With regard to the vessel, it would be enough to observe, that if a neutral ship-owner will lend his name to cover a fraud with regard to the cargo, this circumstance alone will subject him to condemnation. But in this case, there are also many circumstances to maintain a suspicion that the vessel was British property, or, at least, not owned as claimed. Although this course, from extreme anxiety to avoid subjecting a neutral to condemnation, has relaxed its rules in allowing time for further proof, in a case were there was concealment of papers, yet nothing has been brought forwarded to support
*246] the neutral character *of the ship. No charter-party, no original correspondence, nothing, in fact, but those formal papers which never fail to accompany a fictitious, as well as a real, transaction. On the contrary, we find the master, without any instructions from his supposed owners, submitting implicitly to the orders of Bennet & Co., in everything; and the latter assuming even a control over the contract which he exhibits with his supposed owner in Riga, and expressing a solicitude about his expenses, which could only have been suggested by a consciousness that the house of B. & Co. would have to pay those expenses.

Upon the whole, we are satisfied, that it is a case for condemnation both of ship and cargo.

Decree affirmed.

GELSTON *et al. v.* HOYT.

Error to state courts. — Jurisdiction. — Seizure. — Neutrality law. — Pleading.

Uuder the judiciary act of 1789, § 25, giving appellate jurisdiction to the supreme court of the United States, from the final judgment or decree of the highest court of law or equity of a state, in certain cases, the writ of error, may be directed to any court in which the record and judgment on which it is to act, may be found; and if the record has been remitted, by the highest court, &c., to another court of the state, it may be brought by the writ of error, from that court.[1]

The courts of the United States have an exclusive cognisance of the questions of forfeiture, upon all seizures made under the laws of the *United States, and it is not competent for a state court
*247] to entertain or decide such question of forfeiture. If a sentence of condemation be definitively pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be again litigated in any common-law *forum*.

Where a seizure is made for a supposed forfeiture, under a law of the United States, no action of trespass lies in any common-law tribunal, until a final decree is pronounced upon the proceeding *in rem* to enforce such forfeiture; for it depends upon the final decree of the court proceeding *in rem*, whether such seizure is to be deemed rightful or tortious, and the action, if brought before such decree is made, is brought too soon.

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kind commission. As there is a convoy leaving this place to-morrow, for Bermuda, I found it advisable for the Fortuna to join the same, and wish her a very quick and safe passage. Of the above documents, I shall send you duplicates, when I have the honor to write you again. The prices of Russian articles are at present—Raven's Duck, $16, Canvas $42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c. (Signed) J. F. MUHLENBRUCK."

[1] Webster *v.* Reid, 11 How. 437; McGuire *v.* Massachusetts, 3 Wall. 382. The writ must be directed to the highest state court in which a decision can be had, though an inferior one. Downham *v.* Alexandria, 9 Wall. 659; Miller *v.* Joseph, 17 Id. 655. And see Atherton *v.* Fowler, 91 U. S. 143.

Gelston v. Hoyt.

If a suit be brought against the seizing officer, for the supposed trespass, while the suit for the forfeiture is depending, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action.[1] If, after a decree of condemation, then, that fact may be pleaded as a bar; if after an acquittal, with a certificate of reasonable cause of seizure, then, that may be pleaded as a bar. If, after an acquittal, without such certificate, then, the officer is without any justification for the seizure, and it is definitively settled to be a tortious act. If, to an action of trespass in a state court for a seizure, the seizing officer plead the fact of forfeiture, in his defence, without averring a *lis pendens* or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, the plea is bad; for it attempts to put in issue the question of forfeiture, in a state court.

At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified.[2] By the act of the 18th of February 1793, § 27, officers of the revenue are authorized to make seizures of any ship or goods, for any breach of the laws of the United States.

The statute of 1794, § 3, prohibiting the fitting out any ship, &c., for the service of any foreign prince or states, to cruise against the subjects, &c., of any other foreign prince or state, does not apply to any new government, unless it has been acknowledged by the United States, or by the government of the country to which such new state belonged. And a plea which sets up a forfeiture, under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

A plea, justifying a seizure under this statute, need not state the particular *prince or state, by name, against whom the ship was intended to cruise. [*248

A plea, justifying a seizure and detention, by virtue of the 7th section of the act of 1794, under the express instructions of the president, must aver, that the naval or military force of the United States was employed for that purpose, and that the seizer belonged to the force so employed. The 7th section of the act was not intended to apply, except to cases where a seizure or detention could not be enforced by the ordinary civil power, and there was a necessity, in the opinion of the president, to employ naval or military power for this purpose.

To trespass, for taking and detaining, and converting property, it is sufficient to plead a justification of the taking and detention; and if the plaintiff relies on the conversion, he should reply it, by way of new assignment.

A plea, alleging a seizure for a forfeiture, as a justification, should not only state the facts relied on to establish the forfeiture, but aver, that thereby the property became and was actually forfeited, and was seized as forfeited.

Gelston *v.* Hoyt, 13 Johns. 561, affirmed.

Error to the Court for the Trial of Impeachments and Correction of Errors of the state of New York.

This cause had been removed into that court, by the present plaintiffs in error, by writ of error, directed to the supreme court of the said state. In January 1816, the court of the state of New York for the correction of errors in all things affirmed the judgment which had been rendered by the supreme court of the state of New York, in favor of Hoyt, the present defendant in error. And before the coming of the writ of error issued from this court, the said court for the correction of errors of the state of New York, according to the laws of the state of New York, and the practice of that court, had remitted the record, which had been removed from the supreme court of the state of New York, to the said supreme court, with a mandate thereon requiring the *supreme court of the state of New York to execute the judgment, which had been so rendered by it, in favor of [*249 the defendant in error. And the said record having been so remitted, the court of errors of the state of New York, upon the coming of the said writ of error from this court, made the following return thereto:

"State of New York, ss. The president of the senate, the senators, chancellor and judges of the supreme court, in the court for the trial of impeachments

[1] Hall *v.* Warren, 2 McLean 332.

[2] The Caledonian, 4 Wheat. 100.

and the correction of errors, certify and return to the supreme court of the United States, that before the coming of their writ of error, the transcript of the record in the cause, in the said writ of error mentioned, together with the judgment of this court thereon, and all things touching the same, were duly remitted, in pursuance of the statute instituting this court, into the supreme court of judicature of this state, to the end that further proceedings might be thereupon had, as well for execution, as otherwise, as might be agreeable to law and justice; and in which supreme court of judicature, the said judgment, and all other proceedings in the said suit, now remain of record; and as the same are no longer before, or within the cognizance of this court, this court is unable to make any other or further return to the said writ. All which is humbly submitted."

Thereupon, the counsel for the plaintiffs in error made an application to the supreme court of the state of New York, to stay the proceedings upon the said judgment, until an application could be made to this court in respect to the said writ of error. To avoid this delay, the counsel, under the advice
*250] or suggestion of the *judges of the said supreme court of the state of New York, entered into the following agreement, viz:

"It is agreed between the attorneys of the above-named plaintiffs and defendant in error, that the annexed is a true copy of the record and bill of exceptions, returned by the supreme court of the state of New York, to the court of errors of the said state, and remitted by the said court of errors, in the affirmance of the judgment of the said supreme court to the said supreme court. And that the said copy shall be considered by the said supreme court of the United States, as a true copy of the said record and bill of exceptions, and shall have the same effect, as if annexed to the writ of error in the above cause, from the said supreme court of the United States, and that the clerk of the supreme court of the state of New York transmit the same, with this agreement to the clerk of the supreme court of the United States, and that the same be annexed by the said clerk of the supreme court of the United States, to the said writ of error, as a true copy of the said record and bill of exceptions."

Record and Bill of Exceptions.

City and County of New York, ss: Be it remembered, that in the term of January, in the year of our Lord 1813, came Goold Hoyt, by Charles Graham, his attorney, into the supreme court of judicature of the people of the state of New York, before the justices of the people of the state of New York, of the supreme court of judicature of the same people, at the capitol, in the city of Albany, and impleaded David Gelston and Peter A.
*251] Schenck, in a certain plea of trespass, *on which the said Goold Hoyt declared against the said David Gelston and Peter A. Schenck, in the words following:

City and County of New York, ss: Goold Hoyt, plaintiff in this suit, complains of David Gelston and Peter A. Schenck, defendants in this suit, in custody, &c.: For that, whereas, the said defendants, on the tenth day of July, in the year of our Lord 1810, with force and arms, at the city of New York, in the county of New York, and at the first ward of the same city, the goods and chattels of the said plaintiff, of the value of $200,000, then and there found, did take and carry away, and other injuries to the said

plaintiff then and there did ; to the great damage of the said plaintiff, and against the peace of the people of the state of New York.

2. And also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city and county and ward aforesaid, with force and arms, to wit, with swords, staves, hands and feet, other goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels salted provisions, 20 hogsheads of ship-bread, of the value of $200,000, at the place aforesaid found, did take and carry away, and other wrongs and injuries to to the said plaintiff then and there did ; to the great damage of the said plaintiff, and against the peace of the people of the state of New York.

3. And *also, for that the said defendants, afterwards, to wit, on [*252
the same day and year, and at the place aforesaid, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons stone ballast, 100 hogsheads of water, 130 barrels salted provisions, and 20 hogsheads of ship-bread, of the value of $200,000, then and there being and found, seized, took, carried away, damaged and spoiled, and converted and disposed thereof, to their own use, and other wrongs to the said plaintiff, then and there did ; to the great damage of the said plaintiff, and against the peace of the said people of the state of New York.

4. And also, for that the said defendants, on the same day and year aforesaid, with force and arms, to wit, with swords, staves, hands and feet, to wit, at the city, county and ward aforesaid, seized and took a certain ship or vessel, of the said plaintiff, of great value, to wit, of the value of $200,000, and in which said ship or vessel the said plaintiff then and there intended, and was about to carry and convey certain goods and merchandises, for certain freight and reward to be therefor paid to him the said plaintiff ; and then and there carried away the said ship or vessel, and kept and detained the same from the said plaintiff, for a long space of time, to wit, hitherto, and converted and disposed thereof to their own use ; and thereby the said plaintiff was hindered and prevented from carrying and conveying the said goods and merchandises as aforesaid, and thereby *lost [*253
and was deprived of all the profit, benefit and advantage which might and would otherwise have arisen and accrued to him therefrom, to wit, at the city, county and ward aforesaid, and other wrongs and injuries to the said plaintiff then and there did ; against the peace of the people of the state of New York, and to the great damage of the said plaintiff.

5. And also, for that the said defendants, afterwards, to wit, on the same day and year last aforesaid, at the city, county and ward aforesaid, with force and arms, seized and took possession of divers goods and chattels of the said plaintiff, then and there found, and being in the whole of a large value, that is to say, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, 20 hogsheads of ship-bread, of the value of $200,000, and stayed and continued in possession of the said goods and chattels, so by them seized and taken as aforesaid, and the said goods and chattels afterwards took and carried away, from and out of the possession of the said plaintiff ; whereby, and by rea-

son, and in consequence of such said seizure, and of other the premises aforesaid, the said plaintiff not only lost, and was deprived of his said goods and chattels, and of all profits, benefits and advantages, that could have arisen and accrued to him from the use, sale, employment and disposal thereof, but was also forced and obliged to, and did actually, lay out and expend
*254] large sums of money, and to be at further trouble and expense *in and about endeavoring to obtain restitution of the property, so by the said defendants seized, as aforesaid; and other wrongs and injuries to the said plaintiff then and there did, against the peace of the people of the state of New York, and to the damage of the said plaintiff of $200,000; and therefore, he brings suit, &c.

And the said David Gelston and Peter A. Schenck thereto pleaded in the words following: And the said David Gelston and Peter A. Schenck, by Samuel B. Romaine, their attorney, come and defend the force and injury, when, &c., and say, that they are not guilty of the said supposed trespasses above laid to their charge, or any part thereof, in manner and form as the said Goold Hoyt hath above thereof complained against them, and of this they put themselves upon the country.

2. And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth and fifth counts in the declaration of the said plaintiff mentioned, to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second count in the second declaration of the said plaintiff; in seizing, taking,
*255] *carrying away, damaging, spoiling, converting and disposing to their own use, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the third count in the said declaration of the said plaintiff; in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff; and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said plaintiff, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff, above supposed to have been committed by the said David Gelston and Peter A. Schenck; they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said Goold Hoyt ought not to have or maintain his
*256] aforesaid action against them, because they say, that the said ship or vessel, called the American Eagle, with *her tackle, apparel and fur-

niture, the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same and not other or different. And the said David Gelston and Peter A. Schenck further say, that the ship or vessel, mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different: and that the seizing, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different. And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and *20 hogsheads of ship-bread, mentioned in the second, third and fifth counts [*257 in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the general description of goods and chattels mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff, are the same trespasses, and not other or different. And the said David Gelston and Peter A. Schenck further say, that before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, *called the American Eagle, should be employed in the service [*258 of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States of America were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided. And the president of the said United States, to wit, James Madison, who was then president of the

said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did, afterwards, to wit, on the 6th day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, instruct and direct the said David Gelston and Peter A. Schenck to seize, take, carry away and detain, as forfeited to the use of the said United States, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread: And the said David Gelston and Peter A. Schenck further say, that they did, afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward afore-
*259] said, by virtue of the said power *and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston, and Peter A. Schenck, by the said president of the said United States, and not otherwise, seize, take, carry away and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, as forfeited to the use of the said United States, according to the form of the statute in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that the seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, by the said David Gelston and Peter A. Schenck, on the tenth day of July 1810, as aforesaid, is the same seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the several counts in the said declaration of the said plaintiff, and not other or different: And this they, the said David Gelston and Peter A. Schenck, are ready to verify; wherefore, they pray judg-
*260] ment, if the said Goold Hoyt ought to *have or maintain his aforesaid action thereof against them, &c.

3. And for a further plea in this behalf, as to the several trespasses mentioned in the first, second, third, fourth and fifth counts in the declaration of the said plaintiff mentioned; to wit, in taking and carrying away the goods and chattels of the said plaintiff, mentioned in the first count in the said declaration of the said plaintiff; in taking and carrying away the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second count in the said declaration of the said plaintiff; in seizing, taking, carrying away, damaging, spoiling, converting and disposing to their own use, the goods and chattels of the said plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the third

count in the said declaration of the said plaintiff; in seizing, taking, carrying away, keeping and detaining, and converting and disposing to their own use, a certain ship or vessel of the said plaintiff, mentioned in the fourth count in the said declaration of the said plaintiff, and in seizing and taking possession of, and in taking and carrying from and out of the possession of the said *plaintiff, to wit, a ship or vessel of the said plaintiff, called the American Eagle, together with her tackle, apparel and furniture, 500 [*261 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions and 20 hogsheads of ship-bread, mentioned in the fifth count in the said declaration of the said plaintiff; above supposed to have been committed by the said David Gelston and Peter A. Schenck, they, the said David Gelston and Peter A. Schenck, by leave of the court here for this purpose first had obtained, according to the form of the statute in such case made and provided, say, that the said Goold Hoyt ought not to have or maintain his aforesaid action against them, because they say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different; and that the seizing, taking, carrying away, keeping, detaining, damaging, spoiling, converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are the same, and not other or different: And the said David Gelston and Peter A. Schenck further say, that the ship or vessel mentioned in the fourth count in the said declaration of the said plaintiff, is the same ship or vessel, called the American Eagle, mentioned in the second, third and fifth counts *in the said declaration of the said plaintiff, and not other or different; and that the seizing, carrying [*262 away, keeping and detaining, and converting and disposing thereof, to their own use, mentioned in the fourth count in the said declaration of the said plaintiff, is the same seizing, taking, carrying away, keeping and detaining, and converting and disposing thereof to their own use, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, and not other or different: And the said David Gelston and Peter A. Schenck further say, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, mentioned in the second, third and fifth counts in the said declaration of the said plaintiff, are included in, and are the only goods and chattels embraced by the general description of goods and chattels, mentioned in the first count in the said declaration of the said plaintiff, and that the taking and carrying away thereof, mentioned in the said first count in the said declaration of the said plaintiff, is the same taking and carrying away thereof, mentioned in the said second, third and fifth counts in the said declaration of the said plaintiff, and not other or different; and that the several trespasses mentioned in the first, second, third, fourth and fifth counts in the said declaration of the said plaintiff are the same trespass, and not other or different: And the said David Gelston and Peter A. Schenck further say, *that before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, [*263

in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, was attempted to be fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were then and there procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel, called the American Eagle, should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. And the president of the said United States, to wit, James Madison, who was then president of the said United States, by virtue of the power and authority vested in him by the constitution and laws of the said United States, did afterwards, to wit, on the sixth day of July, in the year last aforesaid, at Washington, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, authorize, empower, instruct and direct the said David Gelston and Peter A. Schenck to take possession of, and detain the said ship or vessel, called the American Eagle, with her
*264] tackle, apparel *and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that they did afterwards, to wit, on the tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, by virtue of the said power and authority, and in pursuance of the said instructions and directions so given as aforesaid to them, the said David Gelston and Peter A. Schenck, by the said president of the said United States, and not otherwise, take possession of and detain the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, in order to the execution of the prohibitions and penalties of the act in such case made and provided: And the said David Gelston and Peter A. Schenck further say, that the taking possession of, and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, by the said David Gelston and
*265] Peter A. Schenck, on the tenth day of July 1810, *as aforesaid, is the same seizing, taking, carrying away and detaining of the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread mentioned in the several counts in the said declaration of the said plaintiff, and not other or different: And this they, the said David Gelston and Peter A. Schenck, are ready to verify; wherefore, they pray judgment, if the said Goold Hoyt ought to have or maintain his aforesaid action thereof against them, &c.

And to which the said foregoing pleas, was subjoined the following notice.

Gelston v. Hoyt.

SIR :—Please to take notice, that the defendants, at the trial of the above cause, will insist upon, and give in evidence, under the general issue above pleaded, that the ship or vessel called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as *a part of her said equipment, with intent that the said ship [*266
or vessel, called the American Eagle, should be employed in the service of a foreign prince or state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of another foreign prince or state with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided: And the said defendants will also insist upon, and give in evidence, under the said plea, that the said ship or vessel, with her tackle, apparel and furniture, on the day and year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the ward aforesaid, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the said ship or vessel should be employed in the service of some foreign prince or state, to cruise and commit hostilites upon the subjects, citizens and property of some other foreign prince or state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided. *And [*267
the said defendants will also insist upon, and give in evidence, under the said plea, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor of the customs for the district of the city of New York, on the 10th day of July 1810, and before that time, and that they have ever since continued to be collector and surveyor as aforesaid, and that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York, in the district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take and detain the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested in them by the constitution and laws of the United States. Dated this 11th day of March 1813.

And the said Goold Hoyt, to the said first plea, joined issue, and to the

second and third pleas the said Goold Hoyt demurred, as follows: And as to the plea of the said David Gelston and Peter A. Schenck, by them first above pleaded, and whereof they have put themselves upon the country, the said Goold Hoyt doth the like, &c. And as to the pleas by the said David
*268] Gelston and *Peter A. Schenck, by them secondly and thirdly above pleaded in bar, the said Goold Hoyt saith, that the said second and third pleas of the said David Gelston and Peter A. Schenck, or either of them, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, to bar and preclude him, the said Goold Hoyt, from having and maintaining his action aforesaid, against the said David Gelston and Peter A. Schenck; and that he, the said Goold Hoyt, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said Goold Hoyt prays judgment, and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c.

And the said David Gelston and Peter A. Schenck thereupon joined in demurrer, as follows: And the said David Gelston and Peter A. Schenck say, that their said pleas, by them secondly and thirdly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law, to bar and preclude the said Goold Hoyt from having and maintaining his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck: and that they, the said David Gelston and Peter A. Schenck, are ready to verify and prove the same, when, where and in such manner as the said court shall direct: wherefore, inasmuch as the said Goold Hoyt has not answered the said second and third pleas, nor hitherto, in any manner, denied the same, the said David
*269] Gelston *and Peter A. Schenck pray judgment, and that the said Goold Hoyt may be barred from having or maintaining, his aforesaid action thereof against them, the said David Gelston and Peter A. Schenck, &c.

And afterwards the said demurrer was brought on to be argued before the said supreme court, at the city-hall of the city of New York, and judgment was given against the said David Gelston and Peter A. Schenck, upon the said demurrer.

And afterwards, to wit, at the sittings of *nisi prius*, held at the city-hall of the city of New York aforesaid, in and for the said city and county, on the 15th day of November, in the year of our Lord 1815, before the Honorable Ambrose Spencer, Esq., one of the justices of the supreme court of judicature of the people of the state of New York, assigned to hold pleas in the said sittings, according to the form of the statue in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York aforesaid, for that purposed impannelled, that is to say, Walter Sawyer, Edward Wade, William Prior, James M'Cready, Richard Loines, John Rodgers, Asher Marx, Benjamin Gomez, Samuel Milbanks, James E. Jennings, George Riker and Jacob Latting, good and lawful men of the city and county of New York aforesaid, at which day, came there as well the said Goold Hoyt, as the said David Gelston and Peter A. Schenck, by their respec-
*270] tive attorneys aforesaid, and the jurors of the jury, impannelled to *try the said issue, being called, also came, and were then and there, in

due manner, chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said Goold Hoyt, to maintain and prove the said issue on their part, gave in evidence, that at the time of the seizure of the said ship American Eagle, by the said David Gelston and Peter A. Schenck, she was in the actual, full and peaceable possession of the said Goold Hoyt, and that, on the acquittal of the said vessel in the district court of the United States for the district of New York, it was decreed, that the said vessel should be restored to the said Goold Hoyt, the claimant of the said vessel, in the said district court: and for that purpose, the counsel of the said Goold Hoyt gave in evidence the proceedings in the said district court of the United States, by which it appeared, that a libel had been filed in the name of the United States against the said ship American Eagle, in which it was, among other things, alleged, that the said ship had been fitted out and armed, and attempted to be fitted out and armed, equipped and furnished, with intent to be employed in the service of Petion against Christophe, and in the service of that part of the island of St. Domingo which was then under the government of Petion, against that part of the said island of St. Domingo, which was then under the government of Christophe, contrary to the statute in such case made and provided; and that the said Goold Hoyt had filed an answer to the said libel, and a claim to the said vessel, in which the said Goold Hoyt had expressly denied the truth of *the allega- [*271
tions in the said libel; and it also appeared by the said proceedings, that in the month of April 1811, an application had been made to said district court, by the said Goold Hoyt, to have the said ship appraised, and to have her delivered up to him, on giving security for her appraised value; and it also appeared by the said proceedings, that appraisers had been appointed by the said court, and that they had appraised the said ship, her tackle, &c., at $35,000, and that the said appraisement had been filed, and had not been excepted to; and that the sureties offered by the said Goold Hoyt, for the appraised value of the said ship, had been accepted by the said court; and it also appeared by the said proceedings, that the said cause had been tried before the said district court, and that the said libel had been dismissed, and that the said ship had been decreed to be restored to the said claimant, and that a certificate of reasonable cause for the seizure of the said vessel had been denied. And the counsel of the said Goold Hoyt, to maintain and prove the said issue, did give in evidence, that the value of the said ship, her tackle, apparel and furniture, at the time of her seizure as aforesaid, was $100,000, and did also give in evidence, that the said Peter A. Schenck seized and took possession of the said ship, by the written directions of the said David Gelston; but no other proof was offered by the said plaintiff, at that time, of any right or title in the said plaintiff to the said vessel; and here the said plaintiff rested his cause.

*Whereupon, the counsel for the defendants did then and there [*272
insist before the said justice, on the behalf of the said defendants, that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid, were insufficient, and ought not to be admitted or allowed as sufficient evidence to entitle the said plaintiff to a verdict; and the said counsel for the defendants did then and there pray the said justice to pronounce the said matters, so produced and given in evidence for

the said plaintiff, to be insufficient to entitle the said plaintiff to a verdict in the said cause, and to nonsuit the said plaintiff; but to this the counsel learned in the law of the said plaintiff objected, and did then and there insist before the said justice, that the same were sufficient, and ought to be admitted and allowed to be sufficient to entitle the said plaintiff to a verdict; and the said justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters, so produced and given in evidence on the part of the said plaintiff, were sufficient to entitle the said plaintiff to a verdict, and that he ought not to be nonsuited: whereupon, the said counsel for the defendants did, then and there, on the behalf of the said defendants, except to the aforesaid opinion of the said justice, and insisted that the said several matters, so produced and given in evidence, were not sufficient to entitle the said plaintiff to a verdict, and that he ought to be nonsuited.

After the said motion for a nonsuit had been refused, and the opinion of the said justice had been excepted to as aforesaid, the counsel of the said
*273] *Goold Hoyt, did, in the progress of the trial, give in evidence, on the part of the said Goold Hoyt, that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof; and that in pursuance of such purchase by the plaintiff, the said James Gillespie had delivered full and complete possession of the said ship, her tackle, &c., to the said plaintiff, before the taking thereof by the defendants.

And the said motion for a nonsuit having been refused, and the opinion of the said justice excepted to as aforesaid, the said counsel for the said defendants did, thereupon, state to the said jury, the nature and circumstances of the defendants' defence, and did then and there offer to prove and give in evidence, by way of defence, or in mitigation or diminution of damages, that the said ship or vessel, called the American Eagle, with her tackle, apparel and furniture, before the tenth day of July, in the year of our Lord 1810, to wit, on the first day of July, in the year last aforesaid, at the port of New York, in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, was attempted to be fitted out and armed, and was fitted out and armed, and that the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, were procured for the equipment of the said vessel, and were then and there on board of the said vessel, as a part of her said equipment, with intent that the
*274] *said ship or vessel, called the American Eagle, should be employed in the service of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided.

And the said counsel of the said defendants did then and there offer to prove and give in evidence, by way of defence, or in mitigation or diminution of damages, that he, the said David Gelston, was collector, and that he, the said Peter A. Schenck, was surveyor of the customs for the district of the city of New York, on the 10th day of July 1810, and before that time, and afterwards continued to be collector and surveyor as aforesaid; and

that they, the said David Gelston and Peter A. Schenck, as collector and surveyor as aforesaid, and not otherwise, did, on the said tenth day of July, in the year last aforesaid, at the port of New York, in the southern district of New York, to wit, at the city of New York, in the county of New York, and at the first ward of the said city, seize, take and detain the said ship or vessel, with her tackle, apparel and furniture, and the said 500 tons of stone ballast, 100 hogsheads of water, 130 barrels of salted provisions, and 20 hogsheads of ship-bread, according to the form of the statute in such case made and provided, and by virtue of the power and authority vested in them by the constitution and *laws of the United States, and for such cause as is herein before stated. [*275

And the said counsel of the said defendants did then and there insist, before the said justice, on the behalf of the said defendants, that the said several matters, so offered to be proved and given in evidence on the part of the said defendants as aforesaid, ought to be admitted and allowed to be proved and given in evidence, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid. And the said counsel for the said defendants did then and there pray the said justice, to admit and allow the said matters so offered to be proved and given in evidence, to be proved and given in evidence, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid; but to this the counsel learned in the law of the said plaintiff objected, and did then and there insist, before the said justice, that the same ought not to be admitted or allowed to be proved or given in evidence, in justification of the trespass charged against the said defendants, and that the same ought not to be admitted or allowed to be proved or given in evidence, in mitigation or diminuation of the damages claimed by the plaintiff as aforesaid, inasmuch as the counsel of the said Goold Hoyt admitted, that the defendants had not been influenced by any malicious motives in making the said seizure, and that they had not acted with *any view or design of oppressing or injuring the plaintiff. And the said justice did then and there declare and [*276 deliver his opinion, and did then and there overrule the whole of the said evidence, so offered to be proved by the said defendants, and did declare it to be inadmissible in justification of the trespass charged against the said defendants; and after the admission so made by the counsel of the said Goold Hoyt, as aforesaid, did declare and deliver his opinion, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the said plaintiff from claiming any damages against the defendants, by way of punishment or smart money, and that after such admission, the plaintiff could recover only the actual damages sustained, and with that direction left the same to the said jury: and the jury aforesaid, then and there gave their verdict for the said plaintiff for $107,369.43 damages: whereupon, the said counsel for the said defendants, did then and there, on the behalf of the said defendants, except to the aforesaid opinion of the said justice, and insisted that the said several matters, so offered to be proved and given in evidence, ought to have been admitted and given in evidence, in justification of the trespass charged

against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid.

And inasmuch as neither the said several matters so produced and given in evidence on the part of the said plaintiff, and by the counsel of the said
*277] defendants *objected to, as insufficient evidence to entitle the said plaintiff to a verdict as aforesaid, nor the said several matters so offered to be proved and given in evidence, on the part of the said defendants, in justification of the trespass charged against the said defendants, or in mitigation or diminution of the damages claimed by the plaintiff as aforesaid, appear by the record of the verdict aforesaid, the said counsel for the said defendants did then and there propose their exceptions to the opinions and decisions of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiff as aforesaid, and the said several matters so offered to be proved and given in evidence, on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided. And thereupon, the said justice, at the request of the said counsel for the said defendants, did put his seal to this bill of exceptions, on the said 15th day of November, in the year of our Lord 1815, pursuant to the statute in such case made and provided.

If either party shall require the proceedings in the district court to be set out more at length, then it is understood, that such proceedings shall be engrafted into the bill of exceptions, and form part thereof.

(Signed) Ambrose Spencer. [L. S.]

*278] *The bill of exceptions being carried before the supreme court of the state of New York, the exceptions were disallowed by the court. (13 Johns. 141.) The cause was then carried to the court of errors of the state, where the judgment of the supreme court of the state was affirmed (Ibid. 561), and the cause was brought to this court in the manner before stated.

March 24th, 1817. The *Attorney-General* (*Rush*), for the plaintiffs in error, argued: 1. That the special matter offered in evidence by the plaintiffs in error ought to have been admitted as a defence to the action, or at any rate, that it ought to have been admitted. The 27th section of the act of 1793 contains, in general terms, a provision that it shall be lawful for any revenue-officer to go on board of any vessel, for purposes of search and examination; and if it appear that a breach of any law has been committed, whereby a forfeiture has been incurred, to make a seizure. It has been the wise policy of the law, by enactments and decisions, co-extensive with the range of public office, to throw its shield over officers, while acting under fair and honest convictions. Thus, under the English statutes, no justice of the peace, or even constable, can be sued for anything done officially, who is not clothed with some protection more than is allowed to ordinary defendants; some relaxation of the rules of pleading, or other immunities are extended to him. It is the same with mayors, bailiffs, church-wardens, overseers, and a variety of other officers. So also, excise-officers may always plead the general issue, and give the special matter in evidence. By Stat.
*279] 24 Geo. II., *no justice shall be sued for what he has done officially, until notice in writing served upon him a month beforel and; nor

then, if he tender amends. It would be easy to multiply analogous examples. Several acts of congress, passed since that of June 1794, illustrate the same legal principle. By the 11th section of the embargo act of the 25th April 1808, ch. 170, the collectors of the customs were authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, there existed any intention to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president could be had upon the seizure. It has been repeatedly determined, that it was sufficient, under this act, for the collectors to have acted with honest convictions; and that the absence of probable cause afforded, in itself, no ground to a claim for damages. *Crowell* v. *McFadon*, 8 Cr. 94; *Otis* v. *Watkins*, 9 Ibid. 337; *Otis* v. *Walter*, 2 Wheat. 18. So also, in the law just passed, to preserve more effectually our neutral relations, a principle closely analogous has been introduced. (Act 3d March 1817, ch. 58.) It is provided by the act of the 24th February 1807, ch. 74, "that when any prosecution shall be commenced, on account of the seizure of any ship or vessel, goods, wares or merchandise, made by any collector or other officer, under any act of congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution *shall be tried, that there was a reasonable [*280
cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment, on account of such seizure or prosecution: provided, that the ship or vessel, goods, wares or merchandise, be, after the judgment, forthwith returned to the claimant or claimants." Here, it appears, indeed, that if a certificate be granted, it operates as an absolute bar to an action. But it does not follow, that the refusal of a certificate is to close the ear of a court and jury to all the real merits.

It will, perhaps, be said, that the judgment of the district court restoring the vessel, and refusing the certificate, is conclusive; that it was a court of competent jurisdiction, and that, therefore, the matter which it adjudicated could not be reheard, or its propriety examined into collaterally, in any other court. We are aware of the decisions of this court upon this point, and of the English decisions upon the conclusiveness of judgments, from that in *Fernandez* v. *De Acosta*, Park on Ins. 178 (3d ed.), in the time of Lord Mansfield, to the more recent cases. Those, however, who have scrutinized this doctrine see plainly that, in later times, at least, though it be the law, its inconveniences appear to be sometimes felt, and its wisdom perhaps sometimes doubted. It is an intrinsic objection to the doctrine, that while it professes to look with a single eye to the binding nature of the judgment, turning away *from the merits, yet, in point of fact, the merits do, in [*281
most of the cases, get into view; so difficult is it to thrust them back, in discussions where justice only is sought. Already has the doctrine disappeared from the codes of some of the leading states in the Union; from that of Pennsylvania, by a positive statute, from that of New York, by a judicial decision. *Vandenheuvel* v. *United Ins. Co.*, 2 Johns. Cas. 451. In how many more of the states it has been broken down, is not known, but it is not supposed to be a doctrine entitled to any peculiar favor in this court. But the difference between a sentence of condemnation and of acquittal is

material. An acquittal does not ascertain facts; a conviction does; its character is positive. The former may have arisen from want of evidence; the latter must always rest upon some foundation of proof. A conviction, says Buller, is evidence of the fact; but the reverse of it is not shown by an acquittal. (Bull. N. P. 245.) Even in a common action for assault and battery, the plaintiff cannot rely upon a conviction, on an indictment for the same assault. *Jones* v. *White*, 1 Str. 68. The consequence is, that the defendant may defend himself against the suit, by going into the original facts. The plaintiffs in error asked no more below. So also, to support an action for malicious prosecution, malice in the defendant, and want of probable cause, must both concur. (Bull. N. P. 14.) If, in this action, an acquittal has been had upon the indictment, the plaintiff may still lay before
*282] the jury the evidence which was *heard on the indictment, viz., all the facts and circumstances to show that the prosecution was malicious. (Ibid.) This surely opens to the defendant the corresponding right of going into the original facts on his side. Every principle of just reasoning would seem, then, to lead to the conclusion, that the special matter ought to have gone before the jury. If it did not justify the seizure and detention, it might have served to mitigate the damages. The admission of the plaintiff's counsel, that the defendants below were not actuated by any malicious or vindictive motive, was not tantamount to hearing all the special matter, since it might, and no doubt would, have established in the minds of the jury, a far stronger claim to mitigation than the mere absence of malice. The great end, therefore, of every law-suit has been overlooked; justice has not been done. Unless the judgment below be abrogated, the defendants below, acting as innocent men, and as vigilant and meritorious public officers, are in danger of being crushed under a load of damages which could scarcely have been made more heavy, if levelled at conduct marked by the most undisputed and malignant guilt.

2. The plaintiff below, by demurring to the second plea, was precluded from all right of recovery; and that plea contains matter, which the demurrer itself admits, and which entitled the defendants below to judgment. A demurrer admits all facts that are sufficiently pleaded. What, then, are the facts set forth in this plea? Plainly these, that the American
*283] Eagle was fitted out and equipped, with intent that *she should be employed by a foreign prince or state, to wit, that part of St. Domingo governed by Petion, to cruise against another foreign prince or state, viz., against that part of St. Domingo governed by Christophe; that this was contrary to the act of the 5th of June 1794, and that the seizure thereupon took place, under orders from the president. Is not the case of the defendants below, after these admissions, completely made out? Does it lie with the plaintiff to say, that St. Domingo was not a state, or Christophe a prince? Does not the plea affirm both? Does not the demurrer admit both? What, besides, was it the object of the plea to affirm? What else did the demurrer intend to admit? The former sets them forth as fundamental facts. The latter does not deny, but admits them.

3. In contending that, within the true scope and intention of the act of the 5th of June 1794, both Petion and Christophe were to be considered foreign princes, we do not mean to depart from the reverence due to the former decisions of this court in *Rose* v. *Himely*, 4 Cranch 241, 272, but

think that there are solid grounds for distinguishing the present case from that decision. It is important, that the different branches of the government should look upon foreign nations with the same eyes, and subject them to the same rules of treatment. The decision in *Rose* v. *Himely* took place in February 1808. At that epoch, the act of congress, specifically cutting off intercourse with St. Domingo, and treating it as a dependency of France, was in full force. For the judiciary to have pronounced *this island an independent state, whilst the legislature considered it as a colony, [*284 would have disturbed the harmony of the different parts of the governing power. It would not be easy to foresee the mischiefs of such a conflict of authority and opinion. Look to the South American provinces, at this moment. Spain claims them as her lawful dominion: no power in Europe has acknowledged their independence: yet, in some of them, the authority of the once mother-country is wholly at an end. Now, what embarrassments might not result, if, after the letter of the secretary of state of the 19th of January 1816, to the Spanish minister, our courts should pronounce Buenos Ayres, for example, to be rightfully in its full colonial dependence upon Spain. Vattel's authority upon this subject is decisive. According to him, we are to look to the state of things *de facto*, taking each party to be in the right. Vattel, lib. 3, ch. 3, § 18. The rule laid down in *Rose* v. *Himely*, that such language was to be addressed to sovereigns, not courts, may have been applicable to the condition in which St. Domingo *then* was. It cannot, however, be conceded, that it is of constant and universal application. The progress of events may create a state of things, of which, as they impress their convictions upon mankind, courts too will take notice. The Netherlands waged a war of more than half a century with Spain; Spain never ceased to call it a rebellion; but what were the sympathies, what the conduct of protestant Europe, towards them, during the principal part of the time? What that of England, in particular, who did not *scruple to form treaties with them, while Spain was still denouncing them as [*285 heretics and insurgents? The fact being now palpable to the world, that St. Domingo is independent of all connection with France, repudiating her authority, and spurning her power, this positive state of independence *de facto* may, at length, well be taken to stand in the place of a formal acknowledgment of it by governments: and if courts of justice are to wait until France relinquishes her claim, that day may be indefinite indeed. The act of congress, which specifically interdicted intercourse with St. Domingo, considered as a colony of France, expired in April 1808. It was in full force at the time of the decision in *Rose* v. *Himely*, which constitutes another marked distinction between that case and the present. As to the condemnations which it may be alleged took place under the general non-intercourse laws, passed afterwards, of vessels coming from St. Domingo, upon the footing of its belonging to France, no inference against the argument can be hence deduced. In the first place, those laws left it wholly indefinite as to what colonies did or did not belong to France; they were couched in general terms only. They prohibited all intercourse with Great Britain and France, and their dependencies, without undertaking to designate, in any case, what the dependencies of either were. In the next place, so far as is known, it appears, that the government remitted the forfeitures, in all such cases of condemnation, thereby manifesting its opinion, if any inference is

to be drawn, that time and the progress of events had at length taken this
*286] island out of the true *spirit and meaning of those general laws; and that, as the nations of Europe were trading with it as an independent island, the citizens of the United States might fairly be permitted to do the same.

4. A leading object of the act of 1794 was, to preserve the peace as well as neutrality of the United States. Thus, then, although St. Domingo might not be a sovereign state, to all intents and purposes (which it is not necessary to contend), it was sufficiently independent, whether as to commerce or power, to fall within the mischiefs, and be embraced by the penalties, of the law in question.

Hoffman, and *D. B. Ogden*, for the defendant in error.—1. This court is not competent to take cognisance of this cause, under the 25th section of the judiciary act of 1789, ch. 20. The court has appellate jurisdiction only, from the final judgment or decree of the highest court of law or equity of the state, in certain specified cases. But this jurisdiction cannot be here exercised, because the highest court of law and equity of the state of New York, to whom the writ of error is directed, is no longer in possession of the cause, but has remitted the record and judgment to the supreme court of the state, to whom the writ of error is not, and cannot be directed. The agreement of the parties, under which the record is now before this court, reserves this question to be argued. It does not determine the *return* to be regular and valid, but only that the transcript shall have the same effect as if *annexed* to the writ of error. But even supposing the cause could be re-
*287] examined *upon a return to the writ of error, by the supreme court of the state, the main foundation of appellate jurisdiction in this court is wanting. The judgment of the state court does not decide *against* the title, right, privilege or exemption set up by the defendants below, under the act of congress of 1794, ch. 50; on the contrary, the state court has refused to give any construction whatever to the act of 1794, and to decide whether, under the facts of the case, it did or did not afford the defendants below, a legal defence to the action; because, the parties defendant, having declined to argue the demurrer in the supreme court, the court of errors refused, upon grounds of state law and state practice, to hear them in that court.(*a*) Parties litigant are bound to exercise their rights, according to the law and practice of the *forum* where they attempt to assert them. If they do not assert them, according to the rules prescribed by the *lex fori*, a decision against the party is not a decision against the right set up by him; but only a decision that he has not claimed that right, according to the local law and practice.

2. If, however, the court should be of opinion, that the cause is regularly before it, then we contend, that the testimony offered by the defendants below, upon the trial at *nisi prius*, and which was overruled by the judge, was properly excluded. They did not offer any evidence to show, that the vessel had been, or was intended to be engaged in any illegal trade or
*288] employment. The only law to which *the testimony offered could have any reference, is an act of congress, which was passed June

(*a*) For these grounds, see the opinion of Chancellor KENT in this cause, in the court of errors, 13 Johns. 576.

1794, entitled "an act, in addition to an act, for the punishment of certain crimes against the United States," made perpetual by a subsequent act. By the third section of the first-mentioned act, it is enacted, "that if any person shall, within any of the ports, harbors, bays, rivers or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out and arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of any other foreign prince or state, with whom the United States are at peace, &c., every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to any person who shall give information of the offence, and the other half to the use of the United States." The defendants below merely offered to prove, that the ship was fitted out with intent that she "should be employed in the service of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens and property of that part of the island of St. Domingo, which was then under the govermene of Christophe;" but did not offer to show that either of these parts of the island was *a foreign state, or that either [*289
Petion or Christophe were foreign princes, with whom the United States were at peace. And even if they had proved these facts, the evidence would have been perfectly immaterial and irrelevant: because, in the words of this court, "it is for governments to decide, whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony, as still subsisting." *Rose* v. *Himely*, 4 Cr. 292. The same principle has also been recognised by the highest British tribunals, both as applicable to the case of St. Domingo, and to other revolutions of states not recognised by the government of the country where the tribunal is sitting that is required to take notice of them. Edw. Adm. 1, and app'x. A; *City of Berne* v. *Bank of England*, 9 Ves. 347. What would be the absurd consequences of leaving each tribunal to settle this question, according to the information it might possess? Nothing can be more opposite and irreconcilable than the views given of the situation of St. Domingo by different writers and travellers. How then should a court decide, which has no other sources of information? The government is informed by its diplomatic agents: it has a view of the whole ground, and can judge what considerations ought to influence the decision of this question of complicated policy. Our foreign relations are, by necessary implication, *delegated to con- [*290
gress and the executive, by the constitution. Neither Petion nor Christophe have ever had any secure, firm possession of the sovereignty in St. Domingo. They have not only been contending with each other, but they have had rivals who have attempted to establish adverse claims to different parts of the island by the sword. The defendants below have themselves acted in their official conduct on these principles. In the year 1809, they seized and prosecuted in the district court, the James and the Lynx, two vessels which had come with cargoes from St. Domingo to New York

contrary to the provisions of the non-intercourse acts, forbidding all commercial intercourse between the United States and Great Britain, France and their dependencies. In these cases, they considered St. Domingo as a colony of France; and whilst the suits were depending, the ship now in controversy, was seized by them, under an allegation that she was intended for the service of an independent state, which independent state was the same St. Domingo they had just before considered as a French dependency.

3. The testimony offered by the defendants below could not be admitted, because the district court was the proper tribunal to determine, whether the vessel in question was or was not liable to seizure and forfeiture for the causes alleged. It having been decided in that court, that she was so liable, its judgment is conclusive, and precludes every tribunal, unless upon appeal, from re-examining the grounds of the decision. The authorities on this *291] point are innumerable, *and flowing in a uniform current.(*a*) As to foreign sentences, it is settled in this court, that a sentence of condemnation, by a competent court, having jurisdiction over the subject-matmer of its judgment, is conclusive as to the title of the thing claimed under it. *Rose* v. *Himely*, 4 Cr. 241. And that the sentence of a prize-court, condemning a vessel for breach of a blockade, is conclusive evidence of the fact as between the insurer and assured. *Croudson* v. *Leonard*, 4 Cr. 434. But what is still more pertinent to the present case, the court has determined, that the question, under a seizure for a breach of the laws of the United States, whether a forfeiture has been actually incurred, belongs exclusively to the courts of the United States, and it depends upon their final decree, whether the seizure is to be deemed rightful or tortious. *Slocum* v. *Mayberry*, 1 Wheat. 1. The distinction which has been suggested between the conclusiveness of condemnations and of acquittals, has been considered in several of the authorities, and it is now perfectly settled, that no such distinction exists. A condemnation may be founded on the oath of the seizing *292] party; and though, by *the laws of the United States, he cannot share in the forfeiture, if he becomes a witness, still he is interested to protect himself by a condemnation. Shall, then, a condemnation, founded on such testimony, be conclusive, and an acquittal not? The defendants, themselves, applied for time to plead, until the district court should decide, on the ground that its decision would be conclusive. (See 8 Johns. 179.)

4. The testimony offered by the defendants below could not be admitted in mitigation of damages: because, if admitted, it would only be to show that there was reasonable cause for the seizure, and consequently, that the defendants acted without malice, or any intention to oppress the plaintiff below. But the question whether there was or was not reasonable cause of seizure, is a question which is expressly submitted to the district court by the statutes of the United States,(*b*) and over which this court has declared

(*a*) Vandenheuvel *v.* United States Ins. Co., 2 Johns. Cas. 127, and the authorities there cited. The authorities collected in the same case, 2 Caines' Cases 217, and by Mr. Chief Justice (now Chancellor) KENT, in his opinion in Ludlow *v.* Dale, Id. 217; Wheaton on Capt. 274, 278; Peake's Law of Evidence (3d London ed.) 78, 79, and the cases there cited in a note; Cooke *v.* Sholl, 5 T. R. 255; Dane *v.* Degbergh, Bull. N. P. 244. Opinion of Mr. Justice JOHNSON, in Rose *v.* Himely, in the circuit court, 4 Cranch 508, app'x, note C; 12 Vin. Abr. 95, Evid. A, *b*, 22.

(*b*) Act of the 24th February 1807, ch. 74.

the district court had exclusive cognisance. A certificate of reasonable cause for the seizure having been denied by the district court, every other tribunal is as much precluded, except on appeal, from examining whether there was or was not reasonable cause for the seizure, as they are from examining whether there was or was not sufficient cause of forfeiture. The plaintiff below admitted upon the trial, that the defendants had not been influenced by any malicious motives in making the seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff. And the judge who tried the cause at *nisi prius* *charged the jury, that [*293
this admission precluded the plaintiff from claiming vindictive damages, and the jury rendered a verdict only for the actual damages, as proved by uncontradicted testimony. Where a certificate of reasonable cause is refused, or not granted, a party making an illegal seizure, can be in no better state than he would be, if the law had made no provision respecting a certificate. It is well settled, that probable cause is no justification of an illegal seizure, unless it be made a justification by statute. Nor can evidence of probable cause be received, to mitigate the damages, in cases where there is a disclaimer as to everything but actual damages. For whether there was, or was not, malice or probable cause, the actual damages sustained must be recovered for an illegal seizure, or for any other trespass, if anything whatever is recovered.

5. The second and third pleas of the defendant below are manifestly bad, on general demurrer. 1st. Petion and Christophe were not foreign princes, nor their territories foreign states, and consequently, a seizure for fitting out the vessel to be employed in their service could not be justified.(*a*) 2d. The president had no authority by law to order the seizure. The 7th section of the act of 1794 does not apply to this cause. If it did, the president's order can only be a justification, when applied to an illegal act. If no illegal act be proved, there can be no justification, under the order. Were it otherwise, the president would be a despot. The 7th section of *the act provides, "that in every case in which a vessel shall be fitted [*294
out or armed, or attempted so to be fitted out or armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augumented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel, within the jurisdiction or protection of the United States, as above defined, and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser or other armed vessel, of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case, it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary, for the purpose of taking possession of, and detaining any such ship or vessel with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been

(*a*) See the authorities, cited *ante*, p. 289.

adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise, from the territories of the United States, against the territories or dominions of a foreign prince or state with whom the United States are at peace." Under this provision, the president could
*295] not authorize the defendants below to seize. He *could only employ the army and navy, or the militia, for that purpose. He could only authorize an arrest or detainment, not a seizure, which is a taking and carrying away; he could only authorize a taking possession of, and detaining the vessel, in order to the execution of the penalties and prohibitions of the act. The vessel might have been libelled, and taken into the custody of the officers of the court; but the defendants below have not averred themselves to be revenue-officers, and as such, authorized to seize by the act of 1790, ch. 153. 3d. The 2d plea is not a bar in the court where it was pleaded. What could the plaintiff below have replied to this plea? That there was no forfeiture as alleged? But the state court has no authority to try the question of forfeiture, under the laws of the United States. The courts of the United States have exclusive jurisdiction of that question, and their decision is final and conclusive upon every other tribunal. Or suppose, that the plaintiff had replied, that Petion and Christophe were not independent princes. No municipal court whatever has power to determine that question. The executive government is alone competent to recognise new states arising in the world, and it would be extremely inconvenient and embarrassing, in this age of revolutions, for courts and juries to interfere in the decision of a question of such delicate and complicated policy, depending upon a variety of facts which they cannot know, and of considerations which they cannot notice. Again, if the plaintiff had replied, that the president had given no such instructions as mentioned in the plea, the replication
*296] *would have been immaterial, and a ground of demurrer. 4th. Neither of the pleas aver, that the ship was actually forfeited, but only that it was "seized *as* forfeited," which is not an equivalent averment. The case of *Wilkins* v. *Despard*, 5 T. R. 112, where a similar plea was pleaded, is distinguishable. That was a seizure under the British navigation act, 12 Car. II., ch. 18, § 1, by which the legality of the seizure, and the question of forfeiture itself, might be tried in any court of record in the British dominions, and consequently, in the court itself, where the plea was pleaded. 5th. The 3d section of the act of 1794, after specifying the offences meant to be punished, provides, that "every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so that the fine to be imposed shall in no case be more than $5000, and the term of imprisonment shall not exceed three years; and every such ship or vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of any person who shall give information of the offence, and the other half to the use of the United States." By every just rule of
*297] his construction, the proceeding by indictment against the offender, and conviction, must precede *the suit *in rem*, and the forfeiture of the vessel. The phraseology of the act is different from all the other

statutes authorizing seizures and creating forfeitures. By those statutes, the revenue-officers have power to seize and proceed *in rem* against the thing seized, as forfeited, independent of any criminal proceeding against the offending individual. By this act, the forfeiture of the thing is made to depend upon the conviction of the person, and the president alone has power to seize, and that only as a precautionary measure, to prevent an intended violation of the laws. 6th. The third plea is particularly defective, in omitting to state, as is done in the second plea, what princes or foreign states were intended. It merely alleges, that the vessel was fitted out with intent to be "employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace." It is a sacred rule of pleading, that where an offence is charged, or a forfeiture is claimed, the facts must be so alleged as that the court may judge whether there has been an offence committed or forfeiture incurred.(*a*) To so vague an allegation as this, it would be impossible for the plaintiff below to reply.

Baldwin, for the plaintiffs in error, in reply, insisted on the validity of the special pleas. The defendants below were not bound to answer the conversion, *because the trespass was complete without it. This defect, if any, ought to have been newly assigned by the plaintiff below, if he intended to have taken advantage of it. *Taylor* v. *Cole*, 3 T. R. 292. The forfeiture was well pleaded. The offence being committed, the forfeiture instantly attaches. *The Mars*, 8 Cr. 417. The plea here states, that the ship was seized "as forfeited," in the same manner with that which was held good in *Wilkins* v. *Despard*, 5 T. R. 112, and it alleges the offence in the words of the statute. An allegation that the seizure was made for a violation of the law, that the thing seized was taken as forfeited, is equivalent to an allegation that it was actually forfeited. Nor was it necessary to aver, that the seizure was made by a military or naval force. The 7th section of the act of 1794, evidently contemplates the employment of that description of force, only when, in the opinion of the president, it might become necessary to carry into effect the law. In other cases, the seizure might be made by the ordinary means of the revenue-officer. Nor is a conviction, on an indictment or information *in personam* necessary, before the proceedings *in rem* are commenced. None of the objections to the special pleas are available on general demurrer. [*298

The plaintiff below should have replied, that Petion and Christophe were not independent princes or states, and so have had that question tried as a question of fact. The existence of new states in the world may commence in various modes. 1st. Colonies may become independent *of the parent state, by means of force, and an acquiescence in the effects of that force on the part of the mother-country, for a sufficient length of time, to indicate a relinquishment of all hopes of recovering possession of the dominion. The pride of princes and nations will not always permit them openly and expressly to recognise the independence of rebellious subjects, [*299

(*a*) Com. Dig. tit. Action on Stat. A, 3, pl. 1; Davy *v.* Baker, 4 Burr. 2471; Rex *v.* Robe, 2 Str. 999; 2 Saund. 379; Radford *v.* McIntosh, 3 T. R. 636.

until long after they have relinquished all hope of subduing them. When the case of *Rose* v. *Himely* was determined, a war *de facto* existed between France and St. Domingo; and the former, so far from relinquishing her sovereignty over the latter, was actually attempting so assert it by force of arms. A long period of time has since elapsed, and the attempt has not been renewed. The people of the island have settled down under governments, the conduct of which is a pledge of their stability, and whose policy and institutions would do honor to more civilized and ancient communities. 2d. The existence of new states may be recognised by the supreme power of every country, in whose courts of justice the question of their independence may arise, and that, even while the civil war still rages between the new people and its former sovereign. When thus recognised by the legislative or executive authority of other countries, the tribunals of those countries are bound to take notice of their existence as independent states. This recognition may be made in various modes: by treaty; by a legislative act; by an executive proclamation; by sending to, or receiving from the new state, a public minister or other diplomatic agent. 3d. Their independence may
*300] also *be recognised by a treaty of cession from the parent-country. This treaty may not have become a public historical fact, of which courts of justice will take notice, without other evidence than its own notoriety. It may be deposited in the archives of a foreign, or of our own government. It may require to be proved in the same manner as foreign written laws are proved. In any of these views, the question as to the independence of St. Domingo is a question of fact, to be tried by the jury, and consequently, the plaintiff ought to have replied, that Petion and Christophe were not independent princes or states, as alleged in the defendants' pleas. The instruction of the president, in this very case, implies, that he recognised the independence of the island; the instruction could not otherwise have been legally given.

As to the conclusiveness of the decree of restitution in the district court, it is founded on principles which push the doctrine of the conclusiveness of sentences, to a degree of extravagance irreconcilable with reason and common sense. That every sentence of a court having jurisdiction of the subject-matter, so long as it remains unreversed by the appellate tribunal, is conclusive as to the title of the thing claimed under it, is conceded. But according to the jurisprudence of the state of New York, the sentences of foreign courts of admiralty are held not to be conclusive, as to other persons than those claiming title to the property; *Vandenheuvel* v. *United Ins. Co.*, 2 Caines' Cas. 217; s. c. 1 Johns. Cas. 127, 451; and the conclusiveness of
*301] the sentences of *domestic courts of peculiar and exclusive jurisdiction depends upon precisely the same principle. But supposing a sentence of condemnation to be conclusive, for all purposes, and against all persons; it does not follow, that a sentence of restitution ought to have the same effect. A judgment of acquittal is of a negative quality merely, and ascertains no precise facts. Bull. N. P. 245; Peake's Evid. 48; 1 Harg. Law Tracts 742. It only shows that sufficient evidence did not appear to the court to authorize a condemnation. Why is a decree of condemnation held to be conclusive? Because it is a basis of the title to the thing condemned. But an acquittal forms no part of the title to the thing acquitted, which is restored to the former proprietor, who holds it by the same title as

before. The case said to have been decided before Baron PRICE, in the year 1716, 12 Vin. Abr. 95, Evid. A, *b*, 22, is not pertinent. The elementary writers do not consider this as an adjudged point in any of the cases; and their authority, which is of great weight, makes a distinction, founded in reason and the nature of things, between a sentence of condemnation and a sentence of acquittal. Peake's Evid. 48; Phillips on Evid. 228–29; 2 Evans' Pothier 354. All the authorities confine the conclusiveness of the *res judicata* to parties and privies; the defendants below were neither. Mr. Evans, in commenting upon the decision of Baron PRICE, reported in Viner, says that, "upon principle, *I should conceive that the opposite determination would be more correct, as such an acquittal would be warranted, [*302 upon the mere negative ground, that the crown had not adduced sufficient evidence to support the seizure; and an individual, having a collateral interest in supporting the legality of the seizure, is not a concurrent party with the crown in supporting the condemnation, and asserting the claim of property on the one side, in the same manner as every person having an interest in opposing such condemnation, is, in contemplation of law, a sufficient party on the other." 2 Evans' Pothier 354. So, in this case, the defendants below were not concurrent parties with the United States in supporting the condemnation. It does not appear that the defendants were informers, and so entitled to one-half the forfeiture: the prosecution was carried on in the name of the government and by its law-officers; the defendants had no control over it, and could not appeal from the decision of the district court. They ought not, therefore, to be concluded by it.

February 23d, 1818. The cause was again argued, at the present term, by *Baldwin*, for the plaintiffs in error, and by *D. B. Ogden* and by *Jones*, for the defendant in error.

February 27th. STORY, Justice, delivered the opinion of the court.—This is a writ of error to the highest court of law of the state of New York; and the questions which are re-examinable upon the record in this [*303 *court are such only as come within the purview of the 25th section of the judiciary act of 1789, ch. 20.

But a preliminary question has been made, which must be discussed, before proceeding to consider the merits of the cause. It is contended, that the record is not, and cannot be brought, before this court.

By the judicial system of the state of New York, the decisions of their supreme court are revised and corrected in a court of errors, after which, the record is returned to the supreme court, where the judgment, as corrected, is entered, and where the record remains. In this case, the writ of error was received by the court of errors, after the record had been transmitted to the supreme court whose judgment was affirmed. It is contended, that the record, being no longer in the court of last resort in the state, can, by no process, be removed into this court.

The judiciary act allows the party who thinks himself aggrieved by the decision of any inferior court, five years, within which he may sue out his writ of error, and bring his cause into this court. The same rule applies to judgments and decrees of a state court, in cases within the jurisdiction of this court. As the constitutional jurisdiction of the courts of the

Union cannot be affected by any regulation which a state may make of its own judicial system, the only inquiry will be, whether the judiciary act has been so framed as to embrace this case. The words of the act are, "that a *304] final judgment or decree in any suit in the highest court of law or *equity of a state in which a decision could be had, where is drawn in question," &c., "may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error, the citation being signed," &c. The act does not prescribe the tribunal to which the writ of error shall be directed. It must be directed, either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing, in this particular, the manner in which the writ is to be used, it appears to the court, to be perfectly clear, that the writ must be so used as to effect the object. It may, then, be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the state having cognisance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ. In this case, the writ was directed to the court of errors, which, having parted with the record, could not execute it. It was then presented to the supreme court; but being directed to the court of errors, could not regularly be executed by that court. In this state of things, the parties *305] consented to waive all objections *to the direction of the writ, and to consider the record as properly brought up, if, in the opinion of this court, it could be now properly brought up on a writ of error directed to the supreme court of New York. The court being of opinion, that this may be done, the case stands as if the writ of error had been properly directed.

The original suit was brought by the defendant in error, against the plaintiffs in error, for an alleged trespass, for taking and carrying away, and converting to their own use, the ship American Eagle, and her appurtenances, and certain ballast and articles of provisions, &c., the property of the defendant in error. This is the substance of the declaration, although there are some differences in alleging the *tort*, in the different counts. The original defendants pleaded, in the first place, the general issue, not guilty, to the whole declaration; and then two special pleas. The first special plea, in substance, alleges, that the said ship was attempted to be fitted out and armed, and that the ballast and provisions were procured for the equipment of the said ship, and were put on board of the said ship as a part of her said equipment, with intent that the said ship should be employed in the service of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute *306] in *such case made and provided; and that the original defendants, by virtue of the power and authority, and in pursuance of the instructions and directions of the president of the United States, seized the said

ship, &c., as forfeited to the use of the United States, according to the statute aforesaid, &c. The second special plea is like the first, except that it does not state that the ship was seized as forfeited, but alleges that the ship was taken possession of and detained, under the instructions of the president of the United States, in order to the execution of the prohibition and penalties of the act in such case made and provided; and except that it omits the allegations under the *videlicets* in the first plea, specifying the foreign state by or against whom the said ship was to be employed. To these pleas, there is a general demurrer, and joinder in demurrer, upon which the state court gave judgment in favor of the original plaintiff.

Upon the trial of the general issue, a bill of exceptions was taken to the opinion of the court. By that bill of exceptions, among other things, it appears, that the original plaintiff, at the trial, gave in evidence, that at the time of the seizure, the ship was in his actual full and peaceable possession; that the ship, upon the seizure, had been duly libelled for the alleged offence in the district court of New York; that the original plaintiff appeared and duly claimed the said ship; and upon the trial, she was duly acquitted, and ordered to be restored to the original plaintiff by the district court; and that a certificate of reasonable cause for the seizure of the said ship had been denied. The plaintiff then gave in evidence, *that the value of the [*307
ship, at the time of her seizure, was $100,000; and that the said Schenck seized and took possession of the said ship, by the written directions of the said Gelston; but no other proof was offered by the plaintiff, at that time, of any right or title in the said plaintiff to the said ship; and here the original plaintiff rested his cause. The original defendants then insisted before the court, that the said several matters, so produced and given in evidence on the part of the original plaintiff, were not sufficient to entitle him to a verdict, and prayed the court so to pronounce, and to nonsuit the plaintiff. But the court refused the application, and declared, that the said several matters so produced and given in evidence, were sufficient to entitle the plaintiff to a verdict, and that he ought not to be nonsuited. To which opinion, the original defendants then excepted: and the original plaintiff then gave in evidence, that he purchased the said ship of James Gillespie, who had purchased her of John R. Livingston and Isaac Clason, the owners thereof, and that in pursuance of such purchase, the said Gillespie had delivered full and complete possession of the said ship, &c., to the original plaintiff, before the taking thereof by the original defendants.

The original defendants (having given previous notice of the special matter of defence to be given in evidence on the trial, under the general issue, according to the laws of New York) offered to prove and give in evidence, by way of defence, and in mitigation of damages, the same matter of forfeiture alleged in their first special plea, with the additional fact that *the said Gelston was collector, and the said Schenck was surveyor of [*308
the customs of the district of New York, and as such, and not otherwise, made the seizure of the ship, &c. And the original defendants did, thereupon, insist, that the said several matters, so offered to be proved and given in evidence, ought to be admitted in justification of the trespass charged against the defendants, or in mitigation of the damages claimed by the plaintiff, and prayed the court so to admit it. But the counsel for the plaintiff, admitting that the defendants had not been influenced by any

malicious motive in making the said seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff, the court overruled the whole of the said evidence, so offered to be proved by the original defendants, and did declare it to be inadmissible, in justification of the trespass charged against the defendants; and after the admission so made by the original plaintiff's counsel, that the said evidence ought not to be received in mitigation or diminution of the said damages, as the said admission precluded the plaintiff from claiming any damages, by way of punishment or smart money, and that after such admission, the plaintiff could only recover the damages actually sustained, and with that direction, left the cause to the jury.

From this summary of the pleadings, and of the facts in controversy at the trial, it is apparent, that this court has appellate jurisdiction of this cause, only so far as is drawn in question the validity of an authority exercised under the United States, and the decision is against the validity thereof,
*309] and so far as *is drawn in question the construction of some clause in a statute of the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by the original defendants, for to such questions (so far as respects this case), the 25th section of the judiciary act has expressly restricted our examination. Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties, as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do, but to expound the law as we find it; the defects of the system must be remedied by another department of the government.

The cause will be first considered, in reference to the bill of exceptions. In respect to the proof of the original plaintiff's cause of action, and the opinion of the court, that such proof was sufficient to entitle him to a verdict, no error has been shown upon the argument; and certainly none is perceived by this court. If, however, there were any error in that opinion, we could not re-examine it, for it is not within the purview of the statute. It does not draw in question any authority exercised under the United States, nor the construction of any statute of the United States.

In respect to the rejection of the evidence offered by the original defendants, to prove the forfeiture, and their right of seizure, there can be no doubt, that this court has appellate jurisdiction, if, by law, that evidence ought to have been admitted, in justification of the trespass charged on the original
*310] defendants; for *it involves the construction of a statute of, and an authority derived from, and exercised under, the United States.

In order to establish the admissibility of the evidence offered by the defendants, it is necessary for them to sustain the affirmative of the following propositions: 1. That a forfeiture had been actually incurred under the statute of 1794, ch. 50. 2. That it was competent for a state court of common law to entertain and decide the question of forfeiture. 3. That the sentence of acquittal in the district court was not conclusive upon the question of foreiture. 4. That the defendants, as officers of the customs, had a right to make the seizure.

Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the

government; and if the government adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227; *Roe* v. *Roe*, Hardr. 185; *Malden* v. *Bartlett*, Parker 105; though *Horne* v. *Boosey*, 2 Str. 952, seems *contrà*.) And if the party be entitled to any part of the forfeiture (as the informer, under the statute of 1794, ch. 50, is, by the express provision of the law), there can be no doubt, that he is entitled in that character to seize. (*Robert* v. *Witherhead*, 12 Mod. 92.) In the absence of all positive authority, it might be proper to resort to these principles, in aid of *the manifest purposes of the law. But there are express statutable provisions, which directly apply to the present [*311 case. The act of the 2d of March 1799, ch. 128, § 70, makes it the duty of the several officers of the customs, to make seizure of all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue; and assuming the statute of 1794, ch. 50, not to be a revenue law, within the meaning of this clause, still the case falls within the broader language of the act of the 18th of February 1793, ch. 8, § 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has been committed. Upon the general principle, then, which has been above stated, and upon the express enactment of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure. There is this strong additional reason in support of the position, that the forfeiture must be deemed to attach, at the moment of the commission of the offence, and consequently, from that moment, the title of the plaintiff would be completely divested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts, and it has been recognised and enforced in this court, upon very solemn argument. (*United States* v. 1960 *Bags of Coffee*, 8 Cranch 398; *The Mars*, Ibid. 417; *Robert* v. *Witherhead*, 12 Mod. 92; 1 Salk. 223; *Wilkins* v. *Despard*, 5 T. R. 112.)

In the next place, can a state court of common law, entertain and decide the question of forfeiture *in this case. This is a question of vast practical importance; but in our judgment, of no intrinsic legal dif- [*312 ficulty. By the constitution, the judicial power of the United States extends to all cases of law and equity, arising under the constitution, laws and treaties of the United States, and to all cases of admiralty and maritime jurisdiction; and by the judiciary act of 1789, ch. 20, § 9, the district courts are invested with exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and water, and of all suits for penalties and forfeitures, incurred under the laws of the United States. This is a seizure for a forfeiture under the laws of the United States, and consequently, the right to decide upon the same, by the very terms of the statute, exclusively belongs to the proper court of the United States; and it depends upon its final decree, proceeding *in rem*, whether the seizure is to be adjudged rightful or tortious. If a sentence of condemnation be pronounced, it is conclusive, that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be litigated in another *forum*. This was the doctrine asserted by this court, in the case of *Slocum* v. *Mayberry* (2 Wheat. 1),

after very deliberate consideration; and to that doctrine we unanimously adhere.

The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject-matter, whether as seizing officers, or informers, or claimants, are parties, or may
*313] be parties, to such suits, so far as their interest *extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world, upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons, *toties quoties*, for the same offence, and the claimant be loaded with ruinous costs and expenses. This reasoning applies to the decree of a court having competent jurisdiction of the cause, although it may not be exclusive. But it applies with greater force to a court of exclusive jurisdiction; since an attempt to re-examine its decree, or deny its conclusiveness, is a manifest violation of its exclusive authority. It is doing that indirectly, which the law itself prohibits to be done directly. It is, in effect, impeaching collaterally, a sentence which the law has pronounced to be valid, until vacated or reversed on appeal by a superior tribunal.

The argument against this doctrine, which has been urged at the bar, is, that an action of trespass will, in case of a seizure, lie in a state court of common law, and therefore, the defendant must have a right to protect himself, by pleading the fact of forfeiture in his defence. But at what time and under what circumstances, will an action of trespass lie? If the action be commenced, while the proceedings *in rem* for the supposed forfeiture are
*314] pending in the *proper court of the United States, it is commenced too soon; for, until a final decree, it cannot be ascertained, whether it be a trespass or not, since that decree can alone decide, whether the taking be rightful or tortious. The pendency of the suit *in rem* would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then, in the former case, by the general law, and in the latter case, by the special enactment of the statute of the 25th of April 1810, ch. 64, § 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal, and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury.

The cases also of *Wilkins* v. *Despard* (5 T. R. 112) and *Robert* v. *Witherhead* (12 Mod. 92, 1 Salk. 323), have been relied on, to show that a court of common law may entertain the question of forfeiture, notwithstanding the exclusive jurisdiction of the exchequer *in rem*. But these cases do not sustain the argument. They were both founded on the act of navigation, 12 Car. II., ch. 18, § 1, which, among other things, enacts, that one-third of the forfeiture shall go to him "who shall seize, inform or sue for the same, in any court of record." So that it is apparent, that in respect to forfeitures under this statute, the exchequer had not an exclusive juris-

diction, but that the other courts of common law had *at least a concurrent jurisdiction. And if these cases did not admit of this obvious distinction, certainly, they could not be admitted to govern this court, in ascertaining a jurisdiction vested by the constitution and laws of the United States exclusively in their own courts.

It is, therefore, clearly our opinion, that a state court has no legal authority to entertain the question of forfeiture in this case; and that it exclusively belonged to the cognisance of the proper court of the United States. Indeed, no principle of general law seems better settled, than that the decision of a court of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other court, in which the same subject-matter comes incidentally in controversy. It is familiarly known, in its application to the sentences of ecclesiastical courts, in the probate of wills and granting of administrations of personal estate; to the sentences of prize-courts in all matters of prize jurisdiction; and to the sentences of courts of admiralty, and other courts acting *in rem*, either to enforce forfeitures or to decide civil rights.

In the preceding discussion, we have been unavoidably led to consider and affirm the conclusiveness of the sentence of a court of competent jurisdiction proceeding *in rem*, as to the question of forfeiture; and *à fortiori*, to affirm it, in a case where there is an exclusive jurisdiction. In cases of condemnation, the authorities are so distinct and pointed, that it would, after the very learned discussions in the state court, be a waste of time to examine them at large. Nothing can be better settled, than that a sentence of condemnation *is, in an action of trespass for the property seized, conclusive evidence against the title of the plaintiff. (See [*316 Harg. Tracts 467, and cases there cited; *Thomas* v. *Withers*, cited by Mr. Justice Buller, in *Wilkins* v. *Despard*, 5 T. R. 112, 117; *Scott* v. *Shearman*, 2 W. Bl. 977; *Henshaw* v. *Pleasance*, Ibid. 1174; *Geyer* v. *Aguilar*, 7 T. R. 681, and case cited by Lord Kenyon, Ibid. 696; *Meadows* v. *Duchess of Kingston*, Ambler 756; 2 Evans' Pothier on Obligations, 346 to 367.)

A distinction, however, has been taken, and attempted to be sustained at the bar, between the effect of a sentence of condemnation, and of a sentence of acquittal. It is admitted, that the former is conclusive; but it is said, that it is otherwise as to the latter, for it ascertains no fact. It is certainly incumbent on the party who asserts such a distinction, to prove its existence by direct authorities, or inductions from known and admitted principles. In the *Duchess of Kingston's case* (11 State Trials 261; Runnington Eject. 364; Hale, Hist. Com. Law, by Runnington, note, p. 39, &c.), Lord Chief Justice De Grey declares, that the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which the sentences favorable to the party are to be admitted as conclusive evidence for him, the sentences, if unfavorable, are, in like manner, conclusive evidence against him. This is the language of very high authority, since it is the united opinion of all the judges of England; and though delivered in terms applicable strictly to a criminal suit, must be *deemed equally to apply to civil suits and [*317 sentences. And upon principle, where is there to be found a substantial difference between a sentence of condemnation and of acquittal *in rem?* If the former ascertains and fixes the forfeiture, and therefore, is

conclusive, the latter no less ascertains that there is no forfeiture, and therefore, restores the property to the claimant. It cannot be pretended, that a new seizure might, after an acquittal, be made for the same supposed offence; or if made, that the former sentence would not, as evidence, be conclusive, and, as a bar, be peremptory against the second suit *in rem*. And if conclusive either way, it must be, because the acquittal ascertains the fact, that there was no forfeiture. And if the fact be found, it is strange, that it cannot be evidence for the party, if found one way, and yet can be evidence against him, if found another way. If such were the rule, it wonld be a perfect anomaly in the law, and utterly subversive of the first principles of reciprocal justice. The only authority relied on for this purpose is a *dictum* in Buller's Nisi Prius 245, where it is said, that though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet, an acquittal in such court, is no proof of the reverse, for an acquittal ascertains no fact, as a conviction does. The case relied on to support this *dictum* (3 Mod. 164) contains nothing which lends any countenance to it. (Peake's Evid. 3d ed., p. 47, 48.) But assuming it to be good law, in respect to criminal suits, it has *nothing to do with proceedings *in rem*. Where [*318 property is seized and libelled, as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not. The decree of the court, in such case, acts upon the thing itself, and binds the interests of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it. The original owner stands upon his title, discharged of any latent claims, with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem* does, therefore, ascertain a fact, as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. It should, therefore, be conclusive upon all the world, of the non-existence of the title of forfeiture, for the same reason that a sentence of condemnation is conclusive of the existence of the title of forfeiture. It would be strange indeed, if, when the forfeiture *ex directo* could not be enforced against the thing, but by an acquittal was completely purged away, that indirectly, the forfeiture might be enforced, through the seizing officer; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against, the government itself.

*319] *One argument further has been urged at the bar, on this point, which deserves notice. It is, that the sentence of acquittal ought not to be conclusive upon the original defendants, because they were not parties to that suit. This argument addresses itself equally to a sentence of condemnation; and yet, in such case, the sentence would have been conclusive evidence in favor of the defendants. The reason, however, of this rule is to be found in the nature of proceedings *in rem*. To such proceedings all persons having an interest or title in the subject-matter are, as we have already stated, in law, deemed parties; and the decree of the court is conclusive upon all interests and titles in controversy before it. The title of

forfeiture is necessarily in controversy, in a suit to establish that forfeiture; and therefore, all persons having a right or interest in establishing it (as the seizing officer has) are, in legal contemplation, parties to the suit. It is a great mistake, to consider the seizing officer as a mere stranger to the suit. He virtually identifies himself with the government itself, whose agent he is, from the moment of the seizure, up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. For some purposes, as for instance, to procure a decree of distribution, after condemnation, where he is entitled to share in the forfeiture, or to obtain a certificate of reasonable cause of seizure, after an acquittal, he may make himself a direct party to the suit, and in all other cases, he is deemed to be present and represented by the government itself. By the very act of seizure, he agrees to become a party to *the suit, under the government; for [*320 in no other manner can he show an authority to make the seizure, or to enforce the forfeiture. If the government refuse to adopt his acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates. In legal propriety, therefore, he cannot be deemed a stranger to the decree *in rem;* he is, at all events, a privy, and as such must be bound by a sentence which ascertains the seizure to be tortious. But if he were a mere stranger, he would still be bound by such sentence, because the decree of a court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world.

Upon principle, therefore, we are of opinion, that the sentence of acquittal in this case, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions cannot again be litigated in any other *forum.* And if the point had never been decided, we should, from its reasonableness and known analogy to other proceedings, have had entire confidence in the correctness of the doctrine. But there are authorities directly in point, which have never been overruled, nor so far as we know, ever been brought judicially into doubt.

Above a century ago, it was decided by Mr. Baron PRICE (12 Vin. Abr. A, *b*, 22, p. 95), that an acquittal in the exchequer was conclusive evidence of the illegality of the seizure, and he refused, in that case (which was trover for the goods seized), to let the parties in *to contest the fact over [*321 again. This case was cited as undoubted law before Mr. Justice BLACKSTONE, in his elaborate opinion in *Scott* v. *Shearman* (2 W. Bl. 977); and the doctrine was fully recognised by the court, and particularly by Lord KENYON, in *Cooke* v. *Sholl* (5 T. R. 225), although that cause finally went off upon another point. In all the cases which have been decided on this subject, no distinction has ever been taken between a condemnation and an acquittal *in rem*, and the manner in which these cases have been cited by the court, obviously shows that, no such distinction was ever in their contemplation. If to these decisions we add the pointed language of Lord Chief Justice DE GREY (in the *Duchess of Kingston's case*, 11 State Trials 218, &c.), "that the rule of evidence must be, as it is often declared to be, reciprocal;" the declaration of Lord KENYON (in *Geyer* v. *Aguilar*, 7 T. R. 681, 696), that "where there has been a proceeding in the exchequer, and a judgment *in rem*, as long as that judgment remains in force, it is obliga-

tory upon the parties who have civil rights depending on the same question;" and the general rule laid down by Lord APSLEY (*Meadows* v. *Duchess of Kingston*, Amb. 756), that where a matter comes to be tried in "a collateral way, the decree of a court having competent jurisdiction shall be received as conclusive evidence of the matter," *ex directo* determined; there seems a weight of authority in favor of the doctrine, which it is very difficult to resist. We may add, that in a recent case, which was not cited at the argument (*The Bennet*, 1 Dodson 175, 180), where a ship had been captured
*322] *as prize, as being engaged in an illegal voyage, and acquitted by the sentence of a vice-admiralty court, Sir W. SCOTT held, that by such sentence of a competent tribunal, the question had become *res adjudicata*, and might be opposed with success as a bar to any inquiry into the same facts, upon a second capture, during the same voyage. Yet, here, the parties, who were captors, were different; and the argument might have been urged, that the acquittal ascertained no fact. The learned judge, however, considered the acquittal conclusive proof against the illegality of the voyage, and that all the world were bound by the sentence of acquittal *in rem*. And the same doctrine was held by Mr. Justice BULLER, in his very learned opinion in *Le Caux* v. *Eden* (2 Doug. 594, 611, 612). (*a*)

*323] *This view of the case would be conclusive against the admission of the evidence offered by the original defendants, at the trial, as a justification of the asserted trespass. But the other point which has been stated, and which involves the construction of the act of 1794, ch. 50, § 3, is not less decisive against the defendants. That act inflicts a forfeiture of the ship, &c., in cases where she is fitted out and armed, or attempted or procured to be fitted out and armed, with the intent to be employed "in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace." The evidence offered and rejected, was to prove that the ship was attempted to be fitted out and armed, and was fitted out and armed, with intent that she should be employed in the service of that part of the Island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the sub-

(*a*) In a recent case, in the court of exchequer, in England, it has been determined, that a judicial sale of a vessel, found at sea, and brought into port as derelict, under an order of the instance court of admiralty, on the part of the salvors and claimant (without fraud and collusion), is available against the crown's right of seizure for a previous forfeiture, incurred by the ship having been guilty of a forfeitable offence against the revenue laws: although the crown was not a party to the proceeding in the admiralty court, other than by the king's procurator-general claiming the vessel as a *droit* of admiralty; and although no decision of *droit* or no *droit* was pronounced, and the sale took place *pendente lite*, under an interlocutory order. It was held, that the crown should have claimed before the court, either as against the ship, in the first instance, or subsequently, against the proceeds of the sale, which were paid into the registry to answer claims under the order of sale, or have moved a prohibition. That the warrant for arresting the ship by the admiralty, and the process of citation, was notice to all the world of the subsequent proceedings: and that in pleading such sale, in defence to an information in the exchequer, the facts should be put specially on the record, so that the attorney-general might demur to or traverse them. The Attorney-General *v.* Norstedt (claiming the ship Triton), 3 Price 97. See Wynne's History of the Life of Sir Leoline Jenkins, vol. 2, p. 762.

jects, citizens and property of that part of the Island of St. Domingo which was then under the government of Christophe. *No evidence was offered, to prove that either of these governments was recognised by [*324 the government of the United States, or of France, "as a foreign prince or state;" and if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground, that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively, that Petion and Christophe were foreign princes, within the purview of the statute. No doctrine is better established, than that it belongs exclusively to governments to recognise new states, in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this court in the case of *Rose* v. *Himely* (4 Cranch 241), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals. (*The Manilla*, Edw. 1; *City of Berne* v. *Bank of England*, 9 Ves. 347; *Dolder* v. *Bank of England*, 10 Ibid. 353; 11 Ibid. 283.) If, therefore, this were a fact proper for the consideration of a jury, and to be proved *in pais*, the court below were not bound to admit the other evidence, unless this fact was proved, in aid of that evidence, for without it, no forfeiture could be incurred. If, on the other hand, this was matter of fact, of which the court were bound judicially to take cognisance, then the court were right in rejecting the evidence, for so *far as we have knowledge, neither the government of Petion nor Christophe [*325 have ever been recognised as a foreign state, by the government of the United States, or of France.

In every view, therefore, of this case, the state court were right in rejecting the evidence, so far as it was offered in justification. Was it then admissible in mitigation of damages? Upon this point, we really do not entertain the slightest doubt. The evidence had no legal tendency to show that any forfeiture had been incurred, and upon the proof already in the cause, the seizure was established to be tortious. The plaintiff admitted, that the defendants had acted without malice, or an intention of oppression. Under such circumstances, he waived any claim for vindictive damages, and the state court very properly directed the jury, that the plaintiff could only recover the actual damages sustained by him. And in no possible shape, consistently with the rules of law, could the evidence diminish the right of the plaintiff to recover his actual damages.

We have taken notice of this point, the more readily, because it was pressed at the bar, with considerable earnestness. But in strictness of law, the point is not subject to our revision. We have no right, on a writ of error from a state court, under the act of congress, to inquire into the legal correctness of the rule by which the damages were ascertained and assessed. There is no law of the United States, which interferes with, or touches, the question of damages. It is a question depending altogether upon the common law; *and the act of congress has expressly precluded us from a consideration of such a question. Whether such a restriction can be [*326 defended, upon public policy, or principle, may well admit of most serious doubts.

We may now pass to the consideration of the second plea, which asserts, as a defence, a seizure under the laws of the United States, by the express instruction of the president, for a supposed forfeiture *in rem*, and attempts to put in issue the question, whether such forfeiture was incurred or not. If this plea was well pleaded, then a question may properly be said to arise, within the meaning of the 25th section of the judiciary act, and as the state court decided against the right and authority set up thereon, the decision is re-examinable in this court. Several objections have been urged at the bar against the sufficiency of this plea, upon technical grounds; and if these objections are well founded, then it may be admitted, that the court below may have given judgment on these special grounds, and not have decided against the right and authority set up under the United States.

In the first place, it is argued, that this plea is bad, because it does not answer the whole charge in the declaration, the plea justifying only the taking and detention, and containing no answer to the damaging, spoiling and conversion of the property charged in the declaration. We are, however, of opinion, that the plaintiff can take nothing by this objection. The gist of the action in this case was the taking and detention, and the damag-
*327] ing, spoiling and conversion were matter of aggravation only; *and it is perfectly well settled, that a plea need answer only the gist of the action, and if the matter alleged in aggravation be relied on as a substantive trespass, it should be replied by way of new assignment. (*Taylor* v. *Cole*, 3 T. R. 292; s. c. 1 H. Bl. 555; *Dye* v. *Leatherdall*, 3 Wils. 20; *Fisherwood* v. *Cannon*, cited 3 T. R. 297; *Gates* v. *Bayley*, 2 Wils. 313; 1 Saund. 28, note 3; Com. Dig. Plead. E. 1; *Monprivatt* v. *Smith*, 2 Camp. 175). Independent, however, of this general ground, there is, in this particular case, a decisive answer to the objection; for if the matter of the plea were true and well pleaded, then, by the forfeiture, the property was completely divested out of the plaintiff; and, consequently, neither the conversion nor damage were any injury to him.

But there are other defects in this plea which, in our judgment, are fatal. In the first place, it is not alleged, that the ship and her equipments were forfeited for any offence under the laws of the United States. It is true, that it is stated, that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of a foreign state, &c., to commit hostilities upon the subjects of another foreign state, &c., contrary to the statute in such case made and provided. But it is not added, whereby and for the cause aforesaid, she became and was forfeited to the United States. Nor is this deficiency supplied by the subsequent averment, that the ship was, by the instructions of the president, seized "as forfeited to the use of the United States;" for the manner and cause of the forfeiture
*328] ought to *be directly stated. The plea is, therefore, not only argumentative, but it omits a substantive allegation, without which, it could not be sustained as a bar.

In the next place, the plea is bad, because it does not aver that the governments of Petion and Christophe are foreign states which have been duly recognised, as such, by the government of the United States, or of France, which, for reasons already stated, was necessary to complete the legal sufficiency of the plea.

And in our judgment, a still more decisive objection is, that the plea

attempts to draw to the cognisance of a state court, a question of forfeiture under the laws of the United States, of which the federal courts have, by the constitution and laws of the United States, an exclusive jurisdiction. For the reasons already mentioned, if the suit for the forfeiture was still pending, when the action was brought, that fact ought to have been pleaded in abatement, or as a temporary bar to such action: if the action was brought before proceedings *in rem* had been instituted, that fact ought to have been pleaded, with an allegation that the jurisdiction of the question of forfeiture exclusively belonged to the district court of the district where the seizure was made, which would have been a plea in the nature of a plea to the jurisdiction of the state court: if the suit were determined, then a condemnation, or an acquittal, with a certificate of reasonable cause of seizure, ought to have been pleaded, as a general bar to the action These are all the legal defences which the mere seizure could justify; and if these all failed, then the *seizing officer must have been deemed guilty of the trespass. The plea, then, stops short of the allegations [*329 which the seizing officer was bound to make, to sustain his defence, and it attempts to put in issue matter which, standing alone, no court of common law is competent to try. The demurrer, then, may well be sustained to this plea, since the party demurring admits nothing except what is well pleaded, and the plea being bad in substance, there is, in point of law, no confession of any forfeiture.

The third plea differs in several respects from the second, and is that on which the court have felt their principal difficulty. It asserts, that the ship was attempted to be fitted out and armed, with intent that she should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the United States were then at peace, contrary to the form of the statute in such case made and provided; and that the defendants, by virtue of the instructions of the president, "did take possession of, and detain," the said ship, &c., "in order to the execution of the prohibitions and penalties of the act in such case made and provided." It omits to allege any forfeiture of the ship, or that she was seized as forfeited. So far then as the plea may be supposed to rely on such forfeiture as a justification, it is open to the same objections which have been stated against the second plea. Another objection has been urged at the bar against this plea, which does not apply to the second. It is, that it does not specify the foreign state in *whose service, or against whom, the ship was intended to be employed. As the allegation follows the [*330 words of the statute, it has sufficient certainty for a libel or information *in rem*, for the asserted forfeiture under the statute; and consequently, it has sufficient certainty for a plea. Indeed, there is as much certainty as there would have been, if it had been averred that it was in the service of, or against, some foreign state, unknown to the libellant, which has been adjudged in this court, to be sufficient in an information of forfeiture. (*Locke* v. *United States*, 7 Cranch 339.)

But the main objection to this plea is, that it attempts to justify the taking possession and detaining of the ship, under the instructions of the president, when the facts stated in the plea do not bring the case within the purview of the statute of 1794, ch. 50, which is relied on for this purpose. This statute, in the seventh section, provides, that in every case in which a

vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun, or set on foot, contrary to the prohibitions and provisions of that act, and in every case of the capture of a ship or vessel, within the jurisdiction or protection of the United States, and in every case in which any process, issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons, having the custody of any vessel of war, cruiser or other armed vessel of any foreign prince or state,
*331] *or of the subjects or citizens of any such prince or state; in every such case, it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of the act, &c.

It is to be reccollected, that this third plea does not allege any forfeiture, nor justify the taking and detaining of the ship, for any supposed forfeiture; and that it does not allege, that the president did employ any part of the land or naval forces, or militia of the United States for this purpose, or that the original defendants, or either of them, belonged to the naval or military forces of the United States, or were employed in any such capacity, to take and detain the ship, in order to the execution of the prohibitions and penalties of the act. But the argument is, that as the president had authority by the act, to employ the naval and military forces of the United States for this purpose, *à fortiori*, he might do it by the employment of civil force. But upon the most deliberate consideration, we are of a different opinion. The power thus intrusted to the president is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to
*332] that high responsibility *which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions, in cases within the act, are completely justified in taking possession of, and detaining, the offending vessel, and are not responsible in damages, for any injury which the party may suffer by reason of such proceeding. Surely, it never could have been the intention of congress, that such a power should be allowed as a shield to the seizing officer, in cases where that seizure might be made by the ordinary civil means? One of the cases put in the section is, where any process of the courts of the United States is disobeyed and resisted; and this case abundantly shows, that the authority of the president was not intended to be called into exercise, unless where military and naval force were necessary to insure the execution of the laws. In terms, the section is confined to the employment of military and naval forces; and there is neither public policy nor principle, to justify an extension of the prerogative, beyond the terms in which it is given. Congress might be perfectly willing to intrust the president with the power to take and detain, whenever, in his opinion, the case was so flagrant, that military or naval force were necessary to enforce the laws, and yet, with great propriety, deny it, where, from the circumstances

of the case, the civil officers of the government might, upon their private responsibility, without any danger to the public peace, completely execute them. It is certainly against the general theory of our institutions, to create great discretionary powers by implication; and in the present instance, *we see nothing to justify it. The third plea is, therefore, [*333 for this additional reason, bad, in its very substance, and the state court were right in giving judgment on the demurrer for the original plaintiff.

The judgment of the court for the correction of errors of the state of New York is affirmed, with damages at the rate of six per cent. upon the judgment, from the rendition thereof, and costs.

JOHNSON, Justice.—As the opinion delivered in this case goes into the consideration of a variety of topics which do not appear to me to be essential to the case, I will present a brief view of all that I consider as now decided.

Three pleas are filed to the action. The first is the general issue, under which, according to the practice of the state from which the case comes, notice was given that the forfeiture would be given in evidence. The second plea is a justification, on the ground of a seizure under the order of the president, for the forfeiture incurred under the third section of the act of 1794. The third is a justification under the order of the president, to detain for the purpose of enforcing the prohibitions and penalties incurred under the third section. And this order is supposed to have been issued under authority given in the seventh section.

On the first plea, issue was taken; and on the trial, the state court refused to admit evidence of the forfeiture, *on the ground that the [*334 acquittal in the district court was conclusive against the forfeiture. And on this point, this court is of opinion, that the state court decided correctly. This court is also of opinion, that the state court could not have tried the question of forfeiture arising under the laws of the United States. But this point would have been fatal to the suit, not to the defence, had it been properly pleaded. To the second and third pleas, the defendant demurred: but as the second plea contained only an argumentative, and, of course, defective averment of the forfeiture, viz., "seized as forfeited," that is "because forfeited," that plea did not bring up the question of forfeiture, or any question connected with it. Neither does the third plea bring up the question of forfeiture: for the justification therein relied on is wholly independent of the forfeiture, and rests upon the order of the president to detain for trial, in effect. And hence, the only other point in the case is, whether the seventh section of the act empowered the president to issue such an order. And on this point, we are of opinion, that there is no power given by that act, to authorize a seizure, but only to call out the military or naval forces to enforce a seizure, when necessary. The defence set up is not founded upon the exercise of such a power, but upon a supposed order to the defendants, in their private individual character, to take and detain. The act, therefore, does not sustain the defence.

Judgment affirmed.

*_D. B. Ogden_ inquired, to which of the state courts the mandate [*335 to enforce the judgment was to be transmitted.

MARSHALL, Ch. J.—We must consider the record as still remaining in the supreme court of New York, and consequently, the mandate must be directed to that court.

Mandate to the supreme court of New York.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the supreme court of judicature of the people of the state of New York, returned with the writ of error issued in this case, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that this court having the power of revising, by writ of error, the judgment of the highest court of law in any state, in the cases specified in the act of congress, in such case provided, at any time within five years from the rendition of the judgment in the said courts, have the power to bring before them the record of any such judgment, as well from the highest court of law in any state, as from any court to which the record of the said judgment may have been remitted, and in which it may be found, when the writ of error from this court is issued. And the court, therefore, in virtue of the writ of error in this cause, do proceed and take cognisance of this cause upon the transcript of the record now remaining in the supreme court of judicature of the people of the state of New York; and they do hereby adjudge and order, that the judgment of the court for the trial of impeachments and
*336] *correction of errors in this case be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum *per annum* on the amount of the judgment of the said court for the trial of impeachments and correction of errors of the state of New York, to be computed from the time of the rendition of the judgment of the said court for the trial of impeachments and correction of errors of the state of New York.