

SAWYERS *vs.* LATHRAP.

By moving for a new trial, a party abandons previous exceptions, unless he incorporates them in the motion, and reserves them by bill of exceptions to the decision of the court overruling the motion.

The decision of the court below overruling a motion for a new trial, will not be reviewed by this court unless the evidence is put upon record: the presumption is in favor of the correctness of the decision.

A memorandum signed by the judge, stating that certain facts were proven, is not part of the record.

*Appeal from the Chicot Circuit Court.*

The facts are stated in the opinion of this court.

YELL, for appellant.

PIKE & BALDWIN, contra.

OLDHAM, J. This was an action of forcible entry and detainer under the statute, brought by the appellant against the appellee in the Chicot circuit court. The cause was tried upon the plea of not guilty, upon which a verdict and judgment were rendered for the defendant. During the progress of the trial, the plaintiff excepted to certain instructions of the court, and tendered his bill of exceptions, which was signed and sealed by the judge, and ordered to be made part of the record; but it does not appear that the bill of exceptions was filed, but was brought upon the files as an exhibit to the motion for a new trial. The plaintiff filed a motion for a new trial which was overruled, to which the record states he excepted. No bill of exceptions was presented to the court upon overruling the motion. A memorandum signed by the judge, certifying that certain facts were proven upon the trial, is copied into the transcript as an exhibit to the motion for a new trial; but it has none of the forms nor essentials of a bill of exceptions, and does not purport to be such. Besides, it is shown to have been drawn up and signed by the judge, before the motion for a new trial was made and overruled and not after. There is no entry of record that it was filed, nor is it marked filed.

The plaintiff by moving for a new trial, waived and aban-

doned his exceptions taken to the instructions of the court during the progress of the trial. *Danly vs. Robbins' heirs*, 3 Ark. R. 144. He did not, by exceptions to the decision refusing a new trial, set out the evidence or reserve his previous exceptions as he might have done. *Ashley vs. Hyde & Goodrich*, 1 Eng. R. 92.

The memorandum signed by the judge stating that certain facts were proven, is not a part of the record. *Lenox vs. Pike*, 2 Ark. R. 14. The case is the same as that of *Danly vs. Robbins' heirs*. It presents nothing for the consideration of this court but a motion for a new trial overruled by the circuit court. The presumption is in favor of the correctness of the decision.

Affirmed.

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