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 *Hammer* 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.

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**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
Assembly of the State of Indiana on January 11, 1871, as a director of the Indiana State Prison South, which was then located at Jeffersonville, Indiana; thereafter on January 30, 1871, the said John Kirk was duly commissioned by the Governor of the State of Indiana as Prison Director of said Indiana State Prison South for a term of four years and until his successor should be elected and qualified; the said John Kirk took the oath of office prescribed by law and entered upon the discharge of his duties as such director. At the time of and prior to his election as such prison director, as aforesaid, the said John Kirk had been duly elected, qualified and acting as a member of the city council of the city of Madison, Jefferson County, Indiana. The question under consideration by the Supreme Court was whether or not the said John Kirk vacated the office of city councilman by his election to and acceptance of the office of prison director. In deciding this question, the Supreme Court used the following language:

"The case turns upon the proper construction of the following section of the constitution of the State: 'No person holding a lucrative office or appointment, under the United States, or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted: * * *.' Art. 2, sec. 9.

"Is the office of councilman in a city such an office as is contemplated by that part of the section which says, 'nor shall any person hold more than one lucrative office at the same time'?"

"An office to which there is attached a compensation for services rendered is a lucrative office. Webster defines the word lucrative to mean 'yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade; lucrative business or office.' In Daily v. The State, 8 Blackf. 329, Perkins, J., in speaking of the offices of recorder and county commissioner, said: 'We think, also, they are lucrative offices. Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. We know of no other test for determining a "lucrative office" within the meaning of the constitution. The lucra-"
tiveness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation.’ In this sense, there is no doubt but that the office of councilman in a city is a lucrative office. That the office of prison director is a lucrative office, was decided in the case of Howard v. Shoemaker, 35 Ind. 111. But this does not dispose of the question in controversy. * * *

“It was held by this court, in Howard v. Shoemaker, supra, that the office of mayor of a city was a lucrative office within the meaning of the ninth section of article 2 of the constitution, not because he received a compensation for the discharge of such of his duties as were purely municipal in their character, but for the reason that he had duties to perform, under the laws of the State, aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgment of deeds and other instruments in writing, for which he is entitled to and may charge and receive fees. The court did not decide in that case that the office of mayor, where there was a city judge, was a judicial office.

“The office of councilman is an office purely and wholly municipal in its character. He has no duties to perform under the general laws of the State. The State has enacted a law applicable to all cities which may organize under it. The inhabitants of the particular locality, after having taken the other necessary steps for an organization, elect the designated number of councilmen, who have the power to enact by-laws, and do such other acts and perform such other duties as pertain to their office in the municipality. These powers and duties of councilmen are beyond and in addition to any acts, powers, and duties performed by officers provided for under the state government. * * *. If the executive and administrative duties of the mayor of a city are not such as come within the departments of the state government, as established
by the constitution, it must follow that the duties of a councilman do not. * * *

"In our opinion the office of councilman in a city, although a lucrative office in the ordinary sense of the word, is not a lucrative office within the ninth section of the second article of the constitution. * * *" (Our emphasis.)

It is my opinion that the above decision of the Supreme Court is decisive of the question submitted in your letter. I call your attention to an official opinion issued by me to you under date of December 14, 1943, (Opinions Attorney General 1943, p. 693) in which I held that under the law as declared by the Supreme Court of Indiana in the case of Mohan v. Jackson, 52 Ind. 599, the office of clerk-treasurer of a civil town was not a lucrative office, and for this reason a person holding the office of clerk-treasurer of a civil town was also eligible to serve as a justice of the peace. In this opinion I said:

"There is no law or authority which permits me to ignore an express ruling of the Supreme Court of Indiana or to overrule a decision of the Supreme Court. This power and authority is vested exclusively in the Supreme Court and until such time as the Supreme Court of Indiana sees fit to modify its decision in the case of Mohan v. Jackson, supra, or holds that under the present statute a clerk-treasurer of a civil town is an officer within the State within the meaning of Section 16 of Article 7 of the Indiana Constitution, it is my opinion that the case of Mohan v. Jackson, supra, is decisive of the question presented by your letter."

I reaffirm what I said in my previous opinion and for the reasons above stated I am unable to agree with the opinion of the former Attorney General who issued an official opinion under date of April 9, 1942 (Opinions Attorney General 1942, p. 88), holding that the office of a city councilman was a lucrative office.

Therefore, it is my opinion that, under the law as declared by the Supreme Court of Indiana, in the case of State, ex rel. Platt v. Kirk, supra, a member of the city council of a city in Indiana does not vacate such office upon accepting a seat in the General Assembly of the State of Indiana.