the very hinge on which is turned. But even if there had, as it would have stood single in opposition to a series of cases, I should not have placed much reliance on the superstructure when the foundation failed. But the observations I have made upon the cases alluded to I think warrant me in saying that though there were some expressions tending to shew that such evidence might be received, yet it was not the ground of decision in any of them; they amounted only to obiter dicta; or even let them be called solemniter dicta; and at least they seemed to have proceeded on a supposed general usage at the Quarter Sessions. This therefore brings me to that which was the last topic of argument. The proposition which is stated is this, that the justices of peace in sessions having in general received such evidence as this, their usage creates a rule by which we are to proceed. I have great respect for that class of magistrates; I know their most important utility, and have much regard for many of them individually; but I confess there is **[725]** something of novelty in that argument which refers those whom the constitution of the jurisprudence of this country hath invested with the power of correcting the errors of justices of the peace to the practice of those very persons to learn the rules of evidence by which they are to proceed. I remember a case of *Baldwin et Ux.* v. *Blackmore*, which is reported in 1 Burr. 595, and of which I have a MS. note, and a full memory; where justices of the peace had committed a man and his wife for returning to a parish from whence they had been removed by an order. The action was brought by the husband and wife on the ground that the wife had been improperly committed; the case was twice argued; and the usage of committing femes covert was insisted upon; and it rather appeared at first that some part of the Bench were inclined to give countenance to such an usage; but I well remember that Mr. Justice Foster treated the argument with more indignation than is expressed by Sir James Burrow in his account of that case. I perfectly well recollect that learned Judge's saying that he had heard that communis error facit jus, but he hoped he should never hear that rule insisted upon, to set up a mis-conception of the law in destruction of the law. I should have disdained to say any thing on this position, unless it had received the appearance of some countenance in the cases I have mentioned, and in the discussion of this case. It is the whole ground of the opinions hinted at in the other cases. But I could give some account of the usage during the many years I practised at the sessions, and I confess I never heard of such evidence being received there. The practice I know varies according to the usage of each county where the sessions are held; and I should as soon resort to the usage of every parish in the kingdom on a question concerning the rateability of personal estate. But I will not enter more into this point, as I am clear it would be most dangerous to adopt it. The mistakes of Judges, provided they became universal, would according to that doctrine become rules of law. An usage, commencing at soonest since 13 & 14 Car. 2, contrary to law, and working injustice every day it was persisted in, would supersede the law. Upon the whole I am most clearly of opinion that this examination was not admissible in evidence. It was ex parte, obtained at the instance of those overseers whose parish was to be benefited by it, and behind the backs of the parish against whom it has now been used, without having an opportunity of knowing what was going on, or attending to have the **[726]** benefit of a cross-examination. I regard the question as of the last importance, and as putting in danger the law of evidence in which every man in the kingdom is deeply concerned.

The majority of the Court not being of opinion that the rule for reversing both the orders should be made absolute,

They consequently stand confirmed (*a*).

OGDEN *against* FOLLIOTT, in Error. Friday, June 11th, 1790. The Acts of Confiscation passed in the several States of North America after the Declaration of Independence and before the treaty of peace, by which this country acknowledged their independence, are considered as a nullity in the Courts of Law in this country.

[Referred to, *Phillips* v. *Eyre*, 1870, L. R. 6 Q. B. 27; *Huntington* v. *Attrill* [1893], A. C. 156.]

This was an action (in the Court of Common Pleas) of debt on bond, dated

(*a*) Vide Salk. 17.

New York, October 10, 1769, for 4000l. of current money of the province of New York, North America, being 2250l. of lawful money of Great Britain. Pleas, after oyer (by which it appeared that the defendant, one Richard Morris and Lewis Morris, were jointly and severally bound,) 1st, Richard and Lewis Morris solverunt post diem; 2dly, defendant solvit post diem; 3dly, that at the time of making the writing obligatory, the plaintiff, R. Morris, and the defendant, were severally and respectively persons residing within the United States of America, and continued so, &c. till after the 22d of October 1777. That, on that day, the sum of money, &c. being due and unpaid, &c. and the plaintiff then residing at New York, then being one of the United States of America, by a law of the State of New York, he was ipso facto attainted of the offence of adhering to the enemies of the said State of New York, and all and singular the estate, both real and personal, held or claimed by him, on the 22d of October 1779, was forfeited to, and vested in, the people of New York; which said law of the said State of New York, from thenceforth hitherto hath been, and still is, in full force and effect; and that the said writing obligatory, and all the money due thereon, became, and was, and from thenceforth hitherto hath remained and continued, and still is, forfeited to, and vested in, the people of the said State of New York, &c. 4thly, that, at the time of the making the said writing obligatory, the above mentioned parties were resident within the United States of America. That the defendant was bound only as a surety for the said R. and L. Morris. That the defendant, at the said time, &c. was resident in the State of New Jersey, then being one of the United States of America, and in possession of real and personal property more than sufficient to pay the said sum of 4000l. and his other debts; that on the 2d of January 1779, being so possessed, &c. he was attainted, **[727]** according to the laws and statutes of the said State of New Jersey, of adhering to the enemies of the said State, and thereby all his real and personal estate, within the said State of New Jersey, was forfeited to, and vested in, the said State of New Jersey, for ever; that it was provided by the said State of New Jersey, that the property of the defendant so forfeited to, and vested in, the said State was in the first place made liable to the payment of all his debts, and demands against him; that, in consequence of his attainder, all his property was seised, which at the time of the seizure was more than sufficient to pay the said sum of 4000l. and all his other debts; that after his attainder the plaintiff was at liberty to make, and might have made, demand of the State of New Jersey of the said sum of money due to him upon the said writing obligatory, against the real and personal estates of the defendant so forfeited, &c. and might have been paid thereout. 5thly, to the same effect as the 4th, but reciting more particularly the several Acts of Attainder, and Confiscation, passed by the State of New Jersey against the defendant; and that the plaintiff might and ought to have demanded payment of the bond from that State, &c. The replication tendered issue on the 1st and 2d pleas; and, to the 3d plea, stated that at the time of making the said supposed law of the State of New York, in that plea mentioned, the said State was not one of the United States of America, but was one of His Majesty's colonies in America, then in open rebellion against His Majesty, &c. There was a general demurrer to the 4th and 5th pleas. The rejoinder, after joining issue on the 1st and 2d pleas, to the third replication, stated that before the making of the said law of the State of New Jersey, in the third plea mentioned, to wit, on the 4th of July 1776, the several colonies in America (mentioning them all by name, among which were New York and New Jersey) separated themselves from the Government and Crown of Great Britain, and united themselves together, and were by the people of the said respective colonies in Congress declared and made free and independent States by the name, and stile, of the United States of America, and to have full power to do all acts and things, which independent States of right may do; that on the 3d of September 1783, by the definitive treaty of peace and friendship, made and signed at Paris on that day between His Majesty and the said United States of America, His Majesty acknowledged the said United States of America to be free, sovereign, and inde-**[728]**-pendent, States, and treated with them as such; that by the said treaty the several laws which had been made, and passed, by the Legislatures of the said respective States, after their Declaration of Independence, for the confiscation of the property of persons within the said respective States, were recognized and admitted to be valid; and that before the making of the said law of the State of New York, to wit, on the 4th of July 1776, and from thence continually hitherto, the said

United States became, and were, divided from His Majesty's dominion and Government, and absolutely independent thereof; and that long before, and at the time of making the said law of the said State of New York, and from thence hitherto, the people of the said State have exercised, and still do exercise, sovereignty, legislation, and government, within the said State of New York separately and distinct from the legislation and Government of Great Britain; and that the said law of the said State of New York, from the time of the making thereof, hitherto hath been and still is in full force and effect, &c. Joinder in demurrer to the 4th and 5th pleas, &c. Surrejoinder; that by the treaty of peace the said several laws, &c. were not recognized and admitted to be valid, &c. Rebutter; that, by the first article of the treaty, His Britannic Majesty acknowledged the said United States to be free, sovereign, and independent, States, and treated with them as such. That, by the 5th article of the treaty, it was agreed between His Majesty and the United States of America that the Congress should earnestly recommend it to the Legislatures of the respective States to provide for the restitution of all estates, rights, and properties, which had been confiscated, belonging to real British subjects, and also the estates, rights and properties, of persons resident in districts in the possession of His Majesty's arms, and who had not borne arms against the said United States; and that persons of any other description should have free liberty to go to any part of any of the thirteen United States, and therein remain twelve months unmolested in their endeavours to obtain restitution of such of their estates, rights, and properties, as might have been confiscated; that Congress should also recommend to the several States a re-consideration and revision of Acts and laws, &c. and should also earnestly recommend to the States that the several estates, rights, and properties, of such last mentioned persons should be restored to them, they refunding to any persons, who might be then, at the time of making the said treaty, in possession, the bonâ fide price (where any had been given) which such persons might have **[729]** paid in purchasing the said estates, rights, or properties, since the confiscation, &c.; and that no persons who then had any interest in confiscated lands, either by debts or otherwise, should meet with any impediment in the prosecution of their just rights. That the plaintiff at the time of making the said law of the State of New York, and of the signing the definitive treaty, was resident in a district in the possession of His Majesty's arms within the State of New York, and had not borne arms against the said United States. That by the 6th article of the treaty it was agreed that there should be no future confiscation made, nor any prosecutions commenced against any person, by reason of the part which he might have taken in the then war, and that no person should suffer any future loss, either in his person, liberty, or property; and that those who might be in confinement on such charges, at the time of the ratification of the treaty, should be immediately set at liberty, and the prosecutions so commenced should be discontinued, &c.

General demurrer to the rebutter, and joinder in demurrer.

After argument in the Common Pleas, that Court gave judgment for the plaintiff (*a*); on which the defendant brought a writ of error.

Erskine, for the plaintiff in error, contended that the treaty of peace had relation to, and ratified, the Declaration of Independence; and that in whatever light the Acts of the State of New York might be considered in this country previous to the treaty of peace, yet, inasmuch as the States of America were treated with as independent States, and recognized as such, the Acts passed subsequent to the time of the Declaration of Independence must be taken notice of in the Courts of Law in this country as the Acts of a free and sovereign State. The time when the Americans declared themselves independent is the only period to which the treaty of peace, acknowledging them to be, and not conferring on them the right of being for the first time, independent States, can have relation. It was so considered by the present Lord Chancellor in *Wright* v. *Nutt* (*b*). If then the Act of Confiscation, stated in the pleadings, were the Act of a sovereign and independent State, this Court will consider it as conclusive in this country. In *Wright* v. *Nutt*, the Lord Chancellor commenting on an Act of Confiscation by the State of Georgia, said "It may be a question for private speculation whether such **[730]** a law made in Georgia was a wise or improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be

(*a*) Vid. H. Bl. Rep. C. B. 123. (*b*) Ibid. 149.

equally regarded in Courts of Justice here, whether in private speculation they are wise or foolish." This rule is not confined merely to the cases of civil property: it also prevails in questions of prize (which are in their nature penal) in the Courts of Admiralty in the different countries, who universally give credit to each other's Acts. They are considered as binding and conclusive on property, inasmuch as the subject matter of the sentence is within the jurisdiction of the respective Courts in which it is condemned. Therefore a sentence of condemnation, as prize, in a foreign Court of Admiralty would be an answer to an action of trover brought in this country to recover a vessel, so condemned. So if a subject of France were attainted there, and his property were granted to another, who were to bring part of it with him into this country, he would not be liable to restore it to the person attainted by force of an action to be brought against him here. These instances shew that the penal laws of one country are taken notice of in the Courts of another.

Buller, J.—In questions between a person attainted and a wrong-doer, it is not necessary that the Crown should actually seize the property of the former in order to divest him of it. For though before seizure the person attainted cannot maintain an action against a wrong-doer who is in possession of part of his property, yet that arises from the personal disability of the plaintiff in consequence of the attainder; and therefore if such person were afterwards pardoned, I conceive that he might maintain such an action, notwithstanding the Crown did not re-grant to him his property. A seizure in fact is not necessary since the statute 33 H. 8, c. 20, which enacts that the property of persons attainted shall be adjudged in the actual possession of the Crown, without office. And a bond, as well as a chose in possession, is forfeited by the attainder of the obligee. Staund. P. C. 188 a. Then the Act of Confiscation in this case divested the plaintiff of his property in the bond, and disabled him to sue on it in the Courts of Law in this country as well as in America. A Parliamentary attainder here (to which the Act of Confiscation may be assimilated) is at least equal to an assignment under the bankrupt laws: now it cannot be denied but that such an assignment would be an answer to an action brought by the bankrupt him-**[731]**-self, even before the assignees had actually taken possession of the property sued for; on this ground, that the plaintiff has no property in the subject matter of the action. But if this Court will not take notice of the Act of Confiscation in America, neither will the Courts of Law in America pay any deference to the judgment of this Court: and then the plaintiff in error may be doubly charged; for the recovery in this action could not be pleaded in bar to an action brought in a Court of Law in New York on this very action; and the judgment here will give no cause of action to the plaintiff in error to recover his proportion against the co-obligors in America.

Watson, Serjt. contra, was stopped by the Court.

Lord Kenyon Ch.J.—This question is undoubtedly of considerable moment, inasmuch as it affects an extensive class of persons, and inasmuch as the argument has involved in it the respective rights of the subjects of the different nations: however the ground, on which I am inclined to confirm the judgment given by the Court of Common Pleas, seems perfectly clear. And indeed we all considered it so clear in the last term (*a*) that we did not think it proper that the question should be discussed. Whether or not the report of what passed in the Court of Common Pleas in this case be accurate (*b*) I will not presume to say: but I confess I was induced to think that the word "not" had been omitted in that part of the judgment, where the Acts of the State of New York passed during the war are considered "to be of as full validity as the Act of any independent State" (*c*). For supposing that the language as reported to have been used by that Court, had in fact been used, and that the case was to be determined on that ground, I should have wished to have heard it once argued in answer to the objection made by the plaintiff in error. If we were to consider the Acts of the province of New York as binding, as has been contended, I am at a loss to know why all the property of those persons, which was said to be confiscated, did not pass to the executive power of that State to whom it was said to be forfeited; and why an action might not have been brought in the name of such executive power

(*a*) Vide *Dudley* v. *Folliott*, ante, 584.

(*b*) Mr. Erskine said he had heard from the best authority that the report was accurate.

(*c*) Vide *Folliott* v. *Ogden*, H. Bl. Rep. C. B. 135, l. 12.

to enforce the payment of this bond; and how an action could have been brought in the name of the obligee. Having said thus much on the judgment supposed to have been given by the Court of **[732]** Common Pleas, I can only say that at present I cannot assent to the reasoning on which that Court gave judgment, though I am of opinion that it should be affirmed on different grounds. The Court of Common Pleas, in giving judgment, stopped at the plea: but the judgment, which I am prepared to give, is founded on the whole of the pleadings, which are in substance these; the plea states that the province of New York in 1779, at the time when the confiscatory law passed, was part of the dependencies of Great Britain in open rebellion against the King, and that the plaintiff and the defendant were resident in that State; what became of them afterwards does not appear; and it is not alleged that they were resident in, or subject to the laws of, that State when the treaty of peace was signed. It is not necessary to say what effect that would have had; but thus it stands; in 1779 that province set about a reform and to assert what is called their rights, but which I, sitting here, am bound to say was an act of rebellion against the sovereign power of the State, and that their act was illegal at that time, whatever confirmation it might afterwards receive there by the subsequent treaty of peace. Then, when these parties came into this country before the independence of America was acknowledged, was their property confiscated? Could it have been pleaded here to an action brought at that time that those States had made what they called a law, forfeiting the property of those who adhered to the Government of this country? Certainly not. And yet as between these parties they must be understood to be in the same situation now as at that time; for, whatever operation the treaty of peace might have on the persons resident in that country, it is impossible to say that it was intended to, or did, give effect to the Acts of the Assembly by which the property of our own subjects resident here was confiscated. The consequence of the argument for the plaintiff in error would be, that every act done by the loyalists in America previous to the treaty of peace was admitted by that treaty to be an act of high treason against the State of New York: but that can never be supported. The plaintiff came into this country subject to all his legal contracts, and armed with all the legal rights, which any other subject had.—It would be enough to stop here: but it has been said that, where the property of a subject of one country is confiscated, and vested in the Sovereign State, every other country ought to take notice of the confiscation: but that was not the case; for these persons never were **[733]** attainted by any Act of a Sovereign State, those Acts were passed by the subjects of this country, who at that time withdrew themselves from the Sovereign State, and assumed to themselves a power of making laws. It might equally be said that, if the Isle of Wight, or any town in this country, wished to throw off their allegiance to the King, and to assert what are called the rights of man, and to declare that they would no longer continue subjects of his Government, they would immediately become an independent State. I am therefore most clearly of opinion that the Act of Confiscation which passed 1779 cannot be considered in this country as competent to transfer the property of Folliott to any person whomsoever; and consequently that the right of action, which accompanied him when he came into this country, is not devested out of him. We are pressed at the close of the argument with the peculiar circumstances of the plaintiff in error, who, it was said, could have no remedy against his co-obligors in America, notwithstanding the judgment here, and who might even be sued again on this very bond in that country; but that argument ought not to guide our judgment; for I have always understood it to be clear law that all judicial acts done in one country over the property of the subjects within their jurisdiction are conclusive on the property of those parties in any other country.

Ashhurst, J.—It is sufficient for me to say that I concur in opinion with Lord Kenyon. These parties came here as subjects of this country before the treaty of peace; and therefore any acts done by the State of New York at that time could not alter the rights of our own subjects. The plaintiff and the defendant came into this country in the character of creditor and debtor; and their situation as individuals was not affected by the Acts of Confiscation.

Buller, J.—A very few words are sufficient to decide the present case. It is a general principle, that the penal laws of one country cannot be taken notice of in another. Then apply that principle to the present case: this is an action on a bond, to which the defendant has pleaded that by the penal laws of another country the

property of the plaintiff in the bond has been devested out of him: but this Court cannot take notice of that defence; and then all the pleadings are a nullity, and consequently the action remains unanswered. That is as much as is necessary to say in the determination of this particular case. Another question, however, having arisen in the argument, whether or not it was necessary that there should have been a **[734]** seizure on the part of the State of New York, in order to devest the property out of the plaintiff, I will give my opinion upon it. The answer given at the Bar from the statute 33 Hen. 8, c. 20, that in this country the property of persons attainted is vested in the Crown without office, is not conclusive; and I am still of opinion that a seizure is necessary. The effect of that Act of Parliament is only to avoid the necessity of an office. The case of *Stone* v. *Newman* (*a*) shews what construction has been put on the statute. There, Sir T. Wyat being tenant in tail male, with the reversion in the King, enfeoffed G. Moulton in fee; Sir T. Wyat had issue G. Wyat, who had issue Sir F. Wyat, under whom the defendant claimed. But Sir T. Wyat was attainted, and the attainder was confirmed by a special Act of Parliament (*b*), enacting that he should forfeit all his lands &c. and that they should be vested in the Queen without office (nearly in the same words as are used in the Statute of Henry 8). That case was very elaborately discussed by all the Judges; and in answer to an exception (*c*) taken to the pleadings that no seisin was alleged in the Queen, and that then Sir F. Wyat's title was good until seisin, for he had the first possession, it was adjudged, "That it appeared that, after the attainder, the Queen being entitled by the general Act of Parliament, 33 H. 8, and by the special Act, 1 & 2 P. & M., it was in the Queen without office; and that the Queen granted it unto him under whom the plaintiff claimed, who entered, and was seised, until Sir F. Wyat entered; so he had the priority of possession and right;" wherefore the exception was disallowed. It was so material in that case to give an answer to the objection, that the Court answered it by the fact of the case, namely, that there was an actual seizure. The instance put at the Bar of an assignment by the commissioners of a bankrupt, which devests the property of the bankrupt without actual seizure, bears no analogy to this case. For there is a wide distinction between questions of property between one subject and another, and questions arising on the law of attainder between the Crown and a subject. And I shall never agree in extending the same rule of construction, which obtains in the former instance, to the latter case. It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country from confiscations at home, would not be protected against the designs of artful men who could gain possession of it by any means.

[735] Grose, J.—I continue of the same opinion, which I entertained in the case of *Dudley* v. *Folliott;* and I most perfectly concur with the Court on this occasion. It has been correctly stated by my brother Buller, that the penal laws of one country cannot affect the laws and rights of citizens of another. Then if we were to determine that the plaintiff should not recover on this bond, we must say that the treaty of independence was retrospective, and that it had the effect of declaring that the property of the subjects of America resident in this country was forfeited by an Act, which at the time it passed was considered as mere waste paper, or, if it were of any avail, was an Act of Treason. It has been objected against the plaintiff's recovering here that the defendant will not recover in America against the co-obligor, because the States of America will pay no regard to our judgments; and yet the argument is that we must pay a deference to the acts of those persons, whom we must consider to have been in a state of rebellion at the time when they were passed. Now if it be true that the States of America will not take notice of the judgments given in our Courts of Law, we should be doing great injustice to the present plaintiff to say that we must consider ourselves bound by their Acts of Confiscation.

Judgment affirmed.

THE KING *against* T. STOBBS. Saturday, June 12th, 1790. An indictment will not lie against an officer of the Palace Court for arresting a person not of the King's household, within the King's palace, against whom a writ has issued out of that

(*a*) Cro. Car. 427. (*b*) 1 and 2 P. & M. c. 3. (*c*) Cro. Car. 460.