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THE TIMING OF TORTIOUS AND CRIMINAL ACTIONS FOR THE SAME WRONG

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ABSTRACT. *This paper traces a key example of the overlap between tort and crime and explains the impact of how disjointed English legal thinking has been. For about 400 years English civil courts have accepted some form of pre-eminence of the criminal law where civil and serious criminal liability co-exist. This has often been described as the rule that "a trespass merges in a felony" though a more neutral term would be a "timing rule". The development of the timing rules casts light on how English legal reasoning has approached the relationship between the victim and the state, the procedural context of substantive rules and the impact rules in one area of law can have elsewhere.*

KEYWORDS: *Criminal procedure; civil procedure; legal history; tort; Spain*

English law has no general theory to co-ordinate tort law and criminal law. Most European legal systems managed to develop one centuries ago. For instance, France has long perceived some kind of unity of civil and criminal fault and has given precedence to a criminal prosecution over parallel civil claims.[1] In addition, the French *partie civile* links the procedures for civil wrongs and criminal actions, with the victim being a key player in a criminal action.[2] In Spain, not only will a criminal prosecution usually deal with any compensation for the victim but since 1848 it has done so using rules in the Spanish Criminal Code, not the Civil Code.[3]

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[1] See, e.g., René Demogue, *De la Réparation Civile des Délits* (Paris 1898) and Phillipe Bonfils, *L'action civile, essai sur la nature juridique d'une institution* (Aix-en-Provence 2000).

[2] See, e.g., P. O. Lapie, "The Partie Civile in the Criminal Law of France" (1928) 10 Journal of Comparative Legislation and International Law (3rd Ser.) 33; Jean Larguier, "Civil Action for Damages in French Criminal Procedure" (1964–1965) 39 Tulane Law Review 687.

[3] See, for a general introduction to the present position, Gonzalo Quintero Olivares and Josep María Tamarit Sumalla, "De la responsibilidad civil derivada de los delitos y faltas y de las costas procesales" in Gonzalo Quintero Olivares (ed), *Comentarios al Nuevo Código Penal* (Cizur Menor, Navarra 2005).

General theories like these are based on a paradigm of the relationship between the victim of a crime and the state. In both France and Spain, the criminal justice system has long been shaped to assist the victim, carrying the individual's burden while fulfilling the state's duty to the public at large. Without this overarching framework, English lawyers tend to see the places where tort and crime grate against each other as isolated incidents, rather than pieces in a broader puzzle. For example, since 2003 an English statute has sought to reduce trespass to the person claims brought concerning the events which led to the claimant's conviction for an imprisonable offence.[4] Such claims are thought to denigrate the criminal justice process and so are restricted: the plaintiff must obtain leave to bring the trespass claim and leave is only granted where the defendant's acts were grossly disproportionate. Recently the Court of Appeal has retrospectively granted leave to bring such a battery action, despite the legislation not expressly permitting that.[5] In the same year, the House of Lords held that the defence of *ex turpi causa* can defeat a claim when a tort had caused the victim to lose full mental responsibility before he killed someone: the plaintiff sought damages for the income lost while he was serving time in prison for the killings and the House of Lords rejected this "shift" of the criminal law's sanction to the tortfeasor.[6] Further recent examples of intersections between tort and crime have been discoveries,[7] and rediscoveries[8] of ambiguities in nineteenth century statutes which bridge tort and crime. In these modern cases there has been little analysis of the underlying tensions between tort and crime.

In fact, the doctrinal uncertainty now giving rise to that tension in English law has come to prominence in just the last 150 years. Until the

[4] See s. 329(2) of the Criminal Justice Act 2003.

[5] *Adorian v MPC* [2009] EWCA Civ 18; see also J. R. Spencer, "Legislate in haste, repent at leisure" [2010] C.L.J. 19. See also *Ashley v Chief Constable of Sussex Police (Sherwood intervening)* [2008] UKHL 25; [2008] 1 A.C. 962 where the House of Lords refused to strike out a claim in trespass for a police force killing an unarmed suspect based on a defence of self-defence.

[6] The maxim *ex turpi causa* and a line of reasoning based on maintaining the dignity of the criminal conviction would apply to defeat a claim for loss of earnings and general damages where a train accident victim, suffering from post traumatic stress disorder, committed manslaughter: *Gray v Thames Trains* [2009] 1 A.C. 1339 on which see J. Goudkamp, "The defence of illegality: Gray v Thames Trains Ltd" (2009) 17 Torts Law Journal 1 and *cf. Pitts v Hunt* [1991] 1 Q.B. 24, 39 *per* Beldam L.J.

[7] *Bedfordshire Police Authority v Constable* [2008] EWHC 1375; [2009] Lloyd's Rep. I.R. 39: concerning the Riot (Damages) Act 1886 and the insurability of the Police Authority's liability for the riot at the Yarl's Wood Detention centre in 2002.

[8] *Wong v Parkside Health NHS Trust and another* [2001] EWCA Civ 1721; [2003] 3 All E.R. 932 concerning the bar to a later civil action or prosecution after a summary conviction for assault contained in ss. 44 and 45 OAPA 1861. This was last tinkered with by the Courts Act 2003 c. 39 Sch.10 para.1 (April 1, 2005 as SI 2005/910) but *cf.* the contemporaneous s. 329 (2) of the CJA 2003. See also *H v B* [2009] EWCA Civ 1092 *cf. The Ministry of Justice (sued as the Home Office) v Jason Samuel Scott* [2009] EWCA Civ 1215 on who constitutes the prosecutor for the purposes of a suit in malicious prosecution. There are ambiguities in recent statutory provisions too, see e.g., the Regulatory Enforcement and Sanctions Act 2008 and the examples of its operation given by Celia Wells, "Corporate crime: opening the eyes of the sentry" (2010) 30 L.S. 370, 373–374.

late 1800s, English law put the interests of the state ahead of all others, even putting obligations on the victim to prosecute a crime instead of concerning itself with whether he received compensation. Indeed, until 1870, a convicted felon forfeited all his property to the Crown so a victim who was forced to prosecute first lost all chance of recovery. In the mid-eighteenth century English law began to see the victim of a crime as someone to help rather than only to harness. However, that transition remains incomplete: the victim is no longer pulling the cart but nor is he now riding up front.

This paper traces one key example of the overlap between tort and crime and explains the impact of our disjointed thinking. For about 400 years English civil courts have accepted some form of pre-eminence of the criminal law where civil and serious criminal liability co-exist. This has often been described as the rule that "a trespass merges in a felony", even though, as will be seen later, this phrasing was only accurate for a short while. In this article, a norm to control the timing of a civil action and a criminal prosecution will be called a "timing rule".

Timing rules are significant. They have had a practical role in solving civil disputes and in shaping possible claims in tort. While it is true that criminals are often not worth suing, the case law shows that plaintiffs clearly saw practical value in civil claims preceding criminal prosecutions.[9] Even more importantly, the timing rule is relevant to our understanding of law beyond the cases in which it played a role. Its complex and surprising history demonstrates the influence of procedural, substantive, policy and mechanical factors in the development of legal rules. It also shows just how important and intricate the interfaces of tort and crime can be.

I. Three Phases in the Timing Rule

The history of timing rules can be divided into three phases. The first is from 1607 to 1914, and represents the classical period. Here a merger rule became established, largely to protect the state's interests in forfeited property and in promoting private prosecutions. However the courts had not developed a way to enforce it. The second period is from 1914 to 1967 when the courts settled on a sanction, thereby temporarily stabilising a timing rule but ultimately its value and coherence were sufficiently doubted that it was removed by legislation. From 1967 English law has been in its third phase, with the removal then return of a timing rule. The new rule is in the form of a discretion to suspend a

[9] Sometimes such actions are against peripheral participants in the crime, such as banks whose employees are involved in fraud. The actions might also seek to take advantage of insurance, more beneficial civil rules of evidence and procedure or to force a defendant to return or pay the equivalent in value of specific property.

parallel civil claim but only where the interests of the defendant, not the state, are prejudiced.

A. 1607 to 1914: Rule without Expression

In the early common law, "crime" and "tort", as we call them now, were equally valid ways for a victim to pursue justice for a wrongful act.[10] The most "civil" remedy, the writ of trespass, could be brought or a more penal action (indictment or appeal of felony) could be used. The choice seems to have been between compensation or vengeance, and this choice was one for the victim. This position continued from around the 1200s to the end of the 1500s.[11]

The law's indifference was replaced by precedence for the criminal action. From 1607 until 1967 a civil action based on facts which constitute a felony could not take place before the prosecution for the felony. The analysis of Watkin Williams J. in *Midland Insurance Company v Smith* is an accurate summary of the law:

> The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law.[12]

These three ways to resolve such claims are, in reality, quite closely related.

[10] See generally, David J. Seipp, "The Distinction between Crime and Tort in the Early Common Law", (1996) 17 Boston University Law Review 59; James Barr Ames, *Lectures On Legal History and Miscellaneous Legal Essays* (Cambridge M.A. 1913), Ch. II, III and IV.

[11] In this period there is strong evidence that the two actions were independent: P. R. Glazebrook "The Merging of Misdemeanours" (1962) 78 L.Q.R. 560, 561, esp. note 12; James Barr Ames "Substantive Law before the time of Bracton" in *Lectures on Legal History* (Cambridge 1913), 45–46; *Hudson v Lee* (1589) 4 Co Rep 43 a; 76 E.R. 989 (KB) 989–990 where it appears that an action at law had been maintained for what must have been a felony. Lord Parker once defined a trespass as an act other than a felony: *Amerika Commissioners v SS Amerika* [1917] A.C. 38, 44–46. Lord Parker referred to Maitland, but did not cite specific works. Maitland does say that "Remember that throughout the Middle Ages there is no such word as misdemeanour – the crimes which do not amount to felony are trespasses": F. W. Maitland *The Forms of Action At Common Law* (Cambridge 1948), 49 and see also 65. Lord Parker's view could perhaps refer to the time before the creation of the merger rule.

[12] *The Midland Insurance Co. v Smith* (1881) 6 Q.B.D. 561, 568. A number of cases are missed out, but the basic pattern is valid.

The "drowning" approach, the first mentioned, appears in what was arguably the earliest case discussing the relationship between a felony and trespass arising on the same facts: *Higgins v Butcher* in 1607.[13] As is typical of the early cases, there is doubt over what *Higgins v Butcher* actually decided. Most likely it decided a husband could not maintain an action for the harm suffered by his wife when she was killed. However, in addition to the idea that the right of action died with her, her death was also said to constitute a wrong to the Crown. That wrong was "converted into felony, and that drowns the particular offence and private wrong offered to the master before; his action is thereby lost."[14] The reasoning in respect of the felony was unsupported by authority and arguably not necessary to determine the case. Similarly unclear is the second case of *Markham v Cobb* in 1625.[15] The defendant pleaded that the plaintiff had already indicted and convicted him for burglary, so the second action, in trespass, did not lie. Dodderidge and Whitelock JJ. saw no problem with the later civil action unless the preceding criminal one had been an appeal of felony and the plaintiff had been nonsuited. On the other hand, Jones, J. seemed to hold that if the felony also constituted a trespass, the trespass was entirely "merged" with the felony. Sadly these two views are not reconciled by the court which merely found an unspecified technical defect in the plaintiff's case. Like many courts to follow, it noted the significance of the issues without providing a resolution.[16]

In the seventeenth century the courts departed from the drowning or full merger position. Both *Dawkes v Coveneigh* in 1652[17] and

[13] *Higgins v Butcher* (1607) Yelv. 89; 80 E.R. 61, 61 that the felony "drowns … the private wrong." On this claim see, e.g., W. S. Holdsworth, *History of English Law* (London 1923), vol. iii, 331–333.

[14] See Charles K. Burdick, *Burdick's Law of Torts* (Albany N.Y. 1926), at [36] and P.H. Winfield, *A Text-Book of the Law of Tort* (London 1937), 168 discussing two other approaches: "resurrection" and therefore immunity to civil suit after attainder and the felon being the "human property" of the Crown so not liable. Winfield, p. 170, also noted that in *Higgins v Butcher* neither plaintiff nor defendant had died and that the merger should in any case mean suspension.

[15] *Markham v Cobb* (1625) Jones, W 147; 82 E.R. 79, which was the case Blackburn J. cited as the root of the trespassing merging in a felony rule: *Wells v Abrahams* (1872) L.R. 7 Q.B. 554, 560–561. See also the general dicta in *Cooper v Witham* (1669) 1 Sid. 375; 82 E.R. 1166.

[16] The case ends with the helpful comment: "Quaere bien, car est un point de grand consequens de l'un part, & del' auter" which could be rendered as "Query well, for it is a point of great consequence for one party and for the other".

[17] *Dawkes v Coveneigh* (1652) Style 346; 82 E.R. 765, 766 where the action was maintainable after conviction. The defendant had received benefit of clergy and so still had property. Hale used the case, along with *Markham v Cobb*, to require felonies to be "healed" before trover could be bought: Sir Matthew Hale, *The History of the Pleas of the Crown* (London 1736), 546–547. *Cf.* William Blackstone, *Commentaries on the Law of England* (Oxford 1765–1769), vol. 4, 6 who did not give authority but stated that "the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great", the noting that forfeiture would make it impossible. A little later Lord Somers proposed that: "It shall not be lawful for any person who shall have goods feloniously taken away, to bring any civil action for the recovery thereof, or for damage for the same, before he have proceeded criminally, with effect, against the offenders; but that he may bring his action after such effectual prosecution." Walter Scott, *A Collection of Scarce and Valuable Tracts particularly of Lord Somers*, 2nd ed. (London 1811), vol. vi., 239.

Lutterell v Reynell[18] in 1670 suggested that there was not merger, but that prosecution of the felon was a condition precedent for the actionability of the civil law claim. This was the second of Watkin Williams J.'s categories. Both cases express fear that the felony prosecution will be "smothered" if the plaintiff could elect to bring a civil suit.[19] None of eighteenth century cases offer clarification.[20]

By the 1800s, the law began to focus on promoting viable criminal prosecutions, rather than developing the doctrines of merger or strict condition precedent.[21] This was the third and final of Watkin Williams J.'s categories. The first clear case in this line was *Crosby v Leng* in 1810. Leng had been acquitted on a charge of felonious assault and the court held that a civil action could now proceed. Lord Ellenborough CJ expressed this as a question of timing: while public justice must not be prejudiced, private actions could be brought on the same facts once public justice was secured.[22] Other than occasional returns to the condition precedent analysis,[23] the courts turned to exploring and delimiting what would prejudice public justice.

First, the duty was satisfied once the felon had been convicted just as if he had been acquitted so a contingent civil claim could then

[18] *Lutterell v Reynell* (1670) 1 Mod. 282; 86 E.R. 887, 283.

[19] *Dawkes v Coveneigh* (1652) Style 346; 82 E.R. 765, 347 and *Lutterell v Reynell*, note 18 above, 283. The movement away from the drowning position was relevant where the Crown's allowed a wealthy felony to compound for his felony, paying a significant sum but also often retaining enough to be worth suing.

[20] *Cf. Gibson v Minet* (1791) 1 H. Bl. 569; 126 E.R. 326, 336 *per* Perryn B. who restated the merger rule, with *Master v Miller* (1791) 4 T.R. 320; 100 E.R. 1042, 1048–1059 where Buller J. expressly declines to rule on a future civil action's validity. Finally there was *Whitfield v Lord Despencer* (1778) 2 Cowper 754; 98 E.R. 1344 where counsel on both sides agreed on a merger rule, but counsel for the plaintiff argued that the servant's felony should not suspend the action against the master, see 758 and 761.

[21] See, e.g., Maule J. doubting the duty to prosecute but using arguments at odds with traditional reasoning; *Ward v Lloyd* (1843) 7 Scott N.R. 499, 507, a case of alleged conspiracy of felony: "It has been said that it was the plaintiff's duty to prosecute. It would be a strong thing to say that every man is bound to prosecute all the felonies that come to his knowledge, and I do not know why it is the duty of the party who suffered the felony to prosecute the felon rather than that of any other person; on the contrary, it is a Christian duty to forgive one's enemies, and I think he does a very human and charitable and Christian-like thing in abstaining from prosecuting." Interestingly those words do not appear in the report in (1843) 6 Manning and Granger 785; 134 E.R. 1109.

[22] *Crosby v Leng* (1810) 12 East 409; 104 E.R. 160, 161. Lord Ellenborough crafted a rule to promote certainty of criminal trials: once acquitted, just as once convicted, the defendant could be subject to a civil suit, 413. Grose J., 414, talked only of preventing criminal justice being "defeated". Le Blanc J., 414–415, spoke similarly, adding that "[a]fter the question of felony has been determined, it leaves the trespass untouched." Bayley J., 415–416, seemed to focus on the desirability of promoting prosecutions, particularly those where evidence of the victim would lead to an acquittal on a felony charge. Thomas Noon Talfourd (ed.), *Dickinson's Practical Guide to the Quarter Sessions*, 5th ed. (London 1841), 302 gives this as the first key case in the freezing approach. *Cf.* the contemporaneous cases of *Wallace v Hardacre* (1807) 1 Camp. 45; 170 E.R. 870 and especially *Cox v Paxton* (1810) 17 Ves. 329; 34 E.R. 127.

[23] See, e.g., *Gimson v Woodfull* (1825) 2 Car. & P. 41, 42–3; 172 E.R. 19, 21. In that case the merger rule was used to nonsuit the plaintiff's action in trover against a man who had possession of a horse having purchased it from a thief. Some sympathy must lie with Best C.J. in the vagaries of the duty to prosecute, even in 1889 Bigelow wrote that there seemed to be a condition precedent, but he questioned how it could be enforced: Melville Madison Bigelow, *The Law of Torts* (Cambridge 1889), 129–130.

proceed, according to Lord Tenterden C.J. in *Stone v Marsh*.[24] This case was the start of a long relationship between fraudsters and timing rules; in this case a fleeting appearance by the infamous banker Fauntleroy.[25] Here Fauntleroy and his bank merely acted on the forged instruction by one trustee to sell stock to the detriment of the other two. Before the fraud came to trial, Fauntleroy was executed for other crimes. The defendant's counsel tried a new line of argument: he asserted that the bank could not be made liable for ratifying what was in fact a felony. However, this innovative argument was dismissed by the court.[26] Instead, the true ground of the claim was identified as the receipt of the proceeds of the fraud. After Fauntleroy's conviction and death, an action on that ground could proceed. The phrase, "the action is merged in the felony," was said to be "not at all times and literally true."[27]

Second, and building on *Stone v Marsh*, the duty to prosecute felons did not suspend a civil action against non-felons according to Park J. in *Marsh v Keating* in 1834.[28] This was confirmed in *White v Spettigue* in 1845 in the Court of Exchequer.[29] At first instance Rolfe B. had applied a timing rule to third party possessors of stolen goods but on appeal he followed Pollock C.B. and held that the rule did not apply.[30] The courts accepted that a plaintiff could not "waive" the felony but decided that a plaintiff did not "waive" anything when he sued the mere possessor of stolen goods.

Third, if a prosecution is left incomplete despite the plaintiff's best efforts, civil courts will nonetheless allow his claim, according to *Dudley v Spittle* in 1860.[31] In *Dudley v Spittle* the plaintiff's earlier prosecution had not been carried through because the trial judge thought justice was sufficiently done by sentencing the defendant for another forgery to which he had pleaded guilty.[32]

[24] *Stone v Marsh* (1827) 6 B. & C. 551; 108 E.R. 554.

[25] See generally James Edelman, "Marsh v Keating (1834)" in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in the Law of Restitution* (Oxford 2006); See also Catherine Macmillan, "Rogues Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law" [2005] C.L.J. 711, esp. pp. 718–722.

[26] *Stone v Marsh* (1827) 6 B. & C. 551; 108 E.R. 554, 557 *per* Pollock; rejected, at pp. 559–560.

[27] Ibid., p. 559.

[28] *Marsh v Keating* (1834) 1 Bing. N.C. 198, 131 E.R. esp. pp. 1101–1102 *per* Park J. *Marsh v Keating* involved some of the same persons who had been in *Stone v Marsh* seven years earlier.

[29] *White v Spettigue* (1845) 1 Car. & K. 673; 174 E.R. 986; 13 M. & W. 603; 153 E.R. 252.

[30] Ibid., pp. 677–678 *per* Pollock C.B., pp. 678–679 *per* Rolfe B.

[31] *Dudley & West Bromwich Banking Co. v Spittle* (1860) 1 J. & H. 14; 70 E.R. 642, 643.

[32] A slight regression can be seen two years later in *Chowne v Baylis.* A clerk, having robbed his employers of money, gave them, upon the discovery of his frauds and before his prosecution, an equitable security of equal value on policies and lands. He was afterwards prosecuted and convicted. The debt was held to be good consideration for the securities, and that they were valid. In effect, the felon could preference one creditor over another. According to Sir John Romilly the civil action was suspended until the felon was convicted, though it mattered not by whom: *Chowne v Baylis* (1862) 31 Beav. 351; 54 E.R. 1174, 1176–1177, with Bagallay as counsel for Baylis.

From about the middle of the nineteenth century, once suspension of the civil action became the rule, the courts began to consider the mechanism to hold that action in abeyance. The courts first tried non-suiting the plaintiff as one way to deal with a civil action which breached the suspension rule. This order terminated the particular action but without resolving its merits. It had been used first in *Gimson v Woodfull* in 1825,[33] but that case was seriously doubted on its facts in *White v Spettigue* in 1845.[34] The nonsuit was then promoted in 1863 in *Wellock v Constantine*, a rape case. The trial judge had indicated that he would have found for the defendant unless counsel accepted being non-suited, so counsel gave way.[35] On appeal, Pollock C.B. and Bramwell B. accepted this use of a non-suit.[36]

However, *Wellock v Constantine* was effectively overruled in *Wells v Abrahams*.[37] The case concerned the disappearance of jewellery given as security in anticipation of a loan. The defendant obtained a rule for a new trial on the grounds that trial judge should have non-suited the plaintiff based on *Wellock*. Counsel for the plaintiff argued that *Wellock* showed no more than that a judge may non-suit a plaintiff with consent. In reality, *Wells v Abrahams* was a case where the defendant had tried his luck in defending a civil action and was then complaining when he lost. In addition, by the time of argument in banc a criminal prosecution for feloniously stealing the broach had been instituted. The court confirmed the existence of a timing rule but did not enforce it.[38] It was doubted whether the defendant could seek to rely on the allegation of a felony, but simultaneously deny being a felon.[39] Cockburn C.J. thought it conceivable that a court might stay civil proceedings as being an abuse while criminal proceedings were pending or ongoing; but he could not see any authority for a judge at Nisi Prius, which had only been delegated authority by a court of record, to non-suit the plaintiff or direct a verdict for

[33] *Gimson v Woodfull* (1825) 2 Car. & P. 41; 172 E.R. 19.

[34] *White* v. *Spettigue* (1845) 1 Car. & K. 673; 174 E.R. 986; 13 M. & W. 603; 153 E.R. 252, 679, *per* Rolfe B.

[35] *Wellock v Constantine* (1863) 2 H. & C. 146; 159 E.R. 61.. For more detail on non-suiting, particularly without the consent of the plaintiff, see M. J. Prichard, "Nonsuit: A Premature Obituary" [1960] C.L.J. 88. Prichard particularly highlights, at 88, the removal of the remedy of nonsuit from the High Court under the Rules of the Supreme Court 1883. This would hardly make it an ideal remedy for the merger rule.

[36] *Wellock v Constantine* (1863) 2 H. & C. 146; 159 E.R. 61, 63. At the same time, courts were arguably keen to avoid trespass merging in a felony if possible, e.g., *The Princess Royal* (1870) L.R. 3 A. & E. 41, 47–48 *per* Sir Robert Phillimore responding to Phillimore, 43. See also *R v Evans* (1890) 54 J.P. 471, 471, an odd outlier where substantive civil and criminal laws tightly overlap: an injured party may bring concurrent proceedings, and the civil action will not be stayed, for instance, in libel. The case was phrased as reviewing whether the magistrate had taken into account "fitting" factors in considering an adjournment. It may be that the civil law was thought the best placed to protect the victim's reputation.

[37] *Wells v Abrahams* (1872) L.R. 7 Q.B. 554.

[38] E.g., L.R. 7 Q.B. at p.557, *per* Cockburn C.J.

[39] See, e.g., ibid., pp. 558–9 *per* Cockburn C.J. or pp. 563–4 *per* Lush J.

the defendant.[40] Blackburn J. noted that cases where a timing rule had been implemented in some way were recent and rare.[41] If there were pending criminal proceedings then a stay would be the only recourse, but he knew "no instance" in which a court had done so.[42] Quain J. noted both the inconsistency and the tactical nature of the delayed mention of felony, but suggested a demurrer or motion in arrest of judgment as possible ways to resolve the facts before the court.[43] The form of the timing rule's enforcement was important because so long as the civil action was still valid the plaintiff had leverage over the defendant, whether in settlement or in a later action.

At the same time as the courts began to think about what the appropriate sanction for breach of a timing rule was, they continued to tease out exactly how forcefully prosecution would be required. A series of cases focused on whether the particular plaintiff had to prosecute the felon. Thus, a father did not have to prosecute the felony but could claim for the running down, loss of service and funeral expenses for the death of his daughter: *Osborne v Gillett*.[44] Similarly, *Ex p Ball/In re Shepherd* held that a trustee in bankruptcy did not have to prosecute. There, Baggallay J. gave five principles for who should prosecute. These highlighted that it is only the duty of the person injured to bring the prosecution and even this falls away if someone else does it:[45]

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 or endeavouring to bring 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, or in which prosecution is impossible by reason of the death or escape of the felon.
5. That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect an action.

Then came the insurance case of *The Midland Insurance Co. v Smith* in 1881, where Watkin Williams J.'s highly detailed but obiter

[40] *Wells v Abrahams* (1872) L.R. 7 Q.B. 554, 557–558.
[41] Ibid., p. 559.
[42] Ibid., pp. 560, 562.
[43] Ibid., pp. 564–565.
[44] *Osborn v Gillett* (1873) L.R. 8 Ex. 88, esp. p. 93. See later, *Mattouk v Massad* [1943] A.C. 588.
[45] *Ex parte Ball, In re Shepherd* (1879) 10 Ch. D. 667, 673–674. The rule was also avoided by grounding the action on an antecedent contract in *Ex parte Leslie. In re Guerrier* (1882) 20 Ch. D. 131, 133.

discussion of the law was less precise: that the rule does not require a prosecution to precede a civil action in all cases.[46]

However, the question of sanction had still not been resolved and this showed no signs of changing. There was some inconclusive but influential discussion of the matter in the 1880s Irish case of *A v B*; that discussion is particularly interesting because neither party wanted the rule to apply. Holmes J. thought there was a summary power to stay civil proceedings, one the court could invoke of its own motion where it appeared proper, for example when a criminal case was "actually pending."[47] However, the facts before them did not suggest this, so the court should not interfere. This was also the opinion of Johnson J. and Sir Michael Morris C.J., though the Chief Justice expressly did not decide what sanction was available.[48] Only O'Brien J. approved both the court's discretion to stay on its own motion, and a stay on the facts before him:

> I entertain an opinion – founded upon the policy of the criminal law, and the practice which has existed for very many years in this country, and which practice must, to a large extent, depend upon experience and tradition – that where the Court, from information before it, sees that acts of a grave criminal nature are charged against a party in a civil action, it will, in view of the enormous importance of the matter to the administration of justice, restrain the proceedings until the criminal matter is disposed of.[49]

No solution had been conclusively adopted as the nineteenth century ended. In *Roope v D'Avigdor*, Cave J. treated *In re Ball* as definitive, adding that a demurrer was not the right way to give effect to the rule.[50] No answer was forthcoming from probably the last case in this period, *Appleby v Franklin* in 1885. The court relied on, *Markham v Cobb*, amongst others, for a theoretical summary power to strike out part of a statement of claim disclosing a felony.[51] However even this was obiter since the timing rule was held to apply only to the party directly injured by the felony, not a father suing for the seduction of his daughter.

Commentary on the rule had been sparse but by the end of the nineteenth century, most commentators criticised it. Commentators also seemed to believe judges doubted it. Stephen's Commentaries moved from a position of "gross and atrocious" injuries causing the private action to be "swallowed up in the public" in the first edition

[46] *The Midland Insurance v Smith* (1881) 6 Q.B.D. 561, 568–576.
[47] *A v B* (1889) 24 L.R. Ir. 235, 237. The case appears to be identical with that reported in *S v S* (1882) 16 Cox 566 (Queen's Bench of Ireland).
[48] *A v B* (1889) 24 L.R. Ir. 235, 238–239.
[49] Ibid., 239–240, 240.
[50] *Roope v D'Avigdor* (1883) 10 Q.B.D. 412, 413–414.
[51] *Appleby v Franklin* (1885) 17 Q.B.D. 93 (District Court), 94 *per* Huddleston B., 95 *per* Wills J.

in 1845,[52] to acknowledging the mere suspension of the private wrong in the 8th edition in 1880;[53] but by 1890 he thought that *Wells v Abrahams* had made the rule "practically impossible to enforce".[54] Addison, having been clear on the duty in the first edition in 1860,[55] moved to a position of doubt about the rule, at least by 1893.[56] A writer in the Justice of the Peace Journal in 1883 finished a summary of the law without enthusiasm: "… although the rule may still be said to have some shadowy existence, it is so honeycombed by exceptions, and so difficult, if not impossible, to bring into application, that it merits very little consideration."[57] Ames, lecturing around 1890, said that idea "has been much criticized, and it is doubtful if it is still law."[58] From the first edition of his work on tort law in 1887, Pollock thought that the tide had turned against the rule:

> But so much doubt has been thrown upon the supposed rule in several recent cases, that is seems if not altogether exploded, to be only awaiting a decisive abrogation. The result of the cases in question is that, although it is difficult to deny that some such rule exists, the precise extent of the rule, and the reasons of policy on which it is founded, are uncertain, and it is not known what is the proper mode of applying it … On the whole there is apparent in quarters of high authority a strong though not unanimous disposition to discredit the rule as a mere *cantilena* of text-writers founded on ambiguous or misapprehended cases, or on dicta which themselves were open to the same objections.[59]

However, while authors were busy attacking the rule particularly during a lull in cases, the courts were about to select their means to implement it.

B. 1914–1967: Moving to a Stay

It was another sexual offence case before the Court of Appeal in 1914 which settled on a stay of action as the way to express the suspension rule. In *Smith v Selwyn* the female plaintiff brought a civil action alleging deception, drugging and actual or attempted non-consensual sexual intercourse. The plaintiff argued that these facts constituted a

[52] James Fitzjames Stephen, *Stephen's New Commentaries on the Laws of England* (London 1845), 56.
[53] James Fitzjames Stephen, *Stephen's New Commentaries on the Law of England*, 8th ed. (London 1880), 5.
[54] James Fitzjames Stephen, *A General View of the Criminal Law*, 2nd ed. (London 1890), 502–3.
[55] Though he located discussion in the "recapture and restitution for the wrongful conversion of chattels" section, thus linking to the second of Watkin Williams J.'s categories.
[56] *Cf.* C.G. Addison *On Wrongs and their Remedies* (London 1860), 219–220, without citations, with Horace Smith and A. P. Percival Keep *Addison on Wrongs and their* Remedies, 7th ed. (London 1893), 76: "The duty [to prosecute], if it exists, is confined to felonies …"
[57] "The Merger of Tort in Felony" (1883) 47 J.P. 291, 292. Though he thought some discretion might remain for serious cases. Compare with the somewhat derivative "Merger of Trespass in Felony" (1888) 52 JP 803 and the highly critical "The Merger of Trespass in Felony" (1898) Law Times 498.
[58] Ames, note 11 above, p. 46. The lectures were given at intervals between 1886 and 1895.
[59] Frederick Pollock, *The Law of Torts* (London 1887), 172–173.

misdemeanour contrary to the Criminal Law Amendment Act 1885, s. 3(3).[60] The defendant argued that the claim disclosed a felony, contrary to s. 22 Offences Against the Person Act 1861, so suspending the civil action until after the plaintiff prosecuted. Counsel for the defendant argued from Cave J. in *Roope v D'Avigdor*, Cockburn C.J. in *Wells v Abrahams* and the Irish case of *A v B*, that a stay of action was the correct course.[61] Counsel for the plaintiff argued that *Wells* should be followed: the case should proceed but the judge may decline to enter judgment for the plaintiff. Somewhat surprisingly, the court accepted the arguments of the defendant:

> It is not easy to find a statement in any case as to what is the course which the Court ought to adopt in a matter of this kind. Some of the decisions are not easy to reconcile. This, however, is certain, that the Court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff.[62]

The court had received relatively detailed citations, including to the 9th edition of Pollock in 1912 (still bearing his forecast of the impending abrogation of the rule).[63] However, judgment was not reserved and it is unclear how much time was taken to consider them. If the timing rule was to be followed, the case before the court could not easily have been resolved without a decision on how to implement the rule. Given that fact, a stay was probably the result more supported by authority. On the facts, the proceedings were stayed but leave granted to the plaintiff to amend his claim to better avoid relying on facts suggesting a felony. Nonetheless, the certainty which *Smith v Selwyn* finally provided may have helped to ensure the survival of the rule to which it gave effect.[64]

Judicial comment on *Smith v Selwyn* was of three kinds. First, there was criticism of the decision. For example, Lord Parker in *The Amerika* in 1917 was critical of encouraging the plaintiff to present a case where a felony did not appear on its face but where it might still exist in the background.[65] Second, there was cautious application. In *Carlisle v Orr*, the Court of Appeal of Ireland approved the rule, though with a warning that the stay was the most drastic result: a court should not

[60] The husband was also claiming in his own name for the harm of having lost the consortium of his wife, but the Court of Appeal treated the plaintiffs together: *Smith v Selwyn* [1914] 3 K.B. 98, e.g., p. 104 *per* Kennedy L.J.

[61] Ibid., pp. 100–101.

[62] Ibid., p. 103 *per* Kennedy L.J.; see also p. 106 *per* Swinfen Eady L.J and pp. 106–107 *per* Phillimore L.J.

[63] Ibid., p. 102. Frederick Pollock, *The Law of Torts*, 9th ed. (London 1912), 205–208. Pollock is somewhat sullen in the 10th edition, noting that after *Smith v Selwyn*, "[d]iscussion of the earlier authorities is therefore no longer useful": Frederick Pollock, *The Law of Torts*, 10th ed. (London 1916), 210.

[64] See e.g., Harry Street, *The Law of Torts*, 3rd ed. (London 1963), 97, note 5.

[65] *Admiralty Commissioners v SS Amerika* [1917] A.C. 38, 42–50.

order one unless it was necessary.[66] Third, there were more express doubts about the value of the rule itself. An early example is found in the Irish Court of Appeal in *Tyler v County Council of Cork* in 1921.[67] More powerful criticism came from the House of Lords in *Rose v Ford*, where Lord Wright described the obligation on the private person to prosecute as an anachronism.[68] However, the *Smith v Selwyn* line was certainly being followed,[69] on one occasion simply by copying out the King's Bench report headnote.[70]

After the Second World War, the rare reported cases in this phase were marked by small issues of interpretation and a return to the minutiae of pleading. The extreme nature of a stay of proceedings was picked up from *Carlisle v Orr* in *Jack Clark (Rainham) Ltd v Clark*, which also criticised the artificiality of semantic investigations of pleadings to disclose a felony.[71] Such semantics were highlighted by a very neat point raised in *Fowler v Lanning*: Diplock L.J. noted that a failure in pleadings to allege the fault with which harm was caused had excluded the defendant in *Fowler v Lanning* from pleading the *Smith v Selwyn* timing rule to stay the civil claim.[72] The case was otherwise unconnected, dealing with whether and what fault should be alleged in an action of trespass. Finally there was a pair of cases on the limits of encouraging prosecution: from 1959 a plaintiff need only report the matter to the police before bringing a civil action, regardless of whether the police investigate;[73] by 1965 it was said that a private individual, certainly if of limited means, need not prosecute when the police have declined to do so.[74]

As interpretation of the rule was made sufficiently otiose by *Smith v Selwyn*'s reformulation, judges turned to criticising it: the rule was unfair, complex, confusing and out of date. The judiciary were echoing

[66] *Carlisle v Orr* [1917] 2 I.R. 534 (Court of Appeal of Ireland), 538 *per* Gibson J. at first instance and e.g., p. 550 *per* O'Connor M.R. in the Court of Appeal. A number of the relevant differences in Ireland were cited, such as the lack of an appeal from the Court of Appeal to the House of Lords in England.

[67] *Tyler v County Council of Cork* [1921] 2 I.R. 8 (Court of Appeal of Ireland), at pp. 18–19 *per* Sir James Campbell C.

[68] *Rose v Ford* [1937] A.C. 828, 847–848 *per* Lord Wright and see also p. 834 *per* Lord Atkin and pp. 857–858 *per* Lord Roche. The House of Lords was referring to Slesser L.J. in the Court of Appeal with an obiter remark on felony merger: *Rose v Ford* [1936] 1 K.B. 90, 107–108. Lord Atkin appears again shortly thereafter in the Privy Council, apparently endorsing *Osborn v Gillett* (1873) L.R. 8 Ex. 88: *Mattouk v Massad* [1943] A.C. 588, 592. It should be noted that the seriousness of the remedy does not seem to have been felt in terms of limitation.

[69] Even in probate: *Re G* [1946] P. 183, 187–189; noted (1946) 62 L.Q.R. 218, 219 doubting any justification for the merger rule.

[70] See, *Yardy v Greenwood* (1935) 79 Sol. J. 363, 1 Law Journal County Court Appeals 218; 219 *per* Lord Hanworth M.R.

[71] *Jack Clark (Rainham), Ltd. v Clark* [1946] 2 All E.R. 683, 685–685 *per* Tuckey L.J. The court also stressed that the stay was not automatic, see e.g., Morton L.J., p. 684; noted (1947) 63 L.Q.R. 6.

[72] *Fowler v Lanning* [1959] 1 Q.B. 426, 440. For a similarly tangential reference, see *Abbott v Refuge* [1962] 1 Q.B. 432, 452–3, 460–462, 469–470, on malicious prosecution.

[73] *Gouldbourne v Magnus* [1959] C.L.Y. 2661 (County Court).

[74] *Oloro v Ali* [1965] 3 All E.R. 829, 830–831 *per* Milmo J.

the doubts expressed by commentators at the end of the nineteenth century, even though the timing rule's content and existence was now more certain. According to Peter Glazebrook, "In its present form the rule can find favour only with those who believe that litigation should resemble as closely as possible a game of snakes and ladders …"[75]

C. From 1967: Discretion to protect

These doubts led to reform, but by means that were indirect and ultimately unsuccessful. The Criminal Law Revision Committee's Report on Felonies and Misdemeanours in 1965 ("CLRC Report") had recommended the removal of the distinction between misdemeanour and felony and this was brought about by the Criminal Law Act 1967 ("CLA 1967"), s. 1. The Report had dealt with the timing rule in only one paragraph; finding that the rule had "become unnecessary, especially as it does not apply to misdemeanours, and should be allowed to lapse."[76] However, while the Report argued that removing distinctions between felonies and misdemeanours would remove the timing rule, no section in the Act was devoted to that task. There was no new approach, no guidance on how such cases should be resolved. This is in contrast to the other issues dependent on their being a felony, such as the power of the arrest, penalties for assisting offenders or concealing crimes, where the CLA created new rules hinging the term "arrestable offence" in place of "felony".[77]

The first case post-CLA 1967 was *Jefferson v Bhetcha* in 1979. Forbes J., at trial, had adjourned an application for summary judgment in respect of misappropriated cheques, apparently because he believed that a defendant should not be forced to disclose a defence in a civil case while a criminal one on the same matter was pending.[78] The Court of Appeal were not referred to the CLRC Report nor the CLA 1967 and the court did not refer to the cases of *Smith v Selwyn* and *Wells v Abrahams* which had been cited to them.[79] Indeed, the only case cited by Megaw L.J. in the sole judgement from the two man court was doubted by him. That was the Supreme Court of Victoria case of *Wonder Heat v*

[75] See Glazebrook, note 11 above, p. 562. He continued, in note 17 on p. 562, to give three heads of criticism: (i) since the defendant cannot plead his own wrong, it comes down to the mode of pleading and leading evidence (ii). It applies only where the defendant is the felon, e.g. not where as chance would have it the goods are no longer in the hands of the felon. (iii) It applies only in respect of felonies."

[76] Criminal Law Revision Committee, Seventh Report: Felonies and Misdemeanours. Cmnd. 2659 (1965), at [80]. This was interpreted correctly by the Winn Committee on personal injuries litigation, one year later: "This seems to have been achieved by abolishing felonies …" Winn, Personal Injuries Litigation, Cmnd 3691 (1968), at [389]. See also Sir Derek Hodgson, *Profits of Crime and Their Recovery* (London 1984), 13.

[77] See, e.g., ss. 2–3, 4 and 5 respectively.

[78] *Jefferson Ltd. v Bhetcha* [1979] 2 All E.R. 1108, 1111–1112.

[79] Ibid., 1109. Unfortunately counsel's argument was not reported, so it is unclear who played a role in causing the rule to skip to its new tracks.

Bishop where the English timing rule was applied to adjourn a claim of money had and received because the defendant was already committed for trial.[80] That case was relevant because it had persuaded Forbes J. at first instance in *Jefferson v Bhetcha* to adjourn the case pending the criminal prosecution in order to prevent disclosure of the defendant's defence. Megaw L.J. doubted the outcome of *Wonder Heat v Bishop* and Forbes J.'s belief that a criminal prosecution must be protected from parallel civil proceedings. The judgment in *Jefferson v Bhetcha*, handed down only a day after argument was heard, set out a new approach and became the leading case.[81]

First, the court having control of the civil proceedings could, in the exercise of its discretion under the Supreme Court of Judicature (Consolidation) Act 1925, s. 41, stay those proceedings if it appeared to the court that justice so required. To say that a vexatious civil action could be stayed was orthodox reasoning, and had been used in purely civil cases for some years.[82] However, the innovation was that the discretion could be exercised where the civil courts were dealing with a matter that could or should come before the criminal courts first. It was also the first time statutory authority had been used for the timing rule.

Second, in deciding whether to exercise this discretion, the judge would have to balance the justice between the parties:

> There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit … or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be … in the contemporaneous criminal proceedings … By way of example, a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings … [or] for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way.[83]

[80] *Wonder Heat Pty Ltd. v Bishop* [1960] Vic. Rp. 77; [1960] V.R. 489. The distinction between felony and misdemeanour was abolished in Victoria by the Crimes Act 1958, s. 322B though Pape J. did not seem to think this relevant, even though this was probably the first merger case since the Crimes Act came into force.

[81] See, e.g., the rare reference in *Panton v Financial Institutions Services Ltd.* [2003] UKPC 86, at [7].

[82] See, e.g., *St. Pierre v South American Stores Ltd.* [1936] 1 K.B. 382, an action relating to a lease in a foreign jurisdiction, especially 398 *per* Scott L.J. on the principles affecting the grant of a stay. The section has been used by about 13 cases in total, two of which are merger cases.

[83] *Jefferson Ltd. v Bhetcha* [1979] 2 All E.R. 1108, 113 *per* Megaw L.J. Thus the so-called "right to silence" was not a civil law rule. Therefore the trial judge had exercised the discretion poorly on the facts: p.114.

No stay was given in *Jefferson v Bhetcha*. Courts have continued to apply the test strictly and stays have not been given easily.[84]

Unlike the merger rule's origins, this form of the rule began with the clear purpose of protecting defendants. With this foundation set, litigation could immediately move to test the edges of the rule's application. For instance, there were a number of cases on the application of the rule to tribunals when there was a potential for future criminal prosecutions. In line with the jurisdiction of such tribunals, very often such cases involved employees, financial mismanagement and/or the state.[85] The question was settled in general terms in *R v BBC, ex p. Lavelle* in 1983: the civil law rule applied to disciplinary hearings, though not to judicial review;[86] eight years later it was extended to judicial review as well.[87]

Some external and internal adjustments of the system took place as the twentieth century closed. External to the civil law, but nonetheless relevant, were developments in the criminal law. Thus, for example, when criminal law downgraded the protection of the "right to silence" the civil law took this as validation of its reluctance to consider aspects of criminal procedure.[88] On the other hand, within the civil law other developments affected the form of the new rule. In particular, the new Civil Procedure Rules came into force.[89] A Practice Direction became the governing provision for the timing rule in 2001.[90] It made clear that in an application for the stay of civil proceedings pending the determination of related criminal prosecution: any party to the civil or criminal proceedings may make the application; every other civil party must be made a respondent in the application; the application must give grounds for and estimate the duration of the stay and finally that it

[84] For a rare example see *In Re D.P.R. Futures Ltd* [1989] 1 W.L.R. 778, 790–792. There, *per* Millett J., the real risk to the defendant's chance to a fair trial if a civil case were to precede a criminal one was outweighed by the potential losses to the large number of small investors.

[85] In some of these cases there was a public interest, much like in a criminal prosecution. See, e.g., *R v Chance, ex parte Smith* [1995] C.L.Y. 147 (District Court).

[86] *R v British Broadcasting Corp, ex parte Lavelle* [1983] 1 All E.R. 241, 253–254 *per* Woolf J. There was also the earlier case of *Bastick v James Lane (Turf Accountants) Ltd* [1979] I.C.R. 778 (Employment Appeal Tribunal), 780–784. The Tribunal decided *Bastick* a week after *Jefferson Ltd v Bhetcha* [1979] 2 All E.R. 1108 but without reference to it. See also *Institute of Chartered Accountants in England and Wales, ex parte Brindle* [1995] C.L.Y. 54 and *Secretary of State for Trade and Industry v Pollock* (1998) C.L.Y. 681 where both stays were granted.

[87] *R v Panel on Take-overs and Mergers, ex parte Fayed* [1992] B.C.L.C. 938 (CA), 947–948, 947: citing the risks of publicity causing prejudice and evidence being fabricated.

[88] *Surrey Oaklands NHS Trust v Hurley* (1999) Lawtel Transcripts June 25 (QBD) where Sullivan J. also held that if one of multiple defendants had no answer to the civil claim, fairness required that to be established at the earliest possible stage.

[89] Before these reforms the statutory power had been preserved in s. 49(3) of the Supreme Court Act 1981. For discussion of the proposals preceding the reforms, see A. A. S. Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on "Access to Justice"* (Oxford 1995) while for a guide to their impact immediately on coming into force see Ian Grainger and Michael Fealy, *An Introduction to the New Civil Procedure Rules* (London 1999).

[90] *Practice Direction – Applications* (2001) P.D. 23 para 11A.1–11A.4.

was not necessary for the prosecutor or defendant in the criminal proceedings to be joined as a party to the civil case.[91]

In *V v C*, the first case after the Civil Procedure Rules came into force, the case law from *Jefferson v Bhetcha* was developed and supplemented. The court added some examples of factors to balance when considering a stay: for example, that adverse inferences could be drawn from silence in certain circumstances in both the civil and criminal law and that a positive defence is more likely to exculpate than incriminate. The court also held that where a defendant makes the application, the onus is on him to demonstrate why that discretion should be exercised and the stronger the case against the defendant in the civil context the higher the onus on the defendant should be.[92]

The cases began to take more notice of other areas as well, such as the Human Rights Act 1998,[93] and other issues of constitutionality.[94] However, while the civil judges looked further afield for relevant law, commentaries and writings remained sparse in their treatment of the questions involved.[95]

A recent case highlights just how much the timing rule connects with other areas of law. The case concerns Ashley Mote, a Euro-sceptic and once the MEP for the South East of England. Mote's story is complex but essentially he was challenging findings of social security fraud made against him. Chichester District Council ceased benefits payments to the defendant because of his apparent fraud. They re-evaluated Mote's entitlements and found that overpayments totalling about £67,000 were recoverable from him. Mote appealed the District Council's decision to the Social Security Appeals Tribunal (SSAT) but while that was pending, a criminal prosecution for fraud in respect of the same benefits began. The District Council sought to stay Mote's appeal to the SSAT in the light of the criminal prosecution but the SSAT refused. The SSAT ultimately dismissed Mote's appeal in 2004, reasons being given in 2005. Mote appealed the SSAT's decision to the Social Security Commissioner; the Commissioner dismissed the appeal in 2006. Mote then appealed to the Court of Appeal; that appeal was dismissed in 2007. What takes this case out of the mundane is that from 2004 Mote was a Member of the European Parliament. The potential

[91] On occasion judges have even taken the Civil Procedure Rules as a reason to be aware of criminal law issues in the cases before them: e.g., *Secretary of State for Trade and Industry v Crane* [2001] 2 B.C.L.C. 222 (HC), 226–227 *per* Ferris J.

[92] *V v C* [2002] C.P. Rep. 8 (CA), at [24]–[44]. A court has also refused to stay the civil action merely because witnesses will not co-operate while the criminal case is pending: *Secretary of State for Health v Norton Healthcare Ltd.* [2003] All E.R. (D) 419. For defendants not co-operating, see *Balfron Trustees Ltd. v Peterson and others (No 2)* (2001) All England Official Transcripts (1997–2008), [17]–[36], esp. [33]–[36].

[93] *Barnet London Borough Council v Hurst* [2003] 1 W.L.R. 722, at [44] *per* Brooke L.J.

[94] *Panton v FIS Ltd* [2003] UKPC 86, at [11] also focusing on the right of the plaintiff to have his case decided.

[95] E.g., John O'Hare and Kevin Browne, *Civil Litigation*, 11th ed. (London 2003), at [33.006].

immunities associated with this status led to the criminal prosecution being stayed until the Attorney-General had sought a resolution from the European Parliament that any immunity which did apply was waived. Such a resolution was made in 2005. On October 15, 2008, the Court of First Instance dismissed Mote's application for annulment of that resolution.[96]

The case is interesting for present purposes because of the way Mote's case was argued before Court of Appeal in 2007. One ground was that the SSAT should have stayed its proceedings given the on-going criminal prosecution. In the Court of Appeal's dismissal of the case they focused on the risk of injustice and unfairness to the defendant to the criminal prosecution[97] and covered both civil and criminal law perspectives on the use of a stay of proceedings. The court forcefully dismissed the additional submission that the Human Rights Act 1998 required a stay if the defendant's rights, of unstated origin but presumably under Article 6, under the European Convention of Human Rights were in jeopardy.[98] A further argument from Mote's counsel was particularly novel but also unsuccessful: that the civil trial afforded the local authority a chance to rehearse its arguments for the criminal prosecution.[99]

II. Two shifts in Timing

These phases highlight two surprising shifts in the history of the timing rule: why a means to enforce the rule was lacking for so long before 1914 and then why the rule was removed in 1967 only to be resurrected in 1979.

A. Enforcement before 1914

It is odd for an idea to have permeated legal thinking for three hundred years but for that idea not to have included a means of expression in practice. There are three key issues: why the law did not develop a means to enforce it before 1914, why there was a change in 1914 and why that change affirmed the rule and select the stay of proceedings as the remedy.

1. Why did the law not develop a sanction before 1914?

First, it must be acknowledged that the timing rule rarely needed enforcing in the courts. Judging by appellate cases, timing rule disputes

[96] *Case T-345/05 Mote v European Parliament (Privileges and Immunity)* [2008] ECR II-02849.
[97] *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324, at [20]–[40].
[98] Ibid., at [30]–[32].
[99] Ibid., at [35]–[36]. There was also an affirmation of *V v C* [2002] C.P. Rep. 8 (CA), at [37] on the "right" to silence as opposed to the right against self-incrimination, at [38].

were a steady trickle only from the 1800s.[100] In addition, earlier cases had tended to hold that the rule had not been engaged, so, surprisingly enough, the question of what sanction was appropriate had not needed answering. The rarity of cases is partly a factor of most defendants not being worth suing unless there was identifiable property involved. However, enough cases did arise that some means of enforcement was in fact debated and attempted in a couple of cases before 1914. The slow development of cases might also have been as much a result of what lawyers thought the rule was as what it actually was. Even when the timing rule was in doubt, there were clearly still counsel who were willing to argue it; as is often the case with uncertain rules, few would want to test the matter in court even though they themselves did not believe in it. Sometimes calling upon the rule would seem like a last resort of those with little other hope, as exemplified most recently by the *Mote* fraud saga. There were also other reasons behind the scarcity of cases, but many of them, like the difficulty of bringing small claims before the County Courts Act of 1846,[101] applied across the board rather than just in respect of the timing rule.

Second, there were practical reasons which explain why the background felony might not be raised in the civil action. The plaintiff would not be interested in raising it. The judiciary even encouraged careful drafting of pleadings to clothe felonious facts in the garb of misdemeanours.[102] Dressing down a claim was certainly easier where there was a ladder of offences and the civil claim could be linked to a lower level offence, such as assault rather than rape. Therefore either the defendant had to raise the felony, or the court would need to do so of its own motion.

The defendant's ability to set up his own felony in defence to an action of trespass was doubted from early on, such as in *Markham v Cobb* in 1625 and *Lutterell v Reynell* in 1670.[103] Even if the defendant could raise it, as certainly some defendants did, he must describe the plaintiff's claim as serious enough to require prosecution, but implicitly to deny the felony otherwise his admission of committing the felony might be evidence in any later prosecution or revived civil action. While this is a plausible distinction, it can sound artificial on the facts. It is

[100] A commentator's claim, in 1898, that the legal profession was frequently confronted by mixed tort and crime situations might be an overstatement: "The Merger of Trespass in Felony" (1898) Law Times 498, 498.

[101] 9 & 10 Vict. c.95.

[102] That was in fact the unanimous order in Smith v Selwyn itself, 104–105.The intellectual dishonesty of this was noted in, e.g., *Carlisle v Orr* [1917] 2 I.R. 534, 545 *per* the respondent's counsel and *Amerika Commissioners v SS Amerika* [1917] A.C. 38, 43, 50 *per* Lord Parker.

[103] Such as Jones J. holding that the defendant could not aver his own intention (*animo furandi*), *Markham v Cobb* (1625) Jones, W. 147, 149–150; 82 E.R. 79; *Lutterell v Reynell* (1670) 1 Mod. 282, 283; 86 E.R. 887. See also *Wells v Abrahams* (1872) L.R. 7 Q.B. 554, 560 *per* Blackburn J. and F. W. Maitland, *Justice and Police* (London 1885), 14.

conceivable that a defendant might raise the timing rule as a way to tie up the litigation beyond the means of the plaintiff to carry on, but there is no reason why the courts should have sanctioned this if they were aware of it.

The final possibility was that the judge might raise the question of the felony. It seems likely that a judge at Nisi Prius, where many, perhaps most, potential timing cases would have been heard could not have raised the background felony himself: once a judge at Nisi Prius had a case before him he was a commissioner to try the issues on the record, not to raise or deal with any other points.[104] Such a judge could only refuse to try the case or leave it to the court in banc: either option would have delayed the case very effectively. After the Judicature Acts 1873–75, civil claims that might breach the timing rule would have been brought before the High Court where a judge or master might theoretically act to enforce the rule.

Ultimately judges sought and selected a remedy which they could use without the parties asking for it.[105] However, once the stay of proceedings was established as the means to enforce the rule, the issue of pleadings became even more important: the stay would be decided in summary proceedings without all the evidence necessarily being presented.

Third, the timing rule's means of enforcement was bound up with the substantive shape of the rule itself. At first, when the rule was conceived of as a trespass drowning in the felony, the civil claim would either not be brought in the first place, or could just be dismissed.[106] However, from the start of the mere suspension of the civil action, *Dawkes v Coveneigh* in 1652 perhaps but certainly *Crosby v Leng* in 1810, a way to carry out that suspension might be needed. Even though a stay of the proceedings had first been proposed by Cockburn CJ in 1872[107] it was not adopted for another 42 years. The lack of enforcement mechanism also persisted because the timing rule developed sufficient flexibility to filter out cases of sufficiently minor criminality to avoid influencing the civil case, such as where the defendant was not the felon.

The fourth explanation for the lack of a sanction for the timing rule is connected with the victim's role in the state's system of criminal justice. There were two angles from which the state urged the victim to aid it: forfeiture and initiating prosecutions. These were probably also

[104] *Wells v Abrahams* L.R. 7 Q.B. at pp. 555, 557–558, 563–564.

[105] See *Smith v Selwyn* [1914] 3 K.B. 98, 103: "It is in the power of the Court to grant a stay, and it is the duty of the Court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damages is based upon a felony committed by the defendant." *Cf. A v B* (1889) 24 L.R. Ir. 235, 237 *per* Holmes J.

[106] Perhaps via an unspecified technical error in the plea as may have been the case in *Markham v Cobb*.

[107] *Wells v Abrahams* (1872) L.R. 7 Q.B. 554, 557–558.

the reasons behind the timing rule's first form, that of full merger. During the nineteenth century both changed significantly.

Until 1870 a convicted felon forfeited all his property to the Crown, including any not related to the crime. A civil claim before a prosecution therefore risked diminishing the felon's property to the disadvantage of the Crown.[108] However, enforcement of forfeiture was on the wane well before the Felony Act 1870 which formally removed it: it was practically unused in the nineteenth century.[109]

Overlapping with forfeiture was the state's interest in ensuring prosecutions, even without any benefit by forfeiture. This "public policy"[110] typically meant requiring the victim to prosecute. At least until the 1850s, the vast majority, perhaps 80 per cent., of prosecutions were undertaken by the victims of crimes, many others by those acting on his behalf.[111] The obligation to prosecute was enforced in a number of ways.[112] First, failure to communicate to the proper authorities one's knowledge of a felony may have been a crime, the misdemeanour of misprision of felony. Second, agreeing not to prosecute a crime (certainly all felonies and perhaps misdemeanours) constituted the misdemeanour of compounding a felony.[113]

Prosecuting was a heavy burden. The expense, as well as the time and effort, were significant reasons why some crimes were not prosecuted.[114] While some of the expenses began to be paid from 1752, they varied from county to county and were often incomplete.[115] Victim-driven

[108] This was only a risk, not a certainty, since arguably not all successful civil claims would have been proven to the criminal standard of proof. Being able to claim benefit of clergy had long been a way to avoid the full force of a felony charge, including forfeiture: see, e.g., P.H. Winfield, *A Text-Book of the Law of Tort*, 2nd ed. (London 1943), 176–177, esp. note n; *cf.* note 13 above, Holdsworth, iii, 332.

[109] See, e.g., P.P. (1833), XXIX, 393, paper 765, Felon's Property Returns for 1823–1833: £3,200 forfeited, of which the majority was held in trust for the felon or his family. See also e.g., HC Deb. vol. 200 cols. 931–937 (30 March 1870) and J.H. Baker *An Introduction to English Legal History* 4th ed. (London 2002), 509 suggesting that enforcement had tailed off by the eighteenth century.

[110] E.g. *Gibson v Minet* (1791) 1 H. Bl. 569; 126 E.R. 326, 336 *per* Perryn B.: "for the sake of the public".

[111] David Phillips, *Crime and Authority in Victorian England: The Black Country 1835–1860* (London 1977), 123–130: data from the Black Country showed that in 1836 83% of prosecutions were carried out by the victim but in 1851 only 61% were. Nonetheless, in about half of the cases where the victim did not prosecute it was his agent, employee, spouse, parent or child who did. See also Clive Emsley, *Crime and Society in England, 1750–1900* 4th ed. (Harlow 2010), 188 and Douglas Hay, "Controlling English Prosecutors" (1983) 21 Osgoode Hall LJ 165, 167 adds that treatises did not bother to mention this paradigm of prosecution because it was too common to need comment.

[112] See, generally, Joseph Chitty, *A Practical Treatise on The Criminal Law* 2nd ed. (London 1826) vol. I, ch. 1, "Of the Prosecutor".

[113] On which see C. Howard, "Misprisions, Compounding and Compromises" [1959] Crim. L.R. 750 and 822 and Joel Prentiss Bishop, *Commentaries on the Criminal law* (Boston 1856), §329. See also A. H. Hudson, "Contractual Compromises of Criminal Liability" (1980) 43 M.L.R. 532, esp. pp. 540 and 542.

[114] See Emsley, *Crime and Society in England*, pp. 197–200; For a sense of the number of tasks involved see Douglas Hay and Francis Snyder, "Using the Criminal Law 1750–1850: Policing, Private Prosecution, and the State" in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in England 1750–1850* (Oxford 1989), 25–6; *cf.* Jay A Sigler, "Public Prosecutions in England Wales" [1974] Crim. L.R. 642, 642.

[115] See Emsley, *Crime and Society in England*, p. 196.

prosecutions had been preferred even into the nineteenth century despite awareness of these drawbacks. British subjects preferred to be bound by obligations to prosecute rather than be at the mercy of a public prosecutor.[116] Therefore it is not surprising that the movement towards state sponsored prosecutions really began with the new professionalised police force.[117] They were the successors to the local constables who had been involved in prosecutions in the past and it seemed a logical extension of their role in preventing crime.[118] In addition, police involvement grew slowly: they began more by facilitating the private prosecutions, such as by serving summonses and enforcing appearances,[119] only later taking on all aspects of the prosecution. Gradually the roles reversed and constables took the lead; eventually they even brought victims before magistrates to be bound over to prosecute.[120]

It was somewhere between 1850 and 1880 that the police constable became the dominant prosecutor.[121] In 1869, 83,582 offences were proceeded against in London; in 72,951 of these cases, the police were involved as arresting officers, and in a number as prosecutors as well. Only 11,631 were the result of private summonses.[122] Certainly by 1880 the private prosecutor was in decline and the "policeman-state" took over.[123]

The decline in both these justifications of the rule maps onto the development of the timing rules.[124] In particular, it was during their

[116] Hay and Snyder, "Using the Criminal Law 1750–1850: Policing, Private Prosecution, and the State" in, 35; Maitland, *Justice and Police*, 148–149, esp. note 1: p. 141: "To speak of the English system as one of private prosecutions is misleading. It is we who have public prosecutions, for any one of the public may prosecute; abroad they have state prosecutions or official prosecutions." The sanctity of private prosecutions was upheld even into the 1970s: see Sigler, "Public Prosecutions", p. 649.

[117] A centralized police force was created in London and some parishes in Middlesex and Sussex by the Metropolitan Police Act of 1829. In 1839 the County Police Act permitted Justices of the Peace to create police forces in their counties; such forces were made compulsory by the County and Borough Police Act of 1856.

[118] See Emsley, *Crime and Society in England*, pp. 200–201.

[119] Jennifer Davis, "Prosecutions and Their Context: The Use of the Criminal Law in Later Nineteenth-Century London" in Douglas Hay and Francis Snyder (eds) *Policing and Prosecution in England 1750–1850* (Oxford 1989), 399–400. See also P.P. 1854–55 (481) xii, Select Committee on Public Prosecutors, questions 2929 and 2931.

[120] Hay and Snyder, note 119 above, p. 38.

[121] See Emsley, *Crime and Society in England*, pp. 201–202.

[122] P.P. 1870, xxxvi, Report of the Commissioner of Police of the Metropolis for the Year 1869, p. 2.

[123] V.A.C. Gatrell, "Crime, Authority and the Policeman-State" in F.M.L. Thompson (ed), *The Cambridge Social History of Britain, 1750–1950, vol. 3: Social Agencies and Institutions* (Cambridge 1990), esp. 243 and 245–6. See also the data from Crewe, suggesting that 14% of offences were prosecuted by the victim in 1880: Barry Godfrey, "Changing Prosecution Practices and their Impact on Crime Figures,1857–1940" (2008) 48 British Journal of Criminology 171, 185, 186. Compared to the normally minimalist state intervention of the nineteenth century, in 1863 Stephen identified the state primarily through its function of law-enforced: "The administration of criminal justice is the commonest, the most striking, and the most interesting shape, in which the sovereign power of the state manifests itself to the great bulk of its subjects" in James Fitzjames Stephen, *A General View of the Criminal Law* (London 1863), 207.

[124] These twin interests had been entwined long before, with stolen property being returned to the owner, rather than forfeit to the Crown as far back as Henry VIII, so long as the victim assisted in

decline in the nineteenth century that significant evolution of timing rules took place. First, in 1810 in *Crosby v Leng* the "merger" rule became a rule of suspension, rather than drowning, though admittedly the condition precedent approach of *Dawkes v Coveneigh* in 1652 was not that different. Second, it was particularly property and fraud cases in the mid-1800s which denied a strict condition precedent for the civil action,[125] rather that there should not be a compromise or collusion to frustrate the prosecution. Third, the earliest legislative rejection of a timing rule took place with the 1846 the Fatal Accidents Act which specifically excluded the operation of the rule from the ambit of that Act.[126] While causality is hard to establish, the decline in both justifications provides some explanatory power. For instance, the second justification, the policy of promoting prosecutions, continued after forfeiture's removal in 1870 and could have been the only justification for the application of the timing rule in *Smith v Selwyn* in 1914, though by then even that was doubtful.[127]

The judiciary must have been aware both of the decline of forfeiture and the changes in prosecution on the ground and they shifted their reasoning accordingly. Judges in the twentieth century have occasionally referred to this shift, at least in highlighting how the timing rule was illogical when private parties no longer prosecuted.[128]

Similarly, plaintiffs may have feared a misprision of felony or compounding a felony charge. In effect, if a case openly referred to a felony, the plaintiff risked admitting to a misdemeanour charge unless he swiftly brought an indictment of felony. Timing was quite a technical argument and the timing cases which came up involved counsel on both sides who would have known and explained this risk to the plaintiff. Alternative modes of redress might therefore have been favoured.[129] It must be acknowledged that our understanding of the reality of a

the apprehension of the wrongdoer: Matthew Dyson, "Connecting Tort and Crime: Comparative Legal History in England and Spain since 1850" [2009] Cambridge Yearbook of European Legal Studies 247, 256–257.

[125] See esp. note 31 above.

[126] 9 & 10 Vict., c.93, s. 1,

[127] See, e.g., *Oloro v Ali* [1965] 3 All E.R. 829, 830 *per* Milmo J. It is therefore a slight simplification to say "*Smith* v. *Selwyn* is important, then, because it shows that the rule survives the erosion of its foundations [in forfeiture]": J.C. Smith and B. Hogan *Criminal Law* (London 1965), 22 referring to Street, note 64 above, p. 97. See also "Damages for Assault" (1935) 80 L.J. 376, 376: the rule was founded in forfeiture, and "therefore, existed originally for the benefit of the Revenue, and, as this reason no longer exists, it has been argued that the rule should be abolished. The cases show, however, that the rule is still useful as a test of the *bonâ fides* of the plaintiff in a civil action. As the rule is far from being an anachronism, it may, therefore, be expected to survive the scrutiny of the law reformers." While it may not have come first, the promotion of prosecution was not an "afterthought" to the judges of the nineteenth century, *cf.* Thomas Atkins Street, *The Foundations of Legal Liability* (Northport N.Y 1906), 494.

[128] This has been judicially recognised, e.g., *Rose v Ford* [1936] 1 K.B. 90, 847–848; *Oloro v Ali* [1965] 3 All E.R. 829, 831. See also (1947) 63 L.Q.R. 6 and Winfield, note 14 above, pp. 107–108.

[129] See Davis, note 119 above, p. 426.

misprision charge is limited. It has been carefully argued that the offence was a phantom rather than a reality, at least before the seminal House of Lords case of *Sykes v DPP* in 1961.[130] Nonetheless, enough legal actors believed in the offence throughout our period that its potential effect on cases should be noted. As private prosecutions declined, both in practice and in court rhetoric, so too would any fear of those misdemeanours.

2. Why was there change in 1914?

The question, then, is why a stay of proceedings was adopted in 1914. Some change was understandable by the end of the nineteenth century. By then the procedural difficulties in timing coming before a court had been eased: the Judicature Acts freed trial judges to intervene from 1876. The substantive shape of the rule, suspension rather than merger, called for a means of enforcement from 1652, or 1810 at the latest. The background policy motivations were in decline: forfeiture in practical terms from the start of the nineteenth century and formally from 1870; private prosecutions from the 1850s. Finally, the last reported English case on timing, *Appleby v Franklin*, was in 1885 so the primary mechanism for legal change fizzled out after a frenetic 75 years. Explaining why it then took thirty years until *Smith v Selwyn* in 1914, and even why *Appleby v Franklin* followed the earlier cases, may not be possible. Just because the reasons for a situation fade away, that does not mean that legal change will follow immediately. Perhaps sufficient time needed to pass for counsel and judges to appreciate the decline in the procedural, substantive, policy and mechanical reasons why there had not been a means to carry out the rule. Paradoxically, it might also be that enough time was needed to forget the context of past decisions and effectively start afresh.

3. Why was the merger rule affirmed and a stay of proceedings adopted in 1914?

In 1914, the Court of Appeal in *Smith v Selwyn* faced a defendant validly raising the timing defence. It was a point of legal change and one which could, quite possibly, have led to the removal of the timing rule as no longer being necessary or important. In fact, the rule was affirmed and given expression. Perhaps the idea of timing was too embedded in the legal reasoning of counsel and the Court of Appeal. It may also be that the court's *ex tempore* judgement did not leave

[130] [1962] A.C. 528 which found that the offence did exist in respect of a mere failure to reveal knowledge of a felony, albeit there was some doubt about its past. Cf. P. R. Glazebrook, "Misprision of Felony – Shadow or Phantom?" (1964) 8 American Journal of Legal History 189 and 283; P.R. Glazebrook, "How long, then, is the arm of the law to be?" (1962) 25 M.L.R. 301.

sufficient time to reflect on how 1914 was different to 1885.[131] Conceivably not enough time had passed for them to envisage the legal system without a back-up timing rule for difficult cases. Perhaps they had not considered whether the rule could be dispensed with entirely. In a sense, the Court of Appeal tried to avoid facing up to the content and operation of the timing rule even when they first gave clear expression to it. While the granting of a stay was phrased as a duty, to be applied in all cases of felony, the Court retained the exit of the plaintiff re-arranging the pleadings so as to avoid referring to the felony. While theoretically the Court had no discretion, they would only have to give expression to the rule when the plaintiff's pleadings absolutely forced them to do so.

B. Removal and Resurrection: 1967–1979

By 1967 the situation was different. On the one hand, as in 1914, all the reasons why no means of enforcing the rule had been needed had faded away. In particular, the two policy reasons for having the rule at all were long dead: private prosecutions were insignificant in enforcing the criminal law by the 1960s and forfeiture was long gone. However, much more importantly, by 1967 enough time may have passed that those policy reasons were distant and anachronistic concerns. Contemporary legal actors, not just in the legislative process, acted as if the rule had no value to them and did not look in much detail to its past. The 1960s criticisms of the rule were the same as the forceful academic disapproval in the 1880s and 1890s but the earlier disapproval was not referenced.

However, stepping forward in time rather than back, the abolition of the rule in 1967 played a key role in its 1979 reboot. First, the CLA 1967 removed the formal rule and further obscured its previous rationales[132] so when a new rule was instituted in *Jefferson v Bhetcha* it could set out from an entirely new justification.[133] This new power was also based on completely technical grounds, never before used for this purpose. A discretionary stay would thereafter be granted where necessary to protect the fairness of the criminal proceedings.

Second, the solution adopted by the Court of Appeal in *Jefferson v Bhetcha* was linked to the earlier jurisprudence. The court were cited *Smith v Selwyn* and *Wells v Abrahams* and a key section of the

[131] See, e.g., *Smith v Selwyn*, 103, having been cited many of the earlier cases, Kennedy L.J. merely proceeded with his judgment: "It is unnecessary to traverse the ground again by going through the authorities which have been so fully dealt with in the argument. In my opinion the result of them is this …"

[132] There is one early parallel during counsel's argument in *Peddle v Rutter* (1837) 8 Car. & P. 337; 173 E.R. 521, 522–523 *per* Lord Denman C.J.: a criminal action had been ended because the common serjeant thought the civil action was enough. However, this was not referred to in post 1967 cases.

[133] See, e.g., the reference in *ex parte Fayed* [1992] B.C.L.C. 938, 947–948.

argument and Megaw L.J.'s judgment turned on *Wonder Heat v Bishop*, a case which went into the earlier jurisprudence in detail. The perceived problem facing the court, a civil action coming before a criminal one, had not changed since those cases and the Court of Appeal could not have thought it had. If the Supreme Court of Judicature (Consolidation) Act 1925, s. 41, had been available since 1925, why was that route to a suspension not used before 1979? In fact, the same provision can be found in the Supreme Court of Judicature Act 1873, s. 24(5), so it could had been available to ground a timing rule for a hundred years. Such statutory support had not been felt necessary to the Court of Appeal in *Smith v Selwyn*, public policy being enough for them. It turns out that CLA 1967 had not only wiped away earlier rationales but also reduced the willingness to found rules on such general justifications as well. None the less, the problem had not changed and a statutory power in a Statute first enacted in 1873 was commandeered for the purpose of creating a new timing rule. By selecting a new solution to an old problem the Court of Appeal were continuing a journey begun back in 1607, even if they did not acknowledge it.

This is also a clear example of the views of legal actors shaping the law. In *Jefferson v Bhetcha*, Megaw L.J. doubted the principle that a civil defendant should not be forced to disclose his defence to later potential criminal proceedings. That idea had been supported by Pape J. in the Supreme Court of Australia, by Forbes J. at first instance and by counsel for the respondent defendant before him, that is, Megaw L.J. therefore doubted the beliefs about the timing rule held by other legal actors; beliefs which had been shaping legal outcomes on the ground. But for the belief of a judge, supported by a somewhat obscure reference to an Australian case, English law might not have created a discretionary stay of civil proceedings when it did. All this was apparently to protect the defendant but only when absolutely necessary.

What is surprising is that a justification which did not save the rule in 1967 should be enough to revive it in 1979. The pro-defendant approach to the timing rule did not appear before 1979. The CLRC Report did contain a throwaway line about the possible prejudice to a felony trial as one reason to suspend a parallel civil case,[134] but there was no evidence they took this position specifically to aid the defendant. *Wonder Heat v Bishop* had been decided in 1960, but may not have been well known in England. Perhaps the residual belief in some form of timing rule was floating free in the subconscious of legal actors and the defence of the defendant was the first viable idea to come along.

[134] CLRC Report, note 76 above, at [80].

However, the rule was also returned to a very different setting from the one it left. By 1979 a number of other interfaces of tort and crime had changed. For instance, one area of difficulty with the timing rule was that evidence for the civil action might go stale, witnesses might die or become unavailable and the case generally would be harder to prove.[135] From 1968, plaintiffs could use a criminal conviction to assist their civil case by admitting it as evidence of the facts upon which the conviction was founded. This reform, expressed in ss. 11 and 12 of the Civil Evidence Act 1968, was driven by events in the 1960s, with the report from the Law Reform Committee which led to the 1968 Act submitted in 1967.[136] To take a second example, having to wait to bring a civil claim made the practical burden of the loss greater as the loss would go unremedied for longer. From 1972 criminal courts had a general power to order a convicted defendant to compensate the victim of a crime. While this power was probably not well used at least until the late 1980s, it may have assisted some civil claimants, particularly for smaller sums of money. From 1964 the Criminal Injuries Compensation Scheme also provided some compensation to such victims. Similarly, somewhat enhanced powers to order the return of stolen goods had also been enacted by the Theft Act 1968.[137] These background changes make the operation of a reintroduced a timing rule less onerous than had been the case at the time of *Smith v Selwyn*.

III. Impact of the Timing Rule

A. Criminal Law

The criminal law has paid only passing regard to what the civil courts did with the timing rule. As a matter of fact, neither criminal nor civil courts appear to have monitored the effect of the timing rule on the criminal law. It is true that tracing whether particular criminal proceedings had been furthered or protected by the civil stay might be difficult, but it is odd that the question seems not to have been asked.[138]

[135] It can only be assumed that the limitation period was suspended along with the right to bring the action.

[136] Lord Pearson, Law Reform Committee Fifteenth Report: The Rule in *Hollington* v. *Hewthorn* (1967), esp. at [1], [26], [27].

[137] For more detail see Dyson, "Connecting Tort and Crime", note 124 above, pp. 249–256, 257. By comparison, the first power to suspend a civil action where it collaterally attacked an earlier criminal conviction was created *Hunter v Chief Constable of West Midlands Police* [1982] A.C. 529 (HL). In *Hunter* the appellants in a civil assault action were some of the "Birmingham Six" who argued that their confessions to an infamous bombing, the key piece of evidence for the prosecution in their murder trials, were the result of assaults by the police and other state agents. In both areas the courts have granted themselves a discretion to stay an action. The relationship between these two discretions is a matter of timing: the power to stay for collateral attack deals with a past criminal adjudication, whereas the trespass merging in a felony rule is, *ex hypothesi*, a question of future proceedings, or the risk/desire for them.

[138] It is even hard to find records of cases which had been stayed returning after the criminal prosecution. This would only be after 1914, so the records should be easier to find, if they exist.

Modern examples of discussion within the criminal law are rare. One instance is Professors Smith and Hogan, in their textbook on Criminal Law, discussing the rule briefly in 1965.[139] Similarly, the Hodgson Report on Profits of Crime only tangentially noted the rule in 1984, suggesting that judges did not support it, highlighted its link to forfeiture and argued that the rule could have inhibited the creation of new felonies.[140]

Courts and commentators even had little awareness of similar substantive rules in the criminal law. From at least the middle of the nineteenth century criminal courts have had certain parallel powers to require a litigant to drop a civil proceeding that had already been begun before he could commence criminal proceedings.[141] More importantly, the criminal law has also had rules which have required courts to deal with a theoretically more serious offence before any alternative charges. This came in the form of two familiar sounding rules: that felony drowns in treason and that a misdemeanour merges in a felony. In the first case the criminal courts would acquit of the felony if the evidence suggested treason, and the defendant would be re-tried under the higher charge. This was because the public interest outweighed the ease of a prosecution for a lower offence.[142] There had also been a "merger" rule for misdemeanours in felonies until 1851.[143] A "misdemeanour" was merely the criminal law term for a trespass, so this would make some sense.[144] On some occasions a misdemeanour would be charged in place of a complex or difficult to prove felony.[145] This happened particularly where the prosecutor was uninterested in bringing the felony charge, or else he would have done so already; in contrast to a tort claim, a defendant would not usually claim that he should be on trial for a felony rather than the misdemeanour.[146] It is unclear how much these rules were used but they kept pace with developments in the civil rules.

[139] J.C. Smith and B. Hogan, *Criminal Law* (London 1965), 22. Both were Professors of "Common Law".
[140] Hodgson, note 76 above.
[141] H. T. J. Macnamara (ed), *Paley's Law and Practice of Summary Convictions*, 5th ed. (London 1866), 149. On a requirement to drop a concurrent civil action before bringing a prosecution for assault: *R v Mahon* (1836) 4 A. & E. 575; 111 E.R. 903, 903, *per* Lord Denman C.J.
[142] Thomas Howell, *A Complete Collection of State Trials and Proceedings for High Treason* (London 1826), 311–312.
[143] Though there were later re-appearances: see Glazebrook, note 11 above, pp. 562–572. See also Martin L. Friedland, *Double Jeopardy* (Oxford, 1969), 174–179, esp. 175 on the roots in forfeiture. The ladder of offences point applies particularly here, as in, e.g., assault and murder: J. W. Cecil Turner "Assault at Common Law" (1939–1941) 7 C.L.J. 56, 64–67.
[144] S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981), 404–405. See also Josiah W. Smith, *Manual of Common Law and Bankruptcy* (London 1862), 55 citing Addison (1860), note 56 above, p. 139 though this was a reference to trespass to land.
[145] See Glazebrook, note 11 above, pp. 564–566.
[146] Ibid., 572–573.

B. Tort Law

The timing rules have been a disincentive to pursue civil remedies for particular torts. In its first two phases the rule channelled fact patterns into the criminal law. In addition, there is an argument that one particular area of tort law, civil actions after death, has been strongly affected by a misapplication of the original "merger" rule. In *Baker v Bolton*, Lord Ellenborough held that a husband could not bring an action for damages for the loss of the society of his wife or for mental suffering on her account after her death: "In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."[147] Holdsworth in particular has argued that the Crown's eagerness for property on forfeiture led to both the merger rule, and through that rule, to the view of judges like Lord Ellenborough.[148]

The Ellenborough view is sometimes conflated with the maxim *actio personalis moritur cum persona*: that the personal representative of a deceased victim of a tort cannot bring an action in place of the deceased for the tort that caused death. Lord Ellenborough's dictum, taken as authoritative ever since, covers the same ground as this maxim. However, it also effectively made death a wrong which could not be complained of, even where the plaintiff was not the deceased. Nevertheless there will only rarely be a class of person who could claim to have suffered loss by the death of another. Dependents lose financial support but from 1846 the Fatal Accidents Acts would have allowed recovery for many.[149] Otherwise employers might attempt an action, but most others could not. Eventually the *actio personalis* rule was effectively removed by the Law Reform (Miscellaneous Provisions) Act 1934,[150] but the effects of the common law can still be felt: for example, when the Advisory Council on the Penal System were reporting in 1970 on compensation in the criminal courts they argued that there should not be a power to compensate for a death, since there was no right of action at common law.[151]

[147] *Baker v Bolton* (1810) 1 Camp. 493; 170 E.R. 1033, 1033.

[148] See Holdsworth, note 13 above, vol. iii, 330–331, 333–336 esp. 334; W. S. Holdsworth "The Origin of the Rule in Baker v Bolton" (1916) 32 L.Q.R. 431, 432–436, esp. 434: Holdsworth even cites a reform proposal from 1657 which proposed making an action after death possible as evidence of this link, William Shepherd, *England's Balme* (London 1657), 148; see Winfield, note 14 above, pp.176–177.

[149] From the first Fatal Accidents Act, 1846, since it expressly excluded the application of the merger rule to an action brought under that Act per s.1.

[150] On which see, e.g., W. T. S. Stallybrass (ed.), *Salmond on the Law of Torts*, 10th ed. (London 1945), 348 citing Holdsworth, note 148 above. For the information on the process of drafting the Act, see Sir Noël Hutton "Mechanics of Law Reform" (1961) 24 M.L.R. 18, 23–26.

[151] Kenneth Younger, Advisory Council on the Penal System Report on Reparation by the Offender (1970), at [51].

IV. Conclusion

For over four hundred years the common law has had to decide whether to interfere in a civil action brought before a criminal prosecution on the same facts had been initiated. There were three phrases in the regulation of this question of timing: 1607 to 1914, 1914 to 1967 and from 1967 to today. This paper has taken the view that there is a thread of deference to the criminal law running throughout. At each stage courts and legislators were aware of at least the key aspects of the earlier jurisprudence, even if their published reasoning does not delve deeply into it. In cases, particularly the key decisions of 1914, 1967 and 1979, Counsel argued for, and judges came to accept, the need for a timing rule of some kind. Cases have tended to be un- or barely reserved decisions. Judges have expressed belief in some kind of timing rule without clearly expressing why while commentators have played little to no role in the development of the rule.

In addition, the phases show that timing rules intervened less and less in the civil action. The first timing rule saw the full merger rule of the two actions and the extinction of the civil claim but that was soon weakened to one setting out a condition precedent. From there the timing rule focused on the duty of the injured person to vindicate the public interest. After a brief hiatus there was a discretionary stay that would only be exercised rarely. If there is no thread running through the various rules addressing parallel actions, it is surprising that there would be such a steady liberalising trend, leading from the merger of the civil claim at one end to very rare stays at the other. Certainly the need for some sort of rule survived for centuries, much of that time without a clear sanction for its breach. The underlying problem was not solved by statutory assassination of one rule so a new rule grew into the resulting void. During its life it has been fuelled by a number of mutually exclusive justifications, but their interrelationship has almost never been discussed.

However, there is another view. It could be argued that each rule was distinct and stands alone. For instance, it might be said that the merger rule wiped out any civil claim completely and thus cannot be said to be linked to later rules allowing such claims in certain circumstances. This line of reasoning would see any common thread as certainly cut by the CLA 1967: the *Jefferson v Bhetcha* use of the Supreme Court of Judicature (Consolidation) Act 1925, s. 41 and the later adoption into the Civil Procedure Rules is thus a modern solution to a practical problem.

That two opposing approaches to the development of the case law could both be plausible is a sign of how difficult it is to start to understand the overlaps and undercurrents between tort and crime.

Nonetheless, the relationship between parallel civil and criminal court proceedings in English law provides material and raises important questions about how English law has dealt with the boundary between tort and crime in general. It is one instance of a larger border dispute that has been bubbling away in the courts and legislature for centuries. There are great practical implications depending on where the tort/crime border is and it is time to face up to them. This article has argued that a logical first step to understanding the relationship between tort and crime is to build up a picture of how they have been co-ordinated until now. There is much to learn. Many of what are thought to be novel arguments now can be traced back to other points in the history of the relationship and there is a wealth of material on the outcomes of those arguments waiting to be explored.

The default belief in the last 150 years, if it existed, has been that it would cause confusion for one branch of the law to consider the substantive law of the other.[152] Sometimes this reluctance is manifest in a complete "decoupling" of the tort and criminal law rules.[153] At other times, it results in a rule of tort or crime sitting in a different place on a sliding scale.[154] The common law tradition of noting difficult questions but not answering them remains alive in the borderline of tort and crime.[155]

This is all in stark contrast to our continental neighbours. The Spanish legal system, for instance, is arranged to simplify the relationship between civil and criminal law. In particular, it channels civil claims into the criminal legal process, hence a common name for it "ex delicto", that is, civil liability from a crime. Therefore, it is not only a question of the civil action pre-empting the criminal, but of a civil action being brought separately and out of the normal order. As a consequence, the Spanish suspension rule will be needed less.[156] When it is used the Spanish suspension rule exists to prevent conflicting decisions.[157] This is a rationale that English lawyers have not even discussed.[158]

[152] See, e.g., in relation to automatism *Mansfield v Weetabix* [1998] 1 W.L.R. 1263, 1266, 1268–9; on the civil law of ownership and theft: *Bentley v Vilmont* (1887) 12 App. Cas. 471, 477 per Lord Watson *cf. R v Hinks* [2001] 2 A.C. 241, 263–270 per Lord Jauncey (though *cf.* also pp. 263–270 *per* Lord Hobhouse); on the meaning of "publication" see *R v Sheppard and Whittle* [2010] EWCA Crim 65; [2010] 1 Cr. App. R. 26, at [35].

[153] As in *R v Hinks* and *R v Sheppard and Whittle*, note 152 above.

[154] See *Ashley*, note 5 above, at [17]–[20], [51]–[55], [76] and [86]–[91].

[155] Ibid. at [20]. [55], [89]–[90].

[156] Indeed, the criminal calculations will be from fundamentally different points of view than the civil: Irene Nadal Gómez, *El ejercicio de acciones civiles en el proceso penal* (Valencia 2002), 127–128. See in particular articles 362 and 1804 of the Ley de Enjuciamiento Civil 1881; article 40 of the Ley de Enjuciamiento Civil 2000 and Articles 111 and 114 of the Ley de Enjuiciamiento Criminal 1882.

[157] This has been the case since at least 1881: Jiménez Asenjo, "Las cuestiones prejudiciales en materia civil (Ensayo)" (1951) Revista jurídica de Catalunya 234, 249

[158] Perhaps because civil and criminal law have often been viewed as technically separate areas of the law so not in need of moderation.

Two examples of modern cases on the edges of tort and crime were given at the start of this article: a requirement for permission to bring a trespass to the person claim based on events that led to the defendant's conviction for an imprisonable offence and the application of *ex turpi causa* to a claim damages for being in prison. Looking at these again in the light of a deeper understanding of the timing rule reveals further layers. On the one hand, it is suddenly more surprising that in 2003 Parliament would seek to impede civil actions for assault after a conviction when there was no longer a rule requiring the criminal proceedings to come first.[159] On the other hand, it is more understandable that the defence of *ex turpi causa non oritur actio* was not seen in tort law until the late twentieth century since timing rules would have prevented felonies from giving rise to tort actions until 1870 at the earliest.[160] These are just two examples of legal development being affected by the interfaces between tort and crime.

The points of contact between tort and crime are not isolated incidents: they feed into and are fed by the disputes within tort law and criminal law. They are crucibles where the procedure, substance as well as policy of tort law and criminal law react. By understanding such places, we can learn more about tort, crime and the development of legal systems in general.

[159] See *Adorian v MPC* [2009] EWCA Civ. 18 on s. 329(2) of the Criminal Justice Act 2003. The existence of s. 329(2) could be a reason for the stay to be exercised under *Practice Direction* 23 para 11A.1–11A.4. Otherwise the civil court would decide on the liability between the parties without reference to the criteria in the statute, e.g., that the defendant's actions were grossly disproportionate. On the other hand, as a matter of statutory interpretation, if the civil case comes first, there may simply be no force to the 2003 provision. No reported cases on this have been found since *Adorian v MPC*. Of course, in the majority of situations a criminal conviction will still precede a civil claim.

[160] Felonies were some of the clearest examples of unlawful behaviour, and they were less likely to come before the civil courts, in turn making defences based on them less likely to appear, see, e.g., *Pitts v Hunt* [1991] 1 Q.B. 24, 38–39 *per* Beldam L.J. The first definite case of *ex turpi causa* in England was probably *Ashton v Turner* [1980] 3 All E.R. 870; [1981] Q.B. 137. There may also be a parallel in breach of statutory duty: where a statute imposes a criminal penalty for the failure to uphold a regulatory standard, but is silent on civil liability, there is a presumption that that is an exclusive penalty. See, e.g., *Groves v Wimborne* [1898] 2 Q.B. 402, 408–410 *per* A.L. Smith L.J, 414–415 *per* Rigby L.J.