RECENT ENGLISH DECISIONS.

Court of Appeal.

EX PARTE BALL. IN RE SHEPHERD.

The trustee in bankruptcy of a person who has been robbed, can prove in the offender's bankruptcy for the amount stolen, though the offender has not been prosecuted. The trustee represents, not the injured person, but his creditors, and the necessity of prosecuting the offender before a civil claim can be maintained in respect of the wrong, is a personal duty, which does not extend to the injured person's trustee in bankruptcy. The trustee will be allowed to prove, notwithstanding that the injured person has himself, without having prosecuted, tendered a proof in the offender's bankruptcy.

Whether a voluntary assignee of the debt would be relieved from the duty to prosecute, *quære*.

APPEAL from a decision of BACON, C. J., in bankruptcy.

Shepherd, a clerk to Willis & Co., bankers, absconded on March 16th 1877, and on the 24th of March the bankers received a letter from him confessing that he had robbed them of 7852*l.* 19*s.* On the 26th the bankers gave instructions, in pursuance of which a warrant for Shepherd's apprehension was, on the 28th, put into the hands of a detective, who searched for but was unable to find him. On the 4th of May Shepherd was adjudicated bankrupt, and the bank tendered a proof against his estate for the amount embezzled by him.

The bank having subsequently gone into liquidation, William Turquand, the trustee, applied that the bank's proof against Shepherd's estate should be admitted. This was refused by the register of the Greenwich county court, on the ground that Willis & Co. had not done their best to bring Shepherd to justice, but on an appeal to BACON, Chief Judge in Bankruptcy, he reversed the register's decision and allowed the proof. Thereupon the trustee in Shepherd's bankruptcy appealed to this court.

De Gex, Q. C., and *H. F. Dickens*, for the appellant.—The bankrupt's offence was a felony, 24 & 25 Vict., c. 96, s. 68, and there can be no claim for a debt created by a felonious act until the creditor has prosecuted the debtor. The authorities for our contention are *Ex parte Elliott*, 3 Mont. & A. 110; *Stone* v. *Marsh* (*Fauntleroy's Case*), 6 B. & C. 551, and *Marsh* v. *Keating*, 1 Bing. N. C. 198. The law is clearly stated in Robson on Bankruptcy, 3d ed., pp. 205–6. *Wells* v. *Abrahams*, L. R. 7 Q. B. 554, is not

against this. [JAMES, L. J.—Can a man plead his own felony, and if not, is his trustee in bankruptcy in any better position?] The trustee can take the objection: *Ex parte Elliott.* The plea is not really taking advantage of his own crime; it would aid conviction. *Lutterell* v. *Reynell*, 1 Mod. 282, is the only case where it has been held that a felon cannot plead his felony. Before *Stone* v. *Marsh* many judges thought that the right of action was absolutely merged, but there it was decided that the right is only suspended until after prosecution. The former cases were *Markham* v. *Cobb*, Noy 82, Sir W. Jo. 147; *Lutterell* v. *Reynell*; *Dawkes* v. *Coveneigh*, Styles 346; *Higgins* v. *Butcher*, Yelv. 89; *Cooper* v. *Witham*, 1 Lev. 247. There are, of course, exceptions to the rule, when prosecution has become impossible, *e. g.*, by the death of the felon, or where he has been prosecuted for a similar offence by another person: *Stone* v. *Marsh*; *Crosby* v. *Leng*, 12 East 409; *Wickham* v. *Gatrill*, 2 Sm. & Giff. 353; *Ex parte Jones*, 2 Mont. & A. 93; *Marsh* v. *Keating*; *White* v. *Spettigue*, 13 M. & W. 603. [JAMES, L. J.—If a plaintiff makes out his case without proving any illegality he is entitled to recover, and the defendant cannot upset him subsequently by proving that there was illegality: *In re South Wales Atlantic Steamship Co.*, L. R. 2 Ch. D. 763.]

Winslow, Q. C., and *Bush Cooper*, for the respondent, were not called upon.

Cur. adv. vult.

BRAMWELL, L. J.—In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether, that being so and no more having been done than has been done towards prosecuting the bankrupt, the trustee of Messrs. Willis & Co., the employers, can prove. The law on this subject is in a remarkable state. For three hundred years it has been said in various ways by judges, many of the greatest eminence, that without a doubt, except in one instance, there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that not so much expressed by Mr. Justice BLACKBURN in *Wells* v. *Abrahams*, as to be inferred from what he said. But, though such opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock* v. *Constantine*, 2 H. & C. 146, and *Ex parte Elliott*. *Wellock* v. *Constantine* has been said to be no authority.

If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I had would have been set right, but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But at all events, there are the opinions of Chief Baron POLLOCK and Mr. Justice WILLES—opinions which no one who knew those judges will undervalue. Then there is the judgment of *Ex parte Elliott*, besides the expressed opinion for centuries that a felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible: 1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of the claim by or at the instance of the felon debtor, but that the court of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these. That the first is not true is shown by *Keating* v. *Marsh*, where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to believe that the second supposed solution of the problem is correct. That would be to make the cause of action the act of a felon *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitation would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of composition with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule that *allegans suam turpitudinem non est andiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then, is the fourth solution

right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice BLACKBURN did as a possibility. It is left to the court to find it out on the pleadings. If it appears on the trial, is the judge to discharge the jury? How is the Crown to know it?

There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that where the felon is executed for another felony the claim may be maintained. What is to happen where he dies a natural death, where he goes beyond the jurisdiction, where there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties in my mind in the application of this alleged law, and go a long way to justify Mr. Justice BLACKBURN'S doubt. Still, after the continued expression of opinion in the cases of *Ex parte Elliott* and *Wellock* v. *Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent. It is not necessary for us to do so in this case, because, assuming that there is, and assuming that Messrs. Willis & Co. themselves could maintain no claim in this case until they had performed their duty (if it can be said there is any), to prosecute, we are of opinion that there is no such duty in the respondent, who represents not them but their creditors; that the debt is due at and from the time of the act causing it; that the disability to sue or liability to have proceedings stayed, if any, is personal to him in whom is the duty, and consequently that this claim may be maintained. Whether that would be so if the assignment of the debt was purely voluntary and not under the Bankruptcy Act I do not say. I may further add that I doubt much if Messrs. Willis & Co. themselves would not be entitled to prove, otherwise the estate of the bankrupt might be distributed and injustice done. If it should be said in answer to this that a claim could be entered, the claimant must be admitted to be heard, even before he can make a claim, and his claim would not prevent the distribution of the assets as they are got in among the creditors who have actually proved, unless some were set aside especially to provide for it, which would be a strange anomaly if the principle be a true one. In *Ex parte Elliott*, neither proof nor claim was admitted.

JAMES, L. J.—The judgment which Lord Justice BRAMWELL

has just read, expresses my opinion as well as his, though it does not express entirely that of Lord Justice BAGGALLAY, whose judgment I will now read:

BAGGALLAY, L. J.—I agree with my colleagues in thinking that the appeal in this case should be dismissed, but I prefer to rest my decision upon the same grounds as those assigned by the Chief Judge. It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta* or enunciations of principle rather than decisions: 1. That a felonious act may give rise to a maintainable action. 2. That the cause of action arises upon the commission of the offence. 3. That, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing the felon to justice. 4. That this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Fauntleroy's Case*, or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence. 5. That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action. It is unnecessary to refer to the authorities by which these propositions have been affirmed; the whole subject is fully discussed, and the leading decisions commented upon in the cases of *Ex parte Elliott*, *Wellock* v. *Constantine* and *Wells* v. *Abrahams*. I think, also, that the executors or administrators of the person injured by the felony, or his trustee in bankruptcy, can be in no better position than he himself was in at the date of his death or of the commencement of his bankruptcy; and if at such period prosecution of the offender had, by want of due diligence on his part, become impossible, and he had thereby been debarred from seeking civil redress, his estate must bear the consequences. The question then remains whether prosecution in the present case had been rendered impossible by reason of any want of due diligence on the part of Messrs. Willis & Co., and upon this point I agree with the Chief Judge in thinking that there was no default on their part sufficient to have deprived them of a right to prove, had they continued solvent.

Appeal dismissed, with costs.

A principle or doctrine of law that forbids a person feloniously assaulted from maintaining a civil action for redress until the offender has been prose-

cuted criminally, but allows it in case of a trivial assault and battery; that permits one to recover damages for the maliciously burning of his wood-lot, but not for the arson of his dwelling-house, challenges our inquiry as to its grounds and reasons.

The reasons often assigned are, partly because all a felon's property was formerly forfeited to the crown, and so no advantage could result to a private party by a suit, since his remedy would be worthless; partly because the great majority of criminals are so poor that no damages could ever be collected of them; partly because the courts have power to order a restitution of stolen property upon conviction of the thief; partly because, as the phrase runs, the private wrong is "merged" in the felony; partly because if the party injured was allowed to recover full redress, the crime might not be so promptly or effectively prosecuted. See Stephens's Gen. View of Crim. Law, p. 107–8. But the first reason could hardly have had much force, since, *after conviction* of the felon, the party injured was always allowed to maintain his private action, and when of course, the possibility of finding any estate from which to realize his damages, would be much less than before conviction, since no forfeiture could actually take place until conviction had: *Markham* v. *Cobb*, Noy 82; *Dawkes* v. *Coveneigh*, Style 346; *Peer* v. *Humphrey*, 2 Ad. & El. 495.

And this result shows how little reason there is in the term "merged in the felony," whatever meaning that might have; and Stephens himself calls it "an unmeaning phrase." The principle of restitution upon a criminal conviction would have some force and effect in *prosecution for larceny*, where the thief still had the goods, as it would make a civil action comparatively unnecessary; but it would not at all apply to a large class of cases. What "restitution" could be made to a woman feloniously assaulted, even on conviction of the felon in the criminal trial? And yet, in a recent case, the woman was deprived of her civil remedy because no one had prosecuted the felon criminally: *Wellock* v. *Constantine*, 2 H. & C. 146 (1863).

The other assigned reason, that courts could not first entertain a civil action, on motives of public policy, until after a public prosecution, is more plausible, especially as in England, there being no public prosecutor, as with us, each prosecution depends upon the zeal, energy and resources of private parties. As a stimulus therefore to push an indictment it might be thought proper to suspend the civil remedy until that duty had been discharged. See *Crosby* v. *Leng*, 12 East 409; *Stone* v. *Marsh*, 6 B. & C. 551.

But even this reason does not explain the whole doctrine on this subject, since the same conclusion does not follow in misdemeanors. The civil remedy there is quite independent of any prior prosecution criminally, but the assumed reason exists for the same rule as in felonies.

Therefore a woman whose life was endangered by the most outrageous assault could not maintain a civil action for damages until the felon had been prosecuted criminally, whereas if she had only lost an arm, she could. Reason would seem to indicate that private actions should be more favored in case of the more serious injury than in the other, but the law is said to be otherwise. It is to be hoped that the above-reported case may be carried to the House of Lords, that we may have a final decision as to the law of England upon this question.

But whatever may be finally determined to be the law of England on this subject, the reasons therefor do not exist in America, and the prevailing doctrine here is, where criminal prosecutions are instituted and conducted by public officers appointed for that purpose, that the civil action may be commenced regardless of a criminal investigation, and is in no way affected by it. See *Boston & Worcester Railroad Co.* v. *Dana*, 1 Gray 83; *Pettingill* v. *Rideout*, 6 N. H. 454;