

**OPINION  
46-193**

November 1, 1946 (OPINION)

OFFICER

RE: Member of Legislature or County Commissioner

This is in reply to your letter of October 30, addressed to the attorney general. You state that you are serving Benson County in the capacity of county commissioner and that your term as commissioner expires at the end of 1948. You are a candidate for the state legislature without opposition and will undoubtedly be elected. You inquire whether it will be necessary for you, in case you are elected, to resign as county commissioner.

Section 37 of the Constitution provides as follows:

"No judge or clerk of any court, secretary of state, attorney general, register of deeds, sheriff, or person holding any office of profit under this state, except in the militia or the office of attorney at law, notary public or justice of the peace, and no person holding any office of profit or honor under any foreign government, or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of \$300, shall hold any office in either branch of the legislative assembly or become a member thereof."

You will note that the constitutional provision quoted enumerates who may not be members of the legislative assembly, but a county commissioner is not included in the enumeration. The question might be raised as to whether or not the office of county commissioner is an office of profit under this state within the meaning of the constitutional provision quoted. The office of county commissioner, of course, is a county office, but the county is a political subdivision of the state and, therefore, there is a serious question as to whether or not a county commissioner would come within the prohibition of said section 37.

Another matter to be considered is that county commissioners are required to be in session during the fore part of January, which is the same time that the legislature also is in session.

While there may be some doubt, yet it is my opinion that the better practice would be for the county commissioner to resign as such, and thereby eliminate any question as to his right to serve as a member of the legislative assembly.

NELS G. JOHNSON

Attorney General