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uncertainty and confusion in that a finder is defined merely as the one "who first takes possession." This leaves the old familiar problem of interpreting the term possession. The Court of Appeals in the *Rofrano* case impliedly construed possession as requiring a reduction to physical control³⁸ and so rejected the constructive possession doctrine.

One of the main purposes of the New York statute seems to be to promote the return of lost property by encouraging possible action by finders.³⁹ Indeed, protection of the owner's interest has always been the purported purpose of the courts in dealing with cases in this area.⁴⁰ Bearing this in mind, it is suggested that this would be defeated if the term "possession" was construed to require only a constructive control.

It is doubtful if the Second Circuit in the principal case correctly evaluated the precedents in saying that case law dictated a decision for the tenant. However, its decision is consistent with the purpose of the New York personal property statute. An award of the disputed property to the landlord on the basis of technical prior possession would result in a severe and undue limitation upon the statute's effectiveness. Certainly the temptation not to report a finding would be very great if the finder was aware that by doing so, he might lose his rights in the property found. The *Rofrano* decision should have the effect of encouraging honesty among finders.

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EFFECT OF HOLD OVER PROVISIONS ON VACANCIES IN OFFICE

In many jurisdictions, the incumbent in an elective public office is authorized to hold over after the expiration of the term, until his successor is duly qualified. When the successor fails to qualify, the question arises as to whether there is a vacancy in the office.

The question arose in *State ex rel. Foughty v. Friederich*.¹ At the

³⁸291 F.2d 848, 850 (2d Cir. 1961).

³⁹N.Y. Pers. Prop. Law §§ 251-58.

⁴⁰*Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Foulke v. New York Consol. R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920); *Jackson v. Steinberg*, 186 Ore. 129, 200 P.2d 376 (1948); *Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946). See Comment, 52 Harv. L. Rev. 1105 (1939).

¹108 N.W.2d 681 (N.D. 1961).

1960 election, Heringer was elected a trial judge for a term to commence on the first Monday in January, 1961. The incumbent, Judge Benson, resigned before his term officially expired on January 2, 1961. Afterwards, on December 23, 1960, Heringer died. The governor appointed Friederich to fill the vacancy created by Judge Benson's resignation. The succeeding governor declared that a vacancy existed in the office because Judge-elect Heringer had failed to qualify, and he appointed Foughty to fill the vacancy. When Friederich refused to vacate the office upon request, Foughty filed an information in quo warranto challenging Friederich's claim to said office.

The Supreme Court of North Dakota upheld the trial court's denial of the writ, holding that the subsequent appointment of Foughty was invalid. The court reasoned that a vacancy in office does not result from the death of an elected official before the beginning of the new term where the term of the incumbent extends until a successor has qualified.² One judge dissented, taking the view that the hold over provision was designed in the public interest to prevent a vacancy in office and not to extend the tenure of an incumbent for his own benefit.³

The prevailing rule, as illustrated by the majority opinion is that the death of one elected to an office before he has qualified does not create a vacancy if the incumbent is authorized to hold over until his successor shall have qualified.⁴ Therefore, the office is not to be deemed vacant so long as such office is filled by an incumbent who is legally qualified to perform the duties which appertain to it.⁵

The majority approach draws a distinction between vacancy created during the regular term and the expiration of a term of office. In the latter case, the incumbent is under an obligation to continue in office to discharge the duties until his successor has qualified, and this added period is a part of the rightful term of office⁶ And accordingly, it is an established principle that a qualified successor is one who has been chosen by the same mode as the regular incum-

²Id. at 682.

³Id. at 694.

⁴Pittman v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937); Clark v. Wonnacott, 30 Idaho 98, 162 Pac. 1074 (1917); State ex rel. Freeman v. Carvey, 175 Iowa 344, 154 N.W. 931 (1915); Smith v. Snell, 154 Kan. 197, 117 P.2d 567 (1941); Grinnell v. Bunker, 115 Me. 108, 98 Atl. 69 (1916); State ex rel. Boone County Atty. v. Willott, 103 Neb. 798, 174 N.W. 429 (1919); State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N.E. 738 (1909); State ex rel. Hellier v. Vincent, 20 S.D. 90, 104 N.W. 914 (1905). For cases of other jurisdictions see generally Annot., 74 A.L.R. 486 (1931).

⁵Pittman v. Ingram, 184 Ga. 255, 190 S.E. 794 (1937).

⁶Shackelford v. West, 138 Ga. 159, 74 S.E. 1079 (1912).

bent, absent a statute to the contrary.⁷ Thus, if there is no vacancy to warrant an appointment, and there is no provision for a special election, the incumbent is entitled to hold over for another term.

Some jurisdictions follow a minority rule, as illustrated in the dissenting opinion of the principal case, under which the expiration of a term of office is synonymous with vacancy, even though the incumbent may hold over until his successor has qualified.⁸ Therefore, the appointing power may fill the vacancy created by the expiration of a term of office, if no one has been elected to the office or if the official elected died prior to the beginning of his term.

The jurisdictions adhering to this approach generally emphasize that the hold over provision is not "designed or intended to extend the tenure of office by an incumbent for his own benefit beyond the specified term."⁹ In declaring that a vacancy exists upon the expiration of a term of office, it is reasoned that a holdover provision is not a limitation upon the appointing power to fill vacancies in the offices.¹⁰

Under this approach a vacancy in office does not hinge upon the fact that there is an absence of a qualified person to administer the office.¹¹ The hold over provision is primarily aimed at preventing a hiatus in the office rather than prolonging the tenure of the incumbent.¹²

Another principle stressed by the jurisdictions following this minority approach is the construction of the state constitutions or the applicable statutes.¹³ The Kentucky constitution provides that Justices of the Peace shall hold for three-year terms and "until their successors are elected and qualified."¹⁴ Nevertheless, *Olmstead v. Augustus*¹⁵

⁷*Pittman v. Ingram*, 184 Ga. 255, 190 S.E. 794 (1937).

⁸*State ex rel. Covington v. Thompson*, 142 Ala. 98, 38 So. 679 (1905); *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582 (1903); *Gibbs v. People ex rel. Watts*, 66 Colo. 414, 182 Pac. 894 (1919); *People v. Pillman*, 284 Ill. App. 287, 1 N.E.2d 788 (1936); *People ex rel. Mitchell v. Sohmer*, 209 N.Y. 151, 102 N.E. 593 (1913); *State ex rel. Kenner v. Spears*, 53 S.W. 247 (Tenn. Ct. Ch. App. 1899); *Dobkins v. Reece*, 17 S.W.2d 81 (Tex. Civ. App. 1929); *State ex rel. Finch v. Washburn*, 17 Wis. 678 (1864). For cases of other jurisdictions see generally Annot., 74 A.L.R. 486, 494 (1931).

⁹*State ex rel. Sathre v. Moodie*, 65 N.D. 340, 258 N.W. 558 (1935). This case is distinguished in principal case but is not overruled.

¹⁰*In re Advisory Opinion to the Governor*, 65 Fla. 434, 62 So. 363 (1913).

¹¹*Alcorn ex rel. Hendrick v. Keating*, 120 Conn. 427, 181 Atl. 340 (1935).

¹²*Campbell v. Dotson*, 111 Ky. 125, 63 S.W. 480 (1901).

¹³*State ex rel. Sikes v. Williams*, 222 Mo. 268, 121 S.W. 64 (1909); *People ex rel. Mitchell v. Sohmer*, 209 N.Y. 151, 102 N.E. 593 (1913).

¹⁴*Olmstead v. Augustus*, 112 Ky. 365, 65 S.W. 817, 818 (1901).

¹⁵112 Ky. 365, 65 S.W. 817 (1901).

held there was a vacancy upon the expiration of the incumbent's term. The Court of Appeals of Kentucky felt construction of the constitution should be based "not only on an isolated expression, but on the whole instrument, and the plain purpose of the framers of the instrument must be effectuated."¹⁶ The court said the framers of the constitution could not have intended for a person who was elected for one term of office to hold for a second term simply because his successor had died prior to qualifying. The prerequisite, as followed by the majority jurisdictions, that the successor is to be selected by the same mode as the incumbent has also been held not to be entirely conclusive as requiring actual qualification of a successor. Thus in *State ex rel. Robert v. Murphy*,¹⁷ the Florida Supreme Court said this is only one factor "to be considered with such others as the law may present in forming a correct judgment as to the meaning of that law, whether organic or statutory."¹⁸

In a comparison of the majority and minority approaches, several distinguishing aspects are evident. The rationale in a majority of jurisdictions is that the people should be entitled to select the successors for elective offices.¹⁹ If it is determined that a vacancy exists upon the expiration of the term of office, whenever the successor has not qualified, these jurisdictions feel there would be numerous occasions where the governor would be supplying such offices with incumbents and depriving the electorate of their right as provided under the state constitutions.²⁰ Such jurisdictions reason then, that allowing an incumbent to hold over for another term provides an adequate solution. However, the minority approach provides a more adequate protection for the electorate. It prevents an officer from holding over for a term to which he has neither been elected nor appointed.²¹ The electorate has a manifest right to select successors,²² and if under the circumstances they are unable to do so, then all jurisdictions provide some authority with the power of appointment. Allowing an incumbent to hold over for another term seems an undesirable result, which cannot be concealed by simply labeling the period of holding over as part of the fixed term. An incumbent may manipulate the election so as to secure the selection of a successor who would refuse

¹⁶Id. at 818.

¹⁷32 Fla. 138, 13 So. 705 (1893).

¹⁸State ex rel. Robert v. Murphy, 32 Fla. 138, 13 So. 705, 711 (1893).

¹⁹See State ex rel. Hoyt v. Metcalfe, 80 Ohio St. 244, 88 N.E. 738 (1909).

²⁰Ibid.

²¹Campbell v. Dotson, 111 Ky. 125, 63 S.W. 480 (1901).

²²Ibid.