

No. 13197

Supreme Court of Illinois

Howell

vs.

Howell

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 296.

Howell
vs
Howell

13897
296

STATE OF ILLINOIS, } SS.

{ IN THE SUPREME COURT AT OTTAWA,
{ OF THE APRIL TERM, A. D. 1861.

DANIEL HOWELL, }
 ^{VS} } *Appeal from Henry.*
LEWIS W. HOWELL. }

ABSTRACT OF THE RECORD.

- Page of Record 1. Pleas before the Hon. JOHN H HOWE, Judge of the Sixth Judicial Circuit in Illinois, at the regular term, begun and held at the Court-house in Cambridge, on the second Monday of October, A. D. 1860, it being the eighth day of the said month. Present, Hon. John H. Howe, *Judge*, Thomas Wiley, Jr. *Clerk*, P. H. Sniff, *Sheriff*.
Application of Daniel Howell for judgment against Lewis W. Howell, on the award of arbitrators chosen, &c.
- Page 2. Notice of the application at the October Term, A. D. 1860 of said Court, for judgment on said award.
- Page 3. Affidavit of George A. Brown, that he delivered a true copy of the said notice to Lewis W. Howell, on the sixth day of October, A. D. 1860.
- Page 3. Application of the plaintiff made October 25th, for leave to file a copy of the submission, the original said to have been lost. Leave granted.
- Page 4. Application made October 29th, 1860, for leave to withdraw said copy and file original submission.
- Page 5. Leave granted, and original filed.
Motion by said plaintiff made October 31st, 1860, at same term, for judgment on the award. Motion sustained
- Page 6. and judgment entered, and defendant ordered to comply with said award.
- Defendant, Lewis W. Howell, moves the Court to set aside said judgment. Motion overruled, and defendant excepts.
- Defendant, Lewis W. Howell, prays and obtains leave to appeal, and leave to file bill of exceptions and appeal bond, in the sum of one hundred dollars within thirty days.

Page 7. Defendant, Lewis W. Howell, on the 15th day of November, 1860, files appeal bond in the sum of one hundred dollars.

Appeal bond.

Page 8. Continuation of appeal bond and approval by Clerk and Court.

On the third day of December, 1860, defendant files bill of exceptions.

Page 9. Defendant's bill of exceptions.

The bill of exceptions contains the following points: That on the 22d day of October, 1860, it being the fourteenth day of said October Term, said David Howell, to sustain the issues on his part &c., filed in said Court, the award of the arbitrators, in the words and figures following:

Award of Arbitrators.

STATE OF ILLINOIS, } SCT.
HENRY COUNTY.

The undersigned, arbitrators in the cause of Lewis W. Howell, vs Daniel Howell, having been duly sworn, and having as required by their oaths determined the cause submitted, do hereby award and decide herein as follows: The said Daniel Howell is to deed to the said Lewis W. Howell, fifty acres of land off of the east side of the north east quarter of section No. thirty (30) Township fifteen, Range 2 east, and the said Lewis W. Howell is to deed to the said Daniel Howell, the west half of the east half of the south west quarter of section No. thirty (30) Township No. fifteen (15) Range two (2) east. Each of the parties are to make and execute a deed to the other party to the above named lands, on or before the first day of June, 1860, and we having delivered to each party a copy hereof, ask to be discharged herein, with our costs and witnesses. Each party is hereby required to pay half the costs.

Given under our hands and seals this 17th day of April, 1860.

MICHAEL TAYLOR,	SEAL.
PHILIP KAPPLE.	SEAL.
JOHN PIATT.	SEAL.

Page 10. That the said award was endorsed and filed in the words and figures following: Filed Oct. 22, '60. T. Wiley, Jr. *Clerk*.

That on the 25th day of October, 1860, it being the 17th day of the said Term, said plaintiff, Daniel Howell, prayed and obtained leave to file copy of the submission, the original supposed to be lost.

That on the 29th day of October aforesaid, said plaintiff prayed and obtained leave to file the original submission.

Page 11. The submission of the parties to the award of John Piatt, Michael Taylor and Phillip Kapple, for the purpose settling all controversies, as well the exchange or sale of lands, as of personalty, with the agreement that the award be made a rule of Circuit Court. Submission is dated April 12, 1860, in presence of James M. Barrett, witness.

Page 12. Said Submission is endorsed and filed in the words and figures following: Filed Oct. 29, '60. T. Wiley, Jr. *Clerk*.

That on the same 29th day of October, the defendant, Lewis W. Howell filed his motion in writing and verified by affidavit to correct a mistake in said award.

Page 13. The motion alleges that the arbitrators have awarded to the said Lewis W. Howell, fifty acres off the east side of the north east quarter of section 30 in township 15 north range 2 east, in Henry County, through mistake and evident miscalculation. That the evidence of the witnesses examined by the said arbitrators

was that Lewis W. Howell was to have 60 acres off the east side of the *west half* of the said north east quarter of section thirty, in said township, and not fifty acres off the east side of said quarter section, as written in the award.

Page 14. It also prays that the witnesses who testified before the said arbitrators, may be examined by the Court, and that the Court will correct said mistake in said award.

The motion also shows that George L. Howell, one of the witnesses, (residing with the defendant,) before the arbitrators, was too ill to attend Court; that the defendant could not so well prove the fact in the motion by any other witness, and prayed a continuance.

Page 15. The said motion was endorsed and ordered filed as follows: Filed Oct. 29, '60. T. Wiley, Jr. *Clerk*.

The Court overruled said motion to correct said mistake and to continue, and decided that the defendant might introduce the testimony of the arbitrators to prove any mistake or miscalculation, to which ruling the defendant then and there excepted. The defendant allowed to file further affidavits in support of the motion to correct mistake.

Page 16. That on the thirty-first day of October aforesaid, the plaintiff moved the Court for judgment. On the second day of November, at said term of said Court, the defendant by leave of the Court, filed his exceptions to said award and motion to correct mistake, which was verified by affidavit, and in the words and figures set forth.

The exceptions and motion to correct, may be resolved as follows:

The defendant avers that he has many just and legal exceptions to said award.

That the arbitrators have awarded to him fifty acres off the east side of the north east quarter of section thirty in township fifteen north range 2 east,

Page 17. through evident mistake and miscalculation of the testimony.

That the paper attached and marked "Exhibit A." is a just and true minute of the testimony heard by the arbitrators, and is the identical minute of the testimony taken and kept by Phillip Kapple, one of the arbitrators, at the time of the hearing before them.

That all the testimony heard by said arbitrators was to the effect that the defendant was to have sixty acres off the east side of the *west half* of the north east quarter of section 30 aforesaid.

That the last named tract is worth much more than the first, and is the land which the defendant, Lewis W. Howell was to have by the bargain between the parties.

The motion prays the Court to hear the testimony of the witnesses, and to correct and amend the said mistake, if the same appear.

Page 18. Affidavit of Lewis W. Howell, to the truths of the statement in the notice, also that the paper marked "Exhibit A." is the identical minutes kept by Phillip Kapple, one of the said arbitrators, at the time of the hearing before them.

Copy of "Exhibit A." containing the testimony of the witnesses before the arbitrators, taken by one of them

Witness, Stephen Barrett, knows nothing.

Page 19. Witness, Levi Pillsbury, heard Daniel Howell say he was to give sixty acres of the west side. He agreed to give sixty for forty acres.

Witness, George Howell, heard Daniel Howell say he was to take 20 of the west side. The east eighty is good land. The west is worth the most.

Witness, Mary Howell, heard Daniel Howell say he was to give sixty acres for forty. He was to have 20 acres of the west side. The contract was made in 1856.

Witness, James M. Barrett, as to payment of taxes. Lewis W. Howell quit paying taxes on the 60 acres after the dispute.

Witness, George Howell, says Daniel Howell was to have 20 acres, that Lewis W. Howell was to have 60.

Page 20. Francis Howell says nothing. Some seven lines of the testimony are obliterated.

On the third day of November, at said term of said Court, the defendant, on the hearing of said cause, prayed leave to introduce the witnesses to sustain said motion, and the Court decided that the defendant might introduce the arbitrators who made the award, or their certificates in writing.

Page 21. The defendant declining so to do, the Court overruled said motion, to which ruling the defendant then and there excepted.

The Court thereupon gave judgment on the said award for the plaintiff. To which judgment the defendant then and there excepted, and thereupon moved to set aside said judgment, which motion was in writing.

Motion to set aside judgment for reasons assigned.

Page 22. 1st. Because said award was filed at this term, and the Court ought not to have rendered judgment until next term.

2d. Because the defendant offered to prove that the said arbitrators had made evident mistake and miscalculation in the said award, and applied to the Court for leave to do so, and the Court erroneously refused to hear the same.

3d. Because the defendant, Lewis W. Howell took legal exception to the said award, and the Court ought to have sustained the same.

4th. Because the said evident mistake and miscalculation would have warranted the Court in disregarding the verdict of a Jury, and the Court ought to have amended the same before rendering judgment.

5th. Because the said judgment was in all respects erroneous and void.

And thereupon the Court overruled said motion, to which ruling the defendant then and there excepted.

Page 23. Signature of Judge.

Certificate, signature and seal of the Clerk.

ASSIGNMENT OF ERRORS, TO WIT:

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

(3) The Circuit Court improperly overruled the defendant's motion for a continuance.

- (4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.
- (5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.
- (6) Because the submission to the said arbitrators and the award, they ^{were} were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.
- (7) The Court erred in overruling the defendant's motion for a new trial.

H. W. Howell for appellant

DANIEL HOWELL,

LEWIS W. HOWELL

Appel from Henry.

Case of H. W. Howell for Appellant

Statement of the Case.

Part of the Record.

The record contains the motion made by Daniel Howell, for judgment on the award of arbitrators, against Lewis W. Howell.

The motion was made on the 5th day of October, A. D. 1869, and called him into the October Term, A. D. 1869 of the Circuit Court, the defendant would argue for judgment on the award. The October Term was held on the second Monday, the 5th day of October, 1869.

The submission was in writing and signed by the parties in presence of an arbitrator, and was for the purpose of settling disputes about the sale and exchange of land.

The award was made on the 5th day of October, A. D. 1869, and was for the purpose of settling disputes about the sale and exchange of land.

The award was made on the 5th day of October, A. D. 1869, and was for the purpose of settling disputes about the sale and exchange of land.

The award was made on the 5th day of October, A. D. 1869, and was for the purpose of settling disputes about the sale and exchange of land.

The award was made on the 5th day of October, A. D. 1869, and was for the purpose of settling disputes about the sale and exchange of land.

The award was made on the 5th day of October, A. D. 1869, and was for the purpose of settling disputes about the sale and exchange of land.

IN THE SUPREME COURT, OTTAWA TERM, A. D. 1861.

DANIEL HOWELL,
vs
LEWIS W. HOWELL. } Appeal from Henry.

BRIEF OF H. W. WELLS, for Appellant.

STATEMENT OF THE CASE.

FIRST OF THE RECORD.

The action was in the nature of a motion made by Daniel Howell, for judgment on the award of arbitrators, against Lewis W. Howell.

The notice of the motion was served on the defendant on the 6th day of October, A. D. 1860, and notified him that at the October Term, A. D. 1860 of the Henry Circuit Court, the plaintiff would apply for judgment on the award. The October Term was begun on the second Monday, the 8th day of October, 1860.

The submission was in writing and signed by the parties in presence of one witness, and was for the purpose of settling disputes about the sale and exchange of lands &c., and contained an agreement for judgment of the Circuit Court on the award.

The award was, that Daniel Howell should deed Lewis W. Howell fifty acres of land off the east side of the North east quarter of section thirty, in Township 15 North Range two east, and that Lewis W. Howell should deed Daniel Howell the west half of the east half of the south west quarter of the same section.

The award was filed on the 22d day of October, 1860, and the submission was filed October 29th, 1860. Both being filed during term time of the said October term.

The defendant, before the rendition of judgment, takes exceptions to said award, and moves the Court to correct errors and mistakes in the same, and also moves the Court to continue the hearing of the cause, because of the absence (occasioned by sickness) of a material witness.

The motion to correct is founded on two affidavits of the defendant, which may be analyzed as follows :

[1] Alleges that the arbitrators have awarded the defendant 50 acres of land off the east side of the north east quarter of section 30, township 15 north range 2 east, through evident mistake.

[2] That the testimony of *all the witnesses* before the said arbitrators, was that the defendant was to have 60 acres of the east side of the *west half* of said quarter section of land.

[3] The following plat will enable the Court to judge of the relative positions of the two tracts of land.

Plat of Sec. 30-15-2.

	50 acres awarded to L. W. Howell, through mistake	60 acres bargained for and claimed by Lewis W. Howell.

[4] Attached to one affidavit, is an "exhibit" alleged to contain full minutes of all the testimony heard by the arbitrators.

[5] The defendant also prays a continuance, because of the absence (occasioned by sickness) of a material witness.

The Court overruled said motion to correct, and said motion to continue, and the defendant excepted.

The defendant moved the Court for a new trial, which motion was overruled and the defendant excepted.

ERRORS.

The bill of exceptions preserves all the foregoing points.

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so.

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

When legal exceptions are taken to an award, it is the duty of the Court to hear them. *R. S. Chap. VII Sec. VIII*, as it is only by hearing the exceptions, that the Court can determine as to their validity. See also *Sec. X and XI same Chapter*, and *Wiley et al vs Platter*, XVI Ills. Rep. 540.

The application to the Court to set aside said award, was properly made by affidavits. *Cromwell vs Owings*, 6 Har. and J. 10. *Ridgen vs Martin* i b 403. *Stevens vs Pearson*, 5 Vermont Reports, 503.

Objections to the award were properly made by filing exceptions to the award of the arbitrators. *Wiley vs Platter*, XVII Ills. 540. *Reeves vs Eldridg*, XX Ills. 383. *Spurck et al vs Crook et al*, XIX Ills. 415. *Hurst vs Hurst*, 2 Wash. C. C. 127 also Rev. Stat. Chap. VII, Sec. VIII, X, XI. *Pierce vs Shaw*, 1 Serg. and R. 365.

The defendant was entitled to a continuance under the statute, without any affidavit. R. S. Chap. VII, Sec. VIII, provides that the party filing such award, may at the *next term after such filing, &c., &c.* In this case the award was filed on the 14th day of the October term, and judgment was rendered on it at the same term.

(4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.

The evidence of arbitrators is inadmissible to show a mistake in the award. *Newland vs Douglas*, 2 John 62, 1 Greenleaf on evidence, Sec. 249.

This position is not in conflict with the decisions of this Court in *Spurck et al vs Crook et al*, XIX Ills. 426. Therein, grounds of public policy to prevent fraud, permit an arbitrator to be a witness.

Even if the evidence of the arbitrator was admissible, there can certainly be no reason for refusing other testimony. No authorities are cited in support of this proposition.

(5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.

Here The verdict is not supported by the evidence, the court will disregard and set it aside. *Lowrey vs Orr*, 1 Gill. 70. *Scott vs Blumb*, 2 Gill. 595.

Where it is apparent that a jury mistook the evidence, a new trial will be granted. *Gordon vs Crook*, 11 Ills 142. *Schwab vs Gingerick*, 13 Ills. 697.

In this case the *objection* states that all the witnesses testified that the defendant was to have 60 acres off the *west* side &c. This, if true, would warrant the Court in setting aside the award to the defendant of 50 acres on the *east* side, &c.,

(6) Because the submission to the said arbitrators and the award, then were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.

The submission and award were both filed during the October term of the Court, and the judgment was erroneously rendered the same term.

The case should have been continued until the next term. Chap. VII, Sec. VIII R. S.

The defendant by affidavit brought himself within the Statute providing for continuances. Sec. XIII of the *Practice Act*, and was entitled to a continuance. *Allen et al vs Downing*, 2 scam. 464.

(7) The Court erred in overruling the defendant's motion for a new trial.

In this case, the ruling of the Court upon the the defendant's motion was erroneous, and no substantial justice done the parties. The Court thereford erred in in not granting the defendant's motion for a new trial, and the granting a new, trial was not discretionary, but imperative upon the Court. *Morton vs Baily*, 1 Scam. 213. *Greenup vs Stoker*, 2 Gill. 688. *Riggs vs Savage*, 4 Gill. 129.

²⁹⁶
Homell }
vs }
Homell }

Appeal from Henry
Abstract
vs Bishop

Filed April 18. 1861
H. Deland
Clerk

STATE OF ILLINOIS, } SS.

{ IN THE SUPREME COURT AT OTTAWA,
OF THE APRIL TERM, A. D. 1861.

DANIEL HOWELL, }
 vs
LEWIS W. HOWELL. } *Appeal from Henry.*

ABSTRACT OF THE RECORD.

Page of Record 1.

Pleas before the Hon. JOHN H. HOWE, Judge of the Sixth Judicial Circuit in Illinois, at the regular term, begun and held at the Court-house in Cambridge, on the second Monday of October, A. D. 1860, it being the eighth day of the said month. Present, Hon. John H. Howe, *Judge*, Thomas Wiley, Jr. *Clerk*, P. H. Sniff, *Sheriff*.

Application of Daniel Howell for judgment against Lewis W. Howell, on the award of arbitrators chosen, &c.

Notice of the application at the October Term, A. D. 1860 of said Court, for judgment on said award.

Page 2. Affidavit of George A. Brown, that he delivered a true copy of the said notice to Lewis W. Howell, on the sixth day of October, A. D. 1860.

Page 3. Application of the plaintiff made October 25th, for leave to file a copy of the submission, the original said to have been lost. Leave granted.

Page 4. Application made October 29th, 1860, for leave to withdraw said copy and file original submission.

Page 5. Leave granted, and original filed.

Motion by said plaintiff made October 31st, 1860, at same term, for judgment on the award. Motion sustained

Page 6. and judgment entered, and defendant ordered to comply with said award.

Defendant, Lewis W. Howell, moves the Court to set aside said judgment. Motion overruled, and defendant excepts.

Defendant, Lewis W. Howell, prays and obtains leave to appeal, and leave to file bill of exceptions and appeal bond, in the sum of one hundred dollars within thirty days.

Page 7. Defendant, Lewis W. Howell, on the 15th day of November, 1860, files appeal bond in the sum of one hundred dollars.

Appeal bond.

Page 8. Continuation of appeal bond and approval by Clerk and Court.

On the third day of December, 1860, defendant files bill of exceptions.

Page 9. Defendant's bill of exceptions.

The bill of exceptions contains the following points: That on the 22d day of October, 1860, it being the fourteenth day of said October Term, said David Howell, to sustain the issues on his part &c., filed in said Court, the award of the arbitrators, in the words and figures following:

Award of Arbitrators.

STATE OF ILLINOIS, }
HENRY COUNTY. } SCT.

The undersigned, arbitrators in the cause of Lewis W. Howell, vs Daniel Howell, having been duly sworn, and having as required by their oaths determined the cause submitted, do hereby award and decide herein as follows: The said Daniel Howell is to deed to the said Lewis W. Howell, fifty acres of land off of the east side of the north east quarter of section No. thirty (30) Township fifteen, Range 2 east, and the said Lewis W. Howell is to deed to the said Daniel Howell, the west half of the east half of the south west quarter of section No. thirty (30) Township No. fifteen (15) Range two (2) east. Each of the parties are to make and execute a deed to the other party to the above named lands, on or before the first day of June, 1860, and we having delivered to each party a copy hereof, ask to be discharged herein, with our costs and witnesses. Each party is hereby required to pay half the costs.

Given under our hands and seals this 17th day of April, 1860.

MICHAEL TAYLOR,	SEAL.
PHILIP KAPPLE.	SEAL.
JOHN PIATT.	SEAL.

Page 10. That the said award was endorsed and filed in the words and figures following: Filed Oct. 22, '60. T. Wiley, Jr. *Clerk*.

That on the 25th day of October, 1860, it being the 17th day of the said Term, said plaintiff, Daniel Howell, prayed and obtained leave to file copy of the submission, the original supposed to be lost.

That on the 29th day of October aforesaid, said plaintiff prayed and obtained leave to file the original submission.

Page 11. The submission of the parties to the award of John Piatt, Michael Taylor and Phillip Kapple, for the purpose settling all controversies, as well the exchange or sale of lands, as of personalty, with the agreement that the award be made a rule of Circuit Court. Submission is dated April 12, 1860, in presence of James M. Barrett, witness.

Page 12. Said Submission is endorsed and filed in the words and figures following: Filed Oct. 29, '60. T. Wiley, Jr. *Clerk*.

That on the same 29th day of October, the defendant, Lewis W. Howell filed his motion in writing and verified by affidavit to correct a mistake in said award.

Page 13. The motion alleges that the arbitrators have awarded to the said Lewis W. Howell, fifty acres off the east side of the north east quarter of section 30 in township 15 north range 2 east, in Henry County, through mistake and evident miscalculation. That the evidence of the witnesses examined by the said arbitrators

was that Lewis W. Howell was to have 60 acres off the east side of the *west half* of the said north east quarter of section thirty, in said township, and not fifty acres off the east side of said quarter section, as written in the award.

Page 14. It also prays that the witnesses who testified before the said arbitrators, may be examined by the Court, and that the Court will correct said mistake in said award.

The motion also shows that George L. Howell, one of the witnesses, (residing with the defendant,) before the arbitrators, was too ill to attend Court; that the defendant could not so well prove the fact in the motion by any other witness, and prayed a continuance.

Page 15. The said motion was endorsed and ordered filed as follows: Filed Oct. 29, '60. T. Wiley, Jr. *Clerk*.

The Court overruled said motion to correct said mistake and to continue, and decided that the defendant might introduce the testimony of the arbitrators to prove any mistake or miscalculation, to which ruling the defendant then and there excepted. The defendant allowed to file further affidavits in support of the motion to correct mistake.

Page 16. That on the thirty-first day of October aforesaid, the plaintiff moved the Court for judgment. On the second day of November, at said term of said Court, the defendant by leave of the Court, filed his exceptions to said award and motion to correct mistake, which was verified by affidavit, and in the words and figures set forth.

The exceptions and motion to correct, may be resolved as follows:

The defendant avers that he has many just and legal exceptions to said award.

That the arbitrators have awarded to him fifty acres off the east side of the north east quarter of section thirty in township fifteen north range 2 east,

through

Page 17. evident mistake and miscalculation of the testimony.

That the paper attached and marked "Exhibit A." is a just and true minute of the testimony heard by the arbitrators, and is the identical minute of the testimony taken and kept by Phillip Kapple, one of the arbitrators, at the time of the hearing before them.

That all the testimony heard by said arbitrators was to the effect that the defendant was to have sixty acres off the east side of the *west half* of the north east quarter of section 30 aforesaid.

That the last named tract is worth much more than the first, and is the land which the defendant, Lewis W. Howell was to have by the bargain between the parties.

The motion prays the Court to hear the testimony of the witnesses, and to correct and amend the said mistake, if the same appear.

Page 18. Affidavit of Lewis W. Howell, to the truths of the statement in the notice, also that the paper marked "Exhibit A." is the identical minutes kept by Phillip Kapple, one of the said arbitrators, at the time of the hearing before them.

Copy of "Exhibit A." containing the testimony of the witnesses before the arbitrators, taken by one of them

Witness, Stephen Barrett, knows nothing.

Page 19. Witness, Levi Pillsbury, heard Daniel Howell say he was to give sixty acres of the west side. He agreed to give sixty for forty acres.

Witness, George Howell, heard Daniel Howell say he was to take 20 of the west side. The east eighty is good land. The west is worth the most.

Witness, Mary Howell, heard Daniel Howell say he was to give sixty acres for forty. He was to have 20 acres of the west side. The contract was made in 1856.

Witness, James M. Barrett, as to payment of taxes. Lewis W. Howell quit paying taxes on the 60 acres after the dispute.

Witness, George Howell, says Daniel Howell was to have 20 acres, that Lewis W. Howell was to have 60.

Page 20. Francis Howell says nothing. Some seven lines of the testimony are obliterated.

On the third day of November, at said term of said Court, the defendant, on the hearing of said cause, prayed leave to introduce the witnesses to sustain said motion, and the Court decided that the defendant might introduce the arbitrators who made the award, or their certificates in writing.

Page 21. The defendant declining so to do, the Court overruled said motion, to which ruling the defendant then and there excepted.

The Court thereupon gave judgment on the said award for the plaintiff. To which judgment the defendant then and there excepted, and thereupon moved to set aside said judgment, which motion was in writing.

Motion to set aside judgment for reasons assigned.

Page 22. 1st. Because said award was filed at this term, and the Court ought not to have rendered judgment until next term.

2d. Because the defendant offered to prove that the said arbitrators had made evident mistake and miscalculation in the said award, and applied to the Court for leave to do so, and the Court erroneously refused to hear the same.

3d. Because the defendant, Lewis W. Howell took legal exception to the said award, and the Court ought to have sustained the same.

4th. Because the said evident mistake and miscalculation would have warranted the Court in disregarding the verdict of a Jury, and the Court ought to have amended the same before rendering judgment.

5th. Because the said judgment was in all respects erroneous and void.

And thereupon the Court overruled said motion, to which ruling the defendant then and there excepted.

Page 23. Signature of Judge.

Certificate, signature and seal of the Clerk.

ASSIGNMENT OF ERRORS, TO WIT:

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

(3) The Circuit Court improperly overruled the defendant's motion for a continuance.

- (4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.
- (5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.
- (6) Because the submission to the said arbitrators and the award, ^{now} were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.
- (7) The Court erred in overruling the defendant's motion for a new trial.

H. W. Wells atty for appellant

DAVID HOWELL

LEWIS W. HOWELL

STATE OF ILLINOIS, } ss.

IN THE SUPREME COURT, OTTAWA TERM, A. D. 1861.

DANIEL HOWELL,
vs
LEWIS W. HOWELL. } Appeal from Henry.

BRIEF OF H. W. WELLS, for Appellant.

STATEMENT OF THE CASE.

FIRST OF THE RECORD.

The action was in the nature of a motion made by Daniel Howell, for judgment on the award of arbitrators, against Lewis W. Howell.

The notice of the motion was served on the defendant on the 6th day of October, A. D. 1860, and notified him that at the October Term, A. D. 1860 of the Henry Circuit Court, the plaintiff would apply for judgment on the award. The October Term was begun on the second Monday, the 8th day of October, 1860.

The submission was in writing and signed by the parties in presence of one witness, and was for the purpose of settling disputes about the sale and exchange of lands &c., and contained an agreement for judgment of the Circuit Court on the award.

The award was, that Daniel Howell should deed Lewis W. Howell fifty acres of land off the east side of the North east quarter of section thirty, in Township 15 North Range two east, and that Lewis W. Howell should deed Daniel Howell the west half of the east half of the south west quarter of the same section.

The award was filed on the 22d day of October, 1860, and the submission was filed October 29th, 1860. Both being filed during term time of the said October term.

The defendant, before the rendition of judgment, takes exceptions to said award, and moves the Court to correct errors and mistakes in the same, and also moves the Court to continue the hearing of the cause, because of the absence (occasioned by sickness) of a material witness.

The motion to correct is founded on two affidavits of the defendant, which may be analyzed as follows:

[1] Alleges that the arbitrators have awarded the defendant 50 acres of land off the east side of the north east quarter of section 30, township 15 north range 2 east, through evident mistake.

[2] That the testimony of *all the witnesses* before the said arbitrators, was that the defendant was to have 60 acres of the east side of the *west half* of said quarter section of land.

[3] The following plat will enable the Court to judge of the relative positions of the two tracts of land.

Plat of Sec. 30-15-2.

	60 acres claimed by Lewis W. Howell.	50 acres awarded to L. W. Howell, through mistake

[4] Attached to one affidavit, is an "exhibit" alleged to contain full minutes of all the testimony heard by the arbitrators.

[5] The defendant also prays a continuance, because of the absence (occasioned by sickness) of a material witness.

The Court overruled said motion to correct, and said motion to continue, and the defendant excepted.

The defendant moved the Court for a new trial, which motion was overruled and the defendant excepted.

ERRORS.

The bill of exceptions preserves all the foregoing points.

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so.

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

When legal exceptions are taken to an award, it is the duty of the Court to hear them. *R. S. Chap. VII Sec. VIII*, as it is only by hearing the exceptions, that the Court can determine as to their validity. See also *Sec. X and XI same Chapter*, and *Wiley et al vs Platter*, XVI Ills. Rep. 540.

The application to the Court to set aside said award, was properly made by affidavits. *Cromwell vs Owings*, 6 Har. and J. 10. *Ridgen vs Martin* i b 403. *Stevens vs Pearson*, 5 Vermont Reports, 503.

Objections to the award were properly made by filing exceptions to the award of the arbitrators. *Wiley vs Platter*, XVII Ills. 540. *Reeves vs Eldridg*, XX Ills. 383. *Spurck et al vs Crook et al*, XIX Ills. 415. *Hurst vs Hurst*, 2 Wash. C. C. 127 also Rev. Stat. Chap. VII, Sec. VIII, X, XI. *Pierce vs Shaw*, 1 Serg. and R. 365.

The defendant was entitled to a continuance under the statute, without any affidavit. R. S. Chap. VII, Sec. VIII, provides that the party filing such award, may at the *next term after such filing, &c., &c.* In this case the award was filed on the 14th day of the October term, and judgment was rendered on it at the same term.

(4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.

The evidence of arbitrators is inadmissible to show a mistake in the award. *Newland vs Douglas*, 2 John 62, 1 Greenleaf on evidence, Sec. 249.

This position is not in conflict with the decisions of this Court in *Spurk et al vs Crook et al*, XIX Ills. 426. Therein, grounds of public policy to prevent fraud, permit an arbitrator to be a witness.

Even if the evidence of the arbitrator was admissible, there can certainly be no reason for refusing other testimony. No authorities are cited in support of this proposition.

(5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.

Where The verdict is not supported by the evidence, the court will disregard and set it aside. *Lowrey vs Orr*, 1 Gill. 70. *Scott vs Blumb*, 2 Gill. 595.

Where it is apparent that a jury mistook the evidence, a new trial will be granted. *Gordon vs Crook*, 11 Ills 142. *Schwab vs Gingerick*, 13 Ills. 697.

In this case the *objection* states that all the witnesses testified that the defendant was to have 60 acres off the *west* side &c. This, if true, would warrant the Court in setting aside the award to the defendant of 50 acres on the *east* side, &c.,

(6) Because the submission to the said arbitrators and the award, then were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.

The submission and award were both filed during the October term of the Court, and the judgment was erroneously rendered the same term.

The case should have been continued until the next term. Chap. VII, Sec. VIII R. S.

The defendant by affidavit brought himself within the Statute providing for continuances. Sec. XIII of the *Practice Act*, and was entitled to a continuance. *Allen et al vs Downing*, 2 scam. 464.

(7) The Court erred in overruling the defendant's motion for a new trial.

In this case, the ruling of the Court upon the the defendant's motion was erroneous, and no substantial justice done the parties. The Court thereford erred in in not granting the defendant's motion for a new trial, and the granting a new, trial was not discretionary, but imperative upon the Court. *Morton vs Baily*, 1 Scam. 213. *Greenup vs Stoker*, 2 Gill. 688. *Riggs vs Savage*, 4 Gill. 129.

173
Howell } 296
" }
Howell }

Appeal from Henry

Abstract

& Brief

Filed April 18, 1861
L. Leland
Clerk

STATE OF ILLINOIS, } SS.

{ IN THE SUPREME COURT AT OTTAWA,
{ OF THE APRIL TERM, A. D. 1861.

DANIEL HOWELL, }
 vs
LEWIS W. HOWELL. } *Appeal from Henry.*

ABSTRACT OF THE RECORD.

Page of Record 1.

Pleas before the Hon. JOHN H. HOWE, Judge of the Sixth Judicial Circuit in Illinois, at the regular term, begun and held at the Court-house in Cambridge, on the second Monday of October, A. D. 1860, it being the eighth day of the said month. Present, Hon. John H. Howe, *Judge*, Thomas Wiley, Jr. *Clerk*, P. H. Sniff, *Sheriff*.

Application of Daniel Howell for judgment against Lewis W. Howell, on the award of arbitrators chosen, &c.

Notice of the application at the October Term, A. D. 1860 of said Court, for judgment on said award.

Page 2. Affidavit of George A. Brown, that he delivered a true copy of the said notice to Lewis W. Howell, on the sixth day of October, A. D. 1860.

Page 3. Application of the plaintiff made October 25th, for leave to file a copy of the submission, the original said to have been lost. Leave granted.

Page 4. Application made October 29th, 1860, for leave to withdraw said copy and file original submission.

Page 5. Leave granted, and original filed.

Motion by said plaintiff made October 31st, 1860, at same term, for judgment on the award. Motion sustained

Page 6. and judgment entered, and defendant ordered to comply with said award.

Defendant, Lewis W. Howell, moves the Court to set aside said judgment. Motion overruled, and defendant excepts.

Defendant, Lewis W. Howell, prays and obtains leave to appeal, and leave to file bill of exceptions and appeal bond, in the sum of one hundred dollars within thirty days.

Page 7. Defendant, Lewis W. Howell, on the 15th day of November, 1860, files appeal bond in the sum of one hundred dollars.

Appeal bond.

Page 8. Continuation of appeal bond and approval by Clerk and Court.

On the third day of December, 1860, defendant files bill of exceptions.

Page 9. Defendant's bill of exceptions.

The bill of exceptions contains the following points: That on the 22d day of October, 1860, it being the fourteenth day of said October Term, said David Howell, to sustain the issues on his part &c., filed in said Court, the award of the arbitrators, in the words and figures following:

Award of Arbitrators.

STATE OF ILLINOIS, } SCT.
HENRY COUNTY.

The undersigned, arbitrators in the cause of Lewis W. Howell, vs Daniel Howell, having been duly sworn, and having as required by their oaths determined the cause submitted, do hereby award and decide herein as follows: The said Daniel Howell is to deed to the said Lewis W. Howell, fifty acres of land off of the east side of the north east quarter of section No. thirty (30) Township fifteen, Range 2 east, and the said Lewis W. Howell is to deed to the said Daniel Howell, the west half of the east half of the south west quarter of section No. thirty (30) Township No. fifteen (15) Range two (2) east. Each of the parties are to make and execute a deed to the other party to the above named lands, on or before the first day of June, 1860, and we having delivered to each party a copy hereof, ask to be discharged herein, with our costs and witnesses. Each party is hereby required to pay half the costs.

Given under our hands and seals this 17th day of April, 1860.

MICHAEL TAYLOR,	SEAL.
PHILLIP KAPPLE.	SEAL.
JOHN PIATT.	SEAL.

Page 10. That the said award was endorsed and filed in the words and figures following: Filed Oct. 22, '60. T. Wiley, Jr. *Clerk*.

That on the 25th day of October, 1860, it being the 17th day of the said Term, said plaintiff, Daniel Howell, prayed and obtained leave to file copy of the submission, the original supposed to be lost.

That on the 29th day of October aforesaid, said plaintiff prayed and obtained leave to file the original submission.

Page 11. The submission of the parties to the award of John Piatt, Michael Taylor and Phillip Kapple, for the purpose settling all controversies, as well the exchange or sale of lands, as of personalty, with the agreement that the award be made a rule of Circuit Court. Submission is dated April 12, 1860, in presence of James M. Barrett, witness.

Page 12. Said Submission is endorsed and filed in the words and figures following: Filed Oct. 29, '60. T Wiley, Jr. *Clerk*.

That on the same 29th day of October, the defendant, Lewis W. Howell filed his motion in writing and verified by affidavit to correct a mistake in said award.

Page 13. The motion alleges that the arbitrators have awarded to the said Lewis W. Howell, fifty acres off the east side of the north east quarter of section 30 in township 15 north range 2 east, in Henry County, through mistake and evident miscalculation. That the evidence of the witnesses examined by the said arbitrators

was that Lewis W. Howell was to have 60 acres off the east side of the *west half* of the said north east quarter of section thirty, in said township, and not fifty acres off the east side of said quarter section, as written in the award.

Page 14. It also prays that the witnesses who testified before the said arbitrators, may be examined by the Court, and that the Court will correct said mistake in said award.

The motion also shows that George L. Howell, one of the witnesses, (residing with the defendant,) before the arbitrators, was too ill to attend Court; that the defendant could not so well prove the fact in the motion by any other witness, and prayed a continuance.

Page 15. The said motion was endorsed and ordered filed as follows: Filed Oct. 29, '60. T. Wiley, Jr. *Clerk*.

The Court overruled said motion to correct said mistake and to continue, and decided that the defendant might introduce the testimony of the arbitrators to prove any mistake or miscalculation, to which ruling the defendant then and there excepted. The defendant allowed to file further affidavits in support of the motion to correct mistake.

Page 16. That on the thirty-first day of October aforesaid, the plaintiff moved the Court for judgment. On the second day of November, at said term of said Court, the defendant by leave of the Court, filed his exceptions to said award and motion to correct mistake, which was verified by affidavit, and in the words and figures set forth.

The exceptions and motion to correct, may be resolved as follows:

The defendant avers that he has many just and legal exceptions to said award.

That the arbitrators have awarded to him fifty acres off the east side of the north east quarter of section thirty in township fifteen north range 2 east,

Page 17. through evident mistake and miscalculation of the testimony.

That the paper attached and marked "Exhibit A." is a just and true minute of the testimony heard by the arbitrators, and is the identical minute of the testimony taken and kept by Phillip Kapple, one of the arbitrators, at the time of the hearing before them.

That all the testimony heard by said arbitrators was to the effect that the defendant was to have sixty acres off the east side of the *west half* of the north east quarter of section 30 aforesaid.

That the last named tract is worth much more than the first, and is the land which the defendant, Lewis W. Howell was to have by the bargain between the parties.

The motion prays the Court to hear the testimony of the witnesses, and to correct and amend the said mistake, if the same appear.

Page 18. Affidavit of Lewis W. Howell, to the truths of the statement in the notice, also that the paper marked "Exhibit A." is the identical minutes kept by Phillip Kapple, one of the said arbitrators, at the time of the hearing before them.

Copy of "Exhibit A." containing the testimony of the witnesses before the arbitrators, taken by one of them

Witness, Stephen Barrett, knows nothing.

Page 19. Witness, Levi Pillsbury, heard Daniel Howell say he was to give sixty acres of the west side. He agreed to give sixty for forty acres.

Witness, George Howell, heard Daniel Howell say he was to take 20 of the west side. The east eighty is good land. The west is worth the most.

Witness, Mary Howell, heard Daniel Howell say he was to give sixty acres for forty. He was to have 20 acres of the west side. The contract was made in 1856.

Witness, James M. Barrett, as to payment of taxes. Lewis W. Howell quit paying taxes on the 60 acres after the dispute.

Witness, George Howell, says Daniel Howell was to have 20 acres, that Lewis W. Howell was to have 60.

Page 20. Francis Howell says nothing. Some seven lines of the testimony are obliterated.

On the third day of November, at said term of said Court, the defendant, on the hearing of said cause, prayed leave to introduce the witnesses to sustain said motion, and the Court decided that the defendant might introduce the arbitrators who made the award, or their certificates in writing.

Page 21. The defendant declining so to do, the Court overruled said motion, to which ruling the defendant then and there excepted.

The Court thereupon gave judgment on the said award for the plaintiff. To which judgment the defendant then and there excepted, and thereupon moved to set aside said judgment, which motion was in writing.

Motion to set aside judgment for reasons assigned.

Page 22. 1st. Because said award was filed at this term, and the Court ought not to have rendered judgment until next term.

2d. Because the defendant offered to prove that the said arbitrators had made evident mistake and miscalculation in the said award, and applied to the Court for leave to do so, and the Court erroneously refused to hear the same.

3d. Because the defendant, Lewis W. Howell took legal exception to the said award, and the Court ought to have sustained the same.

4th. Because the said evident mistake and miscalculation would have warranted the Court in disregarding the verdict of a Jury, and the Court ought to have amended the same before rendering judgment.

5th. Because the said judgment was in all respects erroneous and void.

And thereupon the Court overruled said motion, to which ruling the defendant then and there excepted.

Page 23. Signature of Judge.

Certificate, signature and seal of the Clerk.

ASSIGNMENT OF ERRORS, TO WIT:

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

(3) The Circuit Court improperly overruled the defendant's motion for a continuance.

- (4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.
- (5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.
- (6) Because the submission to the said arbitrators and the award, these ^{now} were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.
- (7) The Court erred in overruling the defendant's motion for a new trial.

W. H. Wells atty for defendant

STATE OF ILLINOIS, } ss.

IN THE SUPREME COURT, OTTAWA TERM, A. D. 1861.

DANIEL HOWELL,
vs
LEWIS W. HOWELL. } Appeal from Henry.

BRIEF OF H. W. WELLS, for Appellant.

STATEMENT OF THE CASE.

FIRST OF THE RECORD.

The action was in the nature of a motion made by Daniel Howell, for judgment on the award of arbitrators, against Lewis W. Howell.

The notice of the motion was served on the defendant on the 6th day of October, A. D. 1860, and notified him that at the October Term, A. D. 1860 of the Henry Circuit Court, the plaintiff would apply for judgment on the award. The October Term was begun on the second Monday, the 8th day of October, 1860.

The submission was in writing and signed by the parties in presence of one witness, and was for the purpose of settling disputes about the sale and exchange of lands &c., and contained an agreement for judgment of the Circuit Court on the award.

The award was, that Daniel Howell should deed Lewis W. Howell fifty acres of land off the east side of the North east quarter of section thirty, in Township 15 North Range two east, and that Lewis W. Howell should deed Daniel Howell the west half of the east half of the south west quarter of the same section.

The award was filed on the 22d day of October, 1860, and the submission was filed October 29th, 1860. Both being filed during term time of the said October term.

The defendant, before the rendition of judgment, takes exceptions to said award, and moves the Court to correct errors and mistakes in the same, and also moves the Court to continue the hearing of the cause, because of the absence (occasioned by sickness) of a material witness.

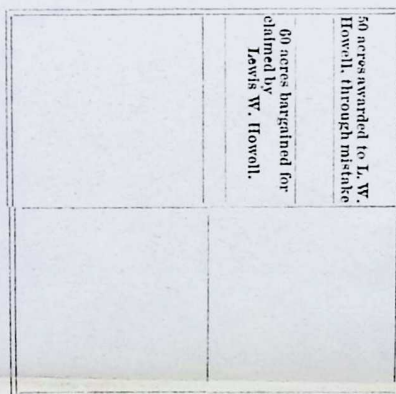
The motion to correct is founded on two affidavits of the defendant, which may be analyzed as follows :

[1] Alleges that the arbitrators have awarded the defendant 50 acres of land off the east side of the north east quarter of section 30, township 15 north range 2 east, through evident mistake.

[2] That the testimony of *all the witnesses* before the said arbitrators, was that the defendant was to have 60 acres of the east side of the *west half* of said quarter section of land.

[3] The following plat will enable the Court to judge of the relative positions of the two tracts of land.

Plat of Sec. 30-15-2.



[4] Attached to one affidavit, is an "exhibit" alleged to contain full minutes of all the testimony heard by the arbitrators.

[5] The defendant also prays a continuance, because of the absence (occasioned by sickness) of a material witness.

The Court overruled said motion to correct, and said motion to continue, and the defendant excepted.

The defendant moved the Court for a new trial, which motion was overruled and the defendant excepted.

ERRORS.

The bill of exceptions preserves all the foregoing points.

(1) The defendant, Lewis W. Howell, took just and legal exceptions to the said award, and offered to prove the same, and the Circuit Court improperly refused to permit the defendant to do so.

(2) The defendant objected to the rendition judgment on said award against him, because of evident mistake and miscalculation in said award, and offered to prove the said mistake and miscalculation, and the said Circuit Court improperly refused to permit the defendant to do so.

When legal exceptions are taken to an award, it is the duty of the Court to hear them. *R. S. Chap. VII Sec. VIII*, as it is only by hearing the exceptions, that the Court can determine as to their validity. See also *Sec. X and XI same Chapter*, and *Wiley et al vs Platter*, XVI Ills. Rep. 540.

The application to the Court to set aside said award, was properly made by affidavits. *Cromwell vs Owings*, 6 Har. and J. 10. *Ridgen vs Martin* i b 403. *Stevens vs Pearson*, 5 Vermont Reports, 503.

Objections to the award were properly made by filing exceptions to the award of the arbitrators. *Wiley vs Platter*, XVII Ills. 540. *Reeves vs Eldridg*, XX Ills. 383. *Spurck et al vs Crook et al*, XIX Ills. 415. *Hurst vs Hurst*, 2 Wash. C. C. 127 also Rev. Stat. Chap. VII, Sec. VIII, X, XI. *Pierce vs Shaw*, 1 Serg. and R. 365.

The defendant was entitled to a continuance under the statute, without any affidavit. R. S. Chap. VII, Sec. VIII, provides that the party filing such award, may at the *next term after such filing, &c., &c.* In this case the award was filed on the 14th day of the October term, and judgment was rendered on it at the same term.

(4) The Circuit Court improperly decided, that the defendant might introduce the testimony, or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exceptions, and his motion to amend.

The evidence of arbitrators is inadmissible to show a mistake in the award. *Newland vs Douglas*, 2 John 62, 1 Greenleaf on evidence, Sec. 249.

This position is not in conflict with the decisions of this Court in *Spurck et al vs Crook et al*, XIX Ills. 426. Therein, grounds of public policy to prevent fraud, permit an arbitrator to be a witness.

Even if the evidence of the arbitrator was admissible, there can certainly be no reason for refusing other testimony. No authorities are cited in support of this proposition.

(5) The errors and defects in said award would have warranted the Court in disregarding the verdict of a Jury. Yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections.

Where The verdict is not supported by the evidence, the court will disregard and set it aside. *Lowrey vs Orr*, 1 Gill. 70. *Scott vs Blumb*, 2 Gill. 595.

Where it is apparent that a jury mistook the evidence, a new trial will be granted. *Gordon vs Crook*, 11 Ills 142. *Schwab vs Gingerick*, 13 Ills. 697.

In this case the *objection* states that all the witnesses testified that the defendant was to have 60 acres off the *west* side &c. This, if true, would warrant the Court in setting aside the award to the defendant of 50 acres on the *east* side, &c.,

(6) Because the submission to the said arbitrators and the award, then were filed during the said October Term of the said Court, and the Court erroneously rendered judgment on said award at the same term, notwithstanding the defendant objected and asked for a continuance.

The submission and award were both filed during the October term of the Court, and the judgment was erroneously rendered the same term.

The case should have been continued until the next term. Chap. VII, Sec. VIII R. S.

The defendant by affidavit brought himself within the Statute providing for continuances. Sec. XIII of the *Practice Act*, and was entitled to a continuance. *Allen et al vs Downing*, 2 scam. 464.

(7) The Court erred in overruling the defendant's motion for a new trial.

In this case, the ruling of the Court upon the the defendant's motion was erroneous, and no substantial justice done the parties. The Court thereford erred in in not granting the defendant's motion for a new trial, and the granting a new, trial was not discretionary, but imperative upon the Court. *Morton vs Baily*, 1 Scam. 213. *Greenup vs Stoker*, 2 Gill. 688. *Riggs vs Savage*, 4 Gill. 129.

Korrell } 296
vs
Korrell }

Appeal from being

Abstract

& Brief

Filed April 18. 1861

A. Deland
Clerk

Transcrip of the record in the case of
Howell vs Howell

(Page 1 of Record)

State of Illinois } Henry County Circuit Court
Henry County } October Term A.D. 1860

Pleas before the Honorable John
H. Howe Judge of the 6th Judicial Circuit of the
State of Illinois At a regular term of the Circuit
court begun and holden at the court house in
Cambridge in said county of Henry and state
of Illinois on the second Monday of October in
the year of our Lord one thousand eight hundred
and sixty it being the eighth day of said month

Present Honorable John H. Howe Judge

Thomas Wiley & Clerk.

Purnel H. Sniff Sheriff

And afterwards to wit at the term aforesaid
and on the 22nd day of October 1860. Daniel
Howell by Minneman & Page his atty filed in said
court a notice of his application for judgment
on an award therein named which notice
is in words and figures following to wit:

" To Lewis Howell Sir

"You are hereby notified

"That at the October Term of the Henry county
"circuit court to be holden at the court house
"in Cambridge in the county of Henry on

(Page 1) "the second Monday of October A.D. 1860 Daniel
"Howell of said County will apply to said court

(Page 2)

"for a judgment on the award made by Michael
"Taylor John Piatt and Philip Kepple arbitrators
"chosen and selected by you and the said Daniel
"Howell to arbitrate all matters in difference between
"the parties which award bears date on the 17th day
"of April AD 1860 at which time and place you can
"appear and show cause if any why judgment
"should not be entered upon said award

"Daniel Howell

"By Winman & Page his attys

State of Illinois {
"Henry County } George A. Brown of said county first
"being duly sworn according to law upon his oath
"says that he delivered to Lewis Howell a true
"copy of the above notice on the 6th day of
"October AD 1860

Geo A Brown

"Sworn and Subscribed before me this 22^d day
"of Oct 1860. J.S. Winman J.P.

And afterwards to wit at the term aforesaid
and on the 25th day of October AD 1860 the fol-
lowing proceedings were had in said cause
to wit

(Page 2)

L

(Page 3)

Daniel Howell

vs

Lewis Howell

} For judgment on award of arbitrators

At this day came the plaintiff
by Heriman & Page his attys and the defendant
by Wells & Lohinger his attorney, and it appearing
to the court that due notice had been given by the
said plaintiff to the said defendant of the intended
application for a judgment on the award made
herein by Michael Taylor John Platt and Philip
Keppele arbitrators chosen and selected by the said
plaintiff and defendant to arbitrate all matters
in difference between said parties, which award
bears date on the 17th day of April A.D. 1860 and is
in the words and figures following to wit

"State of Illinois Henry County Set

"The undersigned arbitrators in the cause
"of Lewis W Howell vs Daniel Howell having been
"duly sworn and having as required by their oaths
"determined the cause submitted do hereby award
"~~to the said Lewis W Howell~~ and decide herein
"as follows the said Daniel Howell is to deed
"to the said Lewis W Howell Fifty acres of land
"off of the east side of the North East quarter of
"Section No Thirty (30) Township fifteen range 2
"East and the said Lewis W Howell is to deed

(Page 3)

(Page 4)

to the said Daniel Howell the West half of the
"East¹/₂ of the South West quarter of section No Thirty
"30 Township, No fifteen (15) range two (2) East each
"of the parties are to make and execute a deed to
"the other party to the above named lands on or before
"the first day of June 1860 and we having delivered
"to each party a copy hereof ask to be discharged
"herein with our costs and witnesses each party
"is hereby required to pay half the cost Given under
"our hands and seals this 17th day of April 1860

" Michael Taylor *EW*

" Phillip Kepple *EW*

" John Piatt *EW*

And this cause now coming on to be heard, On
motion leave is given to file a copy of the sub-
mission of the parties herein to arbitrate and
substitute it for the original, And thereupon
comes the defendant and moves the court
to correct the award herein

And afterwards to wit at the term aforesaid
and on the 29th day of October 1860 the following
proceedings were had in said cause

Daniel Howell {
vs { For judgment on award
Lewis Howell { At this day this cause being

(Page 4)
11

(Page 5-) called came the parties as aforesaid by their attorney
and on motion of plaintiff leave is given to withdraw
copy of Submission and file the original Submission

And afterwards to wit at the term aforesaid
and on the 31st day of October 1860 the following
proceedings were had in said cause to wit

Daniel Howell }
vs } For judgment on award
Lewis Howell }

At this day comes the parties
herein as aforesaid and the said plaintiff by his
attys moves the court for a judgment on the award
of the said arbitrators as above set forth

And afterwards to wit at the term aforesaid and
on the 4th day of Nov. 1860 the following proceedings
were had in said cause to wit

Daniel Howell }
vs } For judgment on award
Lewis Howell }

And now at this day this cause
being again called and on the hearing of the
(Page 5) motion for judgment, the court being fully
advised in the premises sustains the motion

(Page 6)

and judgment entered upon the award as above
entered. It is therefore ordered by the court that the
said defendant convey and he is hereby ruled to
convey to the said plaintiff the west half of the
East half of the South West quarter of Section
thirty (30) Township fifteen (15) North range two
(2) East according to the said award and
that he make said conveyance within twenty
days from the entry of this rule. It is further
ordered by the court that the plaintiff have and
recover of the defendant his costs in this be-
half expended and that execution issue
therefor. And now on the entering of said
judgment comes the said defendant by his
attys aforesaid and moves the court to set aside
the said judgment. And the court having heard
the motion and the reasons therefor overrules the
motion. And thereupon the said defendant by
his attys as aforesaid takes exceptions to the
judgment and ruling of this court and
prays an appeal to the Supreme Court of the
State of Illinois. Which appeal is by the court
granted. And leave given said defendant
to prepare and file his Bill of exceptions and
his appeal bond in the sum of one hundred dollars
to be approved by the court within thirty days.

(Page 6)

(Page 7)

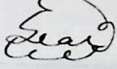
And afterwards to wit on the 13th day of
November 1860 ~~and~~ comes the said defendant
by Wells & Lohmeier his attys and file his appeal
Bond in said cause in words and figures fol-
lowing to wit

Know all men by these presents that we Lewis
W Howell as principal and J A Larson & W Knapp
as security are held and firmly bound unto Daniel
Howell in the penal sum of one hundred dollars
lawful money &c 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 Signed
with our hands and sealed with our seals
this — day of November AD 1860

Now the conditions of this obligation are such
that whereas at the October term of the Henry County
circuit court in a certain cause and motion
therein pending wherein said Daniel Howell
was plaintiff in a motion for judgment against
said Lewis W Howell on the award of John Pate
Michael Taylor and Phillip Kapple arbitrators
&c the said court did render judgment against
the said Lewis W Howell in favor of said
Daniel Howell on said award from which
said judgment the said Lewis W Howell

(Page 7)

(Page 8) prayed and obtained an appeal to the Supreme
court of the State of Illinois. Now if the said
above bounden Lewis W Howell shall prosecute
his said appeal with effect or in case of failure
therein shall well and truly abide and observe
the judgment of the said court and in all things
shall observe and abide and keep the order and
judgment of the said Supreme court then this
obligation to be void and of none effect otherwise
to remain in full force and virtue

Approved by me the { Lewis W Howell 
16 Nov AD 1860 { J A Larson 
J W Kelly & clk { S W Knapp 

Panel approved

J Mc Keown Judge & c.

And afterwards to wit on the 3^d day of December
AD 1860 the said defendant by his attys filed
in said cause his Bill of exceptions therein
in words and figures following to wit:

(Page 8) State of Illinois { Henry County Circuit Court
Henry County } October Term AD 1860

In the matter of the application of Daniel
Howell for judgment of said court against

(Page 10) *Said* on or before the first day of June 1860
and we having delivered to each party a copy
hereof ask to be discharged herein with our
costs and witnesses each party is hereby required
to pay half the costs Given under our hands
and seals the 17th day of April 1860

(Signed)

Michael Taylor *ESQ*

Philip Kapfle *ESQ*

John Piatt *ESQ*

And is endorsed and filed in the words and
figures following to wit "Filed October 22^d/60
P. Wiley & clerk" That on the twenty fifth
day of October AD 1860 it being the seventeenth
day of said term the said Daniel Howell prayed
and obtained leave to file a copy of the original
Submission to arbitration in place of the original
the original being lost That on the twenty ninth
day of October it being the twenty first day of
said term the said Daniel Howell prayed and
obtained leave of the court to withdraw said
copy of Submission and to file the original
Submission the same having been found which
said Submission is in the words and figures
following "Whereas divers disputes and con-
(Page 10) troversies have arisen and are now depending
between Lewis W Howell of Andover county

(Page 11)

of Henry and State of Illinois of the one part
and Daniel Howell of the town and county
aforesaid of the other part Now for the purpose of
settling and determining said disputes and con-
troversies and all manner of contentions as well
all matters pertaining to the sale and exchange of
lands as all matters pertaining to personal con-
tracts it is hereby mutually agreed by and be-
tween the respective parties hereto that the same shall
be submitted to the arbitration and determination
of Michael Taylor John Piatt and Philip Kappeler
all of said county and State or any two of them
so that arbitrators or any two of them shall
make their said award in writing ready to be
delivered to the said parties or so many of them
as may desire it on the 20 day of April 1860
And it is further mutually understood and
agreed that this submission shall be made
a rule in the circuit Court of said county
of Henry and that said court is hereby
authorized to enter up judgment on said
award according to the form of the statute
in such case made and provided at the
next regular term of said court after the
rendering of said award or at any subsequent
term thereafter In witness whereof we have

(Page 11)

herunto set our hands and seals this 12th day
of April AD 1860

(Page 12)

Signed

Daniel Howell Esq

In presence of

Lewis W Howell Esq

James M Barrett

And is endorsed and filed on the back in the
words and figures following to wit "Filed Oct 29/60
J. D. Wiley & Clerk" That on the said twenty
ninth day of October the said Lewis W Howell
the defendant to sustain the issues on his
part filed in said court his motion praying
the court to correct a mistake in said award
and to continue the cause which said motion
was in writing and verified by affidavit and
is in the words and figures following to wit

State of Illinois
Henry County } ss

Henry Circuit Court

October Term AD 1860

In the matter of the application of Daniel
Howell for the rendition of judgment on the
award of John Platt Michael Taylor and
Philip Kappeler arbitrators &c chosen to decide
between and to settle difference between said
Daniel Howell and Lewis W Howell.

Page 12

Lewis W Howell comes into court and
sheweth that the said arbitrators in their said

award between the said Daniel Howell and
his affiant was made as in said award on
(Page 13) file in this cause but the affiant says that
that the said award was made as therein
specified through a mistake of the evidence before
the said arbitrators. affiant here sheweth to
the court that the said mistake of said arbitrators
occured in this that by the evidence before them
at the hearing of the said cause it was testified
by all the witnesses who testified on that point
of the evidence that your affiant was to have
from the said Daniel Howell the sixty acres
on the east side of the west half of the North
East quarter of section number (30) thirty in
Township fifteen (15) North range (2) two east
of the fourth principal meridian and not
the fifty acres on the east side of the east half
of the said quarter section of land and
your affiant further says that the unanimous
testimony of the witnesses who spoke on
this subject was clear and explicit on this
point and your affiant avers that the said
award of the said arbitrators as made
and on file in this cause is through
error and through mistake of the arbitra-
(Page 13) tors on the evidence before them - made to

(Page 14)

"Fifty acres of Land on the East side of the North East quarter of Section Thirty (30)" in place and stead of the "Sixty acres on the east side of the west half of the North East quarter of Section Thirty (30) in said township, aforesaid -

Your affiant says further that in other particulars the said award of the said arbitrators is in accordance with the evidence and this affiant doth not desire to alter or contest the same. Affiant therefore prays that the said witnesses of this cause who appeared before the said arbitrators may be summoned to appear and to testify and inform this honorable court what the said testimony before the said arbitrators actually was. And on the hearing of this cause may it please the court to correct the said mistake of the arbitrators &c as affiant will ever pray.

Further this affiant says that George L. Howell was one of the principal witnesses in said cause before the said arbitrators and affiant cannot so well prove the facts above stated by any other witness as by said George L. Howell. Affiant says that said witness resides at the house of this affiant and for the last three weeks or nearly that time he has been confined to his bed with a dangerous illness and

(Page 14)

that though he is now slowly recovering he
is too ill and feeble to attempt to attend this
(Page 15) term of this court without great danger
of a relapse into great illness. Wherefore
this affiant prays that the hearing of this cause
may be continued until the next term of
this court at which time affiant expects
to procure the attendance of said George
Le Howell further affiant says not

Signed Lewis W Howell
"Sworn to and subscribed before me this 23^d day
of October 1860

J J Francis Jr. C. J.

and is endorsed and filed in the words and
figures following to wit "Filed October 29/60

W. H. & clerk" and the said court upon the
hearing of said motion decided and adjudged
to overrule said motion except as to testimony
or certificate of said arbitrators showing any mis-
take miscalculation or misdescription which the court
decided defendant Lewis W Howell might
do but this he declined doing and to allow
said Lewis W Howell to file other and further
affidavit in support of said motion to amend
(Page 15) to which ruling and judgment the defendant
then and there excepted

That on the thirty first day of October aforesaid
at said term of said court the said plaintiff
(Page 16) moved the court for judgment on said award
That on the second day of November AD 1860
at said term of said court the said defendant
by leave of the court filed his exception to said
award and his motion to correct mistake in
the same which said exception and motion was veri-
fied by affidavit and is in the words and figures
following to wit

State of Illinois	} Henry Circuit Court
Henry County	

In the matter of the application of Daniel
Howell for judgment against Lewis W Howell
on the award of Michael Taylor John Pratt and
Philip Kappeler Lewis W Howell being first duly
sworn on oath says that he hath many just legal
and equitable exceptions to the rendition of
judgment in the said award of the said
arbitrators filed in this cause Because the said
affiant says it appears by the award of the said
arbitrators on file in this cause that the said
arbitrators have awarded to this affiant
fifty acres off the east side of the North East
(Page 16) quarter of section thirty in Township fifteen
North range two (2) East of the fourth P.M

(Page 17) This affiant further says that the said award is so much of fifty acres as aforesaid through evident mistake and miscalculation on the part of the said arbitrators. This affiant further sheweth that the exhibits hereto attached and marked "Exhibit A" is a just true and full minute of the testimony heard by the said arbitrators - that the said minutes of testimony were kept by Philip Kapper one of the said Arbitrators and this affiant says that the said "Exhibit A" is the identical writing kept at the time by said Kapper one of the said arbitrators. This affiant further says that the testimony of the said witnesses was full and explicit to the point and the witnesses examined testified that this affiant was to have sixty acres off the east side of the West half of the said North East quarter of said Section thirty (30) and affiant says that said last mentioned tract of land is worth a very large amount more than the said first described tract of land at least five hundred dollars more and is the land which this affiant was to have as was agreed between the parties. This affiant therefore prays the court to hear the testimony of the witnesses in the said cause and to correct said mistake and misdescription if the same appear and further

(Page 18) This affiant doth not desire to change or alter
the said award but upon the said award but
upon the said award when the court shall correct
the same as aforesaid this affiant also prays
judgment of the court

State of Illinois }
Henry County } f.

Henry Circuit Court
October Term AD 1860

Lewis W. Howell being first duly sworn
says that the facts and statements in above af-
fidavit are true and that the writing attached
hereto written in pencil is the identical writing
written during the trial of the said case before
the said arbitrators and that it contains a full
statement of all the testimony before the said
arbitrators as this affiant verily believes

(Signed) Lewis W. Howell

"Subscribed and sworn to before me this
first day of November AD 1860

J. P. Riley & clerk"

Copy of Exhibit "A"

Lewis W. Howell Plaintiff in arbitration
with Daniel Howell Defendant April 12th 1860

Plaintiff's witnesses and evidence

Stephen Barrett, Do you know anything
about the boundaries of the land - I do not -

- Cross Examining none -

Levi Pillsbury - I heard Daniel Howell say he was to give 60 acres of the west
(Page 19) side - Cross - What did he say? He was to have 60 acres for 40 - he agreed to give 60

George Howell

I heard Daniel Howell say he was to take 20 acres of west side - Cross - The east (80) Eighty is good land subject to overflow at times - the west eighty is worth the most - Give forty five acres of -

Mr Hoyt - He was to give 60 acres for 40 acres on the Bottom he now occupies first bargain in 1856

Mary Howell - I heard D Howell say that he was to give 60 acres for 40 he was to have 20 acres of the west side

Cross

Contract made 1856

James Barrett - Lewis paid one years tax ~~then~~ - then became indispute, D Howell agreed to pay 45 acres - Lewis quit paying tax on 60 acres after the dispute

George Howell

(Page 19) Daniel was to have 20 acres then Lewis was to have 60

Defendants witnesses

(Page 20) Frances Keowell ~ I never heard my father
say he would give 60 acres but I heard him
say he would give 40

x

x

x

x

x

x

x

(Some seven lines of testimony so badly ef-
faced it is not legible - But two witnesses
appear from what can be seen)

That on the third day of November 1860 at
said term of said court the said cause
coming on for hearing the said Defendants
prayed the court for leave to introduce witnesses
to prove the matters and things in said motion
to correct said award and the said court
then and there adjudged and decided the
testimony or certificate in writing of said
(Page 20) Arbitrators might be so introduced to show
any mistake miscalculation or misdescription

on their part but said defendant Lewis W
Howell declining to do this the said motion
(Page 21) of the said defendant be overruled to which
judgment and ruling the defendant then
and there excepted and the said court there-
upon gave judgment on said award in favor
of the said Daniel Howell and against said
Lewis W Howell to which judgment the
defendant Lewis W Howell then and there
excepted and thereupon at the said term
of said court the said defendant moved
the court to set aside said judgment
which said motion is in the words and
figures following to wit

State of Illinois }
Hesany County { Henry Circuit Court
October Term AD 1860

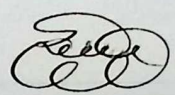
In the matter of the application of Daniel
Howell for judgment against Lewis W
Howell on the award of Philip Kappeler John
Pratt and Michael Saylor Arbitrators &c
The said Lewis W Howell moves the court to
set aside the judgment on said award
for the following reasons Because the said
(Page 21) award was filed at this term of this court
and the court ought not to have rendered

judgment on the same until the next term
(Page 22) of this court, Because the said Lewis W Howell
offered to prove that the said arbitrators had made
evident miscalculation and mistake in the
said award and applied to the court for leave
to prove the said mistake and miscalculation
in said award and the court erroneously
refused to hear the same Because the said
Lewis W Howell took legal exceptions to the
said award and the court ought to have
sustained the same Because the said wi-
dent mistake and miscalculation in said
award would have warranted the court in
disregarding the verdict of a jury and the
court ought to have amended said award
and corrected said mistake before rendering
judgment thereon Because the said judg-
ment was in all respects erroneous and
void

Wells & Lobenzner
for Deft "

And thereupon the said court overruled said
motion to which ruling and judgment the
said defendant then and there excepted
Whereupon the defendants in as much as the
(Page 23) said matters and things herein do not
otherwise appear on the record prayest the

(Page 23)

The Judge of the said court to sign and
seal this Bill of exceptions which is done
of The Honorable 
Judge of the Circuit
of Illinois

State of Illinois }
Henry County } I Amos Gould clk
of the Circuit Court in said county do
hereby certify that the foregoing is a true
full and complete ^{copy of the} record and judgment
of this court in the foregoing cause as appears
of record in my office Witness Amos
Gould clerk of said court and the seal
thereof at Cambridge this 25th day of
March AD 1861

(Page 23)



Amos Gould clk
By W. D. Allynple Depy

Daniel Howell
vs
Lewis Howell

Transcript of record

Forider vs Sevon

And the said appellee by Williamson &
Pharant his attorneys comes and says
that in the record proceedings and judgment
aforesaid there is no such error as is
above alleged; and the said appellee
submits the same to this Court, and asks
that the said judgment be in all respects
affirmed, and that he may recover his costs
April 18. 1861.
Williamson & Pharant
attys for appellee

Assignment of Error

- 1st The defendant Lewis W. Howell took just and legal exceptions to the said award and offered to prove the same and the circuit court improperly refused to permit the defendant to do so
- 2 The defendant objected to the rendition of judgment on said award against him, because of errors, misstatements and mistakes in said award and offered to prove the said mistakes and misstatements and the said Circuit Court improperly refused to permit the defendant to do so
- 3 The Circuit Court improperly overruled the defendant's motion for continuance
- 4 The Circuit Court improperly decided that the defendant might introduce the testimony or certificate in writing of the arbitrators who made said award, and improperly excluded other testimony for the defendant when the defendant offered to introduce the same in support of his exception and motion to amend
- 5 The errors and defects in said award would have warranted the court in disregarding the verdict of a jury, yet the Circuit Court erroneously gave judgment on said award, against the defendant's objections

6 Because because the Submission to
 the said arbitrators and the award there
 were filed during the said October Term
 of the said Court and the Court
 erroneously gave judgment on said
 award at the same time notwithstanding
 the defendants objections and and
 asked for a continuance
 of The Court and in overruling the
 defendants motion for a Continuance

W. Wells for appellant.

Charles C. Bonney
 of counsel -

Note: The printer
 is on 2d
 preceding
 page -

296
 Bonnell
 vs.
 Bonnell
 Appeal from Henry

Record
 Errors
 Consider

Filed April 18. 1881
 L. Leland
 Clerk