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Summary Judicial Power

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SUMMARY JUDICIAL POWER

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(This article was written before the decision in *Bank of United States v. Manheim*, handed down by the Court of Appeals on Mar. 6, 1934, and which, in its expression of principle, is in accord with the conclusions stated herein. Comment on the case will be found at page 387, which was added to the article after it was written.)

The inundation of our courts by the tide of litigation has brought about fundamental changes in our conceptions of justice. With the best of intentions, but, nevertheless, in desperation, we have shifted the very foundation of time-honored rights, and converted them into mere privileges. A "day in court" is thus fast being converted from a right assumed, to a privilege to be granted only for good reason shown. It is the goal reserved only for those who overcome every obstacle placed in their way. It is no longer the inalienable right guaranteed by constitution and protected for every litigant. Relinquishment by waiver is not only tolerated, but encouraged.[1] Even what suggests arbitration, with all its informality and disregard of judicial procedure, is sanctioned by court rules.[2] The line between mere private right and public interest is shadowy indeed, and simple is it for the unwary to tumble from the protecting embrace of public policy into the morass of mere private concern and entanglement.

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[1]Matter of Petition of N. Y., L. & W. Ry., 98 N. Y. 447, 452 (1885); but see People *ex rel.* Battista v. Christian, 249 N. Y. 314, 164 N. E. 111 (1928), 61 A. L. R. 793 (1929).

[2]SUBDIVISION F, RULE 14, TRIAL TERM RULES, KINGS COUNTY:

"The Justice assigned to Special Term, Part 2, shall on each Monday, Wednesday and Friday, between 11 A. M. and 1 P. M., hear such matters as may be brought before him under the provisions of this subdivision, which matters shall be known as 'Informal Motions'. In any action or proceeding in the Second Judicial District in which the attorneys for all parties who have appeared shall appear voluntarily before such Justice for the purpose of obtaining a ruling or decision, such Justice sitting as the court shall hear the parties informally, without presentation of affidavits, motion papers or proof, and make a ruling or decision thereon, which, if desired by either party, may be embodied in a court order or judgment to be signed and entered."

There is an impatience in judicial conduct and procedure, and an intolerance of circumspection in any form—even when guaranteed by constitutions—which have resulted in scuttling the lessons of generations, and in the usurpation of the functions of juries—in an attitude symptomatic of an era in which governments on "vertical" lines, "totalitarian" states, and "new deals" are the rule of the day. Efficiency, by and large, rather than exact justice in each case, is the new standard. The entire judicial machinery—at least, in the larger cities—seems to be geared up to clear our calendars. Like in commercial activity, accomplishment is measured by volume of turnover and dispatch of so many cases. The purpose is praiseworthy, but the result is not judicial. For the grist of the mill cannot be judged by the samples which pass through the appellate courts. For most litigants, the court of last resort is the court of original jurisdiction. It is as if the centrifugal force developed in the ever-increasing whirl of the judicial wheel, is throwing out to the periphery and forever away, all those who cannot hold fast. It seems to be forgotten that the judicial system is made up not merely of judges and courts, but also of lawyers, and that the efforts of all are futile, if the litigants who furnish the causes in litigation are not satisfied that they have had the benefit of deliberate consideration by a court, which has heard them and their witnesses, and not merely read the affidavits prepared by their attorneys. A "day in court" has a literal significance which is the guarantee against loss of confidence in the judicial process.

Our problem arises because, as in all other fields, this ideal conception of a "day in court" has run afoul of conditions never anticipated. The mere volume of litigation has swamped the judicial ship, and we must be careful, lest the very basis of our conception of justice does not go down with it. Granted that justice delayed is a denial of justice itself, yet it has been overlooked that justice unduly expedited, so that it becomes administrative rather than judicial, is no longer respected. Experienced judges and lawyers know only too well that trial by affidavit depends largely on the skill of the affidavit draftsman, whose skill is exhibited as much by what he suppresses as by what he discloses, and that disposition of issues of credibility, though labelled as questions of law, are, nevertheless, decisions of questions of fact. A judicial proceeding inevitably contemplates something of the solemnity and deliberation of judgment, involving an appraisal of witnesses, after an opportunity to be heard. The delay thus inherent has proved to be part of the price of liberty itself.

We do not say that improvements should not be made, if they are

consistent with these principles. But there should be sharp discrimination between those methods which impose burdens on litigants and undermine fundamental conceptions, so that a "day in court" may be avoided, and those which merely weed out litigations in which there is no issue to be tried.

Devices to stem the tide, of the former class, have been many. More judges were elected. Arbitrary increases in the cost of putting cases on the jury calendars were imposed.[3] Jury trial became an institution no longer easily available to those without means. It was made comparatively simple to omit some technical step essential to preserve the right to jury trial, and thus bring about an automatic waiver, where none was intended.[4] Those who insisted upon jury trials, nevertheless, particularly in the lower courts, were accused of bad faith in thus employing a constitutional right to delay the day of justice.

But it is not of these that we shall here treat, but rather of devices whose purpose is right, if only their function be not diverted. We refer to the motions for judgment on the pleadings and for summary judgment, under Rules 112, 113 and 114; dismissals at the trial under Civil Practice Act Section 482, and directions of verdicts under Civil Practice Act Section 457-A.

The praiseworthy function of the rule for summary judgment is now well recognized. The true scope of Civil Practice Act Section 482 is now understood. Their history is now important only as it sheds light upon the origin and function of related clauses in our procedure, conceived in the same purpose of expediting the demise of litigations which present no issue worthy of resolution by trial. Therefore, we refer to the motions for judgment, in whatever form, only insofar as their development may serve as a guide in giving scope to the third innovation of directing verdicts where they might be set aside, under Section 457-A, which provision, strangely enough, has not been satisfactorily interpreted, even at this time. Our purpose will be to establish that, in the light of surrounding circumstances, Section 457-A should be limited to cases in which there is no issue of fact requiring resolution by a jury, and should not be extended to permit judges to usurp the functions of juries. Remedies born of the same function and purpose should be construed and applied by the same standard.

We seek to find the "internal sense" of the statute.

> "The same idea of the rule of constructing a statute, is very quaintly expressed by Plowden in his commentary upon the

[3]N. Y. CIVIL PRAC. ACT §1557-A. [4]N. Y. CIVIL PRAC. ACT §426.

case of *Eyston v. Studd* (2 Plowd. 465). He says, 'it is not the words of the law, but the internal sense of it that makes the law, and our law, (like all others) consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, "*quia ratio legis est anima legis*". And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel; and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit from the law if you rely upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens, that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive.' This authority, it seems to me, is peculiarly applicable to a case where books of science and the literary lexicons are cited to prove the definitions and meaning of *words*, or in the language of Plowden, to prove what is the body, rather than what is the reason and intent of the statute."[4a]

The remedy of summary judgment came in with the Civil Practice Act in 1922. It was said that litigants had no vested right in the delays of litigation, and, accordingly, a procedural rule was formulated, by which discrimination might be made between real issues, deserving trial, and feigued issues, which merely delayed the entry of judgment. Of all the innovations of the Civil Practice Act, this was the most effective, because the soundest, and it has developed its efficiency, for the purpose of reducing dishonest litigation, to an extent quite appreciable and in strict accordance with fundamental conceptions of justice.[5] True, in the beginning, there was much hesitation as to whether the remedy was constitutional. So much was its validity feared, that it was not placed in the Civil Practice Act, but among the Rules, where it might be defended as a procedural regulation, rather than as a change in substance. Past decisions of our courts, particularly of the Court of Appeals, gave warning to be very cautious,[6] but the fear was quite groundless, because

[4a]Holmes v. Carley, 31 N. Y. 289, 290 (1865), quoting from Plowden.

[5]Leonard S. Saxe, *Summary Judgments in New York—A Statistical Study* (1934) 19 CORNELL LAW QUARTERLY 237; *Extension of the Right of Summary Judgment*, by Edward R. Finch, presiding justice of the Appellate Division of the First Department, N. Y. STATE BAR ASSOCIATION BULLETIN, May 1932; REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE, LEGISLATIVE DOCUMENT (1934) No. 50, pp. 40 *ff*.

[6]For early history of experience under RULE 113, see by the author: *Simplification of Civil Practice in New York* (1923) 23 COL. L. REV. 618, 732, (1924) 24 COL. L. REV. 732, 865, (1925) 25 COL. L. REV. 30; *New York Civil Practice Simpli-*

the practical situation demanded a solution, and, in the light of the need, a reason to sustain the innovation was found without difficulty.

True, also, that, in the beginning, there was much confusion as to the proper application of the rule, as well as uncertainty as to its relation to the motion for judgment on the pleadings, under Rule 112. Was the motion for summary judgment merely a plaintiff's remedy?[7] Could it dispose of a counterclaim as well as of mere denials of defenses?[8] Was it to be identified with a motion for judgment on the pleadings, or differentiated by reason of the fact that affidavits could be used?[9] Was its efficacy to be confined within the limits of the issues formed by the pleadings, or would the court go into the merits on the assumption that the pleadings would be later amended to constitute a sufficient vehicle for the issues thus discerned?[10] Could the court impose conditions in granting summary judgment?[11] Was there a real distinction between summary judgment under Rule 113 and partial judgment under Rule 114? Was it the only method of disposing of a case in which there were no real issues to be tried, after issue was joined, or could Rules 104—relating to sham pleadings—and 112—treating of motions for judgment on the pleadings—be availed of, notwithstanding that time had elapsed for motions addressed to the complaint and motions addressed to the answer?[12]

These problems were all solved by the desire to terminate unworthy litigations, though at very serious sacrifice of symmetry in the Civil Practice Act and Rules. Though there was an elaborate mechanism for motions addressed to the pleadings, which had to be made within twenty days and ten days, and though it is inconceivable what could have been in the minds of the framers of the new Civil Practice Act, if they intended that anything which had to be done within twenty days and ten days, could, nevertheless, be done with-

fied (1926) 26 COL. L. REV. 30, (1927) 27 COL. L. REV. 258, 413; *cf.* Lehman, J., in Rogan v. Consolidated Copper Mines Co., 117 Misc. 718, 193 N. Y. Supp. 163 (1922); Mullan, J., in Hanna v. Mitchell, N. Y. L. J., March 3, 1922.

[7]N. Y. CIVIL PRAC. RULE 113, as originally formulated.

[8]Chelsea Exchange Bank v. Munoz, 202 App. Div. 702, 195 N. Y. Supp. 484 (1st Dept. 1922); Goodman & Suss, Inc., v. Wallack, 195 N. Y. Supp. 328 (Sup. Ct. 1922).

[9]General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 139 N. E. 216 (1923); Dwan v. Massarene, 199 App. Div. 872, 192 N. Y. Supp. 577 (1st Dept. 1922).

[10]Curry v. MacKenzie, 239 N. Y. 267, 146 N. E. 375 (1925).

[11]Gibson v. Standard Auto Mutual Gas. Co., 208 App. Div. 93, 203 N. Y. Supp. 53 (1st Dept. 1924).

[12]*Cf.* Wayland v. Tysen, 45 N. Y. 281 (1871); Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106 (1910); Kirschbaum v. Erschmann, 205 N. Y. 127, 98 N. E. 328 (1912); Rochkind v. Perlman, 123 App. Div. 808 (2nd Dept. 1908); Baum's Castorine Co. v. Thomas, 92 Hun 1, 37 N. Y. Supp. 913 (1895).

out time limit, Rule 112 was finally construed so that any motion addressed to the sufficiency of the pleadings could be made at any time, notwithstanding the meticulous delimitation of authority as to particular types of motions.[13]

Similarly, as to Rule 113, solution was found by the same process. The old rule that pleadings could be struck out as sham—now reflected in Civil Practice Rule 104—which, properly construed, was, in effect, a motion for summary judgment, available in any case, was conveniently forgotten, lest some constitutional protection for right to jury trial might invalidate the limited operation possible under Rule 113.[14] So, it was said that one could move for summary judgment in a case involving liquidated damages and on a contract, but not in a case to foreclose a mortgage.[15] Yet, surely, an answer which was false in a foreclosure action was just as much sham under Rule 104, as an answer which was false in an action for breach of contract under Rule 113. And a rule which had been settled for many years, even under the old Code of Civil Procedure—that affidavits might be considered on a motion to strike out as sham, under Rule 104[16]—was overruled by decisions of the Appellate Divisions, which said that, in foreclosure actions, no affidavits might be considered on such a motion.[17] The result was that Rule 113, which was intended to be a cautious extension of a principle already recognized, that affidavits might be employed to ascertain whether there was an issue to be tried, was interpreted so that it foreclosed the conduct of such an inquiry, by a means which had always been recognized.

However, this relapse was corrected by amendments of Rule 113, so that it included most actions—even foreclosure actions—and became available generally, and, thus, what had been an erroneous interpretation of existing law, was corrected through the rule-making power.[18] And, later, this remedy was extended so as to become available to defendants as well as to plaintiffs,[19] and the entire spirit

[13] *Cf.* Hubbs & Company v. Richard, 119 Misc. 436, 197 N. Y. Supp. 45 (1922); N. Y. CIVIL PRAC. RULES 106, 109, 111; Stage v. Michigan Central R. R. Co., 199 App. Div. 675, 191 N. Y. Supp. 824 (4th Dept. 1922); Klippel v. Weil, 204 App. Div. 323, 198 N. Y. Supp. 13 (1st Dept. 1923).

[14] *Cf.* authorities *supra* note 12.

[15] Toner v. Ehrgott, 226 App. Div. 244, 235 N. Y. Supp. 17 (1st Dept. 1929).

[16] *Cf. supra* note 12.

[17] Monica Realty Corp. v. Bleecker, 229 App. Div. 184, 241 N. Y. Supp. 290 (1st Dept. 1930); Lowe v. Plainfield Trust Company, 216 App. Div. 72, 215 N. Y. Supp. 50 (1st Dept. 1926); Levan v. American Safety Table Co., 222 App. Div. 110, 225 N. Y. Supp. 583 (1st Dept. 1927); Reed v. Neu-Pro Construction Corp., 226 App. Div. 70, 234 N. Y. Supp. 400 (1st Dept. 1929).

[18] Amendment adopted.

[19] Amendment adopted.

of the procedural change enlarged, so as not merely to prevent delay in the entry of judgment in favor of plaintiff, but to clear the calendars of cases where the plaintiff had no right to prosecute a litigation. The result was desirable, although, as to defendants, of very little practical consequence, in view of the fact that other and existing rules were merely duplicated,[20] and that, in any event, the remedy is peculiarly a plaintiff's.

But, again, the symmetry of the Civil Practice Act and Rules was marred, for the original purpose of the framers of the Act and Rules was, undoubtedly, to require a defendant who would thus avoid a trial by an anticipatory test of the merits of a cause, to proceed in accordance with Rules 107 and 110. It will be remembered that these rules permitted defendants, within specified time limitations, to move to dismiss the pleadings upon affidavits, establishing particular defenses to the plaintiff's cause of action. But these rules would now seem to have little purpose, if any, in view of the extension of Rule 113 as a defendant's remedy, as well, so that a defendant may now move, upon any ground which would be available to him on the trial, and upon affidavits, to dismiss the complaint.

The net result, therefore, is that, in the interests of simplicity and clarity, we might just as well repeal all of our motion practice, other than as contained in Rules 112 and 113. For to what purpose is it to build up an elaborate scheme of motions, with restricted time limitations, when everything which may be accomplished under that scheme is available, at any time, without limitations, within the broad scope of Rules 112 and 113?

But our purpose in thus exposing this process, is not to dwell upon the mere procedural inadvisability of pyramiding complications, when simple rules are available for the same purpose, but, rather, to show that logic is the last thing in the world which may be relied upon for a proper analysis of procedural development. There is little logic in the entire process of code-making. Necessity or expediency makes the rules. Logic presents them and makes them plausible. When the need expires, the rule becomes illogical. Our present practice, enlarging the scope of summary judicial power, is the result of a steadfast purpose to clear the calendars, by one device or another, without too tender a regard for the symmetry of a procedural system, built up so that a logical order and sequence might follow. If immediate trials were possible, we might well scrap much of the Civil Practice Act, but, since they are not, we must have rules to eliminate, as much as we can, such litigations which have only delay

[20]N. Y. CIVIL PRAC. RULES 107 and 110.

as their purpose. But, if we are to have a practice which will function, it must be easily grasped, not only by ourselves, but also by those whom the future will call to the profession, and who, like ourselves, will be impatient with the lessons of history. Therefore it is that we should eliminate outworn rules and redundant formulations of regulation and principle. For, as the years pass on, the result is always confusion, then impatience, and, finally, disregard of the very fundamentals of judicial process.

Now, tracing the development of our practice as to motions to dismiss the complaint, made during a trial, reflected in Section 482 of the Civil Practice Act, we find a similar process. It was an old theory, supported by the logic of a more leisurely day, that a dismissal of the complaint, at any stage of the trial, short of that point where the party had rested his case, could not be on the merits, but must operate, at the most, as a non-suit, without prejudice.[21] Much significance attached to the difference between a motion to dismiss a complaint and a directed verdict. That conception, at least, in terms, was abolished when Civil Practice Act Section 482 was adopted, for it provided a rule of thumb by which the conclusiveness of the adjudication depended, not on the inquiry as to whether the party had rested his proof, but upon the stage of the case which had been reached, and the form which the dismissal took.[22] So, if the court dismissed the complaint before the close of the plaintiff's case, the presumption was that the dismissal was not on the merits, although it might be, if the court so directed. And, if the dismissal took place at the close of the plaintiff's case or at any later stage, the presumption was that it was on the merits, though it need not be. In order to ascertain just what had occurred and what conclusiveness should attach to the adjudication, it was only necessary to look to the judgment. It was no longer necessary to examine into the record.[23] This was the conclusion after much doubt as to what was the rule, and reluctance to follow a clear and unambiguous statute. Witness the early decision of the Appellate Division of the Fourth Depart-

[21]Caruso v. Metropolitan 5-50 Cent Store, 214 App. Div. 328, 212 N. Y. Supp. 199 (3rd Dept. 1925).

[22]This seems to be clear, notwithstanding the discussion in the case in the preceding note. *Cf.* Hollenbeck v. The Aetna Casualty & Surety Co., 215 App. Div. 609, 214 N. Y. Supp. 402 (3rd Dept. 1926), *aff'd* in 243 N. Y. 540 (1926).

[23]Authorities in note *supra;* also Luce v. N. Y. C. & St. L. Co., 213 App. Div. 374, 211 N. Y. Supp. 184 (4th Dept. 1925); Tanner v. Tennenbaum, 235 App. Div. 173, 256 N. Y. Supp. 562 (1st Dept. 1932); Henderson Tire Co. v. Wilson, 203 App. Div. 658, 196 N. Y. Supp. 879 (4th Dept. 1922), modified 235 N. Y. 489, 139 N. E. 583 (1923).

ment, in which it was said that there could be no such thing as a dismissal on the merits, without a meritorious adjudication in the form of findings of fact and conclusions of law, on the one hand, or the verdict of a jury, on the other.[24]

The third procedural device, incorporated in Section 457-A of the Civil Practice Act, undoubtedly, was a part of the same general policy, *i. e.*, of limiting the right to trial, in the normal sense, only to those cases where there was an issue to be tried. Singularly, however, its scope has not as yet been clearly defined in judicial decision.[24a] Its function is to be determined in the light of the policy indicated by the provisions of which we have already treated—for it is the mischief to be remedied which furnishes the standard for proper interpretation of any new statute.[25]

The statute provides:

> "457-a. *Direction of a verdict.* The judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence."

There are those who think it unconstitutional, because it permits a judge to usurp the function of a jury.[26] For, while a judge might set aside a verdict as against the weight of evidence, and order a new trial, that would be quite different from directing a verdict and thus ending the litigation. On the other hand, there are those who are of the opinion that the issue is not of validity, but of construction, and that the authority to a judge to direct a verdict, where he would set aside a contrary verdict as against the weight of the evidence, is not so broad a grant of power that it includes the power to direct a verdict where the trial justice disagrees with the jury. To them, it seems that a trial justice may direct a verdict, under such circumstances, only where there is a *defect* of proof, as distinguished from dissatisfaction with the quality of the proof or the conduct of the trial; that the grant of power is not an authorization to use it indiscriminately, but only in such a proper case.

But, whatever may be the proper construction, it is quite plain that what the Legislature did was to incorporate in a legislative code of practice, a phraseology not at all novel, but importing a principle which had often been stated in judicial opinion, in the courts of many states, as well as in the federal courts. Accordingly, there is a third approach possible, namely, that what was enacted was

[24]Caruso case, *supra* note 21.

[24a]As pointed out in the caption, the question has now been definitely determined.

[25]American Historical Society v. Glenn, 248 N. Y. 445, 162 N. E. 481 (1928).

[26]RICHARDSON ON EVIDENCE (3rd ed. 1928) p. 140.

merely the statutory declaration of a principle already recognized. So, if we examine Section 459 of the Civil Practice Act, with its counterpart in Sections 1187 and 1188 of the Code of Civil Procedure—which was the only statutory provision on the subject prior to the adoption of Section 457-A—it will be rather startling, but, nevertheless, informative, to observe that nowhere in our civil procedure codes was the proposition ever stated as to the power of a court to direct a verdict. Yet, the power was continually exercised on well-settled principles.

That a statute should declare a rule, rather than make a new one, is nothing novel in procedural codes. So, in *Siebert v. Dunn*,[27] this principle was recognized by the Court of Appeals, in its construction of Section 266 of the Civil Practice Act, relating to counterclaims, and the rule stated that the Civil Practice Act "should not be given an interpretation depriving the defendant of a recoupment which, as stated, the common law would have sanctioned, unless they under such construction, compel it". Similarly, this principle was recognized in *People v. Miller*,[28] in which the Code of Criminal Procedure was construed so as not to abrogate fundamental common law principles, and in which the Appellate Division said, as to such provisions: "Being merely declaratory of the common law, these statutes are to be construed as near to the rule and reason of common law as may be * * * and we are not to limit or lessen their application where for convenience of codification, the rule has been stated in two sections instead of one". Certainly, the purpose of simplification, sought to be accomplished by the revision of our practice, in 1920, was not envisaged as an uprooting and upheaval of all known standards, but, rather as a re-statement of fundamentals, which would more clearly emerge after the elimination of merely procedural embarrassments. It is a fundamental principle of statutory construction that a known phrase, incorporated therein, shall be interpreted with reference to prior law,[29] and that fundamental changes will not be lightly implied.[30] Particularly is this so as to a statutory revision,[31] as to which the rule is that all parts of the statute must be read as a unit and in harmony.[32]

Since we start, therefore, with the basic thought that Section 457-A

[27]Siebert v. Dunn, 216 N. Y. 237, 110 N. E. 447 (1915).

[28]People v. Miller, 143 App. Div. 251 (1st Dept. 1911); *aff'd* 202 N. Y. 618, 96 N. E. 1125 (1911).

[29]O'Rourke v. People, 3 Hun 225 (3rd Dept. 1874).

[30]See cases cited §184 statutes, McKINNEY'S CONSOL. LAWS OF NEW YORK, Vol. 1, p. 256. [31]Davis v. Davis, 75 N. Y. 221 (1878).

[32]Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237 (1925).

was born of the same purpose as Civil Practice Rule 113 and Civil Practice Act Section 482—the first introducing the power to dispose of a controversy without trial, where there is no issue to be tried, and the second attributing to the dismissal of a complaint the finality of an adjudication on the merits, in the absence of express provision to the contrary—we should interpret all by the same standard, *i. e.*, is there an issue to be tried? No one would venture the thought that Rule 113 permitted a judge, in the exercise of his discretion, to dispose of a case on the weight of the evidence, or that Civil Practice Act Section 482 justified a court in dismissing a complaint on the merits, where it was plain that, upon a new trial, further proof might be adduced.[33] The purpose of all of these provisions was to end litigation where there was no issue to be tried. The purpose of all of them would be frustrated and injustice perpetrated, if they were construed so as to permit a judge to determine that which has traditionally been within the exclusive function of a jury. By these standards, Civil Practice Act Section 457-A does no more than formulate, so that all who read may understand, fundamental principles underlying control of jury trials, protected by constitutional guarantees and by the experience of generations. Any other rule would substitute the judge for the jury, in the delicate task of weighing evidence. In many cases, it would deprive litigants of the substance of the right to appeal, even though the form might still be granted them. For, if a judge, merely by reason of the fact that a single witness testified to an occurrence, were able to direct a verdict where he would set aside a contrary verdict as against the weight of evidence, what would there be left of the rule that, even if testimony is uncontradicted, yet, if it be given by interested witnesses, there is an issue of fact which must be submitted to the jury?[34]

Such meager historical background of an extra-judicial character, as there is, shows that there was no purpose but to formulate a rule representing the law as it had been theretofore interpreted. From the Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York (Vol. 1; 1915) we take the following:

Section 37 of the proposed act:

"A verdict may be directed upon the trial where a contrary verdict would be clearly against the weight of the evidence". (p. 22)

[33]As to summary judgment, *cf.* General Investment Co. v. Interborough R. T. Co., *supra* note 9; as to N. Y. CIVIL PRAC. ACT §482, *cf.* Hollenbeck v. Aetna, *supra* note 22; Caruso v. Metropolitan 5–50 Cent Stores, *supra* note 21.

[34]Kavanagh v. Wilson, 70 N. Y. 177 (1877); Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102 (1900).

which, it will be observed, differs from our present statute only in the presence of the additional word "clearly". What was thus intended appears from the following discussion:

> "(Sec. 37) The Association of the Bar of the City of New York recommended the following:
> 'Upon a trial by jury, wherever the evidence adduced by any party is insufficient in law to sustain a verdict; or is insufficient reasonably to satisfy a jury that the facts sought to be proved are established; or is in such contradiction to matters of common knowledge or the laws of nature as to be wholly or in essential parts incredible as a matter of law; or is otherwise wholly or in essential parts incredible as a matter of law; the trial justice shall direct such verdict as would be proper had such party adduced no evidence.'
> The purpose of the proposed amendment, as stated in the memorandum of the special committee of the association, is to state clearly the rule as to the power of a trial judge to take a case from a jury even though there be a scintilla of evidence and to reaffirm the rule laid down in numerous cases, that a judge may direct a verdict where a contrary verdict would be clearly against the weight of evidence by putting into statutory form the law as declared in the McDonald and Fealey cases. (McDonald v. Metropolitan St. Ry., 167 N. Y. 66; Fealey v. Bull, 163 N. Y. 397; Laidlaw v. Sage, 158 N. Y. 73; Hemmens v. Nelson, 138 N. Y. 517; Linkauf v. Lombard, 137 N. Y. 417; Bulger v. Rosa, 119 N. Y. 459; Dwight v. Germania Life Ins. Co., 103 N. Y. 341; Tabar v. Koplin, 4 N. Y. 547)." (p. 210)

This becomes increasingly significant when we appreciate that an earlier New York City Bar Association "Report of the Committee Appointed to Consider the Simplification of the New York Procedure" of November 1, 1909—six years earlier—contained the following recommendation:

> "Trials:
> VIII. Upon a trial by jury, where the evidence is so preponderating in favor of one side, that a verdict contrary to it would be set aside as against the evidence, it should be the duty of the trial justice to direct a verdict. Where there is no evidence to support an issue, the complaint should be dismissed (Recommendation 10).
> Until the decision of the McDonald case (167 N. Y. 66), The Court of Appeals applied the rule that a verdict can be directed as above stated. In the McDonald case, that court disregarded its own repeated decisions and held that in such a case the trial judge could not direct a verdict, but could only set aside an erroneous verdict. (Bulger v. Rosa, 119 N. Y. 459, 464; Linkauf v. Lombard, 137 N. Y. 418, 425–6; Hemmens v. Nelson, 138 N. Y. 517, 529–530; Laidlaw v. Sage, 158 N. Y. 73, 96–7). The

Legislature should be asked to settle this conflict by restoring the ancient rule". (p. 4)

This was crystallized in:

"Recommendation 10—
Resolved that the Code of Civil Procedure should be amended by adding a new section to be known as Section 1185-A, to read as follows:

Section 1185-A. *Direction of a verdict.* Upon a trial by jury, where there is no evidence upon an issue before the jury, it is the duty of the trial justice to dismiss the complaint or counterclaim as to that issue; where the weight of evidence is so preponderating in favor of one side, that a verdict contrary to it would be set aside as against the evidence, it is the duty of the trial justice to direct a verdict as the case may require." (p. 10)

But, as we have seen, this recommendation was dropped in the report made six years later, and, certainly, was not incorporated in the report of the Board of Statutory Consolidation, which immediately preceded the enactment of the Civil Practice Act.

Turning from these extrajudicial sources of information, unfortunately we find little guidance to our inquiry, in decisions of our courts. Thus far, though the question of the proper construction of Section 457-A, has been submitted to the Court of Appeals on several occasions, that court has found it unnecessary to make any determination.[35] However, when the question as to the proper application of Section 457-A was last presented to the court,[36] while it did not pass upon the validity of the statute, because Section 457-A was not directly involved, and because "when the jury had rendered its verdict, the court could have set the same aside on the ground that it was against the weight of evidence, in which case there would have been a new trial, but he could not, in view of the conflict, direct a verdict as he did", the implication was very plain that a trial court might not direct a verdict where there was a conflict in the evidence as distinguished from a defect in proof.

On the other hand, the Appellate Divisions have taken the rule quite literally. In effect, they have said—although, in most instances, without determining the precise question, and usually insisting that the question was not involved—that a judge may himself determine what has traditionally been a question of fact for the jury. Whenever such decisions were prosecuted to the Court of Appeals, they were affirmed, not by reason of Section 457-A, but

[35]Matter of Bennett, 238 N. Y. 583, 144 N. E. 901 (1924); State Bank v. Siff, 254 N. Y. 627, 173 N. E. 895 (1930).

[36]Greenpoint National Bank v. Gilbert, 237 N. Y. 19, 142 N. E. 338 (1923).

only on the ground that the evidence was incredible as a matter of law.[37] This standard is described in *Fealey v. Bull*,[38] as follows:

> "There must be not only some evidence, but the evidence must be sufficient in its nature to warrant the court in submitting a cause to the jury. In nearly all the cases where it has been held that a scintilla of evidence was not sufficient to uphold the verdict, the proof has been a matter of inference. But the rule also applies to cases of direct evidence. The testimony of a witness may be in such contradiction of matters of common knowledge, or the laws of nature, as to be incredible as a matter of law. * * * A witness may be so discredited by his own confession that his uncorroborated testimony is insufficient in law to justify a verdict. * * * We do not assume to enumerate all the cases where a verdict or a nonsuit should be properly directed. Where, however, the right to a verdict depends on the credibility to be accorded witnesses, and the testimony is not incredible nor insufficient as a matter of law, the question of fact is for the jury to determine."

It would seem quite evident, from this discussion and its vague and reluctant definition of the process, that, to determine that evidence is incredible as a matter of law, is, in itself, a dangerous practice, for it comes dangerously close to saying that the court thinks the judgment was right on the weight of the evidence. Certainly, the twilight zone between incredibility, as a matter of law, and the preponderating weight of the evidence, is so narrow as, for all practical purposes, in many cases, to be indiscernible. It is easy enough to pass from one to the other quite subconsciously. As in many other fields, the process is a dangerous one. The tendency would seem to be to extend its application, in the subconscious effort to avoid a decision as to the validity and construction of Civil Practice Act, Section 457-A. Indeed, the recent decision in the *Serina* case[39]—in which the Appellate Division of the First Department, in squarely deciding that Section 457-A permitted a court to direct a verdict where it would set aside a contrary verdict as against the weight of evidence, confused this principle with the established rule that a court may direct a verdict "where testimony is contrary to reason or opposed to natural

[37]Greenpoint case, *supra* note 36; Matter of Price, 119 Misc. 19, 194 N. Y. Supp. 842; *aff'd* 204 App. Div. 252, 197 N. Y. Supp. 778 (1st Dept. 1923); *aff'd* 236 N. Y. 656, 142 N. E. 323 (1923); White & Sons v. U. S. Food Products Corp., 203 App. Div. 787, 197 N. Y. Supp. 391 (1st Dept. 1922); see dissenting opinion of Finch, J., at p. 791; *cf.* Klein v. Katz, 200 App. Div. 473, 475, 193 N. Y. Supp. 98 (1st Dept. 1922), which seems to be to the same effect; Matter of Bennett and State Bank v. Siff, *supra* note 35. [38]163 N. Y. 297, 57 N. E. 631 (1900).

[39]Serina v. New York Railways Co., 238 App. Div. 302, 264 N. Y. Supp. 107 (1st Dept. 1933).

or physical laws"—well illustrates this process. It shows how an interpretation repeatedly made by implication—though never expressly formulated—and followed by trial courts, tends strongly to foreclose consideration of the validity of the rule itself, with the result that, when the question does come up for a decision, it is necessarily influenced by the practice which has become general, and the validity of the rule assumed, upon a principle theretofore carefully distinguished. It is not unusual for error so to be repeated and so to be emphasized as to become a part of the fabric of our law. The insidious effect of such error may well be grasped from the following quotation made in the *Serina* case, from an opinion of the Court of Appeals, which was thought to justify a rule that a court might direct a verdict when it would set aside a contrary verdict as against the weight of evidence:

> "If, in the *discretion* of the court, a verdict *may* (sic) be set aside, the parties are not thereby deprived of a jury trial. It is only when a verdict for the plaintiff *must* (sic) be set aside as unsupported by sufficient evidence that a verdict for the defendant should be directed or the complaint dismissed."[40]

Yet, it is quite plain that, when the Court of Appeals said that "if, in the *discretion* of the court, a verdict *may* be set aside, the parties are not thereby deprived of a jury trial", there was no intention to state that the court might *direct* a verdict on *discretionary* grounds, which would justify it in setting aside a contrary verdict. On the contrary, the statement is plainly made that, in such case, there must be at least a new trial, as is further evidenced by the fact that the Court of Appeals reversed the judgment which had dismissed the plaintiff's complaint in that case.

An examination of the background of Section 457-A, whether in extrajudicial sources or in judicial opinion, since its adoption or prior thereto, will show, very clearly, that it could not have been intended to constitute a change from the practice as it existed before, but that it was no more than the formulation of a principle declaratory of the prior practice, *i. e.*, permitting a court to direct a verdict only in those cases in which it could say that there was no issue to be tried, and forbidding it to direct a verdict in any case in which its attitude was rather of dissatisfaction with the quality of the evidence than with deficiency or defect in proof, and that the convention, in selecting the phraseology of our Section 457-A, committed the not uncommon error[41] of tearing a phrase from judicial

[40]Getty v. Roger Williams Silver Co., 221 N. Y. 34, 35, 116 N. E. 381 (1917).

[41]*Cf.* Colonial City Traction Co. v. Kingston City R. R. Co., 154 N. Y. 493, 48 N. E. 900 (1897); Fealey v. Bull, *supra* note 38.

opinion, which, out of its context, distorted the effect of the decision and misrepresented the universal law on the subject.

As was said with prophetic vision by Cullen, J., in *Fealey v. Bull* (supra): "* * * to excerpt a single sentence from a judicial opinion and construe and interpret it apart from the context of the opinion in which it is found, and without regard to the subject matter under discussion, is not only unreasonable, but at times leads to erroneous conclusions".[41a] This is the basic indictment of the draftsmanship of Section 457-A.

With mere doctrinaire discussions, we shall not concern ourselves. The fundamental questions were all presented and considered in *McDonald v. Metropolitan Street Ry. Co.*,[42] in which it was pointed out that there is a vast difference between directing a verdict, where a court would feel justified in setting aside a contrary verdict, and merely setting it aside and ordering a new trial, because, in the former case, there would be a termination of litigation in disregard of the right of jury trial, whereas, in the latter, there would follow a new trial, as an incident of judicial regulation of jury trials. Certainly, prior to the adoption of Section 457-A, there was no case in which there was even the suggestion that the disposition of questions of fact was within the function of a trial justice. The pendulum had swung back and forth, upon this issue, prior to the *McDonald* case, but the *McDonald* case seemed to settle it, at least, for our time.

Section 457-A, as we have it, has long been the rule in the federal courts and in many of our sister states. An examination of these authorities shows that "the circumstances which will authorize the direction of a verdict have been variously stated, though there is but little real conflict of authority".[43] Even in courts which prefer the phraseology that a court may direct a verdict, where it would set aside a contrary verdict, it is plain that no such thought could be tolerated in a case presenting contradictory evidence or permitting of different inferences by reasonable people. Thus, all of the authorities, professing to apply the rule that a court may direct a verdict where it would set aside a contrary verdict, are perfectly consistent with the rule as formulated in the *McDonald* case, which, in turn, rests upon *Fealey v. Bull*,[44] explaining all the cases. So considered, authorities like *Dwight v. Germania Life Insurance Co.*,[45] and the host of other cases in all jurisdictions, are but applications of the fundamental principle that any issue of fact must be submitted to

[41a] P. 401. [42] 176 N. Y. 66, 60 N. E. 282 (1901).
[43] RULING CASE LAW (1929) §75, p. 1067.
[44] 163 N. Y. 397, 57 N. E. 631 (1900). [45] 103 N. Y. 341, 8 N. E. 654 (1886).

a jury. The old and misconceived "scintilla" rule is all that is exploded by cases of this type. An issue of credibility, though improbabilities and contradictions may furnish a basis for suspicion, is still exclusively for the jury. If the jury might have discredited the party, and even though the court, in the exercise of its discretion, might have set the verdict aside and ordered a new trial, yet, it is the jury alone which must determine the issues of fact.[45a] Where "conflicting inferences may not unreasonably be drawn, the weight of evidence" is for the jury. This is entirely consistent with the rule that "insufficient evidence is, in the eye of the law, no evidence".[45b] Only if there is no issue of fact—as thus defined—can it be said that there is no issue to be submitted to a jury. The cleavage between cases in which a judge is permitted to direct a verdict, and those in which he must submit the issue of fact to a jury, is thus seen to be at that point where the judicial mind can say that there is a *defect* in proof, as distinguished from dissatisfaction with the *quality* of evidence. The compiler of Abbott's New York Digest[46] grasped this essential difference, when he summarized the effect of all of our cases, in the statement that "it is proper to direct a verdict for one party where it would be *necessary* to set aside a verdict for the adverse party". So he groups, in one category, both *Dwight v. Germania Life Ins. Co.*[47] and *McDonald v. Metropolitan Street Ry. Co.*[48] The *necessity* of setting aside a verdict, as we have seen, exists only when there is no possible issue of fact to be submitted to a jury. Never does necessity exist, when it is only upon discretionary grounds, as to the weight of evidence and the quality of proof, that a trial justice may feel that a new trial should be ordered. So construed, Section 457-A is valid and declaratory of accepted principles, because it does not *require* a judge to direct a verdict, where he would set it aside if it came in to the contrary. It merely *empowers* him to do so in a *proper* case: "A judge *may* direct a verdict when he would set aside a contrary verdict as against the weight of the evidence". He does not have to. He should not do so except where, as a matter of law, it is necessary, i. e., where there is a *defect* in proof. Any other interpretation would *require* him to direct a verdict in every case in which he would set aside a contrary verdict. For, surely, the legal right of a litigant, in a law case, tried to a jury, would, under no circumstances, rest in discretion. The power so

[45a] Fealey v. Bull, *supra* note 44.

[45b] Matter of Case, 214 N. Y. 199, 203, 108 N. E. 408 (1915); Pollock v. Pollock, 71 N. Y. 137, 153 (1877).

[46] CONSOL. ED., Vol. 35, §168.

[47] *Supra* note 45.

[48] *Supra* note 42.

granted, since it is discretionary, must be exercised within constitutional limits and within sound rules of judicial discretion. Otherwise, both statute and direction based upon it, are utterly invalid. This is so in every jurisdiction, whatever be the form which the statement of the rule may take. "The duty devolving upon the court in reference to directing a verdict upon the evidence may become, in many cases, one of delicacy and it should be cautiously exercised."[49]

That the substance of the power is the same, whatever be the angle of approach, is well demonstrated in an opinion of the Wisconsin Supreme Court[50], which subscribes to the formula now reflected in Section 457-A of the Civil Practice Act:

> "Upon the motion in this case, the trial judge was asked to decide whether, conceding the evidence to establish in plaintiff's favor to a reasonable certainty all it tended to establish, could men of the age of discretion, of ordinary intelligence, reasonably differ respecting the proper conclusion to draw? Or, to put it another way, was there room in the evidence for conflicting reasonable inferences? Or, as it has been many times put by this court, was the evidence so clear and convincing one way as to leave no room for unbiased and impartial minds to come to more than one conclusion? Or so clear and conclusive as not to admit reasonably of any opposing inferences in unbiased and unprejudiced minds? * * *
>
> "It matters little, if at all, which of the foregoing phrasings is used. They all mean the same thing, though, it is true, one is liable to be so strongly impressed with one way as to be disposed to criticize or condemn others. That may come from the stronger conviction respecting manner of stating the principle than respecting the real logic of the principle itself."

Even in the Federal Courts, where it has long been the rule that the court may direct a verdict where it would set aside a contrary verdict, the cases declare that such rule applies only to those cases where the court *must* set a verdict aside. These cases were analyzed in an opinion written by Judge Taft for the Circuit Court of Appeals for the Sixth Circuit in *Felton v. Spiro*.[51] In that case, the trial judge had refused to set aside a verdict and order a new trial, because he was of the opinion that a verdict could not be set aside for any purpose unless the record was such that a contrary verdict would have to be set aside and a judgment directed by the court as a matter of

[49]Anderson v. Southern Cotton Oil Co., 73 Fla. 856, 74 So. 975 (1917), L. R. A. 1917E 715.

[50]Marshall, J., in Kroger v. Cumberland Fruit Package Co., 145 Wis. 433, 130 N. W. 513 (1911).

[51]78 Fed. 576 (C. C. A. 6th, 1897).

law. Since a question of fact was presented, although he felt that the weight of the evidence was against the finding made by the jury, he denied the motion. The Circuit Court of Appeals reversed the order and sent the case back with instructions to the court below to consider the motion as one for a new trial. It pointed out the distinction between setting aside a verdict as against the weight of evidence and ordering a new trial, on the one hand, and directing a verdict and thus finally disposing of the case, on the other. The court said:

"We come, then, to the question whether a federal court, in which a jury has rendered a verdict, has the power to set aside a verdict when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of a legal discretion may properly do so. Upon this point we have not the slightest doubt. This court, in Railway Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463, has already decided it. In an elaborate and most carefully considered opinion, Judge Lurton, speaking for the court, points out the distinction between that insufficiency in law of evidence to support an issue which will justify a peremptory instruction by the court, and that insufficiency in fact of evidence, when weighed with opposing evidence, which, while not permitting a peremptory instruction, will justify a court in setting aside a verdict based on it, and in sending the parties to another trial before another jury. The cases in England and in this country are reviewed at length by Judge Lurton, and the conclusion reached is fully supported by authority. The result is thus summed up (page 609, 20 C. C. A., and page 477, 74 Fed.):

'We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing on such motions, he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case, we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party.'

See, also, a decision of this court at the present term, announced by Mr. Justice Harlan, in *Insurance Co. v. Randolph*, 78 Fed. 754.

It is apparent, from the foregoing, that the view of the learned judge at the Circuit, expressed in the opinion on the motion for new trial, that because the court cannot direct a verdict one way it may not set aside a verdict the other way, as against the weight of the evidence is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs."[52]

An excellent discussion of the rule will be found in *Ross v. Texas & Pacific Railway Co.*,[53] where the court said:

"* * * If it be true that there was an absence of testimony connecting the death of plaintiffs' son with the negligence of the engineer who was at the time operating the engine, correct practice would have authorized the court to direct a verdict for the defendant. Under such circumstances, the submission of a case to the jury would be useless formality. Says the Supreme Court:

'It is the settled law of this court that, where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, would be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant'. Randall v. Railroad Co., 109 U. S. 482, 3 Sup. Ct. Rep. 322; Goodlett v. Railroad Co., 122 U. S. 411, 7 Sup. Ct. Rep. 1254; Kane v. Railroad, 128 U. S. 94, 9 Sup. Ct. Rep. 16.

But it is said by the court in the case of *Goodlett v. Railroad Co.*, supra, that

'Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved.' Railroad Co. v. Stout, 17 Wall. 661. See, also, Kirkpatrick v. Adams, 20 Fed. Rep. 292, 293; Davey v. Insurance Co., Id. 494; Railway Co. v. Kindred, 57 Tex. 502.

The right to a trial by jury, in cases of this character, is a constitutional right, and juries should be permitted to exercise their proper functions without interference on the part of the court. The court is not authorized to substitute its judgment for that of the jury in reference to questions of fact which it is the peculiar province of the latter to decide, and courts are not called

[52]Pp. 582–583. [53]44 Fed. 44 (W. D. Tex. 1890).

upon to weigh, to measure, to balance the evidence, or to ascertain how they should have decided if acting as jurors. Railroad Co. v. Stout, 17 Wall. 663. 'In no case', says the Supreme Court, 'is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award'. Barry v. Edmunds, 116 U. S. 565, 6 Sup. Ct. Rep. 501".[54]

Similarly, in *Texas & Pacific R. Co. v. Cox*,[55] the court said:

"The case should not have been withdrawn from the jury unless the conclusion followed, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."[56]

"Our view is strengthened, we think, if we bear in mind the rule that, on a motion to direct a verdict for defendant, the plaintiff is entitled to have taken in his behalf the most favorable view of the evidence and that it is not within the province of the court to weigh the evidence."[57]

The views thus expressed, have been generally adopted. Indeed, most courts consider the question presented on a motion for a directed verdict to be the same as the question presented on a motion to dismiss the complaint, *i. e.*, assuming all the facts to be as testified to by the party against whom the motion is made, and giving such party the benefit of all favorable inferences from the testimony on both sides, had such party made out a *prima facie* cause of action and, therefore, presented a question of fact?

"* * * the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a non-suit. It may grant a non-suit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. * * * The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do this of its own motion when the evidence is wholly insufficient to sustain the verdict. This is the meaning of the language in Estate of Baldwin, (162 Cal. 471), where it is

[54]Pp. 44–45. [55]145 U. S. 593, 12 Sup. Ct. 905 (1891). [56]P. 606.
[57]Brown v. Kansas Natural Gas Co., 299 Fed. 461, 467 (N. D. Ga. 1915).

said that a directed verdict 'is proper whenever upon the whole evidence the judge would be compelled to set a contrary verdict aside as unsupported by the evidence.' For a detailed and satisfactory discussion of this proposition reference may be made to the McDonald v. Metropolitan St. R. Co., 167 N. Y. 66".[58]

"* * * in passing upon motions to non-suit and for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor."[59]

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[58]Estate of Casper, 172 Cal. 147, 155 Pac. 631 (1916).

[59]Andre v. Mertens, 88 N. J. L. 626, 627, 96 Atl. 893 (1916). To the same effect are: Swan v. Liverpool Ins. Co., 52 Miss. 704 (1876); Woods v. Atlantic Mutual Insurance Co., 50 Mo. 112 (1872); Moore v. First Nat. Bank of Iowa, 30 Okl. 623, 626 (1912); Fox v. Campbell, 49 Kan. 331, 336 (1892); Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 Pac. 175, 27 A. L. R. 337 (1922); California Packing Corp. v. Lopez, 279 Pac. 664 (Cal. 1929), 64 A.L.R. 1412 (1929).

Excellent discussions of the problem will be found in two cases decided by the Supreme Court of Florida. They justify quotation at length. In Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975, L. R. A. 1917 E 717, 718, the court said:

"The considerations and legal principles that guide the judicial discretion in directing a verdict and in granting a new trial on the evidence are not the same. * * * In directing a verdict, the court is governed by practically the same rules that are applicable in demurrers to evidence. A party, in moving for a directed verdict, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. 6 Enc. Pl. & Pr. 692, *et seq.* The statute enacts that, 'If * * * after all the evidence shall have been submitted on behalf of the plaintiff in any civil case, it be apparent * * * that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff, the judge may then direct the jury to find a verdict for the defendant; and if, after all the evidence of all the parties shall have been submitted, it be apparent to the judge * * * that no sufficient evidence has been submitted upon which the jury could legally find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party.' Acts of 1911, chap. 6220.

"Under this statute, unless 'it be apparent to the judge that no sufficient evidence has been submitted upon which the jury could legally find' for one party, the court is not authorized to direct a verdict for the opposite party. The action of the court under the statute should be such as not to invade the organic 'right of trial by jury'. When the facts are not in dispute, and the evidence, with all the inferences that a jury may lawfully deduce from it, does not, as matter of law, have a tendency to establish the cause of action alleged, the judge may direct a verdict for the defendant. But the court should never direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding; as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge. In an action for negligence, where there is any substantial testimony from which

the jury could find the issues in favor of the plaintiff, a peremptory charge for the defendant should not be given. A case should not be taken from the jury by directing a verdict for the defendant on the evidence, unless the conclusion follows as a matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish. The credibility and probative force of conflicting testimony should not be determined on a motion for a directed verdict. The duty devolving upon the court in reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised. * * *

"When it is clear that no error was committed by the trial court in directing a verdict for one of the parties, an appropriate judgment rendered on such directed verdict will not be disturbed. * * *

"When the evidence adduced as to the material issues in a cause is not conflicting, and the evidence, with all the inferences that a jury may lawfully deduce from it favorable to the plaintiff, does not afford a sufficient legal basis for a verdict for the plaintiff, the trial judge may direct a verdict for the defendant.

"Conflicts in the evidence as to mere immaterial matters will not require a submission of a cause to the jury if on the whole evidence there is a legal predicate for a verdict for one party only, in which case a verdict for that party may be directed.

"But it is reversible error to direct a verdict for one party when there is substantial evidence tending to prove the issue upon which the jury could lawfully find a verdict for the opposite party. * * *

"Where different conclusions may fairly be drawn from the evidence as to whether an employee-driver of an automobile was acting within the express or implied authority of the defendant employer at the time his alleged negligence caused the injury complained of, the evidence should be submitted to the jury under appropriate instructions."

In Gravett v. Turner, 77 Fla. 311, 314–317, 81 So. 476 (1919), the court said:

"In determining whether error was committed in directing a verdict, due consideration should be given to the organic right of trial by jury. Otherwise fundamental principles may be subordinated to procedure or convenience. * * *

"The considerations and legal principles that guide the judicial discretion in directing a verdict and in granting a new trial on the evidence are not the same.

"In directing a verdict the court is governed practically by the same rules that are applicable on demurrer to evidence. Pleasants v. Fant, 89 U. S. 116.

"A party in moving for a directed verdict admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Gunn v. City of Jacksonville, 67 Fla. 40, 64 South. Rep. 435.

"When the facts are not in dispute, and the evidence, with all the inferences that a jury may lawfully deduce from it, does not, as a matter of law, have a tendency to establish the cause of action alleged, the judge may direct a verdict for the defendant. But the court should never direct a verdict for one party unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail, and not primarily the views of the judge. * * * A case should not be taken from the jury by directing a verdict for the defendant on the evidence, unless the conclusion follows as a matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish. The credibility and probative force of conflicting testimony should not be determined on a motion for a directed verdict. The duty devolving upon the court in reference to directing a verdict on the evidence may become, in many cases, one of delicacy, and it should be cautiously exercised. * * *

Referring to *Pleasants v. Fant*,[60] we find the following as a very apt statement of the rule:

> "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict."[61]

We reach the same conclusion if we approach from a different angle and so grasp what may have been intended by the framers of our statute. As was stated by the Supreme Judicial Court of Massachusetts,[62] after discussing the cases in which a verdict might be directed:

> "They are cases where the evidence is insufficient in law to support a verdict. * * * In such cases, a refusal of the judge to instruct the jury that the evidence is insufficient is a good ground of exception. It is not necessary that there should be absolutely no evidence. * * * What this *scintilla* is, needs to be stated a little more definitely; otherwise, it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of the evidence. It would be impossible to draw a line theoretically, because evidence in its very nature varies from the weakest to the strongest by imperceptible degrees. But the practical line of distinction is, that if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the case should be taken from the jury by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions."

This represents the practical rule underlying the entire doctrine by which a court may direct a verdict where it would set one aside if

"Although a motion for a directed verdict for one party may be denied, yet in the same case if the trial court is of opinion that the verdict does not accord with the manifest weight of the evidence and the substantial justice of the cause, a new trial should be granted if motion is duly made.

"While the legal sufficiency of the evidence to support the verdict for one party will make a directed verdict for the other party improper, yet the mere legal sufficiency of the evidence to support a verdict rendered, will not preclude the trial court from granting a new trial where the verdict does not do substantial justice in the cause or is against the manifest weight and probative effect of the evidence."

[60]89 U. S. 116 (1874). [61]P. 122.

[62]Denny v. Williams, 87 Mass. 1, 4–5 (1862).

it came in to the contrary. Nor is it a doctrine unknown to our own courts. It is applied in our daily experience, when juries repeatedly find verdicts contrary to what appellate courts have thought should be the result. An excellent presentation of the subject will be found in *McCann v. New York & Queens County Railway Co.*:[63]

"There is nothing extraordinary in this case. This court has merely differed from the jurors on the inferences that should be legitimately drawn from the evidence. It is significant that in attempting to pass upon these questions of fact, this court has not been unanimous. The first time, the verdict was set aside upon that ground two justices dissented, and the last time one dissented. It is plain that in the circumstances the trial court would have no right to non-suit the plaintiff, and that the court cannot reverse and dismiss the complaint. These issues of fact must be ultimately decided by the jury. The single question presented, therefore, is whether this court can or should accomplish indirectly by setting aside the verdict what it could not accomplish directly, viz., prevent a recovery by the plaintiff. The statutory law on the subject is meagre. Section 999 of the Code of Civil Procedure provides that the justice presiding at a trial may entertain a motion made upon his minutes to set aside the verdict upon the ground, among others, that it is 'contrary to the evidence'. There is, it is true, no express limitation as to the extent to which the court may exercise this power, but this authority is to be construed in the light of the settled practice of the courts. Where the right to a jury trial exists, it is intended that the verdict of the jury shall be conclusive upon the facts in the absence of legal error or bias, passion, prejudice or corruption. Verdicts are set aside as against the weight of evidence, and new trials are granted on the theory that the jury have been influenced by bias, passion, prejudice or corruption. Juries are sometimes thus influenced; but a case would have to present exceptional and extraordinary features to justify the inference that three different juries selected at different times, without any knowledge of the previous history of the case, would be thus influenced.

"The early decisions were to the effect that where two successive verdicts are the same, the second would not ordinarily be disturbed on the ground that it was against the weight of evidence. * * * Sometimes, as in this case, a second verdict has been set aside as against the weight of evidence, but unless the circumstances are extraordinary, and the verdict is clearly outrageous, a court is not justified in setting aside a third verdict upon the same facts. * * *

"While the trial court and the Appellate Division should not hesitate to set aside a verdict as against the weight of evidence

[63] 73 App. Div. 305, 76 N. Y. Supp. 684 (1st Dept. 1902); see also Ridgeley v. Taylor & Co., 126 App. Div. 303, 110 N. Y. Supp. 665 (2nd Dept. 1908).

where the ends of justice appear to require a new trial, yet when it comes to setting aside on this ground alone three verdicts rendered in an ordinary action possessing no extraordinary features, the court should hesitate lest it usurp the functions of the jury."[64]

The principle that an appellate court shall not persistently set aside what a jury has found, applies *a fortiori* to a trial court which is tempted to direct a verdict before a jury has even spoken. Procedural revolutions of such a nature undermine the very foundations of our system of justice. Trial by jury is still the very essence of our process. Trial by jury becomes a flimsy thing indeed—vanishing practically into thin air—if judges may direct verdicts in anticipation of what they may rule after the verdict comes in, unless the power to do so is limited to those cases where there is a defect of proof, as distinguished from dissatisfaction with the weight of the evidence.

The lesson to be gathered from a consideration of the authorities is that, just as, at one time, the courts went too far in requiring submission of cases to a jury, even when there was nothing of reason to substantiate the cause of the party, so, at a later time, the courts found it necessary to insist upon the submission of an issue of fact to the jury, even though the trial justice may have come to a different conclusion. Either principle has its disadvantages, but, at least, the latter is consonant with the essence of the right to trial by jury. A trial requires control by the trial justice. It does not permit substitution of his judgment for that of the jury. Whatever may be the volume of litigation in our courts; whatever may be the well-intentioned desire to expedite business—the price paid is entirely too high, when we sacrifice the very essence of due process, as it has come down to us through generations of experience. If it be true, as stated by our Court of Appeals, that an appellate court is not in a position to appraise the value of testimony, merely on a printed record,[65] then it is also obvious that the power to direct a verdict where a court can set it aside, invests a trial justice with a function, the exercise of which is not capable of adequate review, and that such a power, unduly exercised, and too carefully protected by appellate courts, will lead to abuses which should be avoided. Judicial power, if it is to be respected, must remain within judicial limits. It transgresses that limit when it disposes of the merits of a cause, instead of determining merely whether there is a factual issue to be tried. Summary judicial power is the same, whether we measure it on a motion

[64]Pp. 306–308.

[65]Boyd v. Boyd, 252 N. Y. 422, 169 N. E. 632 (1930).

for judgment on the pleadings, or for summary judgment, or to dismiss a complaint during the progress of a trial, or on a motion for directed verdict. It may summarily determine any issue of law, where the facts or the reasonable inferences which may be made therefrom, are not in dispute. It may do no more. No emergency, no matter how great, justifies a departure from these principles.

Applied to our immediate problem, the conclusion is that we either construe Section 457-A in subordination to them—in which event we give the statute declaratory, but not amendatory effect—or we declare the statute unconstitutional. True, this requires an interpretation of the statute which seeks its "internal sense". But, otherwise, we miss its "kernel", and, in such event, better that we declare it unconstitutional, than that our basic constitutional guarantee of trial by jury, be destroyed in the process of interpretation which grasps only the "shell". "If the provision of the constitution is to remain 'inviolate forever' it must not be violated either in form or spirit".[66] Thus, only, may we retain our "birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power".[67]

There is neither solution nor guarantee to be found in phrases, maxims, or judicial formulae. What is in its essence a question of fact, remains so, however we characterize it or in whatever "phrasing". However the question is presented—whether before the trial by motion for judgment on the pleadings, or for summary judgment, or during the trial by motion to dismiss or for a directed verdict—the inquiry is always the same: Is there an issue of fact to be determined? If there is, its resolution is reserved for trial, and if that trial is of right before court and jury, then the issue of fact is for the jury to determine, to the end that the constitutional right to trial by jury, may thus remain "inviolate forever".

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All of this was written before the decision in *Bank of United States v. Manheim*. That decision points the necessity of ever-constant vigilance, lest the "shell" be substituted for the "kernel". For, in that case, the Court of Appeals, because it was not satisfied with the quality of the evidence—contrary to all the authorities discussed in this article—determined the issue of veracity between witnesses, on a subject as to which reasonable people might well differ, as if it were a question of law. It will serve but little purpose to afford recognition to the correct rule, if, in

[66]Ridgeley case, *supra* note 63, at 305.

[67]Thompson v. Utah, 170 U. S. 343, 350, 18 Sup. Ct. 620 (1898).

applying it, we substitute the phrase "incredible as a matter of law" for the formula of the statute, that, "The judge may direct a verdict when he would set aside a contrary verdict *as against the weight of the evidence*". The process—now, apparently, well on its way—of extending the scope and meaning of the phrase, "incredible as a matter of law", is, indeed, insidious. For, unless promptly checked, it will know no limits short of judicial appraisal of the factual issues involved. When, as in the *Bank of U. S.* case, the court declares that testimony, which is not contrary to the laws of nature nor to reason, is incredible as a matter of law, it does no more than substitute its own judgment of the facts for that of a jury. A phrase has been permitted to destroy a constitutional right. In this manner, the substance of the right to trial by jury is just as effectively destroyed as if Section 457-A were adjudicated to be amendatory, instead of declaratory, of theretofore existing law. Deprivation of the right to trial by jury is just as real and just as serious, when it is accomplished by characterization of an issue of fact as one of law. The doctrine of incredibility as a matter of law is thus extended to a point never before recognized as proper, and an issue of veracity converted into a question of law. If this decision foreshadows the measure by which the law shall be applied to the facts, then the formula, "incredibility as a matter of law", seems destined to a very active and all-embracing future.