

No. 8656

Supreme Court of Illinois

Henry Koester

vs.

Henry Esslinger

71641  7

Henry Esslinger
Appeal from St Clair

Henry Koster
Copy of Record in
St. Clair Circuit

43 - Court 8656

Clerk of Supreme
Court will please
file this record &
docket this case

W B Underwood

Att'y for appellant
Paid by us \$5.00
Filed, Dec 4 - 1867.
N. Johnston City
Paid by us \$5.00

fees \$ 8 $\frac{45}{100}$ paid by
Koster

1
State of Illinois }
St. Clair County, } ss.

Be it remembered that in the St. Clair County Circuit Court, within and for said County, the following proceedings were had, to-wit:

Be it remembered that on the 28th day of September, 1866, the following Declaration was filed, to-wit:

State of Illinois, }
St. Clair County } ss. At the third Monday of the term in the City Court of East St. Louis Henry Essling, plaintiff in this suit, by J. B. Underwood, his Attorney, in an action of assumpsit, complains of Henry Keater, defendant, for that the said defendant, heretofore, to-wit, on the 29th day of May, in the year eighteen hundred and sixty-six, at the City and County aforesaid, became liable to pay said plff. the sum of Five hundred dollars, and being so liable in consideration thereof, then and there undertook and promised to pay said sum to said plff. at the place aforesaid; and whereas the said defendant at the time and place aforesaid became and was indebted to said plaintiff in a sum of money, to-wit: Four hundred dollars for work and labor for two years at wagon-making, done and performed by said plff. for said deft, at his instance and request; and being so indebted in consideration thereof promised to pay said plff. said sum of money when the same afterwards requested. Yet the said deft, not regarding his said promise, although often requested so to do, hath hitherto wholly neglected and refused, and still doth neglect and refuse to pay said plaintiff said sum of money or any part thereof to the damage of said plaintiff Five hundred dollars, and, therefore, he

brings this suit, &c.

p. 13. Underwood, p. 9.

Henry Kaester

To Henry Essling

Dr.

To work & labor for two years at wagen-making

\$500.00

Be it remembered that on the 28th day of September, 1866, the following Pleas were filed, to-wit:

State of Illinois, } In the City Court of East St. Louis
 St. Clair County, } ss. Before William G. Kase, Judge
 City of East St. Louis, } Monday, June 11th A.D. 1866,

Henry Kaester

vs

In Assumpsit.

Henry Essling

And the said defendant by George W. Brackett and Luke H. Hite, his attorneys, comes and defends the wrong and injury when, &c. and says that he did not undertake and promise in manner and form as the said plaintiff has in his declaration thereof complained against him, and of this he puts himself upon the country, &c. By Brackett & Hite, his attorney.

And further plea in this behalf the defendant says action now, because he says that after the making, the promises in said several Courts of said declaration mentioned and before the commencement of this suit, to-wit, on, &c., the defendant paid to the plaintiff divers sums of money amounting, to-wit: to all the money, in the said courts in said declaration mentioned, in full satisfaction and discharge of all causes and rights of actions mentioned in

B

said declaration, which payment the said Plaintiff did then accept of and from the Defendant in such full satisfaction and discharge as aforesaid; and this said Defendant is ready to verify wherefore he prays judgment, &c.,
By Brackett & White, His Attys.

And the said Defendant for further plea in this behalf says actio non because he says that the said Plaintiff before and at the time of the commencement of this action was indebted to the said Defendant in the sum of Six hundred and forty nine dollars, for money paid to said Plaintiff by Defendant, at the Plaintiff's request, which said sum of money so due to the defendant exceeds the damages sustained by the Plaintiff by reason of the non-performance of the Defendant of the said several promises in the said declaration mentioned, and out of said sum of money so due to the Defendant, he, the said Defendant is ready and willing, and hereby offers to set off and allow to the Plaintiff the full amount of the said damages, according to the form of the Statute in such cases made and provided. And this, the said Defendant, is ready to verify, wherefore he prays judgment, &c., By Brackett & White, Attys for Defendant.

Copy of account in set-off mentioned.

Henry Essling to Henry Koester Dr.

To Cash

\$ 649.⁰⁰

And the Plaintiff comes and demurs to Defendants second plea and traverses the other.

J. B. Underwood,

Plaintiff's Attorneys.

Be it remembered that on the 10th day of April, 1868,
the following affidavit was filed, to-wit:

State of Illinois,	}
County of St. Clair.	
Henry Essling,	}
vs.	
Henry Koester.	

Henry Koester, Defendant, in the above entitled suit being duly sworn deposes and says that since the trial of the above cause at the present term of this Court he has for the first time ascertained that he can prove by Mr. Millard, Esq., of East St. Louis, that about one year ago, or in April, 1866, he saw Plaintiff receive some money from Defendant, and heard Plaintiff say that it was now all right and that he was now satisfied, or words to that effect. This was a few days after Plaintiff quit work for Defendant for the last time. This testimony was not given on the last trial, for the reason that defendant was not aware that he could so prove. He further swears that these facts are true. And Affiant further swears that since the trial of this cause he was for the first time informed and acquainted with the fact he could prove by Frederick Ludin, of East St. Louis, that sometime late in October, 1865, he (Ludin, was in defendant's shop, in East St. Louis, having some work done, when he saw defendant pay plaintiff some money. He does not know how much, he saw one \$10 bill and some more, and defendant said "now is this

right," plaintiff said. "yes, this settles up all of our piece work and I won't work by the piece any more." Plaintiff then called said Ludin and others across the street to take a drink at Peter Baumann's, remarking that Koester had paid him up and he would not work any more on the same terms. Affiant further states that this was after the time stated in the evidence, that plaintiff had quit work for him, and that said facts, which he can so prove, are strictly true, and that it was impossible for him to have subpoenaed said Ludin on the trial, as he found out since this trial that he was present. Affiant remembered some one was present, but could not remember who.

And affiant further swears that since the trial of this cause he has found out that he can prove by one Henry Brindle, who lives near the village of Cobokia, in County and State before mentioned; that he said Brindle was present when defendant settled with plaintiff about one year ago, and heard plaintiff acknowledge that his account for work was all settled and that he was paid in full. Affiant further swears that this was since plaintiff has ceased to work for him altogether, as was disclosed by the trial of this cause; that said facts are true, but were not produced on trial because he did not know of said witness having been present until since this trial, he incidentally in conversation with said witness found out the same; that the affidavit of said witness is not here produced because said witness is confined at home by sickness, and affiant has not been able since ascertaining this fact to get an officer to go to his house and swear him to the same. And further

deponent says that these facts were not proven on trial, because of his inability to procure witness for reasons stated. That plaintiff swore on trial that he worked for affiant to the amount of more than eight hundred dollars of which he had received but two hundred and thirty-five.

Affiant used all due diligence to procure testimony before trial, and this application for a new hearing is not made to annoy plaintiff, but that affiant may have justice done him in the premises; and further saith not.

Subscribed and sworn to before
me this 10th day of April, 1867,

Luke H. Hite,



Notary Public.

Henry Koester.

Be it remembered that on the 10th day of April, 1867, the following affidavit was filed to-wit:

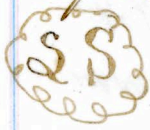
State of Illinois, }
County of St. Clair, }
City of East St. Louis. }

Henry Casley vs. Henry Koester.

Frederick Ludin of lawful age being duly sworn deposes and says: I reside in East St. Louis and have resided here and in the vicinity for four years last past; that he is acquainted with Henry Cushing, plaintiff, and Henry Koester, defendant, in this suit; that he was in defendant's shop sometime late in October, 1865, having some work done, when he saw def^t. pay plaintiff some money; he does not know how

much, but saw one \$10 bill and some more, and defendant said "now is that right," plaintiff said "yes, this settles all of our work and I won't work any more by piece work." Plaintiff then called affiant and others across the street to Peter Baumanns to take something to drink, and said "Koester has paid me all, come take something." He stated that Koester had paid him, and that as he had now settled he would work no more on the same terms. He further swears that he has since the trial of this cause in the Circuit Court he has for the first time informed the defendant that he could prove these facts by him. And further this deponent saith not.

Subscribed and sworn to }
 before me this 10th day of April, 1864, } Frederick Ludin.
 Luke H. White, M.D. }



Be it remembered that on the 10th day of April, 1864,
 State of Illinois. } the following affidavit was filed, to-wit:
 County of St. Clair. }
 Henry Kusling }
 vs. }
 Henry Koester. }

Mr. Willard of lawful age, duly sworn, says: I reside in East St. Louis, am acquainted with the parties to this suit. About one year ago I saw Koester pay Kusling some money and ask him if that was right, Kusling said it was and expressed himself satisfied. This was about the time Kusling quit work for Koester, and further deponent saith not. Mr. Willard,

Sworn to and subscribed before me this 11th day of April, 1868.

Henry A. Kircher, Clerk.

by Fred. C. Scheel, Dy.

Be it remembered that on the 28th day of September, 1866,
the following Transcript was filed, to-wit:

Henry Kessler,

vs.

Henry Kessler

Assumpsit.

Transcript of the Doct. of Wm. G. Kase, Judge
of the City Court of East St. Louis, in the
above entitled cause.

June 1st A.D. 1866. — Precept filed by J. B. Underwood, plaintiff's
attorney — Summons issued and delivered to Marshal County to
serve — returnable on the third Monday, being the 11th day of June,

A.D. 1866. — June 11th, case continued until the 13th day of
June, at 2 o'clock p. m., — June 13th, Court in session —
parties ready for trial — plaintiff demurs to defendant's second
plea, and traverses the others; demurres sustained by the
Court. After hearing the evidence the Court renders
judgment against the defendant and in favor of the
plaintiff, for the sum of Seventy-one dollars and costs
of suit, taxed at \$11.00, June 18th Appeal Bond filed.

State of Illinois,

St. Clair County,

I, Wm. G. Kase, certify that the foregoing is a
true copy of the books and my office.

In witness whereof I have hereunto set my hand and
caused the seal of said Court to be affixed, this 18th day of
June, A.D. 1866.

Wm. G. Kase, City Judge.



Transcript of the Docket of the City Court of West
St. Louis.

Henry Essling,)
vs.) June 1st A. D. 1866,
Henry Koester.) Precipie filed by J. B. Underwood,
Attorney for Plaintiff. Summon
issued and delivered to Marshal County to execute,
returnable on the third Monday of the term, being the 11th
day of June, A. D. 1866. June 11th, 1866, the case
continued until the 13th day of June at 2 o'clock, p. m.
June 13th, 1866, Court in session; parties call for
trial; plaintiff demurs to the defendants several pleas
and traverses the others and demurs to the second plea.
Demurrer sustained by the Court. After hearing the
evidence, the Court rendered judgment in favor of
plaintiff and against the defendant for the sum of Seventy-one
dollars and costs of suit, assessed at \$10.50

June 18th A. D. 1866, Appeal Bond, with
Henry Schell a security.

Approved June 18th, 1866.

Wm. G. Kase, City Judge,

I, Wm. G. Kase, do certify that the foregoing is a true copy
of the books and files of my office.

In witness whereof I have hereunto set my hand and
affixed the seal of Court, this 14th day of September, 1866.

William G. Kase,

City Judge.



State of Illinois, }
 County of St. Clair, }^{ss.} At a regular term of the Circuit Court
 within and for the County of St. Clair and State of Illinois,
 begun and held at the Court House in the City of Belleville on
 Monday, the eighteenth day of March in the year of our Lord
 One thousand eight hundred and sixty-seven, it being the
 third Monday of March in the year of our Lord One thousand
 eight hundred and sixty-seven, according to the act of the
 General Assembly, by the Honorable Joseph Gillespie, Judge
 of the Twenty-fourth Judicial Circuit of the State of
 Illinois, of which the said County of St. Clair forms a part,
 the following proceedings were had, to-wit:

Henry Essinger, }
 vs. } Appeal.
 Henry Hoester, appt }

On the second Tuesday of the term
 come the parties by their attorneys respectively, and both
 parties being ready for trial the Court orders that a jury be
 called, and twelve good and lawful men, to-wit, &c., are chosen
 and sworn according to law. After hearing the evidence and
 arguments of counsel the jury retire to consider upon their
 verdict, and when they return into Court, they publish the
 following verdict: "We, the jury, find for the plaintiff, and
 assess his damages at \$300.00." Thereupon the defendant
 moves the Court for a new trial. On the fourth Monday
 the Court overrules the motion for new trial in this
 cause, which ruling of the Court is at the time excepted
 to by defendant's counsel. It is therefore considered by the

Court that the plaintiff recover of the said defendant, the said sum of \$300.00, his damages, and also his proper costs to be taxed and execution is awarded therefor. And now the defendant prays an appeal to the Supreme Court, which is allowed upon the defendant's filing a bond in the penal sum of \$500.00, and also a bill of exceptions within thirty days. The security on the bond to be approved by the clerk and this cause to be heard by the Supreme Court at Springfield by consent of parties.

Be it remembered that on the ~~26~~²⁷ day of April, 1867, the following bill of exceptions was filed, to-wit:

State of Illinois,	} In the Circuit Court of St. Clair County,
St. Clair County,	
Henry Esslinger,	} To March Term, A.D. 1867.
vs.	
Henry Kaester,	
	} Bill of Exceptions.

Be it remembered that on the trial of this cause at the March term, A.D. 1867, of the said Circuit Court, the said plaintiff, to maintain the issue on his part, gave in evidence to the jury by introducing L. H. Drum, who swore he knew plaintiff had worked for defendant at wagon-making about two months; he was worth \$3.50 or \$4. per day at the time he worked which was in the fall of 1864. Plaintiff had worked for awitness about 12 months; he, witness, had paid him about \$3 per day. Peter de Kayser swore; Don't know of plaintiff working

for defendant; wagon-makers' wages in 1864 & 5 were \$3.50 to \$4. per day. Witness worked at that time by the piece. Plaintiff told him he worked part of the time by the day and part of the time by the piece. Plaintiff is as good a workman as there is in the State. Thos. B. Williams sworn:

Don't know of plaintiff's working for defendant; wages for good wagon-makers at that time were \$3.80 per day; worked at the same bench with the plaintiff for Tansey for the last four or five months. Plaintiff worked for Koester sometime in 1865, but can't speak certainly about the time it was after July, 1865.

August Rohr sworn. Plaintiff worked for defendant from the fall of 1864, about one year; then he went away and staid six weeks or two months and witness went to St. Louis and staid some months, when he returned plaintiff was again at work for defendant. Thinks he worked about two years for defendant. Defendant said he worked part of the time by the piece and part of the time for seventeen dollars per week.

Anton J. Cramer; Witness is a wagon-maker. Plaintiff worked for defendant; commenced in the fall of 1864, worked two months and then left for six or seven weeks and worked in flouring mill. He ^{then} returned and worked for defendant until the Spring of 1866, in March or April. He was a middle class workman, worth from \$3 to \$3.50 per day. He worked early and late. Witness asked defendant how much he paid him (it was in 1865), he answered he did not know, as it

was by the piece. Defendant said he was paying St. Louis prices, and that plaintiff made 4, 5 & 6 dollars a day.

Joseph Chrlacher: Is a blacksmith. Plaintiff worked for defendant in the fall of 1864 a while, then came to work for witness in the mill-yard in East St. Louis, worked six or seven weeks, and then returned to defendant to work. Don't know how much he worked for defendant.

H. W. Haskell. Is a carpenter, boarded at Peter Bauman's for two years with plaintiff; know he worked for defendant from fall of 1864 to spring of 1866. Don't know how much he worked in all.

Henry Esslinger, the Plaintiff, swears: Commenced work for Henry Kaester, defendant, on September 13th, 1864, worked for him about two months, then left and went to work at the mill-yard seven or eight weeks, then returned and worked by the piece for defendant until September, 1865; when my work amounted to \$889. Then commenced to work for defendant at \$17 per week and worked steadily until April, 1866. Defendant has paid me for all this work by the piece, as well as by the day only \$235. Defendant took my book in which I kept account of my work, and tore it up. I said I could not make my board at the piece work because defendant would not pay me.

And the said defendant, to maintain the said issue on his part, gave in evidence to the jury by Henry Goertner, who swore that in September, 1865, plaintiff came into witness' barber-shop in East St. Louis, and said he was going to quit work for defendant; that

he had worked up to that time by the piece and did not more than make his board." Witness then went and told defendant, when defendant said: "Tell him that if he wants to work I will give him \$9 a week and board him, or \$12 a week without board." Witness went and told plaintiff, and immediately after he saw him at work for defendant.

William Nalley sworn: That some time in the fall and winter of 1865, plaintiff worked in my mill-yard, I think it was about three months.

Chas. J. Young sworn: He worked for defendant during the time plaintiff was at work for him. Plaintiff is a very slow workman, not worth more than \$1.50 per day. Don't think he could make more than 50 cts per day working at piece work; he also did bad work. Defendant nearly always paid us at the end of each week and never delayed longer than two weeks. I have seen him pay plaintiff a great many times, almost every week; know that he did pay plaintiff in full.

John Tier. Works for defendant at present; commenced work for him in the middle of December, 1865. Plaintiff was there at that time also working for def't. and continued to work until the week after Easter in April, 1866, when he quit. I saw defendant pay plaintiff every week for six months. Defendant always paid us up at the end of each week.

Herman Koester: Is a son of defendant; Plaintiff worked for defendant from September, 1864, to August, 1865, by the piece, excepting about two

months, when he was away working in the mill-yard. In August or September, 1865, he said he could not make his board by the piece; when defendant told him he would pay him \$8 a week and board or \$12 a week without board. Plaintiff then went to work and worked twenty weeks or until April, 1866, at \$12 per week, when he quit finally; witness saw defendant pay plaintiff many times for his piece work nearly every week; sometimes \$12, \$15 and \$20 at a time, and by the week; he was present with one or two exceptions every week when he worked by the week and saw defendant pay plaintiff in full for each week. Plaintiff was not a good workman and worked very slow.

Henry Koester, defendant, swore Henry Essling, plaintiff, commenced work for me the 13th of September, 1864, and worked one week for which I paid him \$12 in full at the time; he then went to work in the mill-yard and did not come to work for me until January, 1865, when he commenced and worked by the piece at wagon-making until September, 1865, when he said he did not get enough. I then told him I would pay \$9 a week and board or \$12 a week without board. He said he would board himself and work for \$12 a week. His piece work had amounted to \$410 and he had been paid all but \$50, which I then paid him and he commenced to work by the week, and continued until the middle of April, 1866, when he quit and never worked for me afterward. I paid him for the

week-work nearly every time at the end of the week \$12, but a few times it went two weeks, when I paid him \$24. I have paid every cent that I owe him, either for piece work or work by the week. He was a very slow workman and could not earn as much as an ordinary workman. He spoiled some custom work for me that I had to sell at reduced price to get of.

Which was all the evidence offered by either of the said parties, and thereupon the said jury gave their verdict against the defendant. Whereupon the counsel filed the following motion for a new trial:

" Henry Essling, }
 vs. } Motion for new trial.
 Henry Koester }

Comes now the said defendant by Winkelmann and Hite, and moves the court for a new trial in this cause on the ground of newly discovered evidence and for other causes."

Winkelmann & Hite
 Dft's Attorneys.

And in support of such motion said counsel offered the following affidavits:

State of Illinois, }
 County of St. Clair. } ss.

Henry Essling vs. Henry Koester.

Henry Koester, defendant, in the above entitled suit being duly sworn deposes and says that

since the trial of the above cause at the present term of this court he has for the first time ascertained that he can prove by M. Millard, Esq., of East St. Louis, that about one year ago, or in April, 1866, he saw plaintiff receive some money from defendant and heard plaintiff say that it was now all right, and that he was now satisfied, or words to that effect. This was a few days after plaintiff quit work for defendant for the last time; this testimony not given on the last trial for the reason that defendant was not aware that he could so prove. He further swears that these facts are true. And affiant further swears that since the trial of this cause he was for the first time informed and made acquainted with the fact that he could prove by Frederick Ludin of East St. Louis that sometime late in October, 1865, he, Ludin, was in defendant's shop in East St. Louis, having some work done when he saw defendant pay plaintiff some money; he does not know how much, he saw one \$10 bill and some more, and defendant said "now is this right," plaintiff said "yes, this settles up all our piece work, and I won't work by the piece any more." Plaintiff then called said Ludin and others across the street to take a drink at Peter Baumann's, remarking that Hoester had paid him up and he would not work any more on the same terms. Affiant further states that this was after the time stated in the evidence, that plaintiff had quit work for him, and that said facts which he can so prove are strictly true, and that it was impossible

for him to have subpoenaed said Ludin on the trial, as he found out since this trial he was present. Affiant remembered some one was present, but could not remember who, and affiant further swears that since the trial of this cause he has found out that he can prove by one Henry Brindle, who lives near the Village of Cokokia in the County and State before mentioned, that the said Brindle was present when the defendant settled with plaintiff, about one year ago, and heard plaintiff acknowledge that his account for work was all settled, and that he was paid in full. Affiant further swears that this was since plaintiff has ceased to work for him altogether as was disclosed by the trial of this cause; that said facts are true, but were not produced on trial because he did not know of said witness having been present, until since this trial he incidentally, in conversation with said witness found out the same; that the affidavit of said witness is not here produced, because said witness is confined at home by sickness, and affiant has not been able, since ascertaining this fact, to get an officer to go to his home and swear him to the same. And further affiant says these were not produced on trial because of his inability to procure witnesses for reasons stated. That plaintiff swore on trial that he worked for affiant to the amount of more than eight hundred dollars, of which he had never received but two hundred and thirty-five. Affiant used all due diligence to procure testimony before trial and this application for a new hearing is not made to annoy plaintiff, but

that affiant may have justice done him in the premises;
and further saith not. Henry Koester.

Subscribed and sworn to before
me this 10th day of April, 1867.
Lukett H. Hite
Notary Public.

Seal,
[unclear]

State of Illinois, }
County of St. Clair, }
Henry Essling, }
vs }
Henry Koester. }

Mr. Millard of lawful age, duly sworn says: I reside in East St. Louis; am acquainted with the parties to this suit. About one year ago, I saw Koester pay Essling some money, and ask him if that was right. Essling said it was, and expressed himself satisfied. This was about the time Essling quit work for Koester, and further deponent saith not.


Mr. Millard,

Sworn to and subscribed to before
me this 11th day of April, 1867.
Henry S. Kircher, Clk.,
by Fred C. Schell, Dy.

State of Illinois,
County of St. Clair, City of East St. Louis,
Henry Essling vs. Henry Koester.


Frederick Fordin of lawful age
being duly sworn deposes and says: I reside in East

St. Louis and have resided here and in the vicinity for four years last past; that he is acquainted with Henry Essling, plaintiff, and Henry Keester, defendant, in this suit, that he was in defendant's shop some time late in October, 1866, having some work done when he saw defendant pay plaintiff some money; he does not know how much, but saw one \$1.00 bill and some more, and defendant said "now is that right?" Plaintiff said "yes, this settles all of our work, and I won't work any more by piece work." Plaintiff then called affiant and others across the street to Peter Baumann's to take some drink, and said "Keester has paid me all, come and take something." He stated that Keester had paid him, and that as he had now settled he would work no more on the same terms. He further swears that he has since the trial of this cause in the Circuit Court, he has for the first time informed the defendant, and that he could prove these facts by him and further this deponent saith not.

Subscribed and sworn to before me this 10th day of April, 1867,
 Luke W. Hite, N. J.

But the Court overruled the said motion, and gave judgment upon the said verdict of the said jury, against the defendant, to which the said defendant then and there excepted; and inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the Court, and

made part of the record in said cause, and it is done
accordingly

J. Gillespie 

Judge 24th Jud. Cir. Ills.

This bill of exceptions to be signed *nunc pro tunc* and filed,
James M. Hay, Underwood & Davis, for Plaintiff,
Hite, Underwood & Keetling, for Deft.

Be it remembered that on the 26th day of April, 1867,
the following Appeal Bond was filed, to-wit:

Know all men by these presents that we Henry Keester
& Henry Schall, of the County of St. Clair, and State of
Illinois, are held and firmly bound unto Henry Kesslinger, his
heirs and assigns in the penal sum of Five hundred
dollars for the payment of, which well and truly to be made we
bind ourselves, our heirs, executors and administrators, jointly,
severally and firmly by these presents. Witness our hands
and seals this 25th day of April, 1867.

The condition of the above obligation is such that
whereas the said Henry Kesslinger did on the 26th of March, 1867,
in the Circuit Court of St. Clair County, Illinois, at its
March term then held recover a judgment against the
above bounded Henry Keester of the aforesaid County and
State, for the sum of three hundred dollars damages and costs
of suit; from which judgment of the said Circuit Court
the said Henry Keester has prayed for and obtained an appeal
to the Supreme Court of this State. Now if the said
Henry Keester shall duly prosecute his said appeal with
effect and shall moreover pay the amount of the
judgment costs, interests and damages rendered and to be

rendered against him in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Approved April 26th A.D. 1867

Henry Schall
Henry A. Kircher, Clk } Henry Koester



State of Illinois

St. Clair County

ss. I, Henry A. Kircher Clerk of the Circuit

Court in and for said County do hereby certify the foregoing to be a true and correct copy of the Declaration, Pleas of General issue, payment & setoff, Affidavits of H. Koester, F. Sudio & M. Willard, Transcript from City Court, Bill of Exceptions and Appeal Bond and orders of Court as the same appear of record and on file respectively in my office in the case of Henry Esslinger vs. Henry Koester.

In testimony whereof I have hereunto set my hand & affixed the seal of said office at Belleville Illinois this Eighth day of May A.D. 1867.

Henry Kircher
Clerk of the Circuit Court

Henry Koester

vs.

Henry Esslinger

} appeal from St Clair

And the said appellant comes and says that in the record and proceedings aforesaid there is manifest error in this to wit the court

below, erred in overruling his motion
for a new trial, wherefore he prays
that said judgment may be reversed
to,

J. B. Underwood
Atty for appellant.

Ground in Error
J. B. Underwood
Atty for appellee

Kroster

185

Epstein

Lawrence

It was proved in this case that the plaintiff worked for the defendant in his raggen shop from September 1864 to April 1866, with the exception of about three months. The only controversy was whether he had been paid. The parties were both sworn. The plaintiff testified he had been paid in all only \$235. The defendant testified he had paid ^{him} in full. The jury gave the plaintiff a verdict for \$300, which was far too small if they believed the testimony of the plaintiff. But the testimony of the defendant is strongly corroborated by that of other witnesses. Other workmen in the same shop swore that defendant always paid his men generally very well, and never delayed longer than two weeks, and that they had seen the plaintiff paid nearly every week. These statements, considered in connection with the

great improbability that the
plaintiff would continue at work
until, according to his own statement,
his wages unpaid amounted to nearly
a thousand dollars, while the other
workmen were paid in full every
week or ~~the~~ fortnight, compel us
to regard the verdict as clearly
against the evidence. We think
there should be another trial.

Remand remanded

10

W. W. W.
43
Epling

W. W. W. (faint)

W. W. W. (faint)

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Illinois Supreme Court, --- First Grand Division.

HENRY KOESTER
vs.
HENRY ESSLINGER. } Appeal from St. Clair.

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11 Esslinger for \$300. Appeal was allowed Koester to the Supreme Court upon his giving bond &c.
21 which was done. The city judge of East St. Louis has jurisdiction in assumpsit to the extent of \$500, May require written pleadings. Appeals to circuit court are allowed as in cases before other justices of the peace. Private laws of 1865, page 353, sec. 4, 9.

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8 3 issue. Payment, &c. Demurrer was sustained to 2d plea and others traversed.

20 In circuit court the case was tried by a jury. Motion for a new trial overruled and excepted to.
16 All the evidence is as follows. Esslinger proved by:

11 L. H. Dunn that plttf worked for deft. at wagon making two months, worth \$3.50 to \$4.00 per day, in the fall of 1864. Plttf. had worked for witness about twelve months, at about \$3.00 per day. Peter D'Kayser, swore wagon-maker's wages in 1864-5 were \$3.50 to \$4.00 per day. That witness worked at that time by the piece. Plttf. told witness he worked part of the time by the day and
12 part of the time by the piece. Plttf. is as good a workman as there is in the State. Thomas B. Williams swore that wages for good wagon makers were at that time \$3.80 per day. Worked at same bench with plttf., for Tansy, for last 4 or 5 months. August Rohr swore plttf. worked for deft. from fall of 1864 about one year; then he went away and staid 6 weeks or two months, and resumed work. Thinks plttf. worked about two years for deft. Deft. said he worked part of the time by the piece, and part of the time for \$17 per week. Anton J. Cramer swore plttf. commenced work for deft. in fall of 1864; worked two months and then left for six or seven weeks and worked in flouring mill. He returned and worked for deft. until the spring of 1866, in March or April. He was a middle class workman worth \$3 to \$3.50 per day. He worked early and late. In fall of 1865 deft. said
13 plttf. worked by the piece. Deft. was paying St. Louis prices and plttf. made \$4, \$5, and \$6 a day. Joseph Ehrlacher swore plttf. came to work for witness in mill yard six or seven weeks and then returned to deft. H. W. Haskell swore he boarded at Bauman's with plttf two years. Knows plttf. worked for deft. from fall of 1864 to spring of 1866. Henry Esslinger, plttf., swore that he commenced work for deft. on the 13th of September, 1864, and worked about two months. Then left and worked at mill yard 7 or 8 weeks. Then returned and worked by the piece for deft. until Sept. 1865, when his work amounted to \$879. Then worked for deft. at \$17 per week, until April, 1866. Deft. has only paid on work by day and by the piece \$235. Deft. took plttf's book in which he kept his account, and tore it up. Plttf. has said he could not make his board at piece work because deft. did not pay him.

14 *Defts. Evidence:*—Henry Gartner swore that in Sept., 1865, plttf. said in witness' barber shop, he was going to work for deft.; that he had worked up to that time by the piece and did no more than make his board. Witness saw deft., who said: "tell him that if he wants to work I will give him \$9 a week, and board him; or \$12 a week without board." Witness told plttf., and immediately after saw him at work for deft. William Notley swore that sometime in fall or winter of 1865 plttf worked in his mill-yard about three months. Charles J. Young swore that he worked for deft. with plttf. Plttf. is a very slow workman, not worth more than \$1.50 per day. Den't think he could earn more than fifty cents a day at piece-work. He always did bad work. Deft. nearly always paid us at the end of each week, and never delayed longer than two weeks. Have seen deft. pay plttf. a great many times—almost every week. Knows that he did pay plttf. in full. John Fier swore he works for deft. at present. Commenced work in December, 1865, while plttf. was there. Plttf. quit after Easter, in April, 1866. Witness saw deft. pay plttf. every week for six months. Deft. always paid us up at the end of each week. Herman Koester, a son of deft., swore that plttf. worked for deft. from September, 1864, to August, 1865, by the piece, except two months, when away at mill-yard.
15 In August or September, 1865, he said he could not make his board by the piece. Deft then told him he would pay him \$9 a week and board, or \$12 a week without board. Plttf. then went to work and continued twenty weeks, until April, 1866, at \$12 per week, when he quit finally. Witness saw deft pay plttf. many times for his piece work, nearly every week; sometimes \$12, \$15, and \$20 at a time, and by the week. Was present, with one or two exceptions, every week when he worked by the week, and saw deft. pay plttf. in full for each week. Plttf. not a good workman; worked very slow. Henry Koester, deft., swore that plttf. commenced work September 13, 1864, and worked one week, for which he was then paid in full \$12. He then worked at mill-yard, and did not again work for witness till January, 1865, when he said he did not get enough. He then agreed to work for \$12 a week and board himself. His piece-work had amounted to \$410, and he had been paid all but \$50 which witness then paid him. He thence worked by the week until the middle of April, 1866, when he quit, and has not worked for witness since. Witness paid him for the week nearly every time at
16 the end of the week, \$12. But a few times it went two weeks, when witness paid him \$24. Witness has paid him in full every cent for piece work, and for work by the week, &c.

The motion for a new trial was among the other causes for newly discovered evidence. Koester filed an affidavit that after trial he for the first time ascertained that he could prove by M. Millard, Esq., of East St. Louis, that about one year ago he saw plttf. receive some money from deft., and heard plttf. say it was all right, and that he was now satisfied. This was a few days after plttf. quit work for deft. the last time. This testimony was not given at the last trial, for the reason that deft. was not aware that he could so prove. Also swears that said facts are true. Also that since said

- trial he was first aware that he could prove by Frederick Ludin, of East St. Louis, that in October, 1865, Ludin was in deft.'s shop in East St. Louis for work, when he saw deft. pay money to plttf, when plttf. said: "this settles up our piece work, and I won't work by the piece any more" They
- " 18 drank together across the street, and plttf. repeated the same in substance. Affiant knew some one was present, but did not remember who, and only ascertained since the trial. Affiant can also prove by one Henry Brindle, of said county, that he was present at said settlement a year ago, and heard plttf. acknowledge that his account for work was paid in full, which is true, and affiant only learned incidentally, since the trial, of the presence of said witness. That the affidavit of said witness is not produced, because he is confined at home by sickness. That affiant used all due diligence to procure testimony before trial, and this application is made that affiant may have justice done him in the
- " 19 premises.
- " 20 Mr. Millard's affidavit is as stated in Koester's.
- " 20 F. Ludin's affidavit as stated in Koester's.

The court overruled the motion for a new trial, to which Koester at the time excepted. Koester now assigns for error that the Court below erred in overruling his motion for a new trial.

BRIEF.

1. Payment may be given in evidence under the general issue. *Crews vs. Bleakely*, 16 Ill. R., 21. The evidence of payment was overwhelmingly in favor of deft. Koester swears he paid plttf. in full. Charles J. Young swears to facts which show the same thing. So does John Fier and Herman Koester. All the hands in the shop swear that Koester paid his employees generally at the end of every week. It is unreasonable to infer that plttf.'s wages only were withheld. His own testimony, if believed by the jury, would have required a verdict in his favor of over \$1000!! He was also contradicted as to the price he was to get by the week, after September, 1865, by Koester, by Henry Gartner, and Hermann Koester. There is no testimony or fact to corroborate the non-payment.

Where the verdict is manifestly against the evidence or the weight of evidence, a new trial should be granted. *1 Graham and W. on N. T.*, 362. *Scott vs. Plumb*, 2 Gil. R. 595. *Keag vs. Hite*, 12 Ill. R., 99. *Schwab vs. Gingerich*, 13 Id., 698-9. *Goodner vs. Crooks*, 11 Id., 142. *Baker vs. Pritchett*, 16 Id., 66. *Clement vs. Bushway*, 25 Id., 200. *Henry vs. Eddy*, 34 Id., 514.

2. The affidavits of Koester and his witnesses are to an essential fact, the admission by Esslinger of a settlement and payment in full, conclusive in its nature. Koester swears that he used diligence to procure testimony before trial, and by accident discovered this new evidence since the trial; gives the name and residence of the witnesses, and swears the facts to which they will testify are true, and states the reason he could not know of their testimony till after the trial. He was entitled to a new trial on this ground. *1 Graham and W. on N. T.*, 462. *Selenker vs. Risley*, 3 Seam. R. 486.

b. The confession of the opposite party to a vital fact is not cumulative evidence. *Warren vs. Hope*, 6 Greenl. R., 479. *Gardner vs. Mitchell*, 6 Pick. R., 114. *Guyotte vs. Butts*, 4 Wend. R. 579.

WM. H. UNDERWOOD, Atty. for appellant

Henry Hoester
008

Henry Esslinger
Abstract & brief

Filed June 4th 1867
Book Johnston Ct. 23

SUPREME COURT.

HENRY KOESTER, Appellant, }
vs.
HENRY ESSLINGER, Appellee. }

APPELLEE'S BRIEF.

1. The weight of testimony is to be decided by a jury, and the Court will not disturb their verdict unless it is flagrantly erroneous. 1 Scam. 532.

The error must be so manifest that the Court can see at the first glance that the jury were instigated by malice or fraud.

As to the questions of fact, the law assumes that a jury is better qualified than a court, to arrive at a just conclusion, and therefore courts are very reluctant to overthrow a verdict.

In this case the evidence is conflicting in three particulars:

1. How long appellee labored.
2. How much he was to receive. And
3. Was he paid.

Appellant attempts to show appellee could not make a living by piece work, and that when working by the week he agreed to receive only \$12 per week; that he didn't work so long as he pretended, and that he had fully paid what he agreed to pay.

Appellant did not claim that he had paid more than *he contended* he contracted for. Now if the jury, having the witnesses before them, thought the contract was for *higher wages*, or that appellee *worked longer* than appellant admitted, they had the right to allow the payments *pro tanto*, and a verdict for the balance. Now, not only appellee, but August Rohr, swears that appellant was to pay \$17 per week.

The evidence shows that appellant was paying St. Louis prices, by which appellee made \$4, \$5 and \$6 per day, at piece work; and the weight of testimony shows appellee was a good average workman, and worked "early and late," and that appellee worked a longer time than allowed by appellant. Appellee swears to contract price, time of service, and admits the receipt of \$235, which the jury having the witnesses before them, thought more reasonable than appellant's theory; and the court, hearing all the testimony, refused to grant a new trial.

2. It is a point too firmly settled to need authorities, that newly discovered evidence, if cumulative, is no ground for new trial, and a verdict is not to be disturbed for such evidence.

Cumulative Evidence, "in law, is that tending to prove the same point, to which other evidence has been offered." Webster's (Unabridged) Dictionary. Lit. Cumulative, §3 a.

All the newly discovered testimony simply tends to prove payment.

If the newly discovered evidence be admissions of opposite party, motion for a new trial will not be granted. *Gayot v. Butts*, 4 Wend. 579.

JOSEPH B. UNDERWOOD & S. P. DAVIS,

Appellee's Attorneys.

Primo 4 Wm. 219.

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All the newly discovered testimony tends to prove that (Carrington) admitted. The Comptroller of the State (Carrington) has been offered. We do not think it proper to be distinguished for such evidence newly discovered evidence is inadmissible. In no other case.

2. The Court for the first time refused to read evidence. The court hearing all the testimony, refused to grant a new trial. The Court thought more reasonable than appellant's theory; and that of \$2350 which the jury having the witness before them to contract with. That of course, and again the fact he worked a longer time than showed by appellant. Appellee average workman, and worked week and half, and that appellant; and the weight of testimony shows appellee was a good driver, by which it appears that appellant was paying. St. Louis The evidence shows that appellant was paying. St. Louis Robert, swears that appellee was to pay \$12 per week.

Appellant did not claim that he had paid more than he received for the balance. Now, not only appellee but Appellee they had the right to allow the payments was made, and a few or two appellee would, longer than appellant admitted, unless he had them, thought the counting was for wages, was changed he contracted for. Now if the jury, having the whole case, appellant did not claim that he had paid more than he

⁴³
Henry Koester
vs.
Henry Splinger
Left Brief

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Filed June 4th 1869
Noah Johnson, Clerk

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HENRY KOESTER, Appellant.

SUPREME COURT.

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Mr. Millard's affidavit is as stated in Koester's.

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The court overruled the motion for a new trial, to which Koester at the time excepted. Koester now assigns for error that the Court below erred in overruling his motion for a new trial.

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The evidence of payment was overwhelmingly in favor of deft. Koester swears he paid plfff. in full. Charles J. Young swears to facts which show the same thing. So does John Fier and Herman Koester. All the hands in the shop swear that Koester paid his employees generally at the end of every week. It is unreasonable to infer that plfff.'s wages only were withheld. His own testimony, if believed by the jury, would have required a verdict in his favor of over \$1000!! He was also contradicted as to the price he was to get by the week, after September, 1865, by Koester, by Henry Gartner, and Hermann Koester. There is no testimony or fact to corroborate the non-payment.

Where the verdict is manifestly against the evidence or the weight of evidence, a new trial should be granted. *1 Graham and W. on N. T.*, 362. *Scott vs. Plumb*, 2 Gil. R. 595. *Keag vs. Hite*, 12 Ill. R. 99. *Schwab vs. Gingerich*, 13 Id., 698-9. *Goodner vs. Crooks*, 11 Id., 142. *Baker vs. Pritchett*, 16 Id., 66. *Clement vs. Bushway*, 25 Id., 200. *Henry vs. Eddy*, 34 Id., 514.

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WM. H. UNDERWOOD, Atty. for appellant

Henry Koester
vs
Henry Esslinger
Abstract & brief

Filed June 4th 1864
Book Johnson Clk

The object of this abstract is to give a brief and concise statement of the facts and circumstances of the case, and to show the grounds on which the plaintiff claims his right to the property in dispute. It is not intended to be a full and complete statement of the facts, but only a summary of the material facts, and of the points in dispute. It is intended to be a guide to the parties, and to the court, in the trial of the case.

1. The plaintiff, Henry Koester, claims the right to the property in dispute, on the ground that he is the owner thereof. He claims that he purchased the property from the defendant, Henry Esslinger, in the year 1858, and that he has since that time been in possession thereof. He claims that the defendant has no right to the property, and that he is entitled to the same. He claims that the defendant has no right to the property, and that he is entitled to the same. He claims that the defendant has no right to the property, and that he is entitled to the same.

ABSTRACT.

2. The defendant, Henry Esslinger, claims the right to the property in dispute, on the ground that he is the owner thereof. He claims that he purchased the property from the plaintiff, Henry Koester, in the year 1858, and that he has since that time been in possession thereof. He claims that the plaintiff has no right to the property, and that he is entitled to the same. He claims that the plaintiff has no right to the property, and that he is entitled to the same. He claims that the plaintiff has no right to the property, and that he is entitled to the same.

SUPREME COURT.

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HENRY ESSLINGER, Appellee. }

APPELLEE'S BRIEF.

1. The weight of testimony is to be decided by a jury, and the Court will not disturb their verdict unless it is flagrantly erroneous. 1 Scam. 532.

The error must be so manifest that the Court can see at the first glance that the jury were instigated by malice or fraud.

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In this case the evidence is conflicting in three particulars:

1. How long appellee labored.
2. How much he was to receive. And
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Appellant attempts to show appellee could not make a living by piece work, and that when working by the week he agreed to receive only \$12 per week; that he did not work so long as he pretended, and that he had fully paid what he agreed to pay.

Appellant did not claim that he had paid more than *he contended* he contracted for. Now if the jury, having the witnesses before them, thought the contract was for *higher wages*, or that appellee *worked longer* than appellant admitted, they had the right to allow the payments *pro tanto*, and a verdict for the balance. Now, not only appellee, but August Rohr, swears that appellant was to pay \$17 per week.

The evidence shows that appellant was paying St. Louis prices, by which appellee made \$4, \$5 and \$6 per day, at piece work; and the weight of testimony shows appellee was a good average workman, and worked "early and late," and that appellee worked a longer time than allowed by appellant. Appellee swears to contract price, time of service, and admits the receipt of \$235, which the jury having the witnesses before them, thought more reasonable than appellant's theory; and the court, hearing all the testimony, refused to grant a new trial.

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All the newly discovered testimony simply tends to prove payment.

If the newly discovered evidence be admissions of opposite party, motion for a new trial will not be granted. Gayot v. Butts, 4 Wend. 579.

JOSEPH B. UNDERWOOD & S. P. DAVIS,

Appellee's Attorneys.

Henry Koester
vs.
Henry Esslinger

Left Brief

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Folio June 4th 1867
Brook Johnson Clk

HENRY KOESTER, Appellant,
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HENRY ESSLINGER, Appellee.

SUPREME COURT

JOSEPH B. UNDERWOOD & S. F. DYER

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fact, or that appellee worked under that appellant admitted,
reasons before them, thought the contract was for wages, not
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