Smith, Francis
Kinzer, J Louis

vs Dean, William

1853

St. Louis Co

330/3

570/8

Dean acknowledged by bond & obligation under seal to be indebted to Cropper, Robert in $7461.29.
S&K trustees of Dean's estate

Gamble
affirmed
trustees not
legal holders
& petition defective

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State of Missouri }
County of St. Louis } ss Be it Remembered that on the Fourteenth day of March Eighteen Hundred and Fifty Three there was filed in the Office of the Clerk of the Saint Louis Circuit Court within and for the County of St. Louis a petition which is in the words and figures following to wit:

In the Saint Louis Circuit Court. April Term 1853

Saint Louis County. ss

Petition. Francis L. Smith & Louis Kinzer Plaintiffs }
vs
William Dean Defendant } Plaintiffs state that the defendant by his certain bond and obligation under seal hereto annexed and made a part of this petition bearing date on the 2d day of September 1840 acknowledged himself indebted for value received to one Robert Crupper, and for the payment of which sum in said Bond mentioned to wit the sum of seven hundred and fourty four 24/100 Dollars with legal interest on the same from the 2d day of September 1840, he bound himself his heirs and asigns.

Plaintiffs further state that they are the trustees of said Robert Crupper and are the legal holders of said Bond as trustees of said Crupper for the benefit of his creditors, that the said obligation remains unsatisfied and uncancelled in their hands, and the sum of seven hundred and forty four dollars and twenty Nine cents is due from defendant on said

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bond for which sum with interest thereon they ask judgment.

Knox & Kellogg.

State of Virginia
County of Alexandria, to wit:

I Louis Kinzer this day personally appeared before me W. C. Yeaton a Notary Public for the County and State aforesaid and made oath in due form of law and says that he believes the above petition and the facts therein stated are true

I Louis Kinzer

Sworn to and subscribed before me this second day of March 1853. In Testimony whereof I hereto set my hand and affix my seal Notarial the day and year last above written

W. C. Yeaton
Notary Public.

V. S.

The bond hereto annexed and made a part of this petition is in the words and figures following to wit:

Mr William Dean

To Robert Crupper Dr

1840 To Balance due per ye Rend
Sept 2d and by settlement to this date $1144.29
Cr By Amt for use of his name as used in the firm of Crupper & Dean for 2 years at 200$ as per Contract $400.00
Balance $744.29

3 $744.29

The above balance of Seven Hundred & forty four Dollars & Twenty Nine Cents I acknowledge to be justly due to Robt. Cruppen for Value Recd. and for the payment of which I do bind myself my heirs and Assigns; with legal interest on the same from the 2nd day September 1840. Given under my hand & Seal.

Wm. Dean Seal

Thereupon was ipued the following summons to wit:

The State of Missouri,

Summons To the Sheriff of St. Louis County Greeting:

We Command you to Summon William Dean to appear before the Judge of Our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, within and for the County of St. Louis on the Third Monday of April next then and there to answer the Complaint of Francis L Smith & St. Louis Kinzer as set forth in the annexed Petition, and have you then there this writ:

Witness Michael S. Cerré Clerk of said Court, with the seal thereof hereto affixed, at Office in the City of St. Louis, this 14th day of March in the year of Our Lord Eighteen hundred and fifty Three

L. S.

M. S. Cerré Clk

Thereon the Sheriff made the following Return, to wit:

Sheriff's Return. Executed this writ in the County of St. Louis, on the 14th day of March 1853, by delivering to the within named defendant William Dean a certified Copy of the within

writ and petition as furnished by the Clerk.

John M. Wimer Sheriff
By Th. S. Chadbourne Dep'y

And afterwards to wit: At the April Term 1853 of said Court and On Tuesday April 19th 1853 the following further proceedings were had in this cause to wit:

Francis L. Smith & al vs William Dean — Twenty days additional time is given to said defendant to plead herein

And afterwards to wit: At the April Term 1853 of said Court and On Monday May 9th 1853 the following further proceedings were had in this cause to wit:

Francis L. Smith & al vs William Dean — Demurrer filed.

Which demurrer is in the words and figures following to wit:

Francis L. Smith & ~~al~~ & Louis Kinzer vs William Dean — plffs. Deft — Circuit Court of Saint Louis County

And now comes the defendant and demurs to the petition of plaintiffs because it does not state facts sufficient to constitute a cause of action in this:

1st Because said petition does not show or recite any written assignment to the plaintiffs of the bonds set out therein, by the obligee named in the

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same, and because said petition does not show how plaintiffs came to possession of said bonds.
2nd " Because there is no endorsement or assignment on said Bond & therefore said petition shows no title to said Bond in the plaintiffs
3d " Because said petition does not show or recite any instrument in writing appointing plaintiffs trustees of Robert Cruppen, or authorizing them to sue on the bond therein described, nor does said petition state or show, how plaintiffs became the legal holders of said bond
4th " Because it appears from the face of said petition (that at the Commencement of this suit) all cause of action was barred on said bond by the statute of limitations
5th " Because said petition does not state why this action was not brought within ten years from the date of said bond.
6th " Because it does not show ~~they~~ any cause of action accrued on said bond within ten years last past or from the institution of this suit
7th " Because said petition does not state that said bond remains unpaid by defendant to said Robert Cruppen.

S. M. Rankin
for Defendant.

And afterwards to wit at the April Term 1853 of said Court and On Saturday May 14th " 1853 the following further proceedings were had in this cause to wit:

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Francis L. Smith vs. William Dean

The Court having duly heard and Considered the Demurrer of said defendant to the petition of said plaintiffs and being thereof fully advised doth order that said demurrer be sustained.

State of Missouri
County of St. Louis } ss

I Michael J. Cerre clerk of the Circuit Court within and for the County aforesaid Certify the foregoing to be a full and complete Transcript of the Record and proceedings in the Cause of Francis L. Smith vs. Louis Kinzer against William Dean as fully as the same remains in my Office.

In testimony Whereof I hereto set my hand and affix the seal of said Court at Office in the City of Saint Louis this 30th day of September A. D. 1853

M. J. Cerre Clk.

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| Demurrer filed | " 4 |
| Demurrer Overruled | " 4. |

State of Missouri
County of St. Louis

So I Michael S. Cerre Clerk of the Circuit Court within and for the County aforesaid herewith transmit a full and complete Transcript of the Record and proceedings in the Cause of Francis L. Smith & I Louis Kintzer against William Dean as fully as the same remains of Record in my Office

In testimony Whereof I hereto set my hand and affix the seal of said Court at Office in the City of St. Louis this 30th day of September A. D. 1853

M S Cerre Clk

(8)

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October. T. 1853

Francis L. Smith & I Louis Kintzer
Dep. in Error
vs
William Dean
Deft. in Error.

Transcript. Circuit Court

Knox & Kellogg
attys

Filed per October 1853
W S Glanville
Clerk

S. L. M. Clerk & Rec.
Pd by Knox. atty.

# The State of Missouri, ss.

**The State of Missouri,** *To the Honorable the* Circuit Court of the Eighth Judicial Circuit *in said State, GREETING:*

**WHEREAS,** In the record and proceedings in a certain cause lately pending in the Circuit Court of in and for the County of Saint Louis,

wherein Frances L. Smith and J. Louis Kerger were plaintiffs and William Dean was defendant

in an action of manifest error hath intervened, to the great damage of the said plaintiffs as by their complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of Saint Louis, in the County of Saint Louis, in said State, on the third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law, ought to be done.

**Witness,** WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the twenty eighth day of September in the year of our Lord one thousand eight hundred and fifty-three.

Wm. S. Glanville,

CLERK.

$1.50 — paid by plffs. attorneys.

Francis L. Smith et al
Appellants

vs

William Dean Respondent

In the Supreme Court
October Term 1853

The Appellants Francis L. Smith et al come and say that the St Louis Circuit Court erred in sustaining the defendants Demurrer to the petition in the above cause

Krum & Kellogg
Attys for Appellants

No 47

In the Supreme Court
October Term 1853

Francis L. Smith et al
vs
William Dean Respt.
Assignment of Errors

Kane & Kellogg
Attys for Appellants

Filed 29th October 1853
Wm. L. Glanville
Clerk

Smith & Kinner

v

Dean

The plaintiffs claim to recover on a bond made by the defendant Dean payable to one Crupper They allege that they are the legal holders of the bond as trustees of Crupper for the benefit of his creditors. The bond was payable on the 2 September 1840. There is no allegation that the bond was assigned to the plaintiffs.

The petition was demurred to and the demurrer sustained.

Two questions are presented on the demurrer
1 Whether the title of the plaintiffs to the bond is sufficiently stated in the petition.

2 Whether the petition does not shew that the bond action on the bond is barred by the statute of limitations.

We will not say how far the act ~~directing~~ requiring the assignments of bonds and notes to be by indorsement thereon, in order to enable the assignee to sue in his own name, is affected by the Code of practice, which abolishes the distinction between law and equity and requires all suits to be commenced and prosecuted in the name of the real party in interest. But if an assignee or the person beneficially interested in a bond may sue thereon without stating an indorsement ~~or deed~~ he must still state his title in his petition. To state that he is the legal holder is to state a conclusion of law from facts that are traversable. He must state the facts that give him the title to the bond when upon its own face the title appears to be in another. The obligation of the defendant was to pay money to Crupper. By what fact did he become bound to pay it to plaintiffs? The

petition fails to state the facts. The petition says the plaintiffs are the legal holders as trustees of Cropper for the benefit of his creditors. This is no statement of any act done by Cropper transferring the bond. The plaintiffs may be constituted such trustees by the act of Cropper or if the transaction occurred in another State they may be trustees of an insolvent debtor appointed by Law. The petition is in this respect defective.

The ground of demurrer, that the petition shews the action to be barred by the statute of limitations is not available. The petition states a cause of action upon which a recovery may be had and judgment upon such petition would not be disturbed because of the insufficient statement of the cause of action. Time is not under the act of limitations a bar to the action under all circumstances, and we will not require a plaintiff in his original petition to state the facts by which the ~~facts~~ action is to be maintained notwithstanding the lapse of time since the cause of action accrued. It is better to allow the petition to contain only a statement of the original cause of action until the defendant in his answer shews his intention to avail himself of the defence under the act

The judgment is with the concurrence of the other judges affirmed

A R Gamble

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Smith & Kerrer

v.

Dean

Opinion

HRG.

Filed 1 December 1853
Wm S Glanville
Clerk.

Francis L. Smith &
I Louis Kinzer — } Appellants
vs
William Dean } Respondent.

In Supreme Court
October Term 1853.

the demurrer to the petition in this case was properly sustained by the Court below, for the reasons therein assigned.

As to the first three reasons set out in ~~said~~ demurrer respecting assignment, See Case Ainsworth vs Crockett XI Mo Rep page 636.

The Plaintiffs should have shown in their petition how they came into possession of the bond. If Robbert Crapper the obligee in the bond had made a general assignment of his effects to plaintiffs as trustees for the benefit of creditors, it would not be such an assignment as would enable the plaintiffs to sue in their own names, See Case Miller vs Paulsel & Newman VIII. 355.

As to the fourth fifth & sixth reasons assigned in demurrer respecting the limitation of the action. The plaintiffs make the bond a part of their petition - which shows upon its face that it is barred by the statute of limitations. The late Practice Act requires that when the petition does not state facts sufficient to constitute a cause of action, & "when any of the matters enumerated in Section 3 Art 6 (of Practice Act of 1849)

do not appear upon the face of the petition then the objection may be taken by answer but in this case the plaintiffs shown upon the face of their pleading that they have no cause of action, therefore the objection was properly taken by demurrer See Section 346 of Article 6th of Practice Act 1849.

As to the seven Cause of demurrer assigned.

The plaintiffs should have stated that ~~said~~ not only did the said bond remain unpaid undated for & uncancelled in their hands, but that the same was unsatisfied & uncancelled in the hands of said Robert Crosspen. For ought that appears upon this petition it may never have been the intention of Crosspen that these plaintiffs should have this bond - or that they may have found it. or that it has been paid to said Crosspen

Francis L. Smith & al

In the Supreme Court
October Term 1853

William Dean

The plaintiffs contend that it was not necessary to state in the petition how the bond sued on was assigned, and that the statement the plaintiffs were the legal holders of said bond as trustees of said Cruppen for the benefit of his creditors is a sufficient averment of title in said plaintiffs.

The plaintiffs further contend that by the 1st & 2d Sections of the Third Article of Act entitled "An act to reform the Pleadings and Practice in Courts of Justice," the plaintiffs had the right to sue in their own names whether the bond had been assigned to them by any instrument of writing or not, if they were the real parties in interest.

The plaintiffs further submit that the defendant cannot avail himself of the Statute of Limitations by way of demurrer, nor are the plaintiffs required to state any facts in their petition that might present the Statute of Limitation from barring their demand. That the Statute of Limitations under the old system of pleading must be pleaded and can now only be set up by way of answer. Chitty on Pleading 515. 520. 3d J.J. Marshall 363 Smart v Bough. 373 Smart v Jackson 2 Wend. 294 Jackson v Varick 4 Har & J. 539. Maddox v State.

Kane & Kellogg Attys

No 47.

In the Supreme Court
October Term 1853

by
Francis L. Smith
sol
v
William Dean

Statement of Points
and Authorities

Knox & Kelley
Attys for Appellees

Francis L. Smith &
S. Louis Kinzo
appellants
vs
William Dean - Respondent

Points of Respondent

The demurrer of the defendant below to the plaintiffs Petition, was properly sustained by the Court -

The Plaintiff did not stand upon the face of his Petition a Cause of action against the defendant - no assignment or transfer, in writing, of the Bond sued on, to the Plaintiffs is stated in the Petition - Rankin & Krum
for Respondent

8. Mo. Rep. 355

Supreme Court

Smith & Krieger

vs

William Dean

Points of Respondent

Rankin & Krum
for Respondent

Francis L. Smith &
J. Louis Kinzer Appellants In the Supreme Court
vs.
William Dean Respondent October Term 1853

This was a suit on a bond which reads as follows viz.

Mr William Dean

To Robert Crupper Dr

| | | |
|---|---|---|
| 1840 Sept. 2d | To Balance due per a/c Rend. and by settlement to this date | $1144.29 |
| Cr | By amt for use of his name as used in the firm of Crupper & Dean for 2 years at 200 $ as per contract | 400.00 |
| | Balance | $744.29 |

$744.29

The above balance of Seven hundred & forty four dollars & twenty ~~cents~~ nine cents I acknowledge to be justly due to Robt. Crupper for value Rec'd and for the payment of which I do bind myself, my heirs and assigns; with legal interest on the same from the 2d day of September 1840. Given under my hand and seal

Wm Dean (Seal)

The petition and summons were served on the defendant March 14th 1853. The petition is as follows viz: Plaintiffs state that the defendant by his certain bond and obligation under seal hereto annexed and made a part of this petition bearing date on the 2d day of September 1840 acknowledged himself indebted for value received to one Robert Crupper and for the payment of which sum in said bond mentioned to wit the sum of Seven hundred and forty four 29/100 dollars with legal interest on

the same from the 2d day of September 1840 he bound himself his heirs and assigns

Plaintiffs further state that they are the trustees of said Robert Crupper and as the legal holders of said Bond as trustees of said Crupper for the benefit of his creditors that the said obligation remains unsatisfied and unannulled in their hands and the sum of three hundred forty four ~~dollars~~ dollars and twenty seven cents is due from defendant on said bond for which sum with interest thereon they ask judgment

To which petition the defendant filed the following demurrer Viz.

Into court comes the defendant and demurs to the petition of plaintiffs because it does not state facts sufficient to constitute a cause of action in this

1st Because said petition does not show a recital any matter of engagement to the plaintiffs of the bond set out therein by the obligee named in the same and because said petition does not show how plaintiffs came to possession of said bond

2d Because there is no endorsement or assignment on said bond & therefore said petition shows no title to said bond in the plaintiffs

3d Because said petition does not show a recital any instrument of writing appointing plaintiffs trustees of Robert Crupper or authorizing them to sue on the bond therein described nor does said petition state or show how plaintiffs became the legal ~~owners~~ holders of said bond

4th Because it appears from the face of said petition that at the commencement of this suit all cause of action was barred or suddenly the statute of limitations

5th Because said petition does not state why this action was not brought within ten years from the date of said bond.

6th Because it does not state that any cause of action accrued on said bond within ten years last past or from the institution of this suit.

7th Because said petition does not state that said bond remains unpaid by defendant to Robert Cropper.

The Court sustained the demurrer with the plaintiffs bring the case to this Court by Writ of Error.

Knox & Kellogg for Plffs

L. H. Rankin for defendants

In the Supreme Court
October Term 1883

Frances L. Smith et al
v.
William Dean

Statement of facts