

No. 12959

Supreme Court of Illinois

Eggleston

vs.

Buck

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 155.

1860

Egleston
H. 25
Bryce

12959

Repaired

STATE OF ILLINOIS--THIRD GRAND DIVISION

Supreme Court thereof, April term, 1860.

LORENZO EGLESTON, Appellant, }
CHARLES T. P. BUCK, who sues } *Appeal from LaSalle*
for the use of Caroline Gates, Apl'ee. } *County County Court.*

ABSTRACT OF RECORD.

This is an action of assumpsit, brought by Appellee against Appellant in LaSalle County County Court, at December term, 1858.

1 Precipe filed Nov. 13th, 1858.

2 Summons issued Nov. 13, 1858, to Sheriff of LaSalle county.

3 Declaration filed Nov. 23rd, 1858.

Common counts for goods sold and delivered by defendant to plaintiff, for money had and received, &c.

4 Copy of account sued being \$1000 for money loaned, \$1000 for labor performed, \$1000 for goods sold and delivered, and \$1000 due on account stated.

5 Demurrer to declaration filed by plaintiff, Dec. 9th, 1858.

Special causes assigned.

10 Demurrer overruled Dec. 9th, 1858.

11 Plea, general issue, filed Dec. 9th, 1858.

11 March 8th, 1859, leave to plaintiff to file notice of set off.

12 Notice of set off and bill of particulars.

15 Order continuing cause to next term entered March 10th, 1859.

16 Rule entered June 11th, 1859, upon defendant, to file bill of particulars.

Case called for trial. Verdict of Jury in favor of defendant, and his damages assessed at \$663 92-100. Motion by plaintiff for new trial.

17 Motion for new trial overruled June 16th, 1859, and plaintiff excepts.

Judgment in favor of defendant for amount of verdict, and costs.

18 Order for appeal entered June 16th, 1859, upon plaintiff entering into bond of \$1200, with Jas. M. Mills as security. Appeal bond to be filed in 30 days, and bill of exceptions by 23rd June, 1859.

19 Appeal bond filed June 16th, 1859.

20 Bill of exceptions filed June 21st, 1859, which shows the following evidence to have been introduced by the parties on the trial of said cause, to wit: That M. A. Neef was called by defendant and testified that he was acquainted with parties to suit; that during month of March, 1858, he sold a stock of hardware to the plaintiff, as

the agent of Erastus Corning & Co.; that he sold said goods as such agent; that they belonged to Erastus Corning & Co.; that the goods at one time belonged to the defendant, and that Erastus Corning & Co. bought them on executions against defendant—amount of executions \$3000 or \$4000—and that they were bid in by witness as Corning & Co.'s agent. That it was the understanding between witness and defendant that if he, witness, should sell the goods for more than was due from defendant to Corning & Co., that defendant should have the excess. That witness, Neef, lived in Chicago at the time he sold the goods to plaintiff, and that plaintiff resided at LaSalle, and came to Chicago and negotiated the purchase. That Neef told plaintiff of Buck's interest in the goods; that sale was made by witness as Corning & Co.'s agent; that some question arising as to manner of taking inventory, defendant came to Chicago and told witness and plaintiff that most of the goods—nearly all—were invoiced at New York cost. That goods invoiced at \$8200, and were sold by Neef to plaintiff for \$7200; that defendant's indebtedness to Corning & Co. was about \$6500, and that plaintiff agreed with witness to pay the excess of \$700 to defendant.

The plaintiff then moved the Court to exclude the testimony of the witness, Neef, or that portion of the same that tended to show a sale from Corning & Co. to plaintiff, for the reason that the proof did not correspond with the allegations of the declaration. Which motion was, by the Court, overruled, and plaintiff excepted.

The Defendant, then, to maintain the issues on his part, introduced S. H. Weller, who testified that he was acquainted with stock of goods sold to plaintiff; that about one-third were inventoried with a per cent. added to New York cost, and the balance were inventoried at New York cost. The plaintiff, to maintain the issues on his part, introduced N. G. Rounds, who testified that the plaintiff claimed to have paid \$25 for a note for \$125 against defendant. The defendant then admitted plaintiff's account to the amount of \$35 or \$36.

25 There was no other or further evidence offered by either party.
25 Verdict of jury in favor of defendant, and damages assessed at \$663 92-100.

26 Moved by plaintiff for new trial; overruled and exceptions by plaintiff.

ERRORS ASSIGNED.

1st: The Court erred in overruling plaintiff's motion to exclude the testimony of witness Neef from the consideration of the jury, or that portion thereof which tended to show a sale of goods from Corning & Co. to the plaintiff, in which the defendant had an interest.

2d: The Court erred in trying said cause before the defendant had filed a bill of particulars under the order of the Court as shown on page 16 of records.

3d: The bill of particulars was too general, and the testimony of sale from Corning & Co. to plaintiff was not admissible under the bill of particulars, as shown on page 8 of record, filed with the declaration.

4th: The Court erred in overruling motion for new trial and in rendering judgment on verdict.

E. F. BULL, Plffs. Atty.

For additional errors see record
E. F. Bull
Plffs. Atty.

1850 - 140
Lorenz Eglston

Chas. T. Buck for me

Abst. Receives

See Memo
Thant 19 Me.

Printed in Lane
21 Me. 197

Filed Apr 20, 1860

L. A. Clark
Clerk

State of Illinois
Lafayette County

Pleas, Proceedings and Judgments
held and taken in and before the Lafayette
County Court in the state of Illinois, at a
regular term thereof commenced and held
at the Court House in Ottawo in said county
on the Sixth day of December A.D. 1858, and
of the Independence of the United States
of America the Eighty Third

Present Hon John C. Champlin Judge
Philo Lindley Clerk
Francis Warner Sheriff

Be it remembered that heretofore to wit on
the 13th day of November A.D. 1858 a precept was
filed in the Clerk's office of said court in the
words and figures following to wit.

Charles J. P. Buck for the Lafayette County Court
vs of Caroline Gates December Term A.D. 1858
on Presumptive, Damages \$1000.00
Lorenzo Eggleston

The Clerk of said Court will
please issue summons as above and oblige
D. L. Kough atty for Plff

2 And Therefore on the said 13th day of November A.D. 1858. a certain writ issued out of the Clerk's office of said Court in the words and figures following to wit:

The People of the State of Illinois
To the Sheriff of our County of LaSalle, Greeting
We command you that you Summon Lorenzo Eggleston if he shall be found in your County, personally to be and appear in our LaSalle County Court before our Judge thereof, on the first day of the next term of said Court, to be held at the Court House in Ottawa, on the first Monday in December next, at ten o'clock in the forenoon then and there to answer unto Charles J. P. Buck for use of Caroline Gates in a plea of Assumpsit to his damage of One Thousand Dollars, And have you then there this writ, and the manner in which you shall have executed the same. In witness whereof we have caused the Seal of our said Court to be hereunto affixed and attested by Philo Lindley our Clerk thereof at Ottawa this 13th day of Nov. 1858, Philo Lindley Clerk
C. S. Herrick Depy

And afterwards to wit in the 2nd day of December A.D. 1858 said summons was returned to the clerk's office of said court with an endorsement thereon in the words and figures following to wit:

"Executed the within writ by reading it to Lorenzo Eggleston Nov. 19. 1858

Erie S. Waterman Shff
per W. B. Chapman Deft "

And afterwards to wit in the 23rd day of November A.D. 1858 a certain declaration was filed in the clerk's office of said court in the words and figures following to wit

State of Illinois And County Court thereof
Safale County. December Term A.D. 1858

Charles T. P. Buck who sues for
the use of Caroline Gates

Lorenzo Eggleston

Charles T. P. Buck
who sues for the

use of Caroline Gates plaintiff in this suit
by D. L. Hough, his attorney, complaining of
Lorenzo Eggleston defendant in this suit, in
a plea of accumpit. For that whereas, The

said defendant on the Tenth day of November
in the year of Our Lord One Thousand, Eight
Hundred and Fifty Eight at the County of
Safale aforesaid, was indebted to the said
plaintiff in the sum of One Thousand
Dollars of lawful money of the United States
of America, for divers goods wares and mer-
chandises, by the said plaintiff before that
time sold and delivered to the said
defendant and at the special instance
and request of the said defendant and
being so indebted to the said plaintiff the
said defendant in consideration thereof
afterwards, to wit on the same day and year,
and at the place aforesaid, undertook, and
then and there faithfully promised the said
plaintiff well and truly to pay unto the
said plaintiff the said sum of money last
mentioned, when the said defendant should
be thereunto afterwards requested. And
whereas, also, the said defendant afterwards
to wit on the same day and year, and at
the place aforesaid, in consideration that the
said plaintiff had before that time at the
like special instance and request of the
said defendant sold and delivered to
the said defendant divers other goods, wares

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and merchandises of The said Plaintiff
The said defendant then and there under
took and faithfully promised The said
Plaintiff That The said defendant would
well and truly pay to the said Plaintiff
so much money as The last aforesaid
goods, wares and merchandises, at The time
of The sale and delivery thereof, were reason-
ably worth, when The said defendant should
be thereunto afterwards requested; and the
said Plaintiff avers That The said goods,
wares and merchandises last mentioned, at
The time of The sale and delivery thereof, were
reasonably worth the further sum of One
Thousand Dollars, of like lawful money
aforesaid, to wit, at The place aforesaid,
whereof The said defendant afterwards, on the
same day and year and at The place aforesaid,
had notice. And whereas also, The said
defendant afterwards, to wit, on the same
day and year, and at The place aforesaid
was indebted to The said Plaintiff in
the further sum of One Thousand dollars,
of like lawful money as aforesaid, for
money before That time lent and advanced
by The said Plaintiff to The said
defendant and at the like request of The
said defendant. And for other money by

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The said plaintiff before that time paid, laid
out and expended for the said defendant
and at the like request of the said defend-
ant. And for other money by ^{the} said defendant
before that time had and received to and
for the use of the said plaintiff. And
being so indebted, the said defendant in
consideration thereof, afterwards, to wit, on
the same day and year, and at the place
aforesaid, undertook and then and there
faithfully promised to the said plaintiff
well and truly to pay unto the said
plaintiff the said several sums of money
in this count mentioned, when the said
defendant should be thereunto afterwards
requested. And whereas also, the said
defendant, afterwards, to wit, on the same
day and year, and at the place aforesaid
accounted together with the said plaintiff
of and concerning divers other sums of money
before that time due and owing from the
said defendant to the said plaintiff and
then and there being in arrears and unpaid,
and upon such accounting, the said defend-
ant then and there was found to be in
arrears, and indebted to the said plaintiff
in the further sum of One Thousand dollars

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of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff the said defendant in consideration thereof, afterwards, to wit in the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well, and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested etc.,) has not yet paid the several sums of money above mentioned or any or either of them, or any part thereof to the said plaintiff but to pay the same, or any part thereof, to the said plaintiff, the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff

One thousand dollars, and therefore the said plaintiff brings suit etc

David L. Hough
Plaintiff's Attorney.

Copy of account sued on
Lorenzo Eggleston

To Charles J. P. Buck Dr
for the use of Caroline Gates

1858

November 10 th	To money loaned	\$1000. 00
"	labor performed	" 1000. 00
	Goods sold & delivered	" 1000. 00
	Balance due on settlement	" 1000. 00

And afterwards to wit on the 9th day
of December 1858 being a day of said
December Term 1858 of said court a
demurrer was filed in the clerk's office
of said court in the words and figures
following to wit:

State of Illinois — County Court December
Safelle County — Term thereof A.D. 1858

C. J. P. Buck for use of
Caroline Gates

on Assumpsit
Lorenzo Eggleston

And now comes the
said defendant Eggleston by Strain & Bull
his attorneys and says that the said

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plaintiff's declaration is not sufficient in law, wherefore he prays judgment &c. & also for his costs

Strain & Bull

Defts attys

And for special cause of demurrer said defendant shows to the court here the following to wit:

1st That the several promises in said declaration are alleged to have been made to said Puck.

2. There is no allegation that the indebtedness of said Eggleston to said Puck has ever in any manner transferred or assigned to said Gates.

3^d In the breach of said declaration it is not alleged that the plaintiff has not paid the said Gates said money &c.

4th Said Declaration does not lay any damage to said Gates & for other causes &c

And afterwards to wit on the said 9th day of December 1858 being one of the days of said Term of said court, certain proceedings were had and entered of record in said court in the words and figures following to wit

Charles J. P. Buck for use of
Caroline Gates

(n)

Assumpsit

Lorenzo Eggleston

This day comes

The defendant by Strain
& Bull his attorneys and files his demurres
to the declaration of plaintiff filed herein-
whereupon comes the plaintiff by Hough his
attorney, and after hearing the arguments
of counsel said demurres is overruled
by the Court - and on motion of said
defendants attorneys this cause is
continued and leave given to file a
plea herein

And afterwards to wit on the same
day a certain plea was filed in the
office of the clerk of said Court in the
words and figures following to wit

State of Illinois ss County Clerk of said
Safelle County ss County December Term A.D. 1858

Lorenzo Eggleston

vs

Assumpsit

Charles J. P. Buck for
use of Caroline Gates

And now

comes the said defendant

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by Strain & Bull his attys & defends &c and
says that he did not undertake & promise
in manner & form as set forth in
said plaintiffs declaration herein
and of this he puts himself upon the
country &c

By Strain & Bull his attys
And the defendants doth the like
Wallace & Hough
Plaintiffs attys.

And afterwards to wit on the 8th day of
March A.D. 1859, being one of the days of
the March Term 1859 of said court certain
proceedings in said cause were had
and entered of record in said court
in the words and figures following to wit

Charles T. P. Buck for use
of Caroline Gates

^{vs.} Lorenzo Eggleston ^{Assumpsit} This day
comes the defendant by
Strain & Bull his attorneys and on his
motion leave is given to file notice of
set off by to morrow morning

And afterwards to wit on the said 8th day of March 1859 a certain notice was filed in the clerk's office of said court in the words and figures following to wit:

State of Illinois } County Court
Safallie County } March Term 1859

Charles T. P. Buck for the use of &c.

on } The plaintiff will
Lorenzo Eggleston } take notice that the
defendants in the trial
of said cause will give in evidence that
the plaintiff at the commencement of this
suit was and still is indebted to the
defendants in the sum of One Thousand
dollars for goods sold and delivered
by the defendants to the plaintiff at his
request before the commencement of this
suit, and in One Thousand dollars
for the price and value of goods
bargained & sold by defendants to plaintiff
at like instance and request, and
in One Thousand dollars for money
paid laid out and expended by the
defendants for the use of the plaintiff at
his instance and request, and in

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One thousand dollars for money found to be due from the plaintiff to the defendant on an account before the commencement of this suit stated between them. and also that the defendant will set off on said trial so much of said several sums of money so due and owing from the plaintiff to the defendant against any demand of the plaintiff to be proved on the said trial as will be sufficient to satisfy said demand. And will also then and there demand a judgment against the plaintiff for the balance of said several sums of money due the defendant according to the statute made and provided. Strain & Bull
attys for Deft

Lafayette March 29th/58

C. S. P. Buck

Sw to with Lorenzo Eggleston

To Merchandise as per entry of his own 28 80

March 22nd/58 To 10 lb Sticks 5 50

" 3rd Lick 6 18 68

" 23 6th " 5 30

" 24 6th " 5 30

" " 1 Gate Latch 15

14

"	"	"	2 ³ / ₄ Hinges 7 ^c	19	
"	"	"	1 Rake	29	93
27-	"	"	1 Shade		1 00
April 9 th /58	"	"	Shoes		6 85
"	"	"	Cash		1 65
"	15	"	1/2 Doz Silver plated Forks	25	6 00
"	17	"	Cash		50
"	24	"	One Knife Per Kitchen		75
"	"	"	"		50
"	27	"	1 Whip Stock	08	
"	"	"	1 Pr Brass Knobs	10	18
"	30	"	Paid of A Bassett	3	50
May 1 st /58	"	"	2 ^{lb} Nails	6	12
"	4	"	1 Trench Quater		86
"	11	"	1 Dog Muzzle		60
June 1 st /58	"	"	1 Horse Brush		60
"	5	"	32 ^{lb} Lead Pipe	10	3 20
"	19	"	1 Hoe		50
"	28	"	1 Budding Knife		60
"	28	"	1 Doz Picture nails		20
July 1 st /58	"	"	4 ^{lb} Nails	6	24
Aug 7 th	"	"	1 Thermometer		50
Sep 28-	"	"	1/2 Doz Boxes Blacking	8/-	50
"	"	"	1 Blacking Brush		30
Oct 5/58	"	"	10 Nails	5	50
Apr 13-	"	"	Big Note given up		125 00
					<u>\$185 36</u>

15 And afterwards to wit on the 10th day of March A.D. 1859 the same being another of the days of said March Term 1859 of said court further proceedings in said cause were had and entered of record in said court in the words and figures following to wit

Charles T. P. Buck for use of
Caroline Gates

^{vs.} Lorenzo Eggleston Assumpsit
This day comes the defendant by Strain & Puel his attorneys, and on their motion and affidavit filed this cause is continued at defendant's costs to be taxed.

It is therefore considered by the court that said plaintiff have and recover of said defendant his costs and charges by him herein expended at this term and that have execution therefor.

And afterwards to wit on the 11th day of June A.D. 1859, the same being one of the days of the June Term 1859 of said court certain further proceedings in said cause were had and entered of record in said court in the words and figures following to wit

Charles J. P. Buck for use of
Caroline Gates

^{m.}
Lorenzo Eggleston

Assumpsit

This day
comes the defendant by
Strain & Bull his attorneys, and on their
motion it is ordered that the plaintiff file
a bill of particulars herein. Whereupon
comes the plaintiff by Wallace & Hough his
attorneys, and the following jurors of a jury
come to wit. John Wopple, Daniel Carr
Amos Hilsey, Geo H. Hunter, James Alexander
H. H. Powell, Aaron S. Putnam, Archibald
Sharp, Henry Kern, William Hickling
Thomas S. Post and P. S. Ellsworth who
were duly elected tried and sworn
to well and truly try the issues herein
according to the evidence, and after
hearing the evidence and arguments
of counsel the jury retired to consider of
their verdict and after due deliberation
thereon had return into court the following
verdict to wit. That the jury find for plaintiff
and assess his damages herein at Six
hundred and Sixty Three dollars and Ninety
two cents.

Whereupon the defendant by his said

17 attorneys entered their motion for a new trial herein.

And afterwards to wit on the 16th day of June A.D. 1859 the same being one of the days of said June Term 1859 of said court, certain further proceedings in said cause were had and entered of record in said court in the words and figures following to wit:

Charles J. P. Buck for use of
Caroline Gates

^m Lorenzo Eggleston Assumpsit
This day
again come the parties
herein by their said attorneys, and after
hearing the arguments of counsel, said
motion for a new trial herein is overruled by the court, to which ruling of the
court the defendant by his said
attorneys then and there excepted.

It is therefore considered by the
court that said plaintiff have and
recover of said defendant said sum
of Six hundred and Sixty Three
dollars and Ninety two cents for
his damages and also his costs

and charges by him herein expended, and that he have execution therefor. And upon motion and affidavits of said plaintiffs attorneys it is ordered that an execution issue herein instant.

Whereupon the defendant by his said attorneys prays an appeal herein which is allowed upon his entering into an appeal bond in the penal sum of Twelve hundred dollars with James M. Mills as security, said bond to be filed within thirty days from the last day of this term of this court - and leave is given to tender a bill of exceptions herein by the 23rd day of June inst.

And afterwards to wit on the 16th day of June A.D. 1859, an appeal bond was filed in the clerk's office of said Court in the words and figures following to wit.

Know all men by these presents that we Lorenzo Eggleston and James M. Mills

19 are held and firmly bound unto Charles
J. P. Buck for the use of Caroline Gates
in the penal sum of Twelve Hundred
Dollars for the payment of which well
and truly to be made we do hereby
bind ourselves our heirs executors and
administrators jointly and severally,
firmly by these presents. Sealed with
our seals and dated this Sixteenth day
of June A.D. 1859. The condition of
the above obligation is such that
whereas at the June Term of the County
Court for the County of Saferre in the
State of Illinois, the above named
Charles J. P. Buck who sued for the
use of Caroline Gates plaintiff recovered
a judgment against the above bounden
Lorenzo Eggleston, defendant for the sum
of Six Hundred and Sixty Three & $\frac{92}{100}$
Dollars, in an action of Assumpsit,
And whereas the said Lorenzo Eggleston
has prayed an appeal from the said
judgment to the Supreme Court of the
State of Illinois, and whereas said
appeal has been granted by said Court,

Now Therefore if the above bounden
Lorenzo Eggleston shall pay the judgment
interest and costs and damages in the

19 are held and firmly bound unto Charles
J. P. Buck for the use of Caroline Gates
in the penal sum of Twelve Hundred
Dollars for the payment of which well
and truly to be made we do hereby
bind ourselves our heirs executors and
administrators jointly and severally,
firmly by these presents. Sealed with
our seals and dated this Sixteenth day
of June A.D., 1859. The condition of
the above obligation is such that
whereas at the June Term of the County
Court for the County of LaSalle in the
State of Illinois, the above named
Charles J. P. Buck who sued for the
use of Caroline Gates plaintiff recovered
a judgment against the above bounden
Lorenzo Eggleston, defendant for the sum
of Six Hundred and Sixty Three & $\frac{92}{100}$
Dollars, in an action of Assumpsit,
And whereas the said Lorenzo Eggleston
has prayed an appeal from the said
judgment to the Supreme Court of the
State of Illinois, and whereas said
appeal has been granted by said Court,

Now Therefore if the above bounden
Lorenzo Eggleston shall pay the judgment
interest and costs and damages in the

20 case The said judgment shall be affirmed
and shall also duly prosecute his said
appeal, then This obligation to be void ~~to~~
~~be, void,~~ else to be and remain in full
force and effect

Lorenzo Eggleston
James M. Mills

Seal
Seal

21 And afterwards to wit on the 21st day of June A.D. 1859 a certain Bill of Exceptions was filed in the clerk's office of said Court in the words and figures following to wit

State of Illinois }
LaSalle County } p County Court for said
County. Term thereof
Charles J. P. Buck } A.D. 1859.
for use of Caroline
Gates.

vs.
Lorenzo Eggleston } Appearances

Be it remembered that on the eleventh day of June A.D. 1859, the same being one of the days of the said Court term of this Court, this cause came on for trial. and the plaintiff to maintain the issues on his part called as a witness one M. A. Neff who being duly sworn testified in substance as follows That he was acquainted with the parties to this suit, that sometime during the month of March A.D. 1858 he sold a stock of hardware to the defendant. That he was the agent of Erastus Corning & Co. That he sold said goods to defendant as such agent. That the goods sold to defendant belonged to Erastus Corning & Co.

That the goods formerly belonged to Charles
 J. P. Buck, but that they were sold on an
 execution against Buck in favor of
 Erastus Corning & Co. The amount of the ex-
 ecution on which said goods were sold was
 some \$3000 or \$4000. They were bid in by
 witness as agent of Erastus Corning & Co.
 That Erastus Corning & Co. held claims against
 Buck at the time of the sale on the said
 execution, which at the time of the sale to
 defendant amounted to \$6499.19. That it
 was the understanding between him and Buck
 at the time he bid in said goods at said sale
 that if he could sell the goods for more than
 the amount actually due Corning & Co. That
 said Buck should have the benefit of such
 excess. That he lived in Chicago at the
 time of sale, that the goods were in LaSalle,
 the defendant ~~lived~~^{resided} in LaSalle & came to
 Chicago & negotiated there with witness
 for the purchase of the goods, that defendant
 was a day or two negotiating said sale.
 That Truf told defendant of Buck's interest
 in the goods, that some questions arising
 as to the manner of taking said inventory,
 witness sent for Buck at LaSalle who
 came to Chicago, and stated that the

great majority of the goods
 tried at New York est, that the amount
 of the inventory was \$8200. The defendant
 was to pay for said goods the amount
 of said inventory less \$1000, which would
 be about \$7200, that witness made a bill
 of sale for said goods to the defendant, as
 agent for said Corning & Co, for about the
 sum of \$6500, that defendant agreed
 to pay Beck the excess of \$700 of the price
 of the goods over and above Corning & Co's
 claims of \$6500.

And the said defendant then and there
 by his counsel moved the court to exclude the
 testimony of said M. A. Neff, or that further
 thereof which tended to show a sale of goods
 belonging to Erastus Corning & Co, to defendant,
 from the jury, for the reason that there
 was a variance between said proof and
 the allegations in said declaration,
 and that the said proof did not tend
 to sustain the allegations of said dec-
 laration, which motion was then and
 there by said Court overruled to the over-
 ruling of which motion the said defend-
 ant by his counsel then and there
 excepted.

And the said plaintiff, then and there further to maintain the issue on his part, produced one S. H. Miller, who being duly sworn, testified in substance as follows; That he was acquainted with the stock of goods in question, That he formerly clerked for said Buck prior to the sale of said goods by the sheriff on execution against Buck in favor of Erastus Corning & Co., That after defendant bought said stock of goods he clerked for him, That he had frequently told said defendant that said goods had been inventoried at time of sale to defendant with ten per cent added to New York cost, but that he subsequently found upon a careful examination of the inventory he found that about one third of the goods had been inventoried with a per cent added to New York cost, that the balance had been inventoried at New York cost, That about \$300, or \$400 of said one third had been inventoried with five per cent added to New York cost, that to the balance of that third there had been added ten per cent to New York cost in said inventory.

And be it further remembered that said defendant, then and there, to maintain the issue on his part, produced N. L. Round who being duly sworn testified in substance as follows. That the defendant claimed that he had paid \$20. for a \$125 note against said plaintiff, and that the entry for that sum was made on defendant's cash book -

And on his cross examination said Round testified that he did ~~do~~ see the money paid and that he knew but little about it of his own knowledge, and the plaintiff then and there admitted said Defendant's Bill against him filed herein to be correct to the amount of \$ some \$35, or \$36 - -

There was no further or other testimony produced by either party, and the case was submitted to the jury -

Be it further remembered that the jury then and there retired to consider of their verdict, and afterwards on the same day and year aforesaid the jury found the issue joined in favor of the plaintiff and then and there assessed his damages at Six Hundred and Sixty Three dollars and ninety two cents

Be it further remembered that afterwards on the day and year aforesaid, moved the court for a new trial in said cause, and that afterwards to wit on the sixteenth day of June A.D. 1857 the same being also one of the days of said term of this court, said Court overruled said motion for a new trial and rendered a judgment on the verdict, to which overruling of said ~~motion~~ motion and rendering said judgment said defendant by his counsel then & there accepted, and prays that this his bill of exceptions may be signed and sealed by the judge of said Court & made a part of the records in said cause, which is accordingly done.

J. C. Champlin
 Judge of the County Court of Gasconade
 County Missouri.

Seal

27 State of Illinois }
Lafayette County } 23

I Philo Lindley Clerk of the
County Court in and for said County do hereby
certify the above and foregoing to be a true
full and complete Transcript of the Record
Papers, Proceedings, Appeal Bond and Bill
of Exceptions in the cause wherein Charles
J. P. Buck for the use of Caroline Gates is
Plaintiff, and Lorenzo Eggleston is defendant,
as the same appears of record and on file
in my office



In Testimony whereof I have
herewith set my hand and affixed
the seal of said Court at Ottawa
the 16th day of April A.D. 1869

Philo Lindley, Clerk
C. J. Thurnick sept

cts. for Record \$5.⁰⁰ }
paid by E. P. Bull }

State of Illinois } 38 Third Grand Divis-
Supreme Court } ion, April Term 1860

Louise Egbertson }
vs }
Chas. T. P. Buck } Affual Sadall. Co.
for use &c } &c. Court

And now comes
the said plaintiff by E. T. Bull his
attorney and says there is manifest
error in the foregoing record in this
to wit:

1st The court erred in overruling offe. mo.
to exclude the testimony of M. A. Neff
from the consideration of the jury
or that portion thereof which tended
to show a sale from Conning & Co to
the plffs of a stock of hardware, in
which, Dist had an interest -

2nd The court erred in trying said
cause before the defendant had filed
a bill of particulars under the order
of the court as shown on page
16 of the record -

3rd The bill of particulars was too
general and the court erred in
permitting evidence ^{to be introduced} of a sale from

Coming to the plaintiff in which
Def. had an interest, under the bill
of particulars as shown by pages
of recd. which was filed with the
declaration -

4th The court overruled in overruling
motion for new trial and
in rendering judgment on verdict

E. H. Bull

Plffs Atty

State of Illinois } Third Grand Division
Supreme Court } 28 April Term AD 1860

Lorenzo Eggleton

vs
Charles T. B. Buck
for m & c

} Appeal from the
LaSalle County Court

And the said

~~Appellee~~ ~~and defendant in error~~ says that in the
record & proceedings in the above
entitled cause, there is no error

D. L. Congh

~~Atty for def in error~~

Atty for Appellee

Additional errors assigned by leave of court -

1st The court erred in permitting that part of the testimony of the witness Neef to go to the jury which tended to show a promise ~~to the~~ by the Plaintiff to pay money to the defendant, founded on a sale of goods (belonging to Corning & Co), by the witness to the Plaintiff -

2nd The court erred in permitting the testimony of the witness Neef to go to the jury -

C. H. Bull
Pff atty

Finder in these errors
W. H. Ballance
for appellee

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Lorenzo Eglington
Appellant

Versus

Charles J. P. Buck, who
sues for use Caroline Gates
Appellee

Transcript Record

Filed April 14. 1860

L. Leland
Clerk

E. F. Bull atty.

State of Illinois } s.s. Third Grand Division
Supreme Court } April Term A.D. 1860

Lorenzo Eggleston

Appellant

vs.

Charles T. P. Back for use

Appellee

Appeal from
La Salle County Court

Argument sub-
mitted on the part of Appellant —

The proof introduced by the Appellee on the trial of this cause below, Shows that in the spring of 1858, one M.A. Neef as the agent of Messrs. Cowing & Co. sold a stock of hardware belonging to Cowing and Co. to the Appellant, that Appellant paid Cowing & Co. about \$50.00. for the goods and agreed with them to pay the balance of the purchase money some \$600 or \$700 to the Appellee. Upon this state of facts the Appellee brought this suit against Appellant declaring in indebitatus assumpsit. There is no special count upon the contract, nothing is used but the common counts. The Appellant upon the trial below moved the court to exclude from the jury all that part

of the testimony of the witness Meef. that showed or tended to show a sale from Canning & Co. to Appellant of goods belonging to them - which motion was overruled and exceptions taken to the ruling of the court in permitting said testimony to go to the jury -

It is true that Meef's testimony shows that at one time this same stock of goods belonged to Appellee, that they were sold by the sheriff on an execution against Appellee, and Meef. Canning & Co. became the purchasers at such sale. It also appears from the evidence that it was the understanding between Canning & Co. agent, Meef. and the Appellee Buck, that if Meef should obtain more for the stock of goods than the amount of the executions ^{against Buck}, that Buck should have the ~~advantage~~ advantage of such excep. but where that arrangement was entered into there is nothing to show - Neither was there any thing in that arrangement, ^{As disclosed by the evidence} that gave Buck any legal or equitable title to the goods, he had no interest in the goods that he could have maintained in any court of law or chancery - It was as far as the testimony discloses a mere naked promise

without any consideration whatever,
Not made by either by the party owning
the goods or any interest therein, but
made, without authority, by their agent.
Messrs. Leaning & Co. or their authorized agents
above had the right to sell or dispose of
the stock of goods, and they in fact did
make the sale, They owned all the in-
terest in the goods that Buck ever owned.
For they purchased them at sheriff's sale
on an execution against Buck —

The main question there is in this case
will be, "Can the Appellee maintain his
action against the Appellant upon
such a sale or contract as that disclosed
in this case by the evidence, without de-
claring specially upon the contract?"

"Is the evidence properly admissible under
the common counts?" I think not — If
he cannot this ^{Judgment} must necessarily be re-
versed because there is no evidence
aside from that of the witness Neff that
would tend in the least to create an In-
and that testimony shows a sale to Eggleston & Corning & Co, goods
debted up from Eggleston to Buck. The
bill of exceptions gives all of the evidence
introduced on the trial below —

I apprehend there can be no question
but that Leaning & Co. is liable to the goods

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was complete. that they owned the exclusive title thereto, ^{interest therein} they must have owned at least all of Bucks interest in them whatever that was, for they had purchased ^{the same} at sheriff's sale on execution against Buck prior to the sale by them to Eggleston. Buck then could not have sold the same to Eggleston, If he had sold he would have done so without right and could not have recovered of Eggleston the price of the goods. He was in fact as much a stranger to the title of the goods as if he had never owned them - And as such I shall treat him in the argument of this case -

In first Chittys Pleading pages 47 & I find the law laid down thus - "If A" give goods to "B" of the value of eighty pounds on condition that he pay twenty pounds to "C." if "B" do not pay the money "C." may have an action against him and declare that he was indebted to him in twenty pounds for goods of the value of eighty pounds given to him by "A" on condition that he should give twenty pounds to "C." Showing that in an action brought upon a contract of this kind when there is no consideration moving from the de-

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fendant to the plaintiff, the plaintiff must if he seeks to recover count specially upon the contract. —

But I find by the 17th Illinois reports on page 808 that this court has settled that doctrine in this state, and has I think settled the point in controversy here, ~~for~~ favorably to me — In that case Eddy et al vs: Roberts The evidence disclosed that one Williams sold and delivered certain property to the defendant in that suit and that the defendant as a part of the transaction agreed with Williams to pay his debt to the plaintiffs — This court say in that case "We think the plaintiffs may recover upon this undertaking, although not in writing declaring upon the special contract as made to the plaintiffs" And this court in support of that proposition cite 1st Chittys pleading 4 & 5 — Barker vs: Bucklin 2 Denis 45 — 1 John, 139, 18 do 13, 17 Map. 400, 3 Pick 83, 5 Wen. 285, 13 M & W. 661. 11 Ad & Cl 488. 2 Parsons on Con. 303 & note m, same 307 & 388 note w — "But" the court adds "The plaintiff cannot recover under any count in this declaration" (And I particularly desire to call the careful attention of the court to the declaration in

that case) "Neither of the special counts are upon this contract, nor can he recover under the general count for goods sold & delivered &c — In general, if the plaintiff might recover had there been no special contract, then he may recover under the appropriate common count, if, at least, the special contract be accented on his part, and nothing left to be done under it but the payment of money — Here there is nothing upon which the plaintiffs could recover in the absence of the special contract: nor would this court at all inform the the plaintiff of the real cause of action —

Now in the case at Bar I propose to apply some of the principles laid down in that case —

"Is the declaration in this case founded upon the special contract?" No! Nor is it in any way calculated to apprise the Defendant of the plaintiff's cause of action, the very office a declaration is intended to fill — All the fiction of law will fail to torture the contract disclosed by the evidence to be one in any particular like the one declared upon — The goods were not bargained and sold by plaintiff

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to defendant, the goods that were sold to the defendant, the sale of which was the ~~condition~~ consideration of the promise did not, nor did any part thereof, belong to the plaintiff. The contract was not made with him nor with his agent, he was an utter stranger to the defendant as far as the bargain and sale were concerned. Neither can the defendant be said to be indebted to the plaintiff upon an account stated between them, for all the promise that was made was made to a third person, the consideration for the promise, if such was made, moved from a third person. There was no privity of contract whatever between the plaintiff and defendant and the first time the plaintiff is seen figuring in the transaction is when he brought this suit. The goods belonged to another person than the plaintiff and the promise was made to that person. It is true that at the time of the sale the defendant was informed of the private arrangement that had been made between Reef & Buck, but it is ~~also~~ equally true that the evidence does not disclose that Reef had the authority to make that arrangement, and if he had such authority it could not

affect the principle I am contending for. it did not change the title to the goods. They still remained the goods of & Corning & Co., and the testimony shows that as such they were treated by all parties concerned —

The arrangement between Buck & Neef may have been made and probably was, as an inducement to Buck to find a purchaser for Corning & Co's Goods. the fact that the goods were sold on execution to C & Co. for about \$4000 — And C & Co's demands against Buck were some \$6500 would tend strongly to show that such was the case — That Eggleston may have been and was informed of the interest Buck had or would have in the sale of the goods, if they sold for more than \$6500 — would not make the goods those of Buck, would not give Buck any title to the goods, would not have entitled Buck to the right of an action against the defendant unless the defendant had made an express contract to pay Buck the money going to him under the sale — If that is so, and I think there can be no question on that point, then upon the authority of Eddy et al vs. Roberts

17th Ills. "He must declare upon the special contract as there is nothing upon which he can recover in its absence" ~~1st Chitty Pt. 344. The law is stated thus.~~

In 1st Chitty's Pleading on page 340, the law is stated thus —

"Of there were no privity between the parties independently of the special contract then the common counts would be of no avail." Now, Where was the privity between Buck & Eggleston independently of this contract? The contract itself does not even disclose a privity between them, but shows the consideration to have passed from other parties than ~~from~~ Buck to Eggleston and the promise to have been made by Eggleston to such persons — No privity disclosed, nothing upon which the plaintiff could found any action at all without this special contract —

In 1st Saunders on Pleading and Evidence page 180 — Title Declaration. The text says, "That the declaration in this case, i.e. assumpsit — must invariably disclose the consideration upon which the contract is founded the contract itself whether express or implied — and the breach thereof &c"

and in 1st Chitty's Pleading page 107 —
 the same doctrine is asserted in very
 similar words. — The evidence in this
 case shows that the Appellee did not
 follow that rule in declaring in this case.
 The consideration is not disclosed in the
 declaration — The consideration set out
 is a sale of goods by plaintiff to defendant
 &c. The consideration disclosed by the evidence
 is a sale of goods by Trp. Cowing &c. (to which
 Appellee had no title) to the Appellant in
 consideration of which Appellant promised
 to pay a part of the purchase money to
 Appellee — The contract set out in the
 declaration is an implied one arising
 from a sale of goods by plaintiff to defend-
 ant. The contract disclosed by the evidence
 is an ^{special} ~~express~~ one made between the
 Appellant and Trp. Cowing &c. for the sale
 of a stock of goods to which Appellee had
 no title. On consideration of which sale
 Eggleston promised Cowing &c. to pay Buck
 a certain sum of money — If this
 evidence is held to be properly admissible
 under the common counts it seems to me
 that the rule laid down by the last recited
 authorities is entirely done away. That
 the office of a declaration is gone, and

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that for all the practicable benefit to be derived from a declaration, for all the good such a thing will do the defendant, for all the notice it conveys to him of the plaintiff's cause of action, he might just as well and safely go to trial without it. he might just as well be compelled to try his case simply upon an ordinary writ of summons, giving to the plaintiff the widest range imaginable. — Such a practice must inevitably lead to the perpetration of great wrongs. — The books abound with cases similar to the one at bar, numerous are the cases reported, but after a diligent search I have yet to find the first case where suit has been brought ~~on~~ upon such a contract and the plaintiff relied upon the common counts. — There are numerous cases cited and referred to by the courts in the cases I have cited in my brief and although I have examined them nearly all, I have not thought it worth while to refer to them here. They all show that the declaration was upon the special contract. They all seem to concede that a special count upon the contract is necessary. — In some of them the authorities I have referred to in Chitty are quoted and approved and none

favor the idea that the common counts
are sufficient

I see by the first point made by Appellee
that he insists that Buck had an interest
in the goods sold to Appellant and that
he insists that it is not a sale to Eggleston
of Cuming & Co's goods but a sale of goods
in which Buck had an interest and for
which Eggleston agreed to pay Buck -
In answer to that I would say that
I cannot well see how Buck could have
any interest left in the goods after they
were sold upon an execution against
him - I have been taught to believe
that a sale by the sheriff of chattels passed

all interest the defendant ⁱⁿ ~~the~~ the execution had therein to the purchaser and that of course the Appellee had no equity of redemption as he would have in a sale of real estate, and a mere naked promise to allow Buck what might be obtained for the goods over and above \$6500 when the goods sold on the execution for from \$8000 to \$4000, does not give to Buck any interest in the goods, if the purchaser at the sheriff's sale does sell for more than \$6500, and keeps his promise made to Buck without consideration, then it is true that Buck may have an interest in the sale from Erwin & Co., but as the whole consideration moved from Co. to Eggleston and as Erwin & Co and Eggleston were the only parties to the transaction, Buck notwithstanding such interest could not maintain an action against Eggleston unless Eggleston had made an express promise to pay him what was going to him under the sale. As in the absence of that express contract Buck could not recover - Buck then according to the authorities cited particularly those in 17 Ill. and in 1st Chitt. pl. 445 and 840 ^{he} must count specially upon the contract -

To Illustrate. If "A" being the owner of a horse sells him to "B" for \$100 and if "B" at the time of the sale promise "A" that he will give him all he obtains for the horse over and above \$125; and B should afterwards sell the horse to "C" for \$150. at the time of the sale telling "C" of the agreement he had made with "A" - "A" could not bring a suit against "B" for his interest in the sale unless "C" had expressly promised to pay him the amount going to him under the sale, and even then he would have to rely upon the special contract - Or else I have ^{not construed} ~~read~~ the authorities cited correctly -

In regard to ^{the} second point made by Wyllie I think that this court will find that none of the authorities cited tend in the least to controvert or weaken the first position I assume -

When A sells goods to, or does work for, B under a special contract ~~or any thing~~ of that kind and A has fully performed the contract on his part, it may be perhaps and doubtless true that A can bring his suit and declare against B simply upon the common counts, where

there is nothing left for B to do but to pay the money due under the contract, but to enable him to do so the promise must have been expressly or impliedly made to him, the consideration must have moved from him, he must in fact have been privy to the contract - There are broad distinctions to be taken between such a case as that, (as indicated between all the cases cited by Appellee) and the case at Bar. Those distinctions may be briefly stated thus. In the case at bar the consideration ^{for the promise} moved from Coming & Co to Appellant - To have enabled the Appellee to have maintained his suit simply upon the common counts the consideration for the promise should have moved from him - In the case at Bar the Appellee was not privy to the contract - sued on, he should have been or else he should have declared specially on the contract, and further in the case at Bar the property sold belonged to Coming & Co and the promise was made ^{to them} ~~to them~~ for Appellee's benefit, but as Appellee independently of the special contract could not have maintained this suit, as in the absence of such contract,

he must fail, it was absolutely necessary for him to court specially upon the contract —

The last point I make in my brief is that the testimony was not properly admissible under the account filed with the declaration, that the account filed with the declaration as shown by the record was not sufficient to apprise the Appellant of the proof that would probably be introduced by the Appellee. Upon this point, I desire to say no more than simply this. I do not think the account filed complied with either the letter or spirit of the statute, does not in fact apprise the defendant what the plaintiff intends to rely upon.

Respectfully

C. F. Bull

Atty for Appellant

155-140
Lorenz Egleston -
Appellant -

Chas. T. P. ³⁵¹Buck -
Appellee

Argument for Appellant -

- Filed May 14. 1860
L. Leland
Clerk

E. F. Bull
app'to Atty

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

} ss. APRIL TERM, A. D. 1860.

Lorenzo Eggleston, Appellant, vs. Charles T. P. Buck, for use, &c., Appellee.
Appeal from La Salle County Court.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st. The principal point that I shall make in this case is that evidence of a sale of goods belonging to Mess. Corning & Co., and made by them, i. e. Corning & Co., to the plaintiff, in consideration of which the plaintiff promised to pay a part of the purchase money to the defendant, cannot be given in evidence under the common counts, for goods bargained and sold, &c., by the defendant to the plaintiff. If the defendant seeks to recover on such a contract, he should have declared specially on the contract.

1 Chitty's Pleadings, pages 4, 5, 107 and 340 (Note 4.)

1 Saunders' Pl. and Ev., page 180. Title Dec.

Eddy et al vs. Roberts, 17., Illinois, 508.

Barker vs. Bucklin, 2 Denio 45.

2nd Parsons on Contracts 302 and Note M.

Same, pages 307 and 308 and Note W.

1 Johns, 139—18 Johns, 13—5 Wend., 235.

2nd. The Court should have excluded the testimony of the witness Neef from the jury, his testimony did not tend to support the allegations of the Declaration.
17 Illinois, 508—1st Saunders Pl. and Ev., 180.

3rd. Under the pleadings and proofs the plaintiff was entitled to a verdict.
17 Illinois, 508.

4th. The proof was not admissable under the account sued on, filed with the declaration herein.

Revised Statutes 1845, Chap. 83, Sec. 8.

E. F. BULL, Plf's Atty.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

} *Appeal from La Salle Co. Court.*

APPELLEE'S POINTS AND AUTHORITIES.

I. Under the first error assigned I insist,

1st. That Buck had an interest in the goods sold to plaintiff, which fact was disclosed to plaintiff before the purchase. (See Neef's testimony, pages 21, 22 and 23 of the Record.) It was *not*, therefore, a sale of Corning & Co.'s goods, but a sale of goods in which Buck had an interest for which plaintiff agreed to pay Buck \$700.

2d. That, although the transaction showed a special bargain, yet it being fully performed on our part, and nothing remaining to be done by Eggleston but the payment of the money agreed to be paid, that (*i. e.* the money) can be recovered by Buck on the common or *indebitatus assumpsit* counts; and this would be so even if Buck had no interest in the goods sold; *a fortiori*, where he had such interest as shown by the proof in this case.

1 Saund. Pl. & Ev. 180.

Stone vs. Rogers, 2 Meeson & Welsby, 448.

Poulter vs. Kellingbeck, 1 Bos. & Puller 397.

Marchington vs. Vernon, 1 Bos. & Pul. 101—note.

Schermerhorn vs. Vanderheyden, J. R. 140.

Buller's Nisi Prius, 139.

2 Smith's Leading Cases, 15 n.

II. The question presented by the second error assigned is not before this court. It does not appear but what a bill of particulars was filed in accordance with the order of the court below. The bill of particulars is no part of the Record, and is not embodied in the bill of exceptions, nor was any exception to it taken below.

III. The same suggestions apply to the third error assigned.

The additional errors assigned by leave of the court present the same question as the first.

The attention of the court is called to the fact that the printed abstract in the case is wrong in its statement of the evidence, in this that it states that the witness, Neef, was called by *defendant*, and testified that he sold the goods to the *plaintiff*, &c. The reverse of this is shown by the Record. Neef was called by the *plaintiff*, and testified that he sold the goods to the *defendant*, &c., an inadvertance in making the Abstract.

W. H. L. WALLACE,

Counsel for Appellee.

155-

Eggleson vs. Buck

Appelles Point

Filed May 1. 1860
Leland
Clerk

1-
State of Illinois } ss Third Grand Division
Supreme Court } April Term A.D. 1860

Lorenzo Eggleston
Appellant

vs;

Chas. T. P. Buck for use of
Appellee

Appeal from LaSalle
County Court -

Argument sub-
mitted on part of Appellant -

The proof introduced by the Appellee
on the trial of this cause below,
Shows that in the Spring of 1858, one
M. A. Neuf as the agent of Mep. Corning
& Co. sold a stock of hardware belonging
to Corning and Co. to the Appellant,
that appellant paid Corning & Co about
\$6500. for the goods and agreed with
them to pay the balance of the purchase
money ^{some \$650 for \$1100 -} to the Appellee - Upon this state
of facts the Appellee brought this suit
against Appellant declaring in indebitatus
assumpsit - There is no special
count upon the contract, nothing is
used but the common counts - #
The ~~Def~~ Appellant upon the trial
below moved the Court to exclude
from the jury all that part of the

testimony of the witness Neef, that shown or tended to show a sale from Corning & Co. to Appellant of goods belonging to them - which motion was overruled and exceptions taken to the ruling of the Court in permitting said testimony to go to the jury -

It is true that Neef's testimony shows that at one time this same stock of goods belonged to Appellee, that they were sold by the Sheriff upon an execution against Appellee and that Messrs. Corning & Co became the purchasers at such sale, It also appears from the evidence that it was the understanding between Corning & Co's agent, Neef, and the Appellee Bucke, that if Neef should obtain more for the stock of goods than the amount of the executions against Bucke that Bucke should have the advantage of such excess. But when that arrangement was entered into there is nothing to show - neither was there any thing in that arrangement as disclosed by the evidence that gave Bucke any legal or equitable title to the goods, he had no interest in the goods that he could have maintained in any court of law or chancery -

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It was as far as the testimony discloses
a mere naked promise without any
consideration whatever, not made
either by the party owning the goods
or any interest therein, but made,
without authority, by their agent,
Messrs. Corning & Co. or their authorized
agents alone had the right to sell
or dispose of the stock of goods,
and they in fact did make the
sale - They owned all the interest
in the goods that Buck ever owned,
for they purchased them at Sheriff's
sale upon an execution against
Buck -

The main question then in this
case will be, "Can the Appellee main-
tain his action against the Appellant
upon such a sale or contract as that
disclosed in this case by the evidence,
without declaring specially upon
the contract?" "Can he recover"
"Is the evidence properly admissible
under the common counts?" I think
not - If he cannot this case must
necessarily be reversed because there is
no evidence aside from that of the
witness Hey that would tend in
the least to create an indebtedness

from Egleston to Buck - The Bill of Exceptions gives all the evidence introduced on the trial below -

I apprehend there can be no question but that Corning & Co.'s title in the goods was complete, that they owned the exclusive title thereto, they must have owned at least all of Bucks interest in them whatever that was, for they had purchased ^{the same} at Sheriffs sale on execution against Buck prior to the sale by them to Egleston - Buck then himself could not sell the same ^{to} Egleston, if he had sold he ~~could~~ ^{would} have done so without right and could not have recovered of Egleston the price of the goods. He was in fact as utter a stranger to the title of the goods as if he had never owned them - and as such I shall treat him in the argument of this case -

In first Chittys & Pleading I find ~~the~~ ^{the} ~~graps~~ ^{graps} 4 & 5 - I find the law laid down thus - "If A. give goods to B. of the value of eighty pounds on condition that he pay twenty pounds to C. if B. do not pay the money C. may have an action against him and declare

that he was indebted to him in twenty pounds for goods of the value of eighty pounds given to him by ^{"D."} ~~the~~ on condition that he should ^{give} "Twenty pounds to C." Showing that in an action of this kind brought upon a contract of this kind when there is no consideration moving from the defendant to the plaintiff the plaintiff must if he seeks to recover count specially upon the contract. -

But I find by the 17th Illinois Reports on page 508 that this Court has settled that doctrine in this state, and has ~~passed, in~~ favorably to the position I take, I think settled the point in controversy here, favorably to ~~my~~ me - In that case Eddy v. Roberts the evidence disclosed that one Williams sold and delivered certain property to the defendant in that suit and that the defendant as a part of the transaction agreed with Williams to pay his debt to the plaintiffs - This court say in that case "we think the plaintiffs may recover upon ~~upon~~ this undertaking, although not in writing declaring upon the special contract as made to the plaintiffs"

and this court in support of that proposition cite 1st Chittys Pl. 4 & 5 - *Barber vs. Bucklin* 2 Denio 45 - 1 John. 139, 18 do 13 17 Mass. 400, 3 Pick 83, 5 Wm. 235, ~~13~~ ~~13~~ 13 M. & W. 561. 11 Ad & El 438 2 Parsons on Con. 302 & note M. same 307 & 308 note W - "But" the court adds "the plaintiff cannot recover under any count in this declaration" & And I particularly desire to call the careful attention of the court to the declaration in that case & "neither of the special counts are upon this contract, nor can he recover under the general counts for goods sold and delivered &c - In general, if the plaintiff might recover had there been no special contract, then he may recover under the appropriate common count, if, at least, the special contract be executed on his part, and nothing be left to be done under it but the payment of money - Here there is nothing upon which the plaintiffs could recover in the absence of the special contract - nor would this count at all inform the plaintiff of the real cause of action" -

Now in the case at Bar I propose to apply some of the principles laid down in that case

Q "Is the declaration in this case founded upon the special contract?" No, nor is it in any way calculated to apprise the defendant of the plaintiff's cause of action, the very office a declaration is intended to fill - All the fiction of law will fail to torture the contract disclosed by the evidence to be one in any particular like the one declared upon - The goods were not bargained and sold by plaintiff to defendant; the goods that were sold to the defendant, the sale of which was the consideration of the promise did not, nor did any part thereof, belong to the plaintiff, the contract was not made with him nor with his agent; he was an utter stranger to the defendant as far as the bargain and sale were concerned - Neither can the defendant be said to be indebted to the plaintiff upon an account stated between them, for all the promise that was made was made to a third person, the consideration for the promise if such was made, none

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from a third person, there was no priority of contract whatever between the plaintiff and ~~and~~ defendant and the first time the plaintiff is seen ~~is not~~ ~~in the~~ figuring in the transaction is when he brought this suit - The goods belonged to another person than the plaintiff and the promise was made to that person - It is true that at the time of the sale the defendant was informed of the private arrangement that had been made between Nuf and Buck but it is equally true that the evidence does not disclose that Nuf had the authority to make that arrangement, and if he had such authority it could not affect the principle I am contending for, it did not change the title to the goods, they still remained the goods of Corning & Co. and the testimony shows that as such they were treated by all parties concerned -

The arrangement between Buck and Nuf may have been made and probably was, as an inducement to Buck to find a purchaser for

9

Conning & Co's goods, the fact that the
 goods were sold on execution to C & Co.
 for about \$4000 - and C & Co's de-
 mands against Buck were over
 \$6500 would tend strongly to show
 that such was the case - that
 Eggleston may have been and was in-
 formed of the interest Buck had
 or would have in the sale of
 the goods if they sold for more
 than \$6500 - would not make the
 goods those of Buck, would not give
 Buck any title to the goods, would
 not have entitled Buck to the right
 of an action against the defend-
 ant unless the defendant had
 made an express contract to
 pay Buck the money ~~even~~ going
 to him under the sale - If that
 is so, and I think there can be no
 question on that point, then upon
 the authority of *Edely Et al vs Roberts*
 17 Ill. he must declare ~~spec~~ upon
 the special contract - as there is nothing
 upon which he can recover in its
 absence - In 1st Chitty Pl. 340, The law
 is stated thus.

If then ~~be~~ ^{were} ~~no~~ ~~privity~~ of ~~contract~~
 between the parties independently of
 the Special Contract then the com-
 mon counts would be of no avail -
 Now when was the privity between Buck
 and Eggleston independently of this
 contract? The contract itself does
 not even disclose a privity between
 but shows the consideration to
 have passed from other parties than
 Buck to Eggleston and the promise
 to have been made by Eggleston to
 such person - No privity disclosed,
~~nothing but no even~~ nothing upon
 which the plaintiff could found any
 action ^{at} all without this special contract.

In 1st Saunders on Pleading and
 evidence page 180 - Little Declaration.
 The text says "that the declaration
 in this case, i.e. Assumpsit - must
 invariably disclose the consideration
 upon which the contract itself is
 founded the contract itself whether
 express or implied - and the breach
 thereof &c" and in 1st Chitty, Pl.

page 107 - the same doctrine is asserted in very similar words. -

The evidence in this case shows that the Appellee did not follow that rule in declaring in this case. The consideration is not disclosed in the declaration - The consideration set out is a sale of goods by plaintiff to defendant &c, The consideration disclosed by the evidence is a sale of goods by Messrs. Corning & Co. (to which appellee had ~~not~~ title), to the Appellant in consideration of which appellant promised to pay a part of the purchase money to Appellee. The contract set out in the declaration is an implied one arising from a sale of goods by plaintiff to defendant. The contract disclosed by the evidence is a special one made between the Appellant and Messrs. Corning & Co. for the sale of a stock of goods to which appellee had no title, in consideration of which said Egleston promised Corning & Co. to pay back a certain sum of money -

If this evidence is held to be properly
 admissible under the common
 counts it seems to me that
 the rule laid down by the ~~at~~
 last cited authorities is entirely
 done away ~~with~~, that the office
 of a declaration is gone, and that
 for all the practicable benefit to be
 derived from a declaration, for all
 the good such a thing will do the
 defendant, for all the notice it
 conveys to him of the plaintiff's
 cause of action, he might just as
 well and safely go to trial without,
 i.e. he might just ^{as well} be compelled to try
 his case simply upon an ordinary
 writ of summons, giving to the
 plaintiff the widest range imaginable - In such
 case a practice must inevitably lead
 to the perpetration of great wrongs -
 The books abound with cases similar
 to the one at Bar, ~~many~~ are numerous
 are the cases reported, but after a
 diligent search I have yet to find
 the first case where suit has
 been brought upon such a contract
~~and~~ and the plaintiff relied upon
 the common counts -

There are numerous cases cited and
 referred to by the courts in the cases
 I have cited in my brief and although
 I ~~the~~ have examined them nearly all
 I have not thought best ~~to~~ it worth
 while to refer to them ^{here} ~~in my brief~~.
 They all show that the declaration
 was upon the special contract, they
 all seem to concede that a special
 count upon the contract is necessary -
 in some of them the authorities I
 have referred to in Chitty are quoted
 and approved and none ~~show~~
 favor the idea that the common
 counts are sufficient -

I see by the first point made by Appellee that he insists that Buck had an interest in the goods sold to Appellant and that he insists that it is not a sale of goods to Egston ~~belonging to~~ ^{of} "Cominy & Co's" goods but a sale of goods in which Buck had an interest and for which Egston agreed to pay Buck. In answer to that I would say that I cannot well see how Buck could have any interest left in the goods after they were sold upon execution against him - I have been taught to believe that a sale by the sheriff of chattels passed all the interest, ^{the defendant in execution had} ~~therein~~ to ~~the~~ the purchaser ~~at the sale~~ and that of course the Appellee had no equity of redemption ~~therein~~ as he would have in a sale of real estate and a mere naked promise to ~~not~~ allow ~~the~~ Buck what might be obtained for the goods ~~the excess~~ over and above \$6500 - when the goods sold on the execution for from \$3000 to \$4000, does not give to Buck any interest in the goods, if the purchaser at the Sheriff's sale does sell ~~at~~ for more than \$6500 - and keeps ~~the~~ his promise made to Buck without consideration, then it is true that Buck may have

an interest in the sale ~~and~~
 from Corning & Co., but if as the
 whole consideration moved from
 C & Co. to Egleston ~~notwithstanding~~
 and as Corning & Co. and Egleston were
 the only parties to the transaction, Buck
 notwithstanding such interest could not
 maintain an action against Egleston
 unless Egleston had made an express
 promise ~~to~~ to pay him what was going
 to him under the sale - ^{as} In the absence
 of that express contract ~~he~~ Buck could
 not recover - Buck then according
 to the authorities cited particularly those
 in 17 Ills. and in Chitty pl. 4 & 5 &
 340 - must count specially upon the
 contract - ~~to illustrate if A. being~~
~~the owner of a horse promised agreed with~~
~~B to pay him all he might obtain for~~
~~the horse over and above \$100 -~~

~~to~~ To illustrate if "A" being the
 owner of a horse ~~and~~ sells him
 to "B" ~~and B was at the time of the~~
 for \$100 - and if B were at the time
 of the sale promise A that he will
 give him all he obtains for the
 horse over and above \$125. and
 B should ^{afterwards} sell the horse to C

for \$150, at the time of the sale telling C of the agreement he had made with "A". A could not bring ~~suit~~ a suit against B for his interest in the sale unless C had expressly promised to pay him the amount going to him under the sale, and even then he would have to rely upon the special contract - Or else I have read the authorities cited correctly -

In regard to the second point made by appellee I think that this court will find that none of the authorities cited by the appellee tend in the least to controvert or weaken the first position I assume - When A sells goods to, or does work for B under a special contract, ~~or does~~ or anything of that kind and A has fully performed the contract on his part it may^{be} perhaps and doubtless is true that A can bring his suit and declare against B simply upon the common counts, where there is nothing left for B to do but to pay the money due under the contract, but to enable him to do so the promise

17
must have been expressly or impliedly
made to him, the consideration must
have moved from him, he must
in fact have been privy to the
contract - There is a broad distinction
to be taken between such a case as
that, as indeed between all the
cases cited by Appellee and the
case at bar, ~~the case~~ these dis-
tinctions may be briefly stated thus,
In the case at bar the consideration
for the promise moved from Corning & Co
to Appellant - To enable the Appellee
to have maintained his suit simply
upon the common counts the con-
sideration for the promise should
have moved from him - In the
case at Bar the Appellee was not
privy to the contract sued on, he
should have been or else he should
have declared specially on the contract,
and further in the case at Bar
the property sold belonged to
Corning & Co and the promise
was made ^{to them}, it is true for Appellee
benefit but as Appellee independ-
ently of the ^{special} contract could not
have maintained this suit, as in
the absence of such contract he

18
must fail, it was absolutely
necessary for him to count specially
upon the contract—

The last point I make in
my brief is that the testimony
was not properly admissible ~~on~~
under the account filed with
the declaration, that the account
filed with the declaration as
shown by the record was not
sufficient to apprise the Appel-
lant of the Appellees proof that
would ~~prop~~ probably be introduced
by the Appellee upon this point.
I desire to say no more than,
simply this, I do not think
the account filed complied with
either the letter or spirit of
the Statute, does not in fact
apprise the defendant what the
plaintiff intends to rely upon.

Respectfully

E. F. Bull

Atty for Appellant

18
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necessary for him to count specially
upon the contract—

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my brief is that the testimony
was not properly admissible ~~on~~
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plaintiff intends to rely upon.

Respectfully

E. F. Bull

Att'y for Appellant

155-140

Loring Egleston
Appellant

VS

Chas. T. P. Buck for use
Appellee

Argument of ~~Plaintiff~~
Appellant

Filed May 14, 1860
Leland
Clerk

E. H. Bull
Atty for Appellant

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

} *Appeal from La Salle Co. Court.*

APPELLEE'S POINTS AND AUTHORITIES.

I. Under the first error assigned I insist,

1st. That Buck had an interest in the goods sold to plaintiff, which fact was disclosed to plaintiff before the purchase. (See Neef's testimony, pages 21, 22 and 23 of the Record.) It was *not*, therefore, a sale of Corning & Co.'s goods, but a sale of goods in which Buck had an interest for which plaintiff agreed to pay Buck \$700.

2d. That, although the transaction showed a special bargain, yet it being fully performed on our part, and nothing remaining to be done by Egleston but the payment of the money agreed to be paid, that (*i. e.* the money) can be recovered by Buck on the common or *indebitatus assumpsit* counts; and this would be so even if Buck had no interest in the goods sold; *a fortiori*, where he had such interest as shown by the proof in this case.

1 Saund. Pl. & Ev. 180.

Stone vs. Rogers, 2 Meeson & Welsby, 448.

Poulter vs. Kellingbeck, 1 Bos. & Puller 397.

Marchington vs. Vernon, 1 Bos. & Pul. 101—note.

Schermerhorn vs. Vanderheyden, J. R. 140.

Buller's Nisi Prius, 139.

2 Smith's Leading Cases, 15 n.

II. The question presented by the second error assigned is not before this court. It does not appear but what a bill of particulars was filed in accordance with the order of the court below. The bill of particulars is no part of the Record, and is not embodied in the bill of exceptions, nor was any exception to it taken below.

III. The same suggestions apply to the third error assigned.

The additional errors assigned by leave of the court present the same question as the first.

The attention of the court is called to the fact that the printed abstract in the case is wrong in its statement of the evidence, in this that it states that the witness, Neef, was called by *defendant*, and testified that he sold the goods to the *plaintiff*, &c. The reverse of this is shown by the Record. Neef was called by the *plaintiff*, and testified that he sold the goods to the *defendant*, &c., an inadvertance in making the Abstract.

W. H. L. WALLACE,

Counsel for Appellee.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

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W. H. L. WALLACE,

Counsel for Appellee.

155-140

Eggliston. vs. Buck

Appleby Point

Filed May 1, 1860
Leland
Clerk

STATE OF ILLINOIS, }
SUPREME COURT,
Third Grand Division.

ss. APRIL TERM, A. D. 1860.

Lorenzo Egleston, Appellant, vs. Charles T. P. Buck, for use, &c., Appellee.
Appeal from La Salle County Court.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st. The principal point that I shall make in this case is that evidence of a sale of goods belonging to Mess. Corning & Co., and made by them, i. e. Corning & Co., to the plaintiff, in consideration of which the plaintiff promised to pay a part of the purchase money to the defendant, cannot be given in evidence under the common counts, for goods bargained and sold, &c., by the defendant to the plaintiff. If the defendant seeks to recover on such a contract, he should have declared specially on the contract.

- 1 Chitty's Pleadings, pages 4, 5, 107 and 340 (Note 4).
- 1 Saunders' Pl. and Ev., page 180. Title Dec.
- Eddy et al vs. Roberts, 17., Illinois, 508.
- Barker vs. Bucklin, 2 Denio 45.
- 2nd Parsons on Contracts 302 and Note M.
- Same, pages 307 and 308 and Note W.
- 1 Johns, 139—18 Johns, 13—5 Wend., 235.

2nd. The Court should have excluded the testimony of the witness Neef from the jury, his testimony did not tend to support the allegations of the Declaration.
17 Illinois, 508—1st Saunders Pl. and Ev., 180.

3rd. Under the pleadings and proofs the plaintiff was entitled to a verdict.
17 Illinois, 508.

4th. The proof was not admissable under the account sued on, filed with the declaration herein.

Revised Statutes 1845, Chap. 83, Sec. 8.

E. F. BULL, Plf's Atty.

155-140

L. Eggleston
vs

Chas. T. P. Buck for use

Plf Points & Authorities

Filed Apr 25, 1860

L. Deland
Clerk

STATE OF ILLINOIS

IN SENATE

1860 APR 25 P. 1200

EXAMINER FOR THE YEAR AND AUTHORITIES

1. The principal facts in the case are that the plaintiff, L. Eggleston, is a resident of the State of Illinois, and the defendant, Chas. T. P. Buck, is a resident of the State of New York. The plaintiff claims that the defendant has wrongfully taken possession of certain real estate belonging to the plaintiff, and that the defendant has refused to return the same to the plaintiff. The plaintiff seeks a judgment that the defendant is liable to the plaintiff for the value of the real estate, and for the costs of the suit.

2. The plaintiff's case is supported by the testimony of the witness, J. H. Smith, who is a resident of the State of Illinois, and who has seen the real estate in question, and who has seen the plaintiff in possession of the same. The plaintiff also offers in evidence a deed from the State of New York, which purports to convey the real estate to the defendant. The plaintiff claims that the deed is a forgery, and that the defendant has no title to the real estate.

3. The Court should have considered the testimony of the witness, J. H. Smith, and the deed from the State of New York, and should have found in favor of the plaintiff, and should have awarded to the plaintiff the value of the real estate, and the costs of the suit.

17 Illinois 208. Under the pleadings and proofs the plaintiff was entitled to a verdict.

18. The Court was not authorized under the facts and on that with the defendant's case.

19. The Court was not authorized under the facts and on that with the defendant's case.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

} *Appeal from La Salle Co. Court.*

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2d. That, although the transaction showed a special bargain, yet it being fully performed on our part, and nothing remaining to be done by Eggleston but the payment of the money agreed to be paid, that (*i. e.* the money) can be recovered by Buck on the common or *indebitatus assumpsit* counts; and this would be so even if Buck had no interest in the goods sold; *a fortiori*, where he had such interest as shown by the proof in this case.

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Schermerhorn vs. Vanderheyden, J. R. 140.

Buller's Nisi Prius, 139.

2 Smith's Leading Cases, 15 n.

II. The question presented by the second error assigned is not before this court. It does not appear but what a bill of particulars was filed in accordance with the order of the court below. The bill of particulars is no part of the Record, and is not embodied in the bill of exceptions, nor was any exception to it taken below.

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W. H. L. WALLACE,

Counsel for Appellee,

155
Eggston
Buck

~~Eggston~~
Oppelus Points

Filed May 1, 1860
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

} *Appeal from La Salle Co. Court.*

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W. H. L. WALLACE,

Counsel for Appellee.

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Filed May 1st 1860
L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

LORENZO EGLESTON

vs.

CHARLES T. P. BUCK, for use, &c.

} *Appeal from La Salle Co. Court.*

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W. H. L. WALLACE,

Counsel for Appellee.

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Eggston

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Filed May 12th 1860
L. Leland
clerk