THE NEW JERSEY SUPREME COURT AND THE COUNSEL FEES RULE: PROCEDURE OR SUBSTANCE AND REMEDY?

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PART I: THE COURT MAKES AND CONSTRUES THE RULE

I. INTRODUCTION

At the outset, the limits of this study should be set forth. This work is intended as a general examination of the rule-making power of the New Jersey Supreme Court. The vehicle is a detailed consideration of that court's attempt to regulate the particular area of counsel fee allowances by the exercise of such power, and the consequences of that attempt.

It is the initial premise of this study, based on a reading of the key cases involved, that the subject of counsel fee allowances is really not a matter of practice and procedure, but one of remedy in aid of various substantive interests; that in consequence the court has, in attempting to regulate the subject by rule, acted beyond its legitimate power. Therefore, we are concerned with the law of counsel fees in the State of New Jersey not for its own sake, but that we may discover what happens when a rule of court, purportedly procedural, operates in matters of substance and remedy. How does such a rule affect the development of the law of the subject it is intended to regulate? How is such a rule construed, how applied? What role does policy play in its formulation, application and modification? What is the policy at work? What role for the play of reason, that arbiter of consistency? In short, what impact does such a rule have upon the rule-making system itself, the supreme court, the inferior bench and bar, the litigants, the public in general? To discover the answers to these questions will necessitate a considerable knowledge of both the case law and the rule law regarding the subject of counsel fees as the necessary prerequisite to the basic study: the process by which and in which a rule of court, in a matter beyond the competency of the court to enact, is formulated and operates.

The methodology employed followed from this initial premise

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and inquiry. We shall take the rule on counsel fees from its beginning in the circumstances which gave rise to its birth, trying to place ourselves as much as possible in the shoes of the court, so that we may the better, through this historical-sympathetic approach, understand the process of how this mistake came to be made, furthered and perpetuated. Thus, for the moment, we shall ignore the question as to whether, in making such a rule, the court was correct. We shall examine it on its own terms, follow the court in its early struggles to give meaning to its provisions until the point in time, shortly after holding that in the exercise of the rule-making power it is unreviewable, the court confronts the question: whether the matter of counsel fee allowances is really one of practice and procedure and hence a subject for its regulation by rule.

When the court does face up to this basic issue, we face up to it as well.[1] The court and I come to radically different positions. It is my conclusion, here stated and supported, that the Rule is illegitimate. It is the court's conclusion, here criticized and its authorities distinguished, that the Rule is proper.

Thereafter, we resume our historical survey of the rule in action, as amended in the rule-making or legislative process, and as construed in the adjudicatory process. By now, however, there is a difference. I have concluded that the court was then acting improperly and it is hard not to conclude further that the court in some fashion shared this conclusion. There begins to grow the conviction that we are now walking in the tracks of absolute power, that in reading the cases and in following the moves of the court we are witnesses to the art of absolute government. It might be supposed that a system of absolute government, wherein the power to make rules regarding practice and procedure in the courts is made free of legislative supervision, has many advantages: efficiency, consistency, reasonableness, and flexibility. But it will be shortly seen that in the case of the rule regarding counsel fees none of these advantages have come to pass.

This then is a study in absolute power, in the corporate psychology of the body which exercises such power, and in the process by which it operates. The methodology employed is primarily historical, secondarily analytical. The subject of counsel fees is purely incidental.

From this it will follow, that though the law of counsel fees is undoubtedly a hodge-podge, there is felt no compulsion to straighten out

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1 It was the reading of the cases wherein that issue was posed and of the authorities the court cited for its determination, which gave rise to the initial premise of this study, that such allowances are not a matter of practice and procedure.

the mess the court has created. Indeed, one can sympathize with the court to this extent: the subject *is* messy and complicated; and the proper remedy to be administered difficult to prescribe, requiring, when given, a delicacy in the ministration.

Recommendations for such a reform would require a rather thorough study of the economics of the various kinds and phases of litigation; of the types of clients and lawyers involved, their patterns of ethical behavior; of the judges, what manner of men are they, how selected, how affected and unaffected by judicial experience, how subject to control by their judicial superiors; of the intermediate appellate judiciary, its calibre and temperament, its working conditions; and finally, of the supreme court itself, its role in the judicial system, the traditions it has inherited, modified and perpetuated. Without an understanding of all these factors, and without a comparative understanding of all the various counter-types in the English system, it would be a mistake to establish in this American state, by and large, the blanket system of counsel fees permitted under the English practice.

In any case, reform in the law of counsel fees must await the prior reform in the manner in which that law is made. In this sense, as in so many others, the procedure to be employed in the resolution of a problem determines in large part the contents of the solution.

II. THE BEGINNING

In a sense everything in New Jersey that concers the judiciary begins on September 15, 1948, the date as of which, under the 1947 constitution, "[t]he Judicial Article of this Constitution shall take effect."[2] Article VI of that constitution, the judicial article, vests the judicial power of the state in certain designated courts and describes the powers of the various courts it has created. Upon the supreme court it confers the special power to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."[3]

In accordance with these provisions, the new court system began its operation on September 15, 1948, governed by the rules of court[4] prepared and already promulgated by the supreme court,[5] under the direc-

2 N.J. CONST. art. 11, § 4, ¶ 14.

3 N.J. CONST. art. 6, § 2, ¶ 3.

4 RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY (1948).

5 See 70 N.J.L.J. 421 (1947):

> Much of the ground work for the program had already been done by Judge Vanderbilt and those assisting him. The framework of the rules will be taken from the Federal Rules of Civil and Criminal Procedure.

tion of its Chief Justice-designate, Arthur T. Vanderbilt.[6] The new rules of court, based as they were in large part upon the heralded Federal Rules of Civil and Criminal Procedure, were in themselves regarded as a new beginning. But a certain problem concerned the Chief Justice-designate, for which the Federal Rules had made no provision, that of counsel fees. In the federal practice there was no power to award counsel fees generally, but a trial court sitting in an equity matter had, wherever the circumstances required, a discretion to do equity by and through such an award. The extent of this power had been revealed by case law precedent.[7]

In New Jersey, the chancery court had theretofore, by statute, the power generally of conferring a counsel fee award.[8] But by 1948, the practice in that court had, in the words of the present Chief Justice,

> developed into a full scale scandal. We [had] developed a series of fair haired boys who did very well, and litigants had the worry of whether they could risk going into Chancery or defending there.[9]

The mischief was remedied by a provision in the rules to take effect September 15, 1948, which took from the superior court, the successor to the court of chancery, the power to make an allowance of counsel fees except in certain detailed instances.

> 3:54-7. Counsel Fees
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> No fee for legal services shall be allowed in the taxed costs or otherwise, except:
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> (a) in a matrimonial action. In such an action the court in its discretion may make an allowance to be paid by any of the parties to the action, charging, if it deems it to be just, any party successful in the action; but no allowance shall be made as to nonmatrimonial issues joined with matrimonial issues; or
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> (b) out of a fund in court. The court in its discretion may make an allowance out of such a fund, but no allowance shall be made as to issues triable of right by a jury; or
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> (c) in an uncontested action for the foreclosure of a mortgage. The allowance shall be calculated as follows: on all sums adjudged to be paid in such an action amounting to $5,000 or less, at the

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6 His appointment was announced by Governor Driscoll on Dec. 8, 1947, and submitted to the New Jersey Senate on Dec. 15, 1947, 70 N.J.L.J. 409 (1947); and confirmed forthwith, 70 N.J.L.J. 424 (1947).

7 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77(2), at 1348 *et seq.* (2d ed. 1948).

8 Law of April 3, 1902, ch. 158, § 91, [1902] N.J. Laws 540, *as amended*, Law of April 11, 1910, ch. 261, § 1 [1910] N.J. Laws 427; Law of March 30, 1915, ch. 116, § 6, [1915] N.J. Laws 185 (both laws repealed 1951).

9 ADMINISTRATIVE OFFICE OF THE COURTS OF NEW JERSEY, ANNUAL JUDICIAL CONFERENCE 4 (June 16-17, 1966).

rate of 2%; upon the excess over $5,000 and up to $10,000 at the rate of 1%; and upon the excess over $10,000 at the rate of one-half of 1%; or

(d) as provided by these rules or by law with respect to any action, whether or not there is a fund in court.[10]

There seems to be nothing in the way of a legislative history regarding the formulation of the Rule. The Tentative Draft had no clarifying comment.[11] No discussion of the subject appears in the New Jersey Law Journal of the time. This silence was probably deliberate policy to end the "full scale scandal" without further scandalization, and without the need of proving what might, in a court of law, be unprovable.

With this background in mind, it would be profitable to examine the Rule to determine the underlying policy, and to evaluate policy and rule in terms of consistency and reasonableness. The basic policy would seem to be, as was later stated by the court so many times, that each litigant must bear the burden of the costs of his own litigation. And this policy extends generally in matters in equity as well as in law. There are, however, exceptions.

The first of these, as set forth in the Rule, permitted the trial judge, in a matrimonial action, discretion as to an allowance on matrimonial issues, but unaccountably not as to non-matrimonial issues. For, if the general policy forbidding allowances will bend for the special case of a married woman in financial need in pursuit of matrimonial relief, it ought to bend in her favor in her attempt to relieve her financial need by her suit as to property matters. Moreover, the Rule's distinction between types of issues seems hardly justifiable if its policy be based on the fear of the trial judge's allowances. If you trust him sufficiently to empower him to award a counsel fee for services rendered on the matrimonial issue, why not on the non-matrimonial issues?

An even harder task lies in the formulation of a sensible basis for the exception carved out by the second paragraph of the Rule, that allowing a fee "out of a fund in court." What or when is there a "fund"? And why should the general prohibition be relaxed in its case? The Tentative Draft Comment to the Rule did not refer to the "fund." The Rule itself did not define it. Waltzinger, the pioneer commentator to the New Jersey Rules, could not, in his initial commentary, account

10 N.J.R. 3:54-7 (1948).

11 The only comment regarding the Rule set forth in the Tentative Draft Comment was as follows: "This rule does not supplant an allowance under [N.J. STAT. ANN. §] 2:29-82.11." That statute [now § 2A:15-85] pertained to an allowance of counsel fees to a claimant of an unclaimed deposit in the court of chancery.

for its antecedents.[12] Wanting a definition, the term provoked a steady flow of litigation over an eighteen-year period during the course of which its meaning was revealed, extended, denied, shifted, and finally, in the familiar judicial fashion, "explained." It is extremely doubtful, as we shall see from the cases, that as of 1948, the court had, in using the phrase, any clear idea in mind as to what it meant, and thus any firm reason for relaxing the general prohibition in its case.[13]

Let us pass on to the Rule's third paragraph, which permitted a fee in an action for uncontested mortgage foreclosures,[14] but only on the basis of a percentage schedule fixed by the rule. Under this provision, moneylenders are to constitute a special class of litigants, somehow worthy of special exception. The policy judgment is that their expense in litigation should, in part, be passed on to the defaulting debtor, but at a rate usually less than sufficient to compensate the lender's counsel. There would seem no adequate reason for this exception, at least in the realm of justice. Such reasons as we can muster will be "reasons of state": moneylenders are a pressure group, one of the most successful in the business at that.

The final paragraph of the Rule, (d), was a catch-all, permitting a fee where "provided by these rules or by law with respect to any action whether or not there is a fund in court." Thereunder, all sorts of counsel fee awards allowed in other parts of the rules were approved: in probate matters (R. 3:96-3); in discovery (R. 3:37-1 and 3); for a receiver (R. 3:66-4). Presumably, the Rule, by its use of the term "by law," also meant to incorporate such allowances as were then authorized by statute. This is confirmed by the Tentative Draft Comment which noted that the "Rule does not supplant the allowance under [N.J. STAT. ANN. §] 2:29-82.11,"[15] relating to an allowance in the matter of an unclaimed deposit in chancery. There were other specific statutory permissions not mentioned but apparently approved.[16]

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12 2 F. WALTZINGER, N.J. PRACTICE, at 874 (1949).

13 Nor has it been explained why, in a judicial system where law and equity have been merged, an allowance should not be made "out of a fund in court" as to issues triable of right by a jury. *Cf.* Fidelity Union Trust Co. v. Berenblum, 91 N.J. Super. 551, 221 A.2d 758 (App. Div.), *cert. denied*, 48 N.J. 138, 224 A.2d 323 (1966). This curious distinction has been maintained from its beginning in N.J.R. 3:54-7(b) (1948) through its first revision, in N.J.R.R. 4:55-7(b) (1953), to its latest revision, in N.J.R. 4:42-9(a)(2).

14 The Rule was later amended to apply to all mortgage foreclosures, whether contested or not. The date of the amendment was Dec. 7, 1950. 73 N.J.L.J. 419 (1950). Thus *that* unexplained distinction has been eliminated.

15 *See* note 11 *supra*.

16 For example, Law of April 3, 1902, ch. 158, § 92, [1902] N.J. Laws 540, *as amended*, Law of March 20, 1908, ch. 21, § 1, [1908] N.J. Laws 34 (repealed 1951), authorized an award in an action for partition; N.J. STAT. ANN. § 3:33-11 (now § 3A:31-11) authorized

Did the rule, by use of the term "by law," intend to incorporate the then existing general authorization in the statutes for allowances in matters in equity? No, it did not. And when, as we shall see, the question was raised in the trial of a case in the fall of 1948, paragraph (d) of the Rule was promptly amended so to provide.[17]

Even so, the Rule on these terms does not make sense. If the basic reason for the Rule, as latter-day testimony would have it, was the need to end the scandal in chancery, the Rule as written was far too tolerant in the scope of its authorizations. Either the given reason was not the real reason or there were other factors intruding which made the official judicial policy difficult of realization. The latter is more likely the case. If so, we can guess at what these factors were.

The subject of counsel fee allowances is complex. There may have been a feeling at that point in time with the new court system about to get under way, that the new rule on counsel fees, rough as it was, was the best that could be produced under the then pressing circumstances. Rule now, amend later; give the reasons for it still later—that may have been the policy. In addition, each of the specific statutory permissions and some of the rules' various permissions favored somebody's special interest. A rule that ruthlessly excluded all of these might have touched off a march on the legislature; which in turn might have been very eager to reassert its authority, not only in the area of counsel fees, but in the overall realm of practice and procedure, by a rapid reenactment of the exceptions. In the beginning, it should be remembered, it was generally understood that the court's power to make rules regarding practice and procedure in the courts was, in being constitutionally "subject to the law," subject to legislative amendment.

Thus, if the Rule on counsel fees was unclear in its meaning, as in paragraph (b), and arbitrary in its allowances and exclusions even in the same action, as in paragraph (a), or in its selection of worthy suitors, as in paragraphs (c) and (d), the damage could be repaired by returning to the legislature for the enactment of further exceptions or different restrictions. Or could it?

Was the court in its rule-making power "subject to the law" in the sense of legislative amendment? Could a rule of court affecting a matter of "practice and procedure" be changed by later legislative enactment? This would shortly become a constitutional question of the first

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an allowance to counsel secured to represent the estate of an incompetent veteran; N.J. STAT. ANN. § 14:3-15 (now § 14A:3-6) made provision for an allowance in a corporate stockholder's suit.

17 *See* note 20 *infra* and accompanying text.

magnitude in New Jersey and the subject of counsel fees would play a crucial role in the raising of the issue and in its disposition.

In 1950, the court would reveal that it was not at all subject to the legislature in matters of practice and procedure; and, apparently because its rule on counsel fees had been challenged by legislative action, that it would eliminate from that rule any direct authorization by statute.

In originally adopting the Rule, the court had made an initial set of determinations, if not assumptions: first, that the matter of an award of counsel fees was one of "practice and procedure," and thus a matter subject to regulation by rule of court; and second, that such a matter is susceptible of regulation through the rule-making or legislative process, rather than through the case-by-case or adjudicatory process. In its later amendment of the Rule, subsequent to its decision in favor of its own exclusive power in matters of practice and procedure, the court determined, with full knowledge of all the consequences, that it alone, without help, could handle the subject of counsel fees prospectively in the rule-making process.

From these determinations, there will be many consequences for the subject of counsel fees, almost all of them bad. But in order to discuss them and understand, we must first recount how it was that counsel fees became subject to such determinations.

III. The Radical Change of 1950

The Power to Authorize the Allowance of Counsel Fees: The Legislature or the Court—A Constitutional Issue

The constitutional crisis, involving the rule-making power of the supreme court, began with the case of *John S. Westervelt's Sons v. Regency, Inc.*[18] The appellant in that case had, in November, 1948, been denied a counsel fee following entry of summary judgment on the ground such an allowance was not authorized under the new Rule. Appellant argued against this denial on the theory that an allowance was proper under the then existing statutes, N.J. Stat. Ann. §§ 2:29-131 and 132,[19] which conferred upon the old court of chancery the power generally to make allowances for counsel fees; and that the new superior court, chancery division, was the successor to such statutory power. The argument continued that either the Rule had incorporated these statutes in the term "by law" in paragraph (d) or, if not, it was

18 3 N.J. 472, 70 A.2d 767 (1950).

19 *See* note 8 *supra*.

an improper use of the rule-making power under the 1947 constitution and therefore invalid.

By the time the case was argued in the supreme court, late in 1949, the Rule had been changed in the amendment of January 21, 1949,[20] probably to forestall any further such arguments. It was the addition, in paragraph (d), of the clause: "but the authority, heretofore vested in the Court of Chancery for the granting of counsel fees in causes generally, is hereby superseded." Appellant, of course, relied on the terms of the Rule in effect at the time of the trial court's disposition. But, as might have been expected, it did not matter. The court affirmed the denial of an allowance. The Rule as originally drafted and in effect in November, 1948, it said, was

> plainly designed to be self-contained and exclusive. . . . The amendment [of January 21, 1949] was but a clarification of the original purpose, not an amendment of that purpose. It is merely declaratory of the true meaning of the rule as it was.[21]

Had the opinion stopped there, it would have disposed of the appeal completely and neatly. Instead, it continued and opened the door to trouble:

> The construction of the phrase "by law" suggested by appellant would radically modify the provisions of subdivisions (a), (b) and (c) of the rule; and there is no good reason for supposing that this qualification of the specific antecedent provisions was in contemplation. Quite the contrary. The phrase "by law" is operative *in futuro*; it has no retrospective significance; it was not intended that the conflicting pre-existing statutes should remain in force. The rule covers the field to the exclusion of all else.[22]

There is a groping tone in this language, as though the court were construing the words of some mysterious legislative enactment rather than the handiwork of its own creation. And groping, the court lost its way and blundered. If the phrase "by law" were operative only "*in futuro*," this could mean, and perhaps was intended to mean, that all pre-1948 statutes on the subject of counsel fees were repealed by the adoption of the rule in September, 1948. This would include the statute with regard to unclaimed deposits in chancery, in disregard of the Tentative Draft Comment that the "rule does not supplant the allowance under [N.J. STAT. ANN. §] 82.11."[23]

With language this provocative, sweeping away all traces of the

20 72 N.J.L.J. 36 (1949). There were other minor changes affecting style.

21 3 N.J. at 477, 70 A.2d at 770.

22 *Id.* at 477-78, 70 A.2d at 770.

23 *See* note 11 *supra*.

legislative past, and yet leaving room for a legislative future, it is not surprising that the legislature reacted quickly. *Westervelt's* was published January 9, 1950. On March 8, 1950, Senate Bill 237 was introduced.[24] Its intent: to restore to the superior court the power to award counsel fees which, prior to September 15, 1948, it had had generally in chancery matters. In effect, if adopted, it would have constituted a reenactment of N.J. STAT. ANN. § 2:29-131 and a repeal of *Westervelt's*.[25] Its progress was fast. In just about a month, it passed both houses. On April 12th, it was sent to the Governor for his approval.[26]

In the meantime, on March 13th, the case of *Katz v. Farber*,[27] involving once again a construction of the rule on counsel fees, had been argued before the supreme court. Thus, while the legislature and the Governor were considering the basic revision of the entire subject of counsel fee allowances, the court had before it the construction of one paragraph of its Rule. On April 24, while S. 237 sat on the Governor's desk for his consideration, the opinion in *Farber* was published. It is perhaps thinkable that the coincidence of events had some influence upon the contents of the opinion. Attempting to erase the unsettling language of *Westervelt's* that the words "by law" in paragraph (d) of the Rule were to operate only *in futuro*, the court in *Farber* declared:

> As may be inferred from subdivision (d) it was not intended that the rule should supersede statutory provisions then extant (as for example [N.J. STAT. ANN. § 14:14-22[28]] and [N.J. STAT. ANN. §

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24 1950 [N.J.] SENATE JOURNAL 200.

25 The text of S. 237, reproduced in 73 N.J.L.J. 165 (1950), reads as follows:

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. In all causes and matters which prior to the fifteenth day of September, one thousand nine hundred and forty-eight, were within the jurisdiction of the former Court of Chancery, the Superior Court may make such allowances by way of counsel fee to the party obtaining the order or judgment as shall seem to the court to be reasonable and proper, and shall pay such allowances; or where such allowances are ordered to be paid out of property or funds, shall specify and direct the property or funds liable therefor.

2. The court may provide for the inclusion of such allowances in the taxable costs, or provide for their collection in such other manner as is agreeable to the practice of the court.

3. Such allowances shall be in lieu of any allowance for counsel fees provided for by statute.

4. This act shall take effect immediately.

26 1950 [N.J.] SENATE JOURNAL 482, 490, 537; 1950 MINUTES OF [N.J.] ASSEMBLY 814-15.

27 4 N.J. 333, 72 A.2d 862 (1950).

28 This statute, now N.J. STAT. ANN. § 14A:14-20 (as amended by Law of March 19, 1953, ch. 14, § 32, [1953] N.J. Laws 124), authorized the former court of chancery to make allowances to a receiver. This appeared to be covered under the then N.J.R. 3:66-5 (1948), which therefore either superseded the statute or supplemented it.

2:29-82.11)[29]] except as to the authority theretofore vested by statute in the Court of Chancery for the granting of counsel fees in causes generally, exemplified by [N.J. STAT. ANN. § 2:29-131[30]] and 132.[31]

The opinion thus recalled the intention of the draftsman of the Tentative Draft that the "rule does not supplant the allowance under [N.J. STAT. ANN. §] 2:29-82.11." *Farber* then attempted by an act of moderation to restore the delicate balance achieved in the original conception of the rule whereby specific legislative exceptions to the policy of prohibition would be honored.

As though encouraged by this tone of moderation, the senate, without waiting for the Governor's approval of S. 237, the bill affecting the allowances of counsel fees, proceeded on May 15 to the amendment of a second bill, S. 294. It converted it from one affecting general statutory revision to one specifically affecting revision in all matters of practice and procedure. Thus, it would seek to do generally what it had done in one specific instance in passing S. 237: review the rules of court, correct them and conform them to legislative policy. Thus amended, the new bill was quickly approved and sent to the Governor who signed it into law on June 2.[32] Clearly, the new rules of court, the handiwork of the new supreme court, were threatened.

But the court found its answering weapon ready at hand in the forthcoming case of *Winberry v. Salisbury*,[33] wherein oral argument had been set down for June 19th. In *Winberry*, decided in the appellate division the previous September,[34] the issue was whether the time for perfection of an appeal to that court should be governed by rule of court, effective September 15, 1948, or by a pre-existing statute. The appellate division had held in favor of the rule, rejecting the argument that the rule must fail because, being constitutionally "subject to the law," it was subject to pre-existing legislation. That language, it said, "referred to statutes that might thereafter be enacted by the Legislature . . . ."[35]

The decision of the supreme court in *Winberry*, rejecting the position of the appellate division, put an end to all half-measures. Coming only ten days after the date of oral argument, on June 29, it affirmed

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29 *See* note 11 *supra*.

30 *See* note 8 *supra*.

31 4 N.J. at 343-44, 72 A.2d at 868.

32 Law of June 2, 1950, ch. 171, §§ 1-6, [1950] N.J. Laws 368 (repealed 1964).

33 5 N.J. 240, 74 A.2d 406 (1950).

34 5 N.J. Super. 30, 68 A.2d 332 (App. Div. 1949).

35 *Id.* at 34, 68 A.2d at 334.

the judgment of the appellate division dismissing the appeal, but without warning, rejected its opinion that "subject to the law" meant subject to legislative review. Instead, it rendered the term redundant. It meant, wrote Chief Justice Vanderbilt, "but not in matters of substantive law."[36] Two justices disagreed,[37] but the rest followed the Chief Justice. The constitutional *coup d'etat* was accomplished.

Winberry, as an exercise in constitutional exegesis, its wisdom in insisting upon a clear distinction between matters substantive and procedural, and in involving such distinction with the separation of the powers between court and legislature (when in fact no such clear distinction exists), has been ably criticized and defended elsewhere.[38] What concerns us here is the effect of that decision upon the subject of counsel fees: how it shaped the controversies regarding allowances, affected the content of the Rule itself, and molded the rationales for the decisions of cases.

For after *Winberry*, the authority to make law regarding counsel fees had become a constitutional issue. And the effect of *Winberry* was first felt here. On July 8, 1950, the Governor vetoed S. 237, the bill restoring to the superior court the power generally to award counsel fees in equity matters. In his veto message he deplored the attempt to "revive an unhappy practice that has been generally repudiated," since in the prior practice "[l]awyers demanded and occasionally received more for their services than the case warranted." This did not seem a very sure ground. An occasional abuse is inevitable in every use of power. In the case of a trial court, the usual method of correction is appellate review. Perhaps for this reason, the Governor sought an alternate ground. The bill, he noted, raised constitutional questions since it conflicted with the rule-making power, in that RULE 3:54-7 had, by the amendment of January, 1949, made it explicit that the general authority theretofore vested in chancery was thereby repealed.[39]

The final argument was naturally the decisive one. The legislature recognized it as such. No further action was taken on the bill. No attempt was made to override the veto.

There was, to be sure, much storm and protest concerning *Win-*

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36 *See* 5 N.J. at 247-55, 74 A.2d at 410-14.

37 Justice Case concurred only in the result, Justice Heher voted for reversal. *Id.* at 255-68, 74 A.2d at 414-20.

38 *Winberry* was critiqued by Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); for the defense, see Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952).

39 1950 [N.J.] SENATE JOURNAL 1105-07.

berry. Lower court judges muttered. Lawyers editorialized. Some legislators cried out usurpation and proposed a constitutional amendment to override it. A movement was growing. The following year the senate would undertake a series of hearings on the desirability of submission to the electorate of a constitutional amendment.[40] While this movement held strength, all the rules were in jeopardy. If the movement triumphed, clearly RULE 3:54-7 was marked for repeal.

Liberty Title—Counsel Fees: Remedy or Procedure?

It was in this climate of conflict that *Liberty Title & Trust Co. v. Plews*[41] came before the court for oral argument on October 16, 1950. This case, crucial to the development of the law of counsel fees, requires a detailed examination. For in *Liberty Title* appellant, though presenting a clear case for equitable relief, was denied an allowance simply because she did not fall within the Rule, thereby establishing the precedent that the Rule, not considerations of justice, was the inflexible guide in this matter. The court, rejecting appellant's argument to the effect that a court having the power to do equity must not be bereft of the power to fashion the remedy of counsel fees, reaffirmed its basic assumption, without serious discussion, that an allowance of counsel fees is a matter of procedure.

Liberty Title embodied two main questions: whether a trustee bank, guilty of self-dealing and flagrant mismanagement to the detriment of its beneficiaries, could save itself from a surcharge by virtue of a decree entered on intermediate accounting; and if not, whether in addition it would have to pay counsel fees in the absence of an exceptionary provision in RULE 3:54-7.

The charge of wrongdoing had been raised by the beneficiaries in 1945 in the chancery court, thirteen years after the entry of the decree in the intermediate accounting, in response to a petition for final accounting. Overwhelming proof was elicited at the hearings as to the trustee's wrongdoings. The trial court filed its conclusions and supplemented them on September 10, 1948, five days before the effective date of the judicial article of the 1947 constitution, but unfortunately, did not then embody them in a final judgment. By virtue of the new constitution the case was transferred on September 15th to the superior court, chancery division. On June 10, 1949, final judgment was entered.

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40 For a summary of judicial, lawyer and legislative reaction to *Winberry*, *see* material cited note 34 *supra*; 73 N.J.L.J. 276, 284, 351, 359, 370, 383, 423 (1950).

41 6 N.J. 28, 77 A.2d 219 (1950).

In this judgment, the trial court surcharged the trustee some $328,000 and awarded counsel fees in the approximate sum of $54,750. On appeal, the appellate division reduced the surcharge to approximately $220,000 and the allowance for counsel to $37,500 plus disbursements. It noted that the trial had been completed well in advance of the adoption of the new rules and that a formal judgment might well have been entered before the date of transfer to the new superior court.[42] Having saved itself some $125,000 in the appellate division, the trustee applied for certification to the supreme court and there proceeded to save itself some $37,500 more. That court, disallowing any award for counsel fees, rejected the reasoning of the lower courts. The judgment in this case was one of the chancery division of the superior court. The award for counsel fees was embodied in such judgment. At the time of the entry of such judgment, such an award was prohibited by the rule on counsel fees. It concluded with a quote from *Westervelt's*:

> "[T]he incidents of a judgment are ordinarily governed by the state of the law at the time of the entry of the judgment. The taxation of costs is essentially procedural, generally affecting the remedy only. This principle also disposes of appellant's further contention that they are entitled to counsel fees for services rendered prior to the effective date of the Judicial Article of the Constitution of 1947."[43]

The judgment was harsh. As of September 14, 1948, Mrs. Plews was entitled to a judgment of $37,500. The following day she was not. The judgment was unfeeling. The parties to the case were a defending bank, a corporate institution in the business of advertising its fidelity and getting paid for it, convicted of infidelity; and the defrauded beneficiaries, one of them, the testator's widow. The widow, regardless of need, must bear the burden of litigation, which in the judgment of the appellate court, amounted to the reasonable sum of $37,500. This is the policy of the new rule.

It is not surprising that the trial judge, regarding himself as sitting to do equity, was of the view that the Rule was not applicable to his court, that the chancery division of the new superior court had the same basic jurisdiction to award counsel fees in a proper case as did the former court of chancery. This power is inherent in a court having

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42 6 N.J. Super. 196, 213-14, 70 A.2d 784, 793 (App. Div. 1950).

43 6 N.J. at 44, 77 A.2d at 226. This language was taken from *Westervelt's*, but in that case summary judgment had been entered in the chancery division of the superior court on Nov. 16, 1948, after the effective date of the new rules. *Liberty Title* is an extreme application of the principle.

jurisdiction over trusts and trustees and is not derived from statute or rule. One might summarize the argument this way: a court of equity, call it by any name you like, must have the power to judge equitably.[44] And it is not surprising that Chief Justice Vanderbilt reserved for himself the task of writing the opinion in *Liberty Title*. For the view just expressed was a direct challenge to the power of his court to make rules, an attempt to suggest limits to the rule-making power, a challenge of constitutional proportions.

The critical provision of the constitution is Article XI, section IV, paragraph 3. It reads as follows (and in view of what is to come it warrants a careful reading):

> The Court of Errors and Appeals, the present Supreme Court, the Court of Chancery, the Prerogative Court and the Circuit Courts shall be abolished when the Judicial Article of this Constitution takes effect; and all their jurisdiction, functions, powers and duties shall be transferred to and divided between the new Supreme Court and the Superior Court according as jurisdiction is vested in each of them under this Constitution.

The Chief Justice did not set forth a faithful verbatim quotation of that paragraph, instead, he summarized the section as providing

> that the "jurisdiction, functions, powers and duties" of the Court of Chancery be "transferred to and divided between the new Supreme Court and the Superior Court according as jurisdiction is vested in each of them under this Constitution."[45]

Now under another provision of the constitution, his line or argument continued, the supreme court has exclusive power to make rules governing practice and procedure in all courts. Accordingly, the power

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44 This view was attributed to the trial court in the opinion of Chief Justice Vanderbilt in 6 N.J. at 42-44, 77 A.2d at 226. Actually, the trustee had filed for approval of its final account in the Orphans' Court of Atlantic County wherein thirteen years before it had received approval of its intermediate accounting. Hearings on the exceptions to that account and on the issue of opening the decree approving that account were held in the orphans' court and briefs filed there, but before the matter was decided the trial judge was appointed Vice-Chancellor to the court of chancery. With consent of the parties, the matter was transferred to the court of chancery for disposition by the same judge. Liberty Title & Trust Co. v. Plews, 142 N.J. Eq. 493, 60 A.2d 630 (1948). But the supreme court did not consider this circumstance relevant. Incidentally, the trial judge was Vincent S. Haneman; and the author of the opinion in the appellate division was Nathan Jacobs, both of whom thereafter were appointed as associate justices of the supreme court.

45 6 N.J. at 43, 77 A.2d at 226. One wonders how the late Chief Justice would have dealt with an advocate who appeared before him guilty in his brief of such a summary, wherein the courts whose jurisdictions are abolished are reduced to the single court of chancery, and all reference to the jurisdiction of the court of errors and appeals is suppressed, thus making it appear that the jurisdiction of old chancery had been divided between the new chancery division and the new supreme court.

of the old chancery court with respect to practice and procedure in its court has passed on to the new supreme court. Such power as the new chancery division of the superior court may have in this regard, it has as coming from the new supreme court as formulated in its rules. Specifically, "the authority, heretofore vested in the Court of Chancery for the granting of counsel fees in causes generally, is hereby superseded," RULE 3:54-7(d).[46]

Implicit in this argument is the assumed premise that the power of a trial court to award counsel fees is a matter of practice and procedure. This premise indeed had been the basis for the decision in *Westervelt's* that allowances for counsel fees are not permitted in a case outside the exceptions set forth in the rule, even for services rendered before the effective date of the Rule.

But appellants' position had not been that the old chancery court could award a fee as part of its power to make rules regarding its own practice and procedure. Rather the gist of their contention was that chancery could award a fee as part of its power to do equity. Equity does what ought to be done. To pass judgment, to order judgment is the fundamental function of a court. To pass and order judgment in accordance with principles of equity, to embody justice so ordered in a decree is the fundamental function of an equity court. To deny it that power is simply to take away part of its jurisdiction.

In other words, that part of a judgment wherein an equity judge awards a counsel fee in the sum of $37,500 constitutes, as does the other parts of the judgment, the response of that judge, in an ordered statement having legal consequences, to all the facts of the case. It operates on the same level and with the same function as the other parts of his decree, such as an award of a surcharge or the issuance of an injunction, if that be necessary to do equity. No one would seriously argue that the power to surcharge for a specific sum or the power to enjoin is a matter of practice and procedure. The surcharge and injunction are devices to accomplish the ends of justice. They are specific remedies. So is an allowance for counsel fees. The fundamental error in *Liberty Title* was to incorporate within "practice and procedure" the concepts of "jurisdiction" and "remedy," as though all that is not clearly "substantive law" must be "practice and procedure."[47]

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46 6 N.J. at 43, 77 A.2d at 226.

47 Ultimately, it incorporated portions of substantive law as well, as will be more evident in the subsequent analysis. For later manifestations of the view that "jurisdiction" is part of "practice and procedure," see N.J.R. 4:4-4 governing acquisition of jurisdiction in personam; N.J.R. 4:4-5 governing acquisition of jurisdiction in rem or quasi in rem and N.J.R. 1:13-4 governing transfer of actions from court to court for the purpose of acquisition of jurisdiction over the subject-matter.

To return to fundamentals, a remedy is the redress, relief or cure of a wrong (the very word remedy means "cure"). A judicial remedy is the redress, relief or cure of a wrong presented before the court by a complaining suitor in the course of litigation according to prescribed rules governing the trial of issues arising from such complaints. There are various kinds of judicial remedies: damages, injunctions, foreclosure, declaration of rights and liabilities. Courts have varied their remedies to do justice as best they can.

Each wrong arises out of the breach of some body of law. A suit for personal injuries in negligence follows upon a breach (or so it is alleged) of the law of torts prescribing the duty of care. The law of torts being a branch of what is usually called the substantive law, a personal injury damage award could be called a substantive remedy. More exactly, it is a judicial remedy of a wrong established by reference to the prescriptions of substantive law.

There are also judicial remedies arising from a breach of duty prescribed by the law governing procedure; for example, an order for a more definite statement of a pleading.[48] Under the rules governing pleading the moving party has the right, if he has the duty to respond to a pleading, to have before him a pleading not so vague or ambiguous as to render his task of responding practically impossible. The order for more definite statement is in aid of such right. One could say that such an order is a procedural remedy. It would be preferable to call it a judicial remedy of a wrong established by reference to the law affecting procedure.

But as a matter of custom, the term "remedy" has been reserved for the judicial remedy of a wrong established by reference to the prescriptions of substantive law. What sort of remedy is the allowance of a counsel fee? The commonest remedy in the law is the award of pecuniary remuneration or, more plainly, money damages. The rules governing the amount of compensation to be awarded in a particular matter, in other words the measure of damages, have been systematized in a succession of treatises. As Sedgwick pointed out with approval in his treatise on *Damages*, Blackstone ranked damages among that "species of property that is acquired and lost by suit and judgment at law."[49]

Sedgwick regarded the allowance of counsel fees as, in the situation involving merely adverse parties, basically a part of the law of the remedy of damages. In his view:

The expenses of a litigation to obtain compensation would seem to

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[48] See N.J.R. 4:6-4.

[49] 1 T. SEDGWICK, DAMAGES §§ 5, 29, at 6, 28 (8th ed. A. Sedgwick & J. Beale, Jr. 1891); 2 W. BLACKSTONE, COMMENTARIES * 438.

> be, though not a direct, certainly a natural and proximate consequence of the injury, and hence to belong to that class of consequential losses which can be recovered. The true foundation of the rule [disallowing counsel fees] we take to be that the common law has arbitrarily fixed taxable costs as the limit of remuneration for expenses of litigation.[50]

Dean McCormick, in his treatise on damages, pursued this argument of Sedgwick that an award of counsel fees and other such expenses was justified as a natural and proximate element of damage caused by the injury involved in the litigation.[51]

Implicit in this argument is the fact that the injury is recognized to be such in and by the rules of substantive law. In the case of Mrs. Plews against Liberty Title and in similar cases, the injury would seem to lie in the impingement by one suitor of another's "interest in freedom from unjustifiable litigation."[52] If so, we are in the realm of that difficult area of the substantive law where the boundaries of torts, contracts and agency converge.

In just these terms, an impingement of another's "interest in freedom from unjustifiable litigation," Harper and James[53] have analyzed the tort of malicious prosecution and the subsequent award of damages, including an award for counsel fees. As they point out, the principle has been applied to malicious prosecution of civil as well as of criminal cases, albeit in New Jersey, as in a minority of other states, the rule has been confined in civil cases to suits affecting arrest or attachment or some similar control over property.[54]

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50 T. SEDGWICK, *supra* note 49, § 230, at 339. *See generally Id.* §§ 229-41, at 338 *et seq.*

51 C. MCCORMICK, LAW OF DAMAGES §§ 60-71, at 234 *et seq.* (1935). The argument was first set forth in his article, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931). It should be noted that the present position of the New Jersey Supreme Court is on the merits in line with the overwhelming majority of American courts, although it represents a sharp reversal from the pre-1948 practice in New Jersey. It is against this majority position that both Sedgwick and McCormick argued. It should be recalled that it is not the purpose of this study to take a position on the merits of this dispute. In recent years others have joined this argument in favor of an approach to the English position: Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966).

52 This is not to say that such an interest is the only one to be recognized and given protection by the allowance of a counsel fee. There are others, including that to which the New Jersey Supreme Court had given recognition and protection in its provision regarding "fund in court," based on considerations of prevention of unjust enrichment.

53 1 F. HARPER & F. JAMES, TORTS § 4.2, at 302 (1956).

54 *Id.* §§ 4.2, 4.8, at 302, 326. *See* Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139,

There are other closely related torts, for example, the deliberate interference with another's contractual performance by making it more onerous, as where a defendant is held answerable in damages for deliberately dumping stones on a municipal road, thus increasing the expense to a party (the plaintiff) under contract with the municipality to keep the streets clear and clean. In another and related case, liability was similarly placed upon one who negligently crashed into and damaged a bridge in a suit brought by the party under contract with the public agency, the owner of the bridge, to keep it in repair.[55]

There are factors distinguishing these cases from the counsel fee situation. In the latter case, counsel is an agent rather than an independent contractor and while his performance may be made more onerous, it is not he who must perform at a loss, although as a practical matter this is often so. It is the client-principal who must pay the reasonable value of his services which, by virtue of the sometimes malicious, sometimes stupid conduct of a suit by an adversary, are made the more onerous. It is for this reason that the counsel fee, when allowed, is considered the property of the client and not the counsel.[56]

More in point is the case of agent-harassment, which Prosser considers a kind of tortious interference with a contractual relation. He cites the case of regional manufacturers who, objecting to the intrusion in their area of agents for an out-of-state manufacturer of farm wagons, followed them in their progress through the region, harassing and heckling them in such a fashion as to destroy their business. Such activity was held actionable in a suit by the foreign manufacturer for injunctive relief. While the case did not involve a claim for money damages for the additional cost to the agents' expenses, Prosser coupled the agent-harassment situation with the malicious prosecution line of cases.[57]

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83 A.2d 246 (Ch. 1951), *aff'd*, 9 N.J. 605, 89 A.2d 242 (1952), wherein the principle was stated more broadly as applying when a defendant was

> *made to suffer other special grievance different from and superadded to the ordinary expense of a defense.*

Id. at 151, 83 A.2d at 252 (quoting from Potts v. Imlay, 4 N.J.L. 382, 386 (1816)). The *Mayflower* court went on to point out that the grievance need not be "special":

> So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver, the *granting of an injunction*, by writ of replevin, by the filing of a *lis pidens*, or the preferment of charges against a police officer which results in his suspension from duty.

Id. at 152, 83 A.2d at 252 (quoting from 1 T. COOLEY, LAW OF TORTS § 128, at 426-27 (4th ed. 1932)).

55 *See* F. HARPER & F. JAMES, *supra* note 53, §§ 6.9, 6.10, at 499 *et seq.*

56 Poch v. Haag, 105 N.J. Super. 44, 251 A.2d 132 (App. Div. 1969).

57 W. PROSSER, LAW OF TORTS § 123, at 950 *et seq.* (3d ed. 1964), especially 950 n.35; Evenson v. Spaulding, 150 F. 517 (9th Cir. 1907).

To summarize the argument: first, a person has an interest in freedom from unjustifiable litigation which to some extent the courts will protect. For the infringement of this interest thus protected an allowance of counsel fees will be made, the interest thereby becoming a "right" and the infringement a "wrong." Second, the determination of the extent of such protection is a matter of substantive law, involving elements of the laws of contracts, agency and torts. Third, the remedy of the actual allowance involves at the same time the judicial response, its statement of its determination of protection, and its assessment of the amount of compensation due. In short, the allowance, if made and to the extent made, is a judicial remedy of a wrong established by reference to the rules of substantive law.

The courts in general have not been blind to this. In the recent case of *Fleischmann Brewing Corp. v. Maier Brewing Co.*,[58] the United States Supreme Court had before it the question whether, for a deliberate infringement of a valid trademark arising under the Lanham Act,[59] plaintiff was entitled to an award of counsel fees where section 35[60] of the Act, enumerating the available compensatory remedies, failed to provide for counsel fees. The Court decided against an allowance for counsel fees on the following basis:

> When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. . . . We . . . must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context.[61]

And on various occasions since *Liberty Title*, the Supreme Court of New Jersey has in practice, as we shall see later in detail, followed this argument. In an action involving improper use of a trademark, that court directed the trial judge to allow a reasonable counsel fee in lieu of such relief as might be had from a time-consuming and expensive accounting.[62] Prior to that, it had permitted enforcement of a contractual provision in a promissory note for the payment of a reasonable attorney's fee.[63] Again it held that a defendant insurance company was

58 386 U.S. 714 (1967).

59 15 U.S.C. §§ 1051 *et seq.* (1963).

60 15 U.S.C. § 1117.

61 386 U.S. at 720-21.

62 Red Devil Tools v. Tip Top Brush Co., Inc., 50 N.J. 563, 575, 236 A.2d 861, 868 (1967). This case will be discussed at length *infra*.

63 Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 210 A.2d 68 (1965). This case, along with companion cases, will be discussed at length *infra*.

obliged to pay "as a traditional element of damage" the counsel fee incurred by the assured in defending a prior workmen's compensation proceeding which the insurance company had wrongfully refused to defend on her behalf.[64] And even as early as 1952, just two years after *Liberty Title*, it approved the statement:

> In malicious prosecution cases the well nigh universal rule is that reasonable costs and counsel fees incurred in defending the action maliciously brought, are an element of damage.[65]

The vice of the New Jersey Supreme Court's position on counsel fees since 1950 has not been a consistent blindness to the justifiable demands for the inclusion of counsel fees as an item of damages. Rather, it has been a persistent inconsistency of adjudication: in one case approving an allowance as being an "element of damage," not needing to fall within the Rule; in another, excluding the allowance as, being a matter of "procedure," *not* falling within the Rule. In practice, the court has been arbitrary both in its application of the Rule and its reading of the Rule when applied.

This inconsistency hides the fundamental confusion emanating from its basic assumption made in 1948, that the allowance of counsel fees is a matter of "practice and procedure" and therefore a matter for court rules; and from its holding in *Liberty Title* that the power to make such an allowance is not a basic power of a trial court sitting in an equity matter,[66] but rather a power conferred by the supreme court in a rule of "practice and procedure."

The correct assessment of the problem is implicit in the United

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64 Gerhardt v. Continental Ins. Cos., 48 N.J. 291, 225 A.2d 328 (1966). This is discussed *infra*.

65 Mayflower Indus. v. Thor Corp., 15 N.J. Super 139, 175, 83 A.2d 246, 264 (Ch. 1951), *aff'd*, 9 N.J. 605, 89 A.2d 242 (1952). This case is discussed *infra*.

66 Since 1948, the prior separate jurisdictions of "law" and "equity," held by the former supreme court at law and former court of chancery in equity, have been merged in the superior court. That court, pursuant to N.J. CONST. art. 6, § 3, ¶ 2, has "original general jurisdiction throughout the State in all causes." And though the trial part of that court has, by the terms of N.J. CONST. art. 6, § 3, ¶ 3; been divided into two divisions, law and chancery, either division has the full jurisdiction of the court and can accord such remedy as needed to do complete justice in the causes before it, whether legal or equitable. N.J. CONST. art. 6 § 3, ¶ 4; O'Neill v. Vreeland, 6 N.J. 158, 77 A.2d 899 (1951). Since this is so, since *Alcoa*, *Gerhardt* and *Mayflower* (see notes 63, 64, and 65 *supra*) were cases at law, involving claims for money damages; and since the Sedgwick-McCormick thesis is that the award for counsel fees against one's adversary is part of the law of compensatory damages, it would be preferable to consider *Liberty Title* as the case wherein it was held that a trial court does not have the power to fashion the remedy of counsel fees outside the Rule despite that court's general jurisdiction to hear "all causes" and to accord such remedies as needed to do complete justice.

States Supreme Court opinion in *Fleischmann*.[67] There the Court held that the remedy of a counsel fee allowance was not available, not because it was a matter of procedure, but because the statute creating the cause of action had not included, and thus by implication had excluded, the remedy. In effect, the statute by this implicit exclusion had also implicitly so confined the extent of the substantive wrong as not to include therein the impingement upon the trademark holder's interest in freedom from unjustifiable litigation. The interest was thus unprotected. Therefore, for the trial judge to create and confer the remedy of counsel fee, though not mentioned in the statute, was in reality to recognize as protected the trademark holder's interest in freedom from unjustifiable litigation, thereby contravening the statutory policy. Such a remedy was "inappropriate in this context" because it would amount to judicial supremacy instead of legislative in the matter of declaring the limits of substantive rights and wrongs. It is not that the trial court lacked the power to grant such a remedy in the strict jurisdictional sense. It is that to do so in that case would be an abuse of the usual power to fashion remedies—"inappropriate," and hence reversible error.

Unfortunately, in the New Jersey Supreme Court's assessment of the problem, all the categories which in *Fleischmann* are implicitly separate and distinguishable—jurisdiction, remedy-damages, substantive law and procedural, rights and interests, duties, wrongs, legislative supremacy in substantive matters and judicial deference thereto—become confused and blended. In this way, the contents of a judgment become confused with the manner and method of judgment and are referred to as its "incidents . . . essentially procedural, generally affecting the remedy only."[68] The power to fashion remedies and thus to shape the extent of substantive rights and duties is treated as a piddling

[67] The Supreme Court acknowledged the movement for adoption of the English practice in this country. It set forth the arguments in support of the retention of the American rule: the uncertainty in outcome in litigation; discouragement to the poor litigant, and the consequent strain upon judicial administration in determining the issue of a reasonable attorney's fee. It then mentioned the exceptions it had permitted in the past to the general exclusionary rule: in admiralty "in appropriate circumstances," in civil contempt following disobedience of a court order, in common fund cases (read: "fund in court" in New Jersey) to prevent unjust enrichment. It concluded:

> The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting.

386 U.S. at 719. Thus the Court carefully avoided the issue as to whether in the case of statutory causes for which "intricate remedies" have not been prescribed or in the case of judicially-created causes, further exceptions should be made to the general American rule.

[68] See note 43 *supra*.

branch of "practice and procedure," not worthy of detailed analysis. Procedure, so far from being the handmaiden of substantive law, has become in reality its domineering mistress.

And due to the ingenuity of *Winberry*, there is no escape. Inasmuch as the allowance of counsel fees is deemed procedural, the subject-matter is not susceptible of correction by legislative enactment. Only a constitutional amendment can change the result. And in the case of counsel fees, it is not to be expected that the legislature would refer the matter to the electorate for change.[69]

Therefore, because of *Winberry*, the only escape is within the supreme court itself, in retreat from *Liberty Title*. The failure to make the escape has entailed serious and harmful consequences. Some matters, such as the fashioning of remedies in all cases, just cannot be regulated in advance. Justice cannot be programmed, even if the art of formulation of rules of procedure were in a more advanced stage of perfection than it is today. The attempt therefore to "rule" the fashioning of remedies is bound to fail and to fail badly.

But such were the consequences of *Liberty Title*. And the case itself had its inevitable sequel. Although it implied that the allowance of counsel fees was not a matter of substantive law, it did not, the issue not being presented to the court, so hold. It was not until 1953, in the case of *State v. Otis Elevator Co.*,[70] that the court did so. Chronologically, *Otis* is out of place in a section devoted to the radical changes made in the law of counsel fees in 1950, but since in *Otis* the court set forth its defense of RULE 3:54-7 and the underlying premise that counsel fees are a matter of procedure, it is better to discuss the case at this point.

Otis Elevator—Counsel Fees: Substance or Procedure?

Otis involved proceedings in the chancery division of the superior court brought by the State pursuant to the New Jersey Escheat Act.[71] As provided by the statute, Otis was ordered by the court to answer the complaint,[72] retain all escheatable property then in its custody until further order, and disclose to the plaintiff in its answer such informa-

69 N.J. CONST. art. 9 requires that after approval by three-fifths of all the members of each of the respective houses of the Legislature, the specific proposed amendment must be submitted to the people at the next general election for approval by a majority of those voting therein.

70 12 N.J. 1, 95 A.2d 715 (1953).

71 N.J. STAT. ANN. §§ 2:53-15 to -32 (now N.J. STAT. ANN. §§ 2A:37-11 to -28 (1952)).

72 The complaint had alleged in general terms only that Otis had in its custody certain personal property that had escheated to the state.

tion regarding such property as was pertinent and would cause a speedy determination of the action.

Otis filed its answer setting forth all the required information, including detailed schedules showing the names and last known addresses of the record owners of all unclaimed personal property in its custody together with the nature and amounts of such property. It also set up defenses relating to the jurisdiction of the court, the constitutionality of the Act and the applicability of the statute of limitations.

According to the answer, the bulk of the unclaimed personal property consisted of stock, as to part of which a claim of ownership was asserted by a litigant named Grenthal later in the suit. Otis, not pressing the various defenses it had raised, did not contest the State's claim. Grenthal did, however, and lost. The judgment of the trial court formally disallowed the Grenthal claim; declared that all personal property reported by Otis in its answer had escheated to the state and directed that it be turned over to the state treasurer; discharged Otis of all liability therewith; and directed the state treasurer to pay out of the escheated property a counsel fee of $7,000 plus costs to the attorney who had prosecuted for the State.

Otis' application for an allowance of counsel fees and disbursements was denied. In its opinion[73] explaining its denial, the trial court noted that Otis had relied on both the provisions of the Escheat Act[74] and the "fund in court" provision of RULE 3:54-7(b). The court held that the policy of the legislature as revealed in the statute was against an allowance of counsel fees or costs for a defendant in escheat, and that in view of and in deference to this policy, while there was a "fund in court" within the meaning of the Rule, it would use its discretion and deny the application.

Otis appealed seeking a review of that denial. Grenthal also appealed from the judgment denying his claim.[75] Both he and the state opposed Otis' application for counsel fees. Grenthal contended that the provisions of the Escheat Act controlled the question of an allowance in an escheat proceeding to the exclusion of rules of court. Escheated property, he argued in effect, was a matter of state revenue, a branch of

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73 State v. Otis Elevator Co., 19 N.J. Super. 107, 111, 88 A.2d 20, 22 (Ch. 1952).

74 Specifically, on N.J. STAT. ANN. § 2:53-23 (now N.J. STAT. ANN. § 2A:37-21 (1952)), which provides that the State Treasurer shall pay the escheator 5 percent of the escheated property

> as a reward for having supplied the information and evidence upon which the escheat has been successfully prosecuted and shall pay such *other fees* and *costs* as the judgment shall direct. (emphasis added)

Otis relied on the underlined language.

75 He lost on appeal. State v. Otis Elevator Co., 10 N.J. 504, 92 A.2d 385 (1952).

state finance and thus peculiarly within the sole province of the legislature. Any rule of court which had as its effect the award of state moneys was in violation of

> "that very salutary rule of law prescribing interference by the judiciary with the fiscal policies of the government committed by the Constitution to the legislative branch of our government."[76]

He argued further that

> where the Legislature has set up a complete system, in detail, including procedure operating in a limited area, and under restricted circumstances in the fiscal or tax fields, the Courts have no right or power to contravene the legislative mandate or intention.[77]

This was rather a bold argument, a statement for legislative supremacy in fiscal matters, a position involving the separation of powers which, in other contexts, the court had given recognition and respect before *Otis* and since.[78] At no point did Grenthal argue that a counsel fee allowance was a matter of substantive law rather than procedural.

Nor did the State. Less bold than Grenthal, the State preferred to follow the opinion of the trial court, favoring a deference to the statutory policy for reasons not stated but presumably set forth in the Grenthal brief.[79]

As for Otis, its brief placed its main reliance on the Rule, on the theory of a "fund in court," although it did not completely abandon the statute. And it rather pointedly reminded the parties and the court of the words of Chief Justice Vanderbilt in an earlier case that " 'the allowance of fees is a matter of procedure governed by rule of court.' "[80]

Grenthal's argument, it turned out, convinced two Justices, Heher

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76 Brief for Grenthal at 12, 258 BRIEFS OF NEW JERSEY SUPREME COURT (quoting from Jersey City v. Kelly, 134 N.J.L. 239, 248, 47 A.2d 354, 358 (Ct. Err. & App. 1946)).

77 *Id.*

78 Before: Jersey City v. Kelly, 134 N.J.L. 239, 47 A.2d 354 (Ct. Err. & App. 1946). Since: East Orange v. Palmer, 52 N.J. 329, 337, 245 A.2d 327, 331 (1968), *modifying* 47 N.J. 307, 329-30, 220 A.2d 679, 692 (1966); Amantia v. Cantwell, 89 N.J. Super. 7, 213 A.2d 251 (App. Div. 1965) (involving the doctrine of sovereign immunity). *But see* P, T & L Constr. Co. v. Comm'r, Dept. of Transp., 55 N.J. 341, 262 A.2d 195 (1970), wherein the court held that it would no longer recognize the state's defense of sovereign immunity from suit in actions on contract. Thereafter, in Willis v. Dep't of Conser. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970), the court held that such a defense should not be recognized against any tort claim arising after Dec. 31, 1970. The court reasoned in *P, T & L* that while the "satisfaction of a favorable judgment would depend wholly upon the willingness of the Legislature to accept the judgment and provide for payment," the courts should not be closed to a suitor seeking a judgment of his claim. 55 N.J. at 346, 262 A.2d at 198.

79 See Brief for State of New Jersey, 258 BRIEFS OF NEW JERSEY SUPREME COURT.

80 Brief for Otis Elevator Co. at 11, 258 BRIEFS OF NEW JERSEY SUPREME COURT (quoting from Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 495, 86 A.2d 201, 231 (1952)).

and Jacobs. But in siding with him, they colored his position with considerations of substance and procedure. In his dissenting opinion, Justice Jacobs suggested that the award of counsel fees in an escheat proceeding

> would hardly be a simple matter of practice as distinguished from substantive right; at least it would present mixed elements of substantive right and procedure in a field which is of primary and special legislative concern.[81]

Justice Heher, in his dissenting opinion, suggested that

> the conditions attending the enforcement of the sovereign's right of escheat and the proceedings to perfect the escheat are so intimately related to the substantive process as to be inseparable from it. . . . [T]he conditions are of the substance, and not procedural within the concept of the cited constitutional grant of authority to the Supreme Court touching matters of practice and procedure.[82]

From this it will be seen that the statement of the Chief Justice in his opinion—"This is the first case in which it has been contended that counsel fees are a matter of substantive law"[83]—requires a good deal of qualification. Such a contention was not raised by a party. And its maintenance by the two dissenters was limited to the type of proceeding at hand, an action for escheat.

No one in *Otis* then was contending that a counsel fee award in *all* cases is a matter of substantive law. Nevertheless, the Chief Justice, having erected his straw man, proceeded to knock him down:

> From the outset in New Jersey, following English precedents, the allowance of costs and counsel fees had been uniformly considered by the courts of this State to be a matter of procedure rather than of substantive law. *Rader v. Southeasterly Road District*, 36 N.J.L. 273 (Sup. Ct. 1873); *Murphy v.* [*George*] *Brown & Co.*, 91 N.J.L. 412, [103 A. 28] (Sup. Ct. 1918); *Igoe Brothers v. National Surety Co.*, 112 N.J.L. 243, [169 A. 841] [Ct. Err. & App. 1934]; *Robinson v. Jackson*, 14 N.J. Misc. 866, [187 A. 918] (C.P. 1936); *Savitt v. L. & F. Construction Co.*, 124 N.J.L. 173, [10 A.2d 728] [Ct. Err. & App. 1940], affirming 123 N.J.L. 149, [8 A.2d 110] (Sup. Ct. 1939).[84]

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81 12 N.J. at 24, 95 A.2d at 727 (Jacobs, J., dissenting).

82 *Id.* at 34, 95 A.2d at 732 (Heher, J., dissenting).

83 *Id.* at 5, 95 A.2d at 717.

84 *Id.* The Chief Justice cannot be accurate in this statement as a matter of history. In New Jersey at the outset, as in England, causes of action were pursued through the forms of action. The distinction between "substance" and "procedure" had as yet not been formulated. The great innovation in this respect as in so many others was suggested by J. BENTHAM, first in the French language in TRAITÉS DE LÉGISLATION (1802), then in more definitive form in a pamphlet in the English language, entitled SCOTCH REFORM (1808). *See* ELIE HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 373-76, 545 (1949). The grad-

Now since this "holding" in *Otis* has been a cornerstone in the supreme court's construction of the entire law of counsel fees, we should briefly consider the precedents upon which it relied.

Rader, the first case cited, did not at all involve counsel fees, but rather the more limited entitlement to costs. The precise issue presented was whether the loss of costs to plaintiff in an action abated due to the enactment, during suit, of a statute providing for the dissolution of the municipal corporate defendant and the substitution of another municipal corporation to answer for its contractual obligations, unconstitutionally deprived him of his remedy for enforcing his contract with the defendant.[85] The court thought not, since "the right to recover costs is no part of the remedy which inheres in the contract. That right is purely incidental . . . ."[86] In other words, costs is a remedy allowed for the expenditure of time and money pursuing one's contractual remedy, but is not a part of the latter remedy itself, and thus not protected. The court said further that the right to costs does not vest until judgment; any other view would be "unreasonable" and "impracticable." This would seem to follow from the minimal amounts at stake. No reference was made to the categories of substantive law and procedure.

(That costs is a remedy for liability for another's trial expenses was more explicitly recognized in the recent case of *State v. Mulvaney*,[87] where the New Jersey Supreme Court vacated that part of a criminal sentence imposing, in addition to a term in jail, costs in the sum of $16,750, representing one-fourth of the state's trial expenses. The "authority to originate a liability for costs," it held, rests in the legislature and the legislature had made no such provision.)

The remainder of the cited cases did involve counsel fees, but in

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ual infiltration of these Benthamite distinctions through American jurisprudence took place during the course of the 19th century, particularly the second half, and the 20th century.

85 N.J. CONST. art. 4, § 7, ¶ 3 (1844) provided:

> The legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

For the distinction between impairment of obligation of contract and deprivation of remedy for enforcing the contract and the reason for the inclusion of the latter provision, not included in the United States Constitution, see *Rader*.

86 36 N.J.L. at 282; *cf.* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), where the practical difficulties and costs involved in giving notice to persons missing or unknown in a proceeding affecting their property rights bore significantly on the type of notice necessarily employed under the due process provision of the federal constitution. *De minimis lex non curat.*

87 61 N.J. 202, 293 A.2d 668 (1972).

almost all of them the critical issue was whether such an allowance, when authorized by statute, constituted an impairment of contract in violation of state and federal constitutions.

In *Murphy*, the specific issue was whether an amendment to the Workmen's Compensation Act had impaired a contract for hire in providing for the payment of an employee's counsel fees in a compensation proceeding, when applied to the case of an employee hired after the effective date of the amendment. The court there held that even had the hiring preceded the effective date of the amendment, the provision in question

> introduces no change whatever in the substantive terms of the contract of employment, but merely amplifies the remedy and procedure by which that contract is to be enforced.[88]

It would have been more accurate to state, as implied in *Rader*, that allowances are made not in compensation for the substantive wrong giving rise to the litigation, but for the additional expense incurred in pursuit of the remedy for the substantive wrong. They affect the defendant as suitor, not as employer. The use of the term "procedure" in this context is misleading.

The *Igoe* case, the third in the Vanderbilt line of citations, presented a more difficult problem, that of apparent retroactivity of statutory application. The question there decided was whether an amendment to a statutory bond scheme rendering the surety liable for counsel fees in a suit on the bond, would, if applied in a case commenced after the effective date of the amendment on a claim arising before such date, constitute an impairment of the surety's contractual obligation. It would seem that the statutory amendment had not impaired the contractual obligation set forth in the bond or affected it in any manner. It did, however, affect the defendant, not as surety but as suitor, imposing upon him, after the action's commencement, a duty he did not have at the beginning. Considerations of fairness and due process might suggest a limitation as to its operation with regard to services performed before its enactment. The court, however, foregoing analysis and relying on inappropriate authority,[89] upheld the statute and allowed the counsel fee without limitation as involving only a matter of procedure.

The next case, *Robinson v. Jackson*, a trial court decision, followed *Igoe* to the point of absurdity. It held that a statutory amendment allow-

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88 91 N.J.L. at 416, 103 A. at 30.

89 Such as the textual statement in CORPUS JURIS and the supposed precedents of *Rader*, and Lew v. Bray, 81 Conn. 213, 70 A. 628 (1908), both of which involved the propriety of an allowance of costs, not counsel fees.

ing an award of counsel fees in a workman's compensation proceeding in the old court of common pleas, upon remand from the old court of errors and appeals, for services rendered on appeal in the latter court, applied as "procedural" to a case decided in errors and appeals *before* the effective date of the amendment. Of course, this was erroneous not because by so doing it impaired the obligation of defendant's employment contract, but because it imposed upon him a legislative duty as suitor not in existence at the time of the appeal. It is the due process clause, not the contract clause, which is offended.

Finally, the *Savitt* case dealt with a statutory provision that required an employee to deduct from his workmen's compensation award the amount of a prior recovery from a third party charged with negligence, but allowed him a set-off against the deduction in the amount paid to his attorney for services rendered in the third party matter. The court held that this constituted neither an impairment of contractual obligations nor a denial of due process. In this, the court was quite correct. Quite clearly if the legislature saw fit to allow the employer a credit in this connection, it could do so in terms of the employee's net recovery from the third party rather than his gross. But the court was quite clearly wrong in following what it considered to be the holding in *Igoe* "that statutes regulating fees and costs are remedial or procedural in nature only and therefore not unconstitutional as impairing the obligation of contract." In this context, the counsel fee is not a matter of judicial allowance and hence not even a matter of remedy, let alone one of procedure. What was involved was only the substantive rights of the respective parties: the quantum of the credit.

Savitt, like all the other cases, with the exception of *Rader*—and *Rader* is not in point—ran shy of analysis, taking refuge in what it considered the safety of authoritative precedent and of such comfortable categories as "remedy and procedure." In the days when those cases were being decided, this was the easy way out for a court caught in the middle between the manufacturing, mercantile and money classes clamoring on the right for the freedom of contract,[90] the laboring and intellectual classes on the left demanding regulation and control, and subject to review from above by a United States Supreme Court intent

90 "Freedom of contract" in employment cases was used in state litigation to strike down state legislative reforms, first in New York, starting in 1885, then in Pennsylvania. A. M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: *Attitudes of Bar and Bench*, 1887-1895, at 45-54 (1960). According to Paul, the courts' concern, federal and state, in this freedom peaked in 1895, flagged somewhat during the Progressive Era, 1900-1920, quickened again in the era of "normalcy," 1920-1935, and finally disappeared after the crisis in the United States Supreme Court in the late 1930's. *Id.* at 227-29.

on honoring the contract clause of the federal constitution. Instinct moved the courts in these cases to protect the statutes in question *and* the contract clause. It is not in their holdings that *Murphy, Igoe* and *Savitt* erred (as we have noted, *Rader* is not in point and *Robinson* did err), but in their reasoning. Unfortunately, it was not for their holdings that *Otis* cited these cases, but for their reasoning. Wary of the sting of the contract clause and apparently unable to distinguish either between a person's conduct as defendant-suitor and his pre-litigation conduct as contractor, or between the categories of substance, remedy or procedure, they sometimes justified the various allowances for counsel fees as pertaining to remedy or procedure, sometimes to procedure only. This reasoning should not be followed.

Moreover, though the court in *Otis* attempted to do so, this reasoning cannot be followed. We shall pursue the court through its later decisions and see and judge how well the court is able to live with its holding in *Otis*: that counsel fee allowances are a matter of practice and procedure. It will shortly become clear that the court's position is wholly untenable.

The Radical Amendment of Rule 3:54-7

In *Liberty Title*, decided December 4, 1950, the supreme court had held that the power of the trial court to allow a fee to counsel was not a matter for the sound judgment of that court (nor one of substantive law, it was later held in *Otis*) but one within its exclusive rule-making power as pertaining to procedure. Nor was such a matter one for legislative authorization. Three days after the decision in *Liberty Title*, it amended RULE 3:54-7, the rule on counsel fees, by deleting in paragraph (d) the phrase, "by law,"[91] thereby authorizing only such allowances as were specifically set forth or incorporated in the rules; and casting into invalidity, by force of *Winberry*, all unsanctioned legislative provisions, past or future.

Prior to this, in the year 1950, the court, it will be recalled, had vacillated on the question of legislatively authorized allowances and the content to be given the phrase "by law" in paragraph (d). In January of that year it had held in *Westervelt's* that such authorizations in existence at the time of the adoption of the Rule in September 1948 had been thereby repealed; the phrase would operate *"in futuro"* only, despite the language to the contrary in the Tentative Draft Comment.[92] Then in *Katz v. Farber*, decided in April, it had declared an implied

91 73 N.J.L.J. 424 (1950). At the same time, paragraph (c) of the Rule was also amended to make it applicable to all mortgage foreclosures, contested or uncontested. *Id.* at 419.

92 3 N.J. 472, 70 A.2d 767 (1950).

retraction: the phrase meant only a supersession of statutory authorization to award counsel fees generally, but not of the various specific statutory authorizations.[93] Then, perhaps driven by the incongruity of tolerating any number of legislative specifics while prohibiting the principle of a general legislative enablement, it did by the amendment of December 7, 1950, "supersede statutory provisions then extant" and "*in futuro*" as well.

The court would rule alone. But how was it ruling? Not very well to date. Aside from the internal inadequacies of and contradictions in the Rule itself, we have seen the court in a period of eleven months, from January through early December, 1950, shift its position on three different occasions in three different ways on the question of the incorporation in the Rule of statutory provisions: in *Westervelt's* in January, *in futuro* only; in *Farber* in April, both past and future; and by the amendment of December 7, neither past nor future. These shifts not only involved the basic constitutional arrangements as to the power to authorize counsel fee allowances, they also threw the law of such allowances into vacillating disarray. For by *Westervelt's*, the status of existing specific statutory authorizations of allowances, as in the cases of an unclaimed deposit in chancery, of partition, of an application for use of a veteran's surplus income, or of a corporate stockholder's suit, were cast into doubt. By *Farber*, they were once again in. And by the amendment of December 7, they were once again out, this time apparently definitely.

Aside from considerations of power, what were the basic policy factors that could possibly account for these extraordinary shifts in regulation? The court did not say. The rule as stated, it would seem, was enough. Reasons and underlying policies were unannounced, considerations of consistency internal or otherwise apparently disregarded.

But when a court in the formulation of its rules forgets logical consistency, eschews reasons and explanations, it has ceased to act like a court but instead is acting as a legislature.

> Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law. The main employment of a Court is the application of well-known legal principles to the solution of given cases, and the deduction from these principles of their fair logical result. Men trained in and for this kind of employment acquire a logical conscience; they come to care greatly—in some cases excessively—for consistency.[94]

It is true that in speaking of judicial legislation, Dicey was referring to

[93] 4 N.J. 333, 72 A.2d 862 (1950).

[94] A. DICEY, LAW & PUBLIC OPINION IN ENGLAND 362 (1905).

the power of a court employed in the decision of cases, not in the formulation of rules of law in advance of their operation. But it is also true that in empowering a court to legislate prospectively through the rule-making power, it was not expected that the court so empowered would abandon its usual method of operation.

Yet of the New Jersey Supreme Court following the decision in *Winberry*, it was probably not realistic to expect that it would continue to act otherwise. After all, it was not only by virtue of the constitution of 1947, as construed therein, the exclusive maker of rules regarding practice and procedure. It was by virtue of its placement at the apex of the adjudicatory system, the unreviewable judge of whether in a given instance one of its own rules purportedly regulating a matter of practice and procedure was or was not within its own rule-making power.

So placed, the court would be in law unaccountable. So placed, as we are about to see, the court in fact would fashion for itself a new process for the resolution of controversies confronting it. For want of a better name, this new and original method of operation may be called the process of procedure. Its characteristics are severity alternating with relaxation, rules suddenly decreed, succeeded in time or accompanied at the same time by contradictory directives and qualifications, of reasons of state given by way of explanation instead of reasons in law, of decisions in difficult cases seemingly designated to "honor" the rule-making power system instead of accomplishing justice. They are the characteristics of the unfailing one-party system.

In the creation of this one-party system, the subject of counsel fees played a crucial part. In the development of this system, counsel fees has continued to play a crucial part, driving the court further and further into error, deeper and deeper into inconsistency, illogicality and excess. It all began even before the court officially began, in those crowded days before September, 1948, when the new rules were being formulated, with the precipitous judgment to restrict the award of counsel fee allowances in the trial court by rule as a matter of practice and procedure. It culminated in the momentous decisions of December, 1950, that the problem at hand was one simply handled by the court in the Rule, without the aid of the legislature (by deletion of the phrase, "by law"), or of the trial courts (as held in *Liberty Title*).

A vacuum had been created.[95] All further discussions would pro-

[95] For the relationship between absolute government and the process of decision-making in that type of government, see E. BARKER, REFLECTIONS ON GOVERNMENT 197-98 (1948).

ceed within the limits of the court's own formulae, as set forth in the rules. But as the court would find out, the topic of counsel fees was not so simple. Yet confronted with its problems, it would find itself alone in the vacuum of its own making, without collaborators, beyond review, compelled to temporize by dint of trial and error, retracing the path of its original mistake ever so slowly, that error may not seem too obvious. Finally, it would lead not to the point of departure, for that would mean the abandonment of the system, but in a new direction, wherein the court will mix not only the realms of substance and remedy and procedure, but those, as well, of the administration of the courts and the administration of justice. By a new rule, the court will not only create a new cause of action for every case. It will use this new creation as a "procedural mechanism" to help it solve the problem of calendar congestion. Not only will total progress be slow, but matters will in this absolute rule-making state get progressively worse.

IV. VANDERBILT'S COURT CONSTRUES THE RULE

Preliminary Remarks

In the previous section, we were concerned with the constitutional question: who in New Jersey is authorized to regulate the allowance of counsel fees in the trial courts of the state? That decided, we turn in this section to a study of the scope of authorization prescribed by the supreme court. At the start of 1951, the law in New Jersey regarding counsel fees was apparently simple. You looked at RULE 3:54-7 and read that no fee was allowable except: (a) in matrimonial actions; (b) out of a "fund in court"; (c) in uncontested foreclosures; and (d) as provided elsewhere in and by the rules of court. On January 1, 1952,[96] a paragraph (e) was added, permitting a fee in an action for probate of will or codicil. The reach of this new provision will be discussed in a few pages.

The apparent simplicity of the rule was deceptive. For one thing, it developed that "fund in court," as used in the rule, was a phrase of art. There might be moneys actually in court and yet be no "fund"; and then there might be a "fund" where there were no moneys in court. For another, in the case of a moneylender seeking to protect itself in advance against the costs of collection by the inclusion in the bond of a provision for the debtor's payment of its attorney's fee in the event of suit, the demands of contract would embarrass the rules of procedure. Thirdly, the various rules of procedure might authorize allowances

[96] 75 N.J.L.J. 9 *et seq.* (1952). For a more detailed discussion of this amendment, see note 112 *infra*.

difficult to justify on principles of fairness. Fourthly, traditional causes, such as the cause for malicious prosecution, or exigent circumstances, such as a tardy application for trial adjournment, might require, in spite of the Rule, that an allowance be made.

Paragraph (b)—"fund in court"—Construed

In *Katz v. Farber*,[97] the court attempted an explanation of the phrase, "fund in court," but one productive of such confusion and subsequent litigation as to require from the court a later "explanation"[98] omitting much of the content of the original. But since the confusion is instructive in a study of the process of procedural rule-making, the explanation originally afforded should be considered in some detail.

The dispute actually was between the Farbers. They had signed a contract to sell to Katz the realty Farber had acquired before the marriage. When Mrs. Farber refused to sign the deed, Katz sued in the chancery division of the superior court for specific performance. Pursuant to a consent order, the Farbers signed and delivered the deed to Katz and he deposited with the clerk of the court the unpaid balance due under the contract, subject to the respective rights of the Farbers.

Farber thereupon filed a petition for leave to withdraw from the fund so much as belonged to him outright, the remainder, such as the court might find should be held to answer the inchoate dower of Mrs. Farber, to be retained in court. Mrs. Farber cross-petitioned that the value of her inchoate right of dower be paid to her forthwith, basing her claim on an alleged oral contract with Farber which he denied making. The court found that Mrs. Farber failed to prove the contract and dismissed her petition. It permitted Farber to withdraw about one-half of the proceeds and impounded the balance in court to insure the payment of the appropriate income to Mrs. Farber if and when her dower should become consummate, the income therefrom in the meantime to be paid to the husband. It further found it was without present power to value the inchoate right of dower or to make an allowance to her of counsel fees. She appealed and the case was certified to the supreme court, which affirmed both on the merits and on the disallowance of a counsel fee.

In a somewhat rambling fashion the court discussed the meaning of the phrase, "fund in court." It noted that it had been held in *Universal Indemnity Insurance Co. v. Caltagirone*[99] that a sum deposited

97 4 N.J. 333, 72 A.2d 862 (1950).

98 Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 162 A.2d 834 (1960), to be discussed at length *infra*.

99 119 N.J. Eq. 491, 182 A. 862 (Ct. Err. & App. 1936).

in chancery in a suit to enjoin proceedings in execution of a prior judgment at law as security for the payment of such judgment, was not "the subject of the then pending litigation" and consequently not a fund in court for the purposes of an allowance for counsel fee. Thus, summarized the court, there may be a fund "when the money is actually in the custody of the court and is the subject of the litigation."[100] This we shall hereafter refer to as the *Caltagirone* or subject-of-litigation line of case, even though in *Caltagirone* the fund in question was held not to have been the subject of litigation.

Next, the court included within the term, "fund in court," cases involving the administration of trusts or estates. Thus, an accounting "figuratively brings [the] fund into the court," authorizing an allowance for the fiduciary. Third, it included as a "fund" the property of an infant or incompetent preserved or recovered through the intercession of a next friend. This, the court said, was absolutely essential for their safety and security.

Finally, the court included "by analogy" the case of a class suitor who, as in *Cintas v. American Car & Foundry Co.*,[101] produces or protects a fund for the benefit of a class. This it considered a trust fund out of which, in good conscience, the costs of the class suitor should be paid in the form of an allowance for counsel fees.

In sum then, the court seemed to find a fund, within the meaning of the Rule, wherever there was a trust fund, whether actual, constructive or by way of analogy, or where there were moneys deposited in court, the subject of litigation.

The court then turned to the matter at hand, the dispute between the Farbers. It held there to be no fund in court so long as the wife's interest was actually a right of inchoate dower in the realty. But it added that the parties, by consent, had deposited money in court subject to the rules of court. This money, it held

> was not only in the custody of the court, it was the subject of the pending litigation. We regard the deposit as a fund in court against which an allowance for counsel fee could be made in the discretion of the court in proper instance.[102]

But upon the merits of the application, it agreed with the trial court that the allowance should be denied.

The court thus followed *Caltagirone* both in its formulation of the

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100 4 N.J. at 344, 72 A.2d at 868.

101 133 N.J. Eq. 301, 32 A.2d 90 (Ch. 1943).

102 4 N.J. at 344-45, 72 A.2d at 868.

rule that there can be a fund where there is a money deposit actually in court and the subject of litigation, and in its denial of an allowance to the applicant. It was this holding which gave the court so much trouble in the following years until, diplomatically, it denied it had ever so held.[103]

It will have been noted that the court gave reasons of social utility as the basis for an allowance out of a trust fund. For in the case of an incompetent or of a trust or estate administration, who would come forth to serve if he had to pay the expense of an accounting out of his own pocket? The allowance in the class action it had rested on other grounds, on "good conscience," that everyone should bear his fair share. But as to an allowance in a *Caltagirone* or *Farber* situation, it assigned no reason, nor did it point out that in either case no allowance had in fact been made.

Most of the subsequent litigation concerning counsel fee allowances was based on these two kinds of fund. The one, where there were actually moneys in court, the subject of litigation, counsel, relying on what *Farber* had said and held, would seek an allowance out of moneys so deposited and the court would usually deny them. The other, where counsel, regardless of the presence of moneys in court, would seek the determination of a trust fund and an allowance therefrom, sometimes the court would say yes, sometimes, no.

Let us consider the trust fund cases first, since they are the easier; next, the subject-of-litigation cases; and then the cases of the successful litigant unsuccessfully in search of a "fund" according to *Farber*. This will lead us to some basic considerations regarding the fashioning of remedies and the formulation of unaccountable exceptions.

The trust fund cases. From the very first case under consideration, *Milberg v. Seaboard Trust Co.*,[104] a judicial attitude emerges which we will see in later cases forming into a pattern: a disinclination to discuss the facts of the matter before the court bearing on the decision for allowance or disallowance or to examine with care, and with an eye for comparison, the relevant precedents or to explain the basis for decision.

The facts in *Milberg* were these: Seaboard was in the process of dissolution; each of its shareholders was, under an announced plan of sale, to receive a certain named price. Fanny Milberg and the City of Hoboken, shareholders, considering the price insufficient sued to enjoin the sale. Defendants offered in the pleadings to pay into court a sum

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103 See note 98 *supra*.

104 7 N.J. 236, 81 A.2d 142 (1951).

certain, presumably the total of the as yet unsurrendered stock at the price set forth in the plan under attack. The plaintiffs accepted the offer

> on condition that their acceptance would not limit the defendants' liability, if any, to pay into court such other sums as might be determined by the court to be a fair value of the stock outstanding.[105]

The plaintiffs, by order, were designated as representing all owners of stock, being several hundred persons, who as yet had not surrendered their stock.

The lower court characterized the issues of valuation as important and complex. Nevertheless, plaintiffs lost; the injunction was denied. Yet although they had failed in their attempt to create a fund—more money—their counsel received an allowance. And the supreme court affirmed, on the authority of *Cintas*.

In *Cintas*, however, the stockholder receiving the allowance had been a successful suitor. Representing the preferred stockholders, he had obtained a decree restraining his corporation, the defendant, from paying a proposed dividend to common stockholders out of moneys as to which the preferred had prior rights. In *Milberg*, the plaintiffs were unsuccessful. Thus, what constituted the "fund"? *Milberg*, purporting to follow *Cintas*, in fact went beyond it:

> We think in the case *sub judice* the money so deposited constituted a fund in the court, the administration of which was under the jurisdiction of the court for the benefit and protection of a particular class, payable to the members thereof proportionately to their respective shares, and the allowances made were within the sanction of our rule.[106]

But members of the class would have gotten this fund anyway. As to this and *for* this, plaintiffs had done nothing. Nor does it fall within the precedent set forth in *Caltagirone*, because the funds deposited were not the subject of litigation.

Thus, *Milberg*, going beyond *Farber* and *Cintas*, stands for the proposition that one gets a fee not out of the fund one is seeking to create or preserve but rather out of a fund that all litigants are in agreement as to its ownership. It is somewhat like the case of the next friend suing the government official for dissipation of a part of an Indian's property, losing, and yet receiving an allowance out of the Indian's remaining property, provided he had acted in good faith and

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105 *Id.* at 245, 81 A.2d at 146.

106 *Id.* at 245, 81 A.2d at 147.

with reasonable expectations of success.[107] If this is so, the reason for the rule lies in the desire to encourage those who would protect the needy, rather than in considerations of unjust enrichment underlying *Cintas*. Members of a class are not exactly children or incompetents, but practically speaking, their individual interests are often not substantial enough to permit them to litigate as individuals. Thus the class suit affords them an opportunity to advance their claims they would not otherwise have. Since they stand to gain if the class is successful, it is only proper that each should bear his fair share of the risk of litigation if unsuccessful, provided the court finds the claim asserted on their behalf was meritorious and competently presented.

But this the court did not say. In its view, the presence in court of the fund bearing the burden of payment was not a convenient accident but the very heart of the matter. From this, one might get the impression that the court really did not know what it was doing in allowing a fee out of a "fund in court"; whom it was protecting, or why. This impression is not dispelled in the following cases. The first of these is *In re Koretzky*.[108]

There the trial court, after denying a petition of the chief beneficiary of an estate for the removal of the executors, denied the beneficiary's request for counsel fees on the basis of lack of authority. On appeal, the supreme court reversed, holding that the executors were derelict and the plaintiff was entitled to a counsel fee. In one sentence the court disposed of the problem of the lower court's power:

> That there was "fund in court" is apparent, for the action of the plaintiff in seeking the removal of the executors was for the protection of the estate.[109]

This was certainly sensible. In this context it is the entire estate which constitutes the fund to be protected. Thus an allowance to the moving party spreads the expense of the litigation among all the beneficiaries of the estate in proportion to their holdings; as in *Cintas*, where the cost of suit was spread among all the successful preferred shareholders.

But the trial court had doubted its power. A more than one-sentence rationale seemed in order. Yet the court seemed to prefer brevity to explication. Perhaps in part the lower court was confused as to the practice to be followed generally in estate matters. If so, this is

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107 This would be in line with the old New Jersey equity rule set forth in Voorhees v. Polhemus, 36 N.J. Eq. 456, 458 (Ch. 1883) which allowed an allowance to the next friend to an incompetent even though unsuccessful, though in that case entitlement was limited to the "taxed costs of the action," no mention being made of counsel fees.

108 8 N.J. 506, 86 A.2d 238 (1951).

109 *Id.* at 531, 86 A.2d at 250.

not surprising. Consider, for example, the decision in the following year in *Ferguson v. Rippel*,[110] where in a will construction case a fee was approved as to all worthy participants, as out of a "fund in court," because there was a reasonable doubt and uncertainty as to the language under construction. Presumably, the fund in this instance constitutes the sum of the assets whose ownership or distribution is in dispute and therefore under construction, and not necessarily the entire estate. But the allowance is not confined to all who share in the victory. Even the losers, provided they were worthy participants, *i.e.*, arguing a meritorious question, also get an allowance. As to this, there would seem no adequate basis in precedent. The court suggested that the matter involved the administration of a trust and thus came under the cover of *Katz v. Farber*. In this view, an executor or testamentary trustee is entitled to a fee not out of considerations of unjust enrichment (as in *Koretzky* and *Cintas*), but for another reason mentioned in our discussion of *Farber*: the practical need to reimburse a fiduciary for expenses to insure that people will be available to perform these arduous duties. But this reason does not apply to the contesting beneficiaries. Of course, one could say that the assets of the estate are in the custody of the court, that they constitute the subject of litigation, and hence under *Caltagirone*, they constitute a "fund in court." Indeed, this was the basis assigned for such an award in the *Cintas* case.[111] But the court in *Ferguson* did not rely on this basis. Had it done so, it might have had

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110 23 N.J. Super. 132, 142, 92 A.2d 647, 652-53 (App. Div. 1952), *cert. denied*, 11 N.J. 329, 94 A.2d 548 (1953). Actually in *Ferguson* no allowance was made because the language under construction was unambiguous. This case was thereafter cited with approval by the supreme court in Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 162 A.2d 834 (1960), which will be discussed in detail *infra*. (The irony of this will appear later.) *See also* 5 A. CLAPP, N.J. PRACTICE § 296, at 564 (1962).

Ferguson based its authority on *Katz*, but that case did not mention an action for will or trust construction; and on the case of *In re* Purcell, 125 N.J. Eq. 372, 6 A.2d 137 (Prerog. 1939) in the former practice; but there the court, in approving the power of the old orphans' court to allow a counsel fee in a will construction arising out of distribution, had made it clear that such power was based on the Law of June 14, 1898, ch. 234, § 196, [1898] N.J. Laws 788 (repealed 1951), authorizing allowances in "causes litigated in the court." That statute had, of course, died by virtue of the deletion of the words "by law" from the rule governing counsel fees in December 1950. See material cited note 91 *supra* and accompanying text.

111 133 N.J. Eq. at 304, 32 A.2d at 92, where the court said that in

> a suit to construe a will or a trust agreement. . . . [I]t is common practice to award counsel fees out of the decedent's estate or the trust fund, neither of which is in court, but is the subject-matter of the litigation and for that reason under the control of the court.

But cf. West v. St. James' Episcopal Church, 83 N.J. Eq. 324, 325, 91 A. 101, 101 (Ct. Err. & App. 1914), wherein it was stated that costs should not be awarded to an unsuccessful claimant in a suit to recover part of the estate.

to explain the grounds in utility or in conscience for deviating from the usual policy that litigants ordinarily will be expected to bear the burden of suit themselves.

While on the subject of estates, we should consider the terms of the already-mentioned paragraph (e) of the rule on counsel fees added in 1952, governing allowances in an action for probate of will or codicil. Paragraph (e) provided as follows:

> If probate is refused, the court in its discretion may make an allowance to be paid by the proponent of the will or codicil, or out of the estate of the decedent. If probate is granted, the court may make an allowance to be paid by the contestant, but if it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to both the proponent and the contestant, to be paid out of the estate.[112]

The Rule as written presented some difficulties. In the event of a grant of probate, there was, by its terms, an express authorization of an allowance for both the proponent and the contestant. Not so in the case of a refusal of probate. There, the Rule stated only that there may be an allowance. It did not state to whom the allowance may be made. In addition, while in either case—that of a grant or refusal of probate—the court had the choice of imposing the allowance either on the losing party or on the estate, the basis for the decision was, unaccountably, differently stated. Thus, in the case of a grant, the burden is shifted from the losing contestant in whole or in part to the estate "if it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil." While in the case of a refusal, the burden is shifted from the losing proponent—whether in whole or in part is not, as we have just noted, stated—simply "in its [the trial court's] discretion." Such shifts in phraseology could only lead in practice to nonuniformity and to needless litigation in search of a more precise construction.

But meaning aside, what are the bases for such provisions? Presumably, in the case of a refusal, the provision for an allowance out of the estate is based on a policy of encouragement for proponents, as long

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112 Clapp states that the rule was derived from the provisions of the Law of June 14, 1898, ch. 234, § 197, [1898] N.J. Laws 789 (repealed 1951). 7 A. CLAPP, N.J. PRACTICE § 1548, at 271 n.8 (1962). Clapp was Senator in charge of the revision of Titles 2 and 3 in the N.J. Legislature. The former statute, he notes, used the words "expenses of the litigation" and these words were construed so as to include counsel fees, whether the application for the fee arose on the grant or denial of probate.

as the claim advanced be meritorious although not necessarily successful, to the end that a decedent's testamentary dispositions be carried out. An allowance to the contestant from such a source would relieve the proponent of a burden. Any allowance to the proponent would be akin to an award for an unsuccessful next friend to one in need, such as a minor or incompetent. But in authorizing the fee to be assessed against the proponent, the Rule has apparently chosen upon the policy of burdening the loser, as a defeated adversary, with all the expenses, presumably in a case of bad faith. In that case, the allowance is employed as a device to discourage fruitless litigation. Similarly, if probate is granted, there are the same alternate policies for encouraging or discouraging contests, the policy to be invoked depending upon the court's assessment of the merits of defense.

It would appear then that by the formal amendment to the Rule under paragraph (e), the court has, in an action contesting an offer of will or codicil, permitted the imposition of an allowance in favor of one party to be assessed against the estate involved or the other party in what amounts to an adversary situation, apparently basing such allowance in the latter case on what amounts to *bad* faith. Just as in an action for construction of a will, it has permitted, by virtue of the construction of the "fund in court" provision of paragraph (b) in *Ferguson*, an allowance in favor of all worthy participants out of the estate. This amounts, insofar as the nonfiduciary parties are concerned, to an adversary situation, provided these participants have (in effect) acted in *good* faith by presenting a meritorious argument.

In either case, one would like to get from the court a statement as to the nature of the interests being protected, the equities—if the word may be used—in their favor. One would like to know what is so special about litigants in will construction suits that their burdens are made lighter; and what is so sinister about will contestants that they alone are subject, in a case of bad faith, to payment of their adversary's counsel fees. One would like further to know why the subject of the will contest becomes the matter for formal amendment and why the subject of will construction has been allowed to be merged with, and submerged by, the formidable case law on the "fund in court." Again, one would like to know why one provision for an allowance in estate practice appears in paragraph (b) and another in paragraph (e), even though the underlying principles governing their allowance appear to be the same or similar when made out of the estate involved. And why, one would like to know, has the court not disposed of these allow-

ances imposed upon the estate under the precedential statements of *Caltagirone, Cintas* and *Farber*? In short, one would like to have from the court some statement evidencing a comprehensive plan.

Thus, one gets the feeling that the emerging law of counsel fees was following no discernible pattern. The next cases, also concerning the provision for "fund in court," the companion cases of *Driscoll v. Burlington-Bristol Bridge Co.*,[113] and *Haines v. Burlington County Bridge Commission*,[114] do little to dispel this feeling. The court, the Chief Justice again writing the opinions, seems to have committed serious error.

These are the facts. The Burlington Bridge Commission had bought a pair of bridges and other assets from two privately owned companies, paying more than $7,000,000 over its estimated value in condemnation. Two taxpayers, Haines and another, brought suit to rescind the purchase, joining the Commission and the selling syndicate. They obtained temporary restraints and the appointment of a receiver to take possession of and operate the bridges. Then the Governor and Attorney General, starting a second action for rescission and obtaining a stay of the Haines action, assumed management of the cause.

The story developed at the trial sheds some light on the remedies finally awarded by the court. An enterprising syndicate, bent on raiding the treasury of Burlington County, had arranged the passage of a statute where upon the purchase of interstate bridges a county bridge commission would have an effective ten-mile radius monopoly of river crossings. Thereafter, it arranged the purchase of two privately owned Delaware River bridges at a price of about $4,000,000 over their actual value. Then in a quickly moving scheme executed in the span of a single day under its guidance, the Burlington County Bridge Commission was created and organized, adopted a pre-existing plan to purchase the two bridges at a gross profit to the syndicate of approximately $3,000,000, and closed title. Within four additional days, the purchase price in the form of Commission bonds had passed, through the efforts of a fast-moving group of underwriters, into public circulation.

The trial court rescinded the sale, ordered the bridges restored to the syndicate and ordered the latter to repay the Commission the purchase price. It held the bondholders subrogated to the rights of mortgage and other lien holders as of the closing date, and granted a lien on all bridge revenues until the payment of the bonds, subject

113 8 N.J. 433, 86 A.2d 201, *cert. denied*, 344 U.S. 838 (1952).

114 8 N.J. 539, 86 A.2d 236 (1952).

however, to the state's right to acquire the bridges. In the *Driscoll* case, it allowed counsel fees in the sum of $50,000 to counsel for the plaintiffs, the Governor and the Attorney General, to be paid by the bridge receivers out of money in their hands. In the companion case, it allowed to Haines and another a counsel fee of $27,500 to be paid by the bridge commissioners out of its general funds.

On appeal, the supreme court modified the judgment. It held that most of the bondholders, members of the underwriting group, were holders in due course. Thus the bonds as issued were adjudged by the supreme court to be liens on the revenue of the two bridges. So long as the bridges remained in the hands of the bridge commission they and their revenues were to be tax-exempt, but if restored to private ownership, they would be subject to tax thus diverting funds in substantial amounts from the bondholders. Rescission would therefore be inequitable to the bondholders. Instead of rescission, the purchase would stand, but the court would require the syndicate to account for their gross profits of some $3,000,000 and repay such amount to the receivers. They would not be allowed to plead their expenses, some $1,100,000. ("They are hoist with their own petard," chuckled the Chief Justice. Hamlet could not have enjoyed the more the shaft he shoved to Rosenkrantz and Gildenstern.) From this refund and from the revenues coming into their hands the Commission should pay off the bonds; and when paid, the bridges would become toll-free. Until such time the bridges would not be subject to condemnation.

The court denied, however, the allowance of any counsel fee. In *Driscoll*, counsel for the plaintiff had been retained as special counsel. This the Chief Justice considered contrary to general legislative policy against such retainers without specific legislative appropriation.[115] This position would in the court's own terms appear questionable. If, as later held in *State v. Otis Elevator Co.*,[116] it was to be beyond the competence of the legislature to enact statutes authorizing an allowance of counsel fees, so ought it be beyond their competence to enact legislation affecting the denial of a counsel fee. If an allowance is a matter of procedure, so also should be the *denial* of an allowance. And if, on the other hand, under *Driscoll*, legislative policy has a significant bearing in denial of an allowance, it should have followed in *Otis* that such policy should have a significant bearing in the granting of an allowance. The court, as if anticipating this line of reasoning and yet reluctant to yield the fruits of an opportunistic argument, shifted to other

115 N.J. STAT. ANN. § 52:17A-19 (1970).

116 See extended discussion beginning at note 70 *supra* and accompanying text.

grounds and denied the allowance as unauthorized under the rules.

Counsel in both cases had relied on *Farber, Cintas, Milberg* and *Trustees v. Greenough*,[117] a suit to preserve the assets of a trust fund for the benefit of bondholders. But the court rejected the notion that plaintiffs sought to create or preserve a fund. Rather they had sought to rescind an illegal purchase made by a public body. True, as a result of these proceedings, there were funds in the hands of the court-appointed receiver, but not "funds in court" since the funds were not for the benefit of the class for which the plaintiffs are the representatives but for the benefit of the defendant bondholders whom the plaintiffs quite obviously did not represent.

But why did not the fund of some $3,000,000, the gross profits to be repaid by the selling syndicate to the public body which the plaintiffs *did* represent, constitute a "fund in court"? This sum was to be used to pay off the bonds, and upon payment in full the bridges were to be toll-free. To this considerable extent the public interest, for which the plaintiffs had labored, would be benefited. The court did not even consider that question. Instead it left the plaintiffs to their own devices. To Van Riper in the *Driscoll* case, it suggested with some irony that he apply to the legislature for a special appropriation, presumably in the face of the basic policy against such legislation which the court had used against counsel. For Haines and his co-litigant it had no suggestion. Presumably for them, to quote Shakespeare again, virtue is its own reward.

It would appear, however, that a class representative who successfully achieves a rescission of an improvident purchase on the grounds of fraud, saving thereby a diminution in assets of some $7,000,000, minus the true value of the item purchased, is entitled to claim that he has preserved a fund for the class. Is his case any different if, where he sues in rescission and proves the fraud, the court gives him less than the complete remedy he sought but grants him instead, by way of reduction of the purchase price, a judgment of some $3,000,000? Half the loaf should also constitute a "fund."

This does not appear to have been argued. Counsel apparently looked to the toll collections as constituting the fund rather than the purchase price to be restored in the event of a rescission.[118] Even so, the court should not have been misled. Or were some of the plaintiffs so inextricably woven into the political texture of the case that the Chief Justice decided they too ought to be "hoist with their

117 105 U.S. 527 (1882).

118 See briefs for plaintiffs, 142 BRIEFS OF NEW JERSEY SUPREME COURT.

own petard"? Whether or not the court was misled, its opinion is misleading and hard to reconcile with the prior cases. If for pragmatic and equitable reasons, a plaintiff who labors to create or preserve a fund for private parties is due an allowance of counsel fees, a plaintiff laboring on behalf of public funds ought stand in no inferior position.

Not only are *Driscoll* and *Haines* hard to reconcile with the earlier cases, they do not square with the later decision in *State v. Otis Elevator Co.* We have already discussed one inconsistency between the cases; there is another. For in *Otis* the court, having decided that counsel fees were surely a matter of procedure, and that the legislature had no special authority in the matter of finance so as to make laws regarding a draft on the state revenues for payment of counsel fees, concluded in favor of an allowance to the State for just such counsel fees on the theory that the Attorney General had labored for a class, the people of the State of New Jersey, to create or preserve a fund. Let us take a second look at *Otis.*

It will be recalled from our prior view that the State and Otis both had sought allowances in the trial court. That court, following the escheat statute, had granted the State's application, but had denied that of Otis; Otis appealed. No one contended before the supreme court that the allowance to the State was invalid. But when the State and Grenthal, a claimant to certain of the escheated property, argued against an award to Otis on the basis of the provisions of the escheat statute, the court had responded by destroying any statutory authority for an allowance on the grounds that the statute dealt with procedure in this respect rather than with substance thereby disposing of the basis relied upon below for the allowance to the State. Therefore, before it could turn to the Otis claim, the court would first have to revive the award to the State, which it did—within the Rule.

The State had a right to counsel fees, the court held, because there was a "fund in court." Chief Justice Vanderbilt explained:

> [A]n escheat action is one by which the State comes into court seeking an accounting of property of which it is the residual owner and a judgment as to its title thereto. . . . It is well recognized that in an action such as this in the nature of an accounting the property is brought within the control of the court and constitutes a "fund in court" within the meaning of *Rule* 3:54-7(b).[119]

None of this seems necessary. Surely the State did not need an order of court directing it to pay its own counsel his fee out of its own property. Clients ordinarily settle their own bills with counsel

[119] 12 N.J. at 11-12, 95 A.2d at 720.

without reference to the court. In fact, as far as the State was concerned, this was not a counsel fee case at all, "within the meaning of *Rule* 3:54-7(b)." The State sought no reimbursement for its expenses from anyone else, neither from its nominal adversary in the litigation at hand nor from any nonparticipant. This is neither a *Caltagirone* nor a *Cintas*. Nor is it anything else; it is a mirage.

The statutory provision for a court order of allowance was really a convenience, amounting to a settlement by court order of the fair amount due counsel from his client. Since the client here is the state and the type of action involved is an escheat proceeding, wherein property involved is delivered over to the state, it is a service readily performed. By anticipating disputes, it eliminates them.

Of course, in the ordinary case, *i.e.*, one involving private parties, in the absence of dispute, there would be no justiciable matter.[120] But if there were a dispute, then the issue of the proper amount of counsel fees could be decided. Thus a class could, in anticipation of litigation seeking a judgment declaring its ownership in a fund, agree that counsel in charge of such litigation be paid his fee out of such judgment. The court would honor such an agreement. Nor would the agreement become offensive or invalid merely because it provided that the court, after deciding the issue of ownership, should, in the event of a dispute between class and counsel, declare the ancillary issue of reasonable value of counsel's service and enter an order for that amount payable out of the property declared to be the property of the class. The court, it is true, might insist that a separate suit be filed, although there is precedent that it is more proper to proceed in the original cause by supplemental petition and order to show cause.[121] But this is incidental; the essential thing is that the court would enforce the agreement. Yet in *Otis* the court regarded an arrangement along these lines invalid not for lack of an actual controversy—this would have been grounds for nondecision, not for invalidity—but because instead of being set forth in an agreement, it was incorporated in a statute.

But legal mirages, like legal fictions, may be useful to a court intent on disguising the real thrust of its decision: to give effect to the substance of a provision while denying its legal existence. Thus a

120 *Cf.* Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 170, 162 A.2d 834, 838 (1960).

121 Artale v. Columbia Ins. Co., 109 N.J.L. 463, 467, 162 A. 585, 586-87 (Ct. Err. & App. 1932) (cited in Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 170, 162 A.2d 834, 838 (1960)).

remedy for substantive rights is rendered procedure so that the court rule may remain inviolate.

With Otis we are on different footing. Otis was held to be entitled to an award, because under the Escheat Act the burden of listing the personal property to be escheated and of describing it in great detail is placed not upon the state but upon the defendant. It is a burden of inquisition and proof that cannot be avoided by default because, pursuant to statute, the trial court shall, as in this case, direct it to furnish the information. And in the event a claim is made on the property, the burden of proving the claims is by the statute shifted to the claimant. Therefore, concluded the court:

> In these circumstances the statute places the laboring oar in the defendant's hands and without any wrongdoing on its part commands it to produce the appropriate proof that in the ordinary course of judicial proceedings would come from the plaintiff. In these circumstances *it is only equitable* that when it comes to the allowance of counsel fees the defendant be given at least as favorable consideration as the State.[122]

To use the formula of *Cintas*, the defendant, nominally the adversary of the party seeking to create the fund, is in reality that party's helper albeit the help is required of him by statute.

What is noteworthy is that the court, in permitting an allowance in a novel, unprecedented situation, gave recognition in its opinion to the basic equitable considerations underlying the allowance and went so far as to give these considerations their proper name: "equitable." Yet it was no accident that the court in the very same opinion held the power of the trial judge to grant such an allowance to be a matter of procedure. Consequently, the determination of which equitable considerations would form the basis for an allowance was for the supreme court to determine in advance by rule, and thereafter by the courts through the proper construction of the phraseology of that rule, rather than for the trial court by simple reference to its own view of what is equitable under all the circumstances of the case.

This kind of solution means in effect that the supreme court can pick and choose when and where a set of equitable circumstances will be so happy as to warrant an allowance. As Justice Jacobs, dissenting in *Otis*, pointed out, a defendant required under the rules of discovery to search out and make available to plaintiff records and testimony bearing on plaintiff's claim is not recompensed by an allowance. This

122 12 N.J. at 21, 95 A.2d at 725 (emphasis added).

is so even though it should be decided there had been no wrongdoing on his part. Should the mere fortuity that the plaintiff sues not for himself but as a class representative alter the case?

Other questions are suggested. Was it the force of the equitable factors present that induced the Chief Justice to recognize the presence of a fund? Or was it the provisions of the stricken statute which allowed to the escheator a fee of 5 percent

> as a reward for having supplied the information and evidence upon which the escheat has been successfully prosecuted and . . . such other fees and costs as the judgment shall direct[?][123]

And what of a situation wherein the corporate defendant, unlike Otis, actually contests the escheat? (Otis had raised certain legal defenses but had abandoned them.) The Chief Justice considered this and went off on another tack: should there be no reasonable justification for the defense, a mere "show of legal activity," then "the court would be justified either in denying a counsel fee altogether or even in assessing the costs of the proceeding against it."[124]

In other words, the trial court, in square contradiction to the holding in *Liberty Title*,[125] can allow counsel fees not within the Rule, not out of a "fund in court," but out of defendant's pockets. *Non sub lege, sed sub deo.*[126]

Thus, to sum up, in all respects the holdings and rationales in *Otis* are unsatisfactory. After declaring the allowance of a counsel fee to be a matter of procedure and the statutory scheme governing such allowances to be unconstitutional, the court directed awards of such fees to the State and to Otis (thus practically carrying out the statutory intent) even though the direction to the State to pay its own counsel was not, strictly speaking, a counsel fee allowance within the ordinary meaning of the term; and the direction to pay Otis was based on considerations set forth in the statute and unrecognized in other proceedings. Finally, there is the naked decision to assess costs against an escheator for defending in bad faith.

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123 N.J. STAT. ANN. § 2A:37-21 (1952).

124 12 N.J. at 21, 95 A.2d at 725.

125 Liberty Title & Trust Co. v. Plews, 6 N.J. 28, 77 A.2d 219 (1950), discussed at length beginning at note 41 *supra* and accompanying text.

126 *Cf.* Bracton's famous line, *"rex non debet esse sub homine sed sub deo et sub lege quia lex facit regem."* H. DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, bk. I, ch. 8, § 5 (1640). The Chief Justice quoted this line in *Otis*, 12 N.J. at 13, 95 A.2d at 721, and translated as follows: "The king should not be under any man but under God and under the law, because the law makes the king."

But in all of the cases just considered involving the construction of the phrase "fund in court" there are grounds for dissatisfaction. In every case the court has shown a basic disinterest either in explaining its decision or in reconciling or relating the grounds of the instant decision with those in the cases preceding. *Milberg* purported to follow *Cintas* but in fact went beyond it, granting an allowance to class representatives *not* out of the fund they created—since Milberg *et al.* were unsuccessful, they did not create such a fund—but out of a fund already in existence and not the subject of litigation. *Milberg* could have been justified, but it was not. In *Koretzky*, the court's explanation was limited to a single sentence, even though the trial court had considered it lacked power. *Ferguson* found a "fund in court" in an action for will construction, not only for the fiduciary seeking instruction, but for all worthy participants. It might have justified its holding on the grounds that the moneys were brought under the control of the court, were the subject of litigation and relied on the precedents of *Caltagirone* and *Farber*, and even upon dictum to that effect in *Cintas*, but it did not. In *Driscoll* and *Haines* the court seemed bent in not finding a fund where the elements of a fund stared it in the face. And in *Otis* it seemed bent, in suspicious generosity, in finding a fund in circumstances which, in the case of Otis, were not so special, and in the case of the State, did not require the intervention of a court in its behalf at all.

Due to this lack of explanation and guidance we have no clue as to the scope of the interests to be protected and advanced by the provision for "fund in court." It seemed to have no steady meaning. Ultimately, it would seem that the court did not have a steady vision as to what it meant when first employed in the Rule or what it meant after a decade of construction. And the impression of unsteadiness is strengthened when we recall the dictum in *Otis* and the provision in paragraph (e) of the Rule for the assessment in these certain cases of counsel fees against parties defending or proffering in bad faith. This impression will be further confirmed by a study of the next line of cases.

The subject-of-litigation cases. Farber, following *Caltagirone*, will be recalled, had declared that there could be a "fund in court" where there was a money deposit actually in court, the subject of litigation. In the cases arising out of this statement, the court under Vanderbilt tended to be consistent: always to deny a fee when sought on this basis and never to explain under what circumstances a case for such an al-

lowance would arise. Something was always lacking. The moneys were not actually paid into court or were not the subject of litigation or the appellant was unsuccessful, or a combination of these three.

The first of these disappointed suitors was Janovsky of *Janovsky v. American Motorists Insurance Co.*[127] Pending a hearing of his claim before workmen's compensation based on a heart attack suffered at work, Janovsky filed another claim under the Temporary Disability Benefits Law against American, his employer's carrier under its private plan, and received from it, in payment of that claim, the sum of $780. Thereafter in workmen's compensation, he received an award of $328.14 for temporary disability, and of $3,437.50 for permanent disability.

Under the workmen's compensation statute, Janovsky was required to pay back to American, out of his compensation award, such sum as he should receive in that award for temporary benefits. Janovsky claimed that American thereby was entitled only to the return of $328.14 and that if by law he had to repay the entire $780, he was at least entitled to an allowance of a fee for services rendered by his attorney in workmen's compensation. American rejected this claim. Janovsky thereupon sued in the chancery division of the superior court to have the court adjudge that he pay the sum of $780 into court, determine the amount due him, and determine as well whether he was entitled to any counsel fee therefrom. The trial court held that American was entitled to the full $780 and denied any counsel fee. The supreme court on review agreed.

There are really two interrelated questions here: one, whether under the statutes affecting compensation recovery, the employee is entitled to set off the amounts he had to pay his attorney for his services rendered in workmen's compensation; and two, whether under the Rule, he is entitled to an allowance for counsel fees for the work done by his attorney in the resolution of the first question. The supreme court held, first, that the statutory scheme evidently required the repayment to American of the full $780; and second, that Janovsky's claim for an allowance of counsel fees for the resolution of the first question was without merit.

The court presumed that the judgment in his favor in workmen's compensation embodied a proper allowance of counsel fee; if not, the defect was a matter of an appeal, not one for a later proceeding in the chancery division. (This, of course, would apply to the attorney's services expended in getting the awards for temporary and permanent

127 11 N.J. 1, 93 A.2d 1 (1952).

disability and not in resolving the first question involved in this case.) Furthermore, the court said, no allowance could be had in the chancery division except in accordance with the Rule. It rejected the argument that there was present a "fund in court." The facts were that the sum of $780 had not actually been paid into court prior to final judgment and that Janovsky was neither a class suitor nor a successful nonclass suitor.

It would have helped had the court been more complete in its explanation. Of course, Janovsky was not a class suitor; he sued for himself. But apparently he was claiming that the sum in issue, though not actually paid in court, was "the subject of litigation." Thus he hoped for inclusion within the formula announced in *Caltagirone.* The court met that indirectly. It noted his lack of success and relied on a 1914 case in the old court of errors and appeals, *West v. St. James' Episcopal Church,*[128] wherein it was

> indicated that even where there is a fund in court allowance of counsel fee is ordinarily denied to an unsuccessful claimant, suggesting that a contrary view "would be to encourage unnecessary and frivolous litigation."[129]

The court then went on to state that Janovsky should have made reimbursement of the $780 in compliance with the statutory scheme and with his agreement to do this with American. Failing this, the court considered there was ample statutory authority for the entry of an order in workmen's compensation, upon application by American directing Janovsky to make such reimbursement, but that American was not barred from litigating the claim in the chancery division for failing to press it in workmen's compensation.

But this analysis overlooks the fact that Janovsky did have a meritorious argument: whether under the various statutes and under the agreement he had to pay the full $780 which he received from American for temporary disability when in workmen's compensation he was awarded less than that sum for such disability but was also awarded greater than that sum for permanent disability. And such an argument involves a matter of statutory construction, one properly decided not in an administrative agency, but in a court. In addition, the difference between the lesser sum awarded in compensation, that of $328.14, and that of $780 was really the subject of litigation. True, it would have been at issue in workmen's compensation if American had filed an application in that tribunal for an order of payment for

128 83 N.J. Eq. 324, 91 A. 101 (Ct. Err. & App. 1914).

129 11 N.J. at 8, 93 A.2d at 4. As for *West,* see note 111 *supra.*

the full $780. Since it did not, it was at issue before the chancery division. It really should not have made any significant difference whether Janovsky had in fact paid the full sum of $780 into court prior to final judgment. If *Caltagirone* was to be followed, there had to be a "fund in court." The only satisfactory reason why Janovsky could not get an allowance was that, as in the cases of *Farber* and *Caltagirone*, he had litigated fruitlessly. And whereas in *Milberg*, the fee was awarded out of a sum owned by parties whose class representative was Milberg, the fund in *Janovsky* was owned by Janovsky's adversary. In the latter case, it is not the quality of argument which is decisive—whether or not meritorious—but the outcome of the suit: who by winning owns the fund and must thereby bear the expense of paying an award, if made. Obviously, the court should not have the winner pay the loser.

If the unsuccessful, nonclass suitor seeks in vain an allowance from a "fund in court," would a successful nonclass suitor do better? The answer is: no. Consider the next case, that of *American Salvage Co. v. Housing Authority*,[130] which involved a condemnation proceeding brought by the Authority against land owned by Salvage and used by it for a junk business. Following the failure of Salvage to comply with an order to surrender possession by the date fixed in a court order, the Authority obtained a second order authorizing the sheriff to employ a contractor to remove the junk. This was done at a cost of about $30,000. The Authority paid the bill and asserted a lien for this amount against a deposit of $100,000 it had paid into court following a condemnation award in favor of Salvage in that amount. The lien was allowed in full together with a further allowance of $1,000 to the Authority for counsel fees, both to be paid out of the deposit. On appeal, however, the judgment was modified with respect to the lien and the provision for the counsel fee was reversed and set aside. As to the latter, the supreme court merely said:

> [I]n the circumstances of the case, even if the deposit of the award created a fund in court assessable for counsel fees under *Rule* 3:54-7, now *R.R.* 4:55-7, we discover no basis whatever to justify an allowance in any amount to the attorney for the Housing Authority.[131]

This, of course, shed no light on the problem. Unlike Janovsky, the Authority was the successful party. Also unlike *Janovsky*, in this case the money had actually been paid into court.

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130 14 N.J. 271, 102 A.2d 465 (1954).

131 *Id.* at 281, 102 A.2d at 470. The original rules were the subject of a complete revision, known as THE REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY (1953), to be cited as [N.J.]R.R. effective Sept. 9, 1953. N.J.R.R. 1:1-10. In that revision, the rule regarding counsel fee allowances became [N.J.]R.R. 4:55-7.

Was the deposit of $100,000 out of which the allowance was made a "fund in court" within the Rule? According to *Farber*, following *Caltagirone*, it might be if it was "the subject of litigation." Well, it might have been said that the parties here were not disputing over the ownership of or title to the sum which was actually in court, namely, the $100,000 deposit, but over a different matter for a different sum, which, if resolved against the owner of the deposit, could for convenience be taken out of the deposit. Thus, as in *Caltagirone*, the sum in court was not itself the subject of litigation, but merely a security for another claim. The court showed no inclination to make such nice distinctions and dismissed the award without reason.

Surprisingly enough, this decision then became a precedent for a disallowance in *New Jersey Highway Authority v. J. & F. Holding Co.*,[132] another condemnation case. There, following an award, that Authority paid into court a sum comprised of the award with interest. The former owners filed a petition asking that the entire sum be paid to them. The former tenants opposed. The court favored the owners and denied the tenants a counsel fee on the ground that there was no fund in court. On appeal, the denial was affirmed. The language from *Salvage* quoted above was seen as authority for the statement that: "we are not persuaded in the present case that the discretionary action of the trial judge aside from his announced reason was arbitrary or capricious."[133]

This hardly seems a better reason than that given in *Salvage* itself. There were better reasons which the court did not mention. Unlike *Salvage*, the parties that sought the award had been unsuccessful. Thus the denial could be affirmed on this factor, as in *Farber* itself and in *Janovsky*. But unlike *Salvage* and *Caltagirone*, the parties in *J. & F.* really disputed ownership of or title to the very sum deposited in court, not some other claim for which the sum in court was a security. Thus if *Farber* means anything, there was in *J. & F.* a "fund in court."

If then the Authority in *Salvage* was properly denied a fee out of deposit since it was not the subject of litigation, and if Mrs. Farber, Janovsky, and the tenants in *J. & F.* were also properly denied a fee for being the unsuccessful nonclass parties in a dispute over a deposit, which is the subject of litigation, what of the successful party in a dispute over a deposit, the subject of litigation? Can he shift the burden of counsel fees to his adversary?

The successful litigant: no "fund" cases. The widow and heir of a deceased partner, being unable to get a satisfactory accounting from the survivors of the partnership continuing the business, sues in court for

132 40 N.J. Super. 309, 123 A.2d 25 (App. Div. 1956).

133 *Id.* at 318, 123 A.2d at 30.

an accounting, obtains her relief, a share of the assets of the business, and then seeks the further relief of an allowance of counsel fees. This is the typical, recurring example of the successful litigant who bases her claim for an allowance on the "fund in court" provision of the Rule. She always loses.

In *Long v. Mertz*,[134] the case had terminated in a consent judgment which had made no provision for a counsel fee. The widow's later application for it was refused. The appellate court ruled first, she was barred by her consent, second, that she was barred on the questionable authority of *Driscoll* and *Haines* that there was no fund in court, and finally, on the sounder basis of an analysis of the problem at hand:

> But the appellant goes on to say that she created a fund or that she preserved a fund. The only fund that she created or preserved was the fund of $38,750 that the defendants are ordered to pay her. But she does not want to be paid a counsel fee or expenses out of that fund; she wants to be paid counsel fees and expenses in addition to the fund. She wants a personal judgment against the defendants.[135]

Of course, this is the rub. In the ordinary case, the winning party establishes full rights to the sum in court. But if the sum thus won is the "fund in court," what good does it do for the winner to be paid out of what is now her own fund? This is what the supreme court so questionably did for the State in *Otis*. To help the winner, it is necessary to go beyond the fund. But this goes beyond *Farber* and enters the ordinarily forbidden land of *Liberty Title v. Plews*.

The same partnership situation was involved in *Blut v. Katz*.[136] It was decided the same way. The court there conceded

> that in the case of a partnership the surviving partners or partner is in some measure a fiduciary for the estate of the deceased partner and accountable as such to his estate with respect to all assets of the partnership. . . .
>
> But plaintiff seeks a fee, not out of moneys recovered (nor out of moneys which were deposited by defendants with the court to avoid a receivership and which have now been paid over to her on account of her judgment), but out of the defendants' shares in the partnership. She has rendered no benefit to the entire partnership estate. She has not attempted to preserve or perform any service for defendants' shares; nor has she in any way, directly or indirectly, acted for defendants' benefit. Indeed, the issue is directly controlled by what we had to say in *Long v. Mertz* . . . .[137]

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134 21 N.J. Super. 401, 91 A.2d 341 (App. Div. 1952).

135 *Id.* at 404, 91 A.2d at 342.

136 36 N.J. Super. 185, 115 A.2d 119 (App. Div. 1955).

137 *Id.* at 190-91, 115 A.2d at 122.

Mrs. Blut lost because, like Mrs. Long, the funds in court were her own. She cannot recover out of the entire partnership estate because, again as in the case of Mrs. Long, she had not worked for the benefit of a class and, perhaps, because none of the assets of the partnership were actually in the custody of the court other than those deposited with the court to avoid receivership, which she had already won. The court did not advert to the prior statement of the supreme court in *Otis* where it stated that it is "well recognized" that an action of this type "in the nature of an accounting" the property is in the control of the court,[138] creating a "fund in court" within the meaning of the Rule. *Blut* seemed to regard it necessary that the funds constituting the "fund" be actually in the custody of the court, where the plaintiff was not suing, at least in part, on behalf of someone other than herself.

For the case before it, *Blut* was a serviceable enough opinion. It had the added merit that, almost uniquely in the days of the Vanderbilt court, it offered an analysis and systemization of all the cases bearing on "fund in court." But it gave undue weight to the preservation-of-a-trust fund case (*Cintas-Koretzsky*) to the almost total neglect of the subject-of-litigation cases (*Caltagirone-Farber*), analyzing *Ferguson* solely in terms of the former and omitting from its consideration the dictum in *Cintas* regarding the construction of a will or trust agreement. As we shall see, this analysis proved highly influential with the supreme court when in later years, under Chief Justice Weintraub, it undertook its own systematic re-examination of the "fund in court" provision, with results ultimately divisive.

In the following year a similar situation was involved in *Schmerer v. Estate of Marcus Kirschenbaum*.[139] In that case, however, plaintiff was the surviving partner suing for an accounting of the estate of a decedent former partner. In an interim order, the court restrained the executrix from distributing a part of the estate. Defendant denied the existence of a partnership and prevailed at the trial. Nevertheless the trial court regarded the plaintiff's case as meritorious, considered the decedent's estate as constituting a "fund" and awarded plaintiff a counsel fee. The appellate division reversed on the authority of *Long v. Mertz* and *Blut v. Katz*, that a partnership estate does not constitute a "fund in court," and of *Janovsky*, that one suing unsuccessfully in one's own interest is not entitled to a fee.

Finally, there is Mrs. Lambert of *In re Lambert*,[140] another ex-

138 See note 119 *supra*.

139 39 N.J. Super. 475, 121 A.2d 414 (App. Div. 1956).

140 33 N.J. Super. 90, 109 A.2d 423 (Ch. 1954).

ample of an unsuccessful successful litigant. She, having been adjudicated of unsound mind in the county court and committed, contested through retained counsel her husband's suit in the chancery division to have her declared incompetent and himself appointed her guardian. After a jury found her competent, she applied for an award of counsel fees. The court had to deny her application. Since she had been found competent, there was no "fund in court" (albeit had she been found incompetent her estate would have constituted such a "fund"), and therefore no basis for an award. Mrs. Lambert was somewhat in the position of caveator in a will contest; but unfortunately for her neither the terms of paragraph (b) nor of paragraph (e) of the Rule were broad enough to cover the merits of her case, and for want of this forethought the equities in her favor were unavailing.

But if the successful party in a simple suit on behalf of her own interests must fail in the matter of an allowance for counsel fees because ordinarily the fee she seeks must come not out of the "fund" but out of the pockets of her adversary; and if, as we have previously seen, an unsuccessful party must also fail *because unsuccessful*, what meaning does "the subject of litigation" formula have? When will it be used? Why would not the court either give an adequate explanation or simply rewrite the Rule?

The cases of the successful Mrs. Long, Blut, and Lambert were apparently so many cases of statutory-like construction wherein the judges sought justice only within the intent of the legislator. Such a task proves difficult when the legislator obscures his intent and won't, even in the face of patent obscurity, amend the enactment.

A summary. Two questions come to mind in reviewing these cases. The first: What was the court's legislative intent in providing for an allowance out of a "fund in court"? What was the matter of procedure regulated? The second: How did the court explain the contents of this provision? What was the process whereby it ruled in this matter of supposed procedure?

First, the contents. What did the phrase, "fund in court," include? It would seem from a rather lengthy and laborious reading of the cases that first of all, it included the case of the class representative who, for the benefit of his class, either successfully preserves (*Koretzky*) or creates a fund (*Cintas*) or, though failing, advances meritorious arguments in the cause (*Milberg*). In the first instance he is granted an allowance out of the fund preserved or created to prevent an unjust enrichment. In the second instance, he receives reimbursement from other assets of the class in order to insure for the class representation in its need, at

least where these other assets happen to be in court. On similar grounds was the allowance for the administrator or trustee in an action for construction of a will or trust (*Ferguson*) or for the next friend to an incompetent (*Equitable Trust*). In any event, in the case of the class representative, there is this conceptual difficulty: that the award purportedly coming out of the "fund in court" may come not at all out of any funds actually in court, but out of the pockets of the group he represents. And whether successful or not, the fee, when allowed, is forthcoming not from an adversary, but from the litigant's own side.

This remark leads us to the second large group of cases, those wherein the party seeking the allowance does not represent a group or person in need. Such a litigant, it had been stated in *Farber* following *Caltagirone*, could get an allowance as out of a "fund in court" where moneys actually in the custody of the court were the subject of litigation. This would appear to apply to the case of an allowance for worthy participants in a suit to construe a will or trust, at least insofar as nonfiduciaries are concerned. *Cintas* was authority for this. But in *Ferguson* this basis was ignored. And when the court decided upon an allowance out of the estate involved for both proponent and contestant in a will contest, it had recourse to a separate amendment of the Rule in paragraph (e), rather than to the "fund in court" provision of paragraph (b).

And in cases not involving estates, all litigants in search of an allowance in reliance on the formula of "the subject of litigation" were systematically frustrated. He might be unsuccessful, as in *Caltagirone* and *Farber*, or as in *Janovsky, J. & F.*, and *Schmerer*. Unlike the case of a class suitor or one who sues for an incompetent, he needs no encouragement; he sues only for himself. Besides, the moneys constituting the "fund" belong not to the class or person he serves, but to his adversary. He might be successful in the suit only to be denied an allowance, as in *Long*, *Blut*, and *Lambert*, on the ground that the only moneys actually in the custody of the court and which were the subject of litigation he has already won or owns; or, as in *Salvage*, on no grounds at all (but perhaps for the reason that the moneys in that case while actually in court were not the subject of litigation, but merely security for another claim which was the subject of litigation).

The legislative intent then was not very clear. Insofar as entitlement was concerned, the term "fund in court" cut one way for a litigant involved in the usual adversary situation, another for one involved in an action for will or trust construction, and a third for the litigant suing on behalf of a class or a person in need. Insofar as the requirements of a "fund" are concerned, there seemed no telling: sometimes the moneys

had to be actually in the custody of the court, sometimes not. We certainly cannot say what, even after *Farber*, was the court's original intent in writing the provision; and after many case decisions, despite much analysis and careful refinement, we are still in the dark.

This leads us to the second question posed at the beginning of this section: How did the court explain the contents of its provision? Poorly, if at all, we must conclude. *Milberg* was misleading, *Koretzky* barely adequate and *Ferguson* confused. The cases following "the subject of litigation" formula seemed enigmatic; *Driscoll* and *Haines* inexplicable; *Otis* shifting. The partnership cases and *Lambert*, if correct, were unsatisfying: Why should these ladies-in-need be denied their allowance? Because the ordinary rule is that all suitors must bear the burden of their own litigation? But, why? If the trial judges can be trusted to do equity for the class suitors, why not for the ladies-in-need?

What is most noteworthy about the court's performances throughout these various decisions is the lack of explanation. In all of these cases, the court seemed loath to state the policies served by the Rule, to identify the interests it deemed worthy of protection and to discuss the reasons for this protection. Then, there is the lack of consistency. Inclined to abrupt statement, the court seemed uninterested in precedent or in examining its decisions and establishing the law in logical patterns.

The Rule accordingly took on a quality of the absolute, of imperviability to reason. It was as though it had a separate existence in and of itself, its mere existence being meaning enough. Thus ordinarily there was no need to appeal to reason, to a system of underlying relationships. In this process, the Rule, having been made, was administered and the cases disposed of as so many unconnected units of business. For want of the usual judicial process, there came to be no genuine law of counsel fees; no sense of meaning, of depth; but instead a routine succession of decisions. It is difficult to escape the conclusion that the constitutional power of the justices to legislate, to make rules governing practice and procedure, had been exercised at the expense of their psychological power to act judicially in their regard.

But if the court's performance with the "fund" in paragraph (b) of the rule has borne the mark of a certain loss in judicial power, its performance regarding the following paragraph suggests a more serious defect.

Paragraph (c)—"In an action for the foreclosure of mortgage"

Could a bank, having obtained a judgment "in an action for the

foreclosure of a mortgage," have included in such judgment an award for counsel fees calculated at a rate set forth in the bond accompanying the mortgage (3 percent of the principal sum but in no event less than $75)? In other words, where the parties have, before the action, contracted for the allowable compensation for attorney's fees in the event of a foreclosure action, will the court honor the contract or will it set it aside as in conflict with the provisions of paragraph (c) of the Rule regarding counsel fees, which limited the allowance to 2 percent of the first $5,000 of the principal sum of the mortgage, 1 percent of the next $5,000 and 0.5 percent on the sum in excess of $10,000?

This was the issue in *Bank of Commerce v. Markakos*.[141] The trial court discreetly followed the Rule. The bank appealed to the appellate division from the denial of an allowance in excess of the rule schedule, arguing that it was entitled to the fee stipulated in the bond as a matter of contract regardless of the Rule, that the Rule did not supersede or invalidate the covenant, and that if it did,[142] thereby precluding enforcement of the contractual provision, the Rule was beyond the constitutional power of the supreme court. This was a frontal attack. Naturally, it did not succeed; the appellate division affirmed.[143] The Bank then appealed to the supreme court, asserting that its right to an allowance pursuant to the covenant in the bond was a substantive right and the mortgagee's duty to pay the fee was a substantive duty. Therefore the allowance was not a matter of practice and procedure, hence not controllable by rule, but only by the legislature through appropriate statutory provision. It argued further that the legislature had repealed such legislation as there had been regarding provision for such allowances in mortgage foreclosure actions, leaving the field free of statutory regulations.

Thus we have here, and not in *Otis*, the first case in which a party had contended that the matter of counsel fees was one of substantive law and not procedure and therefore beyond the competence of the supreme court. The opinion for the court was written by Chief Justice Vanderbilt; the argument was rejected. Remarkably, there were no dissents.

The court held that there never existed in the State of New Jersey the purported right to contract as to counsel fees; that any attempt by

141 22 N.J. 428, 126 A.2d 346 (1956).

142 In Driscoll v. Burlington-Bristol Bridge Co., the court had already held that parties cannot by consent grant the trial court power to grant an allowance in a case forbidden by the rules. 8 N.J. at 496, 86 A.2d at 232. See notes 113 *et seq. supra* with accompanying text.

143 41 N.J. Super. 246, 124 A.2d 605 (App. Div. 1956).

private parties "would have been struck down as against public policy quite as much as it would if the Legislature had attempted to do so."[144] The legislature had attempted to do so, but as noted by a court reporter in an appendage to an old equity case, the public policy of this state was

> to leave the allowance of counsel fees to the discretion of the chancellor, to be exercised in each particular case in accordance with equitable principles, which in their nature forbid an arbitrary rule by percentage.[145]

The statute had then been ignored. Accordingly, reasoned the court, the public policy of the state would have been equally against a blind allowance based upon a contractual provision or a blind allowance based upon "an arbitrary rule by percentage."

It is strange that the court should invoke the aid of this old policy in chancery, a policy which would have ignored the set limits of the court's own rule along with the set limits of the parties in favor of a policy of discretion which it, the supreme court, had already repudiated in its former decisions. The court's line of reasoning, in reality, is of questionable soundness. It goes like this: the attempt to contract for a fixed rate of counsel fees is and has been against public policy. It was so held where the legislature attempted to permit it. Therefore there is not and never was any such substantive right.

However old equity ignored the statute not because of any substantive impropriety in contracting regarding counsel fees, but because the provision for a fixed rate interfered with its power to fashion a remedy along equitable lines to fit the demands of justice; or in other words, with its power to redress the damages to a plaintiff in foreclosure as the trial court deemed fit. But this power to fashion remedies in the matter of counsel fees was denied the trial court in *Liberty Title* because abrogated by rule. Since this is so, the old objection to the legislative enactment with regard to the matter being thereby removed, there is no long-standing policy in existence against it. Therefore such a statute, or agreement in the absence of statute, should be enforced as a matter of substantive law.

The issue therefore remains whether such a contractual provision is entitled to enforcement as a matter of substantive law, or whether it is procedural and therefore subject to the rule. The court never really faced the issue. It drew comfort from the fact that the former statutory provisions on this subject in old *Title 2* had been deleted in the re-

144 22 N.J. at 432, 126 A.2d at 348.

145 United Security Life Ins. & Trust Co. v. Smith, 51 N.J. Eq. 635 (Ct. Err. & App. 1893).

vision and did not appear in the new *Title 2A*. Since one of the purposes of the revision was to strip the statute books of all its procedural enactments inconsistent with the rules of procedure, the disappearance of the pertinent counsel fee provisions should be, the court argued, regarded as legislative acquiescence that the matter of a counsel fee award was a matter of procedure. Counsel's position was simply that if the legislature repealed or deleted these provisions, considering them procedural, it was mistaken. The court never really considered it. It regarded the legislative position as decisive, relied on the old policy in chancery and dismissed the appeal because it "manifestly presents no substantial constitutional issue."[146] No opinion of the court has had less influence. It is an unhappy non-precedent.

Paragraph (d)—"as provided by these rules": Local 449, An Exceptional Case

The week after the decision in *Bank of Commerce*, oral argument began in the case of *Westinghouse Electric Corp. v. Local 449, Electrical Workers*.[147] Westinghouse had obtained *ex parte* injunctions on three different occasions against the union, but after a hearing involving oral examination and cross-examination of witnesses and full argument, the chancery division vacated the injunctions. Then Westinghouse filed a supplemental complaint seeking an injunction against picketing and obtained a new order to show cause, but this time without the *ex parte* restraint. In the face of a union demand for discovery, Westinghouse moved for dismissal of the proceedings. The union did not oppose this, rather it applied for an award of counsel fees. The trial court awarded the union an allowance of $5,250 and an appeal was taken solely on the issue of the trial court's power to make such an award. The supreme court decided there was such power.

In this case, counsel were diplomatic. All agreed that the allowance of counsel fees is essentially a matter of procedure. The supreme court agreed, citing *Bank of Commerce*, *Otis*, and *Westervelt's*.[148]

Westinghouse argued that the grant below had no specific authorization under the rules. The union's argument was of necessity more complicated. First, it looked to the rule on counsel fees, which read: "No fee for legal services shall be allowed . . . except: . . . (d) As provided by these rules with respect to any action . . . ." Next, it turned to the rule governing "Labor disputes," R.R. 4:67-9, which pro-

146 22 N.J. at 432, 126 A.2d at 348.

147 23 N.J. 170, 128 A.2d 457 (1957).

148 John S. Westervelt's Sons v. Regency, Inc., 3 N.J. 472, 70 A.2d 767 (1950), discussed at length beginning at note 18 *supra* and accompanying text.

vided "The rules of court do not supersede [N.J. STAT. ANN. § 2A:15-51 to 58], inclusive, relating to labor disputes." It then referred to the statute, where in § 2A:15-53, it was provided that no interlocutory injunction shall be allowed until the plaintiff shall first file with the court a bond in favor of the persons enjoined sufficient to secure to them "their court costs, attorney and counsel fees taxed against the plaintiff, in the event that the injunctive relief sought is subsequently denied by the court . . . ." This, the union argued, constituted an implied statutory authority for an allowance, not superseded by rule.[149]

Westinghouse, of course, argued that the supreme court did not thereby intend to establish an authority in the trial court to grant counsel fees. The supreme court itself, remarkably, thought otherwise. The legislature had intended, it concluded, to render "the employer . . . subject to such liability for wrongful or unsuccessful attempts at restraint" and thus to equalize his superior capital position in "suits which might be designed to harass and embarrass"[150] labor unions by providing for the allowance of counsel fees and costs in unsuccessful suits. R.R. 4:67-9 was intended to preserve intact all the provisions of the statute. Thus the statute working through the rules gave authority to the trial court to award counsel fees. "The dominant control of the court in matters of procedure necessitated such an approach,"[151] it said.

There is, of course, nothing improper in the court adopting suggestions made by some other authority in matters of procedure by incorporation in the rules. But the court had rejected this approach in *Otis*, striking down the statutory scheme for awards in proceedings for escheat. And in *Bank of Commerce*, the court had recently remarked that an attempt by the legislature to fix a fee in an action to foreclose a mortgage would be, and had been, contrary to public policy. But in the case of a labor dispute, the legislative enactments are not stricken or ignored. It is true the formalities are observed. It is still the supreme court which has ultimately authorized the award through its rules. But in reality the court has deferred to the legislature.

Moreover, in its analysis of the policy underlying the statute, the court adverted to considerations which are usually regarded as matters of substance and remedy in such phrases as "suits which might be designed to harass and embarrass" and "if the employer were not subject to such liability" and "labor would be protected through compensa-

149 See briefs of parties, 447 BRIEFS OF NEW JERSEY SUPREME COURT.

150 23 N.J. at 176, 128 A.2d at 460.

151 *Id.* at 177, 128 A.2d at 461.

tion." This is the language of substantive law and the law of damages, of Harper and James and Prosser, of Sedgwick and McCormick.

Exceptions to the Rule—the moneylender cases

It was possible to have limited the effect of *Local 449*. A statute had been accommodated, it could have been argued, but it was the exceptional case wherein another rule had been found to have authorized the accommodation, that concerning "labor disputes." Thus unless in another case you can point to another such special rule of authorization, another such statute will not be accommodated. Quickly this was held not to be so. A new precedent was soon established whereunder one could get an allowance if one had, pursuant to a statute, contracted for an allowance.

In *Maryland Credit Finance Corp. v. Reeves*,[152] decided five months after *Local 449*, it was held that a finance company (O, worthy litigant!) which had repossessed an auto and sold it subject to a conditional sales contract, was, in an action for a deficiency judgment against the original purchasers and guarantors, entitled to deduct from the proceeds of the resale all expenses for the retaking including a reasonable attorney's fee because the conditional sales contract had so provided. Accordingly, the appellate division affirmed such part of the default judgment as included an attorney's fee representing 15 percent of the deficiency, and noted without comment that plaintiff relied on the provisions of the then N.J. STAT. ANN. § 17:16B-6 "which sanctions a counsel fee not exceeding 15% in retail installment contracts."[153] It distinguished *Bank of Commerce*: the stipulation for counsel fees there was in direct violation of a specific rule on the subject, R.R. 4:55-7(c). Not so here, and "we do not believe the ruling should be extended by this Division beyond the boundaries of that case."[154]

It was possible to distinguish further between the cases. In *Commerce*, the bank sought an allowance in the foreclosure proceedings for services rendered in those very proceedings, whereas in *Maryland*, the finance company sought in the deficiency judgment proceedings an allowance or credit really for the work done in repossessing, work done before the commencement of the deficiency proceedings started. This was a difference, but the court did not appear interested in differenti-

152 45 N.J. Super. 205, 132 A.2d 36 (App. Div. 1957).

153 The statute was repealed in 1960 and replaced by N.J. STAT. ANN. § 17:16C-42(b) (1970) which provides in part:

> the retail installment contract may also provide for the payment of attorney's fees not exceeding 20% on the first $500.00 and 10% on any excess of the amount due and payable under such contract when referred to an attorney . . . .

154 45 N.J. Super. at 208, 132 A.2d at 38.

ating. It was as though the judges were interested only in curtailing the influence of the Rule without involving themselves in a discussion of its reasonableness.

The effect of *Maryland* was to limit *Bank of Commerce* and the rules drastically. A statute had sanctioned a counsel fee up to 15 percent in a retail installment contract. The parties had contracted; therefore a judgment authorizing a 15 percent counsel fee was affirmed. Before *Maryland,* R.R. 4:55-7 had to specifically authorize such an allowance either by its own terms or by virtue of its incorporation of the terms of another rule, such as the one on labor disputes. Without such authorization, to quote the language of the rule: "No fee for legal services shall be allowed." By virtue of *Maryland,* the subject becomes reversed; there it is said, in effect, that unless R.R. 4:55-7 specifically forbids it, as in *Commerce,* the allowance is proper, where agreed to pursuant to statute.

Another twist in the judicial road. But this twist has proved to be a lasting one. Thereafter the appellate courts have consistently followed the course of upholding contractual provisions for counsel fees except where, following *Commerce,* the case is covered by specific rule of court. *Maryland* has had more life than *Commerce.*

In *Bancredit, Inc. v. Bethea,*[155] the appellate division went further. Defendants had bought a used car from a dealer, signing a conditional sales contract and giving as part of their purchase price a note payable over two years. The note, pursuant to the statute cited in *Maryland,* contained a provision for an additional 15 percent as attorney's fees if placed in his hands for collection. The dealer sold the note and the contract to Bancredit for $650. Defendants made payments totaling about $139 and defaulted. The car was repossessed and sold at public sale for $350. The appellate division in its opinion, without further explanation, noted that, nonetheless, the sum of $448.99 was still due and owing on the note, such sum including attorney's fees as authorized in the note. Judgment was subsequently entered for that amount, plus costs.

In assessing costs, the trial judge approved another allowance for attorney's fees in an amount equal to 5 percent of the total judgment, pursuant to N.J. STAT. ANN. § 22A:2-42, which provides that the district court shall include in the taxed costs against the judgment debtor "a fee to the attorney of the prevailing party, of five per centum (5%) of the first five hundred dollars ($500.00) of the judgment . . . ."

The appellate division found "neither inconsistency nor repeti-

155 65 N.J. Super. 538, 168 A.2d 250 (App. Div. 1961).

tion in the court's allowance of both of these amounts."[156] The 15 percent award was a recognition of the parties' contractual arrangement, its reasonableness sanctioned by statute. (But in *Commerce*, the supreme court had recalled that the old chancery court had always regarded an allowance by "an arbitrary rule of percentage" as against public policy.) Moreover, it was not conditioned upon the institution of a suit. (No, but it could be collected against the will of the promissor only through a suit.) Again, the 15 percent accrues to the noteholder and not to his attorney. The 5 percent allowance, on the other hand, accrues for, and is directly payable to, his attorney. And as a taxed cost, it is in the nature of a statutory penalty against the judgment debtor. Nor would the court even confine the plaintiff to a choice between the allowances. It was entitled to them both. Credit and finance companies are surely the most favored of all litigants.

Maryland Credit and Bancredit had the benefit of protective statutes. What about a moneylender who, though not thus protected, has inserted in the note upon which he lends money a provision for the collection of attorney's fees in the amount of a specified percentage of the unpaid balance? Is he entitled to an allowance in the judgment for the attorney's fees? *Gramatan National Bank & Trust Co. v. Backman*,[157] decided before *Commerce*, had said yes. There the note had provided for 18 percent of the unpaid balance for the expense of collection and attorney's fees; and the judgment awarding 5 percent of the unpaid balance for attorney's fees was affirmed. The propriety of the allowance was not challenged.

In *First Savings & Loan Association v. Heldman*,[158] decided after *Commerce*, the court had before it an attachment suit to collect the balance due on a note. The note contained a provision for "reasonable attorney's fees if collected by law or through an attorney at law." There was no statutory sanction for such a proviso, since the underlying transaction was not a retail sale and was not otherwise covered by statute. Nevertheless, the court allowed a fee of 15 percent for the attorney, inclusive of disbursements. Influenced by *Maryland* and *Bancredit*, it regarded *Gramatan* as the controlling precedent. Once again *Commerce* was limited.

If *First Savings* is correct—and really on what grounds can it be faulted—then what about the case of the prudent businessman, who entering upon an ordinary agreement with another, contracts that in

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156 *Id.* at 552, 168 A.2d at 258.

157 30 N.J. Super. 349, 104 A.2d 729 (App. Div. 1954).

158 79 N.J. Super. 65, 190 A.2d 400 (Bergen County Ct. 1963).

the event of a law suit for breach of the agreement he will be entitled to the reasonable attorney's fees incurred in the suit on the breach? Is he entitled to an allowance in his judgment for attorney's fees? If so, has not the policy of the Rule been stretched to the breaking point, and with it the accompanying thesis, that allowances for counsel fees are merely matters of procedure? But this challenge came later, after the days of the Vanderbilt court. And since in this section we will confine ourselves to the Vanderbilt court's view of the over-all subject of counsel fees, we shall defer discussion of that coming challenge to a subsequent section. For now, we shall pass on to a consideration of the other exceptions carved out of the Rule by the Vanderbilt court.

The suit for malicious prosecution. The second of these exceptions to be discussed had actually been made quite early. It involved the remedy for a claim for malicious prosecution set forth in *Mayflower Industries v. Thor Corp.*[159] Mayflower had sued to enjoin Thor from dealing with parties other than Mayflower as distributor of its products in certain areas and for breach of contract damages. Thor counterclaimed for malicious prosecution of the action. Mayflower dismissed its complaint with prejudice and then moved to dismiss Thor's counterclaim, seeking in the alternative an elimination from the counterclaim the demand for recovery of costs and counsel fees incurred in defending against the allegedly maliciously prosecuted complaint. The trial court noted that there might have been a problem in trying the counterclaim with the original complaint of Mayflower since the law had been that the original proceeding must have terminated before an action for malicious prosecution can be instituted. But in view of the complaint's dismissal, that problem had been cured. As to an award for counsel fees, there was no problem. It said:

> The present case is a damage suit for malicious prosecution. It is not an application for counsel fees in the original injunction proceeding. If it were, in the absence of a bond, our *Rule* 3:54-7 would bar any such allowances. . . .
>
> . . . .
>
> In malicious prosecution cases the well nigh universal rule is that reasonable costs and counsel fees incurred in defending the action maliciously brought, are an element of damage.[160]

An appeal was taken to the appellate division from the various orders of the trial court and certified by the supreme court on its own motion. In a brief per curiam opinion, it affirmed for the reasons expressed below.

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159 15 N.J. Super. 139, 83 A.2d 246 (Ch. 1951), *aff'd*, 9 N.J. 605, 89 A.2d 242 (1952).
160 *Id.* at 175, 83 A.2d at 264.

It is indeed unfortunate that the supreme court did not give us the benefit of its own separate opinion on this subject. We should like to know, for instance, why if Thor seeks costs and counsel fees against Mayflower in the original proceeding as part of the judgment dismissing the injunction complaint such a matter is, as the trial court apparently considered, denominated a matter of procedure, to be governed by the rules and disallowed thereunder; and why if it seeks an allowance of the same costs and counsel fees in a separate suit or in a counterclaim in the same suit, such are governed by "the well nigh universal rule . . . [and allowable as] an element of damage," and thus an inextricable part of a remedy for a substantive cause of action.

Reimbursement of expenses—unjustifiable trial tactics. A third exception to the all-exclusive reach of the Rule was made at about the same time as that for the case of malicious prosecution. In *Allegro v. Afton Village Corp.*,[161] the very basic issue was raised: whether a trial court faced with a belated application for adjournment may grant the request conditioned on the applicant's payment of a sum calculated to reimburse his adversary for the loss suffered by the delay. In that case the trial judge required a tardy plaintiff to pay "costs of $200" to his defendant as condition for his order of adjournment. The supreme court not only approved, but reversed a later dismissal of plaintiff's complaint for his failure to be ready on the adjourned date. It considered that plaintiff's conduct did not warrant dismissal and directed instead that plaintiff further pay defendant the reasonable costs of its preparation for trial on the adjourned date. Chief Justice Vanderbilt dissented, not because he thought the remedy unauthorized, but because he judged it too mild. Characteristically, he voted for dismissal.

In *New Jersey Highway Authority v. Renner*,[162] a similar allowance to the Authority in the sum of $150 as condition for a grant of a belated request for adjournment was considered proper on the precedent of *Allegro*, "not as a counsel fee . . . nor perhaps as costs . . . but as a reimbursement of expenses to which the Authority had been put."[163] Call it what you will, the reality is that a party is being compelled by order of the court, without authorization in the rules and in direct contradiction to the prohibition expressed in RULE 3:54-7, to pay his adversary's expenses including that of counsel fees.

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161 9 N.J. 156, 87 A.2d 430 (1952).

162 32 N.J. Super. 197, 108 A.2d 107 (App. Div. 1954), *aff'd*, 18 N.J. 485, 114 A.2d 555 (1955). The issue of the propriety of allowances for reimbursement of "expenses" was not discussed in the supreme court's opinion. Included in the expenses were the cost to the Authority of bringing into court on the trial date two of defendant's former attorneys and two of its own employees as witnesses.

163 *Id.* at 202-03, 108 A.2d at 110.

There should be no quarrel with the result. To deny a trial court the power to make an *Allegro* order in the absence of rule would seriously affect the sound administration of justice. And the alternate remedy—dismissal of a complaint or suppression of a defense—is too harsh, one not suited to the nature of the offense: the waste of an adversary's agent's time, which means money.

Allegro was then a necessity and, as usual, necessity led to discoveries. The first, that the trial court must in certain cases be supported in its formulation of rules regarding the orderly practice and procedure in its own court even in the absence of a rule of court; thus, it was recognized that the power to make rules regarding practice and procedure must not always be in the supreme court. The second, that breaches of such rules must be remedied; for otherwise the orderly administration of justice would be subverted and parties relying on such order would suffer a loss of time and money thereby. A third, that the remedy for such violation to be administered by the trial court must compensate for the harm caused by the breach. Fourth, that such remedy must be sustained even if it in effect violates the provisions of RULE 3:54-7, forbidding the award of a counsel fee except as specifically provided in that or other rules of the supreme court.

The court should have concluded therefore that as a matter of practicality it could be neither the sole author of rules of practice and procedure as held in *Winberry* nor the sole determinant by rule of court of the circumstances whereunder the remedy of counsel fees could be awarded, as held in *Liberty Title v. Plews*. The court, however, did not apparently draw these conclusions. Instead, proceeding as before, it subsequently amended the provisions of R.R. 4:41, governing the assignment of cases for trial, by adding a new section, R.R. 4:41-6, wherein it codified the result in *Allegro*. Thereafter, the allowance to an aggrieved party of the "reasonable expenses to which the latter and his attorney had been put in attending the court, including a reasonable attorney's fee for the attendance"[164] was provided by rule and thus within the authority of the rule on counsel fee, by then R.R. 4:55-7(d). Thus in the court's view, it alone was the sole author of this rule of trial practice and procedure and the sole determinant of the

164 In the 1969 revision of the rules, this provision was combined with a similar one in N.J.R.R. 4:29-1(c), regarding the failure to attend a pretrial conference, into one rule, the present N.J.R. 1:2-4. The new rule does not provide for the alternate penalty formerly set forth in N.J.R.R. 4:41-6, namely the payment by the offending party of a sum not exceeding $50.00 to the clerk of the court. Thus the old rule recognized the double offense involved in a belated application for adjournment, one to the adversary, the other to the public.

circumstances whereunder the remedy for an allowance of counsel fees could be awarded. The holdings of *Winberry* and *Liberty Title*, evaded in *Allegro*, were thus followed in the later amendment. The court as legislator could do what as court it was not able to do: give justice and honor the holdings in *Winberry* and *Liberty Title*.

Of course implicit in this new amendment was the reaffirmation of the premise that the remedy permitted, the allowance of counsel fees, was a matter of practice and procedure, as was the harm for whose remedy the allowance was authorized. But upon reflection it should have been recognized that the remedy allowed was in protection of a litigant's interest quite similar to the litigant's interest protected in a suit for malicious prosecution. Just as in the latter suit counsel fees are allowed to vindicate a person's interest in freedom from litigation the conduct of which, considered in its entirety, is unjustifiable, so in the case of a belated application for trial adjournment, counsel fees are allowed to vindicate a person's interest in freedom from the unjustifiable trial tactic. In either case, infringement of the freedom results in an unwarranted expenditure of a lawyer's time and the litigant's money. In either case the rights and duties involved are incidents of the law of torts. The court in *Allegro* gave implicit recognition of the underlying realities by setting aside for the case the prohibition of its own rule concerning counsel fees and giving effect to the requirements of substantive law.

A summation. The swift, simple solution to the problem of counsel fees in RULE 3:54-7 (later R.R. 4:55-7) had not, after all, been either swift or simple. *Allegro*, even in the court's own terms, aside from the considerations raised in our analysis, did not suggest simplicity. Its companion cases suggested the solution had not been swift. If in *Allegro*, the court gave de facto recognition to a litigant's interest in freedom from a particular unjustifiable trial tactic, in *Mayflower*, it gave de jure recognition to his interest in a general freedom from unjustifiable litigation by reaffirming his substantive claim in the tort of malicious prosecution (although it rather confused us by suggesting the nonrecognition of such a claim in the very suit maliciously prosecuted). In *Otis*, similarly, the court suggested by dictum that it would protect the interest of the state in its freedom against the maintenance of an unjustificable defense through the entire course of the litigation, without regard to the Rule. In *Maryland* and the other moneylender cases, it recognized the right of a litigant—free of the rules—to protect himself in advance by contract against the cost of the entire conduct of litigation arising from its contractual relation with another without

consideration of whether or not conduct of the litigation was in fact, in whole or in part, justifiable. In *Local 449* it liberally construed a rule and an accompanying statute so as to recognize the interest of a labor union in freedom from the entire conduct of litigation unsuccessfully, although not necessarily unjustifiably, pursued. In all of these cases cognate interests are given protection despite the Rule or, in the case of the labor union, an exceptional protection under the Rule.

If the problem of counsel fees has not received an adequate solution in the Rule, neither has it received a consistent solution in the Rule's own terms. Apart from the special treatment accorded the labor union, why should, in paragraph (c) of the Rule, the mortgage foreclosurer be accorded a partial protection? And why, further, the later addition of paragraph (e), wherein the trial court is empowered in a contest of will or codicil to protect the interest of the proferror or the contestant, as the case may be, in freedom from unjustifiable litigation through the course of the entire suit? The protection accorded by the Rule is neither consistent nor equal.

Then, in another connection, the protection accorded by the rule was uncertain—when it involved a "fund in court." In *Caltagirone* and *Farber* it considered a "fund" present in a simple adversary litigation since moneys in the actual custody of the court were the subject of the litigation, but denied a fee to the unsuccessful party. The successful party, however, precisely because of his success, would scarcely resort to a "fund" he owned for protection. Yet, except for a brief suggestion in *Blut*, the court did little to settle the confusion. Indeed its award to the State in *Otis* served only to confuse the more. And the practice of allowances for worthy participants in an action for will construction seemed without basis, *Ferguson*.

In *Cintas*, *Farber* and *Milberg* it found a "fund" in a class action. In this, we may include the case of trust or estate administration. But it failed to clearly distinguish this type of case from that involving simple adversaries and the different bases for award in either case. In the class suit, it seemed to have trouble in adjudicating consistently, as in *Driscoll* and *Haines*, and in giving the bench and bar an adequate basis for its adjudications. The reasons for *Milberg* were misleading (for if the class suitor had lost, the allowance could not come out of the fund which he had not preserved or created, but out of the pockets of his class members), for *Koretzky* too brief, for *Otis* pointless in part (as concerned the State) and sufficient in part (as concerned Otis, only when considered in isolation). For if Otis was to be awarded a fee for the expense of proving the State's case, why not, as asked in the dis-

sent,[165] a fee for the expense incurred in discovery? The court had in the Rule determined upon, in the case of a "fund in court," an exception to the general prohibition against an allowance. It had failed to communicate the basis in reason for the determination.

This failure is not surprising. On the same fundamental level, the level of adequacy in basis, the entire Rule is at fault. Given the determination that the interests of certain litigants are to be protected under the Rule and the interests of others not, are the interests involved procedural or substantive? Is the remedy afforded or denied a matter of practice and procedure rather than one in aid of substantive rights? The court's thesis—that both the interests and the remedy are matters of practice and procedure—does not stand of its own force. When affronted, as in *Bank of Commerce*, it avoids collapse only by circumlocution. When pressed, as in *Allegro, Mayflower, Maryland* and *Local 449*, it is maintained not by the strength of its own inner energy, but by the use of artful euphemisms and unexplained exceptions. At bottom, the thesis stands not by the force of reason, but supported from below by the power of authority.

Epilogue: The Vanderbilt Court Departs

The Rule must then either be revised or repealed. But the court deprived by its own devices of all collaboration must go it alone by the crude method of trial and error.[166] And that error may not appear as error, the path of revision must be retraced ever so slowly. Then shortly it became too late for this court, the Vanderbilt court, to retrace its path. On November 13, 1956, the date of argument of *Local 449*, that court was still substantially intact: the Chief Justice, Justices Heher, Oliphant, Wachenfeld and Burling had all been a part of the court from its beginning. Sweeping changes were soon, however, to follow. Six days later, on November 19th, Justice Weintraub was appointed to the court.[167] On August 20, 1957, he became Chief Justice, succeeding Arthur T. Vanderbilt who died suddenly on June 20, 1957.[168] During the next three years, the four remaining original jus-

165 It would only be just to say that Justice Jacobs, in his dissent in *Otis* and in his opinion in *Janovsky*, and Judge Clapp in his opinion in *Blut* strove to create a body of law on this subject during this period. But their efforts were decidedly outweighed by the influence of Chief Justice Vanderbilt, who set the tone in his opinions in *Liberty Title, Koretzky, Driscoll, Haines, Otis* and *Bank of Commerce.*

166 See note 94 *supra.*

167 He succeeded Justice Brennan who had resigned the previous month to accept an appointment to the United States Supreme Court. The seventh justice of the court at that time was Nathan Jacobs, who had been appointed in March, 1952.

168 On the same day Justice Weintraub became Chief Justice, John J. Francis became an Associate Justice.

tices of the supreme court either retired or died in office.[169] By the fall of 1960 a new court had formed which for convenience we shall call the Weintraub court.

This new court was free to re-examine, free to change. In the matter of counsel fees, it had inherited a policy embodied in a rule seemingly simple and easy of application. The difficulties we have discussed had been quietly buried: the cases arising thereunder treated in isolation and without systemization. The process of this procedure had been apparently highly successful. But do things differently, try to explain and systematize, and the difficulties will become apparent and abound. Intelligence bent to the task of justifying such an inheritance was bound to fall. The study of that failure will occupy our attention in the following section.

V. The Weintraub Court Construes the Rule

Preliminary Remarks

Because the sequence in which the cases came before the Weintraub court was of great importance in their decisions, we shall in this section discuss them, for the most part, in that order. The first of them, involving the construction of paragraph (d) of the Rule, determined the extent of the exception announced in *Local 449*.[170] In the next series of cases, those construing the "fund in court" provision of paragraph (b) of the Rule, we shall see how the formula set forth in *Caltagirone*[171]—"the subject of litigation"—came to be abandoned; and how the court came to read the provision in the exclusive terms of the *Cintas* case.[172] Then, after a fruitful digression to the moneylender cases arising under paragraph (c) of the Rule, we shall return with the court to the climactic case of *Grober v. Kahn*,[173] involving, once again, the construction of "fund in court." There we shall see the court divide, revealing such fundamental inadequacies in the Rule and its underlying policy as to breed in the Weintraub court, as in the Vanderbilt court before it, a distaste for the process of construction

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169 On Oct. 28, 1957, A. Dayton Oliphant retired, succeeded by Hayden Proctor; on Feb. 24, 1959, William A. Wachenfeld retired, succeeded by Frederick W. Hall; on March 30, 1959, Harry Heher retired, succeeded by C. Thomas Schettino; and on Oct. 29, 1960, Alfred E. Burling died, succeeded the following month by Vincent S. Haneman.

170 See notes 147-51 *supra* and accompanying text.

171 See notes 99 *et seq. supra* and accompanying text.

172 See notes 118 *et seq. supra* and accompanying text.

173 47 N.J. 135, 219 A.2d 601 (1966).

and explanation. Thereafter, the judicial process will be subsumed in the legislative and we shall have entered a new phase.

Paragraph (d)—Local 449 Isolated

The first of the cases to be considered, *DeBow v. Lakewood Hotel and Land Association*,[174] does not, strictly speaking, belong in this section. For the decision, that of the appellate division, was rendered at a time, October 1958, when the Weintraub court was not yet in existence. Three of the justices who were subsequently to sit on that court had not as yet received their appointment.[175] The supreme court was thus in a stage of transition not only in personnel, but in manner of decision. Therefore, because of its place in time, the opinion in *DeBow* reflected the approach of the Vanderbilt court.

The facts in *DeBow* are these. Three corporate defendants in a stockholder's derivative suit moved, pursuant to the then N.J. STAT. ANN. § 14:3-15, for an order requiring plaintiff to furnish security to them for, in the words of the statute, "reasonable expenses, including counsel fees, which may be incurred by it in connection with such action." This provision, it will be observed, was similar to the statutory provision involved in *Local 449*.

The trial court granted the motion, but after dismissing the derivative claims, denied the corporations' applications for counsel fees. They appealed, relying on the opinion in *Local 449* which had fashioned out of similar language in the statute governing labor disputes a legislative policy to authorize the allowance of counsel fees. Unfortunately for them, however, unlike the situation in *Local 449*, there was in the case of § 14:3-15 no reference thereto by rule of court and thus their argument had to fail.

Of course, this had the appearance of the arbitrary: that the one statute favoring a labor union should somehow be deserving of incorporation in the rules and that the other favoring a corporation should not. Anything the court said on this topic would only render the arbitrary obtrusive and the body attempting to justify the arbitrary offensive. Nevertheless, it tried.

Section 14:3-15, it said, did not itself assure a counsel fee; it merely assured, if a fee were allowed, the availability of a resource for payment. It ignored the fact that similar language had been construed in *Local 449* as assuring more than the availability of a resource: the assurance of the allowance itself.

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174 52 N.J. Super. 288, 145 A.2d 493 (App. Div. 1958).

175 See note 169 *supra*.

Then, and rather surprisingly, it cited in passing the decision of the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[176] But in that case that court had held the very provision in question to be, under the doctrine of *Erie Railroad Co. v. Tompkins*[177] as amplified in *Guaranty Trust Co. v. York,*[178] substantive rather than procedural. Thus it was to be applied in a stockholder's derivative suit brought in a federal district court in New Jersey based on diversity of citizenship. And what is more, *Cohen* had gone on to hold that the statute had in fact authorized more than the mere availability of a security in the event of an allowance; it had authorized the allowance itself.

The analysis in *Cohen* is of more than passing interest. It goes to the heart of the basic distinction between the realm of the substantive and that of the procedural with a clarity that must indeed have been unsettling to a superior court judge. And it declares the heretical notion that the allowance of counsel fees is no mere procedural matter, but of the order of substantive law.

This is what the Court said:

> Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, it *creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense* to which he puts the corporation and other defendants, if he does not make good his claims. *Such liability is not usual and it goes beyond payment of what we know as "costs." If all the Act did was to create this liability, it would clearly be substantive.* But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device.[179]

Thus the majority in *Cohen* read the statute as the supreme court had read the other statute in *Local 449,* as both conferring power on the trial court to make an allowance for counsel fees and to require the posting of a security for such an allowance. Justices Douglas and Frank-

176 337 U.S. 541 (1949).

177 304 U.S. 64 (1938).

178 326 U.S. 99 (1945).

179 337 U.S. at 555-56 (emphasis added).

furter dissented only as to the necessity in a federal court of posting the security. They regarded *that* requirement as, in a diversity context, procedural.[180] All had agreed, however, that the provision for the allowance itself was the creation of a new liability and thus clearly substantive. This was, of course, an unmentionable by a New Jersey court. *Cohen* would seem a case to have been avoided or "distinguished," not to have been cited in support.

But *DeBow* blundered on, perhaps by now in nervousness. It proceeded to save the statute from judicial repeal by holding that it "still has viability insofar as requiring the posting of security is concerned."[181] Security for what? For reasonable expenses including counsel fees which, under the basic policy of the New Jersey Supreme Court as evidenced in the then existing rules, are not to be allowed? This reason will not hold either.

Finally, and as though in desperation, *DeBow* came to rest in a simpler and sounder alternate holding. The statutory allowance of counsel fees, if there be such, is superseded, it said, because it deals with "procedure," as held by the supreme court in *Otis*.[182] This we can accept: not argument speciously arrayed, but stark naked precedent. Even mistake, if honestly disclosed, carries a certain dignity of its own.

Interestingly, despite this decision, the legislature has in its recent revision of corporate legislation expressly provided for the payment to a corporation of "the reasonable expenses, including fees of attorneys, incurred . . . in the defense of" a stockholder's derivative action upon a finding of the court "that the action was brought without reasonable cause."[183] And it reenacted the prior requirement of N.J. STAT. ANN. § 14:3-16 for the posting of security for such reasonable expenses.[184] The Comments of the Commissioners for Revision are clear that the intent is in reaffirmation of the result and reasoning in *Cohen* and in derogation of result and reasoning in *DeBow*. In fact, the Commissioners specifically recommended to the supreme court the amendment of its rule governing a stockholder's secondary action so as to provide that " '[i]n any such action . . . the rules of court do not supersede [the statute].' "[185]

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180 *Id.* at 557.

181 52 N.J. Super. at 295, 145 A.2d at 497.

182 See notes 70-90 and 118-26 *supra* and accompanying text.

183 N.J. STAT. ANN. § 14A:3-6(2) (1969).

184 N.J. STAT. ANN. § 14A:3-6(3) (1969).

185 N.J. STAT. ANN. § 14A:3-6 (1969) (Commissioners' Comment—1968). *See also* provision for allowance of counsel fees to a dissenting stockholder in an action brought

These statutory provisions took effect January 1, 1969. Shortly thereafter, the New Jersey Supreme Court published its new revision of the rules governing practice and procedure in the courts, effective September 8, 1969. The number of the rule affecting a "secondary action by shareholders" was changed to RULE 4:32-5. The rule itself, however, did not include the Commissioners' recommendation. Nor was any reference made to this recommendation in the Reporter's commentary to the new rule.

In the absence of any provision or commentary, we do not know what the supreme court would do today with the purported creation of a new liability for counsel fees under § 14A:3-6(2); whether it would, following the naked precedents of *Otis* and *DeBow*, declare it invalid, or, following the tack of *Mayflower*[186] and later cases, decide it was "exceptional" and controlling. And in the absence of guidance on this subject from the New Jersey Supreme Court, it is not at all clear what a federal district court in New Jersey should do with this statute in a case before it on diversity. If it considered *DeBow* as still controlling, it should, of course, ignore the construction given the prior statute in *Cohen* by the United States Supreme Court, and deny the creation of any liability under the statute on the grounds that in the context of *Erie*, as amplified by *Guaranty Trust*, the matter is "substantive" and controlled by state law, albeit the very matter in the state court is considered "procedural."[187] All in all, *DeBow* is not too happy an opinion. But then *Local 449* had not embodied a happy exception.

A newly constituted court coming across this exception for the first time would, if it were acting in a spirit of moderation and conservatism, likely move to limit the exception and by careful explanation distinguish the reach of its extension, although perhaps declining to overrule it outright. This was the course adopted by the Weintraub court when at last duly formed, it was, in the case of *United States Pipe & Foundry Co. v. Steelworkers, Local 2026*,[188] confronted with the problem of *Local 449*.

Actually, the opinion involved two cases. In the first, an employer-obtained strike injunction was dissolved on appeal by the appellate

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against his corporation to determine the fair value of his shares. N.J. STAT. ANN. §§ 14A:11-8 and 11-10.

186 See notes 158-59 *supra* and accompanying text. For other exceptional cases see notes 150-57 and 161 *supra* and accompanying text. Still other cases will be discussed *infra*.

187 Although the authority of *Guaranty Trust* has been somewhat weakened by the later decision in Hanna v. Plumer, 380 U.S. 460 (1965), it would still seem to be controlling in this case, no federal rule of procedure being involved.

188 37 N.J. 343, 181 A.2d 353 (1962).

division because the trial court had failed to follow certain procedural requirements, such as making its findings promptly after the conclusion of the hearings. Thereupon the union asked for an allowance of counsel fees in reliance on the statute followed in *Local 449*. The supreme court declined to apply the statute. It noted that the appellate division had reversed not on the merits—as to that, that court had considered the injunction justified—but for procedural reasons. Thus the employer had not been responsible for the dissolution. It should not be answerable for counsel fees. The statutory authorization should be confined to a case of reversal and consequent dissolution on the merits.

In the second action, Pipe had brought suit seeking a declaration that the matter of a certain employee's discharge was not within the scope of a provision in its collective bargaining agreement providing for arbitration of a dispute concerning discharge of an employee. It also sought and obtained an order restraining the union and the employee from proceeding in arbitration until the declaratory proceeding had been determined. Eventually, the appellate division determined the matter was arbitrable and dissolved the restraint. The trial court denied a union application for counsel fees and the supreme court affirmed. It held that the matter was not a "labor dispute" within the meaning of the Anti-Injunction Act, whose purpose it was to head off strikes with their accompanying violence and to prevent the use of the injunction as a strike-breaking implement. N.J. STAT. ANN. § 2A:15-53 therefore did not apply. The court expressly refused, however, to accede to Pipe's request that *Local 449* be overruled.

The court's position was this: *Local 449* had established § 2A:15-53 as, in effect, another rule allowing counsel fees. It would accept the statutory policy, examine it, measure its scope and apply it accordingly. More than this, it would not do. The statute would be kept in intelligent isolation.

Such a policy could not, however, work with the other troublesome provisions of the Rule, paragraphs (b) and (c). As to "fund in court" for instance, there were too many precedents to consider, their breadth and meaning uncertain. As for the mortgage foreclosure proceeding, its arrangement was radically out of line: moneylenders without security were able to provide for an allowance in full for counsel fees by pre-existing contractual provision.[189] Why should the posting of security affect the result? These problems were more difficult of solution.

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189 See notes 150-57 *supra* and accompanying text.

Paragraph (b)—"fund in court": The "subject of litigation" Cases—Sunset's Facts and Opinion

Almost the first case with which the Weintraub court became involved in the construction of that troublesome provision, "fund in court," was that of *Sunset Beach Amusement Corp. v. Belk*,[190] decided in 1960. Unfortunately, for a court unused to the subtleties contained in the decisions construing the phrase, this case was tricky. This combination, early and tricky, probably contributed to the unsatisfactory opinion and the court's eventual undoing.

The lower court had granted allowances to all the parties involved out of escrow moneys actually deposited with the court, apparently because the sum had been "the subject of litigation." On review, the supreme court, in a striking departure from precedent, abandoned all reference to "the subject of litigation" formula, choosing instead to formulate a test of its own, to be exclusive thereafter in all "fund in court" cases.

The background is as follows. Sunset and Belk entered into an agreement for the sale of the Sunset Amusement Park to Belk. Belk on signing the contract posted by check the sum of $25,000 in escrow with a title company, and later arranged for the placement of two other checks totaling $225,000, in escrow with the same company.

Following a dispute, Belk demanded a return of the moneys and Sunset filed its complaint, suing for specific performance. The title company in response moved to interplead the sums it was holding in escrow. Its application was granted, the trial court directing it to deposit with the court the check for $25,000 and to hold the remaining checks. After trial, the court entered a judgment for specific performance against Belk, but denied such relief as against a co-defendant Varbalow, who, as Belk's sponsor, had signed the two later checks for $225,000. It further allowed to counsel for the title company a fee of $250 for his services in filing the complaint for interpleader. That allowance was unchallenged and the supreme court later regarded it as correct. On appeal, the supreme court modified the judgment, directing that specific performance be required of Varbalow as well and that he be required to endorse the checks totalling $225,000, thereby enabling the title company to collect them.[191]

Upon remand, Sunset applied, in a proceeding to settle the form

190 33 N.J. 162, 162 A.2d 834 (1960). Actually the first case involving "fund in court" to come before the Weintraub court was the fairly simple one of Leeds & Lippincott Co. v. Nevins, 30 N.J. 281, 153 A.2d 45 (1959), discussed *infra*.

191 31 N.J. 445, 158 A.2d 35 (1960).

of judgment in accordance with the mandate, for an allowance of costs and counsel fees. Thereupon counsel for the title company made application for a further allowance in his favor. And counsel for the defendants, while opposing these applications, moved in the alternative and without prejudice to their main position for an allowance on their behalf as well.

The trial court regarded the sum of $24,750 in the hands of the clerk of the court (the sum remaining after the payment to the title company of its original allowance of $250) as a "fund in court." In its judgment, it provided for the following. It ordered specific performance, directing that the closing proceed pursuant to contract, whereby Sunset would receive the sum of $250,000 plus interest subject to certain named allowances, none of them relating to counsel fees. It directed defendants to pay to Sunset costs, including a "counsel fee of $12,500 which is hereby allowed to said plaintiffs out of the fund in court." Similarly, it directed the defendants to pay to the title company its costs, "including a counsel fee which is hereby allowed to said defendant [title company] out of the fund in court." It then directed these defendants to pay their own attorney their costs, to be "taxed as between attorney and client, including a counsel fee of $2,500 which is hereby allowed to said attorney out of the fund in court." Next, it directed the clerk to pay over the sum of $25,000 theretofore deposited with him, less his commissions but plus accruals of interest, to the title company "for the purpose of making distribution at consummation" of the sale at the closing. Finally, it directed Varbalow to endorse the checks totaling $225,000, held by the title company, for collection and ultimately "for distribution at consummation" of the sale at closing.[192]

But if the defendants were to specifically perform and thereby pay plaintiff the sum of $250,000, and if to effect this payment, the Varbalow checks in the sum of $225,000 and the initial $25,000 check deposited by Belk with the clerk (after deducting the various allowances) were to be used at time of closing, there would still be due and owing at that time the amounts deducted for the allowances. Thus a further payment in those amounts from the defendants to the plaintiff to complete the closing would mean, in effect, that the allowances, while nominally out of the "fund in court," were ultimately coming out of defendant's pockets. And this the judgment realistically contemplated.

This was the judgment, tricky, wrought by judicial *leger-de-main*, from which the defendants appealed, opposing the allowances made.

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192 Judgment of the trial court, set forth in Brief for Defendants-Appellants 19a-23a, 573 BRIEFS OF NEW JERSEY SUPREME COURT.

The appeal was briefed by the parties on the issues of timeliness in the application for the allowances and of excessiveness in the amounts. Sunset noted in its brief, as defendants conceded in their brief, the deposit of $25,000 constituted a "fund in court," citing in support *Katz v. Farber*, and two partition cases.[193] Not surprisingly, the supreme court rejected the approach of the parties and went off on its own course. Deciding that there was no "fund in court" save for the title company in interpleading, the court denied all other allowances. In its reasoning it first referred to what it considered to be the underlying policy of the controlling rule, R.R. 4:55-7: to make each litigant bear the cost of his own suit and to stop the prior practice in chancery which had "proved unduly onerous upon litigants and spawned charges of favoritism."[194] The court then referred to the provisions of paragraph (b) of the Rule and commented upon them as follows:

> "Fund in court" is not too happy a term. It is a shorthand expression intended to embrace certain situations in which equitably allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs. The difficulty with the term is that literally it may connote a fund within the precincts of the court in a physical or geographic sense whereas "in court" refers to the jurisdictional authority of the court to deal with the subject matter. . . . And for that matter, the existence of power in the court to control the subject matter is not itself enough to demonstrate the existence of a "fund in court" within the purpose of the rule. . . .
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> In general, allowances are payable from a "fund" when it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests.[195]

Typical, the court noted, were the situations in *Cintas*[196] (a stockholder's class action), *Koretzky*[197] (a suit to remove an executor), *Ferguson*[198] (a will construction case), and *Otis*[199] (an escheat proceeding). *Farber*, it argued, was not contrary to those views. There, it stated, it had been held that as to the contending sellers there was a "fund in

193 For *Farber*, see notes 97-103 *supra* and accompanying text; for the partition cases, see note 205 *infra*. For briefs of defendants-appellants and of plaintiffs-respondents, see 573 BRIEFS OF NEW JERSEY SUPREME COURT.

194 33 N.J. at 167, 162 A.2d at 837.

195 *Id.* at 168, 162 A.2d at 837.

196 See notes 101-03 and 172 *supra* and accompanying text.

197 See note 108 *supra* and accompanying text.

198 See notes 110-11 *supra* and accompanying text.

199 See notes 70-90 and 118-26 *supra* and accompanying text.

court" but that an allowance to these contenders had been denied "doubtless because the claimants to the fund were acting solely to further their individual interests."[200]

The case before it, the court analyzed to be a simple adversary proceeding with each litigant representing his own interest and no other. This applied to the title company as well, except for its initial act in interpleading for which, and only for which, it was properly awarded a fee of $250. The further allowance of $1,000 was compensation for services rendered in defending against the charge of conversion and as such must be set aside. The title company, like any other adversary, must bear the costs of its own defense. Similarly, the allowances to Sunset Beach and to the defendants were improper and must be set aside.

Sunset: *a critique of its holding.* The opinion in *Sunset* has much to recommend it. It contains a systematic and, in some respects, excellent review of a good number of the Vanderbilt court's decisions, attempting for them what the Vanderbilt court had never attempted, a reasonable and consistent explanation. But valiant and praiseworthy though it may be, the attempt does not succeed. It fails in several respects.

In the first place, it is difficult to justify, insofar as all the litigants are concerned, an action for will construction as one protecting the estate or furthering its proper administration. While this may be true of the fiduciary seeking his instructions, it hardly fits the role of the competing beneficiaries, each of whom, as did Belk and Sunset Beach, merely act to further his individual interests, unless perchance he be a member of a class. Moreover, each such beneficiary would seem to stand in the same relation to the assets of the estate in an action for will construction as did Sunset Beach and Belk to the moneys held in escrow and interpleaded.[201]

Second, the *Sunset* reading of *Farber* cannot be correct, that while there was a "fund in court" an award therein was denied because each of the claimants was acting solely to further his own interests. For if the formula set forth in *Sunset* be the exclusive formula—that for there to be a "fund in court" there must be present in the action a litigant doing something more than merely advancing his own interests —there could be in *Farber* no such "fund."

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200 33 N.J. at 170, 162 A.2d at 838.

201 The court apparently followed here an earlier suggestion in *Blut v. Katz* (see notes 136-38 *supra* and accompanying text) despite the explicit statement in *Cintas* that the award in such an action was based on the estate being in the control of the court and the subject matter thereof (see note 111 *supra*).

The difficulty disappears if we return to *Farber* itself. There it was said: "There may be such a fund when the money is actually in the custody of the court and is the subject of the litigation."[202] *Farber* kept separate the cases involving an administration of a trust, including the accounting of a decedent's estate; the cases involving a fund for the benefit of a class, as in *Cintas*; and the cases involving moneys actually in the custody of the court, the subject of litigation. And although the *Sunset* opinion omitted any reference to this last type of case, it was exactly that type which the court in *Farber* considered the case before it to be:

> In the instant case the Court of Chancery had no fund in court so long as the wife's interest was actually a right of inchoate dower in real estate. But the parties by consent deposited moneys in court "subject to the rules" of the court there to remain until disposal of the same by order of the court upon appropriate application by the defendants or either of them. *The money was not only in the custody of the court, it was the subject of the pending litigation. We regard the deposit as a fund in court against which an allowance for counsel fee could be made in the discretion of the court in proper instance.* The trial court had jurisdiction; but upon the merits of the application the allowance should have been, as it was, denied.[203]

The best explanation for *Farber* is that Mrs. Farber was denied her application because on the merits she had lost the case.

From this, the third failure in the *Sunset* reading of the various precedents will be evident: the lack therein of any reference to the formula advance in *Caltagirone* that "Money . . . actually in the custody of the court . . . the subject of litigation" also constitutes a "fund in court." And finally, the ultimate failure, the determination that all the precedents could be reconciled and summarized under the single formula that the litigant, to be rewarded, must have been advancing more than his own interest.

Yet it must be said that for all these failures the actual decision in *Sunset* seems almost correct. Disregarding the misunderstandings in its opinion, let us examine its facts in the light of the precedents as we have stated them. If *Farber* was to be followed and applied, not rewritten, this would take care of defendants. They were unsuccessful and cannot get an allowance.

Sunset, though the successful party, stands in no better position. As we have already pointed out, escrow moneys paid into court and

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202 4 N.J. at 344-45, 72 A.2d at 868.

203 *Id.* at 344-45, 72 A.2d at 868 (emphasis added).

the subject of the interpleader—the check of the defendants to the plaintiff in the sum of $25,000 in down payment—had been determined by the trial court to have been the property of the plaintiff. Thus, while according to the formula in *Caltagirone*, the moneys did constitute a "fund in court," this could not help Sunset. For an award from such a fund would be a draft on its own resources. And to arrange, by a subsequent order, that defendants make good at the closing the depletion in the deposit, amounts to a direction that the allowances be paid not out of the "fund" but out of the defendants' own pockets. It is a variation on the theme of *Long v. Mertz* and *Blut v. Katz*.[204]

The trial court's allowance to the title company, while seeming to rest on different grounds, is also in no better position. The moneys which it had deposited in court following its interpleader were, it is true, the subject of its litigation with both the plaintiff and the defendants. Hence, under *Caltagirone*, they would seem to constitute a "fund in court." Moreover, to a limited extent, the extent open to an interpleading party, the title company had been successful. It had avoided a judgment for liability (the defendants had charged it with conversion) and relieved itself of any further responsibility for the disposal of the escrow moneys. And unlike the plaintiffs who had been successful in the main case, the title company did not own the "fund"; thus it was available as a source of payment for its counsel fees. There is also an apparently plausible ground in policy supporting an allowance in its favor. To encourage the faithful performance of the fiduciary duties of an escrow agent at reasonable rates, to confine the expense of defending disputes arising from the performance of these duties to the controversies in which they arise, the expense of a successful defense against a charge of misconduct should, as in the case of the administration of an estate or trust, be paid out of the assets served. But a closer examination will dispose of this argument.

In the case of an estate or trust, the initiative for its establishment rests with the testator or settler; if there be an allowance, it is his property which bears the burden. And this is appropriate, since it was his disposition which gave rise to the controversy. In the case of the escrow agreement, while the initiative for its establishment rests with the parties served, the property involved belongs either to the one or the other, depending upon the outcome of the case. To make an allowance out of the property of the winner, though not at fault, would be inappropriate. The burden of counsel fees, however, cannot be placed upon the loser without directing that they be paid, not out of the "fund" but

204 See notes 136-38 *supra* and accompanying text.

out of his pocket. And it makes no difference whether one confines the allowance to the services rendered in filing the interpleader or extend it to the services rendered during the entire conduct of the cause. Limited or not, the award must come out of the loser's pocket to spare the winner's right to the "fund."

If so, then the formula of *Caltagirone* should not apply, because in a case of this kind it would lead to absurdity, whether the allowance be for the winner or loser or the man in the middle, the interpleader. This then is the proper reading of the *Sunset* facts in the light of the pre-*Sunset* precedents.[205] It is a very cautious exercise. It holds merely that neither *Caltagirone* nor *Farber* applies. It overrules nothing; it abandons nothing. It accomplishes little: the proper adjudication of its own case without the upset of precedent.

And with this, we come to the real significance of *Sunset*, the substantial harm it involved. The light it shed on *Farber* and *Ferguson* is uncertain; its abandonment of *Caltagirone* unnecessary; the development of its own formula in replacement of all that went before it hasty and premature; and its application to the facts of the case at hand uneven. For surely the title company was merely advancing its own interests in filing for interpleader, to escape the possibility of two inconsistent judgments against it. And surely the allowance the supreme court affirmed came not out of the "fund in court," but out of the pockets of the losing party. Indeed, it can be said that after *Sunset* we, if not the court, are left in an enveloping darkness.

The method of Sunset. *Sunset* in its methodology, it must be said for the court, did represent a substantial break with the past. In this lies its importance. The court was trying to make the law of counsel

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205 Two partition cases had been decided before *Sunset* and had been cited in Sunset's brief in support of its position that there had been a "fund" before the trial court: Baird v. Moore, 50 N.J. Super. 156, 141 A.2d 324 (App. Div. 1958) and Lipin v. Ziff, 53 N.J. Super. 443, 147 A.2d 601 (Ch. 1959). Following *Caltagirone*, these cases had found a "fund" since moneys actually in the custody of the court were in such an action the subject of litigation. Prior to the adoption of the rule on counsel fees, an award in a partition action had been specifically authorized under N.J. STAT. ANN. § 2:71-46 (Law of June 14, 1898, ch. 230, § 26, [1898] N.J. Laws 653 (repealed 1951)), but this enactment was repealed by the supreme court when in December, 1950, it amended the Rule by deleting the phrase, "by law", in paragraph (d). The statute was formally repealed by the legislature when its provisions were not carried over into Title 2A.

In the *Lipin* case, however, while the court held there was a "fund" because it was the subject of litigation, it limited an allowance to the plaintiff only for those services rendered for all the parties, thus anticipating the holding in *Sunset*. Of course, partition is not always a benefit for all the parties concerned. Should, after *Sunset*, a trial court examine all the circumstances of the case or should it deem there to be benefit in any case? In any case hereafter, in view of *Sunset*, a trial court should not find a "fund" simply because the action made the property the subject of litigation.

fees readily understandable in reasonable terms. For better or for worse, the court under its new chief justice was committed to explanation. To use the language of Dicey, it was aiming "at the maintenance of the logic or symmetry of the law."[206]

But unfortunately for the court, it had in *Sunset* attempted too much. The law of "fund in court" and of counsel fees in general was far more complicated than it supposed, the needs it served much larger than could be embraced in the single, narrow test it had wrought. And with its logical conscience, its devotion to symmetry and care for consistency, the court will shortly be brought to the point of dissension and division. This impending quarrel could have been avoided had the court in *Sunset*, intent upon analysis and reconciliation of the precedents, been faithful to all the precedents, those following *Caltagirone* as well as those following *Cintas*, or, expressly considering the former, overruled them.

Even so, some kind of trouble was probably inevitable. If *Sunset* has unwittingly aggravated the problem of "fund in court" allowances, it had not created it. The Weintraub court, with its trust in reason, was laboring on a pile of unreason. It did not know what it was getting into. New to the subject of counsel fees, it was working on certain assumptions: that the rule on counsel fees was a simple matter of practice and procedure (that it could be a matter of substantive law and the law of remedy had probably at that stage not entered its collective head); that, while severe in its prohibitions, it had worked well in practice; that the provision "fund in court," while "not too happy a term," could readily, as in *Sunset*, be refashioned so as to do an adequate job; that, on the whole, the problem was routine and incidental and with the use of a little intelligence and consistency it could be disposed of readily for good.

But such assumptions, as has been shown, were erroneous. The rule on counsel fees purported to be systematic: a codification of the various interests to be protected and unprotected from the burden of litigation. As such, it constituted a drastic prospective incursion upon these areas of substantive law and remedy. In fact, it did not reflect any systematic point of view. The Vanderbilt court apparently had never conducted a thorough study of the subject. It was quite a trick: to produce a systematic rule in the absence of a systematic study.

To protect itself against this structural weakness, the Vanderbilt court had taken refuge in certain devices. It explained as little as possible. Leaving the term "fund in court" vague, it permitted itself a case-

206 See note 94 *supra*.

to-case flexibility akin to the common law method in affording and modifying remedies. In operation, the Rule, by remaining vague and little defined, could constitute the source for affording a remedy, continuing thereby to be somewhat workable in an area inherently remedial. For the Vanderbilt court, the words "fund in court" were a very happy term.

Eliminate this tempering flexibility, apply the Rule in all consistency as though it were a rule, specific and good for all the occasions it purported to cover; as though it were a rule of *procedure*, instead of a rule controlling in advance the determination in every case of interests to be protected and policies to be selected or rejected. The results will be patently chaotic, erratic and confusing.

Since there was no underlying plan to the rule on counsel fees, the Weintraub court, coming to the task of its construction, with minds trained in the law, with a conscience for clarity and logical consistency, could only uncover for itself trouble: not a plan, but the buried skeletons of its predecessors in office. Let us now watch the trouble building in the following cases.

EDITORIAL NOTE: This ends part one of a two-part article. Part two will appear in volume 4, no. 2.