

## NATIONAL BANK v. BANK OF COMMERCE.

Where a judgment was rendered October 5, and the present term commenced October 15, and the writ of error and citation were returnable on the "second Monday in October next," the court, March 17, grants, on motion of the plaintiff in error, an order allowing the writ to be amended by inserting the third Monday of the term as the return-day thereof, but requires him to cause a new citation returnable on the first Monday of the following May to be issued and served.

MOTION to amend a writ of error to the Circuit Court of the United States for the Eastern District of Missouri.

*Mr. Philip Phillips* in support of the motion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The judgment below was rendered Oct. 5, 1878, and the present term of this court commenced October 15. A writ of error returnable on the "second Monday in October next" was sued out and served the day the judgment was rendered. A citation returnable on the same day with the writ was duly signed and served before the first day of the term.

Rule 8 of this court provides that in cases when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day. By sect. 1005 of the Revised Statutes this court is authorized at any time, in its discretion and upon such terms as it may deem just, to allow an amendment of a writ of error when it is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error. Sect. 999, Rev. Stat., provides that the adverse party shall have at least thirty days' notice of a writ of error by citation.

The plaintiff in error now moves to amend the writ so as to make the return-day the first day, or the third Monday of the present term; for the issue of a new citation to conform

to the amended writ, and for leave to file the transcript and docket the cause.

We think the motion should be granted. Sect. 1005 clearly authorizes us, in our discretion, to allow the amendment of the writ, and we cannot see that the defect has prejudiced, or that the amendment will injure, the defendant in error. The fact that thirty days could not elapse between the date of the writ and the return-day presents no objection. Sect. 999 of the Revised Statutes is but the re-enactment of a similar provision in sect. 22 of the Judiciary Act of 1789 (1 Stat. 84), and until the promulgation of the present rule at the December Term, 1867 (6 Wall. vi.), all writs of error were made returnable on the first day of the term next after their date, no matter how short the time between the day of the issue and that of the return. The citation followed the writ, and service was required before the return-day. By a rule entered as early as the February Term, 1803, if the writ issued within thirty days before the meeting of the court, the defendant in error was at liberty to enter his appearance and proceed to trial, or otherwise the cause was continued. 1 Cranch, xviii. At the same term, in *Lloyd v. Alexander* (id. 365), the reason for the adoption of the rule is stated, and in *Welch v. Mandeville* (5 id. 321), the court decided that when the citation was not served thirty days before the term, the defendant in error would not be required to go to a hearing without his consent. The meaning of the statute is not that the citation shall be served thirty days before the return-day, but that the defendant in error shall have at least thirty days' notice before he can be compelled to go to a hearing. We do not understand that the case of *Yeaton v. Lenox* (7 Pet. 220) holds otherwise. Certainly there was nothing in the facts to require any such decision.

As the return-day of the writ is changed, a new citation should issue to notify the defendant in error of what has been done. This is clearly within the rule as stated in *Dayton v. Lash*, 94 U. S. 112.

The transcript may be filed and the cause docketed upon a compliance by the plaintiff in error with the rules in that particular.

An order will be entered allowing the plaintiff in error to amend the writ by inserting the third Monday of the present term as the return-day, in lieu of the "second Monday in October," and requiring him to cause a new citation, returnable on the first Monday in May next, to be issued and served on the defendant in error.

*So ordered.*

---

STRINGFELLOW v. CAIN.

1. Under the act entitled "An Act concerning the practice in territorial courts, and appeals therefrom," approved April 7, 1874 (18 Stat. pt. 3, p. 27), the appellate jurisdiction of this court over the judgment or the decree rendered by a territorial court in a case not tried by a jury can only be exercised by appeal.
  2. Where the record of a suit is duly certified upon an appeal to a district court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its order refusing a new trial and from its judgment are taken to the Supreme Court of that Territory, the statute whereof requires a statement, to be settled by the judge who heard the cause, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them, and no more;" and where a statement settled and signed by him, and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the District Court, upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to the said Supreme Court, — *Held*, 1. That the proceeding was thus made to conform to the requirements of the Practice Act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. 2. That if that court reverses the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing here; but if it has all the evidence which could be considered below, should the case be remanded, it may state the facts established by the evidence and render judgment. On an appeal to this court, the case, if otherwise properly here, will be determined upon the facts so stated. 3. That if the findings of the District Court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the said Supreme Court, and they, for the purpose of an appeal here, furnish a sufficient statement of the facts of the case, within the meaning of the act "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874.
- Supra.*