FEDERAL PRACTICE AND PROCEDURE

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Two early cases held that a district court is without power to correct even a clerical mistake in a judgment that has been affirmed by an appellate court.[67] They are consistent with the line of authority holding that a district court may not act under Rule 60(b) to give relief from a judgment that has been affirmed unless it has leave to do so from the appellate court,[68] although it may be wondered why leave should be necessary if the mistake is truly a clerical one rather than one going to the merits of the case.

C. RELIEF UNDER SUBDIVISION (b)

§ 2857. Discretion of the Court

As is recognized in many cases, a motion for relief from a judgment under Rule 60(b) is addressed to the discretion of the court,[69] although there are some situations so extreme that the

When the attempted appeal from the order confirming the report of a special master recommending that plaintiff's petition be denied technically was invalid because there was no order dismissing the petition, the circuit court of appeals would treat the order as one containing an error "arising from oversight or omission," which could be corrected at any time under Rule 60(a), and, therefore, would consider the order as amended. Crosby v. Pacific S. S. Lines, C.C.A. 9th, 1943, 133 F.2d 470, certiorari denied 63 S.Ct. 1166, 319 U.S. 752, 87 L.Ed. 1706.

67. Without power after affirmance

Home Indem. Co. of New York v. O'Brien, C.C.A.6th, 1940, 112 F.2d 387.

Albion-Idaho Land Co. v. Adams, D.C.Idaho 1945, 58 F.Supp. 579.

68. Cases under Rule 60(b)

See § 2873.

69. Discretion of court

Bibeau v. Northeast Airlines, Inc., C.A.1970, 429 F.2d 212, 139 U.S. App.D.C. 28.

Altman v. Connally, C.A.2d, 1972, 456 F.2d 1114.

Wagner v. Pennsylvania R. Co., C.A. 3d, 1960, 282 F.2d 392.

Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., C.A.4th, 1967, 383 F.2d 249.

Hand v. U. S., C.A.5th, 1971, 441 F.2d 529.

Jacobs v. DeShetler, C.A.6th, 1972, 465 F.2d 840.

Douglass v. Pugh, C.A.6th, 1961, 287 F.2d 500.

International Nikoh Corp. v. H. K. Porter Co., C.A.7th, 1967, 374 F.2d 82.

Hale v. Ralston Purina Co., C.A.8th, 1970, 432 F.2d 156.

Martella v. Marine Cooks & Stewards Union, C.A.9th, 1971, 448 F.2d 729, certiorari denied 1972, 92 S.Ct. 1191, 405 U.S. 974, 31 L.Ed.2d 248.

Caribou Four Corners, Inc. v. Truck Ins. Exchange, C.A.10th, 1971, 443 F.2d 796.

Meyer v. Meyer, 1972, 495 P.2d 942, 209 Kan. 31.

Intercity Realty Co. v. Gibson, 1970, 175 S.E.2d 452, 457, —— W.Va. ——, citing Barron & Holtzoff (Wright ed.).

Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, quoting Barron & Holtzoff (Wright ed.).

result is foreordained and it would be an abuse of discretion either to grant relief [70] or to deny relief.[71] Appellate review is limited to determining whether the district court abused its discretion.[72]

Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).[73] A number of cases say that discretion ordinarily should incline toward granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue.[74] Other cases, however, urge caution in grant-

70. Abuse to grant

It would be an abuse of discretion to reopen a judgment if the moving party shows no legal ground for this relief. Western Union Tel. Co. v. Dismang, C.C.A.10th, 1939, 106 F.2d 362.

71. Abuse to deny

When verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, granting of a motion to alter or amend the judgment, for new trial, or for relief from the judgment, if timely made, is not discretionary. Hopkins v. Coen, C.A.6th, 1970, 431 F.2d 1055.

Notice to other members of the class of proposed voluntary dismissal of certain class actions is made mandatory by Rule 23(c). If the action is dismissed without such notice, an intervening stockholder may have the dismissal set aside as a matter of right. Pittston Co. v. Reeves, C.A.7th, 1959, 263 F.2d 328.

72. Appellate review

See § 2872.

73. Equitable principles

Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 608, **citing Barron & Holtzoff (Wright ed.).**

Assmann v. Fleming, C.C.A.8th, 1947, 159 F.2d 332.

Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, **quoting Barron & Holtzoff (Wright ed.).**

Relief provided by the rule governing relief from a judgment or order is equitable in nature and is to be administered upon equitable principles. Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936.

Granting of relief under this rule providing for relief from judgment or order because of mistake or excusable neglect is subject to general rules of equity and one ground of refusal is that of contributory fault when one has failed to use care to protect his interests or after ascertaining facts fails promptly to seek redress. Carrethers v. St. Louis-San Francisco Ry. Co., D.C.Okl.1967, 264 F.Supp. 171.

74. Incline toward granting

Hodgson v. American Can Co., Dixie Prods., D.C.Ark.1970, 317 F.Supp. 152, 158, **quoting Barron & Holtzoff (Wright ed.),** reversed in part C.A.8th, 1971, 440 F.2d 916.

Stuski v. U. S. Lines, D.C.Pa.1962, 31 F.R.D. 188, 191, **quoting Barron & Holtzoff (Wright ed.).**

In re Cremidas' Estate, D.C.Alaska 1953, 14 F.R.D. 15, 14 Alaska 234.

U. S. v. Williams, D.C.Ark.1952, 109 F.Supp. 456, 462, **citing Barron & Holtzoff.**

Ledwith v. Storkan, D.C.Neb.1942, 2 F.R.D. 539.

Marquez v. Rapid Harvest Co., 1965, 409 P.2d 285, 287, 99 Ariz. 363, **citing Barron & Holtzoff (Wright ed.).**

See also cases cited § 2852 n. 22.

ing relief and say that a judgment should be set aside only in exceptional circumstances.[75]

General formulations of this kind are of limited usefulness. It certainly is true that it is the policy of the law to favor a hearing of a litigant's claim on the merits.[76] It also is true that this policy must be balanced against the desire to achieve finality in litigation.[77]

It is proper for the court to consider whether any prejudice will result to plaintiff if the judgment is set aside, and it was an abuse of discretion for the trial court to refuse to set aside a default judgment when there were no intervening equities and no special harm would result to plaintiff except some delay in finally realizing satisfaction of its claim should plaintiff be successful on trial. Tozer v. Charles A. Krause Milling Co., C.A.3d, 1951, 189 F.2d 242.

This rule authorizing the court to vacate a default judgment should be liberally construed in order that litigants have an opportunity to be heard, and only when a party has evidenced a disregard for the judicial process or hardship will result should courts refuse to vacate a default judgment. Kinnear Corp. v. Crawford Door Sales Co., D.C.S.C.1970, 49 F.R.D. 3.

Any doubt whether in the court's discretion a motion to open a judgment should be granted is resolved in the movant's favor. U. S. v. Small, D.C.N.Y.1959, 24 F.R.D. 429.

See Wham, Federal District Court Rule 60(b): A Humane Rule Gone Wrong, 1963, 49 A.B.A.J. 566, in which it is argued that the courts have erred in not applying the rule in this spirit.

75. Only in exceptional circumstances

Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936, 938.

FDIC v. Alker, C.A.3d, 1956, 234 F.2d 113, 116–117.

Torockio v. Chamberlain Mfg. Co., D.C.Pa.1972, 56 F.R.D. 82, 87.

U. S. v. $3,216.59 in U. S. Currency, D.C.S.C.1967, 41 F.R.D. 433, 434.

DeLong's, Inc. v. Stupp Bros. Bridge & Iron Co., D.C.Mo.1965, 40 F.R.D. 127.

On motion for relief from an order of the court, the burden is upon the moving party to persuade the court that justice requires an exercise of remedial discretion in its behalf. Kowall v. U. S., D.C.Mich.1971, 53 F.R.D. 211.

Though this rule should be construed liberally in the interest of securing substantial justice between the litigants, it is nevertheless desirable that a final judgment be not lightly disturbed, and district court should scrutinize closely the motion for relief and the grounds on which it is based. Cox v. Trans World Airlines, Inc., D.C.Mo.1957, 20 F.R.D. 298.

76. Favor hearing on merits

Spann v. Commissioners of District of Columbia, C.A.1970, 443 F.2d 715, 716 n. 1, 143 U.S.App.D.C. 300.

Russell v. Cunningham, C.A.9th, 1960, 279 F.2d 797, 804.

"It has been said that 'courts will not permit technicalities to prevent them from remedying injustice.' " Trueblood v. Grayson Shops of Tennessee, Inc., D.C.Va.1963, 32 F.R.D. 190, 197. The internal quotation is from the Preliminary Report of the Advisory Committee on Civil Rules, May 1954, p. 55.

77. Balance required

Note, Federal Rule 60(b): Relief from Civil Judgments, 1952, 61 Yale L.J. 76.

The cases calling for great liberality in granting Rule 60(b) motions, for the most part, have involved default judgments. There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits.[78] On the other hand, the leading cases speaking of a requirement of exceptional or extraordinary circumstances have been cases of motions under Rule 60(b)(6).[79] That subdivision of the rule does require a very special showing by the moving party[80] and it does not assist sound analysis to repeat those phrases in cases brought pursuant to the other portions of Rule 60(b),[81] under which a less demanding standard applies.[82]

The cases show that although the courts have sought to accomplish justice, they have administered Rule 60(b) with a scrupulous regard for the aims of finality. Thus they have held that the motion must be made within a "reasonable time," even though the stated time limit has not expired.[83] They have been

"Of course a rule 60(b) proceeding by motion or independent action calls for a delicate adjustment between the desirability of finality and the prevention of injustice." In re Casco Chem. Co., C.A.5th, 1964, 335 F.2d 645, 651.

78. Merits never considered

Spann v. Commissioners of District of Columbia, C.A.1970, 443 F.2d 715, 716 n. 1, 143 U.S.App.D.C. 300.

Leong v. Railroad Transfer Serv., Inc., C.A.7th, 1962, 302 F.2d 555, 557.

Bridoux v. Eastern Air Lines, Inc., C.A.1954, 214 F.2d 207, 210, 93 U.S.App.D.C. 369, certiorari denied 75 S.Ct. 33, 348 U.S. 821, 99 L.Ed. 647.

79. Leading cases

Ackermann v. U. S., 1950, 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207.

Klapprott v. U. S., 1949, 69 S.Ct. 384, 389, 335 U.S. 601, 613, 93 L.Ed. 266.

John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., C.A.3d, 1956, 239 F.2d 815, 817.

80. Special showing

See § 2864.

81. Cases under other subsections

Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936, 938.

Flett v. W. A. Alexander & Co., C.A. 7th, 1962, 302 F.2d 321, 324, certiorari denied 83 S.Ct. 71, 371 U.S. 841, 9 L.Ed.2d 77.

Hulson v. Atchison, T. & S. F. Ry. Co., C.A.7th, 1961, 289 F.2d 726, 730, certiorari denied 82 S.Ct. 61, 368 U.S. 835, 7 L.Ed.2d 36.

U. S. v. $3,216.59 in U. S. Currency, D.C.S.C.1967, 41 F.R.D. 433, 434.

82. Less demanding standard

Wham, Federal District Court Rule 60(b): A Humane Rule Gone Wrong, 1963, 49 A.B.A.J. 566.

The difference between the special standard for Rule 60(b) (6) and that for the other portions of Rule 60(b) was clearly recognized in Martella v. Marine Cooks & Stewards Union, C.A.9th, 1971, 448 F. 2d 729, certiorari denied 92 S.Ct. 1191, 405 U.S. 974, 31 L.Ed.2d 248.

83. Reasonable time

See § 2866.

unyielding in requiring that a party show good reason for his failure to take appropriate action sooner.[84] They have prevented the needless protraction of litigation by requiring the moving party to show a good claim or defense.[85] They have been diligent to consider the hardship that a reopening of the judgment might cause to other persons, and have denied relief when many actions have been taken on the strength of the judgment,[86] or when a party would be unable to obtain his witnesses for a new

84. Good reason for delay

See § 2866 n. 70.

Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, **quoting Barron & Holtzoff (Wright ed.).**

85. Good claim or defense

Fernow v. Gubser, C.C.A.10th, 1943, 136 F.2d 971.

Residential Reroofing Union Local 30–B v. Mezicco, D.C.Pa.1972, 55 F.R.D. 516.

Associated Press v. J. B. Broadcasting of Baltimore, Ltd., D.C.Md. 1972, 54 F.R.D. 563.

Sebastiano v. U. S., D.C.Ohio 1951, 103 F.Supp. 278.

Statement by an attorney for the defaulting party that the defaulting party had a good defense to any allegation of fraud did not, without support of facts underlying the defense, sustain the burden of proof of a meritorious defense. Gomes v. Williams, C.A.10th, 1970, 420 F.2d 1364.

Refusal, in an action by a receiver of a bankrupt corporation to recover diverted assets for the bankrupt, of a district judge, who had been involved in bankruptcy proceeding for a substantial time, to set aside a default entered against defendant, who did not support his late claim, that favorable evidence could be presented at the trial on the merits, with affidavits or documents, and who did not specify his potential witnesses, was not an abuse of discretion. Madsen v. Bumb, C.A.9th, 1969, 419 F.2d 4.

Under the circumstances, defendant's failure to answer within the required time was the result of excusable neglect, and hence defendant, upon indication of compliance with terms prescribed by the court, would be permitted to submit a proposed answer, together with all statements of witnesses and reports of investigation, upon which the court would determine whether a prima facie meritorious defense existed. Trueblood v. Grayson Shops of Tennessee, Inc., D.C.Va. 1963, 32 F.R.D. 190.

When a landowner's answer to a condemnation action instituted by the United States was not timely filed and it was clear that there had been neglect, unless the court could be made to see that the landowner was suffering a clear injustice unless the default was in effect vacated, no remedial intervention could be had. U. S. v. 1.108 Acres of Land, more or less, in Towns of Riverhead & Brookhaven, Suffolk County, State of New York, D.C. N.Y.1960, 25 F.R.D. 205.

In order to set aside a prior judgment, an imperative condition of equitable intervention is that the moving parties make it clearly appear that they have a good defense to the action, and by fraud, mistake, or like equitable basis, they were deprived of their day in court, and there must be an absence of fault or neglect on the part of the movants. Bratnober v. Illinois Farm Supply Co., D.C.Minn.1958, 169 F.Supp. 85.

86. Many actions taken

Menashe v. Sutton, D.C.N.Y.1950, 90 F.Supp. 531.

action,[87] or when many persons had relied on the judgment.[88] Relief will not be given if substantial rights of the moving party have not been harmed by the judgment.[89]

Relief from a judgment is to be "upon such terms as are just." Thus the court, in addition to its general discretion whether to reopen a judgment, has further discretion to impose such conditions as it deems fit, with the moving party then giving the choice either of complying with the conditions or allowing the judgment to stand.[90] These conditions are within the court's power so long as they are a reasonable exercise of discretion.[91]

87. Witnesses unobtainable

McCawley v. Fleischmann Transp. Co., D.C.N.Y.1950, 10 F.R.D. 624.

88. Relied on judgment

Albion-Idaho Land Co. v. Adams, D.C.Idaho, 1945, 58 F.Supp. 579.

89. Substantial rights

Rule 61. See § 2883.

When defendant, although he was not served, retained counsel and filed his answer denying allegations of the complaint, and failed to show how he had been prejudiced by a lack of notice for trial, he did not meet the burden of proof necessary to invoke the court's discretion to set aside the entry of judgment and default judgment, in light of the fact that defendant's absence was not considered by the court in returning a verdict against him. Tartaglia v. Del Papa, D.C. Pa.1969, 48 F.R.D. 292.

When, at the jury's request, testimony of a witness was read to them after they had retired, omission of a part of such testimony that in no wise affected substantial rights of the parties was not a ground for vacating the judgment. Daniels v. Goldberg, D.C. N.Y.1948, 8 F.R.D. 580, affirmed C.A.2d, 1949, 173 F.2d 911.

90. Conditions imposed

Court granted leave to permit the consideration of a Rule 60(b) motion, but under the circumstances refused to stay the enforcement of money judgment attacked, on condition that if the judgment creditor obtained satisfaction of judgment, it would consent to jurisdiction of the district court to order restitution if the outcome of a Rule 60(b) proceeding should so indicate. Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 610–611. See also Bros Inc. v. Davidson, C.A.5th, 1964, 330 F. 2d 65.

When defendant, or its liability insurance carrier, had endeavored at every stage of the proceeding to create unnecessary trouble and expense for plaintiff's attorneys as a condition to vacating a default judgment, defendant or its insurance carrier would be required to pay counsel for plaintiff (1) the taxable costs of action to date, (2) cost of copies of depositions together with the cost of long distance telephone calls and certified copies of documents, and (3) the sum of $2,000 to cover attorneys' fees and such expenses as were not theretofore paid by defendant. Trueblood v. Grayson Shops of Tennessee, Inc., D.C.Va.1963, 32 F.R.D. 190.

Motion to vacate a default judgment, which was entered for defendant's failure to answer interrogatories, was granted on condition that defendant file certain answers within 30 days, produce certain books and papers and pay into court $750 for fees, costs, and expenses of plaintiff's counsel plus an additional $100 if the case did not terminate before specified future date. Hendricks v. Alcoa S. S. Co., D.C. Pa.1962, 32 F.R.D. 169.

91. Reasonable exercise

When an extraordinary condition imposed in vacating a default

§ 2858. Mistake, Inadvertence, Surprise, or Excusable Neglect

Rule 60(b) (1) authorizes the court to give relief from a judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect." Before the 1948 amendment, relief on these grounds was provided only if the moving party himself had made the blunder. No relief could be afforded for the similar defaults of the court [92] or even of the party's agents.[93] The amended rule dropped the limiting pronoun "his" in order to permit relief for the mistake or neglect of others.[94]

The authority to give relief granted by Rule 60(b) (1) has been exercised in a wide variety of cases. In some the ground has been the mistake or excusable neglect of a party not represented by counsel [95] or unable to communicate with his counsel.[96]

judgment is approved, it must be accompanied by supporting findings to show that it represents a reasonable exercise of discretion. Thorpe v. Thorpe, C.A.1966, 364 F.2d 692, 124 U.S.App.D.C. 299.

92. Courts

Jusino v. Morales & Tio, C.C.A.1st, 1944, 139 F.2d 946.

Safeway Stores, Inc. v. Coe, C.A. 1943, 136 F.2d 771, 78 U.S.App. D.C. 19, 148 A.L.R. 782.

Bonner v. Elizabeth Arden, Inc., D.C. N.Y.1948, 80 F.Supp. 243, affirmed C.A.2d, 1950, 177 F.2d 703.

Creedon v. Smith, D.C.Ohio 1948, 8 F.R.D. 162.

Fleming v. Miller, D.C.Minn.1943, 47 F.Supp. 1004, modified on other grounds C.C.A.8th, 1943, 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076.

Nachod & U. S. Signal Co. v. Automatic Signal Corp., D.C.Conn.1940, 32 F.Supp. 588.

But cf.

Bucy v. Nevada Constr. Co., C.C.A. 9th, 1942, 125 F.2d 213.

93. Party's agents

Fleming v. Miller, D.C.Minn.1943, 47 F.Supp. 1004, modified C.C.A.8th, 1943, 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076.

But see

Motion granted because of an oversight by a clerk in the employ of a party's attorney. Weller v. Socony Vacuum Oil Co. of New York, D.C.N.Y.1941, 2 F.R.D. 158.

94. Mistakes of others

Menier v. U. S., C.A.5th, 1968, 405 F.2d 245, 248, **citing Barron & Holtzoff (Wright ed.).**

The Advisory Committee Note to the 1948 amendment of Rule 60(b) said in part: "The qualifying pronoun 'his' has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc." The full Note is set out in the Appendix to the volumes on the Civil Rules and at 5 F.R.D. at 479.

95. Not represented by counsel

When defendant, a layman sued for the price of doors sold to him, attempted to answer a summons and complaint by letter to plaintiff's attorney setting forth defendant's view of the dispute, even assuming

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96. See note 96 on page 164.

Judgments entered because of the failure of a party to appear at trial have been set aside when there was a good excuse for the

that defendant's actions did constitute a mistake of law, a default judgment would be set aside when there had been a prima facie showing of meritorious defense and no showing that plaintiff would be prejudiced by the vacation of the judgment and trial upon the merits. Kinnear Corp. v. Crawford Door Sales Co., D.C.S.C.1970, 49 F.R.D. 3.

Party without counsel thought that the action taken by a trade association in a similar case in another court made it unnecessary for it to do anything. U. S. v. 96 Cases of Fireworks, D.C.Ohio 1965, 244 F. Supp. 272.

Proof that defendant was a person of slender means, and that upon service of process against her she, acting pursuant to advice of the clerk of the federal district court, caused to be transmitted to plaintiff's attorney a writing containing ten statements of fact respecting the controversy, but that did not comply with Rule 12, was a sufficient showing of mistake or excusable neglect to authorize granting of defendant's motion, for vacation of her default and the judgment, entered thereon, when defendant's proposed answer disclosed a bona fide defense to plaintiff's claim. Woods v. Severson, D.C. Neb.1949, 9 F.R.D. 84.

When the record disclosed that officers of defendant, moving to have a default judgment vacated, believed that the representative of another defendant had arranged for counsel to represent the moving defendant and that it learned for the first time that it was not being represented by counsel after judgment had been taken against it for want of appearance and answer, and defendant asserted that it had a complete defense, the motion was granted. Standard Grate Bar Co. v. Defense Plant Corp., D.C.Pa.1944, 3 F.R.D. 371.

96. Unable to communicate

In view of the fact that plaintiff's attorney had completely disappeared some time after the institution of the action and plaintiff claimed he was unaware of the service of various papers on the attorney, such as notice of taking a deposition and notice of motion to strike complaint because of his failure to appear for the deposition, the case would be remanded for a full evidentiary hearing on the issue of whether plaintiff, who defendant alleged let 18 months go before inquiring about the status of the pending lawsuit, had in fact neglected his suit. Vindigni v. Meyer, C.A.2d, 1971, 441 F.2d 376.

When defendant in an action initiated in Guam had moved to California, and plaintiff could not afford to go to Guam for trial, believed the action could be dismissed without prejudice and that his California actions on similar grounds could proceed, had had difficulties locating witnesses scattered between California and Guam, and had had no reply from a Guam lawyer for a year when he had another lawyer file motion for relief, on the ground of mistake, inadvertence, surprise, and excusable neglect, from an order dismissing the action for lack of prosecution, and the basis of the Guam judge's belief that the action lacked merit was erroneous, denial of the motion was abuse of discretion. Russell v. Cunningham, C.A.9th, 1960, 279 F.2d 797.

When in the interim between the filing of plaintiff's motion for summary judgment and the order granting defendant unopposed cross motion, plaintiff's local counsel had been appointed judge of the superior court and plaintiff had difficulties in obtaining in-state counsel and in contacting his former counsel, there was good cause for relief from an order granting summary judgment for defendant and an unopposed motion for relief

failure.[97] Judgments have been set aside when they were based on a misunderstanding about appearance and representation by counsel,[98] or because of a miscalculation about the date that a pleading was due,[99] or when a party had no actual knowledge

therefrom would be granted. International Ass'n of Machinists & Aerospace Workers v. Reeve Aleutian Airways, Inc., D.C.Alaska 1971, 330 F.Supp. 332.

97. Failure to appear

When plaintiff failed to answer call for the assignment of the case for trial because he overslept after taking prescribed medication to make him sleep, and acted promptly to remedy the situation, and it appeared that the failure to appear on time did not prejudice defendant, the ends of justice required restoration of case, which had been dismissed for lack of prosecution, to the assignment list. Denman v. Shubow, C.A.1st, 1969, 413 F.2d 258.

The fact that defendant against whom default judgment had been entered had been ill and in bed for several days prior to and at the time the default judgment was entered, and that the illness prevented his appearance in court, was such "excusable negligence" as to entitle defendant to an order setting aside the default judgment. Ken-Mar Airpark, Inc. v. Toth Aircraft & Accessories Co., D.C.Mo. 1952, 12 F.R.D. 399.

But see

Defendant was not entitled to relief from judgment, on the ground that she had been ill and unable to attend trial. U. S. v. Young, D.C. Ill.1953, 17 F.R.D. 91, affirmed C.A. 7th, 1955, 219 F.2d 108.

98. Misunderstanding

Edwin Raphael Co. v. Maharam Fabrics Corp., C.A.7th, 1960, 283 F.2d 310.

When plaintiff's delay in contacting and requesting from defendant's attorney extension of time to file a response to a counterclaim was short and there was no gross neglect on the part of plaintiff or prejudice to defendant and there was assertion of what might be a meritorious defense, the district judge abused his discretion in not relieving plaintiff of the default judgment and should have permitted a response to the counterclaim out of time. Tolson v. Hodge, C.A.4th, 1969, 411 F.2d 123.

It was an abuse of discretion to refuse to reopen a default judgment when defendant, in a California action, had sent the summons and complaint to his attorney in Arkansas and asked him to contact a particular lawyer in California and was unaware until after default was entered that the California attorney was out of town. Butner v. Neustadter, C.A.9th, 1963, 324 F.2d 783.

It was not an abuse of discretion to dismiss a suit when the case was called for a second time and none of the attorneys for either party were present, but it was an abuse of sound legal discretion to refuse to listen to reason why attorneys for both sides were absent from the courtroom and to vacate the default judgment entered against plaintiff when failure to appear was due to the alleged misapprehension shared by all attorneys that they would be called by the clerk of court when the trial of the cause was to be commenced. Leong v. Railroad Transfer Serv., Inc., C.A. 7th, 1962, 302 F.2d 555.

99. Miscalculation

Wolfsohn v. Raab, D.C.Pa.1951, 11 F.R.D. 254.

Misunderstanding as to the date that summons was served. Trueblood v. Grayson Shops of Tennessee, Inc., D.C.Va.1963, 32 F.R.D. 190.

Compare

Failure of defendant to file a copy of his answer with the clerk of

of the service of process on him.[1] Relief has been given from a default suffered through the excusable neglect of counsel preoccupied with other litigation.[2] Consent judgments have been

court was attributable to "mistake" and "excusable neglect" within this rule authorizing the court to vacate a default judgment for reasons of mistake, inadvertence, surprise, or excusable neglect, when defendant's New York attorney mailed a copy of the answer to plaintiff's counsel, which answer alleged a meritorious defense, and also indicated in an affidavit filed in support of defendant's properly filed motion to vacate the judgment that he was mistaken as to the necessity of filing an answer with the clerk because of the wording of the summons and because of his experience in the courts of New York where, unless the summons sets forth the necessity for filing an appearance and answer with the clerk of court, it is not necessary to file an answer until the date of trial. A. F. Dormeyer Co. v. M. J. Sales & Distrib. Co., C.A.7th, 1972, 461 F. 2d 40.

Failure to file an answer until one day after the expiration of an extended time for service and filing of an answer permitted under an order constituted "excusable neglect" when the answer was timely served on counsel, and the trial court properly refused to grant plaintiff a default judgment for untimely filing. Davis v. Parkhill-Goodloe Co., C.A.5th, 1962, 302 F.2d 489.

1. No actual knowledge

Affidavits, submitted with a motion to open a default judgment, stating that process delivered to defendant's wife was not given to defendant because of his serious illness, but, instead, was turned over to one who was handling his business affairs and who mistakenly believed that it pertained only to bankruptcy proceedings of a corporation, of which defendant was vice president, showed mistake of fact and inadvertence and excusable neglect within the rules authorizing relief from judgment. Rooks v. American Brass Co., C.A.6th, 1959, 263 F.2d 166.

When service was made on the principal defendant in an automobile collision case, but the insurer obligated by a contract to defend had no opportunity to do so because of the neglect of an unknown employee in placing the summons and complaint received by the insurer in storage files, with the result that neither the legal department nor any officer of the insurer had knowledge until the summons was found in the files nearly a year after default was entered, and the insurer alleged a meritorious defense, relief from default would be given on the ground of mistake, inadvertence, surprise, or excusable neglect. Ellington v. Milne, D.C.N.C.1953, 14 F.R.D. 241.

Default judgment against a foreign corporation doing business in West Virginia entered in the federal district court for that state upon service of a summons on the State Auditor should be set aside and the case tried on the merits, when the summons and complaint were sent to defendant by ordinary instead of registered mail, as required by Code W.Va. 31–1–71 authorizing such service, and were not addressed to the last address furnished by defendant or received by defendant and defendant in fact had no knowledge of the action against it until after entry of default. Huntington Cab Co. v. American Fidelity & Cas. Co., D.C. W.Va.1945, 4 F.R.D. 496.

2. Preoccupied with other matters

When there was neglect of duty on the part of an assistant to the attorney general in recommending to the trial judge that a writ of habeas corpus be granted on the ground that petitioner had been

reopened when they were agreed to because of erroneous factual representations.[3] Some other cases in which grounds for relief

deprived of his constitutional rights to due process and neglect was excusable and could not have been avoided by the attorney general, a motion to vacate an order granting the petition for a writ of habeas corpus should have been granted. Naples v. Maxwell, C.A. 6th, 1966, 368 F.2d 219, certiorari denied 87 S.Ct. 1165, 386 U.S. 971, 18 L.Ed.2d 131.

When defendant in a suit for alienation of affections and criminal conversation delivered the complaint to the attorney who was representing plaintiff's husband in negotiations for settlement of a maintenance suit brought by plaintiff, and who inadvertently failed to file an answer to the complaint, it was not unreasonable for defendant to assume that settlement negotiations also related to the suits against her, and neglect was excusable, defendant was entitled to have the default set aside. Barber v. Turberville, C.A.1954, 218 F.2d 34, 94 U.S.App.D.C. 335.

A motion to open a default judgment and for leave to file an answer, counterclaim, and crossclaim on the ground of corporate defendant's counsel's negligence, occasioned by his engagement in the prosecution of the case for the United States as special assistant to Attorney General, after delivery of the summons and complaint to such counsel at defendant's principal office, as set forth in counsel's affidavit, showed that the default was not willful, but the result of counsel's excusable neglect, so as to entitle defendant to relief prayed. U. S. for Use of Kantor Bros., v. Mutual Constr. Corp., D.C.Pa. 1943, 3 F.R.D. 227.

Compare

Preoccupation of counsel with other matters, and his failure to notify client that the case was dismissed for want of prosecution, was held so extraordinary as to fall under subdivision (6), rather than subdivision (1) dealing with "excusable neglect," and thus relief was permitted after more than one year had elapsed. L. P. Steuart, Inc. v. Matthews, C.A.1964, 329 F.2d 234, 117 U.S.App.D.C. 279, certiorari denied 85 S.Ct. 50, 379 U.S. 824, 13 L.Ed.2d 35, noted 1965, 67 W.Va.L. Rev. 173, 1964, 50 Iowa L.Rev. 641.

3. Consent judgment

Under the circumstances in a proceeding to condemn land that appeared on stipulated plat as streets, the government was entitled to relief from a consent judgment on the ground that it had agreed to pay on a misunderstanding as to the owner's rights in streets, but the owner would then be entitled to withdraw the stipulation and to deny that all land was within the dedicated streets. U. S. v. Gould, C.A.5th, 1962, 301 F.2d 353.

Evidence that a laundry consented to entry against it of an injunction and a money judgment of less than the original treble damage claim, in reliance upon erroneous representations by OPA officials that a violation of the Emergency Price Control Act and regulation thereunder had occurred established excusable neglect for which judgment could be vacated, notwithstanding that the laundry was represented by counsel and had facts available to it. Fleming v. Huebsch Laundry Corp., C.C.A.7th, 1947, 159 F.2d 581.

Evidence established that creditor's attorney, employed for the purpose of prosecuting a claim against the bankrupt debtor on an unrecorded assignment of mortgage interest, had no authority to consent to an order that cash payments made by the debtor to the creditor were voidable preferences, and hence the referee's order in accordance with the attorney's consent properly was vacated under subdivision (b) of

under Rule 60(b) (1) were found to exist are set out in the margin.[4]

this rule. In re Gsand, C.C.A.3d, 1946, 153 F.2d 1001.

Compare

When counsel for plaintiffs, who sought to recover property seized under the Trading with the Enemy Act, erred in admitting in a stipulation that plaintiffs "resided" in enemy territory throughout the war, so that they were enemies under the Act and were barred from recovery under the Act, plaintiffs were entitled to relief from judgment on the ground of mistake. Griffin v. Kennedy, C.A.1965, 344 F.2d 198, 120 U.S.App.D.C. 104.

But compare

Cases refusing relief from consent judgments or from stipulations are set out in note 10 below.

4. Grounds for relief

Failure of defendant to file a copy of his answer with the clerk of court was "mistake" and "excusable neglect" when defendant's New York attorney mailed a copy of the answer to plaintiff's counsel, alleging a meritorious defense, and indicated that he was mistaken as to the necessity of filing an answer with the clerk because of the wording of the summons and his experience in the New York courts, where it normally is not necessary to file an answer. A. F. Dormeyer Co. v. M. J. Sales & Distrib. Co., C.A.7th, 1972, 461 F.2d 40.

Even though federal courts in diversity suits are to apply the bonding requirements of the forum state, when mandatory dismissal under a Puerto Rico rule for failure to post bond within 90-day period conflicted with this rule governing exercise of discretion by the court and strong federal policy of liberal treatment of parties in correcting unjust orders, the federal rule governed and allowed rescission of an order in a diversity suit, after expiration of the 90 days, imposing bond in an amount found to be excessive and inequitable, and allowed resetting bond at a lower amount. Johnson Chem. Co. v. Condado Center, Inc., C.A.1st, 1972, 453 F.2d 1044.

Misunderstanding of importance of prior order constituted a "mistake," and whether the case was dismissed because plaintiffs mistakenly thought they had complied with the order when in fact they had not or because the court mistakenly thought they had not complied with the order when in fact they had, the ground for relief would be that provided for mistake in the federal rule and a motion filed more than one year after the date of the order was untimely. Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788, certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

When a series of mischances led to the unavailability of a letter wherein landlord agreed that consent referred to in a lease clause prohibiting assignment would not be unreasonably withheld, which would completely have altered an aspect of a hearing before the bankruptcy referee on motion of the landlord for leave to institute a summary proceeding to recover possession of the leased premises, tenants were entitled to have an order permitting the institution of summary proceedings set aside on the ground of mistake. Speare v. Consolidated Assets Corp., C.A.2d, 1966, 360 F.2d 882.

In an action by a seaman against a shipowner for injuries received on the shipowner's vessel, when the shipowner's motion to dismiss the complaint on the ground that the seaman had failed to appear to have his deposition taken, had been granted unless the seaman would submit to an examination before November 16, 1959, it was an abuse of discretion for the court to deny

The instances just discussed evidence the liberality with which courts have applied this portion of the rule. In the words of one court:

> Rule 60(b) and its counterparts in state statutes, have proven themselves to be valuable, equitable and humane discretionary powers by which courts have been able to relieve the oppressed from the burden of judgments unfairly, fraudulently or mistakenly entered.[5]

But the court went on to say that it would be a perversion of the rule and its purpose to permit it to be used to circumvent another rule. Thus it refused to reopen a judgment when the only "excusable neglect" to which the party could point was that he had failed to take an appeal within the time the rules allow.

the seaman's motion to vacate the judgment that had been entered December 4, 1959 because the seaman had failed to appear for the examination as ordered, when the evidence showed that the original order had assumed that the seaman would have returned from a voyage by November 16, 1959, that the seaman's attorney had notified the shipowner that the seaman had departed on a voyage and would not return prior to December 20, 1959, and that the shipowner had agreed that the examination should take place on that date. Negron v. Peninsular Nav. Corp., C.A.2d, 1960, 279 F.2d 859.

On a motion made promptly after judgment, dismissal of an action because of the failure to appear of a doctor who had been subpoenaed was properly vacated. Sternstein v. Italia-Societa Per Azioni Di Navigazione–Genoa, C.A.2d, 1960, 275 F.2d 502.

When, after a petition for involuntary bankruptcy, defendant executed an admission or confession of bankruptcy and she was adjudicated a bankrupt and she made a prompt showing that she had a defense that she was misled into waiving through the alleged erroneous action of her attorney, defendant was entitled to have the adjudication vacated. Patapoff v. Vollstedt's Inc., C.A.9th, 1959, 267 F.2d 863.

When the affidavit that claimant's attorney had made several telephone calls to the United States Attorney's office to ascertain the proper moves in a forfeiture proceeding and thought in good faith that he had complied with the requirements was uncontroverted, and claimant alleged a meritorious defense, and the government failed to show prejudice, the judgment would be set aside on the ground of excusable neglect. U. S. v. One 1966 Chevrolet Pickup Truck, D.C. Tex.1972, 56 F.R.D. 459.

When a default was entered a little more than two months before defendant filed his petition in bankruptcy, about two months later plaintiff filed his claim in a bankruptcy proceedings bearing a notation that the action had been started and was still pending in federal district court, and six months and four days after defendant's discharge in bankruptcy plaintiff took a judgment, defendant was entitled to have the default set aside under subdivision (b) (1) of Rule 60 on the ground of "excusable neglect," even though the motion to set aside the default was tardily made. Schram v. O'Connor, D.C.Mich.1941, 2 F.R.D. 192.

5. Valuable and humane

Edwards v. Velvac, Inc., D.C.Wis. 1956, 19 F.R.D. 504, 507 (per Tehan, J.).

As the case just discussed indicates, a party cannot have relief under Rule 60(b) (1) merely because he is unhappy with the judgment. Instead he must make some showing of why he was justified in failing to avoid mistake or inadvertence.[6] Gross carelessness is not enough.[7] Ignorance of the rules is not enough,[8] nor is ignorance of the law.[9] Voluntary action by a

6. Must make showing

Associated Press v. J. B. Broadcasting of Baltimore, Ltd., D.C.Md.1972, 54 F.R.D. 563.

In re Perry, D.C.Va.1971, 336 F.Supp. 828, 829, **citing Barron & Holtzoff (Wright ed.).**

Schattman v. Texas Employment Comm'n, D.C.Tex.1971, 330 F.Supp. 328, 330, **quoting Barron & Holtzoff (Wright ed.).**

Petition of Pui Lan Yee, D.C.Cal.1957, 20 F.R.D. 399.

State v. Brown, 1969, 451 P.2d 901, 903, 9 Ariz.App. 323, **citing Barron & Holtzoff (Wright ed.).**

When the district court dismissed the action for plaintiff's failure to comply with several orders of the court relating to pretrial matters and plaintiff did not appeal or pursue any procedure to reinstate the cause until some five months after dismissal when he filed a motion to be relieved of the judgment and plaintiff did not establish the existence of extraordinary circumstances that prevented or rendered him unable to prosecute an appeal and the record did not reveal facts that would tend to show that plaintiff's failure to seek review was due to excusable neglect, the denial of the motion was within the court's discretion. Martella v. Marine Cooks & Stewards Union, Seafarers Int'l Union of North America, AFL–CIO, C.A.9th, 1971, 448 F.2d 729.

When the movant, in a proceeding on a motion to vacate certain default judgments, did not set forth in the motion, or in his affidavit in support thereof, any facts pointing out in any way that there was any mistake, inadvertence, excusable neglect, or other reason justifying relief from the judgment, and did not show to the court what defense, if any, defendant had to the actions, that he was prevented from asserting, and did not state that he did not have notice or knowledge of pendency of the actions before the default judgments were entered against him, the district judge, on a showing made by defendant, did not abuse his discretion in denying motions to vacate. Smith v. Kincaid, C.A.6th, 1957, 249 F.2d 243.

7. Carelessness

U. S. v. Thompson, C.A.8th, 1971, 438 F.2d 254.

Greenspahn v. Joseph E. Seagram & Sons, C.A.2d, 1951, 186 F.2d 616.

Neither ignorance nor carelessness on the part of an attorney will provide grounds for relief under the rule pertaining to mistake, inadvertence, surprise, or excusable neglect. Hoffman v. Celebrezze, C.A.8th, 1969, 405 F.2d 833.

Misplacing papers in the excitement of moving an attorney's office did not constitute excusable neglect in not filing an answer and did not warrant vacating default judgment when the move was made over 14 months after the commencement of the action. Standard Newspapers, Inc. v. King, C.A.2d, 1967, 375 F.2d 115.

8. Ignorance of rules

In re Wright, D.C.Mo.1965, 247 F. Supp. 648, 659.

See also cases cited in note 11 below.

Ignorance of the rules of procedure, claimed as a reason for plaintiff's failure to respond to interroga-

9. See note 9 on page 171.

party may estop him from seeking relief on the ground of mistake or excusable neglect.[10] Failure to make a timely motion

tories for which dismissal was ordered, was not the sort of "excusable neglect" contemplated by the rules as a ground for vacating an adverse judgment, and an order denying the motion to vacate the dismissal was not an abuse of discretion. Ohliger v. U. S., C.A.2d, 1962, 308 F.2d 667.

Ignorance of the rules resulting in an agreement for an unauthorized extension of time to file a motion for new trial was not grounds for relief under this rule permitting relief in cases of mistake, inadvertence and excusable neglect. Hulson v. Atchison, T. & S. F. Ry. Co., C.A.7th, 1961, 289 F.2d 726.

Failure to file a timely motion for new trial because of the erroneous belief that judgment could be entered only after a motion had been made by party was not mistake, inadvertence, or excusable neglect within Rule 60(b). Lapiczak v. Zaist, D.C.Vt.1972, 54 F.R.D. 546.

But compare

A. F. Dormeyer Co. v. M. J. Sales & Distrib. Co., C.A.7th, 1972, 461 F. 2d 40 (mistake concerning requirement of filing a copy of answer excused).

9. Ignorance of law

U. S. v. Erdoss, C.A.2d, 1971, 440 F.2d 1221, 1223, certiorari denied 92 S.Ct. 83, 404 U.S. 849, 30 L.Ed. 2d 88.

Benton v. Vinson, Elkins, Weems & Searls, C.A.2d, 1958, 255 F.2d 299, certiorari denied 79 S.Ct. 123, 358 U.S. 885, 3 L.Ed.2d 113.

Torockio v. Chamberlain Mfg. Co., D.C.Pa.1972, 56 F.R.D. 82.

Judgment will not be reopened because of "newly discovered law." Schattman v. Texas Employment Comm'n, D.C.Tex.1971, 330 F.Supp. 328, 330.

10. Voluntary action

U. S. v. Erdoss, C.A.2d, 1971, 440 F. 2d 1221, certiorari denied 92 S.Ct. 83, 404 U.S. 849, 30 L.Ed.2d 88.

In re Riedner, D.C.Wis.1950, 94 F. Supp. 289.

District court properly refused to set aside a consent decree, which provided for an injunction prohibiting discrimination against any person as a guest of corporation on the ground of "race, color, religion or national origin," and which had been approved by counsel for plaintiffs, counsel for defendants and corporate board of trustees, when the ground for the motion was that three female board members subsequently had changed their minds. Allinsmith v. Funke, C.A.6th, 1970, 421 F.2d 1350.

When it appeared that a provision in a consent judgment awarding six per cent interest on past due social security benefits was intentionally and deliberately included in an order with knowledge, consent, and approval of all parties, and time for appeal from the judgment had expired, modification of the judgment deleting an interest provision on the government's motion under the rule authorizing relief for "mistake, inadvertence, surprise or excusable neglect" was inappropriate. Hoffman v. Celebrezze, C.A.8th, 1969, 405 F.2d 833.

Plaintiff's decision to construe a discovery order for the production of documents as plaintiff saw fit and plaintiff's affidavit, which was made in answer to a motion to dismiss for refusal to produce the documents and which did not offer true compliance with the production order but merely relitigated the basic issue of copying, could not have been the result of "mistake" on the basis of which relief from the dismissal could be granted. Diapulse Corp. of America v. Curtis Pub. Co., C.A.2d, 1967, 374 F.2d 442.

Creditor's entry into a stipulation expunging its claim in an arrangement proceeding in reliance on the ability to enforce the claim in admiralty according to counsel's view of the prevailing facts was not a "mistake" entitling creditor to reopening of the proceeding. Dal Int'l Trading Co. v. Sword Line, Inc., C.A.2d, 1961, 286 F.2d 523.

When plaintiff's tort action was removed from a New York state court to the New York federal district court by reason of diversity of citizenship and was transferred to a Texas federal district court for the convenience of the parties and witnesses, in the interest of justice, and plaintiff served and filed notice of voluntary dismissal, plaintiff's allegedly tardy discovery, of the Texas two year statute of limitation in tort actions was not a "mistake, inadvertence, surprise or excusable neglect" that would warrant the granting of plaintiff's motion. Benton v. Vinson, Elkins, Weems & Searls, C.A. 2d, 1958, 255 F.2d 299, certiorari denied 79 S.Ct. 123, 358 U.S. 885, 3 L.Ed.2d 113.

In a proceeding on a petition for an order to vacate an order dismissing the action as to an individual defendant with prejudice on the ground that the dismissal was made without knowledge or consent of plaintiff, who had conferred with one of her attorneys who was closely connected with the case from the beginning, evidence sustained a finding that dismissal of individual defendant with prejudice was made by plaintiff's counsel with actual knowledge, consent, and approval of plaintiff, and the refusal to vacate the order of dismissal was not an abuse of discretion. Shackleton v. Food Machinery & Chem. Corp., C.A.7th, 1957, 248 F.2d 854.

If plaintiffs failed to inform their attorney of the existence of a critical letter, their action, though improvident, was intentional and was not ground for relief under Rule 60(b) (1). Torockio v. Chamberlain Mfg. Co., D.C.Pa.1972, 56 F. R.D. 82.

Free, voluntary, and calculated decision to dismiss as to some defendants in order to get an earlier trial date would not be set aside even though it later developed that the case could not be tried at the date contemplated. DeLong's, Inc. v. Stupp Bros. Bridge & Iron Co., D.C. Mo.1965, 40 F.R.D. 127.

"Excusable neglect" warranting vacating a judgment fixing compensation in a condemnation proceeding did not exist, despite the condemnees' lack of knowledge of the size of special parking assessment to be paid city from amounts stipulated to be awarded as compensation, when the stipulation resulted from considerable negotiation and correspondence between the parties prior to trial of the condemnation proceeding. U. S. v. Nine Parcels of Land in City of Grand Forks, D.C.N.D.1963, 215 F. Supp. 771.

Plaintiff was not entitled to relief from an order, entered pursuant to stipulation, dismissing his action with prejudice, even though a decision was rendered in another action granting relief similar to that plaintiff had sought, when the decision to stipulate to dismissal was based upon conscientious and informed estimate by counsel of plaintiff's legal chances and a weighing of benefits to be derived against prospective costs of litigation, and there was no showing that counsel did not have authority to enter into stipulation or that it was procured by coercion or fraud or under exceptional or compelling circumstances. Rarick v. United Steelworkers of America, D.C.Pa.1962, 202 F.Supp. 901.

Under the circumstances, a motion to set aside an order dismissing a corporation as a defendant in a civil action, would not be granted on the ground that counsel at the time it entered into a stipulation leading to the order of dismissal was mistaken in that counsel was under the belief that evidence could

for a new trial ordinarily is found not to have been the result of inadvertence or excusable neglect.[11] A defeated litigant cannot set aside a judgment because of his failure to interpose a defense that could have been presented at trial,[12] or because he failed to present on a motion for summary judgment all of the facts known to him that might have been useful to the court.[13]

not be produced sufficient to prove that the corporation was doing business in the jurisdiction, or on the ground that counsel was mistaken in that entry into the stipulation was predicated upon ignorance of counsel that the state legislature had re-enacted a section of the Business Corporation Law defining doing business in the state. O'Brien v. U. S. Steel Corp., D.C. Pa.1960, 25 F.R.D. 260.

But compare

Cases allowing relief from consent judgments and from stipulations are cited note 3 above.

11. New trial motion

Nugent v. Yellow Cab Co., C.A.7th, 1961, 295 F.2d 794, certiorari denied 82 S.Ct. 844, 369 U.S. 828, 7 L.Ed.2d 793.

Sutherland v. Fitzgerald, C.A.10th, 1961, 291 F.2d 846.

Hulson v. Atchison, T. & S. F. Ry. Co., C.A.7th, 1961, 289 F.2d 726, certiorari denied 82 S.Ct. 61, 368 U.S. 835, 7 L.Ed.2d 36, described in note 8 above.

John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., C.A.3d, 1956, 239 F.2d 815.

Lapiczak v. Zaist, D.C.Vt.1972, 54 F.R.D. 546, described in note 8 above.

Frank v. New Amsterdam Cas. Co., D.C.Pa.1961, 27 F.R.D. 258.

But compare

When the docketing stamp of the clerk of court was smudged and indiscernible and made it impossible to ascertain the date of final judgment and petitioner filed his motion for new trial one day late, excusable neglect was established and the motion would be considered to be timely so as to stay the running of the time for filing a notice of appeal. Crawford v. West India Carriers, Inc., D.C.Fla.1972, 56 F.R.D. 32.

12. Interpose defense

Schattman v. Texas Employment Comm'n, D.C.Tex.1971, 330 F.Supp. 328, 330.

Colonial Book Co. v. Amsco School Publications, Inc., D.C.N.Y.1943, 48 F.Supp. 794, affirmed C.C.A.2d, 1944, 142 F.2d 362.

When a taxpayer was awarded judgment for the recovery of taxes allegedly illegally collected with interest from July 31, 1951, the government's motion to amend the judgment to reduce the amount awarded because of erroneous funds by the district director not made within two years of the alleged refund was barred by limitations. Weiler v. U. S., D.C.Pa.1961, 191 F.Supp. 601.

13. Summary judgment

Denial of a motion to set aside a judgment upon grounds of excusable neglect or inadvertence was not an abuse of discretion when counsel failed to file counter-affidavits and points and authorities in opposition to defendants' motion for summary judgment. Smith v. Stone, C.A.9th, 1962, 308 F.2d 15.

When plaintiffs withdrew from their file and delivered to their attorney only the documentary evidence that they believed to be pertinent to their claim, and plaintiffs moved for summary judgment and, notwithstanding the cross-motion of defendant for summary judgment, plaintiffs elected to proceed on the record made by them at the hear-

Relief from a judgment entered for failure to answer in the time permitted often is denied.[14] Other cases in which it was held that no sufficient showing had been made for relief are set out in the margin.[15] But every case must be decided on its own

ing, the motion of plaintiffs to be relieved from summary judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, because plaintiffs failed to deliver to their attorney certain correspondence that was material and relevant to an issue raised by defendant's defense, would be denied. Kahle v. Amtorg Trading Corp., D.C.N.J.1952, 13 F.R.D. 107.

There is a similar decision in Torockio v. Chamberlain Mfg. Co., D.C.Pa. 1972, 56 F.R.D. 82.

Compare

When defendant filed a motion for summary judgment and counsel for plaintiff was not present when the motion was called and the court granted the motion, plaintiff was not entitled to have the order granting summary judgment set aside on the ground that counsel was engaged in litigation in Virginia, even though counsel informed the assignment commissioner thereof, when he took no steps to inform the court or the clerk of court. Bryan v. Groff, C.A.1958, 259 F.2d 162, 104 U.S.App.D.C. 5.

14. Failure to answer

Ledwith v. Storkan, D.C.Neb.1943, 2 F.R.D. 539.

Denial of a motion to set aside a default judgment in a diversity personal injury action was not an abuse of discretion when, despite repeated admonitions of the attorneys for the prevailing party during the ten months following the filing of the complaint, neither defendants nor their insurer entered an appearance or filed an answer, and nontestimonial affidavit concerning omissions of insurer was insufficient, so that no "excusable neglect" appeared. Greco v. Reynolds, C.A.3d, 1969, 416 F.2d 965.

When questions whether condemnees' earlier appearance could be called an answer and whether they should be permitted to amend it to raise defenses to the taking of their property were not raised until after a substantial portion of property had been transferred to the state and reconveyed, the only excusable neglect, mistake, inadvertence, or surprise alleged was the asserted lack of knowledge of possible defenses to taking and prima facie right to take was clear, denial of the motion to call notices of appearance an answer and to amend it was discretionary. Rands v. U. S., C.A.9th, 1966, 367 F.2d 186, judgment reversed on other grounds 1967, 88 S.Ct. 265, 389 U.S. 121, 19 L.Ed.2d 329.

Defendant against whom default judgment had been taken, and who claimed mistake, inadvertence, or excusable neglect because he did not personally consent to his attorney's failure to appear and that the default was obtained by fraud, misrepresentation, or other misconduct of plaintiff failed to show that the trial judge had abused his discretion in refusing to set aside default judgment. Nederlandsche Handel-Maatschappij, N. V. v. Jay Emm, Inc., C.A.2d, 1962, 301 F.2d 114.

That defendant, who ignored all notices and refused to accept certified mail from plaintiff's attorneys after receiving notices concerning the nature of the claim against him, assertedly was unaware of the necessity to obtain counsel did not constitute "excusable neglect." Residential Reroofing Union Local No. 30–B v. Mezicco, D.C.Pa.1972, 55 F.R.D. 516.

15. No sufficient showing

Refusal to add prejudgment interest at the time of post judgment mo-

circumstances. Even the failure to answer has been held to be "excusable neglect" when two cases were closely interrelated and

tions was not error, when no exceptions had been taken to an instruction stating the amount of the verdict if the jury should find for plaintiff and no attempt was made to reserve the interest issue. Arkla Exploration Co. v. Boren, C.A. 8th, 1969, 411 F.2d 879.

Inasmuch as plaintiff did not show that her failure to appear on her own motion for vacation of a prior order of dismissal was due to anything but inexcusable neglect and her complaint had been dismissed because of her refusal to comply with the pretrial order and to respond to a show cause order, denial of the motion to reargue motion to vacate was discretionary. Hines v. Seaboard Air Line R. Co., C.A.2d, 1965, 341 F.2d 229.

Physical incapacity of one of two lawyers representing plaintiff would not entitle plaintiff to relief from a judgment on the grounds of "excusable neglect" absent a strong showing that the other counsel could not have acted for him under circumstances, and when the other counsel was present and acted as his spokesman when he sought to file an amended pleading and when he sought relief from the judgment, there was no such excusable neglect. Flett v. W. A. Alexander & Co., C.A.7th, 1962, 302 F.2d 321, certiorari denied 83 S.Ct. 71, 371 U.S. 841, 9 L.Ed.2d 77.

When an accident causing the death of deceased occurred in 1953, and the summons and complaint were filed in 1955, and on February 4, 1958, an order was entered providing for a dismissal for failure to prosecute unless the note of issue for trial be filed within 60 days, and on March 24, 1958, the present attorney of plaintiff was retained "of counsel" by plaintiff's attorney of record, and plaintiff's present attorney made no request for an extension of time, the federal district court properly entered an order of dismissal on May 27, 1958, though plaintiff's present attorney became ill soon after being retained and was away from the office for several months, and district court properly entered an order refusing to vacate order of dismissal. Tubman v. Olympia Oil Corp., C.A.2d, 1960, 276 F.2d 581.

Movant was not entitled to relief from final judgment pursuant to Rule 60(b) when the affidavit upon which he relied and that had been executed by attorneys who originally represented movant failed to show any circumstances and facts identifying a mistake of counsel that would justify a grant of the exceptional relief sought, and facts could not be supplied by argument. U. S. v. $3,216.59 in U. S. Currency, D.C.S.C.1967, 41 F.R.D. 433.

In a proceeding on a motion to vacate a judgment of dismissal and for leave thereafter to move for summary judgment, in which plaintiff asserted that the alleged avoidance of taking of deposition by defendants and other alleged dilatory tactics were such that plaintiff was unable to move for summary judgment before the period of grace that plaintiff enjoyed for the posting of security had expired, the evidence established that defendants had not acted in such a manner as to penalize plaintiff in the prosecution of his suit. Ritter v. Hilo Varnish Corp., D.C.N.Y. 1960, 186 F.Supp. 625.

When a farm was subject to a first mortgage of a bank and a second mortgage of Farmers Home Administration, both mortgages were duly recorded, and even a perfunctory examination of the records would have disclosed the interests of the lienholders, a failure to make lienholders parties in an eminent domain proceeding was not a result of mistake and inadvertence within the rule allowing relief from judgment for such reasons, and the gov-

it was not unreasonable for the lawyer to suppose that settlement negotiations that were in progress in one case related also to the other case.[16]

Prior to the 1948 amendment, Rule 60(b) was limited to mistakes and inadvertence of a party and it was clear that a motion would not lie under it to obtain relief because of a mistake or inadvertence by the court.[17] The amendment in that year removed that restriction[18] but it is charitable to say that it is "not altogether clear" under what circumstances relief can be sought under the rule for an error of the court.[19] The cases are not consistent and the courts frequently announce rules broader than the facts of the case before them warrant.

In one case the Second Circuit held that on a motion 21 days after judgment, pointing out that the decision was erroneous in the light of a Supreme Court decision handed down 11 days after the judgment, relief from the judgment should have been granted.[20] Commenting on that decision in a later opinion, Judge Friendly, for the Second Circuit, said:

> Under such circumstances there is indeed good sense in permitting the trial court to correct its own error and, if it refuses, in allowing a timely appeal from the refusal; no good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal * * *.[21]

ernment, which did not seek to change the judgment, was not entitled to have judgment and an order of disbursement set aside on the basis that the Farmers Home Administration rather than the creditor, who had not perfected the lien, should have received portion of condemnation award. U. S. v. 758.72 Acres of Land, More or Less, in Boone & Carroll Counties, Arkansas, D.C.Ark.1959, 24 F.R.D. 271.

16. Cases interrelated

Barber v. Turberville, C.A.1954, 218 F.2d 34, 94 U.S.App.D.C. 335.

17. Former rule

See note 92 above.

18. Restriction removed

See note 94 above.

19. Not altogether clear

Schildhaus v. Moe, C.A.2d, 1964, 335 F.2d 529, 531.

20. Second Circuit decision

Tarkington v. U. S. Lines Co., C.A.2d, 1955, 222 F.2d 358.

21. Judge Friendly's comment

Schildhaus v. Moe, C.A.2d, 1964, 335 F.2d 529, 531. In the Schildhaus case itself, however, it was held that relief could not be had for judicial error on a motion made more than eight months after the entry of judgment.

There are similar broad statements from other courts.[22]

But Judge Aldrich, speaking for the First Circuit, has rejected this view. He wrote:

> We neither understand the basis for this interpretation, nor sympathize with it. If the court merely wrongly decides a point of law, that is not "inadvertence, surprise, or excusable neglect." Moreover, these words, in the context of the rule, seem addressed to some special situations justifying extraordinary relief. Plaintiff's motion is based on the broad ground that the court made an erroneous ruling, not that the mistake was attributable to special circumstances. We would apply the same equitable conception to "mistake" as seems implicit in the three accompanying grounds, under the principle of *noscitur a sociis*.
>
> A contrary view, that "mistake" means any type of judicial error, makes relief under the rule for error of law as extensive as that available under Rule 59(e), which permits motions to "alter or amend judgments." Obviously any such motion presupposes a mistake. Indeed, the argument advanced is that a broad construction of "mistake" beneficially extends the ten-day limit for motions under Rule 59(e). Calling this a benefit loses sight of the complementary interest in speedy disposition and finality, clearly intended by Rule 59.[23]

This view, too, is reflected by broad statements from other courts.[24]

22. Other courts

Meadows v. Cohen, C.A.5th, 1969, 409 F.2d 750, 752 n. 4, **citing Barron & Holtzoff (Wright ed.).**

Gila River Ranch, Inc. v. U. S., C.A. 9th, 1966, 368 F.2d 354, 357.

McDowell v. Celebrezze, C.A.5th, 1962, 310 F.2d 43, 44.

Oliver v. Monsanto Co., D.C.Tex.1972, 56 F.R.D. 370, 372, **citing Barron & Holtzoff (Wright ed.).**

Golden Dawn Shops, Inc. v. Department of HUD, D.C.Pa.1971, 333 F.Supp. 874, 879 n. 1.

23. Judge Aldrich's view

Silk v. Sandoval, C.A.1st, 1971, 435 F.2d 1266, 1267–1268, certiorari denied 91 S.Ct. 2189, 402 U.S. 1012, 29 L.Ed.2d 435.

24. Broad statements

Swam v. U. S., C.A.7th, 1964, 327 F.2d 431, 433, certiorari denied 85 S.Ct. 98, 379 U.S. 852, 13 L.Ed.2d 55.

Hartman v. Lauchli, C.A.8th, 1962, 304 F.2d 431, 432.

Blair v. Delta Air Lines, Inc., D.C. Fla.1972, 344 F.Supp. 367, 368.

"Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." Collins v. City of Wichita, C.A.10th, 1958, 254 F.2d 837, 839.

It would be difficult to choose between these two positions, if a choice were necessary. Judge Aldrich's position seems to fit better the structure of the rules. It makes more sense of the relation between Rule 59(e) and Rule 60(b) (1). Further, the limitation on the more permissive view that the motion must be made before the time for appeal has expired seems at odds with the one-year limit on motions under Rule 60(b) (1), although perhaps understandable since motions under that provision also are required to be made within a "reasonable time." On the other hand, it is hard to argue with Judge Friendly's position that there is "good sense" in allowing the trial court to correct its own errors, rather than forcing an appeal, and it cannot be definitely said that the rules preclude this.

A student commentator has suggested that "judicial error involving a fundamental misconception of the law should be distinguished from inadvertent judicial oversight * * *," and that courts should be more willing to use Rule 60(b) (1) "to correct a minor oversight, such as the omission of damages, which in most cases would be perfectly obvious, than there would be to correct a fundamental error of law, which in many cases would not be as clear." [25] That would be a very sensible distinction to draw, and some of the broad statements courts have made are perhaps best understood with regard to which side of the suggested line the particular case fell upon, but if the facts of the cases are examined the nature of the judicial error seems to be more influential with regard to the time limit for the motion than it is for whether the motion will be allowed.

The easiest group of cases is those in which the error involved a fundamental misconception of law and the motion was not made until after the time for appeal had run. Here, with one exception that may be regarded as a fluke,[26] relief is denied.[27]

25. Distinction suggested

Note, Federal Rule 60(b): Finality of Civil Judgments v. Self-Correction by District Court of Judicial Error of Law, 1967, 43 Notre Dame Law. 98, 104.

26. One exception

Notwithstanding the expiration of the time for appeal from a judgment of dismissal, the district court had inherent power over its judgments throughout the term of court during which judgments were granted to modify or change its decisions on the merits with respect to errors of law as well as to errors of fact and had the power to correct judgments of dismissal by adding the words "dismissed without prejudice" so as to give plaintiffs an opportunity to have their day in court to determine whether an amendment to a North Dakota statute could have a retroactive effect so as to permit plaintiffs to maintain the action. Myers

27. See note 27 on page 179.

But if the motion is made within the time for appeal, the cases, with very few exceptions,[28] hold that it can be granted,[29] al-

v. Westland Oil Co., D.C.N.D.1949, 96 F.Supp. 667. This language gives unwarranted significance to "terms of court," contrary to the thrust of Rule 6(c).

27. Untimely motion denied

Schildhaus v. Moe, C.A.2d, 1964, 335 F.2d 529.

Title v. U. S., C.A.9th, 1959, 263 F.2d 28, certiorari denied 79 S.Ct. 1118, 359 U.S. 989, 3 L.Ed.2d 978.

Crane v. Kerr, D.C.Ga.1971, 53 F.R.D. 311.

Rule 60(b) does not authorize reopening a judgment to remove a provision allowing interest against the United States despite a contention by the United States, on a motion made after the time for appeal had run, that there is no statutory authority for interest against it. Hoffman v. Celebrezze, C.A.8th, 1969, 405 F.2d 833.

Alleged fact that a federal district court misconceived the character of causes of action alleged in plaintiff's original complaint was not a mistake or inadvertence within the rule dealing with relief from judgment or order on ground of mistake or inadvertence. Swam v. U. S., C.A.7th, 1964, 327 F.2d 431, certiorari denied 85 S.Ct. 98, 379 U.S. 852, 13 L.Ed.2d 55.

The fact that a judgment is claimed to be erroneous is no ground for relief under Rule 60(b). Hartman v. Lauchli, C.A.8th, 1962, 304 F.2d 431.

That judgment in a condemnation case was, on another owner's appeal, judged to be erroneous insofar as it determined the extent of the property from the government's map did not render the judgment void as to another owner who did not appeal, and did not constitute a reason justifying relief under the rule relating to relief from judgment. Annat v. Beard, C.A. 5th, 1960, 277 F.2d 554, certiorari denied 81 S.Ct. 270, 364 U.S. 908, 5 L.Ed.2d 223.

When landowners brought an action contesting the validity of a state statute relating to the notice required to be given a landowner in condemnation proceedings brought to acquire a pipe line right of way, and validity of the statute was upheld by the court of appeals and certiorari was denied by Supreme Court, the fact that subsequently the Supreme Court held that notice provisions of the statute did not measure up to the requirements of due process clause of U.S.C.A. Const. Amend. 14, § 1 did not justify setting aside the judgment against the landowners. Collins v. City of Wichita, C.A.10th, 1958, 254 F.2d 837, noted 1959, 44 Iowa L.Rev. 574.

A motion to vacate a judgment under Rule 60(b) cannot be used to obtain reconsideration of matters already passed on by the court. U. S. ex rel. TVA v. McCoy, D.C.N.C. 1961, 198 F.Supp. 716.

When an alien abandoned his appeal from a judgment of the federal district court cancelling a certificate of naturalization "because of the controlling decisions," the alien's motion for relief from judgment, on the ground that recent decisions of the United States Supreme Court should equitably and legally control the issues in the case, would be denied, since a change in judicial view of applicable law, after final judgment, is not a basis for vacating a judgment entered before announcement of the change. U. S. v. Polites, D.C.Mich.1958, 24 F.R.D. 401, 272 F.2d 709, affirmed 1960, 81 S.Ct. 202, 364 U.S. 426, 5 L.Ed. 2d 173.

28. Exceptional cases

Silk v. Sandoval, C.A.1st, 1971, 435 F.2d 1266, certiorari denied 91 S.

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29. See note 29 on page 180.

though there are not a great many of these cases clearly in point.

If the judicial error is a minor oversight, of the type that is hardly more than a clerical error, it is held that relief can be granted. This result is reached whether the motion is made before the time for appeal has run [30] or merely within the one-year limit stated in Rule 60(b).[31]

Ct. 2189, 402 U.S. 1012, 29 L.Ed.2d 435, quoted at note 23 above.

Compare

In Blair v. Delta Air Lines, Inc., D.C. Fla.1972, 344 F.Supp. 367, the court held that it lacked power to reconsider its order granting summary judgment on a motion made at most 14 days after the order and eight days after entry of judgment. In this case, however, the moving party merely refiled his original memorandum of law, which he had submitted in opposition to the summary judgment motion, in support of his motion to reconsider. A sounder basis for decision would have been that a party is not entitled to have the same arguments heard twice.

29. Timely motion granted

McDowell v. Celebrezze, C.A.5th, 1962, 310 F.2d 43.

Sleek v. J. C. Penney Co., C.A.3d, 1961, 292 F.2d 256.

Tarkington v. U. S. Lines Co., C.A.2d, 1955, 222 F.2d 358.

Oliver v. Monsanto Co., D.C.Tex.1972, 56 F.R.D. 370.

Hodgson v. Applegate, 1959, 149 A. 2d 839, 849, 55 N.J.Super. 1, **citing Barron & Holtzoff (Wright ed.),** affirmed 155 A.2d 97, 31 N.J. 29.

See also

There is a dictum to this effect in Crane v. Kerr, D.C.Ga.1971, 53 F.R.D. 311, 312.

Compare

When the dismissal of wrongful death complaint on the ground of absence of any person representing decedent as administrator or executor resulted from the absence of information before the court and it appeared that the action on the claim could be maintained under Tennessee statute by the widow and children, plaintiff would be relieved from the court's order of dismissal, by reason of mistake in the court's understanding factual situations then extant, and in interest of justice, and upon plaintiff's payment of costs of action to date. Allen v. Clinchfield R. Co., D.C. Tenn.1971, 325 F.Supp. 1305. In this case the motion was made within a short time after the judgment but the opinion does not disclose whether it was within 30 days.

30. Within time for appeal

It was error for the district court to deny a Rule 60(b) motion, made before the time for appeal had run, to modify its judgment to limit benefits awarded to the period clearly provided by the governing statute. Meadows v. Cohen, C.A. 5th, 1969, 409 F.2d 750.

Even if the motion by a subcontractor's surety to amend an amended judgment to make interest run from the date of the original judgment rather than from the date of the prime contractor's counterclaim had been untimely, relief by way of modifying the judgment so that interest would run only from and after the date of verdicts was available under the rule authorizing relief from final judgment for reasons of mistake, inadvertence, surprise, or excusable neglect or for any other reason justifying relief.

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31. See note 31 on page 181.

§ 2859. Newly Discovered Evidence

Prior to 1948 newly discovered evidence was not a ground for relief from a judgment under Rule 60(b), even though it was a ground for a motion for a new trial under Rule 59 if the motion

Rocky Mountain Tool & Mach. Co. v. Tecon Corp., C.A.9th, 1966, 371 F.2d 589.

Mistake of court in overlooking the significance of the word "judgment" when it approved remittitur of $125,000 when its original intention was that $125,000 should be remitted from the "verdict," could be corrected by the court within a reasonable time before the time for appeal had expired. Gila River Ranch, Inc. v. U. S., C.A.9th, 1966, 368 F.2d 354.

31. Within one year

Brady v. Town of Chapel Hill, North Carolina, 1971, 178 S.E.2d 446, 448, 277 N.C. 720, **citing Barron & Holtzoff (Wright ed.).**

If the court had overlooked one small item of damages in its concern with the major issues in the case, relief could be sought under Rule 60(b). Southern Fireproofing Co. v. R. F. Ball Constr. Co., C.A.8th, 1964, 334 F.2d 122, 129.

Failure of the court in entering judgment to deduct a setoff to which defendant was clearly entitled was either a clerical error, correctible under Rule 60(a), or mistake and inadvertence, correctible under Rule 60(b). O'Tell v. New York, N. H. & H. R. Co., C.A.2d, 1956, 236 F.2d 472.

When, by final judgment in a condemnation proceeding, the government was requested to secure an actuarial opinion necessary to apportion an award between life tenants and remaindermen, and when the government should have been required to pay the expense of that opinion, the case was appropriate, on request by the landowners within one year of the final judgment, for relief from judgment because of mistake not apparent on the record. U. S. v. 818.76 Acres of Land, More or Less, in Cedar & Dade Counties, State of Missouri, D.C.Mo.1970, 315 F.Supp. 758.

The failure of the court to determine the exact amount of rents that a third party was required to turn over to a judgment creditor constituted "inadvertent judicial error" that the court could correct within one year. Ivor B. Clark Co. v. Hogan, D.C.N.Y.1969, 296 F. Supp. 407. In this case the court said, at 410: "It is critical to note that this Court is not attempting to accomplish by way of Rule 60(b) something for which an appeal would be a more appropriate remedy * * * nor is it permitting a relitigation of matter adjudged by the original judgment. * * * This Court, facing the problem of having to fix the value of the supersedeas bond, is merely enlarging its original opinion to include a finding with respect to an issue which, although not apparently in dispute at the time of my initial consideration of this case, should have been decided at that time."

When a motion to correct a judgment in a diversity case arising out of a Florida accident was made within a reasonable time, the court, under the rule giving it authority to afford relief from a final judgment on the ground of mistake or inadvertence, would rectify its error in failing to render a judgment reduced by a setoff required by a Florida statute, and would reduce the judgment in accordance with the required setoff, even though the motion for correction of the judgment was not made until 58 days after entry of the judgment. Caraway v. Sain, D.C.Fla.1959, 23 F.R.D. 657.

were made before the expiration of the time for appeal, and it might have been a ground for an equitable bill of review. In the amendments of 1948 the time for moving for a new trial because of newly discovered evidence was reduced to ten days, but Rule 60(b)(2) was added to allow a motion for relief from the judgment within one year after judgment on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." [32]

The same standard applies to motions on the ground of newly discovered evidence whether they are made under Rule 59 or Rule 60(b)(2),[33] and decisions construing Rule 59 in this context are authoritative in construing Rule 60(b)(2).[34] Under both rules, the evidence must have been in existence at the time of the trial,[35] but if it was in the possession of the party before the

32. Added by amendment

The Advisory Committee Note to the 1948 amendment of Rule 60(b) said in part: "To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal." The full text of the Note appears in the Appendix to the volumes on Civil Rules and 5 F.R.D. at 478.

33. Same standard

U. S. Fidelity & Guar. Co. v. Lawrenson, C.A.4th, 1964, 334 F.2d 464, 465, **citing Barron & Holtzoff (Wright ed.),** certiorari denied 85 S.Ct. 141, 379 U.S. 869, 13 L.Ed.2d 71.

34. Rule 59 decisions

See § 2808.

35. Must have been in existence

Kender v. General Expressways, Ltd., D.C.Pa.1963, 34 F.R.D. 237.

The result of a new physical examination of an injured seaman was not "newly discovered evidence" that would permit reopening the judgment. Ryan v. U. S. Lines Co., C.A.2d, 1962, 303 F.2d 430.

The disqualification of a railroad employee for service a month after the close of his FELA action did not qualify as "newly discovered evidence." Brown v. Pennsylvania R. Co., C.A.3d, 1960, 282 F.2d 522, certiorari denied 81 S.Ct. 690, 365 U.S. 818, 5 L.Ed.2d 696.

When the jury was informed that plaintiff, a member of the military service, would be required to reim-

judgment was rendered it is not newly discovered and does not entitle him to relief.[36] The rule speaks of "due diligence," and

burse the government for medical expenditures out of any recovery, and after judgment for plaintiff had been entered and time to move for new trial had expired the government released and waived its claim against plaintiff for medical services, the fact of the government's release was not "newly discovered evidence" on which defendants could base a motion for relief from judgment, nor would defendants be given relief from judgment on the theory that it was inequitable to require them to pay an element of damage that plaintiff, in effect, had not suffered. Hughes v. Sanders, D.C.Okl. 1968, 287 F.Supp. 332.

36. Not "newly discovered"

In a condemnation case, tried on the theory that the three parcels involved were separately owned, it was not an abuse of discretion to deny a motion to set aside judgment on the ground that the parcels in fact were owned by defendants as tenants in partnership, when the movants, who claimed that they had been unable to show that fact because of "surprise, mistake and excusable neglect," and that they had newly discovered evidence, relied upon an affidavit of defendant who had himself testified at trial that the parcels were separately owned. Kolstad v. U. S., C.A.9th, 1959, 262 F.2d 839.

When defendant airplane manufacturer was well aware from the pleadings that plaintiffs, in an action arising from the crash of an airplane, claimed negligence by the manufacturer, and plaintiffs prior to trial advised the manufacturer precisely what provision of the Civil Air Regulations they would rely upon, the manufacturer could not claim surprise with respect to evidence regarding the asserted defect, and claim that the manufacturer was unaware until two weeks before trial as to the precise regulation that would be relied upon was an insufficient showing to excuse failure to produce at trial a letter from its own files from the Civil Aeronautics Administration, and thus the letter was not a basis either for new trial or for deleting a finding that the regulation in question was applicable. Manos v. Trans World Airlines, Inc., D.C.Ill. 1971, 324 F.Supp. 470.

In a condemnation case evidence that comparable property had been sold for $700 per acre rather than $500 per acre as advanced by appraisers for the owner was not "newly discovered" since the difference was known in fact to the owner before the trial. U. S. v. 72.71 Acres of Land in Montgomery County, D.C.Md.1959, 23 F.R.D. 635, affirmed per curiam C.A.4th, 1960, 273 F.2d 416, certiorari denied 81 S.Ct. 50, 364 U.S. 818, 5 L.Ed.2d 48.

Application of plaintiffs to vacate and set aside the district court's orders and final judgments entered on the mandate of court of appeals, which affirmed the order of the district court dismissing the complaint in a suit to enjoin discharge by the railroad of members of plaintiff union merely because they belonged to plaintiff union and not to defendant unions, would be denied because plaintiffs could have, and should have, posed contention, which was raised by applications to vacate and set aside orders and judgments, long prior to the order dismissing complaint. United R. R. Operating Crafts v. New York, N. H. & H. R. Co., D.C.N.Y.1954, 15 F.R.D. 365, affirmed per curiam C. A.2d, 1953, 205 F.2d 153, certiorari denied 74 S.Ct. 529, 347 U.S. 929, 98 L.Ed. 1081.

That plaintiff had only recently been able to verify additional facts alleged in an amended complaint, which plaintiff wished to file after the original complaint had been dismissed, and after judgment had been affirmed on appeal, was insuf-

the moving party must show why he did not have the evidence at the time of the trial or in time to move under Rule 59(b).[37]

ficient under Rule 60 when no attempt was made to substantiate the amended complaint until after judgment had been affirmed and plaintiff's attorney had advised against including additional allegations in the complaint. Von Wedel v. McGrath, D.C.N.Y.1951, 100 F. Supp. 434, affirmed per curiam C. A.2d, 1952, 194 F.2d 1013.

When plaintiff moved for an order vacating the order dismissing plaintiff's complaint, on the ground of newly discovered evidence, but plaintiff's previous affidavit indicated plaintiff was aware of the alleged evidence several months before the complaint was filed, the motion would be denied without prejudice to the making of another motion based upon mistake, inadvertence, surprise, or excusable neglect. Di Silvestro v. U. S. Veterans' Administration, D.C.N.Y. 1949, 9 F.R.D. 435.

37. Diligence required

Flett v. W. A. Alexander & Co., C.A. 7th, 1962, 302 F.2d 321, certiorari denied 83 S.Ct. 71, 371 U.S. 841, 9 L.Ed.2d 77.

Greenspahn v. Joseph E. Seagram & Sons, C.A.2d, 1951, 186 F.2d 616.

Torockio v. Chamberlain Mfg. Co., D.C.Pa.1972, 56 F.R.D. 82.

Mungin v. Florida East Coast Ry. Co., D.C.Fla.1970, 318 F.Supp. 720, affirmed C.A.5th, 1971, 441 F.2d 728, certiorari denied 92 S.Ct. 203, 404 U.S. 897, 30 L.Ed.2d 175.

Petition of Pui Lan Yee, D.C.Cal. 1957, 20 F.R.D. 399.

When a foreign patent was located in the Patent Office at two places when defendant was sued for infringement but defendant unsuccessfully searched one and failed to search the other, the denial of defendant's motion for relief from final judgment and from postjudgment settlement on the ground of newly discovered evidence consisting of the foreign patent, which defendant believed to be anticipatory of patent allegedly infringed, was not an abuse of discretion. Valmont Indus., Inc. v. Enresco, Inc., C.A.10th, 1971, 446 F.2d 1193, certiorari denied 92 S.Ct. 960, 405 U.S. 922, 30 L.Ed.2d 793.

Asserted procedural irregularity by which required procedure for waiving jury trial in writing or by oral stipulation in open court allegedly was not followed by appellants' counsel was not "newly discovered evidence" that by due diligence could not have been discovered in time to move for a new trial. Schepp v. Langmade, C.A.9th, 1969, 416 F.2d 276.

When the issue was whether the husband or wife was driving an automobile at the time wife was injured, and the jury found that the wife was the driver and that the wife and the driver of truck were both negligent and the truck driver was not called as a witness and defense counsel was unable to ascertain his whereabouts and produce him for depositions, affidavits by the truck driver in support of plaintiffs' motion for new trial that stated that the husband was the driver of the automobile did not require the court to grant a new trial in view of plaintiffs' failure to explain why the truck driver was not located and questioned prior to trial and the evidence merely was cumulative of other evidence offered by plaintiffs. Giordano v. McCartney, C.A.3d, 1967, 385 F.2d 154.

Court did not abuse its discretion in denying a motion to amend and modify an order entered on stipulated settlement of a civil action on trial when the appealing party did not demonstrate that scratch paper containing allegedly false statements of payroll figures that supposedly affected the sale price of stock was really newly discovered or that it could not have been found by due diligence, evidence thereof would have been at best

A judgment will not be reopened if the evidence is merely cumulative and would not have changed the result.[38] Despite all of

cumulative, the appealing party waited 10 months after discovery before moving to amend and modify, and no clear and convincing proof of fraud in the settlement was offered. Westerly Electronics Corp. v. Walter Kidde & Co., C.A. 2d, 1966, 367 F.2d 269.

Motion to vacate judgment on the ground of newly discovered evidence was properly denied when the party failed to show why, with due diligence, he could not have found the evidence in time to move for a new trial within the time limits of Rule 59. Stiers v. Martin, C.A.4th, 1960, 277 F.2d 737.

This rule relating to relief from judgment is not a corrective device to be used when counsel fails to avail himself of the new trial rule, insofar as newly discovered evidence is concerned. Lapiczak v. Zaist, D.C.Vt.1972, 54 F.R.D. 546.

Diligence shown

Defendant's failure to make full use of discovery procedures, in an action for breach of sales contract in which plaintiff's officer testified to contracts for resale, was not, under circumstances, such a lack of diligence as would prevent the grant of a new trial on the claim that the officer's testimony had been untruthful. Krock v. Electric Motor & Repair Co., C.A.1st, 1964, 339 F.2d 73.

38. Not change result

Giordano v. McCartney, C.A.3d, 1967, 385 F.2d 154.

U.S. Fidelity & Guar. Co. v. Lawrenson, C.A.4th, 1964, 334 F.2d 464, 466, **citing Barron & Holtzoff (Wright ed.),** certiorari denied 85 S.Ct. 141, 379 U.S. 869, 13 L.Ed.2d 71.

Zig Zag Spring Co. v. Comfort Spring Corp., C.A.3d, 1953, 200 F.2d 901.

Ramsey v. Curtis, C.A.1950, 182 F.2d 687, 86 U.S.App.D.C. 386.

Union Bleachery v. U. S., C.A.4th, 1949, 176 F.2d 517, certiorari denied 70 S.Ct. 998, 339 U.S. 964, 94 L.Ed. 1373.

Kender v. General Expressways, Ltd., D.C.Pa.1963, 34 F.R.D. 237.

Defendants found to have actual malice in the publication of false statements concerning presidential candidate were not entitled to new trial on the ground of newly discovered evidence consisting of oral statements attributed to a former President in a book concerning his evaluation of the candidate, inasmuch as at the time defendants' magazine was being prepared and edited, acts of defendants were not motivated in any way by that evaluation, for they were unaware of it, and thus the evidence would not be relevant. Goldwater v. Ginzburg, C.A.2d, 1969, 414 F.2d 324, certiorari denied 90 S.Ct. 701, 396 U.S. 1049, 24 L.Ed.2d 695.

When an appeal has been perfected and the record has been filed, the court of appeals should not remand it, without a decision on the merits, in order to allow the trial court to entertain a motion for new trial based on newly discovered evidence, unless the court of appeals can say that variance or irregularity in the testimony is such as to make it reasonably apparent that, with the facts before it, the trial court would be disposed to grant a new trial. Baruch v. Beech Aircraft Corp., C.A.10th, 1949, 172 F.2d 445.

When new evidence was not of such materiality and weight that it would probably produce a different verdict and judgment, and it was merely cumulative and possibly impeaching, and pertained to a collateral issue, and the judgment stood, aside from a collateral issue, on sufficient and adequate evidence, plaintiff's motion for relief from the verdict and judgment, on the ground of surprise, newly

these limitations, there are cases in which Rule 60(b)(2) has proved useful.[39]

discovered evidence, fraud, and alleged misrepresentation or other alleged misconduct of defendant, would be denied. Cox v. Trans World Airlines, Inc., D.C.Mo.1957, 20 F.R.D. 298.

39. Proved useful

Krock v. Electric Motor & Repair Co., C.A.1st, 1964, 339 F.2d 73, described note 37 above.

When a beneficiary, claiming accidental death benefits under a group policy for the death of the insured by hanging, had failed to prevail after adducing proof that the insured had sought to achieve only a momentary state of unconsciousness through strangulation and had provided two methods to release the tension both of which had failed to work, the assertion that the beneficiary had discovered a third method of release that also had failed to work did not constitute merely a new opinion based upon facts already presented, and the beneficiary was entitled to have a motion for relief from judgment deemed one based upon newly discovered fact. Stilwell v. Travelers Ins. Co., C.A.5th, 1964, 327 F.2d 931.

When insurers filed suit against an insured for declaratory judgment that an iron safe clause in fire policies had been violated and that therefore the insurers owed nothing to the insured because of the fire loss, and the insured counterclaimed for full amount of each policy, and judgment was entered in favor of the insurers because the records were not found in the safe after the fire, and less than seven months thereafter the records were found in a storage room and it was discovered that there had not been, in fact, any breach of the iron safe clause, the insured was entitled to relief under subdivision (b) of this rule. Serio v. Badger Mut. Ins. Co., C.A.5th, 1959, 266 F.2d 418, certiorari denied 80 S.Ct. 81, 361 U.S. 832, 4 L.Ed.2d 73.

When the court, in the course of voir dire examination, asked members of the jury panel whether any of them ever had been in a lawsuit in which they sought to recover for personal injuries or defended against such an action, and a juror, who had an action pending at time for injuries similar to those sustained by plaintiff remained silent and served as foreman of the jury, the possibility that the juror would be subject in some degree to extraneous influence of his injury and pendency of his own action rendered him incompetent and the effect of his silence was to deceive and mislead the court and the litigants in respect to his competency and had the effect of nullifying the right of peremptory challenge, and defendant, upon discovery of the juror's incompetency, was entitled to relief from the judgment entered against him. Consolidated Gas & Equip. Co. of America v. Carver, C.A.10th, 1958, 257 F.2d 111.

Compare

Plaintiffs, working interest owners and holders of overriding royalties, were entitled to a hearing on a motion to vacate a judgment for newly discovered evidence, when the jury's finding, on a conditional submission, that tampering with a well by defendant, the landowner-lessor, was not the proximate cause of damage to productive capacity, if any, of the well was induced by either (1) the belief that the lease operator by his own acts previously had destroyed the well or (2) that the well no longer was commercially productive regardless of who destroyed it, and the new evidence related to (1), and there was no judicial certainty as to what the new evidence really amounted to. Laguna Royalty Co. v. Marsh, C.A.5th, 1965, 350 F.2d 817, 823, citing **Barron & Holtzoff (Wright ed.).**

When, in an action by stockholders against officers, directors, and

§ 2860. Fraud, Misrepresentation, and Other Misconduct—Generally

Prior to 1948 there was considerable doubt whether fraud was a ground for a motion under Rule 60(b) or whether it could be attacked only by an independent action. Rule 60(b)(3) was added in 1948 to make it clear that a motion will lie for relief from a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party.[40]

A motion under Rule 60(b)(3) must be made within a reasonable time and in any event not more than a year after judg-

agents of the corporation and others for fraud and conspiracy in corporate consolidation and reorganization proceedings, dismissal of the complaint was affirmed, plaintiffs could apply to the enforcement court to reopen on the ground of after-discovered evidence of fraud, but, to succeed in reopening the reorganization proceeding, plaintiffs would have to satisfy the trial court that they had obtained substantial evidence of fraud that was not available by due diligence in time to present it either in the original reorganization proceeding or in a subsequent petition to reopen the reorganization proceeding, and that the petition attempting to reopen was made within a reasonable time. Nichols v. Alker, C.A.2d, 1956, 235 F.2d 246.

40. Reason for amendment

The Advisory Committee Note to the 1948 amendment of Rule 60(b) said in part: "Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a 'reasonable time,' which might be after the time stated in the rule had run. Fiske v. Buder, C.C.A.8th, 1942, 125 F.2d 841; see also inferentially Bucy v. Nevada Construction Co., C.C.A.9th, 1942, 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60(b) on Other Methods of Relief from Judgment, 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653–659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 322 U.S. 238, 64 S.Ct. 997." The full Note appears in the Appendix to the volumes on Civil Rules and at 5 F.R.D. at 479.

See generally Note, Attacking Fraudulently Obtained Judgments in the Federal Courts, 1963, 48 Iowa L. Rev. 398.

ment.[41] However Rule 60(b) also states that it does not limit the power of a court to entertain an independent action to relieve a party from a judgment [42] or to set aside a judgment for fraud upon the court.[43] Those avenues may be open to obtain redress from a judgment obtained by fraud that is not discovered in time to bring a motion under Rule 60(b)(3). But if the time for a motion has not run, the remedy under Rule 60(b)(3) is at least as broad as by the other procedures and the normal and preferable way to challenge the judgment on this ground is by motion in the court in which it was rendered.[44] Because Rule 60(b) does provide these procedures for raising a question of fraud in the trial court, the question cannot be asserted for the first time on appeal from the judgment allegedly obtained by fraud.[45]

The rule reaches all fraud, and rejects the confusing distinction between extrinsic and intrinsic fraud.[46] The principles that govern the motion were well stated by the Eighth Circuit in a case decided even before Rule 60(b)(3) was adopted.

> The proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law; yet the relief is equitable in character and must be administered upon equitable principles. Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case. The burden of proving such fraud and misrepresentation is, of

41. Time for motion
See § 2866.

42. Independent action
See § 2868.

43. Set aside judgment
See § 2870.

44. Proceed by motion
It is clear that the distinction between extrinsic and intrinsic fraud has been abolished for motions under Rule 60(b)(3). This is less clear with regard to the independent action. See § 2861.

The suggestion in Hadden v. Rumsey Prods., Inc., D.C.N.Y.1951, 96 F. Supp. 988, 992, reversed on other grounds C.A.2d, 1952, 196 F.2d 92, that Rule 60(b)(3), does not cover fraud on the court seems unsound. The only authority cited for the proposition is an early district court case decided long before Rule 60(b)(3) was added to the rule.

45. Not raised on appeal
Court of appeals would not consider an alleged fraudulent alteration of an assignment of rights in a motion picture, in view of the fact that the party asserting the error failed to object at trial and failed to seek relief by the procedure specified in Rule 60(b) for obtaining relief from a judgment alleged to have been obtained by fraud. Rohauer v. Friedman, C.A.9th, 1962, 306 F.2d 933, 2 A.L.R.2d 1395.

46. Distinction rejected
See § 2861.

course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. It must also be made to appear where the application is made by a defendant that he has a meritorious defense to the action. If, however, there are adequate allegations of a meritorious defense properly verified, no counter-showing will be received to refute the allegations of merits presented by the moving party.[47]

Many other cases support the propositions that the burden of proof of fraud is on the moving party [48] and that fraud must be established by clear and convincing evidence.[49] The fraud must be chargeable to an adverse party; the moving party cannot get relief because of his own fraud.[50] The motion is addressed to the

47. Governing principles

Assman v. Fleming, C.C.A.8th, 1947, 159 F.2d 332, 336 (per Gardner, J.).

48. Burden on moving party

Wilkin v. Sunbeam Corp., C.A.10th, 1972, 466 F.2d 714.

Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936.

Abel v. Tinsley, C.A.10th, 1964, 338 F.2d 514.

Cliett v. Hammonds, C.A.5th, 1961, 286 F.2d 471, certiorari denied 81 S.Ct. 1921, 366 U.S. 960, 6 L.Ed.2d 1253.

England v. Doyle, C.A.9th, 1960, 281 F.2d 304.

Atchison, T. & S. F. Ry. Co. v. Barrett, C.A.9th, 1957, 246 F.2d 846.

Parker v. Checker Taxi Co., C.A.7th, 1956, 238 F.2d 241, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719.

Kender v. General Expressways, Ltd., D.C.Pa.1963, 34 F.R.D. 237.

Newman v. Universal Enterprises, D.C.Mun.App.1957, 129 A.2d 696, 698.

49. Clear and convincing evidence

Wilkin v. Sunbeam Corp., C.A.10th, 1972, 466 F.2d 714.

Nederlandsche Handel-Maatschappij, N. V. v. Jay Emm, Inc., C.A.2d, 1962, 301 F.2d 114.

England v. Doyle, C.A.9th, 1960, 281 F.2d 304.

Atchison, T. & S. F. Ry. Co. v. Barrett, C.A.9th, 1957, 246 F.2d 846.

Saenz v. Kenedy, C.A.5th, 1950, 178 F.2d 417.

Cooper Agency v. U. S., D.C.S.C.1971, 327 F.Supp. 948.

Kender v. General Expressways, Ltd., D.C.Pa.1963, 34 F.R.D. 237.

State ex rel. Symms v. V-I Oil Co., 1971, 490 P.2d 323, 94 Idaho 456.

Danner v. Danner, Fla.App.1968, 206 So.2d 650, 653, **citing Barron & Holtzoff (Wright ed.).**

50. Adverse party

District court did not have power to entertain motions of a divorced wife, who sought judgment annulling a 1948 naturalization of her deceased husband and herself, when her allegations were of fraud, but she did not allege fraud "of an adverse party," as required by this rule and when, in any event, her motions were not made within the required one year after the decrees were entered. Simons v. U. S., C.A.2d, 1971, 452 F.2d 1110.

Judgment would not be set aside for fraud when if there was any fraud it was a fraud in which the defendants, now seeking to set aside the judgment, were the principal if not

sound discretion of the court.[51] The motion will be denied if it is merely an attempt to relitigate the case [52] or if the court otherwise concludes that fraud has not been established.[53] If the moving party satisfies the applicable tests, relief will be granted.[54]

the sole participants. Menashe v. Sutton, D.C.N.Y.1950, 90 F.Supp. 531.

51. Discretion of court

Wilkin v. Sunbeam Corp., C.A.10th, 1972, 466 F.2d 714.

Abel v. Tinsley, C.A.10th, 1964, 338 F.2d 514.

England v. Doyle, C.A.9th, 1960, 281 F.2d 304.

Parker v. Checker Taxi Co., C.A.7th, 1956, 238 F.2d 241, certiorari denied 77 S.Ct. 681, 353 U.S. 922, 1 L.Ed.2d 719.

"Such a motion for relief is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who 'presided in the litigation in which the judgment (now alleged as fraudulent) was entered.' * * * Discretion is peculiarly and properly left to the trial court in matters of this kind." Atchison, T. & S. F. Ry. Co. v. Barrett, C.A.9th, 1957, 246 F.2d 846, 849.

In a proceeding on motion by an intervenor to set aside a judgment on ground of fraud, it was duty of trial court to weigh evidence and determine credibility of the witnesses. Cuthill v. Ortman-Miller Mach. Co., C.A.7th, 1957, 249 F.2d 43, certiorari denied 78 S.Ct. 703, 356 U.S. 919, 2 L.Ed.2d 715.

On the exercise of discretion, see generally § 2857.

52. Attempt to relitigate

A motion for relief from judgment on the ground of fraud properly was denied when the movant merely was attempting to use the motion to relitigate the merits of his patent infringement claim, and allegations of fraud were not substantiated. Mastini v. American Tel. & Tel. Co., C.A.2d, 1966, 369 F.2d 378, certiorari denied 87 S.Ct. 2055, 387 U.S. 933, 18 L.Ed.2d 994.

Plaintiff in stockholder derivative action was not entitled to relief from a judgment for fraud upon the court when plaintiff sought merely to reargue the issue of fraud allegedly practiced upon the Securities and Exchange Commission in obtaining permission for a challenged transaction and when no showing was made that the determination that fraud had not been present had in turn been obtained through fraud practiced upon the court. Hawkins v. Lindsley, C.A.2d, 1964, 327 F.2d 356.

Party was not entitled to relief from a judgment entered more than five years prior to the filing of the instant action, seeking to set aside the prior judgment on the ground of misrepresentation by the opposing party, particularly when there was no clear and convincing evidence of fraud, and when the party merely was attempting to relitigate the issue of misrepresentation, previously decided and to reopen the settlement which had in effect been approved by the court. Cooper Agency v. U. S., D.C.S.C.1971, 327 F.Supp. 948.

53. Fraud not established

When a consent judgment enjoining an alleged infringer from infringing a patent was entered in a case in which the issue of misrepresentation of the patent holder in obtaining the patent was one of the key issues and was adjusted by the holder and the infringer between themselves by negotiating a settlement, the infringer was not entitled to be relieved from the judgment on the ground that it had been obtained by fraud on the court, despite later commission ruling that the patent had been obtained by misrepresentation. Chas. Pfizer & Co. v. Davis-Edwards

54. See note 54 on page 192.

§ 2861. —— Distinction between Intrinsic and Extrinsic Fraud

Rule 60(b)(3), by its express terms, permits judgments to be set aside for fraud "whether heretofore denominated intrinsic

Pharmacal Corp., C.A.2d, 1967, 385 F.2d 533.

Conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts supporting the belief did not serve to raise an issue of the existence of fraud in procuring a settlement upon which the judgment was based, much less to carry the burden of resolving such issue. Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936.

Defendant's assertion that he had some proof that the alleged debt was in part paid and that plaintiff knew of this when it obtained an order in state court for the settlement of defendant's indebtedness to plaintiff was not an allegation of fraud and did not justify setting aside the federal court judgment carrying out the settlement, when plaintiff knew that the alleged debt was in part paid when the debt was settled and the alleged debt was greatly in excess of the amount of the settlement. Cass v. Youngstown Sheet & Tube Co., C.A.5th, 1964, 329 F.2d 106, certiorari denied 85 S.Ct. 57, 379 U.S. 828, 13 L.Ed.2d 37.

It is not fraud on the court for an employer to contradict a plaintiff's medical testimony during a trial and then choose to rely on it as a basis for dismissing the plaintiff after trial. Brown v. Pennsylvania R. Co., C.A.3d, 1960, 282 F.2d 522, certiorari denied 81 S.Ct. 690, 365 U.S. 818, 5 L.Ed.2d 696.

In a patent infringement action, the trial court did not abuse its discretion in refusing to give relief from judgment on the ground of fraud upon the court practiced by the prevailing parties through suppression of certain evidence, in view of the court's holding that the allegation was unsupported by the evidence in that there was no intent to suppress, and in view of its holding that the newly discovered evidence was not such as would probably change the result if a new trial was granted. Seismograph Serv. Corp. v. Offshore Raydist, Inc., C.A.5th, 1959, 263 F.2d 5.

In an action for personal injuries in which the distinctive manifestation of the alleged injury was a jerking or twisting of the head and defendant claimed that the jerking appeared to have stopped after trial in which plaintiff recovered a substantial verdict, the record did not disclose an abuse of discretion in refusal of the trial judge to set aside the verdict on the ground that it was obtained through fraud or other misconduct of the plaintiff. Atchison, T. & S. F. Ry. Co. v. Barrett, C.A.9th, 1957, 246 F.2d 846.

Record did not show that persons from whom petitioner acquired its interest in property withheld from the court and receivers of the corporation knowledge that the petitioner was the real party in interest in property of the corporation, which was ordered sold at private sale, and thus permitted the litigation to be conducted in a manner that violated the petitioner's interest, and the petitioner was not entitled on the ground of fraud to have set aside part of the decree that required sale of such property. Deauville Associates v. Murrell, C.A.5th, 1952, 197 F.2d 91.

Trial court did not abuse its discretion in overruling an employer's motion for new trial based on affidavits showing that subsequent to trial a seaman, who recovered judgment for cure and mainte-

or extrinsic." It thus put to an end, at least when relief is sought by motion, a very troublesome and unsound distinction. The old law had permitted relief for "extrinsic" fraud, fraud collateral to the matter or question that was tried and determined by the judgment in question, but had denied relief for "intrinsic" fraud, fraud relating to the subject matter of the action.

The former distinction was difficult to understand and apply. A state court correctly described it as "shadowy, uncertain, and somewhat arbitrary." [55] The distinction originated in the Supreme Court's decision in United States v. Throckmorton.[56] That was an action in equity by the United States, seeking to set aside and have declared void a decree entered 20 years earlier. The

nance, had been continuously employed, if viewed as motion under Rule 60 to set aside the judgment for fraud, when there was no evidence of fraud in procuring the judgment. Campbell v. American Foreign S. S. Corp., C.C.A.2d, 1941, 116 F.2d 926, certiorari denied 61 S.Ct. 959, 313 U.S. 573, 85 L.Ed. 1530.

Refusal to proceed to arbitration by companies that had obtained judgment enjoining action by reinsured and compelling arbitration was not "fraud" upon the court sufficient to entitle reinsured to vacation of the judgment. American Home Assur. Co. v. American Fidelity, D.C.N.Y.1966, 261 F.Supp. 734.

54. Relief granted

When defendant in a personal injury action represented that the maximum insurance coverage available as being $20,000 and plaintiff agreed to settle her claim within such coverage, on condition that the trial proceed to verdict as to liability and damages, and, subsequent to verdict in favor of plaintiff for $40,000, the trial court entered judgment in the amount previously agreed upon, the action of the trial court seven months later in vacating its previous judgment and reinstating the verdict of the jury by reason of defendant's fraud and misrepresentation as to the amount of insurance coverage was proper. Conerly v. Flower, C.A.8th, 1969, 410 F.2d 941.

See also the cases, cited in § 2861 n. 69, in which relief has been given because of perjury.

Evidence, allegedly newly discovered, that the purported signature of the wife of a partner to guarantee of partnership obligation was in fact a forgery and, therefore, inter alia, that the creditor's employee, who purportedly witnessed the wife's signature, participated in some degree in the fraud or misrepresentation, was a sufficient allegation of misconduct of an adverse party to support the grant of relief from judgment against the wife on the guarantee on the theory of fraud, misrepresentation, or other misconduct of an adverse party. Associates Discount Corp. v. Goldman, D.C.Pa.1971, 52 F.R.D. 37.

Compare

When judgment debtors sought to restrain a creditor from enforcing a judgment on the ground that the judgment was obtained by fraud upon the court and the petition alleged duress, fraudulent misrepresentation, and concealment, the debtors were entitled to have the court take proof upon such charges. Hadden v. Rumsey Prods., Inc., C.A.2d, 1952, 196 F.2d 92.

55. Shadowy and uncertain

Howard v. Scott, 1909, 125 S.W. 1158, 1166, 225 Mo. 685.

56. Throckmorton case

1878, 98 U.S. 61, 25 L.Ed. 93.

United States claimed that the decree had been obtained by use of a fraudulent instrument and by perjured testimony. The Court held that the action would not lie. Justice Miller, writing for the Court, recognized that relief can be given for "frauds, extrinsic or collateral, to the matter tried by the first court," [57] but said:

> In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.
>
> On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.[58]

Thirteen years after the Throckmorton case the Supreme Court decided the case of Marshall v. Holmes.[59] It was there held that equity could enjoin the enforcement of a judgment at law obtained by the use of a forged instrument and false testimony if the falsity was not discovered until after the judgment had been rendered and the time for a new trial motion has run. The Court declared it to be "settled doctrine" that relief would lie whenever it is "against conscience to execute a judgment" and the party seeking relief is without fault.[60]

How these two decisions could be reconciled was a mystery, and the mystery was heightened by the cryptic reference in the Marshall opinion to the Throckmorton case.[61] The Seventh Circuit shortly after Marshall certified a question to the Supreme Court seeking guidance on this point but the Supreme Court, on technical grounds, dismissed the certificate and refused to decide whether the two preceding cases had "applied well-settled general principles of law differently in two different cases upon the

57. Extrinsic or collateral
98 U.S. at 68.

58. Distinction stated
98 U.S. at 66.

59. Marshall case
1891, 12 S.Ct. 62, 141 U.S. 589, 35 L.Ed. 870.

60. Against conscience
12 S.Ct. at 64, 141 U.S. at 596.
The Court cited six of its own decisions, a treatise by Justice Story, and a case from another court for this proposition and added: "See, also, U. S. v. Throckmorton, 98 U.S. 61, 65."

61. Cryptic reference
See note 60 above.

same state of facts." [62] With the precedents in so confusing a state, some lower courts have applied the Throckmorton rule, others have given it "token recognition," [63] and others have rejected it altogether.[64]

The clearest and most important consequence of the Throckmorton rule was that a judgment could not be successfully attacked on the ground that it had been obtained by perjury.[65] The rationale, as stated in Throckmorton, is that

> the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.[66]

The argument is forceful—but there is also a forceful answer, put succinctly by the Third Circuit when it refused to follow Throckmorton, saying: "We believe truth is more important than the trouble it takes to get it." [67] The answer was stated more fully by Judge (now Justice) Brennan for the New Jersey Supreme Court:

> Nevertheless, upon principle, we hold that relief for fraud upon the court may be allowed under our rule whether the

62. Refused to decide

Graver v. Faurot, 1896, 16 S.Ct. 799, 801, 162 U.S. 435, 438, 40 L.Ed. 1030.

63. Token recognition

Note, Intrinsic and Extrinsic Fraud and Relief Against Judgments, 1951, 4 Vand.L.Rev. 338, 340.

64. Rule rejected

Publicker v. Shallcross, C.C.A.3d, 1939, 106 F.2d 949. This case has a very helpful discussion of the problem and quotes extensively from commentaries on it.

65. No attack for perjury

E. g., Dowdy v. Hawfield, C.A.1951, 189 F.2d 637, 88 U.S.App.D.C. 241, certiorari denied 72 S.Ct. 54, 342 U.S. 830, 96 L.Ed. 628.

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 630–631.

But see

There was an occasional exception. Thus in Chicago, R. I. & P. R. Co. v. Callicotte, C.C.A.8th, 1920, 267 F. 799, certiorari denied 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791, 16 A.L.R. 386, plaintiff had recovered a judgment for personal injuries, claiming permanent paralysis of his lower limbs, when in fact the paralysis was feigned and plaintiff had not only testified falsely himself, but had used drugs and a false medical history to fool various doctors into testifying that he was paralyzed. The court was able to call the fraud "extrinsic" and permit relief.

66. Rationale of rule

98 U.S. at 68–69.

67. Truth more important

Publicker v. Shallcross, C.C.A.3d, 1939, 106 F.2d 949, 952.

fraud charged is denominated intrinsic or extrinsic. The notion that repeated retrials of cases may be expected to follow the setting aside of judgments rendered on false testimony will not withstand critical analysis. Rather it is more logical to anticipate that the guilty litigant committing or suborning testimony will not risk pursuing the cause further. And, in any event, a court may not set aside a final judgment merely because some testimony is perjured. All perjury is an affront to the dignity of the court and to the integrity of the judicial process, but the law is not without other effective means to punish the perpetrator of the crime. * * * Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief. * * * Clearly, the necessity to satisfy these tests before the judgment may be disturbed is itself a deterrent to repeated litigation of the same factual issues. See 22 Harvard Law Review, 600. For these reasons we agree that it is "a journey into futility to attempt a distinction between extrinsic and intrinsic matter." Moore & Rogers, Federal Relief from Civil Judgments, 55 Yale Law Journal, 623, at 658 (June 1946). "* * * the spectacle of the machinery of the law bearing down mercilessly, and perhaps ruinously, to collect and deliver over the fruits of undoubted fraud (is) peculiarly odious." 126 A.L.R. 393. Plainly, the encouragement of vexatious litigation is the lesser evil. We prefer to follow the equity of the matter and to take away an unjust judgment obtained by vital perjury when the injustice and inequity of allowing it to stand are made evident.[68]

Rule 60(b)(3) expressly rejects the old distinction with regard to motions for relief from the judgment. Relief will lie on

68. Injustice and inequity

Shammas v. Shammas, 1952, 88 A.2d 204, 208, 9 N.J. 321.

See also Comment, Rule 60(b): Survey and Proposal for General Reform, 1972, 60 Calif.L.Rev. 531, 544–553.

a motion from a judgment produced by perjury.[69] There are cases in which the old distinction has been applied, and relief against a judgment procured by "intrinsic" fraud refused, in an independent action to set aside the judgment.[70] These cases merely rely on Throckmorton without extensive discussion of the difficulty of reconciling that case with Marshall or of the competing policy considerations involved. Since there is "little real basis for the distinction between extrinsic and intrinsic fraud," [71] it would be unfortunate if the ancient learning on this point were to be resurrected as a limitation on independent actions now that it is at last decently buried with regard to motions.[72]

69. Relief for perjury

Lim Kwock Soon v. Brownell, C.A. 5th, 1966, 369 F.2d 808, noted 1967, 21 Sw.L.J. 339. The opinion of the Fifth Circuit is quite unrevealing. For the factual background, see the opinion of the district court in that case, D.C.Tex.1966, 253 F.Supp. 963.

State ex rel. Symms v. V–I Oil Co., 1971, 490 P.2d 323, 325, 94 Idaho 456, **citing Barron & Holtzoff (Wright ed.).**

Refusal to vacate a judgment by the district court on a motion that asserted that the judgment had been obtained by fraudulent practices by means of which perjured testimony had been procured and that was supported by affidavits and the indication that the witnesses were willing to testify after having been warned of their constitutional rights was not an exercise of sound legal discretion. Peacock Records, Inc. v. Checker Records, Inc., C.A. 7th, 1966, 365 F.2d 145, certiorari denied 87 S.Ct. 707, 385 U.S. 1003, 17 L.Ed.2d 542.

70. Distinction applied in independent action

Dowdy v. Hawfield, C.A.1951, 189 F. 2d 637, 88 U.S.App.D.C. 241, certiorari denied 72 S.Ct. 54, 342 U.S. 830, 96 L.Ed. 628.

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 630–631.

U. S. v. Rexach, D.C.Puerto Rico 1966, 41 F.R.D. 180.

71. Little real basis

Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 608, **citing Barron & Holtzoff (Wright ed.).**

See also In re Casco Chem. Co., C.A. 5th, 1964, 335 F.2d 645, 651 n. 18, **citing Barron & Holtzoff (Wright ed.).**

72. Should not be resurrected

Note, Attacking Fraudulently Obtained Judgments in the Federal Courts, 1963, 48 Iowa L.Rev. 398, 405–409.

It was in an independent action that the Third Circuit rejected the distinction. Publicker v. Shallcross, C.C.A.3d, 1939, 106 F.2d 949.

"The established rule is that an independent action may be used only for relief from extrinsic fraud, mistake, or accident. The perpetuation of this extrinsic-intrinsic distinction has led the federal courts into a thicket of inconsistency, because the distinction is unnecessary, often irrational, and potentially productive of injustices not outweighed by the interests of finality." Comment, Rule 60(b): Survey and Proposal for General Reform, 1972, 60 Calif.L.Rev. 531, 542.

§ 2862. Void Judgment

Rule 60(b) (4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b) (4).[73] Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense.[74] Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

By the same token, there is no time limit on an attack on a judgment as void.[75] The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b) (4), cannot be enforced with regard to this class of motion. A void judg-

73. No discretion

Austin v. Smith, C.A.1962, 312 F.2d 337, 114 U.S.App.D.C. 97.

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Marquette Corp. v. Priester, D.C.S.C. 1964, 234 F.Supp. 799.

Shannon v. Norman Block, Inc., R.I. 1969, 256 A.2d 214, 218, **citing Barron & Holtzoff (Wright ed.).**

Emery v. Emery, Wyo.1965, 404 P.2d 745, 749, **citing Barron & Holtzoff (Wright ed.).**

74. No meritorious defense

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Schwarz v. Thomas, C.A.1955, 222 F.2d 305, 95 U.S.App.D.C. 365.

Wise v. Herzog, C.A.1940, 114 F.2d 486, 72 U.S.App.D.C. 335.

Shannon v. Norman Block, Inc., R.I. 1969, 256 A.2d 214.

75. No time limit

Misco Leasing, Inc. v. Vaughn, C.A. 10th, 1971, 450 F.2d 257.

Taft v. Donellan Jerome, Inc., C.A. 7th, 1969, 407 F.2d 807.

Bookout v. Beck, C.A.9th, 1965, 354 F.2d 823.

Austin v. Smith, C.A.1962, 312 F.2d 337, 343, 114 U.S.App.D.C. 97, **citing Barron & Holtzoff (Wright ed.).**

U. S. v. Melichar, D.C.Wis.1972, 56 F. R.D. 49.

Ruddies v. Auburn Spark Plug Co., D.C.N.Y.1966, 261 F.Supp. 648, 658, **citing Barron & Holtzoff (Wright ed.).**

State v. Romero, 1966, 415 P.2d 837, 840, 76 N.M. 449, **citing Barron & Holtzoff (Wright ed.).**

Judgment was vacated as void 30 years after entry in Crosby v. Bradstreet Co., C.A.2d, 1963, 312 F.2d 483, certiorari denied 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412.

Rule 60(b) (4), which deals with relief from void judgments, has no real time limit. Marquette Corp. v. Priester, D.C.S.C.1964, 234 F.Supp. 799, 802, **citing Barron & Holtzoff (Wright ed.).** In this case the judgment was held not to be void, although relief was granted under Rule 60(b) (6).

Delay of 22 years did not bar relief. U. S. v. Williams, D.C.Ark.1952, 109 F.Supp. 456.

ment cannot acquire validity because of laches on the part of the judgment debtor.[76]

State law may have some relevance in determining whether a judgment is void,[77] particularly if it goes beyond federal law and would strike down a judgment that federal law would permit. On the whole, however, the limits on the power of courts to enter valid judgments are federal constitutional limits, and the procedure for setting aside allegedly void judgments is wholly controlled by the rule, rather than by state law.[78] Although the rule requires a motion for relief from the judgment, it has been held that the court on its own motion may set aside a void judgment provided notice has been given of its contemplated action and the party adversely affected has been given an opportunity to be heard.[79]

A judgment is not void merely because it is erroneous.[80] It is void only if the court that rendered it lacked jurisdiction of the

76. Effect of laches

Misco Leasing, Inc. v. Vaughn, C.A. 10th, 1971, 450 F.2d 257.

Austin v. Smith, C.A.1962, 312 F.2d 337, 343, 114 U.S.App.D.C. 97, **citing Barron & Holtzoff (Wright ed.).**

Ruddies v. Auburn Spark Plug Co., D.C.N.Y.1966, 261 F.Supp. 648, 658, **citing Barron & Holtzoff (Wright ed.).**

77. Some relevance

See Marquette Corp. v. Priester, D.C. S.C.1964, 234 F.Supp. 799, 802.

Compare

Under both Texas and federal law, only judgments that show a jurisdictional defect on the face of the record are classified as "void judgments" so as to be subject to collateral attack. Little v. Celebrezze, D.C.Tex.1966, 259 F.Supp. 9.

78. Federal procedure

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Limit on relief

When defendant's property improperly was forfeited for his unpunishable conduct and defendant asked for more than merely setting the forfeiture decree aside and would have the district court order the government to reach into its coffer and return the money and property involved to him, such further affirmative relief could not be sustained under this rule providing that on a motion made within reasonable time the court may relieve a party from a void final judgment. U. S. v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A-177369, C.A.5th, 1972, 457 F.2d 1353.

79. Act without motion

U. S. v. Milana, D.C.Mich.1957, 148 F.Supp. 152.

80. Merely erroneous

Friedman v. Wilson Freight Forwarding Co., C.A.3d, 1963, 320 F.2d 244.

Morgan v. Southern Farm Bureau Cas. Ins. Co., D.C.La.1967, 42 F.R.D. 25, 27, **quoting Barron & Holtzoff (Wright ed.).**

Restatement, Judgments, 1942, § 4.

Even if a judgment in an action for damages sustained as a result of a secondary boycott was defective because prejudgment interest was awarded, it was not void and the union was not entitled to relief from the operation of the judgment. Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers, Local No. 480, AFL–CIO, C.A. 5th, 1972, 460 F.2d 105.

"A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. In the interest of finality, the concept of void judgments is narrowly construed." Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645, 649.

Failure of a complaint in a proceeding contesting mining claims to allege the facts of abandonment and the lack of supporting affidavits did not constitute defects that would render original judgments cancelling the mining claims void. Gabbs Exploration Co. v. Udall, C. A.1963, 315 F.2d 37, 114 U.S.App. D.C. 291.

An interlocutory judgment rendered for plaintiff in a patent infringement action on the consent of the parties was not void, in the absence of service of process, on the ground that defendants' attorney who entered a notice of appearance for defendants and signed a stipulation consenting to judgment was not admitted to practice in the district court in which the judgment was rendered, notwithstanding the court rule that only an attorney of the court could enter appearances for parties or sign stipulations, especially when defendants did not appeal from the judgment or assert fraud or other grounds for setting the judgment aside and did not show prejudice to themselves from the fact that the attorney was not admitted to practice before the court. Schifrin v. Chenille Mfg. Co., C.C.A.2d, 1941, 117 F.2d 92, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

When diversity of citizenship existed between the corporate parties and the amount involved exceeded $3,000, in an action to enjoin the use of the name "Metropolitan" by defendant, the federal district court had jurisdiction of the action and the judgment rendered was not void, so that the judgment would not be set aside on the ground subsequently raised in defendant's motion that plaintiff failed to comply with the statute requiring a foreign corporation to obtain a certificate to do business in the state as a condition to the maintenance of an action in the state courts. Metropolitan Opera Ass'n v. Metropolitan Opera Ass'n of Chicago, D.C.Ill.1949, 86 F.Supp. 526.

Incompetency

Incompetency of a party for whom a guardian should have been appointed is correctible on appeal and does not make a judgment void. Scott v. U. S., C.A.5th, 1951, 190 F.2d 134.

Fernow v. Gubser, C.C.A.10th, 1943, 136 F.2d 971.

Beckley Nat. Bank v. Boone, C.C.A. 4th, 1940, 115 F.2d 513, certiorari denied 61 S.Ct. 835, 313 U.S. 558, 85 L.Ed. 1519.

Quinn v. Hook, D.C.Pa.1964, 231 F. Supp. 718, affirmed per curiam C.A.3d, 1965, 341 F.2d 920.

Compare

In an action to set aside a default judgment based upon a New York judgment and an arbitration award, in the absence of any proof or indication of the invalidity of the arbitration award, a motion to vacate the judgment in the federal court was denied even if the New York judgment was void. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co., D.C.Pa.1951, 11 F.R. D. 172.

subject matter,[81] or of the parties,[82] or if it acted in a manner inconsistent with due process of law.[83]

81. Jurisdiction of subject matter

Restatement, Judgments, 1942, § 7.

Compare

Although the absence of subject matter jurisdiction may make a judgment void, the total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

82. Jurisdiction of parties

In the Matter of Penco Corp., C.A. 4th, 1972, 465 F.2d 693, 694 n. 1.

Misco Leasing, Inc. v. Vaughn, C.A. 10th, 1971, 450 F.2d 257.

Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410.

Jones v. Watts, C.C.A.5th, 1944, 142 F.2d 575, certiorari denied 65 S.Ct. 310, 323 U.S. 787, 89 L.Ed. 628.

Ruddies v. Auburn Spark Plug Co., D.C.N.Y.1966, 261 F.Supp. 648.

Shannon v. Norman Block, Inc., R.I. 1969, 256 A.2d 214.

Restatement, Judgments, 1942, §§ 5, 6.

Even though a signed return showing service by the marshal is prima facie evidence of valid service, a party may still have his day in court to prove otherwise. Taft v. Donellan Jerome, Inc., C.A.7th, 1969, 407 F.2d 807.

Movants were not barred from applying for vacatur of a void contempt order until they complied with the direction of the court of appeals to post security for fines for contempt, nor did they waive their right to a determination of jurisdiction by the failure to post bond on appeal when the orders were in fact void for lack of jurisdiction over person of the movants and over the subject matter. In re Stern, D.C.N.Y.1964, 235 F.Supp. 680.

When a judgment obtained in a Florida federal district court had been registered in a Pennsylvania district court and defendants, who were residents of that state, moved to be relieved from the effects of the judgment on the ground that the Florida court had no jurisdiction in that defendants were not properly served with process, the motion would not be dismissed but the action would be deferred until additional information had been submitted when there was nothing in the record to show how the Florida court obtained jurisdiction or what kind of proceedings were used to obtain the judgment. Whitehouse v. Rosenbluth Bros., D.C.Pa.1962, 32 F.R.D. 247.

A judgment rendered without valid personal or substituted service on a defendant is void. U. S. v. Milana, D.C.Mich.1957, 148 F.Supp. 152.

Jurisdiction existed

A judgment against a wife who was personally served is not void because the attorney who represented her was hired by her husband and was not authorized by her to represent her. Brimhall v. Mecham, 1972, 494 P.2d 525, 27 Utah 2d 222.

83. Due process

Bass v. Hoagland, C.A.5th, 1949, 172 F.2d 205, certiorari denied 70 S.Ct. 57, 338 U.S. 816, 94 L.Ed. 494, noted 1950, 59 Yale L.J. 345, and 1949, 62 Harv.L.Rev. 1400.

Restatement, Judgments, 1942, § 8.

See Brimhall v. Mecham, 1972, 494 P.2d 525, 526, 27 Utah 2d 222, **citing Barron & Holtzoff (Wright ed.).**

Judgment enjoining the publication of statements about certain persons is an unconstitutional prior restraint on speech, which will be vacated as void even though the parties had agreed to its entry. Crosby v. Bradstreet Co., C.A.2d, 1963, 312 F.2d 483, certiorari de-

It must be noted, however, that a court has jurisdiction to determine its own jurisdiction. Thus if defendant has challenged the court's jurisdiction over his person and this issue has been resolved against him by a final judgment, that judgment is not void, but is res judicata on the issue of jurisdiction.[84] By the same token, a court's determination that it has jurisdiction of the subject matter is res judicata on that issue, if the jurisdictional question actually was litigated and decided,[85] or if a party had an opportunity to contest subject matter jurisdiction and failed to do so.[86]

nied 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412.

A motion to have an adjudication of insanity vacated was not mooted by restoration and release order. In re Helman, C.A.1961, 288 F.2d 159, 109 U.S.App.D.C. 375.

On defendant's motion under Rule 60(b) (4) to vacate a judgment adverse to him in a 28 U.S.C.A. § 2255 proceeding, the failure to consider defendant's contention that the judgment was void for denial of due process was error. Winhoven v. U. S., C.A.9th, 1952, 201 F.2d 174.

84. Personal jurisdiction resolved

American Sur. Co. v. Baldwin, 1932, 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298.

Baldwin v. Iowa State Traveling Men's Ass'n, 1931, 51 S.Ct. 517, 283 U.S. 522, 75 L.Ed. 1244.

Restatement, Judgments, 1942, § 9.

85. Subject matter jurisdiction decided

Durfee v. Duke, 1963, 84 S.Ct. 242, 375 U.S. 106, 11 L.Ed.2d 186, noted 1964, 18 Sw.L.J. 500.

Stoll v. Gottlieb, 1938, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, noted 1939, 39 Col.L.Rev. 274, 6 U.Chi. L.Rev. 293, 48 Yale L.J. 879.

Davis v. Davis, 1938, 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26.

Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

Restatement, Judgments, 1942, § 10.

Plaintiff could not obtain vacation of judgments on the theory that they were void for lack of jurisdiction over the subject matter, when plaintiff positively alleged the court's jurisdiction of the subject matter under the Civil Rights Act, each defendant denied and challenged that jurisdiction, the court accepted plaintiff's claim of jurisdictional base, made rulings and entered judgments that rested inevitably upon the existence of jurisdiction and each of the judgments was affirmed and certiorari to review the affirmance was denied. Rhodes v. Houston, D.C. Neb.1966, 258 F.Supp. 546, affirmed C.A.8th, 1969, 418 F.2d 1309, certiorari denied 90 S.Ct. 1382, 397 U.S. 1049, 25 L.Ed.2d 662.

86. Failed to contest

Chicot County Drainage Dist. v. Baxter State Bank, 1940, 60 S.Ct. 317, 308 U.S. 371, 84 L.Ed. 329, noted 1940, 28 Geo.L.J. 1006, 53 Harv.L.Rev. 652, 49 Yale L.J. 959.

Boskey & Braucher, Jurisdiction and Collateral Attack, 1940, 40 Col.L. Rev. 1006.

§ 2863. Judgment Satisfied or No Longer Equitable

Rule 60(b)(5) allows relief from a judgment on the grounds that the "judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been revised or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." This provision, added by the amendment in 1948, provides for relief that formerly was available through other remedies.[87]

The one-year limit applicable to some of the grounds for relief in Rule 60(b) does not apply to Rule 60(b)(5).[88] All that is required is that the motion be made in a "reasonable time."[89] The motion speaks to the sound discretion of the court.[90] The court may be more willing to grant relief if the judgment still is prospective, so that relief from it does not require unscrambling of the past and no rights of third parties are involved.[91]

The first of the grounds set out in Rule 60(b)(5), that the judgment has been satisfied, released, or discharged, has been relied on very rarely. Cases are noted in the margin in which relief has been granted[92] or denied[93] on this basis.

87. Other remedies

See § 2867.

Moore & Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623.

88. Limit not applicable

Ridley v. Phillips Petroleum Co., C.A. 10th, 1970, 427 F.2d 19.

89. Reasonable time

A motion to modify an injunction made 22 months after the entry of judgment and with no explanation of the delay was not made within a reasonable time. Morse-Starrett Prods. Co. v. Steccone, C.A.9th, 1953, 205 F.2d 244.

Delay of 29 months between the event that allegedly made an injunction inequitable and the bringing of a motion to vacate the injunction was so unreasonable as to preclude relief. Sunbeam Corp. v. Charles Appliances, Inc., D.C.N.Y. 1953, 119 F.Supp. 492.

See § 2866.

90. Sound discretion

Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp., C.A.2d, 1967, 385 F.2d 533.

Elgin Nat. Watch Co. v. Barrett, C.A. 5th, 1954, 213 F.2d 776.

See § 2857.

91. Still prospective

Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 610, **citing Barron & Holtzoff (Wright ed.).**

92. Relief granted

Motion by codefendant to reduce judgment liability by the amount of the settlement between plaintiff and defendant, served 16 days after the entry of judgment, should have been treated as a motion under the rule authorizing the court to relieve a party from a final judgment that has been satisfied or discharged, rather than as a motion to amend a judgment under Rule

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93. See note 93 on page 203.

The second ground, that a prior judgment upon which the present judgment is based has been revised or otherwise vacated, obviously is sound but also has had very little application.[94]

59, which must be served within 10 days after the entry of judgment. Snowden v. D. C. Transit Sys., Inc., C.A.1971, 454 F.2d 1047, — U.S.App.D.C. —.

Defendant was entitled to relief on the ground that the judgment had been satisfied when the judgment debtor had paid the amount to which plaintiff was entitled even though plaintiff claimed he was entitled to additional interest. Candiano v. Moore-McCormack Lines, Inc., C.A.2d, 1969, 407 F.2d 385.

Rule 60(b)(5) authorized reducing the judgment in an amount that plaintiff had received by settlement from a joint tortfeasor, since under the applicable state law that payment by the other tortfeasor must be regarded as partial payment in satisfaction of the judgment. Caraway v. Sain, D.C.Fla. 1959, 23 F.R.D. 657.

93. Relief denied

Vacating and setting aside a deficiency judgment for failure to file a motion for a deficiency judgment within 90 days after a mortgage foreclosure sale as required by 12 Okl.St.Ann. § 686 afforded defendant all the relief to which he was entitled and defendant was not entitled to a declaration that the judgment was satisfied. Ingerton v. First Nat. Bank & Trust Co. of Tulsa, C.A.10th, 1962, 303 F.2d 439.

Defendant, who did not raise at trial the contention that it had been released by plaintiff's settlement with other tortfeasors, had waived that defense and could not raise it by motion under Rule 60(b)(5). Willits v. Yellow Cab Co., C.A.7th, 1954, 214 F.2d 612.

94. Prior judgment vacated

A judgment in a suit on an attachment bond must be vacated when the state judgment, dissolving the attachment, was reversed. Michigan Sur. Co. v. Service Mach. Corp., C.A.5th, 1960, 277 F.2d 531.

When a judgment was based on an erroneous construction of a prior judgment, and the prior judgment had since been vacated pursuant to Rule 60(a), the later judgment based thereon would be vacated. Jackson v. Jackson, C.A.1960, 276 F.2d 501, 107 U.S.App.D.C. 255, certiorari denied 81 S.Ct. 94, 364 U.S. 849, 5 L.Ed.2d 73.

When a judgment in an action to recover taxes wrongfully collected for 1937 and 1939 deliberately awarded nothing for the 1937 taxes since they were embraced in another independent action in which the judgment had been given for plaintiff, but the judgment in the independent action later was reversed, the court reopened the judgment in the present action. Pierce Oil Corp. v. U. S., D.C.Va. 1949, 9 F.R.D. 619.

Compare

Judgment awarding damages because of a landlord's failure to make refunds of rent as directed by the area rent director was vacated when, subsequent to the judgment, the order to make refunds was reversed by a higher administrative official. Block v. Thousandfriend, C.A.2d, 1948, 170 F.2d 428.

But compare

A favorable administrative decision obtained by a general contractor against the United States for the wrongful termination of a contract did not entitle the contractor to relief from a judgment obtained against him in his prior action against his surety that had filed a counterclaim under his indemnity bond. Blanchard v. St. Paul Fire & Marine Ins. Co., C.A.5th, 1965, 341 F.2d 351, certiorari denied 86 S.Ct. 66, 382 U.S. 829, 15 L.Ed.2d 73.

This ground is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed.[95]

The significant portion of Rule 60(b)(5) is the final ground, allowing relief if it is no longer equitable that the judgment should have prospective application. This is based on the historic power of a court of equity to modify its decree in the light of changed circumstances. As Justice Cardozo said in United States v. Swift & Company: [96]

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. * * * Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.[97]

95. Precedent reversed

Title v. U. S., C.A.9th, 1959, 263 F.2d 28, certiorari denied 79 S.Ct. 1118, 359 U.S. 989, 3 L.Ed.2d 978.

Loucke v. U. S., D.C.N.Y.1957, 21 F.R.D. 305.

"We are of the opinion that the judgment in this case was not 'based' upon a prior judgment which has been reversed or otherwise vacated within the meaning of subsection 5 of Rule 60(b). * * * With the conflicting rulings of the Third and Eighth Circuits before him, each persuasive only, the District Judge ruled in accordance with his own view of the applicable law. Certainly it was not the purpose of the rule to permit a final judgment to be set aside whenever thereafter any case from another jurisdiction involving the same question and decided the same way is later reversed by an Appellate Court. If such was the rule, so-called final judgments would lose most of their finality." Berryhill v. U. S., C.A. 6th, 1952, 199 F.2d 217, 219.

To the extent that the Berryhill case, above, suggests that the result might be different if the precedent since reversed is from the circuit in which the judgment was entered rather than another circuit, it seems unsound, for reasons pointed out in Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645, 650 n. 17.

The extent to which relief may be had in a situation of this kind under Rule 60(b)(1) on the ground that there has been a judicial "mistake" is analyzed in § 2858.

See also

There is a general discussion of this question in Polites v. U. S., 1960, 81 S.Ct. 202, 206–207, 364 U.S. 426, 432–433, 5 L.Ed.2d 173.

96. Swift case

1932, 52 S.Ct. 460, 286 U.S. 106, 76 L.Ed. 999.

97. Power to modify

52 S.Ct. at 462, 286 U.S. at 114.

For more extended discussion of modification of injunctions, see § 2961.

Although the principal significance of this portion of the rule is with regard to injunctions, it is not confined to that form of relief, nor even to relief that historically would have been granted in courts of equity. Any such restriction would be inconsistent with the merger of law and equity.[98] Instead it applies to any judgment that has prospective effect [99] as contrasted with those that offer a present remedy for a past wrong.[100]

The distinction between the present and prospective effect of a judgment has roots that go back to the well-known case of State of Pennsylvania v. Wheeling & Belmont Bridge Com-

This passage is quoted with approval in System Fed'n No. 91, Ry. Employes' Dep't, AFL–CIO v. Wright, 1961, 81 S.Ct. 368, 371, 364 U.S 642, 647, 5 L.Ed.2d 349.

Modification of an equity decree is discussed in § 2961.

See also

An injunction must be subject to adaptation as events may change and it was error for the court to provide that defendant could not seek modification of the injunction for two years regardless of what occurred. Hygrade Food Prods. Corp. v. U. S., C.C.A.8th, 1947, 160 F.2d 816.

District court, which has entered an order for school desegregation, retains continuing jurisdiction over the cause and it must make such adaptations from time to time as the existing developing situation reasonably requires to give final and effectual voice to the constitutional rights of Negro children. Ross v. Dyer, C.A.5th, 1962, 312 F.2d 191, 194.

98. Merger of law and equity

See vol. 4, §§ 1041–1043.

99. Prospective effect

Order of disbarment, even though permanent in form, is subject to modification on proof of a change of attitude. Levenson v. Mills, C.A.1st, 1961, 294 F.2d 397, certiorari denied 82 S.Ct. 397, 368 U.S. 954, 7 L.Ed.2d 387.

Court had power under clauses (5) and (6) of Rule 60(b) to relieve a party from the operation of a judgment against him insofar as the judgment is a lien on property owned by the party. U. S. v. Edell, D.C.N.Y.1954, 15 F.R.D. 382.

Relief seems to be possible under this portion of the rule from the prospective operation of a declaratory judgment.

100. Past wrong

"Rule 60(b)(5) which permits relief from a judgment on the ground that 'it is no longer equitable that the judgment should have prospective application,' properly applies only to judgments with prospective effect, and so does not cover the case of a judgment for money damages. Any suggestion to the contrary in Block v. Thousandfriend, 170 F.2d 428 (2 Cir. 1948) was ill-advised." Ryan v. U. S. Lines Co., C.A.2d, 1962, 303 F.2d 430, 434.

Compare

"While this award of damages sounds in the past, rather than the future, no judgment has yet been paid, and in practical effect we are dealing with the prospective application of the judgment, not the unscrambling of the past. Relief may be available for this." Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 610, **citing Barron & Holtzoff (Wright ed.).**

pany.[1] At an earlier stage of that litigation, in May, 1852, the Supreme Court held that a bridge across the Ohio River at Wheeling was an unconstitutional obstruction to commerce and ordered its abatement.[2] In August, 1852, Congress passed a statute declaring that the bridge was a lawful structure and authorizing the company that owned the bridge to maintain it at its present site and elevation. The Court held that the company remained liable for costs in the earlier proceeding but that so much of the decree as required the bridge to be removed no longer could be enforced. It said:

> Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect[s] the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.[3]

The rule allows relief if it is "no longer equitable" for the judgment to have prospective application. This provision is not a substitute for an appeal.[4] It does not allow relitigation of issues that have been resolved by the judgment. Instead it re-

1. Wheeling Bridge case

1856, 18 How. (59 U.S.) 421, 15 L.Ed. 435.

2. Earlier stage

State of Pennsylvania v. Wheeling & Belmont Bridge Co., 1852, 13 How. (54 U.S.) 518, 14 L.Ed. 249.

3. Distinction drawn

18 How. (59 U.S.) at 431–432 (per Nelson, J.).

4. Not a substitute for appeal

Schildhaus v. Moe, C.A.2d, 1964, 335 F.2d 529.

Morse-Starrett Prods. Co. v. Steccone, C.A.9th, 1953, 205 F.2d 244.

fers to some change in conditions that makes continued enforcement inequitable.[5] As the Court said in the Swift case:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.[6]

It is clear that a strong showing is required before an injunction or other prospective judgment will be modified.[7] Mere pas-

5. Change in conditions

Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645, 651.

Bowdil Co. v. Central Mine Equip. Co., C.A.8th, 1954, 216 F.2d 156, 159, certiorari denied 75 S.Ct. 356, 348 U.S. 936, 99 L.Ed. 734.

"The rule is not to be read without emphasis on the important words 'no longer'; assuming that the propriety of the injunction as issued has passed beyond debate, it refers to some change in conditions that makes continued enforcement inequitable." Schildhaus v. Moe, C.A.2d, 1964, 335 F.2d 529, 530.

Clause (5) applies "only to cases where a judgment which was valid and equitable when rendered is rendered prospectively inequitable by subsequent events." FDIC v. Alker, C.A.3d, 1956, 234 F.2d 113, 116 n. 4.

6. Cannot impeach prior decree

52 S.Ct. at 464, 286 U.S. at 119.

7. Strong showing required

Ridley v. Phillips Petroleum Co., C.A. 10th, 1970, 427 F.2d 19.

Goldberg v. Ross, C.A.1st, 1962, 300 F.2d 151.

FDIC v. Alker, C.A.3d, 1956, 234 F.2d 113.

"Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements." Humble Oil & Ref. Co. v. American Oil Co., C.A.8th, 1969, 405 F.2d 803, 813 (per Blackmun, J.), certiorari denied 89 S.Ct. 1745, 395 U.S. 905, 23 L.Ed.2d 218.

Relief under Rule 60(b)(5) is not a matter of right and the moving party must establish equitable grounds for relief. Blanchard v. St. Paul Fire & Marine Ins. Co., C.A.5th, 1965, 341 F.2d 351, certiorari denied 86 S.Ct. 66, 382 U.S. 829, 15 L.Ed.2d 73.

In determining whether a consent antitrust decree enjoining certain activities of defendants is subject to modification, the initial inquiry is whether the original need for the decree still exists despite intervening changes; the test is not whether the court would issue the existing decree as an original matter under circumstances presently obtaining; the continued need for the decree and the hardship suffered by defendants are neither alternative standards for modification, either of which will suffice, nor cumulative prerequisites, both of which must be established, but they are rather correlative elements of a single standard; as

sage of time is not enough.[8] Again the rule is laid down in the Swift case:

> Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.[9]

Because the standard is an exacting one, many applications for relief on this ground are denied.[10] But on an adequate show-

need is diminished, a lesser showing of hardship permits modification, and as defendants' suffering increases, their burden of showing decreased need is lightened. U. S. v. Swift & Co., D.C.Ill.1960, 189 F.Supp. 885, affirmed 1961, 81 S.Ct. 1918, 367 U.S. 909, 6 L.Ed.2d 1249.

The power of the court in this respect should be very cautiously and sparingly invoked and should be used only in unusual and exceptional circumstances. Petition of Boeing Airplane Co., D.C.D.C.1959, 23 F.R.D. 264, reversed in part on other grounds C.A.1960, 280 F.2d 654, 108 U.S.App.D.C. 106.

But compare

These restrictions do not apply if, rather than defendant seeking relief from a judgment, it is plaintiff who asks to have it modified on the ground that it has not carried out its intended effect. U. S. v. United Shoe Mach. Corp., 1968, 88 S.Ct. 1496, 391 U.S. 244, 20 L.Ed.2d 562.

8. Mere passage of time

Passage of time is not a clear showing of grievous wrong evoked by new and unforeseen conditions such that is required in order to vacate a permanent injunction entered by consent of the parties. SEC v. LeBrock, D.C.N.Y.1965, 245 F.Supp. 799.

Since there was no claim of changed conditions, a 12-year-old injunction requiring compliance with the Fair Labor Standards Act would not be dissolved. Walling v. Harnischfeger Corp., C.A.7th, 1957, 242 F.2d 712.

9. Importance of changes

52 S.Ct. at 464, 286 U.S. at 119.

10. Relief denied

Government, in a proceeding on its motion to vacate a permanent injunction precluding a registrant's induction into the armed services until his local board complied with certain conditions, failed to meet its burden of demonstrating that inequity resulted from the continued enforcement of the injunction against the local board, since the conditions still could be complied with without prejudice to the selective service system. Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

Court properly refused to dissolve injunction when it found no substantial change in conditions. Ridley v. Phillips Petroleum Co., C.A. 10th, 1970, 427 F.2d 19.

ing the courts will provide relief if it no longer is equitable that the judgment be enforced, whether because of subsequent legis-

Evidence was insufficient to establish the substantial change, unforeseenness, and oppressive hardship necessary to modify a 1937 decree that barred plaintiffs from using the name "Esso" in the midwest. Humble Oil & Ref. Co. v. American Oil Co., C.A.8th, 1969, 405 F.2d 803, certiorari denied 89 S.Ct. 1745, 395 U.S. 905, 23 L.Ed.2d 218.

District court did not abuse its discretion in refusing to find that it no longer was equitable that a judgment should have prospective application. Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp., C.A.2d, 1967, 385 F.2d 533.

Absent a history of sustained obedience, a showing of hardship or oppression, and an indication that need for court supervision has become "attenuated to a shadow," an injunction should not be dissolved. Brooks v. County School Bd. of Arlington County, Virginia, C.A. 4th, 1963, 324 F.2d 303.

It was error to dissolve an injunction requiring compliance with the Fair Labor Standards Act when defendant had violated the Act, even after the issuance of the injunction, and the injunction merely required him "to do what the law obliged him to do in the first place." Goldberg v. Ross, C.A.1st, 1962, 300 F.2d 151.

When an injunction against the collection of a city tax on buses communicating with nearby communities in another state, issued on the ground that these communities were not "suburbs" within the statute authorizing the tax was unappealed from and the legislation remained unchanged, a motion for relief from the injunction was denied, notwithstanding alleged changed conditions. Public Serv. Coordinated Transp. v. City of Philadelphia, C.A.3d, 1958, 257 F.2d 701.

When defendant had been enjoined from making cutting bits having the general appearance of those made by plaintiff, the fact that plaintiff later discontinued making that type bit would not justify modifying the injunction to allow defendant to make the bit when unskilled purchasers of bits would be unable to determine whether they were manufactured by plaintiff or defendant. Bowdil Co. v. Central Mine Equip. Co., C.A.8th, 1954, 216 F.2d 156, certiorari denied 75 S.Ct. 356, 348 U.S. 936, 99 L.Ed. 734.

Injunction against disclosure of trade secrets would not be modified on the basis of a change of circumstances, in view of the lack of a sufficient showing that the public interest was endangered by the injunction. Mobay Chem. Co. v. Hudson Foam Plastics Corp., D.C.N.Y. 1967, 277 F.Supp. 413.

"In the typical case, it might be safe to presume that after forty years the object of the equity decree will have been achieved if it ever is to be. But this is not a case where equity intervened to correct a temporary dislocation or to afford a respite so that competition could be restored, and time alone is not a remedy. Here the defendants were huge and remained huge after the decree. They chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields. The decree therefore operates as a restraint and a fetter to preserve the balance of competitive power. Its usefulness is not exhausted or outworn so long as the petitioners retain the economic might they attained through the combination." U. S. v. Swift & Co., D.C.Ill.1960, 189 F.Supp. 885, affirmed 1961, 81 S.Ct. 1918, 367 U.S. 909, 6 L.Ed.2d 1249.

An injunction against the violation of a state fair-trade act would not be dissolved, despite a Supreme Court decision holding those acts

lation,[11] a change in the decisional law,[12] or a change in the operative facts.[13]

unenforcible, in light of a subsequent Act of Congress validating laws of that kind. Sunbeam Corp. v. Charles Appliances, Inc., D.C. N.Y.1953, 119 F.Supp. 492.

11. Statutory change

State of Pennsylvania v. Wheeling & Belmont Bridge Co., 1856, 18 How. (59 U.S.) 421, 15 L.Ed. 435, described in the text at notes 1 to 3 above.

It was error to refuse to modify a consent decree barring a union shop in the light of a subsequent Act of Congress making a union shop permissible. System Fed'n No. 91, Ry. Employes' Dep't, AFL–CIO v. Wright, 1961, 81 S.Ct. 368, 364 U.S. 642, 5 L.Ed.2d 349.

An injunction restraining the government from instituting deportation proceedings without first complying with the Administrative Procedure Act was vacated after Congress enacted a statute removing deportation proceedings from the coverage of the Administrative Procedure Act. McGrath v. Potash, C.A.1952, 199 F.2d 166, 91 U.S.App.D.C. 94.

An injunction against interfering through a secondary boycott with plaintiff's business could be modified in the light of the subsequent passage of the Norris-LaGuardia Act, prohibiting federal courts from issuing injunctions in labor disputes. Western Union Tel. Co. v. International Bhd. of Elec. Workers, Local Union No. 134, C.C. A.7th, 1943, 133 F.2d 955.

12. Change in decisions

"There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." System Fed'n No. 91, Ry. Employes' Dep't, AFL–CIO v. Wright, 1961, 81 S.Ct. 368, 372 n. 6, 364 U.S. 642, 650 n. 6, 5 L.Ed.2d 349.

It was not error for the district court to dissolve an injunction against the violation of the state fair-trade act after a Supreme Court decision holding acts of that kind unenforcible. Elgin Nat. Watch Co. v. Barrett, C.A.5th, 1954, 213 F.2d 776.

Injunction prohibiting defendant from using the word "cola" as part of the name of a drink was vacated in the light of numerous decisions in many courts that plaintiff had no exclusive right to the use of the word "cola" and in view of the fact that many other drinks using that word were being sold. Coca-Cola Co. v. Standard Bottling Co., C.C.A.10th, 1943, 138 F.2d 788.

13. Operative pacts

An injunction properly was dissolved when it appeared that defendant had observed in good faith the provisions of the statute that the injunction enforced for more than ten years and there was no present reason to apprehend violation by him. Tobin v. Alma Mills, C.A. 4th, 1951, 192 F.2d 133, certiorari denied 72 S.Ct. 769, 343 U.S. 933, 96 L.Ed. 1342.

An injunction obtained by a creditor against the transfer of ICC certificates, the principal asset of a debtor corporation, would be continued as against the corporation but not as against an individual who had earlier transferred the certificates to the corporation and who had a default judgment set aside. Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., D.C.Ga.1970, 319 F. Supp. 1308.

Order barring enforcement of a subpoena on the ground of privilege would be vacated to the extent that the subsequent disclosure by the government had waived its privilege. Petition of Boeing Airplane Co., D.C.D.C.1959, 23 F.R.D. 264, reversed in part on other

Relief from a judgment on the ground that it no longer is equitable should come from the court that gave the judgment. Other courts should refuse to entertain an independent action seeking relief from the judgment on this ground, so long as it is apparent that a remedy by motion is available in the court that gave judgment.[14]

§ 2864. Other Reasons Justifying Relief

Clause (6) of Rule 60(b) was added as a part of the 1948 amendments. Although it has been described as "an unprecedented addition to the Rules," [15] and it certainly does go beyond the grounds for relief that would have been available under older procedures,[16] its use has been somewhat inhibited because of doubt about when and how it applies.

The rule has significance in two different ways. Clearly it broadens the grounds for relief from a judgment set out in the five preceding clauses. It gives the courts ample power to vacate judgments whenever that action is appropriate to accom-

grounds C.A.1960, 280 F.2d 654, 108 U.S.App.D.C. 106.

Compare

Owner who was subjected to an injunction to enforce a restrictive covenant prohibiting the use of the premises for the sale of liquor could obtain relief in respect of the actual controversy regarding its application and the effect should the character of the neighborhood so far change or should it otherwise be established the continuation of injunction has become illegal or inequitable. Cataldi v. Werth, C.A.1962, 313 F.2d 553, 114 U.S.App.D.C. 162.

14. Same court

Lapin v. Shulton, Inc., C.A.9th, 1964, 333 F.2d 169, certiorari denied 85 S.Ct. 193, 379 U.S. 904, 13 L.Ed.2d 177, noted 1965, 65 Col.L.Rev. 539.

Torquay Corp. v. Radio Corp. of America, D.C.N.Y.1932, 2 F.Supp. 841.

Cf. Tommills Brokerage Co. v. Thon, D.C.Puerto Rico 1971, 52 F.R.D. 200.

When a motion for relief from judgment raised, in the court in which such judgment had been registered pursuant to statute, virtually the same issues as had been already considered, on a postjudgment motion, by the district court in the district in which the judgment had been rendered, comity and interests of efficient judicial administration justified the court of registration, in the exercise of discretion, in referring such issues back to the court of rendition by denying the motion for relief without prejudice to its presentation in place of rendition. U. S. for Use & Benefit of Mosher Steel Co. v. Fluor Corp., C.A.2d, 1970, 436 F.2d 383.

15. Unprecedented addition

Note, Federal Rule 60(b): Relief from Civil Judgments, 1952, 61 Yale L.J. 76, 81.

16. Beyond older procedures

Klapprott v. U. S., 1949, 69 S.Ct. 384, 390, 335 U.S. 601, 614, 93 L.Ed. 266.

plish justice.[17] In addition, there is no time limit, save that the motion be made within a reasonable time, on motions under clause (6). Thus, to the extent it is applicable, clause (6) does offer a means of escape from the one-year limit that applies to motions under clauses (1), (2), and (3).[18]

There has not been much difficulty in construing or applying the rule in cases in which the motion is made within a year of judgment. In those cases it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses. These prompt motions for relief are granted if the court thinks that justice requires it[19] and denied if the court feels otherwise.[20]

17. Accomplish justice

Klapprott v. U. S., 1949, 69 S.Ct. 384, 390, 335 U.S. 601, 614–615, 93 L. Ed. 266.

Menier v. U. S., C.A.5th, 1968, 405 F.2d 245, 248, **citing Barron & Holtzoff (Wright ed.).**

Laguna Royalty Co. v. Marsh, C.A. 5th, 1965, 350 F.2d 817, 823, **citing Barron & Holtzoff (Wright ed.).**

In re Casco Chem. Co., C.A.5th, 1964, 335 F.2d 645, 651 n. 18, **citing Barron & Holtzoff (Wright ed.).**

Kelly v. Greer, C.A.3d, 1964, 334 F.2d 434.

Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 608, **citing Barron & Holtzoff (Wright ed.).**

Byron v. Bleakley Transp. Co., D.C. N.Y.1967, 43 F.R.D. 413, 416, **citing Barron & Holtzoff (Wright ed.).**

Packard v. Whitten, Me.1971, 274 A.2d 169, 173, **citing Barron & Holtzoff (Wright ed.).**

Brady v. Town of Chapel Hill, 1971, 178 S.E.2d 446, 448, 277 N.C. 720, **citing Barron & Holtzoff (Wright ed.).**

Kinsella v. Kinsella, N.D.1970, 181 N.W.2d 764, 769, **citing Barron & Holtzoff (Wright ed.).**

Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case. Radack v. Norwegian America Line Agency, Inc., C.A.2d, 1963, 318 F.2d 538, 542.

Pierre v. Bernuth, Lembcke Co., D.C. N.Y.1956, 20 F.R.D. 116, 117.

18. Time limit

See § 2866.

19. Prompt motion granted

Rule 60(b)(6) motion made five months after judgment was properly granted when the jury's apparently inconsistent answers to interrogatories and the government's possibly improper use of illegally seized evidence made it in the interest of justice to do so. Hand v. U. S., C.A.5th, 1971, 441 F.2d 529.

Vacation of a judgment on a motion filed after expiration of the time to appeal, followed by the subsequent entry of substantially the same judgment from which an appeal was taken, was not an abuse of discretion, when the parties had been given no notice of the entry of the original judgment and believed that its form was still under consideration, and the appellees could not claim either surprise or prejudice. Smith v. Jackson Tool & Die, Inc., C.A.5th, 1970, 426 F.2d 5.

Relief should have been granted when promptly after judgment defendant made a showing that she had a defense that she was misled into waiving through the erroneous action of her attorney. Patapoff v. Vollstedt's Inc., C.A.9th, 1959, 267 F.2d 863.

Default judgment should have been set aside since defendant had no

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20. See note 20 on page 213.

Regardless of when the motion is made, it is addressed to the discretion of the district court.[21] In general, relief is given under clause (6) in cases in which the judgment was obtained by the improper conduct of the party in whose favor it was rendered or the judgment resulted from the excusable default of the party against whom it was directed under circumstances going beyond the earlier clauses of the rule. The court then considers whether relief under clause (6) will further justice without affecting substantial rights of the parties.[22]

notice of the action and did not willfully or negligently disobey the process of the court. Tozer v. Charles A. Krause Milling Co., C.A. 3d, 1951, 189 F.2d 242.

When plaintiff had failed to adduce additional evidence at the time of the court's earlier deliberations solely because evidence was in the process of preparation for presentation at an expected second hearing on permanent relief and that hearing was deemed unnecessary by the court in light of the evidence presented and when the court wished to consider all the relevant evidence, there was sufficient reason for invoking Rule 60(b)(6). Chicago & E. I. R. Co. v. Illinois Cent. R. Co., D.C.Ill.1966, 261 F.Supp. 289.

Relief by defendant from the government's requirement that proceeds from the sale of his interest in real property be deposited in escrow along with other securities that had previously been deposited with an escrowee as security for a judgment in favor of the government against defendant, pending the outcome of an appeal to the tax court, properly was sought under Rule 60(b)(6), authorizing a court to relieve a party from a judgment for any reason justifying relief from the operation of the judgment. U. S. v. Edell, D.C.N.Y.1954, 15 F.R.D. 382.

20. Motion denied

Court would not use its power under this rule to relieve a party from the effect of a judgment of the court of appeals that the district court thought erroneous. Lapiczak v. Zaist, D.C.Vt.1972, 54 F.R.D. 546.

A motion to vacate was denied in the absence of any showing justifying relief. Crane v. Kerr, D.C.Ga.1971, 53 F.R.D. 311.

When the order of the court required the United States and its agents to remove from their files any notation of or reference to the arrest in question in order to grant full and fair relief to arrestee and the judge who ordered the record of arrest to be expunged had the facts and parties before him and the government on motion for relief from the order offered no reason why points raised could not have been raised either at the earlier hearing or on appeal or why justice required such an order, the matter would not be reopened for mere reconsideration of the previously existing situation. Kowall v. U. S., D.C.Mich.1971, 53 F.R.D. 211.

Judgment would not be reopened even on a motion made promptly thereafter when the motion alleged that the moving party had been under the effect of drugs at the time of the trial but he failed to show that this had interfered with the conduct of the proceeding or that the result would be different if the matter were reopened. Zundel v. Zundel, N.D.1966, 146 N.W. 2d 896, 901, **citing Barron & Holtzoff (Wright ed.).**

21. Discretion of court

See § 2857.

22. General test

U. S. v. Cato Bros., Inc., C.A.4th, 1959, 273 F.2d 153, 157, **citing Bar-**

The court may exercise its power under clause (6) on conditions that will place the parties in status quo.[23] In one rent overcharge case the court ordered vacation of a default judgment unless plaintiff accepted reduction of treble damages to single damages.[24] This seems very dubious. If the circumstances justified reopening the judgment, defendant should have been allowed a trial before paying even single damages. If they did not, plaintiff should recover the treble damages provided for by statute. Another case has held that Rule 60(b)(6) does not authorize a court to impose a penalty for wrongful conduct different from that specifically provided by Congress.[25]

The broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests.[26] In particular, it ordinarily is not

ron & Holtzoff (Wright ed.), certiorari denied 80 S.Ct. 753, 362 U.S. 927, 4 L.Ed.2d 746.

In ruling on a motion to vacate the judgment, equitable considerations, including prejudice or lack of prejudice to the parties, must be given consideration. Smith v. Jackson Tool & Die, Inc., C.A.5th, 1970, 426 F.2d 5.

23. Conditions

Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 608.

Weilbacher v. U. S., D.C.N.Y.1951, 99 F.Supp. 109.

Kinsella v. Kinsella, N.D.1970, 181 N.W.2d 764, 769, **quoting Barron & Holtzoff (Wright ed.).**

24. Single damages

Fleming v. Mante, D.C.Ohio 1950, 10 F.R.D. 391.

25. Different penalty

U. S. v. Cato Bros., Inc., C.A.4th, 1959, 273 F.2d 153, certiorari denied 80 S.Ct. 753, 362 U.S. 927, 4 L.Ed.2d 746.

26. Protect own interests

Ackermann v. U. S., 1950, 71 S.Ct. 209, 211, 340 U.S. 193, 197, 95 L.Ed. 207.

John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., D.C.Pa.1956, 19 F.R.D. 379, 384, **citing Barron & Holtzoff,** affirmed C.A.3d, 1956, 239 F.2d 815.

Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, **quoting Barron & Holtzoff (Wright ed.).**

"We do not speculate on the reasons why the government did not pursue its direct attack on the Lubben injunction; it is sufficient that the decision to do so was one of unfettered choice and free will. Having made that choice, the government must now live with its decision." Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645, 652.

When plaintiff learned of the dismissal of his personal injury action within two months after the entry of the order of dismissal but did not discuss the matter with his attorney or otherwise cause anything to be done in any court for nearly two years and plaintiff could have but did not file a new federal employers' liability action in state court at the time of dismissal, plaintiff either abandoned the case or was guilty of contributory fault and inexcusable neglect and the motion to vacate the order was denied. Carrethers v. St. Louis-San Francisco Ry. Co., D.C.Okl.1967, 264 F.Supp. 171.

Relief refused when plaintiff had made a calculated choice to dis-

permissible to use this motion to remedy a failure to take an appeal.[27] However this is not an inflexible rule and in unusual cases a party who has not taken an appeal may obtain relief on motion.[28]

miss two defendants in order to gain an earlier trial setting. DeLong's Inc. v. Stupp Bros. Bridge & Iron Co., D.C.Mo.1965, 40 F.R.D. 127.

When a realty owner and the United States agreed to the stipulations upon the entering of a judgment in condemnation proceedings, which provided for a yearly rental and thereafter the value of the realty increased by reason of war time conditions, there was not sufficient reason justifying relief so as to grant a motion to relieve realty owner from the judgment. U. S. v. 12.381 Acres of Land, More or Less, Situate in Curry County, New Mexico, D.C.N.M.1953, 109 F. Supp. 279.

27. Failure to appeal

Polites v. U. S., 1960, 81 S.Ct. 202, 364 U.S. 426, 5 L.Ed.2d 173.

Ackermann v. U. S., 1950, 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207.

In all but exceptional circumstances the failure to prosecute an appeal will bar relief under Rule 60(b)(6). Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

In order to bring himself within the limited area of this rule for relief from judgment, a petitioner is required to establish the existence of extraordinary circumstances that prevented or rendered him unable to prosecute an appeal. Martella v. Marine Cooks & Stewards Union, Seafarers, Int'l Union of North America, AFL–CIO, C.A. 9th, 1971, 448 F.2d 729.

"The catch-all clause of Rule 60(b)(6), authorizing the court to relieve a party from a judgment for 'any other reason justifying relief,' cannot be read to encompass a claim of error for which appeal is the proper remedy * * *." Wagner v. U. S., C.A.2d, 1963, 316 F.2d 871.

Landowner who did not appeal could not obtain relief from a judgment in a condemnation case even though on appeal by other landowners it was found that the government's map was erroneous. Annat v. Beard, C.A.5th, 1960, 277 F.2d 554, certiorari denied 81 S.Ct. 270, 364 U.S. 908, 5 L.Ed.2d 223.

Only when the total record portrays extraordinary circumstances, of which the litigant's lack of financial means is only one factual element, may a party who failed to appear or appeal resort to the extreme remedy afforded by Rule 60(b)(6). Loucke v. U. S., D.C.N.Y. 1957, 21 F.R.D. 305.

But see

Simons v. Schiek's, Inc., 1966, 145 N.W.2d 548, 275 Minn. 132.

28. Not inflexible

See Polites v. U. S., 1960, 81 S.Ct. 202, 206, 364 U.S. 426, 433, 5 L.Ed. 2d 173, quoted note 53 below.

It was well within the discretion of the district court to reopen dismissal of an action when, through a misrecording by the clerk of the address of counsel, neither plaintiff nor his counsel were aware that the action had been dismissed. Cavalliotis v. Salomon, C.A.2d, 1966, 357 F.2d 157.

Relief can be granted under Rule 60 (b) (6) if a party has had no notice, from the clerk or otherwise, of entry of the judgment in the case. Radack v. Norwegian America Line Agency, Inc., C.A.2d, 1963, 318 F. 2d 538.

In District of Columbia v. Stackhouse, C.A.1956, 239 F.2d 62, 99 U.S.App.D.C. 242, in which a motion to amend findings of fact and

Two decisions from the Supreme Court immediately after Rule 60(b)(6) was added in 1948, and a decision of the Second Circuit a short time after those decisions, speak to the proper relation between clause (6) and the other clauses of the rule. The earliest case is Klapprott v. United States.[29] More than four years after a default judgment cancelling the naturalization certificate of a person, he moved for relief from the judgment, alleging that he was in jail at the time of the cancellation proceeding and unable effectively to protect his claim to citizenship. Although the Court was sharply divided on other issues, there was no disagreement with the following statements in Justice Black's opinion:

> of course, the one year limitation would control if no more than "neglect" was disclosed by the petition. In that event the petitioner could not avail himself of the broad "any other reason" clause of 60(b).[30]

But to Justice Black the allegations of the moving party "set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part." [31] Since the party had set up "far more" than the "mere allegations of 'excusable neglect'" that would suffice under clause (1),[32] he was entitled to proceed under clause (6), and thus to avoid the one-year time limit. The case ultimately was remanded for a hearing as to the truth of the allegations.[33] The dissenters thought that the application showed no more than mistake, inadvertence, or excusable neglect, and should have been held untimely because not made within a year after judgment.[34]

a decree committing a person as of unsound mind was made eight months after entry of an order, the court entertained an appeal, over objection that the motion for amended findings was not made within 10 days as required by Rule 52(b), since relief from the judgment could be obtained under this rule.

29. Klapprott case
1949, 69 S.Ct. 384, 335 U.S. 601, 93 L.Ed. 266.

30. No more than neglect
69 S.Ct. at 389, 335 U.S. at 613.

31. Extraordinary situation
69 S.Ct. at 389, 335 U.S. at 613.

32. Far more than neglect
69 S.Ct. at 389–390, 335 U.S. at 613.

33. Ultimately remanded
Klapprott v. U. S., 1949, 69 S.Ct. 398, 336 U.S. 942, 93 L.Ed. 1099.

The trial court found the allegations unsupported, and Klapprott was denied relief. U. S. v. Klapprott, D.C.N.J.1949, 9 F.R.D. 282, affirmed C.A.3d, 1950, 183 F.2d 474, certiorari denied 71 S.Ct. 238, 340 U.S. 896, 95 L.Ed. 649.

34. View of dissenters
69 S.Ct. at 393, 335 U.S. at 620.

One year later the Court was confronted with the seemingly similar case of Ackermann v. United States.[35] Again a judgment of denaturalization was sought to be vacated about four years after it was entered. Ackermann alleged that he had lacked funds to appeal from the judgment against him, that he was in detention at the time he should have appealed, and that the appellate court had reversed in a case that had been consolidated with his for trial. The Court, however, thought that Ackermann's decision not to appeal was a matter of deliberate choice. Justice Minton, writing for the Court, distinguished the Klapprott case as having been "a case of extraordinary circumstances" [36] and said that "by no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation." [37]

These cases certainly seemed to establish that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required also by the language of the rule. Despite a few earlier cases that seemed to overlook this point,[38] there is now much authority that the provisions are mutually exclusive.[39]

35. Ackermann case

1950, 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207.

36. Extraordinary circumstances

71 S.Ct. at 212, 340 U.S. at 199. Justice Minton repeated the phrase "extraordinary circumstances" in speaking again of the Klapprott case, 71 S.Ct. at 212, 340 U.S. at 200, and at a still later place spoke of the circumstances of Klapprott as "extraordinary." 71 S.Ct. at 213, 340 U.S. at 202.

37. Deliberate free choice

71 S.Ct. at 212, 340 U.S. at 200.

Justice Black, in a dissent joined by Justices Frankfurter and Douglas, complained that the Court's interpretation "neutralizes the humane spirit of the Rule and thereby frustrates its purpose." 71 S.Ct. at 213–214, 340 U.S. at 202. Justice Clark took no part in the decision.

The Ackermann case was followed in another denaturalization case in which a party had made a free choice not to appeal. Polites v. U. S., 1960, 81 S.Ct. 202, 364 U.S. 426, 5 L.Ed.2d 173.

38. Earlier cases

See Note, Federal Rule 60(b): Relief from Civil Judgments, 1952, 61 Yale L.J. 76, 83 n. 36, citing the following cases as examples: Nelms v. Baltimore & O. R. Co., D.C.Ohio 1951, 11 F.R.D. 441; Weilbacher v. U. S., D.C.N.Y.1951, 99 F.Supp. 109; Fleming v. Mante, D.C.Ohio 1950, 10 F.R.D. 391; U. S. v. Miller, D.C.Pa.1949, 9 F.R.D. 506.

39. Mutually exclusive

Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers, Local No. 480, AFL–CIO, C.A. 5th, 1972, 460 F.2d 105.

Lubben v. Selective Serv. Sys. Local Bd. No. 27, C.A.1st, 1972, 453 F.2d 645.

Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788,

But to recognize that these are mutually exclusive, and that clause (6) is not an easy escape from the time limit of the first three clauses, does not establish what it is that is needed for relief under clause (6) on a motion made more than a year after judgment. Perhaps the most revealing decision is United States v. Karahalias,[40] in which Judge Learned Hand spoke for the Second Circuit. In this case a default judgment of denaturalization had been entered and it was more than 17 years before relief was sought from the judgment. Karahalias had gone to Greece in 1929 in order to bring his wife to this country and did not return until 1947. He alleged that his wife had been so ill that any attempt to bring her to the United States before 1939 would have endangered her life, that he wished to return alone but was advised by the American Embassy in Athens that he could not return without his wife and children, and that from 1939 to 1947 the war made it impossible for him to return. Judge Hand stated explicitly that the ground for relief was "excusable neglect," specifically mentioned in clause (1), but said that clause (6) gives the courts "a discretionary dispensing power" over the time limit usually provided for the first three clauses.[41]

As has been seen, this reading of clause (6) is contrary to the interpretation of it by the Supreme Court in the Klapprott and Ackermann cases. This was called to the attention of the court, on petition for rehearing of its decision in favor of Karahalias. The court agreed that the Klapprott decision "was obviously con-

certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

U. S. v. Erdoss, C.A.2d, 1971, 440 F. 2d 1221, certiorari denied 92 S.Ct. 83, 404 U.S. 849, 30 L.Ed.2d 88.

Rinieri v. News Syndicate Co., C.A. 2d, 1967, 385 F.2d 818.

Tobriner v. Chefer, C.A.1964, 335 F. 2d 281, 118 U.S.App.D.C. 246.

Sunfire Coal Co. v. United Mine Workers of America, C.A.6th, 1964, 335 F.2d 958, certiorari denied 85 S.Ct. 701, 379 U.S. 990, 13 L.Ed.2d 610.

Zurini v. U. S., C.A.8th, 1951, 189 F.2d 722.

Crane v. Kerr, D.C.Ga.1971, 53 F.R.D. 311.

FDIC v. Alker, D.C.Pa.1962, 30 F.R. D. 527, affirmed per curiam C.A. 3d, 1963, 316 F.2d 236, certiorari denied 84 S.Ct. 150, 375 U.S. 880, 11 L.Ed.2d 111.

Lucas v. City of Juneau, D.C.Alaska 1957, 20 F.R.D. 407, 17 Alaska 75.

Comment, Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60b(6), 1968, 33 Mo.L.Rev. 427.

Comment, Temporal Aspects of the Finality of Judgments, 1950, 17 U. of Chi.L.Rev. 664.

Note, Federal Rule 60(b): Relief from Civil Judgments, 1952, 61 Yale L.J. 76.

40. Karahalias case
C.A.2d, 1953, 205 F.2d 331.

41. Dispensing power
205 F.2d at 333.

trary to what we said, both in reasoning and in result," [42] and, retracting its earlier construction, held that no "neglect," however excusable, will survive the one year limitation of Rule 60(b)(1). But this did not require the court to alter its result. Instead it retracted also its statement that Karahalias' inaction was "neglect"—though it had had "no doubt" as to this on its first opinion—and said that since it was not "neglect," it was not subject to any limitation but fell within the terms of clause (6), which permitted reopening of the judgment even after so long a delay. Specifically it said that "when the citizen's inaction resulted from forcible obstacles imposed upon his defence," clause (6), rather than clause (1), is involved. Though this construction might be regarded in the first instance as a logical generalization from the facts of the Klapprott case, the easy way in which the court was able to categorize as not "neglect" what it had been sure was "neglect" only six weeks before, is striking evidence of what a flexible device for avoiding the time limits of Rule 60(b), clause (6) provides to a strong court.[43]

Although it is not easy to fit the later cases into a consistent pattern, in general they seem to follow the flexible approach of the Karahalias case. The courts have echoed, as they must in the light of Ackermann, the view that clause (6) is reserved for extraordinary cases,[44] and they have said that that clause and the other clauses of the rule are mutually exclusive. At the same time they have acted on the premise that cases of extreme hardship or injustice may be brought within a more liberal dispensa-

42. Contrary to Klapprott

205 F.2d at 335.

43. Flexible device

Another court has referred to what was done in Karahalias as a "semantic tour-de-force." McKinney v. Boyle, C.A.9th, 1968, 404 F.2d 632, certiorari denied 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767.

Compare

"[I]t is settled that an appellant cannot circumvent the one year limitation by invoking the residual clause (6) of Rule 60(b)." Serzysko v. Chase Manhattan Bank, C.A.2d, 1972, 461 F.2d 699, 702, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139 (no special circumstances shown).

44. Extraordinary cases

E. g., Boehm v. Office of Alien Property, C.A.1965, 344 F.2d 194, 120 U.S.App.D.C. 100.

Hawkins v. Lindsley, C.A.2d, 1964, 327 F.2d 356.

Crane v. Kerr, D.C.Ga.1971, 53 F.R.D. 311.

DeLong's Inc. v. Stupp Bros. Bridge & Iron Co., D.C.Mo.1965, 40 F.R.D. 127, 131, **citing Barron & Holtzoff (Wright ed.).**

FDIC v. Alker, D.C.Pa.1962, 30 F.R.D. 527, affirmed C.A.3d, 1963, 316 F.2d 236, certiorari denied 84 S.Ct. 150, 375 U.S. 880, 11 L.Ed.2d 111.

Loucke v. U. S., D.C.N.Y.1957, 21 F.R.D. 305.

tion than a literal reading of the rule would allow.[45] Relief often is denied on the ground that an insufficient showing has been made,[46] but if the facts are compelling enough the courts are ready to find that "something more" than one of the grounds stated in the first five clauses is present,[47] and that relief is available under clause (6).[48]

45. Extreme hardship or injustice

Rule 60(b)(6) can be invoked to prevent extreme hardship or injustice. Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788, 792, **citing Barron & Holtzoff (Wright ed.),** certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

Stuski v. U. S. Lines, D.C.Pa.1962, 31 F.R.D. 188, 190, **quoting Barron & Holtzoff (Wright ed.).**

U. S. v. Williams, D.C.Ark.1952, 109 F.Supp. 456, 461, **citing Barron & Holtzoff.**

46. Relief denied

An alien was not entitled to vacate a judgment of denaturalization for any "other reason" than excusable neglect on the theory that his failure to appeal, as his relative successfully did in a consolidated case was justified by his reliance upon the Alien Control Officer's advice that he should "hang on to" his home, which he thought he would have to sell to meet the costs of appeal, and that he would be released at the end of the war, in the absence of allegations of undue influence or privity or fiduciary relations on part of such officer. Ackermann v. U. S., 1950, 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207.

Since Rule 60(b)(6) permits relief only for fraud of an adverse party and only if the motions were made within one year after the entry of judgment, the clause providing for relief for any other reason justifying relief from the operations of a judgment would not be read to authorize an attack for one's own or a nonadverse party's fraud 22 years after judgment was entered, in relation to the complaint of a divorced wife who sought a judgment annulling a 1948 naturalization of her deceased husband and herself. Simons v. U. S., C.A.2d, 1971, 452 F.2d 1110.

Whether a case was dismissed because plaintiffs mistakenly thought they had complied with an order, when in fact they had not, or because the court mistakenly thought they had not complied, when in fact they had, the ground for relief would be a "mistake" and would not come under Rule 60(b)(6). Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788, certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

Refusal of a trial judge who formerly owned stock of plaintiff corporation but who sold that stock 25 years prior to trial to disqualify himself was not ground for relief from judgment. U. S. Fidelity & Guaranty Co. v. Lawrenson, D.C. Md.1964, 34 F.R.D. 121, affirmed C.A.4th, 1964, 334 F.2d 464, certiorari denied 85 S.Ct. 141, 379 U.S. 869, 13 L.Ed.2d 71.

Relief would not lie under Rule 60(b)(6) because of a purported defect expressly appearing on the face of the judgment. James Blackstone Memorial Ass'n v. Gulf, M. & O. R. Co., D.C.Conn.1961, 28 F.R.D. 385.

47. Something more

"While the circumstances reflected by all of these papers bear many of the earmarks of a mere plea for reopening for newly discovered evidence under (2) or fraud under (3), it is something more." Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 609.

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48. See note 48 on page 221.

A quite typical kind of case is that in which a party comes in more than a year after judgment to assert that he is the victim

Allegations showed "far more" than merely excusable neglect. Menier v. U. S., C.A.5th, 1968, 405 F.2d 245, 248.

"The difficulty of [the mutual-exclusiveness] interpretation is that every conceivable ground for relief arguably comes within the first three subdivisions so that subdivision (6) would be superfluous. Therefore, whatever the stated intent of the drafters of the 'any other reason' clause may be, it is more reasonable to suppose it means other special reasons of such a nature that, although the facts fit other subdivisions, they also compel the court to allow relief for equitable reasons. Subdivision (6) should apply when there are any other equitable reasons *in addition* to those enumerated, as well as when there are reasons none of which come within the other subdivisions." Comment, Rule 60(b): Survey and Proposal for General Reform, 1972, 60 Calif.L.Rev. 531, 559–560.

48. Relief granted

Relief granted when circumstances presented more than excusable neglect and included such factors as inaction by the government, unusual delay by the court, and insolvency of the party. Menier v. U. S., C.A.5th, 1968, 405 F.2d 245.

Fraud on the part of a party's own counsel and his former wife does not come under Rule 60(b)(3) and relief is available under Rule 60(b)(6) even though more than a year has passed. McKinney v. Boyle, C.A.9th, 1968, 404 F.2d 632, certiorari denied 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767.

Even though the record on a motion for relief from a judgment of patent validity and infringement disclosed no evil purpose to mistake or conceal in an infringer's affidavit as to the date of a printed publication purportedly describing the invention, the unique factors of the case justified the granting of relief from judgment to permit consideration of a defense of prior publication. Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1965, 351 F.2d 208, certiorari denied 86 S.Ct. 1065, 383 U.S. 936, 15 L.Ed.2d 852.

Case involved "something more" than newly discovered evidence, cognizable under Rule 60(b)(2), or fraud, cognizable under Rule 60(b)(3), because of factors of time, the public interest in the case, and the conduct of the parties. Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 609–610, **citing Barron & Holtzoff (Wright ed.).**

Consent judgment in a patent case was reopened, on a motion made more than a year and a half after judgment, since a party had refused to grant a free license as it had promised and its refusal to carry out its part of the contract by which the judgment was obtained justified the court in taking appropriate action to restore the parties to their status quo prior to the execution of the agreement. L. M. Leathers' Sons v. Goldman, C.A.6th, 1958, 252 F. 2d 188.

Petition on a bill of review to set aside a default judgment entered in a denaturalization proceeding was sufficient to warrant invoking the "any other reason" clause of Rule 60(b)(6) to which the one-year limitation does not apply, so as to justify setting aside the default entered years before. U. S. v. Backofen, C.A.3d, 1949, 176 F.2d 263.

Default judgment against shipowner resulting from death of ordinary seaman would be opened, under this rule allowing the district court to set aside a default for "any other reason justifying relief from operation of judgment," when

of some blunder by his counsel. Claims of this kind seem to fit readily enough within such grounds as mistake, inadvertence, and excusable neglect, all stated in clause (1), and courts frequently have so reasoned and held that clause (6) was inapplicable.[49] But if the court is persuaded that the interests of justice

plaintiff's attorney was aware of the mailing address of the shipowner throughout the entire proceeding but made service of process on the Secretary of State of New York, the affidavits established that a meritorious defense was possible, and the action was brought long after the seaman's death and within one day from the expiration of the limitation at a time when defendant shipowner no longer was engaged in active conduct of its business. Byron v. Bleakley Transp. Co., D.C.N.Y. 1967, 43 F.R.D. 413.

Rule 60(b)(6) applied, and a receiver was entitled to have a default judgment in favor of certain creditors against the judgment debtor set aside when the debtor had prevented other creditors from obtaining judgment by filing answers or obtaining an extension of time in which to file answers. Marquette Corp. v. Priester, D.C.S.C. 1964, 234 F.Supp. 799, 803, **citing Barron & Holtzoff (Wright ed.).**

Personal injury action that was dismissed while plaintiff was in a mental hospital and unavailable for trial was reopened eight years later. Pierre v. Bernuth, Lembcke Co., D.C.N.Y.1956, 20 F.R.D. 116.

When a judgment in an action to recover undistributed profits taxes alleged to have been wrongfully collected for years 1937 and 1939 granted recovery for the year 1939 but deliberately omitted provision for recovery of the 1937 taxes because the 1937 item was embraced in the judgment in an independent action, and thereafter the judgment in the independent action was vacated on appeal, plaintiff on its motion, would be relieved of the judgment in the interest of justice. Pierce Oil Corp. v. U. S., D.C.Va.1949, 9 F.R.D. 619.

Default judgment for treble damages based on a guess as to the amount of damages was unconscionable and justified relief under Rule 60(b)(6). U. S. v. Miller, D.C.Pa.1949, 9 F.R.D. 506.

Since at the time of settlement in April, 1962, plaintiff was not aware of an injury to his hip as a result of a fall, but in October, 1963, he underwent surgery to correct the hip injury, the court did not abuse its discretion in reopening the judgment and setting the case for trial, under a state rule similar to Rule 60(b)(6), on a motion made in January, 1965. Simons v. Schiek's, Inc., 1966, 145 N.W.2d 548, 275 Minn. 132. There is a persuasive dissent.

49. Neglect of counsel

Even if the neglect of plaintiff's attorney was prejudicial to plaintiff's case this would not avoid the one-year limitation of Rule 60(b) nor was it so extraordinary as to bring Rule 60(b)(6) into play. Hawkins v. Lindsley, C.A.2d, 1964, 327 F.2d 356.

Dismissal for want of prosecution, allegedly caused by the serious illness of plaintiffs' attorney, would be the subject of relief under Rule 60(b)(1) and could not be remedied by motion under Rule 60(b)(6) after more than one year had elapsed. Costa v. Chapkines, C.A. 2d, 1963, 316 F.2d 541.

Neglect of plaintiff's attorneys was inexcusable and did not permit relief under Rule 60(b)(6) more than a year after judgment. Stevens v. Stoumen, D.C.Pa.1963, 32 F.R.D. 385.

Dismissal for failure of plaintiff to proceed with the case would not be vacated on motion made 17 months later despite a showing that plaintiff had appeared for a

so require, it is likely to find aggravating circumstances sufficient to permit it to say that the case is properly within clause (6).[50]

It has been said that a change in the law is not enough to permit reopening a judgment under Rule 60(b)(6).[51] Generally that should be true, but this is not an inexorable rule,[52] as indeed the Supreme Court has recognized.[53]

deposition prior to the dismissal but that his attorney had failed to inform the court of this. McCawley v. Fleischmann Transp. Co., D.C.N.Y.1951, 10 F.R.D. 624.

50. Aggravating circumstances

That personal problems of counsel causes him grossly to neglect the case of a diligent client, and to mislead the client, was not mere "excusable neglect" but was an "other reason" justifying relief some two years after dismissal for want of prosecution. L. P. Steuart, Inc. v. Matthews, C.A.1964, 329 F.2d 234, 117 U.S.App.D.C. 279, certiorari denied 85 S.Ct. 50, 379 U.S. 824, 13 L.Ed.2d 35, noted 1965, 67 W.Va.L.Rev. 173, 1964, 50 Iowa L.Rev. 641.

Default judgment against an individual would be set aside, although the motion was not filed within the one year limit, when default and failure to file the motion were due to gross and inexcusable neglect of the individual's counsel, the individual was an uneducated layman suffering from anxiety and illness, and the obligation was that of the corporation rather than the individual. Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., D.C.Ga.1970, 319 F.Supp. 1308.

Default judgment set aside since dedefendant had what might be a meritorious defense and plaintiff did not advise defense counsel, who had answered in an identical action in state court, that he had failed to do so in federal court. Stuski v. U. S. Lines, D.C.Pa.1962, 31 F.R.D. 188.

Gross neglect of plaintiff's counsel, of which plaintiff was unaware, coupled with the absence of neglect on the part of the plaintiffs, constituted more than the "excusable neglect" referred to in Rule 60(b)(1) and permitted relief under Rule 60(b)(6). King v. Mordowanec, D.C.R.I.1969, 46 F.R.D. 474.

Action of attorneys in abandoning the case of a client, who was under medical care outside the jurisdiction, without notice to the client, and in permitting an order dismissing the case to be entered without the client's knowledge or consent would justify an exception to this rule making conduct of attorneys imputable to client and would justify vacation of order of dismissal. Lucas v. City of Juneau, D.C.Alaska 1957, 20 F.R.D. 407, 17 Alaska 75.

Order set aside on a motion made after more than one year on a showing that at the time of the hearing the moving party's lawyer was drunk and did not call witnesses who were present and available to testify. In re Cremidas' Estate, D.C.Alaska 1953, 14 F.R.D. 15, 14 Alaska 234.

51. Change in law

The fact that there has been a change in the law is not a sufficient reason under Rule 60(b)(6) to set aside a prior judgment. Loucke v. U. S., D.C.N.Y.1957, 21 F.R.D. 305.

52. Not inexorable

When a deportation proceeding was enjoined for failure to comply with the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., the injunction did not rest on the con-

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53. See note 53 on page 224.

§ 2865. Procedure for Obtaining Relief

Relief under Rule 60(b) ordinarily is obtained by motion in the court that rendered the judgment.[54] If a judgment obtained in one district has been registered in another district, as provided by Section 1963 of Title 28, it is possible that the court in the district of registration has jurisdiction to hear a Rule 60(b) motion. No case has squarely passed on the question one way or the other.[55] But the rendering court ordinarily will be far more

stitutional ground of denial of due process but was for nonconformance with the Act, and when Congress removed the necessity for complying with that Act, the government was entitled to have the injunction vacated under Rule 60 (b)(6). McGrath v. Potash, C.A. 1952, 199 F.2d 166, 91 U.S.App. D.C. 94.

Previous decree upholding the validity of the state tuition grant system for private schools could be reopened as a result of intervening edicts of the Supreme Court in similar cases and res judicata would not prevent a holding that the system violated the federal Constitution. Griffin v. State Bd. of Educ., D.C.Va.1969, 296 F.Supp. 1178.

53. Supreme Court statement

"* * * [W]e need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law." Polites v. U. S., 1960, 81 S.Ct. 202, 206, 364 U.S. 426, 433, 5 L.Ed.2d 173.

54. Motion in rendering court

Bankers Mortgage Co. v. U. S., C.A. 5th, 1970, 423 F.2d 73, 78, certiorari denied 90 S.Ct. 2242, 399 U.S. 927, 26 L.Ed.2d 793.

55. Not passed on

"The powers of a district court to grant relief against a judgment registered there under 28 U.S.C. § 1963 have not been comprehensively delineated. That it may grant relief in certain circumstances seems clear." U. S. v. Fluor Corp., Ltd., C.A.2d, 1970, 436 F.2d 383, 384–385, certiorari denied 91 S.Ct. 1623, 402 U.S. 945, 29 L. Ed.2d 114.

On registration of judgments generally, see § 2787.

In the case cited by the Second Circuit for the proposition just quoted, Hadden v. Rumsey Prods., Inc., C.A.2d, 1952, 196 F.2d 92, the court did not decide whether the court in which the judgment is registered could rule on a Rule 60(b) motion but held that it could entertain an independent action for relief from the judgment.

The question similarly was avoided in Winfield Associates, Inc. v. Stonecipher, C.A.10th, 1970, 429 F.2d 1087.

See also James Blackstone Memorial Ass'n v. Gulf, M. & O. R. Co., D.C. Conn.1961, 28 F.R.D. 385, 386.

Vaughan v. Petroleum Conversion Corp., D.C.Conn.1953, 120 F.Supp. 175, 178.

There is a dictum in Tommills Brokerage Co. v. Thon, D.C.Puerto Rico 1971, 52 F.R.D. 200, 202–203, that the court of registration has power to decide a Rule 60(b) motion, but in that case the court declined to exercise that power.

"For those cases where a defendant clearly deserves relief, the registration court may have the power to act. * * * Nevertheless, such situations should be viewed as special cases; more often, the Court

familiar with the case and with the circumstances that are said to provide grounds for relief from the judgment. Accordingly it is appropriate for the court in the district of registration to decline to pass on the motion for relief and to require the moving party to proceed in the court that gave judgment.[56]

The rule allows relief from a judgment to be given to "a party or his legal representative." This allows one who is in privity with a party to move under the rule.[57] With this exception, one

issuing a judgment will be the sole forum for modification of its judgment. * * * Where, as here, the judgment appears on its face to be valid in all respects, the registration court should defer to the issuing court." Coleman v. Patterson, D.C.N.Y.1972, 57 F.R.D. 146, 149.

56. Decline to rule

"Few would argue, however, that the court of registration lacks discretion in appropriate circumstances to refer the parties to the court which rendered judgment. * * * Comity among the district courts would obviously be furthered if these issues were referred back to the court which originally considered them. Moreover, because the Arizona court was already familiar with the issues, the interests of efficient judicial administration commend that court as an eminently suitable forum for further related proceedings." U. S. v. Fluor Corp., C.A.2d, 1970, 436 F.2d 383, 385, certiorari denied 91 S.Ct. 1623, 402 U.S. 945, 29 L.Ed.2d 114.

Court that rendered judgment is a more convenient and satisfactory forum to determine a claim that the judgment is void for want of personal jurisdiction over defendant. Tommills Brokerage Co. v. Thon, D.C.Puerto Rico 1971, 52 F.R.D. 200.

"In fact, since this court has had no prior contact with the case and lacks any familiarity with the many considerations, all of which are outside the record, which might influence a court in its ultimate determination of how this judgment for costs should be satisfied, it should not undertake to decide now what was the intent of the District Judge in Illinois." James Blackstone Memorial Ass'n v. Gulf, M. & O. R. Co., D.C.Conn. 1961, 28 F.R.D. 385, 387.

Court, concluding that Rule 60(b) motion should be heard by a district court in Texas, where the judgment was rendered, rather than by a district court in New York, in which it had been registered, stayed further collection on the execution for 30 days so that application might be made to the Texas court, but it did so without any impairment of the levy of the marshal pursuant to the execution that already had issued in New York and without releasing any lien that had already attached. Coleman v. Patterson, D.C.N.Y. 1972, 57 F.R.D. 146.

57. Privity

A trustee in bankruptcy has standing under Rule 60(b) because of his power and status in respect to assets of the estate. In re Casco Chem. Co., C.A.5th, 1964, 335 F.2d 645.

The term "legal representative" embraces an heir at law who stood in the same position as the deceased judgment debtor in respect to real property transferred to the heir. Ingerton v. First Nat. Bank & Trust Co., C.A.10th, 291 F.2d 662.

City officials who succeeded under state law to part of a county officer's powers with respect to the operation of schools, following the city's incorporation, were amenable to a school desegregation decree and could seek amendment of

who was not a party lacks standing to make the motion,[58] nor may an attorney for a party move in his own name.[59] The controlling principle has been clearly stated by Chief Judge Lewis for the Tenth Circuit:

> A "legal representative" under the rule is one who by operation of law is tantamount to a party in relationship to the matter involved in the principal action. * * * If the threshold bar were not restricted, rule 60(b) could be opened to the broadest claims of ancillary jurisdiction and thereby thwart the finality of principal judgments and established procedures to correct fundamental legal errors.[60]

The rule says that the court is to act "on motion" and this is the usual procedure. However the court has power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than a motion.[61]

the decree. Wright v. County School Bd. of Greensville County, Virginia, D.C.Va.1970, 309 F.Supp. 671.

58. Not a party

Screven v. U. S., C.A.5th, 1953, 207 F.2d 740.

The purchaser at a mortgage foreclosure sale lacked standing to move to reopen the foreclosure decree to seek removal of the period of redemption. U. S. v. West Willow Apartments, Inc., D.C. Mich.1965, 245 F.Supp. 755.

A person who claims to own the property in question, but who was not named as a party in a condemnation proceeding, may not move to set aside the judgment in that proceeding. U. S. v. 140.80 Acres of Land in West Feliciana Parish, Louisiana, D.C.La.1963, 32 F.R.D. 11.

59. Attorney

An attorney may not use Rule 60(b) as a vehicle to resolve his private controversy with a party over his fee. Western Steel Erection Co. v. U. S., C.A.10th, 1970, 424 F.2d 737.

Attorneys for a union did not have standing to bring a motion for relief from judgment in view of the fact that the attorneys were not parties to the judgment or cause in which the judgment was entered, and the refusal to reopen terminated case for the purpose of passing on the attorneys' right to additional fees was therefore proper regardless of whether or not the attorneys might have had a claim that could validly be pursued in a separate action. Ratner v. Bakery & Confectionery Workers Int'l Union of America, C.A.1968, 394 F.2d 780, 129 U.S.App.D.C. 305.

Attorney for plaintiffs in a civil action did not have standing to move under Rule 60 for an order modifying certain injunctions entered in the action and directing counsel to take certain actions and refrain from certain activities, even though counsel was no longer counsel for plaintiffs. Mobay Chem. Co. v. Hudson Foam Plastics Corp., D.C. N.Y.1967, 277 F.Supp. 413.

60. Controlling principle

Western Steel Erection Co. v. U. S., C.A.10th, 1970, 424 F.2d 737, 739.

61. Act without motion

McDowell v. Celebrezze, C.A.5th, 1962, 310 F.2d 43.

The court need not hold a hearing on a motion for relief from a judgment if the motion clearly is without substance and merely an attempt to burden the court with frivolous contentions.[62] Findings of fact and conclusions of law are not required on a motion under Rule 60.[63]

§ 2866. Time for Motion

Rule 60(b) contains its own time limits.[64] Relief under the rule is not restricted by the time limits for a motion for a new trial [65] and the concept of a "term" of the court as a limit on the power to grant relief from a judgment has long since been abolished.[66]

U. S. v. Jacobs, C.A.4th, 1961, 298 F.2d 469.

U. S. v. Milana, D.C.Mich.1957, 148 F.Supp. 152.

Packard v. Whitten, Me.1971, 274 A. 2d 169, 173, **citing Barron & Holtzoff (Wright ed.).**

A finding of fraud on the court empowers the district court to set aside a judgment sua sponte. Kupferman v. Consolidated Research & Mfg. Corp., C.A.2d, 1972, 459 F.2d 1072.

62. Hearing not required

U. S. Fidelity & Guaranty Co. v. Lawrenson, D.C.Md.1964, 34 F.R.D. 121, 123, affirmed C.A.4th, 334 F.2d 464, certiorari denied 85 S.Ct. 141, 379 U.S. 869, 13 L.Ed.2d 71.

Refusal of the trial court to allow the filing of reply affidavits and argument in a proceeding to vacate a default judgment was not an abuse of discretion when the record showed that the substance of the affidavits was presented orally to the judge. Standard Newspapers, Inc. v. King, C.A.2d, 1967, 375 F.2d 115.

63. Need not make findings

Delzona Corp. v. Sacks, C.A.3d, 1959, 265 F.2d 157.

See vol. 9, § 2575.

Although it would have been better practice for the district judge to give a written reason for denial of a motion to vacate a default judgment, the failure to do so was not an abuse of discretion, when papers and transcribed argument below indicated that the court had studied the matter and why it denied the motion. Standard Newspapers, Inc. v. King, C.A.2d, 1967, 375 F.2d 115.

64. Time limits

Prior to the 1948 amendment the motion was required to be made within a reasonable time, not exceeding six months after the judgment.

65. Not restricted

Daly v. Stratton, C.A.7th, 1962, 304 F.2d 666, certiorari denied 83 S.Ct. 306, 371 U.S. 934, 9 L.Ed.2d 270.

Reynal v. U. S., C.C.A.5th, 1945, 153 F.2d 929.

A motion under Rule 60(b) does not affect the time for appeal nor the finality and the reason for the short time limits on motions that do, such as under Rule 59, are not applicable. Conerly v. Flower, C.A.8th, 1969, 410 F.2d 941.

66. "Term" of court

The former rule, that a court could not set aside or alter a final judgment after the expiration of the term at which it was entered unless the proceeding for that purpose was begun during that term, was stated in U. S. v. Mayer, 1914, 35 S.Ct. 16, 235 U.S. 55, 59 L.Ed. 129.

Although Rule 60(b) purports to require all motions under it to be made within "a reasonable time," this limitation does not apply to a motion under clause (4) attacking a judgment as void. There is no time limit on a motion of that kind.[67] All other motions under Rule 60(b), however, must be made within a reasonable time of the judgment, order, or proceeding from which relief is sought.

"What constitutes reasonable time must of necessity depend upon the facts in each individual case." [68] The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief [69] and they consider whether the moving party had some good reason for his failure to take appro-

When the rules originally were adopted, Rule 6(c) put an end to the significance of the term. Sprague v. Ticonic Nat. Bank, 1939, 59 S.Ct. 777, 307 U.S. 161, 83 L.Ed. 1184; Gilmore v. U. S., C.C.A. 8th, 1943, 131 F.2d 873, certiorari denied 62 S.Ct. 941, 316 U.S. 661, 86 L.Ed. 1738. Rule 6(c) was rescinded in 1966 because of statutory changes enacted in 1963 that ended the practice of having formal terms of court. See vol. 4, § 1161.

67. Void judgment

See § 2862 nn. 75, 76.

68. Facts of each case

In re Cremidas' Estate, D.C.Alaska 1953, 14 F.R.D. 15, 18, 14 Alaska 234.

69. Prejudice

Motion to vacate an order of dismissal filed November 22, 1966, when plaintiff had learned of the order in January, 1965 and defendant would suffer prejudice if made to proceed to trial was not filed within a reasonable time. Carrethers v. St. Louis-San Francisco Ry. Co., D.C.Okl.1967, 264 F.Supp. 171.

Even if the ground on which plaintiff sought relief from a judgment fell within the scope of this rule permitting court to relieve a party from a judgment "for any other reason justifying relief from operation thereof," a motion to vacate the judgment was not timely when more than three years had elapsed and defendant would be prejudiced if made to proceed to trial. Mach v. Pennsylvania R. Co., D.C.Pa. 1961, 198 F.Supp. 473.

Absence of prejudice

When a motion to vacate an order awarding a mother alleged arrearages in payments for the maintenance of children while children lived in another jurisdiction was made within a few months after the order was entered, and no intervening rights of the mother were prejudiced, the motion for relief was made within a reasonable time, and the judge was authorized to relieve the father from the order on the ground that although the judgment did not specifically so state, maintenance was to be paid only while the children were in the jurisdiction. Jackson v. Jackson, C.A.1960, 276 F.2d 501, 107 U.S.App.D.C. 255, certiorari denied 81 S.Ct. 94, 364 U.S. 849, 5 L.Ed.2d 73.

Motion made almost three years after an action had been settled, and 18 months after plaintiff knew of the circumstance on which the motion was based, was not untimely since defendant did not claim it would be prejudiced in any way if the motion were granted. Simons v. Schiek's, Inc., 1966, 145 N.W.2d 548, 275 Minn. 132.

priate action sooner.[70] Other cases are set out in the margin in which courts have ruled that a motion was made in a reasonable

70. Failure to take action sooner

Coclin Tobacco Co. v. Brown & Williamson Tobacco Corp., C.A.2d, 1965, 353 F.2d 727.

Morse-Starrett Prods. Co. v. Steccone, C.A.10th, 1953, 205 F.2d 244.

Berryhill v. U. S., C.A.6th, 1952, 199 F.2d 217.

Perrin v. Aluminum Co. of America, C.A.9th, 1952, 197 F.2d 254.

Morgan v. Southern Farm Bureau Cas. Ins. Co., D.C.La.1967, 42 F. R.D. 25, 27, **citing Barron & Holtzoff (Wright ed.).**

Von Wedel v. McGrath, D.C.N.J.1951, 100 F.Supp. 434, affirmed C.A.3d, 1952, 194 F.2d 1013.

M. Lowenstein & Sons v. American Underwear Mfg. Co., D.C.Pa.1951, 11 F.R.D. 172.

Ledwith v. Storkan, D.C.Neb.1942, 2 F.R.D. 539.

Railway Express Agency, Inc. v. Hill, App.D.C.1969, 250 A.2d 923, 927, **quoting Barron & Holtzoff (Wright ed.).**

Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, **quoting Barron & Holtzoff (Wright ed.).**

C. Meisel Music Co. v. Perl, 1966, 415 P.2d 575, 579, 3 Ariz.App. 479, **citing Barron & Holtzoff (Wright ed.).**

Marquez v. Rapid Harvest Co., 1965, 409 P.2d 285, 287, 99 Ariz. 363, **citing Barron & Holtzoff (Wright ed.).**

When plaintiff's failure or inability to maintain contact with his counsel in regard to a tort action arising out of an automobile accident during his fugitive months was the consequence of his own wrongdoing and even if incarcerated he could have communicated with his attorney to inquire as to the progress of his litigation, in failing to do so he was deemed to have acquiesced in the attorney's compromise of suit, and he was unreasonably dilatory in letting four and a half years pass, including nine months after he was informed of the dismissal, before filing motion to set aside judgment of dismissal of the tort action. McKinney v. Boyle, C.A.9th, 1971, 447 F.2d 1091.

Contention that when original judgment against negligent employee and employer was marked satisfied as to both of them, it ceased to be fair to enforce the obligation of the joint venturer of the employer on the theory that its liability was secondary to and derivative from the employee's was not raised within a reasonable time and the joint venturer was not entitled to relief from the judgment over entered against it, when it failed to prosecute an appeal it had initiated, it failed to move immediately to alter or amend the judgment and instead it waited 13 months to seek relief under this rule providing extraordinary post-judgment relief. Friedman v. Wilson Freight Forwarding Co., C.A.3d, 1963, 320 F.2d 244.

Delay of 18 months was too long to be regarded as reasonable when, during all that period, the moving party was in possession of the facts about which he ultimately complained. Delzona Corp. v. Sacks, C.A.3d, 1959, 265 F.2d 157.

When a corporation did not move to vacate a default judgment until almost a year after the time it was fully advised of the judgment, a motion to vacate on the ground of fraud, misrepresentation, or other misconduct of an adverse party was not timely within this rule requiring the motion to be filed both within one year and within a reasonable time within the one year period. Mayfair Extension, Inc. v. Magee, C.A.1957, 241 F.2d 453, 100 U.S.App.D.C. 48.

When inter alia, a locomotive fireman who sought relief from a judgment that approved the settlement

time and was timely [71] or that it was not made in a reasonable time and was untimely.[72] In some of the latter group of cases

of a class action against a railway for alleged violations of the Railway Labor Act and the abrogation of the collective bargaining agreements, in substantial part, prior to seeking relief, had remained silent and accepted payments made pursuant to the settlement, a motion for relief, some 2½ months after final hearing, was not timely. Mungin v. Florida East Coast Ry. Co., D.C.Fla.1970, 318 F.Supp. 720, affirmed per curiam C.A.5th, 1971, 441 F.2d 728, certiorari denied 92 S.Ct. 203, 331, 404 U.S. 897, 30 L.Ed.2d 175.

Judgment dismissing a suit brought by corporate plaintiff, upon the stipulation of plaintiff and defendant, would not be set aside on motion of certain stockholders of the corporation when there was no showing of fraud, and when the moving parties, although they had knowledge of the dismissal, delayed more than 70 days before moving to set the judgment aside. McCullough v. Walker, Livestock, Inc., D.C.Ark.1963, 220 F.Supp. 790.

A judgment debtor was not entitled to the grant of a motion to correct a judgment that did not indicate whether it was joint or joint and several, under this rule authorizing the court to grant relief from judgment, when the defect was apparent on the face of judgment and movant alleged no reason for his failure to seek clarification either at the time of entry of the judgment or during the course of appeal, and did not move for relief until more than three years after the entry of judgment. James Blackstone Memorial Ass'n v. Gulf, M. & O. R. Co., D.C.Conn.1961, 28 F.R.D. 385.

Defendant, who was naturalized in 1928, but who returned to Germany in 1932 and remained there until 1949, except for an eight-month period spent in the United States, was not entitled to relief from default judgment declaring her naturalization in 1928 to be void, in view of the facts that she gave her written consent thereto and that she allowed six years to lapse, without a satisfactory explanation for the delay, before seeking relief from the judgment. U. S. v. Willenbrock, D.C.Pa.1957, 152 F.Supp. 431.

When defendant learned within a few days that his attorney had entered into a stipulation and consent to judgment enjoining defendant from use of certain trade name, and when the certified copy of the stipulation and final judgment was served on defendant three months later, but he waited until eight months later, during which time he continued to violate the injunction, before moving to vacate the stipulation and judgment, defendant was guilty of laches and unreasonable delay, and the motion would be denied. Helene Curtis Indus., Inc. v. Dinerstein, D.C.N.Y. 1955, 17 F.R.D. 223.

Motion made nine years after judgment was untimely since the ground on which it was based was known to the moving party within eight months after judgment. Meyer v. Meyer, 1972, 495 P.2d 942, 209 Kan. 31.

71. Motion timely

The filing, three weeks after defendant learned of the default judgment against him, of a motion to set aside judgment and default and to quash service of process, was timely, even though not filed until three years after the purported service. Williams v. Capital Transit Co., C.A.1954, 215 F.2d 487, 94 U.S.App.D.C. 221.

Fifteen months was a reasonable time in which to move for relief under Rule 60(b)(6) when the receiver and his counsel had been

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72. See note 72 on page 231.

the court merely states the time interval involved and says that it was unreasonable but undoubtedly the court forms this judgment in the light of the circumstances of the particular case.

busy in other litigation and hampered by bad health. Marquette Corp. v. Priester, D.C.S.C.1964, 234 F.Supp. 799.

Delay of more than three years did not bar the motion when the party's freedom of action was severely restricted by economic and other conditions and he had no counsel to advise him. In re Cremidas' Estate, D.C.Alaska 1953, 14 F.R.D. 15, 14 Alaska 234.

Three year delay by a person in possession with a claim to title in bringing a proceeding to set aside a default quiet title decree was not unreasonable under the facts. U. S. v. Williams, D.C.Ark.1952, 109 F.Supp. 456.

Motion made on June 6, 1949, to challenge a judgment entered November 20, 1947, was timely since certiorari was not denied by the Supreme Court until January 17, 1949, and on March 8, 1949, the moving party had moved for relief by another device that proved to be unsuccessful. Pierce Oil Corp. v. U. S., D.C.Va.1949, 9 F.R.D. 619.

Motion made within four months after entry of judgment, and following correspondence between counsel, was timely. Woods v. Severson, D.C.Neb.1948, 9 F.R.D. 84.

72. Motion untimely

When a contract of sale by co-owner's receivers was confirmed by the court on June 19, and the other owner was party to the proceedings but did not learn the full terms of the contract until August 26, the other owner's petition of October 31 seeking equitable relief from the judgment by enjoining the sale was not brought within a reasonable time. Goldfine v. U. S., C.A.1st, 1964, 326 F.2d 456.

Sixteen months was not a reasonable time. Gilmore v. Hinman, C.A.1951, 191 F.2d 652, 89 U.S.App. D.C. 165.

Motion to reopen a settlement made ten months after the entry of a stipulation of discontinuance was not made within a reasonable time and plaintiff was not entitled to have the action reopened. Robinson v. E. P. Dutton & Co., D.C. N.Y.1968, 45 F.R.D. 360.

Actions of defendant, which admitted it was duly served in an action for damages and did not deny that its insurer had received two additional reminders of the pendency of the action but yet averred that it failed to appear because of some internal omission of its insurer that subsequently destroyed file without taking any action, showed a lack of diligence that would preclude the court from characterizing its neglect as excusable, and the court was not authorized to set aside a default judgment after defendant's inactivity in the matter for two and a half years. Wagg v. Hall, D.C.Pa.1967, 42 F.R.D. 589.

Delay of ten months and eleven days was unreasonable. Rhodes v. Houston, D.C.Neb.1966, 258 F. Supp. 546, affirmed C.A.8th, 1969, 418 F.2d 1309, certiorari denied 90 S.Ct. 1382, 397 U.S. 1049, 25 L.Ed. 2d 662.

Motion to vacate judgment was not made within a reasonable time, and therefore was not timely, when made 14 months after rendition of the judgment and nine months after a pretrial conference at which counsel for the moving parties was fully apprised of the judgment. U. S. v. 148.80 Acres of Land, More or Less, in West Feliciana Parish, State of Louisiana, D.C.La.1963, 32 F.R.D. 11.

United States was not entitled to relief from dismissal of its third-party complaint when the motion

As has been discussed in an earlier section, there is some authority, although the cases are divided, allowing the use of Rule 60(b) to correct an error of law by the trial court.[73] The courts seem to be holding that a "reasonable time" for a motion of this kind may not exceed the time in which appeal might have been taken if the error involved a fundamental misconception of law [74] but that this limit does not apply if the judicial error was a minor oversight.[75]

The reasonable time requirement is the only limitation on a motion under clauses (5) or (6) of Rule 60(b).[76] Motions under clauses (1), (2), or (3), attacking a judgment on grounds of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud or misconduct of a party, are treated differently. These motions must be made within a reasonable time but they also must be made not later than "one year after the judgment, order, or proceeding was entered or taken." The one year period represents an extreme limit, and the motion will be rejected as untimely if not made within a "reasonable time" even though the one year period has not expired.[77]

for relief was not filed until 32 months after the order of dismissal. Stancil v. U. S., D.C.Va. 1961, 200 F.Supp. 36.

Delay of 29 months between event that allegedly rendered an injunction inequitable and the bringing of a motion to vacate the injunction was so unreasonable as to preclude relief. Sunbeam Corp. v. Charles Appliances, Inc., D.C.N.Y. 1953, 119 F.Supp. 492.

When summary judgment was entered for defendant on December 4, 1950, and an appeal therefrom was dismissed on March 29, 1951, a motion of plaintiff on September 17, 1951, to be relieved of the judgment on the ground of mistake, inadvertence, surprise, or excusable neglect because plaintiffs had failed to turn over to their attorney correspondence that was material and relevant on an issue raised by defendant's defense was not made within a reasonable time under the circumstances and would be denied. Kahle v. Amtorg Trading Corp., D.C.N.J.1952, 13 F.R.D. 107.

73. Error of law

See § 2858 at notes 17 to 31.

74. Fundamental misconception

See § 2858 at notes 26 to 29.

75. Minor oversight

See § 2858 n. 31.

76. Clauses (5) or (6)

In re Cremidas' Estate, D.C.Alaska 1953, 14 F.R.D. 15, 14 Alaska 234.

Pierce Oil Corp. v. U. S., D.C.Va. 1949, 9 F.R.D. 619.

77. Extreme limit

"[T]he one year limitations reflects the extreme period within which the motion might have been made and that it must, in any case, have been made 'within a reasonable time' which may conceivably be less than one year from the judgment's entry." Woods v. Severson, D.C.Neb.1948, 9 F.R.D. 84, 85–86.

Many of the cases cited in notes 70 and 72 above are, as the statement of their facts show, cases in

The one year limit on motions under the first three clauses runs from the date the judgment was entered in the district court.[78] The motion can be made even though an appeal has been taken and is pending.[79] For this reason, it is held that the pendency of an appeal does not extend the one year limit[80] although if the appeal should result in a substantive change in the judgment the time would run from the entry of the new judgment entered on mandate of the appellate court.[81] Although the pendency of an appeal does not extend the one year limit, the fact that an appeal had been pending may be considered in determining whether a motion was made in a reasonable time.[82]

The concept of reasonable time cannot be used to extend the one year limit. A motion under clauses (1), (2), or (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable.[83] Nor does the

which a motion under clauses (1), (2), or (3) was held to be untimely even though it was made within a year of judgment.

78. Entry of judgment

Judgment that decreed the validity of a patent and infringement and that enjoined defendants from infringing in future was a "final" and "appealable" judgment even though the matter of assessment of damages remained, so that defendants' motion for relief from judgment, filed more than one year after entry of judgment, was untimely. Valmont Indus., Inc. v. Yuma Mfg. Co., D.C.Colo.1970, 50 F.R.D. 408.

See also

Serzysko v. Chase Manhattan Bank, C.A.2d, 1972, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.

79. Can make motion

See § 2873.

80. Limit not extended

Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers, Local No. 480, AFL–CIO, C.A. 5th, 1972, 460 F.2d 105.

Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788, 790–791, certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

Corn v. Guam Coral Co., C.A.9th, 1963, 318 F.2d 622, 629.

Vaughan v. Petroleum Conversion Corp., D.C.Conn.1953, 120 F.Supp. 175.

81. Substantive change

See Transit Cas. Co. v. Security Trust Co., C.A.5th, 1971, 441 F.2d 788, 791, certiorari denied 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

82. Determining reasonableness

Pierce Oil Corp. v. U. S., D.C.Va. 1949, 9 F.R.D. 619, 621.

83. Must be denied

Ackermann v. U. S., 1950, 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207.

Keys v. Dunbar, C.A.9th, 1969, 405 F.2d 955, certiorari denied 90 S.Ct. 158, 396 U.S. 880, 24 L.Ed.2d 138.

Capital Investors Co. v. Devers, C.A. 4th, 1967, 387 F.2d 591.

Sunfire Coal Co. v. United Mine Workers of America, C.A.6th, 1964, 335 F.2d 958, certiorari denied 85 S.Ct. 701, 379 U.S. 990, 13 L.Ed. 2d 610.

Tobriner v. Chefer, C.A.1964, 335 F.2d 281, 118 U.S.App.D.C. 246.

Kathe v. U. S., C.A.9th, 1960, 284 F.2d 713.

court have any power to enlarge the time limits of the rule.[84] The extent to which clause (6) may be used for a motion that ordinarily would come under one of the first three clauses, and thus that the one year limit can be avoided, has been discussed in an earlier section.[85]

By virtue of an express saving clause in Rule 60(b), the time limits it states are not applicable to an independent action attacking the judgment,[86] nor to granting relief to a defendant not actually notified as provided in Section 1655 of Title 28.[87] Similarly the rule does not limit the time in which the court may set aside a judgment for fraud upon the court.[88]

D. OTHER METHODS OF RELIEF

§ 2867. Former Writs Abolished

The final sentence of Rule 60(b), added as a part of the 1948 amendments, provides in part that "writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished * * *." Few except legal historians will understand clearly what it is that was abolished, but those who do understand are grateful for what was done.

Cromelin v. Markwalter, C.A.5th, 1950, 181 F.2d 948.

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625.

Davis v. Wadsworth Constr. Co., D.C.Pa.1961, 27 F.R.D. 1.

Hawke v. Servicised Prods. Corp., D.C.Ohio 1949, 9 F.R.D. 549.

Gifford v. Bowling, 1972, 200 N.W.2d 379, 382, —— S.D. ——, **quoting Barron & Holtzoff (Wright ed.).**

Motion by plaintiff to reopen judgment in which a suit by plaintiff was ordered dismissed with prejudice was barred when the motion was not made within one year after judgment was entered, although plaintiff alleged that his counsel, who was no longer in state, had not notified plaintiff of the order dismissing case. Gambocz v. Ellmyer, C.A.3d, 1971, 438 F.2d 915.

Nyyssonen v. Bendix Corp., C.A.1st, 1966, 356 F.2d 193, certiorari denied 87 S.Ct. 43, 385 U.S. 846, 17 L.Ed.2d 77.

Terhune v. American Export Lines, Inc., D.C.N.Y.1958, 24 F.R.D. 70, affirmed C.A.2d, 1959, 271 F.2d 127.

Certain-Teed Prods. Corp. v. Topping, D.C.N.Y.1952, 12 F.R.D. 406.

McCawley v. Fleischmann Transp. Co., D.C.N.Y.1951, 10 F.R.D. 624.

84. Cannot be enlarged
Rule 6(b). See vol. 4, § 1167.

85. Use of clause (6)
See § 2864.

86. Independent action
See § 2868.

87. Not actually notified
See § 2869.

88. Fraud upon the court
See § 2870.