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Gay v. Haseltine.

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Here it is admitted that neither the fact nor the declaration, standing alone, are evidence; and when put together it is the declaration which is significant, and not the fact. The fact was of no importance, standing alone; and the declaration, standing alone, was incompetent. When they are united, the unimportant fact is used as a vehicle to introduce the incompetent declaration.

*New trial granted.*

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GAY & a. v. HASELTINE & a.

Whether it is necessary for the holder of an accepted bill of exchange, payable at a day certain, to present the bill for payment before he can sustain an action against the acceptor, *quære*.

Where an order to pay a sum of money, when the party upon whom it is drawn shall be in funds from a particular source, has been accepted by him, it is his duty to pay when the contingency arises; and if he fail so to do the holder may sustain an action against him without any presentment for payment.

ASSUMPSIT, upon an order drawn by Isaac Guild, August 3, 1838, in favor of the plaintiffs, requesting the defendants to pay them the contents of a certain note "from any overplus which may be realized from the store goods now under attachment, and notes and accounts in your hands as collateral security, when you shall have discharged yourselves as bondsmen on account of E. A. Searle, and a note signed by you as indorser to the Nashua Bank, of four hundred dollars and interest."

This order was accepted by the defendants on the same day.

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It appeared, from the report of an auditor, that the defendants had a balance in their hands, after discharging the demands for which they were bondsmen and indorsers, sufficient to satisfy the plaintiff's claim.

There was no evidence of any presentment for payment.

*Farley*, for the plaintiffs. No demand was necessary. Cro. Car. 384, *Vivian v. Shipping*; 6 N. H. Rep. 541, *Graves v. Ticknor*; 10 Mass. 230, *Lent v. Padelford*.

The plaintiffs had no means of knowing when the defendants were in funds, but the defendants knew.

*J. U. Parker*, for the defendants.

PARKER, C. J. Whether it is necessary for the holder of an accepted bill of exchange, payable at a day certain, to present the bill for payment before he can sustain an action against the acceptor himself, is a question not so clearly settled as to be placed beyond doubt. See Chitty on Bills (8th ed. 1833) 391, 392; cited Story on Bills, sec. 325, note; Chitty & Hulme on Bills, ch. 9, p. 353 (Am. ed.), and note, with authorities cited. In *Hansard v. Robinson*, 7 B. & C. 90, Lord *Tenterden* considered presentment for payment to be necessary, by the custom of merchants, because the acceptor was entitled to have the bill delivered up on payment. But the decision in that case, that an action at law cannot be maintained on a lost bill, may perhaps be found to be unsound; and if the decision should prove to be erroneous, the supposition respecting the custom upon which it is founded may fall with it.

However that may be, we are of opinion that no presentment for payment was necessary in this case.

From the nature of the case the time of payment depended upon matters peculiarly within the knowledge of the defendants, and not within the knowledge of the

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*Kidder v. Norris.*

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plaintiffs. When the contingency arrived, it was the duty of the defendants to perform what they had undertaken to do, without waiting for a presentment by the plaintiffs.

*Judgment for the plaintiffs.*

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**KIDDER v. NORRIS & a.**

In an action against a firm, the plaintiff's books, containing charges against the several members, are not evidence of the delivery to the firm of the goods so charged.

The declaration of one of the partners to the plaintiff's servant, that it was no matter to which of them the articles were charged, since they would all be paid for, does not make such books evidence.

A creditor, receiving a partial payment; cannot apply it in payment of items for which he cannot maintain an action.

One who sues for the price of liquors sold, need not, as part of his case, prove that he has a license to sell them, but the burden of proof is on the objector.

**ASSUMPSIT.** The defendants were inn-keepers, and the conduct of one of them, True Norris, was such as to make him liable to the plaintiffs as a partner, though in fact he was not such.

The charges in the plaintiff's book were against "True-worthy Norris," against "True Norris" and against "T. Norris," and the items so variously charged were posted to one account, extending over several pages in the ledger, which were variously headed, "Trueworthy Norris" and "True Norris."

It was objected that the defendants could not be jointly charged upon the evidence afforded by these entries, but must be sued severally.