

Opinion No. 16-1855

August 1, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Hon. K. K. Scott, District Attorney, Roswell, New Mexico.

County surveyor acting as a reviewer in establishing roads.

OPINION

{*412} I have your letter of the 28th ultimo, with which you say that you enclose a letter from Mr. Nymeyer, County Surveyor of Eddy County, but I do not find the enclosure. I think, however, that your letter sufficiently states the matter upon which you desire an opinion from this office without referring to what Mr. Nymeyer may have written.

You say that he takes the position that a county surveyor, by virtue of his office, is one of the viewers in the establishing of new roads and locations of bridges under Section 1297 of the Codification and that under Section 1294 he is authorized to administer all oaths or affirmations necessary to be administered to the road viewers.

Considering the last position first, as to administration of oaths or affirmations, I do not find anywhere in the statute with regard to the vacation, alteration and establishment of roads, beginning with Section 2652, any requirement that any oath or affirmation should be administered to the viewers, so that the provision in Section 1297 as to the administration of oaths or affirmations appears to be meaningless.

As to Section 1297, it does clearly state that the county surveyor, by virtue of his office, shall be one of the viewers in the establishing of new roads or the location of bridges. This section was a part of Chapter 33 of the Laws of 1891, reappearing as Section 795 of the Compiled Laws of 1897. The existing statute on the subject of the change or establishment of roads and the appointment and duties of viewers, is to be found in Chapter 124 of the Laws of 1905, and reappears in the Codification beginning at Section 2655. It is my opinion that by that act of 1905, the legislature attempted to provide a complete system on the subject of discontinuance, change or establishment of roads and covered the whole subject, thereby, in accordance with a familiar rule of statutory construction, displacing any earlier legislation on the same subject. Clearly, the intention was by providing for three viewers to diminish the chances of disagreement and such chances of disagreement would be increased if the surveyor were added as one of the viewers, making the number four.

Some argument might be made that the inclusion of Section 1297 in the Codification was in the nature of a reenactment and that it must be allowed to stand together with the later provisions as to viewers, but in the repealing and saving clause of the Codification, which appears just after Section 5901, it is provided that the foregoing

sections, taken or adopted from existing statutes, are to be construed as continuations thereof and not as new enactments. It is also provided that if any section or part of a section is inconsistent {*413} with or conflicts with any other section or part of a section, reference may be had in construing the same, to the date of the passage of the original acts from which said sections were taken. Bearing these provisions in mind it appears to me that the legislative intent was not to continue the county surveyor as one of the viewers in the establishment of roads, and that he should be limited in connection with any such work to services as surveyor only. Section 2684 indicates that the surveyor must make a plat, survey and report as they are to be annexed to the report of the viewers.

After the passage of the act of 1905, I am quite sure that the practical construction given to it was in harmony with the opinion I have hereinbefore expressed, and I have never known of the county surveyor acting as one of the viewers, but I have known of his being called upon to make a survey and plat in connection with the condemnation of land for road purposes.