

1881 think the division is where my Brother Lindley has pointed out.
 DYSON The by-law is, in point of fact, two by-laws put together, each of
 v. which is bad, and each of which appears to be in contravention of
 LONDON AND the general law.
 NORTH
 WESTERN
 RAILWAY CO.

Judgment for the appellant.

Solicitor for appellant: *J. W. Sykes.*

Solicitor for respondents: *R. F. Roberts.*

A. P. S.

March 31.

[IN THE COURT OF APPEAL.]

CLARKE v. BRADLAUGH.

Parliament—Oath of Allegiance—Claim to affirm—Parliamentary Oaths Act, 1866 (29 Vict. c. 19)—Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72)—Penalty—Action by Common Informer—Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68)—Evidence Amendment Act, 1870 (33 & 34 Vict. c. 49).

The defendant was sued under the Parliamentary Oaths Act, 1866, for a penalty for sitting and voting in the House of Commons without having made and subscribed the oath appointed by that Act, as amended by the Promissory Oaths Act, 1868, to be taken by members. Sect. 4 of the Act of 1866 provides that "Quakers and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath" may, instead of taking and subscribing the oath, make an affirmation in the form given by the Act. The defendant pleaded that he was a person who by reason of the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, was by law permitted to make a solemn affirmation, instead of taking an oath, because an oath would have no binding effect on his conscience, and that he came within the exemption of the Parliamentary Oaths Act, 1866, and that he had duly made an affirmation in conformity with that Act before sitting and voting. On demurrer:—

Held (by the Court of Appeal, Bramwell, Baggallay, and Lush, L.JJ., affirming the judgment of Mathew, J.), that s. 4 of the Parliamentary Oaths Act, 1866, exempted only persons having a general right to affirm on all occasions on which otherwise they would take an oath, and that the defence was therefore bad, as the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, applied only to persons called to give evidence as witnesses.

The plaintiff replied that the defendant was a person who, by want of religious belief, was not entitled by the Parliamentary Oaths Act, 1866, or the Promissory Oaths Act, 1868, to make and subscribe a solemn affirmation. On demurrer:—

Held (by Mathew, J.), that the reply was bad, as the statute contains no

proviso that none but persons of religious belief were or could be entitled to the benefit of the exemption in s. 4 from taking the oath.

A penalty incurred under the Parliamentary Oaths Act, 1866, may be recovered by a common informer, per the Court of Appeal (Bramwell, Baggallay, and Lush, L.JJ.)

Where there are cross appeals on cross demurrers before the Court of Appeal, and the burden of proof lies on the defendant, so that if he fails in his appeal the cross appeal becomes immaterial, the defendant will be entitled to begin.

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CROSS-DEMURRERS to a statement of defence, and a reply.

The pleadings, so far as material, were as follows:—

Statement of claim.

3. The defendant, on the 2nd of July, 1880, sat and voted in the House of Commons after the speaker had been chosen, without having made and subscribed the oath appointed to be taken by members of the House of Commons, according to the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868. (1)

The plaintiff claimed 500*l*.

Statement of defence.

(1) By the preamble to the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), it is declared to be expedient that one uniform oath should be taken by members of both Houses of Parliament. The 1st section gave a form of oath which was altered by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). Sect. 3 prescribed the time and manner of taking the oath. By s. 4 "every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the form of the oath hereby appointed, substituting the words 'solemnly, sincerely, and truly declare and affirm,' for the word 'swear,' and omitting the words 'so help me God;' and the making and subscribing such affirmation, with such substitution as aforesaid

by a person hereby authorized to make and subscribe the same, shall have the same effect as the making and subscribing by other persons of the oath hereby appointed." By s. 5: "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of 500*l*., to be recovered by action in one of her Majesty's superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

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1. That before the defendant sat and voted in the House of Commons, he made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

2. Further, as alternative matters of defence, that at the time of the committing of the alleged offence in the statement of claim mentioned, the defendant was a person who, when called to give evidence in any court of justice, would object to take an oath, and upon whose conscience an oath, if taken, would have no binding effect, so as to be entitled and permitted to make a promise or declaration on the presiding judge being satisfied that the taking of an oath would have no binding effect, as aforesaid. Before sitting and voting in the House of Commons the defendant made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, and the same was received by the clerk at the table of the House, as the officer duly appointed and authorized to administer oaths to witnesses and to elected members of the House.

3. The defendant, before taking his seat in the House, was required to take the oath prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, and on being so required objected to take the same. The House and the clerk at the table of the House being satisfied that the taking of an oath would have no binding effect on the conscience of the defendant, allowed and permitted him to make an affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

4. Before the defendant took his seat in the House he claimed at the table of the House to make an affirmation or declaration, instead of the oath prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, founding his claim upon the terms of the Act 29 Vict. c. 19, and the Evidence Amendment Acts of 1869 and 1870 (1), and stating that

(1) By the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68, s. 4): "If any person called to give evidence in any court of justice, whether in a civil or criminal pro-

ceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no bind-

he had been permitted to affirm in courts of justice by virtue of the Evidence Amendment Acts; and thereupon it was, by the House, referred to a Select Committee to consider and report their opinion whether persons entitled under the provisions of the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870, to make a solemn declaration instead of an oath in courts of justice, might be permitted to make an affirmation or declaration instead of an oath in the House, in pursuance of the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868.

5. The Committee duly reported, and their report was in the words and figures following:—

“That in the opinion of this Committee persons entitled under the provisions of the Evidence Amendment Act, 1869, and the Evidence Amendment Act, 1870, to make a solemn declaration instead of an oath in courts of justice, can not be permitted to make an affirmation or declaration instead of an oath in the House of Commons in pursuance of the Acts 29 Vict. c. 19, and 31 & 32 Vict. c. 72.”

6. After the making of the report the defendant again presented himself at the table of the House for the purpose of taking the oath prescribed by the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868, when objection was made to his taking the oath. Thereupon it was by the House referred to a Select Committee to inquire into and consider the facts and circumstances under which the defendant claimed to have the oath administered to him in the House, and also as to the law applic-

ing effect on his conscience, make the following promise and declaration: ‘I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth;’ and any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath.”

By the Evidence Amendment Act, 1870 (33 & 34 Vict. c. 49), “The words ‘court of justice’ and the words ‘presiding judge’ in s. 4 of the said Evidence Further Amendment Act, 1869, shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence.”

These Acts do not extend to Scotland.

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able to such claim under such circumstances, and as to the right and jurisdiction of the House to refuse to allow the form of the oath to be administered to him, and to report thereon to the House, together with their opinion thereon.

Paragraph 7 set out the report of the Committee on the 16th of June, 1880, the effect of which was to recommend that the defendant should not be allowed to take the oath, but that, as it appeared that if a member should make and subscribe the affirmation in place of taking and subscribing the oath, it would be possible to test by action his legal right to make such an affirmation, the Committee advised that the defendant should not be prevented from making and subscribing the affirmation should he again seek to do so. Paragraph 8 set out a resolution of the House of the 22nd of June, 1880, that the defendant should not be permitted to take the oath or make the affirmation.

10. On the 2nd of July, 1880, it was resolved by the House as follows :—

“That every person returned as a member of this House, who may claim to be a person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, shall henceforth (notwithstanding so much of the resolution adopted by this House on the 22nd day of June last as relates to affirmation) be permitted without question to make and subscribe a solemn affirmation in the form subscribed by the Promissory Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868, subject to any liability by statute.”

12. After the House had so resolved as aforesaid, the defendant again presented himself at the table of the House and claimed to be a person for the time being by law permitted to make a solemn affirmation instead of taking an oath, and thereupon the defendant duly made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as altered by the Promissory Oaths Act, 1868.

13. After the passing of the said resolutions, and after the making and subscription by the defendant of a solemn affirmation as hereinbefore mentioned, and not until then the defendant sat and voted in the House of Commons as mentioned in the statement of claim.

Reply. 1. The plaintiff, as to the first paragraph of the statement of defence, admits that the defendant sat and voted in the House of Commons and made and subscribed a solemn affirmation as in the first paragraph of the defendant's statement of defence alleged, and says that he sat and voted as aforesaid subject to any liability by statute for so sitting and voting in the House of Commons, and, further, that the defendant was a person who, by want of religious belief, was not entitled to make and subscribe a solemn affirmation by the Parliamentary Oaths Act of 1866, as altered by the Promissory Oaths Act, 1868, or by any other statute in that behalf.

The plaintiff demurred to the second and following paragraphs of the statement of defence, and the defendant demurred to the first paragraph of the reply.

1881. March 7. *Sir H. Giffard, Q.C. (Kydd, with him),* appeared for the plaintiff.

The defendant appeared in person.

Cur. adv. vult.

1881. March 11. MATHEW, J., delivered judgment, after stating the effect of the pleadings and demurrers above set out, as follows: The case for the plaintiff was shortly this. The defendant by the Parliamentary Oaths Act, 1866, was bound to subscribe the oath thereby appointed, and was not entitled to affirm: and the defendant was challenged to point out any later enactment which enabled him to substitute an affirmation for the oath. The defendant at once admitted that the Oaths Act of 1866, would not have entitled him to make an affirmation, but in an argument which in vigour and clearness left nothing to be desired, contended that the legislation relating to oaths which followed the Act of 1866, relieved him from the disability imposed by that statute.

The defendant's contention on this point may be stated thus:—

The Act of 1866, contained in the 4th section an exemption in favour of Quakers and any other persons "for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." When the Act passed, the defendant was not a person permitted by law to make an affirmation instead of

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taking an oath, but that privilege was acquired by virtue of the statutes 32 & 33 Vict. c. 68, and 33 & 34 Vict. c. 49. These enactments, it was said, created a new class of persons of whom the defendant was one (viz., persons permitted to affirm because an oath would have no binding effect on the conscience) who were relieved of the obligation to take an oath. It followed that these persons were intended by the legislature to enjoy the exemption in s. 4 of the Act of 1866. In other words, as the defendant contended, the object of the Acts of 1869 and 1870 was to amend the Act of 1866, and to extend the exemption in s. 4 of that statute to the class of persons represented by the defendant: and it was urged that in order to give effect to this supposed intention of parliament the Acts must be read and construed together as if they were one Act.

In order to decide whether this contention of the defendant is well founded in point of law, it becomes necessary to examine the provisions of the Acts of 1869 and 1870, which are respectively entitled the Evidence Further Amendment Act, 1869, and the Evidence Amendment Act, 1870.

In the first place, the statutes contain no express provision that the persons thereby entitled to affirm are also to be entitled to affirm under the Act of 1866; and it seems difficult to understand, if the legislature intended to make a change in the law in an important matter which affected both Houses of Parliament, that this intention should not be expressed in clear and decisive language. There is nothing of this in the statutes; and nothing to shew an intention that they should have any other operation than that described in the Acts themselves. What their object was is well explained in the preamble to the Act of 1869, which is as follows:—

“Whereas the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery.”

This being the preamble, the statute proceeds to enact that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person,

if the presiding judge is satisfied that the taking of an oath would have no binding effect upon his conscience, shall make a promise and declaration to tell the truth, and shall be liable, for false evidence, to be tried and convicted for perjury.

It seems to me perfectly clear that the Acts were intended to remove restrictions upon the admissibility of witnesses, with a view of promoting the discovery of the truth, and that they had no other object.

The Acts do not, as was contended by the defendant, create a class of persons for the time being by law permitted to make an affirmation instead of an oath. They only provide that a person may be enabled, or, as it would seem required, to give evidence in a court of justice, when the presiding judge has satisfied himself that the person is one upon whose conscience an oath would have no binding effect.

Again, the Acts have an operation less general than that of the Act of 1866, inasmuch as they do not apply to Scotland; and this result would seem to follow from the attempt to read the Acts together that the representatives of Scotch constituencies, objecting to take an oath for the reasons given by the defendant, would remain subject to a disability from which persons of the same class in other parts of the United Kingdom had been relieved.

I see no grounds whatever for supposing that the legislature intended that the Acts of 1869 and 1870 should qualify the Act of 1866, or that all these statutes should be read together as if they were one Act. It seems to me to be only necessary to place the enactments side by side, to see that they have no such relation to each other as was asserted by the defendant; and that it is impossible to attribute to the legislature the intention to blend the Acts together in one scheme of legislation.

Many difficulties in which the defendant's contention involves him were pointed out in the course of the case, and none of those difficulties seemed to me to have been satisfactorily met. Thus, when the improbability was pointed out that the legislature would attempt to deal "uno ictu" with matter of civil procedure, and matter affecting the constitution, the defendant attempted to shew that the privilege of sitting in either House of Parliament was analogous to what he called the privilege of giving evidence

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in a court of justice. The argument only served to indicate the difficulty of the defendant's position. No one who was free to choose his words, and had a preference for accuracy of expression, would speak of the discharge of the all-important and most anxious duty of a witness as "a privilege." Again, when it was shewn that no person was permitted to make an affirmation under the Act of 1869, unless there had been an inquiry by the presiding judge which the House of Commons had no means of making, the defendant had no better answer to offer than that the words "presiding judge" in the Act of 1869 must be taken to include, either the House of Commons or any duly appointed clerk of the House of Commons. But to adopt such a mode of construing Acts of Parliament would not be to interpret but to make them. The contention was equally hopeless that the investigation which the judge was bound to make under the Evidence Act, must be taken to have been made by the House of Commons with a result in the defendant's favour, by reason of the order of the 2nd of July, 1880, and of his being permitted to make an affirmation under that order. It seems very clear that the House of Commons declined to pronounce any opinion upon the question whether the defendant was entitled to affirm in lieu of taking the oath.

I have come to the conclusion that the defendant has failed to establish that the effect of the Evidence Acts was to relieve him of the disability imposed by the Parliamentary Oaths Act of 1866, and that the demurrer to the statement of defence must therefore be allowed.

There remains for consideration the question whether the reply is bad on demurrer. The matter of the reply does not appear to be relevant to what turned out to be the defendant's contention. But as I understand the plaintiff suggests by this pleading that the Parliamentary Oaths Act, 1866, must be construed as if it contained a proviso that none but persons of religious belief were or could be entitled to the benefit of the enactment in s. 4 of that statute. I have considered with the attention it deserved, the very earnest argument addressed to me upon this point by Sir Hardinge Giffard, but I am unable to adopt his contention. There seems to be no escape in a court of law from the short answer of the defendant, that the statute contained no such words.

It was said that I ought to hold that the plaintiff's reply set forth what Parliament must have intended. But I should be reluctant to attribute to the legislature the intention to make important rights dependent upon the solution of the question, whether or not a particular individual could be accurately described, as a "person of religious belief." Upon the whole record judgment must be entered for the plaintiff, the defendant being entitled to such costs as may be attributable to the subordinate issue upon which he has been successful.

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The defendant appealed from the judgment upon the demurrer to the statement of defence, and the plaintiff appealed from the judgment upon the demurrer to the reply.

March 30. *The defendant in person.* Upon these cross-demurrers the defendant is entitled to begin. In the High Court it has been determined that upon the whole record the plaintiff is entitled to judgment, and therefore the burden lies upon the defendant.

Sir H. Giffard, Q.C., for the plaintiff. The plaintiff is entitled to begin upon cross-demurrers: this was the practice in the Court of Queen's Bench before the Supreme Court of Judicature Acts: *Churchward v. The Queen*. (1)

[PER CURIAM. The defendant is entitled to begin. It is immaterial to him what becomes of the demurrer to the reply, unless he can shew that the statement of defence is good.]

The defendant in person. This action is brought under the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5, but the plaintiff sues as a common informer, and that statute does not allow a common informer to recover the penalty. The plaintiff may rely upon *Miller v. Salomons* (2), but in that case express power had been given to bring the action by a statute since repealed, 1 Geo. 1, st. 2, c. 13, s. 17. The Crown alone can recover the penalty, no person being empowered to sue for it:

(1) Law Rep. 1 Q. B. 173, at p. 183.

(2) 7 Ex. 475; in Ex. Ch. sub. nom. *Salomons v. Miller*, 8 Ex. 778.

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2 Tomline's Law Dictionary, title Penal Laws, citing Rastell's Entries 433, and 2 Hawkins P. C., c. 26, s. 17. Where penalties are created by statute, they are made recoverable in one of four ways: first, by the Queen alone; secondly, by the Queen and a common informer; thirdly, by a common informer alone; fourthly, by the party aggrieved. In the present case the penalty is not given to the common informer, and therefore the Crown alone can recover it. The Crown cannot grant to a subject the right to sue for a penalty due to itself. This objection was not urged at the hearing before Mathew, J.; but it is now relied upon as an answer to the action.

As to the construction of the Parliamentary Oaths Act, 1866, the words of s. 4 which allow an affirmation to be made are quite general; they enact that any person entitled by law to make a solemn affirmation or declaration may take his seat in the House of Commons after making the affirmation therein prescribed. By the Evidence Further Amendment Act, 1869, s. 4, the defendant is allowed to make an affirmation when he is called as a witness; and it is contended that whenever a person is qualified to make an affirmation as a witness he may make an affirmation in parliament, and thereupon take his seat as a member of the legislature. As to the argument that the Evidence Further Amendment Act, 1869, does not extend to Scotland, it is to be observed that persons residing in Scotland are entitled to the benefit of laws relating to acts done in England, *Reg. v. Brackenridge* (1); and hence members for Scotch constituencies may avail themselves of the provisions of the Evidence Further Amendment Act, 1869.

[BRAMWELL, L.J. *Reg. v. Brackenridge* (1) is a perfectly plain case, but it does not apply here.]

Sir H. Giffard, Q.C. (Kydd, with him), for the plaintiff. The defendant is not a person who is permitted to make an affirmation within the meaning of the Parliamentary Oaths Act, 1866. He may make a declaration under the Evidence Further Amendment Act, 1869, s. 4, but no statute exempts him on all occasions from taking an oath. He is not in the same position as a Quaker, a Moravian, or a Separatist.

The plaintiff can sue as a common informer; if the argument

(1) Law Rep. 1 C. C. 133.

for the defendant were to prevail the penalty could not be recovered by any one.

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March 31. The following judgments were delivered :—

BRAMWELL, L.J. The first question in this case arises on the statement of claim, and is whether the plaintiff as a common informer can maintain an action for this penalty claimed by him. It is quite certain that where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. Authorities have been cited in support of the proposition, but I may as well call attention also to what is said in Com. Dig. Forfeiture (C), namely, "In all cases where a penalty or forfeiture is given by Act of Parliament without saying to whom it shall be, or a limitation for a recompense for the wrong to the party, it belongs to the king." In this case it is not enacted in express words to whom the penalty shall go, and therefore it may be said that unless it can be shewn that by implication the penalty is given to the party who will sue for it, it belongs to the Crown, and the Crown alone can maintain a suit for it. It is argued, however, on the part of the plaintiff, that it is enacted by implication that the penalty shall go to the common informer, and that argument is founded on the words of the Parliamentary Oaths Act, 1866. "He shall for every such offence be subject to a penalty of 500*l.*, to be recovered by action in one of her Majesty's superior Courts at Westminster." It is contended that that clause shews that a common informer may sue for the penalty, because her Majesty does not sue by action. In a note in Com. Dig. Forfeiture (C) to the passage which I have just read, it is said, "Where the statute does not express how it shall be recovered, it must be sued for in the Exchequer;" and for that *Rex. v. Malland* (1) is cited. The marginal note of that case is, "Where there is no appropriation of a statute penalty, it is a debt to the Crown and suable for in a Court of Revenue, and not by indictment." It is a very short

(1) 2 Str. 828.

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note, but I suppose the reporter shewed, by the marginal note, what his appreciation of the decision was, and in the body of the case it is said, "Therefore, the Court held that the 20s. per thousand was in the nature of a debt to the Crown, where the unappropriated penalty would go, and was suable for in a court of revenue and not by indictment." On the principle established by these authorities, it is argued that as this penalty may be recovered by action in any one of her Majesty's superior Courts at Westminster, it is not the Crown who is to sue for the penalty, but the common informer including the plaintiff. By that reasoning I own I am convinced, and therefore, I think this action maintainable by the plaintiff. I should have had some doubts if the words had been merely "to be recovered by action," because although "action" commonly means a proceeding commenced by writ, yet I am not sure that it would not be reasonable (if it could be otherwise inferred that the penalty was intended to go to the Crown) to hold that the word "action" is a sort of *nomen generale* which includes every sort of legal proceeding. The defendant cited to us 31 Eliz. c. 5, s. 5, in which it was said that actions, suits, informations, and indictments by the Crown for a penalty, must be brought within two years: he thus shewed that the word "action" had been used in relation to some proceeding by the Crown for the purpose of recovering a penalty. I am not very much struck by that argument presented to us by the defendant, because we know very well that in drawing Acts of Parliament a great many words are used to comprehend not a usual, but a possible case, which may have escaped the attention of the draftsman, and therefore, it may have been a prudent thing when that Act of Parliament was drawn some 300 years ago, for the draftsman to use a variety of words, "suit, action, information, and indictment." Still if the words had been merely "to be recovered by action," perhaps from the argument afforded by that Act of Parliament, and perhaps from the general consideration which I have mentioned, namely, that an action is a *nomen generale*, I should have had some doubt whether we should be justified in coming to the conclusion at which we have arrived. I am only expressing my own opinion now, although I know it to be that of my brethren. But in addition to that there are these

other words, "in one of her Majesty's superior Courts at Westminster." Now, unless we suppose that it was intended to confer on the Crown a new exceptional and anomalous power, that is to say, of suing for a penalty due to her Majesty in some court other than a court of revenue, it is manifest that the enactment cannot apply to the Crown. I cannot think that it ever was intended that the Crown should be enabled to maintain any proceeding for this debt, for instance, in the Court of Common Pleas, which was in existence at the time this Act passed; and if it was not, it follows that this provision cannot apply to the Crown, and therefore must apply to the common informer, otherwise the result would be that the legislature has created a penalty which is not recoverable by anybody. It was manifestly intended that the penalty should be recovered by somebody, and therefore, one may put that alternative out of the question. It is manifest from what I have said that the action which may be brought in one of the superior Courts at Westminster may be brought by any one of the public, that is to say, by a person called usually a common informer.

The words I have cited apply to penalties incurred by peers, but afterwards, in speaking of the Commons it is said, that a member of the House of Commons who commits a similar offence is to be subject to a "like penalty." I should say that a "like penalty" in ordinary cases would mean one of the same amount, that is to say, a peer should be liable to a penalty of 500*l.*, and a commoner should be liable to a penalty of 500*l.* It may be said, if that is so, the result will be that the common informer may sue for the penalty incurred by the peer, but that inasmuch as there is no provision that he may sue for the penalty incurred by the commoner, it must be sued for by the Crown. The defendant admits that this construction cannot prevail. He said that it must be admitted that what is true of the penalty incurred by the peer, is true also of the penalty incurred by the commoner. Of course, we are not bound by that admission. We should not be bound by it if it were made by a counsel learned in the law; we should be bound to give our own judgment on the matter, and, therefore, I do not rely on his admission, but I think he was right in it. It is hardly possible that it was intended that the penalty incurred by peers should go to the common informer, and that

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the penalty incurred by a commoner should go to the Crown. Therefore, although I admit it somewhat stretches the words to construe "a like penalty," as I am about to do, I think the words in the statute "a like penalty" mean a penalty with the same incidents and conditions attached to it as are attached to the penalty incurred by the peer. It seems to me therefore, that the penalty incurred by a member of the House of Commons sitting and voting without having been duly sworn under the Parliamentary Oaths Act, 1866, is a penalty which may be sued for by a common informer, but I have not a confident opinion about this question. I think a great deal may be said in support of such doubts as I have indicated in the course of the observations which I have had to make.

I come to the other point, and as to that I think it is about as plain a case as ever came before a court of justice. I think it perfectly plain that the defendant was not entitled to affirm or to declare by reason of the Evidence Further Amendment Act, 1869. We ought not to accept the admission of Sir Hardinge Giffard unless we agreed with it, but it is admitted, and I think rightly admitted by him, that the words of the Parliamentary Oaths Act, 1866, s. 4, contemplate the coming into existence of a class of persons other than those particularly mentioned as being then in existence—"Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." That obviously means every person for the time being, that is to say, "now or hereafter." Of course, it includes those persons who at the time of the passing of this Act were within that description, that is to say, Moravians and Separatists. The statute contemplates that at some future time another class of persons may be permitted to make a solemn affirmation or declaration instead of taking an oath. Then the question is reduced to this, is the defendant one of a class of persons who are now permitted, or were at the time when this question arose in the House of Commons permitted, to make a solemn affirmation or declaration instead of taking an oath? To my mind he clearly was not. He contends that he was, because by force of the Evidence Further Amendment Act, 1869, s. 4, the defendant is such

a person as is described in that enactment. But in my opinion the class of persons who are there described are not persons who are permitted to make a solemn affirmation or declaration instead of taking an oath within the meaning of the Parliamentary Oaths Act, 1866, because it is manifest that this class of persons are those who are, as Quakers are and as others are, permitted, not upon the particular occasion of their being called as witnesses but, on all occasions when they would otherwise have to take an oath, to make a solemn affirmation or declaration. The defendant is not such a person as that. The class of persons to whom he belongs are not persons who are permitted on all occasions whenever they would otherwise have to take an oath, to make a solemn declaration or affirmation. It is only necessary to give one example of it. It is admitted that the class of persons mentioned in s. 4 of the Evidence Further Amendment Act, 1869, would not be permitted to serve on a jury on the condition merely of making a solemn affirmation or declaration instead of taking an oath. One may say generally that in every instance in which an oath would have to be taken, a Quaker is permitted to make a solemn declaration or affirmation instead of taking that Oath, but there are many instances in which the class of persons mentioned in s. 4 of the Evidence Further Amendment Act, 1869, must still take the oath to qualify themselves, and are not permitted to make a declaration. Indeed one may say that the only instance in which they are permitted to make an affirmation or declaration is where they are called upon to give evidence in any court of justice. Therefore it seems to me, and I cannot have a doubt about it, that the Parliamentary Oaths Act, 1866, contemplates the present existence, and the coming into existence of classes of persons who on all occasions are permitted to make a solemn declaration or affirmation instead of taking an oath, and that the Evidence Further Amendment Act, 1869, s. 4, has not created such a class of persons. It seems to me therefore, that the Evidence Further Amendment Act, 1869, did not permit the defendant to make that affirmation in lieu of taking the parliamentary oath, and that the making of this affirmation by him was not equivalent to taking an oath, and that he incurred the penalty.

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I will just call attention to that word "permitted." The expression in the Parliamentary Oaths Act, 1866, s. 4, is, "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation." It is manifest that enactment applies to Acts of Parliament which may be said to have been passed in ease and exoneration and for the benefit of the persons to whom they apply, and that the permission has been given to them for the relief of their conscience, in order that they might not be in the dilemma of either losing some civil benefit, or violating their conscience in order to obtain it. But s. 4 of the Evidence Further Amendment Act, 1869, does not use any such word as "permit." It says, "such person shall make the following promise and declaration." I know that the defendant urged upon us—and he presented every argument I think that could be presented, at least, I cannot think of any other—that he is permitted to affirm when he is a witness in his own cause. No doubt he is permitted under those circumstances. I should say, if it so happened that he wanted to be a witness in his own cause, he would be permitted to do it, but the main object of the enactment is to ensure that the evidence of such a person shall not be shut out, because he cannot take the oath, and it is manifest that under this section he would be compellable to make a declaration.

I am not struck with the difficulty raised by the plaintiff that it is necessary that it should appear to the satisfaction of the judge that the taking of an oath would have no binding effect on the conscience of the person called to give evidence. But I have felt some difficulty as to this, that the Evidence Further Amendment Act, 1869, does not apply to Scotland. I must say I should have doubted whether that would not of itself have afforded a strong argument for the purpose of shewing that the Act cannot have the interpretation that the defendant contends for, because it seems to me extremely difficult to suppose that the Imperial legislature, which has made a law affecting English and Irish tribunals, but not Scotch tribunals, nevertheless has incidentally passed an enactment, with respect to the English law of evidence and English tribunals, which affects the Imperial legislature, even as to the case of a member representing a Scotch

constituency. But as I have said before, it is needless to go into these matters, because I think the other considerations are too plain.

It seems to me that we must pronounce that the statement of defence demurred to is bad, and that for anything in it the plaintiff is entitled to our judgment.

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BAGGALLAY, L.J. The substantial question involved in the present appeal is, whether at the time when the defendant presented himself at the table of the House of Commons, and made and subscribed a solemn affirmation in the form prescribed by the Parliamentary Oaths Act, 1866, as modified by the Pro-missory Oaths Act, 1868, he was a person for the time being permitted by law to make an affirmation instead of taking an oath, within the intent and meaning of the 4th section of the first mentioned Act.

The defendant, in his very able argument, has insisted that, according to the true construction of the Act, the privilege thereby conferred of making and subscribing a parliamentary affirmation instead of taking and subscribing a parliamentary oath, is not limited to such persons as are permitted by law to affirm instead of taking an oath for all purposes as to which, but for such permission, an oath would be required, but is extended to all persons who are permitted to affirm instead of taking an oath, for any one or more, though not for all purposes.

The circumstances of the defendant's case, as put by himself, well illustrate the proposition which he has so affirmed. He has contended that from and after the passing of the Evidence Further Amendment Act, 1869, he was a person permitted by law to make an affirmation, instead of taking an oath, for the one purpose specified in the Act, namely, as a preliminary to giving evidence in a court of justice in a criminal or civil proceeding; though for other purposes, as, for instance, as a preliminary to serving as a jurymen, he is not a person permitted by law to affirm instead of taking an oath. If the defendant's contention as to the construction of the 4th section of the Act of 1866 were well founded, there would be great force in his argument that, having become entitled to affirm instead of taking an oath when called upon to

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give evidence in a court of justice, he was entitled, under the provisions of that section, to make the parliamentary affirmation instead of taking the parliamentary oath.

But I am unable to adopt the construction of the section for which he has contended. It appears to me that, according to the reasonable meaning of the language used, the qualification for making the parliamentary affirmation is a liberty permitted by law for all purposes and upon all occasions for and upon which an oath would otherwise be required to affirm, instead of taking an oath; the section purports to deal with two classes of persons, the first consisting of every person of the persuasion of the people called Quakers, and the second of every other person for the time being by law permitted to make an affirmation instead of taking an oath.

Now the former class were, at the time when the Act passed, permitted to affirm instead of taking an oath for all purposes whatsoever. It appears to me to be the reasonable construction of the section that persons in the second class, who at the time of the passing of the Act were not permitted by law to affirm, but who might for the time being (that is, at some future time) be so permitted, should be permitted to the same extent and for the like purposes, as those in the first class were then permitted, i.e., for all purposes.

The contention of the defendant as to the construction of the section in question being, in my opinion, unfounded, it follows that not being a person authorized by that section to make and subscribe a parliamentary affirmation instead of taking and subscribing a parliamentary oath, he was bound, before sitting and voting in the House of Commons, to take and subscribe the parliamentary oath prescribed by law, and that having sat and voted without taking and subscribing the oath, he has incurred the penalty, to recover which the present action has been brought.

Upon the question whether the present plaintiff was entitled to sue for the penalty, I have nothing to add to what has been said by Bramwell, L.J.; the reasons he has assigned for holding that the present plaintiff is entitled to sue, are to my mind entirely satisfactory.

Various other questions were raised and discussed in the course

of the arguments, and it might have been important to consider and dispose of such questions, had the Court been of opinion that the defendant's contention as to the construction of the Act of 1866 was well founded; but in the view which I have taken of that question, it appears to me immaterial to consider the other questions, which have been raised and discussed during the arguments.

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LUSH, L.J. The first question to be determined is whether the plaintiff is a person capable of suing for this penalty, and that depends upon the construction of the 5th section of the Parliamentary Oaths Act, 1866. It is admitted, and I think rightly admitted, by the defendant—though I agree that it would not be competent for us to take an admission made by the parties on the construction of the statute unless our own judgment coincided with it—that the words “to be recovered by action” must be imported into the latter clause of the section, because when it says “shall be subject to a like penalty” it means that the penalty shall be recovered in the same way and subject to the same incidents as the penalty which has been by the previous clause inflicted upon an unqualified peer. Therefore the second clause would stand thus, “If any member of the House of Commons votes in the House or sits in the House during any debate without having made and subscribed the oath, he shall be subject to a penalty for every such offence of 500*l.* to be recovered by action in one of her Majesty's superior Courts at Westminster.” Now, it does not in terms say who shall have that penalty or who shall sue for it, and if the words had simply been “by action,” I am inclined to think at present it would have belonged to the Crown alone, because the word “action” is a generic term and may be used as a general term. It is used in that sense in one of the Acts of Parliament which have been cited before us, in which moreover it was a redundant expression. But it is evident that that is not the sense in which the word “action” is here used. It is used here in the popular sense of a proceeding commenced by writ; because it is to be “in one of her Majesty's superior Courts at Westminster,” which means of course in either of them. Now the sovereign could only sue by information in the Court of Ex-

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chequer. The sovereign could not have sued in the Court of Queen's Bench or the Court of Common Pleas for this penalty. Therefore, when the statute gives the right of suit by action in either of the Courts, it of necessity to my mind implies that it means an action to be brought by any person capable of suing in any of the three courts which he might select. Therefore, by what is called necessary implication, the right of suit is given to anybody who may sue for the same. In that sense it has exactly the same meaning as it had in the statute which was in force before, but which had in addition to the words "by action in a superior Court" the words "to be sued for by any person who may sue for the same." It has, in my view, exactly the same sense, because the option is given to sue in either of the courts, and that option can only be exercised by a subject and not by her Majesty. I therefore come to the conclusion that the plaintiff is a person capable of suing for this penalty.

That leads me to the material question which was brought here for our decision, namely, whether the defendant is a person within the 4th section who is permitted by law to make a solemn affirmation. Now, in order to construe rightly any statute, one must have before one's mind the state of the law at the time the statute was passed. By several statutes beginning with the early part of the reign of William IV. and ending in the early part of the present reign, members of certain religious bodies whose tenets were known to prohibit the taking of an oath as being contrary to their view of God's word, Quakers for example, were exempted from taking oaths. The first statute passed (3 & 4 Wm. 4, c. 49) enabled Quakers and Moravians to make a solemn affirmation in place of taking an oath in all places and for all purposes whatsoever. That was an immunity given to a particular class of religious persons who were to be exempted throughout the United Kingdom upon all occasions from taking an oath. Under no circumstances after that Act was passed could a Quaker or Moravian be called upon to take an oath. A subsequent statute (3 & 4 Wm. 4, c. 82) extended the same privilege to a class of persons called Separatists; and a still later statute (1 & 2 Vict. c. 77) extended the privilege to persons who had belonged to the society of Quakers or Moravians, but who had seceded from these bodies, still retaining

conscientious objection to take an oath. So that at the time this Act was passed four classes of persons were permitted on all occasions and at all times to dispense with an oath and make an affirmation in lieu of it; Quakers, Moravians, Separatists, and those who had been Quakers or Moravians, and who had seceded from them, but still retained their conscientious objection to an oath. Now it must not be forgotten that at that time the Common Law Procedure Act, 1854, was in force, which enacted by s. 20 that "if any person called as a witness or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn to make his or her solemn affirmation, which solemn affirmation or declaration shall be of the same force and effect as if such person had taken an oath in the usual form." Therefore, besides the classes of persons to whom I have referred who were privileged to adopt an affirmation in all cases instead of an oath, a person called as a witness in an English court—for the statute was confined to England—no matter what his religious creed might be, if he satisfied the judge that he had a conscientious objection to take an oath, was permitted to give his evidence upon the sanction of an affirmation only. That Act was in force at the time that the Parliamentary Oaths Act, 1866, was passed.

Now if it had been the intention of the legislature to give the same privileges to a member returned to the House of Commons, and who came to the table to be sworn, which that same member would have had if he had been called in the Court of Queen's Bench as a witness, nothing would have been easier than to say so. One would have expected the legislature to adopt the words or some equivalent of the 20th section of the Common Law Procedure Act, 1854, and to say, "If any person returned to the House of Commons shall satisfy the Speaker or the House that he has a conscientious objection to the taking of an oath, the Speaker or House upon being satisfied of the sincerity of the objection, shall permit such person to make a solemn affirmation." That would have been the obvious course which the legislature

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would have adopted if it had been intended to confer a similar immunity. There would be no need to refer to Quakers, because that would have embraced Quakers and everybody else who had a conscientious objection to take an oath. In that state of the law what the legislature has said is this: "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of making and subscribing the oath hereby appointed, make and subscribe a solemn affirmation in the following form." Therefore, clearly on the face of it, the legislature did not mean to adopt for the purposes of parliamentary oaths the provision of the Common Law Procedure Act. According to every canon of interpretation, and according to reason, the "every other person" spoken of here must mean every other person in like position to the Quaker, or why should the Quakers be specified? I feel no doubt whatever that that is the true construction of that section, and that parliament did not intend to allow any person whatsoever who alleged before the House that he had a conscientious objection to take an oath to be permitted to make an affirmation. It is true that at that time the statute under which the defendant claims had not passed. That passed at a later period, and that extended the privilege or immunity far beyond the Common Law Procedure Act, 1854. The provisions of the Common Law Procedure Act, 1854, had, by a subsequent statute (30 & 31 Vict. c. 35, s. 8), been applied to criminal cases, because the Common Law Procedure Act applied only to civil cases. But the Evidence Further Amendment Act, 1869, under which the defendant claims, passed at a still later period, and that gives the right, or privilege, or whatever it may be called, to make an affirmation, not only to persons who have conscientious objections to take an oath, but to persons who avow that an oath has no binding effect on their conscience. The 4th section of the Parliamentary Oaths Act, 1866, is plain in its terms, which, to my mind, entirely exclude such cases, and are intended to include only those classes of persons who have a perfect immunity at all times and at all places from taking any oath whatsoever.

The defendant contended, in his able argument, that there was

no need of the 4th section if its object was merely to protect Quakers, Moravians, Separatists, and other persons who were already protected by previous Acts of Parliament. I cannot agree with him in that argument. I am of opinion that if that clause had stood alone it would have excluded Quakers, Moravians, Separatists, and others from the qualification to sit in parliament, because the 3rd section prescribes that the oath "appointed shall in every parliament be solemnly and publicly taken" by every member of the House of Commons. Therefore I think it was necessary to put in the saving clause in the 4th section, in order to preserve the immunities which the legislature had on several occasions for years before granted to the particular classes to whom I have referred. I confess I do not entertain a doubt on either the first point or the second. Having fully considered the bearing of all the statutes, I do not entertain the slightest doubt that the only persons who are permitted in the House of Commons to make an affirmation instead of taking an oath are those classes of persons who by previous Acts of Parliament have been permitted on all occasions and at all times throughout the United Kingdom to make an affirmation instead of taking an oath. My judgment therefore is, that the judgment of the Court below upon the demurrer to the statement of defence is right, and ought to be affirmed. (1)

Appeal dismissed.

Solicitor for plaintiff: *W. G. Stuart.*

Solicitors for defendant: *Lewis & Lewis.*

W. P.

(1) April 27. *The defendant in person* applied to the Court of Appeal that the demurrer to the reply might be argued on the ground that at the hearing on the 31st of March judgment had been given only upon the demurrer to the defence, and that the first paragraph to which the reply was pleaded was not demurred to.

THE COURT (Bramwell, Brett, and Cotton, L.JJ.) intimated that the question raised by the first paragraph of the defence had in fact been decided at

the hearing, but they directed the demurrer to be argued.

May 2. *Sir H. Giffard, Q.C. (Kydd, with him)*, for the plaintiff, was not called on.

The defendant in person argued that the first paragraph of the defence was an answer to the action.

THE COURT (Bramwell, Brett, and Cotton, L.JJ.) held that the first paragraph of the defence was no answer to the claim. In order to entitle the

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