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Article 14

Administrative Law - Notice of Special Assessment

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Norton v. State[11] is the only authority given for the quoted statement in the *Pfost* case. Upon a check of the *Norton* case, and the authorities listed therein,[12] we find that the cases merely say that if no proper exception had been taken to a particular instruction, the mentioning of the specific error on the motion for new trial would preserve the question for appeal. Of course, in Wisconsin it is no longer necessary either to take exception or to interpose any type of objection to instructions.[13]

Whether there was confusion or not in the past is no longer too important, for the Wisconsin Court has now made its position clear. The following statement is certainly unequivocal:

> "A procedural device which affords an opportunity to a trial court to correct its own errors by directing a new trial, without the necessity of an appeal to this court to reach the same result, would seem to be in the public interest. During the course of a trial the trial judge often is required to 'shoot from the hip' in making his rulings without the benefit of briefs or time to make an independent research of the authorities. A very different situation prevails when the trial judge has before him after verdict a motion for new trial grounded upon alleged error. Time will then permit the preparation and filing of briefs by counsel, and for the judge to do independent research of his own."[14]

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Administrative Law—Notice of Special Assessment—Action in equity to set aside special assessments. The City of Milwaukee levied special assessments for street improvements against property owned by the plaintiff. Abutting landowners were given notice of the assessments by publciation, in compliance with the City Charter which provdied that notice of an assessment for street improvement benefits was

[11] 129 Wis. 659, 109 N.W. 531 (1906).

[12] See Grabowski v. State, 126 Wis. 447, at 458, 105 N.W. 805, at 806 (1905).

[13] WIS. STATS. §270.39 (1955); Reuling v. Chicago, St. P. M. & O. R. Co., 257 Wis. 485, 44 N.W.2d 253 (1950).

[14] 274 Wis. at 516. It might be argued that the trial court is not exactly forced to "shoot from the hip" when there are objections to a proposed special verdict, as happened in this case, for there is probably no more opportune time to excuse the jury for a few hours and hear argument.

Lest one get the idea this note is a criticism of the rule laid down, it should be noted that some other states have the same rule. See 3 AM. JUR., *Appeal & Error* §267. Further, it should be obvious that if there is any possibility of preventing the expense of an appeal, the possibility should be exhausted.

The main case has already been cited with approval in two cases. In Frion v. Craig, 274 Wis. 550, 80 N.W.2d 808 (1957), the Court decided that the trial judge's questioning of witnesses and comments during the trial could not be raised on appeal because not raised in the motions after verdict. In Bronk v. Mijal, 275 Wis. 194, 81 N.W.2d 481 (1957), the Court held that although the court was requested to submit a certain question in the special verdict, failure to move for a new trial after verdict bottomed upon such error precluded the raising of the issue on appeal.

sufficient if given by publication.[1] Plaintiff brought this action against the City alleging that: 1) it had no actual notice of the assessment until it was too late to protest it; 2) notice by publication was inadequate to comply with the requirements of due process of law;[2] and that, therefore, the City Charter provisions were unconstitutional. The Supreme Court of Wisconsin held for the defendant (City) and said that the notice by publication was adequate. *Wisconsin Electric Power Company v. Milwaukee,* 263 Wis. 111, 56 N.W. 2d 784 (1953).[3]

In 1955, plaintiff obtained leave of the court to plead over and served an amended complaint. The Supreme Court of Wisconsin again held for the defendant.[4]

On December 17, 1956, the Supreme Court of the United States in a memorandum decision vacated the judgment of the Wisconsin Supreme Court and remanded the case to the Circuit Court for Milwaukee County.

> "Appeal from the Supreme Court of Wisconsin. Facts and opinion, 272 Wis. 575, 76 N.W. 2d 341. Dec. 17, 1956. *Per Curiam.* In this case probable jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County for consideration in the light of Walker v. City of Hutchinson, 352 U.S. 112."[5]

On January 14, 1957, the Supreme Court of the United States amended the order of December 17th so as to remand the case to the Supreme Court of Wisconsin instead of the Circuit Court for Milwaukee County.[6] On March 5, 1957, on motion for judgment on mandate of the Supreme Court of the United States, the Supreme Court of Wisconsin reversed its decision in *Wisconsin Electric Power Company v. Milwaukee* and said:[7]

> "In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessment against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, . . . , and Walker v. City of Hutchinson, 1956, 352 U.S. 112, ..."

By this decision[8] the Supreme Court applied to administrative special assessment proceedings the rule it had theretofor applied in judi-

[1] City of Milwaukee Charter §§11.20, 12.07 & 14.24.
[2] WIS. CONST. art. 1, §13.
[3] Discussed in 40 MARQ. L. REV. 443 (1957).
[4] Wisconsin Electric Power Company v. Milwaukee, 272 Wis. 575, 76 N.W.2d 341 (1955).
[5] Wisconsin Electric Power Company v. Milwaukee, 352 U.S. 948 (1956).
[6] 352 U.S. 958 (1957).
[7] Wisconsin Electric Power Company v. Milwaukee, 275 Wis. 121, at 123, 81 N.W.2d 298, at 299 (1957).
[8] 352 U.S. 948.

cial proceedings. The Court cited two cases when it decided the motion for judgment on mandate of the Supreme Court of the United States: *Walker v. City of Hutchinson*[9] and *Mullane v. Central Hanover Bank and Trust* Co.[10]

The dispute in the *Walker* case arose when the City of Hutchinson filed an action to condemn part of Walker's property so as to facilitate the widening of a street. The proceeding was instituted under a Kansas statute;[11] the court appointed three commissioners to determine compensation for the property taken. They were required by statute[12] to give landowners at least ten days notice of the time and place of their proceedings. The statute authorized the giving of notice either in writing or by publication in the official city paper, the notice was given to Walker by publication in the city paper. The statute also authorized an appeal from the award of the commissioners if taken within thirty days of the filing of the report. Walker took no appeal within the prescribed period, but subsequently brought an equitable action against the city to enjoin it from entering or trespassing on his property. The District Court of Reno County, Kansas, denied relief and the landowner appealed. The Supreme Court of Kansas affirmed the judgment.[13] The case was appealed to the Supreme Court of the United States and it said:

> "The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases."[14]

The Court reversed the judgment of the Supreme Court of Kansas, giving these reasons:[15]

> "In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, . . . , we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with the circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.
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> "Measured by the principles stated in the Mullane case, we

[9] 352 U.S. 112 (1956).
[10] 339 U.S. 306 (1950).
[11] KAN. STAT. §26-201 (1949).
[12] KAN. STAT. §26-202 (1949).
[13] 178 Kan. 263, 284 P.2d 1073 (1955).
[14] 352 U.S. 112, at 115 (1956).
[15] *Ibid.*

think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property . . . . In the persent case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

". . . .

"There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix onesidedly the amount that must be paid owners for their property taken for public use."

The *Mullane* case arose when a trust company published notice of judicial hearings on settlement of accounts of the trustee of a common trust fund. The attorney representing the interests of the beneficiaries in the income of the fund objected on the ground that the notice by publication was inadequate to afford due process of law under the Constitution.[16] The Court held that the notice by publication was insufficient; it said:[17]

". . . within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

It would appear that, in extending the rule of the *Walker* and *Mulane* cases to administrative special assessment proceedings, the Supreme Court of the United States by implication overrules the case of *Londoner v. City and County of Denver*[18] which set forth the rule that:

"In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states . . . . Where the legislature of a state, . . . commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of

[16] U.S. CONST. amend. XIV, §1.
[17] 339 U.S. at 318.
[18] 210 U.S. 373 (1908).

which *he must have notice, either personal, by publication, or by a law fixing the time and place of hearing."*[19] [emphasis supplied].

This departure from the old rule seems to be a sound and reasonable one. Due to the complexity of modern life the first reason for the old rule—the likelihood that the taxpayer will know that special assessment proceedings are pending when he sees improvements being made upon streets abutting his property—is no longer a valid one. The second reason for the old rule—public policy—appears to have been taken into consideration by the Court in the formulation of the new rule. The rule does not require the impossible or highly impractical—personal notice is required only when the names of those to whom the notice is to be given are known or available to the one giving the notice.

It should be noted that the new rule has direct application only to special assessment proceedings. There is some question as to whether it will have any effect upon the type of notice that must be given in proceedings involving the assessment of real property taxes.

The new rule recognizes that while an administrative special assessment proceeding is a proceeding in rem,[20] and a court has jurisdiction of the property, there is nevertheless a personal interest in the determination to be made. The recognition of this rule by the Supreme Court of the United States is also a recognition of the trend of recent decisions in analogous areas such as eminent domain proceedings and tax foreclosure proceedings.

The fact that the notice in an administrative special assessment proceeding is being given by a governmental body should not affect the rule. There seems to be no sufficient reason for treating a governmental body any different than a private individual in this type of case, that is, there is nothing peculiar about litigation between a government and its citizens that should deprive those citizens of a right to be heard.

As a final point, it should be noted that the Wisconsin Legislature has given official recognition to the new rule by the passage of Ch. 130, Laws of 1957, under which Sec. 66.60 (7) of the Wisconsin Statutes (relating to special assessments) has been repealed and recreated so as to require that:

". . . the city or village clerk shall cause notice to be given stating the nature of the proposed work or improvement, the general boundary lines of the proposed assessment district including, in the discretion of the governing body, a small map thereof, the place and the time at which the report may be in-

[19] *Id.* at 385.
[20] For a detailed discussion of requirements of notice in in rem proceedings see 70 HARV. L. REV. 1257 (1957).

spected, and the place and time at which all persons interested, or their agents or attorneys, may appear before the governing body and be heard concerning the matters contained in the preliminary resolution and the report. Such notice shall be given either by publication of a copy of the notice at least once in a newspaper published or having a general circulation in such city or village, or such notice shall be posted in not less than 5 public places within the city or village of which at least 3 shall be within the assessment district *and a copy of such notice shall be mailed to every interested person whose post office address is known, or can with reasonable diligence be ascertained, at last 10 days before the hearing or proceeding . . . .*" [emphasis supplied].

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