



STATE OF KANSAS

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November 1, 1978

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ATTORNEY GENERAL OPINION NO. 78-353

Mr. H. Scott Beims
Rawlins County Attorney
Rawlins County Courthouse
Atwood, Kansas 67730

Re: Crimes and Offenses--County Commissioners--Duties

Synopsis: K.S.A. 19-233 is so vague and indefinite as to deny due process of law to any county commissioners proposed to be charged thereunder.

* * *

Dear Mr. Beims:

K.S.A. 19-233 provides in pertinent part thus:

"That every person who is either elected or appointed to the office of county commissioner of any county in the state of Kansas, *who shall willfully violate any provision of law, or fail to perform any duty required of him by law*, shall be adjudged guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty (50) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment" [Emphasis supplied.]

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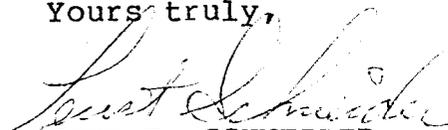
This statute was enacted in 1875, and has been substantially unchanged since that time, insofar as here pertinent. So far as the annotations indicate it has not been the basis for a single prosecution in its history of more than one hundred years.

I understand that a county commissioner in your county has been convicted of a traffic violation, of an unspecified nature. The question has apparently been raised whether that commissioner is now subject to prosecution therefor under the above provision. In my judgment, no such prosecution will lie under this statute.

The statute does not define with any precision whatever the conduct which is prohibited, and which subjects the commissioner to prosecution thereunder. It states only that a wilful violation of any law, or a wilful failure to perform any duty required by law. Certainly, it may be argued that it refers only to those laws which prescribe duties of the members of the board of county commissioners in their official capacity. However, the statute does not identify the *corpus* of laws to which it refers. Even if it were accepted as referring only to those laws which prescribe duties of the members of the board of county commissioners in their official capacity, the ambiguity of the statute is not resolved. Some of those laws prescribe duties in mandatory terms, which the board must perform. Others prescribe duties and responsibilities for the members of the board which are not mandatory, but which are directory only.

It is a settled maxim that a statute which creates and defines a penal offense must state with reasonable clarity the act or conduct which is forbidden, in order that a reasonable person may be advised of the conduct which is prohibited. This statute does not identify any such conduct, save by a general reference to wilful violations of "any provision of law," and failure to perform "any duty required . . . by law." There are, of course, a host of statutory provisions prescribing duties and responsibilities of the board of county commissioners, some of them mandatory and many of them directory. K.S.A. 19-233 fails to describe, in and of itself, any conduct, however, which is identifiable from the statute itself as the basis for a criminal prosecution thereunder. The reader must look to an entirely unspecified body of law to identify such conduct. This vagueness and indefiniteness is intolerable in a criminal statute. In my opinion, the statute defines the prohibited conduct with such vagueness as to deny due process of law to any county commissioner who is proposed to be charged thereunder, and is constitutionally unenforceable.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj