Clarke Vs. Russell

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Court : US Supreme Court

Decided On : 1799

Appeal No. : 3 U.S. 415

Appellant : Clarke

Respondent : Russell

Judgement :

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3 U.S. (3 Dall.) 415

ERROR TO THE CIRCUIT COURT FOR

THE DISTRICT OF RHODE ISLAND

SYLLABUS

Bills of exchange unaccompanied by protests for nonacceptance, but which had been protested for nonpayment, were admitted in evidence.

Parol evidence cannot be given to explain the terms used in written papers which were set up to prove an undertaking or guarantee.

The undertaking declared upon being for the duty of another, it must, to save it from the statute of frauds and perjuries, be in writing and wholly so.

On the return of the record, it appeared that a declaration containing the following count had been filed in an action brought by

"Nathaniel Russell of Charleston, in the District of South Carolina, merchant and citizen of the State of South Carolina, against John Innes Clarke of Providence, in the County of Providence and District of Rhode Island, merchant and citizen of the State of Rhode Island and surviving partner of the company of Joseph Nightingale, now deceased, and the said John Innes Clarke, heretofore doing business under the firm of Clarke & Nightingale."

1st Count.

"That the said John Innes Clarke and Joseph Nightingale, then in full life, on 10 March, 1796, at the District of Rhode Island, in consideration that the plaintiff would at the special instance and request of the said Joseph and John Innes endorse seven several sets of bills of exchange of the date, tenor, and description as set forth in the annexed schedule, drawn by a certain Jonathan Russell who was agent and partner in that particular of the company of Robert Murray & Company, of New York, in the District of New York, on themselves assumed and to the plaintiff faithfully promised that if the said bills should not be paid by the person on whom the same were drawn, and the plaintiff, in consequence of such endorsement should be obliged to pay the same bills, with damages, costs, and interest thereon, they the said Joseph and John Innes would well and truly pay to the plaintiff the amount of the said bills, damages, and costs, and interest, if the drawer

of said bills did not pay the same to the said plaintiff. And the said plaintiff in fact saith that in consideration of and trusting to the said assumption and promise, he did endorse the said bills; and the said plaintiff further in fact saith that the person on whom the said bills were drawn did not accept or pay the said bills, but that the said bills were, in due form of law, protested for nonpayment, of which nonpayment and protest notice was given in due form of law to the drawer thereof and also to the plaintiff, to-wit, on 13 September, 1796, at said District of Rhode Island, by reason whereof, in consequence of said endorsement, the plaintiff was obliged to pay the said bills, with damages, costs and interest thereon, amounting to 4,744, 13s., 1p. sterling money of Great Britain, equal in value to $20,338.52, and actually did pay the sum of money last mentioned in discharge of the said bills before the commencement of this suit, to-wit, on the said 13 September, 1796, at the District of Rhode Island aforesaid, of which the drawer of the said bills, on the day, and year, and at the district last aforesaid had notice, and the said drawer was then and there requested by the plaintiff to pay to him the sum of money last aforesaid, which he the said drawer refused to do, of all which the said Joseph and John Innes, afterwards, to-wit, on the day and year last aforesaid, at the district aforesaid, had notice. Nevertheless. . . ."

The defendant pleaded *nonassumpsit,* and thereupon issue was joined. On the trial the jury found for the plaintiff on the first Count, with $22,839.80 damages, and for the defendant on all the other counts in the declaration. On this verdict judgment was rendered, but the defendant having filed a bill of exceptions, brought the present writ of error. The bill of exceptions was founded on the following reasons, which it set forth at large:

1st. That upon the trial of the issue

"the counsel learned in the law for the said Nathaniel Russell to maintain and prove the said issue, offered in evidence the aforesaid foreign bills of exchange, with protests for nonpayment, but without any protests for nonacceptance of the same or of any of them."

2nd. That

"the said counsel also contended and insisted before the jury that two letters of Clarke & Nightingale, directed to the plaintiff and dated January 20, and 21, 1796, did import an engagement or promise by the said Clarke & Nightingale to the plaintiff that the said Robert

Murray & Co. would fully comply with any contracts or engagements they might make with the plaintiff."

3rd. That

"the said counsel also contended and insisted before the jury that parol testimony is allowable by law to explain said written promise or engagement expressed in said letters."

"But the counsel for the said John Innis Clark before said court did object against said bills of exchange as evidence in said case by reason that the same, or any of them, did not appear to have been protested for nonacceptance, and did insist before the jury that the said letters did not import any promise or engagement by the said Clerk & Nightingale to the plaintiff that the said Robert Murray & Co. would fully comply with any contract or engagements they might make with the plaintiff. And that the promise or engagement by the plaintiff attempted to be proved to be made by the said Clerk and Nightingale with the plaintiff in the said letters ought not to be explained by parol testimony, which had passed to the jury without objection thereto by the said counsel, they only objecting afterwards to its applicability to the said written evidence of the said promise in the said letters."

"And the justice who tried the said cause did then and there deliver his opinion to the jury aforesaid that said foreign bills of exchange ought to be admitted and pass in evidence before the said jury in said case without any protest for nonacceptance. And the said justice did also declare and deliver his opinion to the said jury that the said letters of Clerk & Nightingale, directed to the plaintiff and dated 20 and 21 January, 1796, did import an engagement or promise by the said Clerk & Nightingale to the plaintiff that the said Robert Murray & Co. would fully

comply with any contract or engagements they might enter into with the plaintiff. And the said justice did then and there declare that the said written promise by the plaintiff attempted to be proved with him by the said Clerk & Nightingale by said letters of 20 and 21 January, 1796, to have been made, might be explained by parol testimony."

The letters, on which the action was founded, were expressed in the following words:

"Nathaniel Russell, Esq."

"Dear sir,"

"Our friends Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friends. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house, on whose integrity and punctuality the utmost dependence may be placed. They will write you the nature of their intentions, and you may be assured of their complying fully with any contracts or engagements they may enter into with you. The friendship we have for these gentlemen induces us to wish you will render them every service in your power; at the same time we flatter ourselves this correspondence will prove a mutual benefit."

"We are, with Sentiments of esteem,"

"Dear Sir, your most Obedient Servants,"

"CLERK & NIGHTINGALE"

"Providence, 21 January, 1796"

"Nathaniel Russell Esq."

"Dear Sir,"

We wrote you yesterday a letter of recommendation in favor of Messrs, Robert Murray & Co. We have now to request that you will endeavor to render them every assistance in your power. Also that you will immediately on the receipt of this vest the whole of what funds you have of ours in your hands in rice on the best terms you can. If you are not in cash for the sales of china and nankeens, perhaps you may be able to raise the money from the bank till due, or purchase the rice upon a credit till such time as you are to be in cash for them. The truth is we expect rice will rise, and we want to improve the amount of what property

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we can muster in Charleston, vested in that article at current price. Our Mr. Nightingale is now at Newport, where it is probable we shall write you on the subject.

"We are, etc."

"CLERK & NIGHTINGALE"

It appeared upon the record that William McWhaun, being examined as a witness under a commission, testified, among other things, that in a conversation with Joseph Nightingale, the deceased partner, after the bills of exchange had been protested, Joseph Nightingale declared to the deponent that "there could be no doubt but that the defendants, Clerk and Nightingale, must see the plaintiff, Nathaniel Russell secured." But the defendant applied to put off the cause in the court below on account of the absence of a material witness, and filed an affidavit stating that

"he believed the witness would testify, 'that he was present at the conversation mentioned in W. McWhaun's examination, upon the request of Nightingale, but nothing of the import suggested by McWhaun then passed.'"

The court declared that the cause should be continued on this application unless the plaintiff agreed that the fact alleged in the defendant's affidavit should be

considered upon the trial as proved, to every purpose, which it could effect were the witness present and the agreement was accordingly entered into.

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The opinion of the Court, after some days' deliberation, was delivered by THE CHIEF JUSTICE in the following terms:

ELLSWORTH, CHIEF JUSTICE.

This cause comes up on a bill of exceptions, on the face of which three exceptions appear.

1. First, that bills of exchange, which had been nonaccepted, and protested for nonpayment, were admitted in evidence unaccompanied by protests for nonacceptance.

According to a general rule laid down by this Court in the case of *Barry v. Brown,* from Virginia, and from which rule there appear no special circumstances to exempt the present case, this exception will not hold.

2. A further exception is that the judge, in his charge to the jury, held that the two letters from the defendants to the plaintiff below, of 20 and 21 January, 1796, which were set up to prove an undertaking or guarantee, might be explained by parol testimony, of which kind of testimony some had passed to the jury without objection, but for what purpose does not now appear, as there were divers counts, some of which parol testimony might have supported.

The undertaking declared upon, in the count to which the verdict applies being for the duty of another, it must, to save it from the statute of frauds, and perjuries, be in writing and wholly so. The two letters, therefore, which are relied upon as the written agreement, cannot be added to or varied by parol testimony. Nor can they be so far explained by parol testimony as to affect their import with regard to the supposed

undertaking. The charge then, of the judge, that "they might be explained by parol testimony," expressed as a general rule, and without any qualifications, or restrictions, was too broad, and may have misled the jury. On this ground there must be a reversal.

3. It is therefore unnecessary to decide the remaining question whether the two letters did of themselves import an undertaking or guarantee. It may be proper to suggest, however, that a majority of the Court, at present, inclines to the opinion that they do not.

Judgment reversed, and a venire de novo awarded.