ANNOUNCEMENTS

The Review announces the election to the Editorial Board of the following members of the Third Year Class: Sanford D. Beecher, Joseph Brandschain, J. Lawrence Davis, and John T. Griffith.

The resignation of William Glassman from the Editorial Board has been tendered and accepted.

NOTES

The Meaning and Extent of the Requirement of Good Faith for a Holder in Due Course Under the Negotiable Instruments Law—What is the scope of the doctrine of good faith as propounded by the Negotiable Instruments Law? Ever since the law merchant the aim of the law has been to facilitate the exchange of commercial instruments in order that business might be more readily transacted. Therefore, under some circumstances the law has permitted the transferee of commercial paper to acquire a title which is superior to that of his transferor. The law has, however, taken care of the maker as far as it has been deemed advisable and has allowed him to set up his defenses to the instrument against all parties who are not holders in due course. To achieve the favored position of a holder in due course, it is fundamental that the transferee must act in good faith. The question, therefore, of the extent of bona fides required for such a privileged person is vital, for it must be determined whether the holder of a note need take it with good faith toward the maker alone, or whether he must act bona fide in all of his dealings with the instrument in order to acquire the privileges bestowed upon a holder in due course.

In a recent Pennsylvania case, Fehr v. Campbell, a note made by the maker to his own order and indorsed by him in blank was secured from him by the fraud of a corporation and was transferred by an officer of that corporation to a holder who appropriated part of it to the payment of the officer’s personal obligation to him. This holder sued the maker on the note and the lower court allowed the latter to set up the fraud in the inception of the instrument, saying that the actions of the plaintiff prevented him from being a holder in due course. The upper court sustained the ruling of the lower court and said that under the Negotiable Instruments Law a holder in due course must take the instrument with good faith toward his immediate predecessor in title as well as with good faith toward the maker.

For a proper comprehension of the doctrine of good faith under the Negotiable Instruments Law, the inception and significance of the doctrine of mala fides at the common law must first be understood. The first indication that there was a doctrine of mala fides is found

\[1\] 288 Pa. 549, 137 Atl. 113 (1927)
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reported in English cases of the early eighteenth century. It was decided there for the first time that the title of a holder of negotiable paper, acquired before it was due, for valuable consideration, is not affected by the fraud of a prior party, in the absence of bad faith on the part of the holder in his acquisition of the paper. Later the rule was varied and actual proof of bad faith was not essential to defeat recovery by the holder; it was sufficient to impute bad faith to the holder if from the circumstances an ordinary, prudent man would have become suspicious. Finally, the English court turned back to the original doctrine and the present rule was established which requires actual proof of bad faith and admits proof of gross negligence merely as evidence of bad faith. Though there were decisions to the contrary before the passage of the Negotiable Instruments Law, the prevailing rule in America followed that laid down in the later English cases.

From the foregoing paragraph it is evident that before the Negotiable Instruments Law good faith was essential for recovery by the holder of a note against the maker who had equitable defenses to the instrument. It becomes necessary, therefore, to determine what acts constituted good faith, or lack of it, at the common law. It was established prior to the Negotiable Instruments Law that the holder must have taken the instrument “in the regular course of business” in order to be a holder in due course; in other words, he must have acted as an ordinary business man would have acted with regard to the instrument. If this test is applied to the case in question it is evident that the plaintiff has not met its requirements. Here is a note acknowledged to belong to the corporation by both transferor and transferee, being accepted as to part of it in discharge of the personal obligation of the officer of the corporation, the officer’s only explanation to the transferee being that the company owed him money and that he would “fix it up” with them. Any ordinary business man would have suspected the officer of the corporation under similar circumstances, and the holder of the instrument must be regarded as an

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6 Miller v. Race, 1 Burr. 452 (Eng. 1758); Grant v. Vaughn, 3 Burr. 1516 (Eng. 1764); Lawson v. Weston, 4 Espinasse 58 (Eng. 1801).
7 Gill v. Cubit, 3 Barn. & Cress. 466 (Eng. 1824); Down v. Halling, 4 Barn. & Cress. 339 (Eng. 1825).
8 Goodman v. Harvey, 4 Ad. & El. 870 (Eng. 1836); Uther v. Rich, 10 Ad. & El. 784 (Eng. 1839); Arbouin v. Anderson, 1 Ad. & El. (N. S.) 498 (Eng. 1841).
ordinary business man for the purpose of applying this test at common law.

Let us now turn to the *Negotiable Instruments Law*. For a proper analysis of the cases since the passage of the *Negotiable Instruments Law*, it is essential to find out what the Act regards as the proper requisites of a holder in due course. Section 52 says, in part, that a holder in due course must have taken the instrument in good faith and with no notice of any defect in title or infirmity in it. "Notice" is not defined in this section but the draftsman, Crawford, says that Section 56 gives us the elements which constitute good faith.\(^8\) This section says that "to constitute notice of any infirmity in the instrument or defect in title of the person negotiating it to him, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." But as yet no satisfactory result has been attained, for the meaning of "infirmity" is not set forth. This word is not defined anywhere in the Act, but it is used in conjunction with "defect in title." From a study of Sections 55, 56 and 57 it would seem that "defect in title" includes "infirmity."\(^9\) Since this is so, an understanding of what is meant by "defect in title" will also illustrate what is meant by "infirmity." The term "defective title" is explained in Section 55. This section says that "the title of a person who Negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The phrase merely means that the situations named in this section constitute defenses to the maker against all parties who are not holders in due course, or who do not claim through such a person. This particular section, however, still does not make it evident whether the situations named therein apply to the holder's actions toward the maker solely, or whether they include his actions toward a predecessor in title. A further examination must be made in order to find out what the author of the Act himself meant by the phrase "defect in title." For this purpose we must determine the source of the phrase. In the English *Bills of Exchange Act*, drafted by Chalmers, the phrase "defect in title" was used instead of "equity attaching to the bill," since "equity" was a term unknown in the law of Scotland, to which the *Bills of Exchange Act* extends.\(^10\) The natural connotation of these words would not limit the equities to those of the maker; it

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\(^10\)Chalmers, *Bills of Exchange Act* (5th ed. 1919) 137. Lindley, J., in Alesceck v. Smith, [1892] 1 Ch. 238 said that "defect of title" is an expression in lieu of the phrase "subject to equities" which is an expression not adopted because it is unknown to Scotch law.
embraces all the equities attaching to the instrument including those of the immediate predecessor in title.

With this idea in mind it must be determined whether the plaintiff in the Pennsylvania case had notice of any equities attaching to the bill. It is a well settled rule of law that one who takes negotiable paper which the taker knows to be the property of a corporation for the purpose of applying such paper to the personal use of one of the officers of the corporation must inquire as to the authority of that officer if he wishes to be protected from all defenses to the instrument.¹¹ It must be admitted that in almost all of the cases reported the act of bad faith which prevented the owner from being a holder in due course was toward a party to the suit then before the court, and not, as here, toward an outside party, the corporation which held title to the note when it was negotiated to the plaintiff. But this should make no difference for the holder had notice of the equities of the corporation when he took the note and that should be all that is necessary. Such is the result obtained from a study of Sections 52, 55 and 56, and it is also the result obtained by employing Chalmers' interpretation.¹² This conception of the extent of the doctrine of good faith is rather an innovation in the law, for although the language of the courts had been broad enough to warrant such a view, the great majority of the cases have not been exactly in point. Only two cases have dealt with a situation where the party to whom the act of bad faith was rendered was not a party to the suit. But it is submitted that this doctrine of good faith does include the actions of the transferee in all of his dealings with the instrument and that this Pennsylvania case is an indication of the way courts in the future will handle the situation.

Chief Justice Moschzisker found only one case reported with facts almost identical to the case under discussion, and added research since has not produced any more. In *Fisk Rubber Company v. Pinkey*¹³ the circumstances on which the plaintiff's status as a holder


¹² Goodman v. Simonds, 20 How. 343 (U. S. 1857): "Every one must conduct himself honestly in respect to antecedent parties when he takes negotiable paper, in order to acquire a title which shall shield him against prior equities." Accord: Adams v. Ashman, 203 Pa. 536, 53 Atl. 375 (1902); Ozark Motor Co. v. Horton, 166 S. W. 395 (Mo. App. 1917). See also Paika v. Perry, 225 Mass. 563; 114 N. E. 830 (1917): "In order to show that the defendant had knowledge of such facts that his action in taking the instrument amounted to bad faith it is not necessary to prove that defendant knew the exact fraud that was practised upon plaintiff by defendant's assignor, it being sufficient to show that defendant had notice that there was something wrong about his assignor's acquisition of title, although he did not have notice of the particular wrong that was committed."

¹³ Supra note 11.
in due course hinged concerned a transaction between the plaintiff and the president of a corporation, who in the transaction in question had acted illegally toward his company, neither the corporation nor its president being parties to the suit, and the circumstances under inquiry being distinct from the circumstances of the original fraud upon which the defendant resists payment of the note. The court by a unanimous vote reversed the decision of the lower court and held that the plaintiff’s bad faith toward the corporation in receiving the note from its president in payment of his own personal debt subjected the plaintiff to the defenses of the maker resting on the instrument, a consequence of his not being a holder in due course. The court stigmatized the transaction before it as “out of the ordinary course of business” saying that when paper is so acquired, “unless the authority of the officer is made to appear by affirmative proof, the paper is subject to defenses although in the hands of one who took it for value and before maturity.” When the court spoke of defenses it meant necessarily defenses set up by the maker of the note, for in that case, as in the present case, the maker was the defendant at bar. Though the court cited the Negotiable Instruments Law it did not go into an elaborate interpretation of its sections but based everything on Section 52 and the common law background.

The Washington case is in harmony with the Pennsylvania case and requires a holder in due course to act bona fide in all of his dealings with the instrument if he wishes to have the privilege bestowed upon this favored class, of being free from defenses of the maker.

J. T. G.

Judgment Non Obstante Veredicto in Pennsylvania—The common law rule as to when judgment non obstante veredicto may be granted has undergone many alterations at the hands of the judges and legislators of the United States. In Pennsylvania this change has been especially marked: originally a test of the sufficiency of pleadings, judgment non obstante veredicto has come to be a test of the sufficiency of the evidence. Stated in general terms, Pennsylvania courts grant judgment when supported by a great preponderance of evidence, even though contrary to a verdict based on an appreciable amount of testimony. The problem involved in applying this rule is to define “preponderance” and “appreciable” so that these terms may be applied to specific facts. Strong dicta in the recent case of Hartig v. American Ice Co.¹ attempt to dissipate this difficulty, stating under what circumstances judgment may be entered contrary to a verdict supported by a presumption of law.

At common law, judgment non obstante veredicto was never granted to the defendant.² This remedy was available to the plaintiff

¹ 290 Pa. 21, 137 Atl. 867 (1927).
² See generally, 1 Freeman, Judgments (5th ed. 1925) § 10.
only when, after confessing the plaintiff’s right of action, the defendant relied on facts that, even if proved, would not constitute a valid avoidance. If the jury, under these circumstances, rendered a verdict for the defendant, the plaintiff, on application therefore, after the verdict and before the judgment, could secure judgment in his favor, non obstante veredicto.

The right to give judgment non obstante veredicto on a point of law reserved was granted to the courts of Philadelphia in 1825 and extended to all the common pleas courts of the state in 1863. A court desiring to reserve a point of law directed a verdict for the plaintiff, retaining the privilege of granting judgment non obstante veredicto for the defendant. This procedure was followed in order that the jury, in finding for the plaintiff, might specify the damages to which he would be entitled were the point reserved decided in his favor.

Courts were authorized to grant judgment non obstante veredicto under still different conditions by the Act of April 22, 1905. This statute provided that whenever a point requesting binding instructions had been either reserved or declined the party presenting the point could move for judgment notwithstanding the verdict. The party against whom judgment was entered in the lower court was permitted to appeal to a higher court, moving for judgment in his favor based on the evidence certified and transmitted by the lower court.

It is interesting to note the sharp line of demarcation between each rule and its successor. At common law, judgment non obstante veredicto was based on the pleadings and granted to the plaintiff alone. Under the Act of 1863 it was based on the decision of a point of law reserved and granted only to the defendant. Either party was entitled to judgment non obstante veredicto under the Act of 1905, based on whether the court should have granted a request for binding instructions.

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1 See Notes, L. R. A. 1916E, 828, 829; 12 L. R. A. (n. s.) 1021, 1022.
3 Cook v. Pearce, 8 Q. B. 1044 (1843); Dewey v. Humphrey, 5 Pick. 187 (Mass. 1827); Bellows v. Shannon, 2 Hill 86 (N. Y. 1841).
4 Act of March 1, 1825, P. L. 41; re-enacted March 28, 1835, P. L. 88.
6 In Morris v. Ziegler, 71 Pa. 450 (1872), Sharswood, J., said: "When the jury finds a verdict for the defendant, there can be no judgment entered upon a reserved point for the plaintiff. Such judgment being without any verdict to support it, wants a legal foundation and is therefore erroneous." Accord: Ringle v. Penna. R. R., 164 Pa. 529, 30 Atl. 492 (1894); Glading v. Frick, 88 Pa. 460 (1879).
8 Act of April 20, 1911, P. L. 70, Pa. Stat. (West, 1920) § 12794, a subsequent enactment, permitted either party to request judgment non obstante veredicto based on a request for binding instructions, when the jury disagreed on a verdict.
As a result of the considerable volume of judicial opinion elicited by the Act of 1905, there was formulated a well recognized statement of the general principles that govern a court in considering a motion for judgment non obstante veredicto. In Dalmas v. Kemble, Mitchell, J., commenting on the Act of 1905, said:

"It broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant non obstante veredicto, now what is reserved is a request for binding direction to the jury and may be for either plaintiff and defendant. But though thus enlarged so as to include both parties, the power of the judge is the same as it was before. He is to enter such judgment as would have been entered upon the evidence or in other words to treat the motion for judgment as if it was a motion for binding instructions at the trial, and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence."

Although the general principles have been clearly expressed and are followed by the Pennsylvania courts, considerable confusion exists as to the exact facts that justify giving binding instructions or granting judgment non obstante veredicto. Opinions in several lines of cases express divergent views on this point.

The decision in Lonzer v. Lehigh Valley R. R. has done much to cause the confusion which the opinion in Hartig v. American Ice Co. seeks to dissipate. In the former case, the defendant, relying on a plea of contributory negligence, introduced many witnesses who testified that the plaintiff's husband had been warned by the company of the conditions that caused his death. They testified also that he had disregarded this warning. To rebut this evidence, the plaintiff introduced a fellow servant of the deceased, who testified that he, the witness, had not received notice of the dangerous condition that caused the accident. A verdict for the plaintiff was given in the lower court and judgment entered accordingly.

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Act of 1905, supra note 9.

Pennsylvania courts apparently apply the same rule for weighing the evidence in giving binding instructions and granting judgment non obstante veredicto.

196 Pa. 610, 46 Atl. 937 (1900).

Supra note 1.
The Supreme Court reversed the lower court, holding that the plaintiff's evidence was insufficient to take the case to the jury. Mitchell, J., said:

"When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in capricious disbelief. If they do so, it is the duty of the court to set aside the verdict."

*Holland v. Kindregan* was the only authority cited in support of this proposition. *A per curiam* opinion in that case states that even if there be a conflict of evidence, when that on one side amounts to but a "scintilla," the judge is justified in withdrawing the case from the jury and entering judgment for the opposite party. No authority was cited.

In a number of instances, both previous to and following the passage of the *Act of 1905*, courts have disregarded the opinion of the jury by entering judgment based on strong oral evidence opposed only by a scintilla of proof. This rule is qualified somewhat by *Second National Bank v. Hoffman*, in which case Brown, J., defines "candor," as used in the rule of the *Lonzer* case, to mean "credibility," thus stating that the oral evidence must come from disinterested witnesses.

The rule stated in the *Lonzer* case is opposed by a line of cases holding that, regardless of how overwhelming the oral evidence may be, the credibility of the witnesses must be considered by the jury. *Hartig v. American Ice Co.* is in accord with this view, expressly overruling the holding as to oral evidence stated in the *Lonzer* case.

The plaintiff, in *Hartig v. American Ice Co.*, was employed by an independent contractor engaged in erecting the defendant's building.

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16 *155 Pa. 156, 25 Atl. 1077 (1893).*
18 *229 Pa. 429, 78 Atl. 1002 (1911).*
19 *In Reel v. Elder, 62 Pa. 308, 316 (1869) Sharswood, J., said: "However clear and indisputable may be the proof, when it depends on oral testimony it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial." Accord: Sieber v. Russ Bros., 276 Pa. 340, 120 Atl. 272 (1923); Holzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 73 (1918); Williams v. Ludwig Floral Co., 252 Pa. 140, 97 Atl. 263 (1916); Spear v. Phila., W. & B. R. Co., 119 Pa. 61, 12 Atl. 824 (1888).*
20 *But see dissenting opinion of Schaffer, J., 290 Pa., at 37.*
He was struck by a piece of pipe being unloaded from a truck on the
remises, which truck the plaintiff alleged to be owned by, and used
in the business of, the defendant. In support of this contention, he
introduced evidence to prove that the truck bore the defendant’s name,
that the driver was the person unloading it at the time of the injury,
and that the contents of the truck were to be used in the erection of
the defendant’s building. The defendant offered evidence, partly oral
and partly documentary, to show that it owned no trucks of the kind
described by the plaintiff. It also attempted to prove that it had
taken no part in the construction work and that its trucks did not haul
pipe to the building. The verdict was returned for the plaintiff, but
the lower court granted judgment *non obstante veredicto* for the
defendant on the ground that the plaintiff had failed to show that the
man whose negligence caused the injury was an employee of the
defendant company acting within the scope of his employment.

The Supreme Court, reversing the lower court, ordered a new
trial. This decision was based on the fact that the name on the truck
raised the presumption that the truck was owned by and being used

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21With the single exception of Pennsylvania, no jurisdiction seems to rec-
ognize these presumptions. It is true that brands on cattle have been pre-
sumed, by the majority of jurisdictions, to have been placed there by the owner
thereof, thus arriving at the conclusion that the owner of the brand owned
the particular animal. I Wigmore, Evidence (2d ed. 1923), §150. This
presumption has been extended to other chattels bearing the name of the osten-
sible owner, such as railroad rolling stock. Chicago City Ry. v. Carroll, 206
Ill. 318, 68 N. E. 1087 (1903). In extending the theory, the courts are prone
to regard the evidence as a basis from which an inference may be drawn,
rather than as foundation for a presumption. As an example of this atti-
dtude, Ladd, J., in Howell v. J. Mandelbaum & Sons, 160 Iowa, 119, 124, 140
N. W. 397 (1913), said: “The name on tools or vehicles and articles gener-
ally is commonly accepted as indicating ownership, and, though not of much
probative value, it is enough, in the absence of evidence to the contrary, to
carry the issue to the jury.” In Eshenwald v. Suffolk Brewing Co., 241 Mass.
166, 134 N. E. 642 (1922), the fact that defendant’s name was on a wagon
was admitted, along with other evidence, to prove his ownership.

There are Pennsylvania cases prior to Hartig v. American Ice Co. which
seem to indicate that a name on a business vehicle raises a presumption of
ownership. Holzheimer v. Lit Bros., *supra* note 19, held that the name on
a commercial truck establishes presumptively the ownership and that the em-
ployee of the owner was in charge. Felski v. Zeidman, 281 Pa. 419, 126 Atl.
794 (1924), does not decide the point of ownership, but indicates that a pre-
sumption is raised that the vehicle was being used in the business of the per-
son whose name it bore. In Williams v. Ludwig Floral Co., *supra* note 19, it
was said that “from these facts a fair inference for the jury was that the
wagon was being operated in connection with appellant’s business.” The court
later refers to this deduction as a presumption, although terming it originally
an inference. Sieber v. Russ Bros. Ice Cream Co., *supra* note 19, holds that
the presence of defendant’s name on the car plus the fact that it was loaded
with articles generally transported in connection with his business, was suffi-
cient basis for a presumption that he was the owner. In Thatcher v. Pierce,
281 Pa. 16, 125 Atl. 302 (1924), the ownership of the car being proven, the
court presumed that it was being used in the owner’s business.
for the benefit of the defendant company, which, together with the other evidence tending toward that conclusion, was sufficient to take the case to the jury.

Moschzisker, C. J., after discussing many of the cases relating to the point, stated the general rules that should govern cases of this type:

"When such presumptions so arise, they entitle plaintiff to have his case submitted to the jury (a) unless plaintiff himself shows in the presentation of his case that, as a matter of fact, the car did not belong to defendant or was not being used in his business, or (b) unless, in the testimony produced, defendant is able to point to evidence of 'indisputable physical conditions,' or 'facts,' or to show in the evidence some indisputable basis for 'mathematical tests,' which demonstratively overcome the presumption in plaintiff's favor. This is what is meant by evidence so 'clear, positive, credible, uncontradicted and indisputable in weight and amount as to justify the court in holding that a verdict against [the defendant] must be set aside as a matter of law;' for we have said in connection with the words just quoted that: 'Where there is any uncertainty as to the facts or the inferences to be drawn therefrom, the case is necessarily for the jury. . . . ' Another instance where a case otherwise for the jury may be ruled as a matter of law in favor of defendant is (c) where, in addition to the uncontradicted oral evidence on the side of defendant, showing no liability, there is admittedly genuine or unattacked documentary evidence which relieves defendant from the possibility of liability. (For an instance of this kind see *Walters v. American Bridge Co.* 22); and perhaps there may be other instances of a character, generally speaking, like those itemized as (a), (b) and (c) above, which do not occur to our minds at the present time."

*Grimes v. Pennsylvania Railroad,* 23 decided by the same court a short time previously, presents the typical situation involving this problem. The deceased was killed by one of the defendant's trains at a railroad crossing. The plaintiff relied on the presumption that one so struck used due care and caution. The defendant, attempting to show contributory negligence, introduced evidence of the physical surroundings of the accident to prove that if the deceased had used due care he would have been aware of the approach of the train and

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22 *234 Pa. 7, 82 Atl. 1103 (1912).* Defendant, in this case, relied on the allegation that the injury was caused by an independent contractor, not a servant. This position was supported by what fairly may be described as "unattacked documentary evidence." Moschzisker, J., in a concurring opinion, said: "Under the evidence in this case I would not affirm on the theory that the defence was a matter of law for the court."

23 *289 Pa. 320, 137 Atl. 451 (1927).*
would have escaped injury. The plaintiff secured a verdict in the lower court, but the judge gave judgment *non obstante veredicto* for the defendant. In sustaining the judgment in the Supreme Court, Sadler, J., said:

"If, however, there be, in addition to oral testimony, indisputable physical conditions, indicated by actual measurements, maps or photographs, the existence of a fact ordinarily presumed is negatived."

The opinion also states that "The negative testimony, being controverted, does not amount to more than a 'scintilla,' and therefore cannot prevail to establish an essential fact," thus seeming to refer to the rule of *Lonzer v. Lehigh Valley R. R.* which the principal case expressly overruled.

Considered in general terms, the rule as formulated in the *Hartig* case states that some weighty evidence of reliability in addition to strong oral testimony must be present before a court is justified in disregarding a contrary presumption, and in entering judgment despite the verdict or without the verdict of a jury. There is substantial authority for the rule, although most of the cases deal only with the point in dispute, none of them expounding the law on the subject as generally as is done in the dicta of the principal case.

Only a few cases take a directly contrary view, although it must be considered that the line of cases following *Lonzer v. Lehigh Valley R. R.* are in opposition to this rule, since they affirm a conflicting principle. In *Cromley v. Penna. R. R.* in circumstances similar to those in *Grimes v. Penna. R. R.* and described under "(b)" in the extract quoted from the opinion in the principal case, the court ruled it a matter requiring the consideration of the jury. Similarly in *Kreamer v. Perkiomen R. R.*, the judge would not consider mechanical calculations to establish the contributory negligence of the deceased. Likewise, in *McCafferty v. Penna. R. R. Co.* physical facts having been offered to overcome the presumption in favor of the plaintiff, Fell, J., said, "This presumption, having once arisen, remained until overcome by countervailing proof. Whether it was so overcome was a question of fact for the jury."


25 211 Pa. 429, 60 Atl. 1007 (1905).

26 *Supra* note 23.

27 214 Pa. 219, 63 Atl. 597 (1905).

Little aid in the solution of this problem may be obtained by examination of the decisions in other jurisdictions. Three states use judgment *non obstante veredicto* with less freedom than at common law, while the Federal and Missouri Courts apply the common law rule. The heavy majority of jurisdictions permit either party to secure judgment *non obstante veredicto*, a number of them having adopted statutes like the Pennsylvania Act of 1863. Six states have indicated that judgment *non obstante veredicto* may be granted where no evidence has been produced by either party.

In very few states can a precedent be found for giving judgment contrary to a verdict supported by some evidence. A statute authorizing the courts to enter judgment *non obstante veredicto* where, upon the evidence, either party is clearly entitled to judgment has been enacted in Minnesota. This statute was subsequently adopted in North Dakota. Since the courts in Minnesota and North Dakota have applied these statutes but infrequently in cases where the verdict is supported by some evidence, no attempt has been made to establish a rule for weighing the evidence. In addition to these decisions based on statutes, several courts have exhibited a tendency to break down the strict rule as to when judgment *non obstante veredicto* may be granted. The defendant, in a Kansas case, introduced a deposition that aided plaintiff's case rather than his own. Although this was the only evidence offered by the defendant, a verdict was rendered in his favor. The Supreme Court reversed the verdict giving judgment *non obstante veredicto* for the plaintiff. In Michigan, in an action against a doctor for malpractice, the only evidence offered for the plaintiff was testimony of another doctor who stated that "it was possible" that an error in treatment had been made. A verdict having

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2 Central Savings Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11 (1903) (Judgment *non obstante veredicto* may be granted only when a special verdict is rendered, inconsistent with a general verdict); Best v. Baudry, 62 Mont. 485, 205 Pac. 239 (1922) (Judgment *non obstante veredicto* not warranted in a law case); Brewer v. Sammers Oil Corp., 241 S. W. 519 (Tex. Civ. App., 1922) (Judgment *non obstante veredicto* cannot be rendered by trial Court).


33 C. J. 1179, 1180.

34 C. J. 1186, 1187.

Arkansas, Minnesota, North Carolina, North Dakota, Oklahoma, Wisconsin. See 33 C. J. 1184 and footnote 49 for cases.

35 MINN. LAWS 1895, c. 320. See Gorgenson v. Great Northern Ry., 138 Minn. 267, 164 N. W. 904 (1917); Cruikshank v. St. Paul Ins. Co., 75 Minn. 265, 77 N. W. 958 (1899).

36 N. DAK. LAWS 1901, c. 63. See Aetna Indemnity Co. v. Schroeder, 12 N. Dak. 110, 95 N. W. 436 (1903); Richmire v. Andrews & Gale Elevator Co., 11 N. Dak. 453, 92 N. W. 819 (1902).


been rendered for the plaintiff, the court granted judgment *non obstante veredicto* in favor of the defendant.

The dicta in the *Hartig* case, it is submitted, should do much toward resolving the confusion that exists in applying the Pennsylvania rule of judgment *non obstante veredicto*. It voices the better view in overruling *Lonzer v. Lehigh Valley R. R.* on the ground that in following that case, the court infringes on the functions of the jury. Nor does it go to the other extreme\(^8\) to hold that where there is any conflict of evidence, the case must be decided by the jury. This rule would limit the application of judgment *non obstante veredicto* to cases where no evidence supported the pleadings of a party, thus curtailing to a decided extent the efficient disposition of causes by this method.

The rule as stated in *Hartig v. American Ice Co.* applies only to cases where the verdict is supported by a presumption. The law as to those cases in which the verdict is supported by direct evidence is still unsettled, in fact, seems more unsettled than ever, since the rule in *Lonzer v. Lehigh Valley R. R.* may no longer be applied. It is possible that the *Hartig* rule may be enlarged to include those cases in which the verdict is supported by direct evidence equal or inferior in weight to a presumption. Such a decision, it is submitted, would only succeed in evading the Scylla of the present problem to fall victim of the Charybdis of determining what direct evidence is "equal or inferior in weight to a presumption." The rule of the *Hartig* case can hardly be useful in solving this minor\(^3\) problem; the solution thereof must be left to as yet unrendered decisions.

J. L. D.

Criminal Syndicalism Statutes Before the Supreme Court—At the close of the World War the legislatures of a number of the states,\(^1\) in their desire to curb Communist labor agitation, passed a series of statutes known as "criminal syndicalism statutes."\(^2\) These

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\(^8\) See cases *supra* notes 25, 27, 28.

\(^3\) "Minor" since in a considerable majority of the cases involving this problem of granting judgment *non obstante veredicto* the verdict is based on a presumption.

\(^1\) For a list of states having these statutes see *Chafee, Freedom of Speech* (1920) 404.

\(^2\) The statutes are practically uniform in phraseology. Idaho appears to have supplied the original model. *Chafee, supra* note 1, at 190. *Nelson's Encyclopedia* (1913) 459, defines syndicalism as follows: "A revolutionary working class movement, having for its aim the ownership and control by industrial organizations of the means of production and distribution, thus making the working man his own employer, and securing to him the entire product of his labor. In the United States, syndicalism appeared as early as 1890, in a revolt against the old trade union movement. Its principal exponent is the Industrial Workers of the World (I. W. W.) organized in 1905 under the
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statutes had as their object the punishment of those persons who advocated "crime, physical violence, arson, destruction of property, sabotage or other unlawful acts or methods as a means of effecting industrial or political revolution." It was not the destruction of property but only the incitement thereto that the statutes purported to deal with. In the recent cases of Whitney v. California and Fiske v. Kansas the Supreme Court of the United States passed upon the constitutionality of the California and Kansas statutes.

In the Whitney case the defendant was a member of the Communist labor party which advocated the use of force to overthrow capitalism and establish a working class government. In the Fiske case, the defendant was a member of the Industrial Workers of the World. That organization advocated that the workers of the world organize as a class, take possession of the earth and the machinery of production and abolish the wage system. The use of force was not mentioned in their program. In both cases the defendants were convicted and adjudged guilty of the felony of syndicalism. They appealed on the ground that the statutes denied them the liberty guaranteed by the United States Constitution.

The first question that arises is whether the Constitution places any restrictions on the state legislatures in regard to freedom of speech. Although freedom of speech is protected by the First Amendment, it is well settled that the first ten amendments are merely restrictions on Congress and in no way affect the states. Since the First Amendment does not apply then the only other one that can possibly restrict the states is the Due Process Clause in the Fourteenth Amendment. It has been decided by the Supreme Court that the Due Process Clause has the same scope as the similar clause in the Fifth Amendment.

leadership of Eugene V. Debs and W. D. Haywood." For an excellent discussion of the entire subject see Oakes, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) 160 et seq.

47 Sup. Ct. 641 (1927).

47 Sup. Ct. 655 (1927). Burns v. U. S., 47 Sup. Ct. 650, decided the same day as the Whitney and Fiske cases dealt with a conviction under the California statute, but involved only the wording of a charge to a jury.

The pertinent provisions of the California Criminal Syndicalism Act are:

"Sec. 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who . . . Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons, organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . is guilty of a felony and punishable by imprisonment."

Barron v. Baltimore, 7 Pet. 243 (U. S. 1833); Fox v. Ohio, 5 How. 410 (U. S. 1847); Smith v. Maryland, 18 How. 71 (U. S. 1855).
It is obvious that the Fifth Amendment does not govern freedom of speech because the First Amendment specifically deals with it. Logically, therefore, the Fourteenth Amendment would not be expected to apply to freedom of speech. In recent years, however, the Supreme Court has gradually extended the meaning of the word "liberty" in the Fourteenth Amendment and has practically read freedom of speech into it. The question whether "liberty" included freedom of speech first arose in the case of Patterson v. Colorado. In that case the Court expressly left the question undecided. The next case where the question arose was that of Gilbert v. Minnesota in which the Court stated that it did not consider it or decide it, but simply conceded it for the purposes of the case. Then, in Prudential Insurance Co. v. Cheek the Court stated that the Constitution "imposes upon the states no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence." But in the case of Gitlow v. New York, the Court said "we may and do assume that freedom of speech and of the press is one of the fundamental personal rights and liberties protected by the Due Process Clause." It is not surprising therefore that, with but little comment, it was assumed in the recent cases of Whitney v. California and Fiske v. Kansas that the Fourteenth Amendment applied.

The principal question, and the one that most occupied the Court's attention, was whether the statutes violated the constitutional guaranty of free speech. Before the right of free speech can be abridged, a real necessity for its abridgment must exist. The classic test, which has also been applied to state statutes, is the one laid down in the case of Schenck v. United States: "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to pre-
vent." The right of free speech does not imply unrestricted license or the right of solicitation to commit a felony. In applying the test of the Schenck case, the courts have extended it in several instances. In one case the acts committed clearly showed no present danger, yet it was decided to be within the statute. Therein lies the great danger of the syndicalism laws. In the Whitney case the defendant was convicted, not for practicing or teaching the tenets of syndicalism but for associating with those who proposed to teach it. The Supreme Court held the California statute constitutional on the theory that it was within the police power of the state to punish acts which endangered the public peace and security. Such considerations did not apply in the Fiske case, because there was no evidence that the defendant or his organization advocated the use of crime, sabotage or unlawful violence to overthrow the present industrial system. The Supreme Court held the Kansas statute unconstitutional because "the Act as applied was an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the Due Process Clause of the Fourteenth Amendment." Both of these cases exhibit the difficulty the courts are going to have in applying the syndicalism statutes. The test laid down in the Schenck case does not define what is "a clear and present danger." Consequently, courts will differ greatly as to when "a clear and present danger" exists. That the right of free speech should not be curbed until such danger exists was carefully pointed out by Justice Brandeis, who concurred in the Whitney case on the ground

27 State v. Moilen, 140 Minn. 112, 167 N. W. 345 (1918) (the basis of the conviction was a set of posters two inches square bearing such legends as "Beware Good Pay, Bum Work"; "The I. W. W. Never Forget"; "Sabotage"; "Industrial Unionism"; "Abolition of the Wage System"; "Join the I. W. W. for Freedom"; "The I. W. W. Are Coming"; "Join the One Big Union"; all posted on various buildings by the defendant).
28 The defendant was later pardoned by the governor of California. For comment on the pardon see the Outlook, June 29, 1927, p. 272; New Republican, Aug. 10, 1927, p. 310.
29 Accord: Main, J., in State v. Hennessy, 114 Wash. 351, 365, 195 Pac. 211, 216 (1921).
30 Cf. Edwards (1919) 89 Cent. L. J. 336, 338: "That the California Act is unconstitutional there is little room for doubt."
31 47 Sup. Ct. at 657.
32 Cf. Brandeis, J., in Whitney v. California, supra note 3, at 648: "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."
33 47 Sup. Ct. at 648.
that there was evidence to support the conviction under the only issue raised by the defendant's pleadings. He said:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be presented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated or that the past conduct furnished reason to believe that such advocacy was then contemplated. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." 24

24 See also the opinion of Holmes, J., in Abrams v. U. S., 250 U. S. 616, 630 (1919). See also President Wilson's message of Dec. 1, 1919 in which he said that Congress "should arm the Federal government with power to deal in its criminal courts with those persons who by violent methods would abrogate our time-tested institutions. With the free expression of opinion and with the advocacy of orderly political change, however fundamental, there must be no interference, but towards passion and malevolence tending to incite crime and insurrection under guise of political evolution there should be no leniency." For comment on Justice Brandeis' opinion see the New Republic, June 1, 1927, p. 34. Cf. State v. Laundy, 103 Ore. 443, 458, 204 Pac. 958, 964 (1922), "The acts which shall not be advocated are acts which when done are of themselves unlawful by force of statutes other than the syndicalism statute. If any one of those unlawful acts should be actually committed, the person so
Practically all of these statutes were passed as emergency measures to alleviate a condition that arose directly after the World War and which today exists to a much lessened extent. They illustrate the operation of two powerful forces: the right of free speech as against the right of property. That neither shall prevail at the expense of the other has resulted in the test laid down in the *Schenck* case. It therefore becomes exceedingly questionable whether a real need for their being on our statute books now exists.

C. P.

committing such unlawful act would be guilty of a crime; and surely no competent person would think of attempting to argue that his personal liberties are unconstitutionally curbed by legislation penalizing him for intentionally injuring the person or property of another. Statutes penalizing those who solicit or incite others to commit crimes are not innovations upon the criminal law: . . . If it is within the power of the legislature to declare that a given act, when done, constitutes a crime, then it is likewise within the power of the legislature to declare that to advocate the doing of such act is a crime; for if public policy requires the punishment of him who does an act, it likewise may require the punishment of him who incites the doing of such act, whether the act is actually done or not."