§ 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.

corder is an adviser to the mayor, the two offices cannot be held together.[1] So a representative in Congress holds a *public office*, within the meaning of a charter which prohibits an alderman from holding "any other public office;" and upon his election to and acceptance of "such public office" during his term as alderman, his office as alderman immediately becomes vacant.[2] The proper proceeding is by *mandamus*[3] to compel the common council to order a special election to fill such vacancy, and not by *quo warranto* to try the title to such office, such representative being neither a *de facto* nor *de jure* officer.

§ 228 (167). **Abandonment of Office.** — An office may be *vacated by abandonment*.[4] A *voluntary enlistment* by a civil officer in *the military service* of the United States for three years, or during the war, vacates the civil office, being a constructive resignation by abandonment.[5] So where *residence within the corporation* is necessary in order to be eligible to hold an office, permanent removal from the municipality may undoubtedly be taken as evincing an intention to resign, and as an implied resignation.[6]

§ 229 (168). **Compensation of Municipal Officers.** — We have had occasion to discuss the *complete supremacy of the legislature* over public corporations, limited only by constitutional restraints.[7] Its authority over public offices, which are created or authorized solely for the public convenience, is equally great,[8] and may be conferred upon municipal corporations with respect to municipal offices. The legislature, in the absence of constitutional limitation, may create and abolish offices, add to or lessen their duties, abridge or extend the

[1] Willc. 241, pl. 518; Rex *v.* Marshall, cited, 2 B. & A. 341. *Clerk* of a school district *and collector* of the district were held not incompatible, and the same person may, therefore, be appointed to both offices, there being no prohibition in the act. Howland *v.* Luce, 16 Johns. (N. Y.) 135 (1819). The offices of *councilman and city marshal* are incompatible. State *v.* Hoyt, 2 Oreg., 246. See generally as to incompatible *State and Federal offices*, Respublica *v.* Dallas, 3 Yeates (Pa.), 316; s. c. 4 Dall. 229; Commonwealth *v.* Binns, 17 Serg. & Rawle (Pa.), 219; Commonwealth *v.* Ford, 5 Barr (Pa.), 67.

[2] People *v.* Common Council, 77 N. Y. 503; People *v.* Carrique, 2 Hill (N. Y.), 93; People *v.* Nostrand, 46 N. Y. 381; People *v.* Green, 58 N. Y. 304.

[3] Lamb *v.* Lynd, 44 Pa. 336; State *v.* Rahway, 33 N. J. L. 110; Fish *v.* Weatherwax, 2 Johns. Cas. 217.

[4] Willc. 238; State *v.* Allen, 21 Ind. 516 (1863). In People *v.* Hanifan, 96 Ill. 420, the refusal of an alderman to attend council meetings was held to be an abandonment of the office.

[5] State *v.* Allen, 21 Ind. 516 (1863). But see Bryan *v.* Cattell, 15 Iowa, 538.

[6] Willc. 238; *ante*, sec. 195; Curry *v.* Stewart, 8 Bush (Ky.), 560 (1871).

[7] *Ante*, chap. iv.

[8] *Ante*, chap. iv.; State *v.* Douglass, 26 Wis. 428 (1870); s. c. 7 Am. Rep. 87, and note. As to special constitutional restrictions, *ante*, secs. 58, 60.

term of office, and increase, diminish, or regulate the compensation of officers at its pleasure.[1] But after the services are rendered there is an *implied* (if not express) *contract* to pay therefor at the rates fixed by the ordinance or law in force, at the date when the services were rendered, which contract cannot be impaired by subsequent legislation. Hence, where the law in force at the date when a county district attorney rendered services, provided for the levy of taxes for county purposes at a specified maximum rate, and after the services were rendered a constitutional provision was adopted restricting the limit of taxation, it was held that such restrictive provision impaired the obligation of the plaintiff's contract *pro tanto*, and was, to that extent, void, and that the plaintiff was entitled to a *mandamus* to the county officers, to levy and collect a tax under the law on this subject which was in force when his services were rendered.[2]

§ 230 (169). **Compensation of Officers.** — There is *no such implied obligation* on the part of municipal corporations, and no such relation

[1] *Ante*, chap. iv.; and see also Conner *v.* Mayor, &c. of New York, 1 Seld. (5 N. Y.) 285 (1851); affirming s. c. 2 Sandf. S. C. R. 355; Warner *v.* People, 7 Hill (N. Y.), 81; 2 Denio, 272; People *v.* Morrell, 21 Wend. (N. Y.) 563 (1839); Phillips *v.* Mayor, &c. of New York, 1 Hilt. (N. Y. Com. Pl.) 483; Bryan *v.* Cattell, 15 Iowa, 538, 553, *per Wright*, C. J.; Coffin *v.* State, 7 Ind. 157 (1855); People *v.* Mahaney, 13 Mich. 481; Turpen *v.* County Comm'rs, 7 Ind. 172; Oregon *v.* Pyle, 1 Oreg. 149; Bird *v.* Wasco Co., 3 Oreg. 282 (1871); Cowdin *v.* Huff, 10 Ind. 83; Cooley, Const. Lim. 276; Butler *v.* Pennsylvania, 10 How. 402; Smith *v.* New York, 37 N. Y. 518 (1868); Swann *v.* Buck, 40 Miss. 268 (1866). While the office is continued, and the officer not removed, he is entitled to salary. Hoke *v.* Henderson, 4 Dev. (N. C.) 1; Cotton *v.* Ellis, 7 Jones (N. C.) Law, 545. An officer holding over and continuing to discharge his official duties until his successor was qualified, was held to be entitled to compensation for the time without an express provision to that effect. Robb *v.* Carter, 65 Md. 321. A constitutional amendment prohibiting the legislature from *increasing the compensation* of a public officer during his *continuance* in office refers only to his holding under one appointment. Smith *v.* City of Waterbury, 54 Conn. 174. The same provision was declared to render illegal a vote of a city council to pay a joint standing committee for services rendered, though the office of councilman had no compensation attached to it. Garvie *v.* Hartford, 54 Conn. 441. A salary may be *reduced* during an official term. Harvey *v.* Rush County, 32 Kan. 159. An ordinance of a city is not a "law" within the meaning of the Constitution of *Pennsylvania* providing that "no *law* shall extend the term of any public officer or increase or diminish his salary, &c., after his election." Baldwin *v.* Philadelphia, 99 Pa. St. 164 (1881). Statute authorizing the common council to increase compensation of police justices for additional duties imposed upon them, was held to authorize only one increase, and a second increase was held to be invalid. Cox *v.* New York, 103 N. Y, 519.

[2] Fisk *v.* Jefferson Police Jury, 116 U. S. 131 (1885). Limit of taxation fixed when debt was created cannot be exceeded unless the limit has been enlarged by subsequent statutes. Stewart *v.* Jefferson Police Jury, 116 U. S. 135.

between them and officers which they are required by law to elect, as will oblige them to *make compensation* to such officers, *unless the right* to it *is expressly given* by law, ordinance, or by contract.[1] Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there *is no implied assumpsit* on the part of the corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery, and the amount.[2] If the charter or by-laws provide for a peculiar mode of compensation, as, for example, to a city surveyor for superintending grading of streets, by an assessment upon the property owners, the city is not liable before it collects the money, if it makes the requisite assessments, and is proceeding with proper diligence to enforce them.[3]

[1] Sikes *v.* Hatfield, 13 Gray (Mass.), 347 (1859); Barton *v.* New Orleans, 16 La. An. 317; Garnier *v.* St. Louis, 37 Mo. 554; Rowe *v.* County of Kern, 72 Cal. 353; White *v.* Levant, 78 Me. 568; Perry *v.* Cheboygan, 55 Mich. 250; Haswell *v.* New York, 81 N. Y. 255. It is advisable that salaries should be fixed by ordinance, and not voted as a matter of grace and favor. Smith *v.* Commonwealth, 41 Pa. St. 335; Devoy *v.* New York, 39 Barb. (N. Y.) 169; Bladen *v.* Philadelphia, 60 Pa. St. 464. See opinion of *Thompson*, C. J., Philadelphia *v.* Given, *Ib.* 136. Municipal corporations are not liable for services performed by an officer under an unconstitutional statute. Meagher *v.* County, 5 Nev. 244 (1869); *post*, sec. 910; City of Central *v.* Sears, 2 Col. 588 (1875). The first sentence of this section of the text cited and applied in Bosworth *v.* New Orleans, 26 La. An. 494, 495 (1874). An *officer suspended* without sufficient cause and another appointed in his place cannot recover for salary subsequently accruing until there has been an adjudication in a direct proceeding declaring him entitled to the office and that the incumbent was a usurper. Selby *v.* Portland, 14 Oreg. 243. Where, at the time an officer is elected, his salary has not been fixed, an ordinance passed during his term fixing his salary, is not a violation of the constitutional restriction upon enlarging or diminishing the salary of an officer during his term of office. State, *ex rel. v.* McDowell, 19 Neb. 442; Wheelock *v.* McDowell, 20 Neb. 160. See also Purcell *v.* Parks, 82 Ill. 346; Rucker *v.* Supervisors, 7 W. Va. 661. If the legislature *shortens* an officer's term of office he cannot recover his salary for his unexpired term. Long *v.* New York, 81 N. Y. 425. A *de facto* officer cannot recover the salary annexed to the office; the salary is an incident to the office and not to its occupation. Burke *v.* Edgar, 67 Cal. 182; Meehan *v.* Hudson, 46 N. J. L. (17 Vroom) 276. Further as to *de facto officers*, see *ante*, secs. 215 n., 221 n., 230 n., 235 n., 237 n., 256 and note.

[2] Locke *v.* Central City, 4 Col. 65. A public officer is not entitled to payment for duties imposed upon him by statute in the absence of an express provision for such payment. Jones *v.* Carmarthen, 8 M. & W. 605; Askin *v.* London, 1 Upper Can. Q. B. 292; Pringle and McDonald, *In re*, 10 Upper Can. Q. B. 254; Regina *v.* Cumberlege, 36 L. T. N. S. 700; Brazil *v.* McBride, 69 Ind. 244; Doolan *v.* Manitowoc, 48 Wis. 312; *supra*, sec. 216.

[3] Baker *v.* City of Utica, 19 N. Y. 326; People *v.* Supervisors, 1 Hill (N. Y.), 362; Cumming *v.* Mayor, &c. of Brooklyn, 11 Paige, 596; Jersey City *v.* Quaife, 2 Dutch. (N. J.) 63; Andrews *v.* United States, 2 Story C. C. 203; United States *v.* Brown, 9 How. 487; Barton *v.* New Orleans, 16 La. An. 317; McClung *v.* St. Paul, 14 Minn. 420 (1869); Smith *v.* Commonwealth, 41 Pa. St. 335. "It is very plain to us that a town officer, *as such*, has no legal claim against the town to recover pay for services rendered, unless by an express vote of the town, or a uniform usage to pay that particular officer from year to year, for his services. And in the latter case, it would be very questionable whether a recovery at law could be had, if it had all along been left to the town to make such compensation as they should deem reasonable after the services had been rendered. . . . The same principle has always been recognized in this State in regard to all officers. If no law of the State fixed their fees or pay, their services must be gratuitous." *Per Redfield*, J., Boyden *v.* Brookline, 8 Vt. 284 (1836). But the decision (in Boyden *v.* Brookline, 8 Vt. 284) does not extend strictly beyond *official* services; and when a town agent, acting for the town, or the town itself, employs an attorney at law to prosecute or defend suits against the town, the latter is liable for the services. And the rule is the same if the "town agent," being an attorney, renders for the town professional services, in suits which the proper authorities of the town directed to be instituted. Langdon *v.* Castleton, 30 Vt. 285 (1858); City of Central *v.* Sears, 2 Col. 588; Locke *v.* Central City, 4 Col. 65. A provision that a *city marshal* shall have the same duties, responsibilities, and fees as sheriffs does not import that he may recover from the *county* in which the city is located for services rendered in the administration of the criminal law. Christ *v.* Polk County, 48 Iowa, 302. A municipal officer is presumed to know the city *ordinances* and *orders* which fix his salary, and his acceptance of the amount so fixed will estop him from claiming more. Galbreath *v.* Moberly, 80 Mo. 484; Rau *v.* Little Rock, 34 Ark. 303. As to estoppel by acceptance see also Hobbs *v.* Yonkers, 102 N. Y. 13; McInery *v.* Galveston, 58 Tex. 334.

[1] Commonwealth *v.* Bacon, 6 Serg. & Rawle (Pa.), 322 (1820); followed, Baker *v.* Pittsburgh, 4 Pa. St. 49 (1846) (abolishing annual salary of collector of tolls); also, approved, University *v.* Walden, 15 Ala. 655 (1849): but distinguished, Carr *v.* St. Louis, 9 Mo. 190; Comw. *v.* Mann, 5 W. & S. (Pa.) 418; Smith *v.* County, 2 Par. (Pa.) 293; Madison *v.* Kelso, 32 Ind. 79; Warner *v.* People, 2 Denio (N. Y.), 272; Conner *v.* Mayor, &c. of New York, 1 Seld. (5 N. Y.) 285, 296; Augusta *v.* Sweeny, 44 Ga. 463; Brazil *v.* McBride, 69 Ind. 244; Des Moines *v.* Hillis, 55 Iowa, 643; Marden *v.* Portsmouth, 59 N. H. 18. Under special circumstances, — *Held*, that the salary of a city officer could be diminished by the council. Cox *v.* Burlington, 43 Iowa, 612 (1876). A legislature may authorize the reduction of the salary of a city officer during his term. Love *v.* Jersey City, 40 N. J. L. 456. A statutory provision that "the compensation or salary of any officer shall be fixed before his appointment" does not require that it be fixed before every new appointment; it is sufficiently complied with when the salary is once fixed. People *v.* Crissey, 91 N. Y. 616. A statute or city

§ 231 (170). **Power to abolish Office, and to regulate and to change Salary.** — A municipal corporation *may*, unless restrained by charter, *abolish an office created by ordinance;* and may also, unless the employment is in the nature of a contract, *reduce or otherwise regulate the salaries and fees* of its officers, according to its view of expediency and right. Although an officer may be elected or appointed for a fixed period, yet where he is not bound, and cannot be compelled to serve for the whole time, such election or appointment cannot be considered a contract to hire for a stipulated term. Ordinances fixing salaries are *not in the nature of contracts* with officers.[1]

§ 232 (171). **Same subject. Exception to Rule resting on Contract.** — But where the services to be performed are *professional or private, rather than public or official*, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be *a contract*, and not subject to be impaired by the corporation. Thus the appointment or election by a city council, for a *fixed and definite* period, of a city officer, — for example, *a city engineer*, for one year, at the rate of one thousand dollars per year, — if accepted by him, constitutes, in the opinion of the Supreme Court of Massachusetts, a contract between him and the city; and the city, in such a case, has no authority, unless expressly conferred, to abolish or shorten the term of office, so as to deprive the officer, without his consent, of the right to compensation for the full period, unless for misbehavior or unfitness to discharge the duties of the place.[1]

ordinance fixing the amount of the salary of a city officer is not in the nature of a contract. Love *v.* Jersey City, 40 N. J. L. 456. Such officer, by continuing in office and receiving warrants for monthly payments of his salary during the term, waives all objections to the reduction. *Ib.* In an action against a city treasurer, on his official bond, for moneys received by him, he cannot charge commissions for the whole term at the rate allowed by law at his accession to office, when his compensation has been changed to a lower rate subsequently. Iowa City *v.* Foster, 10 Iowa, 189. Where a police judge agreed to accept the compensation fixed by the city council in payment of his services, if the council would by a change of ordinance provide compensation for the clerk of the court, — *Held*, that the agreement was based on a valid consideration; but that in cases where judgment was rendered against the city before such change, no fees could be recovered. Crane *v.* Des Moines, 47 Iowa, 105; *supra*, sec. 212. In Commonwealth *v.* Bacon, *supra*, it was held that an ordinance which reduced the salary of the mayor after the commencement of his term was valid. The court said, "This cannot be considered in the nature of a hiring for a year, because it was not obligatory on the mayor to serve out the year." Though an ordinance may fix term and compensation of officer, *the office may be abolished*, if its abolition be not forbidden, or salary reduced. There is no contract between corporation and officer that the service shall continue, or the salary not be changed. Waldraven *v.* Memphis, 4 Coldw. (Tenn.) 431 (1867); Hoboken *v.* Gear, 3 Dutch. (N. J.) 265 (1859). The power *to abolish municipal offices* was reaffirmed, citing text, in Butcher *v.* Camden (fire marshal of city), 29 N. J. Eq. (2 Stew.) 478 (1878). General power to a corporation to fix the compensation of its officers does not authorize it to take away the fees of an officer, which are *specifically* fixed by the same charter. Carr *v.* St. Louis, 9 Mo. 190 (1845). The legislature may provide that the salary of an officer may be fixed by one board, *e. g.*, a common council, though it is payable by another, *e. g.*, a county, or board of supervisors; and in that case, the latter have no authority to change it when once fixed. People *v.* Auditors of Wayne, 13 Mich. 233; People *v.* Wayne Co. Auditors, 41 Mich. 4. Where by the general law the compensation of the mayor, which was specified, could be changed by ordinance "*but not during his term of office*," an ordinance providing that "after the expiration of the term of the present mayor of the city, the mayor shall serve without compensation" was held to be *ultra vires* and void, on the ground that a power to *change* the salary was not a power to *abolish* it altogether. State, *ex rel. v.* Nashville, 15 Lea (Tenn.), 697.

[1] Chase *v.* Lowell, 7 Gray (Mass.), 33 (1856); and see Caverley *v.* Lowell, 1 Allen (Mass.), 289 (1861), as to ordinance constituting a contract with city attorney. These cases, if really distinguishable from the others, should not, it is believed, be extended, but the principle limited to instances where the services are not essentially official in their nature, and where the officer or other party is bound to serve for the fixed and definite period. Appointment of *police officer for a year*, held not to create a contract, and he was removable, without cause, within that period. Chicago *v.* Edwards, 58 Ill. 252 (1871).

A resolution of the council empowering an individual to collect the taxes due the city, at a given rate per cent on the amount collected for his compensation, may be repealed or modified at any time by the corporation, on the sole condition that it shall be liable for any compensation earned under the resolution previous to its repeal or modification. Hiestand *v.* New Orleans, 14 La. An. 330 (1859). The court did not regard the resolution as creating a contract, or, if so, it was one of mandate, revocable at the will of the principal. *Ib.*

§ 233 (172). **Extra Compensation.** — It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He *cannot legally claim additional compensation* for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties within the scope *of the charter powers* pertaining *to the office* are increased and not his salary.[1] Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would introduce intolerable mischief. The rule, too, should be rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not, be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse.[2]

[1] *Ante*, sec. 216. Though the duties of a municipal officer may be increased by a city council, it has no power to confer upon another officer the duties, powers, and rights appertaining to his office *by statute*. So, a treasurer duly appointed and qualified, whose duty it was by law to receive and pay out the money belonging to a city, was held to be entitled to commissions upon the proceeds of bonds sold by the mayor under authority of the council. Beard *v.* Decatur, 64 Tex. 7.

[2] *Per Potts*, J., in Court of Errors and Appeals, Evans *v.* Trenton, 4 Zabr. (24 N. J. L.) 766 (1853); *ante*, sec. 216. The text cited and approved in Decatur *v.* Vermillion, 77 Ill. 315 (1875). See, also, Andrews *v.* United States, 2 Story C. C. 202; Palmer *v.* The Mayor, &c. of New York, 2 Sandford (N. Y.) 318; Bussier *v.* Pray, 7 Serg. & Rawle (Pa.) 447; Angell & Ames on Corp. sec. 317; Gilmore *v.* Lewis, 12 Ohio, 281; Detroit *v.* Redfield, 19 Mich. 376; Sidway *v.* South Park Commissioners, 120 Ill. 496. A salaried officer cannot sue the city for a balance of salary due unless there has been some default on the part of the city in making the

§ 234 (173). **Same subject.** — Not only has an officer, under such circumstances, no legal claim for extra compensation, but a *promise to pay* him an *extra fee or sum* beyond that fixed by law *is not binding*, though he renders services and exercises a degree of diligence greater than could legally have been required of him.[1]

necessary appropriations. Waterman *v.* New York, 7 Daly (N. Y.), 489. It has been held in *Pennsylvania* that where an officer's compensation is *fixed by statute* he cannot recover extra compensation for *expenses* incurred in performing his duties, even when the custom had been for a long time that the corporation should bear them. Albright *v.* County of Bedford, 106 Pa. St. 582.

A *salaried* officer of a public corporation has no claim for compensation *extra* his salary, on the ground that the duties of his office have been increased, or new duties added since the salary was fixed. People *v.* Supervisors, 1 Hill (N. Y.), 362; Wendell *v.* Brooklyn, 29 Barb. (N. Y.) 204; Palmer *v.* Mayor, &c. of New York, 2 Sandf. (N. Y.) 318; *ante*, sec. 216; Covington *v.* Mayberry, 9 Bush (Ky.), 304; Andrews *v.* Pratt (compensation for sale of county's railroad stock), 44 Cal. 309 (1872). Special instances, where a claim for compensation, in the absence of express provision, has been sustained, where the law has required a public officer to perform a duty, attended with trouble and expense, clearly *outside* of his regular official duties, see People *v.* Supervisors, 12 Wend. (N. Y.) 257; Bright *v.* Supervisors, 18 Johns. (N. Y.) 242; Mallory *v.* Supervisors, 2 Cowen (N. Y.), 531; *Ib.* 533; Detroit *v.* Redfield, 19 Mich. 376 (1869); McBride *v.* Detroit, 47 Mich. 236; s. c. 49 Mich. 239. If a county attorney goes beyond the limits of his county, at the instance and with the consent of the county board, he may recover reasonable compensation in addition to his salary. Huffman *v.* Greenwood Co., 23 Kan. 281; Butler *v.* Neosho Co., 15 Kan. 178; Leavenworth Co. *v.* Brewer, 9 Kan. 307. This subject is discussed in White *v.* Polk Co., 17 Iowa, 413; *post*, sec. 479.

Where salary *is fixed by ordinance, it cannot be changed* by a committee or individual members of the corporation; nor will their promise to pay extra compensation for the duties of the office be binding on the corporation. But for services performed by request, not part of the duties of his office, and which could as appropriately have been performed by any other person, such officer may, in proper cases, recover a just remuneration. Evans *v.* Trenton, 4 Zabr. (24 N. J. L.) 764 (1853); s. p. Detroit *v.* Redfield, 19 Mich. 376 (1869); Converse *v.* United States, 21 How. 463. For services required by ordinances, *the city attorney* is entitled to the compensation fixed by ordinance, and no other; and the mayor, by virtue of his duty to see that the "ordinances are duly enforced," cannot bind the corporation to pay more than the fixed salary or compensation, and this duty does not authorize that officer to employ assistant or independent counsel in any case, at the expense of the corporation. Carroll *v.* St. Louis, 12 Mo. 44 (1849); Memphis *v.* Brown, 20 Wall. 289, 321 (1873); *post*, sec. 479. Further, as to liability of city to attorneys, see the chapter on Contracts.

[1] Heslep *v.* Sacramento, 2 Cal. 580 (vote of $10,000 to mayor for meritorious services, held void); Hatch *v.* Mann, 15 Wend. (N. Y.) 44; reversing, s. c. 9 *Ib.* 262; approved, Palmer *v.* Mayor, &c. of New York, 2 Sandf. (N. Y.) 318; Batho *v.* Salter, Latch, 54; W. Jones, 65; s. c. Lane *v.* Sewell, 1 Chitty, 175; *Ib.* 295; Morris *v.* Burdett, 1 Camp. 218; 3 *Ib.* 374; Callaghan *v.* Hallett, 1 Caines (N. Y.), 104; s. c. Col. & C. Cas. 179; Preston *v.* Bacon, 4 Conn. 471; Shattuck *v.* Woods, 1 Pick. (Mass.) 175; Bussier *v.* Pray, 7 Serg. & Rawle (Pa.), 447; Carroll *v.* Tyler, 2 Har. & Gill, 54; Smith *v.* Smith, 1 Bailey (S. C.), 70; Debolt *v.* Cincinnati, 7 Ohio St. 237; Pilie *v.* New Orleans, 19 La. An. 274. Payments received by one, knowing the agent to be unauthorized to make them, may be recovered by the principal as money wrongfully had and received. The people are

§ 235 (174). **Liability of Corporation to the Officer; Right of Officer to Salary.** — Where an officer of a municipal corporation, elected by the people for a specified term, is *improperly removed by the city council*, he may sue the corporation for his salary and perquisites for the time intervening between his removal and the expiration of his term.[1] It is a defence to the corporation that the officer *was legally removed*; but if he was removed contrary to law, it is no answer to the action that the corporation, in making the removal, acted judicially, and therefore is not liable for the error it committed.[2]

not bound by acts of a township committee, *ultra vires*, sanctioning unlawful payments to a collector. Demarest *v.* New Barbadoes, 40 N. J. L. 604. The principle in the text operates to deprive a public officer, or an officer of a municipal corporation, of *a claim for a reward* offered for a service which is embraced in his official or legal duties. Gilmore *v.* Lewis, 12 Ohio, 281, where a constable who arrested a thief was held not entitled to a reward offered by the defendant; s. p. Pool *v.* Boston, 5 Cush. (Mass.) 219; the doctrine of the text approved. Decatur *v.* Vermillion, 77 Ill. 315; Matter of Russel, 51 Conn. 577. Where a *fireman* employed as such by a city *brought suit for a reward* offered by a husband for the rescue of the dead body of his wife from a burning building, it was held that, as it *was not his duty to rescue a person from a burning building at the imminent peril of his own life*, the rescue could not be said to be in the line of his duty so as to preclude him from claiming the reward. Reif *v.* Paige, 55 Wis. 496. Where a person before being appointed city treasurer agreed in writing to repay to the city all fees, &c., in excess of $2,000, and the council failed to fix his compensation, it was held that, while the agreement was invalid, he was estopped, by having rendered and settled his accounts, from claiming more than the $2,000. Hobbs *v.* Yonkers, 102 N. Y. 13. A promise by a candidate to serve without compensation will not estop him from claiming his salary. State, *ex rel.* *v.* Nashville, 15 Lea, 697. See *ante*, chap. vi. sec. 139.

[1] Stadler *v.* Detroit, 13 Mich. 346 (1865); Shaw *v.* Mayor, &c., 19 Ga. 468 (1856). The court, in considering the *rule of damages* in such a case, holds that the officer cannot recover of the corporation counsel fees for defending himself against the charges preferred against him, but may recover such "damages as necessarily resulted from his amotion from office, viz., *his salary and perquisites.*" 19 Ga. 468, *supra*. But the corporation, it is suggested, may recoup the same as individuals who improperly dismiss servants employed for a determinate period. 2 Greenl. Ev. sec. 261 *a*. But see United States *v.* Addison, 6 Wall. 291; Hoke *v.* Henderson, 4 Dev. (N. C.) 1. That the corporation cannot thus reduce the amount of recovery, see cases cited in the notes to this section. An action against a city to recover salary cannot be maintained, while the office is occupied by a *de facto* officer, or until the right to the office has been adjudicated. Selby *v.* Portland, 14 Oreg. 243; *supra*, sec. 230, note; *post*, sec. 276.

[2] Shaw *v.* Mayor, &c., 19 Ga. 468 (1856); Shaw *v.* Mayor, &c., 21 Ga. 280; see s. c. Mayor, &c. *v.* Shaw's Administrator, 25 Ga. 590. In the case last cited it was decided that if the removal of a city officer be for a specified cause, not warranting the removal, and the officer sue the corporation for his salary, as a defence to such action it may aver and prove other matters, good in law, to justify such removal. In thus holding, the court say; "If his term of office had not expired when this suit was instituted, and he had moved for a *mandamus* to restore him, instead of bringing an action for his salary, the court would not have interfered, if good cause for his removal could have been shown, although he may have