Clarke *v.* Russell.

Exceptions.—Bills of exchange.—Guarantee.

Where the bill of exceptions is part of the record, and comes up with it, the acknowledgment of the judge's seal is unnecessary; if not tacked to the record, such acknowledgment might be proper.

In an action against the drawer of a bill, protested for non-payment, it is unnecessary to show a protest for non-acceptance.

To charge one person with the debt of another, the undertaking must be clear and explicit.

It seems, that a letter of introduction, containing the following words—"You may be assured of their complying fully with any contracts or engagements they may enter into with you"—does not import an undertaking of guaranty.

In Error from the Circuit Court for the district of Rhode Island. 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 the 10th day of 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, indorse 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 & Co., 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 indorsement, 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 trustng to, the said assumption and promise, he did indorse 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 non-payment, of which non-payment and protest, notice was given, in due form of law, to the drawer thereof, and also to the plaintiff, to wit, on the 13th day of September 1796, at said district of Rhode Island; by reason whereof, in consequence of said indorsement, the plaintiff was obliged to pay the said bills, with damages, costs and interest thereon, amounting to 4744*l.* 13*s.* 1*d.*, 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 13th day of 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

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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, &c.'

The defendant pleaded *non assumpsit;* 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 non-payment, but without any protests for non-acceptance of the same, or of any of them."

2d. That "the said counsel also contended and insisted before the jury, that two letters of Clarke & Nightingale, directed to the plaintiff, and dated January 20th and 21st, 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 contract or engagements they might make with the plaintiff. [*417

3d. 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 Innes Clarke, 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 non-acceptance: and did insist before the jury, that the said letters did not import any promise or engagement by the said Clarke & 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 Clarke & 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,(*a*) 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 non-acceptance: and the said justice did also declare and deliver his opinion to the said jury, that the said letters of Clarke & Nightingale, directed to the plaintiff, and dated the 20th and 21st days of January 1796, did import an engagement or promise by the said Clarke & Nightingale, to the plaintiff, that the said Robert Murray and 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,

(*a*) The cause was tried by Judge CUSHING, but the district judge, BROWN, having been originally of counsel for the defendant, did not sit.

by the plaintiff attempted to be proved, with him by the said Clarke & Nightingale, by said letters of 20th and 21st 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 :

*418] *Providence, 20th January 1796.

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 as 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, &c.,

CLARKE & NIGHTINGALE.

Providence, 21st 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
*419] *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, &c.,

CLARKE & NIGHTINGALE.

It appeared upon the record, that William McWaugh, 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 Nighingale declared to the deponent, that "there could be no doubt but that the defendants, Clarke & 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. McWaugh's examination, upon the request of Nightingale: but nothing of the import suggested by McWaugh 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.

The general errors being assigned, and issue being joined on the plea *in nullo est erratum*, the cause was argued by *Lee*, the Attorney-General, *Howell* (of Rhode Island) and *Ingersoll*, for the plaintiff in error; and by *E. Tilghman*, *Dexter* (of Massachusetts) and *Robbins* (of Rhode Island), for the defendant in error. (*a*)

For the *plaintiff* in error, the following points were urged, and supported by the corresponding authorities: 1st. That the bills of exchange mentioned in the declaration were laid before the jury, without a protest for non-acceptance, or any proof *that they were so protested. (*b*) Lov. on Bills 176; Bull. N. P. 273; 1 T. R. 167; Lov. 81; 3 Bac. Abr. 613; 2 Gord. Univ. Acc. 363; Bull. N. P. 270; Lov. 81, 76–7; 10 Stat. at Large p. —; 11 St. at L. 106; 5 Burr. 2671–2; 8 Mod. 80; 1 Salk. 131; Kyd 137, 140, 151; 2 T. R. 713. [*420

2d. That the court below gave it in charge to the jury, that the letters written by Clarke & Nightingale, amounted to a guarantee of any engagement into which Robert Murray & Co. might enter with the plaintiff: whereas, the letters did not import such a guarantee; there was no other written evidence of it before the jury; and a collateral undertaking to pay the debt of another, must be in writing, agreeable to the English statute of frauds (29 *Car II., c.* 3), which is in force in Rhode Island. Cowp. 227. For any mistake of a judge, in his directions or decisions upon a trial, a bill of exceptions may be tendered. 3 Bl. Com. 372; Reg. Brev. 282; 2 Inst. 287. Even before the statute of frauds, if any contract was made in writing, the writing must be produced; and its contents could not be proved by parol testimony, on the general principle, that the best evidence of which the case is susceptible, must be given. Esp. 780–1. But since the statute, a promise like the one now alleged, can only be made in writing. 3 Woodes. 420–2; 4 Bl. Com. 439. The letters do not contain evidence of such a promise. They are not, in form, letters of credit, which are a species of bills of exchange, are always confined to money transactions, and invariably

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(*a*) On opening the case, *Howell* observed, that it was necessary, he presumed, to call on the judge, who presided at the trial, to acknowledge his seal, affixed to the bill of exceptions.

Ellsworth, Chief Justice.—The bill of exceptions is part of the record, and comes up with it. For that reason, the acknowledgment of the judge's seal is unnecessary. But if the bill of exceptions had not been tacked to the record, such an acknowledgment might have been proper. See Bull. N. P. 317, 319.

(*b*) On *Howell's* stating this point, the Chief Justice remarked, that it was proper to apprise the counsel, that in the case of Brown *v.* Barry (*ante*, p. 365) the same question had been agitated and decided: but *Howell* representing, that he thought there was a distinction between the case of Brown *v.* Barry, where the indorsee sued the drawer of a bill; and the present case, where the indorsee sues the indorser; The Court declared they were willing to hear the argument, though the distinction did not strike them as material. *Howell* then endeavored to support the distinction, on the ground, that a drawer may not be injured by the non-acceptance, as in the case of his not having assets in the hands of the drawee, but that an indorser could not be in that predicament, as a second indorser might resort to the first, and every indorser may resort to the drawer, upon the non-acceptance of the drawee. Lov. on Bills 176.

include a direct and positive undertaking to repay the money, which shall be advanced. Beawes L. M. 447–8; Jacob's L. D., "Letters of credit." Marius 81–2. And, in substance, the letters are nothing more than letters of friendly introduction. The court and not the jury are to construe all deeds and written instruments. 1 T. R. 172. If, when an opinion is declared of the solvency of their friends, there had been any deception, an action in the nature of deceit would lie (3 T. R. 51); Peake's N. P. 226; but there is
*421] no such imputation *here, and the words do not import a promise. 1 Vin. Abr. 261; 1 Roll. Abr. 6; Noy 11; 2 Com. Rep. 558, Cas. 237. Nor is there any equity against the plaintiff in error; for the obligation of a surety is always strictly construed, according to the letter of his engagement. 2 T. R. 266, 366; Yelv. 40–1; Peake's N. P. 226; 1 Esp. Rep. 290. Besides, notice ought to have been given by Russell to Clarke & Nightingale, if he made any advances on account of the letters; and the mere finding of the *assumpsit* will not let in a presumption that such a notice was given. Marius 85; Esp. 290, 442. The first count is a special count, and must be proved as it is laid (Doug. 24); but as those letters would apply as well to any other speculation, as to the indorsement of the bills of exchange, the special count is no notice of the contract given in evidence. The plaintiff should have stated in the declaration all the inducements; should have set forth the letters; should have averred, that Russell was the agent of Clarke & Nightingale; and that in consideration of their request, the bills had been indorsed. But the declaration does not even aver that they ever made the request, in consideration of which the bills were indorsed. Doug. 659.

3d. That the promise alleged to be made in the letters of Clarke & Nightingale, ought not to have been explained by parol testimony: for such testimony is not admissible to explain a deed, or any written instrument.(*a*) 2 W. Bl. 1249; 1 Esp. 780; 3 Wils. 275; Cas. temp. Talb. 240; 3 T. R. 474; 6 Ibid. 671; Doug. 24; 2 Roll. Abr. 276; 1 Atk. 13; Pow. Cont. 277, 290; *Day* v. *Barker et al.*, New Annual Register 1795; Pow. Cont. 373; 1 P. Wms. 618; Pow. Mort. 61; Pow. Cont. 431; 2 Atk. 384; 1 Bro. Ch. 90; Gilb. L. of Ev. 5, 6, 112; 3 Woodes. 327–8; 1 Bro. Ch. 54, 93–4; 2 W. Bl. 1249–50; 1 T. R. 180–2; Bull. N. P. 269, 280; Yelv. 40; 2 Ves. 56, 232.

For the *defendant* in error, it was answered: 1st. That there was no necessity to produce, or to prove, a protest for non-acceptance of the bills of exchange. 3 Dall. 365, 344.

(*a*) Ellsworth, Chief Justice.—On this point, I would wish to see any authorities that distinguish between solemn instruments, and loose commercial *memoranda*. There is seemingly a distinction in principle; though I do not recollect, that it is expressly recognised by any writer on the law. I will, for instance, state this case—A. and B., being at a wharf, the former says to the latter, "I will sell you my ship John." B. asks an hour to think of the proposition; goes home; and shortly after sends a note to A. in these words—"I will take your ship John." May not the party go beyond the note, to explain, by existing circumstances, the word take, which according to existing circumstances, will equally embrace a purchase, a charter-party and a capture? This exemplification will serve to convey my general idea; and it, evidently, includes many cases of daily occurrence in commercial transactions.

2d. That even admitting the letters of Clarke & Nightingale *to be part of the record (which, however, was contested), the decision of the court below was right; for, on a just construction of their contents, they import a promise or guarantee; and the terms of the letters ought to be taken most strongly against the writer. 1 Bac. Abr. 168; 2 T. R. 366.

3d. That the parol evidence at the trial was properly admitted. The bill of exceptions states, that the evidence passed to the jury, without exception, the counsel only objecting, afterwards, to its applicability. Where objectionable evidence is given, and not objected to, but admitted by the defendant's counsel, it is no ground for a bill of exceptions. The applicability of the evidence to the letters, was a matter of fact for the jury, not the court, to determine; and on that point, the court said nothing, though they were of opinion, that the written promise might be explained by parol testimony. What the testimony was, does not appear: (*a*) nor does it appear

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(*a*) *Ingersoll* was proceeding, in the course of his argument, to remark upon the testimony of McWaugh, but was stopped by the Chief Justice, who referred it to the court to decide, whether that testimony could be taken into consideration, in the discussion of the present bill of exceptions?

Washington, Justice.—It has been contended, on the one hand, that even the letters, which are the foundation of the action, do not make a part of the record; but it has been answered, that they are embraced by express words of reference contained in the bill of exceptions. I will not preclude myself, at this stage of the argument, from giving a further consideration to that point: but it appears to me, that although McWaugh's testimony might be deemed a part of the record; yet, as it is not stated, nor even referred to, in the bill of exceptions, we cannot presume that it was the evidence objected to; and therefore, must exclude it from the present discussion, which arises on the bill of exceptions.

Paterson, Justice.—It was objected in the court below, that parol testimony had passed to the jury, to explain the written contract, on which the action was founded; and McWaugh's testimony goes directly to that point. Considering, therefore, all the papers returned with the writ of error, as forming a part of the record, I think, it ought to be taken into view on the present occasion.

Iredell, Justice.—I do not think that in arguing this bill of exceptions, the deposition of McWaugh ought to be regarded. The reference to the letters of Clarke & Nightingale is sufficiently direct to render them part of the record; but when the bill of exceptions speaks of the parol testimony, it does not state what was its import, nor does it anywhere appear, that the deposition of McWaugh was the subject of objection.

Cushing, Justice.—The clerk of the inferior court has certified the record, and that it contains the whole of the proceedings in the cause, the deposition of McWaugh making a part. The bill of exceptions is tacked to the record; and, among other things, it contains an objection to the admission of parol testimony, in explanation of the written contract. When, therefore, we find that McWaugh's testimony is explanatory of the letters of Clarke & Nightingale, I am of opinion, that the reference is sufficient to entitle the deposition to be considered, in deciding upon the bill of exceptions.

Ellsworth, Chief Justice.—The whole of the record is exhibited in a loose and imperfect state; but I am clear, that we ought not to travel out of the bill of exceptions, to find matter to support it. The letters of Clarke & Nightingale, though they might, properly, have been inserted more at large, are so referred to, by words and plain intendment, that we cannot doubt their being the same, to which the bill of exceptions was applied. This is not the case with the deposition of McWaugh. The bill of exceptions does not expressly refer to that document; and though it speaks generally of

that the *court was of opinion, that the promise might be explained by the parol testimony, specifically, whose applicability the counsel denied, though the jury have found that it did apply. 3 Salk. 373; Bull. N. P. 317. Where the parol testimony was given, without objection, how could the court interfere? It must operate with the jury, and the party consented that it should operate, by allowing that it should be delivered, without objection. It does not appear, indeed, that the statute of frauds was insisted on; and certainly, it is not necessary to state a written promise in the declaration. 1 T. R. 451; Bull. N. P. 279; 2 Jones 158. Nor will the court apply the statute to the case, if the party does not. Peake 15. But even where the statute has been pleaded, parol testimony has been attended to, in explanation of written contracts. Skin. 142–3; 2 Vent. 361; Esp. 780. If, however, the construction of the letters is correct, on the part of the defendant in error, the bare declaration of the court below, that parol testimony might explain them, will not invalidate his right of recovery; and this court will not reverse a judgment rendered upon conclusive evidence, appearing on the record, though improper evidence may afterwards have been admitted. The general rule is, that parol testimony is admissible to explain, though not to contradict, a writing. Thus, it has been admitted, *424] in consistence with the writing, to show a consideration other *than that which the deed itself expressed (3 T. R. 474); to explain a certificate of a pauper's settlement (7 Ibid. 609; 2 W. Bl. 1250); to show whether a cellar was comprehended within a lease (1 T. R. 701); to explain a will (2 Ves. 216); and to prove a mistake in an agreement (1 Ibid. 456). It has been admitted, to show declarations at, and after, the writing (1 Chan. Cas. 180; 1 Dall. 193, 426; 1 Atk. 448; 2 Dall. 171, 173, 196); to ascertain a fact under a will (Ibid. 70); to rebut an equity; to prove legacies augmented, not repealed (1 Bro. Ch. 448; 2 Ibid. 521); to prove the advancement of a sum of money to be an ademption of a legacy (2 Atk. 48; 3 Ibid. 77–8; 2 Bro. Ch. 165, 519–21; 2 Ves. 28); and to prove the intention of the father, as to the mode of education, on a devise of guardianship (Ibid. 56). It is admitted in cases of resulting trusts; and constantly in mercantile contracts (Ibid. 331). In fine, the statute speaks, not only of the contract being in writing, but of some note or memorandum of the contract; and therefore, any memorandum in writing of the intent of the parties (such as the letters in question) will serve to take the case out of the statute.

The opinion of the Court, after some days' deliberation, was delivered by the Chief Justice, in the following terms.

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parol testimony, there is nothing said, that points more at McWaugh's deposition, than at the testimony of any other witness, or number of witnesses, examined upon the trial. It is said, that the deposition of McWaugh is a part of the record: but I do not think it would be considered so, on principle, in Massachusetts; and it is too illusory (since all the parol testimony is not annexed), to be long countenanced in practice. There may have been other parol testimony to counteract and invalidate the testimony of McWaugh; and there must, we perceive, have been parol testimony on some points of fact, arising on the face of the bills of exchange themselves. I think, therefore, that the deposition of McWaugh ought to be excluded from all consideration, in arguing the present bill of exceptions.

By the Court.—The deposition of McWaugh is not to be regarded, in the argument on the bill of exceptions.

Ellsworth, Chief Justice.—This cause comes up on a bill of exceptions; on the face of which, three exceptions appear.

1. That bills of exchange, which had been non-accepted, and protested for non-payment, were admitted in evidence unaccompanied by protests for non-acceptance. According to a general rule, laid down by this court, in the case of *Brown* v. *Barry*, 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 the 20th and 21st of 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, [*425 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, incline to the opinion that they do not.(*a*)

Judgment reversed, and a *venire de novo* awarded.

Sims's Lessee *v.* Irvine.

Land law of Pennsylvania.—Montour's Island.—Compact with Virginia.

In Pennsylvania, a survey and payment of purchase-money confer a legal right of entry, which will support an ejectment.

A military right to unappropriated land in America, acquired under a royal proclamation, in 1763, was assignable, by the law of Virginia, to an inhabitant of that state.

Obtaining a warrant on such right, and locating it, gave the assignee a complete equitable title, which was confirmed by the compact between Pennsylvania and Virginia.[1]

Error from the Circuit Court for the Pennsylvania district. An ejectment being instituted in the inferior court, by the lessee of *Sims* v. *Irvine*, the jury found a special verdict, upon which judgment was rendered for the plaintiff, by consent, and this writ of error was brought to settle the title.

(*a*) I have understood, that the Chief Justice, and Cushing, Justice, were for the affirmative; and Iredell, Paterson and Washington, Justices, were for the negative answer, on the third question.

[1] And see Ross *v.* Cutshall, 1 Binn. 399.