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Municipal Corporations—Public Improvements—Statutory Notice Requisite to Jurisdiction

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RECENT DECISIONS

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—STATUTORY NOTICE REQUISITE TO JURISDICTION—Defendant city sought to establish a special improvement district to raise funds necessary for participation with the state highway department in improving a joint city street-state highway. A statute required that notice be sent to every property owner in the proposed district.[1] One of 425 property owners was inadvertently overlooked. Sixty-nine Kalispell residents obtained a decree enjoining defendant city from proceeding, and declaring the improvement district void. On appeal to the Supreme Court of Montana, *held,* affirmed. Notice by mailing to each property owner prior to establishment of an improvement district is a jurisdictional necessity. *Wood v. City of Kalispell,* 131 Mont. 390, 310 P.2d 1058 (1957).

The statute governing creation of municipal improvement districts expressly states that before creating such a district the city council must pass a resolution of intention to that effect; it must then give notice of the passage of the resolution and of the time when protests will be heard, by publication and by mailing a copy of the notice on the first day of publication to every property owner affected.[2]

Johnston v. City of Hardin[3] was the first Montana case to spell out precisely the manner in which the statute is construed. It unequivocally stated that since the statute defines with particularity the mode in which municipal authority may be used in this regard, nothing could excuse failure to strictly observe its mandates.

The majority of American courts have acted similarly and have tended to construe statutes for the creation of special improvement districts strictly against the municipal corporation and liberally in favor of affected property owners.[4] These courts generally have placed responsibility for strict construction on the legislature, indicating that whatever step the legislature has prescribed cannot be declared by the courts to be merely directory or immaterial.[5] However the same result is often reached even where the statute expressly provides for a liberal interpretation.[6] This would seem to indicate that the rule is one of judicial creation rather than a reflection of legislative intent. On the other hand, courts have sometimes recognized that to permit highly technical construction to override justice would be to work a wrong.[7]

The result of this strict construction applied by Montana and the majority of American courts is to hold that absolute compliance with the statute is *jurisdictional.* This view is illustrated by a Michigan case which states that correct notice is a "condition precedent" to jurisdiction over the proceedings.[8] Similar language has consistently appeared in Montana deci-

[1]REVISED CODES OF MONTANA, 1947, § 11-2204.
[2]*Ibid.*
[3]55 Mont. 574, 179 Pac. 824.
[4]See 63 C.J.S. *Municipal Corporations* § 1297 (1950).
[5]Merritt v. Portchester, 71 N.Y. 309, 27 Am. Rep. 47 (1877).
[6]Buck v. Town of Monroe, 85 Wash. 1, 147 Pac. 432 (1915).
[7]People *ex rel.* de Frece v. Lathers, 141 App. Div. 16, 125 N.Y. Supp. 753 (1910).
[8]Auditor General v. Calkins, 136 Mich. 1, 98 N.W. 742 (1904).

sions, perhaps most specifically in the *Johnston* case,[9] where it is stated that strict statutory compliance is the *sine qua non* to creation of the improvement district.[10] This has the effect, in cases such as the instant one, of rendering all the proceedings void and requiring that the city begin anew. Viewed in the light of modern conditions this result seems highly undesirable, and raises the question of why the proceedings should be held a nullity as to property owners who have received the correct notice. At the turn of the century, a Minnesota court held that the better view in cases such as this is that the proceeding is void only as to those who have not been notified, but valid as to those who have had the proper notice.[11] This seems a preferable position.

Explanation for the majority rule may be gleaned from a brief examination of the purposes which have been attributed to statutes providing for the creation of municipal improvement districts. As stated by the Supreme Court of Montana the purpose of serving notice is threefold:[12]

> (1) to apprise the property owner that his property is within the proposed district and liable to assessment if the district is finally created;
> (2) to inform him of the general character of the contemplated improvements and the cost of the same, and
> (3) to advise him of the time when and the place where he may be heard.

It should be noted that compliance with due process of law is not the principal purpose of such statutes. Due process is sufficiently satisfied by newspaper publication. Rather the paramount consideration seems to be supervision of municipal authority.[13] The additional step of notice by mail is insurance that the general character of the proposed improvement will almost certainly come to the actual knowledge of the property owner. This enables those whose property may be affected to investigate the type and quality of materials to be used, the total cost of the project, etc.[14] Thus the underlying purpose of such statutes would seem to be an effective curb to graft, unwise and unnecessary projects, and excessive municipal indebtedness. Of course, a direct concomitant benefit accrues to the individual property owner within the proposed district in that his property is not bound without his knowledge. But even where due process is satisfied, if the district creation statute is not, the improvement district proceedings may be held void.[15]

[9]Note 3 *supra*.

[10]The Montana Supreme Court has at times spoken in terms of substantial adherence to the statute, and substantial compliance with the conditions precedent imposed by the statute. However, this language when applied to the facts still resulted in strict construction. See Shapard v. City of Missoula, 49 Mont. 269, 141 Pac. 544 (1914); Hinzeman v. City of Deer Lodge, 58 Mont. 369, 193 Pac. 395 (1920).

[11]Hurst v. Town of Martinsburg, 80 Minn. 40, 82 N.W. 1099 (1900).

[12]Johnston v. City of Hardin, 55 Mont. 574, 580, 179 Pac. 824, 825 (1919).

[13]Note 4 *supra*.

[14]Benshoof v. City of Iowa Falls, 175 Iowa 30, 156 N.W. 898 (1916).

[15]*Ibid.*

The principal case is the first Montana decision to raise the precise issue of whether jurisdiction attaches over those property owners who have received the correct notice. Apparently the Court believed that prior Montana decisions were *stare decisis* on this point. Conceding this to be true, it does not alleviate the undesirability of a law which holds a municipal improvement district entirely void for improper notice where 424 of 425 property owners have been correctly notified. The additional expense which must be incurred by the municipality in such a case seems unreasonable. Perhaps the solution to this problem lies only in legislative amendment of the existing law. If this be so, two specific questions deserve detailed consideration.

First, is personal notice really essential to the effective implementation of the purposes of the district creation statute? Notice by publication has long been deemed sufficient to subject real property to adverse judgment in an in rem proceeding against it.[16] Service by publication is likewise sufficient to obtain jurisdiction in certain divorce cases.[17] Should the social policy of Montana demand any greater notice in the case of creation of a municipal improvement district than is necessary to divest one of his property or his spouse?

Second, assuming that personal notification is desirable and necessary, is there any valid reason why jurisdiction should not attach over those property owners who have been correctly notified? The purposes of the statute have been satisfied as to them. Then why require the municipality to incur the expense of unnecessary repititious notice to those already properly notified, just to reach one person who was not? It would seem much more logical to hold the district valid upon proper notification of the person or persons omitted.

The factual situation in the instant case is extreme, but it serves to point out the archaic state of Montana law in this regard. In the present era there is no place for the result of the prinicpal case, and it is not to be excused merely because it is the majority view. Courts have placed the responsibility for the strict construction given such statutes on the legislatures, and it appears that the legislatures must bear the responsibility of effectuating any amendments in these laws. It is submitted that the instant case stands as an unjustified impediment to social progress and illustrates the need for legislative revision of Montana's law governing creation of municipal improvement districts.

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[16]Pennoyer v. Neff, 95 U.S. 714 (1877).
[17]See REVISED CODES OF MONTANA, 1947, § 93-3013.