testator's death. Especially is this so, when, as in the will under consideration, it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. All the authorities and dicta concur, that under such circumstances the accruing interest upon the securities, from the time of the death of the testator, should go for the use and maintenance of the beneficiary. It follows from these considerations, that the order of the General Term granting a new trial should be affirmed with costs, and in pursuance of the defendants' stipulation, judgment absolute should be rendered for the plaintiff, and the Supreme Court is directed to ascertain the amount due to the plaintiff on the principles of this opinion, and render judgment therefor with costs.

All concurred except GROVER, J., who dissented, and PORTER, J., who, having been of counsel, took no part.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

ACKNOWLEDGMENT OF EXECUTION.

Proof of Identity.—Legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary, when the officer has no previous knowledge of them. A mere introduction, at the time, is not sufficient: *Jones et al.* v. *Bach et al.*, 48 Barb.

When this previous knowledge does not exist, the officer must take satisfactory evidence, under the solemnity of an oath or formal affirmation, of the identity of such persons: *Id.*

ARBITRATION.

Agreement to submit to—Liquidated Damages.—An agreement, under

[1] From J. W. Wallace, Esq., Reporter; to appear in 5 Wallace's Reports.

[2] From Hon. Charles Allen, Reporter; to appear in 13 Allen's Reports.

[3] From Hon. O. L. Barbour, Reporter; to appear in 48 Barbour's Reports.

[4] From P. F. Smith, Esq., State Reporter; to appear in 53 Pa. State Rep.

seal, of submission to arbitration provided that either party who should fail to perform the award should forfeit to the other a certain sum, and that each party should get a surety for the faithful payment thereof. By a separate agreement not under seal, but on the same paper and made on the same day, another person guaranteed the performance of the award, on the part of one of the parties, and the payment of the penalty, in case he should refuse to perform the same. *Held*, that the principal and guarantor could not be joined in one action, under Gen. Sts. c. 129, § 4: *Wallis* v. *Carpenter*, 13 Allen.

A submission, under seal, to arbitration, can only be revoked by an instrument under seal: *Id.*

Simply proving that an arbitrator was a creditor of one of the parties is not sufficient to invalidate his award: *Id.*

If two persons who have been partners together submit to arbitration all matters between them, and after the commencement of the hearing they and another person with whom they had formed a partnership for transacting a portion of their business submit to the same arbitrators all partnership matters remaining unsettled between them, and under the second submission an award is made fixing a sum as due from the two original partners to such third person, the arbitrators may take such award into consideration in determining the matters in controversy between the original partners, and may award that one of them shall pay the amount thereof to such third person: *Id.*

An agreement of submission to arbitration provided that either party who should fail to perform the award should "forfeit to the other party the sum of fifteen hundred dollars as liquidated damages." By a separate agreement, another person guaranteed the performance of the award, on the part of one of the parties, and agreed to "pay the penalty of fifteen hundred dollars," in case he should refuse to perform the same. *Held*, that the sum of fifteen hundred dollars was to be treated as a penalty, in each agreement, and not as liquidated damages: *Id.*

Assumpsit.

Parol Promise.—During the raid of 1863, whilst the citizens of Pittsburgh were engaged in building defences, the defendant promised the plaintiff, also a citizen, that if he would work on them he would pay him. Notwithstanding the circumstances, the plaintiff was not bound to work gratuitously, and the defendant was liable on his promise: *Smith* v. *McKenna*, 53 Penna.

This promise was not to answer the debt or default of another; it was an independent undertaking by the defendant on his own account, and writing was not necessary to make it valid: *Id.*

Debtor and Creditor.

Vested Remainder.—An estate in vested remainder is liable to debts the same as one in possession: *Nichols* v. *Levy*, 5 Wall.

Hence, where creditors seek to subject, by bill in equity, to their claims an estate in such vested remainder, and it is decided that they cannot do it, the matter will be considered as *res adjudicata*, if they afterwards try to levy, by execution, on the same property, when, by the death of the tenant for life, it has become an estate in possession: *Id.*

EQUITY.

Injunction.—The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property from one party and put it into the possession of another; this can be done only by a final decree: *Farmers' Railroad Co.* v. *Reno, &c., Railway Co.*, 53 Penna.

A preliminary injunction cannot be used to harass or punish a defendant without benefit to the complainant: *Id.*

Interference by Injunction with inferior Tribunals.—With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari: Ewing* v. *City of St. Louis*, 5 Wall.

Therefore, to a bill filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth, as grounds of relief, want of authority in the mayor, and various defects and irregularities in the proceedings, a demurrer on the ground that a court of equity had no jurisdiction of the matter, and that the complainant had a plain, adequate, and complete remedy at law, was sustained: *Id.*

A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If, in the latter courts, equity would afford no relief, neither will it in the former: *Id.*

GUARDIAN AND WARD.

Investment in Land.—If a guardian of minor children uses his wards' money to purchase land, and takes a deed acknowledging the receipt of the consideration paid by him, "guardian of the minor children" of A., but running to himself, his heirs and assigns, without otherwise referring to his guardianship, this is sufficient to give notice to creditors of the guardian that the land is held by him in trust; and parol evidence is competent to show that in fact the land was purchased with the wards' money: *Bancroft* v. *Consen*, 13 Allen.

The fact that a guardian has wrongfully invested his wards' money in real estate will not render such real estate liable to be seized on execution by his creditors: *Id.*

HUSBAND AND WIFE.

Married Woman—Donatio causa mortis.—A married woman has power under our statutes to make a valid disposition of specific articles of her separate personal property by a *donatio causa mortis*, without her husband's consent: *Marshall* v. *Berry*, 13 Allen.

Tenancy by Entireties.—The recent statutes of New York for the better protection of the separate property of married women, have no relation to, or effect upon, real estate conveyed to husband and wife

jointly: *The Farmers' and Mechanics' National Bank of Rochester* v. *Gregory and Wife*, 48 Barb.

In such a case the wife has no separate estate, but is seised, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate: *Id.*

They hold thus not as joint tenants, or as tenants in common, but as tenants by entireties; and the same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety: *Id.*

Where the estate thus held by them is voluntarily converted into money, the same belongs to the husband exclusively, in virtue of his marital rights. And no rule of equity will give the wife the entire amount, as her separate property, to the exclusion of the rights of the husband and of his creditors: *Id.*

In a case where there never was any separate estate or right in the wife, neither the statutes nor the rules of equity, are sufficient to enable her to appropriate the entire property to herself, to the exclusion of the husband's creditors, although they became such during the joint ownership: *Id.*

Insurance.

By Trustee—Payment to a Creditor.—One of five trustees of a church edifice, being the agent of an insurance company, accepted a risk in it from another of the trustees to whom the church was indebted, the policy being in the individual name of the insuring trustee, with a proviso that in case of loss the amount should be paid to a creditor of him the insuring trustee, to whom, however, the church was not indebted. The insuring trustee paid the premiums out of his own funds but on account of the parish, and with the assent of the trustees; and the fact of two previous insurances in other companies, where the insurance was made in the name of the proprietors of the church generally, was recited in this policy made in the individual name of the one trustee. A loss having occurred—

Held, that the creditor of the insuring trustee was entitled to recover on the policy; the case showing that the insurance in the form in which it was made, was made with the assent of all the trustees, and it being a matter immaterial to the company (supposing the risk to be the same) whether the person appointed by the insuring trustee to receive the money retained it to his own use or paid it to the trustees: *Insurance Co.* v. *Chase*, 5 Wall.

Legal Tender Notes.

Custom of Bankers to pay special Deposits in Coin.—A customer of certain bankers at Washington, D. C., in times when, specie payments having been lately suspended, coin was acquiring one value and currency (paper money) another and less, deposited with them both coin and paper money; the different deposits being entered in his pass-book, the one as "coin" the other as "currency," &c. Debts being at this time payable by law only in coin, the bankers requested their customer to make his full balance coin, which he did. Congress passed, about eight months afterwards, an act making certain treasury notes lawful money for the payment of debts. The depositor went on, depositing "coin," and "treasury notes" then regarded as currency, and both were entered accord-

ingly. He afterwards drew for "coin," for a part of his deposit, and his check was paid in coin. He afterwards drew for "coin."—the bulk of his coin balance. Coin was refused and tender made of the treasury notes, declared by Congress a legal tender. On suit brought to recover the market value of the coin drawn for—the bank teller having testified among other things that "after the suspension, and particularly after the act making treasury notes a legal tender, his employers uniformly made with customers depositing with them a difference, in receiving and paying their deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise they paid currency, treasury or bank notes"—the plaintiff offered evidence to show "that the usage and mode of dealing between the said parties as set out in the testimony of the teller was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers:"—

Held, that the evidence was rightly excluded: *Thompson* v. *Riggs*, 5 Wall.

LICENSE.

Under Internal Revenue Acts—A Mode of Taxation only.—Licenses under the Act of June 30th 1864, "to provide internal revenue to support the government, &c." (13 Stat. at Large 223), and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a state: *License Tax Cases*, 5 Wall.

The requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes: *Id.*

The provisions of the Act of Congress requiring such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy: *Id.*

The provisions in the Act of July 13th 1866, "to reduce internal taxation, &c." (14 Stat. at Large 93), for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy: *Id.*

The recognition by the Acts of Congress of the power and right of the states to tax, control, or regulate any business carried on within their limits is entirely consistent with an intention on the part of Congress to tax such business for national purposes: *Id.*

A license from the Federal government, under the Internal Revenue Acts of Congress, is no bar to an indictment under a state law prohibiting the sale of intoxicating liquors. The *License Tax Cases*, *supra*, affirmed: *Pervear* v. *The Commonwealth*, 5 Wall.

A law of a state taxing or prohibiting a business already taxed by Congress, as *ex. gr.*, the keeping and sale of intoxicating liquors —Congress having declared that its imposition of a tax should not be taken to abridge the power of the state to tax or prohibit the licensed business,—is not unconstitutional: *Id.*

LUNATIC.

Inquisition—Burden of Proof.—An inquisition finding that a party is a lunatic or habitual drunkard, is *primâ facie* evidence of incompe-

tency at any time covered by the finding, and the burden is upon the party setting up a contract of the lunatic or habitual drunkard to show that he was sane at its execution: *Noel* v. *Karper*, 53 Penna.

In such case it must be shown that the lunatic or habitual drunkard had memory and judgment enough to understand the character of the act, and the legal responsibility entailed thereby: *Id.*

The presumption in favor of sanity is changed by the fact that there was such inquisition: *Id.*

Proof of fixed habits of intemperance for two years would not, aside from such finding, shift the burden of proof so as to require the party setting up the contract to prove competency at the time of its execution: *Id.*

Marriage and Divorce.

Jurisdiction.—The Supreme Court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute: *Penguet* v. *Phelps*, 48 Barb.

The court has no jurisdiction to declare a marriage void on the ground that a decree for divorce was obtained against the defendant by her former husband for adultery; in which decree she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision she and the present plaintiff went to another state and were there married: *Id.*

Negligence.

Death from Negligence—Damages.—A railroad company, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission: *Railroad Co.* v. *Barron*, 5 Wall.

When a statute—giving a right of action to the executor of a person killed by such an act as would, if death had not ensued, entitle such person to maintain an action for damages—provides, that the amount recovered shall be for the exclusive benefit of the widow, and next of kin, in the proportion provided by law in the distribution of personal property left by persons dying intestate; and that "in every such action the jury may give damages as *they shall deem a fair and just compensation with reference to pecuniary injuries resulting from such death, &c.*, not exceeding, &c.,"—it is not necessary to the recovery that the widow and kin should have had a legal claim on the deceased, if he had survived, for their support: *Id.*

Semble, that statutes of this kind are enacted, as respects the measure of damages, upon the idea that as a general fact the personal assets of the deceased would take the direction given them by the law governing the case of intestates. Hence any damages given must, as a general thing, be so distributed, even though the party have left a will not so devoting his property: *Id.*

The damages in these cases must depend very much upon all the facts and circumstances of the particular case. And as when the suit is brought by the party himself, for injuries to himself, there can be no fixed measure of compensation for the pain and anguish of body and

mind, nor for the loss of time and care in business, or the permanent injury to health and body, so when it is brought by the representative for his death the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. In the latter and more difficult case, as in the former one, often difficult also, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury, applied, as above stated, to all the facts and circumstances: *Id.*

Nuisance.

Damage to an Inn by Noise and Jarring of Machinery.—In an action to recover damages to an inn, from a nuisance, by carrying on works and operating machinery in the neighborhood, which shook the building and prevented guests from sleeping, evidence is incompetent on the part of the plaintiff to show that frequently guests, on leaving the inn at night and seeking other lodgings, declared that they did so because they were prevented from sleeping by the jar. And evidence is incompetent on the part of the defendants to show that, in the opinion of witnesses who were familiar with the locality, and who had bought, sold, and let real estate in the vicinity, the effect of the stopping of the defendants' works would be to diminish materially the value of the plaintiff's premises for occupation, although the plaintiff has introduced evidence to show that operating the defendants' works has diminished the rentable value of his premises: *Wesson* v. *Washburn Iron Co.*, 13 Allen.

An action may be maintained to recover damages for a nuisance to a dwelling-house, caused by carrying on works and operating machinery in the vicinity, which fill the air with smoke and cinders, and render it offensive or injurious to health, and shake the building so as to injure it and render its occupation uncomfortable, although all persons owning estates in the vicinity have sustained similar injuries from the same cause. It is only when the nuisance complained of is an invasion of some common or public right that the remedy is confined to a public prosecution: *Id.*

Pleading.

Negative Pleas.—The plea "covenants performed *absque hoc*, &c.," is a negative plea in part at least; the words "*absque hoc*" introducing a negation after an affirmative inducement: *Smith* v. *Frazier*, 53 Penna.

It contains an averment that the defendant has performed his covenants, and a denial that the plaintiff had performed his; throwing the burden of showing performance on the plaintiff, who is therefore entitled to the conclusion to the jury: *Id.*

Railroad Companies.

Acts and Admissions of Agents.—An agent of a railroad corporation, having charge of a depot, and the freight therein, is the proper person to inquire of respecting lost baggage; and his answer is part of the evidence of the loss, and admissible as *res gestæ*: *Curtis* v. *The Avon, Genesee, &c., Railroad Co.*, 48 Barb.

So, in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it, until it can be sent for: *Id.*

Evidence in Actions against.—In an action by a passenger, against a

railroad company, to recover for lost baggage, evidence to show that the passenger was lame and unable to take charge of his baggage, personally, is admissible, as tending to prove that he was guilty of no negligence in not calling for and taking charge of his baggage upon the arrival at his place of destination; and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for: *Id.*

Liability for lost Baggage.—Where a passenger, on arriving at his destination, neglects to look after his baggage and negligently leaves it, without any arrangement that the carrier shall retain it for him, and it is lost while thus situated, without fault on the part of the carrier, the latter is not liable: *Id.*

But where there is no delivery of baggage carried upon a railroad, to the passenger, and no neglect to claim it or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company's liability, as a common carrier, continues after the baggage is taken from the cars and until it is delivered or tendered to the owner: *Id.*

Stream.

Use by Owner of Land.—The owner of land, through which a natural stream of water passes, has no right to use the water for such purposes as will corrupt it, to the material injury of the riparian owners below: *Merrifield* v. *Lombard*, 13 Allen.

Rights of Owner of Land.—The owner of land bordering upon a stream may lawfully dig a canal upon his own land which will prevent it from being flowed by the erection or raising of a dam below, if he does not thereby divert the water from its natural course; and the fact that the owner below has already begun to build or raise his dam is immaterial: *Storm* v. *Manchaug Co. and Others*, 13 Allen.

Surety.

Negligence of Creditor.—To exempt a surety from liability by reason of the neglect and refusal of the creditor to collect the debt of the principal debtor while he was solvent, although requested to do so by the surety, it must be shown that the creditor was requested to enforce the collection of the debt *by due process of law*. Nothing short of that, in such a case, will exonerate the surety: *Singer* v. *Troutman*, 48 Barb.

Where the request was that the creditor should "push" the principal debtor, "and keep pushing him:" *Held*, that the words used had not the same legal significance as the words "prosecute or collect;" that to give those terms the same legal significance, it was necessary not only that the creditor should have understood them in that sense, but that the surety should have meant and intended that, also: *Id.*

The terms in which such a request are made are not material, but they should be unequivocal and clearly and plainly intended and understood as a request to collect by prosecution: *Id.*

Taxation.

Exemption on account of Military Service.—The property of a married woman is not relieved from taxations for bounties, by the exemption

:f her husband on account of military service: *Crawford* v. *Burrell Township*, 53 Penna.

The exemption of the soldier is a personal privilege, and does not exempt the wife of a living soldier: *Id.*

Telegraph Company.

Power to make Regulations—Message not repeated.—In this Commonwealth, telegraph companies may limit the measure of their liability to damages for errors in the transmission of messages, by reasonable rules and regulations, brought home to the knowledge of the parties interested therein: *Ellis* v. *American Telegraph Co.*, 13 Allen.

If a message is received by a telegraph company for transmission from one point to another in this Commonwealth, written upon a blank which contains, as a part of the terms and conditions upon which all messages are received by them for transmission, a statement that every important message should be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent, for which repetition half the usual price will be charged, and that they will not be responsible for any error in the transmission of any unrepeated message beyond the amount paid for sending the same, unless a special agreement for insuring the same be made in writing, and if an error occurs in transmitting the same, and the same is not asked to be repeated, and the message as erroneously transmitted is written upon a blank containing the same terms and conditions above referred to, and in that form is delivered to the person to whom it is addressed, such person so receiving the same cannot maintain an action against the company to recover greater damages than the amount paid for sending the same, without some further proof of carelessness or negligence on their part than that resulting simply from the error: *Id.*

Tenants in Common.

Accounting between.—One tenant in common, although he have the exclusive possession of the common property, is not liable to account to the other tenants in common either for rent or for a share of the profits, unless there be an express agreement that he shall do so: *Wilcox, Administratrix, &c.*, v. *Wilcox et al.*, 48 Barb.

Liability of Husband for Rent.—Where a married woman is a tenant in common with others, of property occupied by her and her husband, his occupation being that of his wife, no action will lie against him by the other tenants in common, for rent, without proof of an agreement to pay it: *Id.*

Usury.

Mode of Pleading.—Where usury is set up as a defence the usurious contract should be so pleaded that it may appear what rate or amount of interest was taken or secured, and on what sum, and for what time; and the answer should show a corrupt intent: *The National Bank of the Metropolis* v. *Orenth*, 48 Barb.

When these facts appear from the terms of the answer, nothing further is necessary to make it sufficiently definite: *Id.*

If the answer avers that the plaintiff discounted the drafts sued on