STATE BOARD OF TAX COMMISSIONERS. CITIES—Contracts made without appropriation therefor invalid. When a subsequent contract which is connected with a prior invalid contract can be enforced.

December 28, 1944.

Opinion No. 109

Hon. Charles H. Bedwell, Chairman,
State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of December 1st in which you ask for an official opinion concerning the legality or validity of Appropriation Ordinance No. 103, 1944, adopted by the Common Council of the City of Indianapolis. The transcript of the proceedings of the city council which you enclosed shows the said Ordinance No. 103 was introduced on November 14th. Your letter states it was adopted by the Common Council on November 27, 1944. A copy of said ordinance is enclosed in your letter and is as follows:

"BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF INDIANAPOLIS, INDIANA:

"Section 1. That the sum of Two Thousand Nine Hundred Dollars ($2,900.00) be and the same is hereby appropriated from the anticipated, estimated and unappropriated 1944 balance of the General Fund of the City of Indianapolis, Indiana, to Fund No. 26, Other Contractual, Office of the Mayor, for the purpose of paying Fred Telford for written surveys and reports to be delivered to the Mayor on or before November 30, 1944, as follows:

1. The detailed plan covering the operation of the City Garage providing for the handling of the concentration of City vehicular equipment stored in said garage.

2. The detailed plan covering the more extensive use of machinery for cleaning the streets of the City of Indianapolis at night."
3. Plan or re-organization of the Isolation Hospital.

4. Recommendations and an outline to be followed in the organization and operation of the City Personnel Division.

"Section 2. This ordinance shall be in full force and effect upon its passage, approval by the Mayor, and compliance with all law pertaining thereto."

There is nothing in your letter to indicate any question of defect in publication of notice or formalities. The question presented is whether the ordinance is invalid under the provisions of Section 85 of Chapter 129, Acts 1905, page 219 (Section 48-1507, Burns' R. S. 1933). The pertinent part of said section is as follows:

"No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: * * *.

Under this section it has been frequently held that a contract made by a city when funds had not been appropriated for the purpose is void.

Hamer v. City of Huntington, 215 Ind. 594;
Indianapolis v. Wann, 144 Ind. 175.

It is stated in the above case at page 187:

"* * * Such a contract is absolutely void, and is as if it had never been made * * *.

This ordinance on its face purports to pay for four instruments or documents to be delivered thereafter. If the instruments were thereafter delivered on or before November 30, 1944, they were to be paid for, if they were not delivered they would not be paid for under the said ordinance. Under this
ordinance as passed Mr. Telford was not bound to deliver the
documents and there would be no completed contract unless
and until delivery was made after the enactment of the
ordinance and on or before November 30, 1944.

It is urged, however, that the facts show that the appropria-
tion was in fact to pay Mr. Telford for services performed
prior to November 27, 1944, under an invalid oral contract
made prior to the appropriation and ordinance No. 103 was
only an attempt to ratify such prior invalid contract. It is
ture that if a contract entered into by a city is invalid because
of no prior appropriation or any other reason it cannot be
thereafter ratified. See authorities supra. However, here
the question is whether that rule is applicable to said
ordinance No. 103.

The facts bearing upon this question as stated in your letter
are as follows:

"* * * sometime during the month of July, 1944,
a meeting was held in the office of the Mayor of the
city of Indianapolis which was attended by the Mayor,
six members of the Common Council and other officials
of the city of Indianapolis, where a discussion was
had with Mr. Telford concerning his employment for
the period beginning August 1, 1944, and ending
November 30, 1944, to aid the authorities of the city
of Indianapolis in translating the results of the survey
made by J. L. Jacobs Company for budgeting purposes
and in preparing necessary legislation to carry out the
recommendations that were made by J. L. Jacobs Com-
pany in such survey, and it was orally and unanimously
agreed by the Mayor and six members of the Common
Council that Mr. Telford should begin such work on
August 1st and that he would be paid a salary of
$500.00 per month, and in addition thereto, the sum of
$225.00 per month as expense for stenographic help,
supplies and other work in carrying out such oral
agreement. Thereafter, and during the month of Au-
gust, 1944, an ordinance to carry out the terms of such
oral agreement, was duly prepared and presented to
the Common Council, but some contention arose as to
the validity of such ordinance and it was withdrawn.
Thereafter, and on October 2, 1944 ordinance No. 91
entitled 'An ordinance appropriating the sum of Two Thousand Nine Hundred Dollars ($2,900.00) from the anticipated, estimated and unappropriated 1944 balance of the General Fund of the city of Indianapolis, Indiana, to Fund No. 26, Other Contractual, Office of the Mayor, for the purpose of paying Fred Telford for services rendered to and ending November 30, 1944; and fixing a time when the same shall take effect;' was introduced before the Common Council of the city of Indianapolis and thereafter, and on October 16, 1944 such ordinance was defeated by a vote of six (6) opposed to two (2) in favor thereof. In the discussion concerning such ordinance a question was raised about the legality of the form of the ordinance.

"Ordinance No. 103, 1944, a copy of which is attached hereto, was introduced before the Common Council on November 14, 1944 and was adopted on November, 27, 1944, and same has been presented to the State Board of Tax Commissioners with a request that they approve the additional appropriation of Two Thousand Nine Hundred Dollars ($2,900.00) provided for thereby.

"Beginning on August 1, 1944, Fred Telford performed the services contemplated by the oral agreement heretofore mentioned until November 28, 1944. Between November 28, 1944 and November 30, 1944, both inclusive, he prepared and submitted to the city authorities of the city of Indianapolis the documents provided for by ordinance No. 103."

Since the title of ordinance No. 91 is set out, I wish to point out that the constitutional provision relative to titles to statutes has no application to a city ordinance.

Baumgartner v. Hasty, 100 Ind. 575, 585; and cases cited.

On the facts stated the oral arrangement made in July was invalid.

The case of Hamer v. City of Huntington, 215 Ind. 594, supra, has been cited as holding the ordinance in question invalid. In that case a contract for the purchase of a fire
engine was entered into on December 31, 1936. Delivery was on May 4th, 1937. There was a special finding that there was no appropriation for that purpose until May 24, 1937. On July 12, 1937 the company filed a claim for the contract price. This claim was based on the December 31, 1936 contract. The court held the contract invalid upon the special finding of fact that there was no appropriation at the time of the contract.

It is a general rule that where parties have engaged in a transaction or agreement prohibited by law and a subsequent transaction is had, the illegality of the prior transaction will not bar the right to recover on the subsequent one if it is supported by an independent consideration and can be separated from the illegal agreement relied upon as avoiding it. And recovery can be had on the subsequent agreement if the claimant can establish his claim without relying upon the illegal prior agreement.

It was held in the case of Hoffman v. McMullen (C, C, A, 9th), 83 Fed. 372, affirmed 174 U. S. 639, that a contract or an agreement will be enforced even if it is incidentally connected with an illegal transaction provided it is supported by an independent consideration so that the plaintiff will not require the aid of the illegal transaction to make his case.

In Vol. 6, Williston on Contracts, Rev. Ed., Sec. 1753, it is said:

"In general, where an illegal bargain has been executed, a subsequent legal agreement upon new consideration is enforceable although arising out of the illegal transaction, at least where no serious moral wrong is thereby abetted."

The difficulty in this case is not so much in determining the rules of law as it is in the factual situation. The facts submitted do not cover all of the matters necessary to a complete determination of the questions involved. I cannot determine therefrom whether the ordinance in question was passed with the intent to make a new and independent contract based upon a new and independent consideration and enforceable without reliance upon the prior attempted oral arrangement, or whether it was merely an attempt to consummate the prior oral agreement. If the ordinance and the agreement made
subsequent thereto were merely an attempt to consummate the prior illegal agreement, the second agreement would be illegal. If the facts when determined are such that Mr. Telford can establish his claim without relying on the illegal oral agreement and it can be separated from said prior oral agreement, and founded upon the delivery of the four documents as an independent consideration, then it would be valid, and the appropriation would not be subject to the criticism that it was in payment of the consideration for a prior invalid contract. Under such a state of facts the rule in the Hamer case would not apply.

Other questions may be involved, but they have not been presented and are not considered. This opinion is limited to the question discussed.

STATE BOARD OF ACCOUNTS: Cities and Towns—City Councilman is not a lucrative office.

December 28, 1944,

Opinion No. 110

Hon. Otto K. Jensen,
State Examiner,
Department of Inspection and Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

This will acknowledge receipt of your letter dated December 19th, 1944, in which you state that at the general election held on November 7, 1944, a member of the city council of a city in the state of Indiana was elected as a member of the Indiana State Senate, and you submit the following question, to-wit:

"Does a member of the city council of a city in Indiana vacate such office upon accepting a seat in the General Assembly of the State of Indiana?"

In the case of State, ex rel. Platt v. Kirk (1873), 44 Ind. 401, the Supreme Court of Indiana had under consideration a case wherein one John Kirk had been elected by the General