ALSTON & PATRICK *vs.* WHITING & SLARK.

Under our statute, profert of the assignment of a note or bond is necessary, and the want of it is fatal on general demurrer.

Writ of error to the circuit court of Johnson county.

THIS was an action of debt by Whiting & Slark against Alston & Patrick, determined in the circuit court of Johnson county, in March, 1845, before the Hon R. C. S. BROWN, judge.

After the usual commencement in debt, the declaration proceeded thus:—"For that whereas the said defendants heretofore, to-wit, on the 15th day of January, A. D. 1839, at &c., by their certain writing obligatory, sealed with their seals and now to the court here shown, dated as above, bound themselves by their respective styles, &c., to pay Elijah B. Alston, one day after date, two hundred and ninety dollars for value received, with interest, &c.: upon which writing obligatory there is the following endorsement, to-wit: "Pay Whiting and Slark for value received; July 1st, 1843: E. B. Alston."—Breach in the usual form.

The defendants demurred to the declaration upon the grounds that it did not aver any assignment and delivery of the bond sued on by Alston to plaintiffs, and that no profert of the assignment was made. The court overruled the demurrer, and defendants refusing to plead further, gave judgment for plaintiffs.

The defendants brought error.

LINTON & BATSON, for the plaintiffs.

It is a well established principle that a plaintiff shall always show a legal cause of action in himself. In this case the plaintiffs show no cause of action whatever: the note was payable to Elijah B. Alston, and there is no averment that it was ever assigned and delivered to the plaintiffs. It is true the plaintiffs attempt to set out an assignment *in haec verba,* but that assignment does not appear to be made by Elijah B. Alston, nor does the instrument appear to be assigned to Augustus Whiting & Robt. Slark.

It is further contended by the plaintiffs that, if the said writing obligatory was assigned to said defendants in error, it was necessary for them to make a profert of the assignment. Oyer may alone be required of that which is tendered in pleading. An assignment, unless made so by oyer, constitutes no part of the record. *McLain vs. Onstott,* 3 *Ark.* 478.

The assignment of a note or bond can only be questioned by plea supported by affidavit. *Rev. Stat. Ark., ch.* 11, *sec.* 4; and hence the necessity of oyer, if the defendants below wish to deny the execution of assignment.

RINGO & TRAPNALL, contra.

The defendants demurred to the declaration and assigned for cause that there was no profert made of the assignment to the plaintiffs.

Profert is necessary of promissory notes and sealed instruments, because they constitute the gist of the action. *Beebe vs. Real Estate Bank,* 4 *Ark. R.* 127. The assignment is merely the right by which the plaintiff acquires the cause of action, and is transacted among others, and to which the defendant is not a party. In other States where a similar statute to ours exists, no such question was ever made.

OLDHAM, J., delivered the opinion of the court.

We do not conceive it necessary to determine but one question raised by the record and assignment of errors; and that is, whether it is necessary that profert of an assignment should be made.

In *Beebe vs. The Real Estate Bank,* 4 *Ark. R.* 124, it was held that, under our statutes, profert of a promissory note, as well as of a bond, is necessary, and that the omission is ground of general demurrer. Many of the reasons which make it necessary to make profert of a promissory note, apply with equal force to assignments. The execution of an assignment cannot be denied except by plea verified by affidavit, nor is it necessary that the assignee shall set forth the consideration of the assignment. *Rev. Stat., ch.* 11, *sec.* 14, 15, in consequence of which they are elevated in their charac-

ter to an equal dignity with sealed instruments in those particulars. These are the main reasons which induced the court to declare in Beebe vs. The Real Estate Bank, that want of profert of a promissory note is ground of general demurrer.

In *McLain vs. Onstott,* 3 *Ark. R.* 478, it was held that "if the defendant wished to question the assignment, he should have craved oyer of it as well as of the original." This case clearly determines that the defendant is entitled to oyer of the assignment; and by consequence determines that profert is necessary: for oyer can be demanded only where profert is made. *Gould Plead.* 438. 1 *Ch. Pl. Stephens' Pl.* 69.

The want of profert being ground of general demurrer by our statutes, according to the decision in *Beebe vs. The Real Estate Bank,* and the defendants in error having failed to make profert of the assignment to them of the writing obligatory upon which this suit was instituted, the circuit court erred in rendering judgment thereon: wherefore the same is reversed and this cause remanded with leave for the defendants in error to amend their declaration if they desire to do so.