

No. **12180**

Supreme Court of Illinois

Thompson

vs.

Strain

71641  7

³²
John S. Thompson
^{vs}
Isaac Strain

1855

32

12/80

Certs. taxed

1855

Proceedings continued & held at the Court House in Bloomington. within & for the County of McLean. in the Eighth Judicial Circuit of the State of Illinois. at a term of the Circuit Court held within & for said County. before the Honorable David Davis. Presiding Judge of said Eighth Judicial Circuit. at the September Term of said Court. to wit = on the fourteenth day of September A.D. 1854..

No. 672.C.S. John S. Thompson vs. Isaac Strain In assumpsit =

Be it remembered that heretofore, to wit. on the Twenty fifth day of July A.D. Eighteen Hundred & fifty four John S. Thompson by his Attorney James C. Walker. filed in the Clerk's office of the Court aforesaid. a praecipe in assumpsit & security for costs. in words & figures following = to wit =

Praecipe

State of Illinois

McLean Circuit Court

John S. Thompson

vs.

Isaac Strain

Assumpsit =

Damages \$1000 =

The Clerk of the McLean Circuit Court will please issue summons in the above entitled Cause. directed to the

Sheriff of De Witt County. returnable to the
next September Term of the Court =

J. C. Walker =

Atty for Plaintiff

Security
for Costs =

I do hereby enter myself security for
Costs in the above entitled Cause & acknowledge
myself bound to pay or cause to be paid the
same either to the opposite party, or to any of
the officers of the Court, in conformity with the
laws of this State =

Dated this 25th day of July, 1854 =

J. C. Walker =

And thereupon afterward, to wit, on
said 25th day of July, the Clerk of said Court
issued Summons, in words & figures follow-
ing, to wit =

Summons

State of Illinois }
McLean County } ss. The people of the State
of Illinois = To the Sheriff of De Witt County =
Greeting = We Command you to summon
Isaac Strain, if found in your County, per-
sonally to be & appear before the Circuit
Court of said County, on the first day of the
next term thereof, to be holden at the Court
House in Bloomington, on the 2^d Monday
in the Month of September next, to answer
John S. Thomson in a plea of assumpsit

to his damage of One Thousand Dollars
as he says = And have you then @ then
this writ @ make return thereon in what
manner you execute the same =

L.S.

Witness. William McCullough.
Clerk of the said Circuit Court @ the
Seal thereof hereto affixed at Bloom-
ington this 25th day of July A.D.
1854 = Wm McCullough. Clerk-
by his Deputy -

William Ward Orme =

On the back of this Summons was the following
Endorsement = to wit =

Endorsement = "Served by reading this writ to Isaac Strain
on 28th day of July - 1854" =
Wm Polin. Shff of D.C. =

And thereupon afterwards. to wit. on the
First Day of September. year aforesaid. said
Plaintiff by his Attorney aforesaid. filed in
said Clerks Office. his Declaration in as-
=sumpsit. and Note. which declaration and
Note are in words @ figures following to wit =

Declaration State of Illinois
McLean Circuit @ County S.S..

John S. Thomson.

Plaintiff. Complain of Isaac Strain. defendant
being in the custody @ of a plea of Assumpsit
For that whereas. heretofore. to wit = on the

25th day of October 1849. at Saint Louis.
to wit: at the Circuit & County aforesaid. the
said Defendant with one R. B. Baker. who is
not sued in this action. made his certain
promissory note in writing. bearing a certain
date. to wit. the day & year aforesaid. and
thereby. then & there. sixty days after date (thereof)
promised to pay to the order of Plaintiff. Three
Hundred & Ninety. $9\frac{1}{100}$ Dollars. for value rec-
eived. without defalcation or discount. with
interest from date & then & there delivered said
promissory note to Plaintiff. by means
whereof & by force of the Statute in such
cases made & provided. the said defendant
then & there became liable to pay plaintiff
said sum of money in said promissory note
specified. according to the tenor & effect thereof
& being so liable. he. the said Defendant.
in consideration thereof. afterwards
to wit = on the day & year aforesaid. at
the Circuit & County aforesaid. undertook
& then & there promised to pay Plaintiff. said
Sum of money in said promissory note
specified. according to the tenor & effect
thereof = And whereas also. afterwards
to wit = on day of — at the Circuit
& County aforesaid. the said Defendant was
indebted to the said Plaintiff in the further

Sum of One Thousand Dollars. for divers
wares & Merchandise. by the said Plaintiff
before that time sold & delivered to the said
Defendant at his special instance and
request & being so indebted. he. the said
Defendant in consideration thereof. afterwards.
= to wit = on the day & year aforesaid. at the
Circuit & County aforesaid. undertook. & then
& there promised the said Plaintiff to pay to
him the said last mentioned sum of mone-
= ver the said Defendant should be thereunto
afterwards requested = And whereas also
the said Defendant. to wit. on — day of —
at the Circuit & County aforesaid. accounted
with the said Plaintiff of & Concerning divers
other sums of money. from the said Defend-
= ant to the said Plaintiff before that time
due & owing & then in arrear & unpaid &
upon such accounting the said Defendant
was then & there found to be in arrear &
indebted to the said Plaintiff. in the fur-
= ther sum of One Thousand Dollars. and
being so found in arrear & indebted. he.
the said Plaintiff. Defendant. undertook
& promised then & there. in consideration there-
= of. promised to pay Plaintiff said sum of
money. so found to be due & in arrear. when
he the said Defendant. should be thereunto

afterwards requested = And whereas also.
afterwards.. to wit = on - day of — at the
Circuit @ County aforesaid. the said Defendant
was indebted to the said Plaintiff in the fur-
ther sum of four thousand Dollars. for so
much money had @ received @ being so ind-
ebted. he. the said Defendant. in consideration
thereof. afterwards. to wit. on the day @ year
aforesaid. at the Circuit @ County aforesaid.
undertook @ then @ there faithfully promised
the said Plaintiff to pay him the said last
mentioned sum of money. when he should
be thereunto afterwards requested = And
whereas also afterwards. to wit.. on - day
of — at the Circuit @ County aforesaid.
the said Defendant. in consideration that
the said Plaintiff at the special instance
@ request of the said Defendant. had before
that time sold @ delivered to the said Def-
endant. divers goods. Chattels. wares. gro-
ceries @ merchandise. undertook @ then @
there promised the said Plaintiff. to pay
him so much money as he therefor. reasonably
deserved to have of the said Defendant.
when he. the said Defendant should be
thereunto afterwards requested =

And the Plaintiff avers that he therefore
reasonably deserved to have of said Defendant

the further sum of One Thousand
Dollars. at the Circuit & County aforesaid.
whereof the said Defendant afterwards.
to wit = on the day & year last aforesaid
then & there had notice = Nevertheless
the said Defendant. not regarding his
said several promises & undertakings. hath
not as yet paid the said Plaintiff. although
often requested so to do. said several sum of
money or any or either of them. or any part
thereof. but the said to pay him the same
has hitherto wholly neglected & refused
& still doth neglect & refuse - to the damage
of the Plaintiff One Thousand Dollars &
therefore he sues & =

J. C. Walker
Atty. for Plaintiff =

Copy of =
Note =

Copy of note sued on =
"\$390.97 =

Saint Louis. Oct. 25. 1849

Sixty days after date we the
subscribers of Waynesville. State of Ills.
promise to pay to the order of John S. Thom-
son. Three Hundred & Ninety 97/100 Dollars
for value received. without defalcation or
discount. value received. with interest from
date =

R. C. Baker
Isaac Strane =

Copy of Acct.

Copy of Account =

Isaac Strain

To John S. Thompson Dr.

To Goods, Wares & Merchandise

Sold &c =

\$1000

To Amt. of Acct. Stated

1000
2000

Note. \$390.97 = Saint Louis. Oct. 25. 1849 =

Sixty days after date. we the sub-
= scriber of Waynesville. State of Ill. promise
to pay to the order of John S. Thompson. Three
Hundred & Ninety ⁹⁷/₁₀₀ Dollars. for value
received. without defalcation or discount.
with interest from date =

R. C. Baker

Isaac Strain =

On the back of this note was the following

Endorsement

Endorsement. to wit =

on note =

State of Illinois

McLean County

J. Wm McCullough. Clerk

of the Circuit Court of said County. do hereby certify
that this note was filed with a power of attorney
& judgment rendered thereon against Robert
C. Baker in a case wherein John S. Thompson
was Plaintiff & R. C. Baker & Isaac Strain
were defendants at the April Term of said
Court A.D. 1850 = And that afterwards =
to wit = at the April Term 1854. leave was

granted to withdraw said Note upon leaving
a sworn copy on file in its stead & certifying
the facts as above on this note. all of which has
been complied with = Witness my hand & the
Seal of said Court hereto affixed.
August 16th 1854.

Wm McCullough - Clk. =
by W. W. Orme. Dpty. =

And thereupon afterwards to wit - at the
September Term of said Circuit Court to wit -
on the Eleventh day of September A.D. 1854 -
Defendant by his Attorney moved said Court
to reject said Declaration, which motion was
overruled. as appears of Record in ^{the} Common
Law Record of said Court Vol. 6. Page 2. in
words & figures following to wit =

Records of
Court =

672. { John S. Thompson
vs. { In aumpsit =
Isaac Strain

This day came the
Defendant by C. H. Moore. his Attorney & moved
the Court here to reject the declaration herein
filed. which motion is by the Court here
overruled =

And thereupon afterwards to wit..
at said September Term = to wit.. on the 14th
day of September A.D. 1854. Said Defendant
by his Attorney ^(in said Clerk's office) filed his demurrer to the

Demurrer

Declaration aforesaid. in words & figures
as follows = to wit =

Isaac Strain
as.
John S. Thompson

McLean Circuit Court
Sept. Term. 1854 =

And the defendant comes
the wrong & injury. when he says that said
Declaration & the matters therein contained are
insufficient for him further to answer the
same.

Moore & Co. d.

And the said Plaintiff joins in
demurrer

J. C. Walker
Atty. for Plff =

And thereupon afterwards to wit on said
fourteenth day of September A.D. 1854 = at
said September Term. the following Order
was made by said Court. as appears of Record
in Volume 6 of Common Law Records Page 21
of said Circuit Court - Page 21 = to wit =

Order of
Court

672 { John S. Thompson
as.
Isaac Strain

In apumpsit

And now
again at this day comes the said Defendant
& files his Demurrer to the said Plaintiffs dec-
laration = And the same being fully arg-
ued & the Court sufficiently advised in
the premises. It is considered that said

Declaration is insufficient in law to be
answered unto = And the said Plaintiff electing
to abide by his declaration. It is further
Considered by the Court. that said Defendant
recover of the said Plaintiff his costs in this
behalf expended & that he have execution
therefor =

State of Illinois

McLean County

I, William McCullough
Clerk of the Circuit Court in & for said
County. do hereby certify that the foregoing
is a complete transcript of all the pro-
ceedings in the above entitled cause. as
taken from the Records of said Court and
the papers on file in my office =



In witness whereof I have hereunto
set my hand & affixed the seal
of said Court at Bloomington
this Thirteenth day of March
A.D. 1854 =

Wm McCullough Clerk -
by his Deputy =
Hudson Burr =

Received of J. C. Walker Five Dollars in full for
the above transcript of Record =

Bloomington March 14th 1855 }

Wm McCullough Clk -

by H. Burr. Deputy Clk -

State of Illinois } Otterbein Division
Supreme Court } To June Term 1855

John S. Thompson Plaintiff
vs } on a writ of Error
} to Judgement of M^cLean Court
Isaac Strane Defendant

The Plaintiff John S. Thompson
assigns for Error herein.

1st That the Circuit Court Erred
herein to his prejudice in its
judgement at the September Term
1854 in sustaining the defendant's
demurrer to plaintiff declaration.

2nd In adjudging the plaintiff's
declaration insufficient to be answered
unto, and in rendering judgement
against plaintiff.

3rd In not overruling the demurrer
to plaintiff declaration.

4th The said judgement of the
said Circuit Court at the September
Term 1854 is erroneous in every
respect to the prejudice of
the Plaintiff and should be reversed.

Whereupon a reversal is prayed for
and the defendant stated by M^{rs} H. Walker
his atty Couns joins in Error says that Atty for Plaintiff
there is no Error in said record & in Error
decisions therein M^{rs} J. d.

No. 672.C.S.

John S. Thomson

vs.

Isaac Strain

Transcript of Record

Filed April 6, 1885.
A. Veland Clerk.

Fees \$5.00 =

(18-081-2)

John S. Hanson

vs 3

Hautaps Brief

Isaac Strain

The 3rd Section of
§6 Chapter of Rev Statutes 1848
page 299. is as follows,
"all joint obligations and Covenants
shall be hereafter taken and
held to be joint and several"
obligations and Covenants
an obligation is "a legal tie
which binds us to another either
or to do or abstain from doing
some act" 2 Pathier on Obl.
See also Baudouin's Law Dictionary
title Obligation where an
obligation is said to be synon-
ymous with duty and where
civil or personal obligations
are defined to be personal
engagements and which give
the person with whom they are
made a right to demand their
performance, and from these
it is manifest that a written
instrument to pay a certain sum
of money a consideration being
implied from its very nature

is an obligation and if it
be joint by the Statute of this
State is to be taken and held
to be joint and several and
therefore the makers may
be sued either jointly or separately
Admitting then that the declara-
tion in this case shewed an
its face that it was an action
against one upon a joint
note - yet the Statute having
made joint notes joint and
several the demurrer was
improper sustained - but error
was not crossed of the writing
sued on and therefore it was
not brought before the Court
on the demurrer - and as
the declaration does not show
it to be joint the demurrer
admitting the declaration and
every possible inference in
favor of it - the Court will
not presume it to be joint.
The Court in the Case in 1st Gillman
491 to 496 referred to by the Counsel
for defendant made no decision
on Sec. 3 Chap. 5 Rev Statutes page

299 they do not even refer
to the case. The arguments
of the defendant as to what is
in the note and as to those having
come been a judgment on it have
affirmation because it is on
the demurrer to the declaration
and the note is not brought before
the Court at all

The judgment should be reversed

H. Walker

for plaintiff in
error

Shampson Error
 W. J. from m. Dean

Strain

Brief of Plaintiff
 in Error

Filed July 2, 1884.
 C. C. and O. R.



Bloomington Ill.
April 4 1855

Dear Sir

Enclosed I send you \$5.00
to pay cost, on a writ of Error,
in Case of Thompson vs Strane the
renewal of which with a bond for
Cost. I send herewith, which you
will please file and issue sum-
mons directed to Sheriff of De Witt
and send to me, by mail.
Will you be kind enough to write
me whether Messrs Dinkley &
Wallace have obtained a writ
of Error and filed the renewal
in the Case of Cooper Henderson
Also vs John E McClun & others
and whether publication has been
made to the non resident defendants
therein. If they have omitted
to file it I fear it will soon
be too late to make publication
native for next Term. Send the
summons to be executed on McClun
to this County. If they have not filed will
you speak to them about it.
Truly yours
J.C. Walker
Mr. Belmont
Ottawa Ill.

State of Illinois } LaSalle Term
Supreme Court. } A.D. 1855
John S. Thompson }
vs } Bond for Cost,
Isaac Strane }

I hereby enter myself
as surety for Cost in the above
entitled Cause and acknowledge
myself bound to pay or cause
to be paid all the Costs that
may accrue upon the writ
of Error herein either to the
opposite party or to any
of the officers of the Court
in pursuance of the Laws
of the State April 4, 1855
J. Walker

The Clerk of the Supreme Court
will please issue a writ of Error
in the above entitled Cause file
the accompanying record and
the above bond and issue a
summons to the defendant
in Error directed to the Sheriff
of De Witt County,
J. Walker
att'y for plff.

John S. Thompson

no 3 Bond
3 for cents -

Isaac Strane

Filed April 6, 1855.
L. Ireland Clerk.

Bloomington Ills June 30 1855

Hon W B Seaton Chief Jus
Supreme Court Ills

Sir

In case no 32 Thomson vs Strain on the
docket will you please make a memorandum or note on your docket
that defendant ~~files~~ ^{"has"} filed agreement to abandon all the Common
counts in decl (this was done in Court before but the record did not
show it) Submits the Cause upon written argument ~~for~~
filed with the papers. I only ask this in order that the
agreement & argument may not be passed over by the Court
without Examining the same, Respectfully yours H

C H Moore

The agreement I have sent the clerk

John S Thompson } In Supreme Court at Ottawa Ills
vs
Isaac H Strain } Error from McLean County

It is agreed by between the attorneys
for the plaintiff & defendant in the above cause that in the Court
below says atty abandoned all his Common Counts which the
record filed does not show. And it is further agreed that
in the trial of this cause in the Supreme Court all of said
Common Counts are abandoned & That if plaintiff cannot recover
upon the first Count in said Declaration the judgment is
not to be reversed upon the Common Counts as they were
abandoned

C H Moore atty for Isaac Strain
J L Waller atty for
plaintiff Hanson

No 32

Thomson

us

Strain

agreement
as to Common Combs

John S Thomson
vs
Isaac Strain

Error from the Lean

The defendant in Error
by C H Moore his atty Submits the following

1st The first Count is upon a note made jointly
by Strain & R. C. Baker, Baker is not dead,
no excuse is given for his not being joined,
with Strain. The note had not been made
seven seven years, Every presumption was in
favor of Baker being alive.

The plaintiff admits
that Baker is alive by saying "who is not dead in
this action." after this Count upon a joint
note which shows no right to recover against
Strain alone. The Common Counts against
Strain were clearly bad, it was a misjoinder
of Counts of action & a demurrer was good against
the whole declaration

2^a All the Common Counts ^{are} ~~was~~
also clearly bad in this, they alledge in day or
year in which said indebtedness accrued or
said promise ^{was} made, a day certain must be
avowed in the declaration see 1 Chitty ^{11 Ed} 341
257 259, at least the 1st one of them should show a day & year ^{refer to it} than the others

The common Counts in this declaration really
amount to nothing the note in the pleadings
could not be given in evidence against Strain
upon any of them. The note was all the cause
of action the plaintiff had against Strain &
Strain & Baker. This brings us to the real ques
tion the Court are in sustaining ~~and~~ ~~demurrer~~

To 1st Count we think there is no error
The note is a joint note, not a joint several note.
The words "we promise to pay" are not several
but create a joint liability See Story on
promissory notes Sec 59 & authorities there cited

Does the 3^d section of Chap 56 Sec 299 R Stat
1845 change the common Law in regard to
promissory notes, so as to make a joint note
joint several. That statute does not apply to
promissory notes. See 1 Gillman 491, 495-496
The school Law that the statute above reads the
note in that case joint several The court in that
case acknowledges virtually that Chap 56 R L 1845
does not affect promissory notes.

If then the note signed by Strain was a joint
note only, all the makers must be sued jointly
See 1 Chitty 11 ed 42, plus in abatement or demand good 1st Chitty 46 close of page
Strain was sued alone he appears files his demurrer,
the plaintiff by his own pleading shows that Baker is
alive "but not joined" that the plaintiff had commenced
a suit against Baker & Strain in April 1850 & recovered
a judgt against Baker. See copy of note & certificate
of Clerk thereon, written, which shows that in a former
trial or suit, a judgment was obtained against Baker
The plff files this note & certificate as a part of his
renewed pleadings thus admitting at the certificate taken
time. The plaintiff elected in April 1850 to get
a judgment against Baker alone upon this note
Baker did not resist, in 1852 the plaintiff sues
by a new suit to obtain judgt against Strain
separately on the joint note upon which he
has already recovered against Baker

after having commenced his suit against Baker
Strain or ~~Strain~~ Baker alone recovered a judgment
against Baker in 1830. We insist that the ~~note~~ note
was merged in ~~the~~ the judgment or higher
security the action could be maintained upon the
note, either against Strain alone or Baker & Strain
after the first judgment was obtained, 2 Gillman 355 et
sequens

Thus the plaintiff by
his own pleadings shows that he cannot recover
in this action against Strain.
Firstly because he shows upon his papers that
Baker is alive & not joined. See 1 Chitty 46

close of page
2^d Because he shows by his own papers that
a former recovery has been had against Baker
upon the same note. He has elected to take
his remedy against Baker alone, now no judgment
can be rendered against Strain. See 2 Gill
man 355. et sequens 1 Chitty 11 Ed 46 & note 3
18 Johnson 459.

When the plaintiff shows by his pleadings the non
joinder of a debt. No plea in abatement is necessary
a demurrer is good, See 1 Chitty Chitty 11 Edition
page 46 also note (K) on same page.

But supposing the non joinder
of Baker should have been taken advantage of by plea in
abatement & not by demurrer, still the plaintiff shows that
he cannot recover against Strain his sole cause of action is
his note against Strain & Baker this is merged in the action
judgment against Baker. No recovery can be had upon it
against Strain. The plaintiff elected to do this, he cannot complain.

Then we say admitting every ~~fact~~ paper filed
by the plaintiff to be true he shows that he cannot
recover against Strain. A demurrer then was good
against the whole declaration C H Moore atty p, d.

32

Thompson } Error from
us } In Law
Strain }

~~any~~ Authorities
for diff

Filed June 29. 1888.
V. Ireland Ch.

This Cause is submitted
by Sept Strain, upon
this statement
C. H. Moore
Atty