

NELSON, J. I have examined the brief of counsel for plaintiff on the motion made for a new trial. The evidence does not, as claimed by counsel, prove that the plaintiff's intestate sustained the relation of passenger at the time of the injury complained of which resulted in death. The deceased was an employe of the defendant, off duty, and accompanied other employes to whom a car had been loaned for the purpose of attending a meeting about the employes' own business. The car and engine was in charge of Flanagan, who secured the loan of them, or at least the car, for the use of the employes; he being the defendant's yardmaster. Flanagan induced the engineer of a switch-engine to haul down the car; the latter being unwilling at first, as he was going off duty, but finally was persuaded to do so. Flanagan, from the evidence in the case, was negligent in the management of the train; and his negligent act caused the injury to plaintiff; but the defendant was not responsible for his negligence. He was not in the performance of any duty in the line of his employment by the defendant, and was not engaged in furtherance of the company's business. The negligent act complained of was done by Flanagan when the employes on the car were at liberty from their service, and pursuing their own ends exclusively. It is the case of an employer permitting his employes to take his car and engine, and ride for their own pleasure, and negligent management by one of the employes. The defendant, in my opinion, is not liable for damages arising therefrom. I leave out of view other objections to a recovery.

Motion for a new trial denied.

BANGOR SAV. BANK v. CITY OF STILLWATER.

(Circuit Court, D. Minnesota, Third Division. March 31, 1891.)

ACTION ON CITY CERTIFICATES—DEFENSES.

Where in an action upon a certificate of indebtedness issued by a city, and signed by the mayor and clerk, the answer alleges that it was issued without authority, and delivered to the plaintiff without consideration; that the pretended consideration was under a contract with a company of which the mayor was a member; that the contract was fraudulent and void, and no consideration was ever received by the city, and the issue was in excess of the powers of the city, and in violation of law; that the certificate was not issued in anticipation of the revenue; that before it was issued the city, through its city council and financial committee, had anticipated the revenue to the full extent authorized by law,—it is not demurrable as failing to state a defense.

At Law. On demurrer to answer.

Sanders & Bowers, for plaintiff.

Fayette Marsh, for defendant.

NELSON, J. Suit is brought by the Bangor Savings Bank upon a certificate of indebtedness issued by the city of Stillwater, a municipal cor-

poration in the state of Minnesota. The complaint alleges that the certificate for \$7,500 was issued to plaintiff October 29, 1888, drawing interest at the rate of 6 per cent. per annum, and payable to the plaintiff or order on July 1, 1890, at the Fifth Avenue Bank of New York City. The certificate is set forth *in hæc verba*, and is signed by G. M. Seymour, mayor of the city of Stillwater, and attest, E. A. Hopkins, Jr., clerk of the city, with seal attached. This complaint alleges the payment of value for the certificate, and the receipt of the same by the defendant corporation, and the defendant's demand for payment, and refusal, and asks for judgment, etc. The defendant answers the complaint, denying the allegations in the complaint, except that it admits that G. M. Seymour, as mayor, and E. A. Hopkins as clerk, of the city of Stillwater, executed the certificate, but alleges that the said G. M. Seymour and E. A. Hopkins, Jr., were never authorized by the legislature of Minnesota, or by any corporation or body of men, to do so, or to make, issue, and deliver the certificate of indebtedness, and that said certificate was issued and delivered to the plaintiff without consideration, and that neither the city of Stillwater, nor any person authorized to act for it, ever, directly or indirectly, received any consideration for said certificate, and alleges that the pretended consideration was under certain contracts made and entered into with F. H. Lemon & Co. That at the time of making said contracts G. M. Seymour was a member of this company, and mayor of the city, and interested in said contract, and said contract was fraudulent and void, and that no consideration was ever paid or received by this city, and the same was in excess of the powers of the said city, and in violation of law. And further alleges that the money was not borrowed in anticipation of the current revenue of the city, and that before the issuing of said certificate the city had, by and through the actions of its city council and financial committee, in accordance with the statute in such case made and provided, borrowed to the full amount it was authorized by law to do, in anticipation of current revenue, and that the indebtedness so anticipated has never been paid, and alleges that the defendant was never by law authorized to issue said certificates.

A demurrer is interposed by the plaintiff to the answer, which assigns as ground of demurrer that the answer does not state facts sufficient to constitute a defense. The counsel have thoroughly argued the case, and reference has been made to the city charter, defining their power and duties, and the obligations of the city and its officers. While I agree with the plaintiff's counsel substantially upon the law, it requires some proof to meet the issues made by the answer. This was recognized by plaintiff's counsel, and he attempted upon the argument of the demurrer to introduce an affidavit as evidence upon what he regarded as an issue formed by the pleadings. This affidavit could not be read upon the argument, involving only the question of the sufficiency of the answer as a pleading. I think the case can be more properly and understandingly presented upon the trial, and I therefore overrule the demurrer, and give the plaintiff an opportunity to reply in 30 days from the filing of

the order overruling the demurrer, so the case can be noticed for trial at the June term of this court.

Demurrer overruled, with leave to reply, if thought necessary, within 30 days.

UNITED STATES *v.* ENGEMAN *et al.*¹

(District Court, E. D. New York. March 28, 1891.)

1. COURTS—PROCEEDING TO CONDEMN LANDS FOR UNITED STATES—WHERE BROUGHT.

A proceeding to condemn lands for the use of the United States, under the provisions of the act of congress of August 18, 1890, entitled "An act making appropriations for fortifications and other works of defense," etc., is properly brought in a district court of the United States.

2. EMINENT DOMAIN—FOLLOWING STATE PRACTICE.

In such proceeding the practice should be in substantial conformity with the practice pursued in the courts of the state when similar proceedings are there instituted.

At Law. On exception to the jurisdiction.

The United States filed this petition in this court to condemn a part of Plum island. The statute of the United States authorizing the condemnation was the act of August 18, 1890, in which was the provision that the proceedings were to be prosecuted "in accordance with the laws" of the state in reference to similar proceedings. The law of New York state is the general statute of 1890, (Sess. Laws 1890, p. 266,) the provision of which was as follows: "The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court." The defendants excepted to the jurisdiction of this court, claiming that under the words of the two statutes in question the petition must be presented to the supreme court of the state.

Thomas E. Pearsall, (*R. D. Benedict*, of counsel,) for defendant.

Jesse Johnson, U. S. Dist. Atty.

BENEDICT, J. This case comes before the court upon an exception to the jurisdiction. It is a proceeding in the name of the United States to condemn certain land for the use of the United States, under a provision of law contained in the act "for making appropriations for fortifications and other works of defense, passed August 18, 1890." This statute contains the following provision:

"Hereafter the secretary of war may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses; such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property of the states wherein the proceeding may be instituted."

¹Reported by Edward G. Benedict, Esq., of the New York bar.