the same, whereupon a warrant shall issue for the amount. Provisions somewhat similar are found in §§ 5571 and 5572.

In the present case it does not appear that these prerequisites to a comptroller's warrant had been complied with. The bill of costs had not been taxed, nor had it been examined and certified by the Circuit Court, nor by the Attorney General or district attorney, and it contained the costs of the defendant, for which the State is not liable.

Though, therefore, the costs of the prosecution are undoubtedly a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer, the demand made upon him by the relators was unauthorized by law; and, consequently the *mandamus* was properly refused.

The judgment of the Circuit Court is *Affirmed.*

Mr. John P. Murray and *Mr. Benton McMillan* for plaintiffs in error. No appearance for defendant in error.

KNICKERBOCKER LIFE INSURANCE COMPANY *v.* SCHNEIDER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

No. 163. October Term, 1879. — Decided March 2, 1880.

When the plaintiff in an action at law on a life insurance policy against the insurer avers in his declaration that the company had been notified of the death of the person whose life was insured in the policy, and that the necessary preliminary proofs required by it had been made, and the answer is a general denial of all and singular the allegations of the petition so far as the same may have a tendency to give to said plaintiffs any right or cause of action against the respondent, and, not specially traversing the allegations as to notice and proof, sets up specific defences, on which alone the defendant relies, it is not necessary to prove the notification, nor that the necessary preliminary proofs were made.

The case is stated in the opinion.

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

This was a suit on a policy of insurance for $20,000 issued by the plaintiff in error on the life of Gustav Osterman in favor of Schneider & Zuberbier, his creditors. The policy provided for payment within three months after due and satisfactory proof of the

death of Osterman. The petition set forth his death on the 15th of September, 1876, and averred that the company was immediately notified thereof, and that due proof of the death, "made under the forms and directions of said insurance company, were duly forwarded and their receipt acknowledged by said company." The company answered the petition, denying "all and singular the facts and allegations therein contained, so far as the same may have a tendency to give said plaintiff any right or cause of action against respondent," and then averring that Osterman, at the date of the application for insurance and of the policy, "was, and continued up to the time of his death to be, so far intemperate as to impair his health and shatter his constitution; . . . that he was addicted to gambling, a duellist, a debaucher of women, . . . and an idle and roaming character; leading such a dissolute, profligate, and wandering life, as not only materially affected his health, but also considerably shortened the period of his life." There were other averments sufficient to make this a good defence to the action if the allegations were true. It was also averred that the debt of Osterman to the plaintiffs was barred by the statute of limitations; that certain warranties contained in the application for the policy had been broken, and that false answers were made to certain interrogatories propounded by the company's medical examiner. The issues being made up by the pleadings, a trial was had before a jury. On the trial, the plaintiffs after proving the policy and the debt of Osterman, rested. The company then offered evidence tending to prove that the habits of Osterman at the time of the application were so far intemperate as to impair his health and shorten his life. Evidence in rebuttal was given, and both parties rested. The company then asked the court to charge the jury, "that plaintiffs having failed to produce any evidence to show that previous to the institution of this suit they had given notice of the death of said Osterman, in conformity with the provisions printed on the back of the policy, and in fact as the plaintiffs had failed to adduce any evidence tending to show that plaintiffs had furnished, prior to the institution of this suit, any proof whatever of the death of Osterman, said plaintiffs could not recover." This request was refused and the jury, in substance, told that if they found for the plaintiffs on the other issues, their verdict must be in favor of the plaintiffs for the full amount of the policy and interest from the commencement of the suit, because the pleadings, in effect, admitted the death of Osterman and placed the defence on the

ground that, under the facts of the case, his death was not covered by the policy. A judgment having been rendered against the company, this writ of error was brought.

The only question presented by the assignment of errors is whether, under the issues made by the pleadings, it was necessary for the plaintiffs, before they could recover, to show by evidence that they had notified the company of the death of Osterman, and made the necessary preliminary proofs required by the policy before the suit was begun. We think it was not. It is directly averred in the petition that such notice was given and proof made. The answer is to be construed as a whole. There has been no attempt to set up separate defences, such as is allowed in common-law pleadings. No direct issue is made upon the fact of notice and proof, but the whole effort is to show that, notwithstanding such notice and proof, the plaintiffs cannot recover. It is true there is a general denial of all and singular the allegations of the petition, "so far as the same may have a tendency to give said plaintiffs any right or cause of action against the respondent;" but this we understand to be no more than a denial of such averments as are inconsistent with the specific defences set out in the other parts of the answer. Taken as a whole the answer in legal effect admits that the plaintiffs must recover unless the specific defences relied on are sustained. This evidently was the understanding of all parties at the time of the trial, for the objection now insisted upon was not made until the case on both sides had been closed, and the court was about to charge the jury.

The judgment is affirmed, and as it is apparent to our minds that this writ was sued out for delay, damages to the amount of one thousand dollars are awarded in addition to interest.

Mr. Thomas J. Semmes for plaintiff in error. *Mr. J. P. Hornor* and *Mr. W. S. Benedict* for defendant in error.

McINTYRE *v.* GIBLIN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 173. October Term, 1879. — Decided December 1, 1879.

In an action to recover damages for carelessly and negligently shooting and wounding the plaintiff, it is no error to charge the jury that in computing the damages they may take into consideration a fair compensation for the physical and also for the mental suffering caused by the injury.