position and the obligations resting upon me will make its fallacy and unsoundness sufficiently apparent. The act referred to, whatever views may be entertained of its necessity or expediency, is a valid and constitutional law, and as such must be respected and enforced. No judge or other officer of the State or national government, or any citizen of either, so far as the rights of others are concerned, has a right to act on his private and individual views of the policy and validity of laws passed in conformity with the forms of the Constitution. Until repealed or set aside by the adjudication of the proper judicial tribunal, they must have the force of laws, and be obeyed as such. Any other principle must lead to anarchy in its worst form, and result inevitably in the speedy overthrow of our institutions.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

Supreme Court of Ohio, December Term, 1855.

The City of Cincinnati vs. *Leverett G. Stone and Medad W. Stone.* In error. Reserved in the District Court of Hamilton county. Opinion of the court by

BARTLEY, J.—The city of Cincinnati having given a contract to a person to regrade and repave a street, providing in the contract for "the work to be done under the direction of the City Civil Engineer, or Agent appointed by the City Council for the same, who shall have entire control over the manner of doing and shaping all, or any part of the same, and whose directions must be strictly obeyed," &c.; the contractor carelessly and improperly left piles of stones and materials for the work at a place near or about the gutter of the street, where a nuisance was likely to be created, whereby at the time of a rain, the water being obstructed, flowed back and over the pavement on the premises and building of the defendants in error, doing the damage complained of, Held—

1. That the liability of one person for damages arising from the negligence or misfeasance of another, on the principle of *respondeat superior*, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer

does not retain the control over the *mode* and *manner* of the performance of the work under the contract.

2. But where the employer retains the control and direction over the *mode* and *manner* of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.

3. In addition to the fact, in this case, that the city of Cincinnati retained the entire control and direction over the work, under the contract, it was a public duty enjoined upon the city to remove all nuisances from the streets of the city, and to make no contract for the improvement of the streets, by which any nuisance would be created on the premises of the adjacent proprietors, the city was, therefore, clearly liable for the injury sustained by the negligence of the contractor, or of any of his subordinates in the performance of the work.

Elias Straus & Brother vs. *The Eagle Insurance Company of Cincinnati*. Assumpsit. Reserved in the District Court of Ross county. The opinion of the Court by

RANNEY, J.—1. Corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred.

2. The act of incorporation, like any other statute, should be construed in such manner as will best answer the intention of the legislature; and all its parts should, if possible, be made subservient to, and in harmony with, the leading purposes and objects intended to be accomplished, and for which the corporation is created.

3. Unless expressly restrained by its charter, a corporation has the incidental power to make any contract, and evidence it by any instrument, that may be necessary and proper, to accomplish such purposes and objects.

4. A note or bill made or received by such a corporation, is, *prima facie*, within its corporate powers, and, therefore, valid; but it is competent to show, that it was given or taken for a purpose not authorized, and when shown, the contract is void, and the instrument a nullity.

5. An insurance company, authorized by its charter to *invest* its funds and capital stock, as should be deemed best by the directors, for the safety of the capital and interest of the stockholders, has no power to purchase

upon credit, the promissory note of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such note against the claim.

6. The power of investment was designed to enable the company to make a profitable use of its surplus funds; but such a contract, involving the use of no such funds, is, not only, without the limits of the charter, but directly opposed to its leading objects; as it furnishes a strong inducement to withhold prompt payment, for the purpose of depressing the credit of the insured, thereby enabling the company to purchase his paper at a greater discount.

7. The company, therefore, has no power to become a party to the contract of endorsement, and no capacity to receive or hold the legal title to the note.

8. A set-off can only be allowed for such claims as in good faith absolutely belonged to the party at the commencement of the action; and does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller, if they are not so used.

Set-off disallowed, and judgment for plaintiff.

The Atlantic and Great Western Railroad Company vs. *Francis Campbell.*—Petition in error to reverse a judgment of the Court of Common Pleas of Marrion county. The opinion of the court by

KENNON, J.—1st. That in a proceeding to appropriate the land of a person for the use of a railroad company, the owner of the land proposed to be appropriated, is a competent witness to testify in his own behalf, provided the proceedings have been instituted since the code took effect.

2d. That as a general rule the *opinion* of a witness as to the *amount* of *damages* which the landholder will sustain by reason of the construction and use of a railroad, is not evidence.

The verdict of the jury is set aside and the judgment of the Court of Common Pleas reversed.

Follett, Adm'r for the use, &c., vs. *Buyer.* Error to the District Court of Erie county. The opinion of the court by

THURMAN, C. J.—That in an action upon a note brought by the payee, for the use of his assignee, against the maker—the note having been assigned, (but not endorsed,) after due—and it not appearing that the payee was insolvent when he made the assignment, the maker cannot set off money paid by him as surety for the payee, after he received notice of the

assignment, although the money paid was upon a liability entered into before the assignment, but which had not been reduced into judgment against the surety before notice of the assignment was given. The maker had no demand upon the payee when he received such notice, but was only *contingently* liable for him.

Judgment of District Court reversed and that of Common Pleas affirmed.

Ford vs. *Parker.*—Petition in error to reverse the judgment of the District Court of Hancock county. The opinion of the court by

KENNON, J.—1. That the 10th section of the act regulating the jurisdiction of Justices of the Peace, which provides "That justices shall not have cognizance in actions against Justices of the Peace or *other officers* for misconduct in office," includes postmasters.

2. That when an action is brought against a postmaster for misconduct in office, and the damages claimed are less than $100, such action may be commenced in the Court of Common Pleas.

3. That in such action, when the petition charges that a letter containing money was lost by the negligence of the postmaster, and the evidence introduced on the trial tended to prove that the letter containing the money reached the office of the postmaster, the plaintiff may prove, for the purpose of establishing the negligence, that the office was kept in an exposed situation, and that the servants and clerks of the postmaster, in a store in which the post office was kept by the postmaster, had free access to the mail matter in the office.

Judgment of the District Court reversed.

The Board of Education of Brown township, Fairfield county, and others, vs. *John Chaney.*—Motion for leave to file a petition in error to reverse a decree of the District Court of Fairfield county. The opinion of the court by

KENNON, J.—1. That under the 24th section of the act to establish a fund for the support of Common Schools, which provides that "so much of the moneys coming from township tax levied for the continuation of schools after the State fund has been exhausted, shall be applicable only to the payment of teachers in the proper township, and shall be drawn for no other purpose whatever, and all school funds made applicable to the payment of teachers only, shall be distributed to the several sub-districts and fractional parts of districts in the township, in *proportion to* the *enumeration* of the scholars;" each sub-district is entitled to such

distribution, and the funds cannot be applied in any other proportion for the purpose of keeping up a school for seven months in *each* district, notwithstanding the provision of the same act, which provides that the board shall make the necessary provision for continuing the schools in operation in their respective townships for at least seven months.

2. That where such board has not sufficient funds to keep up a school in each sub-district for seven months *without* using the funds belonging to other districts, it cannot comply with the requisitions of the statute in that particular.

Motion for leave to file petition withdrawn.

Justice Martin et. al. vs. *Bailey & Burgess.*—Reserved in the District Court of Cuyahoga county, on a motion for a new trial. The opinion of the court by

BARTLEY, J.—1. That a draft of money payable at a day subsequent to its date, although otherwise in the ordinary form of a check, is a bill of exchange and subject to the usages and rules that govern bills of exchange, and as such, is entitled to days of grace.

2. The distinction between a bill and a check does not depend upon whether drawn payable to order or bearer, or whether drawn upon a bank or a banker or not, but it is founded in the difference in the nature or character of these two classes of commercial paper.

3. A check and a bill of exchange, although in many respects similar, are to be distinguished in the following particulars, to wit:

1st. A check is drawn upon an existing fund, and is an absolute transfer or appropriation to the holder of so much money in the hands of the drawee; whereas a bill of exchange is not always or necessarily drawn upon actual funds in the hands of the drawee, but very frequently drawn in anticipation of funds, or upon a previously arranged credit.

2d. The drawer of a check is always the principal, whereas the drawer of a bill frequently stands in the position of a mere surety.

3d. Although demand of payment and notice of non-payment, *in due time*, may be essential to hold the indorser of a check, yet a failure in this respect does not discharge the drawer, unless an actual loss to him can be shown to have arisen from such delinquency on the part of the holder.

4th. A check requires no acceptance, and when presented, is presented for payment.

5th. It is not protestable, or, in other words, protest is not requisite to hold the maker or an endorser.

4. From these distinguishing characteristics arising out of the nature of these two classes of instruments, it follows, that a check is payable on presentation and demand, and cannot be made payable on a specified day in future, and consequently not entitled to days of grace.

5. Any supposed usage of banks in any particular place to regard drafts upon them payable at a day certain, as checks, and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper.

Motion for a new trial overruled, and judgment for the plaintiff.

Reuben Perkins vs. *Margaret A. Mobley.* Error. Reserved in Belmont county. The opinion of the court by

RANNEY, J.—1. The mother of a bastard child, after the reputed father has been recognized by a justice of the peace, on a complaint instituted by her, under the act for the maintenance and support of illegitimate children, has no power to settle for or release his liability.

2. The liability of the father is created by the statute, and designed for the security of the public against the support of the child, by compelling him to make the necessary provision therefor; and can only be settled by the mother while the complaint is pending before the justice, and upon giving security to the township in which she resides, against all liability for such support.

3. It is not competent to inquire of the general reputation of a witness sought to be impeached; but the inquiry must be confined to the reputation of the witness for truth and veracity.

Judgment affirmed.

David McConohy vs. *The State of Ohio.*—Writ of error to the Court of Common Pleas of Muskingum county, to reverse a judgment against the plaintiff in error, on an indictment for the crime of shooting with intent to kill. The opinion of the court by

BARTLEY, J.—1. That, while drunkenness creates no exemption from criminal responsibility, and may even exaggerate the turpitude of guilt in some cases, *delirium tremens* or *mania a potu,* although the result or consequence of continued intoxication, is *insanity* or a *diseased state* of the mind, which affects responsibility for crime in the same way as insanity produced from any other cause.

2. The reason that intoxication creates no exemption from criminal

responsibility, does not apply to *delirium tremens,* which, although, like many other kinds of mania, the result of prior vicious indulgence, is always shunned rather than courted by the patient, and is not voluntarily assumed, either as a cloak for guilt, or to nerve the perpetrator to the commission of crime.

Judgment reversed, and cause remanded to the Court of Common Pleas.

Cutter Cheadle vs. *The State of Ohio.*—Error to the Probate Court of Morgan county. The opinion of the court by

RANNEY, J.—1. On the trial of an information for selling spirituous liquors not inspected, the State is bound to give some evidence in support of the negative averment.

2. It is error to charge the jury "that the State is not required to prove that the liquor was not inspected. That on the State's proving a sale, the defendant is required to prove that the liquor was inspected."

Judgment reversed, and cause remanded for further proceedings.

Judge SWAN dissented.

Woodworth vs. *Paige.* In Chancery. From Astabula county. The opinion of the court by

THURMAN, C. J.—If there is no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply—then the purchaser will in equity be considered, as in fact he is, a bona fide purchaser without notice.

Semble—That a release of dower in a deed executed by husband and wife, without consideration, to defraud his creditors, will not estop her to claim dower against the grantee, or any purchaser from him with notice. No fraud can be imputed to her because of such release, for the reason that she releases nothing that could be taken by her husband's securities.

Bill dismissed.

Gwin Reed and Taylor vs. *Sibley Shuck, and others.*—Chancery, reserved by the District Court of Vinton county. The opinion of the court by

KENNON, J.—1st. That when a bona fide sale is made of the property of a firm by its members before any proceedings either in law or equity

are instituted by a creditor of the firm, such creditor cannot by any subsequent proceeding acquire a lien upon the property thus disposed of.

2d. That as a general rule, a creditor of a firm has no lien upon the partnership property until acquired by process of law.

3d. That upon a hearing upon bill and answer, the answer will be taken as true in all points, and such answer cannot be contradicted except as provided in Section 31 of Chancery Act.

4th. Where one member of a firm purchases goods or borrows money for the firm on his own credit, giving surety for the payment of the money or the goods, and such money or goods go into, and are used by the firm, and the surety has to pay as such, the firm may convey the goods of the firm to such surety in satisfaction for the money thus paid, and a creditor of the firm cannot set aside such conveyance merely because he was, at the time of such conveyance, a creditor of the firm.

Bill dismissed with costs, reserving any equity of complainant as to surplus of notes and accounts.

Henry Philips vs. *The State of Ohio on the relation of Henry H. Harter and his wife Sarah Harter.*

Writ of error to reverse the judgment of the Court of Common Pleas of Preble county. Reserved in the District Court for decision here.

BARTLEY, J.—1. That the power of proceeding by citation or attachment against an administrator or executor for neglect to file his settlement accounts as required by law, is a necessary incident to the proper exercise of the jurisdiction of a probate court; and the statutory provision in the present administration laws of the State, expressly authorizing such proceeding, is only in affirmance of that incidental power essential to enable a probate court to control and direct the settlement of the estates of deceased persons.

2. Although such proceeding by citation or attachment against an administrator or executor, is not an action at law within the purview of the statute of limitations, but a simple proceeding in the probate court usually preparatory to the commencement of a suit on the administration bond, yet lapse of time after the default of the administrator in filing his final settlement accounts, is sufficient to bar an action on the administration bond, or to amount to a defence against a proceeding in equity for a discovery and account, will constitute a sufficient defence against any such proceeding by citation or attachment.

3. That although the doctrine, that a technical or direct trust is not

barred by lapse of time, is usually recognized as true, yet it appears to be subject to the following important qualifications, namely: That this rule in equity is dispensed with, except in cases of fraud and concealment; first, where there is a remedy by action at law to which a limitation is fixed; second, where an open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title; third, where circumstances exist calculated to raise a presumption from lapse of time, of a discharge or extinguishment of the trust. Judgment of the Common Pleas reversed.

Thomas Hueston vs. *The Eaton and Hamilton Railroad Company.*—Error to the Common Pleas of Butler county. The opinion of the court by

RANNEY, J.—1. The owner of land regularly appropriated to the use of a railroad company, upon proceedings instituted by the company under laws providing therefor, is barred of the common law remedy to sue for and recover the damages he may have sustained by the entry of the company, and the construction of their road upon such land.

2. In such case, the bar is equally effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded him, and deposited for his use.

Judgment affirmed.

Valentine Nicholson vs. *Israel Pine.*—In chancery from Champaign county. The opinion of the court by

KENNON, J.—1. Where a bill in chancery is filed to recover the consideration paid on a contract for the purchase of real estate after the contract of sale has been rescinded by the consent of both parties, and also to recover the value of the corn, wheat and potatoes growing on the land at the time of the recision of the contract, and of hay taken off the land and in stack, and where the amount of the claim is to be reduced by the value of the use and occupation and injuries to the premises done by the purchasers, the respondent, after answering to the merits and submitting his defence to the court, comes too late to object to the jurisdiction of the court upon the ground that the complainant had a plain and adequate remedy at law.

2. Where money is paid upon the purchase of real estate, and the contract is afterward rescinded by consent of the parties, upon an agreement that it shall be left to the honor of the vendor to pay back such *part* of the purchase money as shall be just and equitable, and he afterwards

refuses to pay any, a court will compel him to pay so much thereof as he in justice and equity ought to have paid.

Referred to master, and remanded to District Court.

McGatick vs. *Wasson*.—Motion for new trial—reserved by the District Court of Cuyahoga county. The opinion of the court by

THURMAN, C. J.—W. requested his hired man G. to assist him in placing certain railroad cars and trucks—which he had sold and agreed to ship from Cleveland to Toledo—on a vessel; to do which it was necessary to raise them from the dock by the use of machinery and manual effort. G. consented: the work was to be done the next day, which was Sunday, November 15, as the vessel was about to sail, and her master would not take the cars, &c., unless shipped on that day, and "it was a matter of great necessity that they should be shipped as speedily as possible, as navigation was about closing." While raising one of the trucks, a part of the machinery gave way, owing to which, the truck fell upon G., breaking both his legs. To recover damages for this injury, he brought this suit, charging that it was owing to W.'s neglect that the machinery was insufficient. A verdict being rendered for G., a new trial was moved for by W. *Held*—

1. That if W. had no charge of, or control over the operation of shipping the cars, &c., but, on the contrary, the duty of shipping them rested solely upon the master of the vessel, and he had the entire control over the operation, and W. was acting merely as his assistant or servant, the action should have been brought against the owner of the vessel and not against W.

2. But if it was W.'s duty to ship them, or if it was the joint duty of him and the master of the vessel, he was [as between him and G.] liable for the injury if it resulted from his neglect, or that of the master of the vessel, to provide suitable machinery: the defect in the machinery being unknown to G. The general rule is, that an employer who provides the machinery and oversees and controls its operation, must see that it is suitable; and if an injury to the workman happen by reason of a defect, unknown to the latter, and which the employer by the use of ordinary care could have cured, such employer is liable for the injury.

3. Legally considered, our Sunday act is merely a civil regulation, having no connection with religion, and founded on principles of public policy alone. And the same policy that dictated the prohibitions it con-

tains, also dictated its exception therefrom of "works of necessity and charity."

4. Works of necessity, within the meaning of the act, are not limited to labor for the preservation of life, health or property from impending danger. The necessity may grow out of, or indeed be incident to, the general course of trade or business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Hence the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so.

5. The labor in the present case was a work of necessity within the meaning of the statute, and consequently the point of defence, that the plaintiff was injured while in the commission of an unlawful act, cannot be maintained.

6. A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries and substitute the court to try all questions of fact. It must be clear that the jury has erred, before a new trial will be granted on the ground that the verdict is against the weight of evidence, or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori*, ought it to be the rule when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement.

Motion overruled and judgment upon the verdict.

BARTLEY, J., dissented, upon the ground that the verdict was against the weight of the evidence.

The Town Council of the Town of Newark vs. *Brady, Elliott, et. al.*—Action of debt on penal bond; reserved by the District Court of Licking county.

By an act of the Legislature of 1849, the Town Council of the town of Newark was authorized to subscribe to the stock of the Newark Plank Road Company not more than $10,000, and to issue bonds in payment of the stock, payable at such times, not exceeding ten years, and for such amounts as the council might determine, bearing interest, payable annually, at the rate of seven per cent. per annum; and the Town Council was authorized to *sell* and transfer the stock so soon as it could be sold at *par*. The opinion of the court by

KENNON, J.—1. That the par value of the stock is an amount equal to the amount of stock subscribed.

2. That a sale of such stock, by which the purchaser is bound to pay the bond of $10,000 and interest, given by the town of Newark for the $10,000 stock, is a sale of such stock at its par value.

3. That when there is no restraining clause in the charter of a corporation, it may dispose of any property which it has the right to acquire.

4. That the Town Council of the town of Newark are restrained from selling the plank road stock for less than the par value, but it may sell the stock on *credit*, provided the sales amount to the par value of the stock.

5. Where a corporation issues its own bonds, payable at a future day, with seven per cent. interest thereon, payable semi-annually, when by law it was authorized to make the interest payable annually only, the person who contracts with the corporation for a valuable consideration to redeem such bonds, cannot avoid his contract upon the ground that the corporation exceeded its authority in making the interest on such bonds payable semi-annually instead of annually.

6. If the object of the purchaser of this stock was to obtain the control of the stock of the Plank Road Company, and thereby improperly use the provisions of the charter of the Plank Road Company for the purpose of issuing and putting in circulation, as money and currency, the notes of the company, payable to bearer in violation of law, and such fact at the time of sale was known to the Town Council of the town of Newark, and it made the sale for the *purpose of enabling* the purchaser to carry out such illegal purpose, and the purchaser was, by such sale, enabled more effectually to carry out his intention, and he did in fact do so, the sale of the stock was illegal and void.

The demurrers to all the pleas of Elliott are sustained, and also to all the pleas of Brady except the 9th, as to which the demurrer is overruled and the cause remanded to the District Court for further proceeding.

In the matter of Sarah Sinclair's will. In error from Monroe county.

SWAN, J.—That a will lost or spoliated or destroyed *before* the decease of the testator, cannot be established.