

were trusteeed, including the note in question. The terms of the trust agreement are not set out. The trustees sued upon the note and it was contended that the sole right to bring the action was in the Department of Financial Institutions. In dismissing that contention the court did not consider the effect of the trust agreement except to treat it as a contractual obligation properly enforced by the trustees.

In the instant case, although the Department of Financial Institutions may exercise supervision and control over the Citizens Trust and Savings Bank, residuary beneficiary under the trust agreement, I am of the opinion that it has no direct supervisory power over the trust itself.

**DIRECTOR OF STATE PERSONNEL: Eligibility lists—
limitation of time for which provisional or emergency
appointee may be employed deemed suspended during
war emergency.**

March 6, 1944.

Opinion No. 22

Hon. Dudley A. Smith,
Director of State Personnel,
Indiana Personnel Board,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

Your letter of recent date in substance requests an official opinion upon the following question:

“Is it permissible under the general intent of the Indiana Personnel Act, as stated in Section 1 of the said Act, to interpret Section 23 of said Act, in regard to the making of provisional appointments throughout the emergency of the present war, in such an administrative manner as to permit the continuance of provisional appointments until such time as appropriate eligible lists can be established and certifications made?”

Your letter further states that the employment situation is such that it is impossible to provide eligible lists for the

classified service and that many appointments are made under the "provisional appointment" provisions of the statute which, if the statute is followed literally, would result in vacancies being created each four (4) months which it would be impossible to fill.

The sections of the State Personnel Act of 1941 are as follows:

"When an appointing authority desires to fill a vacancy in the classified service, and the director can not certify the required number of eligibles for such vacancy because there is no appropriate list or because there is not a sufficient number of persons on appropriate lists who are willing to accept appointment, the director may authorize the appointing authority to fill the vacancy by provisional appointment. A provisional appointee shall hold his position only until an appropriate list has been established and the required certification can be made. No provisional appointee shall hold his position for more than four (4) months. No provisional appointment shall be renewed, and no person shall receive more than one (1) provisional appointment in any twelve-month period."

Sec. 60-1323, Burns' 1933 Supp.

"When an emergency makes it impossible to fill a position in the classified service under any other provision of this act, an appointing authority or a subordinate employee, authorized by him, in order to prevent stoppage of public business or loss or serious inconvenience to the public, may appoint any qualified person to such position, but notice shall be given of such appointment to the director forthwith. Any such person shall be employed only during such emergency and for a period not exceeding ten (10) days. A vacancy of which the appointing authority has had reasonable notice, or an employment condition of which he had, or might with due diligence have had, previous knowledge, shall not be considered an emergency under which such appointment may be made. No such appointment shall be renewed."

Sec. 60-1324, Burns' 1933 Supp.

It is a matter of common knowledge that the war time emergency has created a great shortage of manpower within the State of Indiana and that the economic situation is such that the State Personnel Act can not operate as it was intended by the legislature. In ordinary times it might be possible to follow the provisions of the Act strictly and so secure to the state the benefits of its prescribed form of civil service. No one is able to foretell at the present time how long the manpower shortage will continue or the war emergency prevent an efficient and workable operation under the strict provisions of the Act.

The power of appointment is an executive function. *State v. Tucker* (1941), 218 Ind. 614. As is noted in this decision, it is the duty of the Governor under the constitution to see that the laws are enforced. Yet today we are faced with an economic situation which prevents the efficient operation of government and even may result in a break-down of the executive and administrative departments if all the provisions of the State Personnel Act are held valid during this emergency. It is a settled constitutional principle that no independent co-ordinate department of government has any right to encroach upon another department, and the legislature can not by statute place unreasonable restrictions upon either the judiciary, or the executive or administrative departments of the state and so hamstring either of the departments in carrying out their constitutional rights and duties. *Knox County Council v. State ex rel. McCormick* (1940), 217 Ind. 493; *State v. Tucker* (1941), 218 Ind. 614.

The fact that a law may be constitutional when enacted does not prevent it from becoming unconstitutional if subsequent economic conditions make the Act operate in violation of constitutional provisions. The constitutionality of an act is to be determined in the light of economic conditions. *West Coast Hotel Co. v. Parrish* (1937), 300 U. S. 379. The power to fix utility rates is in its essence legislative. 12 *American Jurisprudence*, page 374. Yet if the legislature, or the Public Service Commission of Indiana, acting in its legislative capacity, should fix a utility rate which would be reasonable now, this would not prevent the legislative act from becoming unreasonable at some future date if the economic situation subsequently changed to such an extent that the rate would

be depriving the utility of its property without due process of law.

Under the Constitution of Indiana it is the duty of the Governor and the departments over which he has charge, as well as other constitutional administrative officers, to see that the functions of government do operate and that they operate efficiently. But if it is impossible to obtain employees from classified lists, or if it is now impossible to comply with the provisions of the State Personnel Act for provisional appointments and emergency appointments to operate the functions of state government, such provisions, during this war time emergency, must be held unconstitutional for the reason that under the existing economic conditions they are unreasonable and impossible of execution.

If certain provisions of an act make it unworkable and impossible of performance, such provisions are void and of no effect. *Keane v. Remy* (1929), 201 Ind. 286. If such provisions later become possible of performance, they come into effect at such later time, but during the time of impossibility they are suspended or held in abeyance. *Board of Education v. Morgan* (1925), 147 N. E. 34 (Ill.)

Therefore, it is my opinion that during the war time emergency and the existence of the manpower shortage with reference to obtaining employees for the operation of state government, the limitations contained in Section 60-1323, Burns' 1933 Supplement, and Section 60-1324, Burns' 1933 Supplement, which limit the time that a provisional appointee may be employed or the time that an emergency employee may be employed are suspended and held in abeyance during the time of such emergency.