INDEX

COMPLAINT.

Filed December 1, 1924.

New Jersey Supreme Court

ESSEX COUNTY.

GEORGE H. ROBERTS, *Plaintiff*, *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff, residing in Orange, New Jersey, says that:

1. Defendant is a municipal corporation of the State of New Jersey and the corporate body of the City of Orange, in the State of New Jersey.

2. On August 6, 1900, plaintiff was legally appointed by the governing body of the defendant to the public office of patrolman and member of the Police Department of the City of Orange and accepted said office and qualified as such officer and entered upon the discharge of the duties of said office on said date.

3. He remained in said office and continued such officer and patrolman from said August 6, 1900, to July 1, 1924, when he was retired from said office of patrolman by the Pension Commission of the City of Orange for permanent disability received in the performance of his duty

as such patrolman, pursuant to the statute in such case made and provided, without having been suspended during said period.

4. During all of said period from August 6, 1900, to July 1, 1924, plaintiff held the legal title to said public office of patrolman in and member of the Police Department of the City of Orange, and was entitled to the salary and compensation and emoluments attached to and prescribed for said office.

5. Plaintiff received the salary, compensation and emoluments incident to said office from the date of his appointment, August 6, 1900, to May 15, 1922.

6. From said May 15, 1922, to January 1, 1924, the salary attached to and prescribed for said office of patrolman in the Police Department of the City of Orange was eighteen hundred dollars ($1,800) per year, payable in equal semi-monthly installments on the first and fifteenth days of each month.

7. From said January 1, 1924, to July 1, 1924, the salary attached to and prescribed for said office of patrolman in the Police Department of the City of Orange was two thousand dollars ($2,000) per year, payable in equal semi-monthly installments on the first and fifteenth days of each month.

8. During said period plaintiff became and was entitled to receive from the defendant salary and did receive from the defendant monies on account thereof, as set forth in the following statement, to wit:

Complaint.

Salary as patrolman in Police Department from May 15, 1922, to Jan. 1, 1924, 1 year, 7½ months, @ $1,800 per year $2,925.00

Salary as patrolman in Police Department from Jan. 1, 1924, to July 1, 1924, 6 months, @ $2,000 per year.. 1,000.00

Total due for salary $3,925.00

CREDITS.

2% deducted for Pension Fund. $78.50

1923.

Jan. 1	By cash on account.....	73.50	
Jan. 15	By cash on account.....	73.50	
Feb. 1	By cash on account.....	73.50	
Feb. 15	By cash on account.....	73.50	

1924.

Jan. 1	By cash on account.....	81.67	
Jan. 15	By cash on account.....	81.67	
Feb. 1	By cash on account.....	81.67	
Feb. 15	By cash on account.....	81.67	699.18

Balance due $3,225.82

9. Said balance of $3,225.82, for salary as aforesaid, is still due and owing to plaintiff from the defendant, no part thereof having been paid.

Plaintiff demands as damages $3,225.82, with interest thereon.

WILLIAM A. LORD,
Attorney for Plaintiff.

NOTICE OF MOTION TO STRIKE OUT.

Filed December 26, 1924.

NEW JERSEY SUPREME COURT.

GEORGE H. ROBERTS, *Plaintiff,* *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Notice of Motion.*

To William A. Lord, Esquire, attorney of plaintiff.

TAKE NOTICE, that on the 6th day of December, instant, at 10 o'clock in the forenoon, at the Court House in Newark, before the Honorable William S. Gummere, Chief Justice of the above-stated court, I shall move to strike out the complaint in this cause upon the ground that it discloses no cause of action, in that:

1. The complaint fails to show that the plaintiff rendered services or tendered his services to the defendant during the period for which salary is claimed.

Dated, Orange, New Jersey, December 1, 1924.

WILLIAM A. CALHOUN,
Attorney of Defendant.

ORDER DENYING MOTION.

Filed December 26, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GEORGE H. ROBERTS, *Plaintiff*, *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Order.*

This matter coming on to be heard on motion of defendant to strike out the complaint filed in this cause upon the ground that same fails to show that plaintiff rendered services or tendered his services to the defendant during the term for which salary is claimed, and counsel having been heard and the matter having been considered;

It is, on this December 6th, 1924, on motion of William A. Lord, attorney for plaintiff, ORDERED that the said motion to strike out the complaint be denied, with costs on said motion to be taxed in favor of plaintiff and against the defendant.

WM. S. GUMMERE,
C. J.

ANSWER.

Filed December 11, 1924.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GEORGE H. ROBERTS, *Plaintiff*, *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Answer.*

Defendant, The City of Orange, a municipal corporation of the State of New Jersey, says that:

1. It admits paragraphs one, two and three.

2. It admits that plaintiff held title to the office of patrolman in The City of Orange for the period alleged in paragraph four, but denies that he was entitled to the salary attached to that office for the entire period in which it was held by him.

3. Paragraphs five, six and seven are admitted.

4. It denies paragraph eight, except as admitted in the following statement: Defendant paid plaintiff the sums of money with which it has been credited in this paragraph.

5. It denies that the sum of $3,225.82, or any other sum, is due the plaintiff from the defendant, as alleged in paragraph nine; and admits that it has paid no part thereof.

Answer.

FIRST DEFENSE.

1. On January 6, 1922, plaintiff reported to defendant that he was ill, and from that date until July 1, 1924, when he was retired from office as a patrolman, failed to render any services to the defendant, as a patrolman, or in any other capacity; and failed to tender his services during said period.

SECOND DEFENSE.

1. On March 2, 1915, the Board of Commissioners of The City of Orange adopted a resolution provided that no more than thirty days' pay in any calendar year should be allowed to officers and patrolmen in the Police Department of said city, for absence from duty, either on account of illness or otherwise.

Said resolution remained in full force and effect until June 6, 1922.

2. On June 6, 1922, said Board adopted a resolution providing that no more than sixty days' pay in any calendar year should be allowed to officers and patrolmen in the Police Department of said city, for absence from duty, either on account of sickness or otherwise, which resolution still remains in full force and effect.

3. Copies of said two resolutions are annexed hereto and made a part hereof.

WILLIAM A. CALHOUN,
Attorney for Defendant.

Answer.

Resolved by the Board of Commissioners of The City of Orange that no more than thirty days' pay in any calendar year shall be allowed to officers and patrolmen in the Police Department of this City for absence from duty, either on account of sickness or otherwise.

William A. Calhoun,
William F. Kearney,
Harry D. Wethling,
Frank J. Murray.

Adopted: March 2, 1915.

John J. Byrne,
City Clerk.

Resolved by the Board of Commissioners of The City of Orange, that no more than sixty days' pay in any calendar year shall be allowed to officers and patrolmen in the Police Department of this City for absence from duty either on account of sickness or otherwise.

Frank J. Murray,
Richard J. FitzMaurice,
William F. Kearney,
George Roach,
George W. Perry.

Adopted: June 6, 1922.

Daniel J. Brennan,
City Clerk.

REPLY.

Filed December 13, 1924.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GEORGE H. ROBERTS, *Plaintiff*, *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Reply.*

1. Plaintiff denies the allegations in the so-called "First Defense" in the answer of the defendant, except that he admits that on January 6, 1922, he reported to defendant that he was ill.

2. He admits that the Board of Commissioners of the City of Orange, on March 2, 1915, and June 6, 1922, passed the resolutions referred to in paragraphs one, two and three of the so-called "Second Defense," true copies of which are attached to the answer, but he denies that same were ever of any force and effect so far as plaintiff's claim for compensation as set forth in his complaint is concerned, or that the allegation contained in said "Second Defense" constitute any defense to this action.

WILLIAM A. LORD,
Attorney for Plaintiff.

POSTEA.

Filed November 26, 1925.

This case was tried before Hon. Nelson Y. Dungan, Circuit Court Judge, and, by consent of both parties thereto, without a jury, at the Essex Circuit, on October 16, 1925, upon the following written stipulation of facts entered into by counsel for both parties:

1. Defendant is a municipal corporation of the State of New Jersey and the corporate body of the City of Orange, in the State of New Jersey.

2. On August 6, 1900, plaintiff was legally appointed by the Common Council of the City of Orange, then the governing body of said city, to the public office of patrolman and member of the Police Department of the City of Orange, and then and there accepted said office and qualified as such officer and entered upon the discharge of the duties of said office on said date.

3. Plaintiff remained in said office and continued such officer and patrolman from said August 6, 1900, until July 1, 1924, when he was retired from said office of patrolman by the Pension Commission of the City of Orange for permanent disability received in the performance of his duty as such patrolman, pursuant to the statute in such case made and provided, without having been suspended during said period, and since which last-mentioned date he has been paid a pension out of the Pension Fund of the City of Orange in accordance with the provisions of the statute in such case made and provided.

4. During all of said period, from August 6, 1900, to July 1, 1924, plaintiff held title to said

Postea.

office of patrolman in the Police Department of the City of Orange.

5. Plaintiff received the salary, compensation and emoluments incident to said office from the date of his appointment, August 6, 1900, to May 15, 1922.

6. From said May 15, 1922, to January 1, 1924, the salary attached to and prescribed for said office of patrolman in the Police Department of the City of Orange was eighteen hundred dollars ($1,800) per year, payable in equal semi-monthly installments on the first and fifteenth days of each month.

7. From said January 1, 1924, to July 1, 1924, the salary attached to and prescribed for said office of patrolman in the Police Department of the City of Orange was two thousand dollars ($2,000) per year, payable in equal, semi-monthly installments on the first and fifteenth days of each month.

8. During said period, from May 15, 1922, up to the present time, plaintiff received on account of any monies due him as salary attached to and prescribed for said office of patrolman, the following sums only:

1923.

Jan. 1	By cash on account	$73.50
Jan. 15	By cash on account	73.50
Feb. 1	By cash on account	73.50
Feb. 15	By cash on account	73.50

1924.

Jan. 1	By cash on account	81.67
Jan. 15	By cash on account	81.67
Feb. 1	By cash on account	81.67
Feb. 15	By cash on account	81.67
		$620.68

Postea.

9. On March 2, 1915, the Board of Commissioners of the City of Orange, which was then the governing body of the City of Orange, adopted a resolution reading as follows:

> "RESOLVED by the Board of Commissioners of The City of Orange that no more than thirty days' pay in any calendar year shall be allowed to officers and patrolmen in the Police Department of this City for absence from duty either on account of sickness or otherwise."

10. On January 6, 1922, plaintiff reported to defendant that he was ill, and from that date until July 1, 1924, when he was retired from said office of patrolman as aforesaid, he did not perform any duties as a patrolman or any services in any other capacity for the defendant, or tender his services during said period.

11. On June 6, 1922, the Board of Commissioners of the City of Orange, which was then the governing body of the City of Orange, adopted a resolution reading as follows:

> "RESOLVED by the Board of Commissioners of The City of Orange, that no more than sixty days' pay in any calendar year shall be allowed to officers and patrolmen in the Police Department of this City for absence from duty either on account of sickness or otherwise."

12. If the Court or jury finds for the plaintiff that he is entitled to recover from the defendant any salary or compensation accruing to him since May 15, 1922, other than the $620.68 as set forth in paragraph eight of this stipulation, there should be deducted from same two per cent. (2%) thereof, to be paid into the Pen-

Postea.

sion Fund of the City of Orange in accordance with the statute in such case made and provided.

13. "An Act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this State," approved April 25, 1911, commonly known as the Commission Government Act, was assented to by the majority of legal voters of the City of Orange voting at an election held in said city on April 14, 1914, in accordance with the provisions of said act, since which date the said act has been operative in and applicable to the City of Orange.

14. "An Act regulating the pay of officers and policemen in cities in the second class in this State," approved April 7, 1914, was submitted to voters of the City of Orange by resolution adopted by the governing body thereof at a general election held November 7, 1916, and was then accepted by the voters of said city by the majority of the votes cast for and against said act at such election, and thereupon became operative in and applicable to the said City of Orange.

Upon the facts so stipulated the Court rendred a general finding in favor of the defendant and against the plaintiff.

WM. S. GUMMERE,
President Circuit Court Judge.

Rule for Judgment.

RULE FOR JUDGMENT.

Filed November 30, 1925.

NEW JERSEY SUPREME COURT.

GEORGE H. ROBERTS, *Plaintiff,* vs. THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *On Postea.* *Rule for Judgment.*

This action was tried before Judge Nelson Y. Dungan without a jury upon a written stipulation of facts entered into by counsel for both parties in the presence of the counsel of the respective parties at the Essex Circuit on October 16, 1925.

Upon the facts so stipulated, the Court rendered a general finding in favor of the defendant and against the plaintiff.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff its costs.

Entered November 30, 1925,

On motion of

WILLIAM A. CALHOUN,
Attorney of Defendant.

DECISION.

Filed November 22, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GEORGE H. ROBERTS, *Plaintiff,* *vs.* THE CITY OF ORANGE, a municipal corporation, *Defendant.*	*Action at Law.* *Decision.*

For the plaintiff, William A. Lord, Esq.

For the defendant, William Calhoun, Esq.

DUNGAN, *J.*

This case was tried before the Court without a jury upon an agreed state of facts, from which it appears that the plaintiff was a patrolman and member of the Police Department of the City of Orange from August 6th, 1900, to July 1, 1924, on which date he was retired from said office. During the period from May 15, 1922, to July 1, 1924, the plaintiff was ill and performed no services and received only two month's salary in each of the years during said illness.

On March 2, 1915, the governing body of the City of Orange adopted a resolution that no more than thirty days' pay in any calendar year should be allowed to officers and patrolmen in the Police Department for absence from duty, either on account of sickness or otherwise. On June 6th, 1922, shortly after the beginning of the plaintiff's illness, a resolution was adopted

providing that sixty days' pay, instead of thirty. The plaintiff was paid and accepted sixty days' pay during each of the two years covered by his illness.

It is insisted that the plaintiff is entitled to receive the full pay appertaining to the position of patrolman from the beginning of his illness to the date of his retirement.

Notwithstanding the decisions in other States, which apparently support that contention, it seems to me that the question is decided in this State by the case of City of Hoboken *v.* Gear, 27 Law, p. 265, which was a case where a suit was brought by a discharged policeman whose office had been abolished, and the Court holds (p. 277) that: "the government may abolish the office, and thereby terminate the service without a violation of contract. So, in the absence of constitutional restriction, the compensation or salary of public officers may be diminished, or their duties increased, or the mode of remuneration be changed during their continuance in office, without any infringement or violation of contract. An appointment to a public office, therefore, either by government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is at most a contract that while the party continues to perform the duties of the office, he shall receive the compensation which may from time to time be provided by law."

By the resolution of March 2, 1915, the governing body fixed the salary of patrolmen, when

they were absent from duty, either on account of sickness or otherwise, subsequent to which the plaintiff continued to hold his office and to perform his duties, presumably with knowledge of that provision which, on June 6th, 1922, was made more favorable to him, and when the sixty days' salary in each of the two years of his illness was paid to him, he accepted it. The case of City of Hoboken *v.* Gear, above mentioned, provides that "the right to the compensation grows out of the rendition of the services." The opinion in the case of Stuhr *v.* Curran, 44 Law, p. 181, in an opinion by Mr. Justice Van Syckel, at page 191, says: "the emoluments of office are presumed to be nothing more than an equivalent for the labor it imposes. In this country, where the cases almost uniformly discard the idea of proprietary interest in such offices, the logical sequence is that the right to emolument must be regarded as having no legal existence except as arising out of the rendition of services for which they are compensatory."

In this case, during the period for which recovery is sought, no service was rendered by the plaintiff.

In view, therefore, of the resolutions of the governing body of the city and the fact that no service was rendered by the plaintiff during the period of his illness, and that he has received all the compensation to which he is entitled under these resolutions, he is not now entitled to recover anything additional, and judgment, therefore, is hereby given in favor of the defendant, the City of Orange.

NOTICE OF APPEAL AND REASONS.

Filed December 4, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

GEORGE H. ROBERTS,
Plaintiff-Appellant,

vs.

THE CITY OF ORANGE, a corporation,
Defendant-Appellee.

Notice of Appeal and Grounds.

To William A. Calhoun, attorney for appellee.

SIR:

TAKE NOTICE that the appellant, George H. Roberts, appeals to the Court of Errors and Appeals of the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause upon the following grounds:

1. The Supreme Court, upon the agreed facts submitted to it without a jury, found in favor of the defendant and against the plaintiff, when it should have found in favor of the plaintiff and against the defendant.

2. The Supreme Court decided that the plaintiff was not entitled to the salary attached to the public office which he held because he had rendered no services as such public officer during the period for which he claimed such salary, when it should have decided that the plaintiff was entitled to recover such salary as long as he remained in said public office.

Notice of Appeal and Reasons.

3. The Supreme Court decided, in effect, that the resolutions of March 2, 1915, and June 6, 1922, passed while plaintiff occupied said public office and purporting to fix the salary of patrolmen while absent from duty and under which plaintiff was paid the amounts therein provided for, estopped him from recovering any further salary while absent from duty, when it should have decided that said resolutions were void and of no effect so far as plaintiff's claim for salary was concerned.

4 The Supreme Court rendered judgment in favor of defendant and against the plaintiff when it should have rendered judgment in favor of plaintiff and against the defendant for the full amount for which judgment was asked in the complaint filed in this action.

WILLIAM A. LORD,
Attorney of Plaintiff-Appellant.

The Chronicle Press, Printers, Orange, N. J.

New Jersey Court of Errors and Appeals

GEORGE H. ROBERTS, *Plaintiff-Appellant,* *vs.* THE CITY OF ORANGE, *Defendant-Appellee.*	*On Appeal from Supreme Court.*

BRIEF OF PLAINTIFF-APPELLANT.

This is an action brought by plaintiff against the City of Orange for his salary as a policeman from May 15, 1922, to July 1, 1924, less two months' salary paid to him in the year 1923, and two months' salary paid to him in the year 1924, and the proportion thereof which should be paid to the Pension Fund of the City of Orange in accordance with the statute in such case made and provided.

All the material facts were admitted by written stipulation, as set forth in the postea (Case, p. 10), and the main question at issue is as to whether or not plaintiff is entitled to the salary because it was incident or attached to the public office which it is admitted that he held although he performed no services as patrolman during that period, having been reported ill at the commencement of said period (p. 12, l. 15) and having been retired on half pay for permanent disability received in the performance of his duties, pursuant to the statute, at the end of said period (p. 10, l. 28).

The case was argued at the Essex Circuit before Circuit Court Judge Dungan, without a jury, upon the admitted facts, whose decision

(p. 15) was against the plaintiff and his findings are challenged for errors specified in the grounds for appeal filed and served under Rule 139 of the Supreme Court and which is permitted under the amendment to the Practice Act, P. L. 1916, p. 109, and upheld in the case of *Pannonia B. & L. Assn.* v. *West Side Trust Co.,* 93 N. J. L. 377, which is cited with approval in *Paterson* v. *Sovereign Camp, &c.,* 97 N. J. L. 500, and *Lambert* v. *Cahill,* 2 Misc. 828.

Our first ground for reversal (p. 18, l. 27) is that upon the agreed state of facts judgment should have been for the plaintiff instead of the defendant, and our second ground, our first specific ground (p. 18, l. 33), is that the Court below decided that plaintiff was not entitled to the salary attached to the public office he held because he had rendered no services as such public officer during the period for which he claims such salary, it being conceded, both in the answer (p. 6, l. 22) and in the agreed facts (p. 10, l. 20) that the plaintiff was a public officer, as it has been repeatedly held in this State and elsewhere (see *Tucker* v. *Erie R'way Co.,* 69 N. J. L. 19; *Goldberg* v. *Central R. R. Co.,* 97 N. J. L. 374; Dillon on Municipal Corporations, Fifth Edition, Sections 103, 1655 and 1656).

It is well settled that the fact that an officer has not performed the duties of the office does not deprive him of the right to legal compensation, provided his conduct does not amount to an abandonment of the office (29 Cyc. 1423 and long list of cases there cited) and, of course, there was no abandonment in this case as plaintiff was paid two months' salary during each of the two years covering the period for which

he claims salary (p. 11, l. 24) and was retired by the Pension Commission of the city at the end of said period, as before stated, and it is admitted that he held said office until he was so retired both in the answer (p. 6, l. 23) and in the agreed facts (p. 10, l. 28). In Dillon on Municipal Corporations, Fifth Edition, Section 429 (235), the author says: "It is generally but not universally held that the person who is *de jure* entitled to the office, and not the incumbent *de facto* who actually renders the services, is entitled in law to the emoluments of the office," and we shall see later on to what extent this rule has been modified in New Jersey by the decisions of our courts.

We have made an exhaustive search and cannot find a single case which holds that the rightful incumbent of an office is not entitled to the salary attached or incident thereto, regardless of the duties he performs or does not perform, unless his acts amount to an abandonment of the office, until he has been dismissed or suspended or (in New Jersey) where the office has been actually occupied and the duties thereof performed by a *de facto* incumbent under the bona fide belief that he was a lawful incumbent and without any reason to suspect that his title thereto was challenged.

Among the comparatively recent cases outside New Jersey on the point is that of *Bunch* v. *Macon* (Ga.), 115 S. E. 40, where the Court held that a policeman is a public officer and as such entitled to a salary, not by force of any contract but because the law attaches it to his office. In the State of Georgia, as in our State, the selection, retention, suspension and removal of such officers is regulated by statute and a policeman is entitled to continue a member of the

department until suspended or removed for cause, in the manner provided, and after due notice and trial, and the city contended that plaintiff was not entitled to his salary because, while he was thirty-one days in jail, he was incapacitated from performing the duties, and the Court held that whether or not plaintiff rendered any services during the time for which he claimed compensation, it was of no vital legal import, and the Court said: "The real question is: Did the plaintiff have title to the office during the period for which he claimed compensation? If he had title thereto, he is due his salary; otherwise not. A policeman is a public officer (*Marlow* v. *Savannah,* 28 Ga. App. 368, 110 S. E. 923), and the plaintiff, as such officer, was entitled to the salary, not by force of any contract but because the law attaches it to the office. The plaintiff, being the incumbent, is entitled to his salary until legally suspended or removed. See, in this connection, *Coleman* v. *Glenn,* 103 Ga. 458, 30 S. E. 297, 68 A. St. Rep. 108 and citations, see also Civil Code of 1910, Sec. 264 (3) which declares that an office in this State is vacated by 'incapacity' only 'from the time the fact is ascertained and declared by the proper tribunal.' "

In the case of *Luth* v. *Kansas City* (Mo.), 218 S. W. 901, it was held that the salary is attached to and depends upon the legal title to a public office and the *de jure* claimant is entitled to the salary although he has not occupied the office or performed the duties thereof.

In the case of *State* v. *Chauvin* (La.), 85 S. 645, it was held that the compensation allowed by law cannot be changed by contract.

In the case of *Congdon* v. *Knapp* (Kan.), 187 P. 660, it was held that where a person holds

two offices he is entitled to the salary fixed by law for both and that an agreement that he would perform the duties of either for less compensation than that fixed by law is not valid.

In the case of *Creiger* v. *Hill,* 203 N. Y. S. 413, it was very recently held that a county superintendent of highways is a public officer and is entitled to a salary as an incident to his office, whether he performs the service or not.

In the case of *Bergerow* v. *Parker,* 4 Cal. App. 169, 87 P. 248, it was held that where the plaintiff held the legal title of constable of a town he was entitled to receive the salary attached as an incident to the office (including the time he was incarcerated), and in the case of *Larson* v. *City of St. Paul,* 83 Minn. 473, 86 N. W. 459, it was held that the salary annexed to a public office (sergeant of police) was incident to the title of the office and not to its occupation and exercise.

In the case of *People* v. *Bradford* (Ill.), 108 N. E. 732; 267 Ill. 486 (affirming 190 Ill. App. 289), the Court said:

> "The right to the salary is attached to and follows the legal title to the office, irrespective of the question as to who actually performed the services, even if performed by an intruder, and extends to cases of protracted absence and non-performance of duties and to actual suspension from office and this is true in respect to a de facto officer. * * * The mere neglect of official duties without affirmative action showing an intention to abandon the office, will not operate to forfeit the office and create a vacancy, as such negligence finds its correction in the power of removal, impeachment and punishment."

In the case of *Fitzsimmons* v. *Brooklyn,* 102 N. Y. 536, the Court held that an officer (*e. g.,* a member of the police force) who has been prevented for a time through no fault of his own from performing the duties of his office, and has during that time earned compensation in another and different employment, cannot be compelled in an action to recover his unpaid salary to deduct the amount so earned. Finch, *J.,* who delivered the opinion of the Court in overruling the contention of the city that it was entitled to this deduction, said:

> "The rule sought to be applied by the city to the claim of the plaintiff finds its usual and ordinary operation in cases of master and servant and landlord and tenant; relations not at all analogous to those existing between the officer and the State or municipality. The rule in those cases is founded upon the fact that the action is brought for breach of contract and aims to recover damages for that breach, or compensation for the servant's loss actually sustained by the default of the master. That loss he is required to make as small as he reasonably can. His discharge without just cause is not a license for voluntary idleness at the expense of the master. If he can obtain other employment, he is bound to do so, and if he engages in other service, what he thus earns reduces his loss flowing from the broken contract. But this rule of damages has no application to an officer suing for his salary and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of

> any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at bar."

In the case of *Sleigh* v. *U. S.*, 9 Ct. Cl. 369, it was held that an incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office, though he may be disabled, by disease or bodily injury, from performing his duty, and if it be an office held at the will of the appointing power, and that power does not see fit to have the compensation go on while the incumbent is so disabled, the only remedy, in the absence of express law or regulation authorizing the stoppage of the compensation during the disability, is to remove the incumbent and so end his right to compensation. If the appointing power suffers him to continue in service notwithstanding the disability he is entitled to the compensation.

In our case the Trial Judge bases its decision (p. 16, l. 34 to l. 38) upon the language used by Chief Justice Green in the Supreme Court in the case of *Hoboken* v. *Gear,* 27 N. J. L. 265, 278, where he said, speaking of an appointment to public office: "It is at most a contract that while the party continues to perform the duties of the office he shall receive the compensation which may, from time to time, be provided by law," and (p. 17, l. 13) upon the language he used in the same case on the following page: "The right to the compensation grows *out of the rendition of the services,* and not out of any contract between the government and the officer that the services shall be rendered by him."

We respectfully submit, however, that this language was wholly *obiter* and therefore not controlling even upon the Supreme Court for the decision there was that an appointment to a public office for a term of years, and the acceptance of such office, is not a contract between the government and the person appointed that the officer will serve, or that the government will pay, during the term for which the officer was appointed, and that either party may terminate the official relation which, in that case, was done by the abolishment or attempted abolishment of the police force by Hoboken and by the abandonment of the office, if it still existed, by Gear.

From later cases in this State I think it is clear that all that is inferable from this language of Chief Justice Green is that the compensation attached to a public office is predicated upon the assumption that the occupation of the office requires services for which compensation should be paid, for he said in this very case (p. 277) that the acceptance of such an office for a term of years is not a contract that the officer will serve or that the government will pay during that period and that the acceptance may not be a matter of choice but of compulsion.

We have examined, I think, every case in New Jersey where this widely cited case has been mentioned and in not one of them is there any allusion to this case as authority for a holding that an officer cannot recover compensation attached to his office unless he has performed services during the period for which he claims such compensation, yet the later cases are innumerable where this case is cited and yet allusion is made to the salary being "attached" to an office, for instance, *Meehan* v. *Freeholders of Hudson,*

46 N. J. L. 276, 280, where the Court said: "The salary attached to the office was not promised to him nor was it his due. He bargained for the chances of being voluntarily paid by defendant," and *Butcher* v. *Camden,* 29 N. J. Eq. 478, 481, where the Court said: "The appointment of an officer under such an ordinance has no analogy to a private contract between individuals for service," and, in *Bennett* v. *Orange,* 69 N. J. L. 178, where the Court said: "And where a salary thus attaches to an office the right to it is not affected by a diminution of the duties of the office—the office itself remaining." Furthermore, in the Gear case in the concurring opinion of Justice Vredenburgh, he held merely that the evidence showed that the defendant had abandoned the office and took occasion to say (p. 289): "If the plaintiff had been discharged or prevented from serving by the defendants or by anybody authorized by them he might, perhaps, have been entitled to his salary without performing its duties," the other two Justices who sat in that case concurring but not, of course, endorsing the language used in either opinion that was *obiter dicta.*

The other case relied upon by my adversary and by the Trial Judge (p. 17, l. 15) is the case of *Stuhr* v. *Curren,* 44 N. J. L. 181, where this Court held, by a divided vote of seven to five, that, where a person performed the duties of an office for six months, having no reason to doubt that he was legally elected, but was subsequently ousted by *quo warranto,* an action cannot be maintained against him by the *de jure* officer to recover the fees already received by the former while in possession of the office, thereby modifying, to this extent alone, the prevailing rule in other jurisdictions to the contrary, and Justice

Van Syckel, citing the Gear case, took occasion to say (p. 188): "The right to the fees or compensation does not grow out of any contract between the government and the officer but arises from the rendition of the services," and (p. 191): "The emoluments of office are presumed to be nothing more than the equivalent for the labor it imposes, so that, even conceding the parallel [between property and office], the incumbent gives in service as much as he receives in fees, and it is *damnum absque injuria.* No countenance should be given to the notion that public offices are created for the benefit of office-holders. In this country, where the cases almost uniformly discard the idea of proprietary interest in such offices, the logical sequence is that the right to emolument must be regarded as having no legal existence except as arising out of the rendition of services for which they are compensatory. The case of intrusion by fraud rests upon legal principles which do not apply here. Public policy would require that the fraud-doer be not encouraged by deriving gain from his dereliction." But Chief Justice Beasley, in his dissenting opinion (p. 196) said: "But, in reality, I do not consider the question whether or not a difference in the proprietary rights to office exists in the two countries, as of the least importance to the present discussion. Granted, that such a discrimination can easily be made, how does it affect the pending question? So far as relates to the matter in hand, it is a distinction without a difference. The only point of inquiry is, does the office-holder at common law, with respect to an intruder, have a greater right to the possession of his office than an American office-holder does?" And he goes on to answer this question in the negative.

We respectfully submit that the entire effect of the decision in the Curren case was to modify in this State the common law rule that a *de jure* incumbent is entitled to the compensation attached to an office regardless of who performs the duties thereof to the extent of holding that an innocent holder of an office, who performs the duties thereof, without any reason to believe that his title thereto is questioned, and receives the compensation attached to the office while he so performs such duties, cannot be compelled to disgorge such compensation and pay it over to the *de jure* officer who performed no such duties during such period and further, perhaps, although this would seem to be *obiter,* that "The emoluments of office are presumed to be nothing more than an equivalent for the labor it imposes" (*supra*). Of course emoluments are not attached to any office except upon the presumption that they are to be compensation for the labor involved upon the incumbent of that office but this does not change the common law rule that a citizen may be compelled to accept a public office and perform the duties thereof without compensation or for inadequate compensation and that he is entitled to the compensation attached to the office, whatever it is, even if greatly in excess of the value of the services or labor imposed and even if, through no fault of his, he is unable to perform all, some or any of such services or labor, providing he still continues in such office. That this is so is apparent from the decisions in this State since that of *Stuhr* v. *Curren* and in which that case is cited. Cases are numerous where holders of public offices unlawfully dismissed or prevented from exercising the duties of their offices have been reinstated by the courts and recovered their salaries for the time they were debarred from of-

fice and performed no duties. If prevented by illness the rule should be and is the same.

In the case of *Meehan* v. *Freeholders of Hudson County,* 46 N. J. L. 276, it was held that an unauthorized person gaining possession of a public office by force or fraud has no right of action against the public for the prescribed fees or salary for services rendered during such usurpation and that the compensation attached to the office is not promised to him by expression or implication and that such services are voluntarily rendered, and the Court said, in discussing the Curren case (p. 279): "It was not the design of the judgment of the Court of Errors, nor is it its legitimate effect, to give countenance or encouragement to those who are willing by force or fraud to obtrude in places lawfully assigned to others nor to permit such person to profit by the emoluments belonging thereto." Presumably the *de jure* officer, although performing no services during such usurpation of the office, was entitled to and did receive the "emoluments belonging thereto."

In the case of *Erwin* v. *Jersey City,* 59 N. J. L. 282, the Supreme Court held that where two persons acted in the capacity of city attorney of Jersey City as *de facto* officers neither could maintain a suit for the official salary, but this Court held, on error, 60 N. J. L. 141, 142, that "The pleadings disclosed that Erwin's action was brought to recover the compensation attached to the office of corporation attorney of the City of Jersey City for the period of three months," and that (p. 147), "From these acts it is obvious that Weart, if he had any claim to the office of corporation attorney *de jure,* by reason of any defect in Erwin's title, abandoned to Erwin the position *de facto.*"

In *Blore* v. *Board of Freeholders,* 64 N. J. L. 262, 263, the Court said:

> "The general rule of the common law as administered in England was, that a person entitled *de jure* to an office, and not the merely *de facto* incumbent of the office, had a legal right to the official emoluments. Kreitz *v.* Behrensmeyer, 36 N. E. Rep. (Ill.) 983. An exception to this rule was established in New Jersey by the decision of this court in Stuhr *v.* Curren, 15 Vroom 181, where it was held that a person who had a *prima facie* legal title to an office, which cast upon him a public duty to assume the office and discharge its functions, until by further legal proceedings his apparent title had been overthrown, and who in pursuance of that duty discharged the functions of the office, thereby acquired an indefeasible right to the salary and fees accruing while he was in possession of the office. In Erwin *v.* Jersey City, 31 Vroom 141, this court laid down what may perhaps be deemed a further modification of the English rule, to this effect, that when the incumbent of an office, lawfully holding over after the expiration of his stated term until his successor is appointed, surrenders the office to one who, with color of title, claims to have been legally appointed the successor, and the latter thereupon enters and discharges the functions of the office, he acquires, as against the public and the prior incumbent, an indefeasible right to the salary and fees accruing during his possession."

In *Fredericks* v. *Board of Health,* 82 N. J. L. 200, allusion is made to "the salary attached by a local body to an office to be filled by it," and, in *Gaskill* v. *Atlantic City,* 89 N. J. L. 269, 270, allusion is made to a resolution of the commissioners providing for the payment "of the salary attached to such office," in which case Justice Trenchard, speaking for this Court, said: "Clearly Mr. Gaskill, if he had faith in his claim, should

have brought *quo warranto* and, if he had succeeded, he would have been entitled to the salary for the term," which clearly indicates that a *de jure* officer is entitled to the emoluments of the office even while he does not perform any services as such officer during the period that it is usurped by another.

It seems to me that the case of *Bennett* v. *Orange,* 69 N. J. L. 176, affirmed by this Court in 69 N. J. L. 675, clearly supports our contention and indicates that the common law rule is still in force in this State to the effect that the incumbent of an office is entitled to the compensation attached thereto (except as before shown where the duties thereof have been innocently performed by another without the latter's knowledge of any defect in his title) for, in this comparatively recent case, the Court held that the compensation of a public officer belongs to him, not by force of any contract but because the law attaches it to the office, and that it is not affected by a diminution of the duties of the office—the office itself still remaining.

This was evidently the view taken of the matter by Chief Justice Gummere in denying the motion to strike out the complaint in this action because it did not show that the plaintiff had rendered services or tendered his services to the defendant during the period for which he claimed salary (pp. 4 and 5).

It would seem, however, that all this discussion is largely beside the point because all these cases cited were cases involving questions as to whether or not an office had been abandoned, usurped or the duties thereof performed by one not the *de jure* occupant of such office while in the case at bar no such question arises and it is not claimed

that anyone else either occupied the office or performed the duties of the office of patrolman which it is admitted that Roberts held during the time for which he seeks the compensation attached to that office. As was said in the case of *McArt* v. *Belleville,* 97 N. J. L. 396, 398, there appears to be no limit to the number of patrolmen who might be appointed. Consequently, the question does not arise as to whether or not anyone else performed the duties of the office of patrolman which Roberts was appointed to discharge. His absence from duty, through illness, may have resulted in additional work for some of the other members of the police force or may have made necessary the employment of another policeman, but this does not appear, and it would make no difference if it did for no one has claimed or been paid the salary attached to the office which Roberts held until he was retired.

Roberts is in exactly the same situation as the incumbent of office in the case of *Sleigh* v. *U. S., supra.* His pay could have been stopped only by suspension, removal or retirement, as was held in that case. He was entitled to hold his office during good behavior, efficiency and residence in this city, but could have been removed for incompetency, misconduct, non-residence or disobedience of the just rules and regulations of the department (see Article XVI, Sec. 3, Municipalities Act, P. L. 1917, p. 59), or he could have been retired on half pay, as he eventually was, under the Pension Act, P. L. 1920, p. 325, for permanent disability received in the performance of his duty. Under Section 30, of Article XVI of the Municipalities Act, P. L. 1917, p. 359, if he was absent from duty, without just cause, for the term of five days continuously, he would, at the expiration of such five days, cease to be a member

of the police force, and failure of the City of Orange to so regard him, its payment to him of some of his salary and its subsequent retirement of him for permanent disability received in the performance of his duty, shows conclusively that he was never regarded as "absent from duty without just cause." The City continued to keep him in office and did nothing except fail to pay him his salary. During the period in question, if he had been retired under the Pension Act, he would have been entitled to receive half pay and if he had been discharged for misconduct or for any other reason he would have been entitled to nothing. As long as he held the office, about which there is no dispute, he was entitled to receive the salary attached to it and for which he sues.

Our third ground for reversal is that the Court decided, in effect, that the resolutions of March 2, 1915, and June 6, 1922, passed while plaintiff was in office, and purporting to limit the salary of patrolmen, while absent from duty, to two months' pay which he received, estopped him from now collecting the balance of the salary claimed.

In the first place the answer does not set up the passage of these resolutions in bar of our action or allege that they had any effect whatsoever but simply contents itself with stating that they were passed and annexing copies hereof to its so-called "Second Defense" (p. 7), and I suppose we would have been justified under the pleadings in ignoring altogether the reference to them in the answer, but the Trial Judge, in his decision, refers to same rather intimating that because the plaintiff continued in office after their passage and accepted the salary in accordance with said resolutions, he cannot recover any more now.

Of course it cannot be successfully argued that when these resolutions were passed it was incumbent upon Roberts to resign in order to avoid their supposed effect or that it was incumbent upon him to refuse to accept the two months' salary which was paid him when there was twelve months' salary due him. The money he received was so much money on account and, if it was in payment for specific months, the salary still remained due for the other months for which he had not been paid and there is nothing in the answer or the agreed facts to indicate that he was paid anything during the period in question except on account of any money that may have been then due him. The resolutions in question provide that no more than thirty days or sixty days pay, respectively, shall be allowed patrolmen of the City "for absence from duty either on account of sickness or otherwise" (p. 8). If literally construed they go no further than to limit the allowance that may be given to an employee of the City as a gratuity "for absence from duty," perhaps to pay for medical attendance or other extraordinary expenses incident to his enforced absence, and could have no effect whatsoever upon the regular salary attached to his office. We are not asking for an allowance "for absence from duty" but for the salary attached to a public office. But the disbursing officer of the City of Orange evidently interpreted the resolutions to mean that the annual salary of an officer absent from duty for any reason was reduced by the latter resolution to one-sixth that of officers who were not absent from duty. It may be conceded that the City of Orange has the right to reduce the salary of any of its officers provided that there is no statutory inhibition against it although it is doubtful if, having fixed the salaries for a group of officers, it could single out those

who happened to be absent from duty and say that their salaries should be less than the others. However, the statutes of this State prevented the City of Orange from fixing the salaries of policemen (whether absent from duty or not) below certain limits. An act adopted by the City of Orange, P. L. 1914, page 178 (p. 13, l. 19, of Case), provides that in cities of the second class, such as Orange, the pay or salary of patrolmen after their third year of service shall not be less than $1,300 per year, whereas the resolution in question, if it has the meaning contended for, would have reduced the salary of this patrolman during his enforced absence from duty, to $194 for the year 1923, and to $246.68 for the year 1924. Furthermore, under Section 265 of the Commission Government Act, adopted by the City of Orange (p. 13, l. 3), it is provided that the salary or compensation of any member of the police department shall not be fixed at a less amount than received by him at the time of the adoption of the Act (1st Supp. C. S. 1091). It is also provided in Section 4, Article XIII of the Municipalities Act, P. L. 1917, page 351, that the salary, wage or other compensation then (March 27, 1917) paid to an officer shall continue until changed in accordance with the provisions thereof, that is, by ordinance (not by resolution). Under this legislation the City of Orange was prohibited from reducing the salary of Roberts or any other patrolman, by such resolutions or otherwise, below the limits fixed by the statutes I have cited. The resolutions in question, if they mean anything, could, therefore, have no effect upon the salary attached to the office which plaintiff held and to which he was entitled until he was suspended, dismissed or retired according to law, as before pointed out. In fact counsel for the City did not stress the efficacy of these reso-

lutions in the Court below. If such resolutions were effective, as contended, others could be passed taking away altogether the salary of officers while absent from duty, if only for a day or two, without resorting to any procedure to get rid of such officers as required by law, could actually prevent them from performing duty and yet say they could not be paid while absent from duty, etc. This can't be done.

We respectfully submit that as long as plaintiff remained in office and not under suspension he was entitled to the salary attached to and incident to his office and that he is entitled to judgment in this action for the salary for which he sues and that the judgment below should, therefore, be reversed.

WILLIAM A. LORD,
Attorney and of Counsel
with Plaintiff-Appellant.

P. S.—The case of *State* v. *Rahway,* 2 Misc. Rep. 742, recently called to our notice, seems very much in point, for, in that case, the Supreme Court held, in effect, that the line of cases that we have discussed as to the right to the salary of an office as between the *de facto* and *de jure* claimants do not apply where it does not appear that the office for which salary is claimed was filled by another, and the Court (p. 745) approved the rule laid down in 1 Dill. Mun. Corp. 745 (5th Ed.) Sec. 429, to the effect that an officer entitled by law to a fixed annual salary but prevented, through no fault of his (as, in our case by disability contracted in line of duty) from performing the duties of his office cannot even be compelled, in a suit for his salary, to deduct wages earned in a different employment, and adopted the reasoning of Mr. Justice Finch in *Fitzsimmons* v. *Brooklyn,* 102 N. Y. 536, 538, to the effect that the salary belongs to a police officer as an incident of his office and so long as he holds it, and that, when withheld, he can sue for it and recover the full amount because

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

GEORGE H. ROBERTS,
Plaintiff-Appellant,

vs.

THE CITY OF ORANGE,
Defendant-Appellee.

On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

Abstract of the Case.

This appeal brings up for review a decision of Judge Dungan, sitting in the Supreme Court Circuit for Essex County, in which judgment was rendered in favor of the defendant.

The case was tried before the lower court on an agreed stipulation of facts, which are included in the postea (Case, p. 10).

In brief, it was an action by a former patrolman of The City of Orange, to recover salary from it for the period extending from May 15, 1922, to July 1, 1924, when he retired on a pension.

On January 6, 1922, plaintiff reported to defendant, that he was ill, and from that date until his retirement on July 1, 1924, a period of nearly two and one-half years, he performed no services for the City, nor tendered his services.

Under a resolution passed by the City, plaintiff received 60 days' pay in both the years 1923 and 1924, being the period of his illness; which pay he has credited to the City upon his claim.

It was admitted in the stipulation of facts that he held an office.

From the above facts it is apparent that this case does not come within the rule laid down by the Supreme Court in *Jardot* v. *Rahway* and *McIntyre* v. *Same,* 2 Misc. Rep. 742, 127 Atl. 799, in which police officers were unlawfully dismissed from office, and in which the Court held that they were entitled to their salaries during the period covered by their illegal dismissal.

In the case at bar the sole reason for not paying this officer, was the fact that he performed no services during the period for which he asks to be compensated.

This failure to perform his duties was due to no act or fault of the City authorities, and was occasioned solely by the fact that he claimed to be unable to perform his duties on account of illness.

POINT ONE.

The right of a public officer to salary arises out of services performed.

Appellant in his brief, cites numerous decisions from other states, where the English rule, that salary is an incident of the office, has apparently been adopted. He also cites several decisions of this State, in which the question involved was solely the respective rights of *de facto* and *de jure* officers; these latter cases seem to have no bearing on this case, in which but two questions arise, first as to whether an officer is entitled to a salary for services which he has not performed, and from which he was not prevented from performing by the act of another; and second whether by accepting the gratuity of sixty days' pay from the City for each year of his illness without protest on his part, he has

estopped himself from claiming further compensation.

In *Evans* v. *Trenton,* 24 N. J. L. 764, Evans, who was treasurer of the City of Trenton, brought suit to recover compensation, in addition to his fixed salary. This Court said at page 766, "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." This case is not similar in its facts to the case now before this Court, and is cited merely for the purpose of showing that it was the thought of this Court as long since as 1853, that an office-holder must perform the duties of his office, if he is to have the salary attached to it.

In *Hoboken* v. *Gear,* 27 N. J. L. 265, Gear was appointed a policeman of the City of Hoboken; shortly after his appointment the police force was disbanded by the City. It appeared that he was paid in full for his services as long as he continued to act. He then brought suit on contract against the City to recover his salary for the unexpired portion of his term of two years. A verdict was rendered in his favor and the case was taken to the Supreme Court on a writ of error.

Chief Justice Green in delivering the opinion of the Court, said on page 278, that an appointment to a public office either by government or a municipal corporation under a law fixing the compensation and the term of its continuance is neither a contract between the public and the officer that the services shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is at most a contract, that while the party continues to perform the duties of the office he shall receive

the compensation which may from time to time be provided by law. He further said, on page 279, that the right to the compensation grows out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him.

Justice Vredenburgh, in a concurring opinion said, on page 289, that the plaintiff ceased voluntarily to perform the duties of his office and so is not entitled to the salary.

In *Stuhr* v. *Curran,* 44 N. J. L. 181, Curran received the certificate of election for the office of Chosen Freeholder and performed the duties of the office for six months. He was subsequently ousted by Stuhr on *quo warranto* proceedings. Stuhr then brought suit against him to recover the fees of the office received while he was in possession of the same.

The prevailing opinion of the Court of Errors and Appeals was delivered by Justice Van Syckel in which he reviewed the numerous cases on the subject of offices and distinguished offices held in England where they are incorporeal hereditaments granted by the Royal favor and are the subjects of vested or private interest, from offices held in this country which, he pointed out, are not held by grant or contract nor has any individual a property or vested right in them beyond the constitutional tenure and position.

He said that they are mere agencies of a political nature created by appointment or election for the discharge of public functions. The incumbent cannot sell his office or encumber it, nor will it pass by an assignment of his property.

The right to the office or position does not grow out of any contract between the government

and the officer but arises from the rendition of services.

The Court further said at page 191, that the emoluments of office are presumed to be nothing more than an equivalent for the labor it imposes, and that in this country, where the cases almost uniformly discard the idea of proprietary interest in such offices the logical sequence is that the right to emolument must be regarded as having no legal existence except as arising out of the rendition of services for which they are compensatory.

In the more recent case of *Erwin* v. *Jersey City,* 60 N. J. L. 141, this Court in a decision by Justice Magie said in referring to the decision of *Stuhr* v. *Curran, supra,* that, "It was declared that in this country public office was not property and public officers had no proprietary interest in their offices and it was deduced therefrom that the rights to the emoluments of the office arose not out of the title to the office but out of the actual rendition of services for which such emoluments were designed to be compensatory." He also distinguished between the case of *Stuhr* v. *Curran* and that of *Meehan* v. *Freeholders of Hudson County,* 46 N. J. L. 276, pointing out that the Supreme Court in the last mentioned case decided that one who had intruded in a public office by force and fraud could not recover from the public the salary attached to the office although he had performed the duties devolving upon the officer.

The distinctions between the holders of an office, a position and an employment, have at times been rather closely drawn by the Courts of this State, as was pointed out by Justice Garrison in *Fredericks* v. *Board of Health of West*

Hoboken, 82 N. J. L. 200; and there would seem to be no particular reason as a matter of public policy, even if this case was one of first impression in this Court, for it to hold to the early English rule that merely because a man held an office he was entitled to the salary attached to it as an incident of the office whether or not he performed the duties attached thereto; whereas if he was an employee he would not be entitled to his salary unless he also performed the duties of his employment.

It is respectfully submitted that the lower court was correct in deciding that it was controlled by the decisions of *Hoboken* v. *Gear* and *Stuhr* v. *Curran.*

POINT TWO.

Appellant is estopped from collecting the balance of salary claimed.

Appellant devotes a considerable space in his brief to a discussion of the resolutions passed by the City, under which he received 60 days' pay during each of the two years that he was ill. It is submitted that these resolutions were properly before the Court, being not only pleaded in defendant's answer, but also contained in the agreed stipulation of facts. No objection to the manner in which they were pleaded was raised either before or at the trial of this case. Attention is also called in his brief to the various enactments of the Legislature relating to the salaries of members of the police department.

The effect of the resolutions in question was not to alter or decrease the salary of police officers, but to properly provide for them, for a reasonable period in the event of their illness.

These resolutions are solely for the benefit of the members of the police department and amount to a gift from the City of two months' pay, in the event of illness.

It was clearly not the intention of the Legislature in passing the various laws regulating the salaries of police officers, to compel municipalities to pay for services not rendered, but merely to provide in certain instances for minimum salaries.

It is true that appellant could have been removed from office by the City during his illness under the provisions of Article XVI, Section 3 of Chapter 152, P. L. 1917, on the ground of incapacity, but this would have worked a hardship on him, and also on the City who would have lost an officer of many years experience; and as long as there seemed a prospect of regaining his health, it seemed advisable to continue him as a member of the department.

Appellant became a member of the police department in the year 1900, and continued a member until July 1, 1924, when he was retired on pension. It was a reasonable inference for the Court below to presume that he knew of the resolutions in question limiting his pay in case of illness, and his subsequent conduct in accepting pay for 60 days in each of the two years that he was ill, without a protest, or without demanding that the remainder of his salary for each year be paid him; doing nothing but calmly waiting until he was safely retired on pension, before bringing this suit, was such as to warrant the Trial Court, in finding that he was estopped from now claiming the balance of salary for which this suit is brought.

It is respectfully submitted that the judgment entered in the Supreme Court is correct and should be affirmed.

WILLIAM A. CALHOUN,
Counsel for Defendant-Appellee.

February Term, 1926.