intended to secure the public the *courts do not favor mere technical defences.* Accordingly, actions have been sustained on bonds not required by law, when *executed voluntarily,* and with proper conditions, to secure the performance of official duty.[1] And when required by law, bonds are good, *as common-law obligations,* though they do not conform to the statute, if they contain no condition contrary to law. In such case the obligor voluntarily agrees to make the obligee named a trustee for the persons interested in the due performance of the condition.[2] Thus, an action may be maintained on a bond given to the "selectmen" instead of to the "town," by a town treasurer, conditioned for the faithful performance of his duties.[3]

for moneys alleged to have been received by him as such treasurer, an answer that by the terms of the negotiation, which was approved by the common council, the proceeds remained in the hands of the purchaser, to be used only as needed in constructing the water-works, and that the purchaser had become insolvent while the funds yet remained in his hands, — *Held,* to be sufficient. In such case, a report by the treasurer to the council, as to the condition of the fund, charging himself with funds remaining in the hands of the purchaser, — *Held,* not to estop him to deny his liability. State *v.* Hauser, 63 Ind. 155; as to liability for misapplication of funds, see Robinson *v.* State, 60 Ind. 26.

[1] *Supra,* sec. 214, note; Postmaster-General *v.* Rice, Gilpin, 554; Montville *v.* Haughton, 7 Conn. 543; Commonwealth *v.* Wolbert, 6 Binney, 292; Baby *v.* Baby, 8 Upper Can. Q. B. 76.

[2] Thomas *v.* White, 12 Mass. 369; 5 Mass. 314; Kavanaugh *v.* Sanders, 8 Greenl. (Me.) 442; Sweetzer *v.* Hay, 2 Gray, 49, and cases there cited; Smith *v.* Wingate, 61 Tex. 54; Sutherland *v.* Carr, 85 N. Y. 105; Barnet *v.* Abbott, 53 Vt. 120 (bond executed near the close of an officer's term of office, but *antedated,* to cover the entire term, held good). See, also, Fond du Lac *v.* Moore, 58 Wis. 170.

[3] Sweetzer *v.* Hay, 2 Gray, 49; Horn *v.* Whittier, 6 N. H. 88. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding there *may be no statute requiring one.* Supervisors *v.* Coffinbury, 1 Mich. 355; People *v.* Johr, 22 Mich. 461 (1871); Platteville *v.* Hooper, 63 Wis. 381. The fact that there is already a valid official bond with solvent sureties does not preclude a county court from taking from a delinquent county officer, by way of security for his delinquency, a bond and mortgage on real estate. Turner *v.* Clark Co., 67 Mo. 243 (1878).

Municipal corporations *may sue on official bonds* of public officers when interested therein. State, &c. *v.* Norwood, 12 Md. 177 (1858). In an action on the official bond of an officer appointed by a municipal corporation, reciting the appointment of the principal as such officer, neither he nor his sureties can set up the invalidity of his appointment as a defence to an action for moneys collected. Hoboken *v.* Harrison, 1 Vroom (30 N. J. L.), 73; Seiple *v.* Elizabeth, 3 Dutch. (N. J.) 407; *supra,* sec. 215, note. Sureties on *official bond of de facto* municipal officer are liable for moneys collected by him; and this though he held an office which in point of fact, the corporation could not create. 1 Vroom (30 N. J. L.), 73, *supra. Supra,* sec. 215, note; *post,* secs. 221, note, 230, note. A surety in an official bond of an officer whose *term is limited to a year,* is not liable beyond the year, though the officer continues by law until a successor is provided. Dover *v.* Twombly, 42 N. H. 59 (1860); Chelmsford Co. *v.* Demorest 7 Gray (Mass.), 1 (1856); Mayor *v.* Horn, 2 Harring. (Del.) 190 (1833); Regina *v.* McRae, 5 Upper Can. P. R. 309; Montgomery *v.* Hughes, 65 Ala. 201. A change in a statute by which the time for the annual settlements of county collectors is fixed a month later, and additional time is allowed in which to pay after settlement, releases the sureties on a collector's bond executed before the change. The effect is to postpone the State's right of action against the collector. The rule that *an extension of time given the principal releases the surety* applies between the State and an individual. State *v.* Roberts, 68 Mo. 234. Sureties upon an official bond *are not liable* for a defalcation of their principal, occurring *during a term preceding that for which the bond was given.* Paducah *v.* Cully, 9 Bush (Ky), 323 (1872); Bissell *v.* Saxton, 77 N. Y. 191; Myers *v.* U. S. 1 McLean, 493; Mahaska *v.* Ingalls, 16 Iowa, 81; Townsend *v.* Everett, 4 Ala. 607; U. S. *v.* Boyd, 5 How. 50; Bruce *v.* U. S., 17 How. 437; McIntyre *v.* School Trustees, 3 Ill. App. 77; Arlington *v.* Merrick, 2 Saund. 403; Overacre *v.* Garrett, 5 Lans. 156; Rochester *v.* Randall, 105 Mass. 295; Bamford *v.* Iles, 3 Exch. 380; Austin *v.* French, 7 Met. 126; Kingston Ins. Co. *v.* Decker, 33 Barb. 196; Dedham Bank *v.* Chickering, 3 Pick. 335; Blake *v.* Buffalo, &c., 56 N. Y. 485; McClusky *v.* Cromwell, 11 N. Y. 598; Miller *v.* Stewart, 9 Wheat. 702; Stern *v.* People, 96 Ill. 475; Goodwine *v.* State, 81 Ind. 109, where a city treasurer served *two successive terms under bonds, with the same sureties on each bond,* it was presumed, in a suit upon the second bond, that, at the time it was given, he was in possession of all the money which he should have had, if an accounting had been had, and he and his sureties were held liable therefor. Bernhard *v.* Wyandotte, 33 Kan. 465; and see Hartford *v.* Francy, 47 Conn. 76. And where a collector, holding office for three successive years, and *giving a different bond each year,* was delinquent, and there was no evidence showing the time when the deficit occurred, it was held that the loss should be divided between the three bonds in proportion to the sums collected during the time for which each bond was given. Phipsburg *v.* Dickinson, 78 Me. 457. But in *California,* in a similar case, it was recently (1887) held that, in absence of evidence to the contrary, the presumption is that the misappropriation happened at the end of the last term, for which the sureties on the last bond are liable. Heppe *v.* Johnson, 73 Cal. 265. As to a breach of an official bond, see La Pointe *v.* O'Malley, 46 Wis. 35.

It is no objection to the bond that it *was executed before* the appointment to office was made. Essex *v.* Strong, 8 Upper Can. L. J. 15; s. c. 21 Upper Can. Q. B. 149. The imposition of additional taxes to those assessed at the time of taking the security and the increase of risk thereby has been held not to violate a bond given for the general performance of duties and payment of moneys. Beverley *v.* Barlow *et al.,* 10 Upper Can. C. P. 178; s. c. 7 Upper Can. L. J. 117. Nor is it a defence that the money received by the treasurer was not demanded by the government, which was entitled thereto. Essex *v.* Park, 11 Upper Can. C. P. 473. Nor are irregularities in the mode of appointment a defence. Whitby *v.* Harrison, 18 Upper Can. Q. B. 603; Whitby *v.* Flint, 9 Upper Can. C. P. 449; Todd *v.* Perry *et al.,* 20 Upper Can. Q. B. 649.

§ 217 (156). **Duration of Official Term; Power to hold over; English Statutes and Decisions.** — It was a settled rule of law respecting the old corporations in England that the office of the mayor or other head officer was *annual,* and absolutely expired at the end of the year; and that without an express clause in the charter, *he could not hold over* until his successor was provided. The right, in such case, to *hold over* did not exist by implication, and was not an incident to the office.[1] In some charters, however,

[1] Rex *v.* Atkins, 3 Mod. 12; Rex *v.* Hearle, 1 Str. 627; Mayor of Durham's Case, 1 Sid. 33; Rex *v.* Thornton, 4 East, 308; Foot *v.* Prowse, 1 Str. 625; s. c.

it was in terms provided that the mayor or other chief officer, though elected for a year, should hold until his successor was chosen.[1] When this right existed it was frequently abused, by neglecting to hold an election on the charter day, by which means the officer continued his term. It was this abuse that gave rise to the Statute of Anne, which enacted "that no person in such *annual* office for one whole year should be capable of being chosen into the same office for the year immediately ensuing," and imposed a fine upon every such officer who "should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office at the time appointed for making another choice."[2] Under the Municipal Corporations Act the provision is that the mayor shall be elected each year, at the meeting fixed for the ninth of November, and shall "continue in his office for one whole year,"[3] and by an amendment, until his successor shall have accepted the office of mayor, and made and subscribed the requisite oath;[4] and subsequently the Statute of Anne above mentioned was repealed, as being no longer necessary.[5]

§ 218 (157). **Same subject.** — At *common law, the office of an alderman*, jurat, capital burgess, or other member of a select body, *is a franchise for life*, though by prescription or charter it may be limited to a definite period, but the office was so much in the nature of a freehold that there was an implied right to hold over, unless it was otherwise provided.[6] So with respect to recorder, town-clerk, and the like officers, the duration of the office depended upon the particular charter, but presumptively it was not limited, and their offices were so much in the nature of a freehold that if they were "eligible for a year" and were constituted in general terms, they did not expire with the year, but the possessors were entitled to hold over until others were elected. But it was considered that if they were "eligible for a year *only*," the office *ipso facto* determined on the expiration of a year.[7]

§ 219 (158). **American Doctrine; Right to hold over.** — In *this country*, however, a public office is *not* considered as being in the nature of a *grant or contract*, and the officer, as against the public,

3 Bro. P. C. 169; Willc. 293; Glover, 173.

[1] *Ib.;* Rex *v.* Phillips, 1 Str. 394.

[2] 9 Anne, chap. xx. sec. 8.

[3] 5 and 6 Wm. IV. chap. lxxvi. sec. 49; *ante*, sec. 35, and notes; Reg. *v.* McGowan, 11 Ad. & E. 869.

[4] 6 and 7 Wm. IV. chap. cv. sec. 4.

[5] 3 and 4 Vict. chap. xlvii.

[6] Rex *v.* Doncaster, 2 Ld. Raym. 1564; Foot *v.* Prowse, *supra*.

[7] Willc. 296, pl. 766; Reg. *v.* Durham, 10 Mod. 147; Dighton's Case, 1 Vent. 82.

has no freehold or property in the office; and it is almost an invariable provision of law that all officers shall be elected or appointed for a fixed and definite period. To guard against lapses, sometimes unavoidable, the provision is almost always made in terms that the officer shall *hold until his successor is elected and qualified.* But even without such a provision, the American courts have not adopted the strict rule of the English corporations which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers who hold over until their successors are elected, unless the legislative intent to the contrary be manifested.[1] Thus in Vermont it is held, — there being no statute to the contrary, and such having been the practice, — that school officers elected at the annual meeting hold over until others are elected at another annual meeting, whether more or less than a year from the time of their election.[2]

§ 220 (159). **Holding over.** — The law on the *subject of holding over* by corporate officers has been thus stated by a learned American judge: "Where, in the charter or organic law of a corporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a particular day, and that they shall hold from one charter (election) day till the next, or that they shall be elected 'for the year ensuing *only*,' in such case they *cannot hold over* beyond the next election day or the end of the year."[3] "But where, by the constitution of the corporation, the

[1] People *v.* Runkel, 9 Johns. 147; Slee *v.* Bloom, 5 Johns. Ch. 366, 378; 2 Kent Com. 238; Kelsey *v.* Wright, 1 Root (Conn.), 83; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479; Lynch *v.* Laffland, 4 Coldw. (Tenn.) 96; South Bay, &c. Co. *v.* Gray, 30 Me. 547; Elmendorf *v.* Mayor, &c. of New York, 25 Wend. (N. Y.) 693; State *v.* Wilson, 12 Lea (Tenn.), 246. And see cases *infra*. For the rule when *officers resign to avoid service of process*, see *post*, sec. 887.

[2] Chandler *v.* Bradish, 23 Vt. 416 (1851).

"The better opinion," says *Shaw*, C.J. *arguendo*, in Overseers of Poor, &c. *v.* Sears, 22 Pick. 122, 130, "is that town officers *annually* chosen hold their offices until others are chosen and qualified in their place." School District *v.* Atherton, 12 Met. (Mass.) 105 (1846); Dow *v.* Bullock, 13 Gray (Mass.), 136 (1859). So in *Illinois*. People *v.* Fairbury, 51 Ill. 149 (1869). So in *Connecticut*, an officer elected for "the year ensuing" is, in the absence of any other restrictive provision, entitled to hold beyond the year, and until he is superseded by the election of another person in his place. McCall *v.* Byram Manuf. Co., 6 Conn. 428 (1827), where the authorities are reviewed and commented on by *Hosmer*, C. J.; s. p. Cong. Soc. &c. *v.* Sperry, 10 Conn. 200; State *v.* Fagan, 42 Conn. 32 (1875); Wier *v.* Bush, 4 Litt. (Ky.) 433. Where, by statute, an officer holds for a given term, and "until his successor is elected and qualified," he continues in office until his successor is duly elected and qualified, though this (from failure to elect, or from other causes) be after the expiration of the term. Stewart *v.* State, 4 Ind. 396 (1853); Tuley *v.* State, 1 Ind. 500, 515; Lawhorne, *In re*, 18 Gratt. (Va.) 85.

[3] Tuley *v.* State, 1 Ind. (Cart.) 500. 502 (1849), *per Perkins*, J.; King *v.*

officers are elected for a term, and until their successors are elected and qualified, or where they are elected 'for the year ensuing,' and the charter or organic law contains no restrictive clause, the officers *may continue to hold* and exercise their offices, after the expiration of the year, until they are superseded by the election of other persons in their places."[1]

§ 221 (160). **Right to hold over as against the State.** — As against the public, however, officers cannot found a valid title or *right to*

Mayor, &c., 6 Vin. Abr. 296; Corporation of Banbury, 10 Mod. 346; Rex *v.* Passmore, 3 Term R. 199; 6 Petersd. Abr. 738. But whether a provision merely that an officer shall "be annually elected on a particular day" is an implied restriction that he shall not hold over, see the cases in *Vermont*, *Massachusetts*, *New York*, *Illinois*, and *Connecticut*, above cited. The weight of authority in this country is the other way. Where a city charter gave the mayor power to hold until his successor was elected and qualified, but denied this power to the members of the city council by providing that they should be elected for a specified term, "*and no longer*," and that their seats should be vacated at the end of such term, they cannot hold over, and their action, after the time thus fixed, is void, and does not bind the corporation. Louisville *v.* Higdon, 2 Met. (Ky.) 526 (1859). When the law is silent as to the term, but requires an election to be held every two years, an officer holds over until his successor is provided. Cordiell *v.* Frizzell, 1 Nev. 130.

[1] *Per Perkins*, J., Tuley *v.* State, 1 Ind. (Cart.) 500, 502 (1849) (action on official bond against sureties). The Queen *v.* Owens, 2 E. & E. 86; Frost *v.* Chester, 5 E. & B. 531; Foot *v.* Prowse, Str. 625; Queen *v.* Durham, 10 Mod. 146; King *v.* Lisle, Andrews, 163; McCall *v.* Manufacturing Co., 6 Conn. 428; 9 Conn. 536; 10 Conn. 200; 17 Conn. 588; Kelsey *v.* Wright, 1 Root, 83; Wier *v.* Bush, 4 Litt. (Ky.) 429; Wheeling *v.* Black, 25 W. Va. 266; People *v.* Runkel, 9 Johns. (N. Y.) 147; Vernon Society *v.* Hills, 6 Cow. (N. Y.) 23; Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366; Pender *v.* King, 6 Vin. Abr. 296; 2 Kent Com. 295, note *b*; Hicks *v.* Launcelot, 1 Rol. Abr. 513; Bank *v.* Petway, 3 Humph. (Tenn.) 522; Stewart *v.* State, 4 Ind. 396; Rex *v.* Poole, Cas. temp. Hardw. 23, and Phillips *v.* Wickham, 1 Paige Ch. 590, were considered to have a contrary bearing. It was decided, in Beck *v.* Hanscom, 9 Fost. (29 N. H.) 213, 222 (1854), that where the charter or incorporating act made no provision for the continuance of corporate officers in office after the expiration of the term for which they were elected, they could not hold over until others should be chosen and qualified; citing the opinion of Chancellor *Walworth*, in Phillips *v.* Wickham, 1 Paige, 590; but admitting that The People *v.* Runkle, 9 Johns. (N. Y.) 147, and Trustees *v.* Hills, 6 Cow. (N. Y.) 23, held a different view. In People *v.* Tieman, 8 Abb. Pr. 359; s. c. 30 Barb. (N. Y.) 193, the Supreme Court, at special term, denied that the officer himself could hold over unless authorized by statute, though to protect the public his acts are sustained. See Cocke *v.* Halsey, 16 Pet. 71. One holding a municipal office, under a valid appointment, is not precluded from continuing to act thereunder until his successor is elected and qualified, by the mere fact that he has taken an oath and filed an official bond under an illegal election. Forristal *v.* People, 3 Ill. App. 470. Under the Constitution and laws of *Virginia*, officers *must qualify before* the day on which their terms begin, and on failure to do so the offices are vacant. In such case the incumbents continue to perform the duties of the office after the expiration of their own terms until their successors are qualified. Johnson *v.* Mann, 77 Va. 265; see *supra*, sec. 214, note.

hold over upon their own neglect of duty. Therefore, where the charter made it the express duty of the trustees in office to give *notice of, and themselves to hold, the annual elections*, it was held that if they omitted to discharge this duty, though inadvertently, in consequence of which omission there was and could be no election, that *they were not entitled to hold over*, although by the charter it was provided that they should continue in office until a new election should be made and their successors should qualify.[1]

§ 222 (161). **Vacancies in Municipal Offices, when filled.** — At common law there must be a *vacancy* in the office existing *at the time of the election*; "for one cannot," says Mr. Willcock, "be elected to a corporate office in reversion."[2] The same doctrine has been recognized in this country, and a vacancy must exist before an election to fill it can be ordered,[3] and an election to fill an anticipated vacancy is not valid unless expressly authorized by the charter or statute.[4] Elections, however, in advance of the expiration of the regular term of the incumbent of an office, are always provided for and held, but such cases are not elections to vacancies within the meaning of the rule under consideration. Where the charter provides that in case of the absence of the mayor from the city, another

[1] People *v.* Bartlett, 6 Wend. (N. Y.) 422 (1831). In such a case, being trustees *de facto*, their *acts* would be good. And their *title* would also be good except when called in question by *quo warranto*. *Ib.*; Lynch *v.* Laffland, 4 Coldw. (Tenn.) 96 (1867). *Validity of acts of officers de facto*. *Ante*, secs. 215, note, 216, note. People *v.* Stevens, 5 Hill (N. Y.), 616, *per Bronson*, J.; People *v.* Runkle, 9 Johns. (N. Y.) 147; Trustees *v.* Hill, 6 Cow. (N. Y.) 23; Plymouth *v.* Painter, 17 Conn. 585; Smith *v.* State, 19 Conn. 493; People *v.* Bartlett, 6 Wend. (N. Y.) 422; State *v.* Jacobs, 17 Ohio, 143; Hinton *v.* Lindsay, 20 Ga. 746; *post*, secs. 276, 892. The *unconditional repeal* of a municipal charter *abolishes all the offices* under it; so also does the substitution of a new charter having inconsistent provisions, and not providing for the rights of officers under the old charter. Crook *v.* People, 106 Ill. 237. See this case also as to who are "the city officers then in office," as used in the Incorporation Law of Illinois.

[2] Willc. Corp. 207, pl. 526; Hob. 150; Skin. 45; Glover, 216.

[3] Lindsey *v.* Luckett, 20 Tex. 516; Biddle *v.* Willard, 10 Ind. 63 (1857); People *v.* Witherell, 14 Mich. 48.

[4] Biddle *v.* Willard, *supra*. In this case it was said, that a resignation to take effect at a fixed future time may, if no new rights have attached, be withdrawn, even after acceptance, by the consent of the party accepting; and under the laws of that State it was held that such a resignation did not create a vacancy which would authorize an election at a period prior to the taking effect of the resignation. See *infra*, secs. 225, note, 226, note.

There is no technical or 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. *Per Stuart*, J., Stocking *v.* State (vacancy in new judicial circuit), 7 Ind. 326 (1855); followed, Collins *v.* State, 8 Ind. 344 (1856).

officer shall act as mayor only such an absence as will render the mayor unable to perform the duties of his office is intended.[1]

§ 223 (162). **Refusal to serve in Office.** — It is an established *common-law principle* in England, that since a municipal corporation is entitled to the official service of its eligible members, it may, by virtue of its inherent or incidental power, pass a by-law imposing a pecuniary penalty upon such as *refuse*, without legal excuse, *an office* to which they have been duly elected.[2] The ground of this doctrine is clearly set forth by Lord Holt in Vanacker's Case, and although all of his reasoning is not applicable to our American municipal corporations, still it is believed that under the usual general welfare clause or under their incidental power to pass reasonable and necessary by-laws, they would be authorized, where such an ordinance did not contravene the charter or statute, or public legislative policy respecting offices, to impose a reasonable fine for refusing corporate offices. In *this country*, however, offices have not usually been regarded as burdens to be avoided, but rather as distinctions to be coveted, and hence there has been little occasion to call into exercise the power of the courts, or to test the authority of the corporations to enforce the undertaking of their offices. If, however, under the charter or statute, or the law or policy of the State, an officer has the *right to resign* or lay down his office at pleasure, as is usually the case with us, the authority to impose a fine for refusing to serve would probably not exist.[3]

[1] Detroit *v.* Moran, 46 Mich. 213.

[2] City of London *v.* Vanacker, 1 Ld. Raym. 496; s. c. Carth. 482; s. c. 12 Mod. 272; 1 Salk. 142; Rex *v.* Bower, 2 Dowl. & R. 761, 842; s. c. 1 Barn. & Cress. 587; Vintners' Co. *v.* Passey, 1 Burr. 239; Willc. 230; Glover, 181; Grant, 211. If of a public and magisterial nature, the penalty for refusal may be imposed, though the person be also liable to be punished by indictment, or, in the discretion of the court, by criminal information. London *v.* Vanacker, 1 Ld. Raym. 499; Rex *v.* Grosvenor, 1 Wils. 18; s. c. 2 Str. 1193; Rex *v.* Hungerford, 11 Mod. 132, 142; Rex *v.* Woodrow, 2 Term R. 732; Rex *v.* Whitwell, 5 Term R. 86; Rex *v.* Leyland, 3 M. & S. 184. The Municipal Corporations Act (5 and 6 Wm. IV. chap. lxxvi. sec. 51, Munic. Corp. Act. 1882, sec. 34) requires every qualified person elected to the office of alderman, councillor, auditor, or assessor, or mayor, to accept the office or pay a fine to the borough fund. The refusal to take the requisite oaths is a refusal of the office. Exeter *v.* Starre, 2 Show. 159. As there is a common-law duty to serve in an office to which a person has been duly elected, this duty may, if the office be sufficiently important, be enforced by *mandamus*, and the payment of the fine is not in lieu of service, unless the statute or by-law release him from service by treating the penalty as compensation. Rex *v.* Bower, 1 Barn. & Cress. 585; s. c. 2 Dowl. & R. 842; Rex *v.* Leyland, 3 Maule & Sel. 184; Rex *v.* Woodrow, 2 Term R. 731; *post*, sec. 830. By the above-mentioned provision of the Municipal Corporations Act of 5 and 6 Wm. IV., the fine is in lieu of the acceptance of the office. Grant on Corp. 222.

[3] See Willc. 133, pl. 308; Grant, 221, 222; *post*, sec. 226, note; Gates *v.* Delaware County, 12 Iowa, 405; United States *v.* Wright, 1 McLean, 509; State &c. *v.* Ferguson, 31 N. J. L. (2 Vroom) 107.

§ 224 (163). **Resignation of Municipal Offices.** — An office *must be resigned* either (first) expressly, or (second) by implication.[1] If the charter prescribes the *mode* in which the resignation is to be made, that mode should of course be complied with.[2] *Acceptance* by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority, the tender or offer to resign is revocable.[3] But if the statute provides that an officer may resign at pleasure and that his resignation shall take effect when filed, the principle just stated does not apply, and when his resignation is filed, he ceases to be an officer.[4] The right to accept a resignation is a power incidental to every corporation.[5] It is also a common-law principle that the right *to accept the resignation* of an officer is incidental to the power of appointing him.[6] If *no particular mode* is prescribed, neither the resignation nor acceptance thereof need be in writing, or in any form of words.[7]

[1] Regents of University *v.* Williams, 9 Gill & J. (Md.) 365, 422 (1838); Willc. 132, 238; Grant, 268, 246, note *e*; *Ib.* 221, 222.

[2] Willc. 239; Rex *v.* Hughes, 5 Barn. & Cress. 886, 896; Rex *v.* Mayor of Ripon, 1 Ld. Raym. 563; Rex *v.* Payne, 2 Chitty, 366; Reg. *v.* Morton, 4 Q. B. 146. The statute may provide that the officer shall continue until his successor is elected and qualified, and in such case he will not cease to be an officer merely by resigning so as to be *relieved from the discharge of his duties* as such officer. Badger *v.* United States, 93 U. S. 599 (1876) (*mandamus*); Amy *v.* Watertown, 130 U. S. 302 (1889). See, further on this point, *post*, sec. 887.

[3] Reg. *v.* Lane, 2 Ld. Raym. 1304; Rex *v.* Ripon, *supra*; Hazard's Case, 2 Rol. 11; Jenning's Case, 12 Mod. 402; Rex *v.* Patteson, 4 B. & Ad. 9; 1 Nev. & Mann. 612. The acceptance may be by entry in books, by vote, or resolution, or by treating the place as vacant and electing another to fill it, or ordering an election if to be filled by a popular vote. Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243; State *v.* Ancker, 2 Rich. (S. C.) 245. One elected to an office cannot *resign* it before he has qualified and become an incumbent of it. Miller *v.* Supervisors, &c., 25 Cal. 93; Willc. 236.

[4] Amy *v.* Watertown (No. 1), 130 U. S. 302 (1889), distinguishing Badger *v.* United States, *supra*. *Post*, sec. 887 *a*.

[5] Rex *v.* Tidderley, 1 Sid: 14; Hazard's Case, *supra*. The "common council" may regulate resignations by by-laws, and it may accept resignations, as it represents the corporation at large. Rawlinson (5th ed.) 317, note; Staniland *v.* Hopkins, 9 M. & W. 178; Willc. 240, pl. 615.

[6] Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243; asserting, *arguendo*, the incidental power of municipal corporations, *as such*, to accept resignations, and approving the opinion of Mr. Willcock (Munic. Corp. 240), who observes, respecting the cases on this subject: "I presume that a right to accept a resignation passes incidentally with a right to elect." See, also, Rex *v.* Tidderley, 1 Sid. 14, *per Hale*, Ch. B.; Jenning's Case, 12 Mod. 402; Taylor's Case, Poph. 133. The English Municipal Corporations Act 1882, sec. 36, provides that any "person elected to a corporate office may at any time by writing signed by him, and delivered to the town-clerk, resign the office, on payment of the fine provided for non-acceptance thereof."

[7] Same authorities; and see, also, Rex *v.* Ripon, 1 Ld. Raym. 563; s. c. 2 Salk. 433; Regina *v.* Lane, 1 Ld. Raym. 1304; Jenning's Case, 12 Mod. 402; Regina *v.*

§ 225 (164). **Implied Resignation; Incompatible Office.** — An office may be *impliedly resigned* or vacated by the incumbent being elected to and accepting an *incompatible office*. The rule, says Parke, J., in a leading English case on this subject, that where two offices are incompatible they cannot be held together, is founded on the plainest principles of public policy, and has obtained from very early times.[1] The principle applies not only where the second office is the superior and more important one, but also where it is not.[2] The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor amotion being necessary.[3]

§ 226 (165). **Same subject. Acceptance of Resignation.** — The *doctrine just stated* is undoubtedly true where the acceptance of the second office is made by or with the privity of that authority which has the power to accept the surrender of the first or to amove from it; but "such acceptance does not operate as an absolute avoidance, in cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment."[1] If one holding an office in a corporation be by that corporation elected to an incompatible office, this, of course, is a consent on the part of the corporation that the first office be vacated; and if the second office be accepted, the first is at once and *ipso facto* determined. But, until acceptance, the former office is not vacated.[2]

Gloucester, Holt R. 450; Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243, 248; State *v.* Allen, 21 Ind. 516 (1863); People *v.* Police Board, 26 N. Y. 316; McCunn's Case, 19 N. Y. 188, distinguished. Statutory limitation on the right to resign before successor is chosen and qualified. Badger *v.* United States, 93 U. S. 599 (1876); People *v.* Common Council, 77 N. Y. 503, approving text. A resignation made to the officer who makes the appointment vacates the office as soon as it is received; there is no acceptance necessary. Gilbert *v.* Luce, 11 Barb. (N. Y.) 91; Olmsted *v.* Dennis, 77 N. Y. 379.

[1] *Per Parke*, J., Rex *v.* Patteson, 4 Barn. & Adol. 9 (1832); 1 Nev. & Mann. 612; Regents of the University *v.* Williams, 9 Gill & Johns. (Md.) 365 (1838); 1 Kyd, 369–375; State *v.* Butz, 9 S. C. 156; People *v.* Hanifan, 96 Ill. 420.

By the common law, when two offices or public trusts are incompatible with each other, a person holding the one is not disqualified to be appointed or elected to the other, but his acceptance of the second office is in law an implied resignation of the first, whenever it may be resigned by the mere act of the incumbent without the assent or concurrence of a superior authority. *Per Gray*, C. J., in Commonwealth *v.* Hawkes, 123 Mass. 525 (1878). The rule that one vacates an office by accepting another office incompatible therewith, — applied to a solicitor's acceptance of the office of representative in Congress. State *v.* Butz, 9 S. C. 156; *post*, sec. 427, note.

[2] Milward *v.* Thatcher, 2 Term R. 87, which settled this point conclusively; Rex *v.* Trelawney, 3 Burr. 1615; Gabriel *v.* Clerke, Cro. Eliz. 76; Rex *v.* Godwin, Doug. 397, note 22; Willc. 240, pl. 617; Glover, 139.

[3] Gabriel *v.* Clerke, *supra;* Verrior *v.* Sandwich, 1 Sid. 305; Milward *v.* Thatcher, *supra;* Glover, 329; Willc. 240, pl. 617. Where a *resignation* is to take effect at a *future day* the council may fill the vacancy before that day. Leech *v.* The State, 78 Ind. 570. *Supra*, sec. 222, note.

§ 227 (166). **Incompatible public Offices.** — The *rule under consideration* is not limited to corporate offices, but extends, both in its principle and application, *to all public offices*. Thus, if a judge of the Common Pleas accepts an appointment to the King's Bench, the first office is vacated, since it is the duty of the one to correct the errors of the other.[3] Whether offices are incompatible depends upon the charter or statute, and the nature of the duties to be performed.[4] The same man cannot be judge and minister in the same court, and hence the offices are not compatible.[5] Where the re-

[1] *Parke*, J., Rex *v.* Patteson, *supra*. It has been held in this country, however, that an incumbent of a public office *may lay it down at his pleasure*, and that the officer to whom the resignation, by law, is to be made cannot forbid it or refuse it; and that when received by such officer it operates to vacate the office resigned. Gates *v.* Delaware County, 12 Iowa, 405; United States *v.* Wright, 1 McLean, 509. The delivery by a city engineer, whose office was elective, of a written resignation to the mayor and council, takes effect without any acceptance. State *v.* Mayor of Lincoln, 4 Neb. 260 (1877). *Lake*, C. J., says: "In absence of statute, there is no rule requiring acceptance of resignation to make it effective. The refusal of the municipal authorities to accept it will not compel the officer to retain the office against his will." *Ib.* Compare State *v.* Ferguson, 2 Vroom (31 N. J. L.), 107, 129; Lewis *v.* Oliver, 4 Abb. Pr. R. 121; People *v.* Porter, 6 Cal. 26. Denying right under statute to withdraw resignation after delivering it. State *v.* Hauss (sheriff), 43 Ind. 105 (1873); s. c. 13 Am. Rep. 314. *Ante*, sec. 222, note.

[2] *Ib.;* Milward *v.* Thatcher, *supra;* Rex *v.* Pateman, *supra;* Willc. 243, pl. 623; Arkwright *v.* Cantrell, 7 Ad. & E. 565. Acceptance necessary; see, also, State *v.* Ferguson, 2 Vroom (31 N. J. L.), 107 (1864); see Lewis *v.* Oliver, 4 Abb. Pr. 121. Acceptance of an incompatible office, even under a void election, puts an end to the first office; and the officer, on being ousted from the second office, cannot be restored to the first. Rex *v.* Hughes, 5 B. & C. 886; Rex *v.* Bond, 6 D. & R. 333.

[3] Glover on Corp. 139.

[4] Milward *v.* Thatcher, *supra*, *per Buller*, J.; People *v.* Carrique, 2 Hill (N. Y.), 93, and cases cited; Staniland *v.* Hopkins, 9 M. & W. 178.

Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible for him to discharge the duties of both offices (Bryan *v.* Cattell, 15 Iowa, 538 (1864), *per Wright*, C. J.); and accordingly that case held that the office of district attorney and of captain in the volunteer service of the United States were not legally incompatible. Two offices are incompatible where the holder cannot, in every instance, discharge the duties of each. *Per Bailey*, J., Rex *v.* Tizzard, 17 Eng. C. L. 193.

[5] Poph. 28, 29; 1 Sid. 305; 2 Keb. 93; Glover, 139.