

HANLY vs. MOONEY.

In a debt by petition, it is sufficient for the petition to follow, substantially, the form prescribed by the statute.

Profert of the instrument sued on is not necessary—following the form of the statute is equivalent to profert, and defendant may crave oyer, as if profert were made.

Appeal from the Circuit Court of Phillips county.

DEBT by petition as follows:

“STATE OF ARKANSAS, }
COUNTY OF PHILLIPS. }

In the Circuit Court within and for said county and State—to the term to commence on the 3d Monday in May, A. D. 1847.

Your petitioner, Thomas B. Hanly, the plaintiff in this cause, states that he is the legal owner of a writing obligatory against the defendant, William D. Mooney, in the words and figures following, to wit:” [*Here the bond sued on is copied.*]

“Yet the debt remains unpaid, therefore he demands judgment for his debt, and damages for the detention thereof, together with costs.”

Defendant demurred to the petition on the grounds that no profert

was made of the bond sued on, and that the caption did not pursue the statute. The court sustained the demurrer, and plaintiff appealed.

CUMMINS for the appellant. The act about petition and summons is a special act and controls general legislation. *Ch. 21, Rev. Stat. McFarland et al. v. State Bank, 4 Ark. R. 415.*

The omission of profert in this form of proceeding is not error. *Craven's ex'r v. Logan, 2 Eng. R. 103. Dudley ex'r v. Smith et al., 2 Ark Rep. 369. Webb v. Prescott & Jones, 2 Ark. Rep. 332.*

S. H. HEMPSTEAD, contra. It is a general rule that in all pleadings, whether by plaintiff or defendant, if the claim or defence is founded on a sealed instrument, the party pleading is presumed to have the deed in his possession and he must make profert of it; in other words must offer to show it to the court and his adversary. 1 *Chitty's Pl.* 365, 430. 1 *Arch. Pr.* 164. 10 *Co.* 92 b. 2 *Bouv. Law. Dict.* 302, title "Profert."

This court in numerous cases has established the necessity of profert, as to all instruments under which a party claims, whether sealed or unsealed. *Beebe v. Real Estate Bank, 4 Ark. 124. Tucker v. same, 4 Ark. 429. Buckner v. same, ib. 440. Bonne v. Kay, 5 Ark. 19. Dardenne v. Bennett, 4 Ark. 458. Alston v. Whiting & Slark, 1 Eng. 402.*

If this action had been brought in the ordinary form, profert must have been made, as all will admit: and, as there is nothing in our statutes to dispense with it, the consequence must be that it can no more be omitted in a suit by petition and summons, than in an action of debt commenced and prosecuted in the common law mode. And the reason is found in the known rule, that a defendant cannot craveoyer where profert is not made. 1 *Chitty's Pl.* 430, 431. 1 *Salk.* 497. Although this suit was founded on a writing obligatory of which the defendant had a legal right to demand oyer, yet he could not do so, and was utterly deprived of that right by the omission of the plaintiff to make profert.

The copy of the obligation in the petition is not profert, nor equiv-

alent to it, for the original is not shown at all. In Kentucky and Missouri the original must be filed with the declaration; which is not so under our statute, thus strongly evincing the necessity of profert here.

CONWAY B, J. This was an action by petition in debt on a writing obligatory. The defendant in the court below demurred to the petition and his demurrer was sustained; plaintiff declining to amend, final judgment was rendered against him and he appealed.

The causes assigned for demurrer were, that no profert was made of the obligation sued on, and that the caption of the petition was not in the language prescribed by the statute. It is proper and necessary that the form of the petition should be substantially followed; but it is not essential that the exact words should be employed, especially in the caption: synonymous or equivalent words will suffice. The language in the caption of the petition in this case we think fully tantamount to that in the form, and therefore sufficient.

As to the other cause assigned, it is true, that when bond, bill or note is sued on profert is necessary; but the plaintiff does in effect make profert by pursuing the statutory form. He declares himself the "legal owner or holder of a bond, bill or note to the following effect," and copies it in his own petition, which is equivalent to saying he has it ready to give oyer if required. Oyer cannot be claimed unless profert be made, and it was craved and granted without exception in just such case as the present. *Dudly ex'r v. Smith et al.*, 2 Ark. R. 365. The judgment is therefore reversed.