

INVALIDATING A JUDGMENT FOR FRAUD
... AND THE SIGNIFICANCE OF
FEDERAL RULE 60(b)

By W. DEAN WAGNER*

When it can be proved that a judgment of a court was obtained by fraud, the question arises whether or not it can be set aside and a new trial had. The problem to be discussed here is when can relief be obtained. Two different procedures are to be distinguished:

1. A motion in the court that rendered the judgment.
2. An independent action to set the judgment aside brought in the same court or a different court.

Our concern here is with independent action of the kind brought in the federal courts. Federal Rule 60¹ was amended radically in 1946, altering considerably the former rule regarding the setting aside of judgments. The new rule (so far as pertinent) provides:

“(b) . . . Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), . . . The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken . . . *This rule does not limit the power of a court to entertain an independent action . . . or to set aside a judgment for fraud upon the court.*” (Emphasis added)

The rule thus expressly provides that either intrinsic or extrinsic fraud will constitute ground for upsetting a judgment if a motion is made within one year. But whether not only extrinsic but also intrinsic fraud will constitute sufficient ground for upsetting a judgment after the expiration of the year period is uncertain. The plain language of the rule seems to give *carte blanche* authority to a court to grant relief at anytime for any type of fraud. But recent judicial interpretations of the rule point out questions that deserve consideration.

* 3rd year law student, Duke University; A.B. Colgate, 1950.

¹ 28 U.S.C.A. Rule 60; 28 U. S. C. § 1655.

What is "fraud upon the court" within the meaning of Rule 60's saving clause and how is this to be distinguished from intrinsic and extrinsic fraud? Did the framers of the rule intend to authorize the setting aside of judgments for intrinsic as well as for extrinsic fraud in any case? Were different standards of fraud required for the "independent action" mentioned in the rule than were required for setting aside a judgment for "fraud on the court"? Rule 60(b) is so phrased as to imply that "fraud on the court" is a ground for invalidation of a judgment different from the grounds which will sustain an "independent action"; the clauses using these phrases are separated by another dealing with a quite distinct subject. Was the framers' intent to apply three different rules: one as to direct motions, another as to independent actions not involving "fraud on the court," and a third as to attacks involving "fraud on the court." It seems doubtful that this distinction is sound; for as commentators have suggested,² it is difficult to see why any and every instance of fraud is not "fraud upon the court."

The framers' intention is best indicated in the Advisory Committee's discussion of the rule.³

"The amendment . . . [makes] . . . fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a ground for relief by independent action insofar as established doctrine permits.⁴ . . . And the rule expressly does not limit the power of the court to give relief under the saving clause. *As an illustration of the situation see Hazel-Atlas Glass Co. v. Hartford Empire Co.* [322 U. S. 238 (1944)]." (Italics added.)

"Fraud on the court" as a word of art was new nomenclature introduced in the 1946 amendment to Federal Rule 60. Because of the definite reference to *Hazel-Atlas Glass Co. v. Hartford Empire Co.*,⁵ an examination of this case is imperative for a full understanding of the meaning of the phrase.

Hartford, in support of an application for a patent, submitted to the Patent Office an article referring to the contested process as a

² Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L. J. 623 (1946), n. 268 at p. 692.

³ 28 U.S.C.A. following Rule 60, at p. 313.

⁴ The Committee note cites Moore and Rogers, *op. cit. supra* note 2, and 3 MOORE, FEDERAL PRACTICE, (1st ed.), § 60.03, p. 3266. But the meaning of this reference defining and explaining the rule is ambiguous because these two authorities cite the conflict of opinion which is noted in this comment.

⁵ 322 U.S. 238 (1944).

“revolutionary device.” Although the article was written by Hartford’s officials, it was signed by an impartial outsider. This article was instrumental in persuading the Patent Office to grant the application. Hartford then sued Hazel charging infringement of the patent. The Court of Appeals reversed the district court’s dismissal of the complaint, largely because of the spurious article. Finally, Hazel capitulated and paid Hartford \$1,000,000 and entered into a licensing agreement. The information about the fraud was brought to light about ten years later. Hazel then instituted action to have the judgment against it set aside and the judgment of the district court re-instated. When this case reached the Supreme Court, Mr. Justice Black, writing for the majority of a court divided 5-4, directed the district court to set aside its judgment in the first action entered pursuant to the Circuit Court of Appeals’ mandate, and to re-instate its original judgment. The court said:

“ . . . [The] general rule [is] that [federal courts will] not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered . . . [But] every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside the fraudulently begotten judgment. Here . . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals . . . The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud . . .”⁶

The opinion did not refer to the distinction between extrinsic or intrinsic fraud. Prior to this case there had been two conflicting Supreme Court decisions, the earlier one holding that an independent action to set aside a judgment can be founded only upon extrinsic fraud, the other holding that intrinsic fraud suffices. The court’s failure to characterize the fraud practiced by Hartford justified a belief that a liberal doctrine was to be applied in the federal courts, and that fraud synonymous with the *Hartford* fraud would be a basis for relief. Since the *Hartford* case was used by the Advisory Committee to define the term “fraud on the court,” what this case means is what Federal Rule 60(b) means.

⁶ *Id.* at 244, 245.

Fraud as Ground for Independent Attack
Before Rule 60(b)

It has generally been stated that "the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties rendered by a court of competent jurisdiction have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."⁷ There is little doubt that the majority state rule is that the only type of fraud for which a court of equity will upset a judgment is extrinsic fraud; that intrinsic fraud does not afford ground for relief.⁸ The statement of the law is clear, but its application can lead to perplexities because it often will be difficult to categorize the fraud in question.⁹ The Supreme Court has added confusion by rendering inconsistent decisions relating to the type of fraud needed to upset a judgment; in one case stating flatly that extrinsic fraud only would be ground for setting aside a judgment in an independent attack¹⁰ and in a later decision allowing intrinsic fraud to constitute ground for setting a judgment aside.¹¹ It has been suggested that the rule of the earlier *Throckmorton* case (extrinsic fraud only) and the rule of the later *Marshall* case (intrinsic fraud suffices)¹² are not in

⁷ *United States v. Throckmorton*, 98 U. S. 61, 68 (1878).

⁸ Cf. RESTATEMENT, JUDGMENTS, § 126 with § 121. See FREEMAN, JUDGMENTS, § 1233; 3 MOORE, FEDERAL PRACTICE, (1st ed. 1938), § 60.03; 126 A.L.R. 386. Extrinsic fraud is illustrated by *McGuinness v. Superior Court*, 196 Cal. 222, 237 Pac. 42 (1925), where the fraud alleged was the failure to notify interested parties of the pendency of a suit. *Metzger v. Turner*, 158 P.2d 701 (Okla. Sup. Ct. 1945) illustrated an application of intrinsic fraud. The defendant in an action to quiet title wherein a default judgment had been entered against him sought to have the judgment vacated on the ground of fraud, alleging that the plaintiff had made false allegations that he had good title, and falsely alleged that he was in possession when in fact he was not. It was held that the fraud complained of was intrinsic fraud going to the actual or potential issues in the original suit and was therefore insufficient ground on which to vacate the judgment. See Note, 24 TEX. L. REV. 233.

⁹ It is "a journey into futility to attempt to distinguish between extrinsic and intrinsic matter." Moore and Rogers, *op. cit. supra* note 2 at p. 658.

¹⁰ *United States v. Throckmorton*, *supra* note 7.

¹¹ *Marshall v. Holmes*, 141 U. S. 589 (1891).

¹² *United States v. Throckmorton*, *supra* note 7, was a bill in chancery, the plaintiff seeking to have the court set aside the confirmation of a land grant. The fraud alleged was that the defendant had obtained an illegal land grant from a Mexican official who had no authority to give it. There were other perjured documents involved. The Supreme Court denied relief. In *Marshall v. Holmes*, *supra* note 11, after the close of the term, the defendant against whom the judgments were rendered filed a petition in the same court

conflict.¹³ But a reading of the recent cases demonstrates that different circuits disagree about the effect of these two decisions and are consequently applying different standards.

The third circuit in *Publicker v. Shallcross*¹⁴ thought that the *Throckmorton* case was no longer law. Rejecting the contention that it was without power to invalidate a judgment obtained by intrinsic fraud, the Court of Appeals, citing the *Marshall* case, said: "We do not consider ourselves bound by [the *Throckmorton*] case for . . . we do not believe it is the law of the Supreme Court today . . ." ¹⁵ The court appended the comment: ". . . [The] truth is more important than the trouble it takes to get it."

On the other hand, the 8th circuit in *Phillips Petroleum Co. v. Jenkins*¹⁶ held that the *Throckmorton* case was still law. This was an action for relief from a tort judgment against the appellant on the ground that defendant had simulated an injury and disability and conspired with a physician to deceive examining doctors. The court, citing the *Throckmorton* case, said: "Courts of the United States . . . will not deprive a party of the benefit of a judgment . . . on account of intrinsic fraud."¹⁷

The Supreme Court has never clarified its position.¹⁸ But the type of fraud involved in the *Hartford* case would lead to a tentative conclusion that at least some types of intrinsic fraud could be

for the annulment of the judgment upon the ground that the judgment had been obtained through the use of false testimony and forged letters. The Supreme Court granted relief.

¹³ See *Chicago, R. I. & P. Ry. Co. v. Callicotte*, 267 Fed. 799 (8th Cir. 1920), *cert denied* 255 U. S. 570 (1921); 16 A.L.R. 386.

¹⁴ 106 F.2d 949 (3rd Cir. 1939), 126 A.L.R. 386, *cert denied* 308 U. S. 624 (1940).

¹⁵ *Id.* 106 F.2d at 950.

¹⁶ 91 F.2d 183 (8th Cir. 1937).

¹⁷ *Id.* at 187.

¹⁸ This inconsistency in the federal courts was attempted to be resolved in *Craver v. Faurot*, 64 Fed. 241 (C.C.N.D. Ill. 1894), *reversed* 76 Fed. 257 (7th Cir. 1896), *certif. dismissed* 162 U. S. 435 (1896), where the court, "feeling that *United States v. Throckmorton* and *Marshall v. Holmes* were in direct conflict and not knowing which was to govern, sent the case to the Supreme Court on a certificate of importance. The Supreme Court refused to hear the merits, disposing of the case on a technicality as to the validity of the use of a certificate of importance." 3 MOORE, FEDERAL PRACTICE, (1st ed.), § 60.03, n. 17, p. 3268.

A law writer in 21 COL. L. REV. 268 commented, "As for the federal rule . . . it must remain unsettled. Since the courts are at liberty to cite either line of authority, and do so as suits their convenience, the only possible answer in spite of repeated assertions to the contrary that the federal rule is clear is that there is no federal rule at all."

grounds for upsetting a judgment. Mr. Justice Black's assertion that the "agencies of public justice [are] not so impotent that they must always be mute and helpless victims of deception and fraud . . ." ¹⁹ would apply to deception committed by intrinsic fraud as well as deception by extrinsic fraud. Perjury is considered intrinsic fraud and since the false article utilized by Hartford seems analogous to perjured evidence there is strong ground for arguing that the more liberal *Marshall* rule was adopted as the federal rule. But, because of the ambiguity of the Supreme Court's position, we find two divergent attitudes expressed among the circuits. The lower federal circuits have been permitted to select the remedial attitude they prefer, in spite of what was a muted command to the contrary in *Hazel-Atlas Glass v. Hartford*.

Application of Rule 60(b)

As has been seen, the amendment to Federal Rule 60(b) introduced the term "fraud on the court" and no distinction was drawn between extrinsic and intrinsic fraud in the saving clause. ²⁰ Because of the conflicting viewpoints of the cases up to 1946 it is difficult to ascertain what was intended by this new term. But unless the saving clause of the rule was intended to recognize some type of intrinsic fraud as ground for relief in an independent action, the reference to the *Hartford* decision has no meaning.

Certainly it can be validly argued that *Hartford* impliedly suggested that the *Marshall* case overruled the *Throckmorton* case and that the *Marshall* rule was the rule of the federal courts. The Supreme Court's failure to limit the application of the fraud doc-

¹⁹ *Ibid.* Mr. Justice Black also said ". . . tampering with the administration of justice as indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistent with the good order of society."

Two cases decided by the Supreme Court citing the *Hartford* case fail to shed much light on the meaning the court attached to the decision. *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575 (1945), cited the *Hartford* case and said at p. 580, "The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question." But in *Knauer v. United States*, 328 U. S. 654 (1946), Mr. Justice Frankfurter intimated that the exclusion of intrinsic fraud as a ground for relief might still be the rule.

²⁰ Recall that the rule expressly provides that either intrinsic or extrinsic fraud can be ground for relief by motion to the court that rendered the judgment.

trine to extrinsic fraud indicated an intent to utilize a more liberal doctrine and to accord injured litigants a wider basis for relief. However, whatever the intent of the Supreme Court, the contention that the *Marshall* rule was the rule of the federal courts (*vis-a-vis* the *Hartford* case) was soon rejected by a lower federal court.

Prior to the adoption of Rule 60(b)'s amendment in 1946, the Court of Customs and Patent Appeals had before it in *Josserand v. Taylor*²¹ a petition for leave to file a bill of review in the patent office, the plaintiff claiming that the defendant committed fraud in the interference proceeding in which priority of the invention had been awarded him. The fraud alleged was perjury, and the court said:

"We are unable to [agree that the *Hartford* case held] that a judgment or decree rendered by a federal court at a former term,²² obtained by intrinsic fraud as distinguished from extrinsic or collateral fraud, should nullify a proceeding such as here involved . . . We think it is evident from [that decision] that the Court was of the opinion that 'certain officials and attorneys' of the Hartford Company had entered and carried out a conspiracy to defraud the Patent Office and the Circuit Court of Appeals and that such a conspiracy was not an intrinsic but an extrinsic or collateral fraud.'²³

This decision is important, for if the court's interpretation of the *Hartford* case is correct the new Federal Rule becomes merely a re-statement of the old *Throckmorton* rule. And, *Josserand v. Taylor* was followed, with respect to the meaning of Federal Rule 60(b), in *Dowdy v. Hawfield*.²⁴ The District of Columbia circuit was asked here to set aside the probate of a will because witnesses for the will had given perjured testimony. The court said:

"... [Rule 60(b)] stipulates that 'This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court.' The Supreme Court in *United States v. Throckmorton* . . .

²¹ 159 F.2d 249 (Ct. Cust. & Pat. App. 1946).

²² This decision was rendered prior to the amendment to Federal Rule 60. At this time, the rule regarding motions in the court that rendered the judgment was that a court could not upset a judgment rendered at a prior term. The amendment gave a year grace period.

²³ *Josserand v. Taylor*, *supra* note 21 at 253. This decision is consistent with the suggestion that the *Hartford* case intended to apply a more liberal rule to patent cases only.

²⁴ 189 F.2d 637 (D.C. Cir. 1951), *cert. denied* 342 U. S. 830 (1952).

held that fraud must be 'extrinsic or collateral' to the matter tried by the first court, and not to a fraud in the matter in which the decree was rendered. *Josserand v. Taylor* . . . affirmed this rule and in that case the Hartford case was held not to have changed the rule.'²⁵

The effect of Federal Rule 60 (b) was thus summarily dismissed. The reasoning was: Federal Rule 60 (b) adopts the *Hartford* rule; *Hartford* in *Josserand v. Taylor* was held to have been merely an application of the rule of the *Throckmorton* case; so the *Throckmorton* rule is still law. The court gave no consideration to the possibility that the framers of the code intended to distinguish between grounds for independent attack and grounds for upsetting a judgment for fraud on the court.

Notwithstanding *Dowdy v. Hawfield*, this same District of Columbia circuit²⁶ was asked in *Dausuel v. Dausuel*²⁷ to set aside a judgment of divorce because the decree had been procured by perjury. This was a proceeding on a judgment creditor's bill for alimony wherein the husband filed a cross compliant seeking to set aside the divorce. The trial court dismissed the cross complaint and found generally for the wife. The Court of Appeals held that if the facts were as alleged in the cross complaint the decree of divorce could be vacated. Judge Edgerton said:

"A court may at anytime set aside a judgment for after discovered fraud upon the court. *Hazel-Atlas Glass v. Hartford* . . . Rule 60(b) . . . expressly does not limit the power of a court to entertain an action for that purpose."²⁸ (Italics added.)²⁸

The court did not cite its previous ruling in *Dowdy v. Dowdy*; and by ignoring the distinction between extrinsic or intrinsic fraud implied that it is no longer significant.

New Jersey's Rule of Civil Practice 3:60-2 is identical to Federal Rule 60(b). The New Jersey Supreme Court was asked in *Shammas v. Shammas*²⁹ to interpret the "fraud on the court" phrase. This was an action for divorce wherein the administrator of the estate of petitioner's second wife filed a petition to set aside

²⁵ *Id.*, 189 F.2d at 638.

²⁶ Different judges were sitting.

²⁷ 195 F.2d 774 (D.C. Cir. 1952).

²⁸ *Id.*, at 775.

²⁹ 9 N. J. 321, 88 A.2d 204 (1952); see also *Lyster v. Berberieh*, 65 A.2d 632 (N. J. Super. App. Div. 1949); *Williams v. DeFabio*, 65 A.2d 858 (N. J. Super. App. Div. 1949); and see 98 U. OF PA. L. REV. 117, n.2.

the divorce decree and adjudge petitioner guilty of contempt for wilfully giving false testimony in the divorce trial. Although the court held that the administrators were strangers to the record and had no standing to attack the judgment, it (1) expressly rejected the *Throckmorton* rule, (2) expressly rejected the argument that if intrinsic fraud was allowed to upset judgments endless litigation would result, and (3) held that either intrinsic or extrinsic fraud was within the "fraud on the court" term.

The New Jersey Supreme Court thus has done what the Supreme Court has failed to do, *i.e.*, it has attached a definite understanding to the meaning of the phrase.

Conclusion

Rule 60(b) can be interpreted in at least three different ways. An independent action to set aside a judgment for fraud

- (1) may be grounded only upon extrinsic fraud,
- (2) may be grounded upon either extrinsic or intrinsic fraud,
- (3) may be grounded only upon extrinsic fraud, except in those instances where intrinsic fraud constitutes "fraud on the court."

Until now, the courts have been concerned with whether or not "fraud on the court" includes at least some instance of intrinsic fraud or whether this phrase is controlled by the *Throckmorton* rule. However, the phrasing of Rule 60(b) permits the suggestion that "fraud on the court" is a ground for invalidation of a judgment different from the ground which will sustain an "independent action."³⁰ Such a distinction, however, would tend to multiply the already existing confusion.

The present conflict between the circuits stems from the conflicting decisions rendered by the Supreme Court prior to the adoption of Rule 60(b) and the ambiguity of the term "fraud on the court." The new rule makes it difficult to distinguish the type of fraud which must be availed of within one year, from fraud on the court, which may be urged at anytime. Why is every fraud not a fraud on the court? But as long as the Courts of Appeals have

³⁰ The rule states, "This rule does not limit the power of a court to entertain an independent action, [then a reference to proceedings in rem], or to set aside a judgment for fraud upon the court." Conceivably there are three different circumstances here, with a different rule applicable to each.

inconsistent authorities to cite, Rule 60(b) will stand for the *Throckmorton* rule or the *Marshall* rule depending on the circuit.

Courts refusing to recognize intrinsic fraud as a basis for relief fear the recurring litigation that might result. "Endless litigation in which nothing was ever finally determined would be worse than occasional miscarriages of justice."³¹ Yet, on the other hand there is a natural desire to have the courts perform justice and to deny a man the profits of his own wrongdoing. "The notion that repeated retrials of cases may be expected to follow . . . the setting aside of judgments rendered on false testimony will not withstand critical analysis. Rather it is more logical to anticipate that the guilty litigant committing perjury . . . will not risk pursuing the cause further."³² It is submitted, however, that it is wrong to have different consequences depend on the type of fraud committed—that if "fraud vitiates a judgment" no difference should stem from the label attached to the fraud. The test, rather, should be, was the fraud of the type that the party had a real opportunity to litigate in the first action?³³ If in the opinion of a court a judgment was obtained through the utilization of false records and documents of which a party was justifiably unaware, then the judgment should be set aside, regardless of the fact that the fraud was intrinsic. On the other hand, if a party could have known of the fraud, and had a thorough opportunity to investigate the matter and through his own fault an adverse judgment was rendered, no relief should be available.

Certainly the Supreme Court demonstrated an intent to broaden the scope of the fraud rule in the *Hartford* case and that the framers of Federal Rule 60(b)'s term "fraud on the court" did not restate the *Throckmorton* rule alone. Had the latter been their purpose it seems reasonable to assume they would have said so. Contrary to the opinion in *Josserand v. Taylor, supra*, it is submitted that the Supreme Court adopted and applied the *Marshall* rule in the *Hartford* case and demonstrated an intent to liberalize the federal rule and that Federal Rule 60(b) was an expression of this intent formalized in a rule of procedure.

³¹ *Fawcett v. Atherton*, 298 Mich. 362, 299 N.W. 108; noted in 40 MICH. L. REV. 598.

³² *Shammas v. Shammas*, 9 N. J. 321, 88 A.2d 204 (1952).

³³ See, 98 U. OF PA. L. REV. 117; other law notes discussing intrinsic and extrinsic fraud rules are 22 HARV. L. REV. 600; 49 HARV. L. REV. 327; 21 COL. L. REV. 268; 21 ILL. L. REV. 833; 28 GEO. L. J. 848; 36 ILL. L. REV. 894; 24 TEX. L. REV. 223; 12 CORNELL L. Q. 385.

The interpretation of New Jersey's Supreme Court stems from a more realistic understanding of the intention of the framers of Federal Rule 60(b) and of the more sensible application of the doctrine of fraud upsetting judgments.³⁴ The *Throckmorton* rule leads to anomalous results: of X obtaining relief because his adversary kept one of X's witnesses away from the courtroom and induced the witness not to testify, while Y's judgment against him would stand even though his adversary bribed one of Y's witnesses to utter false testimony on the witness stand. The label extrinsic or intrinsic adds nothing—and justice should not be predicated on words.

Until now no tests have been recommended for defining "fraud on the court." Perhaps the rationalization announced in *Hadden v. Rumsey Products*³⁵ by the district court for the Western district of New York is as wise as possible:

"Out of deference to the deep rooted policy in favor of the repose of judgments . . . courts of equity have been cautious in exercising their power [in upsetting judgments] . . . But when the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable' . . . they have wielded the power without hesitation."³⁶

Until the Supreme Court re-defines its position the "manifestly unconscionable" test will be the only test, and it will remain, as it has been, that despite Federal Rule 60(b) there is no federal rule at all.

³⁴ *Shammas v. Shammas*, *supra* note 32, 88 A.2d at 208, "[U]pon principle, we hold that relief for fraud upon the court may be allowed under our rule whether the fraud charged is denominated intrinsic or extrinsic."

³⁵ 96 F.Supp. 988 (W.D.N.Y. 1951).

³⁶ *Id.* at 993.