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property,[30] but there are no Montana cases on this point. Just as the Montana court in the *Swayze* case implied that the statute requiring a definite beneficiary[31] was not applicable to charitable trusts, it seems reasonable that the court would hold that this code section was not intended to apply to charitable trusts.

The other Montana statute which possibly places limitations on the charitable trust doctrine is Section 91-104 (6977).[32] As we have seen it interpreted in the *Beck* case, this statute was used to prevent an unincorporated state institution from taking by will. The *Swayze* case did not directly overrule the *Beck* decision as the fact situations are distinguishable, and further, neither the *Beck* case nor Section 91-104 (6977) was discussed in the *Swayze* opinion.

As there seems to be no public policy in opposition to allowing charitable unincorporated associations from taking by will, they should be allowed to do so. This could be accomplished by the adoption of the *cy pres* doctrine previously discussed,[33] or by amending Section 91-104 (6977), as California has done,[34] to expressly include unincorporated charitable associations.

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3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of sections 67-502 to 67-611 of this code; or,
4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the sections above enumerated."

[30] *Supra*, Note 28.
[31] *Supra*, Note 7.
[32] *Supra*, Note 8.
[33] *Supra*, Note 11.
[34] *Supra*, Note 15.

RELIEF IN EQUITY AGAINST PROBATE OF A WILL PROCURED BY FRAUD

Although Section 91-1101 (10042)[1] of the 1947 Revised Codes of Montana has been held to be in effect a statute of limitations, the running of which commences with the admission of a will to probate,[2] and further held to be a bar to either direct

[1] R.C.M. 1947, §91-1101 (10042). "When a will has been admitted to probate, any interested person may, at any time within one year after such probate, contest the same or validity of the will."
[2] In Re Murphy's Estate (1920) 57 Mont. 273, 188 P. 146.

or collateral attack on the probate,[3] a Montana attorney, or one in many other jurisdictions with similar type statutes, need not be defeated in all cases when he finds his client harmed by the fraudulent probate of a will, even though the time prescribed by statute for contest has run. Equitable relief may be possible. This comment is intended to point out when and in what manner this limited relief may be had.

Early English equity courts set wills aside for fraud generally,[4] but it is now settled English law that equity has no jurisdiction to do so.[5] In the United States, fraud with respect to the obtaining of probate of a will is said to be an exception to the general jurisdiction of courts of equity to relieve in cases of fraud.[6] Difficulty has been found in assigning any reason for this exception other than that exclusive jurisdiction over the probate of wills is vested in other courts. As Mr. Justice Bradley pointed out in the case of *Broderick's Will*:[7]

> "The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. . . . And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."

Statutes in some American jurisdictions give courts of equity jurisdiction over will contests, but this has been held not a general equity jurisdiction.[8] In *Bacon* v. *Bacon*[9] it is said:

> "The reasons given in support of the exception (to equity's power to set aside decrees in will cases)[10] are generally declared in the opinions to be unsatisfactory and illogical, and discussions usually end with the statement that, whether for good reasons or not, the exception is firmly established, and upon that ground must be adhered to."

It has been said that the cases could lead one to the con-

[3]See note 2, *Supra.*
[4]2 PAGE, WILLS (3rd ed. 1941) §576, p. 90.
[5]Allen v. McPherson (1845, 1847) 1 H.L. Cas. 191, 9 Eng. Reprint 727; 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1185, p. 2462.
[6]30 C.J.S. *Equity*, §48, p. 381.
[7]Kiely v. McGlynn (1875) 21 Wall. 503, 22 L.Ed. 599.
[8]Kelly v. Kelly (1918) 285 Ill. 72, 120 N.E. 515; Queensbury v. Vial (1918) 123 Va. 219, 96 S.E. 173.
[9]Bacon v. Bacon (1907) 150 Cal. 477, 89 P. 317, p. 319.
[10]Words in parenthesis are the writer's and explanatory.

clusion that relief in equity can be had in no circumstances from a decree probating a will;[11] notwithstanding such cases, equity courts in many jurisdictions have given relief against a judgment probating a will from early times. Earlier authorities maintained that such relief was given only "where the circumstances are exceptional"[12] but more recent authority claims such equitable action,

> ". . . merely applies to will cases the general rule of equity jurisprudence that equity will not undertake to try and determine that precise question which has been determined at law, and that even in a case of alleged fraud, equity cannot assume jurisdiction where the fraud is not extrinsic and can only be ascertained by the retrial of an issue which has already been tried by an appropriate tribunal. Equitable relief may be secured against judgments rendered by probate courts to the same extent that such relief may be had from judgments rendered by other courts."[13]

That the law in Montana on the subject is substantially the same as that set out in this last quotation would seem to the writer to have been established in 1936 by the decision in the case of *Minter* v. *Minter*.[14] Plaintiffs in the *Minter* case, suing as heirs, alleged that the defendants offered a purported will of deceased, for probate, well knowing that the testatrix had not signed it in the presence of two witnesses as required by law,[15] although the attestation clause recited that she had done so. It was alleged that in doing this, the defendants represented that the facts set out in the attestation clause were true; that the one witness who actually had been in the presence of the testatrix when she signed was the only person called to testify concerning the due execution of the will, and that the witness who had not been in the presence of the testatrix when she signed was not called, this being done to conceal from the court the true facts concerning the execution of the will. Plaintiffs further alleged that these acts were done with the intent that the plaintiffs would rely upon the statements in the attestation clause, and believe that the will was properly executed, and further, that the defendant's expectations were realized, and plaintiffs did not therefore appear at the hearings to object to probate. Action

[11] 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1185, p. 2460.
[12] 68 C.J., *Wills*, §692, footnote 51, p. 944.
[13] 57 AM. JUR., *Wills*, §964, p. 631.
[14] (1936) 103 Mont. 219, 62 P.2d 233.
[15] R.C.M. 1947, §91-107 (6980).

was commenced in District Court after more time had elapsed than the year provided for contest in R.C.M. 1947, Section 91-1101 (10042).[16] The complaint asked that the order admitting the will to probate be set aside, and that the defendants be restrained from taking under the will. The Court held that because the year provided for in Section 91-1101 (10042)[17] had elapsed, the complaint was addressed to its equitable jurisdiction. In answer to argument of defense counsel to the effect that a court of equity would not in any case set aside "a judgment or order entered in a probate matter," the Court said that it had "heretofore attempted to make plain that orders and decrees made by the District Court sitting in probate occupy no different status than orders and judgments in other civil actions." The Court cited two Montana cases as the ones in which this had been established: *In Re Baxter's Estate*[18] and *Hoppin* v. *Long*.[19] Neither of these cases involved the probating of a will, however, and the Court did not make mention of the fact that the probate of wills has historically been free from attack in an equity court; instead, it treated the order in the *Minter* case the same as an ordinary order or judgment in a civil action. If an order probating a will is treated in this manner, it is then subject to being set aside if it was procured by extrinsic fraud.[20]

To dwell for a moment on the type of relief possible when an order probating a will is attacked because it was gained by extrinsic fraud. The cases which broke down the old prohibition against relief in equity against a will probate did so either by enjoining the fraud feasor from enjoying the advantage thus gained,[21] or by holding him as trustee for the heirs or next of kin.[22] California cases still consider the proper remedy in will cases to be the impressing of a trust.[23] Because succession to an estate partakes of the nature of a proceeding in rem, and because public interest would be best served by the devolvement of such an estate to a new and competent ownership,[24] the writer believes that the better solution to the problem is the imposition

[16]See note 1, *Supra.*
[17]See note 1, *Supra.*
[18](1936) 101 Mont. 504, 54 P.2d 869.
[19](1925) 74 Mont. 558, 241 P. 636.
[20]Clark v. Clark (1922) 64 Mont. 386, 210 P. 93.
[21]Folwell v. Howell (1934) 117 Conn. 565, 169 Atl. 199.
[22]Gaines v. Chew (1844) 43 U.S. 619, 11 L.Ed. 402; Patterson v. Dickerson (1912) 113 C.C.A. 252, 193 Fed. 328; Brazil v. Silva (1919) 181 Cal. 490, 185 P. 174; Seeds v. Seeds (1927) 116 Ohio State 144, 156 N.E. 193, 52 A.L.R. 761.
[23]Gale v. Witt (1948) .....Cal....., 188 P.2d 755.
[24]See note 7, *Supra.*

of a trust, rather than a setting aside of the decree admitting the will to probate, which the Court in the *Minter* case intimated would be done. As was suggested in an older Montana case dealing with fraud, *Hoppin* v. *Long*,[25] it would be better here for the District Court sitting in equity to treat the proceeding at law as valid, and grant needed relief against the consequences of the fraud. Sanctity of title to property would be better maintained by the trust device, and the in personam aspect of resort to equity would not needlessly be disturbed. The difference in treatment can have more than formal results. Equity in imposing a trust can well protect the bona fide purchaser for value, while making the trust fully operative against volunteers or those with notice.[26]

After deciding that the rule in Montana is that an order probating a will can be set aside by a suit in equity even after the statute of limitations for contest has run, the Court in the *Minter* case proceeded to discuss the instances in which this could be done. Quoting a statement in an earlier Montana case, *Clark* v. *Clark*,[27] the Court observed that:

> "The power of a court of equity to grant relief from a judgment obtained by fraud is inherent, and this relates to decrees in equity as well as to judgments at law, but not every fraud committed in the course of a judicial determination will furnish ground for such relief. The acts for which a judgment or decree may be set aside or annulled have reference only to fraud which is extrinsic or collateral to the matter on which the judgment was rendered."

This statement leads logically to a general discussion of extrinsic fraud in general and as recognized by the Montana decisions.

The distinction between intrinsic and extrinsic fraud has been called a nebulous[28] one for good reason. A fraud in the procedure of probate whereby the successful party gains an unfair advantage, as distinguished from fraud in the original transaction, gives basis for the differentiation.[29] One of the earliest Montana cases dealing with extrinsic fraud[30] laid down the requirement that it should be found that there was never a decision in a real contest over the controverted matter. The leading case

[25]See note 20, *Supra.*
[26]3 SCOTT, TRUSTS (1939) §474, p. 2346.
[27]See note 20, *Supra.*
[28]Caldwell v. Taylor (1933) 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194.
[29]2 PAGE, WILLS (3rd ed. 1941) §578, p. 93.
[30]Kennedy v. Dickie (1906) 34 Mont. 205, 85 P. 982.

of *United States* v. *Throckmorton*[31] was relied upon by the court in the *Minter* case. In the *Throckmorton* case Mr. Justice Miller stated that fraud was extrinsic when,

> ". . . the unsuccessful party has been prevented from exhibiting his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case for which a new suit may be sustained to set aside and annul the former judgment or decree. . . ."

The Montana case of *Clark* v. *Clark*[32] gave as examples of extrinsic fraud,

> ". . . where a party residing without the jurisdiction of the court is induced by false pretenses or representations to come within the jurisdiction for the sole purpose of getting personal service of process upon him, or where, through the instrumentality of the successful party, the witnesses of his adversary are forcibly or illegally detained from court or bribed to disobey the subpoenas served upon them, or where a judgment is obtained in violation of an agreement between the parties."

The court found that the fraud alleged in the *Minter* case (defendant's failure to disclose the improper execution of the will) was directly in issue at the hearing on petition for admission of the will to probate, and followed an Oregon case[33] to the effect that, as a policy matter, there should be an end to litigation, and that neither perjured testimony nor fraudulent allegations used in obtaining the judgment in a case constitute extrinsic fraud. Because the plaintiff's complaint alleged at most intrinsic fraud, the court further decided that there was no ground for equitable relief, and that the lower court was correct in sustaining a demurrer to plaintiff's complaint.

Because in argument counsel for both plaintiff and defendant relied upon the California case of *Caldwell* v. *Taylor*,[34] and

[31](1878) 98 U.S. 61, 25 L.Ed. 93.
[32]See note 20, *Supra.*
[33]Dixon v. Simpson (1929) 130 Ore. 211, 279 P. 939.
[34]See note 28, *Supra.*

because the court itself cited passages from it in reporting the *Minter* case, an examination of *Caldwell* v. *Taylor* would seem worthwhile.

The plaintiff alleged in *Caldwell* v. *Taylor* that the defendant tricked plaintiff's father into marriage; that the defendant further tricked the father into believing that she was unmarried, when in fact she was married, and a woman of the streets. Plaintiff's father, because of this belief, made a will in which the defendant was the sole beneficiary. The fraud alleged in the case, held to be extrinsic, was that the defendant deliberately misrepresented her true name, former marital status, and moral character, in answer to direct questions on the point put to defendant by the plaintiff. The plaintiff alleged that the fraud was intended to, and did, prevent the plaintiff from discovering evidence to support a contest of the will within the statutory period. The plaintiff used as a theory in his suit in equity the general scheme of fraud not only in including the making of the will, but also fraud practiced directly on himself, so that he did not have his day in court. Even though the six months period allowed for contest under the California Code had run, the defendant was held as constructive trustee of the benefits for the plaintiff, testator's son and only heir.

The *Minter* case differs from *Caldwell* v. *Taylor* in that in the former there was neither allegation nor proof that the proponents of the will made representations of any kind directly to the plaintiff. At most there was a concealment of the facts and false testimony as to the proper execution of the will. In finding such action to be at the most intrinsic fraud, the Montana Supreme Court followed the rule followed in many cases[35] that perjury alone is not a ground for equitable relief, if the trial was proper in all other respects. It has even been held that perjury on the part of a witness who was bribed by the successful party to the suit is not extrinsic fraud.[36] It has been suggested that perjury be considered grounds for equitable relief by one who admitted that perjury was the "chief example of intrinsic fraud."[37] It would seem to the writer that perjury is properly treated as intrinsic fraud for the reasons set forth

[35]Harvey v. Griffiths (1933) 133 Cal. App. 17, 23 P.2d 532; Steen v. March (1901) 132 Cal. 616, 64 P. 994; La Salle v. Peterson (1934) 221 Cal. 739, 32 P.2d 612; Rudy v. Slotwinsky (1925) 73 Cal. App. 459, 238 P. 783; Pico v. Cohn (1891) 91 Cal. 129, 25 P. 970, 27 P. 537.
[36]Pico v. Cohn, see note 35, *Supra.*
[37]Aldwell, *Equitable Relief from Judgments, Orders, and Decrees Obtained by Fraud*, 23 CAL. LAW REV. 79 (1934), p. 84-5.

in an excellent annotation on the subject,[38] in which it is contended that:

> "The doctrine which seems to be supported by the sounder reasoning, however, is that mere perjury is not ground for such relief, where the truth of the perjured evidence was necessarily at issue and determined by the court or jury in the original action, and the party committing or suborning the perjury does not, other than by the mere utterance or procurement thereof, conceal from the opposing parties the means by which the falsity of the evidence might be discovered, or otherwise mislead the latter . . . to grant relief on account thereof . . . would be to try anew the issue involved and determined in the original action."

The *Minter* case is the only reported Montana case found by the writer that involved alleged extrinsic fraud in connection with the probate of a will, but the Montana Supreme Court has been consistent in looking with a jealous eye upon suits which have for their object the setting aside of a judgment at law for extrinsic fraud in other cases involving ejectment,[39] mortgages,[40] and intestate succession.[41] The Montana view of extrinsic fraud could be said to be strict when a decision from another state such as the one allowing equitable relief because the contestants were ignorant of such defenses as fraud and undue influence at the time probate was procured[42] is considered.

Examples cited by a leading authority[43] will illustrate the manner in which the courts apply the above mentioned principles as to extrinsic and intrinsic fraud. Fraud was found intrinsic when the proponent omitted to disclose that the testator was incompetent, or that the will was obtained by fraud, or that a number of persons had conspired to exercise undue influence upon the testator, or that the will which was offered for probate was a forgery, or that a codicil which modified the will was in existence. Fraud was found extrinsic when the proponent acted to conceal from the contestant that the testator lacked capacity, or acted to omit the name of a legatee from the petition for probate, or failed to disclose the existence of the testator's heir.

A breach of duty to speak or to make disclosures has been

[38]88 A.L.R. 1201, p. 1207.
[39]Kennedy v. Dickie, see note 30, *Supra.*
[40]Dunne v. Yund (1916) 52 Mont. 24, 155 P. 273; Frisbee v. Coburn (1935) 101 Mont. 58, 52 P.2d 882.
[41]Hoppin v. Long, see note 19, *Supra.*
[42]Folwell v. Howell, see note 21, *Supra.*
[43]2 PAGE, WILLS (3rd ed. 1941) §578, p. 94-5.

adjudged extrinsic fraud when a confidential relationship has existed between parties."[44]

A final thing to remember when considering the problem of equitable relief for extrinsic fraud is that a party must come into equity deserving of relief in all respects. As one writer has noted:[45]

> ". . . the usual requirements of equity must be met—the plaintiff must have no other adequate remedy, he must himself be without fault, and he must be diligent in seeking relief when he discovers the fraud. In addition, he must show that the result would have been different had the fraud not been practiced, in that he had a valid defense or case; and he must not have been negligent in allowing the opposing party to practice the alleged fraud."

Summing up, the Montana Supreme Court clearly indicated in the *Minter* case that it would grant equitable relief even after the year provided for in R.C.M. 1947, Section 91-1101 (10042) had elapsed; relief will not be granted for all types of fraud—extrinsic fraud must be alleged and proved; the attitude of the court in the *Minter* case was that the public interest in an end to litigation was of great importance, and that fraudulent allegations, perjured testimony, or a mere concealment of a fact without something more of a collateral nature directly designed to prevent a potential contestant from having his day in court do not constitute fraud of an extrinsic nature, and will not support an action in equity for the purpose of obtaining relief against a fraudulently procured probate of a will.

DEAN F. RATZMAN.

[44]Ferguson v. Wachs (1938) 26 F.2d 910; Sohler v. Sohler (1902) 135 Cal. 323, 67 P. 282; Crow v. Madsen (1939) 31 Cal. App. 240, 87 P.2d 903. Sohler v. Sohler points up the difference between extrinsic and intrinsic fraud nicely. In that case, a widow, executrix under husband's will, conspired with her son, who was not the son of the testator, to procure for him a share of property devised to testator's children. The widow filed a petition naming such children, and alleged that her son was one of them; she thus obtained a decree that the son was one of testator's children, and that he was entitled to a share of his estate. The testator's children had no notice of this fraudulent action. The fact that the executrix and her son succeeded by false and perjured testimony in obtaining a favorable decision in probate was held to be intrinsic fraud, for this was an issue in the case. The Court found, however that the position of the executrix as mother and natural guardian of the minor plaintiffs was such that she was under an obligation to protect their legal rights, and to see that their claims were properly presented before the probate court. The fraud in pushing the false claim to heirship was found to be extrinsic to the case in that it prevented the minor children from being properly represented at the hearing. The son was declared to hold title as trustee of the minor plaintiffs.

[45]Aldwell, *op. cit.*, note 37, p. 79, 80.