſay, that, in my judgment, the decree of the Committee of Appeals was contrary to the proviſions of the act of *Congreſs*, and of the General Aſſembly, extra-judicial, erroneous and void. I am ſtrengthened in this opinion by the true conſtruction of the reſolve of *Congreſs*, of the 15th *January*, 1780, to wit, that the trials in the

1792. new Court of Appeals ſhould be according to the uſage of nations, and *not by Jury*; which implies, that the Court of Appeals, prior to this, had, or ought to have, proceeded by Jury-trials. *Ad queſtionem facti non reſpondent judices, ad queſtionem juris non reſpondent juratores.* 1 *Inſt.* 155. *b.*

As my opinion on the firſt queſtion, is in favor of the defendant, it will appear unneceſſary to ſay any thing to the other points; but as they have been ſtrongly inſiſted upon, I ſhall briefly notice one of them. It rather ſeems to me, that the appellants had no other way of obtaining the execution of the decree in their favor, but by the aid of the Court of Appeals, or of Admiralty, and no Court of Common Law has any juriſdiction in the caſe. *Douglaſs.* 572. 3 *Term. Rep.* 344 4 *Term. Rep.* 382. 400. 1 *Dall. Rep.* 221. 1 *Wils.* 211. And, alſo, that an action will not lie againſt a Judge for what he does as ſuch. *Cro. Eliz.* 80. 397. 1 *Mod.* 184. 185. 2 *Mod.* 218. 12 *Mod.* 388. 391. 1 *Ld. Raym.* 465. 2 *Ld. Raym.* 767. *Salk.* 397.

SHIPPEN, *Juſtice.* This is a ſuit brought on an obligation from the defendant to the plaintiffs' teſtator, for the ſum of £22,000, on a ſpecial condition for the repayment and reſtitution of the ſum of £11496 9 9, paid by the ſaid *George Roſs*, the Judge of the State Court of Admiralty, to the defendant, treaſurer of the State of *Pennſylvania*, as the ſhare and dividend of the ſaid State, in and out of the prize ſloop *Active*, according to the verdict of the Jury on the trial of the ſame ſloop, in the Admiralty Court of the ſaid State, *in caſe* the ſaid *George Roſs* ſhould thereafter, in due courſe of law, be compelled to pay the ſame according to the decree of the Court of Appeals in the caſe of the ſaid ſloop *Active*, and for the indemnification of the ſaid *George Roſs*, from all actions and demands, which might ariſe on account of his having paid the ſaid money to the defendant.

As a foundation for the preſent ſuit, the plaintiffs produced a record of a recovery in *Lancaſter* County againſt them, for the ſum of £3248 4 7 1-4, at the ſuit of *Gideon Umſtead*, *Artemus White*, *Aquila Rumſdale*, and *David Clark*, in an action of *aſſumpſit*, for money had and received by the teſtator *George Roſs*, to the uſe of them the ſaid *Gideon Umſtead*, and others. The judgment appears to have been taken by default, and the damages aſſeſſed by a Jury of Inquiry.

It is ſtated in the caſe, that the defendant had no notice of this recovery 'till after the final judgment. It, therefore, ſeems to have been agreed, that whatever defence the defendant might have made, if he had been privy to that action, he may avail himſelf of in this. Two principal queſtions ariſe on the caſe.

1ſt. Whether the Court of Appeals of *Congreſs*, were competent to decide the queſtion of prize, and the conſequent queſtion, who were the captors to whom the prize ſhould be adjudg-

ed, contrary to the verdict of the Jury, in the State Court of Admiralty? 1792.

2d. Was the action of *Umſtead*, and others, againſt the Judge of the Admiralty, for the money lodged in his Court in conſequence of his own decree, cognizable in the Court of Common Pleas in *Lancaſter* County?

As to the firſt queſtion, I own I am not convinced, that the ſovereign power of the nation, veſted by the joint and common conſent of the people and States of the Union, with the excluſive rights of war and peace, and with the conſequent, and neceſſary powers, of judging in the laſt reſort of the legality of captures on the ocean, can, either in reaſon or ſound law, be precluded from deciding an appeal, both of facts and law, ariſing in caſes of prize, merely becauſe they had recommended to the States to paſs laws to eſtabliſh Courts of Admiralty, for the trial of prize cauſes, in which the facts were, in the firſt inſtance, to be tried by Jury, according to the courſe of the common law. 1ſt. Becauſe, in the nature of things, and according to the courſe and practice of all civil law courts, all deciſions in the Courts in the laſt reſort, *upon appeals*, are made upon a view and full conſideration of both fact and law. 2d. Becauſe, otherwiſe, appeals from the inferior Courts would, in moſt caſes, be vain and nugatory. 3d. Becauſe, otherwiſe, no ſteady and uniform rules of deciſion could be eſtabliſhed, and foreign nations could never know, or confide in, the grounds of our deciſions; and it does not appear to me material, that, in the preſent inſtance, all the parties were *American* citizens. And laſtly, becauſe, in the preſent caſe, *Congreſs* has explicitly reſerved the power of final deciſions upon appeal *in all caſes*.

As to the ſecond queſtion, whether an action is ſuſtainable in the Court of Common Pleas in behalf of *Umſtead*, and others, againſt the Judge of the Admiralty, for the money he diſtributed according to his own decree, I acknowledge I cannot diſcover any principle, or authority in law, upon which ſuch an action can be ſupported. It is not now to be made a queſtion, whether the Courts of Admiralty have not an excluſive juriſdiction over all queſtions of prize, or no prize; and alſo who are the captors of prizes, and how diſtribution ſhall be made; together with the power of enforcing their own decrees: The caſes of *Lindo v. Rodney*, *Le Caux v. Eden*, and *Camden v. Home*, fully ſettle the point. The juriſdiction of the Admiralty ſeems, likewiſe, to be *excluſive* in many caſes, where the queſtion of prize ſeems to be *at reſt*; as where the Admiralty has decided that a ſhip taken is *no prize*, *ex. gratia*, in the caſe of a neutral veſſel. In that caſe it is not competent for a common law Court to ſuſtain a ſuit for the illegal capture, but a new libel is exhibited in the Admiralty, to compel the captors to account to the captured. 4 *Term. R.* 385.

1792. 385. So in the case of *Le Caux verſus Eden*, an action for falſe imprisonment would not lie at Common Law, where the imprisonment was merely in consequence of taking a ship *as prize*, although the *ship had been acquitted*. I know of but one case, where the common law Courts have sustained suits for money paid out of the Court of Admiralty, in consequence of a taking as prize; and that is, where the Admiralty has fully liquidated all demands relating to the proceeds of a prize, and the money remains in the hands of the agents of the captors. In such cases, actions at law have been supported against the agents; but it must be ascertained that these are the agents of the real captors; for, if any thing is left for the Admiralty to settle, as if other persons not represented by the agents claim any part of the proceeds, there the Courts of Law will not interfere. And this was the case of *Camden verſus Home*. 4 *Term Rep.* 382.

What is the case before us? A judge of an inferior Court of Admiralty condemns a prize, declares who are the captors, and orders a distribution accordingly. On appeal to the Superior Court of Admiralty, that Court reverses his judgment, and directs a different distribution. The Judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeably to his own decree. A suit is brought here, to compel the Judge to perform the decree of the Superior Court. Was the case, or question, of prize at rest, or was there not something now to be done by the Superior Court to enforce the sentence? Can ours be a proper Court to decide between the sentences of two contending Courts of Admiralty, or to enforce the sentence of either? It is in vain to say, the times were such, that the Supreme Court could not, or would not, proceed to extremities with the Judge of the inferior Court. We are not authorised to aid a defective, or unwilling jurisdiction, by assuming an extraordinary power, unknown to the law. Can a Judge, in the execution of his own judgment, although contrary to that of a superior Court, be considered as in the situation of an agent receiving the money of his constituents? Or, if by any strained construction he could be called the agent of those in *whose favor* he decrees, can he be sued as the agent of those *against whom* he decrees? In whatever light I view this question, I am satisfied, that the Court of Common Pleas were incompetent to carry into effect the decree of the reversal of the superior Court of Appeals, and that an action for money, had and received against the Judge, who distributed the money according to his own decree, could not be sustained in a Court of law.

YEATES, *Juſtice*. On the statement of facts in this case, three points have occurred.

1st. Whether the Court of Appeals of the *United States* had jurisdiction in the case of the sloop *Active*?

2d.

2d. Whether the Court of Common Pleas, at *Lancaſter*, had jurisdiction in the action by *Gideon Umſtead*, and others, againſt the now plaintiffs? 1792.

3d. Whether the plaintiffs are damnified, ſo as to warrant the preſent proceedings, under all the circumſtances of the caſe?

I will conſider the different points, inverſedly.

On the 3d. point, I am ſatisfied by the authorities cited by the plaintiffs' counſel, that there is ſufficient proof of a damnification, to warrant the ſuit in a common caſe. The non-payment of money at the day, is a forfeiture of a counter bond. 1 *Vent.* 261. *Cro. El.* 672. Putting the obligee in danger of being arreſted is a damnification. 3 *Bulſt.* 233. 5 *Co.* 25. *Cro. Jac.* 340.

It was admitted, indeed, on the laſt argument, that the proceedings at *Lancaſter* ſhould be conſidered as evidence of a damnification; but that the defendant ſhould be let into a full defence in this action. No notice having been given to this defendant of the inſtitution of the ſuit againſt the now plaintiff, he is not ſtopped from ſaying, that they were not bound in the former action, to pay the money.

On the ſecond point, it has been inſiſted by the defendant's counſel, that the Courts of Admiralty having excluſive juriſdiction in caſes of prize and their conſequences, the Common Pleas at *Lancaſter* could have had no cognizance of the action commenced by *Gideon Umſtead*, and others.

In the famous caſe of *Le Caux v. Eden*, WILLES, *Juſtice*— ſays: "Where the injury is the neceſſary and natural conſequence of the capture, the Court of Admiralty has the ſole and excluſive juriſdiction." *Doug.* 579. ASHURST, *Juſtice*, obſerves; "where the Admiralty has juriſdiction of the original "matter, it ought alſo to have juriſdiction of every thing neceſſa- "rily incidental." *Ib.* 580. BULLER, *Juſtice*, in a very elaborate argument infers from all the adjudged caſes, "that the Admiralty "has a juriſdiction on the queſtion of *prize or not prize*, and its "conſequences, and that the common law Courts have none." *Ib.* 587. 590. And in *Smart & Wolff*, the words of Judge BULLER, are; "every caſe that I know on the ſubject, is a clear "authority to ſhew, that queſtions of prize and their conſe- "quences are ſolely and excluſively of the Admiralty juriſdic- "tion." 3 *Term. Rep.* 344.

In *Lord Camden et al. v. Home*, it is adjudged, that the prize Courts, and Courts of Commiſſioners of Appeal, have the ſole and excluſive juriſdiction of the queſtion of prize and no prize, and who are the *captors*. 4 *Term. Rep.* 382.

In *Done's* adminiſtratrix *v. Penhallow*, and at 1 *Dall. Rep.* 221. Mr. *Preſident* expreſſes himſelf thus: In this cauſe, "the vali- "dity

1792. "dity of the ſentence of the Court of Appeals is diſputed. If we "ſay, it is valid, we, in effect, ſay, the brigantine is no prize; if "otherwiſe, we ſay ſhe was a prize. We have clearly no autho- "rity to ſay either the one or the other." And again; "this is an "action to carry into execution the ſentence of the Court of "Appeals, which we have no authority to do, that being the "proper judicature to carry into effect its own ſentences."

Theſe adjudications militate ſtrongly againſt the juriſdiction of the Court of Common Pleas of *Lancaſter* County. The cauſe of action there, was "the immediate and neceſſary conſe- "quence of the veſſel's being taken as a prize." 1 *Dall. Rep.* 221. It was, in ſhort, a demand inſtituted by the plaintiffs, as ſole captors of the ſloop *Active*.

But it has been contended by the plaintiffs' counſel, that here all parties affirm the ſame thing, to wit, that the ſloop was a prize, and *that* queſtion cannot now poſſibly ariſe; which is ſaid to diſtinguiſh it from the ſeveral caſes cited. And for this purpoſe, *Henderſon v. Clarkſon*, determined in this Court, is quoted; where the Court held, that an agent for ſeamen might recover at common law the prize money, due under the decree of the Court of Admiralty of *Pennſylvania*.

I find from my notes, that the circumſtances were as follow: The plaintiff was appointed agent for forty-three ſeamen, on board the privateer brig *Holker*, to receive their prize money. The defendant was Marſhall of the Court of Admiralty of *Pennſylvania*, where two of the prizes were libelled, condemned, and ſold. The plaintiff, on the 27th *December*, 1781, gave a bond to the Commonwealth in £250 penalty, conditioned to account faithfully with the ſeamen, and to pay over the ſhares unclaimed, within one year, to the uſe of the corporation of contributors to the *Pennſylvania* Hoſpital. The Judge of the Admiralty, on that day, alſo, iſſued a writ to the defendants, to deliver over the goods and money due to the owners, and ſeamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. That ſuit was brought to recover the prize money due to the plaintiff's conſtituents: The Marſhall had paid a conſiderable part, and rendered his account, but ſome of the items therein were diſputed. The Court on full argument reſolved, that the agent might, as a common head or center for the captors, and Hoſpital, under the right acquired by the act of Aſſembly, of the 8th of *March*, and 22d *September*, 1780, inſtitute a ſuit in his own name, as the captors themſelves might have done; and as the queſtion reſpecting "prize or no prize" could not come into controverſy, he might recover the money due to them, by the Admiralty decree; they having a veſted intereſt therein, under the

the acts of *Congreſs*, and the Legiſlature. The Marſhall had returned to the Judge, that he had the goods and money ready to be delivered to the captors, or their agent; and this was held to amount to a written promiſe, to pay the ſame to the plaintiff, *Henderſon*, as agent of the ſeamen.* 1792.

The two caſes are not analogous; they poſſeſs diſtinct prominent features: In the former caſe, there was no queſtion, who were the captors, or how the booty was to be divided; there were no diſcordant decrees of different marine Courts; no diſpute reſpecting the conſtitutional powers of the judicature, which pronounced the final decree.

Here they all fully exiſt; and a common Law Court at *Lancaſter*, was called on, to carry into execution the decree of the Court of Appeals, againſt the executors of the State Judge, and in derogation of the decree he had given, ſanctioned by the verdict of a Jury.

On the *firſt* point, it is not eſſentially neceſſary to give an opinion, whether, if the reſolve of *Congreſs* had been *abſolute* and *imperative*, inſtead of being barely *recommendatory*, as to the eſtabliſhment of Courts of Admiralty in the different ſtates, and the laws of any one State had been repugnant thereto, ſuch reſolution would be ſupreme, and controul the law of the individual State: Nor ſhall I attempt to define the former powers of *Congreſs*, by fixing how far they reached, *anterior* to the confederation; which was ſent to the different States for ratification on the 17th *Nov.* 1777, and finally acceded to by *Maryland* on the 1ſt of *March* 1781. I am, however, compelled to ſay, that the powers of *Congreſs* muſt neceſſarily be ſuppoſed to have been co-extenſive with the great objects which America then had in view, and competent to protect and advance the united intereſts of the whole. It is ſufficient in my idea, for the deciſion of the caſe before us, to obſerve, that the preſent ſuit reſting on the judgment in *Lancaſter* county as its baſis, if the then plaintiffs were not legally entitled to recover againſt the executors of Mr. *George Roſs*, the action now before the Court is not ſuſtainable. 3 *Term Rep.* 377. I have only to add, that it would alſo have afforded me much pleaſure, if this argument had been conducted before the Judges of the *Supreme Court* of the *United States*. We formerly indulged ourſelves with hopes of it, when the jury were diſcharged in an action between the now plaintiffs and *Thomas Leaming*, in *January* term laſt, when the ſame points came in queſtion. We may be conſidered, in ſome remote degree, as parties in the preſent ſuit, and the deciſion of the Federal judges would probably have given more general ſatisfaction. But the parties have inſiſted on our opinion; and we are bound

* See the caſe of *Henderſon* v. *Clarkſon*, here alluded to, *poſt*, 174. The caſe of *Roſs. etal.* Executors v. *Rittenhouſe* has been inſerted, by miſtake, of the term when it was argued, not when it was decided.

1792. to give it. On the beſt conſideration, therefore, that I have been able to beſtow on the ſubject, I find myſelf conſtrained to give my voice, that judgment be rendered for the defendant.

MARSHALL *verſus* MONTGOMERY, *et al.*

THIS was an action for Seamen's wages. The Plaintiff ſhipped himſelf on board the defendant's ſhip on a voyage from *Philadelphia* to *Havanna*, from thence to *Cadiz*, and from *Cadiz* back to *Philadelphia*. On the ſhip's arrival at *Havanna*, an embargo was laid, and the ſhip detained a conſiderable time. A plan being formed for the reduction of *New-Providence*, a propoſal was made to the *American* captains, and among the reſt to the defendant, to accompany the *Spaniſh* troops; for which ſervice they were to receive ten dollars and a half per ton, per month, and to be freed from the embargo. A gratuity was alſo to be given to the captains. The defendant, with the reſt of the *American* captains, agreed to go, and *Providence* was taken; but no proviſions being to be had, the ſhip ſailed afterwards for *Philadelphia*, and on her way was captured by the enemy. The wages of the ſeamen had been paid at the *Havanna*, until the ſhip was ready to ſail for *Cadiz*, and the embargo laid. The tonnage was paid, but loſt on the capture of the ſhip.

Rawle contended, that it was clear, that ſeamen's wages muſt be paid during an embargo, and cited *Parke's Inſur.* 142. 1 *Magens.* 68. *Weſket.* 590. 1 *Term. Rep.* 132, *in notis.* That the voyage to *New Providence* is to be conſidered as a new voyage, as it was not the voyage contracted for. Tho' a voyage be altered, wages are ſtill due. Freight, it is true, is the mother of wages. *Eſp.* 112. 3. but freight means nothing but the earning of the veſſel.

Lewis & *Tilghman* urged, that as the veſſel was not entitled to freight, no wages were due: That the voyage was not a diſtinct one, and that the loſs of the veſſel put an end to the claims of the ſeamen.

BY THE COURT:—Here is a new voyage commenced with the aſſent of the ſailors. The queſtion is, was this a new voyage to *Philadelphia* with leave to touch at *Providence*, or was it one voyage to *Providence*, and another to *Philadelphia*. The *Spaniſh* intendant agreed to pay 10 1-2 dollars per ton, and they received it. The intendant calls it freight: It is certainly a compenſation for the uſe of the veſſel; it is an earning by the owners, and the whole object of this voyage was completed at *New Providence*. This may be conſidered, in the ſpirit of the law, as a port of delivery. With the loſs, which happened afterwards, the ſailors have no concern. We conſider this as a diſtinct