errors, and defendant sought to invoke the examination called for by section 793.18. The court stated, 60 N.W.2d 105, at 110, that:

> "Whether we are required to do this when the defendant is represented by counsel and files a formal brief and argument we do not decide. We suggest such procedure would in many cases be unfair to the state, which of course answers only the contentions raised by the defendant's assigned errors which are argued. In any event, we have in this case searched the record as presented to us and find no prejudicial error."

REMEDIES FOR JUDGMENT OBTAINED THROUGH PERJURY

The evidence is in; an adverse judgment has been entered. If it can be established by the party against whom the judgment has been entered that it was based upon perjured testimony,[1] what will be the remedies of the aggrieved party? Among the alternatives which might be available to him are: a motion for new trial,[2] a petition for new trial,[3] an action in equity to set aside the damages,[5] judgment,[4] an action for damages,[5] or persuading proper authorities to presecute for perjury.[6] Which of these should he pursue if his problem is to be presented in the Iowa courts?

The difficulty that faces courts in this situation is a conflict between two fundamental policies of the law. First, the law seeks to afford parties to litigation the fullest opportunity to establish their rights; and, secondly, it desires to maintain and enforce its judgments after the parties have enjoyed the opportunity to establish their rights.[7] The courts are faced with the dilemma that to correct the wrong as between the parties could result in hardship to innocent third persons. For instance, to allow a divorce to be set aside after a period of time might well make an innocent person guilty of bigamy, establish children of the parties as illegitimate, and destroy an expected dower interest. Further, to cancel a deed after a prior lawsuit might well damage an innocent

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[1] Some courts have drawn a distinction between perjured testimony—intentional giving of known untrue facts, and false testimony—unintentional giving of mistaken facts. *E.g.*, Moore v. Gulley, 144 N. C. 81, 56 S.E. 681 (1907). Iowa has not drawn a distinction of this nature and no distinction is intended in this paper by the use of the terms perjured testimony or false testimony. Iowa does not include forged, fraudulent and fabricated documents within the rules discussed in this paper. Use of documents is extrinsic fraud. Bates v. Carter, 222 Iowa 1263, 271 N.W. 307 (1937).

[2] Iowa Code R.C.P. 244 (1950).

[3] Iowa Code R.C.P. 252 (1950).

[4] Iowa Code § 611.15 (1950).

[5] Iowa Code § 611.2 (1950).

[6] Iowa Code c. 721 (1950).

[7] *See* Heathcote v. Haskins & Co., 74 Iowa 566, 570, 38 N.W. 417, 419 (1888).

purchaser for value. With the passage of time the possibility of hardship increases.

In choosing between these conflicting policies the courts have recognized the importance of "time"; thus great weight is given the time the aggrieved party returns to court to challenge the judgment. The dividing time-line in Iowa is the expiration of the time to file a motion for a new trial.[8] If such motion is made within the statutory limit of ten days,[9] the dominant consideration is that the parties be afforded the fullest opportunity to litigate their claims. However, when such time has elapsed, and a new trial is petitioned for,[10] or an action in equity is brought the dominant consideration is that the court must maintain and enforce its judgments after the parties have enjoyed the opportunity to establish their rights.

The motion for a new trial, a remedy available only for ten days after verdict or for a short period thereafter upon permission of the court, is generally made for: (1) material evidence, newly discovered, that could not with reasonable diligence have been discovered and produced at the trial,[11] or (2) misconduct of the prevailing party,[12] or (3) both.[13] The granting of the motion lies within the sound discretion of the court.[14] The supreme court will set aside the trial court's ruling only in a strong case of abuse of discretion,[15] but will interfere more readily where the trial court denies a new trial than where it grants one.[16] If the motion is based upon newly discovered evidence the general requirements relating thereto would apply.[17] If the motion is based upon misconduct of the prevailing party, in addition to showing the false testimony it must be shown that the aggrieved party did not know at the time of the trial that the evidence was false, or did not know of the evidence to prove that the testimony was false.[18]

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[8] Moore v. Goldberg, 205 Iowa 346, 217 N.W. 877 (1928); Guth v. Bell, 153 Iowa 511, 133 N.W. 883 (1911).

[9] IOWA CODE R.C.P. 247 (1950): "Motions . . . must be filed within ten days after the verdict . . ., unless the court, for good cause shown and not ex parte, grants an additional time not to exceed thirty days."

[10] IOWA CODE R.C.P. 252, 253 (1950).

[11] IOWA CODE R.C.P. 244 (g) (1950).

[12] IOWA CODE R.C.P. 244 (b) (1950).

[13] Seven other grounds upon which the motion for new trial may be founded are specified in Iowa Code R.C.P. 244 (1950). The only other one pertinent to the subject matter of this article is found in R.C.P. 244 (c), which involves "accident or surprise which ordinary prudence could not have guarded against."

[14] A motion for a new trial may be granted in the discretion of the court when it clearly appears that the prevailing party offered false testimony upon material matters and the court cannot say that the same conclusion would probably have been reached without such evidence. Moore v. Goldberg, 205 Iowa 346, 217 N.W. 877 (1928).

[15] *Ibid.*

[16] *See* Maland v. Tesdall, 232 Iowa 959, 970, 5 N.W.2d 327, 333 (1942); White v. Zell, 224 Iowa 359, 364, 276 N.W. 76, 78 (1937).

[17] Henderson v. Edwards, 191 Iowa 871, 183 N.W. 583 (1921).

[18] *See* Heathcote v. Haskins & Co., 74 Iowa 566, 38 N.W. 417 (1888).

It is not necessary that the prevailing party knew or participated in the offering of the perjured testimony.[19]

The false testimony must be proven; mere allegations are not sufficient.[20] This proof should be by affidavit or in any other manner the court may direct.[21] The burden is upon the moving party to show that the same result would probably not have been reached without this evidence.[22]

Let us now examine the alternatives available to the aggrieved party after expiration of the time for filing a motion for a new trial. The policy of enforcement of judgments has been applied whether the aggrieved party has filed a petition within a year in the original action,[23] brought an action in equity to set aside the judgment,[24] set up the facts as a defense in an action on a foreign judgment,[25] sought to attack a judgment collaterally,[26] or challenged the judgment in the federal court as a denial of due process.[27]

This change of emphasis in the above situations is shown in *Graves v. Graves*.[28] Originally the husband was granted a divorce from his wife, and the wife awarded alimony upon her cross-petition. Over one year later she petitioned for a new trial, alleging that the husband had fraudulently concealed the amount and extent of his property from her, and that he had given false testimony at the time of the first trial. A new trial was granted because of the *fraud* of the husband in concealing his property from the wife and her inability to prove the fraud within the statutory time, but the court specifically held that the *false testimony* of the husband at the original trial was not of itself grounds for new trial. The court said:

> "This settles the matter for this jurisdiction, and we need only restate the doctrine; which is that false swearing or perjury alone is not grounds for setting aside or vacating a judgment. But, if accompanied by any fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the conclusion that but for such fraud the result would have been different, a new trial may be granted."[29]

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19 In *Maland v. Tesdall*, 232 Iowa 959, 5 N.W.2d 327 (1942) the court held that it was error to overrule a motion for a new trial for misconduct of the prevailing party although there was no showing that the prevailing party knew or participated in the offering of the perjured testimony. An earlier case to the contrary was *Weinhart v. Smith*, 211 Iowa 242, 233 N.W. 26 (1930).

20 Mitchell v. Beck, 178 Iowa 786, 156 N.W. 428 (1916).

21 Iowa Code R.C.P. 245, 116 (1950).

22 Maland v. Tesdall, 232 Iowa 959, 5 N.W.2d 327 (1942).

23 Croghan v. Umplebaugh, 179 Iowa 1187, 162 N.W. 596 (1917).

24 Holmes v. Holmes, 189 Iowa 256, 176 N.W. 691 (1920).

25 Cottle v. Cole & Cole, 20 Iowa 481 (1866).

26 Reimers v. McElree, 238 Iowa 791, 28 N.W.2d 569 (1947).

27 Bryan v. Bryan, 109 F.Supp. 366 (E. D. S. C. 1952).

28 132 Iowa 199, 109 N.W. 707 (1906).

29 *Id.* at 205, 109 N.W. at 709.

What is extrinsic or collateral fraud that would be sufficient to warrant an attack on a former judgment? In the same opinion it was said that:

> "Among the instances given in books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise; or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest . . . In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there."[30]

The court's opinion in the *Graves* case cites two cases as authority for its decision. These are the Massachusetts case of *Greene v. Greene*,[31] and the California case of *Pico v. Cohn*.[32] In the *Greene* case the court held that a party to an action could not maintain a new action by alleging that the former decree was obtained by false testimony, without first setting aside that decree. The decision was based upon the doctrine of res judicata and the harmful effects of a contrary rule. The Iowa court appears to be citing this case as authority for the rule that the parties are estopped to set up false testimony as a ground of fraud sufficient to warrant the granting of a new trial. The case is not authority for this proposition, as the Massachusetts court itself pointed out in *Edson v. Edson*.[33] The court in the *Greene* case held only that an improper method of proceeding had been used without deciding whether false testimony would have been sufficient to set aside the decree if the plaintiff had attempted to do so.

In the California case, the court reasoned that there must be an end to litigation; that a different rule would permit endless

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[30] *Id* at 204, 109 N.W. at 709. This quotation, originally from *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 971 (1891), was repeated in *Abell v. Pertello*, 202 Iowa 1236, 1240, 211 N.W. 868, 869-870 (1927), but has rarely been discussed by the Iowa court. In *Tucker v. Stewart*, 121 Iowa 714, 97 N.W. 148 (1903), a failure to include an item in a final report by an administrator was extrinsic fraud; but in *Reimer v. McElree*, 238 Iowa 791, 28 N.W. 2d 569 (1947), the court called the failure of delivery of a deed intrinsic fraud. The distinction between intrinsic and extrinsic fraud has been noted by many law review articles, *e.g.*, Note, *Fraud as a Basis for Setting Aside a Judgment*, 21 COL. L. REV. 268 (1921); Comment, *Relief against judgment obtained by perjury*, 12 CORNELL L. Q. 385 (1927); Note, *Invalidating a judgment for fraud—and the significance of Federal Rule 60(b)*, 3 DUKE B. J. 41 (1953); Note, *Injunctions against the Enforcement of Judgments Obtained by Perjury*, 22 HARV. L. REV. 600 (1909); Comment, *Perjury as a Ground for Vacating Judgment*, 49 HARV. L. REV. 327 (1935); Comment, *Relief against Judgment obtained by Perjured Testimony*, 21 ILL. L. REV. 833 (1927). The conclusion reached by Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L. J. 623, 658 (1946), is that "[I]t is a journey into futility to attempt a distinction between extrinsic and intrinsic matter."

[31] 2 Gray 361 (Mass. 1854).

[32] 91 Cal. 129, 25 Pac. 970 (1891).

[33] 108 Mass. 590, 11 Am. Rep. 393 (1871).

litigation, a result less desirable than an occasional miscarriage of justice. Actually the doctrines of finality would not be in jeopardy if the aggrieved party was required to prove not only the false testimony but also that a contrary result would probably have been reached except for such testimony. The additional requirement that the aggrieved party did not know the testimony was false or did not know of the evidence to show the testimony was false would prevent the repeated granting of a new trial for false testimony at least on one issue. On the second trial the former aggrieved party would necessarily have to expose the false testimony.

In a later Iowa case, *Croghan v. Umplebaugh*,[34] the court affirmed the rule of the *Graves* case, and explained the reason for the rule as follows:

> "The purpose of the trial is to search for and ascertain the truth. . . . It is the jury's duty to weigh the testimony; to distinguish the false from the true . . . The very controversy suggests the thought that one or the other must give false testimony in support of that which is not true, if he would maintain his contention. It is one of the hazards of the trial, against which the parties must arm themselves, and in the trial defend themselves against. Relief against this is not found in the granting of new trials, but rather in the enforcement of the criminal laws against perjury,—laws which, we regret to say, are not invoked often enough."[35]

When it can be established that the trial has failed to ascertain the truth, the court of equity should be permitted to see that justice be done between the parties. Where the false testimony was introduced for the purpose of deceiving the court or jury, and it appears that the defeated party was surprised and unable to contradict it at the time, a new trial should be granted. The equity concept of laches should apply to require the use of due diligence in exposing the false testimony. A failure to set up a defense known at the time would not entitle the party to a new trial.[36]

The criminal prosecution for perjury suggested by the court would be wholly inadequate and unsatisfactory to the aggrieved party in most cases. It ordinarily is not the policy of the law to send people to criminal law to redress direct injury to person or property.

The use of the rules of discovery might afford some protection to a party to guard against finding himself in the position of an aggrieved party. The rules of discovery in Iowa, however, are limited to the establishment of one's own case, and not to permit an examination of the opposing party's case.[37] The false testimony

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[34] 179 Iowa 1187, 162 N.W. 596 (1917).

[35] *Id.* at 1190, 1191, 1192, 162 N.W. at 597.

[36] *Heathcote v. Haskins & Co.*, 74 Iowa 566, 38 N.W. 417 (1888), seems to be based upon this reasoning.

[37] Hitchcock v. Ginsberg, 240 Iowa 678, 37 N.W.2d 302 (1949); Author's comment, 2 COOK AND LOTH, IOWA RULES OF CIVIL PROCEDURE 121 (1951).

would be used more often to establish the party's own case, and, therefore, not be exposed by use of the Iowa discovery rules.

When considering other civil remedies that might be pursued, other difficulties are found. An independent cause of action for damages would fail if the same reasoning in regard to finality of judgments were applied here by the Iowa court.[38] An action of slander or libel obviously would be of little use to the aggrieved party as the injury sustained usually would not be to the reputation of the party; and statements pertinent to the matter in controversy are privileged.[39] The action of abuse of process would also not lie as this is not a case of the proper use of the judicial process for a wrongful purpose but a wrongful use of the judicial process for a proper purpose.[40]

CONCLUSION

In Iowa a motion for a new trial may be granted within the sound discretion of the court when it is shown that the prevailing party offered or knew that there was received false testimony upon material matters, and the court cannot say that the same conclusion would probably have been reached without such evidence. If the prevailing party did not know that perjured testimony was offered on his behalf, the court must still grant a new trial, under the most recent case.

After the expiration of the time for filing a motion for a new trial, the question will turn upon whether the fraud is extrinsic to the judgment. Perjury itself is intrinsic fraud, not sufficient to set aside, vacate, or collaterally attack a judgment. The fraud, to be extrinsic, must have prevented the aggrieved party from having a trial. It should be noted that there are two conflicting lines of authority on this point, in federal courts.[41] One, established by the *Throckmorton* case[42] and followed both by the state and the federal courts in Iowa, holds that only extrinsic fraud is sufficient to set aside a judgment and that perjury alone is not extrinsic. The other, established by the *Marshall* case,[43] holds that intrinsic fraud including perjury will warrant restraining the execution of a judgment.

The legislature might well consider the adoption of statutory relief for the aggrieved party in this situation. Other state legis-

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[38] RESTATEMENT, RESTITUTION § 72, Comment c (1936).
[39] Smith v. Howard, 28 Iowa 51 (1869).
[40] HARPER, A TREATISE ON THE LAW OF TORTS § 272 (1933).
[41] *But see* Chicago, R. I. & P. Ry. Co. v. Callicotte, 267 Fed 799, 806 (8th Cir. 1920).
[42] United States v. Throckmorton, 98 U.S. 61 (1878), followed in Phillips Petroleum Co. v. Jenkins, 91 F.2d 183 (8th Cir. 1937).
[43] Marshall v. Holmes, 141 U.S. 589 (1891), followed in Publicker v. Shallcross, 106 F.2d 949, 126 A.L.R. 386 (3d Cir. 1939), *cert. denied*, 308 U.S. 624 (1940). In the *Publicker* case, 106 F.2d at 950, the court said: "We do not think ourselves bound by that case [U.S. v. Throckmorton] . . . We do not think it applies to our circumstances and we do not believe it is the law of the Supreme Court today."

latures have provided for a remedy in at least three different manners. The Ohio Code provides that a judgment or order obtained by false testimony may be vacated or modified by the court at any time within two years after the term where rendered.[44] In Minnesota it has been provided that a judgment may be set aside for perjury in an independent action brought for that purpose within three years after the discovery by the aggrieved party of such perjury.[45] In Maine it has been provided that an aggrieved party may maintain an independent action for damages sustained by him against the prevailing party or any perjuring witness.[46]

One possible solution for the problem is expansion of the common law to provide a suitable remedy. The common law is not a fixed but a growing body of law, as has been recognized by the many courts which in the last sixty-odd years have established the individual's right of privacy.[47] Justice calls for judicial re-examination and reconsideration of the remedies available to the aggrieved party who has lost his case because perjured testimony was used against him.

JAMES H. GRITTON (June '53)

JOHN C. HEDLUND (Jan. '54)

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[44] PAGE'S OHIO GENERAL CODE 1938 § 11631(10) (1952 Supp.). This statute requires the guilty party to be convicted of perjury before the remedy can be utilized.

[45] MINN. STATUTES § 548.14 (1949). *But see* In re Estate of Jordan, 199 Minn. 53, 271 N.W. 104 (1937); Murray v. Calkins, 186 Minn. 192, 242 N.W. 706 (1932). These cases hold that "intrinsic" fraud is not within the statute. If the parties are apprised of the issues and have an opportunity to defend they cannot utilize the statute.

[46] MAINE REV. STAT., c. 100, § 177 (1944).

[47] That such a right as the "right to privacy" existed had not been recognized in decisions until it was first described in the classic article by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It now has substantial recognition in case law, which is described in HARPER, A TREATISE ON THE LAW OF TORTS § 277 (1933), and PROSSER, HANDBOOK OF THE LAW OF TORTS § 107 (1941).

HABEAS CORPUS IN IOWA

Traditionally the writ of habeas corpus has been regarded as one of the great bulwarks of individual liberty. Holdsworth enumerates various other writs designed to safeguard the liberty of the subject which eventually became ineffective and were superseded by the writ of habeas corpus at the end of the sixteenth and the beginning of the seventeenth century.¼ He points out, however, that from the time of Edward I various writs of habeas corpus were known to the law.½ Radin quotes Selden as saying it is " 'the highest remedy in law for any man that is imprisoned.' "¾ The writ *habeas corpus ad subjiciendum* was the basic writ relating to personal freedom; it initiated an immediate hearing to determine the legality of an existing actual confinement.[1] Availability of the writ is guaranteed by both state and federal constitutions.[2] It is the purpose of this article to discuss the procedure involved in applying the writ in Iowa and the various uses to which it may be put.

The modern statutory writ is initiated by a verified petition in the name of the person restrained.[3] Application may be made to the supreme, district or superior court or any judge of those courts,[4] and must be made to the court or judge most convenient in point of distance to the applicant.[5] The court has held that convenience rather than measurable distance controls,[6] though inmates of institutions must apply to the court or judge in the district in which they are confined.[7] Application to the supreme court may be made from any place in the state, since its jurisdiction is coextensive with the state.[8]

The petitioner must allege that he is restrained at a particular place, the cause or pretense under which he is held, and why the

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¼ IX HOLDSWORTH, A HISTORY OF ENGLISH LAW 104-108 (3rd ed. 1922-1932). For a list of readings on the history of habeas corpus, see PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 156, n. 5 (2nd ed. 1936).

½ IX HOLDSWORTH, *op. cit. supra*, note 1, at 108.

¾ RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 233 (1st ed. 1936).

[1] 3 BL. COMM. 131 (7th ed. 1775); see Wales v. Whitney, 114 U.S. 564, 571 (1885).

[2] U.S. CONST. ART. I, § 9; IOWA CONST. ART. I, § 13.

[3] IOWA CODE § 663.2 (1950); see State v. Collins, 54 Iowa 441, 442, 6 N.W. 692 (1880).

[4] IOWA CODE § 663.3 (1950). Municipal courts were not created until 1923 and no express authorization for habeas corpus jurisdiction is conferred upon them. Section 602.14 gives them jurisdiction in civil matters concurrent with the district courts, however.

[5] IOWA CODE § 663.4 (1950).

[6] Addis v. Applegate, 171 Iowa 150, 154 N.W. 168 (1915).

[7] State Institution for Feeble-Minded v. Stillman, 236 Iowa 1023, 20 N.W.2d 417 (1945).

[8] Ware v. Sanders, 146 Iowa 233, 124 N.W. 1081 (1910).