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THE COMMON-LAW SYSTEM OF JUDICIAL PRECEDENT COMPARED WITH CODIFICATION AS A SYSTEM OF JURISPRUDENCE

BY CLARENCE G. SHENTON

That the legal consequences of human action may be predicted with certainty is one of the highest ideals toward which those who create schemes of jurisprudence can strive. In so far as law is determinable only by a judgment of a court which forever concludes the rights of the litigants, justice is not effectuated. Law which cannot be ascertained cannot be obeyed. In such cases we must either refuse to adjust rights, or impose the ex post facto adjudication from which we instinctively shrink. The case law system lends itself peculiarly to this fault. Its substantive structure, beaten into form in myriad controversies as the "clash of underlying interests works itself out,"[1] has called forth deserved encomiums. But what countless disappointments and chagrined surprises the process has caused to those who have paid and sacrificed to the end that others, not themselves, might profit by an ascertainment of the

[1] The figure is Bentley's. "The Process of Government," p. 295.

law! The cruel process of fashioning our case law has not ceased. Probably it can never cease, and it is not desirable that it should. Fixity in law, and humanity's progress are warring elements, and the concomitant of that law which needs no hardy pioneers to blaze new trails will be a civilization decadent, sterile, and retrospective.

First suspicion, then conviction, break in upon students of the common law, that we are not utilizing to the full the wealth of experience which we have acquired through so much toil and sacrifice. Profound scholars, philosophers, statesmen, have voiced their belief that mankind is capable of contriving a scheme which will more nearly conform to the ideal of certainty than the system under which we struggle today. James Bryce enumerates the characteristic defects of the case law as two, its frequent uncertainty, and "second, there is the utterly unsystematic character from which the Case Law necessarily suffers. It is the capital defect * * * one might say the only defect of the law of England." [2] Bentham styled it a "yoke about our necks, in wordless, boundless, and shapeless shape." [3] "Its grand defect is its inaccessibility," [4] writes Professor James Parsons. "Pretty tough," [5] "intricate," [6] "cumbrous, ill arranged, obscure, and not infrequently in conflict with itself," [7] "a sort of hand to mouth scrambling at best," [8] "the principal asset of the bar," [9] are typical epithets. Bench, bar, and lay must realize that opinions of opposite ten-

[2] "Studies in History and Jurisprudence," pp. 705-706.
[3] Bentham's Works, vol. 4, p.451.
[4] Legal Topics, p. 89.
[5] Pollock, "The Genius of the Common Law," p. 93.
[6] Austin, "Lectures on Jurisprudence," vol. 2, p. 1136.
[7] Markby, "Elements of Law," p. 61 et seq.
[8] Pollock, "Essays in Jurisprudence and Ethics," p. 238.
[9] Durran, "The Lawyer," p. 108.

or are not common, and where found, must be unconvincing.

Prominent among the causes of our perplexities is the bewildering maelstrom of legal doctrine which must be battled with as each new case arises. The unwieldy bulk of the case law was a matter of solicitude a century ago. "The evils resulting from indigestible heaps of laws and authorities," writes Chancellor Kent in 1823, "are great and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtility."[10] He thought the situation "grievous." It is appalling now. In his day one might have been conversant with all the cases in his own state, together with the leading cases from other jurisdictions. Today he would be a giant indeed who could honestly make the same boast. So much of the law of Pennsylvania as is written is to be found in more than 445,000 pages of reports, and in 8,500 pages of digested statutes.[11] "L. R. A.," begun in 1888, with the aim of "putting the greatest amount of matter most needed by the profession at large in the most practicable compass," to date has spread itself over 135,000 pages.[11] The effects of the increase in bulk of the case law are cumulative. Elaborate systems of annotation and cross reference are devised. The necessity for explaining and reconciling prior cases swells the reports by thousands of pages. Digests, textbooks, and encyclopedias appear. A well known publishing company sells the profession a sixty thousand page encyclopedia, citing 2,800,000 cases, the last volume being completed in 1912. Two huge volumes of annotations, citing 933,753 new cases, are added, and in 1916 half a dozen volumes of a still more compre-

[10] I Comm. 475.
[11] Author's count.

hensive exposition have passed through the presses, in an attempt to solve the problem by a "complete, correlated, systematic, accurate, and adequate statement of the whole law as embodied in all the decisions." [12] How long can it be complete and adequate? The situation is indeed a "vast slough of despond in which lawyers and judges wade in despair." [13] Picture the scene a century hence!

Jeremy Bentham conceived that there might be enacted in statute form a corpus juris which "would speak a language familiar to everybody." "A code framed upon these principles would not require schools for its explanation; would not require casuists to unravel its subtleties." [14] Judges were to make no new laws. Commentaries, if written, were not to be cited. Lawyers and laymen alike were to be absolved from research into the case and statute law of the past. The code was not to be a mere compilation, or consolidation, or revision, of statute law, leaving in concurrent operation the common law. Nor yet was it to be a digest of case and statute law lacking legislative fiat to give it sanction. It was to be complete and self-sufficing, a "body of law including a complete 'succedaneum' to the unwritten law," and Bentham was convinced that he could compile it. [15]

"Reductions to systematic form of the whole of the law, whether statute law, or common law, relative to a given subject," [16] are in operation today in practically all of the civilized world except the United States and

[12] Cyc and Corpus Juris are referred to.

[13] The figure is Raymond Arnot's, 43 Am. Law Rev. 67.

[14] Bentham's Works, vol. 3, p. 209.

[15] See his letter to Madison, Works, vol. 4, p. 451.

[16] The definition is Sir Courtenay Ilbert's, "The Mechanics of Law Making," p. 150.

the British Dominions, and in these countries codifications of particular subjects are found, while in some localities there are complete systems of codes.[17] They do not measure up to Bentham's ideal, in that they do not attempt to preclude the necessity for judicial interpretation and application. We learn that a well recognized principle of German jurisprudence[18] is reasoning by analogy when cases arise which are not directly covered by the provisions of the code. "And where the application of the principle of analogy offers no assistance, in such cases it is for the science of jurisprudence to examine into the 'nature' of the problem, and the 'system of things' of which it is a part, and then to seek to formulate a resulting principle."[19] The French code "has not stopped or made unnecessary historical inquiries into the French law as it stood before 1804. It has not checked the production or prevented the citation of commentaries."[20] The Spanish code, in effect in practically all of Latin America, provides that "when there is no law exactly applicable to the point in controversy, the custom of the place shall be applied, and in default thereof, the general principles of law."[21] The Swiss code is interesting: "The code applies to all legal questions for which it contains a provision * * *. If no command can be taken from the statute, then the judge shall pronounce in accordance with customary law, according to the rule which he as a legislator would

[17] Bryce, "Studies in History and Jurisprudence," pp. 83-84. Japan has codified since this classification.

[18] The word has here the continental denotation.

[19] Loewy "The Civil Code of the German Empire," p. lii, Introduction.

[20] Ilbert, "The Mechanics of Law Making," p. 178. See also Austin, "Lectures on Jurisprudence," vol. 2, pp. 121-127.

[21] Sec. 6, Introduction. Translation from Walton's "Civil Law in Spain and Spanish America."

adopt." [21] The reports of Louisiana, the exemplar of codification in the Union, and of other code jurisdictions, abound in citations of cases from other states, scrutinized in the endeavor to fill the inevitable gaps.[22]

Probably Bentham and his disciples have overestimated their powers. It is obvious that a self-sufficing code must be framed with such minuteness of circumstance as to provide for every conceivable contingency which has arisen or can arise in the future. To argue the impossibility of creating such a code is to be banal. Until the world arrives at the end of its experience, cases of novel impression are inevitable, and their nature it is not within the ingenuity of man to foresee. Ex post facto determination of rights to some extent is unavoidable under any system. Not only is it unavoidable, but prospective legislation is likely to be futile where a realization of the practical aspects involved has not been acquired through the conflicts in the courts. Legislation alone does not create law. Our statute books are full of enactments which, failing to take into consideration the practical exigencies of the governed, the courts with the connivance of the people have allowed to lapse into desuetude. "A code can usefully settle disputed points, and fill up small lacunae in the law," says Judge Chalmers of England, "but it should always have its feet on the ground. It must be form-

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[21] Art. 1, Introduction. Translation by R. P. Shick.

[22] For examples see: Harrington's Estate, 147 Cal. 124, 81 Pac. 546; Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121; Coonan v. Loewenthal, 147 Cal. 218, 81 Pac. 527; Fuller v. Lumber Co., 114 La. 266, 38 So. 164; Lewis v. Ry. Co., 114 La. 161, 38 So. 92; Richardson v. Ins. Co., 114 La. 794, 38 So. 563; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 699.

ed on the firm basis of experience, otherwise you are codifying in the air.'"[24]

Whether codification would to some extent dissipate the uncertainty and disorder of our case law has been the subject of zealous debate. The traditional attitude of the common-law practitioner is antagonistic. It is argued that law, and particulary common law, is not codifiable. Statutes, it is said, are the most prolific sources of litigation.[25] Words are at best a poor vehicle for the expression of thought. The iteration of doctrine found in the decision of a judge is an infinitely more satisfactory exposition of the law than the categorical declaration of a statute, under which the interpretation of law tends to become a matter of mere grammatical construction. The unwritten constitution of England is better understood, and is subject to less dispute, than our codified state and national constitutions. Consider the incompetency of the average legislature. And yet we have all the machinery at our disposal for enacting ordinary legislation that we could have for enacting a code. Where codes have been adopted, legislatures have indulged in persistent, wholesale, and unnecessary amendment, which not only mars the substance of the law, but destroys the very certainty which the codes are designed to procure.[26] It is contended that constant reference to cases from other jurisdictions promotes assimilation of doctrine and uniformity of law, whereas, as witness our divorce laws, statutes produce the wildest diversity. If the case law is obscure

[24] "Codification of Mercantile Law," 25 Am. Bar Assoc. Rep. 282.

[25] Carter, "Law, Its Origin, Growth and Function," p. 284.

[26] See "The Progress of Law Reform in New York," Arnot, 43 Am. Law Rev. 67; "A Century of Judge Made Law," Hornblower, 7 Col. Law Rev. 453; Coudert, "Certainty and Justice," p. 19.

and contradictory, it is no more the peculiar function of codification than of ordinary legislation to utter correctives, and of the two processes codification is immeasurably the more difficult. The common law has shown wonderful capacities for meeting the needs of civilization as they materialize. A code must surely have the undesirable effect of militating against its free growth.

The cogency of most of these arguments persuades us not to expect too much from codification. Their relevancy depends upon the definition of codification at which they are aimed. We cannot expect that codification will be more effective in creating substantive law than any other legislation, and we have come to accept it as approximately true that "to make the law certain on subjects as to which the community itself is most uncertain is a task which never has yet, and never will be accomplished," [27] whether the attempt be by legislative enactment or by judicial decision. But if we seek to enact only the results obtained and sanctioned by long usage, we surely can be met with no objection save that of the inadequacy of words to meet our demands. We are loath to believe that such is the nature of our law. Anything so amorphous, yet so intimately touching our lives, inspires a dread. The phenomenon, much witnessed of late, of cyclopedias and text books cited by bench and bar as authorities—as summarizing correctly the case law—indicates that the inadequacy of language is not an insuperable obstacle to codification.

The most potent arguments against codification find us no remedy for that "capital defect" of case law, its unsystematic character. The benefits to be derived from order and system in jurisprudence are not to be denied. Bentham had this thought when he remarked, "He who has been least successful in the composition

[27] Coudert, "Certainty and Justice," p. 22.

of a code has conferred immense benefit." [28] At present he who writes a good textbook does great service by classifying the case law. But textbooks and encyclopedias usually ignore the statute law, and their business is to enlarge upon conflicts, to provide the attorney with weapons for either side of mooted questions, not to settle them. Courts remain hopelessly at variance and obscure where time can produce no new evidence, where the community opinion is well defined, where the unmoral nature of the question leaves no excuse for lack of unanimity. Legislatures alone can sanction choice in such cases. Digests are inadequate. Their cases have no extra-forum authority. If cases from but a single forum are digested, lacunae will inevitably exist which could safely be filled by the tested experience of other jurisdictions. Legislative sanction is needed to fill up the lacunae . None but an authoritative exposition can delete and ignore the elements to which other expositions owe much of their massiveness. Judge Dillon thought codification on this basis the "manifest destiny" of the United States and England.[29]

Codification's strongest argument is that it is a huge and worldwide fact, and that it has invaded so many strongholds of the common law. In France and Germany it has been called a "popular success."[30] "In France leading provisions of the code have become household words. Familiarity with them is presupposed in popular literature and on the stage."[31] "To the advanced and scientific student of law, the code civil (of France) has supplied a framework to be filled in, supple-

[28] See Ilbert, "Legislative Methods and Forms," p. 126.

[29] "Laws and Jurisprudence of England and America," p. 873.

[30] Ilbert, "The Mechanics of Law Making," p. 154.

[31] Ibid. pp. 174-175.

mented, and illustrated. And to the ordinary student of law it is an inestimable boon that he should be able to find within reasonable compass an orderly and authoritative statement of the leading rules of his craft."[33] "Besides the merits due to its general spirit, the Code possesses certain technical qualities, due to excellent draftsmanship. These qualities are unity, system, precision, and clearness."[33] "With regard to the form, the (German) Code may well be proclaimed a model of scientific draftsmanship," and it "may be truly said to have become a popular handbook."[34] That codification would have the salutary effect of rendering more certain those parts of our law in which our experience justifies our finding certainty might reasonably be expected.

The impulse toward uniformity imparted by case law is negligible. On the other hand history reveals an avidity on the part of states and nations to imitate codes considered well wrought. The Code Napoleon "gave the signal for an enormous movement toward codification.....which extended over the whole world, ...acting directly even upon the precise mode of codification,"[35] and carrying with it the substantive civil law. At least five states have adopted the rejected Field codes of New York.[36] Probably we have most to expect from codification in the cause of uniformity, for it is in answer to uniformity's demands that codification seems to come peculiarly to its own. Codification

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[33] Ibid. p. 180.

[33] Jean Brissaud, in "General Survey by European Authors," p. 290.

[34] Prof. Ernst Freund, Ibid. p. 449.

[35] Brissaud, "General Survey, etc.," p. 305. Louisiana responded to the movement, p. 304.

[36] California, Montana, Iowa, Ohio, South Dakota. See 42 Am. Law Rev. 910. Carter, "Law, Its Origin, etc.," p. 307.

in the German Empire was but an expression of the struggle for national unity.[37] By codes France sought relief from vexatious diversity.[38] Of the territories of the British Empire, India was worst harassed by conflicting systems, and India alone of the British Empire has codes of any pretensions.[39] In our own country the Uniform Commercial Acts are among the most successful codifications.

The objection that codes cramp and stereotype the law, retarding its natural and free growth, brings to light a curious group of anomalies and contradictions. It fails, in the first place, to take that philosophic view of the common law which a short study of its history should inspire. When the strictum jus of the common law failed to provide a suitable vehicle for substantial justice, substantial justice emerged through the medium of courts of equity, or by the intervention of fictions. Absolutism, feudalism, and the stupidity and stubbornness of the courts themselves, have failed to check the progress of the common law, and it is reasonable to suppose that codes would succeed no better. Secondly, paradoxically enough, the doctrine of stare decisis has been invented to impart that very fixity at the contemplation of which the opponents of codification hold up their hands in dismay. Lastly, stare decisis, whose sole raison d'etre is to impart stability and certainty, is one of the prime causes of the unwieldy bulk of our case law, and therefore one of the prime causes of its

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[37] "General Survey," p. 435 et seq. Ilbert, "The Mechanics of Law Making," p. 164. Bryce, "Studies in History and Jurisprudence," p. 777.

[38] Halsbury's Introduction to "The Laws of England," p. cxxi. Ilbert, "Mechanics of Law Making," p. 156.

[39] The Government of India," Ilbert, p. 403.

uncertainty. Justice Black of Pennsylvania writes, "If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence would be the most fickle, uncertain, and vicious, that the world ever saw..... To avoid this great calamity, I know of no recourse but that of stare decisis."[40] Expressions like this are to be met within the reports every day. Can one wonder at the assiduity with which lawyers search for cases in point when courts profess such deference for precedents? They are apparently as essential to the lawyer as statutes. Here, undoubtedly, is one of the most fruitful causes of the embarrassing multiplication of reported cases and legal doctrine. It is worth while to inquire whether stare decisis can survive subjection to the light of reason.

"It is a fundamental proposition," says a New York justice, "that a decision on a matter of law, if once formally rendered in a court of last resort where the commn law is binding, is thereafter final and irrevocable by the court itself, and it can be changed only by the act of the legislature."[41] That may be considered a fair statement of the doctrine. If followed, it might achieve its purpose and justify its existence. It is usually not stated, and never applied so severely, however. "It is an established rule to abide by former precedents," says Blackstone.[42] But he immediately emasculates the rule by adding, "Yet this rule admits of exception where the former determination is most evidently contrary to reason."[43] Chancellor Kent writes, "If a decision has been

[40] Hole v. Rittenhouse, 2 Phila. (Pa.) 411.
[41] In re Tod, 147 N. Y. Supp. 165.
[42] I Comm. 69.
[43] 1 Comm. 69.

made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration of the law, and regulate their actions and contracts by it."[44] But he also leaves a breach through which Lord Brougham's coach and six may readily pass, when he qualifies, "The judges are bound to follow that decision unless it can be shown that the law was misunderstood or misapplied in that particular case."[45] A New York court speaks as follows: "The court almost always in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from paramount authority."[46] "I am not saying that we must consecrate the blunders of those who went before us," says the Pennsylvania Supreme Court in a decision which, strange to say, upholds stare decisis. "A palpable mistake must be corrected.....There are old decisions of which the authority is become obsolete by a total alteration in the circumstances of the country and the progress of opinion. Tempora mutantur."[47]

If under the influence of these typical expositions our stare decisis be not vanished into thin air, it must be admitted that its boundaries are so vague and shadowy as to be incapable of definition. What court which detects an error in a precedent will admit that the precedent is not "clearly erroneous?" Yet in that event we have ample authority for overruling precedents.[48] "It is by the notoriety and stability of such rules that

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[44] 1 Comm. 475-476.

[45] Ibid.

[46] Bates v. Relyea, 23 Wend. (N. Y.) 336. The italics are ours.

[47] McDowell v. Oyer, 21 Pa. St. 423.

[48] See authorities cited on page 19, note 1.

professional men can give advice to those who consult them, and people in general can venture to buy, and trust, and to deal with each other."[49] Of course, if people are not charged with notice of decisions, the doctrine collapses. If they are charged with notice, why should they not be permitted to rely absolutely upon the decision? Why should they be compelled to speculate whether or not a subsequent court will determine that the precedent upon which they would like to rely in "flatly absurd and unjust,"[50] and overrule it? If knowledge of decisions on the part of the people is hypothecated, why not hypothecate knowledge of their being overruled? Non sequitur that rights which have accrued in reliance upon the precedent cannot be protected if the precedent is repudiated. The mere doubting of the correctness of the precedent should be notice that it will be safe no longer to rely upon it, even though equity requires that it be followed in the particular case. The exceptions sanctioned by the sponsors and advocates of the rule have consumed it. As a means of promoting stability and certainty stare decisis is a wretched failure.

Stare decisis is as fallacious in theory as it is futile in its purpose. It presupposes an immutable common law, incapable of adapting itself to the changing needs of society. It proceeds upon the hypothesis that there is a law, which it is the function of a court to declare. Once declared, the law is not to be changed by the courts. Why not? Shouldn't laws be changed at times? Granted, say the courts and commentators, but the power to change is not delegated to the courts. "To relax this principle and incorporate the power to change at will," said a New York judge in the year 1914, "would be to convert courts of justice into new legislative organs.

[49] 1 Kent's Comm. 476.

[50] Blackstone uses the phrase in this connection.

"* * * For the power to change the law is in America and England the exclusive attribute of the legislature proper."[51] In these days, when judicial legislation is a by-word, note the disavowal of power and inclination to change the law or usurp legislative functions. A precedent is to be followed, according to Blackstone, because, "what was before uncertain and perhaps indifferent is become absolute rule, which it is not in the breast of any subsequent judge to alter or vary from, he being * * * not delegated to pronounce new law, but to maintan the old one."[52] In other words, a decision is not to be changed because it is law, and it is law because it is not to be changed by the judges. Courts are not to change laws, for that would prove that courts can change laws, and there would be left no reason to foster the minion of the courts, stare decisis. By what charter do the courts measure their powers, that they are so finicky about changing law? That courts do not change or create law, but merely declare and apply it, is middle age casuistry which no longer falls upon credent ears.[53]

Stare decisis requires us to assume the unbelievable, that all precedents have been correctly decided for all time, or else to conclude that, in its futile attempts to promote stability, its sole justification is to perpetuate error. What need to follow more than the reasoning of a precedent, if it has been decided on principles of eternal justice? The scale of justice is to be kept even and steady, says Blackstone, and "not liable to waver

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[51] In re Tod, 147 N. Y. Supp. 165.

[52] 1 Comm. 69.

[53] "Favorite fiction," says Dillon, "Laws and Jurisprudence of England and America," p. 267. "Childish fiction," Holland, Jurisprudence," p. 66.

with every new judge's opinions." [54] But suppose the opinions of the new judges are the better? "The reasons which are sufficient to influence a court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases," argues Cooley. [55] True, they ought to be. But are they? We must postulate the infallibility of counsel and court which establish the precedent, or be resigned to the consecration of a blunder.

That stare decisis is not in theory an indispensable element in jurisprudence is indicated by the repudiation of the idea in those jurisdictions which administer codified civil law. "Judges are not allowed to decide cases submitted to them by way of general and settled decisions," reads the French code. [56] The German code enacts that "in future decisions no regard is to be had for the opinions of teachers of the law." [57] There is a conscious attempt to prevent the addition of anything to the body of the law by the indirect process of judicial legislation. Decisions are to have "no higher rank, theoretically at least, than the expositions and commentaries of private writers." [58] They are to be binding neither upon the courts which render them, nor upon inferior courts, and are to be merely persuasive, advisory, and evidential. [59]

There is nothing inherent in the substantive civil law, or in codification, which should lead to this atti-

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[54] 1 Comm. 69.

[55] Const. Lim. p. 83.

[56] Art. 5, Code Civil Francais.

[57] Sec. 6, Introduction. Translation by Loewy.

[58] Dillon, "Laws and Jurisprudence of England and America," p. 173.

[59] Holland, "Jurisprudence," p. 69. Gray, "The Nature and Sources of Law," p. 195.

tude. Codification and stare decisis are not mutually exclusive conceptions. Judicial decisions must be made under codes. They might well be obligatory, and in fact are, in theory, in the United States where codified law obtains.[60] The codes of Germany and France—and from these two have emanated all the modern civil law codes—found their origin and model in the code, so called,[61] of Justinian. It is natural that precedents should receive no great deference under a system which adopts a ready made substantive law.[62] So likewise it is natural that a people who have beaten out their substantive law through judicial decision, while their legislative organs were in the quiescent stage, should acquire a race habit of reverence for precedent. But the notion of stare decisis is not foreign to civil law countries in the earlier development of their jurisprudence, and its repudiation is a growth which might be expected to have supplanted judge-made law to some extent when legislatures of common law countries emerged from their quiescence. Prior to the time when Justinian forbade the citation of extra-code authority, the Romans were familiar with the theory of stare decisis, and their edicts, rescripts, "responsa prudentum," etc., probably had some binding force as precedents.[63] In the early history of Geman jurisprudence the doctrine of judicial precedent prevailed, "but the modern German civilians have rather ungratefully kicked down the ladder by which they themselves climbed, and exhibited a great re-

[60] Carter, "Law, Its Origin, etc." p. 304.

[61] "So called," the epithet is appropriate in view of our definition of "code." See Carter, "Law, Its Origin, etc.," p. 266 et seq. Also 7 Col. Law Rev. 453.

[62] Bryce, "Studies in History and Jurisprudence," p. 777.

[63] See Gray, "The Nature and Source of Law," Secs. 424-433. Mackeldey, "Roman Law," sec. 34 et seq. But see Markby, "Elements of Law," p. 61.

pugnance to recognizing judicial decisions, or Gerichtsgebrauch, in any form as a source of law."[64]

Such is the theory of precedent in the civil law jurisdictions. "In practice, however (in Germany), the influence of judicial decisions could not be denied. * * * Decisions have great weight, and are practically regarded as precedents when they represent the consistent practice of the courts."[65] In France are found "veritable streams of judicial law, which can neither be resisted or turned aside."[66] French advocates search for cases in their favor, and "the more they find, the more sure they are of winning."[67] A great Spanish writer criticises the code of his country for ignoring "an essential factor in the history of the civil law (and of all other legal systems), the vital and creative force of the decisions of the courts."[68]

The civil law, which has spurned stare decisis in theory, finds in practice its judicial decisions adding to the substantive law. The common law, deferring to the doctrine in theory, disdains it in practice. In both cases the results might have been expected, for both systems are unconsciously following a third and more important fundamental principle. The attempts of the civil law to prevent precedents from adding to the body of the law are futile because they fail to take into consideration the fact that judicial usage is not the only usage by which law may be created, just as the common law

[64] Gray, "The Nature and Sources of Law," secs. 436-455, collecting German authorities.

[65] Loewy, "The Civil Code of the German Empire," Introduction, p. lii.

[66] Brissaud, "General Survey, etc." p. 300.

[67] Brissaud "General Survey, etc.," p. 300.

[68] Rafael Altamira, Ibid. p. 698. See Salmond "Jurisprudence," p. 159, 4th ed.

failed to realize that its rules would have developed without the aid of stare decisis, as in fact they have. That a precedent is not binding upon courts is not to say that law may not be the indirect result of the precedent. Decisions are likely to conform to precedent for other reasons than that courts are obliged to follow them. The precedent may be based upon compelling reason and justice. Its doctrine cannot be dislodged. It may be difficult to dislodge the doctrine even of an unjust decision before a court of like political or other proclivities, or of identical personnel to that which uttered the precedent. Acquiescence and conformity, perhaps unwilling, are likely to follow. Acquiescence may be ready and prompt in cases where the moral or ethical bearing is not patent, or is negligible. Judge made adjective law, and those decisions, conformity with which has created "rules of property," fall within this class. Decisions tend to establish usage. Out of customs of life and business grow standards by which rights and justice are measured. "The feeling that a rule is morally right is frequently due to the fact that it has long been followed as a rule." [69]

Yet this is not stare decisis. When precedents work such injustice that people cannot or will not acquiesce, no rule deters the civil law from reconsideration, and happily, the common law in its practical results is almost in complete consonance. After all, precedents in the common law serve no purpose but to

[69] The words are Prof. Gray's. 9 Harvard Law Review, 27,

inform the conscience of the court."[70] Decisions from ether jurisdictions were never supposed to do more. No attorney stops with the citation of a single case if others are to be found. Precedents frequently, no doubt, form convenient refuge from the embarrassment, not to speak of the exertion, of deciding on their merits, cases which would reach the same results through de novo consideration. But "cessante ratione legis, cessat ipsa lex," is a much used maxim, and though we perpetrate a petitio principii by proof that stare decisis is not followed in practice, by citation of instances where it has been disregarded, the fickle doctrine can scarcely object to being applied to itself. Authorities in copious quantities may be found to the effect that a single decision is not necessarily binding; that decisions will not be adhered to if there is something manifestly erroneous therein, or for other reasons; that if a decision has not been acquiesced in it is the duty of the court to pass upon it again."[71] Our common law has evolved largely in spite of the restraints of stare decisis.

We apprehend that the civil law theory of precedent is the more reasonable. Any attempt to force upon a civilized people with democratic tendencies law which fails to take a reasonable view of the relations of life at the time the law is promulgated is bound to prove abortive. Absolute certainty is unattainable, for justice and right will never be more than relative conceptions. Stare decisis can never be more than a temporary drag upon the law. A law which shifts is no better for lag-

[70] To this effect see Holland, "Jurisprudence," p. 70. Morris, "History and Development of Law," p. 303. Abbott, "Justice and the Modern Law," p. 232. Pollock, "Essays in Jurisprudence and Ethics," footnote, p. 245.

[71] See 11 Cyc 745 et seq; 26 Am. & Eng. Encyc. of Law, 166-167; 7 R. C. L. 1007 et seq; case note, 12 L.R.A.N.S. 1081.

ging a century behind civilization. Even though stare decisis fails to produce serious petrifaction of the law, who can say that it has not set us in pursuit of false gods? That the emphasis in our jurisprudence has not been misplaced? That the struggle for the truth has not yielded to the dry hunt for cases in point? That stare decisis is not responsible in large measure for the "riotous pandemonium of cases," a phenomenon which, it seems, has not seriously annoyed the civilians?[11]

To summarize and conclude. Some uncertainty is inherent in any system of jurisprudence. But there inheres in case law an uncertainty which arises from disorder. Codification on the firm basis of an exceedingly rich experience should cure this defect. Let judges continue their inevitable work of deciding controversies and legislating if need be, on the frontier lands of the law. But jettison stare decisis. Let not even an impotent theory work for the suppression of constant inquiry into what is best and most just. Perhaps then it will be less inequitable to deny the plea of ignorance of the law, and conscience will function with more satisfactory results.

[11] Dillon, "Laws and Jurisprudence of England and America" p. 285.

MOOT COURT

ZIEGLER v. SPANGLER

Contract for Sale of Land—Vendee in Possession—Right to Recover for Improvements in Ejectment

STATEMENT OF FACTS.

Ziegler contracted with Spangler to convey a farm for $5,000. Spangler was put in possession and made improvements costing $2,500, adding at least $2,000 to the market value of the premises. Spangler retained possession for two years but made no payments on the purchase money although it was payable in three months after taking possession.

Ziegler has begun ejectment. Court has allowed jury to find for plaintiff unless within 3 months the $5,000 shall be paid. The result of Spangler's failure to pay will be the loss of the land and improvements thereon.

Katz for plaintiff.

McNichols for defendant.

OPINION OF THE COURT

Dorio, J. The questions to be considered in this case are, first, can Spangler be ejected for non-payment of purchase money? Second, if he can, can he recover for the value of improvements he put upon the premises?

Spangler agreed to go into posession and pay the purchase money in three months. He remained in possession two years and did not pay it. He clearly is guilty of breach of contract. The law is well settled that where a person goes into possession under a contract of purchase, with consent of the vendor and then defaults in payment of purchase money, he may be ousted by the vendor in an action of ejectment. The first question is therefore answered in the affirmative.

Counsel for defendant contends that Spangler being a bona fide purchaser should recover for the improvements. If such were the case undoubtedly he could, but this is not true in the case at bar. Both parties entered into a perfectly valid contract, supported by the consideration of $5,000 to be paid in three months by Spangler. Not having performed his part of the contract he cannot recover for improvements made upon the premises during his possession. The instruction of the lower

court to the jury was correct. Unless Spangler pays the purchase money within three months, he shall be ejected from the land and lose the improvements.

Affirmed for the plaintiff.

OPINION OF THE SUPREME COURT

The vendor of land, who has not conveyed the title, when the vendee has taken possession, may enforce payment of the purchase money, by the action of ejectment. The court will provide a time within which if payment of the money is not made, the writ of habere facias possessionem may issue, and on the sheriff's delivery of the possession to the vendor, all rights of the vendee in the land will be ended. Improvements made by him are inseparable from the land, and become the property of the vendor. In the case before us, the vendor recovers the land plus $2,000 worth of improvements. This is a harsh result but can be averted only by remedial legislation.

The harshness of the strict foreclosure of a mortgage has been overcome by obliging the mortgagee to sell the land, and leave to the mortgagor any surplus of the purchsae money after paying the debt and interest. A similar method in the case of the contract of sale, under which a portion of the purchase money has been paid, or improvements have been made, would not be inappropriate, and it would be reasonable to confine the vendor to it.

The judgment of the learned court below must be affirmed.

KINGDON v. R. R. CO.

Evidence—Negligence—Scintilla—Facts Left to Jury

STATEMENT OF FACTS.

Kingdon was struck by a locomotive while crossing a track. The liability of the defendant depended upon its having or not having blown a whistle and rung the bell. A person living in the neighborhood said, "he did not hear either and could have heard it." The engineer testified that both signals were given. The court allowed the jury to say what the facts were. Verdict for plaintiff. Motion for judgment, n. o. v.

Rubin for plaintiff.

Mervine for defendant.

OPINION OF THE COURT

RAUB, J. The evidence in this case was evidence of fact and as such was properly submitted to the jury. The evidence having been submitted the verdict of the jury must stand unless it can be shown that the evidence was not such evidence as should have been given to the jury for their consideration. For in Confer v. Pennsylvania Railroad Co., 209 Pa., 425, Justice Potter said, "The fact was specifically submitted to the jury and having been found in favor of the plaintiff, it was error for the trial judge to enter judgment for the defendant on the ground that the evidence itself was insufficient to sustain the finding.' Also, in Commonwealth v. McDowell, 86 Pa. 377, court held, "The judge cannot himself draw conclusions of fact from the evidence." But in Holland v. Kindregan, 155 Pa. 156, it was held, "It does not follow that because the evidence on one side may be overwhelming in the opinion of the trial judge, that the case can be withdrawn from the jury. If there is a conflict of evidence it must go to the jury unless the evidence on one side amounts but to a scintilla. Where the evidence is so weak that it would be the duty of the court to set aside the verdict of the jury, there is no propriety in submitting it." In Fisher v. Scharadin, 186 Pa. 565, the inquiry was whether there was any evidence beyond a scintilla in substaintation of plaintiff's claim. The court held that, "if there was no evidence capable of submission to the jury the claim must fall, not for insufficiency but for want of evidence."

In the present case the question of whether the verdict of the jury can be set aside, and judgment n. o. v. granted depends on whether there was, or was not evidence beyond a scintilla in support of the plaintiff's claim.

We will now consider the evidence. Witness for the plaintiff was a person who resided in the neighborhood. In reference to the fact whether or not the bell of the engine had been rung and the whistle blown said, "I did not hear either and could have heard it." Against this was the positive testimony that both were given. In our opinion the testimony of the plaintiff's witness was not such as should have gone to the jury. In Keiser v. Lehigh Valley R. R. Co., 212 Pa. 209, nine witnesses testified that they did not hear the bell ring nor hear the whistle blow. The testimony of these parties was held to be negative in character and could not prevail against the positive and conclusive testimony of the appellee which clearly showed these duties to

have been performed. Also, in Anspach v. Philadelphia and Reading Railroad Co., 225 Pa. 528, witnesses for plaintiff as to the ringing of the bell and blowing of the whistle merely said, "they did not hear either." In this case the court said "negative testimony of this character by those who did not hear, as against positive affirmative testimony of persons who did hear, and who were in a position to know is not enough to make out a charge of negligence. The trial judge would have been justified in taking the case from the jury for want of sufficient evidence to justify a verdict against the defendant."

In light of these cases, we are persuaded to think as contended by defendant. The mere fact that the plaintiff lived near the railroad does not make his testimony so important, that because he could have heard it and did not in this particular instance, that his testimony should be given any weight by the jury. It was at most negative testimony. And in Newhard v. Penna. R. R. Co., 153 Pa. 417, the judge of the court below, in entering judgment on the reserved point, thought the evidence of negligence sustained by negative testimony was "meager," the upper court thought there was none. The judgment n. o. v. entered by the lower court was sustained by the upper court. Also, in Knox v. Railway Co., 202 Pa. 504, it was held that the testimony of a passenger that the usual warnings were not given at the crossing against the engineer, fireman, brakeman and conductor was not sufficient to warrant a submission of the case to the jury.

Had this witness for the plaintiff in the present case stated that he was listening for this warning and told why he was listening then his testimony would have been of a higher grade and amounted to more than a mere scintilla. In Culhane v. N. Y. C. R. R., 60 N. Y. 155, the following rule is stated: "A mere, 'I did not hear,' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." The Pennsylvania rule, unfortunately, has never been stated as broadly as that, but it has been frequently said that where negative testimony amounted to only a scintilla, a jury cannot be allowed to disregard the positive and conclusive testimony which establishes the controverted fact.

We all know that we do not take notice of the things which are of daily occurrence, such as the warnings given by railroad trains at crossings. Undoubtedly, this man who lived so near

the railroad, had become so accustomed to hearing the warnings sounded by the engines, that it is unbelievable that he should take any particular notice of the absence of these warnings at this one specific instance, and his testimony should have been disregarded.

Moreover the testimony of the engineer is that he gave the warnings. From our own experience, we know that if a person has a special act to do at a certain time and place, within a short time, he becomes so accustomed to doing that special thing at that certain time and place that he does it almost unconsciously. And a person, who has a position of trust and upon whom rests a great responsibility and a duty to perform, is presumed to have performed this duty until it has been affirmatively rebutted. Surely, in the light of the foregoing, the testimony of the plaintiff's witness, which we have shown was but negative, was a mere scintilla. And this mere negative testimony should not, under all circumstances considered, have been given any weight at all nor submitted to the jury. For the reasons stated in the above opinion, we grant the motion of the defendant for judgment n. o. v.

OPINION OF THE SUPREME COURT

Judgment affirmed.

HITCHENS v. FIRE INSURANCE COMPANY.

Fire Insurance—Cancellation of Policy—Substitution of One Company for Another

STATEMENT OF FACTS.

Hitchens obtained a fire insurance policy for $2,500 from four insurance companies on certain personal property. The defendant's policy gave it the right to cancel it on 5 days' notice. Notice was given on August 13, 1917, but on August 16 a fire totally destroyed the property, the value of which was $25,000. On August 14, 1917, Hitchens obtained a policy for $2,500 from a fifth company, intending this to take the place of defendant's, but this intention was not communicated to defendants nor was any distinct intention formed that defendant should be relieved before the expiration of the five days: i. e. of the 18th of August. Hitchens has been paid $2,500 on each of four policies other than defendant's. He claims $2,500 from the defendant.

OPINION OF THE COURT

Fischman, J. The question in this case is whether the plaintiff can recover, on a cancelled policy, for damages to his property before the expiration of the required notice, having already recovered once from another company for damages to the same property.

The case of Arnfeld v. Guardian Assurance Co., 172 Pa. 605, is directly on point in favor of the defendant. The jury in that case was charged as follows: "If the jury believe from the evidence that the plaintiff's, by their agent, Charles Zugschmidt, on the 10th of May, 1893, took out a policy in the Queen Insurance Company for $2,500, upon the same property as that covered by the policy in suit, and that their purpose in so doing was not to increase their line of insurance, but to substitute the policy in the Queen for the policy in suit, then, in view of the fact that the defendants had given notice on the 8th of May, 1893, to cancel the policy within five days agreed upon, the policy in suit would be cancelled the moment the risk was assumed in the Queen Company and the defendants should be released."

In the case before us, the evidence is clear and undisputed. On August 14, Hitchens obtained a policy for $2,500 from the fifth company on the same property intending that policy to take the place of the cancelled one. The plaintiff ought to have surrendered for cancellation, the defendant's policy immediately after that same risk was assumed by the fifth company. What ought to have been done, equity will consider as having been done. The fifth company assumed the risk of insuring the plaintiff's property and they compensated the plaintiff for the damages which he suffered. Why, then should he also be entitled to recover from the defendant for the same injuries to the same property? It certainly is not equitable to allow a person to recover twice for the same debt.

In view of the above facts, we must decide in favor of the defendant.

OPINION OF THE SUPREME COURT

The learned court below has decided in favor of the defendant in deference to Arnfeld v. Guardian Assurance Co., 172 Pa. 605. There was there an agreement between the assured and the company that the new policy should be a substitute for the former; that the company should be released. This element is wanting in the present case. Hitchens, notified that one of his policies would lapse, took out another, intending it to take the

place of the other. But, when? Before the other ceased to protect him, or only when it ceased? The intention of Hitchens was not that defendant should be relieved before the expiration of the five days; nor was it his intention that the new policy should be a substitute, after the lapse of the five days, for the existing one, communicated to the defendant. The property totally destroyed was worth $25,000. The enforcement of all the policies will give him only one-half this sum. The case of Scheel v. German American Insurance Co., 228 Pa. 44, rather than that relied on by the learned court below, furnishes the correct rule of decision.

Judgment reversed with venire facias de novo.

RICKETTS v. JOSIAS

Promissory Notes—Action Against Endorser—Protest—Certificate of Notary—Proof of Notice—Negotiable Instrument Act of May 16, 1901, P. L. 194

STATEMENT OF FACTS

Josias endorsed a note for $500 to Ricketts which the maker failed to pay. Josias denies that notice of dishonor was given to him. A notary's certificate states, that notice was sent by mail duly addressed and stamped. The defendant denies that he received such notice. The notary, called as a witness says he has no recollection. The court tells the jury, (1) the actual receipt of notice is not necessary to bind the defendant; (2) but non-receipt could justify (but not require) the inference that notice was not duly sent; (3) that the assertion in the certificate is sufficient to establish the fact of sending the notice, unless it is overcome by the non-receipt by the defendant and by the failure of the notary to remember that the notice was sent.

Verdict for the defendant. Motion for a new trial.

Sacks for plaintiff.

Jeffers for defendant.

ESKOVITZ, J. Section 105, Negotiable Instruments Act of May 16, 1901, P. L. 208, reads as follows: "Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithsanding any miscarriage in the mails." The fact of depositing in the postoffice a properly addressed prepaid letter enclosing notice of a protest of a promissory note, raises the presumption that it

reaches its destination by due course of mail. This presumption may be rebutted. Phoenix Brew. Co. v. Weiss, 23 Super. 519.

An affidavit of defense denying receipt of notice is insufficient, without stating such facts as would justify the inference that no notice had been given or due diligence used; and evidence that no notice was received is inadmissable in the absence of an allegation or an offer to prove that notice was not duly sent or that there was negligence in giving notice. This view is upheld in all modern cases. McConeghy v. Kirk, 68 Pa. 200.

The defendant contends that the first instruction, that, the actual receipt of notice is not necessary to bind the defendant, is entirely to broad. In support of this he claims that Sec. 105 of Neg. Inst. Act, as quoted supra, has no application here. Let us see if this is true. First, he claims that there is no evidence of the notice having been sent, while there is evidence of its non-receipt. To this we do not agree. It seems that the very converse of this is true.

The certificate of the notary, introduced in evidence states the fact that notice was sent by mail duly addressed and stamped. This if carried out as stated, fully complies with Sec. 105 of the Neg. Inst. Act, treating of the manner of giving notice. The Act of December 14, 1854, which is quoted below, admits this certificate in evidence.

Act of December 14, 1854, P. L. (1855) 724 states, "The official acts, protests and attestations of all notaries, certified according to law, under their respective hands and seals of office, in respect to the dishonor of all bills and promissory notes, and of notice to the drawers, acceptors or indorsers thereof, may be received and read in evidence as proof of the facts therein stated, in all suits now pending, or hereafter to be brought: Provided, that any party may be permitted to contradict by other evidence any such certificate." This act makes the certificate of a notary prima facie evidence of the allegations set forth in it and if there is nothing in contradiction it is conclusive evidence of what it contains. Scott v. Brown, 240 Pa. 328.

From the foregoing it follows there can be no controversy as to the sufficiency or completeness of the notice. The whole issue as we see it, is whether a certificate is conclusive evidence in the absence of an effective rebuttal? To relieve the defendant, it must be proved that he received no notice of protest,

but also, that no notice was given or due diligence used to appraise him of the default of the maker. Tradesmans Bank v. Tillyer, 12 Pa. C. C. Rep. 452; McGee v. Northumberland Bank, 5 Watts 22; Marshall v. Sonneman, 216 Pa. 65.

Marshall v. Sonneman supra, is unlike our case. There notice of dishonor was addressed to the wrong party and it stated that the holder looked to such person for the payment of the note.

The facts in First National Bank v. Tustin, 245 Pa. 151, are similar to the facts in the case at bar. There the defendant attempted only to establish by negative allegations that he did not receive notice. That was held insufficient. If the defendant had offered to prove some direct fact which would have tended to show that the essential requirements of the Act of Assembly had not been performed, either in the protesting of the note or the giving of notice, the controverted facts might have been left to the jury. But the condition which confronted the court as in this case, was nothing but the bare proposition to prove that defendant did not receive notice. There was no fact offered, which tended to show that the notice was not duly received at defendant's place of business or residence or the place where his mail is usually delivered, or that it had been deposited in a United States mail box, or that the notary had neglected to do anything which the law requires him to do, which resulted in the defendant not receiving notice. If the offers had conveyed any of these elements they would probably have been admitted. Instruction number one affirmed.

Instruction number two, that non-receipt could justify, (but not require) the inference that notice was not duly sent, we think is correct. In our opinion, however, it does not help the case of the defendant. Neither do we think the First National Bank v. McBride, 230 Pa. 261, favors him any.

In that case the affidavit distinctly denies personal service of notice, orally or otherwise. If it stopped here, its insufficiency would be apparent for the reason that personal service is not required. But it also denies notice by the mails, in fact any notice at all until suit. The notary's certificate merely stated: "whereof I duly notified the indorser." It does not say how it was sent. But the court said, "had the statement averred that the notice had been given in some particular way allowed by law, nothing, but a specific denial of the fact alleged would have been sufficient to prevent judgment." This is our

case. Here the certificate is complete and no specific denial was given.

Before passing upon instruction number three, that the assertion in the certificate is sufficient to establish the fact of sending the notice unless it is overcome by the non-receipt by the defendant and by the failure of the notary to remember that the notice was sent, we shall review several authorities.

We think that mere non-receipt being admissible evidence has been disposed of in the negative in the foregoing discussion. So we shall only consider the second alternative of that instruction, namely, the necessity of the notary to remember the sending of notice.

In Herer v. Easton Bank, 33 Pa. 134, it was held that the fact that the notary could not remember the sending of notice was immaterial. The certificate was positive proof, the want of recollection no proof at all. Scott v. Brown, 240 Pa. 328, is closely akin to our case. Here it was held that the certificate of the notary that he had given notice to the defendant raised the presumption, since his act was an official act, that is was properly performed and his certificate standing alone entitled the plaintiff to go to the jury.

We think it is reversible error in an action on a note for the trial judge to submit to the jury as a fact or circumstance in the case the testimony of the notary to the effect that he had no present recollection of the indorser having been sent or given notice of the dishonor of the note.

The indorser may attack the correctness of the certificate by a denial of receipt of notice. But the notary's inability to remember anything should be given no weight in support of defendant's denial, if the notary does not deny the genuiness of the certificate. If the certificate contains a copy of the note and declares payment had been demanded and refused of which due notice was given to the indorser, the certificate meets the requirements of the statute. Zollner v. Moffitt, 222 Pa. 644; First National Bank v. Delone, 254 Pa. 409. Therefore the last instruction of the lower court can not be affirmed.

Motion for a new trial granted.

OPINION OF THE SUPREME COURT

With most of the doctrines laid down by the learned court below, in its carefully and ably written opinion, we agree.

(1) The actual receipt of notice of dishonor of a bill or note, by the endorser is not necessary. The Act of 1901 authorizes

the use of the postoffice for conveying the notice, and exempts the endorsee from the risk of non-delivery if the notice is addressed to the proper party and at the proper place.

(2) It is very rarely that a properly addressed letter fails to reach the addressee. From the postoffice non-delivery of notice, then may be inferred, with some degree of confidence, that the letter if properly addressed was not posted. This inference could be made, even if there was no evidence of posting. But in this case, the notary's certificate is evidence of posting. It is not conclusive, however. The learned court below thinks that the non-receipt of the letter would justify the inference that it was not duly sent; that is, that non-receipt might be treated by the jury as overcoming the force of the notary's certificate. In this we think it correct.

(3) But if the mere non-receipt would justify the jury's inference that, despite the notary's certificate, the notice was not sent or not properly addressed, or stamped, how does it happen that this fact (non-receipt) accompanied by another fact (the notary's failure to remember) loses its potency? That the notary has no remembrance is explainable many other ways, by the hypothesis that he did not in fact send the notice. It points in the same direction as the fact of non-receipt. If the second position of the court at trial was correct, how can the third be erroneous? We fail to see.

In First National Bank v. Tustin, 146 Pa. 151, the denial was that protest of a note had been made. But protest is unnecessary, and, though there was no protest, notice of dishonor might have been given, and there was no denial that such notice had been given. The case is not similar to the present.

As the misconception may have affected the verdict and judgment of the court, we are obliged to reverse.

Reversed with venire facias de novo.