

prevented a recovery for the original debt; for it was held in *Bank v. Dana*, 32 Barb. 296, that if notes given on a renewal of former notes are voidable for usury, though intended as payment, they will not operate as payment; and in that case the general doctrine is laid down that a debt cannot be satisfied by a new promise of the debtor which is voidable, and which he has avoided and distinctly refused to fulfill.

In analogous cases it has been held that a recovery may be had for a demand originally valid, though an illegal and invalid note has been taken for it; as where the note wanted the stamp required by law. *Farr v. Price*, 1 East 57; *Tyte v. Jones*, 1 East 58, (note;); *Alves v. Hodgson*, 7 T. R. 245; *Brown v. Watts*, 1 Taunt. 353.

Judgment on the verdict.

JACOB F. BROWN & A. v. DANIEL WENTWORTH & A.

In personal actions the nonsuit of one of several co-plaintiffs is the nonsuit of all.

In such an action where one of several co-plaintiffs, each having equally an interest in the cause of action and maintaining the suit, if at all, in his own right and for his own benefit, and having an equal right to control the suit, shows the court that the suit is brought without his knowledge, consent or authority, and, by petition duly presented, requests to be nonsuited, and no fraud appears, ordinarily a nonsuit will be entered as to all the plaintiffs.

In such a case an offer of indemnity by the other co-plaintiffs to the plaintiff thus petitioning, not made till after the presentation of such petition, will not ordinarily be sufficient to prevent the entry of a nonsuit.

TRESPASS. The declaration alleges that the defendants dug out, cut and severed the plaintiffs' lead pipe, by means of which for a long time before they had drawn water for the supply of their several residences, thereby stopping the supply.

All the plaintiffs, except Brown, came into court with the following petition:

SUPREME JUDICIAL COURT.

CARROLL SS.

April Term, 1866.

To the Honorable Justices of said Court:

We, the undersigned, finding ourselves named in the action of Jacob F. Brown, Loammi Hardy, Leander D. Sinclair, Asa Beacham, and Luther D. Sawyer, against Daniel Wentworth and Kirk B. Neal, now pending in said court, respectfully represent that said action was commenced, and our names used as plaintiffs without our consent, knowledge or authority, and we object to the prosecution of said action in

our names, and do hereby forbid the attorneys of said plaintiffs further prosecuting the same. That we have no doubt that the said defendants, at the time the alleged trespass was committed, had a legal right to dig out, cut, and sever the said lead pipe of the plaintiffs, and to perform the acts alleged in said declaration, the said pipe being upon the land of the defendants. We, therefore, become nonsuit in said action, and pray the court so to order, and to protect us in the premises.

L. D. SINCLAIR,
L. D. SAWYER,
LOAMMI HARDY,
ASA BEACHAM.

It was agreed that the plaintiffs of record are equally plaintiffs in interest, and that Brown is not assignee of either of them, and has no interest in the action different from the others, and that he cannot maintain this action without joining them.

The plaintiff Brown offered to give the other plaintiffs such indemnity as the court might order.

The questions arising on the foregoing case were reserved.

Carter and Stevens, for the plaintiff Brown.

Hobbs and Sawyer, for the four other plaintiffs.

Quarles, for defendants.

BARTLETT, J. In this action none of the plaintiffs stand in the position of assignors or trustees, but each "has an equal interest in the claim in suit, and maintains the action, if at all, in his own right and for his own benefit," and "each has an equal right to control the suit;" and there is no evidence of "any fraudulent or covinous contrivance to defeat the action." The case of *Caverly v. Jones*, 23 N. H. 578, must, therefore, be decisive here; and as four of the five co-plaintiffs show to the court that the action was brought without their consent, knowledge or authority, and request to be nonsuited, a nonsuit must be entered as to all the plaintiffs. It does not appear that any application to these four plaintiffs to permit their names to be used in the action, or any offer of indemnity to them had ever been made by Brown until after they had presented their petition to the court; and we do not see how this offer of such indemnity as the court may order can in law stand any better than the proposition of the counsel for the twenty-nine plaintiffs in *Caverly v. Jones*, 23 N. H. 575, that "the action be suffered to proceed," the other three plaintiffs "being indemnified against costs." In the present case it is unnecessary to decide whether to the ordinary rule there may not exist exceptions, where, from the necessity or peculiar circumstances of the case, a prior request or notice and offer of indemnity should not be required or held essential to the proper com-

mencement of the action, as here no facts are stated to take the case out of the ordinary rule.

There must, therefore, be

A nonsuit.

GEORGE HUNTINGTON v. OTIS BARDWELL.

An agreement by two that one of them shall bid in behalf of both for a mail contract is not invalid unless made for an illegal purpose affecting public policy.

It is not illegal for one interested in a contract for carrying the mail, but not a nominal party to it with the government, to sign the bid and contract as surety, unless this was done with a design to defraud the government.

ASSUMPSIT. The defendant had made in writing a bid for carrying the United States mail on a certain route; his bid had been accepted and he had made a contract with the United States to carry the mail, and the plaintiff had signed the bid and contract as surety for the defendant. The plaintiff claimed, that, as between himself and the defendant, they were joint bidders and contractors, and equally interested in the profits, and this action was brought to recover the plaintiff's share of the profits received by the defendant. The defendant objected that such an arrangement would be in violation of the laws of the United States, illegal and void, and that no action could be maintained upon it. The court overruled the objection and the defendant excepted.

Cushing, for the defendant.

By the law of the United States, act of 1836, secs. 27, 28 and 29, every person contracting to carry the mail is required to furnish sureties for the performance of his contract. If one of the real contractors is permitted to sign as surety, while he is really a principal, the spirit of the law is violated, and the government has not the security which the statute requires. Such an arrangement being unlawful, the plaintiff cannot be permitted to set it up as the foundation of a claim against his partner in the unlawful transaction.

The defendant, it is said, has been performing a contract to carry the mails, and has received money on that account; the plaintiff seeks to take this money from him, and undertakes to maintain his claim by setting up an unlawful agreement. *Prima facie*, the money belongs to the defendant. It can only be shown to be the plaintiff's money by showing the unlawful and fraudulent contract. The parties are in *pari delicto*, and the maxim *melior est conditio possidentis* applies. *White v. Hunter*, 23 N. H. 128.

Vose and Wheeler & Faulkner, for the plaintiff.