FILED
SUPREME COURT
STATE OF WASHINGTON
11/17/2020 4:45 PM
BY SUSAN L. CARLSON
CLERK

No. 98932-0

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA M. MERCERI, a single woman,

Petitioner,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19,

Respondent.

RESPONSE TO AMICUS CURIAE MEMORANDUM OF THE NORTHWEST CONSUMER LAW CENTER IN SUPPORT OF SANDRA MERCERI'S PETITION FOR REVIEW

Gordon Arthur Woodley, WSBA # 7783
Woodley Law
Box 53043
Bellevue, WA 98015
(425) 802-1400

Susan Lynne Fullmer, Attorney at Law, WSBA # 43747
6523 California Ave. SW, #275
Seattle, Washington 98136
(206) 567-2757

Attorneys for Petitioner

TABLE OF CONTENTS

I. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 1

A. The lower court's refusal to issue the required show cause order mandated by CR 60(e) is a watershed departure impacting the public interest. 1

B. The Court of Appeals' failure to overturn the trial court's clear error will short circuit citizens' post-judgment constitutional due process rights to obtain post-judgment relief. 2

II. CONCLUSION 4

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Personal Restraint of: Arnold,
189 Wn.2d 1023, 408 P.3d 1091 (2017).. 2

In re Personal Restraint Petition of Flippo,
185 Wn.2d 1032, 380 P.3d 413 (2016)... 2

Pfaff v. State Farm Mutual Auto ins. Co.,
103 Wn.App 829, 14 P.3d 837 (2000),
review denied, 143 Wn.2d 1021, 25 P.3d 1019 (2001) 1

State v. Watson,
155 Wash.2d 574, 122 P.3d 903 (2005) 2

White v. Holm,
73 Wn.2d 348, 438 P.2d 581 (1968).. 1

WASHINGTON STATUTES

RCW 4.72.040 .... 2, 3

COURT RULES

CR 60 .... 2, 3

Rules of Pleading, Practice and Procedure ("RPPP") 60.04W.................. 3

APPELLATE RULES

RAP 13.4(b)(2) 1, 2

RAP 13.4(b)(4) 1, 2

OTHER AUTHORITY

Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 523 (1960) 2, 3

Petitioner Sandra Merceri agrees with amicus Northwest Consumer Law Center.

I. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The lower court's refusal to issue the required show cause order mandated by CR 60(e) is a watershed departure impacting the public interest.

Review is appropriate because, Northwest Consumer Law Center correctly concludes that Division One wholly reinvented the traditional duties of the trial court, when it approved the denial of a CR 60 motion without the required CR 60(e)(2) show cause hearing. RAP 13.4(b)(2); (b)(4). The trial court inexplicably flipped the presumption against the moving party, wholly undermining the due process procedures embedded in CR 60(e). *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), *accord Pfaff v. State Farm Mutual Auto ins. Co.,* 103 Wn.App 829, 834, 14 P.3d 837 (2000), *review denied*, 143 Wn.2d 1021, 25 P.3d 1019 (2001) ("White demonstrates that a trial court must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant when deciding whether the movant has presented 'substantial evidence' of a 'prima facie' defense.") Such a "watershed departure from prior practice" directly conflicts with this Court's holdings. *See In re Personal Restraint of: Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092 (2017) (accepting review where an appellate decision was a "watershed departure that affects the

greater public interest.")

Mrs. Merceri agrees with Northwest Consumer Law Center that review should be accepted under RAP 13.4(b)(2).

B. The Court of Appeals' failure to overturn the trial court's clear error will short circuit citizens' post-judgment constitutional due process rights to obtain post-judgment relief.

"A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Personal Restraint Petition of Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 414 (2016), *citing State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), *review granted* under the substantial public interest prong, RAP 13.4(b)(4).

Since 1891, Washington law has required the full exercise of due process rights in a post-judgment setting. Trial courts to set a trial or show cause hearing[1] to properly initiate the adversarial proceeding required by CR 60 and its predecessors. *See* Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 523 (1960) (analyzing the statutes and rules in existence before CR 60 was adopted, RCW 4.72.040, Rules of Pleading, Practice and Procedure

---

[1] As Northwest Consumer Law Center correctly concludes, the issue is whether the trial court must notice a hearing, not whether that hearing includes oral argument. *See* Amicus Memorandum at 4-5.

("RPPP") 60.04W, attached as **Appendix A**, also available at https://digitalcommons.law.uw.edu/wlr/vol35/iss4/6/), which have not changed the mandatory adversarial proceeding required by CR 60(e)). "RCW 4.72.040 provided for the trial of disputed issues of fact. To refuse to try such issues was error." Trautman, *supra*, at 523. *See also White v. Holm, supra*. The lower court's watershed departure will cause unnecessary confusion and litigation over a party's constitutional due process rights in post-judgment proceedings.

Mrs. Merceri agrees with Northwest Consumer Law Center that citizens will be adversely affected if the Supreme Court does not accept review. The hundreds of Washington cases addressing CR 60 since the rule was adopted by this Court in 1965 conservatively illustrate the potential adverse impact on Washington citizens.[2] Once a lower court nullifies a Supreme Court rule, chaos and confusion will ensue.

Even greater harm is the Court of Appeals' nullification of this Supreme Court's rule requiring due process procedures in post-judgment hearings. This blatant challenge to the Supreme Court's rulemaking authority, if left unchecked, seriously erodes due process rulemaking authority and the Supreme Court's protection afforded to all citizens of

[2] The undersigned conducted a search of legal databases, finding 951 cases in Washington that addressed CR 60 since its adoption by this Court in 1965. *See* Trautman, *supra*, for the large number of cases addressing CR 60's predecessors before 1960.

this state. The sudden nullification of citizens' rights presents an issue of overwhelming public interest.

A decision to not accept review and to not correct the lower court's nullification opens a Pandora's box which will erode both the citizens' right to justice and the Supreme Court's role as the last resort for protecting those rights. As Justice Louis Brandeis stated in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564 (1928):

> *The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*

II. CONCLUSION

The Petition for Review should be granted.

Respectfully presented this November 17, 2020.

/s/ Gordon Arthur Woodley
Gordon Arthur Woodley, # 7783
P.O. Box 53043
Bellevue, WA 98015
(425) 453-2000

/s/ Susan Lynne Fullmer
Susan Lynne Fullmer, #43747
6523 California Ave. SW, #275
Seattle, WA 98136
(206) 567-2757

Attorneys for Petitioner

Appendix A

Washington Law Review

Volume 35
Number 4 *Annual Meeting of the Washington State Bar Association*

11-1-1960

Vacation and Correction of Judgments in Washington

Philip A. Trautman
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Digital Commons Network Logo

Part of the Civil Procedure Commons

Recommended Citation
Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. & St. B.J. 505 (1960).
Available at: https://digitalcommons.law.uw.edu/wlr/vol35/iss4/6

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

VACATION AND CORRECTION OF JUDGMENTS IN WASHINGTON

PHILIP A. TRAUTMAN*

After a judgment has been entered by a superior court, counsel is sometimes confronted with the problem of what steps may be taken to remedy alleged errors or mistakes. The obvious alternative is that of appeal. There are, however, other possibilities which are perhaps less widely known which may equally well serve to attain the end sought. It is the purpose of this article to examine these other possibilities for obtaining vacation and correction of judgments. The inquiry will be directed to such questions as what grounds will suffice for obtaining relief, what procedures must be followed, and what are the applicable time limitations in each instance.

To be distinguished from the vacation or setting aside of a judgment is the correction of a judgment because of a clerical error. This involves the matter of amending the judgment to make it correspond to the facts and law as actually decided and applied. It has long been established in Washington that a court has inherent power to modify a judgment entry to make it conform to the judgment actually rendered.[1] Thus, if the court directs judgment for one party and the clerk enters it for another or if the court directs a certain judgment and another and different judgment is entered, this may be corrected.[2]

The leading case is *O'Bryan v. American Investment & Improvement Co.*[3] A judgment was entered dismissing an action. Several months later a petition was filed to have the judgment corrected to read that the dismissal was without prejudice. An order to this effect had been entered in the minutes prior to the entry of the judgment. The supreme court reversed the trial court's denial of the requested relief and set forth the principle of inherent power, independent of any statute. Further, the court stated that there was no discretion involved in the correction of an entry that concededly did not state the judgment of the court.

* Associate Professor of Law, University of Washington.

[1] Pappas v. Taylor, 138 Wash. 31, 244 Pac. 393 (1926); Fisher v. Jackson, 120 Wash. 107, 206 Pac. 929 (1922); Litzell v. Hart, 96 Wash. 471, 165 Pac. 393 (1917); Shaughnessy v. Northland S.S. Co., 94 Wash. 325, 162 Pac. 546 (1917).

[2] McCaffrey v. Snapp, 95 Wash. 202, 163 Pac. 406 (1917).

[3] 50 Wash. 371, 97 Pac. 241 (1908).

This inherent power is now embodied in Washington Rule of Pleading, Practice and Procedure 60 as follows:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected 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. 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.[4]

Several points should be noted in conjunction with this rule. There is no specified period of notice prescribed. In fact, it has been held that a correction may be made without notice to the parties affected.[5] The rule applies only to clerical errors and does not authorize a court to change a judgment in substance as by correcting an error of law contained therein or by recording a judgment that was never in fact rendered.[6]

In *In re Kramer's Estate*[7] a will provided that the husband of the deceased could use the principal of an estate as he might deem necessary for his comfort and support. In making final distribution in 1950, the superior court entered a decree to the effect that "in the event that it is necessary for the surviving husband's comfort and support the court so finds" the husband might use the principal.

Several years later, in 1956, a petition was filed to correct the decree by deleting the phrase "and the court so finds," which was not contained in the will. The superior court granted the relief sought and this was affirmed. The supreme court stated that if it was the intention of the trial court to include the phrase, there was no clerical error and there could be no correction under Rule 60. However, if it was unintentional, correction could be had. It was found that the secretary of the attorney who submitted the decree for the judge to sign had made a mistake in typing the decree. This was not discovered at the time by either the attorney or the judge. Rule 60 thus applied. The case is of consequence not only as indicating what will be considered as a clerical error, but also as illustrating that there is no fixed time limitation for relief under the rule, six years having elapsed in this instance.

One final illustration of the power of a superior court to correct clerical errors is evidenced by cases wherein an appeal has been taken

---

[4] The Washington rule is taken from FED. R. CIV. P. 60(a).
[5] Barough v. Israel, 46 Wn.2d 327, 281 P.2d 238 (1955).
[6] Rajewski v. Dart, 51 Wn.2d 52, 315 P.2d 636 (1957).
[7] 49 Wn.2d 829, 307 P.2d 274 (1957).

with error being assigned which might have been corrected by the superior court if called to its attention. In such instances, the supreme court has directed correction but has denied the appellant his costs. In one case this was done where there was an error in designating the date for commencement of the running of interest[8] and in another where there was ambiguity in the judgment as to the amount of damages.[9]

There are other bases for obtaining correction and vacation of judgments than that of clerical errors. These are provided for by several statutes scattered throughout the code. Before considering the scope and application of each, note should be taken of some general principles which apply to all of the provisions, except as otherwise indicated.

In the discussion which follows concerning vacation of judgments, reference is had to the final judgment. In the case of oral informal opinions of a judge,[10] interlocutory orders,[11] and minute entries by a clerk[12] the court retains jurisdiction to modify and change them without regard to the statutes applying to vacation. Even as to the judgment itself, it may be recalled by the judge prior to its entry by the clerk without regard to the statutory provisions.[13] It is only after the judgment has been signed by the judge and filed with the clerk that its vacation is dependent upon the statutory and rule provisions hereafter discussed.[14]

It is the court which rendered the judgment whose powers will be considered. Except in certain instances wherein a collateral attack is possible, a court of co-ordinate or concurrent jurisdiction may not vacate a judgment. Stated affirmatively, in the case of a direct attack, as under the statutory provisions or by an independent suit in equity, only the court wherein a judgment is entered or an appellate court may vacate it.[15] Applying these propositions to the courts of Washington,

[8] Gordon v. Hultin, 146 Wash. 61, 261 Pac. 785 (1927).

[9] Coluccio v. State, 189 Wash. 236, 64 P.2d 786 (1937).

[10] Lasell v. Beck, 34 Wn.2d 211, 208 P.2d 139 (1949); Ritter v. Johnson, 163 Wash. 153, 300 Pac. 518 (1931); North River Transp. Co. v. Denney, 149 Wash. 489, 271 Pac. 589 (1928); Quigley v. Barash, 135 Wash. 338, 237 Pac. 732 (1925); Landry v. Seattle, P. A. & W. R. Co., 100 Wash. 453, 171 Pac. 231 (1918).

[11] Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370 (1899).

[12] Shaw v. Morrison, 145 Wash. 420, 260 Pac. 666 (1927).

[13] State *ex rel.* Brown v. Brown, 31 Wash. 397, 72 Pac. 86 (1903).

[14] Valley Iron Works v. Independent Bakery, 171 Wash. 349, 17 P.2d 898 (1933); Wagner v. Northern Life Ins. Co., 70 Wash. 210, 126 Pac. 434 (1912). To the effect that a judgment is entered as of the date it is signed by the judge and delivered to the clerk for filing, regardless of the time when the clerk actually records it, see Canzler v. Mammoliti, 40 Wn.2d 631, 245 P.2d 215 (1952) and Cinebar Coal & Coke Co. v. Robinson, 1 Wn.2d 620, 97 P.2d 128 (1939).

[15] Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923 (1917).

it follows that the superior court of one county has no power to entertain a direct attack upon the judgment of the superior court of another county.[16]

As to the matter of time within which vacation must be sought, at common law a judgment could be vacated during the term at which the judgment was rendered. In Washington terms of courts do not exist as at common law either for the supreme court[17] or for the superior courts.[18] It has been said that in Washington judgments have no probationary period in the sense that they are subject to the control of the court and subject to being set aside, vacated or modified by it on its own motion as were judgments at common law during the term at which they were entered. On the contrary, judgments regularly entered after the time within which a motion for a new trial may be filed, immediately have all the conclusiveness of a judgment at common law after term and can only be modified or vacated in the manner and for some one or more of the causes provided by the statutes for vacating or modifying judgments.[19]

Only a party or one in privity with him may seek vacation.[20] This is true as to each of the statutory provisions and to an independent suit in equity. Neither a stranger to the record nor the court on its own motion may make the application.[21] Thus an attorney having an unpaid balance due him by one of the parties to a divorce proceeding was held not to be entitled to move to set aside the decree of divorce, even though the decree had been procured by another attorney without a substitution of attorneys and in violation of legal ethics. Not having been a party to the proceeding, he had no legal right to have the judgment set aside.[22] However, if a judgment were completely void as by the failure to bring the defendant within the jurisdiction of the court by effective summons, there is the possibility that the court under its inherent power might vacate upon its own motion and perhaps even upon the motion of a stranger to the record if his interests were directly and injuriously affected by the judgment. Certainly this would be the exceptional case due to the possible danger of affecting the rights of

---

[16] *In re* Higdon, 30 Wn.2d 546, 192 P.2d 744 (1948).

[17] Wash. Const., art IV, § 2 provides: "The said court [supreme court] shall always be open for the transaction of business except on nonjudicial days."

[18] RCW 2.08.030 provides: "The superior courts are courts of record, and shall be always open, except on nonjudicial days."

[19] McCaffrey v. Snapp, 95 Wash. 202, 163 Pac. 406 (1917); State *ex rel.* McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57 (1910).

[20] Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182 (1901); State *ex rel.* Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917 (1895).

[21] State *ex rel.* McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57 (1910).

[22] State *ex rel.* Brenner v. Superior Court, 166 Wash. 502, 7 P.2d 604 (1932).

parties. And, in any event, such a stranger could not demand the vacation as a matter of right, but rather would have to depend upon the exercise of discretion by the court.[23]

The proposition that only parties of record may seek the vacation of a judgment does not mean that all the parties to the original action must be joined in the vacation proceedings. If the parties interested in the proceedings are joined and the interests of all will be protected, a technical defect in the failure to join all will not be fatal. It is not necessary, in short, to have the same plaintiffs and defendants as in the original proceedings.[24]

Another principle of general application is that much discretion rests with the trial court. The result is that considerable deference is given to the trial court determination.[25] This is particularly true in the case of applications for the vacation of default judgments, which are the most common instances wherein requests for vacation arise.[26] In exercising such discretion in the case of default judgments, the primary duty of the court is to inquire whether or not the moving party has a defense of merits. If it clearly appears that a strong defense exists, the court will not inquire closely into the reasons resulting in the entry of the default.[27] Further, in the case of default judgments, the relief requested is to be liberally construed and the supreme court is less likely to interfere with the trial court's exercise of discretion where vacation is granted than where denied.[28] On the other hand, if there has been full opportunity at the trial for determining the merits of the case, greater caution is to be exercised in vacating judgments.[29] This is particularly true where strong considerations of public policy arise as with divorce decrees.[30]

One final point of general application is that a court in vacating a judgment is not limited to an all or nothing exercise of discretion. It may impose conditions upon the grant or denial thereof.[31]

[23] Ballard Sav. & Loan Ass'n v. Linden, 188 Wash. 490, 62 P.2d 1364 (1936).
[24] Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779 (1901).
[25] Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182 (1901).
[26] Pederson v. Klinkert, 156 Wash. Dec. 326, 352 P.2d 1025 (1960); Rule v. Somervill, 150 Wash. 605, 274 Pac. 177 (1929); Hurley v. Wilson, 129 Wash. 567, 225 Pac. 441 (1924).
[27] Yeck v. Department of Labor & Indus., 27 Wn.2d 92, 176 P.2d 359 (1947).
[28] Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wash. 597, 289 Pac. 527 (1930); Aid v Bowerman, 132 Wash. 319, 232 Pac. 297 (1925).
[29] State v. Roff, 44 Wn.2d 309, 266 P.2d 1059 (1954); McDougall v. Walling, 21 Wash. 478, 58 Pac. 669 (1899).
[30] Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268 (1905); Metler v. Metler, 32 Wash. 494, 73 Pac. 535 (1903).
[31] Melosh v. Graham, 122 Wash. 299, 210 Pac. 667 (1922); Hendrix v. Hendrix, 101 Wash. 535, 172 Pac. 819 (1918).
[56] Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wash. 597, 289 Pac. 527

It has been said many times that a court cannot vacate or modify a judgment in the absence of statutory grounds.[32] A striking illustration of this principle is *Pacific Tel. & Tel. Co. v. Henneford.*[33] The state supreme court affirmed a judgment granting a permanent injunction restraining state officers from collecting an excise tax on the use of property brought into the state which was not procurable within the state. Afterwards the United States Supreme Court rendered contrary decisions, the state supreme court in a later, separate opinion changed its views, holding such tax collectible on such property, and the state legislature amended the taxing act to specifically cover such property and made the tax retroactive. Nevertheless, it was held that since none of this fit within the grounds specified by statute, the judgment could not be vacated. On the other hand, if there are sufficient statutory grounds appearing on the record, an application to vacate a judgment may be granted, although such grounds are not relied upon by the party seeking relief.[34] Of course, the grounds must not have been previously passed upon by the court in conjunction with some other motion, as for a new trial,[35] and there must not have been a consent to the entry of the judgment.[36]

Though the court sometimes speaks as if the statutory grounds and procedures are exclusive, the possibility of an independent suit in equity or a collateral attack remains, as will be discussed later. Most attacks upon judgments rest upon a statutory basis, however, and they require initial consideration.

The most important statutory provisions relating to vacation of judgments are to be found in RCW 4.72.[37] RCW 4.72.010 sets forth the grounds upon which vacation may be had. Of the eight grounds listed, the principal ones for present consideration are in the last six subdivisions.[38]

The most commonly relied upon ground for vacation is prescribed

---

[32] State *ex rel.* Lundin v. Superior Court, 90 Wash. 299, 155 Pac. 1041 (1916); Okazaki v. Sussman, 79 Wash. 622, 140 Pac. 904 (1914); *In re* McKeever's Estate, 48 Wash. 429, 93 Pac. 916 (1908).

[33] 199 Wash. 462, 92 P.2d 214 (1939).

[34] Smith v. Smith, 36 Wn.2d 164, 217 P.2d 307 (1950).

[35] Friedman v. Manley, 21 Wash. 675, 59 Pac. 490 (1899); Greene v. Williams, 13 Wash. 674, 43 Pac. 938 (1896).

[36] Arnot v. Fischer, 161 Wash. 67, 295 Pac. 1116 (1931).

[37] Though at one time it was held that RCW 4.72 was applicable to criminal as well as civil judgments, the more recent interpretation is that a judge has power to vacate criminal judgments which extends beyond the grounds stated in RCW 4.72.010. *Compare* State v. Scott, 101 Wash. 199, 172 Pac. 234 (1918) *with In re* McNutt v. Delmore, 47 Wn.2d 563, 288 P.2d 848 (1955).

[38] RCW 4.72.010(1) provides that a judgment may be vacated or modified: "By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the rules of court relating to new trials." A general discus-

in subdivision three as follows: "For mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order." It must first be noted that this is interpreted to mean any mistake or neglect which warrants modification or vacation in the furtherance of justice and not just mistakes or neglect of the clerk.[39] The mere establishment of a mistake, however, is not sufficient; it must result in a judgment that is wrongful or oppressive.[40] In addition, in a recent 5-4 decision it was determined that a mistake of fact is not included within the meaning of the statute. A contention was made that a judgment for a minor resulted from a mutual mistake of fact in that the parties at the time of a compromise settlement did not realize the full severity or extent of the minor's injuries. It was held that even if true, this would not justify a vacation of the judgment, barring fraud or collusion.[41] What type of mistake or neglect then does meet the requirement of the statute?

Clearly a mistake by the clerk is included. Thus, if the clerk enters a judgment contrary to the directions of the judge[42] or enters a judgment upon an informal or oral order of the judge,[43] it may be vacated under subdivision three.

Mistakes of parties are likewise included if found to be excusable in character rather than wilful.[44] Where the defendant left the state shortly before the hearing, intending not to return, and to place property in a sister state beyond the reach of the court, the neglect was wilful and vacation of a default judgment was denied.[45] The determination of whether the mistake or neglect alleged is sufficient rests primarily in the discretion of the trial court.[46] This is illustrated very well by comparing *Moe v. Wolter*,[47] which held there was sufficient mistake to justify vacation where a party did not appear on an attorney's advice upon receipt of mailed notice in a foreign state, with

sion of new trials is beyond the scope of this comment. See, WASH. RULE PLEADING, PRACTICE, PROCEDURE 59.04W, RCW 4.76, and Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088 (1915).

RCW 4.72.010(2) provides for vacation: "By a new trial granted in proceedings against defendant served by publication only as prescribed in RCW 4.28.200." This basis for vacation will be discussed separately in detail later.

[39] National Bank of Commerce v. L. Kilsheimer & Co., Inc., 59 Wash. 460, 110 Pac. 15 (1910).

[40] Northern Pac. & P. S. S. R. R. v. Black, 3 Wash. 327, 28 Pac. 538 (1891).

[41] Handley v. Mortland, 54 Wn.2d 489, 342 P.2d 612 (1959).

[42] Hartford v. Stout, 102 Wash. 241, 172 Pac. 1168 (1918).

[43] Wiggins v. Shaw, 99 Wash. 408, 169 Pac. 853 (1918); Shaughnessy v. Northland S.S. Co., 94 Wash. 325, 162 Pac. 546 (1917).

[44] Bishop v. Illman, 14 Wn.2d 13, 126 P.2d 582 (1942).

[45] Hendrix v. Hendrix, 101 Wash. 535, 172 Pac. 819 (1918).

[46] Dow v. Dow, 135 Wash. 188, 237 Pac. 304 (1925); Jordan v. Hutchinson, 39 Wash. 373, 81 Pac. 867 (1905).

[47] 134 Wash. 340, 235 Pac. 803 (1925).

Rule v. Somervill,[48] which held there was not sufficient mistake where the party failed to appear as a result of his own reliance upon the law of the foreign state rather than the law of Washington. The two cases also give a clue as to the difference in meaning of wilful and excusable neglect.

Examples of mistake or neglect by a party deemed to be excusable in character, thereby justifying vacation are: where the failure to appear resulted from the party assuming another person would defend;[49] where the party had relied upon an out of court settlement and failed to appear;[50] where the failure to appear resulted from summons being served upon a corporation officer who was unfamiliar with legal proceedings;[51] where the defendant did not understand English and had been told an attorney was protecting his rights;[52] where the party made a mistake in noting the return day beyond the time when an answer should have been made;[53] and where the party made a mistake as to the date of service of summons upon him.[54] In all of these instances, application for vacation was made promptly upon discovery of the mistake or neglect. A failure to act with dispatch may result in denial of an otherwise valid ground for vacation.[55]

Just as the mistake or neglect of a party may justify vacation if excusable, so the same is true of counsel. Vacation was justified where an attorney left the state and the substituted attorney was not fully acquainted with the facts;[56] where the attorney incorrectly noted the day for answering;[57] and where misunderstanding arose between the parties' counsel as to the method of notice for trial.[58] Vacation was properly denied where a default judgment resulted simply from a want of attention by counsel;[59] where counsel for the plaintiff obtained a voluntary dismissal and the statute of limitations thereby barred further recovery;[60] and where the attorney withdrew from the case without leave of court, thereby resulting in nonappearance and a default.[61]

[48] 150 Wash. 605, 274 Pac. 177 (1929).

[49] Jacobsen v. Defiance Lumber Co., 142 Wash. 642, 253 Pac. 1088 (1927); Cammarano v. Longmire, 99 Wash. 360, 169 Pac. 806 (1918).

[50] McBride v. McGinley, 31 Wash. 573, 72 Pac. 105 (1903).

[51] Spoar v. Spokane Turn-Verein, 64 Wash. 208, 116 Pac. 627 (1911).

[52] Paltro v. Gavenas, 97 Wash. 327, 166 Pac. 1156 (1917).

[53] Mt. Vernon Nat'l Bank v. First Nat'l Bank of Monroe, 104 Wash. 107, 176 Pac. 13 (1918).

[54] Titus v. Larsen, 18 Wash. 145, 51 Pac. 351 (1897).

[55] See Frieze v. Powell, 79 Wash. 483, 140 Pac. 690 (1914).

[56] Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wash. 597, 289 Pac. 527 (1930).

[57] Reitmeir v. Seigmund, 13 Wash. 624, 43 Pac. 878 (1896).

[58] O'Toole v. Phoenix Ins. Co., 39 Wash. 688, 82 Pac. 175 (1905).

[59] Green v. Russell, 71 Wash. 379, 128 Pac. 645 (1912).

[60] Anderson v. Shields, 51 Wash. 463, 99 Pac. 24 (1909).

[61] McInns v. Sutton, 35 Wash. 384, 77 Pac. 736 (1904).

Attempts have at times been made to modify or vacate judgments under subdivision three on the ground that the judgment entered did not accord with the unexpressed intent of the judge. Such attempts have generally failed. In one instance the judge in a criminal case sentenced the defendant to the state penitentiary. Later it was sought to modify this by providing that confinement should be in the reformatory, which the judge stated was his intention. It was held that such an unexpressed intention was not within the meaning of the word "mistake."[62] The same result was reached where the judge inadvertently omitted from the decree a provision for the repayment of money. His unexpressed intention did not justify a vacation.[63] Likewise, the inclusion in a judgment of a provision which the court did not intend to require has been held not to be a ground for vacation.[64] Contrary to the above cases is *Morsbach v. Thurston County*,[65] where the court held that vacation would lie where the judgment included an award of damages when it was only intended to adjudicate the title to property. The case may be qualified by the fact that there was no evidence to support an award of damages as required by law. Barring that, the case seems inconsistent with the others cited and seemingly stands alone on the question of what constitutes ground for vacation under subdivision three. It would seem that it would be more proper to seek relief in such an instance under Washington Rule of Pleading, Practice and Procedure 60, as previously discussed.

Subdivision three also provides for vacation in the event of "irregularity in obtaining a judgment or order." An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it at an unseasonable time or in an improper manner.[66] If the irregularity in procedure results in the deprivation of a substantial right, vacation is in order.[67] Examples of irregularities justifying vacation are the conducting of a proceeding to determine the question of insanity of an alleged insane person without a jury after one was demanded;[68] the entering of a pre-

[62] State *ex rel.* Lundin v. Superior Court, 90 Wash. 299, 155 Pac. 1041 (1916).
[63] McCaffrey v. Snapp, 95 Wash. 202, 163 Pac. 406 (1917).
[64] Schmelling v. Hoffman, 124 Wash. 1, 213 Pac. 478 (1923).
[65] 148 Wash. 87, 268 Pac. 135 (1928).
[66] Merritt v. Graves, 52 Wash. 57, 100 Pac. 164 (1909).
[67] State v. Gallagher, 46 Wn.2d 570, 283 P.2d 140 (1955). The trial court in pronouncing judgment and sentence failed to ask the defendant if he had any legal cause to show why judgment should not be pronounced against him. This was an irregularity, but since no showing of deprivation of a substantial right was made, a motion to vacate was denied.
[68] *In re* Ellern, 23 Wn.2d 219, 160 P.2d 639 (1945).

mature final judgment when only an interlocutory order was proper;[69] the entering of a judgment of dismissal on the court's own motion on the ground of insufficiency of the complaint, while issues of fact were pending;[70] and the denial of a constitutional right or privilege in connection with an arraignment or plea.[71] In each instance it will be noted that there was some deviation of a substantial character from the regularity in procedures. If the deviation is unsubstantial, as delay in entering a default judgment,[72] or a failure to obtain possession of the plaintiff's brief before judgment,[73] vacation is improper.

In a few instances cases can be grouped according to the type of irregularity. If there is a want of proper service of process, the proper procedure is to move for vacation of the judgment upon the basis of an irregularity.[74] Thus, if summons is mailed to the wrong address,[75] if summons by publication misstates the object of the action,[76] or if summons recites that the complaint has been filed with the clerk when such is not true,[77] there is such an irregularity as to justify vacation.

The requirement of proper notice carries over to other procedures than that of summons and the original service of process. A failure to give notice to parties of subsequent proceedings after appearance,[78] or notice of the appointment of a guardian,[79] or notice of an order for change of judge,[80] or notice of a request for a nonresident cost bond[81] justifies the vacation of the subsequent order or judgment.

It is also possible that the judgment itself may be so defective as to constitute an irregularity. This is true, for example, in the case of a default judgment beyond the purport and scope of the pleadings[82] or a judgment which fails to conform to a jury verdict and an applicable statute.[83]

Much confusion has arisen in the cases in the courts' attempts to distinguish between irregularities and errors of law. The distinction

[69] Muscek v. Equitable Sav. & Loan Ass'n, 25 Wn.2d 546, 171 P.2d 856 (1946).
[70] State *ex rel.* Hennessy v. Huston, 32 Wash. 154, 72 Pac. 1015 (1903).
[71] State v. Taft, 49 Wn.2d 98, 297 P.2d 1116 (1956).
[72] First Nat'l Bank v. Dudley, 80 Wash. 376, 141 Pac. 884 (1914).
[73] State *ex rel.* Grady v. Lockhart, 18 Wash. 531, 52 Pac. 315 (1898).
[74] American Discount Corp. v. Gerrard, 156 Wash. 271 ,286 Pac. 666 (1930); Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161 (1900); Brewer v. Howard, 59 Wash. 580, 110 Pac. 384 (1910); Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053 (1894).
[75] State *ex rel.* Cole v. Blake, 123 Wash. 336, 212 Pac. 549 (1923).
[76] Hays v. Peavey, 54 Wash. 78, 102 Pac. 889 (1902).
[77] Golson v. Carscallen, 155 Wash. 176, 283 Pac. 681 (1930).
[78] C. S. Barlow & Sons v. H. & B. Lumber Co., 153 Wash. 565, 280 Pac. 88 (1929); Molloy v. Union Transfer, Moving & Storage Co., 60 Wash. 331, 111 Pac. 160 (1910).
[79] State *ex rel.* Lowary v. Superior Court, 41 Wash. 450, 83 Pac. 726 (1906).
[80] State *ex rel.* Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481 (1919).
[81] Harringer v. Keenan, 117 Wash. 311, 201 Pac. 306 (1921).
[82] Stark Brothers v. Royce, 44 Wash. 287, 87 Pac. 340 (1906).
[83] Seattle & Mont. Ry. v. Johnson, 7 Wash. 97, 34 Pac. 567 (1893).

has been drawn upon the basis that irregularities justify vacation whereas errors of law do not. For the latter the only remedy is by appeal from the judgment.[84] The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen. Of course, viewing the matter from the opposite side, the fact that an order is appealable for error of law does not limit the court's power to vacate for irregularities contained therein.[85]

An error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make.[86] An irregularity has reference to something extraneous to the action of the court or goes to the question of the regularity of the proceedings.[87]

The difficulty arises not in determining the difference in definition between the two, but in applying the definitions to diverse factual situations. Errors of law have been held to include the failure of arbitrators to determine all the questions presented,[88] improperly restricting proof to certain elements of damage,[89] the fixing of an executor's compensation in excess of a statutory allowance,[90] the failure of the record in a divorce decree to show an allegation and finding as to the residence of the plaintiff or any finding of the specific facts upon which the decree rested,[91] misconstruction of statutes,[92] and improper rulings on the qualifications of jurors and the admissibility of evidence.[93] Viewing the problem more generally it appears that an irregularity is regarded as a more fundamental wrong, a more substantial deviation from procedure than an error of law. An irregularity is deemed to be of such character as to justify the special remedies provided by vacation proceedings, whereas errors of law are deemed to be adequately protected against by the availability of the appellate process. Other than that, the most that can be said is that it must be left for the court in each instance to classify. Though this is most unsatisfactory from

[84] Hurley v. Wilson, 129 Wash. 567, 225 Pac. 441 (1924).
[85] Morsbach v. Thurston County, 148 Wash. 87, 268 Pac. 135 (1928); *In re* Johnston's Estate, 107 Wash. 25, 181 Pac. 209 (1919).
[86] *In re* Ellern, 23 Wn.2d 219, 160 P.2d 639 (1945).
[87] Kern v. Kern, 28 Wn.2d 617, 183 P.2d 811 (1947).
[88] McElroy v. Hooper, 70 Wash. 347, 126 Pac. 925 (1912).
[89] Okanogan-Douglas Inter-County Bridge Co. v. McPherson Bros. Co., 152 Wash. 58, 277 Pac. 380 (1929).
[90] *In re* Doane's Estate, 64 Wash. 303, 116 Pac. 847 (1911).
[91] Faulkner v. Faulkner, 90 Wash. 74, 155 Pac. 404 (1916).
[92] Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182 (1901).
[93] *In re* Ellern, 23 Wn.2d 219, 160 P.2d 639 (1945).

the standpoint of prediction, it is necessary in order to enable the court to evaluate the many diverse factors alleged to justify vacation.

Subdivision four of RCW 4.72.010 provides for vacation "for fraud practiced by the successful party in obtaining the judgment or order." The chief point to note in this respect is that the fraud must be extrinsic or collateral in character.[94] This requires some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy.[95] As in other instances of alleged fraud, it must be actual and positive in character and not merely constructive; it must be established by clear, cogent and convincing evidence.[96]

Instances where extrinsic or collateral fraud have been found include intentional failure to give notice of hearing to the adverse party after the latter's appearance,[97] intentional mailing of summons to the wrong address,[98] intentional misleading of a party as to the nature of the action,[99] intentional misleading as to the time of trial,[100] and intentional procurance of an *ex parte* decree by a wife in a separate maintenance action without disclosing a prior release of the husband from all obligation to support her.[101]

Perhaps more enlightening is an analysis of some cases where sufficient fraud to justify vacation was not found.[102] In *In re Christianson's Estate*[103] a motion was made to vacate a decree of distribution in probate on the ground that the administrators did not disclose to the court the existence of certain nieces and nephews entitled to share in the estate. The court found that due notice had been given and concluded there was no fraud justifying vacation of the decree. One may assume that if representations had been made to the nieces and nephews that it was unnecessary for them to appear and protect their rights

---

[94] Compare FED. R. CIV. P. 60(b) (3) which provides for the vacation of a judgment for fraud by an adverse party "whether heretofore denominated intrinsic or extrinsic."

[95] Wood v. Copeland Lumber Co., 41 Wn.2d 119, 247 P.2d 801 (1952).

[96] Burke v. Northern Pac. Ry., 86 Wash. 37, 149 Pac. 335 (1915).

[97] State *ex rel.* LeRoy v. Superior Court, 149 Wash. 443, 271 Pac. 87 (1928).

[98] Rowe v. Silbaugh, 107 Wash. 518, 182 Pac. 576 (1919).

[99] State *ex rel.* Weidert v. Superior Court, 36 Wash. 81, 78 Pac. 198 (1904).

[100] Bast v. Hysom, 6 Wash. 170, 32 Pac. 997 (1893).

[101] Smith v. Smith, 36 Wn.2d 164, 217 P.2d 307 (1950).

[102] In some instances the allegations, though true, simply have not constituted fraud. A party's failure to disclose evidence which would defeat his claim is not fraudulent. Burke v. Bladine, 99 Wash. 383, 169 Pac. 811 (1918); McDougall v. Walling, 21 Wash. 478, 58 Pac. 669 (1899). The violation of an oral agreement between attorneys does not constitute fraud under subdivision four in view of WASH. RULE PLEADING, PRACTICE, PROCEDURE 89.04W requiring such agreements to be in writing. Muscek v. Equitable Sav. & Loan Ass'n, 25 Wn.2d 546, 171 P.2d 856 (1946).

[103] 16 Wn.2d 48, 132 P.2d 368 (1942).

or that they would participate in the decree of distribution, extrinsic fraud would have been found. In such an instance there would have been intentional conduct preventing a fair determination of the controversy.

Numerous cases have arisen in which an attempt has been made to obtain vacation on the basis of perjured testimony at the trial. It is clear that perjury alone does not constitute fraud sufficient under subdivision four to justify the vacating of a judgment.[104] It is necessary that the circumstances be such as to relieve the party seeking vacation of all implication of want of diligence and to deceive him completely as to the nature of the testimony.[105] Perhaps if it could be established that the adverse party had intentionally procured the perjured testimony and that the exercise of reasonable diligence would not have discovered this, the necessary extrinsic or collateral fraud would be found.

Situations may arise where it will be difficult to determine whether the ground for vacation is "fraud practiced by the successful party" or "mistake, omission or neglect." Suppose a party in asking for relief chooses a ground different from the one the court deems applicable. Is relief to be denied? The court has indicated that it will not engage in refined distinctions in distinguishing between "fraud" and "mistake."[106] Presumably the same attitude will, and should, prevail in the interpretation and application of all grounds for vacation. Otherwise, one may be denied relief because of a technical error in having guessed wrong in choosing among the numerous and sometimes ambiguous statutory provisions.

Subsection five authorizes vacation "for erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings." This provision has been given a narrow construction. Assuming that a proper person is appointed as guardian and that he properly represents the minor or incompetent person, and absent fraud upon the guardian or collusion by the guardian with the adverse party,

---

[104] Huseby v. Kilgore, 32 Wn.2d 179, 201 P.2d 148 (1948); Burke v. Bladine, 99 Wash. 383, 169 Pac. 811 (1918); Friedman v. Manley, 21 Wash. 675, 59 Pac. 490 (1899); McDougall v. Walling, 21 Wash. 478, 58 Pac. 669 (1899).

[105] Doss v. Schuller, 47 Wn.2d 520, 288 P.2d 475 (1955).

[106] Hull v. Vining, 17 Wash. 352, 49 Pac. 537 (1897). This case is of consequence also in indicating that if the ground for the vacation relates to a defense rather than to an affirmative claim, there is greater reason for allowing vacation. If vacation is denied in the case of the defense, there is no other relief available, whereas in the instance of an affirmative claim, another action may be instituted assuming a statute of limitations has not run.

minors and incompetents are bound the same as other persons.[107] No distinction is otherwise recognized under the subsection between a decree in favor of or against infants and a decree to which adults only are parties, and the same invalidating vice must be found in the one case as in the other.[108]

Subsection eight should be considered in conjunction thereto. Vacation is allowed "for error in a judgment shown by a minor, within twelve months after arriving at full age." Where it is sought to vacate a decree on the ground of error shown under this subsection, the error must clearly appear upon the face of the record in the original proceedings and must be such error as would have entitled the minor to a reversal of the decree upon appeal, had he been under no disability at the time of its entry and in a position to prosecute an appeal.[109] The principal effect of the subdivision is to extend the period within which vacation may be had. The minor may seek vacation within one year after arriving at majority. Thus a minor acting within one year after arriving at majority was able to obtain the vacation of a judgment awarding all of his mother's property to her surviving husband for error in admitting oral evidence to vary a will which failed to mention the children of the testator.[110]

Vacation may be had under subdivision six "for the death of one of the parties before the judgment in the action." Care should be taken in such an instance to abide by the statutory procedures for vacation, as explained below, as it has been said that such a judgment is only voidable within the time and manner provided by statute and not void so as to authorize a collateral attack.[111] Finally, subsection seven authorizes vacation "for unavoidable casualty, or misfortune preventing the party from prosecuting or defending." There has been little litigation involving the meaning of this provision. It would appear that it has reference to such things as sicknesses, accidents, or perhaps death in the immediate family of one of the parties, such as to prevent the party from prosecuting or defending.

The time limit within which application must be made for vacation under RCW 4.72 is one year after the entry of the order, judgment or

[107] *In re* Hardison, 28 Wn.2d 921, 184 P.2d 840 (1947); Burke v. Northern Pac. Ry., 86 Wash. 37, 149 Pac. 335 (1915); Kromer v. Friday, 10 Wash. 621, 39 Pac. 229 (1895).

[108] Handley v. Morton, 54 Wn.2d 489, 342 P.2d 612 (1959).

[109] Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154 (1905); Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099 (1904).

[110] Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779 (1901).

[111] Gordon v. Hillman, 109 Wash. 223, 186 Pac. 651 (1919); Hotchkin v. Bussell, 46 Wash. 7, 89 Pac. 183 (1907).

decree in question.[112] It is one year from the entry and not from the time of discovery of the mistake, omission, irregularity or other ground.[113] After the elapse of a year the only remedy available for the vacation of a judgment is an independent action in equity or a collateral attack.[114] This does not mean that the party may elect to seek vacation under the statutes within the year or wait and bring an independent action in equity after the elapse of a year. He has no such election. If the ground is discovered within the year, as fraud, the statutory remedy is exclusive. A failure to apply during the year will result in the denial of relief later should an independent suit be initiated.[115]

The requirements for statutory vacation are not met from a time standpoint simply by filing an application some time within the year. Due diligence must be exercised and any unreasonable or unexplained laches in applying for relief may result in the denial thereof.[116] Thus where one sought vacation within three days of the expiration of the year without any showing of diligence, relief was denied.[117]

By virtue of Washington Rule on Appeal 15, once notice of appeal is given the supreme court acquires jurisdiction of the case. The superior court is then without power pending the appeal to vacate, change or modify the judgment.[118] Further, a judgment of the superior court, appealed to the supreme court and determined upon its merits, becomes in effect a judgment of the supreme court. The superior court is without power after its remand to vacate or otherwise modify it except in such manner as may be necessary to carry out the mandate of the supreme court.[119] This latter rule is subject to the qualification, however, that the supreme court will, upon a proper showing made

[112] WASH. RULE PLEADING, PRACTICE, PROCEDURE 60.04W; Collins v. Sea Prod. Co., 124 Wash. 625, 214 Pac. 15 (1923); Spokane Valley Power Co. v. Northern Pac. Ry., 99 Wash. 557, 169 Pac. 991 (1918); Krohn v. Hirsch, 81 Wash. 222, 142 Pac. 647 (1914).

[113] Scottish Am. Mortgage Co., Ltd. v. Stone, 132 Wash. 487, 232 Pac. 289 (1925); Nevers v. Cochrane, 131 Wash. 225, 229 Pac. 738 (1924).

[114] State *ex rel.* Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013 (1898).

[115] Batey v. Batey, 35 Wn.2d 791, 215 P.2d 694 (1950).

[116] Dawson v. Carstens, 98 Wash. 96, 167 Pac. 86 (1917); Nelson v. Nelson, 56 Wash. 571, 106 Pac. 138 (1910); Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042 (1894).

[117] Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182 (1901).

[118] Kawabe v. Continental Life Ins. Co., 99 Wash. 214, 169 Pac. 329 (1917); Gust v. Gust, 71 Wash. 75, 127 Pac. 556 (1912); Inland Nursery & Floral Co. v. Rice, 56 Wash. 21, 104 Pac. 1117 (1909); Aetna Ins. Co. v. Thompson, 34 Wash. 610, 76 Pac. 105 (1904); Canada Settlers Loan & Trust Co. v. Murray, 20 Wash. 656, 56 Pac. 368 (1899); State *ex rel.* Mullen v. Superior Court, 15 Wash. 376, 46 Pac. 402 (1896).

[119] State *ex rel.* Seattle v. Superior Court, 1 Wn.2d 630, 96 P.2d 596 (1939); Richardson v. Sears, 87 Wash. 207, 151 Pac. 504 (1915); Pacific Drug Co. v. Hamilton, 76 Wash 524, 136 Pac. 1144 (1913); Kath v. Brown, 53 Wash. 480, 102 Pac. 424, (1909); State *ex rel.* Jefferson County v. Hatch, 36 Wash. 164, 78 Pac. 796 (1904); State *ex rel.* Wolferman v. Superior Court, 8 Wash. 591, 36 Pac. 443 (1894).

within the year, grant leave to apply to the lower court for the vacation of a judgment affirmed by the supreme court.[120] It is to be stressed that the mere fact that leave to move against the judgment is granted by the supreme court does not justify vacation by the trial court. The applicant must still qualify under the statutory grounds for vacation.[121] Also it is to be noted that the time during which the appeal is pending is not counted as part of the time within which the applicant is required to move against the judgment for its vacation.[122]

One other point relating to the year limitation is that the fact the judgment is subject to vacation for that period does not prevent it from being final in character. Execution may be had and the judgment may be enforced in another state by a suit for a judgment thereon during the year. Any grounds for vacation tried and determined in the other state in the suit on the judgment are res judicata and bar an application to vacate the judgment in this state on the same grounds.[123]

Assuming that proper statutory grounds are established and that the party acts diligently within a year in seeking vacation, the question may be posed as to what steps must be followed. Washington Rule of Pleading, Practice and Procedure 60.04W prescribes the procedure and, in doing so, in effect supersedes several parts of RCW 4.72. Application is to be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding. A failure to supply such affidavit will result in a denial of the motion even if adequate grounds are stated in the motion.[124] Care should be taken to strictly abide by the rule as to the contents of the motion and affidavit.[125]

Upon the filing of the motion and affidavit, the court will enter an order fixing the time and place of the hearing thereof and directing all

[120] Doss v. Schuller, 47 Wn.2d 520, 288 P.2d 475 (1955); Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952); Pacific Tel. & Tel. Co. v. Henneford, 199 Wash. 462, 92 P.2d 214 (1939); Haaga v. Saginaw Logging Co., 170 Wash. 93, 15 P.2d 655 (1932); Post v. City of Spokane, 35 Wash. 114, 76 Pac. 510 (1904); State *ex rel.* Post v. Superior Court, 31 Wash. 53, 71 Pac. 740 (1903); Post v. City of Spokane, 28 Wash. 701, 69 Pac. 371 (1902).

[121] Gudmundson v. Commercial Bank & Trust Co., 160 Wash. 489, 295 Pac. 167 (1931).

[122] *In re* Shilshole Avenue, 101 Wash. 136, 172 Pac. 338 (1918).

[123] Harju v. Anderson, 133 Wash. 506, 234 Pac. 15 (1925).

[124] State v. Gallagher, 46 Wn.2d 570, 283 P.2d 140 (1955).

[125] Roberts v. Shelton S.W.R.R., 21 Wash. 427, 58 Pac. 576 (1899).

parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted. The motion, affidavit and order to show cause are to be served upon the parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide. If such service cannot be made, the order is to be published as directed by the court and a copy of the motion, affidavit and order mailed to the parties at their last known post office address and another copy thereof served upon the attorneys of record such time prior to the hearing as the court directs.

Prior to the adoption of Rule 60.04W, the procedures for vacation specified in RCW 4.72 were exclusive, except for an independent suit in equity or a collateral attack.[126] With the adoption of Rule 60.04W, it became exclusive to the extent of its coverage and such statutory provisions as are inconsistent therewith are abrogated.[127] Applying this principle, the following statutes should be deemed to be superseded in whole or in part: (1) RCW 4.72.020 provides that the proceedings for the vacation of a judgment for mistakes or omissions of the clerk or irregularities in obtaining the judgment shall be by motion served on the adverse party or his attorney within one year. This subject is now covered completely by Rule 60.04W.[128] (2) RCW 4.72.030 provides that proceedings for vacation under RCW 4.72.010(2) through (7) shall be by petition verified by affidavit setting forth the judgment, the facts or errors constituting a cause to vacate it, and if the party is a defendant, the facts constituting a defense to the action. In providing for a petition, the statute is inconsistent with Rule 60.04W and should be deemed abrogated. Likewise, the contents of the affidavit are now governed by the rule. The only part of RCW 4.72.030 which remains effective is that part providing that proceedings shall be begun within one year after the judgment is entered, unless the party entitled thereto is a minor or person of unsound mind, in which case the time limit

---

[126] Betz v. Tower Sav. Bank, 185 Wash. 314, 55 P.2d 338 (1936); State *ex rel.* Post v. Superior Court, 31 Wash. 53, 71 Pac. 740 (1903); Whidby Land & Dev. Co. v. Nye, 5 Wash. 301, 31 Pac. 752 (1892).

[127] RCW 2.04.200 provides: "When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect."

[128] The statute is cited in Pederson v. Klinkert, 156 Wash. Dec. 326, 352 P.2d 1025 (1960) for the proposition that a proceeding for vacation must be commenced within a year after the judgment is entered. It would seem that reliance might better have been placed upon Rule 60.04W. The authority of the case for the proposition that RCW 4.72.020 remains in effect is weakened by the fact that the court relied upon the statute as providing the time limit for proceedings under subdivisions four and seven of RCW 4.72.010 when by its very wording RCW 4.72.020 had reference only to subdivision three of RCW 4.72.010.

is one year from the removal of such disability. (3) RCW 4.72.040 provides for the procedure upon the filing and service of a petition. As the rule makes no provision for a petition, the statute is superseded in this respect. Except as specified below, the statute and rule otherwise cover the same matter and the rule should be deemed to supplant the statute accordingly.[129]

While the above statutes should be deemed abrogated to the extent indicated, the question remains as to what effect the decisional law construing the statutes has under the rule. At one time there was some confusion in the cases as to whether a motion or a petition was the proper method for applying for vacation due to the existence of both RCW 4.72.020 and 4.72.030.[130] This is now clarified by the rule in providing for a motion and accompanying affidavits in all instances.

Service of the application for vacation under the statutes could be made upon either the party or his attorney of record.[131] Rule 60.04W now provides for service "upon all parties affected in the same manner as in the case of summons in a civil action," if such service can be made, and if not, then it must be made by publication, plus service on the attorney of record. This clearly requires personal service on the adverse party, if possible, and service on the attorney of record will not suffice in the ordinary case.[132]

RCW 4.72.040 provides in part that "the facts stated in the petition shall be demed denied without answer." Though the petition no longer exists, a case decided since the adoption of the rule has held that no answer is required to raise an issue of fact in the event of an application to vacate a judgment.[133] A striking illustration that the quoted provision in the statute survives is *Caldwell v. Caldwell*.[134] It was held that where a motion to vacate a judgment was filed, issues of law and fact were presented which were deemed denied without answer. As the plaintiff failed to bring the issues before the court for decision within one year, the motion was subject to dismissal for want of prosecution under Washington Rule of Pleading, Practice and Procedure 41.04W(a). The case also illustrates that while the court under Rule 60.04W is directed to fix the time and place of hearing of the order

[129] See WASH. RULE PLEADING, PRACTICE, PROCEDURE (Appendix), Memorandum 4, List of Superseded Statutes and Explanation of the List, by Professor Robert Meisenholder.

[130] Mt. Vernon Nat'l Bank v. First Nat'l Bank, 104 Wash. 107, 176 Pac. 13 (1918); Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92 (1901).

[131] Foster v. Foster, 130 Wash. 376, 227 Pac. 514 (1924); Harju v. Anderson, 125 Wash. 161, 215 Pac. 327 (1923).

[132] State *ex rel.* Gaupseth v. Superior Court, 24 Wn.2d 371, 164 P.2d 890 (1946).

[133] *In re* Ellern, 29 Wn.2d 527, 188 P.2d 146 (1947).

[134] 30 Wn.2d 430, 191 P.2d 708 (1948).

to show cause, the obligation to timely procure such an order rests upon the moving party.

Though no answer was necessary under the statute, one might be filed if it did not introduce a new cause.[135] This resulted from the concluding provision of RCW 4.72.040 that the "defendant shall introduce no new cause, and the cause of the petition shall alone be tried." Such an interpretation, while restricting the issues to the cause stated in the application to vacate, enabled the defendant to establish any defense he might have to the application. It appears that this is not inconsistent with the provisions and purposes of Rule 60.04W and that an answer may still be filed subject to the stated conditions.

There is authority, since the adoption of the rule, allowing the filing of a demurrer to an application to vacate.[136] This would now be in the form of a motion to dismiss for failure to state a claim upon which relief can be granted.[137] Under RCW 4.72.040 one could waive the benefit of the statutory denial by a demurrer to the application to vacate on the ground it did not state sufficient facts and by then standing on the demurrer if it was overruled.[138] It appears that a motion to dismiss would have the same effect under Rule 60.04W.

RCW 4.72.040 provided for the trial of disputed issues of fact. To refuse to try such issues was error.[139] Likewise, there is provision in the rule for a hearing to determine factual questions. The court may try the issues itself or may elect to have them determined by a jury. Because of the equitable character of the proceedings, however, such jury determination is advisory only and is not binding upon the court.[140] Also on the matter of factual issues, at one time it was not necessary for the judge to make formal findings of fact in support of orders vacating judgments.[141] Such are now required.[142]

Finally, on the subject of what remains of RCW 4.72.040, there is authority since the adoption of the rule supporting the proposition that vacation proceedings should be conducted in the same way, as near as can be, as in an original action.[143] It appears that RCW 4.72.040 should be deemed still effective to the following extent:

---

[135] Harju v. Anderson, 133 Wash. 506, 234 Pac. 15 (1925).
[136] *In re* Ellern, 23 Wn.2d 219, 160 P.2d 639 (1945).
[137] WASH. RULE PLEADING, PRACTICE, PROCEDURE 7(c) and 12(b).
[138] State *ex rel.* Martin v. Superior Court, 148 Wash. 405, 269 Pac. 1 (1928); Meeker v. Meeker, 117 Wash. 410, 201 Pac. 786 (1921).
[139] Baer v. Lebeck, 126 Wash. 576, 219 Pac. 22 (1923).
[140] Roth v. Nash, 19 Wn.2d 731, 144 P.2d 271 (1943).
[141] Frieze v. Powell, 79 Wash. 483, 140 Pac. 690 (1914).
[142] WASH. RULE PLEADING, PRACTICE, PROCEDURE 52.04W.
[143] Wood v. Copeland Lumber Co., 41 Wn.2d 119, 247 P.2d 801 (1952).

> [Except as provided by Washington Rule of Pleading, Practice and Procedure 60.04W] all the proceedings [shall be] conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the [motion] shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the [motion] shall alone be tried.

Such a construction would not conflict with Rule 60.04W and would eliminate those areas where the rule and statute on their face now cover the same matter.

Though there are instances where RCW 4.72 is superseded or modified by Rule 60.04W, several provisions of the chapter remain effective. This is indicated by the wording of the rule itself, "Except as modified by this rule RCW 4.32.240, 4.72.010 - .090, shall remain in full force and effect." One provision that still has particular significance is RCW 4.72.050, which provides:

> The judgment shall not be vacated on motion *or petition* until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

Except for the italicized phrase "or petition" the statute is unaffected by the rule and remains in full effect. By virtue of the statute, an allegation that the petitioner has a meritorious cause of action or defense is a necessary condition for the vacation of a judgment.[144]

Considering a defendant's application first, there must be a clear showing of a prima facie defense on the merits.[145] It is necessary to set out the facts showing the prima facie defense as a bare statement or allegation is insufficient.[146] At the hearing on the motion to vacate, the court will not decide the merits of the controversy, but will only determine whether the facts alleged constitute a defense and whether there is substantial evidence to support the matters of defense so alleged.[147]

Even if a party alleges and proves facts constituting a prima facie defense, the granting or denial of the vacation is still within the discretion of the trial court.[148] This is qualified somewhat by the fact that

[144] Handley v. Mortland, 54 Wn.2d 489, 342 P.2d 612 (1959).
[145] Hoefer v. Sawtelle, 43 Wash. 23, 85 Pac. 853 (1906); Williams v. Breen, 25 Wash. 666, 66 Pac. 103 (1901).
[146] Pefound v. Gagnon, 172 Wash. 311, 20 P.2d 17 (1933); Hurley v. Kwapil, 156 Wash. 225, 286 Pac. 664 (1930).
[147] State *ex rel.* Nelms v. Superior Court, 148 Wash. 24, 267 Pac. 775 (1928); Russell v. Union Mach. & Supply Co., 100 Wash. 208, 170 Pac. 565 (1918).
[148] Lasell v. Beck, 34 Wn.2d 211, 208 P.2d 139 (1949).

where the probability of a meritorious defense is strong, less will be required on the question of cause for vacation of the proceedings.[149] On the other hand, if no cause for vacation is stated in the motion, it will be denied regardless of the strength and character of the defense.[150]

There are two instances in which an affidavit of a meritorious defense need not be filed in order to obtain a vacation. The first is where a default judgment is prematurely entered and the defendant appears within the time required to avoid default.[151] Secondly, no affidavit of a meritorious defense is necessary to vacate a judgment entered without jurisdiction.[152]

If it is a plaintiff who is seeking vacation, the statute requires that he allege facts constituting a valid cause of action. In the ordinary case, this in effect requires nothing of the plaintiff since his cause of action already appears in the complaint. In such instances, it is not necessary to repeat the showing of a valid cause of action.[153]

The remaining provisions of RCW 4.72 which remain effective may be summarized briefly. Under RCW 4.72.060 the court may first try and decide upon the grounds to vacate a judgment before trying and deciding upon the validity of the defense or cause of action. Appellate cases suggest that the court not only "may" do so, but should do so.[154] RCW 4.72.070 allows for the obtaining of an injunction suspending the proceedings when a vacation or modification is sought of a judgment or order. If the proceedings are suspended and there is then a denial of an application to vacate or modify a judgment or order for the recovery of money, RCW 4.72.090 provides that damages may be imposed against the applicant in the discretion of the court in addition to the original amount of the judgment, not exceeding ten per cent on the amount of the judgment.

Finally, RCW 4.72.080 provides that the provisions of the chapter shall not be so construed as to affect the power of the court to vacate judgments as elsewhere provided in the code. This necessitates a consideration of other statutory provisions affecting vacation.

[149] Yeck v. Department of Labor & Indus., 27 Wn.2d 92, 176 P.2d 359 (1947); Jacobsen v. Defiance Lumber, Inc., 142 Wash. 642, 253 Pac. 1088 (1927).
[150] Harter v. King County, 11 Wn.2d 583, 119 P.2d 919 (1941); Haynes v. Schwartz Co., 5 Wash. 433, 32 Pac. 220 (1892).
[151] Tiffin v. Hendricks, 44 Wn.2d 837, 271 P.2d 683 (1954); Batchelor v. Palmer, 129 Wash. 150, 224 Pac. 685 (1924); Hole v. Page, 20 Wash. 208, 54 Pac. 1123 (1898).
[152] John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938); Frieze v. Powell, 79 Wash. 483, 140 Pac. 690 (1914); Sakai v. Keeley, 66 Wash. 172, 119 Pac. 190 (1911); Bennett v. Supreme Tent of the Knights of the Maccabees of the World, 40 Wash. 431, 82 Pac. 744 (1905).
[153] Harringer v. Keenan, 117 Wash. 311, 201 Pac. 306 (1921).
[154] Harter v. King County, 11 Wn.2d 583, 119 P.2d 919 (1941); Pringle v. Pringle, 55 Wash. 93, 104 Pac. 135 (1909).

The most important of these is an easily overlooked clause in RCW 4.32.240. It is there provided that, "the court . . . may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

Examples of adequate grounds for vacation under this statute include the inducing of a party not to appear at a hearing and to interpose a defense on the basis that no personal judgment would be taken against him and then having such a judgment entered;[155] the denial of a new trial entered without notice, after an agreement to submit the same at some future time to a visiting judge who died before the matter was submitted;[156] and the entering of a default judgment where the defendant believed in good faith that he had employed a lawyer to defend the action, though such was not true.[157] It is readily apparent that the grounds provided in RCW 4.32.240 are closely related to those provided in RCW 4.72.010(3) and (7), which allow for vacation for mistakes, neglect or omission of the clerk or irregularity in obtaining a judgment or order, and for unavoidable casualty, or misfortune preventing the party from prosecuting or defending. There is no indication that the court will indulge in refined distinctions requiring the moving party to choose a particular ground. The court will be more concerned with the relief sought and the objective sought to be attained.[158]

Rule 60.04W applies to RCW 4.32.240 just as it does to RCW 4.72. Consequently, the procedure is the same for both. There must be a motion and supporting affidavits, both substantial grounds for relief and a meritorious defense must clearly appear,[159] and there is the same provision for the method of notice of the hearing. Discretion resides with the trial court, the one year time limitation applies, and conditions may be imposed upon the grant or denial of the requested relief.[160] Finally, the trial court may not vacate its judgment under the section for errors of law.[161]

---

155 Hull v. Vining, 17 Wash. 352, 49 Pac. 537 (1897).

156 Little Bill v. Dyslin, 51 Wash. 675, 99 Pac. 1026 (1909).

157 Kain v. Sylvester, 62 Wash. 151, 113 Pac. 573 (1911).

158 Hull v. Vining, 17 Wash. 352, 49 Pac. 537 (1897). *But see* Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053 (1894) where the court held that the proceeding must be under RCW 4.72 rather than RCW 4.32.240 when the cause assigned for vacation was that proper service had not been had upon the defendant.

159 Leavitt v. DeYoung, 43 Wn.2d 701, 263 P.2d 592 (1953).

160 Halter v. Spokane Soap Works Co., 12 Wash. 662, 42 Pac. 126 (1895).

161 *In re* Jones' Estate, 116 Wash. 424, 199 Pac. 734 (1921).

A statute requiring specialized treatment is RCW 4.28.200. Subdivision two of RCW 4.72.010 allows for vacation, "by a new trial granted in proceedings against defendant served by publication only as prescribed in RCW 4.28.200."

RCW 4.28.200 provides:

> If the summons is not served personally on the defendant... he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

The statute is restricted to those instances in which service is by publication. In authorizing a defendant to defend on a showing of "sufficient cause," the evident intent is to provide the trial court in such instances with a greater discretion in granting a vacation than in the case of personal service of process. As the court has said:

> It [the statute] did not take away any rights possessed by parties having judgments rendered against them, but gave additional rights to parties having judgments rendered against them upon service by publication. In the absence of this provision, a judgment rendered upon service by publication could not be set aside for any different reason than could other judgments.[162]

This interpretation is supported by the fact that the statute was adopted several years after the adoption of RCW 4.72 and RCW 4.32.240.

As indicated, an action initiated by personal service of summons does not come within the statute. Likewise, the section does not apply to service of summons void on its face or a judgment entered without summons of any kind. Rather the statute contemplates an application based upon matters outside the record when there has been service by publication, as in a case where a judgment has been entered on a cause of action to which the defendant has a meritorious defense and where he has in fact had no actual notice nor opportunity to present his defense.[163] Particular note should be taken that actions for divorce are excluded from the benefit of the statute.[164] This does not, however,

[162] Chaney v. Chaney, 56 Wash. 145, 151, 105 Pac. 229, 232 (1909).
[163] Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858 (1900).
[164] Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268 (1905); Metler v. Metler, 32 Wash. 494, 73 Pac. 535 (1903); McCord v. McCord, 24 Wash. 529, 64 Pac. 748 (1901).

preclude an attack upon a divorce decree obtained by service by publication for fraud under RCW 4.72.[165]

The statutes previously discussed comprise all of the statutory grounds for the vacation of judgments except in a single class of cases, namely, actions to recover possession of real property where the service is by publication and a default judgment is given for failure to answer. RCW 7.28.260 provides that in such cases the defendant, or his successor in interest, shall be entitled, upon application made at any time within two years from the rendition of the judgment and upon the payment of the costs of the action, to an order vacating the judgment and granting him a new trial. Attempts to extend the statute beyond actions to recover possession have been unsuccessful. The statute has been held not to apply to actions to set aside fraudulent conveyances,[166] actions to forfeit land contracts,[167] actions to establish lost boundaries,[168] or quiet title actions.[169]

In addition to the statutory bases for seeking the vacation of judgments, one may under some circumstances institute an independent action in equity to have a judgment set aside. One of the most common grounds asserted for such relief is that of fraud practiced by the successful party in procuring the judgment. As in the case of fraud asserted under the statutory provisions as a ground for vacation, it must be extrinsic in character.[170]

If the fraud is discovered within one year of the judgment, the proceedings for vacation must be instituted under the statutory provisions as the procedure set forth therein is exclusive.[171] One may not elect to wait and begin a separate equitable action later.[172] If a year has elapsed at the time of the discovery of the fraud, it is not possible to seek relief by motion in the original action. It is then necessary to institute a suit in equity.[173]

---

[165] Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229 (1909); Graham v. Graham, 54 Wash. 70, 102 Pac. 891 (1909); McDonald v. McDonald, 34 Wash. 293, 75 Pac. 865 (1904).

[166] Jordon v. Hutchinson, 39 Wash. 373, 81 Pac. 867 (1905).

[167] Smith v. Stiles, 68 Wash. 345, 123 Pac. 448 (1912).

[168] Strunz v. Hood, 44 Wash. 99, 87 Pac. 45 (1906).

[169] Bruhn v. Pasco Land Co., 67 Wash. 490, 121 Pac. 981 (1912).

[170] Farley v. Davis, 10 Wn.2d 62, 116 P.2d 263 (1941).

[171] Batey v. Batey, 35 Wn.2d 791, 215 P.2d 694 (1950); Muller v. Hendry, 171 Wash. 9, 17 P.2d 602 (1932); State *ex rel.* Post v. Superior Court, 31 Wash. 53, 71 Pac. 740 (1903).

[172] Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061 (1898).

[173] Nevers v. Cochrane, 131 Wash. 225, 229 Pac. 738 (1924); Twigg v. James, 37 Wash. 434, 79 Pac. 959 (1905); State *ex rel.* Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013 (1898).

If the fraud is discovered after the elapse of a year, one must make seasonable application for equitable relief. Any unexplained laches may result in denial of the requested relief.[174] It has been further held that the maximum period for obtaining relief from a judgment on the ground of fraud, even by an independent equitable action, is three years from the time of discovery of the fraud.[175] To be contrasted with this is the situation where, instead of instituting an independent action for relief, the party sets up the alleged fraud as an equitable defense to a suit on the judgment. Such an equitable defense is not barred by any statute of limitations or by laches as long as a right of action on the judgment survives; the defense may be made whenever the judgment is sought to be enforced.[176]

If one timely seeks the vacation of a judgment by motion in accordance with the rules and statutes and this is denied, he is precluded in any subsequent proceeding, whether it be by motion or an independent action, from obtaining the same relief.[177] Thus, as an example, the denial of a timely motion to vacate a judgment for fraud bars a subsequent action in equity to set aside the judgment.[178]

Just as a motion in the original proceedings to vacate a judgment must be made in the court rendering the judgment, so likewise an independent suit must be initiated there. No court other than that which rendered the judgment may grant the equitable relief.[179] The statutory and rule provisions setting forth the procedures for obtaining vacation do not, however, apply in the case of an independent suit for equitable relief.[180] Instead, one must institute an original action by serving process upon the party and the matter will be tried out as any other ordinary suit in equity.[181]

Another common ground alleged for equitable relief is lack of jurisdiction to render the judgment. A judgment entered without jurisdic-

---

[174] Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777 (1910); Washington Dredging & Improvement Co. v. State, 53 Wash. 346, 101 Pac. 884 (1909).

[175] Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923 (1917); Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757 (1902).

[176] State *ex rel.* American Freehold-Land Mortgage Co. v. Tanner, 45 Wash. 348, 88 Pac. 321 (1907).

[177] Kelley v. Sakai, 72 Wash. 364, 130 Pac. 503 (1913); Newell v. Young, 59 Wash. 286, 109 Pac. 801 (1910); Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874 (1909).

[178] Muller v. Hendry, 171 Wash. 9, 17 P.2d 602 (1932).

[179] *Compare,* Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923 (1917) where action brought in Pacific County to set aside judgment of King County was not allowed, *with* later case of Rowe v. Silbaugh, 107 Wash. 518, 182 Pac. 576 (1919) where action brought in King County was allowed.

[180] Spokane Co-Operative Mining Co. v. Pearson, 28 Wash. 118, 68 Pac. 165 (1902).

[181] Foster v. Foster, 130 Wash. 376, 227 Pac. 514 (1924); State *ex rel.* Northern Pac. Ry. v. Superior Court, 101 Wash. 144, 172 Pac. 336 (1918).

tion may be attacked directly, *i.e.*, under the statute or in equity, regardless of whether the defect appears by the record or not.[182] Evidence outside the record is admissible. There is, of course, a presumption of jurisdiction which must be overcome by clear and convincing proof.[183] The mere fact that defects appear in the record is not sufficent proof to overcome the presumption as it will be presumed that jurisdiction was properly acquired by means not shown in the record.[184] However, evidence clearly establishing that personal service was not had upon the defendant or that land involved was not within the county would be sufficient. The fact of a recital in the judgment that jurisdiction existed[185] or a statement in the return of a sheriff that proper service was made[186] does not preclude an attack upon the judgment.

There is no time limit as a judgment entered without jurisdiction is void.[187] The court has said that this is true without regard to laches.[188] It may be assumed that circumstances might be such, as for example reliance by a third party on the judgment, that equitable considerations would weigh against vacating the judgment should too long a time elapse. This is for the court to determine in its discretion. Just as the one year statutory time limit does not apply, so likewise it is not necessary to show a defense upon the merits. The law requires no showing other than that the defendant was, in fact, not served with process or that there was no jurisdiction over the subject matter. This results from the fact that the power to vacate such judgments does not arise from the statutes or rule; it is an inherent power of the court.[189]

One may elect to proceed in the original action in accordance with the statutes and rule or he may proceed by an independent equitable suit to attack a judgment for lack of jurisdiction. Upon the termination of one, he may not then proceed under the other, as an adverse judgment in one proceeding is a bar to an action for similar relief under a different name or in a different form.[190] Thus, where the defendant

[182] John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938); Hurby v. Kwapil, 156 Wash. 225, 286 Pac. 664 (1930); Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158 (1917); Bennett v. Supreme Tent of the Knights of the Maccabees of the World, 40 Wash. 431, 82 Pac. 744 (1905); Scott v. Hanford, 37 Wash. 5, 79 Pac. 481 (1905); Dane v. Daniel, 28 Wash. 155, 68 Pac. 446 (1902).

[183] Northwestern & Pac. Hypotheek Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139 (1902).

[184] Nolan v. Arnot, 36 Wash. 101, 78 Pac. 463 (1904).

[185] Burns v. Stolze, 111 Wash. 392, 191 Pac. 642 (1920).

[186] Johnson v. H. P. Gregory & Co., 4 Wash. 109, 29 Pac. 831 (1892).

[187] John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938); King County v. Rea, 21 Wn.2d 593, 152 P.2d 310 (1944).

[188] Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785 (1910).

[189] Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158 (1917); Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785 (1910).

[190] Boylan v. Bock, 60 Wash. 423, 111 Pac. 454 (1910).

sought vacation by an independent suit and lost, he was not able to succeed by a motion in the original action. His only remedy was by appeal from the adverse ruling in the independent action.[191]

In a few instances, attempts have been made to vacate judgments in equity upon grounds other than fraud and lack of jurisdiction. Though the court has spoken in terms suggesting that other grounds for equitable relief may exist, the actual cases decided on appeal indicate that a party cannot be very hopeful of success.[192] As an example, relief was denied where a judgment was prematurely entered without notice, there being jurisdiction and no fraud.[193] Even if a judgment is inequitable, it will, of course, not be set aside nor will its enforcement be enjoined, when it was the result of the complaining party's own fault or inexcusable neglect, as where a party failed to make a proper defense through his own negligence.[194]

A final method by which a judgment may be set aside is by a collateral attack thereon. Collateral attack has been variously defined by the Washington court. As used in this article, it means an attack upon a judgment in ways other than by proceedings in the original action or by proceedings in equity to have it set aside.[195]

The only ground for a collateral attack is lack of jurisdiction of the

---

[191] Stolze v. Stolze, 111 Wash. 398, 191 Pac. 641 (1920).

[192] See Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777 (1910) where equitable relief was granted when a different judgment by default was entered than the facts alleged warranted.

[193] Merchants' Collection Co. v. Sherburne, 158 Wash. 426, 290 Pac. 991 (1930); Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158 (1917).

[194] Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1939).

[195] This is in accord with RESTATEMENT, JUDGMENTS, § 11 (1942). This definition has been approved by the Washington court in Hanna v. Allen, 153 Wash. 485, 491, 279 Pac. 1098, 1100 (1929). "A collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*."

The Washington court has several times cited with approval the following definition in 34 C.J. § 827, 521 (1924): "A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it; any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree; an objection, incidentally raised in the course of the proceedings, which presents an issue collateral to the issues made by the pleadings. In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the Judgment is collateral." See Thompson v. Short, 6 Wn.2d 71, 106 P.2d 720 (1940).

In *In re* Peterson's Estate, 12 Wn.2d 686, 725, 123 P.2d 733, 751 (1942), it was said, "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law; and correlatively, a collateral, or indirect, attack on such a proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect, in some manner not provided by law."

court to render the judgment. Such an attack will be successful only if it affirmatively appears from the record that the court had no jurisdiction. Evidence may not be produced to show facts outside the record, although such facts might be sufficient to sustain a direct attack, as under the statutory provisions or in equity.[196] Further, the mere fact that the jurisdiction of a court to render a particular judgment does not appear of record does not render it subject to collateral attack. Where the record is silent upon any particular matter, it will be presumed that whatever ought to have been done was rightly done.[197]

Unlike a direct attack in equity, the fact that a judgment was procured by the fraud of one of the parties does not justify setting aside the judgment collaterally.[198] Only if the fraud is such that it deprived the court of jurisdiction will this be successful and then it is the jurisdictional factor which is controlling.[199] Barring that, where the court has jurisdiction of the subject matter and where the court has adjudged that jurisdiction over the person of the defendant has been properly acquired and where there is nothing in the record to contradict the judgment, fraud is of no consequence in a collateral proceeding.[200]

The basic reason for the strictness of the rule in a collateral attack is founded on the consideration that the regular and orderly way of trying the validity of judgments is by an appeal or under the statutes in the cause itself or by a direct suit in equity. Only lack of jurisdiction, which renders the judgment void, is deemed to be of such consequence as to justify an attack by other means.

There is, of course, no time limit for attack upon a judgment void on its face for lack of jurisdiction. In such an event, the judgment may be attacked directly or collaterally at any time.[201]

In conclusion, the most obvious means to attack an invalid judgment is by appeal. There are, however, other avenues of relief available. In numerous instances a party may rely upon any of several statutes setting forth specified grounds for vacation. One must strictly abide

---

[196] Brown v. Brown, 46 Wn.2d 370, 281 P.2d 850 (1955); Thompson v. Short, 6 Wn.2d 71, 106 P.2d 720 (1940); Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923 (1917); Scott v. Hanford, 37 Wash. 5, 79 Pac. 481 (1905). One exception to the requirement of lack of jurisdiction for a successful collateral attack is suggested by Roche v. McDonald, 136 Wash. 322, 239 Pac. 1015 (1925) where it was held that a default judgment entered upon a complaint so deficient as to conclusively negative the existence of a cause of action was void and subject to attack collaterally. The case was later reversed in Roche v. McDonald, 275 U.S. 449 (1927) on other grounds.

[197] *In re* Higdon, 30 Wn.2d 546, 192 P.2d 744 (1948).

[198] Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757 (1902).

[199] Batey v. Batey, 35 Wn.2d 791, 215 P.2d 694 (1950).

[200] Thompson v. Short, 6 Wn.2d 71, 106 P.2d 720 (1940).

[201] King County v. Rea, 21 Wn.2d 593, 152 P.2d 310 (1940).

by the statutory and rule provisions to assure the success of such proceedings. In a few instances, as lack of jurisdiction and fraud, a direct suit in equity is proper. If the lack of jurisdiction appears on the record, a judgment may even be attacked collaterally in other proceedings.

SUSAN L. FULLMER, ATTORNEY AT LAW

November 17, 2020 - 4:45 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98932-0
Appellate Court Case Title:	Sandra Merceri v. Bank of New York Mellon, et al.

The following documents have been uploaded:

- 989320_Briefs_20201117164055SC588368_6941.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2020-11-17 Response NWCLC amicus.pdf

A copy of the uploaded files will be sent to:

- Amanda@nwclc.org
- asoldato@klinedinstlaw.com
- chenry@HDM-legal.com
- ghensrude@klinedinstlaw.com
- mwalsh@klinedinstlaw.com
- pray@klinedinstlaw.com
- susan@fullmerlaw.info
- woodley@gmail.com

Comments:

Sender Name: Susan Fullmer - Email: susan@fullmerlaw.info
Address:
6523 CALIFORNIA AVE SW, #275
SEATTLE, WA, 98136
Phone: 206-567-2757

Note: The Filing Id is 20201117164055SC588368