divided between the James Gray and the General Clinch, according to the rule laid down by this court in the case of the Schooner Catharine et al. *v.* Dickinson et al., (17 How., 170.)

The decree of the Circuit Court is therefore reversed; and the case remanded, with directions to adjust the loss upon the principles stated in this opinion.

We do not assent to so much of this opinion as makes the "James Gray" liable for negligence, merely for want of exact conformity to port regulations.

S. NELSON.
R. C. GRIER.
NATHAN CLIFFORD.

THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, PLAINTIFFS IN ERROR, *v.* MOSES C. MORDECAI.

A writ of error must be made returnable to the first day of the term, which is now the first Monday in December. If made returnable to any subsequent day, it is erroneous, and will be dismissed on motion. It cannot be amended.

THIS case was brought up by writ of error from the Circuit Court of the United States for the western district of Virginia.

It was an action of debt, brought by Mordecai, (a citizen of South Carolina,) upon a judgment which he had obtained against the insurance company, in the Circuit Court of the United States for the district of South Carolina. A judgment was given also for Mordecai in the Circuit Court of Virginia, from which the insurance company sued out a writ of error in October, 1858, which was made returnable to this court on the "second Monday in January next," (being the second Monday in January, 1859.)

Mr. Phillips moved to dismiss the writ of error, on the ground that the writ was not made returnable according to law, and in support of the motion gave the following reasons:

The English rules with regard to the return day of a writ of error are—

In the King's Bench it is returnable *ubicumque*, &c., on the first or last *general* return of the term.

In the Exchequer Chamber it is returnable before the justices of the Common Bench, &c., on a *particular* return day.

In the House of Lords, when the Parliament is sitting, the writ is made returnable before the King in his present Parliament, *immediate*. After a prorogation, the writ is returnable at the next session; or after a dissolution, at the next *Parliament*, specifying the day when it is to be holden.

By the act of 24th September, 1789, the court was directed to hold two sessions, the one commencing the first Monday in February, and the other, first Monday in August. The sessions of the court were subsequently changed by statute to be the second Monday in January, and then to the second Monday in December.

While the statute gives the commencement of a term, it does not regulate its duration. The court may sit several months or one month. If, therefore, a writ of error is not made returnable to the first day of the session, it may so happen that the record would be sent up on a day when the court is not in session.

It is true that the acts of Congress do not determine the day of return; this was left to be determined by the court, under the power given to regulate its process.

Under the act of the 3d May, 1792, it was made the duty of the clerk of this court, with the approval of two of the judges, to prepare the form of a writ of error. This was done, and the writ then made out undoubtedly made it returnable to the first Monday of the court. The clerk informs me that at each succeeding change of the terms, new blanks have been prepared, in which the return day was stated to be the first of the term. Not only is the act silent as to the day of the return, but it is equally so as to the term. Yet this court has in two cases dismissed a writ of error when a term had intervened. (Hamilton *v.* Moore, 3 Dal., 371; Blair *v.* Miller, 4 Dal., 21.)

While no rule of the court specifically declares that the writ

shall be made returnable to the first day of the term, the 43d rule, adopted in 1835, declares that, when the judgment or decree is rendered thirty days before the term, the cause shall be docketed and the record filed within the first six days of the term. This is wholly inconsistent with the idea that a writ of error on such a judgment could be made returnable at a subsequent period.

AMENDMENT.—At common law, writs of error were not amendable. (1 Arch. Drac., 214.) This was afterwards regulated by stat. of 1 Geo. I.

The 32d section of the judiciary act, though writs of error are not named, may be understood to confer a similar authority.

It may be, therefore, that leave to amend will be granted when there is anything to amend by. This was the case in 4 Dal., 12.

In this case there is nothing to amend by.

The motion was opposed by *Mr. Robinson*, upon the following grounds:

1. Under section 22 of the act of Congress establishing the judicial courts of the United States, a writ of error issued by the clerk of the Supreme Court is to be returnable at a certain day and place therein mentioned, but that day need not be the first day of the next term.

The form of a writ of error is given in Curtis's Digest, p. 599. It is made returnable to "the —— Monday of —— next." It may be that, in most cases, it is now made returnable to the first Monday in December, and that formerly, when the term commenced the second Monday in January, it was in most cases made returnable to that day. This, however, is not because of any necessity to make it returnable to the first day of the term, but because that, in most cases, is a convenient day.

It would be of no avail to make it so returnable when there is not, between the day on which the writ of error issues and the first day of the next term, time to give the adverse party the twenty or thirty days notice required by the act of Congress.

Nor will it do to say that, during the twenty or thirty days

next preceding the commencement of a term, no writ of error is to issue; for that would make it impossible ever to obtain under section 23 a *supersedeas* to a judgment rendered within those twenty or thirty days.

Judge Curtis observes that the citation "may be made returnable in term, and on *such a day of the term* as will enable the plaintiff in error to have it served on the adverse party thirty days before its return day." This is entirely correct. And there is but a slight inaccuracy in the language which follows, to wit: that "if this can be done thirty days before the first day of the next term, it *should* be made returnable on that day." No doubt that, in such case, it *may* be made so returnable. But, in the nature of things, it is, at the time of issuing the writ, impossible to know whether the writ can be served thirty days before the first day of the next term. It is therefore proper that there should be room for some exercise of discretion on the subject, and that the writ should be made returnable to some day of the next term sufficiently distant to make it probable that there can, before that day, be the twenty or thirty days notice.

In this very case it was, at the time the writ of error issued, exceedingly doubtful whether, in the very short time that remained, it would be practicable to serve the writ of error under section 23, by lodging a copy thereof in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment. And if the twenty days notice could not be given in this way, it was, at the time the writ issued, far from being certain that there would, before the first day of the next term, be sufficient time to give that notice in any other way. It was therefore proper to make the writ returnable to some convenient day beyond the first day of the next term; and the second Monday in January was such convenient day.

2. Under the act of Congress of May 3, 1792, sec. 9, it was the duty of the clerk of the Supreme Court to transmit to the clerks of the inferior courts the form of a writ of error approved by two of the judges of the Supreme Court, and it was lawful for the clerks of the inferior courts to issue writs of

error agreeably to such forms as nearly as the case may admit. (Brightly Dig., p. 137, sec. 4; p. 260, sec. 6; p. 896, secs. 5, 11.)

It may reasonably be presumed that, in discharge of the duty prescribed by this act, the form of a writ of error was approved by two of the judges of the Supreme Court, and transmitted to the clerks of the inferior courts, and that the writ of error in this case was issued agreeably to such form. If so, the writ of error must be lawful unless there be something in the act which in terms requires the writ to be returnable to the *first day* of the term. But this is carefully avoided by the act, which directs merely that the writ of error shall be "returnable to the Supreme Court."

3. If there be any irregularity in the writ, it is merely clerical, like the irregularity in Course, &c., *v.* Stead and wife, 4 Dall., 22, and Blackwell *v.* Patten, &c., 7 Cranch, 277. As the irregularity of the teste was insufficient to quash or dismiss the writ in those cases, so the irregularity in the return day is equally insufficient to quash or dismiss the writ here. As in Course, &c., *v.* Stead and wife, the writ was amendable in respect to the teste, so here it is amendable in respect to the return day.

In Mossman *v.* Higginson, 4 Dall., 12, where the return day of the writ of error was left blank, it was deemed a merely clerical error, and, as such, amended. The writ is regularly tested here as it was there, and, it appears, *when* the writ was filed below and here.

Wood *v.* Lide, 4 Cranch, 180, modifies or explains Hamilton *v.* Moore, 3 Dall., 371, and Blair *v.* Miller, 4 id., 21. In those cases, the objection was, not that the writ was defective in form, but that, after the return day, a whole term passed before the record and writ of error were filed in the Supreme Court.

Mr. Chief Justice TANEY delivered the opinion of the court.

The defendant in error, on the 8th of October, 1858, obtained a judgment against the plaintiffs in error in the District Court of the United States for the western district of Virginia.

On the 18th of the same month, this writ of error was sued out, and made returnable on the second Monday in January then next ensuing—in other words, it was made returnable on the second Monday in January, in the present term of this court; and the defendant in error was cited to appear here on that day.

A motion has been made to dismiss the case, upon the ground that, in order to bring the judgment of the District Court before this court, the writ of error must be returnable on the first day of the term, and that a writ of error with a different return day is not authorized by law, nor by the rules and practice of this court.

By the act of Congress of May 8, 1792, (1 Stat., 278,) it was made the duty of the clerk of this court to transmit to the clerks of the several Circuit Courts of the United States the form of a writ of error, to be approved by two of the judges of this court; and the clerks of the Circuit Courts were by that act authorized to issue writs of error agreeably to such form, as nearly as the case would admit. And it is by virtue of this act alone that the clerk of a Circuit Court, or of a District Court exercising the jurisdiction of a Circuit Court, is authorized to issue a writ of error to remove a case to this court.

Immediately after its passage, the form of a writ of error was adopted and transmitted to the clerks of the Circuit Courts, pursuant to its provisions; and that form made it returnable on the first day of the term of this court next ensuing the issuing of the writ—that is, on the day appointed by law for the meeting of the court. The form then adopted has never been changed, nor are we aware of any case in which a writ of error with a different return day has been sanctioned by this court.

It is unnecessary, therefore, to inquire what may be the rules of practice in this particular in other courts. The legal return day was fixed under the authority of the act of 1792; and a writ of error issued by the clerk of a Circuit Court, or of a District Court exercising the powers of a Circuit Court, with a different return day, or differing in any other material respect from the form transmitted, is without authority of law, and will not bring up the case to this court.

The rules of the court have been framed in conformity with this return day of the writ; and the rule which permits a defendant in error to docket and dismiss a case if the transcript is not filed by the plaintiff within the time therein limited, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff might then file the transcript.

He may, it is true, return the writ with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ, and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term. The writ before us was obviously issued by some oversight of the clerk, who followed the form used when this court met on the second Monday in January, without, it would seem, adverting to the circumstance that the day of meeting had been changed by law, and that the first Monday in December, and not the second Monday in January, was the first day of the term.

Neither can the writ of error be amended. The defendant in error was cited and admonished to appear on the second Monday in January; and if the writ were amended, it could not be maintained with this citation, for the defendant must be cited to appear on the same day that the writ is returnable. The citation is the regular and familiar process from a court of justice, notifying and requiring the defendant to appear and make his defence, if he has any, on the return day of the writ. And the common-law process of a writ of error made returnable on one day, and a summons to the defendant to appear at another, would be without precedent, and would be as objectionable as the entire absence of a citation. And the want of proof that the defendant was cited has always been held to be a fatal defect in the process prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record.

Nor can this mistake be corrected by a citation from this court. The act of Congress requires it to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court.

The case must therefore be dismissed for want of jurisdiction in this court.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR, *v.* PHILIP QUIGLEY.

A railroad company is responsible in its corporate capacity for acts done by its agents, either *ex contractu* or *in delicto*, in the course of its business and of their employment.

It is responsible, therefore, in an action for the publication of a libel.

It is within the course of its business and the employment of the president and directors, for them to investigate the conduct of their officers and agents, and report the result to the stockholders.

But a publication of this report must be made under the conditions and responsibilities that attach to individuals under such circumstances.

In the absence of any malice or bad faith, a report to the stockholders is a privileged communication. But this privilege does not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation, or the members of the community.

So far, therefore, as the corporation authorized the publication in the form employed, they are responsible in damages.

But the instruction of the Circuit Court was erroneous, holding the corporation responsible for a publication which took place after the commencement of the suit. Also an instruction allowing the jury to give exemplary damages, because there was no evidence that the injury was inflicted maliciously or wantonly.

Under the general-issue plea, no question could be raised as to the capacity of the parties to sue in the Circuit Court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

It was an action on the case for libel brought by Quigley against the railroad company, under the circumstances which are fully set forth in the opinion of the court, which also contains the instructions of the Circuit Court to the jury.