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# FEDERAL COURTS-GRANTING OF NEW TRIAL ON INITIATIVE OF THE COURT

William F. Snyder S. Ed.
*University of Michigan Law School*

FEDERAL COURTS—GRANTING OF NEW TRIAL ON INITIATIVE OF THE COURT—Following conviction for violation of a federal statute, petitioner was granted his release on a writ of habeas corpus by a federal district court, on the basis of uncontroverted testimony that his counsel had not been present when the jury returned its verdict. Within ten days of this release, a motion for rehearing was filed, supported by affidavits that his counsel actually had been present. On subsequent hearing, the court set aside its former order and remanded petitioner to custody, on the theory that his release was obtained by means of a fraud on the Court. The present action was a habeas corpus proceeding challenging the remanding order. *Held*, the remanding order amounted to the granting of a new trial on the court's initiative and, being made after the statutory period had expired, was void. *Thomas v. Hunter*, (D.C. Kan. 1948) 78 F. Supp. 925.

To grant a new trial on its own initiative has usually been considered an inherent power of the court and, despite statutory limits on motions for new trial by the litigants, has been permitted at any time within the term during which the judgment was rendered.[1] Statutes imposing time limits on new trial motions occasionally have been treated as mandatory on the court as well as the parties;[2] but, being an infringement on common law judicial powers, they are usually strictly construed.[3] Administrative difficulties prevented the complete abolition of the common law concept of term-time in the Federal Rules. However, recognizing its arbitrary features, the advisers eliminated this concept as a factor in the powers of courts over their judgments.[4] In lieu thereof, specific periods have been provided during which various motions to affect judgments may be brought.[5] Term-time being no longer available as a limit on the court's inherent powers, it was further specifically provided that these periods are not subject to enlargement on the court's initiative.[6] Viewing the proceeding in the instant case as involving a motion for new trial,[7] the decision seems entirely proper in light of the above rules.[8] A question arises, however, as to whether the court might not have treated it as a motion to vacate or amend under Federal Rule 60(b).[9] This rule was promulgated

[1] Sulzbacher v. Continental Casualty Co., (C.C.A. 8th, 1937) 88 F. (2d) 122; and see cases collected, 48 A.L.R. 362 (1927).

[2] Nichols v. Houghton Circuit Judge, 185 Mich. 654, 152 N.W. 482 (1915).

[3] 40 L.R.A. (n.s.) 294 (1912).

[4] Federal Rule 6(c). See notes of the Advisory Committee and Commentaries on this rule in MANUAL OF FEDERAL PROCEDURE 31 (1940).

[5] Federal Rules 25, 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), 73(a), 73(g).

[6] Federal Rule 6(b). See comment in MOORE'S FEDERAL RULES 25 (1947).

[7] Habeas corpus proceedings are subject to federal rules concerning new trials. De Jordan v. Hudspeth, (C.C.A. 10th, 1943) 137 F. (2d) 943. A petition for rehearing may be treated as a motion for new trial. Safeway Stores, Inc., v. Coe (App. D.C. 1943) 136 F. (2d) 771.

[8] The case also accords with authority in clearing two other hurdles. (1) A timely motion by the parties does not warrant a new trial on the court's initiative on independent grounds. Marshall's U.S. Auto Supply, Inc., v. Cashman, (C.C.A. 10th, 1940) 111 F. (2d) 140; Freid v. McGrath (App. D.C. 1942) 133 F. (2d) 350. (2) An order contrary to the rule stated above is absolutely void and may be challenged for the first time on collateral attack. Aderhold v. Murphy, (C.C.A. 10th, 1939) 103 F. (2d) 492.

[9] "On motion the Court, upon such terms as are just, may relieve a party . . . from a judgment . . . taken against him through his mistake, inadvertence, surprise, or excusable

in the realization that the absolute finality of judgments, as dictated by the rules previously discussed, would frequently result in substantial injustice. It was designed to give an extended period during which such elements as mistake, surprise, excusable neglect, newly discovered evidence, fraud or misconduct, satisfaction, or other factors rendering the order void, could be introduced to relieve a party from judgment.[10] The court discusses this possibility but determines that the only fraud involved was of an intrinsic variety, which could not be a ground for rehearing.[11] Recent cases have thrown considerable doubt on the distinction between intrinsic and extrinsic fraud where fraud is urged as a basis for vitiating a final judgment.[12] Moreover, the distinction seems to have been explicitly abolished by the 1946 amendment to Rule 60(b).[13] It is true that most cases in which the distinction has been disregarded have been independent actions to set aside prior judgments, but the applicable principles should not be affected by the ancillary nature of the proceedings.[14] Particular emphasis has been placed on the public interest in judgments untainted by fraud,[15] and the public welfare would seem to be intimately connected with the fraudulent release of a convicted criminal. In justification of the court's position, however, it should be noted that the motion was apparently framed on a theory of newly discovered evidence, for which there was clearly no basis. The only valid criticism would seem to be directed at an overly nice respect for form in interpreting rules designed primarily to reach substance.[16]

*William F. Snyder, S. Ed.*

neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment. . . ."

[10] See extended comment in MOORE'S FEDERAL RULES 115 (1947).

[11] Principal reliance was placed on United States v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93 (1878).

[12] Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62 (1891); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944).

[13] Federal Rule 60(b), as amended in 1946, allows fraud as a basis for relief from prior judgment "whether heretofore denominated intrinsic or extrinsic"; it also provides that the court still retains power to set aside a judgment for fraud on the court.

[14] See Moore & Rogers, "Federal Relief From Civil Judgments," 55 YALE L. J. 623 (1946), for full discussion of the form and nature of the remedy under Rule 60(b).

[15] Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944), involved a fraudulent patent. The Court stated at p. 246: "The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

[16] Federal Rule 1. "They shall be construed to secure the just, speedy, and inexpensive determination of every action."