Opinion No. 231.

Counties—Printing, Qualifications for —Newspapers, Continuous Printing— Statutes—Construction.

HELD: Failure to print the regular issues of a weekly newspaper for eight weeks is a material deviation from the requirements of the statute relating to qualifications of a newspaper to contract for county printing.

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The Baker Journal, a weekly newspaper, commenced business at Baker, Montana, in December, 1933. Thereafter it printed and published each Wednesday, a weekly newspaper in Fallon County, until October 26, 1935, when a disastrous fire occurred. Thereafter the two next issues of the paper, October 30 and November 6, although edited at Baker, were actually printed somewhere outside of Fallon County (we are informed they were printed at Beach, North Dakota.) The following issues of the paper, November 13, 20, 27 and December 4, 11 and 18 were missed entirely. The county commissioners called for bids for the county printing to be submitted on December 16. The time was later extended to December

30, 1935. We believe there is no dispute as to these facts. The question is whether the Baker Journal was eligible on December 30, to bid for the county printing.

That portion of Section 4482, R. C. M. 1921, as amended by Chapter 10, Laws of 1929, which bears on the subject, reads as follows: "It is hereby made the duty of the county commissioners of the several counties of the State of Montana to contract with some newspaper, (1) printed and published at least once a week, and (2) of general circulation, (3) printed and published within the county, and (4) having been printed and published **continuously** (a) **in such county** (b) **at least one year immediately preceding the awarding of such contract,** * * *." (Emphasis by figures, letters and heavy type ours.)

Has the Baker Journal met the requirements of the above statutory test when, immediately prior to December 30, 1935, it printed and published a newspaper in Fallon County for only 44 weeks out of the 52 weeks comprising a full year; when for nearly two months or one-sixth of the time it failed to print or publish any issue of the paper in the county?

It will be admitted that the courts cannot undertake to make any exceptions to the law. The court may not legislate even though it may appear only fair and just that some exception should be made. If the legislature has laid down a hard and fast rule or test, which does not provide for any exceptions, the court must accept it as the legislature enacted it. It is the duty of the court to construe the law as it finds it. (Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294; State ex rel. Thelen v. District Court, 51 Mont. 337, 152 Pac. 475; 59 C. J. 945.) Where the language of a statute is plain and unambiguous, there is no occasion for construction. (Great Northern Utilities Co. v. Public Service Commission, supra; Cruse v. Fischl, 55 Mont. 258, 175 Pac. 878; Scheffer v. Chicago Etc., Ry. Co., 53 Mont. 302, 163 Pac. 565.) A statute must be given effect according to its plain and obvious meaning. (Melzner v. Northern Pacific Railway Co., 46 Mont. 162, 127 Pac. 146.) These principles, however, are well established, and many other cases in Montana and other jurisdictions might be cited in support thereof.

The only word in the statute concerning which any question might be raised as to its meaning is the word "continuously". "Continuous" has been defined by Webster's Dictionary as "without break, cessation or interruption; without intervening space or time; uninterrupted; unbroken; constant, continued; as, a continuous road." In the Century Dictionary it is defined as "uninterrupted in time, sequence, existence or action; without cessation." See also Standard Dictionary and 13 C. J. 206, which contains references to cases where the word is defined. The word "continuously" has been defined by the courts: "With continuity or continuation; without interruption; unbrokenly; uninterruptedly; without intermission or cessation; without intervening time, implying an unbroken sequence." (13 C. J. 209, and cases cited.)

In the above statute the word "continuously" must be considered with reference to both place and time. A newspaper must be printed and published continuously in the county and also continuously for one year immediately preceding awarding of the contract in order to be eligible to bid for the county printing. As the word is used in the statute we believe that it can only be given its natural, plain, ordinary and commonly understood meaning as given in the dictionaries and by the courts. (57 C. J. 577.) As so used it means without intervening space or time.

No doubt one of the purposes of the statute was to prevent the letting of printing contracts to "mushroom enterprises which may, and sometimes do, spring up overnight in furtherance of political designs" (Stange v. Esval, 67 Mont. 301, 215 Pac. 807), and also to insure employment of local capital and labor (State v. Board of County Commissioners, et al., 77 Mont. 316, 250 Pac. 606). It might be argued that the purpose of the act was to prevent the awarding of printing contracts to fly-by-night enterprises and that since the Baker Journal was established in December, 1933, it cannot be classified as a fly-by-night or

mushroom enterprise. This may be conceded. We are confronted by the fact, however, that the legislature has provided the test of eligibility or qualification of newspapers in bidding for county printing and we are not at liberty to disregard it even though we may feel that the test in some cases is too rigid. The legislature could easily have added to the above test some exception as follows: "Provided that when a newspaper shall have been printed and published continuously in the county for one year (or insert such other period as the legislature deemed advisable) should such newspaper be involuntarily suspended on account of fire, earthquake, strike, flood, accident, epidemic, act of God or financial difficulties (or insert such other cause as the legislature might choose to add) and it shall appear to the county commissioners that such suspension was only temporary or will be only temporary, the commissioners nevertheless may contract with such newspaper for such county printing; provided further, that such temporary suspension shall not be longer than ————." (Here insert such period as the legislature may choose to select.)

It must be at once apparent that the courts cannot provide for any such exception. If it should undertake to do so what would be the limits of its powers? Where would it stop? This would clearly be an invasion of the legislative field prohibited by the Constitution (Section 1, Article IV) in the following words: "The powers of the government of this state are divided into three distinct departments: the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Should compliance with the statute be excused on the theory that an act of God prevented it? In the first place it may be questioned whether the fire was an "act of God." Fire, except when originating from lightning or spontaneous combustion is not usually regarded as an act of God. (1 C. J. 1177.)

In Chicago, Etc. Ry. Co. v. Sawyer, 69 Ill. 285, 289, 18 Am. Rep. 613, it was held that a loss arising from the great fire in Chicago, was not one arising from the act of God. Furthermore, we are not aware of any theory of law or authorities holding that compliance with a statute is excused when it is made impossible by an act of God. Even though compliance with the statute should be excused by the courts on this account, the further question would arise as to how long it should be excused. The adoption of such a theory, it occurs to us, would be a dangerous precedent.

Even though the suspension of the paper was caused by fire, was the continuance of the suspension due to fire or was it caused by financial difficulties? The first two issues of the paper were printed and published but not in the county, as required by statute. The next six issues were missed entirely. On its face it would appear that such continued suspension was not caused by fire but by financial difficulty or some other cause. Certainly it would not be contended that statutory performance may be excused because of financial difficulties.

Can the suspension be overlooked on the ground that there was substantial compliance with the statute? In Martien v. Porter (the Tax Commission case) 68 Mont. 450, 219 Pac. 817, it was held that a substantial compliance with a constitutional provision as to amendment of the Constitution was sufficient. The practical application of this doctrine, however, to the facts in that case, was later criticized by the court in Tipton v. Mitchell, 97 Mont. 420, 35 Pac. (2d) 110, where the court in a similar case said: "All the members of this court as now constituted are not satisfied with the majority opinion in the Tax Commission case." The court virtually approved the minority opinion by Justices Galen and Cooper in the earlier case. We have been unable to find any case applying the doctrine of substantial compliance (60 C. J. 977) to the positive requirements of a statute such as we are considering but even if it is applicable, which may be doubted, it would, at most, in our opinion, be limited in its application to trifling deviations such as where the two issues of the newspaper were

printed and published out of the county but all of the other issues had been printed and published in the county; where one or two issues had been missed entirely but all other issues had been actually printed and published in the county; where one issue in one week was missed but two issues were printed and published the following week.

In view of the language used by our court in Tipton v. Mitchell, supra, we are satisfied that any substantial deviation from the requirements of the statute would not be approved by our court. Failure to print and publish for eight weeks or two months, the regular issues of the paper, is, in our opinion, a material deviation from the requirements of the statute. It is therefore our opinion that the Baker Journal was not a competent bidder for the county printing on December 30, 1935.

Our opinion is supported by State v. Board of County Commissioners, supra. The point there decided was the eligibility of the "Searchlight" of Hardin, to bid for the county printing of Big Horn County. This paper was moved from Billings in January, 1925. In moving, some casting was lost and from January 21, 1925, to June 3, 1925, the paper was printed at Billings, in an adjoining county, although all editorial matter and copy was written at the Searchlight office at Hardin. A small 9x12 supplement was also printed at Hardin and circulated with each weekly issue of the paper. From June 3, 1925 to March 2, 1926 (nine months) all printing and publishing was done at Hardin. Clearly, the Searchlight was not a mushroom growth or a fly-by-night newspaper since it had actually been printed and published in Billings before it was moved to Hardin and it had been moved to Hardin sixteen months before it submitted bids for the county printing, but after a review of the cases, including the Le-Favor case in California, relied upon by the Baker Journal, the court said: "It follows that the Searchlight met the requirements of the statute only from June 10, 1925, to March 2, 1926, or less than one year, and was therefore not eligible to contract with the commissioners for the county printing."

There is nothing in the court's opinion indicating that its decision would be otherwise in the case of compliance with the statute for only ten months.

See also Stange v. Esval et al., supra, where the court held that a newspaper which was printed and published for seven months only, was not eligible to bid or contract for the county printing.

It may seem unjust that a newspaper, having met with such an unfortunate disaster, should be required to suffer further by not being permitted to bid or contract for the county printing but the responsibility must rest with the law making branch of the government and not with the courts. Th remedy is to amend the law and not nullification.