ENGLISH REPORTS.

COURT OF EXCHEQUER.

Jones v. Brassey and Ballard.

(Concluded from page 44.)

Channell, B.—I am of opinion that this rule should be discharged. There were three states or conditions of things arising out of the original action; one was the claim of a sum of money, as to which the plaintiff admitted he was satisfied by means of payment, and the credit he gave was proof of payment, so as to dispense on the part of the defendant with the necessity of proving it. There was then another claim, as to which, except as to £65, parcel of it, the defendant pleaded payment, which, if true in point of fact, afforded a defence in point of law. Then there was a third claim with respect to that matter of the £65, which was excepted by the pleadings. The defendant by his pleas denied the whole cause of action except as to £65, and as to £65 there is what is called a *nil dicit*, which is a plea amounting to confession. The plaintiff signed judgment as to the part not pleaded to, and entered a *nolle prosequi* as to that part of the demand which was pleaded to and affected by the two pleas. Now, the plaintiff having brought his second action, the question would arise upon the pleadings, whether or not the sum of money sought to be recovered in the present action, was disposed of by means of the judgment recovered in the first action. It is not unimportant to observe that the entry of a judgment is always considered, (although, in point of fact, it takes place by the action of the attorney,) as the act of the court. The *nolle prosequi* is an entry of the parties; the court cannot, as a general rule, prevent the plaintiff, if he chooses to enter a *nolle prosequi*, from taking that course. Upon the pleadings, as originally framed in this action, the question, I think, would be this: The plaintiff by his replication would have admitted that some judgment, in point of fact, had been recovered between the present plaintiff and the present defendant, whether the causes of action in respect of which that judgment was recovered be the same causes of action or not. There must not only be an identity of particulars, and identity of matter, but it must be matter which was in each case the subject of a judgment; and supposing that the amount for which the *nolle prosequi* was entered can be identified, as upon the evidence here it can be, with the amount sought to be recovered, the case upon the original pleadings would fail in this, that though there was an identity in the subject matter of the claim, there was not an identity in this, viz., that the one subject matter was not identified with the other, because the entry by the plaintiff in the first action of a *nolle prosequi* was not the case of a judgment recovered. Now, taking, as far as we can, a just and equitable view of the case, we relieve the parties from the pleadings, and give them an opportunity of setting up a defence, if they can, without pleadings; and the case then must be looked at as if it was a case stated for the opinion of the court without pleadings. But then we must look at the facts, and see whether, even though there had been no pleas, the facts of the case were such as entitled the plaintiff or the defendant to our judgment. Now, when we dispense with and discard the pleadings altogether, we have no doubt, in point of fact, because it is admitted (and no question arises as to all that was not admitted by the plea of payment), there was a denial as to £65, but as to all beyond £65 there was no denial, and, therefore, discarding the pleadings, it raises the question whether or not a *nolle prosequi* disentitles the plaintiff to recover in a subsequent action in respect of that amount which was the subject of the *nolle prosequi*. I have put two or three instances in the course of the argument, and many others might be cited. A nonsuit does not disentitle the plaintiff to sue in respect of the same matter; and there is another case which is analogous—the case of a *stet processus*, which resembles, in some respects, an entry of *nolle prosequi*, although the *stet processus* is an act of consent between the parties, and the *nolle prosequi* may be, and is, in fact, the act of one of the parties. A *stet processus* does not disentitle the plaintiff to sue in respect of the same cause of action as to which it was entered, unless it can be shown that it was entered under such circumstances as to raise an inference to the contrary. As a matter of evidence it shows no actual bar in point of law. For these reasons I am of opinion that this rule should be discharged, and the verdict must stand for the plaintiff, conditionally, subject to a reference.

Pigott, B.—I am quite of the same opinion. When we get rid of these pleadings the question is, what is the effect of a *nolle prosequi?* As long ago as the year 1789, the court decided that matter in the case of *Cooper* v. *Tiffin*, in which, after action brought and declaration delivered, the plaintiff, on discovering that the defendant was an infant, had entered a *nolle prosequi*, and the defendant thereupon moved to be allowed his costs under the statute of 8 Eliz. c. 2, s. 2, which gives the defendant costs, "if after declaration the plaintiff shall suffer the suit to be discontinued, or otherwise shall be nonsuit in the same," and he contended that the case came within the reason of the statute, and that in practice such costs were always allowed, to which it was answered by the plaintiff, in showing cause, that the case neither came within the words or the reason of the Act of Parliament; the words being only "discontinuance" and "nonsuit," and that there was good reason for not extending the statute to a *retraxit* or *nolle prosequi*, because, by taking three steps, which were active, the parties could not afterwards commence another action for the same cause: whereas, on discontinuing or becoming nonsuit, which are negative, the party is at liberty to bring another action for the same cause, to prevent which the statute was passed. But the court said that the case of a *nolle prosequi* could not be distinguished in reason from a *discontinuance*, for in this as well as that the party might afterwards commence another action for the same cause, and that the practice had been to give costs in such cases: (3 T. 511.) And in the forms given in our books of practice, a judgment upon *nolle prosequi* is the same as it