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likely that in the near future it will be necessary to regulate rainmaking, not only by rules of nation-wide application, but also by international treaty.

GUS D. HATFIELD, JR.

INTRINSIC AND EXTRINSIC FRAUD AND RELIEF AGAINST JUDGMENTS

Closely akin to the doctrine of res adjudicata[1] is that which will not allow a court of equity to grant relief against a fraudulently acquired judgment unless the fraud is shown to have been "extrinsic" or collateral rather than "intrinsic" fraud.[2] According to this rule, to warrant equitable relief against a judgment on the ground of fraud, it must appear that the fraud was practiced in the very act of obtaining the judgment. Relief is granted on the theory that through fraud extrinsic and collateral to the actual proceedings before the court, the unsuccessful party has been prevented from fully presenting his case, and hence that there has never been a real contest before the court on the subject matter of the suit.[3] On the other hand, the rule is that an issue or controversy which has once been tried and passed on by a court should not be retried in an action for relief against the judgment,[4] since otherwise litigation would be interminable.[5]

The origin of the doctrine, and the authority most cited in the cases on the problem is *United States v. Throckmorton*,[6] in which Mr. Justice Miller laid down the governing principle as follows:

> "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicae, ut sit finis litium*, and *nemo debet bis vexari pro una et eadam causa*. . . .

1. "When a tribunal having jurisdiction of the subject-matter and the parties has once decided a question, it is *res adjudicata* between those parties, and cannot be relitigated by them in an original proceeding before another tribunal." State *ex rel.* Roberts v. Lawrence, 76 Kan. 940, 92 Pac. 1131, 1133 (1907).

2. "Extrinsic" fraud is often referred to as "fraud in the procurement." See, *e.g.*, Chermak v. Chermak, 227 Ind. 625, 88 N.E.2d 250 (1949).

3. Hogan v. Scott, 186 Ala. 310, 65 So. 209 (1914); Bergin v. Haight, 99 Cal. 52, 33 Pac. 760 (1893) (collusion between administrator and attorney); Spencer v. Vigneaux, 20 Cal. 442 (1862) (concealment of partial payment); De Louis v. Meek, 2 Greene 55, 50 Am. Dec. 491 (Iowa 1849); Keith v. Alger, 114 Tenn. 1, 85 S.W. 71 (1904); *cf.* Maddox v. Apperson, 82 Tenn. 596 (1885).

4. It is said that where the same matter has been actually tried, a "party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted." Greene v. Greene, 68 Mass. (2 Gray) 361, 366 (1854). The simple answer to such a statement is that this gives no reason; it merely states the result. *See* Warner v. Blakeman, 4 Keyes 487, 507 (N.Y. 1868).

5. See 3 FREEMAN, JUDGMENTS § 1233 (5th ed., Tuttle, 1925); 3 POMEROY, EQUITY JURISPRUDENCE § 919b (5th ed., Symon, 1941); Note, 23 CALIF. L. REV. 79 (1934); 9 CALIF. L. REV. 155 (1920); 21 COL. L. REV. 268 (1921); 36 ILL. L. REV. 894 (1942); 34 MARQ. L. REV. 138 (1950).

6. 98 U.S. 61, 25 L. Ed. 93 (1878).

> But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. . . . In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."[7]

The *Throckmorton* case was followed thirteen years later by the California court in *Pico v. Cohn,*[8] and these two cases are commonly regarded as the leading decisions on the problem.[9] Both, it seems, have succeeded in evolving from the facts of a particular case a rigid rule, and, with sweeping statements of doctrine, established a rule restricting equity courts of the future in applying the facts to the particular case at hand.[10]

But the present weight of the *Throckmorton* case would perhaps not be as great[11] if the courts were to consider the procedural differences existing at that time. Most of the cases on which the *Throckmorton* decision relies were actions in equity for new trials;[12] the case itself involved an action to "vacate" a judgment. Justice Miller said that a bill in chancery "was at that time a very common mode of obtaining a new trial."[13] The passage of statutes governing the granting of new trials eliminates the necessity of many actions in equity for that purpose. Diligence on the part of a losing party will generally enable him to seek a new trial within the statutory period.[14] Frequent applications to enjoin judgments were made in equity before the practice of awarding new trials was introduced into the common

7. 98 U.S. at 65-66.
8. 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L.R.A. 336, 25 Am. St. Rep. 159 (1891).
9. See Note, 126 A.L.R. 390 (1940).
10. "In Tucker v. Stewart, 121 Iowa, 714, 97 N.W. 148, we said that the rule announced by the Supreme Court of the United States in U.S. v. Throckmorton, *supra*, is that uniformly followed in this state. This settles the matter for this jurisdiction. . . ." Graves v. Graves, 132 Iowa 199, 109 N.W. 707, 709, 10 L.R.A. (N.S.) 216, 10 Am. Cas. 1104 (1906).
11. For collections of cases, see authorities in note 5, *supra*.
12. Railroad Company v. Neal, 1 Woods 353, 20 Fed. Cas. 183, No. 11,534 (C.C.E.D. Tex. 1870); Riddle v. Baker, 13 Cal. 296 (1859); Borland v. Thorton, 12 Cal. 440 (1859); Dixon v. Graham, 16 Iowa 310 (1864).
13. 98 U.S. at 67.
14. Lack of diligence appears to be the principal reason for the refusal of equity courts to act in the cases cited in the *Throckmorton* opinion. See note 12, *supra*.

law courts.[15] Mr. Justice Clifford, in *Crim v. Handley*,[16] said, "Until the practice of granting new trials in courts of law was introduced, every reason existed why equitable relief should be afforded; but as the courts of law now exercise that power very liberally, especially in case of fraud or unavoidable accident, a resort to equity is seldom necessary or successful."[17] This restraint seems to be the ideology leading up to the *Throckmorton* rule, the courts sometimes ignoring, in refusing relief against intrinsic fraud, that the proper relief is the enjoining of the person of the guilty party, and that such action does not affect the judgment of the law court, as in the granting of new trials.

Because of the harshness of the *Throckmorton* rule, it has caused much embarrassment to courts which give it token recognition, and yet seek tc avoid its harshness by terming certain acts "extrinsic" fraud in order to grant relief against unconscionably acquired judgments.[18] Most courts have departed from the *Throckmorton* rule where there exists a fiduciary or other relationship such that the perpetrator of the fraud owes a duty to disclose the facts to the injured party,[19] even though perjury, the most obvious form of "intrinsic" fraud, is committed.[20] And in the case of judgments on arbitration awards, most courts have made an exception to the general rule.[21] Some courts have shown by their inner turmoil that the harshness of the rule is recognized, and yet go very far to sustain it.[22]

But the rule has never had unanimous adherence. The British courts have not drawn the distinction between intrinsic and extrinsic fraud, their attitude being that fraud vitiates everything it touches,[23] and that equity has the power to interpose and refuse to allow a successful litigant to receive the fruits of his fraud perpetrated in a former action.[24] Relief has

15. Crim v. Handley, 94 U.S. 652, 24 L. Ed. 216 (1876). See 15 R.C.L., Judgments § 214 (1917); Note, 32 L.R.A. (N.S.) 905, 929 (1911).
16. Crim v. Handley, *supra* note 15.
17. 94 U.S. at 658.
18. See *e.g.*, Chicago, R.I. & P. Ry. v. Callicotte, 267 Fed. 799, 16 A.L.R. 386 (8th Cir. 1920); McGuinness v. Superior Ct., 196 Cal. 222, 237 Pac. 42 (1925); Note, 126 A.L.R. 390, 402, n.37 (1940).
19. Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282 (1902) (mother and minor children); 3 FREEMAN, JUDGMENTS § 1235 (5th ed., Tuttle, 1925); Note, 23 CALIF. L. REV. 79, 83 (1934).
20. Silva v. Santos, 138 Cal. 536, 71 Pac. 703 (1903); Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169 (1902).
21. See 49 HARV. L. REV. 327 (1935).
22. See, for example, the recent case of Alexander v. Hagedorn, 226 S.W.2d 996 (Tex. 1950), where the court refused to relieve the plaintiff of a default judgment which the justice had been induced by fraud to render against him. Justice Smedley, dissenting, says that the judgment treats "the applicable equitable rules as inflexible rules, ignoring the fact that the rules of equity are in a measure flexible and adaptable to particular exigencies." *Id.* at 1003.
23. Abouloff v. Oppenheimer & Co., 10 Q.B.D. 295 (C.A. 1882); Flower v. Lloyd, 10 Ch.D. 327 (C.A. 1879).
24. Cole v. Langford, [1898] 2 Q.B. 36; Vadala v. Lawes, 25 Q.B.D. 310 (C.A. 1890).

probably been given more freely against foreign judgments,[25] "but it is said to be equally applicable to judgments obtained in England; and I see no reason for holding that a judgment in a division court is to be exempted from the operation of the principle."[26] And in an early case, no distinction was made between extrinsic and intrinsic fraud when a new trial was granted in equity where it was shown that the former judgment was founded upon a forged instrument.[27]

Street, J., said in *Johnston v. Barkley*,[28] "It is obviously necessary in order to prevent an abuse of the right to have a judgment re-opened upon the ground of fraud, that the fraud should be that of the party who has obtained the judgment; that it should be clearly made out; and that it should have undoubtedly been at the foundation of the decision which has been attacked; and the attacking party must be prepared to shew this upon an application to stay his action as frivolous and vexatious."[29] But this limitation is applicable to all suits in equity, and the facts behind each case may be looked to individually.[30]

The *Throckmorton* rule has been flatly rejected in Wisconsin.[31] The requirement of a very high degree of proof in suits in equity to enjoin a "victor from enjoying the spoils" of his fraud in Wisconsin[32] seems largely to eliminate the principal objection to actions of this sort—*i.e.*, that there would be no end of litigation.[33] The Wisconsin rule is not abrogated by a procedural rule similar to Rule 60(b) of the Federal Rules of Civil Procedure,[34] the independent action after term being available as in the Federal Courts.[35] Neither does the Wisconsin practice seem to be encouraging excessive and endless litigation.[36]

"The numerous American decisions bearing on the point, and the near absence of English and Canadian ones, afford ground for the contention that a general assurance in the law that a judgment obtained by perjury will be protected presents a temptation to

25. See Note, 32 L.R.A. (N.S.) 905 (1911).
26. Johnston v. Barkley, 10 Ont. L.R. 724, 728 (1905). "I do not find the cases upon the subject to turn upon the difference suggested . . . between judgments obtained by extrinsic fraud and those obtained by perjury at the trial." *Id.* at 727.
27. Coddrington v. Webb, 2 Vern. 240, 23 Eng. Rep. 755 (Ch. 1691).
28. 10 Ont. L.R. 724 (1905).
29. *Id.* at 728. See Boring v. Ott, 138 Wis. 260, 119 N.W. 865, 868, 22 HARV. L. REV. 600 (1909).
30. This appears to be the viewpoint of Chief Justice Marshall in Marine Ins. v. Hodgson, 7 Cranch 332, 336, 3 L. Ed. 362 (U.S. 1813).
31. An exhaustive summary of the problem is contained in Boring v. Ott, 138 Wis. 260, 119 N.W. 865, 22 HARV. L. REV. 600 (1909), which was reinforced by the Wisconsin court in Laun v. Kipp, 155 Wis. 347, 145 N.W. 183 (1914). The ruling is apparently not affected by the recent case of Werner v. Riemer, 255 Wis. 386, 39 N.W.2d 457 (1949), 34 MARQ. L. REV. 138 (1950), since that case concerned a suit at law where the plaintiff sought to relitigate the question of fraud which had been passed on before.
32. Discussed with approval, Note, 23 CALIF. L. REV. 79, 84 (1934).
33. See note 5 *supra*.
34. WIS. STAT. § 269.46 (1949).
35. Gimbel v. Wehr, 165 Wis. 1, 160 N.W. 1080, 1082 (1917).
36. See Note, 23 CALIF. L. REV. 79, 84 (1934); 49 HARV. L. REV. 327 (1935).

give false testimony and that, in the interests of something more nearly approaching a true 'administration of justice,' litigants might better be assured that a judgment attributable to clearly provable perjury cannot be held in the face of due diligence of the opposing litigant."[37]

There has been some question as to whether the new Federal Rules of Civil Procedure[38] have abolished the distinction between intrinsic and extrinsic fraud in the Federal courts.[39] But Rule 60(b) merely abolishes the distinction in authorizing relief by the same court that handed down the judgment—relief to be given on motion no later than one year after judgment. This rule concludes by providing that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules *or by an independent action*."[40] This "independent action" is the same action in equity herein discussed, and where "the independent action is resorted to, the limitations of time are those of laches or statutes of limitation."[41]

In most jurisdictions, therefore, the *Throckmorton* rule has not been changed or overruled,[42] and the distinction between "intrinsic" and "extrinsic" fraud still troubles the courts.[43] Its validity is doubtful. By adverting to the procedural aspects of the cases originally establishing the rule, it is possible to distinguish them. The principal attribute of equity jurisdiction is its power to act upon the person of an individual to restrain him from doing something which conscience and justice demand that he not do. This is the precise remedy which should and can be applied to the question of fraudulently acquired judgments. "In cases of this character the injunction acts not on the court rendering the judgment, but on the party."[44] It is not suggested that equity grant a new trial or reverse the decision of the law court granting a fraudulently acquired judgment, but that it should enjoin

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37. Note, 126 A.L.R. 390, 394 n.11 (1940).

38. FED. R. CIV. P. 60(b).

39. Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 640 *et seq.* (1946); 34 MARQ. L. REV. 138, 140 (1950).

40. Italics supplied.

41. Editor's notes to Rule 60(b). See Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 659 (1946). See *id.* at 650-53 for comparison with similar rule in California.

42. The case of Marshall v. Holmes, 141 U.S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870 (1891), is often cited as being in conflict with the *Throckmorton* case. See, *e.g.*, Publicker v. Shallcross, 106 F.2d 949, 952, 126 A.L.R. 386 (3d Cir. 1939); Boring v. Ott, 138 Wis. 260, 119 N.W. 865, 868 (1909). But the court did not in fact make a direct holding on the question, *see* 3 FREEMAN, JUDGMENTS § 1233 (5th ed., Tuttle, 1925), merely incidentally saying that "it might be that relief could be granted by reason" of the facts alleged. 141 U.S. at 601.

43. Interesting recent cases concerning the procedure for obtaining relief from judgments acquired by extrinsic fraud on the court include: Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 Sup. Ct. 997, 88 L. Ed. 1250 (1944); Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948).

44. Chicago, R.I. & P. Ry. v. Callicotte, 267 Fed. 799, 810, 16 A.L.R. 386 (8th Cir. 1920).

the successful party from enforcing the judgment.[45] Even if courts continue to refuse to grant this discretionary relief in the case of "intrinsic" fraud, they may still look to the cases where mere token recognition has been given to the *Throckmorton* doctrine,[46] expanding the definition of extrinsic fraud to allow more equitable relief.[47] And there is certainly no adequate reason for continuing to apply the distinction between the two kinds of fraud where motions for relief before the same court are concerned. The time for these motions is limited by statute or court rule and the objection that a judgment would never be final does not apply. This change, embodied in the Federal Rules, is the minimum modification of the *Throckmorton* rule to be urged.

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45. See 15 R.C.L., *Judgments* § 214 (1917); Moore and Rogers, *Federal Relief from Civil Judgments,* 55 YALE L.J. 623, 654 (1946).

46. Note 18, *supra.*

47. Bolden v. Sloss-Sheffield Steel & I. Co., 215 Ala. 334, 110 So. 574, 49 A.L.R. 1206 (1925); El Reno Mut. F. Ins. Co. v. Sutton, 41 Okla. 297, 137 Pac. 700, 50 L.R.A. (N.S.) 1064 (1913).