

No. 12675

# Supreme Court of Illinois

Topper

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vs.

Snow

210 91

Tappan

Amos

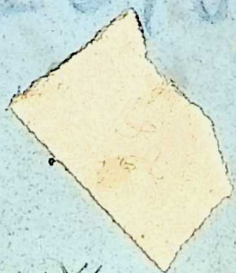
210

Tappan

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1858

12675



X

Refused

State of Illinois 3  
Knox County 355

Pleas before The honorable John  
S. Thompson, Judge of the Tenth Judicial Circuit  
in The State of Illinois at a Court begun and holden  
at The Court House in The City of Knoxville on The third  
Monday of April in The Year of our Lord one  
Thousand eight hundred and fifty seven it being  
The twentieth day of said Month in said Year.

Present:

Honorable John S. Thompson Judge  
James H. Stewart States Attorney  
George W. Enke Sheriff  
Cephas Arms Clerk

State of Illinois  
 Knox County - } Knox Circuit Court April term A D 1857  
 Samuel P. Snow }  
 vs }  
 Andrew J. Lopper }

Be it remembered That at the  
 April term of the circuit court of Knox County Illinois  
 the Defendant in the above entitled cause on the 14<sup>th</sup>  
 day of May 1857 filed his Bill of Exceptions in the  
 words and figures following

To wit:

Knox County } ss

Knox Circuit Court April Term A.D. 1857.

Samuel P. Snow  
as Plaintiff

Andrew J. Topper  
Defendant }

Be it remembered that at the April term of the Circuit Court of Knox County Illinois this cause was pending. And that the Declaration filed therein was in the words and figures following:

" State of Illinois }  
" Knox County } ss

" Knox Circuit Court April Term  
" A.D. 1857-

" Andrew Topper the defendant in this suit was  
" summoned to answer Samuel P. Snow the Plaintiff  
" in this suit in a plea of trespass on the case  
" on promises and therefore the said plaintiff  
" complains &c

" For that whereas the said Defendant heretofore  
" to wit on the 3<sup>rd</sup> day of April A.D. 1857 at Port  
" Byron to wit at the county aforesaid made his  
" certain promissory note in writing bearing  
" date a certain day and year therein mentioned  
" to wit the day and year aforesaid and thereby  
" then and there the said defendant promised to  
" pay on the first day of October 1855 to the order  
" of said plaintiff by the name and description of  
" Sam<sup>l</sup> P. Snow the sum of Two Hundred and  
" nineteen Dollars for value received with interest  
" after maturity and then and there delivered the

" said promissory note to the said plaintiff by means  
" whereof and by force of the statute in such case  
" made and provided the said defendant then and  
" there became liable to pay to the said plaintiff  
" the said sum of money in the said promissory note  
" specified and interest thereon from and after the  
" maturity of said promissory note according to the  
" tenor and effect thereof and being so liable he  
" the said defendant in consideration thereof afterwards  
" to wit on the day and year first aforesaid at the  
" county aforesaid undertook and then and there  
" faithfully promised the said plaintiff to pay him  
" the said sum of money in the said promissory note  
" specified and interest thereon from and after the  
" maturity of said promissory note according to the  
" tenor and effect thereof.

" And Whereas, the said defendant heretofore  
" to wit on the said 3<sup>rd</sup> day of April A.D. 1854 at Port  
" Byron to wit at the county aforesaid made his other  
" certain promissory note in writing bearing date a certain  
" day and year therein mentioned to wit the day and  
" year aforesaid and thereby then and there the said  
" defendant promised to pay on the first day of  
" October 1856 to the order of said plaintiff by the  
" name and description of Saml P. Snow the further  
" sum of Two Hundred and thirty one dollars for  
" value received with interest after the maturity  
" of said note. And then and there delivered the said  
" promissory note to the said plaintiff by means whereof  
" and by force of the statute in such case made and  
" provided the said defendant then and there became  
" liable to pay to the said plaintiff the said sum  
" of money in the said promissory note specified accor =

" ding to the tenor and effect of the said promissory  
 " note and being so liable he the said defendant in  
 " consideration thereof afterwards to wit on the day  
 " and year first aforesaid at the county aforesaid  
 " undertook and then and there faithfully promised  
 " the said plaintiff to pay him the said sum of  
 " money in the said promissory note specified accor-  
 " ding to the tenor and effect thereof.

" And whereas also afterwards to wit on the  
 " first day of January A.D. 1857- at the county aforesaid  
 " the said defendant was justly indebted to the said  
 " plaintiff in the further sum of eight hundred  
 " dollars lawful money of the United States for as  
 " much money before that time paid laid out and  
 " expended to and for the use of the said defendant  
 " at his special instance and request and being so  
 " indebted he the said defendant afterwards to wit  
 " on the day and year last aforesaid at the county  
 " aforesaid undertook and then and there faithfully  
 " promised the said plaintiff to pay him the said  
 " sum of money whenever he the said defendant should  
 " be thereunto afterwards requested.

" Yet the said defendant not regarding his  
 " said several promises and undertakings but con-  
 " triving and <sup>intending</sup> ~~undertaking~~ to wrong injure and defraud  
 " the said plaintiff in this behalf, hath not as yet  
 " paid the said several sums of money or any or either  
 " of them or any part thereof to the said plaintiff  
 " although often requested so to do, but the said  
 " defendant to pay him the same has hitherto wholly  
 " neglected ~~to do~~ and refused and still doth neglect  
 " and refuse to the damage of the said plaintiff of  
 " eight hundred dollars and therefore he brings

" suit

" Hannaman & Hale

attys for Plaintiff. "

and that the defendant filed his pleas therein which are in the words following:

" State of Illinois }  
" Knox County } ss

" Knox Circuit Court April term A.D. 1857-

" Samuel P Snow }  
" is }

" Andrew Topper } And now comes the said defendant  
" and defends the wrong and injury when &c and says  
" he did not undertake and promise ~~to~~ in manner and  
" form or in any manner as the plaintiff hath  
" above thereof alleged against him & of this he puts  
" himself upon the country &c

" And the said Peffs doth the like. Douglass & Craig

" Hannaman & Hale attys for Deft.

" attys for Peffs.

" And for further plea in this behalf the said  
" defendant says *etis non* as to said first and second  
" count because he says that the consideration of said  
" promissory notes in said counts mentioned has failed  
" in this. On the same day of the execution of said promissory  
" notes and as a consideration for the execution of  
" the said promissory notes the said plaintiff executed  
" to said defendant his certain writing obligatory  
" in the words and figures following:

" Know all men by these presents that I Samuel P.  
" Snow of Rock Island county State of Illinois am held  
" and firmly bound unto Andrew Topper of Knox  
" County State of Illinois in the just and full sum of  
" Five hundred dollars well and truly to be paid

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I hereby bind myself my heirs executors administrators  
and assigns firmly by these presents: witness my hand  
and seal this 3<sup>rd</sup> day of April 1854.

The condition of the above obligation is such that  
whereas the above named Snow has this day Deeded  
by a Quit Claim to said Topper a certain tract of  
land in the north west qr of sec Twenty two Township  
no. (13) Thirteen range three east in said Knox County  
containing forty five acres; for a fuller description  
of said tract of land reference being had to the  
above named deed. And whereas the said Topper  
did on the 27<sup>th</sup> day of June 1853 purchase the said  
tract of land for the taxes due for the year 1852  
now in case the said Topper obtains a Tax Deed  
for said tract of land on the 28<sup>th</sup> day of June, or as  
soon thereafter as may be, 1855. the same not having  
been redeemed and he having advertised the same  
according to law then in that case the above named  
Snow is bound as above to make to the said Topper  
his heirs or assigns a Warranty Deed for said tract  
of land in addition to the Quit Claim Deed this day  
given to the said Topper.

And whereas the said Topper having given  
this day given to said Snow a Mortgage Deed to the  
South West qr of the N. West qr of sec. 15 fifteen  
Township (13) Thirteen north three east to secure the  
payment of three notes this day given by said Topper  
to said Snow one for the sum of \$207<sup>00</sup> due Oct. 1<sup>st</sup> 1854.  
one for \$219<sup>00</sup> due Oct. 1<sup>st</sup> 1855 and one for \$231<sup>00</sup> due  
Oct. 1<sup>st</sup> 1856. Now in case the said forty five acres  
of land is redeemed so that the said Topper cannot  
obtain a legal Tax title to said land then in that  
case the said Snow is bound as above and hereby

agrees to deduct from any or all of said notes that may fall due after the said 28 day of June 1855 the sum of Two hundred and fifty dollars with interest at six per cent and this instrument is to be a perfect bar or set off to any suit or suits on said mortgage or notes to the amount of the said Two hundred and fifty dollars and interest but nothing herein contained is to prevent the collection of the note for 207<sup>00</sup> due the first day of Oct next.

Witness

Samuel P. Know seal

A. Belcher.

" which writing obligatory is now the Court here  
 " shown & the said defendant avers that the sale and  
 " conveyance of the land in the said bond mentioned  
 " and the title thereof recited as expressed in said  
 " writing obligatory was the consideration of said Notes  
 " & said defendant further avers that said Tax Sale  
 " had passed redemption before the commencement  
 " of this suit, that the same had been properly adver-  
 " tised - that said land had not been redeemed from  
 " said sale - that the deed on such Tax Sale had  
 " been properly made, and yet that said plaintiff did  
 " not and has not before the commencement of this  
 " suit made and tendered to the Defendant any warren-  
 " ty deed for the said premises according to the terms of  
 " the said writing obligatory whereby said defendant  
 " says the consideration of said promissory notes has  
 " failed and this he is ready to verify wherefore he  
 " prays judgment &c

Douglas & Craig Attys for Deft.

" And the said defendant for further plea in this  
 " behalf leave first had and obtained as to the 3<sup>rd</sup>  
 " count in plaintiffs declaration above pleaded

" says action on because he says that he is not  
 " indebted to the plaintiff in manner and form or in  
 " any manner as the plaintiff hath alleged and of  
 " this he puts himself on the country &c

" And the said Plaintiff doth } Douglass & Craig  
 " the like } attys for Deft.  
 " Hannaman & Hale, attys for Plff. "

and that the plaintiff to said pleas filed his repli-  
 cation therein as follows:

" And the said plaintiff as to the plea of Defendant  
 " 2<sup>nd</sup> above pleaded saith that the said plaintiff by  
 " reason of any thing in that plea alleged ought  
 " not to be barred from having and maintaining  
 " his aforesaid action thereof against the said def-  
 " endant because he says that the sale and convey-  
 " ance of said land and the title thereof secured  
 " as expressed in said writing obligatory was not  
 " the consideration of said notes and that the  
 " said tax sale had passed redemption before the  
 " commencement of this suit that the same had been  
 " properly advertised that said land had not been  
 " redeemed from said sale that the deed on such tax  
 " sale had been properly made and that the plaintiff  
 " did before the commencement of this suit make and  
 " tender to the defendant a warranty deed to said  
 " premises according to the terms of said writing  
 " obligatory and the consideration of the said notes has  
 " not failed and which the said plaintiff prays may be  
 " inquired of by the county &c

" Hannaman and Hale

" Deft doth likewise attys for Plff

" Douglass & Craig

" Attorneys for Deft

to which The similiter was added by The defendant.  
That a jury was waived and a trial was had before  
the Court and The Plaintiff to maintain the issue on  
his part introduced in evidence two promissory notes  
in words and figures as follows:

" #219 Port Byron Apl 3<sup>d</sup> 1854

" On the first day of Oct. 1855 after date I  
" promise to pay to the order of Saml P. Snow  
" two hundred nineteen dollars value received  
" inst after maturity

Andrew Topper.

" #231<sup>00</sup> Port Byron Apl 3<sup>rd</sup> 1854

" On the first day of Oct 1856 after date I  
" promise to pay to the order of Saml P. Snow  
" two hundred and thirty one dollars value received  
" inst after maturity

Andrew Topper. "

And introduced as a witness Robert L. Hannaman who being duly sworn testified that before suit brought he tendered to Leander Douglass one of the attorneys of Defendant in this suit a warranty deed executed by Plaintiff to the defendant for the land described in the defendant's second plea and R. L. Hannaman testified he asked said Douglass if he would consider that a tender of the deed and he said certainly or words of like import and before suit he asked Douglass or said to him you won't dispute the tender and he said all right give us your hand.

And also introduced Leander Douglass as a witness who being duly sworn testified that heretofore a suit was brought by plaintiff against

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defendant on one of the notes now sued on which  
suit was dismissed at the last term of this court &  
That in said suit witness was attorney for defendant  
and That before the commencement of this suit Robert  
S. Hannaman showed to witness the deed mentioned  
by said Hannaman and tendered the deed to witness  
for defendant and That he inspected the deed and  
handed it back to him; and That afterwards  
saw the defendant and supposed he told defendant  
of the tender but could not say and That Defendant  
told witness to let them go on and collect the notes  
if they could and further testified That he never  
was authorized by Defendant to get the Deed or to  
receive it but was Defendants attorney in the first  
and is his attorney now so far as the defence of this suit  
goes and That he never intended in conversation with  
Robert Hannaman That the tender to witness was a good  
tender to Defendant but intended only to not dispute  
the offer of the Deed to witness.

X  
It was admitted on the trial of said cause  
That the Plaintiff executed the Bond or contract  
set out in Defendants second Plea which was all of  
the evidence on the above entitled cause. and That  
thereupon the Judge of said Court at the above  
named term of this Court rendered judgment in  
favor of the Plaintiff in the words and figures  
following

" May 4. 1857.

" This day comes the Defendant by his attorney  
" and filed his pleas to the Plaintiffs Declaration. There-  
" upon came the Plaintiff by his attorney and filed  
" his replication to the Defendants second plea, Then  
" came the Defendant and filed his Demurder to the

" <sup>which were overruled</sup> Plaintiffs replication herein. Thereupon issue being  
 " joined for trial waived a jury and for trial.  
 " put themselves upon the Court: after hearing the  
 " evidence it is considered by the Court that the  
 " Plaintiff have and recover of the said Defendant  
 " the sum of four hundred and eighty two Dollars  
 " and sixty two cents together with his costs by him  
 " in this suit expended and may have execution therefor.

And to the rendition of said judgment the said Defendant by his Counsel then and there objected and excepted. and Thereupon the Plaintiff then and there made <sup>a</sup> motion for a new trial which motion and the reasons therefor are in the words and figures following to wit:

" Samuel P. Know {  
 " as {  
 " Andrew J. Topper } Knox Circuit Court April term  
 " A.D. 1857-

" And now comes the said Defendant and moves  
 " the Court for a new trial in Cause for the following  
 " reasons:

" 1<sup>st</sup> There is no evidence to sustain the judgment.  
 " 2<sup>nd</sup> The judgment is against the law and the evidence.  
 " 3<sup>rd</sup> The law is for the Defendant on the issues and  
 " evidenced

Douglas V Craig

Atty for Deft.

And the said Court then and there during the term aforesaid overruled the said motion and that the Defendant to the decision of the Court in overruling said motion by his Counsel then and there objected and excepted.

And that the matters aforesaid may be a matter of Record in said Cause I John S Thompson Judge of

said Court have during the continuance of the above term of this court caused to be signed and sealed this Bill of Exceptions

John S. Thompson Real

Samuel P. Snow } State of Illinois

vs

} Knox County }  
}

Andrew J. Tupper }

Knox Circuit Court April Term A.D.  
1857-

And afterwards to wit on the 8<sup>th</sup> day of June A.D. 1857 came the said defendant and filed his appeal bond in the following words and figures to wit:

" Know all men by these presents that we Andrew J.  
" Tupper and Abel Austin are held and firmly  
" bound unto Sam<sup>l</sup> P. Snow in the penal sum of one  
" Thousand Dollars for the payment of which well and  
" truly to be made we bind ourselves our heirs and  
" administrators jointly severally and firmly by  
" these presents. Witness our hands and seals this 8 day  
" of June A.D. 1857-

" The condition of the above obligation is such that  
" whereas the said Samuel P. Snow did on the fourth  
" day of May A.D. 1857 in this Circuit Court in and for  
" the County of Knox and State of Illinois recover a  
" judgment against the above named Andrew J. Tupper  
" for the sum of Four Hundred and eighty two  $\frac{62}{100}$  Dollars,  
" and costs of said suit from which judgment the said  
" Andrew J. Tupper has taken an appeal to the Supreme  
" Court of the State of Illinois.

" Now if the said Andrew J. Tupper shall pay or  
" cause to be paid the said judgment costs interest &  
" damages in case said judgment shall be affirmed  
" and shall also duly prosecute his said appeal

141  
" Then This Bond shall be void otherwise shall be  
" and remain in full force and effect  
" Security approved by me } Andrew Topper Real  
" This 8<sup>th</sup> day of June A.D. 1857. } Abel Austin Real  
C. Arms CLK. "

Samuel P. Snow

as

Andrew J. Topper

May 4.<sup>th</sup> 1857.

This Day comes The Defendant  
and prays an appeal to the Supreme Court: There=  
upon it is ordered <sup>by the Court</sup> That The same be allowed;  
and That The Defendant file his Bond with  
Security approved by the Clerk in The sum  
of One Thousand Dollars within sixty Days  
and have leave to file his bill of Exceptions  
in sixty Days-

State of Illinois }

Knox County

Bes I Cephas Arms Clerk of The  
Circuit Court within and for said County and State do  
hereby certify That the above and foregoing contains  
a full true & complete copy of The Record in said  
cause as appears to me from The files and Records  
of said Court.



In testimony whereof I have hereunto  
set my hand and affixed The seal  
of said Court in The city of Knoxville  
this 31<sup>st</sup> day of March A.D. 1858.  
Cephas Arms Clerk

Andrew J. Joseph } Superior Court  
                                  } of Illinois  
                                  } April Term 1888  
Samuel P. Moore }  
                                  } Appellee

And now comes the  
Appellant and says that manifest  
error hath intervened in the record  
& proceedings hereto attached  
and for this assigns the  
following <sup>causes</sup> to wit

- 1 The Court erred in making  
judgment for the appellee  
and against appellant
  - 2 The Circuit Court erred  
in overruling motions for  
new trial
  - 3 The said Court erred  
in refusing that the application  
to the record be filed by  
defendant below was proper  
the evidence adduced sustained
- Wherefore the appellant  
prays that the said judgment  
be reversed and the case  
reversed

Respectfully submitted  
for Appellant

And the said Appellee comes by  
his attorneys & says there is no objection  
in the said record & proceedings that  
he prays may be required of by the Court  
that the judgment be affirmed  
Said Appellee's attorneys

Andrew J. Tupper  
219 is applicant  
& Samuel P. Snow  
is appellee  
~~Andrew Tupper~~  
Appeal from Knox

Filed April 21. 1858  
L. Leland  
Clerk.

Manning Douglas & Co  
attys for Tupper

B. S. P.

Paid \$4.00 And 1/2  
Langhans