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LACK OF JURISDICTION OF THE SUBJECT MATTER IN THE NEW JERSEY COURTS: APPLICATION OF N.J.R. 1:13-4, THE TRANSFER OF CAUSES RULE

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INTRODUCTION

It is generally stated as a principle of American law that every act of a court lacking jurisdiction over the subject matter of a case is a nullity, including the eventual judgment.[1] Nor is the fundamental impotency overcome by consent of the parties.[2]

This rule has come under scrutiny in recent years. The late Professor Edson R. Sunderland subjected its application within a state court system to a withering attack.[3] While its application in

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[1] *See, e.g.*, Oil Well Supply Co. v. Superior Court, 9 Cal. App. 2d 624, 626, 51 P.2d 908, 908 (Dist. Ct. App. 1935); Gill v. Lynch, 367 Ill. 203, 208, 10 N.E.2d 812, 814 (1937); State *ex rel.* Hall v. Hall, 153 Ore. 127, 129, 55 P.2d 1102, 1103 (1936); Perkins v. Hall, 123 W. Va. 707, 711, 17 S.E.2d 795, 799 (1941).

[2] *See, e.g.*, American Fire & Gas. Co. v. Finn, 341 U.S. 6, 17-18 (1951); McLain v. Brewington, 138 Ark. 157, 161, 211 S.W. 174, 175 (1919); Dudley v. Mayhew, 3 Comst. 9, 12 (N.Y. 1849). Jurisdiction over the subject matter is, of course, to be distinguished from jurisdiction over the person which can be conferred by consent.

[3] Sunderland, *Problems Connected with the Operation of a State Court System*, 1950 WIS. L. REV. 585, 585-89. After stating the general principle regarding lack of subject matter jurisdiction, Professor Sunderland observed:

> Most of the states, however, have done nothing to ameliorate the absurd and frightful consequences flowing from a want of jurisdiction over the subject-matter. The concept of jurisdiction has assumed an almost superstitious significance, and want of jurisdiction has become a judicial taboo. There must be no trifling with its sinister power. Economic advantage, social benefit, convenience—all these count for nothing in the face of its devastating logic. An act done without jurisdiction is no act at all, an absolute nullity. Orders made without jurisdiction are merely blank paper. They cannot be vitalized by any subsequent act, for you cannot make something out

the federal system has been defended,[4] it has also been criticized when invoked by an appellate court on its own motion.[5]

The origin of the rule is said to have been based in reasons of state—the determination of the common law courts representing the Crown to restrict the competence of Church courts and to wrest control of the administration of justice from the courts of the local magnates. A decline in an earlier practice of finding jurisdic-

of nothing. The vocabulary of negation has been exhausted in describing proceedings without or in excess of jurisdiction.

> The real difficulty is that want of jurisdiction in any case has been treated as though it were due to the fault of the litigating parties. They were presumed to know the law, and they failed to observe its rules. Therefore, they should take the consequences, and if the penalty is severe it will perhaps teach them to be more circumspect next time. But one who looks more deeply might well inquire whether the real fault is not with the state which forces the litigant to face a jurisdictional dilemma which never ought to exist. The courts are established to render service, but every obstacle placed in the path of those wishing to use them diminishes their value to the public which they serve.

Id. at 588. *See also* Dobbs, *The Decline of Jurisdiction by Consent,* 40 N.C.L. REV. 49 (1961).

[4] C. WRIGHT, LAW OF FEDERAL COURTS § 7 (2d ed. 1970), in which the conceptual argument for the rule is stated but not personally endorsed. Unlike the state courts with general jurisdictional power, the Constitution created federal courts of limited jurisdiction. Professor Wright notes that an action in a federal court without subject matter jurisdiction would have to be dismissed

> [b]ecause of this unusual nature of the federal courts, and because it would not be simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction . . . .

Id. at 15. However, Professor Wright further remarks upon allowing jurisdictional defects to interfere with an otherwise proper and just disposition on the merits:

> Such a harsh rule could hardly be defended as a sensible regulation of procedure, and can only be justified by the delicate problems of federal-state relations that are involved.

Id. at 16 (footnote omitted).

[5] 1 J. MOORE, FEDERAL PRACTICE ¶ 0.60[4], at 610-11 (2d ed. rev. 1974). Professor Moore in criticizing a strict application of the traditional jurisdiction rule stated: "Such doctrines, however, do not increase respect for judicial administration, and are not necessary for the preservation of the proper distribution of judicial power." *Id.* at 611. *See also* Morse, *Judicial Self-Denial and Judicial Activism—The Personality of the Original Jurisdiction of the Federal District Courts* (pts. 1 & 2), 3 CLEV.-MAR. L. REV. 101 (1954), 4 CLEV.-MAR. L. REV. 7 (1955).

A few federal courts, however, have taken a more flexible approach to the issue of subject matter jurisdiction. For example, in Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960), it was held that a defendant could not claim lack of jurisdiction where it had previously stipulated the existence of necessary jurisdictional facts. The defendant raised the jurisdiction question only after the statute of limitations had expired. The Third Circuit would not allow the defendant to "play fast and loose with the judicial machinery and deceive the courts." *Id.* at 144.

Di Frischia has been given theoretical support in Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment,* 51 MINN. L. REV. 491, 504-09 (1967).

For federal district court treatment of the issue on grounds which would constitute estoppel see Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252, 254-55 (W.D. Pa. 1958), supported by Stephens, *Estoppel to Deny Federal Jurisdiction—Klee and Di Frischia Break Ground,* 68 DICK. L. REV. 39, 40-43 (1963). *See also* Young v. Handwork, 179 F.2d 70, 72–73 (7th Cir. 1949), *cert. denied,* 339 U.S. 949 (1950); Kreger v. Ryan Bros., 308 F. Supp. 727, 728–29 (W.D. Pa. 1970).

tion in consent was one of the consequences of this constitutional struggle for power.[6] Thereafter, in this country, the influence of federal precedents and Judge Cooley's formulation of the rule, based in large part on the federal precedents, proved decisive.[7]

Insofar as state practice was concerned, Professor Sunderland summarized the difficulties.[8] Jurisdiction is based on various distinctions spread among various courts. There are separate courts for cases of large and small amounts with an arbitrary dollar division between them. Among the trial courts, there are separate probate courts and family courts, and courts for causes arising in certain localities. There are courts which may handle equity matters and others which may not. There are municipal courts. Finally, there are courts of review. Jurisdiction is sometimes exclusive, sometimes concurrent. And the lines of legislative demarcation as to jurisdiction are not always clear and are from time to time shifted by amendment or judicial construction. Yet an error in assignment of a case proves fatal; the parties must begin again in the proper court.[9]

Professor Sunderland considered the remedy for this ill to lie in the adoption of a general rule of construction whereby the various statutory provisions for the distribution of judicial business would be considered directory rather than mandatory.[10] This result might be achieved chiefly by the transfer of any case during the proceedings to the proper court "with no loss to the proceedings already had" and, if the mistake had not been discovered until after the judgment, by the validation of that judgment.[11] He per-

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[6] Dobbs, *supra* note 3, at 54–66. *See also* D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE, STATE AND FEDERAL 487-88 (3d ed. 1973) [hereinafter cited as LOUISELL & HAZARD].

[7] *See* LOUISELL & HAZARD, *supra* note 6, at 488-90. The eminent 19th century jurist and legal commentator, Thomas McIntyre Cooley, set forth the consequences of lack of subject matter jurisdiction:

> A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 846 (8th ed. 1927). While Judge Cooley's formulation of the rule became firmly entrenched in American jurisprudence, it has been characterized as "a loose reading of the precedents." LOUISELL & HAZARD, *supra* note 6, at 488.

[8] Sunderland, *supra* note 3, at 585-86.

[9] *Id.*

[10] *Id.* at 586.

[11] *Id.*

ceived this remedy in New Jersey's adoption in 1912 of a statute designed to promote such transfers and accordingly known as the "Transfer of Causes Act."[12]

It will be the purpose of this article to study the law of New Jersey since the enactment of the 1912 statute to discover what effect the Act and its subsequent amendments and successor rules of court, as construed by the courts have had upon the basic principle of invalidity attaching to the judgment of a court lacking jurisdiction over the subject matter. Our study will be complicated by two factors. First, the 1947 constitution of the State of New Jersey made significant changes in the state's judicial system. Second, that constitution conferred upon the New Jersey supreme court the power to make rules regarding practice and procedure;[13] and that court, pursuant to such power, did, after some hesitation, incorporate the basic provisions of the 1912 statute, as amended and supplemented, in a rule of court. For the sake of clarity, we will first briefly consider the development of the law under the old court system from the adoption of the original enactment in 1912 until September 1948, at which time that court system was terminated by the new constitution,[14] and then the various changes made under the new court system during the transitional period of 1948 through 1954. Finally, we shall examine the law as it has developed thereafter.

PRACTICE UNDER THE OLD SYSTEM

Prior to 1948, New Jersey's judicial system was a maze of courts and jurisdictions. There were separate trial courts at law, equity and probate: the supreme court and the circuit court for law; the court of chancery for equity; and the prerogative court for

[12] *Id.* at 587-88. The statute was Law of March 28, 1912, ch. 233, §§ 1-4, [1912] N.J. Laws 417.

[13] N.J. CONST. art. 6, § 2, ¶ 3; *id.* art. 11, § 4, ¶ 5. This article will not consider the question as to whether provision for the transfer of causes is a matter for the exercise of the judicial rulemaking power governing practice and procedure in the courts. In 1912, it was obviously considered a matter for legislative action. In 1952 the statute was repealed. *See* note 53 *infra.* This left the field clear for judicial action. The Transfer of Causes Rule not only affects jurisdiction of the subject matter in the courts, but also the operation of the various statutes of limitation, which traditionally are matters considered to be within the competence of the legislature—not the courts. *Quaere*: Are these matters of practice and procedure?

[14] On September 15, 1948, the Judicial Article of the 1947 constitution went into effect. N.J. CONST. art. 11, § 4, ¶ 14. This abolished the old court of errors and appeals, the supreme court, the court of chancery, the prerogative court, and the circuit courts. The jurisdictional power of these courts was transferred to the new supreme court and superior court. *Id.* ¶ 3.

probate. The supreme court also had an intermediate appellate jurisdiction in actions at law. Furthermore, each county had separate courts of civil (law and probate) and criminal jurisdiction: the court of common pleas, the orphans' court, the court of oyer and terminer, the court of quarter sessions, the court of special sessions, and the surrogate's court. There were, in addition, the inferior courts: the county district court in each county for the trial of actions at law involving ordinary matters of limited amount; the juvenile and domestic relations court in some of the counties; and, among others, the municipal court in the various municipalities. Overall, there was a court of final review—the court of errors and appeals.[15] The origin and jurisdictional basis of many of the courts lay in colonial practice and ultimately in English precedent.[16] Their antiquity was such as to induce the following observation from D.W. Brogan, the eminent authority on both English and American political and governmental institutions:

> [I]f you want to see the old common law in all its picturesque formality, with its fictions and its fads, its delays and uncertainties, the place to look for them is not London, not in the Modern Gothic of the Law Courts in the Strand, but in New Jersey. Dickens, or any other law-reformer of a century ago, would feel more at home in Trenton than in London, where, despite the survival of wigs and miniver and maces, the law has been modernized, simplified, made more rapid and efficient; in fact, everything that is desirable except cheap.[17]

A spirited effort to simplify this multiplicity, embodied in a proposal to amend the constitution of 1844 by merging the various statewide trial courts into one court and the various county courts in each county into one county court, failed at the polls in 1909.[18]

[15] Harrison, *New Jersey's New Court System*, 2 RUTGERS L. REV. 60, 64-71 (1948); McConnell, *A Brief History of the New Jersey Courts*, 1 N.J. DIGEST 349, 352-53 (West 1954). The constitutional courts of the old system are listed in N.J. CONST. art. 6, § 1 (1844).

[16] Harrison, *supra* note 15, at 64-65.

[17] D.W. BROGAN, THE ENGLISH PEOPLE, IMPRESSIONS AND OBSERVATIONS 108 (1943), quoted in FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY 42 (J. Boyd ed. 1964).

[18] For text of the proposed amendment see N.J. Senate Con. Res. No. 1 (introduced Jan. 18, 1909) [hereinafter cited as S.C.R. No. 1]. The proposed amendment would have abolished the existing court structure, replacing it with a system similar to that established by the 1947 constitution. Notably, the proposed amendment would have merged the separate courts of law and equity. *Id.* at 5. The proposal was supported by the incumbent governor. Address by Governor Fort, Meeting of the N.J. Bar Association, June 11, 1909, reprinted in 32 N.J.L.J. 197-99 (1909). Nevertheless, this and other constitutional amendments were defeated "by a large majority" in a special election on September 14, 1909. *Editorial Notes*, 32 N.J.L.J. 257 (1909).

The 1909 effort to reform the court system was only one of a long series of such attempts. For an overview of this topic see Erdman, *The Movement for Judicial Reorganization*,

Following that, a second best result was achieved in the enactment in 1912 of the "Transfer of Causes Act."[19] This statute provided that no civil cause pending in the court of chancery, the supreme court, or the circuit court, which were courts of statewide jurisdiction, or in the courts of common pleas, which were county courts, was to be dismissed for want of jurisdiction over the subject matter, but was to be transferred with its record

> for hearing and determination to the proper court, which shall thereupon proceed therein, as if the cause or matter had been originally commenced in that court.[20]

The original statute was thus limited in its scope. Not only did it pertain to only a few of the many courts of original jurisdiction in the state system, but also did not confer power to transfer upon the appellate courts. Thus, while an erroneous order of transfer might be the subject of an appeal for reversal, an erroneous retention of jurisdiction could only lead to a futile trial on the merits followed by an appeal and a subsequent reversal for lack of jurisdiction in the trial court, since in the latter case the usual American rule would apply—a judgment of a court lacking such jurisdiction is void and subject to reversal on appeal. To remedy this defect and to broaden the scope of the Act, it was amended in 1915 to provide that

> [s]uch transfer may be made at any stage of the proceedings . . . and upon an appeal being taken in any such cause that had not been so transferred the appellate court may . . . hear and decide such appeal and direct the appropriate decree or judgment . . .

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3 N.J. BAR Q. 304 (1936). Proposed amendments to revamp the courts were passed by one or both houses of the legislature nineteen times between 1880 and 1935. *Id.* at 304. On three occasions, in 1890, 1903, and 1909, proposed constitutional amendments failed at the polls. *Id.* at 308, 311-12, 315-17. The thrust of the reform movement was to create an independent court of errors and appeals, to merge law and equity, and to otherwise simplify the jurisdictional maze of the court system. *Id.* at 318. The attempts to reorganize the court system failed at the special elections because of the low voter turn-out, opposition to unrelated proposals at the same special elections, and purely partisan politics. There was no disagreement that the court system was in need of fundamental reform. *Id.* at 308, 311-12, 315-17.

[19] Law of March 28, 1912, ch. 233, §§ 1-4, [1912] N.J. Laws 417.

[20] *Id.* § 1. The origin of this enactment may be found in a provision of the defeated 1909 proposal to amend the constitution of 1844. The proposal would have amended article VI, creating a new supreme court with an appellate division, a law division, and a chancery division. S.C.R. No. 1, *supra* note 18, at 2. The proposal also would have allowed the newly created supreme court to

> provide by rule for the transfer of any cause or issue from the Law Division to the Chancery Division, or from the Chancery Division to the Law Division of the Supreme Court . . . and for the giving of complete legal and equitable relief in any cause in the court or division where it may be pending.

Id. at 5.

to be entered in the court to which such cause ought to have been transferred.[21]

In 1936 the scope of the statute was again extended, this time to apply to additional courts of original jurisdiction, the county district court, the court of oyer and terminer, the court of quarter sessions, and the court of special sessions; and to authorize the transfer of a cause for lack of jurisdiction "either in the original suit or on appeal."[22] In the general revision of the laws made in 1937, this Act with its amendments became N.J. REV. STAT. §§ 2:26–60 to –65, and as such became the basic referent until its repeal on January 1, 1952.[23]

Before considering the further changes made after the adoption of the 1947 constitution, it would be well to pause and state what the basic statutory scheme provided and how the courts utilized its provisions to accomplish its purposes. The first provision, that prescribing a transfer from one trial court to another, presented no problems. Operating as a procedural device, it authorized the clerk of the court lacking jurisdiction to forward the papers to the clerk of the court having jurisdiction. Thus such a transfer between trial courts was permitted, even though the statute of limitations had run before the date of transfer, as long as the action had been timely—though mistakenly—commenced in the transferring court.[24] Further, it was held that process issued in

[21] Law of Feb. 24, 1915, ch. 13, § 2, [1915] N.J. Laws 39. This statute, approved on the 24th of February, 1915, was probably inspired by the appeal in Thropp v. Public Serv. Elec. Co., 84 N.J. Eq. 144, 93 A. 693 (Ct. Err. & App. 1915), argued December 7, 1914, but decided on March 1, 1915 without reference to the amendment. The court reversed an order of injunction for lack of jurisdiction in chancery, there being an adequate remedy at law, and remanded with a direction to transfer the action to the law courts. *Id.* at 147, 93 A. at 694.

[22] Law of June 22, 1936, ch. 163, §§ 1-3, [1936] N.J. Laws 386. This amendment was the first time that provision was made for transfer in a criminal case. Of the four courts added by the 1936 amendment, three had criminal jurisdiction—the court of oyer and terminer, the court of quarter sessions, and the court of special sessions. To extend the act to criminal causes it was also necessary to amend section one. The original 1912 enactment had provided for transfer of any "civil cause or matter." The 1936 amendment simply deleted the limitation of "civil." *Id.* § 1.

[23] Law of Dec. 5, 1951, ch. 344, §§ 1-12, [1951] N.J. Laws 1453-55. In 1951 the legislature completely revised title 2 of the 1937 statutes dealing with the administration of criminal and civil justice. Chapter 344 constituted the entire revision, designated title 2A. *Id.* § 1, at 1453. Section 4 was the repeal of old title 2. The Transfer of Causes Act, not included in the revised title 2A, was consequently repealed.

[24] Carey v. Brown, 92 N.J. Eq. 497, 499, 113 A. 499, 500-01 (Ch. 1921) (dictum). *But cf.* Thomas v. Flanagan, 99 N.J. Eq. 717, 719, 134 A. 298, 298-99 (Ch. 1926), in which it was held that a case could not be transferred from chancery to law after the statute of limitations had run because it had not been brought "mistakenly" in the chancery court. As to the operation of the Transfer of Causes Act on the statutes of limitations see note 13 *supra*.

the transferring court, such as a writ of attachment, would be honored in the transferee court.[25]

When, however, we consider the second provision of the Act —that enabling an appellate court in its discretion, failing a transfer in the court of original trial jurisdiction, to hear and determine the appeal on the merits and transfer on remand—we come to a more complicated matter. Of course there is no problem where the appellate court, apprised of the jurisdictional deficiency of the lower court, elects not to determine the appeal on the merits but simply to vacate the judgment below for lack of jurisdiction, remanding to the proper court for a new trial. In that event, the statute, so construed, operates again as a procedural device, affecting the forwarding and receiving of papers.

The statute, however, contemplated more than that. By enabling the appellate court to hear and determine the case on the merits and to remand to the proper court, it envisioned the validation of the proceedings of the trial court, including its judgment, even though it lacked jurisdiction. This is most apparent in the case of a reversal whether coupled with an order for a new trial or for the entry of a judgment opposite to the one originally determined. In form, the judgment is that of the transferee court; in substance, it is that of the transferring court which lacks the power to enter it. The process is of course fictional, but one implicit in the statutory provisions. Through this fiction, it would be possible to say that New Jersey maintains the usual American rule that the judgment of a court lacking jurisdiction over the subject matter is void—but upon transfer such a judgment may be validated. A similar problem is raised under the initial provision of the statute, by which transfer is sought from a trial court after a hearing and determination in that court. In such a case a transfer, involving the direction to enter judgment in the transferee court, would be more than a matter of practice and procedure. At issue would be the validation of acts of a court lacking the power to enter them.[26]

[25] Vaux v. Vaux, 115 N.J. Eq. 586, 588, 172 A. 68, 69 (Ch. 1934). The court emphatically stated:

> The Transfer of Causes act gives to the court in which the suit is begun, jurisdiction of the action for the purpose of the transfer. The process which brings the defendant into the first court is given the same validity for that purpose, at least, as if the court had full jurisdiction of the cause of action; and so upon the transfer, the second court has jurisdiction over his person without further process.

Id.

[26] Such a possibility, however, was contemplated in the 1915 and 1936 amendments. *See* notes 21-22 *supra* and accompanying text. The 1937 codification provided: "A cause or matter may be transferred under authority of this article at *any* stage of the proceedings therein." N.J. REV. STAT. § 2:26-62 (1937) (emphasis added).

The courts under the old practice generally chose not to become involved in these problems. Where the separate statewide courts of law and equity were involved, the constitutional right to trial by jury obtruded. So the former court of chancery, deciding after a trial on the merits that the petitioner must fail because he had an adequate remedy at law, would order transfer to law so the parties might have their trial by jury.[27] And the court of errors and appeals, reversing a chancery decree for money damages for want of equitable jurisdiction had, instead of deciding the case on its merits, ordered the cause transferred to a court of law for trial.[28]

Indeed, judicial conservatism under the former system was such that it was held improper for a law court, when faced with an equitable defense to a legal claim, to transfer the cause to the court of chancery for the purpose of trying this defense. Instead, as before, the case must proceed piecemeal.[29] The Act, it was held, did not apply: the court of law did have jurisdiction to hear the claim; its lack pertained only to the trial of the issue.[30] The statute did not deal in such nuances.[31]

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[27] Scerbak v. Lane, 102 N.J. Eq. 497, 501-02, 141 A. 582, 583-84 (Ch. 1928). This case involved the transfer of a cause which had begun as an action at law on a promissory note. In the course of the trial, the law judge perceived the case as being one for the court of chancery. *Id.* at 499-501, 141 A. at 583. The obligors contended that they were "ignorant and illiterate" and did not understand the nature of the instrument they had signed. *Id.* at 500, 141 A. at 583. In ordering the return of the case to the law courts, the vice-chancellor stated:

> It seems to me, in the first place, that the law court had jurisdiction, and that there was no specific ground of exclusive equitable jurisdiction involved. That being so, [the transfer from law] was erroneous, because it is only where a case is pending in a court that has no *jurisdiction* that the Transfer of Causes act applies, and permits the transfer to another court which has jurisdiction.

Id. at 501, 141 A. at 583 (emphasis in original). Since there was no basis for exclusive equitable relief, there was an adequate remedy at law. The effect of ignorance or misrepresentations on the obligation of the note raised "a jury question . . . which should be determined in the court of law." *Id.* at 502, 141 A. at 584.

[28] F. W. Horstmann Co. v. Rothfuss, 128 N.J. Eq. 168, 171, 15 A.2d 623, 625 (Ct. Err. & App. 1940). *See also* Stein v. Elizabeth Trust Co., 131 N.J. Eq. 35, 36, 22 A.2d 872, 874 (Ct. Err. & App. 1941), in which after reversal of a chancery decree for want of equitable jurisdiction, the suit had been transferred to the supreme court for trial at law.

[29] Thus, for example, an unsuccessful defendant in a contract action in a law court could apply to the court of chancery for equitable relief by way of reformation of the contract. *See* Commercial Union Assurance Co. v. New Jersey Rubber Co., 64 N.J. Eq. 338, 343-44, 51 A. 451, 453 (Ct. Err. & App. 1902). Similarly, a plaintiff who had lost at law in a contract action was not barred from seeking reformation of the contract in chancery. *See* Knight v. Electric Household Util. Corp., 133 N.J. Eq. 87, 91-92, 30 A.2d 585, 587-88 (Ch. 1943), *aff'd*, 134 N.J. Eq. 542, 36 A.2d 201 (Ct. Err. & App. 1944).

[30] Curran v. Carroll, 101 N.J.L. 329, 333, 128 A. 164, 165 (Ct. Err. & App. 1925); Hunt v. Gorenberg, 9 N.J. Misc. 463, 473-74, 155 A. 881, 886 (Sup. Ct. 1930); *cf.* Scerbak v. Lane, 102 N.J. Eq. 497, 501, 141 A. 582, 583 (Ch. 1928).

[31] Transfer for lack of jurisdiction of an issue had been included in the 1909 proposal to amend the 1844 constitution. *See* note 20 *supra*.

Thus before the merger of law and equity in 1948, the Act was limited in its scope. It did not apply to all courts. It did not affect the transfer of causes where the trial of only certain issues was beyond the jurisdiction of the court. And although the Act did provide for the appellate validation of the proceedings heard in a trial court lacking jurisdiction, it was not so applied, usually out of consideration for the constitutional requirements of trial by jury.

A more thoroughgoing reform would have to await the advent of a new judicial attitude. This came with the adoption of the 1947 constitution with its complete revision of the judicial system.

TRANSITION UNDER THE 1947 CONSTITUTION

Under the 1947 constitution, the superior court was created—a court of original statewide jurisdiction in matters of law, equity, and probate, having the powers of the former supreme court, the circuit court, the court of chancery, and the prerogative court.[32] The superior court was divided into two trial divisions, law and chancery, each, subject to rules of court, exercising the powers of the other when justice so required, granting "legal and equitable relief . . . in any cause so that all matters in controversy between the parties may be completely determined."[33] With this merger of law and equity in the superior court, the principal reform attempted in the 1909 proposal to amend the constitution of 1844 was at last accomplished.[34]

Pursuant to the 1947 constitutional mandate, a rule of court provided that all actions, maintainable under the former practice in the court of chancery or in the prerogative court, should thereafter be brought in the chancery division; all other actions in the superior court were to be maintained in the law division.[35] The rules further provided for the transfer from one division to another in the event of improper placement.[36] It was early recognized that such a transfer was to be effected under the rules of

[32] N.J. CONST. art. 11, § 4, ¶¶ 3, 8, 10; *id.* art. 6, § 3.

[33] *Id.* art. 6, § 3, ¶¶ 3, 4.

[34] *See* note 18 *supra.*

[35] N.J.R. 3:40-2 (1948). This rule has been maintained through both of the major revisions of the court rules. The rule was retained in the 1953 revision in N.J.R.R. 4:41-2 and became N.J.R. 4:3-1(a)(1) in the 1969 revision.

[36] N.J.R. 3:40-3 (1948). This rule was also substantially continued throughout the rule revisions. It became N.J.R.R. 4:41-3 (1953) and in 1969, with some modification, N.J.R. 4:3-1(a)(2). For a recent case applying the divisional transfer rule and discussing its underlying policies see Government Employees Ins. Co. v. Butler, 128 N.J. Super. 492, 494-97, 320 A.2d 515, 517-18 (Ch. 1974).

court. The Transfer of Causes Act was not to be invoked, inasmuch as that statute applied not to divisional transfer, but to court transfer.[37]

Practice in the county courts had also been simplified. The 1947 constitution provided for one county court in each county, having the jurisdiction formerly exercised by the separate courts of common pleas, orphans' court, court of oyer and terminer, court of quarter sessions and court of special sessions.[38] Nevertheless, there still remained 21 separate county courts as well as the various "inferior courts of limited jurisdiction":[39] the juvenile and domestic relations court, the county district court, and the municipal court, among others.[40] The basic reason for the enactment of the Transfer of Causes Act in 1912 may have been eliminated, but in view of the considerable number of courts of separate jurisdiction, it continued to have purpose.

Accordingly, early in 1949, the Act was used to effect the transfer of a local action, brought in the county court of a county in which the realty was not located, to the proper court—either the county court of the county in which the land was situated or the superior court.[41] In passing, it was noted that the Act would not apply to transfers from the superior court because of the merger of law and equity, and that the matter of transfer between courts was one of practice and procedure, regulable by rule of the newly created supreme court.[42]

Influenced perhaps by this decision and the accompanying dictum, the supreme court later that year, considering that such a transfer was indeed a matter of practice and procedure, adopted R. 1:7-8A.[43] Paragraph (a) of the rule authorized, as before, transfers of civil causes from a county court or a county district court lacking jurisdiction thereof to a proper court. It further authorized—this was new; the statute, we have seen, made no such provision—transfer where either of these courts lacked jurisdiction

[37] *See* Galloway v. Eichells, 1 N.J. Super. 584, 590-91, 62 A.2d 499, 502-03 (Ch. 1948), in which the court made no reference to the Transfer of Causes Act but relied solely on the rules of court in ordering transfer to the law division for a trial by jury.

[38] N.J. CONST. art. 6, § 4, ¶ 1. The county courts have probate divisions which handle probate matters within their inherited jurisdiction and law divisions which dispose of the county courts' criminal and civil jurisdiction. *See* N.J. STAT. ANN. § 2A:3-1 (1952).

[39] N.J. CONST. art. 6, § 1, ¶ 1.

[40] McConnell, *supra* note 15, at 356-57.

[41] Donker v. National Newspaper Corp., 65 A.2d 120, 121-22 (N.J. Essex County Ct. 1949).

[42] *Id.* at 122.

[43] For text of the rule see 72 N.J.L.J. 373 (1949).

over the trial of any issue.[44] This would prove useful, for while the county court under the new constitution did have incidental, but not primary, equitable jurisdiction,[45] the extent of this power was not clear. Moreover, its powers at law were sometimes limited.[46] And the county district court was at that time considered to have no equitable jurisdiction whatsoever.[47] Paragraph (b) of the rule

[44] Thus at last was accomplished the reform contemplated in the proposed constitutional amendment of 1909. *See* note 20 *supra*.

[45] N.J. CONST. art. 6, § 4, ¶¶ 1, 4, 5; *id.* art. 11, § 4, ¶ 4. Regarding the incidental equitable powers of the county courts see Tumarkin v. Friedman, 17 N.J. Super. 20, 24-27, 85 A.2d 304, 306-07 (App. Div. 1951), *cert. denied*, 9 N.J. 287, 88 A.2d 39 (1952), in which it was held that the county court having proper jurisdiction was empowered to grant all legal and equitable relief necessary for complete determination of the case. *See also* Donnelly v. Ritzendollar, 14 N.J. 96, 101-06, 101 A.2d 1, 4-6 (1953); Carton v. Borden, 8 N.J. 352, 357-58, 85 A.2d 257, 259 (1951); Miske v. Habay, 1 N.J. 368, 374-75, 63 A.2d 883, 886 (1949); Heuter v. Coastal Air Lines, Inc., 12 N.J. Super. 490, 494-95, 79 A.2d 880, 883 (App. Div. 1951); Stier v. Schreiber, 3 N.J. Super. 450, 451, 66 A.2d 463, 463 (Essex County Ct. 1949).

[46] Although a constitutional court, the jurisdiction of the county court is subject to legislative alteration. *See* N.J. CONST. art. 6, § 4, ¶¶ 1, 4. For example, N.J. STAT. ANN. § 2A:3-3 (1952) provides that the county court has general jurisdiction over all civil actions at law "other than proceedings in lieu of prerogative writs." Jurisdiction in prerogative writ actions is vested in the superior court. N.J. CONST. art. 6, § 5, ¶ 4. Exercising its rulemaking power, the supreme court has provided that proceedings in lieu of prerogative writs are to be brought in the appellate division or law division of the superior court, but not in the chancery division. *Compare* N.J.R. 2:2-3 (1969) *with* N.J.R. 4:69-1 (1969). *But see* Shepard v. Woodland Township Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (Ch. 1974) (action in lieu of prerogative writ challenging zoning ordinance).

Judicial doubt has also been expressed as to the county court's jurisdiction to determine title to realty—even in an action involving the distribution of an intestate estate, which is clearly within that court's probate jurisdiction. In the case of *In re* Estate of Weeast, 72 N.J. Super. 325, 178 A.2d 113 (Burlington County Ct. 1962), the court stated: "The County Court has no jurisdiction to try title to real estate." *Id.* at 333, 178 A.2d at 117. This sweeping statement seems in error in the light of N.J. STAT. ANN. § 2A:35-1 (1952), which provides that

> [a]ny person . . . claiming title to such real property, shall be entitled to have his rights determined in an action in the superior court or in the county court of the county wherein the real property is located.

See also N.J. STAT. ANN. § 2A:3-3 (1952), which confers general jurisdiction upon the county courts in an action at law. This incorporated the provisions of Law of June 22, 1936, ch. 200, [1936] N.J. Laws 493, which had stricken language of an earlier statute, Law of March 23, 1900, ch. 140, § 4, [1900] N.J. Laws 332, excluding the trial of realty title actions from the jurisdiction of the court of common pleas—the predecessor of the county court. *See* A. CLAPP, WILLS AND ADMINISTRATION, 7 N.J. PRACTICE § 1911 n.9 (Supp. 1973).

[47] The county district courts are courts of limited jurisdiction created by statute and not the constitution. The statute defining the jurisdiction of the county district court limits the amount in controversy and the actions to those having "a civil nature at law." N.J. STAT. ANN. § 2A:6-34 (a) (Supp. 1974-75). The statute was construed as precluding consideration of equitable actions and equitable issues by the county district court. *Compare* Josefowicz v. Porter, 32 N.J. Super. 585, 589, 108 A.2d 865, 867 (App. Div. 1954) (action for rescission) *with* Scott v. Bodnar, 52 N.J. Super. 439, 442, 145 A.2d 643, 645 (App. Div. 1958), *cert. denied*, 29 N.J. 136, 148 A.2d 650 (1959) (reply raising equitable avoidance to defense of release).

authorized, as before, an appellate court, failing such a transfer below, to hear and decide the appeal on the merits and remand the case for entry of judgment in the proper court.

There were two significant omissions from the former statutory scheme. First, the rule, probably through inadvertence, did not make explicit provision for the transfer "at any stage of the proceedings" in the trial court, as had the 1915 amendment and the 1937 revision; instead, adopting the direction contained in the original statute of 1912, it provided for a transfer "to the proper court for determination."[48] Second, again probably through inadvertence, the rule failed to provide for transfer for lack of appellate jurisdiction.[49] It reverted to the direction of the original statute of 1912 instead of to the provision in the 1936 amendment which had been carried forward in the 1937 general statutory revision. These omissions, however, seem to have been unnoticed by the courts in their decisions of the later cases.

There was a third omission in the new rule. It did not provide for transfers from the superior court, probably in reliance on the constitutional provision that such court "shall have original general jurisdiction throughout the State in all causes."[50] Despite the apparently absolute language of this provision, the supreme court subsequently decided in 1951 that the superior court did lack jurisdiction over the complaint of an unwed mother seeking judgment of paternity against a putative father and a consequent award

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In Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 173 A.2d 270 (1961), the supreme court addressed itself to the doubts about "the power of the county district court to deal with equitable issues arising in a case which otherwise is within its jurisdiction." *Id.* at 465-66, 173 A.2d at 274. After reviewing the judicial reform effected in New Jersey to avoid jurisdictional disputes between courts of law and equity, the court examined the various rules of court and concluded:

> Hence the county district court must accept any equitable issue offered to defeat an action within its jurisdiction or to avoid a separate defense to such action. The rules of court are plain; there no longer is a barrier to the rendition of the correct judgment. To hold otherwise would continue the procedural waste which the constitutional reform intended to end and indeed at a level of litigation wherein the litigants can least afford to bear it.

Id. at 469, 173 A.2d at 275-76. For editorial commentary on this decision see *Equity in the District Courts,* 84 N.J.L.J. 548 (1961). *See also* Marini v. Ireland, 56 N.J. 130, 138-40, 265 A.2d 526, 530-31 (1970) (equitable defense requiring absolution from payment of rent and summary dispossession must be considered by the county district court).

[48] *Compare* Law of Feb. 24, 1915, ch. 13, § 2, [1915] N.J. Laws 39 *and* N.J. REV. STAT. § 2:26-62 (1937) *with* 72 N.J.L.J. 373 (R. 1:7-8A) *and* Law of March 28, 1912, ch. 233, § 1, [1912] N.J. Laws 417. *See* notes 21-22 *supra* and accompanying text.

[49] This was added to the Transfer of Causes Act in the 1936 amendment. *See* note 22 *supra* and accompanying text.

[50] N.J. CONST. art. 6, § 3, ¶ 2.

of support for her child.[51] Nevertheless, no immediate change was made in the provisions of the rule to render it applicable to the superior court. For the time being, that court theoretically was left uncovered. The prior statute, the Transfer of Causes Act, was probably considered invalidated by the enactment of the rule.[52] In any event, it was formally repealed as of January 1, 1952.[53]

Eventually, coverage for the superior court was effected in a general, if complicated, revision of the rules of court, operative as of September 9, 1953.[54] In this revision, R. 1:7-8A(a) because R.R. 4:3-4 (a) and R.R. 7:6-2 (a).[55] R.R. 4:3-4 (a) provided for the transfer of a civil cause from a trial division of the superior court lacking jurisdiction either of a cause or, as before, of an issue to a court having such jurisdiction. R.R. 7:6-2 (a) made similar provision for the county district court; and by R.R. 5:2-1, the provisions of R.R. 4:3-4 (a) were made applicable to law actions in the county court.[56] In place of former R. 1:7-8A(b), R.R. 1:4-10 and R.R. 7:6-2 (b)[57] provided for transfer, as before, while on appeal in the supreme court and, by cross-reference,[58] while in the appellate division of the superior court.[59]

These adjustments, it was considered, would complete the transition in practice from the old judicial system to the new. Various improvements had been effected. The constitution had made several; by creating a single court of statewide original jurisdiction and single courts of countywide jurisdiction, and by merging law and equity in the statewide court, it had reduced the number of separate courts and consequently reduced the need for the transfer of causes between separate courts. The rules had gone

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[51] Borawick v. Barba, 7 N.J. 393, 395-98, 81 A.2d 766, 766-68 (1951).

[52] See the dictum to this effect in Donker v. National Newspaper Corp., 65 A.2d 120, 122 (N.J. Essex County Ct. 1949) discussed in text at note 42 *supra*. *See also* Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406, 414, *cert. denied*, 340 U.S. 877 (1950), holding that any pre-1948 statute on a procedural matter was repealed by a later rule of court in light of the supreme court's plenary rulemaking power in such matters, conferred by paragraph 3 of article 6, section 2 of the 1947 constitution. As to the correctness of this judgment in the context of transfer of causes see *quaere* in note 13 *supra*.

[53] *See* note 23 *supra*.

[54] The original rules of 1948 were the subject of this complete revision, known as the REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY (1953) [hereinafter cited as N.J.R.R.]. *See* N.J.R.R. 1:1-10.

[55] *See* N.J.R.R., Table 1, at ix.

[56] The rules of court governing civil actions in the county courts are now incorporated in the rules for superior court actions. N.J.R. 4:1.

[57] *See* N.J.R.R., Table 1, at ix.

[58] N.J.R.R. 2:4-1.

[59] *See* N.J.R.R., Table 1, at ix.

further by authorizing transfer for lack of jurisdiction over the trial of an issue.

The rules as revised, unlike the predecessor statute, did not provide for the transfer of a criminal or a quasi-criminal case.[60] Thus a defendant seeking relief from an illegal sentence of a municipal court and wrongly appealing to the law division of the superior court instead of to the county court[61] could not resort to the provisions of the various transfer rules either in the law division or in the appellate division to which he further appealed. Nevertheless, in such a case, the appellate division, considering that "the Superior Court had the power as a matter of common law to transfer the cause to the County Court,"[62] and considering further the spirit of the rules in effect in civil cases, proceeded as though these rules should apply to a criminal case and by "analogy" decided the appeal on the merits in favor of the defendant, remanding the case to the county court for further proceedings.[63]

Further revisions followed this decision. The various rules were scrapped and in their place a single one adopted: R.R. 1:27D, to take effect at the beginning of the next judicial year, September 8, 1954.[64] Under paragraph (a), "any court" lacking jurisdiction of a cause or issue had the power to transfer the action to a proper court. And by paragraph (b), failing such transfer, any appellate court had the power to determine an appeal on the merits and remand the case to a proper court. Thus, by extending to "any court" the power to transfer, the arrangement was made applicable to criminal as well as civil cases.

This change completed the transition from the old to the new judicial system. The old had involved the limited practice of the transfer of primarily civil causes by and between certain named courts, where the transferring court lacked juris-

[60] Transfer of criminal actions was added in the 1936 amendment. *See* note 22 *supra.*

[61] An appeal from a judgment of such a court of limited jurisdiction is taken within ten days to the county court. N.J.R. 3:23-2.

[62] Manda v. State, 28 N.J. Super. 259, 262, 100 A.2d 500, 502 (App. Div. 1953).

[63] *Id.* at 265, 100 A.2d at 503.

[64] 77 N.J.L.J. 236 (1954). Rule 1:27D provided:

(a) Except as elsewhere provided in these rules, and subject to the right to be prosecuted by indictment, where any court of this State is without jurisdiction of the subject matter of an action, issue or cause, it shall, on motion or on its own initiative, order the action or cause, with the record and all papers on file, transferred to the proper court for determination; and the action or cause shall then be proceeded upon as if it had been originally commenced in the proper court.

(b) Where any cause transferable under paragraph (a) is appealed without having been transferred, the appellate court may decide the appeal and direct the appropriate judgment to be entered in the court to which the cause should have been transferred.

diction over the subject matter of an entire cause. The new, as finally elaborated, permitted the transfer of any cause, civil or criminal, by and between any court where the transferring court lacked jurisdiction either over the subject matter of an entire cause or of a particular issue. Thereafter, one further minor change has been made, providing for such a transfer from a court "where an indispensable party to the cause cannot be served within its jurisdiction" to a court where he can.[65] In the revision of the rules in 1969, the provisions effecting transfers are to be found, without change, in R. 1:13-4.[66] No further change has been made to date. We shall next consider what use the courts have made of these provisions.

PRACTICE UNDER THE NEW SYSTEM

Extension of the Transfer Practice Before Hearing and Determination: The Special Problem of Appellate Transfer

The arrangement at last established by rule, as of 1954 and essentially maintained thereafter, was basically that set forth in the original statute of 1912 as amended in 1915—a transfer of a case from one court of original jurisdiction to another, and failing this, a determination of a later appeal on the merits in the discretion of the appellate court and remand to the proper court.[67] It had been broadened in application, as we have just noted, to cover all courts, all causes, and other deficiencies such as lack of jurisdiction over an issue and the absence of an indispensable party.

But the rule had not made provision, as had the 1936 amendment to the statute,[68] for the transfer of cases from one appellate court to another, as in the case of an appeal taken from the judgment of a trial court or administrative tribunal to the wrong appellate court. The deficiency, however, was soon made good in the cases. Thus, in *State v. Magonia,*[69] it was held, without reference

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[65] 81 N.J.L.J. 358 (1958).

[66] *See* RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, Table of Disposition: Parts I-VIII (1969) [hereinafter cited as N.J.R.], which reflects changes made by the 1969 revision. N.J.R. 1:13-4 corresponds without change to the former N.J.R.R. 1:27D. *See also* N.J.R. 4:3-4(b) and N.J.R. 6:4-1.

[67] *See* note 21 *supra* and accompanying text.

[68] *See* note 22 *supra* and accompanying text.

[69] 44 N.J. Super. 89, 129 A.2d 756 (App. Div. 1957). For further proceedings in the supreme court see 25 N.J. 95, 135 A.2d 184 (1957).

to the textual difficulties involved, that the rule did so provide.[70] *Magonia* was the traditional case of an appeal taken from a trial court of original jurisdiction to a wrong appellate court. Other cases quickly followed, authorizing, as if under the rule, a transfer to the right appellate court of a case appealed to the wrong appellate court from a trial decision of an administrative agency. Thus a case appealed to the wrong county court from a determination by the Division of Workmen's Compensation could be transferred to the right county court.[71] The practice went beyond this transfer from court to court and sanctioned the transfer, again as under the rule, between the appellate division and either of the trial divisions of the one superior court, in cases involving the appeal to the wrong division from the decision of an administrative agency.[72] Thus with the approval of the supreme court,[73] the rule was in effect amended to authorize the transfer on appeal of causes improperly appealed to the wrong court or the wrong division of a court.

In all of these cases, however, the transfer between appellate courts or divisions was made prior to a determination of the merits

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[70] 44 N.J. Super. at 92, 129 A.2d at 758. The appellate division made only the following reference to the transfer rule:

> Since the announced object of the rule [requiring the immediate certification of capital cases to the supreme court] is to avoid undue delay, we shall invoke *R. R.* 1:27*D* and by our mandate direct the clerk of this court to transmit the record to the Supreme Court.

Id.

[71] Wexler v. Lambrecht Foods, 64 N.J. Super. 489, 494, 166 A.2d 576, 579 (App. Div. 1960). A similar result had been reached under the prior practice in Hart v. Kimball, 122 N.J.L. 217, 218-19, 4 A.2d 493, 493-94 (Sup. Ct. 1939), but at a time when expressly authorized by statute. *See* note 22 *supra* and accompanying text.

[72] Pfleger v. State Highway Dep't, 104 N.J. Super. 289, 290-91, 250 A.2d 16, 17 (App. Div. 1968). *See also* Valonis v. Mayor & Township Comm., 54 N.J. Super. 567, 569-70, 149 A.2d 793, 793-94 (App. Div. 1959), in which the court reviewing a municipal administrative proceeding held that the law division should have transferred the action to the county court for review as provided by statute rather than dismiss the prerogative writ proceeding for failure to exhaust administrative remedies. An appeal after the remand was dismissed on other grounds. 62 N.J. Super. 241, 162 A.2d 586 (App. Div. 1960).

[73] *See* Central R.R. v. Neeld, 26 N.J. 172, 184, 139 A.2d 110, 117, *cert. denied*, 357 U.S. 928 (1958). The court ordered the dismissal of complaints filed in the law division because the plaintiff had not exhausted administrative remedies. 26 N.J. at 181, 139 A.2d at 115. The court also acknowledged that the law division lacked jurisdiction because review of the determinations of state administrative agencies, such as the Director of the Division of Taxation, should be on appeal to the appellate division instead of by complaint to the law division which reviewed local administrative determinations. But the choice of the wrong division was not deemed to be fatal in and of itself because, under rule 1:27D the choice of the wrong division would result in transfer and not dismissal, at least when instituted within the applicable time limitations. *Id.* at 184, 139 A.2d at 117.

of the appeal. Thus, as in the case of a pre-determination transfer at the trial level, the order was essentially a procedural one, designed to promote a faster determination of the merits of the controversy, and in no way involving the validation of a judgment of a court lacking jurisdiction.

Limits on Transfer After Hearing and Determination

More difficult questions arise when a transfer is sought or made after a hearing and determination on the merits. Ordinarily, as the rule provides in its paragraph (b), such a transfer would be made by an appellate court after its decision on the merits of an appeal from a judgment of a trial court lacking jurisdiction, by means of a remand to a trial court having such jurisdiction for the entry of the appropriate judgment. Possibly the rule may be construed further to authorize, following hearing and determination, the transfer from an improper appellate court to the one to which the appeal should have been taken, with a direction from the former court to the clerk of the latter for the entry of appropriate judgment in his court. And sometimes such a transfer may be sought under paragraph (a) of the rule at the trial level after judgment on the merits, seeking validation of the transpired proceedings.

All of these cases involve, as we said when discussing the former statutory scheme upon which the rule of court is based, a validation through a process of fictionalizing; by it the judgment of the wrong court, having been declared bad as a matter of form, is saved in substance through the process of its entry in the right court as though it were the judgment of that court—when in fact it is not. The rule, however, has a saving grace which leads it out of temptation. In the case of an appeal, it confers upon the appellate court the discretion of hearing or abstaining from hearing the merits of the appeal.[74] And in this discretion the appellate courts have found their salvation. Relying not upon the fiction, but with sound judicial instinct upon the varying policy considerations involved, they sometimes have opted for validation of the proceedings under challenge, sometimes through modification have purged the proceedings of their error, and in a few cases, by abstaining, have confirmed their invalidity. The technique of determination and transfer has been by no means automatic. The decisions themselves lend light to the true coloration of the rule's

[74] N.J.R. 1:13-4(b). The language of the rule is clearly permissive: "[T]he appellate court *may* decide the appeal . . . ." *Id.* (emphasis added).

operations. We shall discuss them in that order: validation with or without transfer; modification without transfer; and nullification and dismissal or transfer.

Validation With or Without Transfer: Untimely Challenge to Apparent Authority

Usually, as we read the decisions, the jurisdictional issue is not timely raised. This is not surprising. Ordinarily, a jurisdictional deficiency is most likely to be a factor in one of the courts of limited jurisdiction, such as the county district court or the juvenile and domestic relations court, where the calendar load is extremely heavy and the practice is summary;[75] where lawyers talk fast and loud and shoot from the hip and judges often respond in kind. It is not surprising that an issue involving the jurisdiction of one of these courts should first come to light upon appeal rather than during the trial. Whether the issue is finally raised by one of the appealing parties or by the court itself seems immaterial.

Moreover, the issue is usually not raised below because the trial court apparently has jurisdiction. Thus, a juvenile and domestic relations court has power in some but not all cases—and the limits are not clearly defined—to award financial support for a wife against her husband.[76] Such was the situation in *Caravella v. Caravella,*[77] in which on appeal from an award of support by that court the defendant-husband challenged the trial court's jurisdiction for the first time, arguing that where there was a consensual separation the support order was beyond that court's statutory powers.[78] The appellate division upheld the challenge but under the rule proceeded to a determination on the merits.[79] Finding for

[75] Thus, for example, the number of civil cases filed with the county district courts for the court years 1969-1970 was 215,491; for 1970-1971, 237,548; for 1971-1972, 239,213; and for 1972-1973, 251,743; as compared with the following totals for the law division of the superior court and the county courts for the same years: 33,892, 32,324, 31,107, and 31,750. The figures for the juvenile and domestic relations courts for the same years were: 85,770, 88,670, 99,270, and 103,259, compared with the following for the chancery division, matrimonial, of the superior court for those years: 11,041, 13,349, 17,940, and 22,933. ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, 1972-1973; ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, 1971-1972; ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, 1970-1971; ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, 1969-1970.

[76] *See* D. HERR & J. LODGE, MARRIAGE, DIVORCE AND SEPARATION, 10 N.J. PRACTICE 421 (3d ed. 1963, Supp. 1974).

[77] 36 N.J. Super. 447, 116 A.2d 481 (App. Div. 1955).

[78] *Id.* at 449-50, 116 A.2d at 482.

[79] *Id.* at 453, 116 A.2d at 484. Judge Clapp was not deeply troubled by the jurisdictional challenge:

the husband in that respect as well—there was error in the trial proceedings—it remanded the case for a new trial, directing that the wife be given an opportunity to move for transfer to the proper court, the chancery division of the superior court, for further proceedings on an amended complaint.[80]

In such a case no great problem is presented. Not only is the trial court acting in a kind of case typically within its cognizance and the challenge belated, but, after the appellate disposition, the matter rests in the same posture it would have, had a reversal been based solely on the issue of jurisdiction—a remand with an order for new trial. Additionally, there is the advantage of curing the case of further error, thus rendering it more likely that the second trial will be final.

Such a course does represent a departure from a pure application of the customary American principle since it involves some consideration of the merits of the controversy after a discovery of a basic jurisdictional deficiency. But the departure is minimal: The determination results in a disavowal of the prior finding on the merits. What the Transfer of Causes Rule does accomplish in this kind of case is the speedy transmittal of papers from court to court, saving plaintiff the tedious task of suing anew in a right court following a perfunctory dismissal in the wrong court. In these circumstances the rule works essentially in the same way as it does in the cases of transfer before hearing and determination either at trial or upon appeal, as a purely procedural device governing the orderly transmittal and acceptance of legal papers.

A different problem is presented when a judgment for defendant in a kind of case typically within the cognizance of the trial court is affirmed on the merits after a belated challenge to its jurisdiction. In this circumstance, the jurisdictional issue is most likely to be raised by the court—a winning defendant will ordinarily desire to retain the fruits of victory and the losing plaintiff will ordinarily be oblivious of or hesitant to raise error which he had invited. But whether raised by the court on its own motion or a not so hesitant plaintiff, the usual American rule on jurisdiction demands invalidation of the judgment. In this case, then, an application of the second paragraph of the New Jersey court rule operates on a more than procedural basis by authorizing the determination

> [T]he fact that jurisdiction over the subject matter lies, not in the court below, but in another court in the state, is not as serious a matter as it once was. . . . Under *R.R.* 1:27*D*(*b*), we may deal with the case as though it had been brought in the court (the Superior Court) authorized to act under *N.J.S.A.* 2*A*:34-24.

Id.

[80] *Id.* at 454, 116 A.2d at 484.

of the appeal on the merits and a remand to the proper court for the entry of the appropriate judgment.

This is what the appellate court in *Vorhies v. Cannizzaro*[81] purported to do. The defendants had obtained a jury verdict of no cause for action in a suit brought in the county district court, but the trial judge set aside the verdict and ordered a new trial. Leave to take the interlocutory appeal was granted. The appellate division vacated the new trial order and found for the defendants on the merits, deciding that judgment on the verdict, though void, should be entered not in the county district court but rather in the county court.[82]

In examining the record on appeal, the court had discovered that plaintiffs, a woman suing for personal injuries and her husband suing per quod, had demanded damages in a sum beyond the monetary limits of the county district court.[83] Therefore, it held, the trial court "did not have jurisdiction, and since the jurisdiction here deals with subject matter, as distinguished from parties, it cannot be waived or conferred—even by consent."[84] Then, having quick recourse to the rule, it ordered the entry of judgment for the defendant in the proper court, the county court, whose jurisdiction does not depend on monetary limits.

The effect of the rule in such a case is almost miraculous—a jury verdict for a defendant returned in a court without jurisdiction becomes alive and working. Almost miraculous, but not quite. All is explicable by natural causes—by virtue of a magnificent legal transplant, the voice of the right court utters the private determinations of the wrong court. Through the power of the law the dumb speak.

But of course this is not what has really happened at all. Under the cloak of the legal fiction that the judgment of the wrong court is really the judgment of the right court, the rule has operated to legitimatize the only judgment there is—that of the wrong court. In other words, the judgment of a court lacking jurisdiction over the subject matter was not in this case void. What it decided was affirmed and validated. And the court decided that way in *Vorhies* because under the circumstances of the case it was fair and proper to do so. The action was one ordinarily cognizable in the county district court—an action for damages for personal injuries arising out of a complaint at law in negligence, tried without

[81] 66 N.J. Super. 551, 169 A.2d 702 (App. Div. 1961).

[82] *Id.* at 553, 560-61, 169 A.2d at 703, 707-08.

[83] *Id.* at 560, 169 A.2d at 707.

[84] *Id.*

challenge to the jurisdictional capacity of that court and terminating in a verdict indisputably within that capacity. Not only was it fair to hold the plaintiffs to a judgment on this verdict, but it would have been a waste of judicial time and energy to do otherwise. Justice and expediency meet. And therefore, contrary to what the court *said,* the element of waiver or consent of the parties was relevant, and the usual rule that waiver or consent does not confer jurisdiction was not applied. Perhaps it might have been preferable had the court in *Vorhies* simply decided that under the circumstances plaintiffs were, by proceeding to trial, deemed to have waived their demand for damages in excess of the monetary limits of the trial court. Such a holding would have saved the jurisdiction of the county district court and obviated the necessity of resorting to the artificial technique of the rule.

In *Scott v. Bodnar,*[85] such an evasion was not possible. There the appellate division reversed a county district court judgment for defendant which had barred recovery for personal injuries on the ground of a release. The appellate court ordered the entry in the appropriate county court of partial judgment declaring the release invalid.[86] The trial as to the release's validity, though recognized by the trial court as an equitable issue to be determined by a judge not a jury, was not within its competence at all. At that time it lacked the power to try an equitable issue.[87] As in the preceding cases, the failure in jurisdiction had not been raised below and there was in the circumstances a basis for the trial court's mistaken assumption of jurisdiction. The case had been started in the county court, which did have the power of trying an incidental equitable issue,[88] but had apparently been transferred under a then frequently utilized statute to the county district court for trial, since it was considered likely that the case would terminate in a money judgment within that court's monetary limits.[89] And the judge, trying

[85] 52 N.J. Super. 439, 145 A.2d 643 (App. Div. 1958), *cert. denied,* 29 N.J. 136, 148 A.2d 650 (1959).

[86] 52 N.J. Super. at 441, 449, 145 A.2d at 644, 649. While the appellate division remanded the cause to the county court for entry of partial judgment concerning the release, it ordered the re-transfer of the case to the county district court for a jury trial by that court on the remaining issues, all legal in nature. *Id.* at 450, 145 A.2d at 650.

[87] *See id.* at 441, 445, 145 A.2d at 645, 647. Until the 1961 decision in Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 173 A.2d 270, the county district courts could not determine any equitable issues. Now, the county district court must accept any equitable issue offered to defeat an action or to avoid a separate defense to an action. *See* note 47 *supra. Accord,* Citizen's First Nat'l Bank v. Brierley, 98 N.J. Super. 497, 500-01, 237 A.2d 885, 887 (App. Div. 1968).

[88] N.J. CONST. art. 6, § 4, ¶ 5. *See* note 45 *supra.*

[89] This practice was authorized by N.J. STAT. ANN. § 2A:15-47.1 (Supp. 1974-75),

the case in the county district court, was a county court judge temporarily assigned there.[90] In this situation the judgment, to be preserved, must in form be that of a court properly having jurisdiction. And this must be so, as long as it is insisted as a matter of form that a court lacking jurisdiction cannot validly enter a judgment. But again, the reality in this kind of case is otherwise: That judgment will in substance be given validity where no one has raised an objection to the jurisdiction below and the court proceeded on the assumption of authority.

We have been discussing cases where the jurisdictional deficiency of a trial court apparently having authority is first raised or noticed on appeal. We have already covered reviews on the merits which result in a reversal and grant of a new trial (*Caravellà*),[91] vacation of a new trial order and direction of judgment on a jury verdict for defendant (*Vorhies*),[92] and reversal of final judgment for defendant and order for entry of partial judgment for plaintiff (*Scott*).[93] More substantial problems are presented when a review on the merits, whether after an affirmance or a reversal of the judgment below, results in an order for final judgment for the plaintiff. Whereas a judgment for defendant ordinarily involves only a finding of no basis for relief, a judgment for plaintiff involves not only a finding of entitlement to relief but ordinarily its award. It may be the type of relief granted that is beyond the court's power, or, in the case of money damages, merely the amount. In the former instance, it may be that only in certain cases the court is unable to afford the remedy. For example, a county court may not generally have the power to construe the language of a will or trust, but may do so where the resolution of that issue is a necessary prerequisite to the grant of some further relief which it is empowered to afford; as in the case of a proceed-

formerly Law of September 14, 1953, ch. 394, ¶ 1, [1953] N.J. Laws 2032, *as amended,* Law of April 5, 1955, ch. 7, ¶ 1, [1955] N.J. Laws 32. The supreme court, in reaction to certain abuses, adopted a rule amending the statute, drastically curtailing thereby the practice by adding the requirement that no transfer down may be ordered unless "all parties waive trial by jury and agree to be bound by the jurisdictional limits applicable to actions initially instituted in the county district court." N.J.R. 4:3-4(a). *Quaere:* Is this a legitimate exercise of the supreme court's rule-making power? Is the restriction on the trial court's power to transfer a matter of practice and procedure? Of court administration?

[90] 52 N.J. Super. at 441, 145 A.2d at 644. The confusion of the trial judge is reflected in his statement, while sitting in the county district court, that " 'County Courts now are authorized to administer equity as well as law.' " He proceeded to decide the equitable issues. *Id.* at 445, 145 A.2d at 647.

[91] *See* notes 77-80 *supra* and accompanying text.

[92] *See* notes 81-84 *supra* and accompanying text.

[93] *See* notes 85-96 *supra* and accompanying text.

ing for approval of a final accounting and order for distribution of an estate.[94] Thus, it may sometimes happen that a county court may proceed to utter such a construction in a case where its jurisdiction is only apparent.

But does the county court have the power to construe a will in connection with a proceeding for approval of an intermediate accounting? The executors in *In re Schmidt*[95] considered it helpful to receive such a construction from the court and expeditious to combine the suit with a petition for approval of an intermediate accounting.[96] A hearing was held in the probate division of the county court which allowed the accounting and construed the will in such a way as to affect adversely the testator's widow and favor other beneficiaries.[97] The widow appealed in her individual capacity and, for the first time, raised the issue of the lower court's jurisdiction.[98] Since the will construction was not necessary for the approval of the accounting, she argued, the county court's incidental equitable jurisdiction could not be invoked.[99] Consequently, that court was without power to construe the will in that proceeding, even though concededly the very same court could later give the very same construction at the time of final accounting and distribution.[100] The appellate division declined to decide the issue of the lower court's jurisdiction.[101] In a questionable exercise of its power of original jurisdiction granted under the 1947 constitution and the rules of court, the appellate division decided the case on the merits and affirmed the county court's judgment.[102] Again one

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[94] *See In re* Bibinski, 73 N.J. Super. 163, 165, 179 A.2d 185, 186 (Camden County Ct.), *aff'd sub nom.* Wright v. Dzienis, 77 N.J. Super. 455, 187 A.2d 8 (App. Div. 1962). *See generally* A. CLAPP, WILLS AND ADMINISTRATION, 7 N.J. PRACTICE § 1911 (3d ed. 1962).

[95] 46 N.J. Super. 369, 134 A.2d 810 (App. Div. 1957).

[96] *Id.* at 374, 134 A.2d at 812.

[97] *Id.* at 374-75, 134 A.2d at 812-13. The lower court's opinion is reported at 38 N.J. Super. 524, 119 A.2d 786 (Hudson County Ct. 1956).

[98] 46 N.J. Super. at 375, 134 A.2d at 813.

[99] *Id.* at 378, 134 A.2d at 815. For cases discussing the incidental equitable jurisdiction of the county court see note 45 *supra.*

[100] 46 N.J. Super. at 378, 134 A.2d at 815.

[101] *Id.*

[102] *Id.* at 379-81, 134 A.2d at 815-17. The sources of the court's original jurisdiction are section 5, paragraph 3 of article 6 in the 1947 constitution and N.J.R.R. 1:5-4, the present N.J.R. 2:10-5. This power is solely ancillary to the court's appellate jurisdiction. The constitutional provision allows the supreme court and appellate division only to "exercise such original jurisdiction as may be *necessary* to the complete determination of any cause on review." N.J. CONST. art. 6, § 5, ¶ 3 (emphasis added).

This 1947 constitutional provision has been traced to prior provisions in an unsuccessful 1944 proposal, a 1942 draft constitution, the unsuccessful 1909 constitutional amendment, and the English Judicature Act of 1873. *See* State v. Ferrell, 29 N.J. Super. 183, 185, 102

cannot quarrel with the realities of the case. After all, there was a full hearing below on the merits, conducted without objection and with full participation of all the parties before a court which under some circumstances has the power to hear such a controversy. As in *Vorhies* and *Scott,* there was the appearance of authority, based upon the frequent exercise of the power to construe in similar circumstances and the uncontested exercise of this apparent authority. No compelling countervailing reasons appearing, the appellate court in *Schmidt,* as in *Vorhies* and *Scott,* proceeded to hear and determine the case on the merits and, in effect, affirmed, resorting in this case to the ill-fitting guise of "original jurisdiction" rather than to the more usual cloak afforded by the Transfer of Causes Rule. The result is the same; only the technique of disposition differs. It may be inferred that in *Schmidt* had the rule allowing appellate determination on the merits been invoked, the appellate division would have applied it.

Schmidt involved, in effect, an affirmance of a judgment below for the plaintiff-executors and certain defendant-beneficiaries. It probably would have made no difference, insofar as the jurisdictional question was concerned, had the appellate court in its disposition reversed the judgment below and entered judgment for the defendant-widow. The other beneficiaries in that case, there losing, could not very well complain. They, together with the executors, who had invited the error below, had sought to preserve the fruits of the judgment on appeal. Nor would it probably have made any difference if the case had originally been decided in favor of the widow and the appellate court had reversed in favor of these other beneficiaries.

In all the preceding cases, challenge to the jurisdiction of the trial court was raised only on appeal. A different case was pre-

A.2d 70, 71-72 (App. Div. 1954). Writing in *Ferrell,* Judge Clapp demonstrated the ancillary nature of this "necessary" original jurisdiction by noting that the language of its predecessor sources was an original jurisdiction "incident to" or "incidental to" the appellate jurisdiction. *Id.* For an overview of this area see Schnitzer, *Civil Practice and Procedure,* 9 RUTGERS L. REV. 307, 324-25 (1954).

If the trial court was without jurisdiction of the subject matter, as Mrs. Schmidt argued, and if the transfer of causes rule is not invoked, then under the prevailing doctrine the proceedings of the trial court are void and of no consequence. Thus there is really nothing in that case before the appellate division to review. Its jurisdiction is limited to the narrow point of considering and determining the lack of jurisdiction of the lower court. Should the appellate division instead consider and determine the case on the merits, it is indeed exercising original jurisdiction in the matter—not in aid of its appellate jurisdiction but instead of it. As Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803): "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

sented in *Journeymen Barbers, Hairdressers and Cosmetologists' International Union of America, Local 687 v. Pollino,*[103] in which the challenge, though timely made and sustained in the trial court, was essentially disregarded by the appellate court, in great part due to the provisions of the rule and the peculiar circumstances of the case. The facts are as follows: A barbers' union sought by complaint filed in the county district court to replevy its union cards from defendant barbershop owners.[104] Under the then governing statute,[105] that court had jurisdiction, replevin being an action at law, if the cards to be replevied were worth $1,000 or less. At the conclusion of the plaintiff's case, defendants moved to dismiss on the grounds the plaintiff had failed to prove that the cards were worth less than the jurisdictional limit, and had thereby, under their view of controlling precedents, failed to carry its burden of proving a jurisdictional basis for the action.[106] In fact, plaintiff had offered no evidence as to value. Instead, in response to defendants' argument, it asked the court to take judicial notice of the cards' obviously nominal value and argued in reply that the burden was on defendants to prove that they were of value greater than the jurisdictional limits.[107] Defendants countered that their value was obviously greater than the limits because of their symbolic worth but offered no supporting proof.[108] The court reserved decision on the motion, took further testimony from defendants on the merits and finished the case. Some weeks later it issued its opinion that judgment was to be entered for the defendant both on the merits and for lack of jurisdiction.[109] The plaintiff appealed and

[103] 39 N.J. Super. 250, 120 A.2d 767 (App. Div.), *aff'd,* 22 N.J. 389, 126 A.2d 194 (1956). In the supreme court's opinion there is no reference to the jurisdictional issue except in the dissent of Justice Heher. 22 N.J. at 402-05, 126 A.2d at 202-03. Justice Heher argued that the county district court did not have jurisdiction since the action was not really one at law in replevin but rather one concerning "the relations of the parties involving equitable principles." *Id.* at 404, 126 A.2d at 203.

[104] 39 N.J. Super. at 253-54, 120 A.2d at 768.

[105] N.J. STAT. ANN. § 2A:6-34 (1952), *as amended,* N.J. STAT. ANN. § 2A:6-34 (Supp. 1974-75). The former statute conferred jurisdiction on the county district court in replevin actions "where the value of the goods or chattels of which replevin is sought does not exceed the value of $1,000." In 1969 the amount was raised to the present $3,000. For a discussion of the effect of the amended statute on recovery in county district court actions instituted prior to amendment but tried subsequent to it see Avon Sheet Metal Co. v. Heritage House Associates, 107 N.J. Super. 487, 489-92, 259 A.2d 241, 242-44 (Essex County Dist. Ct. 1969).

[106] Appendix to Brief for Plaintiff-Appellant at 56a-57a, Journeymen Barbers Local 687 v. Pollino, 39 N.J. Super. 250, 120 A.2d 767 (App. Div. 1956) [hereinafter cited as Appellant's Appendix].

[107] Appellant's Appendix, *supra* note 106, at 58a-59a.

[108] *Id.* at 63a.

[109] *Id.* at 6a-11a.

the defendants again argued both the merits and the jurisdictional issue.

It was of course an anomaly to have a judgment on the merits from a court which considered itself without jurisdiction to enter such a judgment, particularly when such a determination turned on the subordinate issue of the allocation of the burden of proof. It is not surprising that under these circumstances the appellate court passed over the jurisdictional problem and went to the merits, upon which it reversed the trial court.[110] It might have held that on the facts lack of power had not been established. Instead it stated, referring to the jurisdictional issue, that "[u]nder our present appellate practice . . . this is a matter of minor concern,"[111] to be disposed of under the rule after resolving the substantive questions. And only after having disposed of the merits, did it return to the problem of jurisdiction. The court considered but rejected the alternative of a conditional remand to the district court for the taking of proof to supplement the unsatisfactory trial record concerning the value of the cards and, upon a finding of value in excess of the limits, for the transfer to the superior court for the entry of judgment for replevin therein. Instead, it simply directed the entry of judgment in the county district court.[112]

Thus, if we read *Journeymen* in the light of its facts, we may say that regardless of the language used, the general rule on lack of jurisdiction was soundly held not to apply where, as there, the jurisdiction of the trial court was not challenged until trial; such jurisdiction turned on a question of fact, the monetary value of the relief sought; the evidence introduced suggested jurisdiction, and contrary evidence, though readily available, was not introduced; and the judgment of non-jurisdiction was entered by the trial court some weeks after the conclusion of the trial on the merits and accompanied a judgment on the merits. Under these circumstances, considerations of proper economic utilization of judicial

[110] 39 N.J. Super. at 262-63, 120 A.2d at 773.

[111] *Id.* at 254, 120 A.2d at 768-69. The court further stated:

> If the cause is cognizable, not in that court, but in some other trial court in the State, we nevertheless should endeavor to resolve the substantial questions; however, we then, through our mandate, will direct judgment on our conclusions to be entered in a court which has jurisdiction of the subject matter.

Id. (citation omitted).

[112] *Id.* at 263, 120 A.2d at 773. In rejecting a remand for the taking of proof as to value, the court stated:

> It would be unfortunate if we had to send the case back to the County District Court to take evidence as to the value of the cards and then—if the cards were found to be worth more than $1,000—to transfer the case to the Superior Court, just for the purpose of entering a judgment on our mandate.

Id.

time and effort pragmatically dictate that the jurisdictional challenge be denied and the case decided on the merits. Nor could the defendant complain. Surely if he had been bent on trial in the superior court, he should have moved before trial, with supporting affidavits in proof of excessive value, for a transfer to that court. He has only himself to blame if he trusts to raising this issue in the midst of trial—without benefit of supporting proof—in the fast-moving county district court. Essentially the appellate court, by its decision, cast the burden of such proof on the defendant and determined that lack of jurisdiction had not been shown.

But the unqualified suggestion in the opinion that the question of the trial court's lack of jurisdiction was now, under the rule, to be "a matter of minor concern" is misleading. It happened to be so in the circumstances of that case, but to regard such an issue in any case as essentially a matter of practice and procedure, regardless of considerations of fairness, legislative policy, and the sound administration of the courts, would lead to unjust conclusions and chaotic practices. Surely, had the defendants prior to trial presented convincing proof to the county district court that the value of the cards was far beyond the monetary limits of that court, the posture of the case would have been significantly different. Further proceedings in that instance would have been without color of authority over a litigant's timely objection. Even under the rule, lack of jurisdiction becomes then a matter of major concern, as we shall shortly see.

Returning to the review, we may say that in all the foregoing cases, the power of the trial court to adjudicate was upheld and its judgment given validity despite the various challenges to jurisdiction either (a) by declining to examine into the alleged invalidity (*Schmidt, Journeymen*);[113] (b) by validating the supposed (*Vorhies*)[114] or real (*Scott*)[115] invalidity by resort to the transfer mechanism of the rule; or (c) by reversing on the merits and remanding with orders for a new trial and possible transfer (*Caravella*).[116] In each case, the authority of the court or the judge to proceed was apparent, or at least not disestablished, and the challenge either belated or ineffectual. In none of these cases would it probably have made any difference had the challenge, though made at the trial level, been interposed for the first time after the case had gone to

[113] *See* notes 95-112 *supra* and accompanying text.
[114] *See* notes 81-84 *supra* and accompanying text.
[115] *See* notes 85-90 *supra* and accompanying text.
[116] *See* notes 77-80 *supra* and accompanying text.

judgment. A timely and effective challenge, however, alters the basic nature of the case, as we shall see in the following sections.

Cases of Modification: Timely Challenge to Unauthorized Judgments

The interposition of a timely challenge not only dissipates the illusion of apparent authority, but also forces the trial court to face the fact that it may be acting beyond the limits of its powers as established by the constitution or by legislation, thereby possibly exposing the challenger to an unnecessary trial, an unauthorized judgment, or both.

Where the lack of jurisdiction goes not to the trial itself but only to some aspect of the judgment, the challenge is perforce post-judgmental. Under these circumstances, the challenge—though timely—will come late, and the remedy, seeking to save the unchallenged trial and the essence of the determination on the merits, will be to modify rather than totally invalidate the judgment below. A typical case of such challenge is that presented to the entry of judgment in the county district court in excess of its jurisdictional monetary limits.

One such case was that of *Reiser v. Simon.*[117] There, contractors brought suit against homeowners for damages in the sum of $250, the balance due on the contract and held in escrow. The escrow agent was also named a defendant and subsequently deposited the $250 in court under an interpleader. The owners, besides claiming the $250 in response to the interpleader, counterclaimed for $1,000 in damages against the contractors for poor workmanship.[118] Following trial, the court awarded the deposit to the owners, denied the contractors' claim and upheld the counterclaim of the owners, entering judgment for them in the sum of $250 on the interpleader and the sum of $1,000 on the counterclaim. On appeal, judgment on the interpleader was affirmed, but judgment on the counterclaim was reduced from $1,000 to $750 despite the "important jurisdictional question" raised by the plaintiffs.[119]

The appellate court did not advert to the transfer rule, but the tenor of its opinion was such as to lead to the conclusion that, had its applicability been raised, it would have been denied. The continued maintenance of the county district court as a court with definite limits on monetary recovery was at stake. Such a position is

[117] 63 N.J. Super. 297, 164 A.2d 650 (App. Div. 1960).

[118] *Id.* at 299-300, 164 A.2d at 651.

[119] *Id.* at 301, 304, 164 A.2d at 652-53.

not at odds with that taken in *Vorhies.*[120] There also, the jurisdiction of the county district court to try a demand in excess of the monetary limits was unchallenged during trial, but the appellate court saved both the judgment and the jurisdiction of the trial court by resort to the transfer rule. Theoretically, of course, the *Vorhies* result seems to countenance an evasion of the county district court; but in practice both *Vorhies* and *Reiser* may be reconciled on these grounds: a claimant going to trial on an excessive demand will be deemed to have tried the claim on the merits within the jurisdictional limits and will be deprived of any excess in the verdict by an appropriate modification of judgment, even though the excess in demand was not challenged during trial. In both cases then, primary consideration was given to the legislative policy establishing the monetary limits of the court's trial jurisdiction. In *Reiser,* this consideration outweighs the resultant unfairness to the claimant, and pragmatism operates to save the fruits of trial by trimming the recovery, instead of, by resort to the transfer rule as in *Vorhies,* ordering a transfer and entry of the judgment elsewhere.

In *Reiser,* the extent of the jurisdictional limits was not clear at the time the case was tried,[121] and the claims were not obviously beyond the power of the court to try. Nevertheless, the appellate court did not consider this a pertinent factor; a claimant guessing wrongly is yet bound by the limits. In *Vorhies,* the claimants in

[120] *See* notes 81-84 *supra* and accompanying text.

[121] *See* 63 N.J. Super. at 301, 164 A.2d at 652. Indeed this opinion served only to becloud the law still further. For a typical view of the soundness of this decision as to limits on counterclaims in the county district court see R. McDONOUGH, COUNTY DISTRICT AND MUNICIPAL COURTS, 17 N.J. PRACTICE § 175, at 80-81 & n.44 (2d ed. 1971).

The decision is also difficult to reconcile with the alternate holding in Kingsley v. Wes Outdoor Advertising Co., 55 N.J. 336, 339, 262 A.2d 193, 194-95 (1970), construing the provisions of N.J. STAT. ANN. § 2A:6-34 (1952), *as amended,* N.J. STAT. ANN. § 2A:6-34(a) (Supp. 1974-75), which authorizes a penalty action in the district court "where the debt, balance, penalty, damage or other matter *in dispute* does not exceed, exclusive of costs, the sum or value of $1,000." (Emphasis added.) The supreme court held that the county district court had jurisdiction under that statute to entertain an action by the plaintiff, a state official, seeking to recover a total of 576 separate penalties involving 576 separate but substantially related statutory violations. The court noted that the plaintiff could have brought 576 separate suits and had them consolidated for trial. "In practical reality, the suit was not for a single penalty in excess of $1,000 but, as noted, for 576 penalties, no one of which exceeded $1,000." 55 N.J. at 340, 262 A.2d at 195. The court also held that the county district court had additional jurisdiction to entertain an action for a penalty affecting the removal of an outdoor advertising sign under N.J. STAT. ANN. § 54:40-67 *et seq.* (1960) and that the $1,000 monetary limit in N.J. STAT. ANN. § 2A:6-34 (1952) did not apply to this statute. 55 N.J. at 339, 262 A.2d at 194. The opinion did not cite the decision in Ricciardi v. Rabin, 79 N.J. Super. 7, 190 A.2d 196 (App. Div. 1963), although the cases are in accord. *Ricciardi* is discussed at notes 122-30 *infra* and accompanying text.

demanding the sum of $5,000 were apparently asserting damages beyond the authority of the county district court, but that case was saved by a zero verdict. Would it have made a difference had they recovered a verdict equal to their demand? Would the lack of challenge before or during trial be relevant? Should the rule of court then apply, enabling the county district court to transfer the cause for entry of judgment, in accordance with the demands, to a court having no limits upon its award? There are no precedents directly in point to guide us, but it is likely that in this occasional situation, the appellate court would follow *Reiser* and reduce the judgment to the permissible limits, rather than establish a precedent of validating the excess by using the transfer rule. In part, such a precedent would render the county district court a trap for the unwary. Its summary, informal practice would lead to unforseen results. And the occasional case of a deliberate disregard of limits by bench and bar would not be countenanced.

A situation akin to this was involved in the case of *Ricciardi v. Rabin*,[122] in which the challenge based upon exceeding monetary limits was not initially raised until after judgment. First let us state the facts: The complaint sounded in negligence in six counts. Each of the first four counts set forth a claim for personal injuries for a member of the Ricciardi family, three infant sons and their mother. In each of the fifth and sixth counts, the father/husband pleaded per quod. Each count demanded an amount within the jurisdictional limits of the court, but the total demanded in all six counts exceeded the limits.[123] After a trial without a jury, the plaintiffs recovered judgments against the defendant in amounts which individually were less than, but in the aggregate more than, the limits. Defendant thereupon moved before the trial judge for a new trial upon the ground, raised for the first time, that the court lacked jurisdiction over the subject matter and, on the merits, that the verdicts had been excessive. The motion was denied and defendant appealed.[124]

The appellate division unanimously agreed that the verdicts were not excessive, but divided on the question of jurisdiction. Two of the three-judge panel decided that the court below had jurisdiction under the pertinent statute.[125] Since, they argued, the various plaintiffs could have achieved the same result by suing separately

[122] 79 N.J. Super. 7, 190 A.2d 196 (App. Div. 1963).

[123] *Id.* at 8, 190 A.2d at 196.

[124] Brief for Plaintiff at 2, Ricciardi v. Rabin, 79 N.J. Super. 7, 190 A.2d 196 (App. Div. 1963) [hereinafter cited as Plaintiff's Brief].

[125] 79 N.J. Super. at 8, 190 A.2d at 196.

and trying their cases together under an order of consolidation, the term "action" in the statute, limiting the county district court's jurisdiction to an action up to $3,000 in negligence, must in effect mean "claim."[126] They distinguished *Vorhies,* in which they said the complaint had been "incompetently drawn and consisted of a single count in which the husband and wife jointly sued for $5,000, lumping their claims indiscriminately," whereas in *Ricciardi* the claims were segregated.[127] The third judge considered the case to be, under the statute, clearly beyond the trial court's jurisdiction. He viewed the majority's position as an unwarranted extension of the statutory language and an unwarranted intrusion upon the legislative domain which includes provision for the jurisdiction of the inferior courts.[128] But then, having thus strictly construed the statute so as to adjudge the trial court without power to determine the claims, he voted for the more radical alternative—the employment of the provisions of paragraph (b) of the rule, thereby, upon the supposed authority of *Vorhies,* directing the entry of the judgment of the county district court in the superior court.[129]

With this suggestion we have stepped into the realm of the unreal. For if the concurring opinion be sound, that under the statute the county district court in *Ricciardi* lacked jurisdiction to try such a complaint and to enter judgment in the amounts there demanded, this deficiency was present from the beginning of the trial, through the taking of testimony, to the final determination. While it is true such deficiency had not been raised prior to judg-

[126] *See id.* at 8-9, 190 A.2d at 196-97. At that time the controlling statute, N.J. STAT. ANN. § 2A:6-34 (1952), provided:

> Every action of a civil nature at law, other than a proceeding in lieu of a prerogative writ . . . where the damage or other matter in dispute does not exceed, exclusive of costs, the sum or value of $1,000, shall be cognizable in the county district courts of this state.

Plaintiffs and the trial court had also relied on a directive and memorandum on aggregation of claims circulated to the presiding judges of the various county district courts by the administrative director of the courts. Plaintiff's Brief, *supra* note 124, at 2. A copy of the aforementioned memorandum can be found in Plaintiff's Brief, Appendix, *supra* note 124, at P-la. The appellate division, however, made no mention of these interpretative statements in its opinion.

After this case was decided, the legislature codified the result in *Ricciardi* by a statute permitting the aggregation of claims "in actions for damages resulting from negligence." N.J. STAT. ANN. § 2A:6-34.1 (Supp. 1974-75). *Quaere:* Does the rather specific authorization for aggregation in negligence actions mean that the legislature disapproves such a course in other actions, such as products liability suits? Probably not; but the legislature's habit of piecemeal codification of prior decisions does impose a heavier burden on the judiciary in later cases to elaborate satisfactory reasons for its determinations.

[127] 79 N.J. Super. at 9, 190 A.2d at 197.

[128] *Id.* at 10-11, 190 A.2d at 197-98.

[129] *Id.* at 10, 190 A.2d at 197.

ment, the trial court in entering judgment in excess of the statutory limits could not but act in disregard of those limits. And by so doing, it would have intruded without warrant upon the legislative domain, the assignment of jurisdictional limits for an inferior court—the very thing the opinion accused the majority of doing in construing the statute broadly. To apply the rule in such a situation, as the concurring judge would have done, is to lend validity to usurpation.

Error lay not in perceiving that the rule speaks in terms of fiction, but in that the fiction is serviceable only in furtherance of certain underlying policies such as the validation of a judgment of a court operating with unchallenged apparent authority. This was the situation in *Vorhies* which the concurrence purported to follow. But that case was distinguishable from *Ricciardi* for a much more basic reason than that mentioned by the majority. Although in both cases the trial proceeded without challenge to the supposed jurisdictional defect—the possibility of a verdict within the limits of the complaint's demand, but beyond the jurisdictional limits of the court—such possibility was erased in *Vorhies* in the actuality of a zero verdict, whereas in *Ricciardi,* under the concurring view, it was realized in the verdict. Thus, the zero verdict in *Vorhies* was in fact within the legislatively established limits of the county district court, whereas the allegedly excessive verdict of *Ricciardi* could not be.

Of course, a substantial argument can be made in support of the concurring position. *Ricciardi* was not a clear case of an excessive demand. There was a basis, eventually supported by the majority, for contending that the demands were authorized under the statute. And again, the challenge was belated. Under these circumstances then, the trial court had not acted in cavalier disregard of its authority, and considerations of fairness and conservation of judicial resources require that the defendant be considered to have waived his jurisdictional defense. As a practical matter the judgment is preserved through the employment of the transfer rule, rendering it a judgment of the county court rather than the county district court.

But such an argument would make considerations of fairness and pragmatism weightier than that of fidelity to legislative policy. And that the concurrence seemed unwilling to do. Moreover, the argument seems at odds with the approach taken by the appellate division in *Reiser.* There the court, we saw, faced with a similar situation—an excessive judgment following a belatedly challenged

excessive demand in an action whose jurisdictional limits were unclear—struck the excess, saving thereby the judgment and the jurisdiction of the trial court. Fidelity to legislative policy was indeed the supreme consideration. Fairness yielded. And pragmatism worked to trim the judgment, thus saving the jurisdiction but not the fruits of victory.

The danger then of the concurrence is that not only does it work at cross-purposes, elevating and then degrading legislative policy; but it does so by the use of a fiction to achieve a pragmatic and fair result without so stating. Its reasoning removed from its context could justify a similar employment no matter how palpable the excess and timely the challenge. Some such application was sought and decisively rejected in *Andriola v. Galloping Hill Shopping Center, Inc.*[130] Plaintiff, suing in the county district court for personal injuries, had asked for $3,000 in damages and received a jury verdict for $8,000. Thereafter she moved in the trial court, pursuant to paragraph (a) of the rule, for a transfer of the case to the county court or superior court so that judgment might be entered there in the sum of $8,000. Thus this case differs from those preceding in that it is the plaintiff who, challenging the jurisdiction of the court in which the case was tried, seeks the benefit of the transfer rule. The trial court denied the motion, reduced the verdict to $3,000 and ordered judgment to be entered in that amount.[131] Plaintiff appealed, arguing that the county district court, having lost jurisdiction upon return of the $8,000 verdict, should have transferred the case below under paragraph (a) of the rule and that, in default thereof, the appellate division should order the transfer to a proper court under paragraph (b).[132]

The appellate division held, however, that the trial court had jurisdiction, a suit at law for personal injuries, and that there were absolute jurisdictional limits on the amount recoverable there "regardless of what the trier of facts may determine the actual damages to be."[133] It further held that a transfer after a verdict could not be effected under the rule for the purpose of entering a judgment on a verdict in excess of the limits. To do that would practically destroy the county district court as a place for the inexpensive and expeditious disposition of the many relatively minor cases which comprise the vast bulk of litigation in the state.

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[130] 93 N.J. Super. 196, 225 A.2d 377 (App. Div. 1966).

[131] *Id.* at 198, 225 A.2d at 379.

[132] *Id.* at 199, 225 A.2d at 379.

[133] *Id.* at 201-02, 225 A.2d at 380-81.

The limits on liability, it observed, limit the time and money likely to be spent by defense counsel in the preparation and trial of cases, thereby affording a plaintiff quick and inexpensive justice.[134] The court regarded the disposition in *Vorhies* as equitable under the circumstances and followed the majority rather than the concurring opinion in *Ricciardi* affirming the judgment below.[135]

Some conclusions would seem to follow. If, as in *Andriola,* a jury verdict in excess of the limits does not oust the county district court of jurisdiction where the demand for damages in plaintiff's complaint was within the limits, but must instead be reduced to these limits; and if as in *Reiser,* a judge's determination in excess of the limits does not oust the court of jurisdiction even though such judgment coincides with the amount demanded, and the trial of the demand was unchallenged but must instead be reduced to these limits; it should follow (though it was said not to in *Vorhies*) that a jury verdict within the limits does not oust the court of jurisdiction even though the plaintiff's demand was in excess. The contrary opinion in *Vorhies* that an excessive demand takes the case out of the court's jurisdiction and that the rule could save the fruits of trial by effecting a post-judgmental transfer, followed by the concurrence in *Ricciardi,* was in effect abandoned, though not repudiated, in *Andriola.*

From *Reiser* and *Andriola* we may conclude further, despite the suggestions in *Vorhies* and *Ricciardi,* that the courts will honor the statutory policy restricting the amounts of recovery in the county district court and will not permit the rule to be used so as to validate judgments in excess of these limits. Thus, regardless of the demands in the complaint, once a case is tried in the county district court without challenge to its jurisdiction, the amount recovered will be limited to its jurisdictional capability. Rather than tailoring the jurisdiction to fit the judgment, the methodology sanctioned in the rule by a transfer after appeal, these cases prescribe the opposite technique—tailoring the judgment to suit the jurisdiction. The overriding consideration is the preservation of the county district court as a readily available tribunal, affording quick and cheap judgment in cases of limited value.

This tailoring the judgment through use of the technique of "modification" is practical and defensible where, as in the cases discussed in this section, the jurisdictional deficiency extends not to the trial of a cause or issue, but to some aspect of the judgment

[134] *Id.* at 201, 225 A.2d at 380.

[135] *Id.* at 204-05, 225 A.2d at 382.

entered, such as the amount of damages awarded. The situation would naturally be different were the county district court to try a case in which a jurisdictional challenge had been timely made to a demand clearly beyond the monetary limits. The situation is also different when it is the type of case or the relief itself that is at issue, where the parties and the court are on notice from the start that the matter at hand is beyond the competence of the court to try. In such a case, something beyond a modified order is required. This we shall next discuss.

Cases of Invalidation: Timely Challenge to the Unauthorized Hearing and Determination

The primary jurisdiction of the county district court is confined to actions at law. Thus a complaint seeking solely such extraordinary equitable relief as a mandatory injunction would be beyond its competence and should, on defendant's challenge, be transferred for trial to the chancery division of the superior court. But failing this, what is an appellate court to do in view of the rule, when faced with an appeal from a judgment granting an injunction? Modification in such a case is not a practical alternative. And if the court decides the case on the merits, it validates in substance the exercise of the lower court's jurisdiction and thereby encourages further similar excursions. There are rather strong arguments against permitting this, one constitutional and one practical. The first lies in the recognition that the county district court, being a court of limited jurisdiction, is a creature of the legislature, and that the various statutes of jurisdiction have not authorized that court to afford primary equitable relief.[136] An exercise of such power cannot be made under the cloak of apparent authority: That court never has the power to award such relief. Therefore, such an exercise amounts to judicial usurpation.[137] The second lies in the nature of the relief itself. An injunction is an extraordinary remedy, affecting personal freedom. It is highly doubtful whether a court of summary practice, burdened with a heavy trial calendar[138] and accustomed to loose methodology, should be entrusted with this kind of power. Sound reflection suggests that the award of the extraordinary remedy be confined to a court of deliberation.[139] The conclusion would seem to follow that theoreti-

[136] *See* note 47 *supra.*

[137] *Cf.* Brown v. United States, 365 F. Supp. 328, 345-50 (E.D. Pa. 1973).

[138] *See* the statistics on the county district court caseload in note 75 *supra.*

[139] Circuit Justice Baldwin's caveat of almost 150 years ago still rings true today: There is no power the exercise of which is more delicate, which requires greater

cal and practical considerations join to require the invalidation of such an order and a remand to the proper court for a new trial without discussion of the merits. Once again, the controlling factor lies not in the language of the rule itself, but in overriding policy considerations.

There is no precedent directly in point confirming the above analysis, but some support may be found in the decision in *Knoblock v. Knoblock.*[140] There a wife seeking to collect arrearages from her husband brought suit in the county district court. When the husband interposed as his sole defense the court's lack of jurisdiction over the subject matter, she moved for and received summary judgment for the amount due her, with the trial court denying the husband's cross-motion for dismissal on the jurisdictional issue.[141] The appellate division, in a summary three-sentence opinion, reversed the judgment for lack of jurisdiction and remanded the case with directions for a transfer, under the rule, to the chancery division of the superior court.[142]

Suits for support are of course matrimonial actions, cognizable in the chancery division and involve the discretion of the trial court as to whether changes in circumstances require a deviation from the terms of the separation agreement.[143] Discretion implies equitable powers foreign to actions at law. Thus, while the suit for arrearages might superficially appear to be one within the county district court's competence as being a routine action at law for debt, the error upon challenge ought readily to be evident. An appellate court cannot, without undermining the laws of jurisdiction, countenance such a suit. It constitutes, more subtly than an action

> caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages.

Bonaparte v. Camden & A.R.R., 3 F. Cas. 821, 827 (No. 1617) (D.N.J. 1830).

[140] 119 N.J. Super. 432, 292 A.2d 35 (App. Div. 1972).

[141] Appendix to Brief for Defendant-Appellant at 7-9, 12, 16-17, Knoblock v. Knoblock, 119 N.J. Super. 432, 292 A.2d 35 (App. Div. 1972).

[142] 119 N.J. Super. at 433, 292 A.2d at 35.

[143] The court in *Knoblock* relied on Bendler v. Bendler, 3 N.J. 161, 69 A.2d 302 (1949). At common law, interspousal suits to enforce mutual promises could not be brought in a law court. Relief, however, was available in equity. *Id.* at 168-69, 69 A.2d at 305. *Cf.* Immer v. Risko, 56 N.J. 482, 495, 267 A.2d 481, 488 (1970), authorizing interspousal suit at law for damages arising out of an automobile tort.

Knoblock made no reference to Timmerman v. Timmerman, 23 N.J. Misc. 52, 55, 41 A.2d 24, 26 (Dist. Ct. 1945), which had held that the county district court had no jurisdiction to adjudge a suit for support arrearages. *See also* Tellian v. Healy, 60 N.J. Super. 539, 542-44, 159 A.2d 777, 778-79 (L. Div. 1960), transferring an action to recover arrearages for child support provided for in an out-of-state divorce decree from the law division of the superior court to the chancery division.

for injunction in the county district court, a usurpation of authority.

The case closest to *Knoblock* is that of *State v. Osborn.*[144] In *Osborn,* the proceedings below were held invalid, not because a court had overreached its jurisdiction but rather because a tribunal created by the executive had pretended to be part of the judiciary. Yet there is a significant similarity. In each case the trial tribunal had proceeded to try the action in the face of a challenge that the matter was utterly beyond its competence.

These are the facts: Osborn was charged, tried and convicted in the "Marine Navigation Court" of operating a power vessel in state tidal waters in violation of the Tidal Waters Navigation Act,[145] which makes such an offense punishable by a fine of up to one hundred dollars or ten days' imprisonment for a first offense, and double the fine or imprisonment for a repeated violation.[146]

The same act charged the Department of Conservation and Economic Development in the executive branch of government with the duty of enforcement;[147] provided that a complaint might be brought thereunder in any county court, county district court, county criminal court, or municipal court;[148] and vested the commissioner of the Department, two of his named associates, and such of their assistants as he might designate, with all the powers of a magistrate of a municipal court.[149] Purportedly pursuant to this last provision, the commissioner established the "Marine Navigation Court" and appointed as its "magistrate" one of his assistants.[150]

Pursuant to rule,[151] Osborn appealed his conviction to the county court and moved for dismissal of the judgment of the "Marine Navigation Court" on the ground that that tribunal, not being a part of the state's judicial system, lacked jurisdiction. The county court, however, besides its appellate jurisdiction which Os-

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[144] 32 N.J. 117, 160 A.2d 42 (1960).

[145] N.J. STAT. ANN. §§ 12:7-44 to-53 (1968). The provision violated, section 12:7-47, provides in pertinent part: "No power vessel shall be operated in a reckless manner."

[146] *Id.* § 12:7-51.

[147] *Id.* § 12:7-52. This section also provides that the procedure to be used for enforcement "shall be the same as in the case of other violations under Title 12 of the Revised Statutes relating to . . . craft operating in other than tidal waters." These enforcement provisions are set forth in *id.* §§ 12:7-34.31 to 34.

[148] *Id.* § 12:7-34.31.

[149] Law of Dec. 8. 1954, ch. 236, § 32, [1954] N.J. Laws 879 (repealed 1962).

[150] 32 N.J. at 125, 160 A.2d at 46-47.

[151] N.J.R.R. 3:10-2 (corresponds to N.J.R. 3:23-2)

born had invoked in taking the appeal, had by virtue of the above mentioned statutory provision original jurisdiction to try the charge.[152] Thus, if it decided that the lower tribunal had lacked jurisdiction, it could, it reasoned, proceed to hear the case in the exercise of its original jurisdiction. On the other hand, if it decided the lower tribunal had jurisdiction, it would proceed to hear the case in the exercise of its appellate jurisdiction with, as in the case of an appeal from an inferior court to the county court, a plenary hearing, *i.e.*, trying the case from the beginning, as does a court when it presides over a new trial.[153] In either case the hearing would be substantially the same. The court, considering it would make no difference and considering the defendant's objection under the circumstances to be a procedural one, waived under the rules by his appeal,[154] rejected Osborn's challenge, heard the case as an appeal on the merits, convicted him and exacted a fine.[155]

On further appeal, the supreme court reversed the judgment of the county court, holding it to be reversible error for that court to exercise its appellate jurisdiction instead of dismissing the judgment of the "Marine Navigation Court" for lack of jurisdiction.[156] It agreed that ordinarily an appeal to the county court waived any procedural defect in the original trial, but added:

> [T]he reach of the waiver provision of *R. R.* 3:10-10(*b*) extends only to procedural matters. It does not have the effect of curing a lower court's lack of jurisdiction over the subject matter, which is not conferred by the defendant's waiver or implied consent. Jurisdiction over the subject matter is the power of a court to hear and determine cases of the class to which the proceeding in question belongs. It rests solely upon the court's having been granted such power by the *Constitution* or by valid legislation, and cannot be vested by agreement of the parties.[157]

The court further held that the legislature had never, by the above statutory provisions, intended to establish a new court such as the "Marine Navigation Court," but that, in vesting members of the executive branch with the power of adjudication of statutory violations concurrently given to certain named courts, it had vio-

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[152] *See* note 14 *supra* and accompanying text.

[153] N.J.R.R. 3:10-10 (corresponds to N.J.R. 3:23-8).

[154] Appeal of a criminal conviction effects a waiver of "any defect in, or the absence of, any process or charge laid in the complaint." N.J.R. 3:23-8(c) (corresponds to N.J.R.R. 3:10-10(b)). [The former rules had omitted a comma; otherwise the texts are identical.]

[155] 32 N.J. at 120, 160 A.2d at 44. The fine was, however, reduced from $100 to $25 by the county court. *Id.*

[156] *Id.* at 128, 160 A.2d at 48.

[157] *Id.* at 121-22, 160 A.2d at 45 (citations omitted).

lated the separation of powers article in the 1947 constitution.[158] Consequently, it held the conviction rendered by a member of the executive branch purportedly sitting as a judicial magistrate to be a nullity.[159]

The provisions of the Transfer of Causes Rule it refused to apply. The rule, it said, referred only to "a court." The "Marine Navigation Court" not being "a court," its "magistrate" could not have utilized the rule in the first instance.[160] Nor on appeal, therefore, could the county court; for the rule contemplated a real court, not a bogus one. The state's pragmatic argument that it was immaterial whether the "Marine Navigation Court" was bogus or real since the county court which heard the case on the merits had original jurisdiction under the statute was rejected. That jurisdiction, the supreme court stated, had not been invoked.[161] Bent upon nullity, it ordered a dismissal of the complaint and remanded.

Osborn is unusual then in three respects: First, for its reversal of the judgment below with a direction of subsequent dismissal for lack of jurisdiction in the tribunal uttering the judgment; second, for its rejection of the proposition that the case nonetheless should be heard and decided on the merits and remanded for the entry of judgment in a proper court; and third, for its reaffirmation of the standard American rule of law, made official currency by Cooley,[162] that jurisdiction of a court over the subject matter is conferrable only by constitution or legislation, not by consent of the parties.

This then is a second limitation to the overall application of the Transfer of Causes Rule. For reasons of state, grounded in the policy decision to safeguard the integrity of the judicial branch from legislative and executive encroachment, the rule will not apply to a tribunal pretending to be in and of the judiciary. The rule will not extend to permit a transfer from such a tribunal to a real court; it will not validate on appeal the tribunal's judgment; and when the court on such appeal determines the case anew in its appellate capacity rather than transferring the case to itself for trial

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[158] *Id.* at 126-27, 160 A.2d at 47-48. *See* N.J. CONST. art. 3, § 1. *Cf. id.* art. 6, § 6, ¶ 1.

[159] 32 N.J. at 128, 160 A.2d at 48.

[160] *Id.* at 123, 160 A.2d at 45-46.

[161] The court reasoned:

> The complaint was not addressed to [the county court], and the State made no attempt to institute proceedings before it in any other way. The jurisdiction of the County Court was invoked only by way of the defendant's appeal, and thus it heard the cause only in its appellate capacity.

Id. at 122, 160 A.2d at 45.

[162] *See* note 7 *supra.*

in its original jurisdiction, the rule on further appeal will neither validate such a judicial judgment nor consider the transfer as having been made.[163] Such proceedings are void from beginning to end. Worst of all, no further proceedings will be countenanced in the original action. No remand to a proper court—only dismissal with a subsequent new start—satisfied the supreme court.

There are circumstances other than outright usurpation and reasons of state which may also require invalidation. For example, a court's jurisdiction and the validity of its prior proceedings may be timely challenged by an intervening party. Under such circumstances, a transfer without invalidation would be meaningless.

This was the case in *In re Old Colony Coal Co.*[164] Assignees of the corporation under a deed of assignment for the benefit of creditors had started proceedings in the Hudson County Court.[165] Having received an offer to sell the corporate assets, they filed a petition with the court to accept it, giving notice to all creditors except one.[166] Following a hearing, the court entered an order

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[163] Compare this restrictive validating policy with that followed by the supreme court in State v. Saulnier, 63 N.J. 199, 306 A.2d 67 (1973). Overruling State v. McGrath, 17 N.J. 41, 110 A.2d 11 (1954), the court held that a county court judge could try together an indictment and a nonindictable disorderly person complaint involving the same incident, on the theory that jurisdiction lay in the superior court. 63 N.J. at 207-08, 306 A.2d at 70-71. Where the indictable offense has as a lesser included offense a disorderly person charge, the court stated that

> [w]hether the . . . indictment is tried by a Superior Court judge or a County Court judge it is to be dealt with, at least for jurisdictional purposes, as a Superior Court proceeding.

Id. at 207, 306 A.2d at 71. This is novel. Theretofore, it was generally understood, as in *McGrath*, that the county judge trying criminal indictments sits of course in the county court and, as held in *McGrath*, that court has no jurisdiction to try a disorderly person complaint. *See* 17 N.J. at 52-53, 110 A.2d at 17. *See also* N.J. STAT. ANN. § 2A:3-4 (1952), conferring jurisdiction on the county court only in criminal proceedings "of an indictable nature."

If this line is pursued, *Saulnier* will take its place in New Jersey as a judicial evolutionary leap of the first magnitude along with such precedents as State v. DiPaolo, 34 N.J. 279, 286-89, 168 A.2d 401, 404-06 (1961), where the court substantially eliminated all territorial restrictions on the county court's jurisdiction in the trial of criminal cases, and Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 465-69, 173 A.2d 270, 274-76 (1961), in which the county district court was held to have an equitable jurisdiction it had never before possessed. For a more extensive discussion of *De Marco* see notes 47 & 87 *supra*.

[164] 49 N.J. Super. 117, 139 A.2d 302 (App. Div. 1958).

[165] N.J. STAT. ANN. § 2A:19-7 (1952) requires filing such an assignment with the surrogate of the county in which the assignor "resides." Although Old Colony's "statutory registered" office was in Newark, Essex County, its "principal place of business" was in Kearny, Hudson County. 49 N.J. Super. at 120, 139 A.2d at 304. Since Old Colony was a corporation, this was the improper place to file. *See* note 168 *infra*.

[166] The Chesapeake & Ohio Railway Co. had obtained a judgment against Old Colony in the Law Division of the Superior Court, Essex County, between August 20, 1956, when the assignment was executed, and September 13, 1956, when the deed of assignment was

authorizing the sale. The unnotified creditor, thereafter learning of the proceedings, moved to vacate the order for lack of notice and lack of jurisdiction in the court since Old Colony's principal office was in Essex County rather than in Hudson.[167] The trial court granted the motion solely on the latter ground,[168] declared all prior proceedings void, and ordered the case transferred to the Essex County Surrogate for further proceedings. The assignees appealed, arguing not against the transfer but the invalidation of the prior proceedings. The appellate division dismissed the appeal and endorsed this invalidation.[169] Recalling the antecedents of the rule in the Transfer of Causes Act, it observed:

> [T]he rule could not be interpreted as imparting validity to any orders or judgments rendered by a court which concededly lacked the power to enter them.
>
> Moreover, transfer of causes under the rule contemplates the making of a "determination" by only the transferee court. The action set aside in the present case was of sufficient substance to be considered a part of the determination in the proceedings. It was therefore properly set aside so that the determination in that respect could be made by the proper court.[170]

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filed. 49 N.J. Super. at 120, 139 A.2d at 304. Unexplained delays in filing abounded in the *Old Colony Coal* case.

[167] 49 N.J. Super. at 121-22, 139 A.2d at 305.

[168] *Id.* at 122, 125, 139 A.2d at 305, 307. Reliance was placed on N.J. STAT. ANN. § 2A:19-45 (1952), which provides:

> A corporation making a general assignment shall be deemed . . . a resident of the county in which its principal office is located, and the county court of such county or the superior court shall have jurisdiction in the premises.

This provision was upheld to ensure

> a precise and a determinable county so that creditors and other interested persons can search the records in the county where the corporation maintains its statutory office and know whether the corporation has conveyed its assets to an assignee. This is a definite and sensible way to determine jurisdiction.

49 N.J. Super. at 126, 139 A.2d at 307.

[169] 49 N.J. Super. at 124, 139 A.2d at 306. Since not all the issues in controversy between all the parties involved had been decided at the time the order was entered vacating the prior proceedings, this order was interlocutory in nature. *See, e.g., In re* Estate of Url, 5 N.J. 507, 512, 76 A.2d 249, 251 (1950). Appeals from an interlocutory order at the time *Old Colony Coal* was decided had to be made within ten days thereafter. N.J.R.R. 2:2-3(a), now extended to fifteen days by N.J.R. 2:5-6(a). In the instant case, however, thirty days passed between the entering of the order and filing of notice of appeal. 49 N.J. Super. at 122, 139 A.2d at 305. The court therefore dismissed the appeal for lack of timeliness, but, having further decided that the appeal lacked merit and that "the issues are of general interest and ought to be clarified for the guidance of the bar," it went on to discuss the merits of the case. *Id.* at 124, 139 A.2d at 306.

[170] 49 N.J. Super. at 125, 139 A.2d at 307 (citation omitted). The court's opinion had previously noted that the administrative nature of these proceedings necessitated continual decisions on minor matters prior to any final determination of the issues. *Id.* at 123, 139 A.2d at 305.

This observation, however, is misleading on two points. While the rule itself cannot give validity to the determination of a court lacking jurisdiction, paragraph (b) of the rule, by providing for an appellate determination upon the merits and for a subsequent remand to the transferee court for a formal entry of judgment, must at least contemplate a process for validating orders or judgments of the trial court, even though the latter might lack the power to enter them.[171]

Further, the court does not sufficiently stress the point that requirements of due process are the ultimate grounds for invalidation in this type of situation. Where, as here, significant proceedings have transpired in the absence of a non-participating, unrepresented, and unnotified litigant which affect his interest, due process considerations will demand that, when timely challenged for lack of jurisdiction, the prior proceedings be invalidated. In this context, as the court notes,[172] the transfer must be purely ministerial. It is not the bare language of the rule which is determinative but the underlying public policy.

A court then must decline to proceed to a hearing and determination on the merits when faced with a timely and valid challenge to its jurisdiction—and in the occasional case of a timely and valid challenge made to prior proceedings will invalidate them. A transfer by and between trial courts under paragraph (a) of the rule must, under the circumstances, be purely procedural without consequences of validation. And failing this, the disposition under paragraph (b) of the rule must also be purely procedural; the appellate court will decline to hear and determine the appeal on the merits but will instead reverse for lack of jurisdiction. These are the lessons to be gleaned from the cases.

CONCLUSIONS

The provisions of the Transfer of Causes Rule are of deceiving simplicity. Insofar as they authorize a transfer before a hearing and determination, they are a matter of minor concern, dealing

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[171] *See* pp. 7-8, 21-22 *supra*.

[172] The intent of the rule as construed by the court was chiefly to avoid wasted time and duplication of effort by avoiding

> the bar of the statute of limitations and the necessity of re-service of process. Jurisdiction over the person previously obtained would not be vitiated by the lack of jurisdiction in the court over the subject matter. All pleadings and other papers already filed would not have to be re-filed or re-instituted *ab initio*.

49 N.J. Super. at 125, 139 A.2d at 306-07.

only with the details of practice, the forwarding and receipt of records. Thus viewed, they advanced the usual policy underlying the formulation of rules of practice and procedure, "simplicity . . . and the elimination of unjustifiable expense and delay."[173] Transfer in these terms at the trial level ordinarily raises no problem, as was decided by the trial court in *In re Old Colony Coal Co.* and affirmed upon appeal.[174] Transfer upon the same terms from one appellate court to another, though not strictly authorized in the rule, can readily be justified on the same basis—simplicity and the unjustifiable expense and delay.

When we consider the question of validation, we have gone beyond the simply procedural. We have become involved in the problem of when and under what circumstances the judgment of a lower court will be upheld, even though it has not the authority to make it. *Osborn* held that the decision of the court will not be validated when it involves the determination of an unconstitutionally created tribunal to insure the integrity of the judicial system. We have argued, along somewhat similar lines, that it will not be validated in a case clearly beyond the court's statutory competence to act, involving a substantial question of incompetence, such as the award of an injunction, over a defendant's objection, in the summary practice of the county district court. This case we have called usurpation. In *Knoblock*, the appellate division, in effect, applied that doctrine when it invalidated the judgment of a county district court in a suit brought by a wife against her husband for arrearages under a support agreement, and in which the trial court had ignored the husband's timely jurisdictional challenge. The consequence of invalidation is that the appellate court declines to exercise its discretion, given in paragraph (b) of the rule, to hear and determine the appeal on the merits and to order the entry of the appropriate judgment in the proper court. In addition, considerations of due process require the invalidation of all prior proceedings had before the appearance of the party, not previously noticed or represented, who timely challenges their validity (*Old Colony Coal*). Superior policy considerations in these cases outweigh the need for procedural simplicity and the elimination of expense and delay, and necessitate a decision against validation, either under

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[173] N.J.R. 1:1-2. *See also* N.J.R.R. 4:1-2.

[174] Of course, transfer does suspend the operation of the statute of limitations. This was an important objective of both the original statute and the rule of court. *Compare* note 24. *supra with* note 172 *supra*. As to whether this is strictly procedural see note 13 *supra*.

paragraph (a) of the rule as in *Old Colony Coal,* or under paragraph (b) as in *Osborn* and *Knoblock*. And in *Osborn*, the court refused to apply the rule even to the procedural extent of remanding the case to a proper trial court for a new trial, the procedure followed in *Old Colony Coal* and *Knoblock*.

On the other hand, when the trial court or trial judge has under the color of authority proceeded to judgment in the trial of a claim or issue, without objection of counsel, an appeal from such judgment will be heard and determined on the merits and judgment entered in the appropriate court. In order for there to be apparent authority, the case or issue must be one customarily or frequently heard in that court or similar to one heard there. Thus, the county district court customarily tries personal injury cases ending in zero verdicts (*Vorhies*). The county court frequently construes a will (*Schmidt*). A county court judge customarily tries incidental equitable defenses or replies (*Scott*). The juvenile and domestic relations court customarily tries some, though not all, matrimonial support cases (*Caravella*).

This technique of appellate determination and remand involves the use of a fiction, that the judgment entered is that of the right court instead of the wrong court, the transparency of which should be evident when the case culminates in the affirmance of the original determination on the merits (*Vorhies*). When the case ends in a reversal on the merits with a remand for a new trial, recourse to the fiction is not necessary, since the judgment below has been undone anyway (*Caravella*). And a resort to the rules becomes unnecessary when a case, originally decided against a plaintiff both on the merits and for lack of jurisdiction after an ineffectual and ill-timed challenge to the jurisdiction, is reversed on appeal on the merits: The conservation of judicial energies requires under the circumstances a disregard of the jurisdictional issue (*Journeymen*).

When a court, however, operating under authority to try a cause proceeds to enter a judgment beyond its power with respect to the amount of damages, validation will not be given to the judgment and thus the rule will not apply, usually in deference to the overriding need to maintain a court of summary practice for the swift and cheap disposal of cases of inferior worth (*Andriola*). Nor on the other hand, will the proceedings be invalidated. Instead, the judgment will be modified to fit the jurisdictional limits (*Andriola* and *Reiser*). The suggestion to the contrary in the concur-

ring opinion in *Ricciardi* will probably not be followed. (*Ricciardi* itself was held to be a case of proper jurisdiction; thus, the rule did not apply.)

In sum, the rule operates at two levels. In prescribing the routine of transfer before hearing and determination, it does affect a matter of minor concern, of mere practice and procedure. In authorizing the validity of a determination made before transfer, it involves matters of major concern; the separation of powers, usurpation of authority, due process, the sound administration of justice, fairness to the parties, etc. In writing its prescriptions for validation in fictional terms, the rule disguises its content so well as to deceive sometimes even the judiciary, who treat matters of major concern as though of minor concern.

Providing for the transfer of causes, with all due respect to the late Professor Sunderland, is no simple matter.[175] The variables are considerable, involving, as in the days of old English practice, reasons of state. The suggestion is sound that the question of jurisdiction over the subject matter no longer be considered an absolute bar to the validation of all proceedings, no matter how untimely raised. As evidenced by this study of New Jersey cases, the application of this proposal does bring about a flexibility in the administration of justice, to the end that in every case one feels that justice has been done. But justice sometimes does require the invalidation of proceedings. Even in *Osborn*, which turns on a question of state, one feels happy to learn of the demise of the "Marine Navigation Court."

Whether the rule should stand in its present form is doubtful. There are implicit in the decisions fruitful suggestions for revision and repeal. An obvious one: the New Jersey supreme court should announce as a matter of judicial policy—rather than as a supposed matter of practice and procedure—that the usual American rule regarding jurisdiction of the subject matter no longer applies in that state, but has been modified along the above lines; and that the decision as to validation or modification of prior proceedings including judgment will be determined in the cases in accordance with judicial precedents. The rule could then be amended to provide for the simple procedural technique of transfer between trial courts and between appellate courts prior to hearing and determi-

[175] Professor Sunderland had glibly stated: "Jurisdictional difficulties are so easily avoidable that no reasonable excuse can be offered for their existence." Sunderland, *supra* note 3, at 588.

nation, no validation being required. The provision for such a transfer after hearing and determination would be deleted.

In that event, the inconsistencies and confusions arising under the present rule would be quite substantially reduced. The reform it was intended to accomplish would indeed have been accomplished. Waiver and consent can sometimes confer jurisdiction. The fiction of transposition of judgment can now be discarded in favor of realistic practice.