SELECT CASES ON CRIMINAL LAW.

PART I.

GENERAL PRINCIPLES OF CRIMINAL LIABILITY.

SECTION I.

THE DISTINCTION BETWEEN CIVIL AND CRIMINAL WRONGS.

[*Damnum sine injuria.*]

ANONYMOUS.

KING'S BENCH. 1695. 3 SALKELD 187.

An indictment for scolding was quashed, because it was not said to have been *ad magnam perturbationem pacis.*

[*Breach of Contract.*]

REGINA *v.* NEHUFF.

QUEEN'S BENCH. 1706. 1 SALKELD 151.

Motion for a certiorari to remove an indictment found at the Old Bailey for a cheat. The defendant had borrowed £600 from a feme covert, and promised to send her some fine cloth and gold dust as a pledge. He sent no gold dust but some coarse cloth worth little or nothing....The Court granted a certiorari; because the fact was not a matter criminal (for it was the prosecutor's fault to repose such a confidence in the defendant), and it was an absurd prosecution.

[*Breach of Contract.*]

REX *v.* WHEATLEY.

KING'S BENCH. 1760. 1 W. BL. 273.

The defendant was indicted for that he, being a common brewer, and intending to defraud one Richard Webb, delivered to him sixteen gallons (and no more) of amber beer for and as eighteen gallons [which latter quantity he had contracted to deliver]; and received 15*s.* for the same. He was convicted.

Morton moved in arrest of judgment. This was not an indictable offence; being merely a breach of civil contract, and not a selling by a false Measure, such as shows a general plan of imposing on the public.

DENNISON, J. ...What is it to the public whether Richard Webb has or has not his eighteen gallons of amber beer?...

Judgment arrested.

[EDITOR'S NOTE. Similarly in *Rex* v. *Bradford* (3 Salkeld 189, A.D. 1697), where the defendant had broken his contract to cure the prosecutor's ulcerated throat, it was held that, as no public interest was concerned, the only remedy was by civil action. Probably all these prosecutors were led to take criminal proceedings by the fact that in these they themselves would be admissible witnesses but not (as the law then stood) in civil proceedings. And in *Reg.* v. *Nehuff* the prosecutrix had the further disability of coverture.]

[*Tort.*]

REGINA *v.* DANIEL.

QUEEN'S BENCH. 1704. 3 SALKELD 191.

The defendant was indicted for enticing an apprentice to depart from his master and absent himself from his service....

HOLT, C. J., held that the seducing an apprentice to absent himself was not indictable, because it doth not affect the public....

[See also REG. *v.* CHEESEMAN, *infra*, p. 85.]

[*Tort committed by many against many.*]

REX *v.* RICHARDS.

KING'S BENCH. 1800. 8 DURNFORD AND EAST 634.

This was an indictment against six defendants for not repairing a

private road constructed by virtue of an Act of Parliament for draining and dividing a certain moor, called King's Sedgemoor, in the county of Somerset....The defendants pleaded not guilty. On the trial at the assizes at Bridgewater, before Grose, J., the jury found a special verdict, in substance as follows:—That the commissioners named in the said Act by their award set out the said private road and drove-way as described in the indictment; that the commissioners directed that it should be for the use of the several owners of the tenements of the nine parishes mentioned in the indictment; and that it should be repaired by the several owners of the tenements in six of those parishes. That the said road was ruinous and out of repair: That the six defendants are severally and respectively owners of certain tenements in the said several six parishes or hamlets....That the defendants had not repaired the said drove-way....That there are five hundred tenements in the said nine parishes, of which the owners are entitled to the use of the said drove-way....And two hundred and fifty owners of tenements in the said six parishes....That from the time of making the said award, all persons willing to pass and repass over the said drove-way, have at their free will and pleasure passed and repassed over the same on foot, and with cattle and carriages: That the said drove-way communicates at both ends with the king's highway....

Praed, for the prosecutor, argued, That this, though a private road, was set out by virtue of a public Act of Parliament, under which the defendants were directed to repair it; that consequently the not repairing was a disobedience to a public statute, and therefore the subject of an indictment. That this non-repair might be considered to a certain degree as concerning the public...because it appeared by the special verdict that there were no less than 250 persons who were liable to the repair of this road, and the difficulty of suing so many persons together was almost insuperable.

BUT THE COURT interposed, and said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported. That the known rule was, that those matters only that concerned the public were the subject of an indictment; and the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the fact that many individuals were liable to repair; or by the fact that many others were entitled to the benefit of it, for each party injured might bring his action against those on whom the duty was thrown. That the circumstance of this road having been set out under a public Act of Parliament,

did not make the non-repair of it an indictable offence; for many public Acts are passed which regulate private rights, but it never was conceived that an indictment lay on that account for an infringement of such rights. That here the Act was passed for a private purpose, that of dividing and allotting the estates of certain individuals. That even if it were true that there was no remedy by action, the consequence would not follow that an indictment could be supported; but, in truth, the parties injured had another legal remedy [i.e. by action].

Judgment for the defendants.

[*Penalty sued for by a private informer.*]

ATCHESON *v.* EVERITT.

KING'S BENCH. 1776. 1 COWP. 382.

This was an action of debt to recover penalties, under the statute 2 Geo. II., c. 24, s. 7, against bribery[1]. Plea, not guilty. Verdict for the plaintiff. On behalf of the defendant, it was moved that there might be a new trial; because a Quaker had been received as a witness upon his affirmation, and it was objected that, this being a *criminal cause*, his evidence ought not to have been received.

LORD MANSFIELD. I wish that, when the Stat. 7 and 8 Wm. III., c. 34, was made, the affirmation of a Quaker had been put on the same footing as an oath, in all cases whatsoever: and I see no reason against it, for the punishment of the breach of it is the same. In this Act, however, there is an exception to their being admitted as witnesses in criminal causes[2]. The question therefore is, What the statute means by the words "criminal causes"?...In cases where an action and an indictment both lie for the same act, as in assault, imprisonment, fraud, etc., a Quaker is an admissible witness in the action, though not on the indictment.

Actions for penalties are, to a variety of purposes, considered civil suits. To be sure, the action in this case is not given only to recover a penalty but is attended with disabilities. Therefore, it partakes much of the nature of a criminal cause. Moreover, the offence itself is not merely by statute, but was indictable at common law.

[1] The bribed elector forfeiting £500 to *any one* who sued.

[2] By 9 Geo. 4, c. 32 this exception was removed.

Morris, for defendant. Till the statute 7 and 8 Wm. III., there was no doubt about not receiving a Quaker's affirmation. But that statute, in compliance with the prejudices of this sect, broke in upon the rule of the common law, partly in favour to them, and partly for the general benefit of the subject. At the same time the legislature drew the line, by providing "that nothing should enable the affirmation of a Quaker to be received in any criminal cause": and another statute, 22 Geo. II., c. 30, sect. 3, says, "in any criminal case." But the Court has already decided that 'cause' and 'case' are the same. The question therefore is, Whether the present is a criminal case or not? Crimes and punishments are necessary attendants on each other. Punishment is a legal term, and is understood to be in consequence of some offence. The charge against the defendant is a charge of bribery. The statute upon which the action is brought, treats bribery as an 'offence,' throughout, and the person committing it is an 'offender.' Consequently it considers bribery as a crime. It will be said, on the contrary, that this action, to recover the penalty prescribed by the statute, is merely a civil action. That is not so. For bribery was a crime at common law: and the penalty given by the statute is only part of the fine due at common law to the public in satisfaction of the offence: besides which, the statute inflicts additional pains and penalties which are also incurred by the judgment.

With respect to indictments, and all prosecutions which upon the face of them are manifestly criminal suits, there can be no dispute. The question therefore is, Whether it is the form alone, or the substance, that constitutes a criminal action? There are two cases to this purpose. In 2 Str. 1219, a rule for quashing an appointment of overseers was held to be a civil action, and a Quaker's affirmation of service of the rule admitted accordingly. But in 2 Str. 856, which was the case of an appeal of murder, though the appellant had a right to release the appellee in every stage of the cause, a Quaker's evidence was rejected; because in substance it was a criminal prosecution. And it matters not whether the offence is of the greatest or least magnitude: If the end of the action is merely damages, a Quaker's affirmation is admissible: but wherever the end is punishment, as in this case, it is not. Here the penalty is not given as damages, but as part of the punishment; and even if it were, still this is a criminal action in respect of the additional pains and disabilities incurred by the judgment. And this is an answer to the objection, that if the party were arrested and imprisoned for the penalty, the action so much partakes of a civil suit, that the defendant might be discharged under an Act of insolvency. For, supposing he could be so discharged, the Insolvent

Act could not remove the further pains and disabilities. Therefore, both upon the reason of the thing, and the authorities in the books, this is a criminal action, and consequently a Quaker's affirmation is not admissible.

Rooke, for plaintiff. The great question is, Is this a criminal cause? The criterion of distinction between a criminal and a civil cause is, the form of the proceeding, not the offence which occasions it. An assault and nuisance may be prosecuted either by action or by indictment; in the one case, a Quaker's affirmation may be received; in the other, not. The offence of bribery may be prosecuted either by action or indictment. The plaintiff has chosen to prosecute by action, and in so doing he has proceeded civilly, not criminally. This cause is in its form an action of debt for a special cause, at the suit of a private subject. The plaintiff does not sue *tam pro rege quam pro seipso*; he sues in his own name only, and recovers the whole penalty. The declaration states, that the defendant owes the money; and that though often requested, he refuses to pay. The ground of complaint is, the non-payment of a debt. The action is founded upon that implied contract, which every subject enters into with the State to observe its laws. The plea is, *nil debet*; not that the defendant is not guilty. The judgment is to recover the debt; and the party imprisoned for non-payment may have the benefit of the Insolvent Act. Thus far, then, the whole is merely a civil proceeding. But it is said, there is a disability incurred by the judgment, and therefore it is a criminal proceeding. To this it may be answered, that the disability is no part of the judgment, but only a consequence of it: the form of the proceeding is not affected by it. The being restrained from suing for a debt beyond time of limitation, is as much a disability, as the being restrained from voting; yet there is no doubt but that a Quaker may give evidence to prove a debt to be above six years' standing.

LORD MANSFIELD....Is the present a criminal cause? A Quaker appears, and offers himself as a witness; can he give evidence without being sworn? If it is a criminal case, he must be sworn, or he cannot give evidence. Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions. Mr Justice Blackstone, and all modern and ancient writers upon the subject, distinguish between them. Penal actions were never yet put under the head of criminal law or of crimes. To make this a criminal cause, the construction of the statute must be extended by equity. It is as much a civil action as an action for money had and received. The legislature, when they excepted to the evidence of Quakers in criminal causes, must be understood to mean

causes technically criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony....

No authority whatever has been mentioned on the other side; nor any case cited where it has been held that a penal action is a criminal case; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is, an appeal of murder[1]. But that is only a different mode of prosecuting an offender to death; instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end[2] which the King's prosecution would have had if the offender had been convicted, namely, execution. ...Attachment deprives a man of his liberty [yet one] was obtained in this court upon a Quaker's affirmation; and not a word said by way of objection.

The three other Judges concurred.

Rule discharged.

[EDITOR'S NOTE. In 1829 Quakers' affirmations were made admissible in criminal trials.]

[*Penalty sued for by a public official.*]

THE ATTORNEY GENERAL *v.* BRADLAUGH.

COURT OF APPEAL. 1885. L.R. 14 Q.B.D. 667.

Information in the Queen's Bench Division by the Attorney General to recover penalties of £500 each against C. Bradlaugh for voting as a member of the House of Commons without complying with the provisions of the Parliamentary Oaths Act, 1866[3].

[1] 2 Str. 856.

[2] Nevertheless an Appeal was "a private suit, wholly under the control of the party suing; execution was at *his* option; and his sole object might be to obtain pecuniary satisfaction"; (Bayley J., 1 B. and Ald. 457).

[3] 29 Vict. c. 19, sect. 3. "The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every member of the House of Peers at the table in the middle of the said House before he takes his place in the said House, and whilst a full House of Peers is there with their Speaker in his place; and by every member of the House of Commons at the table in the middle

The information was tried at bar in the Queen's Bench Division, in June, 1884, before Lord Coleridge, C. J., Grove, J., and Huddleston, B., and a special jury....The jury found that the Speaker was sitting in the chair at the time when the defendant made and subscribed the oath; but that he was sitting for the purpose of preparing or correcting notes which he was about to address to the defendant, and he had not resumed his seat for the purpose of allowing the defendant to make and subscribe the oath. The jury further found that upon the 11th of February, 1884, the defendant had no belief in a Supreme Being, and was a person upon whose conscience an oath, as an oath, had no binding force; and, that the House of Commons had full cognizance and notice of these matters by reason of the avowal of the defendant. The jury also found that the defendant did not take and subscribe the oath according to the full practice of Parliament; and that the defendant did not take and subscribe the oath as an oath. Upon these findings the Queen's Bench Division, sitting for the trial at bar, ordered a verdict to be entered for the Crown upon the first, fourth, and fifth counts of the information, for separate penalties of £500....

The Court of Appeal granted a rule for a new trial or to enter judgment for the defendant, on the ground of misdirection and misreception of evidence....

Sir H. James, A.G., and *Sir H. Giffard, Q.C.* (*Sir F. Herschell, S.G.*, and *R. S. Wright*, with them), for the Crown. There are two preliminary objections to the hearing of this appeal. The first is, that the information is a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and therefore that there can be no appeal to this Court.

This is an information filed by the Queen's Attorney General in order to recover a penalty; and the nature of informations of that

of the said House, and whilst a full House of Commons is there duly sitting, with their Speaker in his chair, at such hours and according to such regulations as each House may by its Standing Orders direct."

Section 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 five hundred pounds, 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."

kind was much discussed in *Attorney General* v. *Radloff*[1]. In that case the Court of Exchequer was equally divided; two of the judges, Platt and Martin, BB., holding that an information (which in that case was for breach of the laws as to customs), was not a criminal proceeding, and two of them, Pollock, C.B., and Parke, B., holding that it was. It is true that in that case some stress was laid on the fact that the offender might be summarily convicted before justices; but this circumstance was really immaterial; under 11 and 12 Vict. c. 43, justices have power to convict summarily for both civil and criminal offences. It is submitted that the view of Pollock, C.B., and Parke, B., was correct, and that informations filed by that Attorney General in order to recover penalties are criminal proceedings. Moreover, to consider the question from a different point of view, although the penalty imposed by the Parliamentary Oaths Act, 1866, s. 5, might perhaps have been recovered by an action of debt, nevertheless the wrongful act or offence, of which the defendant has been convicted, must be deemed to be of a criminal nature; for by s. 3 of the Parliamentary Oaths Act, 1866, a member of Parliament is liable to be indicted if he does not take the oath of allegiance, and the remedy under s. 5 may be regarded as merely cumulative. Some wrongs are both of a civil and criminal nature, such as libel and assault, and it is erroneous to contend that the existence of a civil remedy causes a wrongful act to become of a civil nature. There is no distinction in principle between this case and *Mellor* v. *Denham*[2]; the only difference is that in that case the appeal was from the refusal of justices to convict for contravention of the bye-laws of a school board. *Mellor* v. *Denham* was followed by *Reg.* v. *Whitechurch*[3]. It is true that the penalty is to be recovered "by action": Parliamentary Oaths Act, 1866, s. 5; but the word "action" is of wide signification, and includes even criminal proceedings; this is plain from Com. Dig. Action (D. 1) Placita Coronae, and also from Bacon's Abridgment, Actions in General (A.), where it is said that "actions are divided into criminal and civil." These passages are cited and relied upon by the Earl of Selborne, L.C., in *Bradlaugh* v. *Clarke*[4]. The Queen by her prerogative can recover the whole of a penalty in any Court, even although a moiety be expressly given to a common informer: *Rex* v. *Hymen*[5].

BRETT, M. R. A majority of the Court are of opinion that the present information is not a "criminal cause or matter" within the

[1] 10 Ex. 84.
[2] 5 Q.B.D. 467.
[3] 7 Q.B.D. 534.
[4] 8 App. Cas. p. 362.
[5] 7 T.R. 536.

meaning of the Supreme Court of Judicature Act, 1873, s. 47....It has been at different times during this argument contended before us on both sides, for different purposes, that the 3rd section of the Parliamentary Oaths Act, 1866, imposes on every member a legal obligation to take and subscribe the oath, and that, if a member does not take and subscribe the oath in the manner therein set forth, an indictment will lie against him on that section alone as for a misdemeanour, and that the penalty in the 5th section is cumulative. That was at one time argued by the Attorney General in order to shew that the acts complained of in the information were criminal, and that no appeal would lie. It was afterwards argued by the defendant in this case that the same construction should be put upon the statute, for the purpose of shewing, at all events, a great hardship, namely, that the 3rd section would put upon him an obligation to take the oath, and that the 5th section, if construed in the way insisted upon by the Crown, would inflict upon him a penalty of £500, for his voting after he had then taken the oath thus forced upon him. I think that the Act of Parliament must be read as a whole, and that the two sections cannot be treated separately; therefore it seems to me that the true construction of the Act of Parliament is that it imposes a new obligation not known to the common law, and that with regard to a non-performance of that obligation it enacts a certain consequence. Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member without having taken the oath in the manner appointed is, that the member becomes liable to a penalty. If that be so, no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. The recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament I should on that ground alone say that no crime is enacted by this Act. But there is more than that: this penalty of £500 is, in the phraseology of this Act of Parliament, to be recovered "by action in one of Her Majesty's superior courts at Westminster." Now, it may be true to say, as appears from the passage cited from Comyn's Digest (Action D. 1), that in some cases "actions" will include indictments or will include criminal informations. In some cases it may,