

COUNTY SURVEYORS: (1) County surveyors to make surveys under Sec. 60.120 RSMo 1949 "when called upon," but not to exclusion of other competent surveyors. (2) Sec. 60.170 RSMo 1949 imposes mandatory duty on county surveyor to make surveys on "orders of survey." (3) Only surveys made by county surveyor entitled to become part of official "record of surveys" required under Sec. 60.340 RSMo 1949. (4) Willful and malicious destruction of landmarks is a misdemeanor under Sec. 560.530 RSMo 1949. (5) Surveying of corners in decayed or perishable condition under Sec. 446.010 RSMo 1949 may be accomplished by one other than county surveyor. (6) Surveys under procedure set forth in Secs. 446.040 to 446.170 RSMo 1949 to be accomplished only by county surveyor. (7) Neglect to make surveys and plats required by Sec. 137.185 RSMo 1949 constitutes misdemeanor under Sec. 137.190 RSMo 1949. (8) Right to make surveys under Sec. 137.185 RSMo 1949 not exclusive right of county surveyor unless same are made pursuant to "orders of survey" issued by county court or city council of city, town or village.

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July 27, 1955

Honorable Jay White  
Prosecuting Attorney  
Phelps County  
Rolla, Missouri

Dear Sir:

The following opinion is rendered in reply to questions you have submitted on behalf of the county surveyor of Phelps County, and appearing in his letter of June 9, 1955, addressed to you, such queries reading as follows:

"(1) When the service of the Phelps County Surveyor are available, and he is resident and present in the county, has the county surveyor of another county (such as Pulaski or Dent) the right to come into Phelps County to establish or re-establish section corners? In the event the Pulaski or Dent County surveyor DOES so enter the county and set such corners, then what is the legal status of his survey (and the corners he may set) when he does NOT FILE ANY RECORD OR MAP in the office or offices of Phelps County court, county recorder, or county surveyor, Suppose he SHOULD file such a record, but in the DENT OR PULASKI county offices. How does THAT action meet the requirements set forth in Chapter 60, Chapter 446, and Chapter 445?

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"(2) When a farmer or other land owner pulls up government or county surveyor section corners, in order to replace them with fence posts - what is the legal remedy, and procedure to be followed?

"(3) Under Chapters 60 and 446 - or any other Missouri law--can section corners, or corners of subdivisions thereof (as of 40-acre or 10-acre tracts) are PRIVATE SURVEYORS (not county surveyors) authorized to set or relocate and reset such corners - or is this an exclusive duty and right of the county surveyor?

"(4) What is the procedure to be followed when land owners lay out for themselves (without formal county survey) small lots, less than 10 acres, of irregular shape, of form such as make description as regular fractional parts of such 40 or 10 acre lots impossible? This falls under Sec. 137.185 (page 1283) RSMo 1949. There are literally hundreds of such tracts or cases in this county--the number is growing each day."

Investigation discloses that Phelps County is a county of the third class, and the county surveyor therein is required, before entering upon the duties of his office, by Section 60.030, RSMo 1949, to enter into a bond conditioned, in part, as follows:

" \* \* \* that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; \* \* \*"

At this point we refer to two statutes, Sections 60.120 and 60.170 RSMo 1949, which disclose the two sources from which a county surveyor in a county of the third class derives authority to make surveys and charge the statutory fees set forth in Section 60.110 RSMo 1949, as amended, Cumulative Supplement, 1953.

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Section 60.120 RSMo 1949, provides:

"The county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same; provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

Section 60.170 RSMo 1949, provides:

"The county surveyor shall execute all orders to him directly by any court of record, for surveying or resurveying any tract of land, the title of which is in dispute before such court, and all orders of survey for the partition of real estate."

A reading of Section 60.120 RSMo 1949, quoted above, discloses under what circumstances the county surveyor is obligated under the statute to make his services available to the general public. It should be noted that the county surveyor functions under the statute "when called upon," and no language therein clothes such public official with authority to insist on making all surveys which may be desired by any persons who have an interest in establishing boundaries of land tracts lying within the county.

The above quoted Section 60.170 RSMo 1949, may be aptly referred to as the law which discloses mandatory duties to be carried out by the county surveyor. Surveys made under authority of such statute are not made at the behest of private persons, but upon orders of survey issued by courts of record. County courts are also authorized to direct orders of survey to the county surveyor under applicable statutes.

Section 60.150 RSMo 1949 dealing with surveys as legal evidence is not to be overlooked since its language refutes any contention that a county surveyor has the sole right and authority to make all surveys in the county. Such statute provides:

"No survey or resurvey, hereafter made by any person, except that of the county surveyor or his deputy, shall be considered legal evidence

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in any court in this state, except such surveys as are made by the authority of the United States or by mutual consent of the parties."

The construction to be placed on statutes appearing in Chapter 60 RSMo 1949 entitled "County Surveyors and Surveys" is reflected in the language of Section 60.330 RSMo 1949, reading as follows:

"This chapter shall in nowise be construed either to affect the legality of surveys heretofore legally made and recorded, or to prevent surveyors from taking advantage of any corners previously legally established."

Under Section 60.340 RSMo 1949, the county surveyor is required to keep a fair and correct record of all surveys made by himself and his deputies and such record becomes the "record of surveys" of the county to be preserved in the office of the county recorder. A duly certified copy of any survey appearing in the "record of surveys" is to be accepted as evidence, to all intents and purposes, as the originals themselves.

In the case of Ghostner et al. v. Schrock, Sup. 64 S.W. (2d) 664, the Supreme Court of Missouri was construing what is now Section 60.150 RSMo 1949, quoted supra, which statute decrees what surveys are to be considered legal evidence. The court spoke as follows at 64 S.W. (2d) 664, l.c. 666:

"This statute does not make the surveys in question conclusive evidence of the true line. The provision of the statute which makes the survey of the county surveyor or his deputy 'legal evidence' evidently means that such surveys, when made in accordance with the statute, are admissible in evidence, and are prima facie evidence of their own correctness, but not conclusive, and may be overthrown and disproved by any competent evidence. Neither does the statute prohibit the introduction in evidence of surveys made by private persons or by any public surveyor, provided the correctness of such surveys has been established by competent evidence." (Underscoring supplied)

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On the question of what surveys are entitled to record in the "record of surveys" of the county, the following language is quoted from Carter v. Hornback, 139 Mo. 238, 1.c. 243:

"But it is claimed by counsel for plaintiff that it was proven that Lloyd was in fact deputy county surveyor, and also that his survey was made by mutual consent of the parties there interested, and therefore the record was admissible. We must confess our inability to see the force of this argument. Such evidence did not make it an official survey, and it was only as such that it was entitled to record in the record of surveys of the county, and it is only under these conditions that the record or a duly certified copy thereof can be received in evidence. Now, if the survey was made by mutual consent of the parties to the suit it would have been competent evidence. R.S. 1889, Sec. 8312. But the record would not be competent evidence even then, while the original would be." (Underscoring supplied.)

In Carter v. Hornback, quoted supra, the court had under review what is now Section 60.150 RSMo 1949.

Sections 60.210 to 60.310 RSMo 1949 contain definite instructions to county surveyors touching the division of sections of land into halves, quarters, eighths and sixteenths; the establishment of blank quarter section corners, subdivision of fractional sections, establishment of decayed or destroyed section corners and the manner of perpetuating corners. It will suffice to say in relation to such statutes that they prescribe a procedure to be followed by a county surveyor when he is accomplishing an official survey to become a part of the "record of surveys" of the county, but in only one of the eleven statutes referred to above as Sections 60.210 to 60.310, RSMo 1949, do we find the "county surveyor" referred to by title once, and in Section 60.310 RSMo 1949, prescribing how corners are to be perpetuated, we find "every surveyor" referred to. This leads to the conclusion that such statutes are to be considered as laying down rules to be followed without deviation by county surveyors when making official surveys, and as accepted procedure to be followed by any surveyor accomplishing the ends to which such statutes are directed.

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Under Section 60.320 RSMo 1949, county surveyors and their deputies are charged with the duty of reporting violations of law relative to the destruction of landmarks which 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. Section 560.530 RSMo 1949, relating to the destruction of landmarks, provides:

"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."

Sections 446.010 to 446.170 RSMo 1949 deal with the establishment of land boundaries. Section 446.010 RSMo 1949, provides:

"Any person, his agent or attorney, owning or being interested in any tract of land within this state, any corner or corners of which shall be in a decayed or perishable condition, may require the surveyor of the county to make a survey thereof."  
(Underscoring supplied.)

8 Section 446.040 RSMo 1949, provides:

"When the corner or corners of any survey shall have been destroyed or obliterated by time or accident, the owner of such survey, or of any other lands, the title of which may be affected by the loss of any such corner, may call on a magistrate of the county in which the land shall be situate, for the purpose of establishing such corners by testimony."

It will be noted that when it is sought to survey corners in a decayed or perishable condition under authority contained

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in Section 446.010, RSMo 1949, quoted above, the person interested may require the county surveyor to accomplish the survey, but the language of the statute is permissive as to the land owners right to choose the county surveyor. A reading of Sections 446.040, RSMo 1949, quoted above, and the succeeding sections to and including Section 446.170, RSMo 1949, discloses a distinct procedure for establishing destroyed corners by oral testimony of witnesses, and when such procedure is employed the county surveyor is specially designated as the surveyor to survey, plat and issue his certificate in accordance with the testimony of witnesses whose testimony is to form the basis for the survey. In this particular type of proceeding it must be reasonably concluded that only the county surveyor may make the survey, plat, certificate and deliver the same to the county recorder for official record. (Underscoring supplied).

The surveying of tracts of less than one-sixteenth of a section of land in counties, both within and without the corporate limits of any city, town or village is treated in Section 137.185, RSMo 1949. The language of the statute discloses its purpose to be to effectuate intelligent description of lots and blocks in aid of proper assessment of property taxes. When treating of surveys to be made of these small tracts lying outside of any city, town or village, the statute provides that the surveys and plats thereof are to be made by a "surveyor in the county," with the additional provision that if such surveys and plats are not accomplished by the person, company or corporation subdividing the tracts, the county court may require the county surveyor, by order of record, to do such work. As to tracts lying within the limits of any city, town or village, the statute provides that the city council may have such tracts surveyed and platted by the city surveyor, "or other competent surveyor." Nothing in such statute discloses that the county surveyor may preempt the field in making such surveys unless ordered to do so by the county court when such surveys have not been accomplished by others competent to make the same. A person, company or corporation failing to have surveys and plats made as required by Section 137.185 RSMo 1949, is subject to prosecution under Section 137.190 RSMo 1949, which provides:

"Any person, company or corporation that may hereafter violate the provisions of section 137.185 shall upon conviction be deemed guilty of a misdemeanor."

The conclusions hereinafter stated are directed to the inquiries made in the opinion request and are based on a construction of cited statutes and excerpts from adjudicated cases germane to the questions.

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#### CONCLUSION

It is the opinion of this office that (1) Section 60.120, RSMo 1949 makes it the duty of a county surveyor to make surveys in his county only "when called upon" by the person demanding the survey, and such statute confers no right on the county surveyor to make such surveys to the exclusion of other competent surveyors; that (2) Section 60.170 RSMo 1949, imposes an obligation on the county surveyor to make surveys upon "orders of survey" issued to him by courts of record; that (3) Section 60.340 RSMo 1949 providing for a "record of surveys" to be maintained by the county surveyor is complimented by Section 60.150, RSMo 1949, and only surveys made by the county surveyor are to be termed "official surveys" and entitled to become a part of the "record of surveys" of the county; that (4) the willful or malicious destruction of landmarks is a misdemeanor under Section 560.530, RSMo 1949; that (5) the surveying of corners in a decayed or perishable condition under authority of Section 446.010 RSMo 1949 may be accomplished by one other than the county surveyor; that (6) procedure set forth in Sections 446.040 to 446.170 RSMo 1949 for establishing destroyed corners by oral testimony of witnesses contemplates that surveys accomplished pursuant to such procedure are to be made only by the county surveyor; that (7) the neglect of the duty placed upon a person, company or corporation under Section 137.185 RSMo 1949 to make surveys and plats of tracts less than one-sixteenth part of a section constitutes a misdemeanor under Section 137.190 RSMo 1949, and the right to make such surveys is not the exclusive right of the county surveyor unless he makes the surveys pursuant to an "order of survey" issued by the county court or a city council of any city, town or village.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON  
Attorney General

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