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Judgments - Fraud as Basis for Collateral Attack

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Judgments — Fraud as Basis for Collateral Attack — The plaintiff Werner was a stockholder and former employee of a corporation. The corporation had commenced an action against the plaintiff for money due on an open account. The plaintiff began two actions against the corporation and its officers to recover money due him for commissions, to require an accounting, to recover for misappropriated funds, and to remove the officers of the corporation for gross misconduct. The parties agreed to an arbitration of several issues, one of which was the value of sixty-four shares of the corporation's stock held by the plaintiff. The arbitrator made an award finding the value of the stock to be $500.00 per share. Thereafter the plaintiff obtained an order to show cause to vacate the award and stated in his affadavit that the award was false and inaccurate by reason of the defendant's fraudulent suppression and concealment of the true facts pertaining to the value of the stock. The lower court then entered an order permitting inspection of all books and records of the corporation by the plaintiff. The defendants appealed from this order, and while the appeal was pending, the parties settled the dispute, accepting the award and executing the releases. Thereupon summary judgment was entered dismissing the actions upon their merits. On the ground that he had new evidence of fraud the plaintiff brought this action to recover damages for fraud in inducing the plaintiff to sell his stock to the corporation at a price lower than its value. *Held:* The dismissal of the prior actions upon their merits was *res judicata* as to the question of defendant's fraud in this action. The plaintiff cannot collaterally attack a prior judgment when it appears he was not prevented from having a fair trial and when the fraud alleged in this action is that which was adjudicated in the prior actions. *Werner v. Riemer 39 N.W. 2nd 457 (Wis., 1949).*

Before the enactment of the Code in Wisconsin, a judgment was attacked by bill of review in equity.[1] The Code abolished this practice and provided specific statutory grounds for attacking a judgment.[2] However, fraud is not given as a ground for relief as it is in the statutes of some states. In other states which like Wisconsin do not specifically list fraud as one of the statutory grounds for relief, the courts sometimes by interpretation bring fraud within the purview of the specified grounds.[3] But the Wisconsin Court has stated that the Wisconsin statute is applicable only where the enumerated grounds are present.[4]

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[1] Uecher v. Thiedt, 133 Wis. 148, 113 N.W. 447 (1907).

[2] Wis. Stat. 269.46 (1) The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertance, surprise, or excusable neglect and may supply an omission in any proceeding.

[3] Freeman on Judgments, 5th Ed. Vol. 1, Sec. 232, p. 459.

[4] Royal Indemnity Co. v. Sangor, 166 Wis. 148, 164, N.W. 821 (1917).

The prevailing rule is that a judgment may be upset by collateral attack only when the fraud is extrinsic, as distinguished from intrinsic. Fraud is usually described as being intrinsic where the fraud alleged in the collateral attack is based upon facts which were litigated or could have been litigated in the prior action.[5] Extrinsic fraud is said to exist where a party has been prevented from having a fair trial or presenting all his case to the court, or where the fraudulent conduct actually contributed in procuring the judgment.[6] The Restatement of the Law of Judgments is in accord with the latter statement.[7] New evidence not previously available will not of itself warrant relief.[8] Usually fraudulent concealment of facts which, if known at the trial, would have prevented the judgment is ground for relief.[9] A good example of such concealment occurred where a divorced wife was appointed administratrix of her deceased husband's estate and received a widow's distributive share. On sufficient evidence that she was divorced and remarried at the time of the deceased's death, it was held that the administration proceedings could be set aside on the ground that there was extrinsic fraud in the concealment of facts in obtaining the judgment.[10] The leading case which draws the distinction between intrinsic and extrinsic fraud is *United States v. Throckmorton et al*[11] in which Justice Miller stated as the reason for the rule:

> "that the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of endless nature of the strife, than any compensation arising from doing justice in individual cases."

The *Throckmorton* rule was followed in *Uecher v. Thiedt*,[12] which decision was relied upon in the instant case. In *Uecher v. Thiedt* a husband and wife agreed to separate voluntarily. The husband represented that he was not worth more than $6,000, whereupon the wife accepted $1,500 in lieu of all further claims that she might have against him. The wife obtained a divorce. Upon the huband's death, the wife asked that the divorce decree be set aside and that she be declared his widow on the ground that he falsely represented his wealth, the truth being that he was worth $16,000. However, the court held that this

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[5] Am. Juris. Vol. 31, Sec. 654, p. 230.
[6] Ibid.
[7] Restatement of the Law of Judgments, Sec. 118 (1942).
[8] Ibid, Sec. 126.
[9] Freeman on Judgments, 5th Ed. Vol. 3, Sec. 1234, p. 2571.
[10] Paul v. Paul, 41 S.D. 383, 170 N.W. 658 (1919).
[11] United States v. Throckmorton et al., 98 U.S. 61, 25 L.ed. 93 (1878).
[12] Uecher v. Thiedt, 133 Wis. 148, 113 N.W. 447 (1907).

was not such fraud as is necessary to set aside a judgment, since it did not appear that the husband practiced any fraud which induced the court to grant a divorce. Another important Wisconsin case which is frequently referred to by textwriters is that of *Boring v. Ott.*[13] There Ott and Pool had an employment contract which they mutually rescinded. After Pool's death, Ott concealed the rescission and successfully brought a claim against Pool's estate on the contract. The judgment was set aside as being obtained by fraud and perjury. Comparing *Uecher v. Thiedt* and *Boring v. Ott* it is not difficult to see that the fraud was extrinsic in the latter but not in the former.

The rule that a judgment can be collaterally attacked only in situations where the fraud is extrinsic or goes to procuring the judgment has not been consistently followed by the Wisconsin Court. At an early date perjury was held to be sufficient ground for relief from a judgment.[14] And it has been unequivocally stated that enforcement of a judgment may be enjoined where it was obtained by intrinsic fraud such as wilful perjury.[15] Probably the best review and most vigorous comment on the question appears in *Laun v. Kipp* wherein Justice Marshall said:

> "the real principle of adjudications (Wisconsin) is that the power of equity to relieve against unconscionable judgments will not be strictly confined to such as are characterized by fraud extrinsic."[16]

To distinguish intrinsic and extrinsic fraud is sometimes difficult.[17] From this difficulty the question of the necessity of the distinction naturally flows. It is significant to note that the distinction has been expressly abolished in the Federal courts by an amendment to the Federal Rules of Civil Procedure.[18] It has been often said that courts cannot advantageously litigate issues which have been tried before. Justice Marshall in *Laun v. Kipp* met this problem particularly well when he said:

> "The rule is not so closely fenced by technical lines but that wise administration can enable the court to redress serious wrongs. . . . Doubtless whether the facts require judicial interference is largely matter of administration in a field where courts should exert their power sparingly."

In the instant case it is difficult to see, under any rule, why the court should have relieved the plaintiff from the judgment when he elected to execute a release and where he did not even allege that there was any fraud inducing the release. FRANK W. HAMMETT

[13] Boring v. Ott, 138 Wis. 260, 119 N.W. 865 (1909).
[14] Stowell v. Elred, 26 Wis. 504 (1870).
[15] Amberg v. Deaton, 223 Wis. 653, 271 N.W. 396 (1937).
[16] Laun v. Kipp, 155 Wis. 347, 145 N.W. 183 (1914).
[17] Freeman on Judgments, 5th Ed. Vol. 3. Sec. 1234, p. 2570.
[18] Federal Rules of Civil Procedure, Rule 60B.