CAMPBELL *vs.* THRUSTON.

Where a case is submitted to the circuit court sitting as a jury, and a bill of exceptions taken upon the grounds that the finding is contrary to evidence, this court will not review the testimony for the purpose of determining whether the finding was correct, unless there was a motion for a new trial, as if the case had been tried by a jury.

As to new trials.

Writ of error to the circuit court of Hempstead county.

THIS was an action of debt, by petition, brought by Thruston against Campbell, and determined at the January term of the circuit court of Hempstead county, 1845, before the Hon. GEORGE CONWAY, judge.

The action was founded on a note, executed by Campbell to Fannin, and assigned to plaintiff. The defendant pleaded that the note was given for money won of him by Fannin at a game of cards, called *poker,* and for no other consideration, and that he ought not therefore to be charged therewith, &c. The plaintiff took issue upon the plea, the case was submitted to the court, sitting as a jury, and after hearing the evidence, the judge found in favor of, and gave judgment for the plaintiff for the amount of the note, &c.; to which defendant excepted, took a bill of exceptions, setting out the evidence; and brought error.

JOHNSON C. J., delivered the opinion of the court.

The plaintiff in error objects to the decision of the court below upon the ground that it is unwarranted by the evidence adduced upon the trial. The case, as disclosed by the record, in our conception, presents legally no question for the consideration of this court. No exception was taken at the trial in respect to the testimony, or any opinion of the court receiving or excluding it, nor was the court called upon by either party to express any opinion as to the law arising thereupon in any point of view whatever, nor was there any motion made for a new trial. It is admitted that the bill of exceptions shows that it contains all the evidence in the case, but the evidence therein contained is not made a part of the record in such a manner as to authorize this court to consider it for the purpose of revising the judgment based upon it. The facts in the case were before the court setting as a jury, precisely as they would have been before the jury if one had been required. The court was bound not only to consider the law arising upon the testimony, but also to consider and determine upon the competency, the relevancy

and the weight of the testimony, as well as the credibility of the witnesses; and therefore its judgment as to the facts may have been influenced by considerations, or circumstances, which cannot be made to appear to a revising court: such, for instance, as the credibility of a witness or witnesses, which might depend upon an almost infinite variety of circumstances, and therefore the law has wisely left the determination of controverted facts to the tribunal where the witnesses appear and are examined, and will not suffer the finding or decision thereupon to be disturbed, unless the wrong done thereby is so manifest as to warrant the conclusion that it was induced by some improper motive or palpable misapprehension; and then it can be set aside only upon a motion for a new trial, which in this instance was not made. We think it clear therefore that there is no error in the judgment and proceedings of the circuit court, as shown by the record, for which this court would be warranted in reversing and setting them aside. Judgment affirmed.