which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment.

To this last amended petition, the defendants Winston, Berry, Air and Root severally answered, denying the matters alleged against them generally, and setting up as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of $1,500, paid to him by J. R. Hallam, Barry Taylor and James Taylor, Jr., who were originally their co-defendants in the action, settle, released and discharged said defendants, from whom said sum was received, from any and all liability for the wrong and injury committed by them, and as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for $2.556 against all the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which the judge who tried the cause held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject, however, to the opinion of the court on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

Stallo & Kittredge for plaintiff.

Jordans & Jackson for defendants.

Storer, J.—The important question for us to consider, as the counsel upon both sides admit, is, what was the effect of the entry by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this:

"The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *nol. pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in *Rex.* v. *Sergeant* (12 Mod. 320), and is now the settled law.

We find in the early case of *Parker* v. *Lawrence*, decided in the reign of James I., Hobart 70, that the court were of opinion that a *nol. pros.* as to one or more joint trespassers, before action, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Walsh* v. *Bishop* (Cro. Car. 243).

Since this decision the current of the law has been uniform on the point. We find it settled in *Noke* v. *Ingham* (1 Wilson 90;) *Dale* v. *Eyre* (*Id.* 306;) *Cooper* v. *Tiffin* (3 T. R. 511;) *Mitchell* v. *Milbank* (6 T. R. 200).

The cases are carefully collected and approved by Sergeant Williams in his note to *Salmon* v. *Smith* (1 Saunders 206, note 2), and establish fully the rule we have indicated, that a *nol. pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *nol. pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: *Pell* v. *Pell* (20 Johns. 126;) *Woodward* v. *Newhall* (1 Pickering 500).

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and although a plea in abatement is permitted in case of the non-joinder of debtors, the privilege does not extend to tort-feasors; all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of *Cocke* v. *Jenner* (Hob. 66), and *Hitchcock* v. *Thornland* (3 Leonard 122). All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In *Ellis* v. *Bitzer* (2 Ohio 89) it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all condition or exceptions: *Fitch* v. *Sutton*, 5 East 232; *Rowley* v. *Stoddard*, 7 Johns. 207; *Dezeng* v. *Baily*, 9 Wend. 336; *Shaw* v. *Pratt*, 22 Pick. 305; *Mason* v. *Jouetts' Admr.*, 2 Dana 107; *Miller* v. *Fenton*, 11 Paige 18; *Hoffman* v. *Dunlap*, 1 Barb. 185; *Crawford* v. *Millspaugh*, 13 Johns, 87; *Seymour* v *Minturn*, 17 *Id.* 169; *Couch* v. *Mills*, 21 Wend. 425; *Jackson* v. *Stackhouse*, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.