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## Procedure--Setting Aside Final Judgments in Missouri

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## PROCEDURE—SETTING ASIDE FINAL JUDGMENTS IN MISSOURI

### I. INTRODUCTION

The common law rule of universal application was that a court of general jurisdiction had the power, during the term at which its judgments were rendered, to modify, vacate, or set aside those judgments, and that such judgments were absolute only upon the adjournment of the court for that term.<sup>1</sup> During the term, the court had the power to act upon its own initiative, or upon an outside suggestion provided by motion of a party or from any source whatever.<sup>2</sup>

Under Rule 75.01 of the Missouri Rules of Civil Procedure, a trial court now has the same power, during a thirty day period following rendition of a judgment, to vacate, modify or set aside that judgment.<sup>3</sup> This similarity extends also to the ability of the court to exercise such power either upon its own motion or from a suggestion made to the court.<sup>4</sup> Finally, as with the common law, the control of judgments by the trial court exists as to matters of fact and matters affecting the determination of issues of fact, but not as to questions of law, for there is no discretion as to the law.<sup>5</sup> The parties are entitled both to reasonable notice of the order to set aside the judgment and an opportunity to be heard regarding the order.<sup>6</sup>

If the trial judge grants a new trial under rule 75.01, the grounds for the new trial must be "specified" in the order. This requirement may be satisfied by reference to a ruling in another case or to the grounds contained in a motion directed to the court, but certainly the best practice would be for the court to state the grounds directly in the order granting the new trial.<sup>7</sup>

As a general rule, a court in this state lacks authority to disturb its final judgments after lapse of the thirty day period following rendition, except as authorized by statute or by certain common law procedures.<sup>8</sup> It is the purpose of

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1. Rottman v. Schmuker, 94 Mo. 169, 7 S.W. 119 (1888); *In re* Henry County Burial Ass'n, 229 Mo. App. 300, 77 S.W.2d 124 (K.C. Ct. App. 1935); Ramsey v. Rothwell, 168 Mo. App. 271, 153 S.W. 792 (K.C. Ct. App. 1913).

2. Reed v. Moulton, 210 S.W. 34 (Mo. 1919); *In re* Henry County Burial Ass'n, *supra* note 1.

3. Albert J. Hoppe, Inc. v. St. Louis Pub. Serv. Co., 361 Mo. 402, 235 S.W.2d 347 (1951); Willis v. Willis, 274 S.W.2d 621 (Spr. Ct. App. 1954); Mid-State Equip. Corp. v. Hobart Welders Sales & Serv. Inc., 233 S.W.2d 757 (St. L. Ct. App. 1950).

4. Mo. R. Civ. P. 75.01; Bradley v. Bradley, 295 S.W.2d 592 (St. L. Ct. App. 1956); Willis v. Willis, *supra* note 3.

5. De Marie v. Thompson, 359 Mo. 457, 222 S.W.2d 93 (1949); Mayrakos v. Mavrakos Candy Co., 359 Mo. 649, 223 S.W.2d 383 (1949); Albert J. Hoppe, Inc. v. St. Louis Pub. Serv. Co., *supra* note 3.

6. Quinn v. St. Louis Pub. Serv. Co., 318 S.W.2d 316 (Mo. 1958); Albert J. Hoppe, Inc. v. St. Louis Pub. Serv. Co., *supra* note 3.

7. See Long v. Stillwell Homes, Inc., 333 S.W.2d 103 (K.C. Ct. App. 1960).

8. State v. Mulloy, 322 Mo. 281, 15 S.W.2d 809 (1929); State v. Kirkwood, 117 S.W.2d 652 (St. L. Ct. App. 1938). It should be pointed out that the cases cited herein still refer to "term" rather than to the thirty-day period provided by the recent Missouri rules and statutes. For clarity and consistency with modern

this article to examine these statutory and common law exceptions. The methods to be discussed encompass only those available to the court which rendered the judgment. Therefore, the remedies of appeal, certiorari to review, and collateral attack upon void judgments are beyond the scope of this article, because they contemplate action brought in a court other than the court of rendition. The motion for a new trial and the motion to set aside an interlocutory judgment<sup>9</sup> for default or for failure to prosecute are also excluded, because such motions must be filed prior to the expiration of the thirty day period following rendition of the judgment.

## II. NUNC PRO TUNC ORDERS

One common law procedure still utilized by the courts to correct judgment entries of record is the issuance of orders nunc pro tunc. The literal translation of nunc pro tunc is "now for then," which reveals both the retroactive effect of such an order and its purpose, which is to correct some error in the record of the judgment—to do something now which should have been done previously at the time of the judgment.<sup>10</sup> Such orders are authorized only where the original record entry of the judgment is not the actual judgment rendered by the court. In such a case the court of rendition may issue an order nunc pro tunc to make the record conform to the judgment actually rendered.<sup>11</sup> Thus, orders nunc pro tunc are not true exceptions to the rule prohibiting courts from altering or setting aside their judgments after thirty days; they merely enable the courts to make their records conform to the judgment actually rendered upon a cause.

The theory behind the remedy is that, although the courts have lost jurisdiction of a case after the lapse of thirty days, they have not lost jurisdiction over their records.<sup>12</sup> Nunc pro tunc entries may thus be made at any time following rendition of the judgment.<sup>13</sup> This is true even though the court has lost jurisdiction of the case itself, either by lapse of time or by appeal of the case to a higher

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practice, the authors will refer to the thirty-day period following rendition of judgment rather than to "term." See also *Aetna Ins. Co. v. Hyde*, 327 Mo. 115, 34 S.W.2d 85 (1930); *Jeude v. Simms*, 258 Mo. 26, 166 S.W. 1048 (1914); *Madden v. Fitzsimmons*, 235 Mo. App. 1074, 150 S.W.2d 761 (St. L. Ct. App. 1941).

9. The importance of the provision enabling a court to set aside an interlocutory judgment obtained by default of the defendant, Mo. R. Civ. P. 74.05, should not be overlooked. The trial court exercises this power at its discretion and will require a showing by the defendant that he has a good and sufficient excuse for his default and, most important, that he has a meritorious defense. This power exists until final judgment is rendered. Following a rendition of final judgment, the procedure to set aside takes the form of a petition for review under rule 74.12, discussed in the text accompanying footnotes 22-36 *infra*.

10. BLACK, LAW DICTIONARY 1218 (4th ed. 1951).

11. *McCarthy v. Eidson*, 262 S.W.2d 52 (Mo. 1953) (en banc); *Clayton v. Holland Furnace Co.*, 300 S.W.2d 824 (St. L. Ct. App. 1957).

12. *Aronberg v. Aronberg*, 316 S.W.2d 675 (St. L. Ct. App. 1958); *Clayton v. Holland Furnace Co.*, *supra* note 11; *Vaughn v. Kansas City Gas Co.*, 236 Mo. App. 669, 159 S.W.2d 69 (K.C. Ct. App. 1942).

13. *Turner v. Christy*, 50 Mo. 145 (Mo. 1872); *Abbott v. Seamon*, 229 S.W.2d 695 (Spr. Ct. App. 1950).

court.<sup>14</sup> However, the need for correction of the court's records must arise through the mistakes or misprisions of the recording clerk or clerk of the court, because errors of the judge in rendering the decision or judgment cannot be remedied by this method.<sup>15</sup> Thus, where the court has failed to make an order which it might or ought to have made, it cannot be corrected nunc pro tunc.<sup>16</sup> Neither can the remedy be invoked to impose a judgment different from that actually rendered, even though it was not the judgment the judge intended to render.<sup>17</sup> To illustrate, in *Schenberg v. Schenberg*,<sup>18</sup> the trial court, more than three months after entry of its judgment, entered an order awarding attorney's fees nunc pro tunc. Such entry, designed to correct a mistake or oversight by the judge, was held to be an improper use of the order.

Another limitation upon the use of orders nunc pro tunc is that they must be supported by and based upon some entry, minute or notation in the record, or some paper on file in the case.<sup>19</sup> Parol evidence cannot be the basis for issuance of a nunc pro tunc order, nor can such entries be grounded upon facts resting in the memory of witnesses to the trial, or even the memory of the judge himself.<sup>20</sup>

When a party moves the court to issue an order nunc pro tunc to correct a judgment already entered, there is a presumption that the judgment entered is the judgment actually rendered by the court. The burden is therefore upon the moving party to show, by competent evidence, that a different judgment was in fact rendered.<sup>21</sup>

The highly limited use to which orders nunc pro tunc may be put in changing judgments after rendition justifies a limited consideration of them in this article. The rules applicable to such orders are stated clearly and definitively by the courts, and there appears to be little or no conflict of authority regarding them.

### III. PETITION FOR REVIEW TO SET ASIDE A DEFAULT JUDGMENT

The petition for review is a statutory exception to the rule prohibiting vacation or modification of judgments beyond the thirty day period following rendition. The basic provisions of the remedy are set forth in the Rules 74.045, 74.09, 74.12, 74.13, 74.15 and 74.17 of the Missouri Rules of Civil Procedure. Reading these rules together, the operation of the petition for review may be summarized as follows: A defendant against whom a final default judgment has been rendered may appear within three years after such judgment and, by petition for review, show "good cause" for setting it aside. However, if the plaintiff serves the defendant with notice of the suit and a copy of the final judgment, defendant's

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14. *Aronberg v. Aronberg*, *supra* note 12; *Clayton v. Holland Furnace Co.*, *supra* note 11.

15. *Turner v. Christy*, *supra* note 13; *Aronberg v. Aronberg*, *supra* note 12.

16. *Schenberg v. Schenberg*, 307 S.W.2d 697 (St. L. Ct. App. 1957).

17. *Aronberg v. Aronberg*, *supra* note 12.

18. *Supra* note 16.

19. *State v. Kitchin*, 282 S.W.2d 1 (Mo. 1955); *Doerschuk v. Locke*, 330 Mo. 819, 51 S.W.2d 62 (1932).

20. *Doerschuk v. Locke*, *supra* note 19.

21. *Aronberg v. Aronberg*, *supra* note 12.

time for bringing petition for review is limited to one year after such service is made. The remedy applies only to defendants who were not personally summoned to the action and who neither appeared to the suit nor filed any responsive pleadings in the action. Rule 74.15 requires a statement contained in the petition that defendant was not personally served and that he did not appear to the suit, as well as allegations that plaintiff's petition was untrue in some material matter (setting out such matter in the petition) or that defendant had then and has now a good defense to plaintiff's cause of action (setting out such defense in the petition). Thereafter, the defendant must also answer or direct a motion to the plaintiff's petition within a reasonable time, such reasonable time to be set by the court. If the defendant fulfills these requirements, the case will then proceed as though the defendant had appeared to the original action and had filed responsive pleadings or motions to plaintiff's petition. Thus, the effect of the remedy is to make conditional default judgments which have been rendered upon constructive service, such judgments to become final at the expiration of the time periods limited by the statutes and rules. In the interim, the judgment may be opened whenever the defendant complies with the statutory formula.<sup>22</sup>

There has been some confusion among the authorities as to what constitutes "good cause" under what is now rule 74.12. The Missouri Supreme Court has on several occasions stated that if the petition for review contains the required statements and allegations of lack of personal service and the existence of a good defense or falsity in plaintiff's petition, this is sufficient good cause for setting aside the judgment.<sup>23</sup> That court has also held that if the petition contains the required allegations, the court is without discretion in the matter and must grant the petition.<sup>24</sup> Furthermore, the allegations in the petition are considered by the courts to be conclusively true for the purpose of showing good cause, and are subject to attack only upon trial on the merits, after the original default judgment has been set aside.<sup>25</sup> On the other hand, the Missouri courts of appeal have occasionally required an additional element, besides those expressly required in the statutes: that defendant also show by specific averments that he was not negligent in allowing the default judgment to be rendered against him.<sup>26</sup>

As previously mentioned, the petition for review applies only to judgments rendered by default upon constructive service.<sup>27</sup> It may not be utilized by a defendant who has been either personally served or who appeared to the suit,

22. *Osage Inv. Co. v. Sigrist*, 298 Mo. 139, 250 S.W. 39 (1923).

23. *Dillbeck v. Johnson*, 344 Mo. 845, 129 S.W.2d 885 (1939); *Fadler v. Gabbert*, 333 Mo. 851, 63 S.W.2d 121 (1933); *Osage Inv. Co. v. Sigrist*, *supra* note 22; *Howard v. Scott*, 225 Mo. 685, 125 S.W. 1158 (1910); *Edwards v. Rovin*, 322 S.W.2d 144 (St. L. Ct. App. 1959).

24. *Dillbeck v. Johnson*, *supra* note 23.

25. *Garrison v. Schmicke*, 354 Mo. 1185, 193 S.W.2d 614 (1946); *Osage Inv. Co. v. Sigrist*, *supra* note 22.

26. *Oxley v. Oxley*, 239 Mo. App. 894, 203 S.W.2d 134 (Spr. Ct. App. 1947); *McElvain v. Maloney*, 186 S.W.2d 745 (Spr. Ct. App. 1916); *Santa Fe Car Icing Co. v. Kemper*, 166 Mo. App. 613, 149 S.W. 1163 (K.C. Ct. App. 1912).

27. *Osage Inv. Co. v. Sigrist*, *supra* note 22.

regardless of how meritorious his defense would have been.<sup>28</sup> However, the Missouri Supreme Court has held that if the defendant was not personally served, he may rely upon the petition for review even though he had personal knowledge of the pendency of the suit.<sup>29</sup>

Another point, relating to the requirement of non-personal service, should be noted. Rule 74.12 requires that the defendant seeking to use this remedy must not have been "summoned personally." Section 511.170, RSMo 1949, the substantive predecessor of the rule, stated that the petition for review would be available only to a defendant who was not "summoned as required by this chapter." It is quite possible that the change in wording may have revived an old issue of construction, *i.e.*, whether *substituted* personal service also precludes a defendant from bringing the petition for review. The original controversy arose with relation to the statute which became Section 506.150 RSMo 1959 (now rule 43.01 (b) (3)), providing a method of service upon an individual by leaving a copy of a summons and petition at his usual place of abode, with some member of his family over fifteen years of age. The cases which required *actual* personal service upon the defendant in order that he be precluded from the remedy followed the theory that the intent of the statute providing for petition for review was to give the defendant a mode of relief where the service of process, though legal and giving the court jurisdiction, still did not give the defendant *actual* knowledge of the pendency of the suit and therefore did not afford him an opportunity to be heard.<sup>30</sup> Contrary holdings were based upon a literal reading of the statute—that the statute did not require that the summons be served upon the actual person of the defendant, but only that he must not have been "summoned as required by this chapter," and that the chapter under consideration provided for substituted personal service by delivery to a party's usual place of abode, etc.<sup>31</sup> This conflict was apparently resolved by the Missouri Supreme Court in *State v. Trimble*,<sup>32</sup> wherein the court followed the literal approach and held that since the statute providing for petition for review required that the defendant not have been "summoned as required by this chapter," then, if defendant had been served by one of the modes of service required by the chapter, he would be precluded from the remedy provided by petition for review.

It might be argued today that, due to the supreme court's complete reliance upon the literal wording of the statute as it then read, the decision in *Trimble* is of no effect in construing the meaning of the words "summoned personally," and as a result that the courts should hold such language to require *actual* personal service upon a defendant in order that he be precluded from the remedy of petition for review. However, it should be pointed out that the probable reason

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28. *Boas v. Cliffdale Land & Farm Co.*, 193 S.W. 806 (Mo. 1917); *Schneider v. Schneider*, 273 S.W. 1081 (St. L. Ct. App. 1925).

29. *Miners Bank v. Kingston*, 204 Mo. 687, 103 S.W. 27 (1907).

30. See *Stanton v. Hannah*, 199 S.W. 145 (Mo. 1917); *McElvain v. Maloney*, *supra* note 26.

31. *Mattocks v. Van Asmus*, 180 Mo. App. 404, 168 S.W. 233 (K.C. Ct. App. 1914).

32. 309 Mo. 415, 274 S.W. 712 (1925).

for the change in wording in the new rules, and the deletion of the reference to "this chapter," was to remove the ambiguity which such reference would create in a volume of rules which contains no such chapters as such, but only "parts."

Although there is some dispute on the point, there is authority for the proposition that a petition for review is not required where the judgment is sought to be set aside during the thirty day period following rendition of judgment, even though a final default judgment has been rendered. Vacation of such judgment may be had by motion, but it is entirely within the discretion of the court whether such relief will be granted. Thus, it was held in *Currey v. Trinity Zinc, Lead and Smelting Co.*:<sup>33</sup>

The right to set aside a judgment on motion made at the term at which the same was rendered exists independent of any statute. It is the inherent power of every court of general jurisdiction, and exists in all cases, and upon the application of either party or upon the court's own motion.<sup>34</sup>

The petition for review is in the nature of an independent action.<sup>35</sup> If the petition is denied, the judgment is final and an appeal lies therefrom, but if the review is granted, the case goes to trial on the merits and the party opposing the petition must plead. His appeal must wait till the final determination of the case.<sup>36</sup>

#### IV. MOTION TO SET ASIDE FOR IRREGULARITY

Perhaps the most broadly applicable method of setting aside final judgments after the thirty day control period has elapsed is the motion to set aside a judgment for irregularity, recognized and limited by Rule 74.32 of the Missouri Rules of Civil Procedure. The rule reads:

Judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within three years after the rendition thereof.

The rule is not limited to default judgment situations. As the wording of the rule may indicate, this method of setting aside final judgments did not have a statutory origin. The rule merely recognizes the pre-existing common law remedy and places a three year limitation upon its utilization.<sup>37</sup> In light of rule 75.01, already mentioned, which provides a thirty day period after judgment during which the court retains control to modify or set aside its judgments, recent deci-

33. 157 Mo. App. 423, 139 S.W. 212 (Spr. Ct. App. 1911).

34. *Id.* at 435, 139 S.W. at 215. *Accord*, *Harkness v. Jarvis*, 182 Mo. 231, 81 S.W. 446 (1904); *Miller v. Crawford*, 140 Mo. App. 711, 126 S.W. 984 (K.C. Ct. App. 1910). *Contra*, *Armstrong v. Elrick*, 177 Mo. App. 640, 160 S.W. 1019 (St. L. Ct. App. 1913); *Santa Fe Car Icing Co. v. Kemper*, *supra* note 26; *Hale v. McConey*, 152 Mo. App. 1, 132 S.W. 618 (Spr. Ct. App. 1910); *Billingham v. Miller & Teasdale Comm'n Co.*, 115 Mo. App. 154, 89 S.W. 356 (St. L. Ct. App. 1905).

35. *Dillbeck v. Johnson*, *supra* note 23.

36. *Stanton v. Hannah*, *supra* note 30.

37. *Cross v. Gould*, 110 S.W. 672 (St. L. Ct. App. 1908).

sions have interpreted the three year limitation set out in rule 74.32 as starting to run after the thirty day period following the judgment has expired.<sup>38</sup>

An irregularity which will constitute grounds for the motion must be ascertained solely through reference to the record of the trial or hearing, and this requirement is strictly and mechanically enforced by the courts. If the judgment appears on the face of the record to have been rendered through timely and regular procedure, no fact stated therein can be disputed or impeached by parol evidence and no irregularity can be alleged, no matter how convincing the parol evidence might be.<sup>39</sup>

The irregularities contemplated by the rule go generally to matters procedural, as opposed to errors of substantive law or errors going to the merits or issues of the case. Thus, it is the violation or misapplication of established rules of procedure which form the grounds for the remedy.<sup>40</sup>

More specifically, an "irregularity," within the meaning of the statute and as applied at common law, is definitively interpreted to be the want of adherence to some prescribed rule or mode of proceeding, consisting either of omitting to do something that is necessary for the due and orderly conduct of a suit, or the doing of it at an unreasonable time or in an improper manner. Although this definition is general to the point of ambiguity, courts usually adhere to almost these exact words when explaining the grounds for which the remedy will lie.<sup>41</sup> For this reason, it would be helpful to illustrate a few of the fact situations which will justify an application of the remedy.<sup>42</sup>

Where a judgment was premature in that it was rendered upon default prior to the lapse of the time in which the defendant had to answer, a motion filed under a statute identical to rule 74.32 was sustained.<sup>43</sup> Amendment of the plaintiff's

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38. *Mandell v. Holland Furnace Co.*, 337 S.W.2d 87 (Mo. 1960); *Murray v. United Zinc Smelting Co.*, 263 S.W.2d 351 (Mo. 1954); *Wooten v. Friedberg*, 258 Mo. 26, 198 S.W.2d 1 (1946); *Ruckman v. Ruckman*, 337 S.W.2d 100 (St. L. Ct. App. 1960).

Under the common law, the motion was usually filed at the same term in which the judgment was rendered. Therefore, in addition to placing a limitation upon the time for bringing the motion, it might also be said that rule 74.32 extends the period of time in which it may be brought (to three years). *Tureck v. Tureck*, 207 S.W.2d 780 (St. L. Ct. App. 1948); *Poindexter v. Marshall*, 193 S.W.2d 622 (Spr. Ct. App. 1946).

39. *Casper v. Lee*, 362 Mo. 933, 245 S.W.2d 132 (1952); *Harrison v. Slaton*, 49 S.W.2d 31 (Mo. 1932); *In re Jackson's Will*, 291 S.W.2d 214 (Spr. Ct. App. 1956).

40. *Weatherford v. Spiritual Christian Union Church*, 163 S.W.2d 916 (Mo. 1942); *Robb v. Casteel*, 340 S.W.2d 180 (K.C. Ct. App. 1960); *Bradley v. Bradley*, *supra* note 4.

41. See, e.g., *Edson v. Fahy*, 330 S.W.2d 854 (Mo. 1960); *Murray v. United Zinc Smelting Co.*, *supra* note 38.

42. It should be noted that some of these cases were decided under statutes prior to, although essentially the same as, present Rule 74.32 of the Missouri Rules of Civil Procedure.

43. *Jeude v. Simms*, *supra* note 8; *Chenoweth v. LaMaster*, 342 S.W.2d 500 (Spr. Ct. App. 1961); *Poindexter v. Marshall*, *supra* note 38; *Cross v. Gould*, *supra* note 37.



pleadings without notice to the defendant has also been held to be such an irregularity of record as to require sustaining the motion.<sup>44</sup> A judgment which was not responsive to the pleadings, in that it gave relief in excess of the amount requested in the pleadings, constituted an irregularity of record for which such a motion was held to lie.<sup>45</sup> Where, in a divorce case, the trial judge ordered that the defendant's property be placed in the possession of the clerk of the court, to be paid out to the plaintiff as the alimony installments came due, the judge's action in excess of his authority was such an irregularity of record that a motion to set aside the judgment should have been sustained.<sup>46</sup> Where the record showed that the purchaser at a foreclosure sale had no notice of an application for approval of a redemption bond, such notice being required by statute, the failure of notice left the trial court without jurisdiction to enter a judgment of redemption, and the judgment should have been set aside upon motion for irregularity.<sup>47</sup>

It should be noted that the irregularity need not be one which would render the judgment absolutely void and therefore subject to collateral attack.<sup>48</sup> However, this does not mean that a judgment which is totally void for complete lack of jurisdiction may not be attacked in this manner. The motion applies both to irregular and to void judgments.<sup>49</sup> Furthermore, a motion to set aside for irregularity will lie where jurisdiction was only partially absent.<sup>50</sup>

The foregoing cases indicate a few of the procedural defects of record for which judgments have been set aside under rules and statutes similar to or identical with rule 74.32. On the other hand, certain defects, notably not procedural in nature, have been specifically held *not* to be irregularities under rule 74.32. A motion to set aside a judgment for irregularity of record is not available for judgments whose records contain judicial error.<sup>51</sup> Where the proceedings in the case have been regular, regardless of how erroneous they may have been, the trial court's power to interfere ends at the expiration of the thirty day period following the rendition of the judgment.<sup>52</sup> Thus, such a motion may not be availed of for the purpose of testing the sufficiency of the evidence upon which the judgment was based.<sup>53</sup> Neither will such a motion be effective to challenge the sufficiency of a petition, even though such error is grounds for an appeal.<sup>54</sup> Non-joinder of a necessary party to an action is an irregularity patent upon the record, justifying

44. *Rubbelke v. Aebli*, 340 S.W.2d 747 (Mo. 1960).

45. *Wooten v. Friedberg*, *supra* note 38; *Johnson v. Underwood*, 324 Mo. 597, 24 S.W.2d 133 (1929).

46. *Tureck v. Tureck*, *supra* note 38.

47. *White v. Huffman*, 304 S.W.2d 909 (St. L. Ct. App. 1957).

48. *Wooten v. Friedberg*, *supra* note 38; *Crabtree v. Aetna Life Ins. Co.*, 341 Mo. 1173, 111 S.W.2d 103 (1937); *Cross v. Gould*, *supra* note 37.

49. *Harrison v. Slaton*, *supra* note 39; *Tureck v. Tureck*, *supra* note 38.

50. *Harrison v. Slaton*, *supra* note 39; *White v. Huffman*, *supra* note 47; *Poindexter v. Marshall*, *supra* note 38.

51. *Casper v. Lee*, *supra* note 39.

52. *Robinson v. Martin Wunderlich Constr. Co.*, 72 S.W.2d 127 (St. L. Ct. App. 1934).

53. *Harrison v. Slaton*, *supra* note 39.

54. *Casper v. Lee*, *supra* note 39; *Harrison v. Slaton*, *supra* note 39.

the setting aside of a default judgment upon motion under rule 74.32, but this is true only in cases of default judgments. Where the defendant has appeared and contested the cause, such defect of parties is waived by failure to raise the point by demurrer or answer.<sup>55</sup>

The case of *Buchholz v. Manzella*<sup>56</sup> illustrates the mechanical rigidity with which the courts follow the rule that the irregularity complained of must appear upon the face of the record, and that parol evidence will not be allowed to contradict or impeach the record in order that an irregularity may be shown. The motion in that case was grounded upon defendant's allegation that he had not been notified of the time and place of the hearing and that the case was not listed for trial or assigned to a division. As a result of this lack of notice, a default judgment was rendered against defendant. The record of the trial upon which the judgment was rendered merely recited: "Now on this day pursuant to notice this cause coming on for trial, plaintiff appears by attorney and defendant fails to appear and prosecute its appeal. . . ." The appellate court held that lack of notice was not a matter of record and that the motion should not have been sustained.

By no means will all procedural defects of record justify the setting aside of a judgment for irregularity, as will be seen by reference to other sections of the Missouri Rules of Civil Procedure. Rule 74.30 lists fourteen "imperfections, omissions, defects, matters or things" for which no judgment shall be "reversed, impaired, or in any way affected."<sup>57</sup> It has been held that this language pertains

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55. *Casper v. Lee*, *supra* note 39.

56. 158 S.W.2d 200 (K.C. Ct. App. 1942).

57. Rule 74.30 reads as follows:

When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, nor shall such judgment nor any judgment after trial or submission, nor any judgment upon confession *nihil dicit* or upon failure to answer, nor any judgment upon a writ or inquiry of damages executed thereon, be reversed, impaired, or in any way affected by reason of the following imperfection, omissions, defects, matters or things, or any of them, namely: (1) for want of any writ, original or judicial; (2) for any default or defect of process, or for misconceiving any process, or for awarding the same to the wrong officer, or for the want of any suggestion for awarding process, or for any insufficient suggestion; (3) for any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not signed to any return actually made by him; (4) for any variance between the original writ and petition; (5) for any mispleading, miscontinuance or discontinuance, insufficient pleading, jeofail or misjoining issue; (6) for want of any warrant of attorney of either party, except in cases of judgment by confession, when such warrant is expressly required by law; (7) for any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him; (8) for the want of any allegation or averment on account of which omission a motion could have been maintained; (9) for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict; (10) for any mistake in the name of any party or person, or in any sum of money, or in any description of any property, or in reciting or stating any day, month or year, when the correct name, sum or description shall have been once rightly alleged in any of the pleadings or proceedings; (11) for a mistake in a name of any juror or officer; (12) for the want of any venue if the cause was tried in the proper county;

to setting aside judgments for irregularity as well as other obvious remedies such as reversal on appeal.<sup>58</sup> Item fourteen of the rule suggests the character of the other thirteen defects for which no judgment may be affected when it states: "for any other default or negligence of any clerk or officer of the court or of the parties, or of their attorneys, *by which neither party shall have been prejudiced.*" (Emphasis added.) Rule 74.31 further clarifies the matter and sets out the manner in which such defects will be corrected by the courts. That rule states:

The omissions, imperfections, defects and variances enumerated in Rule 74.30, and all others of a like nature, *not being against the right and justice of the matter of the suit, and not altering the issues between the parties on the trial*, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by appeal. (Emphasis added.)

Thus, to paraphrase the language of these rules, defects in the rendition of a judgment which are not against the right and justice of the matter of the suit, and which do not alter the issues between the parties or by which neither party shall have been prejudiced, cannot be the basis upon which a judgment is "reversed, impaired, or in any way affected." This has been held to apply to motions to set aside for irregularity of record.<sup>59</sup>

The motion to set aside a judgment for irregularities is not an ordinary motion within the usual sense of the word, but amounts to a direct attack upon the judgment and is in the nature of an independent proceeding.<sup>60</sup> Therefore, an appeal may be taken from a court's order overruling the motion.<sup>61</sup>

## V. MOTIONS IN THE NATURE OF CORAM NOBIS

The common law writ of error coram nobis was a writ granted by a rendering court in order to correct some error of fact which, had it been known at the time of rendition of the judgment, would have precluded the entry of such judgment.<sup>62</sup> The writ, and the motion which has replaced it, were then and are today used to obtain a review by a court of its own judgment, as distinguished from review by an appellate court.<sup>63</sup> The writ has been replaced in this state by a motion to set aside for error of fact, supported by evidence *not* found on the face of the record (as distinguished from the motion to set aside for irregularity patent upon

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(13) for any informality in entering a judgment or making up the record thereof, or in any continuance or other entry upon the record; (14) for any other default or negligence of any clerk or officer of the court or of the parties, or of their attorneys, by which neither party shall have been prejudiced.

58. *Cherry v. Wertheim*, 25 S.W.2d 118 (St. L. Ct. App. 1930); *Bogges v. Jordan*, 283 S.W. 57 (K.C. Ct. App. 1926).

59. *Cherry v. Wertheim*, *supra* note 58; *Bogges v. Jordan*, *supra* note 58.

60. *Crabtree v. Aetna Life Ins. Co.*, *supra* note 48.

61. *Harrison v. Slaton*, *supra* note 39; *Ford v. Ford*, 24 S.W.2d 990 (Mo. 1930); *Audslay v. Hale*, 303 Mo. 451, 261 S.W. 117 (1924); *Poindexter v. Marshall*, *supra* note 38.

62. *Jeude v. Simms*, 258 Mo. 26, 166 S.W. 1048 (1914).

63. *Townsend v. Boatman's Nat'l Bank*, 148 S.W.2d 85 (St. L. Ct. App. 1941).

the face of the record, discussed previously).<sup>64</sup> However, the courts still usually refer to such motions as motions in the nature of a writ of error coram nobis, or motions in the nature of coram nobis.<sup>65</sup>

As was hitherto pointed out, the common law motion to set aside for irregularity has been recognized by statute, and therein limited to a period of three years after judgment.<sup>66</sup> A motion in the nature of coram nobis, on the other hand, has no statutory reference whatever, and no limitation as to the time in which it may be brought.<sup>67</sup> Like the motion to set aside for irregularities, it is considered a new action—an independent and direct attack upon a judgment with the purpose of revoking that judgment, and an order of the court thereon is an order from which an appeal will be allowed.<sup>68</sup>

The fact in question must be such that, had it been known at the time of the rendition of the judgment, it would have prevented entry of the judgment.<sup>69</sup> Two recent Missouri Supreme Court cases have stated that the error upon which the motion is grounded must be one relating to jurisdiction—an absence or abuse of the rendering court's jurisdiction, but unknown by it, which thereby prevented it from entering a valid judgment.<sup>70</sup> These facts must have been unknown to the court at the time of rendition and must not have been known to the party making the motion; neither may they be such that the latter could have known of them by exercising due diligence.<sup>71</sup> The remedy does not apply to facts which go to the merits of the cause, *e.g.*, facts which would have constituted a defense to the action, newly discovered evidence, or any evidence which was or could have been adjudicated upon the trial.<sup>72</sup> Neither will the motion be sustained where the error

64. *Casper v. Lee*, *supra* note 39; *Simms v. Thompson*, 291 Mo. 439, 236 S.W. 876 (1922); *State v. Riley*, 219 Mo. 667, 118 S.W. 647 (1909).

65. See, *e.g.*, *Edson v. Fahy*, *supra* note 41; *Casper v. Lee*, *supra* note 39; *Wooten v. Friedberg*, *supra* note 38; *Kings Lake Drainage Dist. v. Winkelmeyer*, 228 Mo. App. 1102, 62 S.W.2d 1101 (St. L. Ct. App. 1933); *Schneider v. Schneider*, *supra* note 28; *Cross v. Gould*, *supra* note 37; *Fisher v. Fisher*, 114 Mo. App. 627, 90 S.W. 413 (K.C. Ct. App. 1905).

66. See Mo. R. Civ. P. 74.32.

67. *Badger Lumber Co. v. Goodrich*, 353 Mo. 836, 184 S.W.2d 435 (1944); *Simms v. Thompson*, *supra* note 64; *State v. Riley*, *supra* note 64; *Latshaw v. McNees*, 50 Mo. 381 (1872); *Bank of Skidmore v. Ripley*, 84 S.W.2d 185 (K.C. Ct. App. 1935).

68. *Norman v. Young*, 301 S.W.2d 820 (Mo. 1957); *State v. Harrison*, 276 S.W.2d 222 (Mo. 1955); *State v. Riley*, *supra* note 64.

69. *Casper v. Lee*, *supra* note 39; *City of St. Louis v. Franklin Bank*, 351 Mo. 688, 173 S.W.2d 837 (1943); *Jeude v. Simms*, *supra* note 62; *Johnson v. Wilson's Estate*, 256 S.W.2d 297 (St. L. Ct. App. 1953).

70. *Edson v. Fahy*, *supra* note 41; *City of St. Louis v. Franklin Bank*, *supra* note 69.

71. *Norman v. Young*, *supra* note 68; *Casper v. Lee*, *supra* note 39; *Jeude v. Simms*, *supra* note 62; *Pike v. Pike*, 239 Mo. App. 655, 193 S.W.2d 637 (K.C. Ct. App. 1946); *State v. Kirkwood*, 117 S.W.2d 652 (St. L. Ct. App. 1938); *Kings Lake Drainage Dist. v. Winkelmeyer*, *supra* note 65; *Fisher v. Fisher*, 114 Mo. App. 627, 90 S.W. 413 (K.C. Ct. App. 1905).

72. *Edson v. Fahy*, *supra* note 41; *Schoenhals v. Pahler*, 257 S.W.2d 662 (Mo. 1953); *Casper v. Lee*, *supra* note 39; *Wagner v. Shelly*, 240 Mo. App. 550, 210 S.W.2d 394 (K.C. Ct. App. 1948); *Kings Lake Drainage Dist. v. Winkelmeyer*, *supra* note 65.

alleged is a judicial error of law, as distinguished from an error of fact.<sup>73</sup> It has been previously pointed out that the motion does not pertain to errors apparent upon the face of the record, nor may it be supported by allegations of fact which are contrary to or seek to impeach those which are set out in the record.<sup>74</sup>

A few cases in which the motion was refused will serve to illustrate the foregoing rules. In *King's Lake Drainage Dist. v. Winkelmeyer*,<sup>75</sup> a judgment setting an assessment upon the moving party's land had been set aside on a writ of error coram nobis and a lower assessment rendered. The ground upon which the trial court sustained the motion was that the acreage of movant's land was less than the acreage figure used by the court in determining the original assessment. The St. Louis Court of Appeals reversed, holding that the acreage of the land was a fact material to the amount of the assessment, and that since the assessment was a matter in issue, the acreage of the land was a fact going to the merits of the cause rather than to the right of the court to proceed. In *Schoenhals v. Pahler*,<sup>76</sup> plaintiff appealed from the denial of a writ of error coram nobis grounded upon the claim that the trial court had wrongfully dismissed with prejudice her original action. The supreme court held that if the "with prejudice" provision constituted error, it was judicial error, and not the type of error against which the error coram nobis principle relieves; that the motion lies to review and reverse a judgment for error of fact going to the jurisdiction of the court as distinguished from an error of law. In *Johnson v. Wilson's Estate*,<sup>77</sup> the motion was based upon allegations of the moving parties that they had not been served with notice of the pending suit. The record, however, recited that proper service had been made. The appellate court affirmed an order denying the motion and held that the grounds alleged constituted an attack upon the verity of the record—a matter which cannot be the basis for a writ of error coram nobis.

The foregoing rules and cases demonstrate that the courts are quite explicit as to which facts and errors do *not* constitute grounds for the motion in the nature of a writ of error coram nobis. However, as to what kinds of factual errors will support the motion the courts are not nearly so specific. Probably the best modern approach to the question is set out in *City of St. Louis v. Franklin Bank*.<sup>78</sup> In defining the type of facts which will support the remedy, the court said:

The facts must be such as affect the *power and right* of the court to render the particular judgment—facts which, if known, would have *prevented* its rendition. In a sense they must be directed against what would have been either a want or abuse of jurisdiction—at least, not mere error—if the facts had been known to the court.<sup>79</sup>

73. *City of St. Louis v. Franklin Bank*, *supra* note 69; *Snider v. Christie*, 272 S.W.2d 27 (Spr. Ct. App. 1954); *Johnson v. Wilson's Estate*, *supra* note 69; *Wagner v. Shelly*, *supra* note 72.

74. *Johnson v. Wilson's Estate*, *supra* note 69; *Hadley v. Bernero*, 103 Mo. App. 549, 78 S.W. 64 (St. L. Ct. App. 1903).

75. *Supra* note 65.

76. *Supra* note 72.

77. *Supra* note 69.

78. *Ibid.*

79. 351 Mo. at 706, 173 S.W.2d at 846.

Yet, even this definition does not clearly delineate the grounds upon which the motion will be sustained. The breadth of the definition is deceptive, and the courts prefer to demonstrate the application of the remedy by pointing out the fact situations in which the motion has been sustained.<sup>80</sup>

Some of the cases in which the motion in the nature of a writ of error coram nobis has been held proper are as follows: Where an error of the court clerk caused the defendant's case to be placed on a jury waived docket, and the judge incorrectly assumed that the jury had been waived and therefore tried the case without a jury, writ of error coram nobis was held proper to set aside the judgment.<sup>81</sup> Where the notice and summons were served upon the defendant while he was insane, a motion in the nature a writ of error coram nobis was held proper to correct a default judgment rendered against him.<sup>82</sup> Where the defendant was insane and bedridden at the time a default judgment was rendered against him, such facts were held to be sufficient to sustain the motion.<sup>83</sup> When a defendant died after service upon him but before the judgment was rendered, the motion was the proper remedy to set aside the judgment.<sup>84</sup> Prior to the Married Women's Act, where a married woman was sued and judgment obtained against her without the joinder of her husband, it was adjudged proper to set aside the judgment on writ of error coram nobis, since the fact of her marriage did not appear of record.<sup>85</sup> Where one of the defendants in a suit was not served, and the attorney representing the other defendants answered as though he represented the unserved party, the motion was allowed to set aside the judgment against the unserved party.<sup>86</sup> A judgment against a dissolved corporation on an injunction bond was set aside upon such motion, because notice of a motion to assess damages against the bond was not served on the successor corporation and notice did not appear of record.<sup>87</sup> Where a false sheriff's return led the court to find a defendant to be a nonresident and the court ordered service upon him by publication, a default judgment was rendered against him. A motion to set aside was held to be proper, since the judgment was based upon an error as to the defendant's residence.<sup>88</sup> And where a judgment was rendered against an infant without a guardian ad litem being appointed for him, the unknown fact of infancy was held to make the judgment invalid, and writ of error coram nobis caused it to be set aside.<sup>89</sup>

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80. See, e.g., *Edson v. Fahy*, *supra* note 41; *City of St. Louis v. Franklin Bank*, *supra* note 69; *Simms v. Thompson*, *supra* note 64; *Jeude v. Simms*, *supra* note 62; *Johnson v. Wilson's Estate*, *supra* note 69; *Schneider v. Schneider*, 273 S.W. 1081 (St. L. Ct. App. 1925); *Ragland v. Ragland*, 258 S.W. 728 (K.C. Ct. App. 1924); *Cross v. Gould*, *supra* note 37.

81. *Wagner v. Shelly*, *supra* note 72.

82. *Norman v. Young*, *supra* note 68.

83. *Bank of Skidmore v. Ripley*, *supra* note 67.

84. *Calloway v. Nifong*, 1 Mo. 223 (1822).

85. *Walker's Adm'r v. Deaver*, 79 Mo. 664 (1883); *Latshaw v. McNees*, *supra* note 67.

86. *Craig v. Smith*, 65 Mo. 536 (1877); *Warren v. Lusk*, 16 Mo. 102 (1852).

87. *Hecht Bros. Clothing Co. v. Walker*, 224 Mo. App. 1156, 35 S.W.2d 372 (St. L. Ct. App. 1931).

88. *State ex rel. Hudson v. Heinrich*, 14 Mo. App. 146 (St. L. Ct. App. 1883).

89. *Neenan v. St. Joseph*, 126 Mo. 89, 28 S.W. 963 (1894).

These cases illustrate the highly limited factual situations in which the motion or writ will be sustained. They all involve a defect of jurisdiction, due either to improper service or notice which is not of record, or some characteristic of a party, such as his minority, marital status, insanity or death, which fact was unknown to the court at the time of the rendition of the judgment. The dissimilarities between the motion to set aside for irregularity and the motion in the nature of writ of error coram nobis are therefore apparent. The former is grounded upon procedural defects patent upon the face of the record, while the latter is based upon parol evidence as to some unknown jurisdictional defect, which is not apparent on the face of the record. The former has a three year statutory limitation while the latter has none. By way of similarity, neither motion may attack the verity of the record, and both constitute an independent and direct attack upon the judgment, from which an appeal will lie. Furthermore, modern cases have held that, since the two motions perform the same function—a direct attack to set aside a judgment after the thirty day period following rendition thereof—the two remedies may properly be presented in the same motion if a judgment is subject to attack upon both grounds, and a judgment may be set aside on the basis of either or both of the remedies.<sup>90</sup>

#### VI. SETTING ASIDE JUDGMENTS BY SEPARATE SUIT IN EQUITY

It is a familiar rule that a judgment tainted by extrinsic fraud, unavoidable accident or excusable mistake may be set aside by means of a separate suit in equity.<sup>91</sup> However, the complaining party must be free of personal fault or negligence, and a decree will be set aside only when a failure to do so would result in substantial injustice to a party litigant.<sup>92</sup>

The most oft-alleged of these grounds is fraud. Although there is a wide variation in the factual situations, the Missouri courts have been uniform in requiring that the fraud complained of go to the procurement of the judgment<sup>93</sup>—that it be “extrinsic” rather than “intrinsic” fraud. The rationale underlying this rule is based upon the doctrine of *res judicata*, and was aptly stated by the Missouri Supreme Court when it said: “Courts of equity do not grant such relief for the purpose of giving the defeated party a second opportunity to be heard on the merits of the case.”<sup>94</sup>

Perhaps the leading Missouri case is *Fadler v. Gabbert*.<sup>95</sup> There a court of

90. *Edson v. Fahy*, 330 S.W.2d 854 (Mo. 1960); *Murray v. United Zinc Smelting Corp.*, 263 S.W.2d 351 (Mo. 1954); *Casper v. Lee*, 262 Mo. 927, 245 S.W.2d 132 (1952); *Crabtree v. Aetna Life Ins. Co.*, *supra* note 48; *In re Jackson's Will*, 291 S.W.2d 214 (Spr. Ct. App. 1956).

91. See BLACK, JUDGMENTS § 368 (2d ed. 1902); *United States v. Throckmorton*, 98 U.S. 61 (1878); *Hockenberry v. Cooper County State Bank*, 338 Mo. 31, 88 S.W.2d 1031 (1935).

92. *Fadler v. Gabbert*, 333 Mo. 851, 63 S.W.2d 121 (1933).

93. *E.g.*, *Fadler v. Gabbert*, *supra* note 92; *Irvine v. Leyh*, 102 Mo. 200, 14 S.W. 715 (1890).

94. *Reis v. La Presto*, 324 S.W.2d 648, 654 (Mo. 1959).

95. *Supra* note 92.

equity set aside a quiet title and partition judgment on the basis of fraud. Defendants in the action were not given notice of the suits, and, though defendants were minors, no guardians ad litem had been appointed. In upholding the trial court's action, the Missouri Supreme Court reviewed the nature of a cause of action for equitable relief from judgments, and was careful to note that the fraud which vitiates a judgment is fraud going to its procurement, as distinguished from fraud relating to matters going to the merits. It was the court's opinion that defendants had been "tricked" or "lulled" into a loss of their defenses—a fraud upon the court as well as the defendants.

An absolute definition of fraud in the procurement would be difficult to frame, and in lieu of such a definition the most helpful approach is to consider representative cases in which courts have allowed the setting aside of a final judgment by a separate suit in equity. In *Ward v. Quinlivan*,<sup>96</sup> plaintiff had represented to defendant that the suit would be dismissed. Defendant relied upon this statement and plaintiff took default judgment. The court found this to be "judgment by fraud." In *Jones v. Arnold*,<sup>97</sup> the court gave equitable relief when the judgment was obtained while pendency of the suit was being concealed from minor defendants. In *Cross v. Gould*,<sup>98</sup> it was held that allegations that plaintiff's attorney had violated a promise to notify defendant's attorney of the trial date were sufficient to state grounds for equitable relief from the judgment. In *Picadura v. Humphrey*,<sup>99</sup> the plaintiff's contingent remainder interest was destroyed by a decree in a reformation suit, to which the plaintiff was induced to consent by means of an "entry of appearance" contained in a document signed by her as a result of misrepresentations by the defendants. The Missouri Supreme Court found that the reformation judgment was procured by fraud, as it resulted from conduct which "tends to trick an adversary out of a defense or to blind him to the pendency of an action."<sup>100</sup> Judgments obtained where violation of an agreement or promise has resulted in the loss of a meritorious defense may be set aside by a separate suit in equity.<sup>101</sup> However, absent such an express or implied promise, no duty arises to give notice to the opposing party of an intention to take a default judgment where personal service has been obtained,<sup>102</sup> and lack of notice in such cases does not afford sufficient grounds for equitable relief.<sup>103</sup>

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96. 57 Mo. 425 (1874).

97. 359 Mo. 161, 221 S.W.2d 187 (1949).

98. 131 Mo. App. 585, 110 S.W. 672 (St. L. Ct. App. 1908).

99. 335 S.W.2d 6 (Mo. 1960).

100. *Id.* at 14.

101. *Fadler v. Gabbert*, *supra* note 92; *Ward v. Quinlivan*, *supra* note 96; *Watkins v. Hubbard*, 343 S.W.2d 189 (K.C. Ct. App. 1961); *Cross v. Gould*, *supra* note 98; *Sherer v. Akres*, 74 Mo. App. 217 (St. L. Ct. App. 1898). See generally 3 FREEMAN, JUDGMENTS § 1243 (4th ed. 1892).

102. *Kroger v. Angle*, 321 S.W.2d 27 (St. L. Ct. App. 1959). *But see Jones v. Arnold*, *supra* note 97, at 170, 221 S.W.2d at 193 pointing out that the circumstances of a case may give rise to a duty to speak and disclose; these circumstances may include inequality of condition and superior knowledge on the part of one party, which knowledge is not within reasonable reach of the other party.

103. 49 C.J.S. *Judgments* § 372 (1947).



To determine more accurately what constitutes sufficient grounds for equitable relief, it is helpful to review cases where the courts have denied relief. In *Ellis v. Ellis*,<sup>104</sup> the Supreme Court of Missouri declined to set aside a divorce decree rendered where the wife's amended cross petition, praying for a divorce decree, was not re-verified and lack of verification allegedly deprived the trial court of jurisdiction. The court found no extrinsic or collateral fraud in the procurement of the decree. The plaintiff husband was present in court when the decree was rendered and was charged with notice of the contents of the pleadings. There was thus a "fair submission of the controversy between the parties," and the alleged fraud pertained only to matters going to the merits of the cause of action rather than to the procurement of the decree.<sup>105</sup>

A variety of "equitable grounds" for relief were advanced by the plaintiff in *Reis v. LaPresto*.<sup>106</sup> Here a petition in equity to set aside a default judgment was dismissed for failure to state sufficient facts upon which a court of equity could set aside a prior judgment. Personal service was had upon plaintiff and a default judgment later obtained while negotiations for a settlement were in progress. Although the court noted that false representations that pleadings need not be filed during negotiations, and a subsequent violation of those representations resulting in a judgment, *could* support an action in equity to set aside such judgment, the instant case involved no such representations, either express or implied. The plaintiff also contended that false testimony had been given in the prior suit and that as a result the judgment should be set aside. The court again denied relief, on the grounds that "false testimony pertaining to any fact in issue on the merits of the cause of action and to which the other party has an opportunity to make a defense does not afford equitable grounds for setting aside a judgment."<sup>107</sup>

In *Hemphill v. Hemphill*,<sup>108</sup> an equitable action to nullify a divorce was allowed on the grounds of failure of the guardian ad litem to represent properly the insane plaintiff-wife in the divorce proceeding. This was held to be a fraud upon the court, in that there was a fraud in the procurement of the decree. However, the petition to set aside the decree also alleged false testimony and false averments in the pleadings in the divorce action. The court held these latter grounds to be insufficient to warrant equitable relief, and noted that "it has repeatedly been held that false swearing and false averments in the pleadings do not give rise to an action in equity to set aside a judgment for fraud."<sup>109</sup>

As previously mentioned, it is well established that the fraud must go to the procurement of the judgment under attack in order to serve as grounds for equitable interference with the judgment. However, it has been suggested by a judge of the Springfield Court of Appeals that an exception should be made, allowing

104. 263 S.W.2d 849 (Mo. 1953).

105. See also *Jones v. Arnold*, *supra* note 97; *Jones v. Jones*, 254 S.W.2d 260 (St. L. Ct. App. 1953).

106. *Supra* note 94.

107. 324 S.W.2d at 655.

108. 316 S.W.2d 582 (Mo. 1958).

109. *Id.* at 586.

a judgment to be set aside for *intrinsic* fraud, if: (a) such fraud is irrefutable and was not subject to being made an issue of fact in the original action; and (b) the complained-of fraud had a material effect upon the result.<sup>110</sup> It appears that this exception would constitute a desirable and useful means of protection from fraud and perjury and would operate to provide flexibility to the equitable remedy of setting aside judgments for fraud.

The party attacking the judgment upon the ground of fraud has the burden of showing such fraud by "clear, strong, cogent, and convincing evidence leaving no room for reasonable doubt of its existence."<sup>111</sup> In addition, there exists a presumption in favor of the honesty and validity of the judgment under attack, which must be overcome by the party alleging fraud.<sup>112</sup>

Equity will also intervene to set aside judgments procured as a result of unavoidable accident or excusable mistake.<sup>113</sup> Illustrative of such grounds is the holding of the Missouri Supreme Court in *Contrare v. Cirese*,<sup>114</sup> wherein a tax deed was set aside. The deed was issued out of a confirmation judgment which was procured through an appraiser's mistaken viewing of property adjoining the property to be sold, the mistake causing the property to be sold for about \$200 when its actual value was over \$5,000. The court held that sufficient grounds existed for equitable intervention. So also, in *Cherry v. Wertheim*<sup>115</sup> a petition in equity to vacate a default judgment was sustained on the ground of accident. Service of summons in the action was made upon plaintiff's wife. Due to her inattention, plaintiff was never apprised of the pendency of the action until after entry of the default judgment. The service of summons was unquestionably a lawful substituted service, but the court relied upon the lack of actual notice and the absence of any negligence personal to the plaintiff to find equitable grounds for relief.

The *Cherry* case laid down two additional requirements for equitable intervention which should be noted: the lack of an adequate remedy at law by any form of motion, petition or proceeding in the original action; and the prima facie showing by plaintiff of a meritorious defense to the cause of action upon which the original judgment was rendered.<sup>116</sup> The plaintiff in that case had raised the bar of the statute of limitations and of failure of consideration as defenses to the original cause of action, and the court found this to be a prima facie showing of meritorious defenses.

This latter requirement proved an insurmountable hurdle to the plaintiff in *Patterson v. Fitzgibbon Discount Corp.*<sup>117</sup> In that case, service of summons in the

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110. *Bachlar v. Bachlar*, 339 S.W.2d 846, 851 (Spr. Ct. App. 1960) (concurring opinion by Ruark, J.).

111. *Jones v. Arnold*, *supra* note 97; *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Coleman v. Coleman*, 277 S.W.2d 866 (Spr. Ct. App. 1955).

112. *Reger v. Reger*, 316 Mo. 1310, 293 S.W. 414 (1927); *Ruckman v. Ruckman*, 337 S.W.2d 100 (St. L. Ct. App. 1960).

113. See 3 FREEMAN, JUDGMENTS §§ 1246-1248 (5th ed. 1925).

114. 336 S.W.2d 485 (Mo. 1960).

115. 25 S.W.2d 118 (St. L. Ct. App. 1930).

116. *Id.* at 120. See also *Kerber v. Alt*, 275 S.W.2d 604 (St. L. Ct. App. 1955).

117. 339 S.W.2d 301 (St. L. Ct. App. 1960).

first action was made upon plaintiff's wife. Due to her failure to apprise plaintiff of the summons, a default judgment was rendered against plaintiff in favor of an endorsee on a promissory note. Plaintiff-maker contended that the payee's title was defective due to lack of consideration, but the court found defendant to be a holder in due course and thus not subject to such defenses. The court refused to inquire into the matter of accident or mistake, since the finding was that plaintiff did not show a prima facie case of a meritorious defense to the original cause of action. In reaching its decision, the court noted that before equity would intervene two things must be present:

These are that there must be a prima facie showing of a meritorious defense and there must have been an accident, mistake, inadvertence, mischance, or unavoidable circumstance which prevented the party from presenting that defense. Both factors must be present and if either is absent the equity action will not lie.<sup>118</sup>

Since the primary aim in such cases is to enable the losing party to raise a new defense, it is highly desirable to require a prima facie showing of a meritorious defense, as the court did in the *Patterson* case. In this way courts can avoid upsetting existing judgments when a costly and time consuming new trial would reach the same result.

The requirement of a prima facie showing of a meritorious defense also exists when equitable relief is sought for extrinsic fraud which has prevented the losing party from defending an action brought against him. The party seeking relief must show a state of facts which would warrant equitable intervention on his behalf.<sup>119</sup> It follows that equity will not intervene to set aside a judgment due to extrinsic fraud in the procurement, where it is patently obvious that upon retrial the same judgment or decree would be rendered.

A petition in equity to set aside a judgment is of course subject to the defense of laches, although generally this defense will not be permitted to shorten the period of time allowed by the applicable statute of limitation.<sup>120</sup> Where relief is sought on the ground of fraud, Section 516.120, RSMo 1959, limits the time within which to file the petition. This statute provides, in part, that an action for relief on the ground of fraud shall be brought within five years, with the exception that the cause of action shall be deemed not to have accrued until discovery of the alleged fraud by the aggrieved party at any time within ten years after the occurrence of the facts constituting the fraud. There will, however, be situations in which the cause of action is not barred by limitations and laches for a considerably longer period of time. Thus, in *Hughes v. Neely*,<sup>121</sup> the Missouri Supreme Court approved an action brought in 1959 cancelling two 1930 judgments which

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118. *Id.* at 306.

119. *Kroger v. Angle*, *supra* note 102; *Jones v. Jones*, *supra* note 105.

120. *Revare v. Lee*, 257 S.W.2d 676 (Mo. 1953); *Coleman v. Crescent Insulated Wire & Cable Co.*, 350 Mo. 781, 168 S.W.2d 1060 (1943).

121. 332 S.W.2d 1 (Mo. 1960).

vested title to land in a life beneficiary. Plaintiffs were contingent remaindermen, and the court stated:

[E]ven as to vested remaindermen a statute of limitations cannot run until the end of the particular estate and . . . "in this connection equity follows the law and ordinarily will not hold a party barred by his laches where the statute of limitations has not run."<sup>122</sup>

## VII. MOTIONS TO SET JUDGMENTS ASIDE FOR FRAUD

Early Missouri cases held that judgments procured through fraud could, *by motion*, be set aside at a subsequent term. Some of these cases referred to the motion as in the nature of a writ of error coram nobis. Dictum in those cases also indicated that such motion or writ might apply to set aside judgments on other equitable grounds, such as mistake, excusable negligence, surprise, or accident. Subsequent cases generally disapproved of or overruled such holdings, and the doctrine fell into state-wide disrepute. However, a recent Kansas City Court of Appeals decision has once again brought forth the matter, by holding that a court may grant equitable relief to set aside a judgment for fraud even where such remedy is instituted by motion. Although the court did not refer to the motion as in the nature of coram nobis, the effect of the ruling raises the old issue regardless of what denomination the motion is given. Because of the complex interrelation of the cases upon this subject, it seems best to approach it on a historical basis.

*Downing v. Still*,<sup>123</sup> decided in 1889, appears to have been the first Missouri case in point. In reference to a motion to set aside, made after the term in which the judgment was rendered, the supreme court said: "Though fraud and mistake are often grounds for [equitable] relief, yet the proper proceeding in a matter of this kind is by motion."<sup>124</sup> This statement was made in reply to an objection that questions of fraud and mistake can be inquired into only upon a separate petition or bill in equity. The court did not refer to the motion as in the nature of coram nobis.

Twelve years later, in *Estes v. Nell*,<sup>125</sup> the supreme court, this time speaking of the motion as in the nature of a writ of error coram nobis, said: "The motion or petition, it has been ruled, must show that the movant or petitioner was prevented from making the defense by surprise, accident, mistake or fraud of the adversary without fault on his part."<sup>126</sup> The court did not cite *Downing v. Still* as authority for this proposition.

Then, in 1905, the Kansas City Court of Appeals handed down its decision in

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122. *Id.* at 6, quoting from *Rhodus v. Geatley*, 347 Mo. 397, 147 S.W.2d 631 (1941). See also *Picadura v. Humphrey*, *supra* note 99. The cases reveal very little controversy over the period of time within which an equitable action to set aside a judgment due to fraud must be brought. The bulk of the cases are undoubtedly brought within the period limited by § 516.120, RSMo 1959.

123. 43 Mo. 309 (1889).

124. *Id.* at 320-21.

125. 163 Mo. 387, 63 S.W. 724 (1901).

126. *Id.* at 394, 63 S.W. at 725.

*Fisher v. Fisher*.<sup>127</sup> The alleged grounds for setting aside the judgment were based upon breach of an agreement between the parties' attorneys that no further action would be taken in the case without negotiation. Plaintiff's attorney breached the agreement by taking a default judgment against defendant. In answer to plaintiff's contention that such allegations would support a separate suit in equity but not a motion in the nature of *coram nobis*, the court said:

The distinction sought to be drawn by the plaintiff between cases arising from fraud in the procurement of the judgment and those based upon other mistakes of fact, both of which require proof *dehors* the record, is not founded in good reason. The principle upon which the relief is afforded in any case is that the court has been misled, without the injured party being negligent, into pronouncing the judgment; a thing that he would not have done had he known the real facts.<sup>128</sup>

The court apparently did not accept the doctrine that such motion is limited to facts indicating a defect in or abuse of jurisdiction, but rather felt that any facts which would render the judgment unjust constituted grounds for setting it aside.

Three years later, *Cross v. Gould*<sup>129</sup> produced another theory to justify setting aside, by motion in a subsequent term, a judgment based upon fraud. The St. Louis Court of Appeals reversed the trial court's denial of a motion grounded upon allegations that plaintiff's counsel had promised to notify defendant's counsel, who resided in another state, as to when the court would convene, but had failed to do so and had taken a default judgment against the defendant. Speaking of motions in the nature of writ of error *coram nobis* and similar motions applied in other states, the court said:

[T]he principles of equity jurisprudence are frequently administered in a summary manner on such motions to the end that needless litigation shall be prevented and complete justice had. It is said the practice of summarily administering equitable relief on motions of this character is certainly justified in those states, such as Missouri, where, by the system adopted, the kinds of procedure which obtained separately at common law and in equity are amalgamated in one form of action and the different character of relief administered by the same tribunal. At any rate, the practice of setting a judgment aside at a subsequent term on motion in the nature of writ of error *coram nobis* for fraud practiced in the act of procuring the judgment obtains generally in the courts of this country and of this State. . . .<sup>130</sup>

The court declined to carry this theory to its logical conclusion; it would not advocate such relief by motion as to other grounds for general equitable relief, such as surprise, accident or mistake, but only where fraud was alleged.

Finally, in 1914, in the landmark case of *Jeude v. Sims*,<sup>131</sup> the supreme court completely reversed what could have been a trend toward allowing judgments to

127. 114 Mo. App. 627, 90 S.W. 413 (K.C. Ct. App. 1905).

128. *Id.* at 632-33, 90 S.W. at 415.

129. 131 Mo. App. 585, 110 S.W. 672 (St. L. Ct. App. 1908).

130. *Id.* at 601, 110 S.W. at 677.

131. 258 Mo. 26, 166 S.W. 1048 (1914).

be set aside after term by motion based upon equitable grounds. The case involved a motion grounded upon an alleged fraudulent breach of an agreement or promise made by plaintiff's attorney to have the cause continued beyond the date set for trial. On the date set for trial, plaintiff's attorney appeared, asked for, and received judgment against the defendant. The trial court sustained the motion to set aside the judgment, and, because the case involved title to land, the plaintiff took his appeal to the supreme court. The supreme court reversed the trial court and ordered reinstatement of the judgment for the plaintiff. The motion had not been designated as in the nature of writ of error coram nobis, and the court, declaring that the motion could not be sustained as such, made the following statement:

The motion in this case simply sets up that the plaintiffs fraudulently misled counsel for the defendants as to the time of the trial of the cause. Whilst such conduct, if shown upon a trial by bill in equity to set aside the judgment for fraud, would perhaps be good, yet we fail to find any case wherein such fact is a ground for the common-law writ of error coram nobis.<sup>132</sup>

The court cited no cases to support this contention. It did not distinguish, disapprove, or even mention any of the preceding four cases even though the two earliest cases were from the same court and the latest two were almost directly in point.

Equally astounding was the statement made in a subsequent paragraph, apparently inserted to justify and explain the ruling on the motion:

The trial of the issue of fraud used in preventing the party from being present and making a defense is the trial of an issue outside of any issue involved in the case in which the judgment is rendered. It is not an issue in that case, and in my mind not an issue out of which an error of fact can arise, which would authorize a writ of error coram nobis. *The error of fact to be corrected by the writ of error coram nobis must be errors of fact pertinent to the issues in the case, and not mere extraneous matters.*<sup>133</sup> (Emphasis added.)

Thus, not only did the Missouri Supreme Court overturn precedent as to the scope of the motion in the nature of a writ of error coram nobis, without citing authority; it justified such a ruling by adding a new requirement to the common law writ—that the error of fact upon which the remedy is grounded must be an error of fact “pertinent to the issues in the case.” This element not only has never before or since been held to be a requirement of the motion or writ, but, as a matter of fact, an error of fact going to the issues or merits of the cause has been expressly held *not* to be error upon which the motion may be grounded.<sup>134</sup>

Whether or not the court's opinion in *Jeude v. Sims* was written in a judicial vacuum became of little consequence, however, for other state courts followed the decision without criticism. Nor did the strong dissent of Judge Lamm, who

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132. *Id.* at 40-41, 166 S.W. at 1052.

133. *Ibid.*

134. Cases cited *supra* note 72.

argued the theories set out in both the *Fisher* and *Cross* decisions, raise any adverse comment in later cases.

In *Simms v. Thompson*,<sup>135</sup> a case arising in the same court eight years after *Jeude v. Sims*, consideration of a motion in the nature of a writ of error coram nobis was again involved. One of the grounds alleged in the motion to set aside was fraud in the procurement of the judgment. The moving parties alleged that the fraud occurred when the plaintiffs charged in their petition to quiet title that the defendants were non-residents, thereby justifying service by publication, when in fact the defendants were well known residents of the county, and that such improper service caused a default judgment to be rendered against them. The court reviewed the remedy of motion in the nature of a writ of error coram nobis, quoting much of the opinion in *Jeude v. Sims*. It was then observed that "relief is not granted in this state on the ground of fraud, and doubtless would not be on the ground of accident or mistake, those being distinct grounds for relief in equity . . . [citing *Jeude v. Sims*] *Cross v. Gould* . . . in that respect is therefore disapproved."<sup>136</sup> Upon motion for rehearing, the court further held that, even if fraud could be a ground for the relief sought, there could have been no fraud in the procurement of the judgment, because the allegedly fraudulent act of causing service to be allowed by publication would not, if known, have prevented the court from rendering the same judgment. This is true, it was said, because the statute under which the plaintiff's quiet title action was brought did not require an allegation of non-residence of unknown defendants in order to authorize service by publication. The court seemed to imply that a distinction might be drawn between fraud in the procurement that misleads the court as to some fact pertinent to the validity of the judgment, and fraud which in effect prevents a party from appearing and presenting a valid defense. The court said that the defendant did not allege this latter type of fraud:

It is unnecessary for us to rule that in a case where a defendant is prevented from presenting a valid defense existing in the facts of a case, by duress, fraud, or excusable mistake, that relief will be granted on error coram nobis. That question is not before us. We held in *Jeude v. Sims* . . . that fraud in the procurement of a judgment cannot be relieved against in this sort of proceeding.<sup>137</sup>

The significance of the distinction apparently drawn between fraud in the procurement of a judgment and fraud which prevents a defendant from making a valid defense is not ascertainable from any of the cases. What the court meant by this language is made even more uncertain by the fact that *Jeude v. Sims* expressly stated that fraudulently preventing a party from appearing and making a valid defense was not grounds for the writ of error coram nobis.<sup>138</sup>

Two years later, the Kansas City Court of Appeals handed down its decision in *Ragland v. Ragland*.<sup>139</sup> In that case the plaintiff petitioned for a divorce. When

135. 291 Mo. 493, 236 S.W. 876 (1922).

136. *Id.* at 518, 236 S.W. at 881.

137. *Id.* at 529, 236 S.W. at 885.

138. *Jeude v. Sims*, *supra* note 131, at 40-41, 166 S.W. at 1052.

139. 258 S.W. 728 (K.C. Ct. App. 1924).

his unknowing spouse was served with summons, plaintiff assured her that he had changed his mind and would dismiss the suit. He thereafter continued to live with her. On the date set for the hearing, plaintiff appeared and testified that he had been separated from the defendant since before he filed for divorce. A default judgment was rendered in plaintiff's favor, granting him a divorce. Plaintiff then went back and continued to live with the defendant until the term at which the judgment was rendered had expired. At a subsequent term, after learning of the deception, the defendant spouse brought a motion in the nature of a writ of error coram nobis to set aside the judgment on the ground that the judgment had been procured by fraud and perjured testimony. It should be noted that the alleged fraud by the plaintiff not only constituted fraud in the procurement, in that he misled the court into pronouncing judgment, but also fraud in the second respect, in that defendant was prevented from appearing and making a valid defense. The motion was overruled and defendant appealed. The Kansas City Court of Appeals affirmed the trial court, citing and quoting extensively from both *Jeude v. Sims* and *Simms v. Thompson*. The court stated that *Simms v. Thompson* disapproved *Cross v. Gould* insofar as the latter held that fraud is sufficient upon which to base a writ of error coram nobis. The court further held that, in view of *Simms v. Thompson*, its prior decision in *Fisher v. Fisher* was overruled, and that the motion filed by the defendant could not be considered to be an independent suit in equity, *Jeude v. Sims* being cited to support this proposition.

Immediately thereafter, the St. Louis Court of Appeals fell into line with its decisions in *Hartford Fire Ins. Co. v. Stanfill* and *Schneider v. Schneider*.<sup>140</sup> The court, noting the decisions in *Simms v. Thompson* and *Ragland v. Ragland*, held that in Missouri the motion in the nature of a writ of error coram nobis was not available for relief of judgments procured by fraud.

From its singular origin in *Jeude v. Sims*, the doctrine that a judgment procured by fraud will not be set aside at a subsequent term by motion in the nature of a writ of error coram nobis, and that such a motion will not be considered as a bill or petition in equity, remained relatively undisturbed and unchallenged until 1961.<sup>141</sup> In that year, in *Watkins v. Hubbard*,<sup>142</sup> the Kansas City Court of Appeals

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140. 259 S.W. 867 (St. L. Ct. App. 1924); 273 S.W. 108 (St. L. Ct. App. 1925).

141. There was one qualification set out by way of dictum in a Kansas City Court of Appeals case, *Sowers-Taylor Co. v. Collins*, 14 S.W.2d 692, 693 (1929). Referring to a hypothetical case wherein the plaintiff forged the sheriff's signature to the return upon a summons, thereby showing proper service where none was in fact made, the court said:

It is sometimes said that it is not the office of a writ of error coram nobis to set aside a judgment on the ground of fraud; but this only means that a judgment may not be set aside when attacked in this manner, on the ground that the court was induced by fraud to exercise its jurisdiction. If the court has been misled into supposing that it had jurisdiction over the person of the defendant, and this fact is not apparent from the inspection of the record, then the writ of error coram nobis will lie whether the court was misled by fraud or mistake.

The court further explained that this would not constitute an attack upon the verity of the record because this was not an impeachment of the return, but only



wrote new state law, or rather exhumed old law, by holding that a motion to set aside a judgment grounded upon allegations of fraud could be treated by the court as a separate suit in equity instituted by motion rather than by petition. The facts upon which the decision arose involved the alleged breach of a promise made by the attorney for the plaintiff that he would move to dismiss the suit brought against the defendants. Instead, he took a default judgment. Defendants nine days later moved to set aside the judgment; the motion was sustained, the default judgment set aside, and a new trial ordered. Plaintiff appealed to the Kansas City Court of Appeals. In affirming the trial court's action, the appellate court acted with complete knowledge of the line of decisions following *Jeude v. Sims*. It was admitted that, according to those decisions, a writ of error coram nobis, denominated as such, would not lie for fraud in the procurement of a judgment, and that *Jeude v. Sims* and *Ragland v. Ragland* had also held that a separate suit in equity could not be instituted by a motion not purporting to be a petition in equity. To support its holding, the court first noted that the law as it existed prior to *Jeude v. Sims* had allowed equitable relief by motion, and that the decision in *Jeude v. Sims* was supported by no citation of law, either case or text. The court then pointed out that the Missouri Rules of Civil Procedure were promulgated for the express purpose of expediting litigation and reducing cost and delay; that the rules provide that substance rather than form shall be considered in determining the adequacy of a pleading; that the motion in the instant case had set out the two essential elements required of a petition in equity, a statement of the facts showing that the pleader is entitled to relief, and a demand for relief; and that to demand a petition in equity, which would differ from the motion in this case only in matters of form, would serve no purpose but to add to the cost and delay of the proceedings. The court's final and perhaps best argument in favor of allowing equitable relief by motion was stated thusly:

Aside from the Rules, the law should be consistent. Courts regard proceedings raised by motion in the nature of writ of error coram nobis, filed in the original action, as a separate suit directly attacking the judgment. . . . Consistency directs the same treatment of defendant's pleading. It likewise is filed in the original court, for the same purpose, also as a direct attack on the judgment, but on equitable grounds. The remedy should be as readily extended as an instrument of relief from intentional wrong as from honest mistake—fraud being one of the special abhorrences of the law.<sup>143</sup>

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a claim that no return was made. There has apparently been no subsequent application of this qualification to the rule disallowing motions for fraud, and it is doubtful whether the dictum might be applied to circumvent the rule in other fraud cases. Apparently it could be applied only where the court did not in fact have jurisdiction, but was misled by fraud to believe that it did. Whether or not the hypothetical facts stated above amount to impeachment of the record is debatable since the record bespeaks of a return and the moving party is alleging that there was none. However, it remains a moot question until tested in a court of this state.

142. 343 S.W.2d 189 (K.C. Ct. App. 1961).

143. *Id.* at 195.

It would be presumptuous to attempt to predict the destiny of the theory of the *Watkins* decision or its effect upon any future cases wherein judgments are sought to be set aside by motion for fraud or other equitable grounds. It is interesting to note, however, that if the reasoning of the case is followed, it will, in effect, constitute the resumption of a procedural trend toward allowing vacation of judgments by motion upon equitable grounds—a trend which was interrupted by the overruling of *Fisher v. Fisher* and *Cross v. Gould* more than thirty-five years previously.

Although *Watkins v. Hubbard* provides direct authority for the use of a motion to set aside for fraud rather than a separate suit in equity, quite probably a petition in equity is the safer route and the one most likely to be approved under the present state of the law. However, the uncertainty as to the particular method to be used in setting a judgment aside for fraud points up the need for an expansion of the Missouri Rules of Civil Procedure to cover the problem.

The confusion could be eliminated by the adoption of a simple provision in the rules allowing a direct attack upon a judgment, based upon equitable grounds, to be raised by motion as well as by a separate suit in equity. It is submitted that requiring a separate suit in equity to set aside a judgment results only in added delay, increased costs and possible jurisdictional problems, all of which should suffice to provide a stimulus for change by a specific court rule.<sup>144</sup>

#### VIII. SUMMARY AND CONCLUSIONS

After the lapse of the statutory thirty day period following pronouncement of judgment, the following remedies, assuming the elements of each are present, are available in Missouri to set aside a judgment in the court of its rendition: (a) To correct errors in the record and make the records conform to the judgment actually rendered by the court, an order nunc pro tunc may issue. (b) A petition for review to set aside a default judgment rendered upon constructive service provides the proper remedy for a defendant in a default judgment suit who can show "good cause" for the court to set aside its prior judgment. (c) A procedural irregularity appearing on the face of the record and substantially affecting the rights of the party movant is the basis for a motion to set aside a judgment for irregularity. (d) An unknown jurisdictional defect not apparent on the face of the record constitutes grounds for a motion to set aside for error of fact, or a motion in the nature of coram nobis. (e) If the remedy at law is inadequate, and the judgment under attack was procured by fraud, accident or mistake, the judgment may possibly be set aside by a separate suit in equity. (f) A motion to the court of rendition to set aside its judgment for fraud is apparently available within the jurisdiction of the Kansas City Court of Appeals, and arguably should be available on a state-wide basis. However, in the present unsettled state of the law on this point, the remedy in such situations will probably be limited to a petition to set aside by a separate suit in equity.

The area of procedure for vacating and modifying judgments appears to be ripe for a re-examination and simplification to conform to the advances made in other procedural areas by the Missouri Rules of Civil Procedure. In outlining rea-

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144. See *In re Jackson's Will*, 291 S.W.2d 214 (Spr. Ct. App. 1956).

sons for the revision of the existing procedural rules by the supreme court, Judge Hyde noted three primary objectives: elimination of unnecessary delay, elimination of technicalities, and reduction in costs of litigation.<sup>145</sup> It is obvious that a consolidation of the existing practices as to vacating and modifying judgments would serve to provide a highly useful addition to the existing rules.

The supreme court might well look to Rule 60 of the Federal Rules of Civil Procedure for a model upon which to base a similar rule covering Missouri procedures. That rule provides for relief from a judgment either by motion or by independent action. Rule 60(a) deals with clerical mistakes; 60(b) concerns mistakes, fraud, newly discovered evidence, excusable neglect, etc. The significant provision, 60(b), reads as follows:

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. . . .

The federal rules thus prescribe, in a uniform manner, procedural steps for obtaining relief from judgments, either by motion or by an independent action. It is submitted that such a comprehensive rule provides far more effective procedures than are available at present in Missouri under our existing conglomeration of ancient common law writs, statutory provisions, equity practices, and court rules. Needed relief in this area can be readily provided by the Supreme Court's rule making authority,<sup>146</sup> and exercise of its power by providing a comprehensive rule would be of benefit to both bench and bar.

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145. Hyde, *Reasons for Adopting a Complete Code of Civil Procedure by the Missouri Supreme Court Under Its Constitutional Rule Making Authority*, 3 St. Louis U.L.J. 378, 381 (1955).

146. Mo. CONST. art. 5, § 5.