

Eng. Rep.]

JONES V. BRASSEY AND BALLARD.

[Eng. Rep.]

At the trial, before Bramwell, B., a verdict was, by direction of the learned judge, entered for the plaintiff, and a rule having been obtained pursuant to leave to set that verdict aside and enter it for the defendants, on the ground that they were entitled to it on the plea of judgment recovered, it was

Held, by the Court of Exchequer (Kelly, C.B. and Channell and Pigott, BB.) discharging the rule, that the plaintiff was entitled to the verdict. The *nolle prosequi* entered as to part of the plaintiff's claim, before final judgment in the first action, did not preclude him from bringing a second action for the balance of his claim, which was the subject of the *nolle prosequi*, and from recovering; and the plea of "judgment recovered" was not supported or proved by the *nolle prosequi*.

[24 L. T. Rep. N. S. 947.]

The plaintiff had brought an action on the 27th October, 1870, against the defendants in the ordinary form to recover £133 8s. 10d., balance due for work and labour done and performed by him as a contractor and otherwise at their request, and for materials provided and money due on accounts stated, &c., in which the particulars of his claim delivered consisted of a series of items eighty or ninety in number, amounting in the aggregate to the sum of £278 5s. 10d.; with a credit given for £144 17s., money received on account, showing a balance, which the plaintiff claimed to be due to him, of £133 8s. 10d., for which sum he brought the above-mentioned action. To the declaration in that action the defendants pleaded: first, except as to the sum of £65 7s. 3d., parcel, &c., never indebted; secondly, except as to the said parcel, satisfaction and discharge of the plaintiff's claim by payment; and they said nothing in bar of the plaintiff's claim to the said sum of £65 7s. 3d.

The plaintiff then, on the 14th Nov., 1870, entered a *nolle prosequi* in respect of so much of the claim, as the defendants' pleas were pleaded to—viz., £68 1s. 7d., and signed judgment for £65 7s. 3d. in the following form:—

"*Nolle prosequi* and judgment by *nil dicit*, dated 14th Nov., 1870.

"And hereupon the plaintiff says that he will not further prosecute his suit against the defendants, in respect of so much of the claim in the declaration mentioned as the defendants' pleas are pleaded to, and therefore, as to so much of the said claim, let the defendants be acquitted and go thereof without day, &c.; and, inasmuch as the defendants have said nothing in bar or preclusion of the action of the plaintiff in respect of the said sum of £65 7s. 3d., parcel of the money claimed, and in the said pleas excepted, the plaintiff remains therein undefended against the defendants, therefore it is considered that the plaintiff do recover against the defendants the said sum for £65 7s. 3d., and £7 7s. 6d. for his costs of suit."

The defendants satisfied the said judgment, and the plaintiff immediately thereupon, viz., on the 15th Nov., 1870, commenced the present action to recover the sum of £68 1s. 7d., in respect of which the *nolle prosequi* was entered in the previous action, as before mentioned, in which the declaration was in the same form as that in the previous action. To this declaration the defendants pleaded, first, never indebted; secondly, satisfaction and discharge by payment of the plaintiff's claim before action; and, thirdly, a special plea that the plaintiff, on the 26th Sept., 1870, in H. M.'s Court of Exchequer

of Pleas at Westminster, impleaded the defendants, in an action for the recovery of the debts and moneys in the declaration above mentioned, and for, upon, and in respect of the contracts and causes of action in the said declaration above mentioned, and such proceedings were thereupon had in the said action that afterwards, and before the commencement of this suit, to wit on the 12th Nov., 1870, by the consideration and judgment of the said court, the plaintiff recovered, in the said action, the said debts and moneys in the said declaration above mentioned, to wit, £65 7s. 3d., and also £7 7s. 6d. for his costs and charges by him about his suit in that behalf expended, whereof the defendants were convicted; and by the record and proceedings thereof still remaining in the said court fully appears, which said judgment is in full force and unreversed.

By his replication, the plaintiff (1) suggested to the court the death of the above-named defendant Brassey; (2) joined issue on the defendants' first and second pleas; and (3) pleaded, by way of new assignment, to the third plea that he sued for money payable by the defendants to him for other causes of action than those in the said third plea mentioned, and in respect whereof the said judgment was recovered, as aforesaid.

To such new assignment to the third plea, the defendant Ballard pleaded, first, never indebted; secondly, satisfaction and discharge by payment before action; and upon those pleas to the plaintiff's new assignment issue was taken and joined.

The particulars of the plaintiff's claim in the present action, delivered under a master's order of the 5th Dec., 1870, consisted of precisely the same items and sums as those contained in the particulars delivered in the prior action, showing the before-mentioned balance of £133 8s. 10d., to which was now appended a credit item thus:

Cr. 1870. Nov. 14.	133	8	10
By amount of judgment recovered.	65	7	3

	£68	1	7
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and it was for that balance of £68 1s. 7d. that the present second action was brought.

At the trial of the present action before Bramwell, B., at Westminster in Hilary term last, the record and particulars in the former action were put in and admitted. It was also admitted that, before the pleadings in the first action, all the items and the defendants' objections to them were discussed, and also that the defendants intended to suffer judgment for all that was due in respect of each item. Thereupon a verdict was, by the direction of the learned judge, entered for the plaintiff for £68 1s. 7d., subject to a reference. Referee to be agreed on by the parties, or to be named by the judge, with leave reserved to the defendants to move for a rule, calling on the plaintiff to show cause why the verdict found for the plaintiff should not be set aside, and a verdict entered for the defendants pursuant to leave, on the ground that the defendants were entitled to the verdict, on the plea of judgment recovered, the learned judge having erroneously directed it to be entered for the plaintiff on that plea.