

No. 14631

# Supreme Court of Illinois

McMillan, Imp

---

vs.

Bethold et al

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71641  7

STATE OF ILLINOIS,  
SUPREME COURT,  
THIRD GRAND DIVISION.

No. 148

J. W. Middleton & Co., Stationers, 196 Lake St.

*Apr. T. 1864*

*(Reported)*

*W. H. Miller*

*1864*

*Reported*

14631

# SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

**April Term, A. D. 1864.**

JONH McMILLAN impleaded with  
FREDERICK D. TATON, Appel-  
lants,

*vs.*

PIERRE B. BETHOLD,  
JULIAS H. SMITH,  
MACKLOTT THOMPSON,  
Appels.

APPEAL FROM McLEAN.

## ABSTRACT OF RECORD.

1st. Action by Appellees *vs* Appellants upon promissory note.

Declaration alleges, that on to-wit, October 27th, 1860, at St. Louis, defendants by the name of McMillan and Taton, made their certain promissory note, and delivered same to plaintiffs, thereby promising to pay to the order of plaintiffs, by their firm name of Bethold, Smith & Co, four months after date, two hundred and twelve 84-100 dollars for value received, negotiable and payable without discount.

COMMON COUNTS.

INDEBITATUS ASSUMSIT.

WORK AND LABOR DONE,

GOODS SOLD AND DELIVERED.

MONEY LOANED.

MONEY PAID.

MONEY RECEIVED.

MONEY DUE ON INTEREST.

MONEY DUE ON ACCOUNT STATED.

PROMISE TO PAY AND GENERAL BREACH.

*Copy of Note.*

3      \$212 84.12.

ST. LOUIS, Mo., Oct. 27th, 1860.

Four months after date we promise to pay to the order of Bethold, Smith & Co. two hundred and twelve 84-100 dollars for value received, negotiable and payable without defalcation or discount.

McMILLAN & TATON.

6 Defendant McMillan plead general issue only,

7 *March 5, 1863, submitted to the Court for trial.*

S Judgment for plaintiffs.

Motion for new trial by Defendant; overruled; exception by defendants; appeal taken.



11

12

The above was all the evidence.

Defendant at the time objected to the introduction of all said testimony, which objections were overruled by the Court, and defendants then and there excepted.

Judgments for plaintiffs \$238,69.

Motion of defendants for new trial ; overruled and exception.

## ERRORS ASSIGNED.

1. The court erred in the admission of improper testimony.
2. In overruling motion of new trial.
3. In giving judgment for plaintiffs.
4. The judgment is against the law and the evidence.
5. In admitting secondary evidence of the contents of the note without a sufficient foundation being made.

LELAND, & BLANCHARD and JOHN M. STILLWELL,  
For Plaintiffs.

148 168

John McMillan  
implied &c —

as

Pierre B. B. Tholoz  
et al

Abstract

Filed April 13, 1864  
G. Leland C. M.

REWARD & REVENUE DEPARTMENT

and a sufficient number of copies of the contents of the same.

2. In order that every copy of the contents of the same may

4. The judgment is against the law and the evidence.

3. In order that every copy of the contents of the same may

5. In order that every copy of the contents of the same may

1. The same are in the possession of the same.

ERRORS ASSIGNED



John H. Millan

vs  
Pierre Bartholae

Julius H. Smith

Blacklot Thompson

} appeal  
from all 3 cases.

Now Come the  
said Appellants Pierre Bartholae  
et al by Glover, Esq. & Camp-  
bell their Attys. And enter  
their motion herein to dismiss  
the appeal in said Cause and  
Assign the following Cause.

The said Appeal was not  
prayed ~~and entered~~ for at the  
time of rendering the Judgt  
as provided for by Sec  
47 of the Stat 1845

See States Stat 264 -

By The Record pages 7+8 - it ap-  
pears that the Judgt was ren-  
dered March 9<sup>th</sup> 1863 -

And by pages 8+9 - it appears



That the appeal was not  
prayed for until March  
13 - 1863 When four days  
had elapsed since the  
rendering of the judgment

So that the Record shows af-  
firmatively that the said  
appeal was not taken in  
compliance with the Statute  
& should therefore be dis-  
missed

Campbell  
for Appellant

It while the lamp holds out to burn  
The wick sinner may return  
Such prayer the <sup>father</sup> ~~coast~~ should never spare  
If made before the court adjourns  
Beland for Appellee

148  
McMillan

5  
Perchoee

et al

Filed April 23. 1864

Clarence M



1.  
Plea continued and held at the Court House in  
Bloomington in the County of McLean and State of Illinois  
before the Honorable Circuit Court of the Eighth Judicial  
Circuit of the State of Illinois. in a certain cause wherein Pierre B.  
Berthold, Julius H. Smith & Macklott Thompson were plaintiffs  
and John McMillan & Frederick D. Tator were Defendants.

State of Illinois } ss  
McLean County } Be it remembered, that heretofore, to wit, on  
the 21<sup>st</sup> day of February A.D. 1862, came Pierre B. Berthold,  
Julius H. Smith & Macklott Thompson, plaintiffs, by Owen T.  
Reeco, their attorney, and filed their Declaration against John  
McMillan & Frederick D. Tator, Defendants, which said Dec-  
laration, together with a copy of the note sued on, and Bond for  
costs accompanying the same were respectively in words and figures  
as follows.

State of Illinois } ss In the McLean County Circuit Court.  
McLean County } Of the March Term, A. D. 1862.

Pierre B. Berthold, Julius H. Smith & Macklott Thompson  
partners trading and doing business under the firm name of Berthold,  
Smith & Co. plaintiffs by their atty. complain of John McMillan  
and Frederick D. Tator, late partners under the firm name of McMillan  
& Tator, Defendant, in a plea of assumpsit. For that whereas the said  
Defendants heretofore, to wit, on the 27<sup>th</sup> day of October in the year of  
our Lord Eighteen Hundred and Sixty, at St. Louis Mo. to wit, at the  
County and State aforesaid by the name and description of their  
firm name of McMillan & Tator aforesaid made their certain prom-



promissory note in writing, bearing date, the day and year aforesaid, and then and there delivered the same to the plaintiffs, and thereby, then and there promised to pay to the order of the said plaintiffs by their said firm name, four months after date, Two Hundred and twelve  $84/100$  Dollars for value received, negotiable and payable without defalcation or discount. By reason whereof, and by force of the Statute in such case made and provided, the said Defendants then and there became liable to pay the said plaintiffs the said sum of money in said promissory note specified according to the tenor and effect thereof, and being so liable they, the said Defendants in consideration thereof, undertook and promised plaintiffs, to pay said sum of money in said note specified, according to the tenor and effect thereof.

And whereas, the said Defendants, on the first day of November in the year Eighteen Hundred and Sixty One, at the County and State aforesaid were indebted to the said plaintiffs in the sum of Three Hundred Dollars, for the price and value of work, then and there done, and materials provided by the plaintiffs for Defendants at their request, and in the sum of Three Hundred Dollars for the price and value of goods, then and there bargained and sold by the plaintiffs to the Defendants at their request, and in the sum of Three Hundred Dollars, for so much money, then and there lent by plaintiffs to Defendants at their request, and in the sum of Three Hundred Dollars for money then & there paid by plaintiffs for the use of Defendants at their request, and in the sum of Three Hundred Dollars for money then and there received by the Defendants for the use of the plaintiffs, and in the sum of Three Hundred Dollars for interest due from said Defendants to the said plaintiffs, for and in respect of said plaintiffs having forbore and



3

given day of payment of money due from the Defendants to the plaintiffs at the Defendants request. for a long time then elapsed. And in the sum of Three Hundred Dollars for money found to be due from Defendants to plaintiffs. on account. then and there stated between them. And the Defendants afterwards. to wit. on the day and year last aforesaid. at the County and State aforesaid. in consideration of the premises respectively. then and there promised to pay the last mentioned several moneys respectively to the plaintiffs on request. Yet the Defendants have not paid any of the said monies or any part thereof. although often requested so to do. to the Plaintiffs damage of Three Hundred Dollars. and therefore they bring suit &c.

O. J. Reese. Plaintiffs Attorney.

Copy of the note sued on.

#212.  $\frac{84}{100}$

St. Louis. Mo. Oct. 27<sup>th</sup> 1860

Four months after date we promise to pay to the order of Berthold. Smith & Co. Two Hundred and twelve  $\frac{84}{100}$  Dollars for value received. negotiable & payable without defalcation or discount.

(Signed) McMillan & Tator.

Bond for cost.

Berthold. Smith & Co.

vs

McMillan & Tator

In Assumpsit.

I do hereby enter myself security for costs in the above entitled cause. and acknowledge myself bound to pay or cause to be paid. all costs that may accrue in this action. either to the opposite party. or to the officers of this Court in pursuance of the laws of



this State.

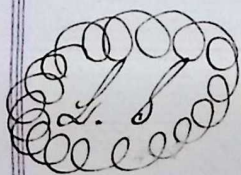
Dated this day of November 1861.

C. J. Reeves.

And thereupon, on said 21<sup>st</sup> day of February 1862, there issued out of said Clerk's office a writ of Summons in words and figures as follows, to wit:-

State of Illinois  
 McLean County <sup>ss</sup> The People of the State of Illinois.  
 To the Sheriff of said County - Greeting -

We command you to summon John McMillan & Frederick D. Tator, partners under the name of McMillan & Tator, if found in your County, personally to appear before the Circuit Court of said County of McLean, on the first day of the next term thereof, to be holden at the Court house in Bloomington on the first Monday in the month of March next, to answer unto Pierce B. Berthold, Lubin B. Smith & Macklott Thompson, partners of the firm of Berthold, Smith & Co. in a plea of assumpsit, to their damage Three Hundred Dollars as they say. And have you then and there this writ, and make return thereon in what manner you execute the same. Witness W<sup>m</sup>. McCallough, Clerk of said Circuit Court and the seal thereof hereto affixed at Bloomington this 21<sup>st</sup> day of February A. D. 1862.



W<sup>m</sup>. McCallough, Clerk  
 By J. Barr. Deputy.

Which said Summons was by the Sheriff of said County returned



5- into said clerks office endorsed as follows. to wit.

Executed this writ on this 21<sup>st</sup> day of February 1862. by reading  
the same to the within named John McMillan. The within named  
Frederick D. Tator not found in my County.

Fee. S. & R.

60

Malg -

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65

John B. Routt. Shff.

By L. E. Rucker. Depty.

And thereupon. afterwards. at the march term of said Court. to wit  
on the 4<sup>th</sup> day of March A. D. 1862. this cause was called and  
the following order was made by said Court. as appears of record. to wit.

Berthold. Smith & Co.

vs

McMillan & Tator

In Assumpsit

This day. on motion of said plaintiffs  
by their attorney. the said Defendant John McMillan is by the  
Court ruled to plead to the Declaration filed herein against him  
by Thursday the 13<sup>th</sup> day of this month.

And thereupon. afterwards. to wit. on the 16<sup>th</sup> day of March  
A. D. 1862. came the said John McMillan by his attorney. and  
filed his plea to said plaintiffs Declaration in words and  
figures as follows. to wit.



6  
M<sup>c</sup> Millan & Tator  
ads  
Berthold. Smith & Co. } M<sup>c</sup> Lean Circuit Court.

And now comes John M<sup>c</sup> Millan one of  
the Defts. and defends &c. and says that he did not assume  
and promise in manner and form as the said pl<sup>ts</sup> have alledged  
in their said Decl- alledged. and of this he puts himself upon  
the country. By John M. Stilwell his atty.  
And plaintiff doth the like. By  
Rever. atty=

And thereupon. This cause was continued from term to term. by a  
general order of continuance entered at the close of each term. until  
the December Term. And at the December Term of said Court. to wit.  
on the 13<sup>th</sup> day of December A. D. 1862. the following order was  
entered in this cause. as appears of record. to wit.

Berthold. Smith & Co.

vs

In Assumpsit.

John M<sup>c</sup> Millan & Frederick D. Tator

And now at this day comes  
the said Defendant John M<sup>c</sup> Millan by his attorney. and moves the  
Court to continue this cause. and presents to the Court an affidavit  
in support of said motion. And said Plaintiffs not admitting  
the matters and things in said affidavit contained. and the  
Court being fully advised in the premises. doth order that  
this cause be continued at the costs of said Defendant.



7  
and thereupon afterwards at the March Term of said Court  
this cause came on for hearing.

Present. Hon. John M. Scott. Presiding Judge

Luman Burr. Clerk.

Norval Dixon. Sheriff.

and the following proceedings were had herein as appears  
of record. to wit.

Thursday March 5<sup>th</sup> 1863.

Prise B. Berthold. Julius H. Smith &  
Macklott Thompson. of the firm of  
Berthold. Smith & Co.

vs

In Assumpsit.

John McMillan & Frederick D. Tator

And now at this day come  
the said plaintiffs by O. J. Reeves. their attorney. and also comes the said  
John McMillan by Stilwell his attorney. and this cause now coming on  
for hearing. by consent of the parties. the issue herein joined is submit-  
ted to the Court for trial without the intervention of a Jury. And the  
Court having heard the evidence produced. and not being fully  
satisfied what Judgment ought to be rendered herein doth take  
the same under advisement.

Monday March 9<sup>th</sup> 1863.



Pierre B. Berthold, Julius H. Smith  
& Macklott Thompson. partners of the firm  
of Berthold, Smith & Co.

vs

John Mcmillan & Frederick D. Tator

In Assumpsit.

And now at this day  
again come the parties hereto by their attorneys. and the Court being  
now fully advised in the premises. doth find the issue for the Plaintiffs  
and doth assess their damages at Two Hundred and Thirty Eight  
Dollars and Sixty nine cents. And now comes the said Defendant  
John Mcmillan by his attorney. and moves the Court to grant a new  
trial in this cause. which motion is by the Court overruled. It is there-  
fore considered by the Court that said Plaintiffs recover of and  
from the said John Mcmillan. the sum of Two Hundred and  
Thirty Eight Dollars and Sixty nine cents. their damages so assessed  
by the Court as aforesaid. and also their costs by them in this behalf  
expended. and that they have execution therefor.

Friday March 13<sup>th</sup> 1863.

Pierre B. Berthold, Julius H. Smith &  
Macklott Thompson. partners of the firm  
of Berthold, Smith & Co.

vs

John Mcmillan & Frederick D. Tator

In Assumpsit.

And now at this day  
comes the said Defendant John Mcmillan by his attorney and  
prays an appeal from the Judgment of this Court to the Supreme



9 Court of this State. and the same is granted. upon said Defendant giving Bond in the penalty of Five Hundred Dollars conditioned as the law directs within thirty days from this date with S. W. Waddell as security.

And thereupon. on said 13<sup>th</sup> day of March A. D. 1863. came the said Defendant John Mcmillan by his attorney and filed his Bill of Exceptions in this cause. which Bill of Exceptions was in words and figures as follows. to wit.

Pierre B. Berthold. Julius H. Smith & Macklott Thompson. partners under the firm name of Berthold. Smith & Co.

In Assumpsit.

In McLean Circuit Court. and State of Illinois.

John Mcmillan & Frederick D. Tator. partners under the firm name of Mcmillan & Tator

Be it remembered

that on the trial of this cause. at the March Term. A. D. 1863. of said Court before the Hon. John M. Scott. Judge of said Court. by consent of parties a Jury being waived. said plffs. to maintain the issue on their part. introduced one G. Frank Guley. who being duly sworn. testified that he knew Plffs. who were in business. and reside at St. Louis. Mo. - knew Defts. by reputation as wholesale Grocers in Bloomington Ill. - had seen one of Defts. could not tell certainly whether the one he had seen was Mcmillan or Tator. That witness was Salesman & traveling & collecting agent of Plffs. That on the 27<sup>th</sup> day of Oct. 1860. witness as Salesman of Plffs. sold to Defts. a Bill of Goods. to wit. Whiskey amounting to \$212.84.



and that said Goods were shipped by witness as per order of Defts. to Bloomington Illinois. by the St. Louis, Alton & Chicago Railroad. Witness knows that Goods were sold to one member of the firm. could not now recollect whether it was McMillan or Tator.

At the time said Whiskey was sold a note was given for the amount of the sale by Defts. to Pltffs. due in four months from date. In May 1861. Witness presented said note to Defts. for payment. At that time the note was due. One of the Defts. was present when said note was presented by said witness. The presentation aforesaid being at Defts. place of business in Bloomington Illinois. Defts. not being ready to pay said note. witness placed the same in his memorandum book. and started at once for Alton. by St. Louis, Alton & Chicago Railroad.

On arriving at Alton witness went directly to the place of business of a man with whom Pltffs. had had business transactions. and on putting his hand in his pocket for his memorandum Book he found the same was gone. Witness could not tell whether the same was picked from his pocket or lost. Witness at once advertised the loss of said memorandum Book & contents in Alton papers. That said note was in said memorandum Book when said Book was lost. that witness has never heard anything concerning said memorandum Book or its contents. including said note. since its loss. Here an instrument of writing was handed to witness. who testified the same was a copy of the note. made by Defts. to Pltffs. and which witness had lost from his possession as above set forth. That he knew the same was a copy of said note. The written part of said note he knew to be a copy from his own recollection. and the printed part of the note from the fact that Pltffs. had but one form of printed blank notes. That so far as witness knowledge extended. Defts. had never paid said note. Pltffs. then



11  
offered in evidence the copy of said note which witness had sworn to as an exact copy of the original.

Copy of note which witness swore to.

\$212  $\frac{84}{100}$

St. Louis Mo. Oct. 27<sup>th</sup> 1860

Four months after date we promise to pay to the order of Berthold, Smith & Co. Two Hundred and Twelve  $\frac{84}{100}$  Dollars for value received. negotiable and payable without defalcation or discount.

Due March 2. 1861.

M<sup>c</sup>Millan & Tator

That part of said copy which is underscored was printed, and the balance written. On cross examination, the said Gouley said, that it was not impossible that Defts. might have paid said note to plffs. and witness not know it, but it was not at all probable, on account of the manner in which plffs. did business, and from the reason that witness had charge and control of all the collections of plffs. Plffs. offered in evidence affidavit of G. Frank Gouley, (wit above sworn) which reads as follows.

State of Missouri

County of St. Louis

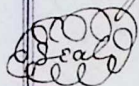
On this 8<sup>th</sup> day of November, 1861, personally came before me the undersigned, a notary public, in and for the County aforesaid, G. Frank Gouley, Clerk of Berthold, Smith & Co. of the City and County aforesaid, who upon his oath states, that the note referred to in his affidavit, of which the attached is a true copy, was not endorsed by Berthold, Smith & Co. and that the note was lost by him in the City of Alton, Illinois, and was advertised in a daily newspaper there, and that due diligence was exercised to obtain its recovery. The note was either picked from his pocket or mislaid in a memorandum book in some store in Alton.

G. Frank Gouley.

Subscribed & sworn to before me this



8<sup>th</sup> day of November. 1861.



C. Haquembourg.

Justice of the Peace & Notary Public.

St. Louis Co. Missouri

Copy.

State of Missouri.

County of St. Louis

On this 31<sup>st</sup> day of Oct 1861. personally came before me the undersigned a notary Public. in and for the County aforesaid, G. Frank Goulet. Clerk of Beuthold. Smith & Co. of St. Louis Mo. who upon his oath states that on the 27<sup>th</sup> day of Oct. 1860. McMillan & Tator of Bloomington Illinois. gave Beuthold. Smith & Comp. their note. payable to the order of said Beuthold. Smith & Comp. payable four months after date for the sum of \$212<sup>34</sup>/<sub>100</sub>. which note has been lost or mislaid. of which the attached is a true copy of the same & that all just credits and assets have been allowed. to which the same is entitled. showing the amount justly due. to be as before stated.

Subscribed & Sworn to before me G. Frank Goulet.

this 31<sup>st</sup> day of October 1861.

Signed. C. Haquembourg.

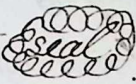
Notary Public. St. Louis County Mo.

The above is all the evidence that was offered in the case. All of which evidence as aforesaid. was then and there objected to by Defts. Counsel. objections overruled. and exceptions taken.

Thereupon the Court found the issue for Pltffs. and assessed their damages at \$238.69. Thereupon Defts by their Counsel moved the Court for a new trial - motion overruled by Court and entered judgment for amount as aforesaid for Pltffs. and Defts. then and there excepted.



Whereupon the Counsel of said McMillan & Tator. depts as aforesaid, inasmuch as the matters aforesaid. do not appear by the record of the verdict aforesaid. prays that the said Judge as aforesaid. would set his hand and seal to this Bill of Exceptions. containing the several matters so proved and given in evidence as aforesaid. according to the Statute in such case made and provided. which is accordingly done. at the time and place of trial aforesaid.

John M. Scott   
Judge &c.

And thereupon afterwards. to wit. on the 10<sup>th</sup> day of April A.D. 1863. came the said John McMillan and filed his appeal Bond in this cause. which Bond was in words and figures as follows. to wit.

Know all men by these presents that we John McMillan & Samuel W. Waddle. of the County of McLean and State of Illinois. are held and firmly bound unto Pierre B. Berthold. Julius C. Smith & Macklott Thompson. of the firm of Berthold. Smith & Co. in the penal sum of Five Hundred Dollars. for the payment of which. well and truly to be made. we. and each of us bind ourselves. our heirs. executors and administrators. jointly. and severally and firmly by these presents.

Scaled with our seals and dated at Bloomington this 17<sup>th</sup> day of March Anno Domini. One Thousand. Eight hundred and Sixty three.

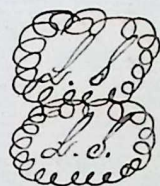
The condition of the above obligation is such. That whereas. the above named Pierre B. Berthold. Julius C. Smith & Macklott Thompson did on the 9<sup>th</sup> day of March. One Thousand Eight Hundred and sixty three. at a term of the Circuit Court then being holden within and for the County of McLean and State of Illinois obtain a Judgment



against the above bounden John Mcmillan for the sum of Two Hun-  
dred and Thirty Eight Dollars. and Sixty nine cents and costs of  
suit. from which Judgment. the said John Mcmillan has prayed  
for and obtained an appeal to the Supreme Court of said State.

Now if the said John Mcmillan shall duly prosecute said appeal  
and shall moreover pay the amount. of the judgment. costs. interest  
and damages. rendered. and to be rendered against him. the said John  
Mcmillan. in case the said Judgment shall be affirmed in the said  
Supreme Court. then the above obligation to be null and void. otherwise  
to remain in full force and virtue.

Taken and entered into before me John Mcmillan  
and approved this 10<sup>th</sup> day of S. W. Waddle  
June. A. D. 1863.



Luman Burr. Clerk

State of Illinois  
McLean County }  
I, Luman Burr. Clerk of the Circuit Court in  
and for said County do hereby certify that the foregoing is a true and  
complete transcript of the records and files of my office pertaining  
to a certain cause wherein Pierre B. Berthold, Julius H. Smith &  
Macklott Thompson of the firm of Berthold, Smith & Co. were plain-  
tiffs. and John Mcmillan & Frederick D. Tator were Defendants.

Given under my hand and seal of office at  
Bloomington this 27<sup>th</sup> day of June. A. D. 1863.

Luman Burr. Clerk





Supreme Court of Illinois  
3<sup>d</sup> Grand Division April term 1864

~~Frederick & Talbot~~

John W. Millam ~~Pltffs~~ ~~vs~~ ~~Carroll~~  
impeached with Frederick & Talbot appellants

vs

Frederick Bethold Appellees  
Julius W. Smith Deft vs  
Macklott Thompson

And now comes the said  
appellants of Seland and Blanchard his attorneys  
And say that in the foregoing record, judgment  
& proceedings there is manifest error in this  
1<sup>st</sup> The Court erred in the admission of  
improper testimony

2<sup>d</sup> In overruling motion for new trial

3<sup>rd</sup> In giving judgment for Pltffs

4<sup>th</sup> The judgment is against law and evidence

5<sup>th</sup> In admitting secondary evidence of the  
contents of the note without a sufficient  
foundation being laid therefor

Seland & Blanchard

Pltffs attys

Now Comes the said Appellees & say  
that in the record & proceedings a-  
foresaid & in the reading of judg-  
ment aforesaid there is no error

O. F. Reeves  
for appellees



John McMillan

vs

Berthold. Smith & Co.

Transcript.

Recd. of Lno. McMillan  
\$4.00 for this Record,  
L. Burr. Clerk



148 168

John W. Miller

20

Richard Smith Esq

Receivd & Envs

Filed April 15. 1864

L. Leland  
Clerk



# Supreme Court of Illinois:

## THIRD GRAND DIVISION.

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APRIL TERM, A. D. 1864.

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JOHN McMILLAN, Impleaded  
with FREDERICK D. TATOR  
Appellant,

vs.

PIERCE BETHOLD,  
JULIAS H. SMITH,  
MACKLATT THOMPSON,  
Appellees.

} APPEAL FROM McLEAN.

### BRIEF AND ARGUMENT OF APPELLANT.

This was an action of assumpsit brought by Appellees vs. Appellant, John McMillan and Frederick D. Tator, upon the following note:

\$212 84-100.

St. Louis, Mo., Oct. 27th, 1860.

Four months after date we promise to pay to the order of Bethold, Smith & Co. two hundred and twelve 84-100 dollars for value received, negotiable and payable without delfalcation or discount.

McMILLAN & TATOR.

Summons was served upon McMillan only, who filed his several pleas of the general issue, upon the trial. Appellees attempted to prove the loss of the note and were permitted to introduce secondary evidence of its contents, and judgment was rendered against appellant for amount of note and interest.

*Given April 30 1864*  
*L. L. D. R.*



Before secondary evidence of the contents of the note could be introduced in evidence, a foundation must be laid therefor. How must such foundation be laid? By presenting to the court an affidavit showing the loss or destruction of the note, and that the same cannot be found upon due and diligent search.

*Dormady v. State Bank of Illinois*, 1 Scam 286.

In this case the affidavit of a third party was presented to the Court, for the purpose of laying such foundation, but the foundation laid thereby is insufficient to warrant the introduction of secondary evidence. The allegation is that the note is "lost or mislaid," being in the alternative. This has already been decided by the court to be insufficient.

*Rogers v. Miller et al*, 4 Scam, 334.

*Wade v. Wade & Brown*, 12 Ill. 89.

G. Frank Gouley, the party who made the affidavits that the note was "lost or mislaid," testified on the trial in relation to the loss as follows :

"In May, 1861, I presented said note to Defendants for payment ; at that time the note was due ; one of the defendants "was present when said note was presented to him. The presentation aforesaid being at defendants' place of business, in "Bloomington, Ill. Defendants not being able to pay said note "witness placed the same in his memorandum book and started "at once for Alton, by the St. Louis, Alton & Chicago Railroad, "On arriving at Alton, he went directly to the place of business "of a man with whom plaintiffs had had business transactions, "and on putting his hand in his pocket for his memorandum "book, he found the same was gone ; he could not tell whether "the same was picked from his pocket or lost ; he at once advertised the loss of said memorandum book and contents in "Alton papers ; that said note was in said memorandum book "when said book was lost ; that he has never heard anything "concerning said memorandum book or its contents, including "said note since its loss."



*defects* Now if the foundation of the loss of the note is defective, can the defendants be cured by the testimony of witnesses as to the contents; we think not; the foundation is one thing, the evidence of contents is another, each must stand or fall by itself. If the court admits testimony without a proper foundation being laid therefor, it is manifest error. Suppose no attempt had been made in the case at bar to lay a foundation, but the court had permitted evidence of loss and contents to go direct to the jury, we need not argue that such would have been error; then if it is error to dispense with a foundation, is it not an error to accept of an insufficient foundation, or in other words, can you by evidence to the jury, cure an error of the court in allowing the evidence under no foundation or an insufficient foundation. But the statements of the witness as to the loss of the note, if incorporated in the foundation, would not cure its defects. He put the note in his memorandum book at Bloomington, traveled from there to Alton, and the book was missing; don't know whether it was lost or left at Bloomington, or on the road to Alton, or at Alton; made no efforts to find same except advertising in Alton papers. The evidence shows no inquiry or search for the same but asserts that witness has not heard of the note since. There is not that diligence shown in efforts to find the note that the law requires. The plaintiffs were not sworn in relation to the loss of the note, and the whole statements of the witness, including the affidavits, shows that the note was "lost or mislaid" which we have shown to be insufficient. The allegation of loss in the writing is more reliable than the statements of the witness on the trial, taken down by council.

LELAND & BLANCHARD,

For Appellant.



W. Millan & Co

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Bethold & Co

Briefs

Brief