Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character."

See also cases annotated in 89 A. L. R. at page 138.

Specifically answering your questions:

(1) Although the authorities are not in accord, it seems to me the better view is that there is a vacancy in the case of all members of the board at present. See authorities cited in State v. Williams, supra. I am of the opinion that you are authorized by law to make immediate appointments to fill unexpired terms in the membership of said board; two terms to expire January 6, 1946, and two terms to expire January 6, 1948. I do not believe that the appointments to first expire are invalid because of the unlikelihood of approval by the Senate of such appointments, for otherwise upon the death or resignation of a member prior to the approval of his appointment by the Senate, such appointment might be invalid from inception.

(2) I am of the opinion that the Governor should report his appointment to the senate in the next special or regular session for approval. In the meantime as above stated, the appointments are valid.

OFFICIAL OPINION NO. 110

October 2, 1945.

Hon. Milton Matter, Director
Indiana Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have your letter submitting nine instruments and inquiring as to the legality and effect thereof. These each purport to be an agreement relating to the operation of public service privileges and facilities at some state park. The contracts submitted may be divided into two general classes or types
according to wording and subject matter. In one group may be included the following:

1. Clifty Falls State Park, dated 1-1-44.
2. Turkey Run State Park, dated 1-1-44.
3. Indiana Dunes State Park, dated 5-1-44. (Duneside Inn and Cabins.)
4. Brown County State Park, dated 11-14-44.
5. Indiana Dunes State Park, dated 11-14-44. (Dunes Arcade and the Pavilion.)

Each of these contracts provide they shall be for a term of two years and purport to grant a “license and concession” for the operation of such public facilities and services as lodging, eating and/or other activities in the park. The so-called licensee is given full maintenance for himself and family, and an annual salary. The salary is payable out of gross earnings of the business conducted, if sufficient, but is guaranteed in any event. Provision is then made so that if the receipts are sufficient and there are profits, that the “licensee” will receive sums in addition to the stated salary. It is required that the “licensee” shall furnish bond at the cost of the enterprise to insure the faithful performance of the contract. Provisions are included for accounting between the parties, keeping of books and verification of accounts.

The commission is required to furnish all permanent equipment, while expendable supplies and current equipment is to be furnished from the revenues of the enterprise. Electricity and water are to be paid as an operating expense of the enterprise, and the enterprise is required to pay 10% of the cost of the equipment furnished by the state into an equipment depreciation and replacement fund.

The contracts provide that the licensee is required to conduct the “* * * enterprise in an efficient and business-like manner and the commission reserves the right at all times to direct the licensee in the methods of operation of said business within the limits of good hotel and restaurant practice.”, and also the commission retains the right to approve prices to be charged.

Each of these contracts contains substantially the following clause:
"This license and concession is not intended and shall not be construed to vest in the licensee any title of the State or property rights on said premises or any part thereof, and the Commission does not, by this instrument, relinquish or convey in any degree its duty and right to operate and manage this park for the use of the public, and to make rules and regulations therefor, including the charge of admission for entrance into the park, the regulation of public conduct, and all other matters pertaining to said park authorized by law. The said rules and regulations insofar as they shall pertain to the concessions licensed herein shall be reasonable in consideration of the purposes and uses for which the State is maintaining said park."

The remaining contracts submitted may be put in one group. They are as follows:

6. McCormick's Creek State Park, dated 1-5-38.

Each of these contracts is for a term of five years, and each, except that at Shakamak State Park, grants to the so-called licensee an option to renew for an additional five years. The contract at Shakamak State Park grants to the so-called licensee the first opportunity to re-license. In each the "licensee" agrees to pay 10% of the gross income derived from the operation of these enterprises to the state in quarterly installments, and the contract makes provisions for audit and for the keeping and verification of records. In each the licensee agrees to furnish all necessary furniture, fixtures and equipment, supplies and other articles necessary in the proper function of the concession and the state agrees to keep the buildings and equipment owned and furnished by it in a good state of repair. All risks of loss or damage to his property are to be borne by the licensee, and all net profits of the enterprise are evidently to be retained by him.

The state retains control over the prices to be charged and reserves the right of the public to use the park. Paragraph 13, above quoted, in connection with the first group of contracts,
is substantially repeated in each of these contracts. Assignment without consent of the state is prohibited. There is an option to cancel or terminate upon violation of the terms, and there is a requirement that the licensee shall peacefully vacate the premises upon termination or cancellation of the agreement.

These four contracts numbered 6, 7, 8 and 9 were each exactly as follows:

"IN WITNESS WHEREOF, the parties hereto have duly executed and sealed these presents the day and year first above written.

STATE OF INDIANA
DEPARTMENT OF CONSERVATION.

(sgd.) V. M. SIMMONS

V. M. Simmons, Commissioner.

Licensee.

On the last line is the name of the other party.

The above agreements were executed at different times and each purports to be executed by the Department of Conservation. I, therefore, wish to refer to the pertinent statutes relating to that department during the period involved.

THE STATUTES

Chapter 60, page 375, of the Acts of 1919, created an administrative department to be known as "The Department of Conservation," composed of four members appointed by the Governor, not more than two of whom shall belong to the same political party (Section 2.). The Commission appointed a director who "shall have power with the approval of the commission, to appoint, and remove for cause, chiefs of divisions, and, upon the recommendation of said chiefs, to appoint and remove all assistants, inspectors and employees thereof" (Section 3). Chiefs of divisions, and all assistants, inspectors and employees were to "each receive a compensation to be de-
terminated by the commission, upon recommendation of the director, subject to the approval of the Governor.” (Section 5.)

Section 6 of the Act provided that the commission should organize by electing one of its members chairman, who shall hold office for one year, and “Three members shall constitute a quorum to do business.” Section 12 of this Act, as amended in 1921, made six divisions in the Department of Conservation, one of which was called “Lands and Water.” Section 18 of the Act, as amended in 1929, provided:

“The department of conservation shall have the following powers, duties and authority:

1. To have the care, custody and control of the several preserves and parks owned by the state, other than the state forest reserves.”

There are provisions relating to certain specifically named parks not involved in your request, but the above quoted part of Section 18 contains the entire authority vested by the Legislature in the Department of Conservation over state parks.

In 1933, the Legislature passed what was called the “State executive-administrative act.” (Chapter 4, p. 7.) This act created eight divisions of the executive, including the administrative department of the state. Number seven was the “Department of Public Works.” By Sec. 6 the Governor was authorized to appoint each officer, employee or servant of the executive, including the administrative department, and the tenure or service of each was to continue at the pleasure and discretion of the Governor, with certain exceptions not pertinent here. By Sec. 9 the Governor was specifically authorized in his discretion “to assign and/or reassign, transfer and/or retransfer, the, and/or any administrative power, duty or function, of whatsoever name, nature, kind or character now prevailing, or prevailing under any act passed at the seventy-eighth session of the General Assembly of the State of Indiana to such one, or more, of said eight departments defined in Section 2 hereof; and all such powers, duties and functions shall continue without lapse, diminution or abatement to and in such department.” Section 16 provided that the Department of Public Works shall be in charge of the Board of Department of Public Works, which shall consist of the Governor, Lieutenant-Governor and three other persons, one of whom
shall be designated by the governor as the chief administrative officer thereof.

Section 26 of said Act provided:

"That whenever any division of the executive including the administrative department of the State of Indiana, be the same a person, body or organization of whatsoever character, is referred to or designated in any law, contract or document, such reference or designation shall be deemed to refer to and include the department organized hereunder to which the powers, duties and functions thereof are assigned and transferred, or the appropriate authority therein, so far as such law, contract or document pertains to matters which are by reason of such assignment and transfer placed within the supervision and jurisdiction of the department to which such assignment and transfer is made."

Section 30 of said Act repealed all laws in conflict.

The above Act was repealed by the General Assembly of 1941, but as four of the instruments submitted by you were executed during the effective period of said Act, it is necessary to determine the authority and jurisdiction of the subject during such period. By an executive order of Paul V. McNutt, Governor, effective April 15, 1933, all the "powers, duties and functions" of the Department of Conservation were transferred to the Department of Public Works.

The "State executive-administrative act" and the executive order above referred to were repealed by Chapter 4, page 8, of the Acts of 1941. The repeal was made effective May 1, 1941. (See, also, pages 31 and 124 of the 1941 Acts.) Thus, from April 15, 1933, until May 1, 1943, whatever powers and functions the prior statutes had vested in the Conservation Department were in the Department of Public Works, but they were not enlarged by the transfer. After May 1, 1941, the powers, duties and functions of the Department of Conservation became as under prior valid legislative enactments.

Tucker v. State (1941), 218 Ind. 614.

In 1945 the Legislature gave the Indiana Department of Conservation authority "to construct, rent, lease, license or
operate public service privileges and facilities in any state park or parks” (Section 12 of Chapter 353). See Opinions Attorney General No. 64, 1945. Prior to 1945 the Legislature had not conferred such authority by statute upon any public officer, board or commission.

In fact, at the 1943 session of the General Assembly there was introduced a bill (H. B. No. 447) conferring power upon the Department of Conservation to “rent, lease or operate public service privileges and facilities in any state park or parks.” This bill failed to pass. While in no way determinative, this indicates that the Legislature considered that the Conservation Department did not have power to rent or lease public service privileges and facilities in the state parks and was unwilling at that time to confer such power on the Commission by legislative enactment.

As above shown, the only provision in the statutes at the times the agreements in question were executed conferring jurisdiction over state parks upon the Department of Conservation, or the Board of Works as the transferee of its powers, which I have found is that set forth above, giving it the “care, custody and control” of the parks owned by the state. Prior to 1945 there was no statute giving it the authority to rent, lease or license any privileges, concessions or facilities in any state park. Furthermore, from 1933 to May 1, 1941, the powers, duties and functions of the Department of Conservation in the “care, custody and control” of the state parks was in the Board of the Department of Public Works. It is, therefore, necessary to consider the authority of the Board of the Department of Public Works during its existence from April 15, 1933, to May 1, 1941, and of the Department of Conservation from then until March 2, 1945, to make such contracts.

**Authority of Public Boards and Officers to Contract**

In 1884 the Supreme Court of Indiana had before it the question of the power of the State Auditor to contract in reference to the lands of the State in the case of McCaslin *et al.* v. The State *ex rel.* Auditor of State, 99 Ind. 428, and at pages 439 and 440 said:

“It is manifest, we think, that the question of the sufficiency of this paragraph of answer is wholly de-
dependent upon the response which must be given to this further question, namely, was the alleged agreement of the auditors of state with the appellant Margaret McCaslin a valid and binding agreement as against the State? Were the auditors of state authorized and empowered to bind the State by any agreement in relation to the land in controversy? It needs no argument to show that these questions must be answered in the negative. The General Assembly of the State, as we have seen, had authorized the sale, not the exchange, of the land, and had authorized the Governor and the commissioners of the house of refuge, not the auditor of state, to sell the same for cash or on credit. The auditor of state had nothing whatever to do with the sale of the land, and any agreement he may have made in relation thereto with the appellants, or either of them, was and is absolutely void, and of no binding force against the State of Indiana. This proposition is so plain and so manifestly right that it hardly needs the citation of any authority in its support. A State officer can only deal or contract in relation to the property of the State, when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized, is void as against the State.

* * *.” (Our emphasis.)

The case of Julian v. State (1889), 122 Ind. 68, was an action in quantum meruit for the value of appellants' services as attorneys in the prosecution of certain actions on behalf of the State, alleging an employment by the Attorney General with the approval of the Governor, Secretary, Auditor and Treasurer of State, and the performance of the employment. The question turned on the authority of the Attorney General to make contracts of employment. The court said in this regard at page 72:

"It is a well-settled doctrine that officers of the State exercise but delegated power, and this is particularly true of the attorney general. His office is created by statute, and he, as such officer, can only exercise such power as is delegated to him by statute. A contract
made with the attorney general is void unless he is expressly or impliedly authorized by statute to make such contract. State v. Portsmouth Savings Bank, 106 Ind. 435; Platter v. Board, etc., 103 Ind. 360, and authorities there cited."

The Court also said at page 73:

"It is also well settled that all who deal with officers exercising statutory powers, and whose authority is limited by statute, are charged with notice of the scope of such officers' authority. Honey Creek School Tp. v. Barnes, 119 Ind. 213; Pierce v. United States, and Dover, etc., Savings Bank v. United States, 19 U. S. (L. C. P. Co. ed.), p. 169, at bottom (The Floyd Acceptances, 7 Wall. 166)."

and it was held that no express statutory authority was given to the Attorney General to make such a contract and it was invalid.

In the case of State v. Portsmouth Savings Bank (1886), 106 Ind. 435, the question of the authority of state officers to dispose of the state land was before the court, and it is said at p. 450 of the opinion:

"* * * Public officers have no authority to dispose of the State's lands except such as is conferred upon them by positive statutes. Any sales of such lands by them without such statutory authority are void as against the State, unless they are in some proper way ratified by the State. McCaslin v. State ex rel., 99 Ind. 428; Brown v. Ogg, 85 Ind. 234; Vail v. McKernan, 21 Ind. 421; Skelton v. Bliss, 7 Ind. 77; Ferris v. Cravens, 65 Ind. 262; Whiteside v. United States, 93 U. S. 247; Hull & Argalls v. Marshall County, 12 Iowa 142."

It was held that public officers cannot do indirectly what they could not do directly and that the state's land could not be disposed of in any way except in pursuance of law, and that the purchasers were bound to take notice of the lack of authority.
Statutes relating to the authority of public officers over the state's land must be strictly construed. In the case of Tolleston Club v. Lindgren (1906), 39 Ind. App. 448, the Court said at page 452:

"* * * Manifestly it was the intention of the legislature that the land should be sold under the act of 1852 for not less than $1.25 an acre. The only authority the public officers had to sell the land was that given them by this statute. Such a statute should be strictly construed. State v. Portsmouth Sav. Bank (1886), 106 Ind. 435, 451. * * *"

In the case of Matthews v. Goodrich (1885), 102 Ind. 557, the effect of a release or conveyance of state land to the United States was before the court, and in holding it invalid the Court said at page 569:

"If the governor could reconvey the land to the United States without a particular recital of power, as to which we make no decision, he could not so reconvey without authority from the Legislature. His general authority as an officer of the State included no such power. The learned and careful counsel for the appellees have not been able to refer to any statute conferring such authority, and we have not been able to find such a statute * * *".

In the case of Terre Haute, etc., R. Co. v. State (1902), 159 Ind. 438, the Court said at page 466:

"It is probable that the right of the Attorney-General or the Treasurer of State to demand an accounting would have been implied if the law had been silent. But there is no basis for an inference here. A specific provision for an accounting, and to whom it shall be made, having been written in the law, no other can be implied. A public officer is a creature of the statute, and has no power but that expressly conferred, and necessarily implied, to enable him to carry out some specific duty, and if at any time down to 1847 the Attorney-General, Treasurer, or other officer of State, had attempted to settle, and give acquittance to appel-
lant, the act would have been void, and would have concluded no one. McCaslin v. State ex rel., 99 Ind. 428, 439, Platter v. Board, etc., 103 Ind. 360-378; State v. Portsmouth Sav. Bank, 106 Ind. 435-451."

In the case of Snoddy v. Wabash School Township of Fountain County (1896), 17 Ind. App. 284, at page 287, it is said:

" Upon the subject of the promises of school townships, the Supreme Court, in Honey Creek Tp. v. Barnes, 119 Ind. 213, says: 'School townships are corporations with limited statutory powers, and all who deal with a trustee of a school township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law.' * * *"

In the case of State ex rel. Shuler, Trustee v. Board of Commissioners of Fountain County (1896), 147 Ind. 235, at page 236, it is said:

"The school and civil township are of very limited powers and the law declared in this State concerning the power of school township applies with equal force to civil townships. The authority of the trustee is purely statutory. His acts create no binding obligation against the civil or school township unless they are authorized by law, and all who deal with him must at their peril ascertain the extent of his authority."

In the case of Lund v. Board of Commissioners of County of Newton (1910), 47 Ind. App. 175, at page 179, it is said:

"The board of commissioners, like other statutory officers, is without power to make any contracts for the expenditure of money, except such as are conferred upon it by statute."

In the case of Silver, Burdett & Co. v. Indiana State Board of Education et al. (1904) 35 Ind. App. 438, at pages 453 and 454, it is said:

"The state board of education and the state board of school book commissioners are creatures of legisla-
tive enactment. They exist by virtue of the statute, and they have no power, and cannot exercise any authority, except that which is conferred upon them by statute. They may be regarded as agents of the State, by virtue of which they act for the State in the interest of all the people. The scope of their agency is prescribed by statute, and by the statute they are commissioned to do specific things and are directed as to the manner in which these must be done. Beyond the bounds of the statute they cannot go, and they can bind the State only while acting within their authority.

In the case of Hord v. State (1907), 167 Ind. 622, the Court cites numerous authorities upon the authority of a public officer to contract, and said at page 631:

"It is evident that, under the issue raised upon the complaint herein, the onus is upon appellant to show that Attorney-General Michener, the supposed agent of the State, in making the contract, was exercising the power conferred, either expressly or impliedly, upon him by the statute. Such a statute, if any, must be regarded as the letter of his special agency in the matter, and beyond it he could not go and thereby bind the State or create any liability against it. This proposition is well settled by the authorities. (Citing cases.)"

"It is an equally well-settled rule that all persons dealing with public officers, whose power or authority to represent and bind the State, or some subordinate municipality thereof, depends upon or is limited by statute, are charged at their peril with notice of the scope of the power of such officers under such statute. (Citing cases.)"

In the case of Daily v. State ex rel. (1909), 171 Ind. 646, at page 652, the Court said:

"As we said in Sherrick v. State (1906), 167 Ind. 345: 'The legislature must prescribe all the duties the Auditor of State will be permitted to exercise.' His
duties and powers, except such only as are necessarily implied to enable him to render obedience to some express command of the General Assembly, are expressed, defined and given publicity by and through the public laws of the State. All are required to take notice of the length and breadth of the auditor's authority. 'Every one having dealings with them (public officers) is charged with the legal limitations of their agency.' Tiedeman, Commercial Paper, Sec. 136."

In the case of New York Central R. Co. v. Public Service Co. (1922), 191 Ind. 627, at page 635, the Court said:

"In this state it has been held that the State Board of Tax Commissioners is a body of special statutory powers, and acts outside of its granted powers are absolutely void. State Board Tax Commrs. v. Belt R., etc., Co. (1921), ante 282, 130 N. E. 641, and cases there cited."

"The same rule holds as to the Public Service Commission. It is created and its duties defined by statute. Its powers and duties are conferred and limited by the statute, and where power is given it to do a certain thing in a certain manner, the manner prescribed is the measure of the power given. When it is given authority to do a certain thing, the duty is imposed on it by statute to do such thing, and it has no authority to delegate its power to any one else."

In the case of Department of Ins. v. Church Members Relief Assn. (1940), 217 Ind. 58, at page 60, the Court said:

"* * * When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden. The administrative officers of the state, as well as the appellee, were bound by the statute. The insurance department had no power to authorize or acquiesce in the issuance
of policies unauthorized or forbidden by the statute. An estoppel against the state cannot arise out of the unauthorized acts of state officers. Platter v. Board of Com’rs. (1885), 103 Ind. 360, 381, 2 N. E. 544, 556, 557; Sandy v. Board of Com’rs. (1909), 171 Ind. 674, 677, 87 N. E. 131, 132; Ness v. Board of Com’rs., etc., et al. (1912), 178 Ind. 221, 232, 98 N. E. 33, 1002; 21 C. J. Sec. 193, p. 1191; 19 American Jurisprudence Sec. 66, p. 818.”

Additional authorities that invalid contracts with the state may not be ratified and that an estoppel against the state cannot arise out of the unauthorized acts of its officers, include:

Silver Burdett & Co. v. Indiana State Board of Education et al. (1904), 35 Ind. App. 438, 462;
First National Bank v. Van Buren School Township (1910), 47 Ind. App. 79, 86;
D. V. Turnpipe Co. v. Board of Commissioners of Bartholomew County (1880), 72 Ind. 226, 234;
Wrought Iron Bridge Co. v. Board of Commissioners (1897), 19 Ind. App. 672, 677;
Clinton School Township v. Lebanon National Bank (1897), 18 Ind. App. 42, 45;
Jessup v. Hinchman (1921), 77 Ind. App. 460, 465;

Upon the question of the powers of the director of the Department of Conservation, the Supreme Court of this state, in the case of State ex rel. Lieber et al. v. Sloan et al. (1926), 197 Ind. 556, at page 560 said:

"The appellee questions the right of the relator in the capacity of the Director of the Department of Conservation to intervene. The Department of Conservation was created by Ch. 60, Acts 1919, p. 375. The status of such department is administrative only, and is a branch of the administrative arm of the government of the state (S.1). This department is admin-
istered by a commission of four members in whom vest all the powers and duties delegated to this department of the administrative branch of the government. This commission is without the power to delegate any of its powers and duties to any officer or agent it may employ, either as directed by the act itself, or as any inherent power which the commission might seek to take. The commission thus constituted has power to appoint a director, who is the executive officer of the department, and whose appointment is not limited or extended to any definite period of time, but who may be removed at any time without pretext by the commission. He is in no sense a member or part of the commission itself, which solely represented this department; and, as such director, does not have the power to sue and is not capable of being sued as such officer. Wherefore he is without standing as a relator in the name of the Department of Conservation. * * *"

In Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, the Court quotes with approval from 59 C. J. 172 as follows:

"Public officers have and can exercise only such powers as are conferred on them by law, and the state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, * * *"

In the case of Jobe v. Urquhart (1912), 102 Ark. 470, at page 484, the Court said:

"* * * In the first place, as against the State, no one can acquire vested rights in a void contract. Ordinarily, all contracts with the State must rest upon some legislative enactment, or be specially provided for by law, and no agent or officer has the power to bind the State by contract independent of a special or general statute authorizing the same. In this respect the law governing the contracts of the State is different and not so general in its application as the law regulating contracts between individuals. A void contract
is in legal effect no contract. By it no rights are
divested. From it no rights can be obtained. The
law treats the contract as a *nudum pactum*, and the
courts cannot breathe life and vitality into a void con-
tact, forsooth it may point to a moral. * * *”.

**BOARDS MUST ACT IN SESSION**

It is also well settled that the powers of board and com-
missions may not be exercised by the individual members
separately. Their acts are official only when done by the
members convened in session upon a concurrence of at least a
majority, and with at least a quorum present.

In 42 American Jurisprudence, at page 389, Sec. 74, it is
said:

“The powers and duties of boards and commissions
may not be exercised by the individual members
separately. Their acts are official only when done by
the members convened in session, upon a concurrence
of at least a majority, and with at least a quorum
present. * * *”

This question was considered and passed upon by the Indi-
ana Supreme Court in the case of Terre Haute Gas Corpora-
tion v. Johnson (1942), 221 Ind. 499, 45 N. E. (2nd) 484.

In that case the Court recognizes the rule as above stated
and further held that all members of the board must have a
fair opportunity to participate in its action or the action is
void.

See also:

Campbell v. Brackenridge, 8 Blackf. 471;
Potts v. Henderson, 2 Ind. 327;
Board of Com’rs. Cass County v. Ross, 46 Ind.
404;
Board of Com’rs Franklin County v. Bunberg,
111 Ind. 143;
Columbus, C. & I. C. Rw. Co. v. Board of Com’rs
Grant Co., *et al.*, 65 Ind. 427.
SUMMARY OF RULES RELATING TO POWER TO CONTRACT

A contract by which a statutory officer or board seeks to bind the state must rest upon some legislative enactment and in this respect differs from contracts of individuals. Such authority must be conferred in positive terms or be necessary to enable him or it to carry out some express command of the legislature. If the legislature has failed to grant or confer such authority it does not exist. Where such authority is conferred by valid legislative enactment, the contract must be executed by officers or an officer possessed of power and authority to execute the same. Where the authority is in a board it cannot be exercised by the individual members separately. It must be exercised by the members legally convened in session upon a concurrence of at least a majority and with at least a quorum present. In addition all members of the board must have had a fair opportunity to participate in its action or the action is void.

POWER OF PUBLIC OFFICERS TO MAKE CONTRACTS BINDING ON SUCCESSORS

The authorities are not wholly in accord on the power of public officers and boards to make contracts binding on their successors. However, many of the cases may be reconciled on the language of the particular statute involved or the nature of the subject matter of the contract. From the summary of the contracts above given it is shown that those numbered 6, 7, 8 and 9 were for five years, and numbers 6, 7 and 8 purport to give right of renewal at the option of the licensee for an additional five years, making a total of ten years. At the time they are dated, the care, custody and control of the state parks was in the Department of Public Works. This department was abolished by statute in 1941. A Conservation Commission was appointed in 1941 with a change in personnel. At the time the contracts were signed, it was known that new appointments would arise before the life of the contracts terminated. The Conservation Commission, as it existed in 1941, was abolished in 1945 by statute and a new one created. At the time these contracts were executed it was known that two members of the Board of the Department of Public Works were elected and their terms
would expire and be filled by elections held on at least two occasions before the end of the ten-year period. It was further known that there would be at least four sessions of the General Assembly which might legislate concerning the operation of the state parks, that the policies of the management of the state park and its public services, privileges and facilities might be changed by succeeding sessions of the General Assembly and by succeeding boards which might be entrusted with their operation, control and management. Many changes in policy might be made in the future on such questions as the nature and extent to which fees should be charged, the kind, nature and extent of the facilities and equipment with which the parks were to be furnished. The question thus arises as to whether and to what extent one board or officer could tie the hands of succeeding officers, boards and even future legislatures by such contracts.

In the case of Board of Commissioners of Jay County v. Taylor, et al. (1890), 123 Ind. 148, the Court had before it a contract employing a county attorney beyond the term of its membership. The Court conceded the power to employ an attorney but held the contract beyond the term of the membership against public policy and void. The Court said at page 152:

"If the contract in question is binding, the board of commissioners at one session may employ counsel to serve the board, as then organized, and at the same time employ counsel to serve it in advance, and at a time when it is known the membership of the board will be different.

"It is true that under the contract in question, the beginning of the term for which the appellees were employed, was only postponed three months from the date of the employment; but in the meantime the term of office of one member of the board expired, and that of another began, and if, under such circumstances, attorneys could be engaged three months ahead, why not for one, two or three years in advance?

"But the most obnoxious feature which we find in the contract is, the length of time for which the appellees were employed.

"We know as a matter of law, as we have already said, that the membership of the board will be changed
as many as three times from the date of the employment to the expiration of the term of service, unless some of its members are re-elected, and in that case the terms of office will be different; unless some of the members are re-elected there must be an entire change in the membership of the board between the date of the employment and the expiration of the time covered by the contract. This contract deprives the board as reorganized from year to year of the right to employ its attorneys for the next following year.

"If such contracts are binding, then no difference how distasteful an attorney may be to the members of the board, or how little confidence they may have in his ability, legal learning or honesty, so long as he performs the conditions of the contract on his part they are bound to recognize him, accept his services and assume the responsibility. And if the contract in question, extending as it does over a period of three years, is valid, why may not a like contract covering a period of six, nine or a dozen years be upheld?

"Our conclusion is, that the contract is against public policy and void."

This holding was approved in Jessup v. Hinchman (1921), 77 Ind. App. 460.

In the case of Hord v. State (1907), 167 Ind. 622, at page 641 the Court said:

"These authorities fully sustain the proposition that appellant’s appointment or employment as the assistant of Attorney General Michener terminated with the expiration of the latter’s official term. The fact that subsequent incumbents of the office knew of his appointment, or acquiesced therein, would not alone be sufficient to reinvest him with authority to continue to represent the State as the assistant of the Attorney-General. He must be shown to have been reappointed or reemployed by the successive Attorneys-General as their assistant to continue the prosecution of the claims in controversy. * * *"
In the case of Milikin v. Edgar County (1892), 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447, the Court held that a statute which authorizes the board of supervisors to "appoint a keeper of the poorhouse and all necessary agents for the management and control of the poorhouse and farm, and prescribe the compensation and duties," does not empower such board, the members of which are themselves elected annually, to contract to employ a person as keeper for a term of three years. The Court said:

"* * * If the board had the power to * * * contract * * * for 3 years, no reason is perceived why it might not make a contract for five or even ten, years, and, if this could be done, the hands of succeeding boards would be tied,—their powers taken from them. If this important power—the supervision of a poor farm and the care of the unfortunate—may be so far delegated as was attempted in this case—the county might be deprived in a great measure of one of the most important affairs intrusted to its care and supervision. The statute should not receive a construction which might lead to such disastrous results, * * *

In the present matter, if the Conservation Commission could, under the statute then in force by contract, turn over the care, custody and control of the facilities of the State Parks to a private person or corporation for 10 years, no reason is seen why it could not make such a contract for 20 or even 50 years, and the "care, custody and control" of the parks and their facilities vested by statute in the Department of Conservation and its succeeding boards be thus taken from them or greatly impaired.

In the case of Vacheron v. N. Y. (1901), 34 Misc. 420, 69 N. Y. S. 608, the plaintiff had a ten-year contract to sprinkle roads of Queens County, at a certain amount per mile per season, made July 6, 1897, with Queens County by its Board of Supervisors. The Charter of defendant (City of N. Y.) was passed May 4, 1897, to go into effect January 1, 1898. The Court said:

"* * * the board of supervisors had no power to make such a contract to run longer than the period of
its own existence. The care of the roads was an administrative duty to be performed by each successive board during its existence. An existing board could not perform that duty for its successors."

In the case of First National Bank v. Peck (1890), 43 Kan. 643, 23 Pac. 1077, a statute authorized county commissioners to designate a bank in which to deposit public money. There was no express statutory authority to make such designation continue for any particular length of time. It was held not to be binding on succeeding boards. It was said:

"* * * If it had been the purpose of the legislature that county commissioners might tie their hands and those of their successors and bind the county to retain the funds in a certain bank through several changes in the membership of the board, or for any stated time, it would surely have made it clear in the statute enacted. The public interest will be best served by leaving the board free to change the depository whenever in the judgment of the commissioners the safety of the public moneys and the good of the county require such change. * * *"

The Kansas Court reached the same result in the case of Sheldon v. Butler County (1892), 48 Kan. 356, 29 Pac. 759, on a contract designating a paper for official publications. The rule is stated in 46 C. J. 1032, 1033 as follows:

"Because a public official, for a known and limited term, has power to make a contract, he is not authorized thereby to make one for an indefinite or long extended term; ordinarily the power is limited in time to the term of the officer who makes it, but if the extent of the officer's power is not expressly limited, the facts and circumstances of each case must be considered in determining it. And necessity, or its equivalent of great advantage to the principal, may furnish a reason for enlargement beyond the term, but he who asserts the existence of the necessity or great benefit has the burden of proving it."
In 20 C. J. S. 1009, 1010, it is stated:

"Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, which (1009) tie the hands of the succeeding board and deprive it of its proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest. Such want of power to contract beyond the term of the board is an exception to the right of the board to contract as a municipal arm of the state."

In the case of Moore v. Luzerne County (1918), 262 Pa. 216, 105 Atl. 94, the plaintiff had a contract with the county commissioners by which he agreed to furnish the plans, designs, drawings and specifications and descriptions for and to supervise, inspect and report upon the construction of part of a certain county road. For this plaintiff was to receive six per cent. of the entire cost of construction. Contract dated December 23, 1911. Plaintiff was ready to proceed under contract but it was revoked by a later board of county commissioners on January 25, 1912, who selected another engineer in plaintiff's place and who built the road. No work was done by plaintiff. On the question of the validity of the contract:

"Moreover, the court cannot blind its eyes to the fact that, in public and private life alike, an official or agent, whose term of service is about to expire, might be tempted to favor his friends and retainers at the expense of his principal. Because thereof, public policy requires that the courts, in furtherance of public and private honesty and fair dealing, shall apply such procedural rules as will prevent or limit summary recovery upon agreements which possibly may result from yielding to such temptation. Publicity discourages temptation, and hence statutes usually do not require
public corporations to file affidavits of defense, and for a like reason the courts do not require the utmost strictness in such affidavits when the language of the statute is general, and does not specify the requisites of the affidavit."

"* * *

"Tested by the above rules, we are of opinion that the judgment below is erroneous. The contract was made by the county commissioners but a few days preceding their retirement from office and the induction of their successors, and related to work, all of which was to be performed after they had ceased to be public officials. As the record now is, it is barren of any explanation of that material fact. It is a mistake to suppose that, because a public official, or indeed any other agent for a known limited term, has power to make a contract, he is authorized thereby to make one for an indefinite or long extended term. If the agency itself does not expressly limit the extent of the agent's power, then the facts and circumstances of each case must be considered in determining it. Ordinarily it is limited in time to the term of the agent who makes it. Necessity, or its equivalent of great advantage to the principal, may furnish a reason for enlargement beyond the term, but he who asserts the existence of the necessity of great benefit has the burden of proving it. This is particularly true of public officials, else those going out of office might so tie the hands of those coming in as to cause serious embarrassment and loss to the public. Every one would concede, for instance, that an outgoing board of county commissioners might well contract for the coal needed in the county offices during the existing or ensuing winter, although their terms ceased on the first of January; and every one would likewise concede that their contract for coal to cover a decade would ordinarily be wholly beyond their powers."

This case was followed in Myers v. Luzerne County (1918), 262 Pa. 223, 105 Atl. 96.
The case of Wilett & Wilett v. Calhoun County (1928), 217 Ala. 687, 117 So. 311, involved an action on contract by plaintiff against the county. The Court said:

“(1) The question presented is whether or not the board of revenue of a county had authority to make a contract with plaintiff as counsel or attorneys for said county board or court to extend beyond the term of the board as it existed at the time of the execution of such contract.

“We think not. It is contrary to public policy or injurious to the interest of the public, in that the effect would be ‘tying the hands of the succeeding board and depriving the latter of their proper powers.’ Such succeeding board, as personally constituted, should at all times be free to select its own confidential legal adviser. Such has been the ruling in New York, Ohio, New Jersey, Indiana, Illinois, Kansas, Iowa, and Colorado. 15 C. J. 542; Board of Com’rs of Jay County v. Taylor, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160. The rule as to the county printer in Colorado was discussed in Liggett v. Board of Com’rs of Kiowa County, 6 Colo. App. 269, 40 P. 475, and in Webb v. Spokane County, 9 Wash. 103, 37 P. 282, the rule as to the county physician in Washington was to the contrary. Such employments were not personal and confidential to the county board. We adhere to the majority view as to the attorney for the board, that such action is void as against public policy, the employee standing as he does in confidential or personal relation to the board. Board of Comrs. of Jay County v. Taylor, supra; Board of Com’rs of Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385.

“(2) In the case of Clark v. Eagerton, 207 Ala. 491, 93 So. 455, the question was the right of the board to protect the financial interests of the county, and to that end employ counsel and pay for services rendered in substituting through the courts the lost tax records of the county under the statute made and provided for such contingency. Gen. Acts 1919, p. 68, amending Gen. Acts 1915, p. 549. The Clark-
Eagerton Case, *supra*, is not decisive of the question here presented. The right of employment of counsel, advisory and personal, to their successors, in the respect that each board of revenue should select its own attorney and counselor, is the generally recognized exception to the rule or right of contract by such municipal arm of the State. Millikin v. Edgar County, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447; Sheldon v. Board of Comrs. of Butler County, 48 Kan. 356, 29 P. 759, 16 L. R. A. 257; Picket Pub. Co. v. Board of County Com'rs of Carbon County, 36 Mont. 188, 92 P. 524, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 358, note, 12 Ann. Cas. 989, and authorities, 29 L. R. A. (N. S.) 656. See also, 7 R. C. L. 916, § 21.”

Other cases on this question include:

King County v. U. S. Merchants & Shippers Ins. Co. (1929), 150 Wash. 626, 274 Pac. 704, 706;

Hyde v. Bd. of Commr's. of Converse County (1934), 47 Wyo. 101, 31 Pac. (2d) 75, 78, 80;


As shown by the foregoing authorities the question of contracting beyond the term of office is frequently tied into the question of the statutory authorities to contract. In my opinion the rule may be stated to be that in the absence of express statutory authority one board may not bind its successors by a contract for service, particularly where such service is confidential or involves the carrying out of matters of policy. Necessity or great advantages to the state may furnish a reason for enlargement beyond the term but he who asserts the existence of the necessity or great benefit has the burden of proving it.

**APPLICATION OF STATUTES AND AUTHORITIES**

We now come to the application of the foregoing statutes and authorities to the contracts in question. Taking up first
those contracts numbered 1 to 5, inclusive, above, it is my opinion that they are primarily in the nature of contracts of employment. The decision most nearly in point which I have found is Warren v. Topeka, et al. (1928), 125 Kan. 424, 265 Pac. 78, 57 A. L. R. 558. In that case there was involved an agreement which provided that the city sold and granted to one Torsney the exclusive privilege to operate all the concessions in the park for a definite period, that in operating such concessions the city was to maintain supervision over the park and to have complete control and supervision at all times as to cleanliness and sanitary conditions. Torsney was to furnish guards at the pool. The commissioner of parks was to have general supervision of the park and Torsney in the operation of the concessions was to observe the rules laid down by the commissioner. The Court said:

"* * * A careful examination of the agreement attached to the petition does not show it to be a lease from the city to defendant Torsney. It can more properly be called a concession, with the city reserving to itself and the commissioner of parks and public property full and complete control and supervision over the entire park and the property therein and the right to impose from time to time rules and regulations as to the operation of the concessions granted. We think, as was said concerning an apparently similar agreement in the Bailey Case above cited, that 'the concessions granted do not amount to the leasing of any part of the park . . . Nor do they involve the loss of control over it by the public officers.' Page 329.

"If the defendant Torsney does not have a lease but only a concession, with absolute supervision and control to be exercised over him at all times by the city and its officers, he cannot be said to be an independent contractor, but more properly an agent or employee of the city. * * *"

At the time the contracts involved were executed, the statute (Sec. 3 of Chapter 60 of the Acts of 1919, Sec. 60-703 Burns’ R. S. 1933) gave the director power, with the approval of the commission, to appoint chiefs of divisions and "upon
recommendation of said chiefs to appoint and remove all assistants, inspectors and employees thereof.” Their compensation was “to be determined by the commission, upon recommendation of the director, subject to the approval of the Governor.” (Sec. 60-705 Burns’ R. S. 1933.) At the same time the statute vested the “care, custody and control” of state parks in the department of conservation. No power or authority was given it in the exercise of their “care, custody and control” other than through chiefs of division, assistants, inspectors and employees. To the extent that those agreements numbered from 1 to 5 inclusive, to wit:

1. Clifty Falls State Park, dated 1-1-44.
2. Turkey Run State Park, dated 1-1-44.
3. Indiana Dunes State Park, dated 5-1-44.
   (Duneside Inn and Cabins)
4. Brown County State Park, dated 11-14-44.
5. Indiana Dunes State Park, dated 11-14-44.
   (Dunes Arcade and the Pavilion)

are agreements of employment and were executed in compliance with the above statute, they were valid, subject to the removal of such employees or assistants by the director as expressly reserved in Section 3 of said Act above. It is further my opinion that to any extent which the contracts may go beyond such statutory authorization, they are not binding on the state. Were a public official permitted to bind the state by a contract with a private individual without statutory authority therefor, or to delegate to private individuals duties imposed by statute upon such public official at the expense of the state, there would be little limit to which he could pledge and bind the state and the authority. Duties and powers imposed by the Constitution on the General Assembly, and constitutional officers could be contracted away by those officials temporarily filling public office. It is also my opinion that the subject matter of these contracts involves questions of the policy of the commission in carrying out and exercising its statutory duty of the “care, custody and control” of the state parks, and that one commission could not by contract bind succeeding commissions or another board or officer who might be charged with the authority and duty by the Legislature, or which would be binding upon succeeding
legislatures. It is my opinion that these contracts were subject to termination and that they were terminated by the legislature by Chapter 353, page 763, of the Acts of 1945. If these contracts are subject to construction as leases or as vesting any interest in the property of the State in the "licensee," then to that extent they would be invalid as beyond the authority of the officer or officers executing them, in my opinion.

Next to be considered are those contracts which I have designated as numbers 6, 8 and 9, to-wit: McCormick's Creek State Park, dated January 5, 1938; Pokagon State Park, dated December 30, 1939; and Shakamak State Park, dated January 1, 1941. These contracts are something more than contracts of employment. The state parks, the buildings, improvements and facilities thereof which were erected and installed by the state, are the property of the state and its citizens. At the time these agreements were dated, the care, custody and control of the state parks was in the Board of the Department of Public Works, which, unlike the Conservation Commission, was not a bi-partisan board. As above pointed out, said board could act only when in lawful session and as a board. I have caused search to be made of the records and minutes of said board, and no action of the board is shown authorizing or approving either of said three agreements. They purport to be executed by "State of Indiana, Department of Conservation, V. M. Simmons, Commissioner." At that time there was no legally functioning department of conservation, all of its powers, functions and duties having been transferred to the Department of Public Works by executive order. Consequently there could be no commissioner of the Department of Conservation. At that time said V. M. Simmons was the administrative officer of the Department of Public Works, but as such officer he was given no statutory authority to bind the state of Indiana by contracts giving the exclusive right to have the custody of and to operate hotel and restaurant business in the property of the state for a period of five years, with an additional five at the option of the individual contracted with. If this could be done for ten years, then I see no reason why such contracts could not be made for twenty-five or even fifty years, and thus a large part of the facilities of the state parks could be put in private hands to be operated for private profit for a long period of
time, and the care, custody and control of the public officials be largely diverted. Should the Legislature, in its determination of the policy to be followed in the operation of the state parks, determine that preference be given residents of the state in the use of their facilities, or that preference be given ex-service men as employees in their care and operation, or any other matter of policy, its hands would be tied by a contract executed years before by an appointed official who was no longer in office. It is my opinion that these three contracts are not binding on the state of Indiana or its present officials.

This leaves the contract of Spring Mill Inn, Inc., dated June 1, 1939. I pointed out above that there was no approval or other record in the minutes of said board of those three contracts referred to as numbers 6, 8 and 9. I might add that I am unable to find any record of approval of any contract relating to state parks in said book, with the one exception of that relating to the facilities at Spring Mill Park. Concerning said contract, the following appears in said minutes book:

"RESOLUTION OF THE DEPARTMENT OF PUBLIC WORKS"

"At a special meeting of the Board of Public Works, State of Indiana, held in the office of the administrative officer on the 18th day of April, 1939, upon motion duly made and seconded the following motion was unanimously adopted:

"Be it Resolved by the Board of the Department of Public Works that the following license and concession agreement for Spring Mill State Park be and it is hereby adopted and approved:

"(H. I.)"

"Be it further resolved that the Spring Mill Inn, Inc., be and it is hereby approved as a Licensee and Concessionaire, and Virgil M. Simmons, administrative officer of the Department of Public Works be and he is hereby authorized to execute for and in behalf of the State of Indiana, Department of Public Works the
above and foregoing contract with Spring Mill Inn, Inc., as Licensee.

"Unanimously approved and adopted this 18th day of April, 1939.

"DEPARTMENT OF PUBLIC WORKS

"MEMBERS OF AND CONSTITUTING BOARD
OF PUBLIC WORKS

Virgil M. Simmons, Administrative Officer of the Department of Public Works"

Said minutes are unsigned.

It will be noted that the above purport to be minutes of a special meeting held April 18, 1939 in the office of the director. There is no showing as to what members were present. The records of the office of the Secretary of State disclose that Articles of Incorporation of Spring Mill Inn, Inc., were acknowledged and filed on April 24, 1939, and a certificate of incorporation was issued on that date, thus the minutes of the Department of Public Works purport to show the execution of a contract with said corporation six (6) days before the existence of such a corporation. The incorporators and first board of directors of said corporation were Myron L. Rees, Elinore Moran Rees and Joseph T. Moran. I am informed that Elinore Moran Rees and Joseph T. Moran were respectively the wife and father-in-law of Myron L. Rees. The records of the department show that during the month of April and for some time prior thereto Myron L. Rees was the director of state parks. Thus the records show that when the contract was made on April 18th it was made with a corporation not existing and which, when it came into existence, consisted of the director of state parks, his wife and her father.

The above contract provided by paragraph 8 as follows:

"The Licensee shall furnish all furniture, fixtures, equipment, supplies, and other articles necessary in the operation and proper function of the concessions herein licensed except the State shall furnish window
shades, throughout the building where shades are necessary.

"The State shall furnish all furniture, rugs, lamps, drapes, and equipment for all public rooms.

"The State may at its option furnish any equipment which, in its opinion, may add to the comfort and pleasure of the park and hotel guests.

"The Licensee shall first obtain written permission from the State before installing any permanent or temporary fixture or equipment in or about the concessions herein granted. Likewise, the Licensee shall have written permission from the State before changing any of the present water supply lines, electric equipment lines, or any other utility or machinery now in use."

However, the records show that after April 18, 1939, the board paid for furniture, fixtures, equipment and supplies in said hotel and by an agreement dated September 15, 1939, sold the same to said Spring Mill Inn Corporation for $12,000.00 on installments without interest. The contract payment provision being as follows:

"The VENDEE agrees to pay the VENDOR the sum of $12,000, without interest in installments of $2,500 a year, due and payable on December 31 of each year, or so much of said $2,500 annual installment as may accrue to the VENDEE as net profits after paying all expenses and charges from the operation during said year of the concession rights held at Spring Mill State Park."

This contract was executed "State of Indiana, Department of Public Works, Department of Conservation, Virgil A. Simmons, Chief Administrative Officer." I fail to find any authorization of or even discussion of this agreement in the minutes of the Board of Public Works. As shown above, the department paid for said equipment, and the Spring Mill Inn, Inc., was to pay for them out of net profits of its contract. So far as I can tell the $12,000.00 amount represents the purchase price to the state of said articles with this exception: Equipment which apparently was the used equip-
ment of a restaurant was purchased from one Earl D. Robison. The invoice is dated May 25, 1939, and it was paid by the Department June 20, 1939, in the sum of $115.00. These equipment and supplies were included in said agreement at the price of $64.25.

The contract itself for the facilities of the park bears date of June 1, 1939, although the minutes herein quoted show it was adopted and approved and made a part of the minutes on April 18, 1939. It purports to cover the following:

"This agreement made this 1st day of June, 1939, between the State of Indiana, by and through the Department of Public Works, hereinafter called the State, and the Spring Mill Inn, Inc., hereinafter called the Licensee, in consideration of the terms, conditions and covenants herein contained the parties hereto mutually agree as follows:

1. a. A license and concession to operate a hotel and restaurant business and to sell and serve articles of food, drink, tobacco products, newspapers, pictures, photographs, post cards, souvenirs, and similar articles in Spring Mill Inn.

   b. A license and concession to operate and conduct a restaurant business and to sell and serve articles of food, drink, tobacco products, newspapers, pictures, photographs, post cards, souvenirs, and similar articles in Montgomery Tavern.

   c. A license and concession to operate and conduct a refreshment stand and to sell and serve articles of food, drink, tobacco products, newspapers, pictures, photographs, post cards, souvenirs, and similar articles, in the Shelter House adjacent to the picnic area.

   d. A license and concession to operate and conduct the refreshment and concession stand to sell and serve articles of food, drink, tobacco products, newspapers, pictures, photographs, post cards, souvenirs, and similar articles in the refreshment stand in the picnic area.
e. A license and concession to operate a bathhouse and to operate and conduct therein a refreshment business and to sell and serve articles of food, drink, tobacco products, newspapers, pictures, photographs, post cards, souvenirs, and similar articles in the said bathhouse.

f. A license and concession to operate and conduct a boat house and boat rentals.

g. A license and concession to use and occupy the building known as the Turley Residence for the purpose of conducting a rooming and lodging house for employees.

h. This license and concession shall be exclusive and the Licensee shall have a license to conduct all concessions in said Spring Mill State Park now existing or hereafter established."

It is thus to be noted that the contract purports to cover not only all existing facilities of the park but those “hereafter established.”

Clause 2 of the agreement is as follows:

“2. This license shall be for a period of five years from January 1, 1939, but may be terminated sooner by the State upon violation by the Licensee of any of the terms, conditions and stipulations herein contained.”

Thus the agreement was made retroactive from January 1 of that year and gave Spring Mill Inn, Inc., the proceeds during the previous months when said Rees was director of parks. The above contract was signed “Spring Mill Inn, Inc. By Myron L. Rees, President.” I have been unable to find an executive order creating the office of director of parks and defining his duties, but it appears quite likely that he had immediate care, custody and charge of the parks and was the chief officer in that division of the department, at least he was the appointee of a state officer.
The statute provides:

"Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agents, or any person holding any appointive power, or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any state-house, courthouse, school house, bridge, public building or work of any kind, erected or built for the use of the state, or any county, township, town or city in the state in which he exercises any official jurisdiction, or who shall bargain for or receive any percentage, drawback, premium, or profit or money whatever, on any contract, or for the letting of any contract, or making any appointment wherein the state or any county, township, town or city is concerned, on conviction, shall be fined not less than three hundred dollars ($300) nor more than five thousand dollars ($5,000), and be imprisoned in the state prison not less than two (2) years nor more than fourteen (14) years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." (Our emphasis.)

(Sec. 10-3713 Burns' R. S. 1933, 1942 Replacement.)

Contracts made in violation of this statute are invalid and not binding on the State; however, it is not necessary to determine the application of the above statute to this contract, as in the absence of a statute a public officer or agent is not permitted to be interested in a contract with the governmental agency which he represents. A number of decisions are quoted and summarized in the case of Noble v. Davison (1911), 177 Ind. 19, where the court said at p. 28:

"Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy. Counsel for appellants say in their
brief: 'Public policy is a juridical *ignis fatuus* upon which a judicial decision is sometimes sought to be founded when no support can be found for it is in the law, and it is resorted to frequently when the purpose is to take from one of the parties to the controversy that which is his by vested right, sometimes by constitutional guarantees. * * * It was an unhappy day for the law when the term was invented and given meaning as having the force of law.'

"We cannot concur in any such suggestion. One has heedlessly considered the decisions of this court, who would at this day assert such doctrine. This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, against the public good or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results.

"Integrity in the discharge of official duty is zealously guarded by the law. It lends no aid to that which tends to corrupt or contaminate official action, whether such action be judicial, legislative or administrative. 9 Cyc. 485. And the tendency of contracts between municipal corporations and officers thereof, for municipal improvements or supplies, is to mislead the judgments of the officers of the municipality, if not to sully their purity.

"In Chensy v. Unroe, *supra*, this court quoted with approval the following from 1 Dillon, Mun. Corp. (4th ed.) Sec. 444: 'It is a well-established and salutary doctrine, that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and
enforced wherever a well regulated system of jurisprudence prevails.'

"In Waymire v. Powell (1886), 105 Ind. 328, 4 N. E. 900, this court, in holding void a contract between a board of county commissioners and one of its members, said: 'The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employments, whether made directly or indirectly, utterly void.'

"In City of Fort Wayne v. Rosenthal (1881), 75 Ind. 156, 39 Am. Rep. 127, it was held that the employment by a board of health, of one of its members to vaccinate pupils in a public school, was void. The court said: 'As agent he cannot contract with himself personally. He cannot buy what he is employed to sell. If employed to procure a service to be done, he cannot hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason.'

"In Wingate v. Harrison School Tp., supra, it was held that a contract by a school trustee for the improvement of school property, by the terms of which he was to share in the profits of the contract, was void as against public policy.

"In Case v. Johnson, supra, it was held that a contract between a board of town trustees and one of its members, for a street improvement, was void, both by statute and because it was against public policy.

"* * *

"We see no reason for relaxing the rule adhered to so strictly by the courts of this State. In fact, not only in Indiana, but elsewhere, generally, the principle is applied by the courts in a large and constantly increasing number of cases. 9 Cyc. 482. As was said in State, ex rel. v. Windle, supra, 'The protection of the public interests requires that no exception to this rule shall be allowed, nor any evasions tolerated.'"
It is to be noted that this contract was not merely for some concession but purported to turn over to the Spring Mill Inn, Inc., virtually all the facilities of the park established or to be established.

Some of the authorities above quoted gave some consideration to the question of necessity or benefit. Upon this question the records of the Department of Conservation show that the gross receipts of Spring Mill Inn, Inc., in 1941 were $127,355.79; that in 1942 they were $155,160.04, in 1943 they were $153,500.53 and in 1944 were $173,139.36; that the "profit available for administrative salaries and returns to the lessees at each of the hotels for 1940 and 1941 follow * * * Spring Mill 1940, $21,959.05—1941, $25,042.14."

On August 4, 1942 one of the members of the commission made a report to the commissioner based upon an audit and survey made by a firm of certified public accountants. This report contains the following:

"1st. All hotels of at least 50 rooms can be operated successfully from a financial standpoint.

"2nd. There is nothing to indicate this financial success can be attributed solely to any one individual.

"3rd. There is nothing to indicate the success if (sic) any hotel depends solely upon the manager for its success.

"4th. It shows the investment of the state in the hotel is not a controlling factor.

"5th. It shows a very disproportionate return to the state on its investment.

"6th. It also shows the net profits derived from the operation of most of the hotels for several years past are all out of proportion to the returns to the state, considering the respective investments and the usual net profits from similar business and equal investments."

and also:

"My conclusions from the above analysis lead me to recommend to the Conservation Committee:
“1. Each hotel should be handled as an individual unit.

“2. The State's Conservation Commission should handle the business of each of its hotels solely upon the merits of the existing conditions, the hotel's cost, its past volume, its clientele, the character of the hotel in its physical aspects such as social rooms, kitchen equipment, sleeping rooms with and without bath, furnishings, length of paying season, availability for convention and group assemblies, housing facilities for the help, type and capacity of the cabin facilities, the distance to and from the larger towns, and all other elements that enter into each hotel's picture.

“3. The Conservation Commission should use its best unbiased business judgment in granting leases to concessionaires to the end that the State of Indiana receives its full share of all profits derived from the operation of each hotel or other concession.

"Such a lease is purely a matter of business and the same rules should apply as are used in private transactions of a similar nature.

“4. The State being considered the host, it behooves the Conservation Commission to see that the State keeps complete control of each hotel to the end that a uniform system of efficient service is rendered by each hotel.

"No hotel excepting in its physical restrictions should be allowed to be inferior in service to any other hotel.

“5. The State should have a competent hotel and concession manager who would establish minimum standards approved by the Director and the Conservation Commission, and would then periodically, but not at regular intervals, visit the hotels, thoroughly inspect them, advise with the management and then report in detail to the director on an inspection report which of itself, would show the condition as revealed by the inspection.

“6. Uniform accounting system to be installed in each hotel.
7. Simple, easily compiled reports including menus, house count, etc., to be sent to headquarters each day.

8. Each menu at each hotel to bear a statement that the Conservation Commission of Indiana desires to render every reasonable service consistent with good hotel practice, in a courteous manner and solicits praise or complaint from the public. This is your hotel. Address Charles DeTurk or Hugh A. Barnhart.

9. The Conservation Commission should not try to have uniform charges at each hotel or for each cabin. Let the Conservation Commission set a minimum and maximum; thus hotel rooms with bath can be rated from $4.50 to $6.00 per day. Then get proper rates according to all the conditions, kind of room, location as to view, front or back room, floor it is on, furniture, decorations in room, etc., etc. In other words, charge according to the conditions and be guided by what other hotels charge in other states and especially our National Parks.

10. The Conservation Commission should run the hotels so as to cause as little friction or complaint as possible from private owners in our state or other states. The State should help not hinder private enterprise.”

It would thus appear that this contract has not been beneficial to the state financially. It has received greater return on its investment from facilities not under such a contract. That there was no great necessity is shown by the fact that other similar facilities have been successfully operated without such contracts.

In addition to the lack of statutory authority in the Board of the Department of Public Works to execute such an agreement as the above agreement with Spring Mill Inn, Inc., turning over all the facilities of a state park then existing or thereafter established to a private corporation to be operated for its private profit for a period of ten years, there is the additional situation surrounding its execution. For the various reasons given I am of the opinion that this contract is
invalid and not binding on the State of Indiana, its officers, representatives and agents.

In this opinion I have included a summary at the end of the discussion of each of the various subjects in the opinion, but for your convenience a recapitulation of the results as applied to the contracts submitted is as follows:

The following contracts,

1. Clifty Falls State Park, dated 1-1-44.
2. Turkey Run State Park, dated 1-1-44.
3. Indiana Dunes State Park, dated 5-1-44.
   (Duneside Inn and Cabins)
4. Brown County State Park, dated 11-14-44.
5. Indiana Dunes State Park, dated 11-14-44.
   (Dunes Arcade and the Pavilion)

in my opinion are essentially agreements of employment, and to the extent that they are such agreements of employment, were valid subject to the removal of such employees or assistants as expressly reserved in the statutes above referred to. It is further my opinion that any extent to which such contracts go beyond the statutory authorization as heretofore pointed out, they are not binding on the state.

As to the following contracts:

6. McCormick's Creek State Park, dated 1-5-38.

it is my opinion that for the reasons pointed out in the above opinion each of the said contracts numbered 6, 8, 9 and 10 above are not binding on the State of Indiana or its present officials.