MERCHANT *vs.* SLATER.

Under our Statute profert of a promissory note, and of the assignment thereof, is necessary: *as heretofore held in cases cited.*

In a suit by the assignee of a note, the declaration should negative the payment thereof by the defendant to the original payee before the assignment, otherwise it will be fatal on demurrer.

Appeal from the circuit court of Independence county.

THIS was an action of assumpsit by Slater against Merchant, determined in the Independence circuit court, at the August term, 1845, before the Hon. WM. CONWAY B., Judge.

The action was upon a promissory note, executed by Merchant to one Dickinson, and assigned by Dickinson to plaintiff.

In the declaration, no profert was made of the note the assignment was alleged without an averment of time, and no profert was made of it, nor was the payment of the note to Dickinson before the assignment negatived in the breach.

The defendant demurred to the declaration, the court overruled the demurrer, and, the defendant declining to plead over, rendered final judgment for plaintiff, and defendant appealed.

PORTER, for appellant.

The declaration in this case nowhere shows that said supposed assignment was made previous to the commencement of this suit. It is an established rule in pleading that the party must show with certainty the capacity in which he sues, and if the cause of action accrues by virtue of an assignment he must either sue as assignee, or show such authority by apt averments in some part of the pleadings. *Sabin vs. Hamilton,* 3 *Ark. Rep.* 485. This action purports to be founded upon a promissory note, and under our Statute, the distinction between promissory notes are so far done away as to make profert of a promissory note necessary. *Beebe et al. vs. the Real Estate Bank,* 4 *Ark. Rep.* 124. Want of profert of a promissory note is under our Statute good cause of general demurrer. *Buckner and others vs. Real Estate Bank,* 4 *Ark. Rep.* 440. The breach is insufficient in this, that it does not allege that the said sum of money was not paid to the said assignor before the said supposed assignment of the instrument, nor does the declaration in any part thereof show what time said assignment was made: so that taking all the averments in the declaration, and the breach at the conclusion, and there is nothing that negatives the payment of the whole amount of the said supposed sum sued upon.

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

The question is, did the circuit court err in overruling the demurrer to the declaration. Under our Statute profert is necessary of a promissory note, as well as of a bond, and its omission is ground of general demurrer. See *Beebe et al. vs. the Real Estate Bank,* 4 *V. A. R. p.* 124. *Same vs. same,* same *V. p.* 429. The craving oyer of the instrument sued on does not entitle the party to oyer of the assignment on it, nor place them on the record. *Dardenne vs. Bennet et al.* 4 *V. A. R. p.* 458. Our Statute has elevated assignments to the same dignity as instruments of evidence, as the originals themselves, and they can be impeached only in the same manner. It is therefore equally necessary to make profert of the assignment as of the original itself, and the omission of either is

fatal on demurrer. This point was expressly ruled in the case of Roane et al. vs. Hinton and Allen decided at the present term of this court. The declaration is fatally defective as it does not pretend to make profert of either. The breach is also insufficient as it does not negative the payment of the sum demanded to the assignor previous to the assignment. Judgment reversed.