

DRAPER *v.* ROBINSON.

Opinion delivered November 27, 1911.

APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where appellant seeks a reversal for error of the court in refusing a continuance and in giving a certain instruction, but fails to abstract the testimony heard on the motion for continuance and the testimony heard upon the trial, and does not show that any motion for new trial was made and overruled, the cause will be affirmed.

Appeal from Benton Circuit Court; *Joseph S. Maples*, Judge; affirmed.

*Tom Williams*, for appellant.

*McGill & Lindsey*, for appellee.

Objections to instructions will not be considered where all the instructions are not set out in the abstract; and where the abstract fails to set out the evidence adduced at the trial, the instructions given will be presumed to have been correct. 92. Ark. 143. Where appellant's abstract fails to show that a

motion for a new trial was filed and overruled, only errors in rendition of the judgment which are apparent on the face of the judgment record will be considered on appeal. 93 Ark. 85; 95 Ark. 123. The judgment should be affirmed for entire failure to comply with rule nine of this court with reference to abstracting the record.

KIRBY, J. This was a suit by James Robinson against T. M. Draper, for damages alleged to have grown out of the use of slanderous and defamatory words about him, charging in effect that he had committed perjury.

A general demurrer was interposed to the complaint, but it does not appear that the court passed upon it. Answer was then filed, denying the allegations of the complaint. Appellant, on the calling of the case for trial, filed a motion for continuance, setting up that he was sick and physically unable to be present at the trial. Several affidavits were filed in corroboration of his motion, and some oral testimony was heard by the court. The motion was denied, and it is contended here that the court erred in its refusal to grant a continuance and also in the giving of the instruction numbered one at the request of the plaintiff.

The abstract of the appellant does not show the testimony heard orally by the court on the motion for a continuance, neither does it set out any of the testimony heard upon the trial of the case, nor any of the instructions given by the court, except the one complained of, nor any motion for a new trial made and overruled, in fact it is so incomplete and insufficient that it can not be determined from it that a trial was had and a verdict rendered, and this court is precluded from passing upon the merits of the case.

Counsel for appellee have not attempted to supply the omissions and defects in appellant's abstract, but only to emphasize them and insist upon an affirmance of the judgment of the lower court for noncompliance with rule nine of this court.

There being nothing in the abstract and brief to show, in accordance with the rules of this court, error committed in the trial of the case below, which should be reviewed here, the judgment must be affirmed. *Files v. Tebbs*, post p. 207. It is so ordered.