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## FEDERAL RELIEF FROM CIVIL JUDGMENTS

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OPINION varies sharply concerning the extent to which relief should be granted from a judgment. This divergence necessarily results from a clash of the two principles that litigation must terminate within a reasonable time, but that justice must be accorded the parties. The necessity of expediting litigation to a conclusion is universally recognized, but the federal system is the only one which is outstandingly successful in actually clearing dockets and keeping abreast of judicial business. This success is attributable to a number of factors: a fairly adequate number of judges for the district courts and circuit courts of appeal; the organization of the federal judiciary so that district and circuit judges may be freely transferred both within circuits and to other circuits, which shifts surplus manpower to courts with congested dockets; an increasing pressure by the Conference of Senior Circuit Judges and the Judicial Councils within each circuit that stale actions be dismissed and live actions be tried; the Administrative Office for the United States Courts which arms the Conference and Councils with data on judicial business and assists administratively in implementing their decisions; the general limitation of the right of appeal from a district to a circuit court of appeals to an appeal from a final judgment; the Supreme Court's appellate jurisdiction which is based largely upon the Court's discretion in granting certiorari, with the attendant sharp limitation on the Court's obligatory jurisdiction invoked by appeal; and the Federal Rules of Civil Procedure which have provided a simple and direct procedure for the presentation of claims, the formulation of issues, and their adjudication in the district courts.

Certainty in litigation is substantially affected by two concepts. The theory that litigation must end is conceptually expressed by *res judicata* which confers something approaching absolute stability upon final judgments. Certainty in arriving at those judgments is pro-

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moted by stare decisis. Briefly stated, the term *res judicata* is often used to denote two legal effects of a final judgment: (1) that such a judgment upon the merits is an absolute bar to a subsequent action between the same parties, or those in privity, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different.<sup>1</sup> The doctrine of judicial finality and its underlying policy have been well stated by Mr. Justice Harlan:

"This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."<sup>2</sup>

Composed as it is of two recognized polar elements, stare decisis necessarily commands less finality. The affirmative element requires a particular court, and all courts owing obedience to it, to abide by the rules of law evolved in prior cases by it, or by any court to which it owes obedience. The negative element, always at war with the positive, accords all American courts, unlike the House of Lords with its professed infallibility, the power and duty, under certain circumstances, of self-correction of error.<sup>3</sup> Mr. Justice Brandeis has stated the duty of a court in this manner:

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1. 1 MOORE, FEDERAL PRACTICE (Supp. 1942) § 2.044 (hereinafter cited as MOORE). As there pointed out the term *res judicata* may be technically limited to the first matter; and the term estoppel by judgment applied to the second matter. Since the policy underlying both technical *res judicata* and estoppel by judgment lead to the same objective—judicial finality—we need make no technical differentiation for our purpose and hence will use *res judicata* as including estoppel by judgment.

2. *Southern Pacific R. R. v. United States*, 168 U. S. 1, 49 (1897). In similar vein Mr. Justice Clarke reasoned: "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 299 (1917).

3. See *Helvering v. Hallock*, 309 U. S. 106, 121 (1940): "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction."; Moore and Oglebay, *The Supreme Court, Stare Decisis and Law of the Case* (1943) 21 TEX. L. REV. 514. For the House of Lords rule, see *London Street Tramways Co. v. London County Council* [1898] A. C. 375.

"*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." <sup>4</sup>

Exercise of the power of self-correction by the present Court in re-orienting itself and recording the judicial shift, particularly in public law cases, has caused much comment and criticism, perhaps the sharpest from the Court's own personnel. Mr. Justice Roberts, in particular, has said:

"This tendency . . . indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors . . . the instant decision . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. . . . It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court . . . should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions." <sup>5</sup>

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4. *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405-8 (1932) (Brandeis dissenting). Six years later the *Burnet* case was overruled. *Helvering v. Producers Corporation*, 303 U. S. 376 (1938).

5. *Smith v. Allwright*, 321 U. S. 649, 666-70 (1944). See also his statement in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 113 (1944): "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy. Of course the law may grow to meet changing conditions. I do not advocate slavish adherence. . . . The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late, as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow. . . ." For other comment, see Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied* (1945) 31 A. B. A. J. 501; Grinnell, *The New Guesspotism* (1944) 30 A. B. A. J. 507; (1944) 30 A. B. A. J. 484 (comment of the Texas Bar); Moore and Oglebay, *loc. cit. supra* note 3.

Whether this criticism is too extreme need not detain us. All concede, including Justice Roberts, that a slavish adherence to the past is not desirable. Precedent must often be modified to prevent injustice. The problem is to restrict the power of self-correction along generally acceptable channels.

Justice also requires that the finality behind *res judicata* be subject to corrective power. But again, the difficulty in drawing the line becomes apparent. After surveying the exceptions in many states to the doctrine of finality of judgments, Freeman, a recognized authority, makes this stricture generally, although with specific reference to New York:

“. . . judgments seem to be regarded not as inviolate and enduring testimonials, but as temporary structures, to be torn down, re-modeled or rebuilt whenever the builders feel competent to improve the original workmanship or design.”<sup>6</sup>

Whether this comment, like Roberts' criticism of *stare decisis* in the Supreme Court, is too caustic need not be analyzed. The fact remains that *res judicata* is not an inexorable command. It would be intolerable if it were. Thus, direct attacks upon the judgment, as by motion for new trial or by appeal, have become accepted and standardized challenges to the finality of a judgment. On the other hand, a motion to vacate a judgment for fraud, mistake, inadvertence, surprise or excusable neglect; the ancillary remedies of *coram nobis*, *audita querela*, and bill of review; the doctrine of inherent power in a court to correct its adjudications; the independent action in equity to enjoin the enforcement of a judgment; and collateral attack offer uncertain yet extensive and dangerous weapons for assault upon finality.

Finality of judgments and *stare decisis* are but facets of acceptable judicial administration. Because adherence to precedent affects countless persons, who did not have their day in court when the precedent was established, and because law must change with conditions, the doctrine of *stare decisis* must be handled in a manner responsive to the best creative effort of the judicial process. This demands the utmost in flexibility of treatment. Finality of judgments, on the other hand, deals with an adjudication made on the law and the facts as of a particular time, and directly affects only a very limited number of persons—the litigants and those in privity. Quite naturally the adjudication should be conclusive, subject to some correctional power. How far this power can be categorized and restricted within rather well defined boundaries is the problem before us.

#### FEDERAL RULE 60

*Background of the Rule.* Federal Rule 60 is the rule which deals specifically with relief from civil judgments of federal district courts.

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6. 1 FREEMAN ON JUDGMENTS (6th ed. 1925) 388.

When the Supreme Court's Advisory Committee originally had before it the adoption of the Rules, which the Court subsequently promulgated in 1938, the Committee carefully considered the problem of finality, its general desirability, and its relationship to a number of rules. At that time the term of court was the critical factor in the district court's power over its final judgments at law and in equity. While the district court had plenary power over such judgments during the term, it was in general without power to reconsider its final judgments at law and in equity after the expiration of the term, unless (1) the proceeding seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period.<sup>7</sup> A good illustration of the inflexibility of the term rule is to be found in *United States v. Mayer*.<sup>8</sup> In that case a motion for a new trial on the ground of the concealed bias of a juror was made as soon as the bias was discovered, but after the expiration of the term at which the judgment of conviction was entered and over which the court had not reserved control. The Supreme Court, speaking through Mr. Justice Hughes, followed the theory that the district court lacked power to consider the motion; and that as there was no general jurisdiction over the subject matter after term time the consent of the United States attorney that the motion be heard was unavailing. Mr. Justice Hughes stated clearly that the rule was applicable to both civil and criminal actions; "the general principle obtains," he said, "that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term."<sup>9</sup> Exceptions to this general rule were the utilization, under certain circumstances, of the ancillary remedies of *coram nobis*, *coram vobis*, *audita querela*, bill of review and bill in the nature of a bill of review—remedies which had grown up to give relief after term time in certain limited situations; the occasional utilization of the doctrine of the court's inherent power over its judgments; and the independent action in equity to enjoin enforcement of a judgment. So inflexible was the general rule that in order to make it workable and yet bring themselves within its purview, many district courts established local rules extending the term for a specified period from the date of the entry of a final judgment to retain jurisdiction and power over such judgment for a sufficient time to allow application for relief to be made.<sup>10</sup>

On the other hand in bankruptcy where the court sat continuously

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7. *Zimmern v. United States*, 298 U. S. 167 (1936) (equity); *D. L. & W. R. R. v. Rellstab*, 276 U. S. 1 (1928) (law); *United States v. Mayer*, 235 U. S. 55 (1914) (law-criminal); *In re Metropolitan Trust Co.*, 218 U. S. 312 (1910) (equity).

8. 235 U. S. 55 (1914), cited *supra* note 7.

9. *Id.* at 67.

10. 1 MOORE at 415-6.

and had no terms, the rule was otherwise. The bankruptcy court had the power for good reason to revise its judgments upon reasonable application and before rights had vested on the faith of its action.<sup>11</sup>

Faced with these alternatives the Committee could have adopted the bankruptcy rule for civil actions, at law and in equity, and subjected the finality of civil judgments to a sound, albeit a rather vague, principle. Quite naturally the Committee adopted a more conservative approach. Definite time limits were substituted in lieu of the term rule which operated unequally, since the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near its end. It was not practicable to abolish terms of court which Congress had established for the purpose of requiring a district court to sit at definitely specified times and places throughout the district.<sup>12</sup> So the Committee first provided in Rule 6(c) that the expiration of a term of court should in no way affect "the power of a court to do any act or take any proceeding in any civil action which has been pending before it." It then stated in Rule 58 the precise time when a judgment should be considered entered and effective: "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." From this established point, definite and rather short time limits were provided for the making of motions which would affect the finality of a judgment, arrest the running of appeal time, and start the full time for appeal running anew from the disposition of any or all of these motions.<sup>13</sup> These motions and time limits were: a motion under Rule 50(b) for judgment in accordance with a motion for directed verdict—within 10 days after the reception of a verdict, or, if a verdict was not returned, within 10 days after the jury has been discharged; a motion under Rule 52(b) to amend or make additional findings and amend the judgment accordingly—not later than 10 days after entry of a judgment; a motion under Rule 59 for new trial—"not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."<sup>14</sup> The Committee did not deal with the time for appeal either from the district court to the Supreme Court or

11. *Wayne Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131 (1937). Applicability of the doctrine of this case is further dealt with in considering the time for appeal under the proposed amendment to Rule 73(a). See *infra*, p. 690, note 261.

12. 1 MOORE at 417.

13. See *infra*, p. 690, for discussion of the effect of these motions upon appeal time in relation to the proposed amendment of Rule 73(a).

14. The quoted provision comes from Rule 59(b), which deals with a motion for new trial made by a party. Rule 59(d) provides that the court may on its own initiative order a new trial; here, too, the time limit is 10 days after entry of judgment.

from the district court to the circuit court of appeals, but left the statutory appeal periods intact,<sup>15</sup> which for the great bulk of appeals that go to the circuit court of appeals would mean a period of three months.<sup>16</sup> Finally it established in Rule 60 a general time limit of six months for relief from judgments, although as shall be noted the exceptions contained in the rule gave a court certain power over its judgments for a much longer period of time.

It will be recalled that *United States v. Mayer*<sup>17</sup> proceeded on the theory that the expiration of the term terminated the court's *jurisdiction* over its final judgments, subject to the established exceptions at common law and equity underlying the ancillary remedies and the independent action to enjoin the enforcement of a judgment. But since Rule 82 states that "These rules shall not be construed to extend or limit the jurisdiction of the district courts . . .," it follows that the Committee and the Court in abrogating the effect of the term upon the court's power over its judgments and substituting definite time limits did not follow the jurisdictional theory of the *Mayer* case. This course of action was eminently sound. Historically, the term rule can be adequately explained as a rule of repose (somewhat analogous to a statute of limitations), which the common law and equity courts invoked to give finality to their judgments. Thus, when these courts evolved the ancillary remedies, such as *coram nobis* and bill of review, and the independent action in equity, which gave relief long after term time, they were not enlarging their jurisdiction, but were merely recognizing that under certain circumstances their self-imposed

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15. Rules 72, 73(a).

16. In civil cases governed by the Federal Rules, the time for appeal to a circuit court of appeals from a final judgment is normally 3 months after the entry of judgment. 43 STAT. 940 (1925), 28 U. S. C. § 230 (1940). An exception to this is made by 45 U. S. C. § 159 (1940) which provides only 10 days for an appeal from the judgment of the district court upon an award of a board of arbitration under the Railway Labor Act. The time for appeal from certain interlocutory judgments or orders in proceedings for injunctions and in receivership proceedings, and from a judgment in an action for infringement of letters patent, which is final except for the ordering of an accounting, is 30 days. 43 STAT. 937 (1925), 28 U. S. C. §§ 227, 227a (1940). The time for appeal from the District Court to the Court of Appeals for the District of Columbia is regulated by Rule 10 of the latter court's rule and was 20 days. After the decision of the district court but prior to that of the Court of Appeals in *Hill v. Hawes* and on February 1, 1941, the latter court amended Rule 10 to substitute a period of 30 days for the 20 days theretofore provided. See *Hill v. Hawes*, 320 U. S. 520, 521 (1944).

In bankruptcy under § 25a, appeals may be taken to the Circuit Court within 30 days after notice of the entry of judgment. This time limit is also subject to the maximum period of 40 days after entry if no such notice is given. 2 COLLIER ON BANKRUPTCY (14th ed., 1940) 898-901.

The time periods for direct appeal from a district court to the Supreme Court are not uniform. In the main they are 60 and 30 days, respectively, from the entry of a final judgment and interlocutory judgment. 1 MOORE 398-400.

17. 235 U. S. 55 (1914), cited *supra* notes 7-9.

rule of repose should be relaxed. Also from a practical point of view, term time should not be regarded as jurisdictional, since a court normally does not have the right under its rule-making power to deal with jurisdiction, yet the grounds for and the time within which relief may be obtained from judgments are technical matters which are better regulated by rules of court than by statutes. It is true that the Court, by promulgating the Federal Rules, did not foreclose a litigant from challenging the validity of any rule or rules.<sup>18</sup> Nevertheless, consideration by the Committee and the Court, respectively, in recommending and promulgating the Rules is entitled to great weight.<sup>19</sup> When this factor is coupled with the historical background of the term rule and the practical reason for dealing by rule of court with relief from judgments, the validity of the Rules dealing with this matter is not to be seriously doubted.

*Rule 60 as Promulgated.* A rule dealing directly with relief from a judgment should deal with at least two matters: clerical mistakes; and grounds of a more serious proportion, which for convenience may be described as substantive in character. The first matter had been rather adequately covered by Equity Rule 72 as interpreted, and since the Committee utilized generally the sound features of the Equity Rules it adopted the substance of the equity rule dealing with clerical mistakes. It, therefore, provided in subdivision (a) of Rule 60 that

"Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be cor-

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18. *Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1 (1941) (Rule 35 providing for physical and mental examination unsuccessfully challenged on the ground that it affects substantive right); *Mississippi Pub. Corp. v. Murphree*, 66 Sup. Ct. 242 (U. S. 1946) (Rule 4(f) allowing a summons to be served outside the territorial limits of a district but within the territorial limits of the state where the district court is held does not enlarge jurisdiction). See also the Committee's Note to Rule 23(b), which provides, among other things, that in a shareholders' secondary action the complaint "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law." The Committee states that "As a result of the decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23. . . ." Second Preliminary Draft of Proposed Amendments (1945) 24-25.

19. See cases cited *supra* note 18; *Summers v. Hearst*, 23 F. Supp. 986, 992 (S. D. N. Y. 1938), Judge Leibell in sustaining the validity of Equity Rule 27, the predecessor of Federal Rule 23(b), note 18 *supra*, which was not then in effect, stated: "If Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v. Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule." See (1940) 26 Va. L. Rev. 823.

rected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." <sup>23</sup>

This provision has proved generally satisfactory.<sup>21</sup>

Relative to matters of substance the Committee, however, did not have an adequate model in either the common law or equity practice, since these were geared to term time. Upon the strong recommendation of its member from California, Mr. Warren Olney, Jr., the Committee substantially adopted the California practice in the first two sentences (particularly the first) of Rule 60(b). Section 473 of the California Code of Civil Procedure provides:

*"Relief from judgment taken by mistake, etc.* The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken." <sup>22</sup>

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20. Although Equity Rule 72 provided that corrections could be made "at any time before the close of the term at which final decree is rendered," the rule was invoked to correct clerical mistakes after term time. *Ommen v. Talcott*, 180 Fed. 925 (S. D. N. Y. 1910), app. *dism'd*, 231 U. S. 761 (1913) (the case deals with old Equity Rule 85 from which Equity Rule 72 was derived); see *In re Wight*, 134 U. S. 136 (1890). Situations in which corrections have been made under Rule 60(a) or its predecessors are: misstatement as to date of entry of decree, *Ommen v. Talcott*, *supra*; incorrect date from which interest on mortgage debt was to be computed, *Fidelity Ins. Trust and Safe Deposit Co. v. Roanoke Iron Co.*, 84 Fed. 744, (C. C. W. D. Va. 1898); misstatement of designation of letters patent transferred to wife under separate maintenance decree, *Maginn v. Standard Equipment Co.*, 150 Fed. 139 (C. C. A. 7th, 1906); incorrect place of sale under foreclosure decree, *Fulton Inv. Co. v. Dorsey*, 220 Fed. 298 (C. C. A. 8th, 1915); failure to include interest, *Rigopoulos v. Kervan*, 53 F. Supp. 829 (S. D. N. Y. 1943); misstatement of petitioner's birthdate in naturalization records, even though the error was petitioner's and not the court's, *Application of Levis*, 46 F. Supp. 527 (D. Md. 1942); misstatement of petitioner's name in naturalization records, *Matter of Garcia*, 9 Fed. Rules Serv. 60a. 11, Case 1 (W. D. Pa. 1946); failure of lower court to enter a judgment dismissing a petition in a bankruptcy case, *Crosby v. Pacific S. S. Lines*, 133 F. (2d) 470 (C. C. A. 9th, 1943). See 126 A. L. R. 956 (1940) for general treatment of the problem of clerical mistakes.

21. The only problem arising under the provision has been whether or not mistakes may be corrected by a district court after an appeal has been taken. The proposed amendments expressly provide that mistakes may be corrected before the appeal is docketed in the appellate court, and after docketing if the appellate court grants leave to do so. Second Preliminary Draft of Proposed Amendments (1945) Rule 60(a), *infra* note 264.

22. The quoted provision is the third paragraph of § 473. The fourth and concluding paragraph of the section is quite similar to Rule 60(a), but is broader in that it provides for the setting aside of a void judgment or order. It reads:

*"Correction of clerical mistakes in judgments or orders. Setting aside void judgment or order.* The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order di-

Rule 60(b) reads:

"(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified."

It can thus be seen that the first sentence of Rule 60(b) is taken almost literally from the California section; that only verbal adaptations were made. By providing a six-months' time limit, the second sentence of Rule 60(b) adopts the substance of the second sentence of the California section. Also, the practice prescribed by the Rule is substantially similar to that of its model, although the two may vary somewhat, since a motion under Rule 7(b)(1) must state the grounds therefor but need not be accompanied by a proposed answer or other pleading as provided in the California section. The California provision and the federal adaptation are deficient in that they do not expressly recognize fraud as a basis for relief by motion, although the deficiency has been met by decisional emendation.<sup>23</sup>

The balance of Rule 60(b)—the two concluding sentences—has no counterpart in the California practice act. The first of these sentences states clearly that the motion does not affect the finality of the judgment, hence does not enlarge appeal time; and does not suspend its operation, hence does not affect any lien or other right the judgment may establish nor its effect as *res judicata*. The second saving clause of the concluding sentence also has occasioned no difficulty since it is a clear affirmation of the statutory direction that in an *in rem* suit a defendant who has not been served with *in personam* process nor personally served with the order of the court made pursuant to the statute has an absolute right, upon payment of costs, to come in within one year after entry of the final judgment, have it set aside, and plead to the action.<sup>24</sup>

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rected, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

Strangely enough the first two paragraphs of § 473 deal, respectively, with the amendment of pleadings, and continuances.

23. See *infra* notes 46, 82, 85.

24. *Perez v. Fernandez*, 220 U. S. 224 (1911).

The first saving clause of the concluding sentence is, however, ambiguous. In reference to the scope of the "action to relieve a party from a judgment, order, or proceeding," which is preserved without time limit by the first saving clause, the Committee Note to Rule 60(b) states:

"For the independent action to relieve against mistake, etc., see Dobie, *Federal Procedure*, pages 760-765, compare 639; and Simkins, *Federal Practice*, ch. CXXI (pp. 820-830) and ch. CXXII (pp. 831-834), and compare § 214."

The wording of the saving clause referring to an "action" and the Committee Note to the Rule referring to the "independent action" might indicate that only *original* actions are saved and that a merely ancillary proceeding such as the bill of review or coram nobis is abolished. But the references in the Committee Note to Judge Dobie and Professor Simkins are to discussions of bills of review, independent actions, and incidentally writs of error coram nobis.<sup>25</sup> Thus, although it is not too clear from the rule itself what the saving clause embraced, when the Committee Note is looked to for guidance, it is reasonable to conclude that both original and ancillary actions were intended to be preserved.<sup>26</sup>

In arriving at the totality of relief authorized by Rule 60(b) two sets of precedents are now apposite. First, the federal decisions construing the scope of the "action" preserved by the first saving clause. These interpret it as embracing not only independent actions in equity but also the old ancillary proceedings: no new powers were created, no old ones enlarged, but all former powers were retained.<sup>27</sup> The second line of precedent is the California decisions. These are persuasive in interpreting the first two sentences of Rule 60(b) adapted from Section

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25. The direct page reference (pages 760-5) to Judge Dobie are to discussions of the bill of review; the compare reference (p. 639) is to the writ of error coram nobis and the original action in equity. The direct page references c.CXXI, pp. 820-30 and c.CXXII, pp. 831-4) to Professor Simkins are, respectively, to the bill of review and the independent action in equity; the compare reference (§ 214) is to the writ of error coram nobis and the original action in equity.

An earlier draft of the Committee Note (note to Rule 66(b) of the May, 1936, Draft) expressly referred to the bill of review as an example of an independent action which was intended to be preserved by the saving clause.

26. See 3 MOORE at 3274 *et seq.*

27. *Fraser v. Doing*, 130 F. (2d) 617, 622, 6 Fed. Rules Serv. 60b.51, Case 1 (App. D. C. 1942), Miller, J., stated: ". . . we see no reason to conclude that Rule 60(b) . . . was intended to expand the issues which may properly be urged in a bill of review, or in a complaint in the nature of a bill of review. The remedy was one which had been carefully worked out, over the years, to accomplish a certain limited purpose. It was regarded by the rule-makers as of sufficient importance to warrant the preservation of power in the court to use it when the occasion required. It is obvious that it was their purpose, by means of the reservation which they wrote into Rule 60(b), merely to recognize a power already existing; not to create a new one, or to enlarge the old one."

473 of the California code,<sup>28</sup> and the scope of the independent action in equity to enjoin the enforcement of a judgment for fraud, accident or mistake.<sup>29</sup> Since, however, Section 473 has no saving clause like that of Rule 60(b), and California, having only a code background, never had a common law and equity practice comparable to the federal ancillary remedies, the California decisions are of limited utility concerning the ancillary remedies, but do, nevertheless, lend support to their availability.<sup>30</sup>

*The Federal decisions.* The substance of the writ of error coram nobis has been retained under the Rules, and relief which could have been obtained by the writ may now be secured by motion addressed to the court which renders the judgment. In *Preveden v. Hahn*<sup>31</sup> a judgment on the merits, based upon a stipulation signed by counsel for both sides, was entered. More than six months later (but within a year's time) the plaintiff moved to vacate the judgment on the ground that his then attorney had no authority to enter into the stipulation. Over the defendant's contention that the court lacked power to grant the motion, relief was accorded. Judge Goddard stated that the first saving clause

"reserves to the courts the inherent power to vacate orders or judgments improperly entered and preserves for litigants the old remedies of bill of review in equity and bill of error 'coram vobis' or 'coram nobis' at law. . . . Since the ancient writ of coram vobis has been replaced by the more modern and simpler procedure of bringing a motion, the question presented is whether the relief sought by plaintiff is of the character recognized by the writ of coram vobis. The judgment now sought to be vacated is a judgment of this court founded upon an error not in law but an error of fact not appearing on the face of the record nor put in issue, unknown at the time to the court and to the party seeking relief through no fault on the part of the court nor the aggrieved party, and is a judgment which would not have been entered had this fact been known. Therefore,

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28. *Ledwith v. Storkan*, 6 Fed. Rules Serv. 60b.24, Case 2, 2 F. R. D. 539 (D. Neb. 1942) (reviewing California and incidentally other state decisions and holding that a party will not be relieved from a default judgment on the ground of inadvertence or excusable neglect of counsel where the reasons given for the attorney's neglect were unconvincing and the party himself had not been reasonably diligent); *United States for the Use of Kantor Bros. Inc. v. Mutual Construction Corp.*, 7 Fed. Rules Serv. 60b.24, Case 1 (E. D. Pa. 1943) (holding that the California courts regard § 473 as remedial in nature and that the inadvertent failure of defendant's attorney to procure the filing in another city of an answer to a complaint is excusable neglect where the failure was caused by the attorney's full-time participation in another case); *Fiske v. Buder*, discussed *infra* p. 639.

29. See *infra* under subhead, The California Decisions.

30. *Ibid.*

31. 36 F. Supp. 952 (S. D. N. Y. 1941) discussed in Commentary, Effect of Rule 60b on Other Methods of Relief from Judgment (1941) 4 Fed. Rules Serv. 942.

the court has the authority to entertain this motion and to grant such relief as the situation calls for which clearly is to vacate the judgment in question."<sup>32</sup>

The facts in *Cavallo v. Agwilines*<sup>33</sup> and *McGinn v. United States*<sup>34</sup> were similar and like results followed on the theory, and partly on the authority, of Judge Goddard's decision in the *Preveden* case. Where, however, the effect of the saving clause was not discussed (nor apparently considered) a *contra* result was reached.<sup>35</sup>

32. *Id.* at 953.

33. 6 Fed. Rules Serv. 60b.31, Case 2, 2 F. R. D. 526 (S. D. N. Y. 1942). After referring to *Preveden v. Hahn*, Judge Rifkind stated: "It may appear that violence is done to the language of the carefully drafted rules if we read the word motion into the word action. However, the intention to preserve the old remedies for the correction of orders and judgments improperly made is quite clear. For the ancient writs of error coram vobis and coram nobis and for the bill of review, the motion is the modern substitute. It should not be lightly inferred, in the absence of express language, that these well established remedies are not embraced in the language of the rule. *Fiske v. Buder*, 125 F. (2d) 841 (C. C. A. 8th). See 3 Moore's Federal Practice, § 60.01 *et seq.* The facts in the instance case are not distinguishable in any material aspect from those of *Preveden v. Hahn*, *supra*, which were held appropriate for the application of a writ of error coram vobis."

One variant fact, however, should be noted. In the *Preveden* case the judgment of dismissal was on the merits because of a stipulation which plaintiff's counsel did not have the authority to make. In the *Cavallo* case the judgment of dismissal was for want of prosecution, which was due to the belief of plaintiff's counsel, induced by defendant's counsel, that there was no merit in the action. As to this Judge Rifkind said: "It is clear, however, that plaintiff did not know of a change of heart on part of his attorney, nor of his failure to bring the case to issue nor of its dismissal. He has never consented to the abandonment of the action. His present attorneys certify that he has a meritorious cause of action. The plaintiff has been deprived of his day in court not through any fault of his own but by the unauthorized act of his attorney." Accordingly it would seem that Judge Rifkind is correct in his conclusion that the facts of the *Preveden* and *Cavallo* cases call for the same relief.

34. 6 Fed. Rules Serv. 60b.51, Case 3, 2 F. R. D. 562 (D. Mass. 1942). This case contains an extended discussion by Judge Ford of the former various remedies that could be utilized to obtain relief from judgments and decrees. And unlike Judge Rifkind (see note 33, *supra*) he did not even regard the use of a motion as doing violence to the saving clause which refers to an action. "As seen, the old writs of error coram nobis, or coram vobis, have been replaced by the modern practice of proceeding by motion. *New England Furniture & Carpet Co. v. Willcutts*, 55 F. (2d) page 987. Even though this is an ancillary proceeding, I regard it as an 'action' within the meaning of the rule. The draftsmen of the rule cannot be regarded as thinking of every little nicety of language and by the use of the word 'action' foreclose an ancillary remedy that so long existed." 6 Fed. Rules Serv. at 687, 2 F. R. D. at 565.

As an additional ground for decision Judge Ford held that the action was commenced before the Federal Rules became effective, and if Rule 60(b) did not authorize relief here, the Federal Rules would not be applied and relief would be given by the writ of error coram nobis.

35. *Reed v. South Atlantic Steamship Co.*, 6 Fed. Rules Serv. 60b.31, Case 1 (D. Del. 1942), decision by Circuit Judge Biggs. Even if Judge Biggs had considered the saving clause, the decision might well have been the same, because it would seem that plaintiff's attorney had not abandoned his client's claim as he did in the *Preveden*, *Cavallo* and *McGinn* cases (the plaintiff did not replace his counsel in the *Reed* case as he did in the other cases), but that the dismissal for want of prosecution resulted from his inadvertence or neglect. If

In the leading case, *Wallace v. United States*,<sup>36</sup> Judge Frank made an extended analysis of the saving clause and its relation to the earlier provisions contained in Rule 60(b) and concluded that the ancillary common law and equitable remedies were available under the rule but that *coram nobis* did not lie in this instance. A taxpayer, Wallace, sued to recover an overpayment; his action was dismissed for want of prosecution in 1938, although dismissal was improper under the local rules of the trial court. Approximately two and a half years later, Wallace's counsel moved to restore the case to the trial calendar and supported his motion by affidavit to the effect that the dismissal had occurred due to his inadvertence because of the press of his duties as a State Senator. On February 14, 1941, the trial court granted the motion and vacated the dismissal. Counsel for the United States moved to vacate that order on the ground that it had been entered in violation of Rule 60(b); plaintiff's counsel countered with an affidavit stating that the government's counsel had consented to the entry of the order on condition that Wallace would stipulate the facts so that the case could be tried on the merits, and that subsequently such a stipulation had been made; the court found the facts stated in the affidavit to be true. The trial court denied the government's motion to vacate. When the case subsequently came on for trial and the government moved for dismissal, on the ground that the court lacked jurisdiction because its order of February 14, 1941, was invalid, this motion was also denied; the case was tried and judgment went for the plaintiff on the merits. The sole basis of the government's appeal was the lack of the trial

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this were true the saving clause could not be utilized to gain relief after six months, since relief from mere inadvertence or neglect is expressly covered in the first part of Rule 60(b) and a maximum time limit of six months is there imposed. See *Wallace v. United States*, discussed *infra*, pp. 636-7.

For completeness, see also *Shimer v. American Oil Co.*, 7 Fed. Rules Serv. 60b.31, Case 3, 3 F. R. D. 365 (M. D. Pa. 1944) where a motion made in 1944 to set aside a nonsuit entered in 1937 (thus nearly seven years before) was denied because of the plaintiff's laches. Judge Watson goes on to state, however, in a short and not helpful opinion that does not consider the saving clause: "Plaintiff's motion was not only not made within a reasonable time, but it was not made within six months, which is the dead line under 60b of the Federal Rules of Civil Procedure." 7 Fed. Rules Serv. at 894, 3 F. R. D. at 365. This appears to be another case involving inadvertence or neglect on the part of plaintiff or his counsel, and not abandonment by plaintiff's counsel, and hence properly denied. Even if it were originally a proper case for the utilization of the substance of the writ of error *coram nobis*, laches would bar relief. The Editor of the Rules Service appends the following proper note to the Report: "While the decision of the court is correct, it is not apparent how the motion could have been made within six months after March 30, 1937, under Rule 60b, that rule not becoming effective until September 16, 1938." 7 Fed. Rules Serv. at 894.

36. 142 F. (2d) 240 (C. C. A. 2d, 1944). *Accord*, *Sharlot v. Ford Motor Co.*, 9 Fed. Rules Serv. 60b. 31, Case 1 (E. D. N. Y. 1945).

court's power to make the order of February 14; Wallace conceded that unless this order was valid his claim was barred by the statute of limitations. In relation to this latter point Judge Frank said:

"We are satisfied that the record shows that the trial court entered that order [Feb. 14, 1941] on the consent of government's counsel. If the defendant were a private person, that consent would conclude the matter and Wallace's judgment would be unassailable. But, assuming for the moment that, absent such consent by defendant's counsel, the trial court could not properly enter the vacating order (an issue we shall consider later), the question arises whether a government counsel has implied authority (there being no express authority) by such a consent to eliminate the defense of the statute of limitations. We are constrained to answer in the negative."

It then became necessary to determine the trial court's power to make the order in question, and the following propositions were laid down.

1. That what may be done within 6 months, pursuant to the body of the Rule, may not be done thereafter under the exception contained in the last sentence.

2. ". . . the Rule's history indicates that 'action' was intended also to cover whatever could have been done by a writ of error coram nobis or coram vobis, or a bill of review, or a bill in the nature of a bill of review, despite the fact that any such proceeding was, before the new rules, not an independent 'action' but ancillary to the main suit."

3. "The consequence of that interpretation is that pursuant to a motion made or action begun after six months, no relief can be granted under Rule 60(b) except that which would previously have been proper, after the expiration of the term, in proceedings by way of such ancillary writs or bills or in an independent suit to set aside an order for 'extrinsic' fraud. The kind of relief Wallace sought here could not, before the Rules, have been accorded him in such ancillary proceedings, and he made no charge of fraud.

"The vacating order of February 14, 1941, was therefore wholly unauthorized; since it lacked validity, the trial court had nothing before it, and its judgment on the merits was erroneous."<sup>37</sup>

The Fifth Circuit has also recognized in *Jones v. Watts*<sup>38</sup> that the substance of *audita querela* may still be utilized. The theory of this case was that the judgment debtor could not obtain relief, from a judgment in favor of the United States, by an independent action, since the sovereign had not consented to be sued in such a proceeding; that *audita querela* was for the purpose of that rule an independent action;<sup>39</sup>

37. 142 F. (2d) at 242-5, 7 Fed. Rules Serv. at 892-3.

38. 142 F. (2d) 575 (C. C. A. 5th, 1944).

39. This had been established by *Avery v. United States*, 12 Wall. 304 (U. S. 1870).

that the substance of *audita querela* was, however, still available by motion made in the original proceeding, subject only to laches. The court did not discuss the effect of Rule 60(b); but observed that "The Rules of Civil Procedure, which now govern, favor the use of motions in substitution of the old remedial writs. Rule 81(b)." <sup>40</sup>

An historical aspect of these two ancillary remedies which might effect a limitation of their practical utility has not been considered by the courts. Since the writ of error *coram nobis* and *audita querela* were utilized to give relief only from common law judgments, must a federal court today analyze the civil action to determine whether the action would formerly have been one at law before utilizing the substance of the writ to grant relief? Technically it should, and if it concluded that the action were "equitable" it would have to deny relief unless the former equitable remedies would warrant remedial action.<sup>41</sup> Apart from resurrecting distinctions between law and equity which require historical research when a practical consideration of the situation at hand would give a speedy answer, the result may or may not be satisfactory depending on whether equity would give relief.<sup>42</sup> But the federal cases have not discussed this general problem, and apart from *Jones v. Watts*, and the cases of *McGinn v. United States* and *Wallace v. United States* which, because they were suits against the United States, were undoubtedly actions at law, it cannot be determined from the reports whether the other cases were at "law" or in "equity." Because the Federal Rules abolish the procedural distinction between law and equity and because of the procedural need for relief in the cases where the old common law and equitable writs afforded remedies against

40. 142 F. (2d) 575, 577 (C. C. A. 5th, 1944).

41. See note 27, *supra*.

42. Since the writ of error *coram nobis* was chiefly available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself [see *infra* under Writ of Error *Coram Nobis* (or *Coram Vobis*)], if such a mistake of fact occurred in an equitable action it would probably be subject to correction. See *McGinn v. United States supra*, note 34, where Judge Ford stated: "Also, there is a likelihood that plaintiff's motion might have been granted under the old practice in the form of an original bill in equity. Aside from fraud, the original action could be utilized to impeach a judgment for mistake. *United States v. Beebe*, 180 U. S. 343; *Robb v. Vos*, 155 U. S. 13; *Perkins v. Hendryx*, C. C., 149 F. 256." 6 Fed. Rules Serv. at 687, 2 F. R. D. at 566. Also 3 MOORE § 60.03. And there is authority that an original action is not necessary, but relief from extrinsic mistake may be obtained by motion in the proceeding wherein the judgment is rendered if the court possessed a general jurisdiction at law and in equity. *Olivera v. Grace*, 19 Cal. (2d) 570, 122 P. (2d) 564 (1942), subsequently discussed under the subhead *The California decisions, infra*, pp. 644-53. Then too the doctrine of inherent power may be drawn upon to accord relief. See *Bucy v. Nevada Const. Co.*, 125 F. (2d) 213, 5 Fed. Rules Serv. 60a.12, Case 2 (C. C. A. 9th, 1942) discussed *infra*, pp. 640-1. If the fact involved could properly be classified as newly discovered evidence, or as showing fraud, a bill of review would accord relief. See pp. 676-7, *infra*.

judgments, it would appear sound policy to apply the substance of those writs in all civil actions.<sup>43</sup>

In *Fraser v. Doing*,<sup>44</sup> the Court of Appeals held that the first saving clause in Rule 60(b) preserves the remedy formerly available by a bill of review or a bill in the nature of a bill of review, which granted relief on the following grounds: (a) for error of law apparent on the face of the record without further examination of matters of fact; (b) because of new facts discovered since the decree which would materially affect the decree and probably induce a different result; and (c) for fraud in procuring the decree. No relief was granted in the instant case, however, as the only possible basis for relief was ground (a), which was lacking in merit; and for the further reason that the bill of review was premature since, at the time it was filed, a motion for a new trial could have been made in the former proceeding. The Second Circuit in *Wallace v. United States* is in accord with the theory that the saving clause retains the substance of the old bills of review or bills in the nature of bills of review. The Tenth Circuit is also of that opinion.<sup>45</sup> Apparently in a proper case relief may be obtained either by an original action as in *Fraser v. Doing*, or by motion as in *Wallace v. United States*.

In *Fiske v. Buder*<sup>46</sup> extrinsic fraud was involved, and relief was accorded by *motion*, and without the necessity of an independent action, long after the six-months period had expired. This case is important for at least two reasons: its reliance upon California decisions that give relief by way of motion on grounds not specified in Section 473 of the California Code;<sup>47</sup> and because the proceeding, in which the order relieved from was made, was still pending the court should have had control over such an order regardless of whether the fraud be intrinsic or extrinsic.<sup>48</sup>

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43. See 3 MOORE at 3275.

44. 130 F. (2d) 617 (App. D. C. 1942).

45. *Norris v. Camp*, 144 F. (2d) 1 (C. C. A. 10th, 1944) (applying Rule 60(b) in bankruptcy by virtue of General Order 37).

46. 125 F. (2d) 841, 5 Fed. Rules Serv. 60b.51, Case 1 (C. C. A. 8th, 1942).

47. The court pointed out that Rule 60(b) is based upon § 473 of the California Code, that the California authorities allow a judgment to be vacated by motion after the statutory time where the fraud is extrinsic as in this case. The order was set aside for two reasons: the merits were with the moving party and there were no laches on his part.

48. The decision that the district court had the power to grant relief seems sound. Because the order was made in a case still pending and involved the distribution of an undistributed fund that was under the court's control, the court should have the power regardless of whether the fraud be intrinsic, such as perjury, or extrinsic, as here, in preventing a defense. If Rule 60(b) is applicable to this type of order, and the theory of the Eighth Circuit is to that effect, the Rule should be amended to make it clear that, so long as an action is pending, the court does not lose control over orders made therein. Under one of the proposed amendments, Rule 60(b) will expressly be made applicable to final orders only. See *infra* pp. 691, 693.

The Ninth Circuit in *Bucy v. Nevada Construction Company*<sup>49</sup> ruled that the inherent power in a court to vacate an order or judgment was not limited by Rule 60. The crux of the conflict among members of the court concerned that portion of the Judicial Code providing:

"Whenever any cause shall be removed . . . and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed."<sup>50</sup>

The majority felt that the removal statute did not preclude the district court from vacating a remand order when nothing had been done toward carrying it into execution; the dissent contended that on making the remand order the district court lost jurisdiction, whether the order was right or wrong. Aside from this statutory problem, the majority had to deal with the power of the court to vacate the order in question. After relying upon the district court's rule for new trial, on motion made within ten days for error in law, and without any reference to Rule 59, the court stated that Rule 60, the notes, and discussion of the Advisory Committee and commentators supported the theory of the inherent power of courts to correct their own errors and that Rule 60 did not affect, interfere with, or curtail such common-law power.<sup>51</sup> Admittedly, if a remand order is subject to Rule 60(b), there would be no ground for the motion to vacate, assuming that the court may upon its own initiative entertain the motion, for the court would not be relieving "a party . . . from a judgment, order, or proceeding taken against him through *his* mistake, inadvertence, surprise, or excusable neglect." Rule 60(b) does not authorize the court to relieve a party from a judgment entered because of the *court's* mistake of law.<sup>52</sup>

49. 125 F. (2d) 213, 5 Fed. Rules Serv. 60a.12, Case 2 (C. C. A. 9th, 1942).

50. 36 STAT. 1094 (1911), 28 U. S. C. § 71 (1940).

51. The court cites the Advisory Committee's discussion appearing on page 185 of the Proceedings of the Institute at Washington, D. C. The commentator cited is 1 FREEMAN, JUDGMENTS (5th ed. 1925), pp. 375, 376. Freeman, at this point, is mainly concerned with the proposition that during the term the court has unlimited control over its judgments and inherent power to set them aside.

For another case referring to the inherent power, but unnecessarily so, see *Preveden v. Hahn*, *supra*, note 31.

For cases sustaining inherent power of the appellate courts to set aside their judgments long after term time because of fraud upon the court, see *Root Refining Co. v. Universal Oil Products Co.*, 147 F. (2d) 259 (C. C. A. 3d, 1945), *cert. granted*, 324 U. S. 839 (1945). See also *Art Metal Works v. Abraham & Straus*, 107 F. (2d) 944 (C. C. A. 2d, 1939) *cert. denied* 308 U. S. 621 (1940) for the substantive disposition of one case which the Second Circuit reopened, without reported discussion, in which Judge Manton had participated and where it was shown that he had been corruptly influenced; and see *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238 (1944), discussed *infra*, pp. 679-681.

52. *Nachod & United States Signal Co. v. Automatic Signal Corp.*, 32 F. Supp. 588,

It is true that relief might have been given under the first saving clause of Rule 60(b) by analogy to the bill of review for error of law apparent on the record, if the action were one formerly "equitable" or if the substance of the equitable remedies is available today in the civil action, whether it be one formerly at law or in equity,<sup>53</sup> provided it is held that Rule 60(b) applies to interlocutory orders and that relief can be obtained from them only as provided therein. But, assuming the removal statute has not deprived the court of jurisdiction over the case, the Ninth Circuit appears to have been on sound ground in asserting inherent power since the order was interlocutory and the action was still pending before the court. If Rule 60(b) applies to interlocutory orders it should be amended,<sup>54</sup> for reasons now to be considered.

In *Wallace v. United States*, which considered at some length the meaning of the saving clause and its relation to the other provisions of Rule 60(b), Judge Frank stated:

"We need not and do not here consider a question which we discussed but left undecided in *Matter of Barnett*, 2 Cir., 124 F. (2d) 1005, 1011, 1012: Does Rule 60(b) preclude relief because of events occurring after the six months where, before the new rules (see *Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82 . . . ) relief would have been granted by a motion made after the expiration of the term but could not have been granted in an independent action or pursuant to the writs or bills described above?"<sup>55</sup>

*John Simmons Company v. Grier Brothers*<sup>56</sup> affirmed the complete power of a federal court over its interlocutory orders, Mr. Justice Pitney stating that "if an interlocutory decree be involved, a rehearing may be sought at any time before final decree, provided due diligence be employed and a revision be otherwise consonant with equity."<sup>57</sup> The prayer in this case was for a permanent injunction against unfair competition and infringement of plaintiff's reissue patent and for an accounting as to both matters. The injunction was granted by the Pennsylvania district court on July 24, 1914. Upon appeal, the Third Circuit held the reissue patent invalid, but the decree was not entered

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3 Fed. Rules Serv. 60b.2, Case 1 (D. Conn. 1940). Possibly a proposed amendment eliminating "his" might warrant relief. See pp. 688, 686, *infra*.

53. For discussion as to whether the old law and equitable remedies should be available only in "law" and "equity" suits, respectively, or be applied in all civil actions, see *supra*, pp. 638-9.

The substance of the writ of error coram nobis would not be available since the error involved was one of law and not fact.

54. For a similar conclusion as to the order of distribution where the action is still pending see the final discussion of *Fiske v. Buder*, *infra*, p. 642.

55. *Wallace v. United States*, 142 F. (2d) 240, 244, n. 14 of the opinion (C. C. A. 2d, 1944).

56. 258 U. S. 82 (1922).

57. *Id.* at 90-91.

in the district court until almost a year after the mandate went down. Subsequently, in another suit by the same plaintiff but against a different defendant, the Supreme Court affirmed a decision holding the reissue patent valid. After appropriate proceedings, the Pennsylvania district court sustained a bill of review and held that its former decree, issued pursuant to the Third Circuit's mandate, be set aside. The Third Circuit reversed on the theory that "a change in the authoritative rule of law, resulting from a decision by . . . [the Supreme] court announced subsequent to the former decree, neither demonstrates an 'error of law apparent' upon the face of that decree nor constitutes new matter *in pais* justifying a review."<sup>58</sup> Although agreeing with the Third Circuit that this was a correct statement of the law governing bills of review, the Supreme Court reversed on the following reasoning:

"The decree of July 24, 1914, although following a 'final hearing', was not a final decree. It granted to plaintiffs a permanent injunction upon both grounds (unfair competition and patent infringement), but an accounting was necessary to bring the suit to a conclusion upon the merits."<sup>59</sup>

For the same reason the decree which the district court entered pursuant to the Third Circuit's mandate was not a final decree. So long as the accounting proceeding was pending a bill of review was not proper and the principles governing such a bill were inapplicable; the so-called bill of review should, however, be treated as essentially a petition for rehearing directed to an interlocutory decree; the Supreme Court's decision in the Second Circuit case demonstrated that the Third Circuit had erred in its disposition of this case upon the first appeal, and the error "even though not amounting to 'error apparent,' within the meaning of Lord Bacon's first ordinance" concerning bills of review, "afforded ample ground for setting matters right upon a rehearing before final decree."<sup>60</sup>

The principle of the *Simmons* case is sound: so long as the court has jurisdiction over an action, it should have complete power over interlocutory orders made therein and should be able to revise them when it is "consonant with equity" to do so. Under this principle it would be clear that, in the removal case previously discussed,<sup>61</sup> unless the district court had lost jurisdiction over the action by virtue of the removal statute, the court could vacate its remand order. And it would seem that in the *Fiske v. Buder*<sup>62</sup> situation the court should have equal power over its order of distribution so long as the undistributed fund is sub-

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58. *Grier Bros. Co. v. Baldwin*, 265 Fed. 481, 488 (C. C. A. 3rd, 1920).

59. 258 U. S. at 89.

60. *Id.* at 92.

61. *Bucy v. Nevada Construction Co.* *supra*, n. 49.

62. See note 46 *supra*.

ject to the court's control and the action remains pending for purposes of distribution. These cases involving interlocutory orders proceeded, however, on the theory that Rule 60(b) was applicable to such orders, but that, nevertheless, relief could be given because of the inherent power of the court in one case, and because of extrinsic fraud in the other. Support for these decisions is found in the inclusiveness of the language of the first sentence of Rule 60(b) referring to a "judgment, order, or proceeding," and in the California decisions construing a similar phrase as including interlocutory orders.<sup>63</sup>

It was settled that where a final decree granting a permanent injunction has become of no use or benefit to the one whose rights were protected, or where it would be inequitable to continue it, because of the occurrence of facts and conditions since its rendition, the decree could be modified or vacated.<sup>64</sup> The first saving clause of Rule 60(b) is inept

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63. See note 88 *infra*.

64. *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421 (U. S. 1855) (subsequent enactment by Congress of a statute authorizing a bridge over the Ohio river at Wheeling rendered inoperative a Supreme Court decree enjoining the continuance of the bridge and ordering its abatement as a public nuisance); *Hodges v. Snyder*, 261 U. S. 600 (1923), (where defendants had been enjoined from proceeding under an attempted incorporation of an independent district into a consolidated school district on the ground that there was no statute authorizing such incorporation, the subsequent enactment of a curative statute granting such power warrants vacating the injunction), *aff'g* 45 S. D. 149, 186 N. W. 867 (1922); *United States v. Swift & Co.*, 286 U. S. 106 (1932). By a consent decree entered in a suit by the United States under the Sherman Act, a monopolistic combination of meat packers was dissolved and the packers were enjoined from doing certain things, including the wholesaling and retailing of "groceries." Years later certain of the defendants applied for a modification eliminating the latter matter. Although holding that there had not been such a change of events as to warrant modification, Mr. Justice Cardozo stated: "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."); *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85, 106 N. W. 429 (1905) (where defendant had been enjoined from interring the dead in certain land because of polluting plaintiff's wells, it was recognized that the court had the power to vacate the injunction if plaintiff had ceased using the wells, but use was found and vacation denied); *RESTATEMENT, TORTS*, § 943, p. 729; 3 *MOORE* (Supp. 1942).

The fact that the court has erroneously applied the law, or that there is a subsequent judicial change in the theory of law on which the decision is based is not ground for modification of a permanent injunction. *National Popsicle Corp. v. Hughes*, 32 F. Supp. 397 (N. D. Cal. 1940) (On June 3, 1930, D was enjoined from infringing P's patent. On February 2,

in preserving this power, but since the power is clearly rooted in practical good sense courts have continued to exercise it.<sup>65</sup>

*The California decisions.* As the power of the California courts over their final judgments expired at the end of the term, unless kept alive by motion or appropriate proceeding during the term, the state early enacted legislation prescribing time limits in which judgments and defaults might be vacated. The time within which an application for relief must be made and the grounds therefor depended upon whether relief could be obtained only under some provision of the code or existed independent of statute.<sup>66</sup> Thus, the California decisions are helpful to the extent that they show that Section 473 of the California Code (from which Rule 60(b) was adopted) is not exclusive.

1938, the 9th Circuit, in another action between P and X, determined that some but not all of the patent claims in the P-D suit were invalid for want of invention. D moved to dissolve the injunction in the P-D case because of the 9th Circuit decision in the P-X suit. Held: denied; *Pacific Tel. & Tel. Co. v. Henneford*, 199 Wash. 462, 92 P. (2d) 214 (1939) (state supreme court subsequently changed its position in another case and upheld validity of the state compensating tax); noted in (1939) 7 U. CHI. L. REV. 180; see *John Simmons Co. v. Grier Brothers*, cited *supra* note 56. On the other hand there is authority that a change of judicial decision may warrant modification. *Ladner v. Siegel*, 298 Pa. 487, 148 Atl. 699 (1930) (change of law by judicial decision as to what constitutes a nuisance held to warrant modification of injunction against maintenance of a public garage).

It is clearly proper for a federal court to provide in a decree, that has prospective features, for its modification in the event of a change in state law. *Glenn v. Field Packing Co.*, 290 U. S. 177 (1933) (A three-judge court permanently enjoined the imposition of a Kentucky tax of ten cents per pound on oleomargarine sold within the state as violative of the Kentucky constitution. Held, "the decree will be modified by providing that the members of the State Tax Commission, or that Commission, may apply at any time to the court below, by a bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state constitution, or that by reason of a change in circumstances the statute may be regarded as imposing a valid tax.") *Id.* at 179; (1934) 47 HARV. L. REV. 708.

65. *International Railway Co. v. Davidson*, 65 F. Supp. 58, 8 Fed. Rules Serv. 60b.51, Case 3 (W. D. N. Y. 1945).

66. For the background of § 473, see 14 CAL. JUR. 1060-2; *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344 (1893).

In *Olivera v. Grace*, 19 Cal. (2d) 570, 122 P. (2d) 564 (1942) Chief Justice Gibson stated for a unanimous court: "In many states, including California, the general common law power that courts had to control their own judgments during the term at which they were rendered has been continued in the form of statutory authority. . . . Under such statutes the court which rendered the judgment has power, in its discretion . . . for a definite period of time and upon specified grounds to open, vacate or modify its own final judgment. (CODE CIV. PROC., sec. 473; . . .)" *Id.* at 573, 122 P. (2d) at 566.

And in reference to the matter covered in the fourth and concluding paragraph of § 473 [quite similar to Rule 60(a)] on the correction of clerical mistakes and the setting aside of a void judgment, see note 22 *supra*, the Chief Justice states: "Apart from statutory authority, all courts are said to have an inherent power to correct their records, so as to make them speak the truth, and under this inherent power courts have frequently corrected their final judgments, when, because of clerical errors or omissions, the judgments actually rendered were not the judgments intended to be rendered. . . . Similarly, a court has inherent power,

Relief from judgments or orders may be summarized as follows:

1. Clerical mistakes may be corrected at any time.<sup>67</sup> A judgment which is void on its face may be vacated at any time.<sup>68</sup> Also a default judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings may be vacated within a reasonable time, which by analogy to Section 473a, is limited to one year.<sup>69</sup>

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apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored.

"In addition to the situations already discussed," he continued, "where courts have set aside final judgments under statutory authority or under their inherent power to correct their own records, there exists a well-recognized jurisdiction in equity. . . . Equity's jurisdiction to interfere with final judgments is based upon the absence of a fair, adversary trial in the original action."

The history of the fourth and concluding paragraph of § 473 was traced in the earlier case of *Estate of Estrem*, 16 Cal. (2d) 563, 107 P. (2d) 36 (1940): "Prior to 1933 this particular subdivision of § 473 was in section 900a of the Code of Civil Procedure, relating to justices' courts. In that year as part of extensive amendments made to the various Code sections relating to the jurisdiction and procedure of the courts, the special sections relating to the justices' courts were repealed and their contents incorporated in the general sections relating to pleadings in civil actions (CODE CIV. PROC., §§ 420-475), which were at that time made applicable to all courts. (CODE CIV. PROC., § 34.) Fear existed that unless the contents of former section 900a were placed in some statute, courts not of record might be held to be without those powers. (*F. E. Young Co. Inc. v. Fernstrom*, 31 Cal. App. (2d) (Supp.) 763, [79 Pac. (2d) 1117]). Thus, the 1933 amendment to section 473 added nothing to the jurisdiction of the courts with respect to setting aside their judgments or orders. Independently of this provision a court may set aside at any time a judgment or order obtained by extrinsic fraud. A court may set aside at any time a judgment or order void on its face. It may set aside a default judgment or order issued without proper jurisdiction over the person of a defendant who at no time was before the court if motion for such relief is made within one year. And, of course, it may set aside a judgment or order inadvertently made upon motion within six months, under section 473. But it cannot, after time for appeal has elapsed, set aside a judgment or order on the ground that the court lacked jurisdiction, when the facts establishing such jurisdiction were found by the court in the original proceedings, and all adverse parties were properly served with notice and had the opportunity to present their objections." *Id.* at 572, 107 P. (2d) at 41.

67. See the concluding paragraph of § 473 set out in note 22 *supra*; *Olivera v. Grace* and *Estate of Estrem* both *supra*, note 66.

68. *Ibid.*

69. *Estate of Estrem*, 16 Cal. (2d) 563, 107 P. (2d) 36 (1940); *Richert v. Benson Lumber Co.*, 139 Cal. App. 671, 34 P. (2d) 840 (4th Dist. 1934) (relief denied a party although he filed his notice one day before a year had expired following the rendition of the judgment, and two days before the expiration of a year from its entry where the motion was actually made more than a year later), criticized in (1935) 23 CALIF. L. REV. 217, 218 ("the strict application of the year provision seems very harsh where the existence of the order or judgment is not discovered by the party against whom it has been given in time for him to make his application. It is submitted, therefore, that the provision should be applied subject to the qualification that the discovery be made within the period, or that the defendant have a reasonable time after such discovery to act. The principal case, however, seems to repudiate any such qualification, for a lapse only of a few extra days was held enough to deprive the defendant of his remedy at law. Probably in some cases equitable relief may be had.").

2. Relief may be had under Section 473 on motion made within a maximum time limit of 6 months where a judgment, order, or proceeding was taken against a party through his mistake, inadvertence, surprise, or excusable neglect.

3. Judicial error may be remedied by motion for new trial;<sup>70</sup> by motion to vacate a judgment or decree, "when based upon findings of fact made by the court, or the special verdict of a jury" because of "incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact," or because the judgment or decree is "not consistent with or not supported by the special verdict," and to enter another and different judgment;<sup>71</sup> and by appeal.<sup>72</sup> Judicial error is not correctible under Section 473.<sup>73</sup> But a bill of review may be maintained notwithstanding the remedy by motion for new trial.

4. Relief may be obtained by an original action to enjoin the enforcement of the judgment or order, or by a motion made in the proceeding culminating in the judgment or order, at any time, subject only to the doctrine of laches, where there was *extrinsic* (as distinguished from *intrinsic*) fraud, accident, or mistake.

The non-statutory ground of bill of review, cumulative to the statutory remedy for a new trial, was considered at length and reaffirmed in *San Joaquin & Kings River Canal & Irrigation Company v. Stevinson*,<sup>74</sup>

Section 473(a), which is utilized by analogy, provides: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." Compare the second saving clause of Rule 60(b) discussed p. 632 *supra*.

70. See § 657 specifying grounds for new trial; § 659 provides that a motion for a new trial must be made "either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment"; this time "shall not be extended by order or stipulation."

71. Section 663. Service of a notice of intention to move under § 663 must be made within ten days after notice of the entry of judgment; the time designated for the making of the motion must not be more than sixty days from the time of the service of the notice. Section 663a.

72. Appealable judgments and orders are enumerated in § 963. An appeal may be taken within sixty days from the entry of said judgment or order. "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." Section 939.

73. *Glougie v. Glougie*, 174 Cal. 126, 162 Pac. 118 (1916).

"Some errors, however, . . . seem to have been treated as proper grounds for vacating the judgment, probably because regarded as irregularity and inadvertence, as in case of a judgment rendered without findings, or of a judgment on a default prematurely entered, or which had been waived." 14 CAL. JUR. 1022.

74. 175 Cal. 607, 166 Pac. 338 (1917), critically noted in (1918) 6 CALIF. L. REV. 154 on the ground that it divides a united procedure into "law" and "equity" actions and gives relief only in the latter cases. The commentator overlooks the possibility of extending such equitable relief to *all* actions under the united procedure. See p. 638-9 *supra*.

two judges dissenting from the principle. The basis for the bill of review was newly discovered evidence, and while the bill was filed within a relatively short time after the discovery of the evidence (about four and one-half months), the plaintiff was adjudged guilty of laches in failing for 12 years after the commencement of an action involving riparian rights to examine the land records, which would have disclosed a deed by the defendant conveying such rights to a third party—the newly discovered evidence. The court's declared reason for holding that a bill of review in equity will lie in California is that "The superior courts have complete and full jurisdiction of all cases in equity—the same jurisdiction as that possessed and administered by the high court of Chancery."<sup>75</sup> A very practical reason which the court did not stress

75. 175 Cal. at 611, 166 Pac. at 340. The court continued in the *San Joaquin* case as follows:

"It is true, of course, that the legislature may prescribe the mode of procedure in the exercise of that jurisdiction, and if a different form of action or procedure is provided as a substitute for the former bill in equity, the method provided by the statute must be followed. But the proceeding for a new trial at common law existed concurrently with the remedy in equity for a new trial. One is not a substitute for the other. Such bills have been frequently entertained in this state and treated as a proper subject of equity jurisdiction. *Buckelew v. Chipman*, 5 Cal. 399; *Mulford v. Cohn*, 18 Cal. 46; *Butler v. Vassault*, 40 Cal. 74; *Allen v. Currey*, 41 Cal. 318. The reason for the rarity of such actions is easily discernible from the decision in *Mulford v. Cohn*. It is perhaps surrounded by greater difficulties in the way of success than any other action known to the law or equity. Upon this subject the court there says:

'It must be shown distinctly in such a bill that the facts are of controlling force; that they were not known to the defendants at the time of the trial; that the defendants used all proper diligence to prepare their case for trial, and to procure the evidence, and that they were unable, without fault or negligence on their part, to procure it; that the testimony is now within their control, and that they will be able to procure it on another trial. The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiffs, and why no motion for new trial was made in the court trying the case, and before the lapse of the term.'

"It is also necessary as a matter of course, that all these facts should be fully proven in order to establish the right to such relief. Perhaps in the matter of diligence there is no method of procedure in which so high a standard is required, both in the pleading and the proof, to authorize the relief." *Ibid.*

The court pointed out that "Bills of review for a new trial are of two kinds; a review for errors appearing on the face of the record, and a review because of newly discovered evidence. With respect to a review for errors on the face of the record, it was settled in equity that they would not be entertained after the time allowed by the statute for an appeal had expired. . . . With respect to bills of review for newly discovered evidence, the rule is not the same. There are decisions holding that such a bill must be instituted within the time allowed for an appeal but that the time begins to run only upon the discovery of the new evidence. The present case was begun within that period after the discovery. But with this exception the rule is that the time within which such an action must be begun is to be determined within the sound discretion of the court, and must not be an unreasonable period and will depend upon the circumstances of the particular case." *Id.*, at 613, 166 Pac. at 341.

Chief Justice Angellotti, with whom Justice Henshaw concurred, agreed that the judg-

is that the statutory time for moving for a new trial on the ground of newly discovered evidence (10 days)<sup>76</sup> is so short as to be useless.

In the above situation the *ancillary* equitable remedies for relief from a judgment or order were held not to be superseded by the code. It has also long been established that the *original* jurisdiction of chancery to relieve a party from a judgment or order, the fruit of certain types of fraud, accident or mistake, has not been impaired by Section 473. The California courts have verbally followed the federal doctrine of *United States v. Throckmorton*<sup>77</sup> that the fraud, accident or mistake

ment dismissing the bill of review was proper but dissented from the theory of the majority on the ground that the matter of a new trial on the ground of newly discovered evidence was covered, to the exclusion of all other remedies, by the statute. "This court has already held that a bill of review will not lie for errors appearing on the face of the record (the other ground under the old equity practice), the statute providing an appeal as the exclusive remedy. (See *San Francisco Sav. & Loan Soc. v. Thompson*, 34 Cal. 76, 78.) The same is true on principle as to a bill of review on the ground of newly discovered evidence." 175 Cal. at 614, 166 Pac. at 341.

The doctrine of the *San Joaquin* case has been applied in another code state. *DeBaca v. Sais*, 44 N. Mex. 105, 99 P. (2d) 106 (1940) (The district court had jurisdiction of bill of review to correct or amend its judgment foreclosing mortgage by including omitted tract described in mortgage as part of property ordered sold for satisfaction of judgment, though such bill was filed over five months after entry of judgment and was not authorized by statute.); *State ex rel. Brady v. Frenger*, 44 N. Mex. 386, 103 P. (2d) 115 (1940) (A bill of review is the correct remedy to secure a review of a decree on the ground of evidence discovered too late to be available at the original hearing or on a motion for new trial provided the strict rules governing such procedure would otherwise authorize it. "The district courts of this state have complete and full jurisdiction in all equity cases, including all equity procedure not changed by statute, and the statutory proceeding for a new trial is not a substitute for bills of review." 44 N. Mex. at 388, 103 P. (2d) at 116).

76. See §§ 657, 659 referred to in note 70 *supra*.

77. 98 U. S. 61 (1878). The bill in equity to annul a decree establishing land title in certain persons was brought more than twenty years after the rendition of the decree sought to be annulled. The fraud relied upon was a false deed—intrinsic fraud in that the validity of that deed was one of the crucial issues in the earlier suit. After referring to the sound principle of *res judicata* that puts an end to litigation the Court, through Mr. Justice Miller, reviewed the means whereby judgments may be attacked:

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

"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

must be extrinsic to afford independent equitable relief.<sup>78</sup> In spite of the fact that some federal courts have interpreted their doctrine as authorizing independent equitable relief whether the matter be ex-

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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 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. (citing authority) . . .

“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.

“ . . . We think these decisions establish the doctrine on which we decide the present case; namely, 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.

“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 the endless nature of the strife, than any compensation arising from doing justice in individual cases.

“The case before us comes within this principle. The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.” *Id.* at 65, 68.

78. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537 (1891) (following *United States v. Throckmorton* it was held that an independent suit in equity to annul a decree would not lie because the prevailing party obtained it by bribing a witness to swear falsely); *Stean v. March*, 132 Cal. 616, 64 Pac. 994 (1901) (perjury is intrinsic fraud); *Fresno Estate Co. v. Fiske*, 172 Cal. 583, 157 Pac. 1127 (1916) (same); *La Salle v. Peterson*, 220 Cal. 739, 32 P. (2d) 612 (1934) (“and the fact that the bringing of the action and the introduction of the perjured evidence may have resulted from conspiracy does not change it from intrinsic to extrinsic fraud”); *Bake v. O’Riordan*, 65 Cal. 368, 4 Pac. 232 (1884) (A decree of distribution to the defendant had been obtained by the consent of an attorney, who, fraudulently and without authority, appeared for Bake, who was entitled as husband of the decedent. Held, equitable relief could be given because of the extrinsic fraud practiced upon the court and the losing party.); *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282 (1902) (held there was equitable power to give relief from a decree of distribution induced by the fraud of the defendants, coupled with the mistake or ignorance of the plaintiff, where the ignorance was also the

trinsic or intrinsic,<sup>79</sup> the California courts have continued to make this

result of the fraud); *Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78 (1907) (inducement of one to refrain from presenting a proper defense to a foreclosure of a mortgage suit by virtue of the promises and agreement of the plaintiff therein to devise and bequeath the property upon his death to the defendant was, as to the defendant, extrinsic fraud which prevented a presentation at the trial of defendant's meritorious defense); *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317 (1907) (Leading case on extrinsic mistake. Testator declared that, if his estate was worth more than \$250,000, the wife of his son and the husbands of his two daughters should each receive ten thousand dollars. The estate was worth more than the sum specified, and on the reading of the will the word "ten" was by mistake read as "two", for which it could easily be taken. Testator's three children were appointed his personal representatives, and had copies of the will made for each legatee, in which the mistake was continued. The subsequent proceedings in the estate were conducted by the use of the copies, and plaintiff, the wife of the son, was induced by the personal representatives to execute a receipt in full of her legacy on the payment to her of \$2,000, and such personal representatives thereafter obtained a decree of distribution, at which plaintiff did not appear and was not represented, which fixed her interest in the estate as \$2,000. Held, that as there had never been any real contest with reference to the amount of plaintiff's legacy, the mistake was extrinsic and an independent suit to set aside the decree would lie within the principle of *United States v. Throckmorton.*); *Soule v. Bacon*, 150 Cal. 495, 89 Pac. 324 (1907) (similar case and result, although plaintiff had looked at the will and had seen a newspaper account that the legacy was \$10,000); *Olivera v. Grace*, 19 Cal. (2d) 570, 122 P. (2d) 564 (1942) (Rust and her daughter, Haas, held certain property as joint tenants. Subsequently Grace, as administratrix of the Haas estate, sued Rust to reform the joint tenancy deed and obtain an adjudication that the property was owned in fee simple by Haas; after personal service was made upon Rust, Grace took a default judgment on August 14, 1936. At that time the defendant Rust was in fact mentally incompetent and known to be so by Grace, but was not judicially declared incompetent until nearly two years later. The now plaintiff, Olivera, did not discover the default judgment until January 4, 1939, after Rust's death and after Olivera's appointment as administratrix of the Rust estate. Shortly thereafter Olivera, as administratrix, sued to set aside the default judgment. Held, complaint stated a cause of action. While it was contended that the now defendant Grace was guilty of extrinsic fraud in taking a default judgment against her grandmother at a time when she knew that the latter was in fact incompetent, the court preferred to put its decision on the ground of extrinsic mistake. "Where an adversary hearing has in fact been held, a cause of action for relief in equity can be stated upon the ground that extrinsic fraud prevented a *fair* adversary proceeding. In cases such as the one here presented, however, where there has been no adversary proceeding at all, the right of the incompetent defendant to equitable relief may be established if the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing as well as where the plaintiff's fraud prevented such a hearing. Courts have granted such relief on behalf of incompetent defendants aside from the element of fraud on the part of the plaintiff if, in fact, no adversary hearing was held. . . . Some courts, it is true, have referred to this situation as 'constructive fraud' which entitles the incompetent defendant against whom a default judgment has been taken to relief in equity. . . . We think it more accurate, however, to characterize such a situation as extrinsic mistake, which is a recognized ground for the intervention of equity where the mistake has prevented a fair adversary hearing." *Id.* at 577); *Clavey v. Loney*, 80 Cal. App. 20, 251 Pac. 232 (1926) (the fact that by mistake an entire interest in property was by decree of distribution distributed to one entitled to only a fractional interest therein, would not, in the absence of extrinsic fraud, warrant equitable relief); (1921) 9 CALIF. L. REV. 156; (1934) 23 CALIF. L. REV. 79; (1943) 31 CALIF. L. REV. 600.

79. See *Publicker v. Shallcross*, 106 F. (2d) 949, 126 A. L. R. 386 (C. C. A. 3d, 1939) (a court of equity will, even after two years, vacate its decree authorizing a receiver to com-

nebulous distinction, although recent cases have given relief in situations bordering closely upon, if not involving only, intrinsic matter.<sup>80</sup>

It will be recalled that while Section 473 authorizes relief on the ground of mistake, inadvertence, surprise, or excusable neglect, it is entirely silent concerning fraud.<sup>81</sup> It is not surprising, however, to find

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promise a claim against another where such decree is shown to have been obtained by perjury as to the debtor's ability to pay), *cert. denied*, 308 U. S. 624 (1940). The *Publicker* case notes the conflict between *United States v. Throckmorton* and the later decision of *Marshall v. Holmes*, 141 U. S. 589 (1891) and the divergent holdings of the lower federal courts. See 3 MOORE, at 3268-9; (1921) 21 COL. L. REV. 268 ("The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal, the other that it is not, both of which have been followed, and neither of which has ever been overruled. . . . Since the courts are at liberty to cite either line of authorities, and do as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all. And there will be none until one or the other of the conflicting decisions is overruled." *Id.* at 269). The *Publicker* case concludes: "In our judgment, and if the case arises, the harsh rule of *United States v. Throckmorton* . . . will be modified in accordance with the more salutary doctrine of *Marshall v. Holmes*. . . . We believe truth is more important than the trouble it takes to get it." 106 F. (2d) at 952.

80. *Caldwell v. Taylor*, 218 Cal. 471, 23 P. (2d) 758 (1933) (Where it was held in an action by the sole heir of the testator that, although the deliberate falsehood made by the defendant beneficiary to the plaintiff for the purpose of concealing her real identity was the same specie of fraud as that practiced upon the testator and was necessary to prevent the entire structure of deceit from collapsing, the alleged fraud was extrinsic in that it was practiced upon the plaintiff with the purpose of preventing him from presenting to the court the actual facts which, if established, would vitiate the will.); *Stenderup v. Broadway State Bank*, 219 Cal. 593, 28 P. (2d) 14 (1933) (Defendant's conduct in fraudulently refusing to furnish plaintiff with any information as to collections, prior to the accounting in which defendant's witnesses fraudulently testified to the amount of the collections, was held to be extrinsic fraud. This case is criticized in (1934) 23 CALIF. L. REV. 79 on the ground that the plaintiff had ample opportunity to cross-examine and produce other witnesses and that the court did not base its decision upon the doctrine, for which there is ample authority, that concealment by a trustee amounts to extrinsic fraud.); *Hallett v. Slaughter*, 22 Cal. (2d) 552, 140 Pac. 3 (1943), criticized in (1943) 31 CALIF. L. REV. 600, also noted in (1943) 42 MICH. L. REV. 532 (Where both the original and the copy of the present plaintiff's answer in a suit against her on an account for medical services were apparently lost in the mails, and both a default and then a judgment by default were entered against her of which she had no knowledge until her right for relief against the default was barred under § 473 by lapse of time, it was held that the plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense. Since the now defendants owed the present plaintiff no duty to enter the default judgment immediately after the entry of default, it can be seen that the court seizes upon an inconsequential factor to take the case out of the intrinsic accident and mistake category. Were it not for the fact that § 473 applies to interlocutory orders as well as to final judgments the case would have been easy, since plaintiff initiated her action to vacate the default judgment within a short time after its entry. But accident and mistake may, of course, not come to light until some time after the entry of a final judgment.); *Bartell v. Johnson*, 60 Cal. App. (2d), 140 P. (2d) 878 (1943) (Where the now plaintiff's attorney wrote him that a personal injury action had been closed in his favor but subsequently the now defendant instituted another suit on the same cause of action and a default judgment was entered against the now plaintiff, the complaint was held to state a good cause of action within the rule of the *Hallett* case, *supra*.)

81. See note 22 *supra* and text accompanying.

that the section has been construed to cover relief from judgments or orders taken against a party through fraud,<sup>82</sup> for at least two reasons: the code provision is remedial and should, therefore, be liberally construed;<sup>83</sup> and, as we have seen, independent equitable relief is not given for intrinsic, but only for extrinsic, fraud. The two remedies—the remedy afforded by Section 473, and the independent equitable remedy—appear distinct and cumulative.<sup>84</sup> The fact that a party applies for and is denied relief under Section 473 is not in itself a bar to equitable relief.<sup>85</sup> The basis for this latter relief is found in the constitutional grant to those courts of "original jurisdiction in all cases in equity;" and while the legislature may change the practice or procedure, the

82. *In re Yoder*, 199 Cal. 699, 251 Pac. 205 (1926); *Difani v. Riverside County Oil Co.*, 201 Cal. 210, 256 Pac. 210 (1927); *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317 (1907) (provision in § 473 for relief for a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect "could undoubtedly also include mistake superinduced by the fraud of another party"); *In re Johnson*, 7 Cal. App. 436, 94 Pac. 592 (1908) ("In applications for relief under section 473 . . . no distinction is to be made between extrinsic or other fraud. Fraud or its equivalent, whether upon the court or a party or one so situated as to be held in law an adversary, is sufficient to warrant relief."); *Tomb v. Tomb*, 120 Cal. App. 438, 7 P. (2d) 1104 (1932) ("If the fraud is intrinsic and the time for appeal has expired, then the party seeking relief from such intrinsic fraud must, under the provisions of § 473 . . . make application for such relief within six months after judgment. But if the fraud is extrinsic this limitation does not apply.").

83. See *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932 (1900); *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63 (1900); *Waybright v. Anderson*, 200 Cal. 374, 253 Pac. 148 (1927); *In re Mercereau*, 126 Cal. App. 590, 14 P. (2d) 1019 (1932).

84. *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232 (1884); *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317 (1907); *Olivera v. Grace*, 19 Cal. (2d) 570, 122 P. (2d) 564, 140 A. L. R. 1328 (1942).

85. *Estudillo v. Security L. & T. Co.*, 149 Cal. 556, 562-3, 87 Pac. 19, 22-3 (1906) (" . . . the question presented for decision is whether a party against whom a judgment excessive in amount has been entered upon a fraudulent and collusive agreement between his attorney and the opposing party can maintain a separate suit in equity to vacate such judgment, or enjoin its enforcement when it appears that he had notice of its entry and the fraud in its procurement in ample time to have moved for relief under section 473. . . . In support of a motion he is limited to ex parte affidavits of voluntary witnesses unless the court in its discretion permits a wider latitude. In a separate suit he may bring unwilling witnesses into court by subpoena, and he may take their depositions. The remedy is ampler and more efficacious, and the case is one which demands the amplest and most efficacious remedy. My conclusion is that the plaintiffs had the right to maintain this suit, notwithstanding they knew of the frauds alleged in ample time to have moved upon that ground. But it is objected that they did move, and that their right to have the judgment vacated is *res judicata*. It does not, however, appear from this complaint that they moved upon the ground of the fraud here alleged, and the report of our decision on the appeal from the order denying the motion shows that it was made upon the ground of want of authority in their attorney to stipulate . . . in such a case as this the correct practice would be to move promptly under section 473 . . . and, if defeated in that proceeding, to commence a separate action for relief upon the ground of the plaintiff's fraud—a practice to be commended as convenient and expeditious in case the motion should be granted, and as affording the injured party all the advantages of a regular trial of the issue of fraud if the more summary proceeding proved ineffectual."); *Wilson v. Wilson*, 55 Cal. App. (2d) 421, 130 P. (2d) 782 (1943).

mere method by which the jurisdiction is exercised, it cannot take away the jurisdiction entirely, nor substantially impair it.<sup>85</sup> In addition to invoking this independent equitable jurisdiction by a separate action, "where the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court."<sup>87</sup>

From the California decisions it is reasonable to construe Rule 60(b) as follows:

1. The Rule applies to both interlocutory and final orders and judgments.<sup>88</sup>
2. Even without the first saving clause, and *a fortiori* with it, Rule 60(b) provides a cumulative remedy and does not impair any ancillary or independent jurisdiction of the federal courts to relieve a party from a judgment or order, and hence such proceedings as were available in the federal courts as *audita querela*, writs of error *coram nobis*, bills of review, and independent actions in equity are still available.<sup>89</sup>
3. Independent equitable relief may be obtained, in addition to an original action, by a motion addressed to the court in which the judgment or order was rendered.<sup>90</sup> Ancillary proceedings must, of course, be brought in that court.

#### AN APPRAISAL OF THE SCOPE OF RULE 60 (b) AS NOW INTERPRETED

In light of the interpretation placed upon the first saving clause of Rule 60(b) by the federal decisions, as well as the supporting interpretation generally afforded by the California decisions, a review of the nature and scope of the independent action in equity and the ancillary and equitable remedies is necessary for a complete understanding of the Rule.

##### *The Independent Action in Equity.* The nature of the independent

86. *Bacon v. Bacon*, 150 Cal. 477, 484, 89 Pac. 317, 320 (1907) (it would be unconstitutional to construe that section of the code which provides that distributive decrees in probate shall be "conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal" as depriving the courts of their equitable power to give relief from judgments and orders).

87. *Olivera v. Grace*, 19 Cal. (2d) 570, 576, 122 P. (2d) 564, 568 (1942) ("the statement in *Tinn v. U. S. District Attorney*, 148 Cal. 773, 84 P. 152, to the effect that equity jurisdiction can be invoked only by means of an independent action, and not upon motion, is no longer an accurate statement of the law."); *McGuinness v. Superior Court*, 196 Cal. 222, 237 Pac. 42 (1925); *Chiarodit v. Chiarodit*, 218 Cal. 147, 21 P. (2d) 562 (1933); *King v. Superior Court*, 12 Cal. App. (2d) 501, 56 P. (2d) 268 (1936).

88. The California courts construe their § 473 as applicable to both interlocutory and final orders. While most of the decisions heretofore discussed dealt with relief from final orders, the following deal with interlocutory orders: *Hallett v. Slaughter*, cited *supra* note 80 (entry of default); *Chiarodit v. Chiarodit*, cited *supra* note 87 (interlocutory divorce decree); *Holtum v. Grief*, 144 Cal. 521, 78 Pac. 11 (1904) (order granting new trial on condition).

89. See *San Joaquin* case, cited *supra* note 74.

90. See note 87, *supra*.

action is such that a court of equity may restrain not only the enforcement of equitable decrees but also judgments at law; and the decree or judgment need not have been rendered by the court whose equitable jurisdiction is invoked. Thus a federal court, in a proper case, could enjoin the enforcement not only of a federal judgment, but of a judgment or decree of a state tribunal.<sup>91</sup> This latter principle has been carried to the point of sustaining jurisdiction to relieve against a divorce decree, although the federal courts have no original jurisdiction over divorce proceedings.<sup>92</sup> Formerly it was well settled that 28 U. S. C. § 379, generally forbidding the use of a federal injunction "to stay proceedings in any court of a State," did not prevent federal courts "from depriving a party by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience."<sup>93</sup> A reasonable view was that by entertaining such actions a court is not interfering with the processes of another court and barring the latter's judgment, but is merely acting upon the holder of the judgment who is within its jurisdiction; the bill to impeach or enjoin does not operate to review, undo or reverse the decree or judgment but merely seeks to deny the other party of the fruits thereof.

*Toucey v. New York Life Insurance Company*<sup>94</sup> casts doubt upon the power of a federal court to relieve from state judgments. While this case only held that a federal court could not enjoin relitigation in a state court of matter adjudged in a federal court, the majority opinion, nevertheless, expressed doubt as to the validity of cases authorizing a federal court to enjoin the enforcement of a state judgment.<sup>95</sup> Yet, the Second Circuit upheld the power in a later case.<sup>96</sup> This subject involves a matter with which the Committee is powerless to deal by Rule, and

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91. 3 MOORE, § 60.03.

92. *McNeil v. McNeil*, 78 Fed. 834 (C. C. N. D. Cal. 1897).

93. *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 183 (1920). See also *Marshall v. Holmes*, 141 U. S. 589 (1891); *Simon v. Southern Ry.*, 236 U. S. 115 (1915); *Atchison T. & S. F. R. R. v. Wells*, 265 U. S. 101 (1924). But where the state action was still pending, only an interlocutory judgment having been entered, the federal court could not enjoin the state proceeding. *Essanay Film Co. v. Kane*, 258 U. S. 358 (1922).

94. 314 U. S. 118 (1941).

95. In reference to the cases cited in note 93 *supra*, Justice Frankfurter in the *Toucey* case at 136-7 commented: "The foundation of these cases is very doubtful. However, we need not undertake to re-examine them here since, in any event, they do not govern the cases at bar."

96. See *Griffith v. Bank of New York*, 147 F. (2d) 899 (C. C. A. 2d, 1945), Note (1945) 54 YALE L. J. 687 (where a state court had dismissed a petition for damages for defendant's breaches of duty as a testamentary trustee and duress in forcing plaintiff to consent to a judgment as such trustee, the court held without discussion of the *Toucey* case that the federal courts may exercise their equity powers to set aside, enjoin enforcement of, or ignore a state court's judgment obtained by fraud).

the fate of a federal action to enjoin the enforcement of a state judgment must be left to judicial decisions or legislative action.

If the *Toucey* case has not altered the federal rule, the controlling principle of federal jurisdiction is: an action to enjoin a state court judgment may be brought originally in a federal court,<sup>97</sup> or removed to it if within the removal statutes,<sup>98</sup> because of diversity of citizenship or alienage,<sup>99</sup> or because of a general federal question if the enforcement of the state judgment would deprive the plaintiff of property without due process.<sup>100</sup> The principles of equitable jurisdiction stem from such circumstances "as would authorize relief by the Federal court, if the judgment had been rendered by it and not by a state court;"<sup>101</sup> and the federal remedy may be invoked without first pursuing the remedy provided by state procedure.<sup>102</sup>

The principles of the *Toucey* case do not, of course, restrict in any way the power of a federal court to give relief from a federal judgment. But if original federal jurisdiction is necessary for an independent action to enjoin a federal judgment, complications may arise. When the original judgment was entered in an action where the jurisdiction was based upon diversity or alienage, then in most, but not necessarily all, cases the same diversity or alienage would exist in the subsequent action by the judgment debtor to enjoin the judgment creditor. The jurisdictional amount might, however, cause trouble. If in the original action the plaintiff's claim exceeds \$3,000 but the recovery is for less than this amount, it could hardly be said that, in the subsequent action to enjoin, the amount in controversy satisfied the jurisdictional minimum. Similar, and perhaps more serious, jurisdictional problems would be encountered where the original judgment was entered in an action arising under the Constitution, laws, or treaties of the United States, since the federal question supporting jurisdiction of the first action would not be present in the subsequent action based upon fraud, accident, or mistake, as the case may be. Realization of these practical difficulties has resulted in supporting the equitable action upon principles of ancillary jurisdiction. It is at least clear that where

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97. *Wells Fargo & Co. v. Taylor*, cited *supra* note 93 (diversity); *Simon v. Southern Ry.*, cited *supra* note 93 (diversity).

98. *Marshall v. Holmes*, 141 U. S. 589 (1891) (removal by the *plaintiff* because of diversity at a time when the removal statutes permitted a plaintiff to remove). If however the proceeding in the state court is not of an original and independent character, but is ancillary—being equivalent in common-law practice to a writ of error *coram nobis*—the proceeding is supplementary and not removable. *Barrow v. Hunton*, 99 U. S. 80 (1878).

99. *Marshall v. Holmes*, cited *supra* note 98.

100. *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932) (as where the judgment was entered without notice).

101. *Marshall v. Holmes*, cited *supra* note 98.

102. *American Surety Co. v. Baldwin*, cited *supra* note 100; *Simon v. Southern Ry.*, cited *supra* note 93; *Atchison, T. & S. F. R. v. Wells*, cited *supra* note 93.

the equitable action is brought in the *same* federal court which rendered the judgment under attack, the equitable action may be supported as ancillary. In *Pacific Railroad of Missouri v. Missouri Pacific Railway*<sup>103</sup> the court held and stated:

"On the question of jurisdiction the suit may be regarded as ancillary to the Ketchem suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific Railroad v. Missouri Pacific Railway Co.*, 1 McCrary, 647, 3 Fed. 772. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court."<sup>104</sup>

Since the jurisdiction is ancillary, the venue of the independent action may be properly laid in the court which had jurisdiction of the original action.<sup>105</sup> The principles of service of process stated by Mr. Justice Miller in *Pacific Railroad v. Missouri Pacific Railway*<sup>106</sup> which involved a suit to set aside a decree and sale of the Missouri Pacific made upon foreclosure, were: after application to the court setting forth the circumstances which render service on the attorney of a person before the court in the former suit proper, and a court order directing that such service be made, then such service, when made, shall answer as a substitute for actual service on the party so represented by the attorney; but, as to persons who were not parties to the original action, process can not be served upon them without the territorial jurisdiction of the court. This case has been interpreted as not limiting the right to serve process, beyond the territorial limits of the court, upon those who were parties to the original action or are in privity with such parties,<sup>107</sup> or, as the Sixth Circuit has stated, a party to the original suit is already in court for all ancillary proceedings.<sup>108</sup>

103. 111 U. S. 505 (1884).

104. *Id.* at 522. *Accord*: *Johnson v. Christian*, 125 U. S. 642 (1888); *Carey v. Houston & Texas Ry.*, 161 U. S. 115 (1896); *Dickey v. Turner*, 49 F. (2d) 998 (C. C. A. 6th, 1931) (bill to enjoin enforcement of defendant's law judgment in same court because of fraudulent assignment to prevent offset held ancillary to original suit, making jurisdiction independent of amount in controversy or diversity of citizenship).

105. *Dickey v. Turner*, 49 F. (2d) 998 (C. C. A. 6th, 1931); see also *Lesnik v. Public Industrials Corp.*, 144 F. (2d) 968, 8 Fed. Rules Serv. 13h.23, Case 1 (C. C. A. 2d, 1944) (where a defendant pleaded a compulsory counterclaim against plaintiff and additional parties, the counterclaim was ancillary and no separate satisfaction of the venue requirements was necessary as to such additional parties).

106. 3 Fed. 772 (C. C. E. D. Mo. 1880).

107. *O'Connor v. O'Connor*, 146 Fed. 994 (C. C. W. D. Tex. 1906). *Accord*: *Hanna v. Bricton Mfg. Co.*, 62 F. (2d) 139, 149 (C. C. A. 8th, 1933); and see *Merriam v. Saalfield*, 241 U. S. 22, 29 (1916); *Leman v. Krentler-Arnold Co.*, 284 U. S. 448, 454-5 (1932).

108. *Dickey v. Turner*, 49 F. (2d) 998 (C. C. A. 6th, 1931). See also *Minnesota Co. v.*

If the independent action in equity is not brought in the federal court which rendered the original judgment, but in another federal court it is quite doubtful if such action can be supported on ancillary principles.<sup>109</sup> Even if jurisdiction exists for such an action, the position has been taken that the second federal court "should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court."<sup>110</sup>

From the foregoing discussion it can be seen that the so-called independent action in equity in a federal court to enjoin the enforcement of a federal judgment is not, as a practical matter, very dissimilar in its procedural aspects from the ancillary common-law and equitable remedies of *audita querela*, *coram nobis* and bill of review, which may now be instituted by motion. The principle governing the forum for the independent action approaches very closely the principle governing the forum for the ancillary remedies, to wit, the court which rendered the judgment under attack. Where the independent action is brought in the court which rendered the original judgment it is supported for purposes of jurisdiction and venue on the ground of ancillary jurisdiction: a continuation of the original action for jurisdictional purposes. Service of process in the independent action does not differ radically from the service of a motion invoking the ancillary remedies. The motion for ancillary relief must state grounds therefor in much the same manner that the complaint must state a basis for relief in the independent action.<sup>111</sup> By virtue of Rule 43(e) the same type of hearing may be had on the motion as in the independent action; and the same principles of appeal would apply in each situation.

Any essential difference between the independent action and the

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St. Paul Co., 2 Wall. 609, 633 (U. S. 1864) where Mr. Justice Miller stated: "But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another State, a party to the judgment at law." (emphasis added.)

109. *Raphael v. Trask*, 194 U. S. 272 (1904); *Winter v. Swinburne*, 8 Fed. 49 (C. C. E. D. Wis. 1881); 1 Cyc. OF FED. PRAC. (2d ed. 1943) §§ 278, 282; see *Mitchell v. Maurer*, 293 U. S. 237 (1934) (where the question was mooted).

110. *Torquay Corporation v. Radio Corporation of America*, 2 F. Supp. 841, 844 (S. D. N. Y. 1932) (action in New York state court to enjoin the carrying out of a consent decree entered in the federal district court for Delaware removed to the Southern District of New York, and dismissed; there were also other grounds for dismissal).

111. Rule 7(b).

ancillary remedies today cannot, therefore, be explained in terms of pure procedure.

There are perhaps some substantive differences between the two methods, if the rule of *United States v. Throckmorton*<sup>112</sup> still obtains. Under this decision, an independent action to enjoin the enforcement of a judgment will lie only where the fraud, accident, or mistake complained of was *extrinsic* in character. But the later Supreme Court case of *Marshall v. Holmes*<sup>113</sup> gave relief from *intrinsic* fraud, and put the basis for relief at large upon the following very general terms:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.'"<sup>114</sup>

The Third Circuit in following the rule of *Marshall v. Holmes* has recently remarked:

"In our judgment, and if the case arises, the harsh rule of *United States v. Throckmorton* . . . will be modified in accordance with the more salutary doctrine of *Marshall v. Holmes*. . . . We believe truth is more important than the trouble it takes to get it."<sup>115</sup>

Furthermore at times it is a journey into futility to attempt a distinction between extrinsic and intrinsic matter. Some of the more recent California cases have illustrated this.<sup>116</sup> A further illustration from the federal field is *Chicago, Rock Island & Pacific Railway v. Callicotte*.<sup>117</sup> Whether Callicotte's injuries had resulted in permanent paralysis of his lower limbs was one of the main issues litigated in the personal injury action that terminated in a favorable judgment for Callicotte. Thereafter the railroad learned that the paralysis had been feigned and successfully sued to enjoin the enforcement of the judgment. Not only did Callicotte and certain of his family and friends testify falsely, but

112. 98 U. S. 61 (1878). See p. 648 *supra*.

113. 141 U. S. 589 (1891).

114. *Id.* at 596.

115. *Publicker v. Shallcross*, 106 F. (2d) 949, 952 (C. C. A. 3d, 1939), *cert. denied* 308 U. S. 624 (1940).

116. See *Caldwell v. Taylor*, *Stenderup v. Broadway State Bank*, *Hallett v. Slaughter*, and *Bartell v. Johnson*, cited note 80 *supra*.

117. 267 Fed. 799 (C. C. A. 8th, 1920), *cert. denied* 255 U. S. 570 (1921).

by the use of drugs and a false medical history of the case he had fooled one of his own doctors and other doctors, including those of the railroad who had examined him before trial. The Eighth Circuit held that because of the facts, additional to perjury, extrinsic fraud was involved.<sup>118</sup> Few will question the justice of granting relief to the railroad from Callicotte's de luxe reinforced perjury, but the judgment was no more fraudulent than any that results from successful perjury. Accordingly, it seems that little is to be gained by classifying successful fraud into intrinsic and extrinsic categories; and that "the more reasonable course to pursue would be to weigh the degree of fraud and the diligence with which such was unearthed and proceeded on."<sup>119</sup> This rationale, also, applies to relief by an independent action on other grounds such as accident and mistake.

*Audita Querela.* The writ of audita querela was a common law writ that originated in the fourteenth century, about the tenth year of the reign of Edward III.<sup>120</sup> Sir William Blackstone speaks of it in this fashion:

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118. It was necessary to classify the case as one of extrinsic fraud, since the Eighth Circuit did not regard the *Marshall* case as being in conflict with the *Throckmorton* case. In the Annotation to the *Callicotte* case, 16 A. L. R. 386, 397, on the subject of fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, the commentator, however, states: "With the exception of the reported case the authorities upon the question under annotation, applying the general rule that a judgment will not be set aside for fraud or perjury unless it be extrinsic or collateral to the matter originally tried, have denied relief against the judgment."

119. 3 MOORE 3269; (1927) 21 ILL. L. REV. 833; (1927) 12 CORN. L. Q. 385; and see (1934) 23 CALIF. L. REV. 79, 84 commenting on the Wisconsin experience in granting independent relief from both intrinsic and extrinsic fraud.

An independent action in the federal court, based on diversity, to enjoin the enforcement of a state judgment would be subject to a state statute of limitations or a state doctrine of laches, as the case may be, which would bar a like independent action in the state court. *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945); see Comment (1946) 55 YALE L. J. 401. An original action in the federal court to enjoin the enforcement of a federal judgment rendered in an action where jurisdiction was based on diversity presents a slightly different problem. There is authority, however, for applying the state statute of limitations, if any. *Boone County v. Burlington & Missouri River R. R.*, 139 U. S. 684 (1891) (suit held barred by laches also). If the federal judgment sought to be enjoined was rendered in an action involving a federal matter, it might be contended that this presents a matter upon which the federal courts, in the absence of an applicable federal statute of limitations, should be free to apply their own doctrine of laches in the action for injunction. See *Holmberg v. Armhecht*, 66 Sup. Ct. 582 (U. S. 1946). But in actions formerly legal, although involving a federal matter, federal courts have applied state statutes of limitations as a rule of substantive law in the absence of an applicable federal statute, and even prior to the *York* case, *supra*, tended to do likewise in equity suits. 1 MOORE 240, 245-6. The *York* case and the union of law and equity under Rule 2 should reinforce that tendency, but the *Holmberg* case thwarts it. As to what will constitute laches if that doctrine still has any validity, see *Hendryx v. Perkins*, 114 Fed. 801, 811-2 (C. C. A. 1st, 1902) (9 years constitutes laches), *cert. denied* 187 U. S. 643 (1902).

120. 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 257.

"An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: As if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which . . . must always be before judgment) an *audita querela* lies, in the nature of a bill in equity, to be relieved against oppression of the plaintiff. . . . [Audita querela] is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath a good defence, is too late to make it in the ordinary forms of law. But the indulgence now shewn by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice."<sup>121</sup>

While the substance of this exposition is often quoted with general approval,<sup>122</sup> Blackstone's reference to *audita querela* as an equitable action is taken to refer to the character of the proceeding as "equitable" in nature, although in fact it is an independent common-law action, the complaint sounds in tort, the proper plea is not guilty, and damages are recovered if a tort has actually been committed.<sup>123</sup>

While it has sometimes been said that "the writ of *audita querela* was limited to a ground of discharge occurring subsequent to the entry of the judgment, and did not extend to matters arising before its rendition and the proper subject of a defense to the action,"<sup>124</sup> a well established rule, and certainly the rule followed by the federal cases hereinafter set forth, is that it includes certain matters arising before as well as after judgment.<sup>125</sup> To the extent, however, that relief is accorded for matters prior to judgment there is little, if any, distinction between

121. 3 BL. COMM. \*405-6.

122. *Humphreys v. Leggett*, 9 How. 297, 313 (U. S. 1850); *New River Mineral Co. v. Seeley*, 120 Fed. 193, 196 (C. C. A. 4th, 1903); *Baker v. Penecost*, 171 Tenn. 529, 106 S. W. (2d) 220 (1937); *Longworth v. Screven*, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834).

123. *Avery v. United States*, 12 Wall. 304 (U. S. 1870); *Little v. Cook*, 1 Aikens 363 (Vt. 1826); *Longworth v. Screven*, 2 Hill 298, 300 (S. C. 1834) ("that writ, as a common law mode of proceeding . . . is a regular suit, where the parties may take issue in law or in fact, and a regular judgment must be pronounced"); 5 AM. JUR. 491-2; 7 C. J. S. 1281. For a form of petition for writ of *audita querela*, see *Newhart v. Wolfe*, 102 Pa. 561 (1883).

124. *Luparelli v. United States Fire Ins. Co.*, 117 N. J. L. 342, 188 Atl. 451 (1936), *aff'd* 118 N. J. L. 565, 194 Atl. 185 (1937) (although the court made the statement set forth in the text it gave relief on matter arising before judgment, see *infra*, n. 153, and text accompanying); *Baker v. Penecost*, 171 Tenn. 529, 106 S. W. (2d) 220 (1937) (dictum).

125. 5 AM. JUR. 492; 7 C. J. S. 1279.

coram nobis and audita querela and oftentimes no attempt is made to keep the remedies separate.<sup>126</sup>

While audita querela is an independent proceeding, it must be brought in the trial court which rendered the judgment;<sup>127</sup> and may be brought after the mandate from an appellate court has gone down in the original proceeding, unless, of course, the matter sought to be raised is foreclosed by the original proceedings.<sup>123</sup>

Preliminary to a more detailed discussion of the scope of audita querela it should be noted that although the independent common-law proceeding of audita querela has given way in the federal courts and in most state courts to some proceeding thought to be more convenient or summary, the substance of the remedy is retained in many states and, what is more important, in the federal courts. In other words the formal procedure has generally disappeared, but the substance remains, since the courts look to the scope of audita querela in determining whether relief from the judgment in question is proper. Some of the

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126. In *Robertson v. Commonwealth*, 279 Ky. 726, 132 S. W. (2d) 69, 71 (1939) (overruled as to certain propositions not here pertinent by *Smith v. Buchanan*, cited *infra*, note 177), a person convicted of crime unsuccessfully petitioned the trial court to grant him the writ of coram nobis "and or" the writ of audita querela because of perjured and newly discovered evidence. The court stated: "We see but little distinction between the writ of coram nobis and that of audita querela. Judge Elliott, the distinguished jurist who wrote the leading case of *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, had before him the writ of coram nobis, but a careful reading of that opinion will show that he in effect granted the writ of audita querela. Sanders was indicted for the murder of his wife and when the case was called for trial an ominous mob surrounded the court house intent upon lynching the defendant. Under the duress of his counsel and the attachés of the court, if not the trial judge himself, Sanders entered a plea of guilty without presenting his defense. The writ of coram nobis was granted not because of any mistake of fact but rather to relieve Sanders from duress and oppression, and to allow him to present a defense which was not available to him at the time of trial. As Judge Elliott made no distinction between the writs of coram nobis and audita querela, we will not attempt to do so here." And Freeman states of audita querela: "It is . . . sometimes sanctioned in cases where the writ of coram nobis seems peculiarly appropriate." 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 257, pp. 517-8.

127. *Manning v. Phillips*, 65 Ga. 548 (1880); *Eureka Casualty Co. v. Municipal Court of City of Los Angeles*, 136 Cal. App. 195, 28 P. (2d) 708 (1934); *Eureka Casualty Co. v. Municipal Court*, 136 Cal. App. 261, 28 P. (2d) 709 (1934). In the *Eureka Casualty* cases a surety's bail was forfeited in the municipal court. Thereafter the surety moved this court to vacate the forfeiture alleging that it had discovered the defendant had died. The municipal court denied the motion. The surety then filed in the superior court his petition for a writ of audita querela. Held, denied. While a proceeding equivalent to petition for writ of audita querela is authorized when duly taken by motion for new trial or for relief from judgment granted through mistake, inadvertence, surprise, or excusable neglect, the motion must be made in the court of original jurisdiction, and hence is not available in the superior court to have the municipal court judgment vacated.

128. *Humphreys v. Leggett*, 9 How. 297 (U. S. 1850). If this principle is not implicit in *Robertson v. Commonwealth*, 279 Ky. 762, 132 S. W. (2d) 69 (1939), it has been definitely established in *Smith v. Buchanan*, *infra*, note 177.

procedural substitutes for the writ of *audita querela* are: motion;<sup>129</sup> rule to show cause;<sup>130</sup> statutory certiorari;<sup>131</sup> statutory affidavit of illegality;<sup>132</sup> suit in equity.<sup>133</sup>

129. *Harris v. Hardeman*, 14 How. 334 (U. S. 1852); *Landes v. Brant*, 10 How. 348 (U. S. 1850); *Jones v. Watts*, 142 F. (2d) 575, 577 (C. C. A. 5th, 1944) ("In present day practice the validity of money judgments which are in execution may be tested in three ways: (1) By motion to quash . . . (2) Affidavit of Illegality, under Statutes . . . (3) Injunction, by a suit in equity."); *Longworth v. Screven*, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834); *Barnett v. Gitlitz*, 290 Ill. App. 212, 8 N. E. (2d) 517 (1937) (defendant's motion to vacate plaintiff's judgment or in the alternative that the court satisfy or record the judgment was in the nature of a writ of *audita querela* and should be granted in this case); *Eureka Casualty Co. v. Municipal Court of City of Los Angeles* (2 cases), *supra* n. 127; *Hill v. DeLaunay*, 34 Ga. 427 (1866) (see n. 132 *infra*); *Electric Plaster Co. v. Blue Rapids City Township*, 81 Kan. 730, 732-3, 106 Pac. 1079, 1080 (1910) ("As a substitute for *audita querela* our practice affords the same remedy either by motion or petition. . . . While the writ itself has become obsolete the remedy still exists in a proper case. The prayer of the petition in this case is that the judgment be vacated and a new trial granted, and the action is brought under §§ 568 and 570 of the Code of Civil Procedure (Gen. Stat. 1901, §§ 5054, 5056), upon the grounds set forth in the fourth subdivision of § 568, which authorizes the district court to vacate or modify a judgment at or after the term, 'for fraud practised by the successful party in obtaining it.' " Held, relief denied because the fraud involved, perjury, was intrinsic.); 15 Am. Dec. 695 (Annotation: "The proceeding by writ of *audita querela* is superseded in a majority of the states by the more summary method of application for relief by motion upon notice to the adverse party: (citing cases). And, as a general rule, wherever *audita querela* would lie at common law, relief may now be obtained on motion."); 20 L. Ed. 405 (Annotation: "Remedy by motion may now be obtained in most States where formerly the party would have been entitled to *audita querela*." [citing cases]).

130. *Luparelli v. United States Fire Ins. Co.*, 117 N. J. L. 342, 188 Atl. 451 (1936), *aff'd*, 118 N. J. L. 565, 194 Atl. 185 (1937).

131. *Baker v. Penecost*, 171 Tenn. 529, 531, 106 S. W. (2d) 220, 221 (1937) ("Section 8990 of the Code provides: 'Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of *audita querela*; (5) instead of writ of error.' ").

132. *Hill v. DeLaunay*, 34 Ga. 427, 428-9 (1866) ("The proceeding by illegality, given by our statute, has been substituted for the writ of *Audita Querela* in England. Formerly, the writ was resorted to to correct all errors which are redressed here by illegality. The remedy by illegality is cumulative, not exclusive. In modern practice, the writ of *Audita Querela* has been superseded almost entirely by motion . . . and the same relief is now afforded by motion which was formerly granted by said writ. Much more, in this State, should the proceeding by illegality be superseded by motion, which is more cheap and expeditious, especially where the facts are all before the Court and none of them disputed."); *Manning v. Phillips*, 65 Ga. 548 (1880); *Fidelity & Casualty Co. of N. Y. v. Whitaker*, 172 Ga. 663, 666, 158 S. E. 416, 418 (1931) ("The remedy by affidavit of illegality is statutory, and applies generally only to the arrest of executions based upon judgments of courts, and not to the arrest of executions issued *ex parte* by a ministerial officer."). An affidavit of illegality may be authorized by statute where the judgment has been satisfied, settled, or become dormant for failure to enforce it for a specified period of time, or where the judgment is void. See, e.g., GA. CODE ANN. § 39, 1001-9; 33 C. J. S. §§ 147-50.

133. *Humphreys v. Leggett*, 9 How. 297 (U. S. 1850); *New River Mineral Co. v. Seeley*, 120 Fed. 193, 196 (C. C. A. 4th, 1903); *Robertson v. Commonwealth*, 279 Ky. 762, 132 S. W. (2d) 69 (1939); and see *In re Drainage Dist. No. 7*, 25 F. Supp. 372, 383 (E. D. Ark. 1938), *aff'd*, 104 F. (2d) 696 (C. C. A. 8th, 1939), *cert. denied* 308 U. S. 604 (1939).

As early as 1834 the South Carolina court stated that the indulgence of the courts, in granting summary relief upon motion, had rendered useless the writ and driven it out of practice both in England and this country.<sup>134</sup> In 1850 the United States Supreme Court stated that a motion was familiar practice in cases where *audita querela* was proper,<sup>135</sup> and two years later in holding that a motion was a proper substitute, made this clear pronouncement:

“. . . it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense.”<sup>135</sup>

But while evolving this simple and forthright practice, the Court did not insist upon use of the motion. Thus, a suit in equity to enjoin enforcement of a federal judgment at law was sustained in a case where the principles of *audita querela* warranted relief.<sup>137</sup> The flexibility of this approach which does not require resort to a particular procedural remedy is commendable.<sup>133</sup> Thus, the ancient common law and equitable remedies for relief from judgments are helpful both when

134. *Longworth v. Screven*, 2 Hill 298, 299-300, 27 Am. Dec. 381, 382-3 (S. C. 1834). The court continued: “Where the facts are doubtful, and the Court should be unwilling or unable to decide them, an issue might be ordered, which I think has been the practice in this State; and then such an issue would become the substitute for the formal and technical writ of *audita querela*, and answer the same end. Or the party complaining might be put to that writ, as a common law mode of proceeding, which is a regular suit, where the parties may take issue in law or in fact, and a regular judgment must be pronounced. 1 Mass. 101; 17 Johns. Rep. 484. I should be unwilling to say that it is so far obsolete that our Courts would not allow it, if preferred. The present motion is therefore considered as a substitute for the writ of *audita querela*, . . .”

135. *Landes v. Brant*, 10 How. 348, 371 (U. S. 1850); *Humphreys v. Leggett*, 9 How. 297, 313 (U. S. 1850) (“. . . although it [*audita querela*] is said to be in its nature a bill in equity, yet, in modern practice, courts of law usually afford the same remedy on motion in a summary way.”—per Grier, J.).

136. *Harris v. Hardeman*, 14 How. 334, 345 (U. S. 1852).

137. *Humphreys v. Leggett*, 9 How. 297, 313, 314 (U. S. 1850) (“. . . courts of equity usually grant a remedy by injunction against a judgment at law, upon the same principles. . . . He [the judgment debtor] is . . . in the same condition as if the defence had arisen after judgment, which would entitle him to relief by *audita querela*, or a bill in equity for an injunction.”)

138. For an excellent example, see *In re Rothrock*, 14 Cal. (2d) 34, 92 P. (2d) 634 (1939). The California Supreme Court describes the proceedings in this manner: “By this consolidated proceeding, the applicant . . . has moved and petitioned this court for writ of *coram nobis*, writ of *audita querela*, writ of *habeas corpus*, writ of *certiorari*, recall of *remittitur*, revocation and annulment of judgment, *subpoena duces tecum*, production of documents, permission to appear and testify, and other and further relief. Uncertain of his remedy, petitioner has couched his plea in these various forms, but the allegations in each instance are identical, and the prayer in substance is that, regardless of form, he be given the relief to which the facts entitle him.” *Id.* at 635.

the simple motion is a satisfactory substitute on the formal level and when they are used merely as guideposts in determining whether the case is proper for disturbing the finality of a judgment.

Now to proceed with *audita querela* as a guidepost to substance. It did not lie to correct mere judicial error, the remedy here being a motion for a new trial or a writ of error.<sup>139</sup> This seems proper since in the interest of the finality of judgments the definite time limits for a new trial or appeal should not be circumvented by a motion of *audita querela*, where the only time limit is laches. Nor could it be used to obtain relief from intrinsic fraud, such as perjury, in a jurisdiction where a bill to enjoin would lie only for extrinsic fraud.<sup>140</sup> While it had characteristics of a bill in equity, it could not be utilized to set aside an execution sale of particular lands where the judgment creditor had a legal right to levy thereon;<sup>141</sup> nor to quash an execution levy upon property subject to a mortgage executed by the judgment debtor where the judgment creditor proceeded on the theory that the mortgage was a fraudulent transfer and hence had the legal right to disregard the mortgage.<sup>142</sup> On the other hand on principles somewhat analogous to relief from an injunction that has been rendered inequitable because of a change of circumstances,<sup>143</sup> a bankruptcy court has refused to give effect to a finding, underlying a state court judgment, that was rendered baseless by subsequent facts.<sup>144</sup> *Audita querela* was proper to

139. *Little v. Cook*, 1 Aikens 363, 15 Am. Dec. 698 (Vt. 1826); *Shear v. Flint*, 17 Vt. 497 (1845) (not permissible where a writ of error is proper by the common law, as where right to jury trial was denied, though the right of appeal is taken away by statute).

140. *Electric Plaster Co. v. Blue Rapids City Township*, 91 Kan. 730, 106 Pac. 1079 (1910) (see note 129, *supra*); *Robertson v. Commonwealth*, 279 Ky. 762, 132 S. W. (2d) 69 (1939) (see note 126 *supra*).

141. *Longworth v. Screven*, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834) (A purchaser of land which was subject to the lien of a judgment, and which was afterwards sold under it, cannot set aside the levy and sale on the ground that the defendant in the execution had at the time other lands and personalty sufficient to satisfy the execution.).

142. *Baker v. Penecost*, 171 Tenn. 529, 106 S. W. (2d) 220 (1937).

143. See note 64, *supra*.

144. *In re Drainage Dist. No. 7*, 25 F. Supp. 372, 383 (1938) (In the reorganization of a drainage district, Haverstick claimed priority for his state court judgment amounting to \$20,000 because the Arkansas Supreme Court had found that his land was "totally and permanently destroyed for agricultural purposes" by certain acts of the drainage district. Yet within a year after that pronouncement the Haverstick land was completely reclaimed. In denying priority to the Haverstick judgment, the court said: "Throughout our jurisprudence there has always been some method of correcting a judgment which becomes unjust by subsequent developments. The original common law method was by a writ of *audita querela* but the modern remedy is by proceeding in equity. . . . It would not be just to give Haverstick a preference based on an announcement of the Supreme Court [of Arkansas] which is rendered baseless by subsequent facts."), *aff'd* 104 F. (2d) 696 (C. C. A. 8th, 1939), *cert. denied* 308 U. S. 604 (1939).

See also *Wetmore v. Law*, 34 Barb. 515 (N. Y. 1860) (where an injunction has been granted because of the absence of any legal right and this objection has since been removed by valid statute, the injunction may be vacated on motion as a substitute for *audita querela*).

challenge the validity of a judgment for lack of jurisdiction over the defendant's person, whether the record failed to or did show jurisdiction.<sup>145</sup> It has also been utilized to vacate judgments taken under the following circumstances: against a lunatic whose guardian was not notified;<sup>146</sup> against an infant who defended without appointment of a guardian;<sup>147</sup> where, during the pendency of the suit, the defendant paid

145. *Harris v. Hardeman*, 14 How. 334, 345 (U. S. 1852) (A default judgment was entered May, 1839 on substituted service; the marshal's return failed, however, to show proper substituted service. A writ of fieri facias was sued out in March, 1840, levied, and defendant executed a forthcoming bond on April 20, 1840. In pursuance of this forthcoming bond another fieri facias was sued out June 11, 1840. Upon defendant's motion at the May term, 1850, until which time the proceeding had been stayed, the court set aside the judgment, and quashed the forthcoming bond and fieri facias. Mr. Justice Daniel stated: "At the time of the motion . . . judgment was still unsatisfied, and was in the progress of execution, and the forthcoming bond, filed in the clerk's office, according to the laws of the State, was properly a part of the process of execution, the fieri facias being sued out therein from the office without any order of the court. The proceedings then, still being as it were in fieri, and not terminated, it was competent for the court to rectify any irregularity which might have occurred in the progress of the cause, and to do this either by writ of error coram vobis, or by audita querela if the party choose to resort to the latter mode. If this position be maintainable, then, there would seem to be an entire removal of all exception to the judgment of the Circuit Court as it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error coram vobis or audita querela, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense."); *New River Mineral Co. v. Seeley*, 120 Fed. 193, 196 (C. C. A. 4th, 1903). (The general manager in Virginia of a New York corporation sued it in the federal court in Virginia and caused the bookkeeper, who was under his control, to accept service for the corporation, and subsequently took a default judgment. The corporation had no other notice of the suit until months after the judgment was rendered. Held, bill to vacate judgment sustained as a substitute for the writ of audita querela.); see *Landes v. Brant*, 10 How. 348, 371 (U. S. 1850) (If the judgment was voidable for want of notice although the judgment recited "that the parties appeared by their attorneys and dispensed with a jury, and submitted the facts to the court," then it should have been set aside by an audita querela, or on petition and motion; such being the familiar practice in similar cases"); *Jones v. Watts*, 142 F. (2d) 575, 576 (C. C. A. 5th, 1944) ("If these appellants can by proper and sufficient evidence show that they were never served they are entitled to a remedy. An ancient remedy in courts of law was by *audita querela* in the court which rendered the judgment, and without limit of time. In modern practice this procedure has been substituted by motion in the cause, with notice, or by statutory remedies."); compare *United States v. One Trunk Containing Fourteen Pieces of Embroidery*, 155 Fed. 651 (E. D. N. Y. 1907) (court lacked power and could not in its discretion relieve a person, at a subsequent term, from a default judgment of forfeiture entered after due service of process).

In Georgia where the statutory affidavit of illegality has been substituted for the writ of audita querela it is provided: "If the defendant shall not have been served and does not appear, he may take advantage of the defect by affidavit of illegality; but if he shall have had his day in court, he may not go behind the judgment by an affidavit of illegality." GA. CODE ANN. § 39-1009.

For the California practice, see notes 66, 69 *supra*.

146. *Lincoln v. Flint*, 18 Vt. 247 (1846). Cf. *Olivera v. Grace*, 19 Cal. (2d) 570, 122 P. (2d) 564 (1924), set out in note 78 *supra*.

147. *Starbird v. Moore*, 21 Vt. 529 (1848).

the debt but the plaintiff nevertheless took judgment;<sup>148</sup> and where judgment was taken after the action was discontinued by agreement,<sup>149</sup> or by failure of the parties to appear for trial.<sup>150</sup> Subject to the qualification that *audita querela* may not be used where the party complaining has had a legal opportunity of defense and has neglected it,<sup>151</sup> it is proper to present defenses in existence prior to, but not as a practical matter available before, judgment. Examples are: death of the principal, unknown to the surety, prior to forfeiture of the surety's bail;<sup>152</sup> that the insurer has paid a certain amount under the policy to the mortgagee who has credited the insured accordingly, but the insured recovers judgment for the full amount of the policy;<sup>153</sup> where between the time of a judgment in the surety's favor in the federal circuit court and its reversal by the United States Supreme Court, judgment against the surety is recovered by a different party, and satisfaction is had in the state court for the full amount of the bond.<sup>154</sup> *Audita querela* has

148. *Lovejoy v. Webber*, 10 Mass. 101 (1813).

149. See *Jenney v. Glynn*, 12 Vt. 480 (1839) (but *audita querela* denied because the parties had not consented to a discontinuance).

150. *Pike v. Hill*, 15 Vt. 183 (1843).

151. *Avery v. United States*, 12 Wall. 304 (U. S. 1870) (During the Civil War the United States took possession of A's warehouse as "captured and abandoned property," and received rents approximating \$7,000. After the war the government sued A as surety on a postmaster's bond and recovered judgment approximating \$5,000. Subsequently A applied to the court to satisfy the judgment and also for a writ of *audita querela*, assigning as a reason for not having pleaded a set-off that he did not know until just before he filed his petition and made his motion that the rent money was in the federal treasury. Held, petition and motion were rightly denied, for if A had a claim of set-off he was at fault in not having discovered and pleaded it.); *United States v. One Trunk Containing Fourteen Pieces of Embroidery*, 155 Fed. 651 (E. D. N. Y. 1907) (although, said the court, from the standpoint of discretion the application to open default judgment of forfeiture would be appealing).

152. See *Eureka Casualty* cases, *supra*, n. 127.

153. *Luparelli v. United States Fire Ins. Co.*, 117 N. J. L. 342, 188 Atl. 451 (1936) (Defendant insurer admitted liability and paid to the mortgagee \$350, but denied liability to insured on the policy of \$2,000. The insured, nevertheless, recovered judgment for that amount. Although the insured judgment-creditor has received a credit from the mortgagee of \$350 he seeks to execute his judgment in full against the insurer. The insurer tendered the amount of the judgment less \$350 and sought satisfaction of the judgment. Held, granted.), *aff'd* 118 N. J. L. 565, 194 Atl. 185 (1937).

154. *Humphreys v. Leggett*, 9 How. 297 (U. S. 1850) (The state court judgments were entered at the May term, 1840. In February, 1845, the Supreme Court reversed the federal circuit court's judgment entered against the surety. The surety then offered in the circuit court his plea of payment of the bond *puis darrein continuance*, but the plea was refused because of the Supreme Court's mandate. The surety then instituted his suit in equity to enjoin enforcement of the federal judgment. Held, judgment for the surety. "The mandate from this court was, probably, made without reference to the possible consequences that might flow from it. At all events, it operated unjustly, by precluding the complainant from an opportunity of making a just and legal defence to the action. The payment was made while the cause was pending here. The party was guilty of no laches, but lost the benefit of his defence, by an accident over which he had no control. He is, therefore, in the same con-

also been useful to show matter arising subsequent to entry of judgment, such as satisfaction or discharge, in whole or in part.<sup>155</sup> This general principle has been utilized where two suits on the same cause of action and between the same parties proceed in different forums to judgment at the same time so that satisfaction of either judgment may be shown in discharge of the other.<sup>156</sup> Admittedly this latter example is atypical. But there are recurring instances that present difficulty where a second judgment is based upon a prior judgment, or matter conclusively established by it, and the first judgment is subsequently reversed. First take the case where an appeal in the second action would go to the same court that reversed the first judgment. In this situation if an appeal is taken from the second judgment, the appellate court may take judicial notice of its action in the first case and make proper disposition of the second appeal.<sup>157</sup> But if no appeal is taken in the second action the Supreme Court ruled in *Reed v. Allen*<sup>158</sup> that the second judgment is res judicata of the matters therein adjudged; and the result of this case was that a party adjudged by the appellate court on the merits in the first action to be entitled to certain property was precluded by the second and unappealed judgment based solely on the first and subsequently reversed decision from obtaining the property in a third and subsequent action. Now take the case where the second judgment is rendered in a different forum so that the appeal goes to a different appellate court. This court will not take judicial notice of the reversal of the first judgment and, unless this matter can be brought into the record by amended or supplemental pleadings, it is not available on appeal. Moreover, the judgment in the second action is not subject to collateral attack.<sup>159</sup> Clearly there should be some flexible procedure that affords relief, and if that second judgment is a federal judgment there must be some procedure that affords relief after the running of the relatively short periods of time for a new trial, for appeal, and for relief from a judgment under Rule 60(b). The principles

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dition as if the defense had arisen after judgment, which would entitle him to relief by *audita querela*, or a bill in equity for an injunction." *Id.* at 314).

155. *Doerr v. Schmitt*, 375 Ill. 470, 31 N. E. (2d) 971 (1941); *Barnett v. Gitlitz*, 290 Ill. App. 212, 8 N. E. (2d) 517 (1st Dist. 2d Div. 1937). Insofar as *Johnson v. Finn*, 294 Ill. App. 616, 14 N. E. (2d) 240 (1938) holds *contra* it must be considered as overruled by the *Doerr* case; it is, however, correctly decided on the point that the corporate reorganization of the debtor does not discharge the debtor's guarantor.

156. See *Bowne v. Joy*, 9 Johns. 221 (N. Y. 1812).

157. *Butler v. Eaton*, 141 U. S. 240 (1891).

158. *Reed v. Allen*, 286 U. S. 191 (1932), 81 A. L. R. 703. This case and subsequent developments are set out in detail in 1 MOORE, at 165-8.

159. *Deposit Bank v. Frankfort*, 191 U. S. 499 (1903) (federal court judgment based on Kentucky judgment subsequently reversed, may not be disregarded by Kentucky courts); *State v. Tillotson*, 85 Kan. 577, 117 Pac. 1030 (1911).

underlying *audita querela* for judgments at law and bill of review for decrees in equity do afford relief.<sup>160</sup>

The unique advantages of employing the substantive principles of *audita querela* on a motion are three. First, because the motion represents a simple procedure, familiar to the federal courts as a substitute for the independent procedure of *audita querela*.<sup>161</sup> Second, the substance of *audita querela*, as outlined above, affords warranted relief in situations not covered by Rule 60(b), apart from the first saving clause.<sup>162</sup> Third, because if an independent action must be brought,

160. *Ballard v. Searles*, 130 U. S. 50 (1889) (bill of review proper where second decree was equitable); *Merchants' Ins. Co. v. DeWolf*, 33 Pa. 45, 46, 75 Am. Dec. 577 (1859) (" . . . on a reversal of the first judgment, the defendant shall have a right to *audita querela*; or, perhaps, to a writ of error coram nobis, to have the court below reverse its own proceedings and award restitution. . . ."); see *Deposit Bank v. Frankfort*, 191 U. S. 499, 512 (1903) ("It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application.").

161. See p. 663 *supra*.

162. The following is a summary where *audita querela* affords relief, subject only to the time limit of laches, but relief is either not afforded or its attainment is doubtful under Rule 60(b), apart from the saving clause, even within six months:

1) From a finding of a judgment rendered baseless by subsequent facts, see note 144, *supra*;

2) Where jurisdiction over the defendant was not obtained, see note 145, *supra*; (conceivably the elimination of the word "his" in the proposed amendment to Rule 60(b), see p. 688, *infra*, might warrant relief on the theory that the court had made a mistake or acted inadvertently in entering judgment without jurisdiction of the defendant);

3) Where judgment is irregularly entered against infants or incompetents, see notes 146-7, *supra*; (conceivably the elimination of the word "his" by the proposed amendment (see *infra*) might warrant relief under Rule 60(b));

4) Where between the time of a judgment in the surety's favor in the federal circuit court and its reversal by the United States Supreme Court, judgment against the surety is recovered by a different party and satisfaction is had in the state court for the full amount of the bond, see note 154, *supra*;

5) Where a judgment is subsequently discharged in whole or in part, see note 155, *supra*;

6) Where two judgments are entered at the same time, but in different forums, on the same cause of action and one judgment is subsequently discharged, see note 156, *supra*;

7) Where a second judgment is entered on the basis of an earlier judgment which is subsequently reversed, see notes 157-160, *supra*.

Rule 60(b) would afford relief, but only within the time limit of six months, in the following cases:

1) Where the plaintiff went ahead and took judgment despite the settlement of the claim by the defendant, or an agreement of the parties that the action be dismissed, see notes 148-50, *supra*; (certainly this would be true under the proposed amendment to Rule 60(b), see p. 691, *infra*, which authorizes relief from a judgment on the ground of "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.");

2) Where a defense was in existence prior to judgment but could not be availed of as a practical matter, see notes 152-4, *supra*.

relief cannot be obtained from judgments in favor of the United States.<sup>163</sup> According to *Jones v. Watts*,<sup>164</sup> while an independent action against the United States could not be maintained by the judgment debtor because of the sovereign's immunity from suit, and while *audita querela* was an independent action within the immunity rule,<sup>165</sup> nevertheless, the substance of *audita querela* was still available by motion made in the original proceeding, subject only to laches.

*Writ of Error Coram Nobis (or Coram Vobis)*. The distinction between *coram nobis* and *coram vobis* is only nominal. Tidd explains it in this fashion. If the proceeding was brought in the King's Bench to set aside a judgment of that court it was called a "writ of error *coram nobis*, or *quae coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself. . . . In the Common-Pleas, the record and process being stated to remain before the king's justices, the writ of error is called a writ of error *coram vobis*, or *quae coram vobis resident*."<sup>166</sup> The term *coram nobis* will be used hereinafter since it is more commonly used in the cases.

A necessary distinction, however, is that the writ of error and the writ of error *coram nobis* served entirely different functions and were akin only in name and the fact that both were common law writs. The function of the writ of error was to bring a judgment of an inferior court before a higher court, having appellate jurisdiction, for purposes of review on questions of law. The writ of error *coram nobis*, on the other hand, was a writ to the *same* court which rendered the judgment to have that judgment set aside because of error in *fact*, which Tidd characterized as "not the error of the judges, and reversing it is not reversing their own judgment."<sup>167</sup>

While Blackstone noted the remedial possibilities of *audita querela* and his discussion has served as a starting point for many courts,<sup>168</sup> he made no mention of *coram nobis*. The writ, however, had long been in use before he wrote,<sup>169</sup> and Judge Cooley and other editors of the Com-

163. *Avery v. United States*, 12 Wall. 304 (U. S. 1870); *Jones v. Watts*, 142 F. (2d) 575 (C. C. A. 5th, 1944).

164. 142 F. (2d) 575 (C. C. A. 5th, 1944).

165. This had been established by *Avery v. United States*, *supra*, note 163.

166. 2 TIDD, PRACTICE IN PERSONAL ACTIONS (1807) 1056. Cf. *Camp v. Bennett*, 16 Wend. 48, 51 (N. Y. 1836) on this nominal matter to the effect that the name *coram nobis* is not appropriate in New York, since "the record represents the fact as it really takes place, before the justices of the supreme court."

167. 2 TIDD, *loc. cit. supra*, note 166.

And hence a statute governing the time for suing out a writ of error does not apply to a writ of error *coram nobis*. *Strode v. The Stafford Justices*, 23 Fed. Cas. 236, No. 13, 537 (C. C. D. Va. 1810) (opinion by Marshall, C. J.).

168. See pp. 659-60, *supra*.

169. See *Jacques v. Cesar*, 2 Saund. 100 (1682).

mentaries have appended notes calling attention to the old common law writ of *coram nobis*.<sup>170</sup>

The Supreme Court, at an early date, recognized that *coram nobis* was firmly rooted in the old common law and explained Blackstone's failure to mention the writ as due to the use of the motion to obtain its substance.<sup>171</sup> The Tennessee court also comments in this fashion: "The writ of error *coram nobis*, under our Code, may come in for the praise bestowed by Sir William Blackstone upon the *audita querela*, as a 'writ of most remedial nature, which seems to have been invented lest in any way there should be an oppressive defect of justice.'" <sup>172</sup> There is little, if any, distinction between *coram nobis* and *audita querela* so far as the latter proceeding is utilized to give relief for matter preceding the rendition of judgment;<sup>173</sup> although *audita querela* is broader in scope in that it also gives relief for matter arising subsequent to judgment, such as discharge.<sup>174</sup>

In *United States v. Mayer*,<sup>175</sup> after stating that the writs of error *coram nobis* or *vobis* were available to bring before the court that rendered the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself,<sup>176</sup> the Court went on to hold that a juror's bias against the defendant, although concealed on his *voir dire* examination for the purpose of securing the jury fees, was a proper basis for a new trial but was not within the scope of *coram nobis*.<sup>177</sup> On the other hand, the leading case of *Sanders v. State*<sup>178</sup> held

170. BL. COMM. (Cooley's 2d ed. 1873). 3 *id.* (Couch ed. 1844) 406 n. 3; 2 *id.* (Sharswood ed. 1866) 406-7, n. 5; 2 *id.* (Jones ed. 1916) 2019-21, notes 4, 5.

171. In *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 148 (U. S. 1833), Mr. Justice Johnson stated: "It cannot be questioned that the appropriate use of the writ of error *coram vobis*, is to enable a court to correct its own errors; those errors which precede the rendition of judgment. In practice the same end is now generally attained by motion; sustained, if the case require it, by affidavits; and it is observable, that so far as the latter mode superseded the former in the British practice, that Blackstone does not even notice this suit among his remedies . . . the cases for error *coram vobis*, are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law."

But Blackstone had dealt with *audita querela*, although, as he recognized, the motion had become its procedural substitute. See text accompanying note 121, *supra*.

172. *Jones v. Pearce*, 59 Tenn. 281, 286 (1873).

173. See note 126, *supra*.

174. See notes 155, 156, 160, *supra*.

175. 235 U. S. 55, 68 (1914).

176. See also along substantially the same lines *Jacques v. Cesar*, 2 Saund. 100 (1682); *Pickett's Heirs v. Legerwood* 7 Pet. 144, 148 (U. S. 1833); *Bronson v. Schulten* 104 U. S. 410, 416 (1882); also *Strode v. The Stafford Justices*, 23 Fed. Cas. 236, No. 13, 537 (C. C. D. Va. 1810) (judgment against a defendant, who had died, set aside 14 years later); 2 TIDD, *loc. cit. supra* note 166.

177. Referring to *coram nobis* the Court stated: "This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already

that a defendant was entitled, by the principles of coram nobis, to have a judgment of conviction set aside and a new trial, where his trial was a sham because of mob violence. In this case, a motion for new trial would have been unavailing, since, under the state statute, it had to be made before judgment and judgment was pronounced while the mob dominated the court. In the *Mayer* case, the time for new trial had run before the ground therefor was known. The *Sanders* case differs then from the *Mayer* case only in the extent of the prejudice, and so the two seem irreconcilable. For while the degree of unfairness may properly be considered in determining whether a court is justified in disturbing the finality of a judgment, the court's *power* over its judgment should not depend upon such factors.<sup>179</sup>

Other cases illustrate that the basis of coram nobis is narrow, and oftentimes a case that is beyond its scope is as meritorious as one within its purview. Thus coram nobis affords an infant relief from an adverse judgment where he was not represented by a guardian or prochein ami, although he appeared by attorney.<sup>180</sup> But where a

stated, in those cases where the errors were of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid. In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial (Judicial Code, § 269)—an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decision of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered." *United States v. Mayer*, 235 U. S. 55, 69 (1914).

The court expressly left open the question whether the substance of the writ of coram nobis was available in the federal courts in a criminal case. That it is, see *Robinson v. Johnston*, 118 F. (2d) 998 (C. C. A. 9th, 1941) *remanded for further proceedings on other grounds*, 316 U. S. 649 (1942). And it is extensively utilized in state practice. *People v. Reid*, 195 Cal. 249, 232 Pac. 457 (1924) (but the statutory remedies of appeal and new trial supplant the writ to the extent that they cover the subject); *Lamb v. Florida*, 91 Fla. 396, 107 So. 535 (1926) (and is available after affirmance); *Sanders v. State*, 85 Ind. 318 (1882); *Smith v. Buchanan*, 291 Ky. 44, 163 S. W. (2d) 5 (1942) (affirmance by an appellate court creates no obstacle to the utilization of coram nobis, and overruling *Robertson v. Commonwealth*, 279 Ky. 762, 132 S. W. (2d) 619 (1939) cited *supra*, note 126 so far as it is inconsistent); *Mitchell v. Mississippi*, 179 Miss. 814, 176 So. 743 (1937) (writ may issue to determine whether insanity has developed since the trial of the accused, but not the issue of his insanity at the time of the commission of a crime or at the time of his trial); Orfield, *The Writ of Error Coram Nobis in Civil Practice* (1934) 20 VA. L. REV. 423, 427-428.

178. 85 Ind. 318, 44 Am. Rep. 29 (1882) (When arraigned for murder *S* pleaded not guilty, but because of threats and imminent danger of lynching which terrified him and his counsel, and because of the urgent solicitation of his counsel, he withdrew that plea and pleaded guilty; the court immediately pronounced judgment of life sentence; and *S* was at once hurried to the train and conveyed to the State's prison.) For the view that this case in effect granted the writ of *audita querela* and not coram nobis, see note 126, *supra*.

179. Compare discussion of the independent action in equity for fraud, *supra* p. 659.

180. See *Camp v. Bennett*, 16 Wend. 48 (N. Y. 1836); text accompanying note 176, *supra*. *Audita querela* would also lie. See note 147, *supra*.

competent party appears and joins issue and the case is regularly brought on for trial by the plaintiff and judgment had, the fact that the defendant was no longer represented by counsel and received no notice of the trial, all of which were known to plaintiff and his counsel, is not such an extraneous fact that coram nobis will afford relief, even though the defendant shows that he has a good defense.<sup>181</sup> A judgment entered upon a stipulation of counsel is, however, subject to coram nobis by a party whose counsel lacked power to enter into the stipulation.<sup>182</sup>

In cases involving mistakes of the judicial machinery, the difference between relief and no relief depends upon whether the mistake is classified as clerical or judicial. Thus where a garnishee answered but the clerk failed to file the answer and a default judgment was taken, the garnishee could obtain relief.<sup>183</sup> Where an appellate court dismissed an appeal on the ground that no final decree had been entered in the court below, but at the next term of court a corrected transcript was adduced, showing there had been a final decree which the clerk, through mistake, had failed to include in the record, the appellate court permitted the reinstatement of the appeal. The case which advanced this proposition was *The Palmyra*.<sup>184</sup> Mr. Justice Story spoke for the Court:

"Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."<sup>185</sup>

But subsequent cases have not been overly kind to *The Palmyra*. In *Rice v. Minnesota & Northwestern Railroad*,<sup>186</sup> the Court in a similar fact situation distinguished *The Palmyra* as a case in admiralty and

181. *Phillips v. Negley*, 117 U. S. 665 (1886), but without prejudice to defendant's right to file a bill in equity. That *audita querela* might have afforded relief, see note 150, *supra*.

182. See notes 31-4, *supra*.

183. *Jones v. Pearce*, 59 Tenn. 281 (1873).

184. 12 Wheat. 1 (U. S. 1827).

185. *Id.* at 10.

186. 21 How. 82, 85 (U. S. 1858). Chief Justice Taney stated: "But it [*The Palmyra*] was a case in admiralty, where the power and jurisdiction of an appellate court is much wider upon appeal, than in a case at common law. For, in an admiralty case, you may in this court amend the pleadings, and take new evidence, so as in effect to make it a different case from that decided by the court below. And the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding, are altogether inadmissible in a common-law suit."

For a modern point of view that gives the appellate court power over its judgments whether the mistake be clerical or judicial, see note 138, *supra*, and compare the *Hazel-Atlas Glass* case, note 221, *infra*.

refused to apply its holding in a common law action. But the holding of this case was short lived for it seems to have been overruled *sub silentio* by *Alviso v. United States*.<sup>187</sup> The sweep of Mr. Justice Story's language has, however, been confined by Mr. Justice Day along the following lines:

"*The Palmrya*, like every other case, must be read in the light of the point decided in the case, and in considering the language of Mr. Justice Story, who spoke of the general power of the court to reinstate a case dismissed by mistake, it is evident that he had in mind, for he says so, that the first dismissal was for a clerical mistake, which is a well-recognized ground for correcting judgments at subsequent terms, upon notice and proper showing."<sup>188</sup>

Because of this limitation strangely divergent results sometimes follow from fact situations that are almost identical, as the companion cases, *New England Furniture & Carpet Company v. Willcuts*<sup>189</sup> and *New England Furniture & Carpet Company v. United States*,<sup>190</sup> attest. A corporate taxpayer simultaneously instituted two suits in the same district court to recover an alleged overpayment of income taxes. The defendant in one case was Willcuts, the collector; the defendant in the second case was the United States, and for convenience we shall designate this as the government case. Little progress toward trial was made in either case because of an investigation being made by the Treasury Department, and on November 2, 1929, an identical stipulation was filed in each case continuing it pending that investigation. Prior to that time the clerk had placed the *Willcuts* case on the calendar apparently because there had been no advancement made in the pleadings for one year, but had failed to follow the district court rule requiring 30 days' notice to all counsel; and on April 1, 1930, there being no appearance, the court dismissed the action. By motion made in September, 1931, the plaintiff sought to vacate the dismissal order and reinstate the case; and the court held that the dismissal being due to a clerical error the judgment could be set aside under the principles of *coram nobis*. The government case had followed the same pattern,

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187. 6 Wall. 457 (U. S. 1867). An appeal in equity dismissed for want of citation at a former term, omitted to be returned from neglect of the clerk, was reinstated upon the authority of *The Palmrya* and without any reference to the *Rice* case, note 186, *supra*.

188. *Wetmore v. Karrick*, 205 U. S. 141, 155 (1907). It was not necessary to overrule the *Rice* case, *supra*, note 186; indeed in some ways, it seems to have been regarded favorably because of its limitation of *The Palmrya*.

189. 55 F. (2d) 983 (D. Minn. 1931). "In modern practice, the writ of error *coram nobis* may be defined as a common-law writ issuing out of a court of record to review and correct a judgment of its own relating to some error in fact as opposed to error in law, not appearing on the face of the record, unknown at the time without fault to the court and to the parties seeking relief, but for which the judgment would not have been entered." *Id.* at 987.

190. 2 F. Supp. 648 (D. Minn. 1931).

except that the clerk had given the notice required by the district court rule and the case was properly on the calendar and subject to dismissal; it was dismissed on April 1, 1930, there being no appearance; and then by motion made in September, 1931, the plaintiff sought to vacate the dismissal order. This motion was denied by the same judge, Judge Nordbye, who had sustained the motion in the *Willcuts* case. He noted this distinction:

"There is an entire absence of any clerical mistake, error, or default cognizable by the writ of error coram nobis. The court, therefore, is of the opinion that in this case it has lost jurisdiction, and that it has no other alternative but to deny the motion. It may well be that plaintiff was lulled into security by the stipulation for continuance, and the facts presented might justify a court of equity in granting the relief prayed for."<sup>191</sup>

But when the corporate taxpayer instituted the suggested suit in equity it was dismissed, since necessarily it was against the United States and the sovereign had not consented to be sued.<sup>192</sup>

The distinction taken by Judge Nordbye in the *Willcuts* and the government case is in line with venerable doctrine concerning coram nobis, including Supreme Court doctrine<sup>193</sup> and the recent Second Circuit case of *Wallace v. United States*.<sup>194</sup> His decision is correct on the historical and technical level, but it seems time for a change in the law so that control over judgments is placed on a more rational and less technical basis.

Where the writ is available the only time limit at common law was laches,<sup>195</sup> and, in a case decided by Marshall on circuit, the writ was granted fourteen years after judgment.<sup>196</sup> In some states a specific time limit has been prescribed by judicial decision<sup>197</sup> or by statute.<sup>198</sup>

191. *Id.* at 650.

192. *Ibid.*

193. *Wetmore v. Karrick*, 205 U. S. 141 (1907); notes 177, 189. See p. 670, *supra*.

194. See note 36, *supra*.

195. *Bronson v. Schulten*, 104 U. S. 410 (1881) (no relief where seventeen years had elapsed after entry of judgment for plaintiff and payment, when the error, if any existed, only needed a comparison of plaintiff's bill of particulars with the report of the referee, to be seen, or at least to be suggested); *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681 (1861); *Scott v. Rees*, 300 Mo. 123, 253 S. W. 998 (1923); *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153 (1850).

196. *Strode v. The Stafford Justices*, 23 Fed. Cas. 236, No. 13, 567 (C. C. D. Va. 1810); cf. *Milam County v. Robertson*, note 197, *infra*, where the death had been noted on the record.

197. *Jeffery v. Fitch*, 46 Conn. 601 (1879) (three years on the analogy of a new trial); *Weaver v. Shaw*, 5 Tex. 286 (1849) (two years on the analogy of a bill of review limited by statute to two years); cf. *Milam County v. Robertson*, 47 Tex. 222 (1877) (motion to vacate judgment of Supreme Court rendered 7 years before, because of the death of a defendant which had been noted on the record prior to judgment, denied because of laches).

*Bill of Review or Bill in the Nature of a Bill of Review.* The distinction between a bill of review and a bill in the nature of a bill of review, as stated by Mr. Justice Story, was largely formal in his time:

"As the original decree which it [the bill of review] seeks to review was properly, according to our course of practice, to be deemed recorded and enrolled as of the term in which the final decree was passed, it is certainly a bill of review in contradistinction to a bill in the nature of a bill of review; which latter bill lies only when there has been no enrollment of the decree. Being a bill brought by the original parties and their privies in representation, it is also properly a bill of review in contradistinction to an original bill in the nature of a bill of review; which latter bill brings forward the interests affected by the decree other than those which are founded in privity of representation."<sup>199</sup>

This same line of demarcation is stated in his treatise on equity pleading.<sup>200</sup> Today, the basis for a bill of review has been expanded to cover fraud, and bills bringing forward this ground are oftentimes referred to as bills in the nature of bills of review; but this is merely a terminological development.

The origin of the bill of review is to be found in the first Ordinance of Lord Chancellor Bacon, which provided:

"No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."<sup>201</sup>

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198. ILL. ANN. STAT. (Smith-Hurd, 1936) c. 110, § 196. Illustrative of statutory limitation is the following Illinois provision:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

199. *Whiting v. Bank of the United States*, 13 Pet. 6, 13, 37 (U. S. 1839).

200. STORY, EQUITY PLEADINGS (10th ed., 1892) §§ 403, 409.

201. See 2 STREET, EQUITY PRACTICE (1909) 1256 where the Ordinance is set out; also *Purcell v. Coleman*, 4 Wall. 519, 521 (U. S. 1866); *Hill v. Phelps*, 101 Fed. 650, 651 (C. C. A. 8th, 1900).

As Street pointed out this Ordinance appears to authorize a bill of review in three classes of cases: (1) for error of law apparent in the body of the decree (or in American practice, error apparent on the face of the record);<sup>202</sup> (2) newly discovered evidence; and (3) for new matter or new facts occurring after the decree is entered.<sup>203</sup> Street thought, however, that the third ground was not a basis for a bill of review.<sup>204</sup> The clear statement by the Supreme Court in *Scotten v. Littlefield*<sup>205</sup> would bear him out, at least as to federal practice:

"Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result."<sup>206</sup>

But what the Court adjudged in the *Scotten* case was that a subsequent decision by it in another case based on principles which, if applied, would have produced different results in the earlier decree now attacked, does not show error apparent in that decree, nor is it new matter *in pais* sufficient to sustain a bill of review. Furthermore, the Supreme Court has recognized that the bill of review is proper to obtain relief from an equitable decree based upon a prior judgment or decree that is subsequently reversed, just as *audita querela* gives relief from a judgment at law under similar circumstances.<sup>207</sup> Hence the conclusion that historically there were three grounds for a bill of review, as heretofore enumerated, would appear sound.<sup>208</sup>

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202. "It has also been suggested at the bar, that no bill of review lies for errors of law, except where such errors are apparent on the face of the decree of the court. That is true in the sense in which the language is used in the English practice. In England, the decree always recites the substance of the bill and answer and pleadings, and also the facts on which the court found its decree. But in America, the decree does not ordinarily recite either the bill, or answer, or pleadings; and generally not the facts on which the decree is founded. But with us the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each country is precisely the same, in legal effect; although expressed in different language—viz., that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence." Mr. Justice Story in *Whiting v. Bank of the United States*, 13 Pet. 13, 14 (U. S. 1839).

203. 2 STREET, EQUITY PRACTICE (1909) 1256.

204. *Ibid.*

205. 235 U. S. 407 (1914).

206. *Id.* at 411.

207. See pp. 667-8, *supra*.

208. *Hill v. Phelps*, 101 Fed. 650, 651 (C. C. A. 8th, 1900): "The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evi-

The Court of Appeals for the District of Columbia in *Fraser v. Doing*<sup>209</sup> was of the opinion, based upon lower federal court cases, that fraud in procuring the decree had also become recognized as a ground for a bill of review. While Story recognized fraud as a basis for impeaching a decree, he thought that it could be brought forward only by an original action—"an original bill in the nature of a bill of review."<sup>210</sup> But the opinion expressed in *Fraser v. Doing* seems to have become established law by virtue of *Hazel-Atlas Glass Company v. Hartford-Empire Company*<sup>211</sup> subsequently discussed.

The bill of review was a device whereby an equity court could grant relief from a final decree rendered by it at a previous term of court. Since the equity court, like the common law court, had control over a proceeding until a final decree had been entered, there was no reason to bring a bill of review to have an interlocutory decree set aside and hence it would not lie.<sup>212</sup> Also, since the equity court could, during the same term, give relief from a final decree on a petition for rehearing, a bill of review was not proper until that time had expired.<sup>213</sup> This principle has been carried forward under the Federal Rules to the extent that a bill of review is premature so long as the final decree is subject to correction by a motion for new trial under Rule 59.<sup>214</sup> It is, then, when the decree has become final and the court has otherwise lost control over its decree that the principles of the bill of review become important.<sup>215</sup>

The bill of review for error of law apparent upon the record was narrower in scope than the petition for rehearing under which both conclusions of law and fact could be attacked. It was in the nature of a writ of error, but sought the determination of the same court which had rendered the judgment rather than that of an appellate court; and it was normally required to be brought within the time allowed for appeal, subject to further limitation by laches. Since the bill of review

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dence; (2) new matter which has arisen since the decree; and (3) newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered." *Accord*: *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, 155 Fed. 524 (C. C. A. 6th, 1907).

209. See note 44, *supra*.

210. STORY, EQUITY PLEADINGS (10th ed., 1892) § 426.

211. 322 U. S. 238 (1944).

212. *John Simmons Co. v. Grier Bros.*, 258 U. S. 82 (1921) set out and discussed, p. 641, *supra*.

213. *Obear-Nester Glass Co. v. Hartford Empire Co.*, 61 F. (2d) 31 (C. C. A. 8th, 1932); 3 MOORE at 3259.

214. *Fraser v. Doing*, note 44, *supra*.

215. If, of course, Rule 60(b) is construed to apply to interlocutory orders, as it would be proper to construe it by analogy to the California practice, and the federal courts no longer have the control over such orders that they had prior to the Federal Rules, the reason for limiting bills of review to final decrees would no longer exist. For discussion of power over interlocutory orders, see *supra*, pp. 641-3.

for error apparent served the function of a writ of error, it could be filed as of right without leave of court, subject to the fact that a pending appeal or a prior remand under which the final decree was entered pursuant to a mandate from the appellate court might make application to the appellate court necessary.<sup>216</sup> The type of errors were thus described:

" . . . an erroneous construction of a statute, or insufficiency of averments in the bill, or a want of federal jurisdiction apparent on the face of the record, or procedure which, apparent on the record, did not constitute due process of law, or a fundamental and material departure from regular procedure, were all held to be proper bases for bills of review. But mere technical errors or irregularities of procedure could not successfully be made the foundation of a bill; such defects could not open up a decree which rendered substantial justice between the parties on the merits of the controversy."<sup>217</sup>

Under Rule 59, a motion for a new trial on such ground must be made not later than 10 days after the entry of judgment. To counterbalance this shrinking in the time during which a court may correct its own errors by granting a new trial, the substance of the bill of review still serves some function.

During the term at which a final decree had been entered a petition for rehearing based on newly discovered evidence could be used. After the term this general function was served by the bill of review; but was granted only on the strongest showing, since it tended to deter the reasonable finality of litigation. The new matter or evidence relied on had to be of such a controlling nature as would probably induce a different conclusion than that on which the former decision was based. The granting of the bill was within the discretion of the trial court, subject to review by the appellate courts only where there was evidence of abuse. The only time limitation was the equitable doctrine of laches.<sup>218</sup> Since the motion for new trial on the basis of newly discovered evidence is singled out for special attention by Rule 59(b) and given a longer time during which it may be made to the trial court, *i.e.*, before the expiration of the time for appeal, a reasonable construction is that such a method for opening up a judgment for newly discovered testimony is exclusive, subject, of course, to the right, in an exceptional case, to bring an independent action to enjoin the judgment.<sup>219</sup>

216. DOBIE, FEDERAL PROCEDURE (1928) 762-3; 3 MOORE at 3259, 3261-2; 2 STREET, EQUITY PRACTICE (1909) §§ 2129, 2130.

217. 3 MOORE at 3260-1.

218. DOBIE, FEDERAL PROCEDURE (1928) 763-4; SIMKINS, FEDERAL PRACTICE (rev. ed. 1934) § 891; 3 MOORE at 3263-4.

219. See 3 MOORE at 3264-5. This conclusion is supported by the theory of *Wallace v.*

A third basis for a bill of review is the occurrence of new matter or new facts after the entry of the decree which make its enforcement inequitable, such as the reversal of a prior judgment or decree upon which the decree in question was bottomed. Here the only time limitation would be laches.<sup>220</sup>

The final ground for a bill of review is fraud in procuring the decree. This can best be illustrated by a discussion of *Hazel-Atlas Glass Company v. Hartford-Empire Company*.<sup>221</sup> Hartford filed an application for a patent in 1926 and was confronted with considerable Patent Office opposition. In order to help along the application, certain officials and attorneys of Hartford prepared an article and had it published in a trade magazine in 1926 under the name of the president of the Flint Glass Workers' Union. Later in that year the article was introduced as part of the record before the Patent Office. The patent issued January 3, 1928. About six months later Hartford brought an action to enjoin infringement by Hazel and for an accounting. The article was in the record only as part of the "file-wrapper" history and seemingly played no important part before the district court, where the case was tried in 1929 and resulted in 1930 in a dismissal of the action on the ground that no infringement had been proved. On appeal to the Circuit Court of Appeals, the attorneys for Hartford called the court's attention to the article in their brief; and that court apparently gave considerable weight to the article when on May 5, 1932, it held the patent valid and infringed. On Hazel's application the time for filing a petition for rehearing was extended five times, but it never filed such a petition due to the fact that Hazel and Hartford entered into a settlement agreement, and so on July 30, 1932, the mandate of the appellate court went down to the district court. Hazel had had some intimation of the existence of the fraud at the time of the trial and decision on appeal, but had been unable to obtain detailed information, and the facts did not come out in full until nine years later at which time and on November 19, 1941, Hazel filed a petition in the court of appeals for leave to file a bill of review in the district court. The Circuit Court of Appeals held that since any fraud practiced had been practiced on it, the court should itself pass upon the question whether the mandate should be recalled and the case reopened, but relief was denied on the merits. The Supreme Court reversed "with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue a mandate to the District Court directing it to set aside its judgment

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*United States*, set out and discussed in text accompanying note 36 *supra*. For proposed change of Rules 59(b) and 60(b) relative to newly discovered evidence, see pp. 689, 691, 693, *infra*.

220. See note 160 *supra*; SIMKINS, FEDERAL PRACTICE (rev. ed. 1934) § 890.

221. 322 U. S. 238 (1944).

entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate." <sup>222</sup> Mr. Justice Black, for the majority, said that while there was a general rule against setting aside decrees after the expiration of the term, there was also a rule of equity to the effect that relief could be granted against decrees, regardless of the term, for after-discovered fraud, "by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment." <sup>223</sup> He did not classify the fraud involved in the case as intrinsic or extrinsic, but cited both *Marshall v. Holmes* and *United States v. Throckmorton*, which have been thought to stand for different propositions: (1) that either intrinsic or extrinsic fraud is sufficient basis for an independent equitable action to enjoin,—the *Marshall* case; (2) that only extrinsic fraud is a basis for such an action,—the *Throckmorton* case. <sup>224</sup> He did state, however, that "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." <sup>225</sup> The Court also held (1) that whether or not Hazel had exercised proper diligence, the fraud could not be condoned, especially since "there are issues of great moment to the public in a patent suit;" <sup>226</sup> (2) that as the issue of fraud was clear and not in dispute the appellate court had the power and the duty itself to pass on the issue and to vacate its judgment, and was not required to send the case to the district court for decision; <sup>227</sup> (3) that the effect of the fraud called for a complete denial of relief to Hartford

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222. *Id.* at 251.

223. *Id.* at 245.

224. See p. 648, *supra*.

225. 322 U. S. 238, 245-6 (1944).

226. *Id.* at 246.

227. In footnote 5, 322 U. S. 249, Mr. Justice Black states: "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examinations and cross examinations of witnesses. It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below, that a trial might bring forth evidence to disprove the facts as shown by these documents. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

"Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision. *Cf.* *Art Metal Works, v. Abraham & Strauss*, 107 F. (2d) 940."

for the claimed infringement of the patent. Mr. Justice Roberts, for the minority, contended: (1) that the court of appeals had no power to revise its judgment after the expiration of the term; (2) that original jurisdiction had not been conferred by Congress upon that court and hence it had no authority to try the issues "of what is essentially an independent cause and enter a judgment of first instance on the facts and the law"<sup>228</sup> either on affidavits or by a "full dress trial;"<sup>229</sup> (3) that Hazel was not remediless since the fraud involved was extrinsic and this would support a bill of review filed, with leave of the appellate court, in the district court; and (4) that this procedure was preferable since it would permit "a deliberate and orderly trial of the issues"<sup>230</sup> which involved, in addition to fraud, laches and the problem of a deliberate settlement by Hazel with Hartford. Because of the different theories of the majority and minority it seems clear that the decision stands for the propositions that a bill of review does not invoke original jurisdiction but is for that purpose a continuation of the former litigation; and that there is no arbitrary time limit on the power to grant relief. It fails to give clear answer as to whether extrinsic fraud is necessary to afford relief. But since the proposed amendments to Rule 60(b) would add "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party" as a ground for relief by motion made within one year, while preserving without time limit the power of a court to set aside a judgment for fraud upon it, importance in distinguishing the type of fraud will shift to "fraud upon the court," if the amendment is adopted.<sup>231</sup>

The cases are in conflict as to whether a bill of review is such an independent action that it cannot be maintained against the United States, absent some express statutory authorization.<sup>232</sup> Since the Supreme Court has ruled that *audita querela* may not be maintained against the United States,<sup>233</sup> it would be reasonable to conclude that its equitable counterpart, the bill of review, could not. But this conclusion is at war with the theory of the *Hazel-Atlas* case which regards the bill of review as a continuation of the original litigation so that original jurisdiction is not invoked by it. Even if the conclusion is maintained, the substance of the bill of review would be available

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228. 322 U. S. 238, 258 (1944).

229. *Id.* at 257.

230. *Id.* at 271.

231. See p. 691, *infra*.

232. *Zegura v. United States*, 104 F. (2d) 34 (C. C. A. 5th, 1939) (may not be maintained; other grounds of the decision were laches and no basis for the bill), *cert. denied*, 308 U. S. 586 (1939). *Contra*: *Bush v. United States*, 13 Fed. 625 (C. C. D. Ore. 1882).

*Gherwal v. United States*, 46 F. (2d) 998 (C. C. A. 9th, 1931), cited by the *Zegura* case as in accord with its holding involved an independent suit in equity and not a bill of review.

233. *Avery v. United States*, 12 Wall. 304 (U. S. 1870); and see p. 669, *supra*.

against the United States by motion made in the original proceeding, subject only to such time limitations as would apply if the formal bill of review were being maintained, under the theory of *Jones v. Watts*.<sup>234</sup>

#### COMPARISON OF RULE 60(b) AS NOW INTERPRETED WITH STATE PRACTICE

As now interpreted, Rule 60(b) keeps alive the ancient doctrines surrounding the traditional common law and equitable ancillary remedies in a modern code procedure. To determine whether continuation of these concepts is desirable to achieve an efficient compromise between the policies of according justice to the parties and terminating litigation swiftly, the federal practice may be compared with that of the state which exceeds all others in volume of litigation—New York.

Although it is largely impossible to ascertain how much substance of the old remedies remain in most states,<sup>235</sup> the case of *In re Grays' Will*<sup>236</sup> pronounces New York's unfavorable attitudes towards them. This action involved an independent suit to set aside and restrain the enforcement of a default foreclosure decree against an executrix on the ground that the mortgagee had falsely represented to the executrix that the mortgage debt remained unpaid and that such fraud induced the default in the foreclosure action. A motion to dismiss was sus-

234. See p. 669, *supra*.

235. Professor Orfield in his discussion as to whether the writ of error coram nobis is absolute concludes:

"It is believed that the courts in every state grant the relief given under the writ either by virtue of decision or statute. Decisions of the federal courts and of thirty states grant relief by the writ or by motion in civil cases. Four other states grant the relief in criminal cases and would doubtless grant relief in civil cases. It is to be doubted whether the courts of any jurisdiction would refuse relief if the issue were squarely presented." Orfield, *The Writ of Error Coram Nobis in Civil Practice* (1934) 20 VA. L. REV. 423, 427.

Some courts have upheld the substance of the remedies but have found the procedural aspects distasteful. *Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367 (1898) (where an application for the writ of error coram nobis was considered as though it were a motion to vacate the judgment).

Whether the substance of the legal and equitable remedies is available often depends upon a detailed review of the statutory and sometimes constitutional history of the particular forum. *Boyd v. Smith*, 200 Ga. 687, 205 N. W. 522 (1925) (Writ of coram nobis held unavailable because of the broad statutory grounds upon which a judgment may be vacated or modified, even though the statute did not cover the case at hand), writ of error dismissed 270 U. S. 635 (1926); *Carlsen v. State*, 129 Neb. 84, 261 N. W. 339 (1935) (held that, although the statutory provisions for relief were extensive, the writ of coram nobis was available where the statutory grounds were not adequate); *In re Ernst*, 179 Wis. 646, 192 N. W. 65 (1923) (held the constitutional provision which retained the common law as part of the law of the state until altered by the Legislature continued the writ of coram nobis except where other remedies had been substituted); see also notes 74 and 75 *supra*.

236. 169 Misc. 985, 8 N. Y. S. (2d) 850 (Sup. Ct. 1939).

tained on the ground that only intrinsic fraud was involved.<sup>237</sup> As to the contention that the action could be sustained as a bill of review, Justice Bergan stated:

"[Under the English practice,] the impression of the great seal and the enrollment of the decree were matters of grave solemnity. . . . A separate suit resulting in a new decree of equal formality seemed to be the only logical device for the alteration or change in a decree consistent with that concept of finality.

"The present New York practice, in equity as in law, is far more elastic. . . . [B]oth reason and necessity for the bill of review as a separate suit in equity have disappeared, and it is fully within the power of the court, as a matter of policy, to decline to entertain a separate complaint for relief in this form and to remit a party otherwise showing good ground to the ample protection of the statutory practice."<sup>238</sup>

The approach of this case was to evaluate the need for the old common law and equitable remedies in the light of the statutory remedies for relief from judgment and to conclude that the former were no longer useful. In this connection it is well to note the various remedies and time limits in New York which are in general longer than in the federal system. A judgment entered without proper jurisdiction, which would be subject to collateral attack, may be vacated upon motion. This power does not depend upon any statute, but is said to be inherent in the court.<sup>239</sup> Clerical mistakes may be corrected at any time pursuant to Section 105 of the Civil Practice Act, a provision comparable to Rule 60(a). Concerning the time allowed to enter notice of an appeal, New York practice makes a distinction between default and non-default judgments: that the former are non-appealable "unless an appeal therefrom be expressly authorized by law."<sup>240</sup> In appealable cases the general time for appeal from the supreme court to the appellate division is "thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof";<sup>241</sup> the general time for an appeal

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237. "If perjury upon a trial is not a sufficient ground for the relief sought, it would seem that an unsworn misrepresentation by a plaintiff to a defendant of the merits of a defense would constitute no better ground. So it was indicated in *Crouse v. McVicar*, 207 N. Y. 213, 100 N. E. 697 . . . I think this case is not distinguishable from that one and Judge Cardozo, in restating the rule upon that and other authorities in *Fuhrmann v. Fanroth*, 254 N. Y. 479, 482, 173 N. E. 685, 687, pointed out that the relief is granted only upon the basis of some 'covinous device' of fraud affecting the very means by which the judgment was obtained, but added that 'the rule is less rigid where the application for relief is by motion in the action.'" *In re Gray's Will*, 169 Misc. 985, 8 N. Y. S. (2d) 850, 852-3 (Sup. Ct. 1939).

238. *Id.* at 854.

239. 5 CARMODY'S NEW YORK PRACTICE (perm. ed.) § 1516.

240. N. Y. CIV. PRAC. ACT § 557.

241. *Id.* at § 612.

as of right to the court of appeals is sixty days<sup>242</sup> and for permissive appeals a varying time, depending in part upon term time of the appellate division.<sup>243</sup> In reference to a motion for new trial, Carmody states that where the motion is based on error in a finding of fact or ruling upon the law, the motion must be made before the expiration of the time within which an appeal may be taken; in other cases, the motion must be made within a reasonable time.<sup>244</sup> Thus it can be seen that as to non-default judgments the trial court has extensive power over its judgments through granting a new trial, and there would in truth be little reason to sustain a bill of review in New York based on newly discovered evidence or fraud.

In relation to default judgments Section 108 provides that a court in its discretion may relieve a party, at any time within one year after notice, from a proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Carmody states, however, that this power is not solely statutory but inherent and that courts, "in the exercise of their control over their own judgments, may open such judgments upon the application of any one adversely affected by the judgment upon sufficient reason, in the furtherance of justice."<sup>245</sup> In relation to all types of judgments, two other sections should be noted. Section 521 provides that a motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year since the filing of the judgment, unless the hearing is adjourned until after the year has expired or the term for which the hearing is noticed is not held. Section 522 provides that a motion to set aside a final judgment for error in fact not arising upon the trial may be made by the party against whom it is rendered; or if execution has not been issued and the judgment has not been wholly or partly satisfied or enforced, by the party in whose favor it is rendered. The time period for relief under Section 522 is two years, except in the case of certain named disabilities where the time can be extended up to five years but not more than one year after the disability ceases.<sup>246</sup> But again Carmody cautions that:

"it is to be remembered that the court, in its inherent power and control over its own proceedings, may vacate a judgment on other grounds, where it appears that substantial justice will be subserved and injustice prevented thereby."<sup>247</sup>

And, of course, the independent action in equity exists "to cancel judgments, or to enjoin their enforcement in whole or in part, upon equitable grounds, such as fraud in the procurement of the judgment."<sup>248</sup>

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242. *Id.* at § 592.

243. *Id.* at § 592.

244. 4 CARMODY, *op. cit. supra*, note 239 at § 1439.

245. 5 *Id.* at § 1522.

246. N. Y. CIV. PRAC. ACT, § 528.

247. 5 CARMODY, *op. cit. supra*, note 239 at § 1513, pp. 3581-2.

248. *Id.* at § 1512; and see *Crouse v. McVickar* and *In re Gray's Will*, note 237, *supra*.

When the various New York statutory procedures and their accompanying time provisions, together with the doctrine of inherent power, are considered and compared with the relatively short time periods in the federal practice <sup>249</sup> it can be seen that the New York courts probably have more extensive control over their judgments, without the necessity of resorting to the common law and equitable remedies, than the federal courts have even with such remedies. Thus, it would appear possible to devise a satisfactory civil procedural system omitting the traditional remedies altogether.

In the final analysis the issue is as to how far the principle of finality of judgments must yield in a particular case to a court's desire to prevent inequity. Freeman makes this pertinent summary and comment:

"Notwithstanding general concurrence in the principle . . . as to the finality of judgments after the term, it is generally held inapplicable to void judgments, and by most courts exceptions are made or limitations imposed in the case of judgments obtained irregularly or by fraud. In fact, principles about as ample and liberal as those recognized at equity, upon application to vacate decrees where there has been no hearing on the merits, seem to be applied to judgments in some states. . . . [I]n New York judgments seem to be regarded not as inviolate and enduring testimonials, but as temporary structures, to be torn down, remodeled or rebuilt whenever the builders feel competent to improve the original workmanship or design."<sup>250</sup>

#### SUMMARY; CRITICISM; AND RECOMMENDATIONS

The Federal Rules which affect the finality of judgments have worked well in practice. No glaring defects have been exposed. Certain ambiguities have developed, however, and some structural weaknesses have been exposed. These may be summarized in this manner. The continued existence of a term of court has been relied on to give a court power over its judgments, despite the theory of Rule 6(c) that term time should not affect the court's power in any way. Due to the fact that Rule 6(b), giving the court power to enlarge periods of time, expressly excepted only Rule 59 governing new trial, it could reasonably be argued that the time limits of Rules 50(b),<sup>251</sup> 52(b),<sup>252</sup> and 60(b), which directly affect the finality of judgments, could be ex-

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249. 10 days for a new trial, except on the ground of newly discovered evidence where the time limit is appeal time, Rule 59(b); 10 days to move for judgment n.o.v. under Rule 50(b); 10 days to amend findings, Rule 52(b); six months for relief from a judgment (other than clerical mistakes) under Rule 60(b); and the general appeal time of 3 months.

250. 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 198.

251. Motion for judgment not withstanding the verdict.

252. Amendment of findings and judgment.

tended. If this construction were adopted the finality of judgments would be at large. Relative to the direct operation of Rule 60 governing relief from a judgment or order, there is no serious basis for criticism, although there are structural weaknesses and the rule can no doubt be improved. A minor ambiguity has developed under Rule 60(a) as to which court, trial or appellate, has power to permit the correction of clerical mistakes pending an appeal.<sup>253</sup> As far as subdivision (b), the substantive part of Rule 60 is concerned, more important animadversions are in order. First, the initial sentence adapted from the California code is deficient in not expressly including fraud as a basis of a motion for relief from a judgment, although this deficiency has been cured by judicial construction. Second, the adapted California provision is deficient in that it is subject to the construction that it applies to interlocutory orders as well as final orders, although the rule should limit power only over the latter type of judgment. Third, the pronoun "his" is too restrictive in that it authorizes a party to be relieved from a judgment only when it is taken against him through *his* mistake, inadvertence, surprise, or excusable neglect, although the mistake or neglect of others may be just as material and call just as much for supervisory jurisdiction. Fourth, the adapted provision gives a maximum time period of only six months in which relief by motion may be obtained and this is probably too short. Fifth, the scope of the first saving clause which preserves the power of a court to entertain an *action* is ill defined.

This latter point deserves more extended comment. The federal cases which have considered the first saving clause are in complete harmony on the proposition that it preserves the substance of the ancillary common law and equitable remedies, except insofar as their substance is specifically covered by some rule, and that in addition it preserves the independent action in equity; that the substance of the ancillary remedies may be obtained by motion in the original action; and that this motion is not subject to a six months' time limit but may be made at any time subject to the doctrine of laches. As a consequence the scope of the saving clause is shrouded in ancient lore and mystery. Perhaps because the judicial power is so vaguely restricted, Rule 60(b) has worked fairly satisfactorily. At any rate it has. Insofar as the result reached in one case is a proper basis for the criticism of a rule, *Wallace v. United States*<sup>254</sup> appears to indicate that the rule is too

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253. Some courts have thought that upon the taking of an appeal the district court lost its power to permit correction. See *Schram v. Safety Investment Co.*, 45 F. Supp. 636 (E. D. Mich. 1942); also *Miller v. United States*, 114 F. (2d) 267 (C. C. A. 7th, 1940). For the view that clerical mistakes may be corrected by the trial court before the appeal is docketed and thereafter by the appellate court, during the pendency of the appeal, see *Perlman v. 322 West Seventy-Second Street Co., Inc.*, 127 F. (2d) 716 (C. C. A. 2d, 1942); 3 MOORE at 3276.

254. 142 F. (2d) 240 (C. C. A. 2d, 1944), discussed at pp. 636-7, 641, *supra*.

restrictive. The *Wallace* case need not be criticized on the ground of its interpretation. In fact it seems correctly to interpret the first saving clause as retaining the ancillary common law and equitable remedies and to conclude that relief could not be granted under them—in this suit by analogy to *coram nobis*. It is the result which may be censured—that the Rule, despite the first saving clause, did not afford sufficient power to set aside the improper dismissal of an action and compelled the Second Circuit to set aside a judgment on the merits.

In more general terms utilization of the common law and equitable remedies seems objectionable on the following grounds. It compels an historical search for and approach to remedies that are not geared to a united procedure. And if, nevertheless, these remedies are expanded by judicial construction so that the common law remedies may be utilized in present civil actions formerly equitable and the equitable remedies may be utilized in present civil actions formerly legal, in addition to the type of action out of which they grew, there will still be situations, because of the historical growth of the old remedies, where relief will not be afforded, although these are as meritorious as situations where relief is granted.<sup>255</sup>

In considering amendments to the Federal Rules the Advisory Committee dealt very tentatively with this problem of finality in its Preliminary Draft of Proposed Amendments in 1944. It made no proposal concerning Rule 6(c) dealing with term time. Relative to enlargement of time under Rule 6(b) it submitted three alternatives. The first alternative was to retain the rule without amendment. As noted, under one construction this would leave the finality of judgments indeterminate. The second alternative proposed to strike out the limitation upon the court's power to enlarge the period of time under Rule 59; and, so far as the problem of judgments is concerned, prohibit the court only from enlarging the period of time stated in Rule 60(b). Under this alternative the court could permit a motion to be made at any time without limit under Rule 50(b) for judgment notwithstanding the verdict, under Rule 52(b) for amendment of findings and modification or vacation of an existing judgment, and under Rule 59 for new trial. This alternative would definitely make both appeal time and ultimate finality indefinite. The argument for it was that courts should have the widest discretion, on a proper showing at any time, to relieve a party from an unjust judgment, and that such relief is more important than fixing a definite time for ending the litigation and producing finality of judgments. While this general objective seems laudable, it would appear better attained by putting definite time limits on motions under Rules 50(b), 52(b) and 59, which affect both appeal

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255. See particularly the *New England Furniture & Carpet Co.* cases, and *United States v. Mayer*, discussed at pp. 673, 670, *supra*.

time and finality, and by enlarging the court's power under Rule 60(b), which affects only finality. The third alternative adopted this view to the extent that it prohibited the enlargement of the periods of time under Rules 50(b), 52(b), 59, and 60(b). In reference to Rule 60, the Committee clarified subdivision (a), relative to the correction of clerical mistakes pending an appeal.<sup>256</sup> Relative to subdivision (b) the Committee struck out the restrictive pronoun "his"; and added "fraud, misrepresentation or other misconduct of an adverse party" as an express ground for relief by motion made within a maximum period of six months. It made no attempt to clarify the first saving clause, although it stated in its note that "Some members . . . have had the impression the writ of error *coram nobis*, at common law, and the bill of review in equity, were abolished by these rules . . ."; that the matter was in doubt and was the subject of further study.<sup>257</sup> The proposed amendment was deficient in that it failed to make Rule 60(b), with its limitations, apply only to final judgments. If the ancillary remedies were not retained as thought by some of the committee members, the rule would still be subject to the following criticism:

(1) provision for relief would be available only within an unduly short period time;

(2) it is productive of harsh and inequitable results to enumerate exclusive situations when relief can be afforded by motion; and when this is done courts will invent some means of escape as by the doctrine of inherent power, or the doctrine that the term of court gives power;

(3) the Rule would give relief from judgments in favor of the United States only within the six months period, since an independent action, in equity cannot be maintained against the United States;

(4) the Rule would, under one line of authorities, afford relief from intrinsic fraud, accident or mistake only within the six months period, and yet the distinction between what is intrinsic and what is extrinsic (the basis of an independent action) is difficult if not impossible to draw;

(5) the Rule would afford no relief, except in the situations where the independent action would be available, on facts occurring subsequent to the judgment and which render enforcement of the judgment inequitable, as where a change of circumstances warrants a modification or vacation of a final injunction, or where the judgment in question is based upon a prior judgment that is subsequently reversed.

The Second Preliminary Draft of Proposed Amendments in 1945 represented a more considered appraisal of the entire problem and did

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256. It adopted the view of the *Perlman* case set forth in note 253, *supra*. Subject to some improvement in language it again appears as a proposed amendment in the May, 1945 Draft, and is set forth in note 264, *infra*.

257. Preliminary Draft of Proposed Amendments of May, 1944, p. 73.

work improvements. The Committee proposed to amend Rule 6(c) to provide clearly that the continued existence of a term of a court gave no added power. It adopted the substance of the third alternative concerning Rule 6(b) of the First Draft by providing that the court could not extend the time for taking any action under Rule 50(b), 52(b), 59(b), (d) and (e),<sup>258</sup> 60(b), and 73(a).<sup>259</sup> However, it struck out of Rule 59(b) the provision that a motion for a new trial on the ground of newly discovered evidence may be made within appeal time, with leave of court obtained on notice and hearing and on a showing of due diligence. Such a motion, as all other motions for a new trial, would now have to be served not later than 10 days after the entry of the judgment. Since new evidence can seldom be discovered within that short period, the motion for new trial on that basis would be practically eliminated by the proposal. Justification for this can be found in a correlative amendment to Rule 60(b) making newly discovered evidence a basis for relief from a judgment within the maximum period of a year. The proposed change of Rule 59(b) has two good features. The extension of time from three months (the present normal time for appeal) to one year is needed if newly discovered evidence is to be an effective basis for relief. Yet by removing this ground for relief from Rule 59, except when urged within 10 days from the entry of judgment, the time for appeal is not subject to enlargement by the motion. Relative to appeal time the Committee went further, in conformity to a resolution of the Judicial Conference of Senior Circuit Judges, and, speaking generally, proposed an amendment to Rule 73(a) reducing the time for appeal to a circuit court of appeals from three months to 60 days in government and 30 days in private cases.<sup>259</sup> It further proposed to codify in Rule 73(a) the practice that

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258. Subdivision (b) of Rule 59 provides for a motion for new trial, and subdivision (d) authorizes the court to grant a new trial on its own initiative not later than 10 days after entry of judgment. Subdivision (e) is a new subdivision which the Second Preliminary Draft proposed to add, and reads: "(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

259. This governs when and how an appeal is taken to the circuit court of appeals.

260. The proposed amendment reads: "The time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States is a party the time shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." An allowance of 60 days to all parties in government cases is justified because the matter of whether an appeal by the government shall be taken must be passed upon by several persons. See Second Preliminary Draft of 1945, p. 83-4. And if the government is given 60 days it is advisable to give all the parties to such a case the same time to avoid complications in the case of cross-appeals. The last exception is a nod in the direction of *Hill v. Hawes*, 320 U. S. 520 (1944), without adopting its theory that during term-time the court can re-enter a judgment so that the losing party who had no notice of its entry may appeal. See Second Preliminary Draft of 1945, pp. 84-5.

"The running of the time for appeal as provided in this subdivision is terminated by a timely motion <sup>261</sup> made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) or Rule 59(e) to amend or make additional findings of fact or to alter or amend the judgment in more than purely formal or mechanical aspects;<sup>262</sup> or denying a motion for a new trial under Rule 59(b)." <sup>203</sup>

With the time for appeal reduced and defined the Committee proposed several substantive changes in Rule 60(b).<sup>264</sup> These changes can

261. To be timely the motion under Rules 52(b), 59(b) and (e) must be served not later than 10 days after the entry of judgment; and under Rule 50(b) not later than 10 days after reception of the verdict or discharge of the jury where no verdict is returned. This requirement that the motion in civil actions be timely represents a definite refusal to apply the bankruptcy rule to civil actions. In bankruptcy proceedings a motion for a new trial may be entertained even after the expiration of the time for appeal, and the full time for appeal will start running anew upon the disposition of the motion. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131 (1937); *Bowman v. Loperena*, 311 U. S. 262 (1940); *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144 (1942); *Chapman v. Federal Land Bank of Louisville*, 117 F. (2d) 321 (C. C. A. 6th, 1941); *Missouri v. Todd*, 122 F. (2d) 804 (C. C. A. 8th, 1941). Cases which had carefully considered the problem under the Federal Rules had held that when the time limits prescribed in the rules had expired, the court lost the right to entertain a motion for new trial, to vacate or amend the judgment, or for judgment notwithstanding the verdict, as the case may be, and could not thereafter entertain such a motion and thereby start the appeal time running anew. *Safeway Stores v. Coe*, 136 F. (2d) 771 (App. D. C. 1943) (distinguishing the bankruptcy rule where the court has no terms; and stating that since the Federal Rules have abolished terms and substituted therefor various definite time limits, the same rule should be applied when such time limits expire as was formerly applied in law and equity actions when term time was effective—see notes 7-10, *supra*); *Jusino v. Morales & Tio*, 139 F. (2d) 946 (C. C. A. 1st, 1944). The proposed amendment repudiates rulings or dicta to the contrary, as in *United States v. Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7th, 1943); *Babler v. United States*, 137 F. (2d) 98 (C. C. A. 8th, 1943); *Suggs v. Mutual Benefit Health & Accident Ass'n*, 115 F. (2d) 80 (C. C. A. 10th, 1940).

262. This language is adapted from *Leishman v. Associated Wholesale Electric Co.*, 318 U. S. 203, 206 (1943), where it is stated that a motion to amend or supplement the "findings of fact in more than purely formal or mechanical aspects tolls the appeals statutes, and that the time for taking an appeal runs from the date of the order disposing of the motion." Due to the difficulty of determining what is purely formal or mechanical, and to make sure that the time for appeal is tolled so long as the district court is considering a motion to add or amend findings, whether or not this would require alteration of the judgment, it is probably wise to redraft this clause to read: "or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment."

263. This clause is restricted solely to the *denial* of a motion for a new trial, since if it is granted there is no final judgment from which to appeal. Compare the preceding clause of the rule dealing with a motion under Rules 50(b), 52(b), and 59(e) where a final judgment obtains whether the motion be denied or granted.

264. For completeness it should be noted that the Committee proposed to add the fol-

be graphically shown as follows, with matter proposed to be stricken out in brackets and new matter in italics.

"*On motion* [the court], *and* upon such terms as are just, *the court* may relieve a party or his legal representative from a *final* judgment, order or proceeding [taken against him through his] *on the following grounds*: (1) mistake, inadvertence, surprise, or excusable neglect; (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)*; or (3) *fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party*. The motion shall be made within a reasonable time, but in no case [exceeding six months] *more than one year* after [such] *the* judgment, order, or proceeding was *entered or taken*. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an *independent* action to relieve a party from a judgment, order, or proceeding or (2) to set aside within one year as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified, or (3) *to set aside a judgment for fraud upon the court*. *Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action.*"

The proposed substantive changes are these:

(a) Since Rule 60(b) is applicable to final orders only, the court's power over interlocutory orders is therefore properly not limited.

(b) Any mistake, inadvertence, surprise or excusable neglect is the basis for relief. Under the present rule it must be that of the party seeking relief. Here, too, the change is sound.<sup>255</sup>

(c) Newly discovered evidence is made the basis for relief. By shifting this basis from the new trial rule to Rule 60 it is made more effective, and the danger of utilizing it to move for a new trial and thus to enlarge appeal time is eliminated. Further, it makes explicit a ground for relief that was hiddenly contained in the rule by the first saving clause since newly discovered evidence was a ground for a bill of review.

(d) The express inclusion of fraud as a third ground for relief supplies a technical omission. One difficulty will arise in trying to distinguish the type of fraud here referred to and which must be availed

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lowing at the end of subdivision (a) dealing with clerical mistakes: "During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." See notes 253, 256, *supra*.

255. See p. 686, *supra*.

of within one year, from fraud upon the court which may under the newly proposed third saving clause be urged at any time.<sup>266</sup>

(e) The period of time for relief under the rule is enlarged from six months to one year, and is salutary.

(f) The first saving clause is limited to independent actions; and the last sentence abolishes both the substance and procedure of the old ancillary remedies at common law and equity.

It is clear from this last change, coupled with the proposed changes in rules affecting term and appeal time, that the Committee attempted to state definitely the grounds for and the time when relief from a judgment could be obtained. Two objections may be made: (1) if an inclusive rule is to be adopted, the proposed rule is not sufficiently inclusive; (2) detailed inclusiveness is not desirable and a very general directive rule on the use of power is sounder.

In support of the first objection we note that a judgment which was void for want of either jurisdiction of the subject matter or jurisdiction of the defendant was subject to collateral attack in any forum at any time.<sup>267</sup> And hence the rule should recognize that a court can purge its records of void judgments.<sup>268</sup> Further, the old ancillary remedies gave relief in two situations not covered by the proposed rule: the writ of *audita querela* at law and the bill of review in equity could be used to show matter arising, subsequent to the entry of the judgment, by way of satisfaction, release, or discharge of the judgment;<sup>269</sup> and the writ and bill could be used to show that a prior judgment, which was made the basis of a subsequent judgment, had been reversed or otherwise vacated.<sup>270</sup> It was also settled that a final injunctive decree with prospective application could be modified or vacated under proper circumstances.<sup>271</sup> And even if these matters were included in the rule, some general residual clause would probably be necessary to cover unforeseen contingencies even at the risk of undercutting the principle

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266. Since courts exist to do justice, any fraud in the presentation of a case to the court could plausibly be said to be fraud upon the court, whether it be accomplished through the bribery of a member of the court or jury, by the use of false or perjured testimony, by concealing or suppressing testimony, by reference in a brief to supposedly impartial authorities when these are known to be otherwise, or by resorting to any sharp practice that hinders the fair presentation of a claim or defense. The Committee Note cites *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238 (1944) as an example of fraud upon the court. In this case, the signature of a supposedly impartial person was procured for an article written by company officials, and the article was subsequently used in a brief on appeal. See p. 679, *supra*. Fraud there was. But why this was more of fraud upon the court than any type of fraud that interferes with the administration of justice is not apparent.

267. *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Williams v. North Carolina*, 325 U. S. 226 (1945); *Wyman v. Newhouse*, 93 F. (2d) 313 (C. C. A. 2d, 1937).

268. See, e.g., the California rule set out in note 22 *supra*.

269. See notes 155, 208, *supra*.

270. See note 160 *supra*.

271. See note 64 *supra*.

of inclusiveness. A rule meeting these objections is set forth in the footnote.<sup>272</sup>

On the other hand a directive rule on the use of power could read as follows:

"On motion, the court, upon such terms as are just, may at any time relieve a party or his legal representative from a final judgment, order or proceeding taken against him where substantial justice requires, but having due regard for intervening rights and the general desirability of the early finality of judgments. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, §§ 118, a judgment obtained against a defendant not actually personally notified." The heart of the change is embodied in the first sentence. Perhaps its directive would make the concept of finality of judgments too closely akin to *stare decisis* to meet with satisfaction. But the thesis of this article has been that finality of judgments is and must be a much more flexible concept in practice than it is generally thought to be; and that it is desirable to recognize this fact. *Stare decisis* and finality are facets of the same problem, differ only in degree, and produce better results when the judicial process is free to use their principles with an understanding flexibility.

272. (Matter stricken out is in brackets; new matter is in italics).

Mistake; Inadvertence; Excusable Neglect; *Newly Discovered Evidence; Fraud, etc.* On motion [the court] and upon such terms as are just, *the court* may relieve a party or his legal representative from a *final* judgment, order, or proceeding [taken against him through his] for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);* (3) *fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;* (4) *the judgment is void;* (5) *the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;* or (6) *any other reason justifying relief from the operation of the judgment.* The motion shall be made within a reasonable time [but in no case exceeding six months] and for reasons (1), (2) and (3) not more than one year after [such] the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court [(1)] to entertain an *independent* action to relieve a party from a judgment order, or proceeding, or [(2)] to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified] to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.*