

Tilton, 38 N. H. 257. At one time it was held in Massachusetts, which has an auditor law of which ours is a substantial copy, that the report changed the burden of proof. *Allen v. Hawks*, 11 Pick. 359; *Jones v. Stevens*, 5 Met. 373, 378; *Company v. Richmond*, 8 Met. 434. But it is now held otherwise in that state. *Morgan v. Morse*, 13 Gray 150; *Brewer v. Company*, 104 Mass. 593. Cases may be found in this state in which language is used which might be construed to mean that the party against whom the report is must show by a preponderance of evidence that the conclusions of the auditor are wrong; but we think, on an examination of the cases, it will be found that the report has never been held to place the burden of proof upon the defendant on the general issue. An auditor's report does not change the issue tried by the auditor. When the case comes before the jury, the questions to be tried are still the same, the only change being that the party in whose favor the report is has obtained an additional piece of evidence, a piece of evidence that proves his case in the absence of other evidence. If it is in favor of the party upon whom by the pleadings the burden of proof rests, it does not change the burden, but it is simply evidence on all the points in his case, like other evidence; and when the opposite party gives evidence of just equal weight, so that the scales balance, he is obliged to go no farther. The report in this case was evidence on all the points necessary for the plaintiff to prove to enable him to recover; the defendants could then give evidence to impeach or meet the plaintiff's case; and when the evidence was all in, to enable the plaintiff to recover he should have had a preponderance of evidence in his favor, on the points where the burden was upon him on the original pleadings. In this sense the report is *prima facie* evidence for the party in whose favor it is.

Verdict set aside.

DOE, C. J., and FOSTER and ALLEN, JJ., did not sit: the others concurred.

BEATSON & a. v. HARRIS.

A release of a suit or cause of action by one of two plaintiffs, copartners, made by a fraudulent connivance with the defendant, is void.

ASSUMPSIT, for goods sold. The plaintiffs had been former partners in business, and sold the goods to the defendant, who owed for them when the suit was brought. After the action was entered and before the next term of court, Messer, one of the plaintiffs, indorsed upon the summons served on the defendant,

over the partnership signature, made by him, that all claims embodied in the suit were settled, and the action was to be entered neither party at the next term of court. The plaintiffs claimed that the release was obtained by fraud, and, upon evidence excepted to by the defendant, the referee found that Beatson furnished all the capital of the firm, which had been dissolved more than two years when the suit was brought. Messer was insolvent and indebted to Beatson, who had an understanding with Messer that he was to collect the accounts of the firm, and thus far he had done so. The defendant went twice to see Messer before he obtained the release. It was obtained without the payment of any money, but "upon a certain agreement then made." The defendant did not see Beatson, because he knew he could not settle with him without paying the claim, and Beatson did not know of nor assent to the release of the action. Both parties move for judgment.

H. Holt, for the plaintiffs.

H. W. Parker, for the defendant.

ALLEN, J. In personal actions having more than one plaintiff, a release by one of the plaintiffs is a defence (*Kimball v. Wilson*, 3 N. H. 100, *Clark v. Dinsmore*, 5 N. H. 140); and a release by one partner of an action in favor of a partnership binds the firm. *Pierson v. Hooker*, 3 Johns. 68; *Bulleley v. Dayton*, 14 Johns. 387; *People v. Keyser*, 28 N. Y. 226, 228; 1 Pars. Cont. 186, 187. But fraud vitiates all contracts, and a release given by the fraud of one partner, or obtained through the fraud of the defendant, or through the fraudulent connivance of one partner with the defendant, could not be upheld against the firm. *Morse v. Bellows*, 7 N. H. 549, 567; *Noyes v. N. H. N. L. & S. R. Co.*, 30 Conn. 1; *McBride v. Hagan*, 1 Wend. 326; *Gould v. Gould*, 36 Barb. 270; *Smith v. Stone*, 4 G. & J. 310; 1 Pars. Cont. 187.

Fraud has not been found in express terms, but the facts which are found, coupled with omissions, are too significant to admit of any reasonable explanation consistent with good faith on the part of Messer and the defendant. The claim sued for was due. Messer was insolvent, owed Beatson, and knew that this claim with others belonged to him, and that he, Messer, had no authority to collect it. The defendant went repeatedly to Messer before he obtained the release, but did not try to settle with Beatson because he knew he could not without paying the claim. He knew the claim was due, and must have known, or ought to have known, of Beatson's sole authority and Messer's want of authority to collect or adjust the claim. No money was paid on account of the release, and it does not appear that anything else than money was paid, or agreed to be paid, nor what the "certain agreement" was; whether it was of any value as a consideration for the release, and if so,

whether or not the partner, Messer, was to receive the benefit of it on his private individual account. The silence of the report on the subject of the agreement is eloquently suggestive, and no other conclusion can be arrived at than that the release was obtained without any legal consideration. Want of authority on the part of Messer to give the release, known to the defendant, and want of a legal consideration for the release, destroyed its force and made it void.

Judgment on the report for the plaintiffs.

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

CHARLESTOWN BOOT & SHOE CO. v. DUNSMORE & a

A dividend paying corporation cannot join another officer with its directors, nor compel them to act with one who is not a director, in the management of its business.

As an absolute rule, it is not the duty of the directors of a corporation to keep its property insured.

A declaration charging the directors of a corporation with negligence in not keeping its property sufficiently insured, whereby it suffered loss from the destruction of the property by fire, will be held bad on demurrer, unless sufficient facts are alleged to show that it was the duty of the directors to keep it insured.

CASE. Demurrer to the declaration in which the following facts were alleged:—The plaintiffs are a manufacturing corporation having for its object a dividend of profits, and commenced business in 1871. Dunsmore was elected director in 1871 and Willard in 1873, and entered upon the discharge of their duties, and have continued so to act by virtue of successive elections until the present time. December 10, 1874, the corporation voted to choose a committee to act with the directors to close up its affairs, and chose one Osgood for such committee. Osgood tendered his services, but the defendants refused to act with him, and contracted new debts to a larger extent than allowed by law. By their negligence, debts due to the corporation to the amount of \$2,161.23 have been wholly lost. By their negligence in disposing of the goods of the corporation, a loss has accrued of \$3,300.40. By their neglect to sell the buildings and machinery of the corporation when they might and ought, and were urged by Osgood to sell, the same depreciated in value to the extent of \$20,000.

Also for that the plaintiffs owned and possessed a certain shop of the value of \$10,000, and a large amount of machinery and fixtures