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Wycough vs. Ford and Reed.

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## WYCOUGH VS. FORD AND REED.

PRACTICE IN SUPREME COURT: *Bill of exceptions: Evidence on motion in circuit court.*

When the evidence adduced upon the hearing of a motion in the circuit court is not preserved by bill of exceptions, the ruling of the court will be sustained if the facts stated in the motion will warrant it.

APPEAL from *Independence* Circuit Court.

\_\_\_\_\_, Circuit Judge.

*Rose*, for appellant.

HARRISON, J. This was an action of ejectment by M. A. Wycough against William Ford and Isaac N. Reed, for a tract of eighty acres of land.

The defendant, Reed, filed a motion to dismiss the action, setting forth that the land had been purchased at a sale for the non-payment of taxes, in 1866, by William A. Binns, under whom he, through several conveyances claimed; that valuable improvements had been made upon it since; and he, and those under whom he claimed, had regularly paid the taxes; and that the plaintiff had not, before the commencement of his action, filed in the office of the clerk of the court an affidavit that he had tendered to said Binns, his agent or legal representative, the amount of taxes and costs paid on account thereof, with interest on the same at the rate of 100 per centum upon the amount first paid therefor, and 25 per centum per annum upon all costs and taxes paid upon the land thereafter from the time said costs and taxes were paid, and the full value of all improvements of whatever kind and description made thereon, and that the same had been refused.

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The court sustained the motion and dismissed the action at the cost of the plaintiff.

The plaintiff appealed.

Without taking a bill of exceptions and bringing the evidence produced upon the hearing of the motion, upon the record, the plaintiff, it seems, asked that an exception to the ruling of the court be noted upon the record; the evidence is not, therefore, before us, and we must presume that it was sufficient to sustain the motion.

It is only when the grounds of objection fully and necessarily appear in the entry, that an exception may be taken simply by noting the same upon the record; as in the case of an exception to the ruling of the court upon a motion to change the proceedings from law to equity, or from equity to law, and transfer the action to the proper docket, or upon a motion to make a pleading more specific and certain; and it is very seldom that an exception so taken will dispense with a bill of exceptions, or answer any purpose whatever.

The motion was in accordance with sections 2267 and 2268 Gantt's Digest, and the facts set forth, if proven or admitted, are, as has several times been held, sufficient cause for a dismissal of the action. *Graig v. Flanagan*, 21 Ark., 319; *Pope v. Macon*, 23 Ark., 644; *Haney v. Cole*, 28 Ark., 299; *Spain v. Johnson*, 31 Ark., 315.

The judgment is affirmed.

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