

A person elected to fill the vacancy in the office of County Commissioner takes office on the first Monday in January following the November election at which he was elected to fill the vacancy.

CARSON CITY, November 19, 1940.

HONORABLE ERNEST S. BROWN, District Attorney, Reno, Washoe County, Nevada.

DEAR MR. BROWN: Reference is hereby made to your letter of November 15, wherein you advise a person was elected County Commissioner in Washoe County to fill the vacancy in the unexpired term of a deceased County Commissioner. WE note that your query is: When does the newly elected County Commissioner, *i.e.*, the person elected to fill the vacancy in the office, take office?

After due consideration of the statutes of this State on the question, we are of the opinion that it is covered by section 1935, Nevada Compiled Laws 1929. The last sentence of that section reads as follows: "Any vacancy or vacancies occurring in any board of county commissioners shall be filled by appointment of the Governor, and such appointee or appointees shall hold his or their office until the first Monday in January following the then next general election, except as provided otherwise in this act."

It would seem that the Legislature has specifically fixed the time in which a person elected to fill a vacancy in the office of County Commissioner shall take office, or in other words, the Legislature has fixed the time in which the appointee shall surrender the office in the event of the election of another person. We do not find any other statute which in our opinion qualifies the foregoing quoted provision of the law. We think that the person elected to fill the vacancy here is not entitled to take office until the first Monday in January, 1941.

Very truly yours,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

B-20. United States Senator, Number of Vacancies in Office of Where Death Occurs After General Election but Before Expiration of Current Term.

Where a person is elected United States Senator at the general election and dies prior to the beginning of his new term of office on the third day of the next succeeding January, two vacancies are created by such death, one for the term ending at the end of the current term of such decedent United States Senator on the third day of the first succeeding January following such election, and the other for the term beginning on said third day of January and ending at the first succeeding biennial or quadrennial general election held thereafter and the ascertainment and certification of the person so then elected.

Both such vacancies are filled by temporary appointments by the Governor. The vacancy for the remainder of said original new term of United States Senator so deceased shall be filled by election at such succeeding biennial or quadrennial election.

NOTE--Since my letter opinion of November 25, 1940, to Governor Carville not only supplements but also covers all the essential points dealt with in my letter opinion to him of November 14, 1940, except this language from the Twentieth Amendment of the Constitution of the United States, section 1:

SECTION 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

We are omitting the latter from our report and publishing only the former which is as follows:

CARSON CITY, November 25, 1940.

HONORABLE E. P. CARVILLE, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR CARVILLE:

SUPPLEMENT TO OUR OPINION OF NOVEMBER 14, 1940

Supplementing our opinion of November 14, 1940, on the question of the filling of the vacancies created by the death of Senator Key Pittman in the office of United States Senator for his present term ending at noon on January 3, 1941, and for the new term of six years beginning at noon on January 3, 1941, and ending at noon on January 3, 1947, to which he was, no doubt, elected at the regular election this year, we desire to add the following, although we believe said opinion as originally written is both correct and complete in every particular, and we have had no occasion since that time to change our views as expressed in that opinion.

As on all other occasions, this office is concerned solely with the question of what is the law, not what it ought to be, nor with the question of whether it embarrasses anyone or whether it satisfies anyone at all, although naturally we always desire to please and to satisfy our people by our opinions when this can be done without any sacrifice of principle or any departure from the Constitution and law as written. We are not at all concerned with policy, but only with a determination of what the law actually is as written.

The purpose of this opinion is to comply with the promise implied in the last paragraph of my letter to you constituting my opinion of the 14th instant, to the effect that we would make a further research "and then advise you of our views and opinion in this matter," which is so important to our people. We have made such a further research and, as we believe, an exhaustive research, and have carefully studied the Constitution of the United States and the Constitution of

the State of Nevada, and all the laws on the points involved and all the cases of courts of last resort which we can find dealing with these points, both State courts and Federal courts, including the Supreme Court of the United States, as well as many of the contests for the office of United States Senator conducted in the United States Senate, and the Congressional Record relating to the seating of United States Senator Charles B. Henderson when he was appointed by Governor Boyle, of this State, to fill the vacancy created by the death of United States Senator Newlands of this State. We are still of the opinion that the only vacancy now existing is that in the present term of United States Senator Pittman, especially since the result of the election has neither been canvassed nor certified. We are also of the opinion that a vacancy in Senator Pittman's new term as United States Senator will exist at noon on January 3, 1941, and not until that time, and that such vacancy in said new term will continue thereafter for the entire term of six years, unless and until filled by temporary appointment by the Governor of this State at least until the next regular election held in this State for the election of State and other officers in November 1942, and possibly by election of the people at that time for the remainder of said new term from and after that election, a point which we shall discuss later.

That there will be a vacancy in the new term beginning at noon on January 3, 1941, cannot be questioned. The law is well settled on this point. We have examined many cases dealing with the subject and find that the rule is as stated in *Dobkins v. Reece*, 17 S. W. (2d) 81, that, where an officer was reelected but died before the expiration of his original term, and before qualifying for the second term, one appointed to fill the vacancy held only for the remainder of the unexpired term, when a new vacancy existed for the term to which the incumbent was elected, which the County Commissioners were authorized to fill by appointment.

The foregoing rule of law was expressly stated and followed in *Maddox v. York*, 54 S. W. 24; *Stocking v. State*, 7 Ind. 327; and many other cases in which *Maddox v. York* was followed with approval.

The Supreme Court of Nevada in *State v. Irwin*, [5 Nev. 111](#), passing upon the question of an anticipatory vacancy in office had occasion to define the word "vacant" and did so in the following language, which is supported by many more recent cases cited in note to that case in Nevada Digest, pages 133-135, inclusive:

There is no technical nor peculiar meaning to the word "vacant," as used in the constitution. It means empty, unoccupied; as applied to an office without an incumbent, there is no basis for the distinction urged, that it applies only to offices vacated by death, resignation or otherwise. An existing office without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday.

Adopting the Court's illustration, certainly the new term for which the late Senator Pittman was elected will be a new house at noon on January 3, 1941. It will then be just as vacant as the old house is at this time, and under the law must be filled by a new inhabitant as of that date.

A more recent decision (March 17, 1927) of the Supreme Court of this State which sustains said decision of the Supreme Court of this State in *State of Nevada v. Irwin*, supra, as to what constitutes a vacancy in a new office or term of office, is the case of Ex Rel. Williamson v. Morton, 50 Nev. 145; 254 Pacific, 147, from the syllabus of which we quote as follows:

There being no constitutional provision authorizing county assessors to hold over until their successors are elected and qualified, under Const. art. 15, sec. 11, providing that the legislature shall not create office, tenure of which shall be longer than four years, office of county assessor becomes vacant at expiration of four years, even though no successor is elected and qualified.

As stated in my opinion of November 14, 1940, there is now a vacancy in the old or present term of the late Senator Pittman that may be filled immediately by appointment, which appointment if made will be for the remainder of the present term and only up to noon on January 3, 1941; and that there will be a vacancy in the new term beginning at noon on January 3, 1941. With respect to the filling of the vacancy in the new term, we have made exhaustive search of the authorities and find the following conclusions are unquestionably to be drawn therefrom:

That the Governor of Nevada is and will be legally empowered to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman, under and by virtue of the provisions of section 2593, Nevada Compiled Laws 1929. Said section 2593 is a part of an Act of the Legislature of this State expressly enacted by it in 1915 pursuant to the permissive power granted the Legislature by the Seventeenth Amendment to the United States Constitution, for the very purpose not only of providing a law for the election of United States Senators, but also to provide for the filling of vacancies temporarily in such offices when necessary. Section 2593 being enacted by express permission of Congress as expressed in the Seventeenth Amendment, we think it most necessarily follows that said section must be construed in the light of the language contained in such amendment, and not construed in the light of expressions of the Supreme Court of Nevada in cases dealing with purely local and State offices governed by the Constitution of Nevada. The Seventeenth Amendment, as quoted in my opinion of November 14, provides that the Legislature may empower the executive of any State to make "temporary appointments until the people fill the vacancy by election as the Legislature may direct." Any expression in a State law authorizing its executive to appoint a United States Senator, we think, must be qualified and limited by the term "temporary appointments."

It must be clear that the chief purpose (practically the only purpose) of the Seventeenth Amendment to the Constitution of the United States, a part of which was quoted on page 2 of my opinion of 14th instant, was and is to provide for the *election* of United States Senators, instead of the *selection* thereof by State Legislatures as had been theretofore required, for the entire term of six years as provided in the Constitution of the United States, and to require the issuance of writs of election by the Governor of the particular State for such elections. It is true that the proviso in said paragraph of said section 17 so quoted empowers the Legislatures to authorize the Governor of the States in which vacancies in the office occur to make "*temporary appointments*" thereto "until the people fill the vacancy by election as the Legislature may direct." Upon an intensive study, and a reasoning out of this situation and said language quoted from said

Seventeenth Amendment, and upon an exhaustive research, as hereinafter indicated, we are convinced, and are of the positive opinion, that the above-quoted word “temporary” relating to such appointments of the Governor limits the term of such appointments, and that said language does not delegate to the Legislature of this State the authority to authorize the Governor of this State to make an appointment for the entire new term. Certainly such an appointment would not be consistent with the word “temporary” as used in said quoted portion of the Seventeenth Amendment. We are, therefore, of the opinion that the Governor of this State can legally appoint a person to fill the vacancy in Senator Pittman’s new term of office only for the term beginning at noon on January 3, 1941, and ending at the next regular election to be held in this State for the election of State and other officers in November 1942, and that the term of such an appointee should be limited to that time, especially as there is absolutely no constitutional or statutory provision sufficiently authorizing the Governor of this State to call a special election to fill said vacancy, or to call a special election for the election of any other officer.

The Constitution of the United States provides:

Each house shall be the judge of the elections, returns, and qualifications of its own members * * *. Art. I, Sec. 5.

The Supreme Court of the United States in *Reed et al. v. County Commissioners*, 72 L. Ed. 924, said:

The United States Senate is the judge of the elections, returns, and qualifications of its members. *It is fully empowered and may determine such matters without the aid of the House of Representatives, or the Executive or Judicial Department.* (Italics ours.)

That the Committee on Privileges and Elections of the United States Senate, in the case of the seating of Honorable Gerald P. Nye, as a United States Senator, in a case “on-all-fours” with the instant case, construed the Seventeenth Amendment to the United States Constitution and the North Dakota statute in question there, under which Mr. Nye was appointed, in the same manner as we have hereinabove noted, is shown beyond question in the report of the proceedings of the Senate hearing on the matter. Such report is set forth in full at pages 265 to 275, inclusive, in the recent publication entitled “Senate Election Cases, 1913-1940,” the same being Senate Document No. 147, 76th Congress, 3d Session. We quote briefly from the Committee Report, where the committee referring to the North Dakota Act, which Act was simply the reenactment of a Dakota statute enacted long prior to the adoption of the Seventeenth Amendment, said:

Nowhere is express reference made to the Constitution of the United States, and, nowhere in said act does the language used indicate that the Legislature of the State of North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, supra, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, supra, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the

executive of that State the power, as the seventeenth amendment provides, to make a *temporary appointment* only, until the people should fill the vacancy by election. (Italics ours.)

The report of the Nye case, supra, also shows that the then committee recognized that the Nevada Legislature had enacted suitable legislation conforming to the Seventeenth Amendment. It said:

It is interesting to note that 46 States have passed laws expressly recognizing by the language used the seventeenth amendment to the Constitution. Two States--Kansas and North Dakota--have omitted to recognize the amendment by any direct or express reference. The power to make temporary appointments has been conferred by 41 States upon their respective executives. * * *

Nevada is shown by said report of the Nye case to be one of said 46 States which has passed laws expressly recognizing said Seventeenth Amendment; and the law of this State, which includes said section 2593 so enacted and approved in this State in 1915, is included in said Senate Election Cases, 1913-1940" as a law which is recognized by the United States Senate as complying with said Seventeenth Amendment.

No one can escape the conclusion that the Nevada Act will unquestionably be construed by the Committee on Privileges and Elections of the United States Senate as providing the Governor of this State the power to make a temporary appointment to fill the new term of the late Senator Pittman until the remainder of such term can be filled by an election by the people according to law.

It is also to be noted that the foregoing view is concurred in by the United States Senate Legislative Counsel and the United States Senate Parliamentarian in telegrams dated November 18 and 22, 1940, a copy of which was furnished your office on those dates.

Further, a precedent for such temporary appointment is found in this State. It must be borne in mind that section 2593 Nevada Compiled Laws 1929 was approved March 6, 1915. The records in the archives of the office of Secretary of State show that on January 12, 1918. Honorable Charles B. Henderson was, by the Governor, appointed United States Senator to fill the vacancy caused by the death of Senator Francis G. Newlands, whose term had some three years yet to run. Senator Henderson received the following certificate of appointment, omitting the formal parts:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nevada, I, Emmet D. Boyle, the governor of said State, do hereby appoint CHARLES B. HENDERSON a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of FRANCIS G. NEWLANDS is filled by election, as provided by law.

The record shows that Senator Henderson filed for election for the *remainder* of the *unexpired* term at the November 1918 election, was elected at such election and served the *remainder* of such term. This is a sufficient precedent.

It would seem, therefore, that there is and can be no question as to your authority to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman beginning on and as of the 3d day of January 1941 at 12:00 o'clock noon on that day.

Further, in view of the authorities hereinbefore cited and the views hereinbefore set forth, although there is no express statutory period definitely fixing the time the appointment is to run, we are of the opinion that the appointment should not be made for the entire new term of six years; and since there is no provision in our law for a special election to fill such a vacancy, it is our opinion that the appointment should be temporary and only until the next regular election of State and other officers in November 1942.

It is our further opinion that, since the said appointment of Honorable Charles B. Henderson as United States Senator to fill the vacancy caused by the death of Senator Newlands, as quoted on page 7 hereof, has been recognized and accepted by the United States Senate as in proper or sufficient form, it might be wise to follow the language of that certificate of appointment, with such changes as may be necessary to make the certificate accord with the present case.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-21. Motor Vehicle Registration Law.

A motor truck mounted on two axles, each axle of which is equipped with two wheels mounted with dual tires, and the truck equipped with a caterpillar tread arrangement, may operate on the highways of this State when properly registered, provided the caterpillar tread arrangement is not used in propelling the truck on the highway.

CARSON CITY, December 9, 1940.

HONORABLE MALCOLM McEACHIN, Ex Officio Motor Vehicle Commissioner, State Capitol, Carson City, Nevada.

DEAR MR. McEACHIN: Reference is hereby made to your letter asking the official opinion of this office on the matter referred to you by Linn Manufacturing Corporation, of Morris, New York, in its letter to you dated September 17, 1940, wherein such corporation requests from you information as to whether a certain truck manufactured by it known as Model No. C-5 would come within the weight limitations contained in the laws of Nevada with respect to the allowable load limit on the public highways of this State. In brief, whether by reason by