

CRIMES AND PUNISHMENTS: A prosecution under Section 4143, R. S. Mo. 1929, must show a wilful and malicious intention to destroy landmarks.

February 4, 1937

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Honorable Tom A. Brown
House of Representatives
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of January 28, 1937, wherein you request an opinion embodied in your letter as follows:

"I have a letter from the Assistant Surveyor of Mercer county, Missouri, Mr. Joseph Stewart, who is also the general utility surveyor for all of my section of the state, in which he states that in the construction of highways throughout our section he finds a deplorable condition of the destruction of surveyor's established corners which have been destroyed by the construction of these highways. He gives many specific cases where he has found much trouble in making surveys and says surveys have been very expensive to the farmers who have employed him to run the lines. Instead of finding the corner that his notes give him for a starting point, he often has to go many miles to find such corner and re-run all the old lines over to re-establish the corner that has been destroyed in the construction of highways. I will quote some of his letter to me:

" 'Some time ago the Wynn family called upon me to set marks for them to use in dividing the Wynn farm. The Wynn farm is along, and south of Highway number 6 in Grundy county, and just east of Davies county line. Highway builders had put service material over the necessary corners and had gone outside the old right of way and took up the witness marks and left no marks so that I was up in the air. The worker had set the grader blades so as to tear out some of the corner stones, and when it was suggested to him to replace the marks he said he was making roads; not setting corner rocks. It cost fifty dollars to have the corner stone relocated.'

"He gives me numerous other instances in Mercer county, and my own county of Harrison. Mr. Stewart's object in writing me was to get me to introduce a bill to force the highway department to relocate the corners they destroy, but upon investigation of the statutes it seems to me that sections 4143 and 11605 are all the laws we need on this subject. I would like your opinion on this subject as to whether you consider them adequate so that we can fully prosecute those people who destroy these surveyors' corners. If the law is not adequate I will try to introduce the bill that will cover the subject."

You state in your letter that most of the landmarks and mileposts were destroyed by highway workers. We are unable to locate any statute compelling the

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Highway Department to restore any such landmarks or posts, in the event that same are destroyed when the Department is building or repairing roads.

You refer to two sections in your letter which might cover the situation. Section 4143 is as follows:

"Every person who shall willfully or maliciously, either: First, remove any monument of stone or any other durable material, created for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, or of the state, or any legal subdivision thereof; or, second, deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point in such boundary; or, third, cut down or remove any tree upon which any such marks shall be made for such purpose, with intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor."

The other section, namely, 11605, is as follows:

"It shall be the duty of every county surveyor and every deputy county surveyor to report as soon as practicable all violations of law relative to the destruction of landmarks that come under their observation, or of which they have knowledge, to the grand jury or to the prosecuting attorney of the county in which the violation occurs."

The latter section is merely a duty imposed upon the county surveyor and deputy county surveyor with respect to violations, and no prosecution could be maintained under said section, so that in reality the only section which is truly a penal section is Section 4143. Your attention is called to the first sentence of said Section which uses the words "shall willfully or maliciously." Applying the section to highway employees and officials when landmarks are destroyed, do the elements 'willfully and maliciously' accompany their acts in every case. In most instances we assume that the landmarks are destroyed accidentally, and not intentionally, on the part of the Highway Department. Ordinarily, when a statute denounces a crime as a misdemeanor a wrongful intention is not necessarily an element of proof.

The Kansas City Court of Appeals has construed "willfully and maliciously", as used in Section 4143, Revised Statutes Missouri 1929, in the case of State v. Ferguson 82 Mo. App. 1. c. 585, in the following language:

"It is quite true that in misdemeanors a wrongful intent is not necessarily essential. For instance, a sale of intoxicating liquor to a minor is an offense, regardless of the belief of the seller that he was of age. So of many cases affecting the revenue, especially that of the Federal government. The legislature, on account of the facility of evading the law, cuts off all opportunity to do so by broadly declaring the act itself to be the offense.

"But here, the offense consists not alone in moving a corner stone, but in willfully moving it. That is, in moving it knowing it was a corner stone. A

man might move a stone in the most innocent way, and under circumstances where no one would have thought of it being a corner stone, yet, if it afterwards turns out to have been, in fact, a corner stone, he surely ought not to be charged with a violation of this statute, notwithstanding he intentionally moved the stone. The act lacks the statutory element of willfulness.

"There are many cases where the supreme court of this and other states have held in grave felony cases, that, willfully merely meant, intentionally. But those are cases which involved other terms of definition to make out the offense - terms which necessarily showed wrongful motive. So while in such cases, murder for instance, willfully would mean intentionally, yet the further words defining the offense demonstrates that it must be a wrongful intention. It would not be allowable, of course, in a case of murder to instruct that willfully could mean an innocent act done intentionally.

"The statute in question by using the word willfully meant more than the mere voluntary act; it meant to imply a wrongful act. Merely doing an act intentionally, that is, not accidentally, will not fill the definition of a misdemeanor which requires that it shall be done willfully. The voluntary act should be with a bad or an unlawful purpose. State v. Preston, 34 Wis. 682;

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Commonwealth v. Kneeland, 20
Pick.220; Hanson v. South
Scituate 115 Mass.336; Fuller
v. Railway, 31 Iowa, 204;
Felton v. United States 96 U.S.
699; 1 Bishop's Crim. Law. sec.
428."

CONCLUSION

We are of the opinion unless it could be shown that the employees of the Highway Department willfully and maliciously destroyed the landmarks, no prosecution could be maintained under Section 4143. Therefore, the present law, in our opinion, is not adequate to protect the landmarks in every instance.

Respectfully submitted,

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APPROVED:

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