

No. 12655

Supreme Court of Illinois

Swift, et al.

vs.

Marsh.

Urkunde

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George B. Mueser

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12655

7858



Preface

United States of America -
State of Illinois - County of Cook } S.S.

Pleas before the Honorable John M.
Wilson Judge of the Cook County Court of
Common Pleas with and for the County of
Cook and State of Illinois at a regular Term
of said Cook County Court of Common Pleas begun
and holden at the Court House in the City of
Chicago in said County on the first Monday
being the first day of February in the year of our
Lord One Thousand Eight Hundred and
fifty eight and of the Independence of the
United States the Eighty second.

Present The Hon^{ble} John M. Wilson Judge

Carlos Haven Pros^{nt} Atty.

John L. Wilson Sheriff

Attest. Walter Kimball Clerk

Be it Remembered that herebefore
to wit on the ninth day of January in the
year of our Lord One thousand Eight
hundred and fifty eight George B. Maush
by Cooper Ayer & Sonnes his Attornies
filed in the Office of the Clerk of said Court
a certain preceipe for Summons which said
preceipe follows in these words, to wit.

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George B. Marsh
versus.
Richard W. Swift
Lyman P. Swift &
James S. Johnston

State of Illinois }
Cook County } ss.
In Court of Common Pleas
Feb Term 1858. -

To the Clerk of said Court

Upon ^{the} filing of this Declaration in
your Office let a summons issue to the said
Defendants returnable to the February Term of
the said Court in an action of trespass on the
Case upon promises. Damages \$500. -

Hooper Ayer & Semmes

Attorneys for Plaintiff -

And afterwards to wit on the same day
and year aforesaid the said Plaintiff by his
Attorneys aforesaid filed his Declaration
which said Declaration follows in these
words and figures to wit.

State of Illinois }
Cook County } ss.

Cook County Court of Common Pleas
Of the February Term in the year of our
Lord One Thousand Eight Hundred and
fifty eight.

George B. Marsh Plaintiff in
this Suit by Hooper Ayer & Semmes Attorneys

complains of Richard K Swift byman P Swift
 and James S Johnston Defendants who
 were summoned & in a plea of trespass
 on the case on promises. For that Whereas
 also the said Defendants heretofore lent on
 the 8th day of August in the year of
 our Lord One Thousand Eight Hundred and
 fifty seven at Chicago aforesaid were
 indebted to said plaintiff in the sum of
 Five hundred Dollars of lawful money
 for money by the said plaintiff before that
 time lent and advanced to and paid laid
 out and expended for the said Defendants
 and at their special instance and request
 And also in the further sum of Five
 Hundred Dollars of like lawful money
 for other money by the said Defendants before
 that time had and received to and for the
 use of said plaintiff - And also for that
 the said Defendants accounted with the said
 plaintiff of and concerning ^{divers} other sums of
 money from the said Defendants to the said
 Plaintiff before that time due and owing
 and then in arrear and unpaid and upon
 such accounting the said Defendants then
 and there found to be in arrear and indebted
 to the said plaintiff in the further sum of
 Five hundred Dollars of like lawful money
 and being so ^{indebted} found in arrear and indebted

the said Defendants in consideration thereof afterwards writ on the day and year last aforesaid at Chicago undertook and then and there promised the said Plaintiff to pay him the said several Sums of Money in this Count mentioned when they the said Defendants should be thereunto afterwards requested.

Breach — And yet the said Defendants not regarding their said several promises and undertakings have not as yet paid the said several Sums of Money or any or either of them or any part thereof to the said Plaintiff though often requested so to do but the said Defendants to pay the same have hitherto wholly neglected and refused and still do neglect and refuse — to the damage of said Plaintiff of \$500 — and therefore he sues for

Hooper Ayer & Simmons
Plaintiffs' Attorneys.

R. K. Swift Brother & Johnston.
To George B Marsh D.

For Money lent & advanced	\$ 500 —
" had & received	\$ 500 —
" Account stated	\$ 500 —

City of Chicago in said County this 9th
day of January A.D. 1857.

Walter Kimball Clerk
Shirley's Mother.

Summed by reading to the within
named Richard W. Swift & James Johnston
January 22nd 1857. James Johnston not
found in my books.

John & Maria Swift
by John Taylor Deput.

And afterwards to wit on the fourth day of
February in the year aforesaid the said Plaintiff
by his Attornies aforesaid filed in the office of the
Clerk of the said Court a Certificate of Deposit
which said Certificate is in the words and
figures following to wit.

No A 262. Savings Department.
State of Illinois. R W Swift Brother & Johnston.
Bankers.



Chicago Aug 8th 1857.

Certificate
G B Marsh has deposited with us

Three Hundred Dollars in funds as stated below
to the credit of ~~himself~~ to be paid in like
funds to his order hereon.

Currency \$ 300 -

R W Swift Brother & Johnston

Gold —

By B B Chambers.

\$ 300

then Defendant Richard W. Swift and
James Johnston only, and my books

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City of Chicago in said County this 9th
day of January A.D. 1858.

L.S.

Walter Kimball Clerk
Sheriff's Return.

Served by reading to the within
named Richard H. Swift & James S. Johnston
January 14th 1858. Lyman P. Swift not
found in my County.

John L. Wilson Sheriff
by Jeth Taylor Depy.

And afterwards to wit on the fourth day
of February in the year aforesaid the said
day being one of the days of the February Term
of said Court - the following, among other
proceedings of the said Court were had and
entered of Record to wit

George B. Marsh

vs
Richard H. Swift
Lyman P. Swift &
James S. Johnston

Assumpsit.

This day comes the said
Plaintiff by Hooper Ayer & Sonnes his
Attorneys, and due personal service of summons
issued in this cause having been had on the
said Defendants Richard H. Swift and
James S. Johnston only, and they being

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And afterwards to wit on the same day and year aforesaid there issued out of the Office of the Clerk of the said Court a Writ of Summons in the words and figures following to wit. —

State of Illinois

County of Cook }

S.S.

The People of the
State of Illinois.

To the Sheriff of said County - Greeting

We command you that you Summon
Richard K Swift Lyman P Swift & James S.
Johnston if they shall be found in your County
personally to be and appear before the Cook
County Court of Common Pleas of said
County on the first day of the next term thereof
to be holden at the Court House in the
City of Chicago in said County on the first
Monday of February next to answer unto
George B. Marsh in a plea of Trespass
on the case on promises to the damage of
the said plaintiff as he says in the sum of
Five hundred Dollars — And have you then
and there this writ with an endorsement
thereon in what manner you shall have
executed the same

Witness Walter Kimball Clerk of our
said Court and the Seal thereof at the

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now three times solemnly called in open Court
come not nor does any person for them or either
of them but herein make default, which is
on motion of said Plaintiff taken and
^{to be entered} ordered of Record. Wherefore the said
Plaintiff ought to have and recover of the said
Defendants Richard W. Swift & James S.
Johnston impleaded with Lyman P. Swift
his damages herein sustained by occasion of
the premises And the Court after hearing the
allegations and proofs submitted by said
Plaintiff assesses his damages to the sum of
Three Hundred Dollars.

Therefore it is considered that the said
Plaintiff do have and recover of the said
Defendants Richard W. Swift and James
S. Johnston impleaded as aforesaid his damages
of three hundred Dollars in form aforesaid
by the Court here assessed and also his Costs
and charges by him about his suit in this
behalf expended and have execution therefor

And thereupon said Defendants impleaded
as aforesaid pray an appeal to the Supreme
Court of the State of Illinois which is allowed
on their filing an appeal bond in the sum of
four hundred Dollars with Van H. Herguin
or James H. Kees as Security Said bond
and bill of exceptions to be filed in ten
days -

And afterwards to wit on the thirtieth day of February in the year aforesaid the said day being one of the days of the said February Term of said Court - the following, among other proceedings of the said Court were had and entered of Record, to wit.

George B March	} Assumpsit
^m	
Richard K Swift	
Lynnan P Swift & James S Johnston	

And now come the Defendants by their Attorneys aforesaid and on their Motion. It is ordered that the time to file Bill of Exceptions in this case be extended to the eighteenth instant.

And afterwards to wit on the same day and year last aforesaid the said Defendants impleaded as aforesaid came and filed their Appeal Bond in words and figures following that is to say.

Know all men by these presents that Richard K Swift James S Johnston and
are held and firmly
bound unto George B March in the penal

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Sum of Four Hundred Dollars for payment
of which well and truly to be made to said
George B. Marsh his heirs or Assigns We bind
ourselves jointly and severally our heirs
executors and Administrators firmly by these
presents. Sealed with our Seals and dated
this fifth day of February A.D. 1858. —

The Condition of this Obligation is
such that Whereas in a certain suit in the
Cook County Court of Common Pleas wherein
said George B. Marsh was plaintiff and
said Richard K. Swift and James S.
Johnston impleaded with Lyman P. Swift
were defendants the said plaintiff on the
fourth day of February A.D. 1858 recovered
a judgment against the said Defendants
impleaded as aforesaid for the sum of
Three hundred Dollars damages besides
costs of suit from which said judgment
Richard K. Swift and James S. Johnston
said last named Defendants have
prayed an appeal to the Supreme Court
of the State of Illinois which appeal has
been granted upon said Defendants
giving this Bond.

Now if the said above bounden
Defendants shall well and truly pay the
judgment, costs, interest and damages in
case the said judgment shall be affirmed

by said Supreme Court and shall duly prosecute their said appeal then the above obligation be void, otherwise of force.

R. K. Swift

Seal

J. S. Johnston

Seal

Van H. Higgins

Seal

And afterwards to wit on the sixteenth day of February aforesaid in the year aforesaid the said Richard K. Swift and James S. Johnston impleaded with Lyman P. Swift as aforesaid filed in the Office of the Clerk of the Court aforesaid their Bill of Exceptions, which said Bill of Exceptions is in the words and figures following to wit

State of Illinois County of Cook ss.

In the Cook County Court of Common Pleas.

Of the February Term 1858.

George B. Maister

Richard K. Swift

& James S. Johnston

impleaded with

Lyman P. Swift -

Be it remembered that the default of the said Defendants, Richard K. Swift and James S. Johnston having been entered in this cause and the same having been brought on before the Court for the assessment of damages therein

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at the February Term of said Court A D 1858 Court
on the fourth day of February A D 1858 The
Plaintiff for the purpose of proving the said dam-
ages against the said Defendants Richard H.
Swift and James S Johnston offered in evidence
to the Court a Certificate or Instrument in writing
in the words and figures following. to wit.

No A 262.
State of Illinois.



Savings Department
of
R.R. Swift Brother & Johnston.
Bankers

Chicago Aug 8 / 1857.

Certificate
G B Marsh has deposited with us
Three Hundred Dollars in funds as
stated below to the credit of himself to be
paid in like funds to his order hereon
Deposit

Currency \$ 300 -
Gold
\$ 300

R.R. Swift Brother & Johnston
By B B Chambers.

To the reading of which as evidence the said
Defendants by their Counsel then and there
objected for the reason that the same was not
admissible as evidence under the Declaration
And that it was a Special Agreement which
could not be received in evidence under the
common Courts - which objection of the said
Defendants so made as aforesaid was
overruled by the Court and said Instrument
was read as evidence to which ruling and

decision of the Court in admitting said instrument as Evidence in this Cause the said Defendants by their Counsel then and there excepted -

Said Instrument in writing was all the Evidence offered by the plaintiff on said aforesaid and the Defendants declining to make any proof The Court thereupon assessed the damages at the sum of Three Hundred Dollars And the said Defendants thereupon moved the Court to set aside the Inquest and assessment so made as aforesaid and to grant to the said Defendants a new assessment of damages in this Cause which motion of the said Defendants so made as aforesaid was overruled by the Court And to the decision of the Court in overruling said Motion the said Defendants by their Counsel then and there excepted.

The Court thereupon rendered judgment upon said assessment against said Defendants Richard W. Swift & James Johnston for the sum of Three hundred Dollars (\$ 300 -) And the said Defendants by their Counsel prayed an appeal to the Supreme Court and that this their Bill of Exceptions might be signed and sealed by the Court which is accordingly done.

John W. Wilson



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State of Illinois } S.S.
County of Cook }

I Walter Kimball Clerk of the Cook County Court of Common Pleas in and for the County of Cook and State of Illinois do hereby certify that the above and foregoing Transcript of all the papers on file in my office is a full and true and of all the proceedings entered of Record in the Case wherein George B Maush is Plaintiff and Richard W Swift Lyman P Swift and James S Johnston are Defendants.



In testimony whereof I have hereunto set my hand and the Seal of the said Court at the City of Chicago in the County aforesaid this 20th day of March A.D. 1858.

Walter Kimball
Clerk

Superior Court, State of Illinois
Richard W Swift & James S Johnston, complainants with
Lyman P Swift
vs
George B Maush

And now come the
Svs Richard W Swift & James S Johnston

by Scates McAllister Smith & Peabody, their
attorneys and say that in the Record & Proceed-
ings aforesaid, & in the recitation of the ~~same~~ ^{same}
recited aforesaid there is manifest error
in this, that there was improper testimony
admitted on the apportionment of damages in
said Cause.

Also there is error in overruling the
motion for a reassessment of damages.

Also there is error in the giving of
Judgment against said Richard B. Swift
& James S. Johnston upon said apportionment
of damages as has aforesaid.

And the said Richard B. Swift and
James S. Johnston pray that the Judgment
aforesaid for the issues aforesaid and for
other issues in the said Record & Proceedings
being, may be reversed, annulled and
altogether broken for naught. And that
they may be restored to all things which
they have lost by occasion of said Judgment as

Scates McAllister Smith & Peabody
Attys for Appellants

State of Illinois

Supreme Court 3^d Division

Richard H. Swift &

James S. Johnson in
-pleaded with Lyman

P. Swift

Appellants

vs

George B. Marsh

Appellee

Appeal from
Cook County Court,
Common Pleas

And the said
George B. Marsh by his attorneys
Hooper & Levenson, come and say
that there is no error, either in
the record and proceedings aforesaid,
or in giving the judgment
aforesaid & they pray that the
said Court here may proceed
to examine as well the matters
aforesaid above for error aforesaid
& that the judgment, aforesaid, in
form aforesaid given may be
in all things affirmed & so forth

E. B. Hooper &

John M. S. Levenson

Attorneys for Appellee

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Filed May 27 1838
L. Leland
Clerk

State of Illinois, Supreme Court—3d Division.

RICHARD K. SWIFT, AND
JAMES S. JOHNSTON, *impleaded with*
LYMAN P. SWIFT,

APPELLANTS.

vs

GEORGE B. MARSH,

APPELLEE.

} Appeal from
Cook Co. Court of Common Pleas.

} Abstract of Record.

This was an action of *assumpsit* brought by the appellee against the appellants to the February term, 1858, of the Cook County Court of Common Pleas.

The declaration contains the common counts only, and was filed on the 9th day of January, 1858.

On the fourth day of February the default of the defendants, Richard K. Swift and James S. Johnson, was entered in the court, and the damages were assessed against them by the court.

On the assessment of damages, the only evidence offered by the plaintiff was a certificate of deposit, as follows :

No. A 262
State of Illinois.

SAVING'S DEPARTMENT
OF R. K. SWIFT, BROTHER & JOHNSTON,
BANKERS.

Chicago, August 8, 1857.

G. B. Marsh has deposited with us Three Hundred Dollars in funds, as stated below, to the credit of himself, to be paid in like funds, to his order hereon.

CURRENCY \$300
Gold ———
\$300.

R. K. SWIFT, BROTHER & JOHNSTON.

By B. B. CHAMBERS.

To the introduction of which as evidence, the said defendants, by their counsel, objected. Objection overruled by the court, and exception taken. The damages were assessed by the court at the sum of Three Hundred Dollars. Defendants moved for a re-assessment—overruled and excepted to, and judgment entered upon the assessment. Defendants, Richard K. Swift and James S. Johnston prayed an appeal, and filed their bond and bill of exceptions, according to the order of the court.

The admission of the certificate of deposit as evidence, the overruling of the motion for a re-assessment, and the rendition of judgment in manner and form aforesaid, are now assigned for error.

Points made, and authorities cited by the appellants.

I

The execution of the certificate was not proved. It was inadmissible as evidence, under the common counts until this was done. The default did not admit the execution of an instrument not declared on.

II

If the execution of the certificate had been proved, it would still be inadmissible, under the common counts, which it in no way tends to establish. It was, doubtless, designed to apply to the count for money had and received; but we insist it is not applicable to that count hereon, it neither acknowledges the receipt of money, nor is it a promise to pay money. The funds described in the body of the instrument are

described as currency, in the margin. The value of the currency should have been found, and the judgment, if any, could be rendered for the value of the currency only.

Smith et al vs Dunlap, 12 Ills., 189.

Phillips vs Riley, 3 Conn., 266

Robinson vs Nobles Adm'rs, 8 Peters, 181.

Hixon vs Hixon 7, Humphrey 33.

Gordon vs Parker 2, Sunde's & M., 485.

Dillard vs Evans, 4 Pike, 175.

III

The instrument was a common banker's certificate of deposit, and describes the defendants as Bankers. Under the circumstances, it is insisted that the defendants were not liable to be sued until the certificate had been presented to them, and payment demanded. The certificate, by its very terms, was payable to the order of the plaintiffs thereon.

Sup Court

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Richard R Swift
et al

v

George B Marsh

Abraham &c

Filed Jan 24 1835

at Boston

John A

Wm M Kellogg

John A Jewell for
attys

SUPREME COURT.

STATE OF ILLINOIS, THIRD DIVISION.

RICHARD K. SWIFT, AND
JAMES S. JOHNSON, *impleaded with*
LYMAN P. SMITH, *Swift*
Appellants.

VS
GEORGE B. MARSH,

Appellee.

*Appeal from Cook
County Court of Common
Pleas.*

APPELLEE'S BRIEF.

The first point of appellants' must be abandoned. No objection was made in the court below to the admission of the certificate in evidence, on the ground that its execution was not proven. The transcript discloses the reason urged for its rejection—"That it was a special contract, and not admissible in evidence, under the common counts."

This objection concedes the execution, at all events, no objection on that point was specifically made.

4th Seam 7, 5th Gilman, 287.

The certificate was properly offered in evidence, under the common counts.—
The suit was between the immediate parties to the instrument, and an acknowledgment of indebtedness.

Young vs Adams, 6 Mass., 189.

Wilson vs Fisher 4, Pick 421.

12 Pick. 126. Ibid, 316.

4 Wendell, 490.

The terms "currency," current bank notes, or bank notes, are equivalent to the word "money," and mean bank notes received and passing at par, or convertible into specie on demand.

Pierson vs Watkins, 2d Eng., 292.

Leiber et al vs Goodrich, 5 Cowen, 187.

Judah vs Harris, 19th John, 144-5-6.

Munn et al vs Exrs Munn, 1 John, Ch. Rep., 231.

If not paid or tendered, the judgment on such certificates must be in money.

Smith vs Goddard, 1 Hamm, 179

1st Hamm, 524.

Morris vs Edwards, 1 Hamm 189.

It follows, that if the terms used in the certificate import an obligation to pay in par funds the amount of deposit, the certificate itself ascertains the amount and value, and no evidence affixing it, was necessary or proper

The judgment by default removed all formal and technical objections, such as absence of proof of demand, even if it were necessary to have made such demand, (which is not needed), in a case contested upon issues.

E. R. HOOPER & JOHN M. S. CAUSIN,

Attorneys for Appellee.

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Wm. H.

vs

Harste

Brace

Filed May 3rd 1838

L. Holmes
Clerk