**Marquette Law Review**

Volume 36
Issue 2 *Fall 1952*

Article 11

# Judgments - Equitable Relief from Judgments Obtained by Fraud, Intrinsic and Extrinsic

Donald Griffin Jr.

First, a statute should expressly limit its effect so as to prevent recovery by a third party based upon the imputed negligence. It should not be used as a basis for a suit or counterclaim by a third party against a person who has no right of control over his bailee, vendee, or the agent, servant or employee of such bailee or vendee. Secondly, the legislature should frame the statute so that there can be no misunderstanding of the meaning of "agent," "servant" or "employee" within the act. If this is done, Wisconsin courts will be able to handle such situations, which have come under much criticism, in a fair and equitable manner.

DOUGLAS J. MCCLELLAND

---

**Judgments — Equitable Relief from Judgments Obtained by Fraud, Intrinsic and Extrinsic** — The deceased had been sued for divorce by the plaintiff in 1946 and in his answer set for his property with particularly. The plaintiff at that time had no knowledge of the amount of property owned by the deceased and was not guilty of negligence in ascertaining the facts. The court relied on the defendant's representations and confirmed a pre-trial stipulation as to the apportionment of the defendant's property. On learning of the actual holdings of the decedent at an inventory and appraisal filed after his death, the plaintiff sued the executor of the decedent's estate in equity praying for relief from the property settlement on the ground that it was based on the decedent's fraud perpetrated on the court. The relief was not granted by the trial court. *Held:* Judgment reversed. The power of a court of equity to relieve against unconscionable judgments for fraud will not be strictly confined to those that are characterized by extrinsic fraud. *Weber v. Weber et al, 260 Wis. 420, 51 N.W. 2nd 18 (1952).*

The general rule in the United States is that the acts for which a court of equity will grant relief from a judgment because of fraud must relate to extrinsic or collateral fraud and that intrinsic fraud is not sufficient.[1]

The United States Supreme Court followed that rule in *United States v. Throckmorton,* and defined extrinsic fraud as that relating to matter not tried by the court rendering the judgment and intrinsic fraud as that relating to matter on which the decree was rendered, and stated that:

> "Where the unsuccessful party had been prevented from exhibiting full his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by acts of the

[1] 31 AM. JUR. JUDGMENTS §654 (1940).

> 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 fair hearing."[2]

Then thirteen years later while not overruling that decision because its final judgment was based on other principles, the Supreme Court stated it was a settled doctrine that if it be against the conscience of the court to execute a judgment, any fact of which the injured party could have availed himself but was prevented by fraud unmixed with any negligence on his part will justify an application to a court of chancery.[3]

Again the Supreme Court held that, where the enforcement of a judgment would be "manifestly unconscionable," they have the power to grant relief from such a judgment though again the decision was based on another issue.[4]

Nevertheless, the *Throckmorton* rule has not been expressly overruled and is followed in the majority of the state courts in the United States including those of our sister states, Iowa and Michigan.[5]

Extrinsic fraud has been defined as actual fraud such that there is on the part of the person chargeable with it *mala sens,* acting to take undue advantage of some one else for the purpose of defrauding him.[6] But while intrinsic and extrinsic fraud are the terms generally accepted to describe the differences in types of fraud, they do not constitute a simple and infallible formula to determine whether in a given case the facts surrounding the fraud warrant equitable relief from a judgment.[7]

The Wisconsin Court has adopted as its basic rule:

> "That the chancery will relieve against judgment at law on the ground of its being contrary to equity when defendant was ignorant of the fact in question pending the suit or it could not have been received as a defense by fraud or accident or the acts of the other party unmixed with negligence or fault on his part."[8]

---

[2] United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878).
[3] Marshall v. Holmes, 141 U.S. 589, 35 L.Ed. 870, 12 S.Ct. 62 (1891).
[4] Pickford v. Talbot, 225 U.S. 651, 56 L.Ed. 1240, 32 S.Ct. 687.
[5] Graves v. Graves, 132 Iowa 199, 109 N.W. 707 (1906);
Leslie v. Procter & Gamble Mfg. Co., 102 Kan. 159, 169 P. 193 (1917);
Steele v. Culver, 157 Mich. 344, 122 N.W. 95 (1909);
Scudder v. Evans, 105 Neb. 292, 180 N.W. 254 (1920);
[6] Flood v. Templeton, 152 Cal. 148, 92 P. 78 (1907), quoting Patch v. Ward L.R. (1867) 3 Ch. App. 207.
[7] Jorgensen v. Jorgensen, 32 Cal. 2d 13, 193 P. 2d 728 (1948).
[8] Stowell Stal v. Eldred, 26 Wis. 504 (1870).

The court has realized that the invention of a formula for extrinsic and intrinsic fraud has not solved the problems of applying it in particular cases and under particular circumstances.[9] Even the *Throckmorton Case* does not assume to do more than state a general rule.

Realizing this the Wisconsin Court held in a case where a judgment had been obtained by fraud and perjury of the successful party that equity suffers no wrong to be done without a remedy where the wrong is so serious that it will disturb the conscience of the court of equity, and where there is no equitable defense available against the party defrauded.[10] That rule is approved in a later Wisconsin Case though plaintiff did not prove he was not guilty of inexcusable neglect in asserting his right to relief.[11]

Then in *Laun v. Kipp*[12] it was held that while the precedents of the Wisconsin Court go only to the extent of holding that a judgment secured by wilful perjury may under some circumstances be relieved from in equity, that does not establish an exclusive situation where intrinsic fraud can be dealt with but that the power of equity in relieving from an unconscionable judgment will not be confined to those characterized by intrinsic fraud. That court also stated that where there is a duty to speak and there is a failure to do so, there is a fraud of a most serious nature, and that both intrinsic and extrinsic fraud must be proved clearly and satisfactorily.

There are three Wisconsin cases which have seemingly adopted the rule of the *Throckmorton Case.* In *Uecher v. Thedt*[13] and *Routledge v. Patterson*[14] there was neither a showing that the fraud complained of was the basis for the rendition of the judgment nor that the judgment was inequitable on the facts as they really existed. In the other case, *Willeard v. Wenkelson*[15] the plaintiff had deserted her husband and was served with a summons and complaint, but the issue on which she based her appeal was tendered in the divorce action at which she did not appear.

Further distinction can be drawn from the fact that in each of these cases the appellant requested the divorce be set aside while in the instant case relief was granted only from the division of the estate.

---

[9] Broeng v. Ott, 138 Wis. 260, 119 N.W. 865 (1909).
[10] *Ibid.* The Wisconsin Supreme Court said, "We believe it is in harmony with the general rules of equity and best calculated to the doctrine so often enunciated by this and other courts 'that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands.'"
[11] Schulteis v. Trade Press Publishing Co., 191 Wis. 164, 210 N.W. 419 (1926).
[12] Laun v. Kipp, 155 Wis. 347, 145 N.W. 183 (1914).
[13] Uecher v. Thedt, 133 Wis. 148, 113 N.W. 447 (1907).
[14] Routledge v. Patterson, 146 Wis. 226, 131 N.W. 346 (1911).
[15] Willeard v. Wenkelson, 191 Wis. 406, 211 N.W. 137 (1926).

The last case on this matter in Wisconsin prior to the instant case stated that, regardless of the differentiating facts, *Laun v Kipp* overruled *Uecher v. Sheer* wherever they were in conflict and that the Wisconsin rule is that intrinsic fraud is sufficient under certain circumstances to warrant intervention of court of equity in relieving from unconscionable judgments.[16] The instant case firmly establishes this as the controlling law in this forum.

The *Throckmorton Case* bases its general rule on the fear that the trouble of retrying each case would be much greater and work greater hardship than the compensation that would arise from doing justice in particular cases. This fear seems to be groundless because in Wisconsin only seven cases have reached the Supreme Court on this issue since *Laun v. Kipp,* which expressly rejected the *Throckmorton* rule.[17]

The position of the Wisconsin Courts seems to be more in harmony with the spirit and purpose of equity as originally conceived and is a commendable attempt to escape from the rigidity of rules which to a considerable extent have destroyed the discretion and effectiveness of equity courts.[18] It is also in harmony with Rule 60 of the Federal Rules of Civil Procedure which rejects the *Throckmorton* rule.[19] It would seem that this rule should be universally adopted.

DONALD GRIFFIN, JR.

---

**Estoppel—Effect of Overruling a Judicial Decision—Equitable Estoppel against the Taxing Power of the State**—The Wisconsin Legislature had established a tax[1] on the declaration by foreign corporations of dividends based on income earned in the state, but the petitioner relied on an earlier decision of the Wisconsin Supreme Court[2] and did not deduct the tax from dividends paid by it in the years 1944 through 1946 because profits were insufficient to offset losses previously accumulated in the state. The Wisconsin Department of Taxation acknowledged the same Supreme Court decision and did not question the petitioner's action until the Supreme Court reversed its stand in a subsequent case.[3] Thereupon, the Department of Taxation assessed the privilege dividend tax against the petitioner upon

---

[16] Amberg v. Denton, 223 Wis. 653, 271 N.W. 396 (1937).
[17] Note, 3 ALA. L. REV. 224 (1950-51).
[18] FREEMAN, JUDGMENTS Sec. 1233 (5th ed., 1925).
[19] Fed. R. Civ. P. 60(b)
"... court may relieve a party or his legal representative from a final judgment, order, or preceding for the following reasons:
(3) fraud (whether heretofore denominated intrinsic or extrinsic) ...."

[1] WIS. STATS. (1951), sec. 71.16.
[2] J. C. Penny Co. v. Tax Commission, 238 Wis. 69, 298 N.W. 186 (1941).
[3] Department of Taxation v. Nash-Kelvinator Corp., 250 Wis. 533, 27 N.W. 2d 899 (1947).