

BINGHAM, J. The committee in their report assigned to the petitioners their shares jointly, and to the petitionee, without the consent of the petitioners, her share, with one hundred and fifty dollars more than the shares of the petitioners, awarding that she pay them that sum to make the shares equal, for the reason that the estate could not be divided equally without prejudice or inconvenience. In this the committee exceeded their authority. They were proceeding under Gen. Laws, c. 247, ss. 13, 25, in which they were authorized to divide the estate by setting off to each petitioner his just share; but if the estate is so situated that it cannot be divided so as to give each owner his share therein without great prejudice or inconvenience, they may, if the parties consent, assign the same or a part of it to one of the owners, he paying to the others such a sum of money as the committee may award to make the shares equal.

The authority of the committee to partition the estate otherwise than by giving each owner his just share therein being dependent on the consent of the parties, and the petitioners having refused theirs, this part of the report was a nullity. *Barney v. Leeds*, 54 N. H. 128, 145.

It appears in the report that the petitioners refused to consent to the partition and award, and moved at the term that the estate be sold and the proceeds divided among the owners, and that the petitionee moved for judgment on the report.

The court, on examination, found that it would not be for the interest of all parties to have the estate sold, and ordered judgment on the report, subject to the exception of the petitioners. If the court had found it for the interest of all parties to sell the estate, the statute authorized it to order a sale, but the court, finding that it would not be for their interest, properly declined to make the order.

The action of the committee being unauthorized, their report should be set aside.

*Exception sustained.*

BLODGETT, J., did not sit: the others concurred.

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SULLIVAN.

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BARTON v. CROYDON.

The payee of a note is entitled in equity to the securities held by a surety on the note.

BILL IN EQUITY, for an injunction to restrain the defendants from proceeding at law in the collection of a note given by the

plaintiff upon the purchase of a farm, which was mortgaged to the defendants to secure the same. The cause was heard on a demurrer to the bill

*Ira Colby, H. P. Rolfe, and S. L. Bowers, for the plaintiff.*

*A. S. Wait, for the defendants.*

CARPENTER, J. Including the note and mortgage to the defendants, the plaintiff paid the stipulated price for the farm. He was not injured by his mistaken supposition, however caused, that the farm was mortgaged directly to the defendants. It was immaterial to him by what means, whether by fraud or otherwise, his vendor was induced to require, or to consent, that a part of the purchase-money should be paid to the defendants. Upon the allegations of the bill as it stands, the plaintiff, however it might be with his vendor, who is not a party, and makes no complaint, has received no injury, and is entitled to no relief.

To save delay and needless expense to the parties, the case has been considered as if the amendment to the bill making George Barton a plaintiff, and all other amendments proposed by the plaintiff in his brief, were already allowed. Thus amended, the material allegations of the bill are as follows: September 18, 1846, Peter Barton gave to Martin A. Barton a mortgage of his farm, conditioned to save him harmless for signing as surety Peter's note to the defendants, and in 1862 died insolvent, leaving substantially no estate. Prior to 1862 Martin A. failed, and in 1867 obtained his discharge in bankruptcy. George Barton, a son of Peter, in some way (in what way is not stated) acquired a title to the farm. He became insane before 1862, and so remains. His guardian, about July 1, 1874, sold the farm to this plaintiff, and laboring under the mistake that Peter gave the mortgage of September 18, 1846, directly to the defendants to secure the payment of the note, instead of to Martin to save him harmless for signing it as his surety, induced this plaintiff to give, in part payment of the agreed price, his note for the same amount to the defendants, with a mortgage of the farm to secure its payment, whereupon the defendants surrendered the old note. Upon this state of facts, the mistake is quite as immaterial as before. The defendants were legally entitled to the benefit of the mortgage from Peter to Martin, and the guardian in paying, or providing for the payment of, the original note out of the avails of the farm, did no more than equity would compel him to do. *Bank v. Herrick*, 61 N. H. —; *Holt v. Bank*, 62 N. H. —.

*Demurrer sustained.*

BLODGETT, J., did not sit: the others concurred.