North Dakota Law Review

Volume 17 | Number 6 Article 1

1940

Bar Briefs

North Dakota State Bar Association

M. L. McBride

BAR BRIEFS

PUBLISHED MONTHLY AT DICKINSON

—BY—

STATE BAR ASSOCIATION OF NORTH DAKOTA

M. L. McBride, Editor

Entered as Second Class Matter, Dec. 9, 1936, at the Postoffice at Dickinson, North Dakota, Under the Act of August 24, 1912.

VOL. 17. MAY, 1941. NO. 6.

NEW LOGAN-WALTER BILL

The history of the struggle of the Logan-Walter bill, intended to govern by law federal officers and agencies, is told in the March and April, 1941, numbers of the A.B.A. Journal. The House of Delegates of the American Bar Association at its meeting on March 17th, 1941, adopted a statement of principles, and expressed the opinion that Senate Bill 674, introduced by Senator Hatch, best embodied such principles. Since then, Congressman Walter has introduced H. R. 4238 in the House, which is almost the identical bill.

Hearings have commenced in the Senate and will probably continue for a month or six weeks. Numerous federal agencies are attacking the bill and they are, for the most part, insisting that their agencies be exempt therefrom. No one expects them to agree to any legislation which will in any considerable measure affect their powers and jurisdiction.

We must depend upon the lawyers in the respective states organizing and conducting such a campaign of education with the State Medical Associations, State American Legions, farm groups, patriotic groups and others, to support the Senators and Congressmen from the respective states in their fight for this legislation. The American people, of all classes and professions, made a magnificent fight in behalf of the Logan-Walter bill and we can make an even better one

(Continued on Next Page)

(Continued from First Page)
in behalf of the two bills I have mentioned, if the various state organizations and groups will inform themselves with respect thereto, and lend their active and vigorous assistance. The people and not the politicians will save this country from totalitarianism if it can be saved.

I therefore urge that every lawyer write our Senators and Congressmen asking them to support this worthy legislation and that you interest others to do the same.

H. G. NILLES,
President.

NATIONAL CONFERENCE OF JUDICIAL COUNCILS

Washington, D. C.—Impetus to the work of the National Conference of Judicial Councils was given at a luncheon here, held in connection with the meeting of the American Law Institute, at which members of the conference heard reports on what American lawyers are doing during the emergency and how their English brethren are carrying on under war conditions.

Sir Wilfred A. Greene, Master of the Rolls of England, and Dr. Arthur L. Goodhart, professor of Jurisprudence at Oxford University, gave off-the-record talks on conditions there. Other speakers were Jacob M. Lashly, president of the American Bar Association; Solicitor General Francis Biddle; and Judge Edward R. Finch, chairman of the conference. Arthur T. Vanderbilt, chairman of the conference Executive Committee, presided.

In attendance at the luncheon were Attorney General Jackson; justices of the United States Supreme Court; senior judges of the federal circuit court of appeals from several districts; judges of the United States Court of Appeals of the District of Columbia; chief justices of state supreme courts; law school deans, and others.

VACATION OF JUDGMENTS — EXTRINSIC AND INTRINSIC FRAUD

The principle that there has to be an end to litigation and that when a party has had his day in court the judgment thus rendered shall be final was first enunciated in 1702 by the Lord Keeper in the High Court of Chancery in the case of Tovey v. Young, 2 Vern. 437, S. C., 24 Eng. Rep. R. 93 (1702).

In the vacating of judgments, fraud plays an important part. Generally, fraud justifying equntable relief against enforcement of the judgment must be extrinsic to the issues. Con't. Nat'l Bank v. Holland Bank Co., 66 F. (2d) 823 (C.C.A. Mo. 1933). The leading case of United States v. Throckmorten, 98 U. S. 61, 25 L. ed. 93 (1878), held that fraudulent acts which will move a court of equity to set aside or annul a judgment or decree relate to frauds which are extrinsic to matters tried by the first court.

This decision was based on the same principle as that of Tovey v. Young in 1702. This relates only to cases between the same parties, to the same subject of controversy, and rendered by a court of competent jurisdiction. In general, that is, the courts will not again in such cases go into the merits of an action for the purpose of detecting and annuling the fraud. United States v. Throckmorten, supra.

We have stated that fraud to authorize a court's vacation of a former judgment must in the great majority of cases be extrinsic. State v. Wright, 56 S. W. (2d) 950 (Tex. Civ. App. 1933). Extrinsic fraud is some act or conduct of the prevailing party which has prevented a fair submission of the controversy and includes such acts as: keeping party from exhibiting his case fully, keeping party away from court, false promise of a compromise, no knowledge on part of defendant of the suit, where an attorney connives to defeat his client, and in all cases where there was not a real contest. Putnam v. Putnam, 126 Kan. 479, 268 Pac. 797 (1928). Extrinsic fraud is that which is practiced directly upon the party seeking relief against the judgment, which party has been prevented from presenting all of his case to the court so that but for such fraud the decision would be different. United States v. Throckmorten, supra. Failure to give legal notice to adversary has been held to be extrinsic fraud, also to prevent a witness from attending a trial. Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282 (1902). The fraud of a party who occupied the dual capacity of executrix and mother, in pushing the claim of her son by her first marriage to heirship and distribution, was held to be extrinsic fraud in concealing the truth from the legal minor heirs, due to the fact that they were not properly represented at the trial. Sohler v. Sohler,, supra. Where the party who speaks falsely or who refuses to sepak occupies a fiduciary relationship, the better rule is that such fraud is extrinsic and will justify equitable interference. Latham v. McClenny, 36 Ariz. 337, 285 Pac. 684 (1930). The holding is an example where the fraud is generally considered intrinsic, but the court places a constructive trust on the property or the proceeds for the rightful owners. This is done where it would not be conscionable to let the wrongdoers retain the benefits of their wrongs. Still another example would be the case where perjured testimony is employed, usually considered intrinsic fraud, and held to be extrinsic fraud, because the jurisdiction of the court has been imposed upon by the use of such perjured testimony. Carey v. Carey, 121 Pa. Super. 251, 183 Atl. 371 (1936).

Intrinsic fraud is something that occurs in the course of an adversary proceeding, such as the production of forged documents, where adversary party has the opportunity to make the truth appear. Kasparian v. Kasparian, 132 Cal. App. 773, 23 P. (2d) 802 (1933). Intrinsic fraud includes such matters as: fraudulent testimony, perjured testimony, or any such matter which was actually presented to and tried by the court in rendering the judgment assailed. Intrinsic fraud as such will not be sufficient

grounds for setting aside the judgment by the holding of a majority of the courst today. Intrinsic fraud is usually that fraud by which a decree or judgment is obtained by false evidence upon issues within the case. Sohler v. Sohler, supra. A decree distributing deceased wife's estate could not be set aside merely because the husband falsely represented that the land was community property, the fraud being intrinsic, that is, perjured testimony. Meeker v. Waddle, 83 Wash. 628, 145 Pac. 967 (1915). A false allegation by an administrator that he and his sister are sole heirs of the decedent, whereby a decree of distribution is procured does not entitle heirs to relief in equity, the fraud being intrinsic. But this same administrator's sending remittances to a third person according to an annual custom of the deceased, so as to mislead the other heirs into believing that the deceased was still living, constituted extrinsic fraud so as to justify equitable relief, the court held. Monk v. Morgan, 49 Cal. App. 154, 192 Pac. 1042 (1920. Where title to land was obtained by intrinsic fraud in contravention of the terms of the will, the court placed a constructive trust on the land in favor of the rightful holders under the will, recognizing as a matter of law the finality of the first decree as a muniment of title in the wrongdoers. In this case the fraud was of an intrinsic nature but the court imposed an involuntary trust. Weyant v. Utah Savings Co., 54 Utah 181, 182 Pac. 189, 9 A.L.R. 1119 (1919). The last mentioned remedy given by the court is often used when the strict holding of extrinsic fraud would create too great an injustice. The failure of an administrator to give notice to a creditor of an estate of final settlement, according to an agreement between administrator and creditor, is not extrinsic fraud justifying equitable interference. Weyant v. Utah Savings Co., supra.

In summary the following may be said of extrinsic and intrinsic fraud in the vacating of judgments: most of the cases involve the setting aside of a judgment of a probate court, in which it is required that the fraud must be of an extrinsic nature, to vitiate the decree; but the courts do make exceptions where the facts and merits of the case so demand. The questiton of extrinsic and intrinsic fraud arises largely in cases of contracts, sales, divorce actions, wills, etc. Regardless of the subject of the action, the rules stated apply to all of the cases. There is not one definition of extrinsic fraud for wills and another for sales; the distinctions and differences remain the same. The fraud must be extrinsic to vacate the judgment, that is the strict and generally followed construction. However, courts will often decide cases on their respective merits, as to the equitable rights of parties involved, and impose a constructive trust, or employ a special construction upon the particular fraud in the given instance, so as to do equity and justice, but still lend lip-service to the distinctions normally articulated.

ARLEY R. BJELLA,
Third Year Law Student,
University of North Dakota.

THE LEGALITY OF CONCURRENT GENERAL AND SPECIAL ELECTIONS

The system of elections in the United States is not of common-law origin, but is entirely statutory, and the exercise of the right of suffrage is regulated in all states by constitutional and statutory provisions.[1] Thus the problem as to whether or not special and general elections may legally be held on the same day and at the same place is one primarily of statutory determination in the United States.

What are the distinguishing features of the two types of elections? A general election is said to be one which occurs at stated intervals, as fixed by law, and which occurs at stated intervals without any superinducing cause other than the efflux of time; a special election is one that arises from some exigency or special need outside of the usual routine, such as to submit to the electors a measure or proposition for adoption or rejection.[2]

Coming back to the problem as to whether or not special and general elections may be held at the same time and place, American Jurisprudence states, "Although under some constitutional and statutory provisions it is held that a general and special election may be held upon the same day and at the same place, it has been said that the weight of authority favors the definition that a special election is one which takes place at a different time from that at which an election fixed by law is held, and that the submission of special propositions at such an election does not convert it into a special election."[3] From this quoted matter it is indicated that special and general elections, by some rulings, may be held on the same day and at the same place. As to the latter part of the quotation, "that such an election does not convert it into a special election" there is considerable doubt. The court in Dysart v. St. Louis[4] substantiates this by saying, "It is a matter of common knowledge that at nearly every general election, propositions are authorized and submitted to the voters as special propositions. Submission of these propositions are not, in common parlance, called special elections. They are merely votes on special propositions submitted at a general election." But many, and it would seem the majority, of the cases hold contra and adhere to the view that special propositions presented at general elections are nevertheless special elections. In Furste v. Gray[5] the Kentucky court follows this line of reasoning by holding that the time for holding an election to fill a vacancy in the General Assembly may be fixed for the same day as the general election, and this does not prevent it from being a "special election."

---

[1] 18 Am. Jur., Elections, § 2.
[2] Supra, § 5.
[3] Ibid.
[4] 321 Mo. 514, 11 S. W. (2d) 1045, 62 A.L.R. 762 (1928).
[5] 240 Ky. 604, 42 S. W. (2d) 889 (1931).

It has been held, also, that the submission of a proposed amendment to a city charter constituted a "special election," although it was not so designated by the city council, and although it was submitted at the same time as the general election.[8] This is a next-door-neighbor case from Minnesota, where the ballots containing the sole question as to whether this single amendment should be adopted were submitted to the voters on general election day. The court had no difficulty in construing the acceptance of the amendment as being a special election. In view of Chapter 238, Laws of Minnesota, 1903, it is obviously the intention of the Legislature, according to the court, that, when an amendment to the city charter is submitted at the same time as a general election such as that held in the instant case in 1932, the voting on the amendment shall be considered a special election. The statute refers to "both elections," and it cannot be otherwise construed.

A proposition as to issuance of bonds by the South Park Commissioners of Illinois, a municipal corporation empowered to maintain, improve, and develop parks and boulevards, was voted on at the same time as the general city, county, and state election. The court held that this did not change the character of the bond issue election, and it was nevertheless a "special election."[9]

In Norton v. Coos County[4] one finds another case relating to issuance of bonds. The only election authorized within the scope and title of the Oregon Laws of 1913[5] related to special elections to determine issuance of bonds and warrants. A road bond election, though held on the same day as a general election, was nevertheless a "special election" within the meaning of section 11 of the said Act, providing that "only one special election shall be held in one county in any one year." Therefore, a subsequent road bond election during the same year was unauthorized and void.

So, too, holds Wilson v. Wasco County,[10] another Oregon case, in deciding that a road bond election is a special election in character, although held on the same day as the general election. Still another Oregon case[11] sanctions this principle, holding that where an initiative measure to move the county seat was voted on at the general election, it was as to the initiative measure a "special election." In People v. Czarnecki[12] it was held that an election to fill a vacancy in the office of a state senator was a "special election," although held on the same day as a general election.

---

[8]Godward v. City of Minneapolis, 190 Minn. 51, 250 N. W. 719 (1933).

[9]George G. Renneker Co. v. South Park Com'rs, 322 Ill. 393, 163 N. E. 786, 788 (1928).

[4]113 Ore. 619, 233 Pac. 664, 866 (1925).

[5]Ore. Laws 1913, c. 103, p. 170.

[10]83 Ore. 147, 163 Pac. 317 (1917).

[11]Hill v. Hartzell, 121 Ore. 4, 252 Pac. 552, 555 (1927).

[12]312 Ill. 271, 143 N. E. 840, 841 (1924).

Kentucky,[13] Washington,[14] and Montana[15] express approbation of the principle under discussion.

It is seen, then, that there is authority for these two propositions: (1) general and special elections may be held on the same day; (2) an election is nevertheless "special" although held at the same time as a general election.

What is the North Dakota law? A case decided in 1909[16] indicates that in a strict, legal sense, although the vote on a change in county boundaries is cast at a general election, this is the holding of a "separate election,"[17] notwithstanding that it was held in connection with the general election for convenience, to save expense, trouble, and time, which would be wasted in holding a special election, and because there is a better attendance of voters at general elections than at most special elections, and thus likely to be a more complete expression of the preference of the electors. This case cites State ex rel. McCue v. Blaisdell,[18] decided a year previously, wherein the court held that electors might express their final choice for a United States senator at the general election; this as a matter of convenience, and to save expense. Such choice was voted at the same time and place, and conducted by the same officers, as at the general election.

Notice might also be had of the law in North Dakota dealing with issuance of bonds for municipal corporations wherein Section 10, Chapter 196 of the 1927 Laws of North Dakota, reads as follows: "The ballot for such an election shall be separate from other ballots on the same day for other elections. . . ." May one not fairly presume from this statement alone that a special and general election may be held on the same day and at the same place in North Dakota?

But of course a condition precedent to the validity of dual elections is that they be properly noticed as required by law. In Corpus Juris it is stated: "Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result. If the statute simply provides that certain acts or things shall be done at a particular time or in a particular manner with-

---

[13]Houston v. Boltz, 169 Ky. 640, 185 S. W. 76, 77 (1916): An election for the issuance of bonds for the construction of public roads was none the less a "special election" although held on the same day as the general November election.

[14]State v. Superior Court for King County, 71 Wash. 484, 128 Pac. 1054, 1055, Ann. Cas. 1914C, 591 (1913): An election to fill the vacancy on a district bench is a special election, though held on the same day of the general election.

[15]State v. Kehoe, 49 Mont. 582, 144 Pac. 162, 165 (1914); An election to fill a vacancy although held at the same time as the general election, is a "special election."

[16]State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360 (1909).

[17]"Separate" is no doubt used in the sense of "special," as this word is so used later in the opinion of the case.

[18]18 N. D. 55, 118 N. W. 141 (1908).

out declaring their performance is essential to the validity of the election, they will be regarded as mandatory if they effect the actual merits of the election, and directory if they do not. Where the terms of the statute are absolute, explicit, and peremptory no discretion is given; and when penalties are imposed against the violation of its respective terms they have the same effect as negative words and render its observance imperative. . . .'"[19]

In Marsden v. Harlocker[20] it is said that in all general elections, the time, place and manner of holding which are prescribed by law, the rule is well-settled that electors must take notice thereof, and as a corollary to this legal principle any requirements for the issuing of proclamations or the giving of other notice in respect to such elections must be treated as directory only. In the case of special elections, however, all the statutory requirements as to proclamations or other means of giving notice are considered as mandatory and must be observed in order to render the vote of the electors participating therein valid.

The reasons for this rule are obvious. Suffrage is a civil right to which qualified persons are entitled. If the election, being general, occurs at regular intervals, by operation of law, these persons are presumed to have knowledge thereof. But where some local project is under consideration, the propositions are special, and qualified voters cannot be presumed to have knowledge thereof, unless the statutory requirements are complied with.

Undoubtedly the rule in North Dakota is that elections must be properly noticed so as to comply with the law, and this may be seen in Perry v. Hackney,[21] wherein it is said that the conduct of elections is mandatory.

Thus, in concluding, and in view of the apparent trend of authority in North Dakota, and in view of Chapter 196, Section 10 of the 1927 Laws of North Dakota, a special proposition may be voted on legally in North Dakota at the same time as the general election, if there is proper noticing, conducting of election, and balloting.

MARGARET PFEFFER,
Second Year Law Student,
University of North Dakota.

---

[19]20 C. J., Elections, § 223.
[20]48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786 (1906).
[21]11 N. D. 148, 90 N. W. 483 (1902).

BAR BRIEFS

PUBLISHED MONTHLY AT DICKINSON

—BY—

STATE BAR ASSOCIATION OF NORTH DAKOTA

M. L. McBride, Editor

Entered as Second Class Matter, Dec. 9, 1936, at the Postoffice at Dickinson, North Dakota, Under the Act of August 24, 1912.

VOL. 17. JUNE, 1941. NO. 7.

A WORD TO NEW LAWYERS

Once more the portals of the temple of Law have opened to admit new disciples to the profession.

In this materialistic age it is not disinterested ideals, but the acquisitive instinct that is the mainspring of ambition. Success is measured by the size of accumulations, the incentive might be ambition for power, and in recent days this has assumed additional importance. But the practice of our profession is not just commercial: but has been defined, — "as a calling in life based on specific training and ability, contemplating public service and differentiating from ordinary business vocation by its subordination of pecuniary returns to efficient service."

May you receive inspiration from the foreword of the report of the Committee on the Canon of Ethics of the American Bar Association, — "These Canons and the spirit they breathe serve to convey a message of hope to every lawyer to whom his profession is something more than a resource for making a livelihood and who aspires in the practice of it to play at least a humble role in a great organized movement to promote human welfare and happiness through some approximation to an ideal administration of justice. Like the old Grand Jury oath that inspired the utterance of Mr. Justice Cardozo, in these Canons 'the word has been proclaimed, to steady us when we weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudices, the spirit is still pure'."

May it be your happy lot to win a professional success that the world will approve by the yardstick of its own standards, but I counsel you never to abandon the higher ideals of your profession.

The opportunities we enjoy here in this country should serve to remind you that beyond the "work for work's sake," to dedicate your efforts also to the social ends to justify life by higher standards. It is a base thing "to receive favors and render none."

(Continued on next page)