the defendant for stealing this brooch. Defendant had paid the amount of plaintiff's judgment and costs.

Torr, Q C., for the defendant, had obtained a rule nisi for a new trial on the ground that the evidence tended to prove a felony; and on affidavits of the facts subsequent to the trial, that is, a criminal prosecution for the felonious stealing of the brooch alleged to have been converted in the action

Aspinall, Q C., for the plaintiff, shewed cause.
Torr, Q C., supported the rule.

The arguments upon the rule came on by way of motion, when the following were cited and discussed: *Crosby* v. *Leng*, 12 East. 409; *Stone* v. *Marsh*, 6 B & C. 551; *Gibson* v. *Minet*, 1 H. Bl. 569; *White* v. *Spettigue*, 13 M & W. 603; 1 Hale, Pleas of the Crown 546; Com. Dig. "Action on case," B. 51; *Dawkes* v. *Covenaigh*, Styles 346; 1 Sm. L. C. 6th edit, 267; 9 & 10 Vict. c. 93, s. 1; *Harris* v. *Shaw*, Cas temp Ld. Hard. 349; *Wellock* v. *Constantine*, 2 H. & C 146; *Markham* v. *Cobb*, Wm Jones, 147; *Gimson* v. *Woodfull*, 2 C. & P. 41; *Huggins* v *Butcher*, Yelv 89 [See also Bishop's Criminal Law, vol. 1, sects. 553 to 603; and *Prosser* v. *Rowe*, 2 C & P. 421.]

COCKBURN, C J.—This rule must be discharged. There is a rule long established, in fact coeval with the law of England, that where a certain statement of facts discloses at the same time a civil injury to an individual and a public injury, the civil injury is suspended until there has been a prosecution by the party injured That is the law; the question is, how is it to be enforced? It may be that the person against whom a prosecution is impending may plead that he is in the position of a felon, and may thus stop the civil action. I do not say so; it certainly would be to allow a person to allege his own criminality. To bring a civil action while the prosecution was going on may be oppressive. Under such circumstances, the court, as it is always willing to do, might, by the exercise of its summary jurisdiction, stay proceedings. Or suppose a person neglects to prosecute, preferring from selfish interest to bring a civil action, a public prosecutor might apply to the court to interfere and prevent his deriving the benefit of the fruits of his action. The only question in this case is whether my brother Lush ought to have interfered either by nonsuiting the plaintiff, or, if he refused to be nonsuited, by entering a verdict for the defendant. I cannot see whence he derives the power to do either. A judge at Nisi Prius has not the power of the court, nor is he always even a member of the court in which the action is brought. He is merely the instrument of the court to try the issue upon the record. Possibly he might refuse to try the cause. But when the cause has begun, the judge can only deal with the issues before him. In this case they were upon the pleas of not guilty and not possessed. The property was the plaintiff's, and the defendant had converted it. If he converted it *animo furandi*, the conversion would amount to a felony, and he would be liable to be prosecuted. Whether the conversion was felonious or not was a question of fact. How was the judge to direct a nonsuit, or how could he leave such a question to the jury? There was no such issue, and the judge had no power to do so. This is an application for a new trial on the ground that upon the facts the judge should have nonsuited, or entered a verdict for the defendant, He should have done this, it is alleged, on the ground that the facts showed that the defendant had committed a felony. At the trial Mr Torr, properly, would not have admitted that the defendant had committed a felony. He comes here applying on facts which, he says, shew a felony, and denies that a felony was committed. He applies on facts of which he denies the truth. He has, therefore, no *locus standi*. The only ground on which he could apply would be that he had committed a felony.

BLACKBURN, J.—I am of the same opinion. There are, no doubt, many dicta of high authority that where there is a civil injury which is also the subject of a criminal prosecution for felony, it is the duty of the person injured first to prosecute, and that he cannot go on with his civil remedy until he has prosecuted. There is no case, however, before those of *Gimson* v. *Woodfull* (2 C. & P. 41), and *White* v. *Spettigue* (13 M. & W. 603), in which that rule has been acted upon. It is quite possible that such a duty may lie upon the party injured Upon a proper case made on behalf of the Attorney-General, acting in the capacity of public prosecutor, shewing that such an action was brought by a person desiring to avoid prosecuting, or in any way to compromise a felony, the court might stay proceedings in the action. I doubt whether, upon the application of a defendant who was being criminally proceeded against, such an action might not be stayed until the criminal proceedings were disposed of, on the ground of his being harassed with the two proceedings at the same time. Now, it is said that it was the judge's duty to nonsuit the plaintiff, or to direct a verdict for the defendant At the trial the question to be decided was: Did the defendant convert the goods mentioned in the declaration to his own use? If the jury had found that the facts had amounted to a felony, were the jury to say that the defendant was not guilty of the conversion? I do not think that the defendant could have pleaded a good plea that the conversion charged against him in the declaration was a felony. The authority for the series of dicta which have been quoted is to be traced back to the case of *Markham* v *Cobb* (Wm. Jones 147), decided in the time of Charles I. This was an action of trespass for entering the plaintiff's house and taking £3000 of his money. The plea was, that the plaintiff procured the defendant to be indicted and convicted before the justices of gaol delivery of the county of Nottingham for burglariously entering the said house and taking therefrom £3000, which was the trespass alleged. To this plea the plaintiff demurred The plea in effect was, that the plaintiff had elected to take criminal proceedings against the defendant, and therefore could not go on with this civil action. The decision in that case as to the election was that a party had an election between bringing trespass or an appeal; that bringing an appeal would be a bar to bringing an action for the