INDEX.

TESTIMONY.

WRIT OF ERROR.

NEW JERSEY, SS: (Seal)

THE STATE OF NEW JERSEY to the CHIEF JUSTICE and other Justices of our Supreme Court of Judicature GREETING:—
JOHN W. JOHNSON AND HARLEY C. ALBEE, PARTNERS etc., AS JOHNSON & ALBEE,

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between John W. Johnson and Harley C. Albee, partners in trade as Johnson and Albee, plaintiffs, and John Herman Schmitt, defendant, in an action upon contract, manifest error hath intervened to the great damage of the said defendant, as by his complaint we are informed; we being willing that the error if any there be, should, in due manner, to correct, and full and speedy justice be done to the parties aforesaid, in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly, send, under your seal, the record and proceedings and complaint aforesaid, with all things touching and concerning the same to our Court of Errors and Appeal in the last resort in all causes, at Trenton, on the twenty-fifth day of March, instant together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error what of right and according to law and custom of the State of New Jersey ought to be done.

WITNESS, HONORABLE MAHLON PITNEY, Chancellor and President Judge of our

said Court of Errors and Appeals at Trenton, aforesaid, the seventh day of March, Nineteen hundred and eleven.

S. D. DICKINSON,
Clerk.

PETER W. STAGG,
Attorney.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same; we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J. (Seal)

NEW JERSEY SUPREME COURT.

JOHN W. JOHNSON and HARLEY C. ALBEE, partners in trade as JOHNSON and ALBEE,
Defendants in Error,

vs.

JOHN HERMAN SCHMITT,
Plaintiff in Error

On Contract.
On Postea.
J. Emil Walscheid,
Attorney.

As yet of the second day of April, A. D. one thousand nine hundred and ten.

WITNESS, WILLIAM S. GUMMERE, Esq,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

HUDSON COUNTY, SS:—

JOHN HERMAN SCHMITT, the defendant herein was summoned to answer unto JOHN W. JOHNSON AND HARLEY C. ALBEE, partners in trade as Johnson & Albee, the plaintiffs therein, in an action on contract, and thereupon the said plaintiffs, by J. Emil Walscheid, their attorney, complain:—

For that whereas, the said defendant heretofore, to wit, on the fourteenth day of December, A. D., one thousand, nine hundred and eight, at the Township of North Bergen, to wit, in the County of Hudson, aforesaid, by his certain writing obligatory, sealed with his seal and now shown to the Court here, the date whereof, is a

certain day and year therein mentioned, to wit, the day and year aforesaid, together with one Joseph Barbato, acknowledged himself to be held and firmly bound unto Johnson & Albee, the plaintiffs, aforesaid, in any amount of milk sold by the said Johnson & Albee to the said Joseph Barbato and charged to him, to be paid in lawful money of the United States to the said Johnson & Albee, their executors, administrators or assigns; which said writing obligatory was and is subject to a certain condition thereunder written thereby it was conditioned that if the above bounded Joseph Barbato, his heirs, executors or administrators should pay or cause to be paid unto the above named Johnson & Albee, their executors, administrators or assigns, the sum of money for milk sold and delivered to the said Joseph Barbato by the said Johnson & Albee, from time to time during the time that the said Joseph Barbato should receive said milk from said Johnson & Albee, that then the above obligation should be void, otherwise, to remain in full force and virtue as by the said writing obligatory and the condition therein will more fully and at large appear.

And the said plaintiffs say that thereafter and from time to time, up to a certain date, to wit, the fifteenth day of August, A. D., one thousand nine hundred and nine, they, the said plaintiffs, did sell and deliver to the said Joseph Barbato and at his certain instance and request, milk, which said milk was received by the said Joseph Barbato from the said plaintiffs and that the price agreed upon between the said Joseph Barbato and the said plaintiffs for the said milk was and is the sum of three thousand, one hundred and ninety-seven and 35/100 ($3,197.35) dollars and that the reasonable value of the milk thus

sold and delivered by the said plaintiffs to the said Joseph Barbato was and is the sum of three thousand one hundred and ninety-seven and 35/100 ($3,197.35) dollars.

And the said plaintiffs further say that although the said milk was thus sold and delivered to the said Joseph Barbato and the money aforesaid has become due from the said Joseph Barbato, that neither the said Joseph Barbato, or the said defendant have paid for the said milk the money mentioned in said writing obligatory, but, therein have made default in this that they have paid on account of said milk only the sum of two thousand, two hundred and fifty-six and 60/100 ($2,256.60) dollars and that there is still due and owing on account of the said milk and on account of money for milk sold and delivered to the said Joseph Barbato by the said plaintiffs from time to time, the sum of nine hundred and forty and 75/100 ($940.75) dollars.

And the said plaintiffs for assignment of a breach of the said writing obligatory, according to the form of the statute in such case made and provided, say that they have often requested payment of the said sum of nine hundred and forty and 75/100 ($940.75) dollars of and from the said Joseph Barbato and of and from the said defendant, and that neither the said Joseph Barbato nor the said defendant, have as yet paid the said sum of money above demanded or any part thereof to the said plaintiffs or otherwise according to the said writing obligatory and condition, but to pay the same have hitherto wholly refused, and still do refuse to the damage of the said plaintiffs, two thousand ($2,000), dollars, and therefore, they bring their suit.

TO THE ABOVE NAMED DEFENDANT:

Please take notice that the following is a

true copy of the writing obligatory upon which the foregoing action is founded:—

"KNOW ALL MEN by these presents, that we, Joseph Barbato of the Township of North Bergen, and John Herman Schmitt, Town of Wood-ridge, from the State of New Jersey, held and firmly bound unto Johnson and Albee, of Rockland, New York, in any amount of milk sold by the said Johnson and Albee, to the said Joseph Barbato, and charged to him, to be paid in lawful money of the United States to be paid to the said Johnson and Albee, their executors, administrators or assigns; for which payment, to be made, we bind ourself, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated the fourteenth day of December, one thousand nine hundred and eight.

The conditions of the above obligation is such, that if the above bounded Joseph Barbato, his heirs, executors or administrators, shall pay, or cause to be paid, unto the above named Johnson and Albee, their executors, administrators or assigns, the sum of money for milk sold and delivered to the said Joseph Barbato, by the said Johnson and Albee, from time to time, during the time that the said Joseph Barbato receives said milk from the said Johnson and Albee, then the above obligation to be void, otherwise to remain in full force and virtue.

JOSEPH BARBATO (L. S.)
JOHN HERMAN SCHMITT (L. S.)

In the presence of:—

State of New Jersey, } ss.:
County of Hudson, }

JOHN HERMAN SCHMITT, being duly sworn, according to law, says that he owns real estate, the title of which is in his name, and said to be situated in the Town of Wood-Ridge, Bergen County, New Jersey, valued at $5,000.00, mortgage, and other liens amounting to $900.00 and that he is recoverable in the sum above stated, over and above all his liabilities whatsoever.

JOHN HERMAN SCHMITT.

Sworn and subscribed to before
me at Town of Union, N. J.,
this 14th day of December, A.
D., 1908.

MICHAEL MODARELLI, *Notary Public.*"

Judgment will be claimed for the sum of nine hundred and forty and 75/100 ($940.75) dollars, besides interest from August 15th, 1909, and costs of suit to be taxed.

And the said John Herman Schmitt, by Peter W. Stagg, his attorney comes and defends the wrong and injury, when etc., and says he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country.

And for a further plea in this behalf, the said defendant by leave of the Court, here for this purpose first had and obtained, by Peter W. Stagg, his attorney comes and defends the wrong and injury, when, etc., and says that the said writing obligatory is not his deed, and of this he puts himself upon the country.

And for further plea in this behalf the said defendant, John Herman Schmitt, by leave of the

Court here for that purpose first had and obtained by Peter W. Stagg, his attorney, says that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says that said writing obligatory set out in said declaration was without consideration and has no legal and binding effect upon this defendant.

This the said defendant is ready to verify. Wherefore he prays judgment of the said plaintiffs ought to have or maintain their aforesaid action therefore against him.

And the said plaintiffs, as to the pleas of the said defendant, by him first and secondly above pleaded and whereof he has put himself upon the country, does the like.

And the said plaintiffs, as to the plea of the said defendant by him thirdly above pleaded, says that the said plaintiffs ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant because they say that said writing obligatory set out in said declaration was based upon a valid consideration and of this, they put themselves upon the country.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the County of Hudson, on the third Tuesday of September, A. D. one thousand nine hundred and ten, by whom, etc., and the same day is given to the parties aforesaid, there, etc.,

And now at this day, to wit, the twenty-fifth day of February, A. D., nineteen hundred and eleven, before our said Supreme Court at Trenton, come the said plaintiffs, by their attorney aforesaid, and the Judge before whom etc., having

first sent hither his record had before him in these words, to wit:—

Afterwards, to wit, at a Circuit Court holden at the City of Jersey City, in and for the County of Hudson, before his honor, Benjamin A. Vail, one of the Judges of the Circuit Court, appointed to try issues in the Supreme Court, on the twenty-third day of November, in the year one thousand, nine hundred and ten, according to the form of the statute in such case made and provided, comes as well the said plaintiffs as the said defendant by their respective attorneys within mentioned, and the right to a trial by jury having been waived by the parties aforesaid, and it being consented that the cause be tried by the Court without a jury, and the evidence of the parties having been heard, the said Court does find as a fact and say that the said within mentioned writing obligatory is the deed of the said defendant, John Herman Schmitt, as the said plaintiffs, John W. Johnson and Harley C. Albee have within in that behalf alleged, and that the said defendant did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and the said Court does assess the damages of the said plaintiffs by reason of the non-performance of the said promises and undertakings over and above the costs and charges by them by their suit in this behalf expended at the sum of one thousand and thirty and 12/100 ($1030.12) dollars and for those costs and charges six ($.06) cents.

Therefore it is considered that the said plaintiffs do recover against the said defendant their said damages by the Court in form aforesaid found to one thousand thirty dollars and twelve cents, and also forty-five dollars and thirteen cents for their costs and charges aforesaid by the

Court now here adjudged to the said plaintiffs and with their assent, which said damages, costs and charges in the whole amount to ONE THOUSAND SEVENTY-FOUR DOLLARS AND TWENTY-FIVE CENTS.

Judgment signed this twenty fifth day of February, A. D. Nineteen hundred and eleven.

WM. S. GUMMERE, C. J.

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN testimony whereof I have set my hand and the seal of said Court at Trenton, this sixteenth day of March, A. D. nineteen hundred and eleven.

WM. RIKER, JR.,
Clerk.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY CIRCUIT.

JOHN W. JOHNSON, et al., partners,
Plaintiffs.

vs.

JOHN HERMAN SCHMIDT,
Defendant.

On Contract.

Transcript of shorthand notes of testimony taken on the twenty-third day of November, 1910 before Hon. Benjamin A. Vail, Judge.
Appearances:

For Plaintiff, J. E. WALSCHEID, Esq.,

For Defendant, PETER W. STAGG, Esq.

GEO. P. KELLEY,
Official Stenographer,

Eighth Judicial Dist. of N. J.

Court House, Jersey City, N. J.

JOHN HERMAN SCHMITT, the defendant, being called, was sworn on behaif of the plaintiff, and testified as follows:

DIRECT EXAMINATION by Mr. Walscheid:

Q. Mr. Schmitt, you are the defendant in this action, are you not? A. Yes.

Q. I show you a paper writing. That is your signature, is it not? A. Yes.

Q. You wrote that? A. Yes.

Q. You saw Joseph Barbado write that? A. Yes.

MR. WALSHEID: I offer the paper in evidence.

MR. STAGG: I object to the paper being offered in evidence.

THE COURT:—There is not subscribing witness?

MR. WALSCHEID:—No.

MR. STAGG: I object because it is not evidential in this case, for the reason it is alleged to be a bond without any penal sum at all. I want to argue that question.

THE COURT: That is the gist of the whole case?

MR. STAGG: Outside of the question, what is due.

THE COURT: Do you question that?

MR. STAGG: I don't know anything about it.

THE COURT: Then, of course, you cannot deny it.

MR. STAGG: I cannot deny it.

THE COURT:—I will reserve that question. I will admit it for the present. But is not that the whole case?

MR. WALSCHEID:—That is the proposition, whether this agreement stands good for the default of another

THE COURT: You prove the amount, and if there is no dispute about that, it seems to me I might as well take it away from the jury and decide it as a question of law. I have to do it.

MR. STAGG: You have to decide this question. Of course, if it should be decided against us, this question,—I don't know anything about this milk and whether it has been furnished or not.

THE COURT: Let them put in proof.

MR. STAGG: No cross-examination.

THE COURT: Mark the paper as admitted, reserving the motion to strike out. I will preserve your rights.

(Paper marked Exhibit P. 1.)

Defendant prays exception to the ruling of the Court, which exception is allowed.

B. A. VAIL,
Judge.

HARLEY C. ALBEE, one of the plaintiffs, being sworn on his own behalf, testifies as follows:—

DIRECT EXAMINATION by Mr. Walscheid.

Q. Mr. Albee, you are in business, are you? A. Yes, sir.

Q. With a partner? A. Yes, sir.

Q. What is your partner's name? A. John W. Johnson.

THE COURT: You do not require him to go over all those items.

MR. STAGG: He can ask him a general question.

Q. I show you Exhibit P. 1. did you receive this paper? A. Yes, sir.

Q. From whom did you receive it? A. Joseph Barbado.

Q. You received this paper from Joseph Barbado? A., Yes, sir.

Q. Prior to this receipt of this paper had you had any business dealings with Barbado? A. No; not prior to it.

Q. Subsequent to the receipt of this paper did you have any business dealings with him? A. No.

Q. After you received this paper did you do any business with Joseph Barbado? A. Yes, sir.

Q. What business did you do with him? A. Shipped him milk.

Q. Sold him milk? A. Yes, sir.

MR. STAGG: Shipped him milk.

Q. Shipped him milk? A. Yes, sir.

Q. Do you keep any books of account? A. I do.

Q. Who keeps those books of account? A. I do.

Q. Yourself? A. Yes, sir.

Q. Showing the milk shipments? A. Yes, sir.

Q. From day to day? A. Yes, sir.

Q. Those books before you, are they your books of account? A. Yes, sir.

Q. Do they show your daily shipments to Barbado? A. Yes, sir.

Q. The full account? A. Yes, sir.

Q. What is the total amount of shipments in cash—the total amount of money according to your books that you shipped to Barbado? A. $3,197.35.

Q. Beginning immediately after the receipt of this paper in December, 1908? A. Yes, sir.

Q. And ending when? A. July 31, 1909.

Q. Has he paid you any money on account? A. Yes, sir.

Q. ——of those shipments? How much has he paid you on account? A. $2,256.60.

Q. So that there is now a balance due of how much? A. $940.75.

Q. He has not paid you that? A. No, sir.

Q. Nor has Mr. Schmidt paid it? A. No, sir.

MR. WALSCHEID: I offer the books of account.

CROSS EXAMINATION by Mr. Stagg:

Q. Mr. Albee, where is your business? A. Rockland.

Q. Are you stationed at that end of the business? A. Yes, sir.

Q. Were you there all the time when this milk was shipped to Mr. Barbudo? A. Do you mean at the shipping point?

Q. Yes. A. I was not.

Q. Do you know whether the milk was shipped or not to him that you have in your books there? A. I do.

Q. How? I mean of your personal knowledge? A. I know.....

Q. Just answer my question. A. I know it as good as a man can.

Q. Do you know of your own personal knowledge whether the milk was shipped to him or not? A. Yes, sir.

Q. Were you present when it was shipped? A. No.

Q. Were you present when any of it was shipped? A. Not at the shipping station, no.

Q. The last you saw of the milk was when it left your place? A. I do not see the milk. I am in the office and the milk is shipped by.....

Q. Did you see any of the milk shipped? A. Some of it, yes, sir.

Q. How much of this milk did you see shipped, and where was it shipped? A. I couldn't say as to that. I am not present at the shipping point when it is shipped.

Q. Well, you are simply telling us then, when you say it was shipped, what somebody else told you?

THE COURT: He merely produces the books. The books may make a prima facie case, if the books are kept in the ordinary course of business.

MR. WALSCHEID: I think that is the pertinent inquiry.

MR. STAGG: Then do I understand that they make a prima facie case by shipment?

THE COURT: Yes—of course, subject to denial—but the books are prima facie evidence of shipment.

Counsel for the defendant prays an exception to the ruling of the Court, that the books are prima facie evidence of shipment, which exception is allowed.

B. A. VAIL (S.)
Judge.

PLAINTIFF RESTS.

THE COURT: Now your only defence is that the bond is not.....

MR. STAGG: No; there is another defence, your Honor, and that is, according to the terms of the bond, outside of this..

MR. WALSCHEID: If your Honor please, I would like to recall that statement that

we rest. I have another witness I would like to produce.

MR. STAGG: I supposed you rested.

THE COURT: Your books made a prima facie case.

MR. WALSCHEID: I want to prove actual receipt of the milk.

THE COURT: You do not have to.

MR. WALSCHEID: All right. I will rest.

MR. STAGG: Now, if your Honor please, in the first place, the second point I will raise first, and that is this, that the condition of the bond is.... it is a little peculiar condition—the condition of the obligation is (Reads) Now there is no proof of delivery here. Proof of the books I do not think.....

THE COURT: The books are prima facie proof of sale and delivery when they are kept in the ordinary course of business. Now, of course, it is subject to denial.

MR. STAGG: We are standing here as a mere bondsman, and we do not know anything about it, and it seems to me they could prove the delivery when it is in the bond, outside of the mere fact that goods sold and delivered are entered in a book account. This is not a suit brought on a book account.

THE COURT: No; but so far as this branch of the case is concerned their liability rests upon their making proof of the sale and delivery of the goods. Now I say the books are prima facie proof, and so they are.

MR. STAGG: To that I take exception when the time comes. On the other question of the bond.....

THE COURT: That is purely a question of law?

MR. STAGG: Yes.

THE COURT: And the only fact has been proven. I think we better withdraw a juror, and then if you have any authority to submit let me have it, because it seems to me it must turn entirely upon whether that bond is a legal bond or not.

MR. STAGG: I am perfectly willing to have a juror withdrawn and have it go to the court and give us a certain time to put in the authorities.

THE COURT: Would that be satisfactory? Having proved the amount of the goods, your right to recover rests entirely on the validity of this paper. That is the force and effect of this paper.

MR. WALSCHEID: Yes; whether you call it a bond or what you call it.

THE COURT: I call it a bond. It is an obligation or it is nothing, one of the two.

MR. STAGG: I do not think it is anything.

MR. WALSCHEID: What does your Honor desire to do?

THE COURT: I want you to give me your authorities, if you haven't them now, to sustain or set aside this obligation.

MR. STAGG: The Judge suggests this, that we withdraw a juror and consent that the case be tried before the Court on the facts that are in here, and then we have a certain length of time to present a brief.

MR. WALSCHEID: That is entirely satisfactory to me.

MR. STAGG: Say ten days and then you have five days to answer.

THE COURT: As soon as you send the papers to me I will decide it.

(The jury was discharged).

NEW JERSEY SUPREME COURT.

JOHN W. JOHNSON, et al., partners, etc.,
Plaintiffs,
vs.
JOHN HERMAN SCHMIDT,
Defendant.
} *On Contract.*

DECISION.

VAIL, J.

This case, by consent of counsel, was tried by the court without a jury. The action is founded on a written instrument of which the following is a true copy:

"Know all men by these presents that we, Joseph Barbuto, of the Town of North Bergen, and John Herman Schmidt, Town of Wood-ridge, State of New Jersey, held and firmly bound unto Johnson & Albee of Rockland, New York, in any amount of milk sold by the said Johnson & Albee to the said Joseph Barbuto and charged to him, to be paid to the said Johnson & Albee, their executors, administrators, or assigns for which payment to be made, we bind ourself, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, Dated the fourteenth day of December, one thousand nine hundred and eight.

The condition of the above obligation is such that if the above bounden Joseph Barbuto, his

heirs, executors or administrators shall pay or cause to be paid unto the above named Johnson & Albee from time to time during the time that the said Joseph Barbuto receives the said milk from the said Johnson & Albee, then the obligation to be void otherwise in full force and virtue.

(Signed) JOSEPH BARBUTO (L. S.)

(Signed) JOHN HERMAN SCHMIDT (L. S.)

In the presence of:''

At the trial it was proved that Barbuto had purchased milk of the plaintiffs to the value of $3,058.08 and had paid on account $2,117.33, leaving a balance due of $940.75, and his failure to pay this amount is assigned by the plaintiff's as a breach of the bond. It is insisted on the part of the defendant that the bond is void because there is no penalty expressed and therefore there can be no recovery against the surety.

The weight of authority is against this contention In Dodge vs. St. John, 96 N. Y., 260, suit was brought on a guardian's bond where the penalty had been omitted, and the court held that the only effect was to make the bond commensurate with the condition.

In Curren vs. Harlan, 130 Mass., 265, it was held that a bond in which neither penalty or amount was expressed, but conditioned to idemnify the obligee ''against all loss, damage and expense to which he may be subject by reason of his becoming bail in the U. S. Court,'' could be enforced. The same doctrine was also held in Jenkins vs. Stetson, 9 Allen Mass., 128. The weight of authority holds that a bond is void in

which neither amount or penalty is expressed, but if the condition is clear the obligation can be enforced.

In case at bar, the condition is manifest and the amount of the indebtedness is proved. The defendant insists that even if the bond is valid it only covers the indebtedness at date of the execution. I cannot give it such a limited construction. By its terms it made obligors liable for all milk sold and delivered by the plaintiffs to Barbuto "from time to time during the time that the said Joseph Barbuto receives the said milk," from the plaintiffs. This language certainly makes it a continuing obligation.

The plaintiffs are entitled to judgment for $940.75 with interest from August 4, 1909, to February 21, 1911, amounting to $1030.12.

NEW JERSEY COURT OF ERRORS AND APPEALS.

John W. Johnson and Harley C. Albee, partners in trade as Johnson and Albee,
Defendant in Error,
vs.
John Herman Schmitt,
Plaintiff in Error.
} *On Writ of Error.*

ASSIGNMENTS OF ERROR.

NEW JERSEY, SS:

Afterwards, to wit, on the return of said Writ before the said Court of Errors and Appeals of the State of New Jersey, at Trenton, comes the said John Herman Schmitt, Plaintiff in Error by Peter W. Stagg, his attorney, and says that in the record and proceedings aforesaid and also in the giving of judgment aforesaid there is manifest error.

FIRST:—Because the said Court erred in permitting the plaintiffs to offer in evidence a certain Exhibit marked P. 1.

SECOND:—Because the Court erred in the following ruling that the Books of plaintiff were prima facie evidence of shipment.

THIRD:—Because the Court erred in the ruling that the Books were Prima facie proof of

sale and delivery when they are kept in the ordinary course of business.

FOURTH:—Because the Court erred in holding that the Bond signed by the Plaintiff in Error was a valid bond upon which judgment could be given.

FIFTH:—Because the Court erred in finding for and in giving judgment for the defendants in Error and against the plaintiff in Error upon illegal and insufficient evidence, without such illegal evidence the Court ought to have given judgment in favor of the plaintiff in Error and against the Defendants in Error.

For all of which errors the verdict should be set aside and a new trial granted.

PETER W. STAGG,
Attorney of Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN W. JOHNSON, et al.,
Defendants in Error,

vs.

JOHN HERMAN SCHMITT,
Plaintiff in Error.

Error to Supreme Court Joinder in Error.

And hereupon afterwards to wit, on the return day of said writ—the said John W. Johnson and Harley P. Albee, partners, defendants in error, by J. Emil Walscheid their attorney, comes into court and says there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray here that the court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed.

J. EMIL WALSCHEID,
Attorney for and of counsel with Defendants in Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Joseph Barbato of the Township of North Bergen, and John Herman Schmitt, Town of Wood-ridge, from the State of New Jersey held and firmly bound unto Johnson and Albee, of Rockland, New York, in any amount of milk sold by the said Johnson and Albee, to the said Joseph Barbato, and charged to him to be paid in lawful money of the United States, to be paid to the said Johnson and Albee, their executors, administrators or assigns: FOR WHICH PAYMENT, to be made, we bind ourself, our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated the fourteenth day of December, one thousand nine hundred and eight.

THE CONDITION of the above obligation is such that if the above bounden Joseph Barbato, his heirs, executors or administrators, shall pay, or cause to be paid, unto the above named Johnson and Albee, their executors, administrators or assigns, the sum of money for milk sold and delivered to the said Joseph Barbato, by the said Johnson and Albee, from time to time during the time that the said Joseph Barbato, received said milk from the said Johnson and Albee, then the above obligation to be void, otherwise to remain in full force and virtue.

IN THE PRESENCE OF:

State of New Jersey
County of Hudson

JOSEPH BARBATO (L. S.)
JOHN HERMAN SCHMITT (L. S.)

John Herman Schmitt, being duly sworn, according to law, says that he owns real estate, the title of which is in his name, and said to be situated in the Town of Wood-ridge, Bergen County, New Jersey, valued at $5,000.00 mortgage and other liens amounting to $900.00 and that he is recoverable in the sum above stated, over and above all his liabilities whatsoever.

JOHN HERMAN SCHMITT.

Sworn and subscribed to before me
at Town of Union, N. J., this 14th
day of December, A. D. 1908.

MICHAEL MODARELLI,
Notary Public."

New Jersey Court of Errors and Appeals

JOHN W. JOHNSON AND HARLEY C. ALBEE, PARTNERS IN TRADE, AS JOHNSON AND ALBEE, *Defendants in Error,*	*On Writ of Error.*
VS.	
JOHN HERMAN SCHMITT, *Plaintiff in Error.*	

BRIEF OF PLAINTIFF IN ERROR.

This case was tried partly before a jury in the Hudson Circuit and partly before his Honor Judge Vail after one Jury had been withdrawn which trial before the Judge was by consent. Decision of the Court will be found on pages 19, 20 and 21 of printed book and this Writ of Error is brought to set aside the verdict of the Court and the judgment entered thereon.

FIRST ASSIGNMENT OF ERROR.—This Assignment of Error is based upon the exception taken on page 16 of printed book. Your Honors will notice that the objection to the offer of this exhibit is found on page 12 in this language:—"I objected because it is not evidential in this case, for the reason it is alleged to be a bond without any penal sum at all."

I claim that this bond exhibit P. 1, is void for the reason that it has no penalty expressed in the bond. The language of the Bond is "held and

firmly bound unto * * * in any amount of milk sold by the said * * * to the said * * * and charged to him."

If the penalty of the bond is to be measured by the amount of milk sold by the plaintiffs to one of the bondsmen and charged to him then I claim that the word "sold" and the words "charged to him" must be used in the past tense, that is the penalty must be for milk sold and charged to him, it cannot be meant to cover future sales and future charges. To cover future sales and future charges the language would have been," in any amount of milk hereafter sold by the said plaintiffs to the said Joseph Barbato and charged to him" and to make the paper legal evidence the Court had no right to read in this penalty the word "hereafter."

FOURTH ASSIGNMENT OF ERROR.—I claim that the bond is not a valid and binding obligation against the Plaintiff in Error not only because of the wording of the penalty clause, but also because of the condition expressed in said bond.

Your Honors on examining said bond will find the following condition. The condition of the obligation is such that if the above bounden Joseph Barbato, his heirs, executors or administrators shall pay or cause to be paid unto the above named Johnson and Albee, their executors, administrators or assigns, the sum of money for milk sold and delivered to the said Joseph Barbato by the said Johnson and Albee, from time to time during the time that the said Joseph Barbato received said milk from the said Johnson and Albee, then the above obligation to be void otherwise to remain in full force and virtue.

Now, if at the time of giving of said bond there had been an account running for some time for

milk sold and delivered by said Johnson and Albee to said Joseph Barbato, which milk had been received from said Johnson and Albee by said Joseph Barbato then said condition would have covered such an account. It might be true that a state of facts had existed in which from time to time milk had been sold by Johnson and Albee to Joseph Barbato previous to the signing of said bond and that it was the condition of said bond that the account should have run only up to the time that Joseph Barbato received said milk and that really the bond was given for a claim that was at that time due and owing from said Joseph Barbato to Johnson and Albee and not for any future milk.

In constructing this condition to the bond we must place, if the bond is valid at all a reasonable construction upon both the penalty part of the bond and its condition using its language in the ordinary every-day sense. Milk sold and delivered means a transaction that has already happened and not something to happen in the future. If I say I have sold to John Jones Five hundred dollars worth of milk it does not mean that I will sell him five hundred dollars worth to-morrow or next day but it means that I have already sold it at that time. If I say I have sold and delivered, it means not only that I have sold it but I have actually delivered it and even using the words from time to time does not put a different construction upon the words "sold and delivered" when we take in consideration the words in said condition that the said Joseph Barbato ~~received said milk not~~ receives ~~but received. The entire language of both the bond itself and its condition is not sale and delivery and receive from time to time, but sold and delivered and received, every word of which is used in the past tense~~.

It may be true that the person who drew the bond intended it to mean something other than it says, but this suit is brought by the plaintiffs against the defendant who has received no consideration whatever for the making of this bond and he is entitled in the said case on the bond to have it construed strictly, which construction I claim is in his favor. A case cited by his Honor Judge Vail in his decision, Curren vs. Harlen, 130 Mass. 265, is in line with the construction that I have placed upon this bond. There the language of the condition was against all loss, damage and expenses to which he may be subjected by reason of his becoming bail in the U. S. Court, that language is in the future and not in the past tense. In this case it is not contended by the plaintiff that at the time of signing said bond, any part of their alleged claim was due and owing by Joseph Barbato to them. The case of Dodge vs. St. John in 96 New York, page 260, in which the Court held that where the penalty had been omitted in a guardian's bond the only effect was to make the bond commensurate with the condition.

This case is not exactly in point with that case. The penalty was not omitted in this bond but the penalty placed in the bond is void because of uncertainty, unless the penalty is for milk sold and delivered previous to the signing of the bond and then could be ascertained and as to making the penalty commensurate with the condition that in itself would not make the penalty due for milk sold after the signing of said bond.

Your Honors by examining the opinion of his Honor Judge Vail on page 21, will find that he uses this language:—

In case at bar the condition is manifest and the amount of indebtedness is proved. The defendant insists that even if the bond is valid it only covers the indebtedness at date of execution. I

cannot give it such a limited construction. By its terms it made obligors liable for all milk sold and delivered by the plaintiffs to Barbato and now quoting from the bond, he says "from time to time during the time that the said Joseph Barbato receives the said milk." That quotation of the Court is a mistake because on examination of the bond on page 25, you will find the condition of the bond reads in that part as follows:—"from time to time during the time that the said Joseph Barbato received said milk, not receives, as the Judge said but received and I contend that the Court had no legal right to change that word received in the condition and make it read receives, of course if the bond read receives, that would mean in the future, the bond reads received which is in the past, and I claim that the Court had no right to change that word so as to give the condition another construction other than the original word would give it, and by so doing attempt to make valid a bond which if it has any validity at all, is only valid for a debt due and owing at the time of the giving of the bond and not valid for any future milk sold or delivered and for that reason I claim this verdict and judgment should be set aside.

SECOND AND THIRD ASSIGNMENTS OF ERROR.—Brings up the question as to whether or not the books are prima facie evidence of shipment.

There is no evidence in this case that any milk after the signing of this bond was actually delivered to or received by Joseph Barbato. It has been held in this State that books of account are legitimate prima facie evidence to show the sale and delivery in the usual course of business of personal property and its price and of work and

labor performed and the sums due for such services. Page 14:—

Q. What business did you do with him. A. Shipped him milk.

Q. Do you keep any books of account A. I do.

Q. Showing the milk shipments? A. Yes, sir.

Q. Do they show your daily shipments to Barbato? A. Yes, sir.

A full examination of the same witness's testimony on cross examination will indicate to the Court that all the books did show was the account of milk shipped to Barbato.

Now coming back again to the condition of the bond before the plaintiff can recover if he can recover at all even if the bond is held to be valid he must not only show a sale and delivery to Joseph Barbato, but an actual receiving of the milk and for all that we know in this case not one penny's worth of this milk was ever received by Barbato. The condition of the bond is a conditional one if valid at all and as I said before the defendant Mr. Schmitt never having received any consideration for the signing and executing this bond and never having received any milk or in any way obligated himself to the payment of any money other than the obligation which may grow out of the signing of the bond if the same is valid. The mere offering of the books showing shipments of milk does not furnish prima facie proof of the plaintiff's case to warrant a verdict in favor of the plaintiffs and against the defendant on said bond.

I also cite the following cases:—

Mayor Etc. of City of Bayonne, vs. Standard Oil Co., 78 *Atlantic Reporter, page* 146.

In this case the Court on page 148 says:—

Ordinarily books of account are legitimate prima facie evidence to show the sale and delivery in the usual course of business of personal property, Oberg vs. Brien, 50 N. J. Law, 146 * * * and so if the plaintiff had put in its books showing the account against the defendant without explanation as to the manner in which it was made up, and then rested, it would have established a prima facie case against the defendant, for the books apparently show the sale and delivery to the defendant of the amounts of water specified therein, but the testimony of Mr. Hickey disclosed that the account in the books was not in fact a record of the sale and delivery of water, but a record of the conclusions drawn by the water department from the readings of the various meters hereinbefore referred to. Such a record proves nothing against the defendant, and is no evidence of the sale and delivery of water to it.

Supreme Court of Rhode Island Churchill vs. Hebden, et al., 78 *Atlantic Reporter, page* 337.

In that case the Court says on page 338, the rule is well stated as follows: Books of account are inadmissible to show to whom credit was given when that fact is in issue. Thus they are not evidence to charge a defendant with goods delivered to a third person, or for services performed for a third person, on the adverse parties order.

New Jersey Supreme Court. Rumsey vs. New York and New Jersey Telephone Company, 20 *Vroom, page* 322.

In this case the Court held that in an action brought to recover for the rent and services of a

telephone it appeared that the number of each service was entered at the time upon a slip and these slips were sent to the main office where the gross number of calls for each month was entered in a book and the slips were afterwards destroyed. Held that the book was not admissible in evidence.

I, therefore, ask your Honors to set aside the judgment and verdict in this case with costs.

Respectfully submitted,

PETER W. STAGG,

Attorney and of Counsel with Plaintiff in Error.

New Jersey Court of Errors and Appeals

JOHN W. JOHNSTON, et al.. Plaintiffs below and Defendants in Error, vs. JOHN HERMAN SCHMITT, Defendant below and Plaintiff in Error.	On Error to Supreme Court.

BRIEF OF DEFENDANTS IN ERROR.

The writ in this case brings up a judgment of the Supreme Court in favor of the plaintiffs below, after a trial of the court without a jury, in an action in covenant, against the surety in a bond, given to secure credit of one, Joseph Barbato, for milk to be sold and delivered to him by the plaintiffs.

The declaration recites the bond, alleges a breach and has annexed thereto a copy of the bond.

The defendant pleads **non assumpsit,** non est factum, and that the writing obligatory is void because of the absence of consideration, whereupon issue is joined.

At the trial plaintiffs proved the bond and offered the same in evidence. Defendant objected "because it is not evidental in this case, for the reason it is alleged to be a bond without any penal sum at all." (P. 12 of case line, 13.)

The Court admitted the bond reserving motion to strike out. It was marked Exhibit No. 1. Whereupon defendant prayed and was allowed an exception (P. 13 of case, line 8.)

The plaintiffs thereupon showed that they received the bond from Joseph Barbado, the person mentioned in the bond as the receiver of milk, and for the security of whose indebtedness the bond was executed; (P. 13 of case, bottom of page), that prior to the receipt of the bond they had had no business dealings with Barbado; that immediately after the receipt of the bond, they sold him milk which was shipped to him; that the shipments of milk continued to July 31, 1909, and amounted to a cash total of $3,197.35, of which sum Barbado had paid $2,256.60, leaving a balance due of $940.75 (P. 14-15 of case.)

Plaintiffs also produced their books of account and the person to who kept them as a witness. This witness identified the books; showed that they were kept by him; that they showed the milk shipments to Barbado from day to day; that they showed the full account with Barbado, the total amount charged to Barbado; the amount paid by Barbado; and the balance due from Barbado. (P. 14-15 of case.)

These books had been placed before this witness when he first took the stand the account of Barbado had been found, and the court addressing counsel for the defense had said: "You do not require him to go over all those items." To which counsel had replied: "He, (counsel for plaintiffs) can ask him a general question. (P. 13 of case.)

Counsel for defendant, replying to the court, had further admitted that he could not deny what was due for milk sold. (P. 12 of case.)

The books were then offered in evidence, and counsel for defendant cross-examined the witness. This cross-examination was not directed **against the books** as books of original entry kept in the ordinary caurse of business, but attempted to prove that the witness

had no personal knowledge of the milk shipments recorded in the books.

> The Court: He merely produces the books. The books may make a prima facie case, if the books are kept in the ordinary course of business.
>
> Mr. Stagg: Then do I undertand that they make a prima facie case by shipment?
>
> The Court: Yes—of course, subject to denial —but the books are prima facie evidence of shipment.

Counsel forthe defendant prays an exception to the ruling of the court that the books are prima facie evidence of shipment, which exception is allowed. (P. 16 of case.)

The books of account were then admitted in evidence.

The plaintiff rested.

The defendant offered no evidence.

The judgment of the court was for the plaintiff for $1,030.12.

POINTS.

I.

There was no error in admitting the bond in evidence, or in basing a judgment thereon.

The amount the plaintiff in error bound himself to pay is expressed in the penal clause of the bond, as follows:

> "In any amount of milk sold by the said Johnson and Albee, to the said Joseph Barbato and charged to him to be paid in lawful money of the United States, to be paid to the said Johnston and Albee * * ."

Whether the word "sold" in the foregoing clause applies to future or past dealings, in either event the total amount or limit of the obligation can at all times be ascertained by a mere calculation, and is therefore fixed. The condition written under this obligation is:

> "That if the above bounden Joseph Barbato, his heirs, executors or administrators, shall pay or cause to be paid unto the above named Johnson and Albee, their executors, administrators or assigns, the sum of money for milk sold and delivered to the said Joseph Barbato by the said Johnson and Albee, **from time to time during the time that the said Joseph Barbato, receives** said milk from the said Johnson and Albee, then the above obligation to be void, otherwise to remain in full force and virtue."

It is contended that the word "sold" in the obligation is just as applicable to a future transaction as to one that is past, when not with the remaining words of the clause in which it appears. And if there is any doubt as to the proper interpretation of this word, this doubt must yield when we examine the language of the condition of the bond.

The bond is a continuing obligation to cover future credits. The penalty of the bond is the total amount of these credits, and the actual liability, measured by the condition, is the amount of milk for which Barbato refuses or neglects to pay while this credit is being extended.

The bond fixes the amount above which the defendant cannot be held, and also the amount for which he can actually be held, "certum est, quod certum reddi potest."

The bond is a continuing guarantee and an original obligation to pay in the event that Barbato does not.

> Columbia Electric Supply Co., vs. Kemmet, 67 N. J. L., 18;

Lyon & Co. v. Plum, 69 Atl. Rep., 210;
Wilkinson Gaddis Co. v. Van Riper, 63 N. J. L., 394.

But even though there be ambiguity in the language of the bond, it cannot aid the defendant and does not prevent the enforcement of the obligation if its meaning can be ascertained. And to that end the purpose for which the bond was given and the circumstances surrounding the giving of the bond may be examined.

5 Cyc., 730;
2nd Ed. Am. & Eng. Enc. of Law, Vol. 14, p. 1144.

So in this case it appears that plaintiff had no business dealings with Barbato before the bond was delivered to them and that only after receipt of the bond did they commence to sell milk to him (p. 14 of Case). Nor is there any evidence of any pre-existing indebtedness at the time when the bond was executed and delivered.

And if the bond had been given for a pre-existing indebtedness it would be void for want of consideration.

Whitehead v. American Lamp Co., 70 N. J. Eq., 581.

And the words of a guarantee will be read most strongly against the guarantor.

Hoey v. Jarman, 39 N. J. L., 523.

And

"No particplar form of words is essential to make a writing under seal obligatory, but any words which acknowledge the debt, or indicate that the maker intends to bind himself to pay, will be sufficient."

Wood v. Chetmood, 17 Stew., 64;
Same Case, 18 Stew., 369.

Nor is it necessary that a penalty be expressed in the bond.

Thus, a bond is not void which is conditioned to indemnify the obligee "against all loss, damage and expense to which he may be subject by reason of his becoming bail in the U. S. Court."

Conner v. Harlan, 130 Mass., 265.

In this case, neither penalty nor amount, except as above stated, was mentioned.

So also a bond, conditioned to devise "All our personal estate of every description as well as what we now have in our possession as what we may receive at the decease of our mother," has been held enforceable.

Jenkins v. Stetson, 9 Allen (Mass.), 128.

In such cases, the only result of the omission to state a penalty has been held to make the bond commensurate with the condition.

5 Cyc., 734.

II.

Books of account are prima facie evidence of sale and delivery of merchandise.

The defendant in reserving the exception upon which the second and third assignments of error are based (see p. 16 of Case), does not claim that the books are not books of original entry, kept in the ordinary course of business, or that the proof upon this subject was insufficient to warrant the admission of the books in evidence as boks of original entry, but assails the legal principle that such books, when

proven are prima facie evidence of delivery.

Books of account are legitimate prima facie evidence to show the sale and delivery in the usual course of business of personal property and its force.

Oberg v. Breen, 21 Vroom, 145;
Diament v. Colloty, 37 Vroom, 295;
Bayonne v. Standard Oil Co., 78 Atl. Rep., 146.

The cases cited by counsel for defendant do not apply, because in those cases the books were rejected because of reasons not urged here. In fact in this case there is no objection to the offer of the books.

Thus, in Bayonne v. Standard Oil Co., supra, the books were rejected because they did not show sales but rather showed the conclusions drawn from a calculation of differences.

In the case of Rumsy v. Telephone Co., 20 Vroom, 322, the books were rejected because they merely showed a summary of the charges month by month, made up by adding the original charges for each month.

In Churchill v. Hedden (R. I.), 78 Atl. Rep., 337, the books of account were held in admissible to establish the contractual relation between the parties.

It is respectfully submitted that the judgment below should be affirmed.

November Term, A. D. 1911.

J. EMIL WALSCHEID,
Attorney for and of Counsel with
Defendant in Error.