

portant part of the record, and is one of the things upon which the trial court acts in granting the writ or allowing the appeal. It is plain, therefore, that such assignment constitutes an essential part of the record to be presented to this court, and that it cannot be superseded by a subsequent assignment of errors,—certainly not by one filed without leave of the court. In *U. S. v. Goodrich*, 4 C. C. A. 160, 54 Fed. 21, the circuit court of appeals for the Eighth circuit held that it “will not consider errors the assignment of which is not made and filed in the court below when the appeal or writ of error is allowed.” In *Insurance Co. v. Conoley*, 11 C. C. A. 116, 117, 63 Fed. 180, the circuit court of appeals for the Fourth circuit held that it would not consider an assignment of errors not filed in the trial court by the plaintiff in error at the time he filed his petition for the writ, though the trial court, at the time such petition was filed and the writ of error was allowed, granted additional time for filing assignments of error, and notwithstanding they were filed within the time granted. See, also, *Flahrity v. Railway Co.*, 6 C. C. A. 167, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 61 Fed. 808; *Grape Creek Coal Co. v. Farmers’ Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838; *Railway Co. v. Reeder*, 22 C. C. A. 314, 76 Fed. 550; *City of Lincoln v. Sun Vapor Street-Light Co. of Canton*, 8 C. C. A. 253, 59 Fed. 759; *Deutsch v. Wiggins*, 15 Wall. 539.

Upon the ground that the record does not contain, and the brief of the appellant does not rely upon, any assignment of errors filed in the court below at the time of the allowance of the appeal, the judgment is affirmed.

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MAYER v. FT. WORTH & D. C. R. CO. et al.

(Circuit Court, S. D. New York. April 8, 1899.)

**REMOVAL OF CAUSES—TIME FOR FILING PETITION.**

Under rule 24 of the general rules of practice of New York adopted January 1, 1896, which provides for the extension of the time for serving a pleading “by stipulation or order,” a stipulation extending the time to answer until a date named may be regarded as fixing the time when the defendant is required to answer “by the rule of the state court” within the meaning of the removal act, and a petition for removal filed previous to that date is in time.

**On Motion to Remand.**

A. J. Dittenhoefer, for plaintiff.

Noah H. Swayne, for certain defendants.

LACOMBE, Circuit Judge. It is contended that the cause was removed too late, because, although there had been a stipulation between counsel that time to answer might be extended to a date subsequent to that on which petition for removal was filed, no order of court to that effect had ever been obtained. Such contention is in accordance with the decision of this court in *Schipper v. Cordage Co.*, 72 Fed. 803, and in subsequent cases. As the rules of the state court then stood, it was thought that a mere stipulation to extend (without order) could not be construed as requiring answer to be served on the

day named, "by the rule of the state court," which is the phrase used in the federal statute. Attention is now called to the revised phraseology of rule 24 (general rules of practice of the state), adopted January 1, 1896, which reads as follows:

"Rule 24. \* \* \* When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order except upon two days' notice to the adverse party of the application for such order."

This rule, coupled with the stipulation, may fairly be held to make an extension "by rule of the state court," and the removal should be held to be in time. The defendant Dodge, who, it is alleged, is a citizen of New York, does not seem to be a necessary party. Motion to remand denied.

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SCHOOL DIST. OF CITY OF SEDALIA, MO., v. DEWEESE.

(Circuit Court, W. D. Missouri, C. D. March 28, 1899.)

No. 2,204.

LIMITATION OF ACTIONS—AVOIDANCE OF BAR—PLEADING.

A mere allegation that plaintiff "had no knowledge or notice" of an alleged fraudulent conversion of property, on which the action is based, until a later date, is insufficient to avoid the bar of limitation; no facts showing either concealment by defendant or diligence on the part of plaintiff being alleged.

On Demurrer to Petition.

John H. Bothwell and Chas. E. Yeater, for plaintiff.  
William S. Shirk, for defendant.

PHILIPS, District Judge. This cause has been submitted on a general demurrer to the petition. It is not deemed necessary that the court should pass upon other questions raised by the demurrer, in view of the fact that the demurrer must be sustained on the ground that the cause of action, on the face of the petition, is barred by the statute of limitations. Waiving the consideration of the question as to when plaintiff's cause of action first accrued, as against James C. Thompson, it certainly accrued, as against the First National Bank of Sedalia, not later than the month of July, 1893; and, as this suit was not instituted until the 20th day of January, 1899, more than five years had elapsed after the cause of action accrued when the suit was filed. The only attempt on the part of the plaintiff to avoid the operation of the statute is the following amendment to the petition, admitted at the hearing of this demurrer, to wit:

"And, further, plaintiff states that it had no knowledge or notice of the fraudulent conversion or sale of said bonds by said Thompson as aforesaid, and did not discover the same until after the failure of said bank, in May, 1894."

This is wholly insufficient to avoid the statute of limitations in an action for money had and received. *Wood v. Carpenter*, 101 U. S. 141; *Foley v. Jones*, 52 Mo. 64; *Wells v. Halpin*, 59 Mo. 92; *Moore v. Smelting Co.*, 80 Mo. 86; *Hoffman v. Parry*, 23 Mo. App. 20. The