It is, therefore, my opinion, in answer to your question number 6, that the statute makes it unlawful to possess a net or seine other than those excepted; that the statute is valid and that the possession by the owner in question would be illegal unless he obtains a permit as provided for in the Act, or the seine or net in question is within those excepted by the Act.

OFFICIAL OPINION NO. 81
August 13, 1946.

Mr. John D. Pearson, Insurance Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of July 11, 1946 which reads as follows:

"Section 235, Article 2, of the Indiana Insurance Law which relates taxes to be imposed upon Foreign Insurance Companies, operating in the State of Indiana, provides for certain deductions from Cross Premium Income in arriving at a basis for computation of the taxes due. Under this specification, and taking into consideration the deductions permissible, must the company deduct from the gross premium only such losses as have been actually paid in the State without consideration for such part of the loss as has been reinsured?

"First, in other words, where Indiana risks are reinsured are the losses on direct writing deductible on a gross or net basis?

"Second, are losses paid by the reinsuring company deductible by the reinsuring company in computing taxes due the State of Indiana?"

The pertinent part of the premium tax upon foreign insurance companies is Section 235 of Chapter 162, page 588 of the Acts of 1935 (39-4802 Burns’ 1933 R. S.):
“(a) Every insurance company not organized under the laws of this state and doing business within this state shall, on or before the first day of March of each year, report to the department, under the oath of the president and secretary, the gross amount of all premiums received by it on policies of insurance covering risks within this state, or in the case of marine or transportation risks, on policies made, written or renewed within this state during the twelve months' (12) period ending on the thirty-first day of December of the preceding calendar year. From the amount of gross premiums, shown as above provided, shall be deducted (1) losses actually paid within this state, (2) considerations received for reinsurance of risks within this state from companies authorized to transact an insurance business in this state, (3) the amount of dividends paid or credited to resident insureds, or used to reduce current premiums of resident insureds, (4) the amount of premiums actually returned to residents on account of applications not accepted or on account of policies not delivered and (5) the amount of unearned premiums returned on account of the cancelation of policies covering risks within the state. At the time of making the report required above every such insurance company shall pay into the treasury of this state for the privilege of doing business in this state, an amount equal to three (3) per cent of the excess, if any, of the gross premiums over the deductions allowed herein.”

This provision of the statute in so far as losses paid is concerned is found originally, in substantially identical language, in Section 8 of Chapter 93, page 205 of the Acts of 1873. The tax there was three per cent upon gross premiums “less losses actually paid within the state.”

In answering your questions, I am considering reinsurance in its technical sense; in other words, only those cases where the contract of reinsurance involves no direct liability upon the insurer to the original insured. It has been defined as follows:
"* * * In its technical sense a contract of reinsurance is one by which one insurer causes the sum which he has insured to be reinsured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility.
* * *

1 Cooley, Briefs on Insurance, 774.

It is well to bear in mind in considering the reinsurance feature that since the premium tax is imposed only upon foreign insurance companies, any consideration of reinsurance recovery by a company taxable under Indiana premium tax would necessarily involve a contract in which at least one of the parties (the reinsured) is a foreign corporation. Depending upon its execution and the domicile of the reinsuring company, the contract may or may not be entered into in Indiana.

The problem to be resolved stated in terms of a fact situation is this—Insurance Company A domiciled in State X insures a risk in Indiana and collects a premium for such insurance. Clearly it is taxable upon this premium. In order to protect itself, Insurance Company A then enters into a reinsurance agreement with Insurance Company B which is domiciled in Indiana or another state to reinsure 80 per cent of the risk. A premium is paid by Insurance Company A to Insurance Company B. A loss is then sustained by Insurance Company A upon the Indiana risk and the loss is paid in full to the insured in Indiana. After paying the loss then Insurance Company A collects the pro rata share of the reinsurance agreement from Insurance Company B. In deducting from its annual premium tax payable in Indiana does Insurance Company A deduct the loss which it paid to the insured or does it deduct only that part of the loss for which it did not collect reinsurance?

If the loss were $1000, under the first hypothesis the company would deduct $1000, and under the second would deduct only $200, which would have the effect of increasing its premium tax in Indiana by three per cent on $800.

In considering the legislative intent in the premium tax, we may consider first the actual language employed. It
is to be noted that the language is "losses actually paid within the State." The loss actually paid within the State in the above hypothetical situation was $1000. The Act does not say "losses sustained" or "losses" but "losses actually paid within the state." Considering the language alone, it would seem that the foreign corporation may deduct the total loss paid. That construction is strengthened by other considerations: The reinsurance contract itself may be entered into wholly without the State. It is a res over which the jurisdiction of the State of Indiana could be applied only as incidental to other jurisdictional factors. For instance, in Connecticut General Life Insurance Co. v. Johnson (1938), 303 U. S. 77, a Connecticut corporation licensed to do business in California entered into contracts with other insurance companies licensed to do business in California, reinsuring their California risks. The reinsurance contracts were entered into in Connecticut where the premiums were paid and losses were payable. California attempted to tax the reinsurance contracts, under the statute which taxed gross premiums received upon "business done in this state." It was held in that case that California had no jurisdiction to impose the tax and it was therefore a denial of due process as applied to those contracts. The court said at page 81:

"* * * apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies authorized to do business there, California has no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. * * *"

The full broad implication of the Connecticut General case has been modified as to regulation of insurance companies to some extent.

See:

Hoopston Canning Co. v. Allen (1943), 318 U. S. 313.
But on the question of tax has not been overruled.  
See:  

International Harvester Co. v. Dept. of Taxation (1944), 322 U. S. 435 at page 444.

Thus, there is some question of the jurisdictional power of Indiana to increase the measure of tax upon a foreign company by consideration of a transaction wholly extraterritorial to Indiana. If an interpretation consistent with the language of the statute may be given to it which avoids the constitutional question, the courts have uniformly held that it should be done. Furthermore, if two foreign insurance companies are considered, both having identical premium receipts and identical losses yet one reinsured and the other did not, the one reinsuring would pay a higher tax to Indiana, merely because it followed a business practice wholly without the state which the other company did not follow. The inequality thus achieved is not desirable in any revenue measure.

If we assume, however, that the reinsurance contract were entered into in Indiana, should that make any difference in so far as Company A may deduct its gross loss? If not, we are confronted with an inequality in the tax between two foreign corporations in substantially the same situation, arising from the fact that one reinsures in a foreign corporation, the other in a domestic. The foreign corporation reinsuring with a domestic is required to pay more tax upon the same "premiums received" on Indiana risks although actually its losses are the same.

Since the inception of premium tax, I am informed it has been the uniform practice of the Department of Insurance to permit deductions of losses actually paid disregarding any reinsurance recovery. While that departmental construction is not decisive, it is of persuasive force.

See:  

Metropolitan Life Insurance Co. v. State (1917), 186 Ind. 407 at 410;  
3 Sutherland Statutory Construction, 305.

Finally, being a revenue measure, it should be strictly construed against taxation and in favor of the taxpayer.
In State *ex rel.* v. Continental Insurance Co. (1918), 67 Ind. App. 536 at page 556, the court said of the Indiana premium tax:

"* * * Statutes like the one under consideration, imposing a special tax on corporations, are within the rule that a statute providing for imposition of taxes shall be strictly construed and that all reasonable doubts in respect thereto shall be resolved against the government and in favor of the citizen. * * *"

In the same case, an analogous situation arose. The question was whether the premium tax should be applied to reinsurance premiums. The court there said at page 557:

"As we construe said Sec. 10216, the legislative intent expressed therein is that the tax shall be imposed only on business done within the territorial boundaries of the State of Indiana. The license is upon the business and the tax is laid on 'every insurance company not organized under the laws of this state, and doing business therein.' Where a foreign company takes over from another foreign company, for the purpose of reinsurance, risks on property in this state, the transaction is, of course, between the companies, and the insurer would not be subject to the tax on the reinsuring premium if the business was not done in this state. And this would be so whether the companies were licensed to do business in this state or not."

In view of the foregoing considerations, the answer to your first question in my opinion, is that where Indiana risks are reinsured, the losses on direct writing are deductible on a gross basis.

Your second question contains the following hypothetical situation: Insurance company A domiciled in State X reinsures a risk for insurance company B. A premium tax upon the direct writing may be paid depending upon the domicile of company B—whether foreign or domestic. It is noted that in Section 235, *supra*, insurance company A is permitted to deduct the consideration received for reinsurance of risks within this state from companies authorized to transact an
insurance business in this state. Thus insurance company A would not have to pay premium tax upon the reinsurance premium received from insurance company B.

Here too, if both companies are foreign, no loss is "actually paid within this state."

Conceivably, if the direct writing were by a domestic company, a loss is paid within the state upon the reinsurance, but as in the consideration of the first question, to permit a deduction of the loss in this situation creates inequalities for which there is little basis between contracts and companies in the same position.

That fact and the fact that no tax upon the reinsurance premium is paid lead me to believe that in providing for deduction of losses, the legislature intended such deduction only on those risks where the premium is taxable.

In answer to your second question, I am therefore of the opinion that losses paid by the reinsuring company upon Indiana risks are not deductible.

OFFICIAL OPINION NO. 82
August 12, 1946.

Hon. George W. Boner, M.D., Superintendent,
Madison State Hospital,
North Madison, Indiana.

Dear Doctor:

Your letter of July 26, 1946, received, requesting an opinion as to whether or not a patient dying in your institution, unclaimed by relatives and who did not die with a contagious disease, should be turned over to the Anatomical Board at Bloomington, Indiana, under Section 63-602 Burns' 1933, same being Section 2, Chapter 31, Acts of 1903, or whether said Act is superseded by Section 17, Chapter 69, Acts of 1927, same being Section 22-1217 Burns' 1933.

You further desire to know, if the 1927 Act prevails, whether the amount paid by the county to the Treasurer of State for burial is credited back to the hospital, so that you do not lose the use of this money out of your appropriation.