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Judgments--Vacation after Term for Fraud

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An exclusionary result is a precise fact of science worthy of conclusiveness.³² The principal case represents a logical, realistic approach: the jury determines only whether the tests were accurately performed. If it finds that they were accurately performed, exclusion of paternity follows irresistibly. If it finds that the tests were inaccurately performed, that finding can stand only if there is evidence to support it.³³ Thus, the tests were virtually conclusive evidence. This decision is representative of the progressive acceptance of the validity of blood test results. Slowly, this medico-legal mechanism is achieving the evidentiary stature it merits.³⁴

FREDERICK R. DIXON

JUDGMENTS — VACATION AFTER TERM FOR FRAUD

Appellant sought by equitable attack after term to vacate for fraud a divorce decree obtained by appellee against appellant, alleging that at the time of the divorce trial the appellee was still married to a previous husband. Appellant had learned of the previous marriage at about the time the action for divorce was brought, but did not assert the defense during the trial. *Held:* The fraud alleged constituted intrinsic fraud, for which a judgment will not be vacated; and appellant's failure to assert his knowledge of the bigamous marriage during the trial constituted a total lack of diligence.¹

The general rule that a judgment will be vacated after term for extrinsic fraud, but not for intrinsic fraud, is well settled.² However, extrinsic fraud

³² Note, 23 N.Y.U.L.Q. REV. 156 (1948).

³³ The evidence in *Jordan v. Davis*, 57 A.2d 209 (Me. 1948), (motion for new trial overruled), showed that the tests had been performed under the direction of Doctor Hooker, an authority in blood grouping research. Yet the court held that the jury should be allowed to find that technical error had been made. In the principal case, decided one year later, blood tests were performed under the direction of the *same* Doctor Hooker and the court held that if the jury found technical error in the making of these tests, it was mere conjecture.

³⁴ Perhaps the next step is the enactment of statutes making an exclusionary blood test result a complete defense in bastardy proceedings. Maguire, *supra* note 18, at 174. It has also been proposed that a National Scientific Commission should be formed to establish appropriate criteria to insure the reliability of all scientific proof; statutes then should provide that scientific evidence conforming to the Commission's standards is *prima facie* evidence in relevant proceedings. Smith, *Scientific Proof*, 52 YALE L. J. 586 (1943).

¹ *Chermak v. Chermak*, 88 N.E.2d 250 (Ind. 1949).

² *Independence Lead Mines Co. v. Kingsbury*, 175 F.2d 983 (9th Cir. 1949); *Josserand v. Taylor*, 159 F.2d 249 (C.C.P.A. 1946); *Thomas v. Hunter*, 78 F. Supp. 925 (D. Kan. 1948); *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970 (1891); *Michael v. American National Bank*, 84 Ohio St. 370, 95 N.E. 905 (1911); *Kenney v. Kenney*, 76 N.E.2d 918 (Ohio App. 1946); *Metzger v. Turner*, 195 Okla. 406, 158 P.2d 701 (1945); 1 FREEMAN, JUDGMENTS § 233 (5th ed. 1925). Generally, a judgment will be vacated only for fraud practiced by or at the solicitation of the successful party. 3 FREEMAN, JUDGMENTS § 1238 *et seq.* (5th ed. 1925). Also,

and intrinsic fraud are terms incapable of exact definition. The term "extrinsic fraud" purportedly refers to fraud which denies to the unsuccessful party a trial on the merits, by preventing him from knowing that suit has been brought, or by inducing him not to contest the action, or by misleading him so that he is ignorant of a defense available to him.³ Thus, extrinsic fraud was found to exist where a husband obtained a default judgment in an annulment proceedings against his wife after leading her to believe that he had abandoned the action;⁴ where a default judgment was obtained by telling an adversary that "there would be a friendly suit" to clear title;⁵ and where a default judgment was procured by bribing the opposing party's attorney to stay away from court.⁶ Intrinsic fraud, however, relates to fraudulent acts which hinder the correct determination of an issue contested in the original action.⁷ The giving of perjured testimony⁸ and the fraudulent introduction into evidence of forged documents⁹ are the most common examples of intrinsic fraud.

Early American cases granted vacation of judgments obtained by means of intrinsic fraud.¹⁰ The modern rule denying vacation stems from *United States v. Throckmorton*.¹¹ In that case the government sought vacation of a judgment, charging that the defendants had obtained it by introducing forged documents and perjured depositions in evidence. The Supreme Court denied relief, asserting that endless litigation would result from a contrary holding.¹² A later Supreme Court case, *Marshall v. Holmes*,¹³ granted

generally, only a party to a judgment may obtain vacation. 1 *id.* § 258. For exceptions, see 1 *id.* § 260 *et seq.* General equitable considerations govern the granting of equitable relief from judgments. See RESTATEMENT, JUDGMENTS § 127 *et seq.* (1942).

³ Extrinsic fraud is also called "fraud in the procurement." *Phillips Petroleum Co. v. Jenkins* 91 F.2d 183 (8th Cir. 1937); *Crain v. Crain*, 205 S.W.2d 897 (Mo. App. 1947).

⁴ *Bloomquist v. Thomas*, 215 Minn. 35, 9 N.W.2d 337 (1943).

⁵ *Jones v. Arnold*, 221 S.W.2d 187 (Mo. 1949).

⁶ *People v. Perris Irig. Dist.*, 142 Cal. 601, 76 Pac. 381 (1904).

⁷ *U.S. v. Throckmorton*, 98 U.S. 61 (1878); *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970 (1891); *Garcia v. Ramos* 208 S.W.2d 111 (Tex. Civ. App. 1948).

⁸ *La Salle v. Peterson*, 220 Cal. 379, 32 P.2d 612 (1934); *Rent-a-Car Co. v. Globe and Rutgers Fire Ins. Co.*, 166 Md. 447, 171 Atl. 350 (1934); *Old Nat. Life Ins. Co. v. Patillo*, 195 S.W.2d 690 (Tex. Civ. App. 1946).

⁹ *Old Nat. Life Ins. Co. v. Patillo*, *supra* note 8.

¹⁰ *McGehee v. Gold*, 68 Ill. 215 (1873); *Seward v. Cease*, 50 Ill. 228 (1869); *Laithe v. McDonald*, 12 Kan. 340 (1873); *See Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 336 (U.S. 1813).

¹¹ 98 U.S. 61 (1873).

¹² *Accord*, *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970 (1891); *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077 (1900); *Kenney v. Kenney*, 76 N.E.2d 918 (Ohio 1946). Other objections to allowing vacation have been announced. *La Salle v. Peterson*, 220 Cal. 379, 32 P.2d 612 (1934) (complainant had his oppor-

vacation on facts similar to those of the *Throckmorton* case. Lower federal courts have reached conflicting results in attempting to follow either the *Throckmorton* case or the *Marshall* case or both.¹⁴ The more recent cases, however, show a tendency to follow the *Throckmorton* case.¹⁵ Later Supreme Court decisions have failed to clarify the position of that Court.¹⁶

The state courts are almost uniform in strict adherence to the general rule that a judgment obtained by intrinsic fraud will not be vacated.¹⁷ Thus statutes which authorize the setting aside of judgment after term for fraud

tunity at the trial to make the truth appear); *Crain v. Crain*, 205 S.W. 2d 897 (Mo. App. 1947) ("every man should have his day in court — not two days"); *Maryland Steel Co. v. Marney*, *supra* (the losing party too frequently is willing to accuse his adversary of perjury).

¹² 141 U.S. 589, 12 Sup. Ct. 62 (1891).

¹⁴ See *Publicker v. Shallcross*, 106 F.2d 949 (3d Cir. 1939) (declaring that there is an irreconcilable conflict between the two cases); *Thomas v. Hunter*, 78 F. Supp. 925 (D. Kan. 1948) (ignoring the *Marshall* case); *Martin v. Sheeley*, 67 F. Supp. 689 (D. Alaska 1946) (citing the *Marshall* case as following the *Throckmorton* case); *Graver v. Fautot*, 64 Fed. 241 (7th Cir. 1892); *Josserand v. Taylor* 159 F.2d 249 (C.C.P.A. 1946) (stating that there is no conflict).

¹⁵ *Independence Lead Mines Co. v. Kingsbury*, 175 F.2d 983 (9th Cir. 1949); *Bradburn v. McIntosh*, 159 F.2d 925 (10th Cir. 1947); *Josserand v. Taylor*, 159 F.2d 249 (C.C.P.A. 1946); *Thomas v. Hunter*, 78 F. Supp. 925. (D. Kan. 1948); *Martin v. Sheely*, 67 F. Supp. 689 (D. Alaska 1946).

¹⁶ *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421, 43 Sup. Ct. 458, 464 (1923); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 Sup. Ct. 997 (1943) (granting equitable relief from a judgment obtained in part by introduction in evidence of spurious documents). See *Josserand v. Taylor*, *supra* note 15 (stating that the *Hazel-Atlas* holding did not abrogate the existing rule). However RESTATEMENT, JUDGMENTS § 126, comment *c* (Supp. 1948) has been modified because of the *Hazel-Atlas* case. The comment now suggests that equitable relief will be granted where a judgment is obtained by the introduction in evidence of false documents "knowingly procured" by the successful party or his attorney. The comment also suggests that relief will be granted from a judgment obtained by perjured testimony *knowingly procured* by the successful party or his attorney. This latter suggestion was made in view of *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945). Most cases have denied relief for subornation of perjury. *La Salle v. Peterson*, 220 Cal. 379, 32 P.2d 612 (1934); *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970 (1891); *Maryland Steel Co. v. Marney*, 91 Md. 36, 46 Atl. 1077 (1900); *Nesson v. Gilson*, 224 Mass. 212, 112 N.E. 870 (1916); *Cronse v. McVickar*, 207 N.Y. 213, 100 N.E. 697 (1912). *Contra*: *Fair v. Tampa Electric Co.*, 158 Fla. 15, 27 So.2d 514 (1946).

¹⁷ See Note, 126 A.L.R. 390 (1940). There is less strictness in applying the rule to judgments on arbitration awards. *Johnson v. Wells*, 72 Fla. 290, 73 So. 188 (1916); *Fire Association of Philadelphia v. Allesina*, 49 Ore. 316, 89 Pac. 960 (1907). See Note, 99 A.L.R. 1198 (1935); 49 HARV. L. REV. 327 (1935) *Contra*: *Jacobowitz v. Metselaar*, 268 N.Y. 130, 197 N.E. 169 (1935) (to permit vacation would defeat the purpose of arbitration which is to avoid the delay and expense of litigation); *Fernandez Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (1925) (the parties in informal proceedings assume the risk which results from absence of formal legal safeguards).

have been interpreted to apply only to extrinsic fraud,¹⁸ and even where perjury is expressly stated by statute to be sufficient to justify setting aside a judgment, Minnesota courts have refused relief where the perjury was "intrinsic" — that is, perjury which occurred at the trial — without indicating for what acts in the nature of perjury the statute would justify vacation.¹⁹ Ohio by statute permits vacation of a judgment for perjury, but only where conviction of the perjurer for the offense is shown.²⁰

Denial of relief from judgments obtained in intrinsic fraud has been criticized severely.²¹ The reason advanced by most courts for denying vacation — that endless litigation would result²² — is seemingly refuted by the experience in Wisconsin, where vacation for intrinsic fraud is permitted.²³ Only two cases seeking vacation on the ground of intrinsic fraud have appeared before the Wisconsin Supreme Court since 1934.²⁴ In addition, it should be observed that the rule as generally applied rewards skillfulness in the concealment of intrinsic fraud until after the term of court has expired.²⁵

Some courts, perhaps sensitive to the extreme inequities which may result from a strict application of the rule, have expressed approval of it, but evaded its effect by treating clear cases of intrinsic fraud as "extrinsic."²⁶ Other courts have encountered difficulty in attempting conscientiously to apply the rule because the terms "intrinsic fraud" and "extrinsic fraud" have not been clearly defined.²⁷ It may be suggested that the traditional discre-

¹⁸ *Manning v. Manning*, 206 Ark. 425, 175 S.W.2d 982 (1943); *Stout v. Derr*, 171 Okla. 132, 42 P.2d 136 (1935).

¹⁹ *Bloomquist v. Thomas*, 215 Minn. 35, 9 N.W.2d 337 (1943); *Bell v. Jordan*, 199 Minn. 53, 271 N.W. 104 (1937) (to warrant vacation, the fraud must be such as to affect the jurisdiction of the court, or prevent a party from appearing or presenting his defense).

²⁰ OHIO GEN. CODE § 11631-10.

²¹ See Note, 126 A.L.R. 390, 394 (1940).

²² See note 12 *supra*; *Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 166 Md. 447, 171 Atl. 350 (1934); *Michael v. American National Bank*, 84 Ohio St. 370, 95 N.E. 905 (1911).

²³ *Amberg v. Deaton*, 223 Wis. 653, 271 N.W. 396 (1937); *Federal Life Ins. Co. v. Thayer*, 222 Wis. 658, 269 N.W. 547 (1936).

²⁴ See note 23 *supra*. See Comment, 23 CAL. L. REV. 79 (1934), in which the writer observes that only four cases concerning intrinsic fraud were before the Wisconsin Supreme Court from 1914 to 1934.

²⁵ For other criticisms see *Laithe v. McDonald*, 12 Kan. 340 (1873); *Laun v. Kipp*, 155 Wis. 347, 145 N.W. 183 (1914); see *Metzger v. Turner*, 195 Okla. 406, 409, 158 P.2d 701, 705 (dissent); Comment, 23 CALIF. L. REV. 79 (1934); 22 HARV. L. REV. 600 (1909); Note, 126 A.L.R. 390, 394 (1940).

²⁶ *Bolden v. Sloss-Sheffield Steel Co.*, 215 Ala. 334, 110 So. 574 (1925) (perjured testimony at trial); *El Reno Mut. F. Ins. Co. v. Stratton*, 41 Okla. 297, 137 Pac. 100 (1913) (same).

²⁷ Compare *Chicago, R. I. & P. Ry. Co. v. Callicote*, 267 Fed. 799 (8th Cir. 1920)