therein provided remains eligible for later appointment without further examination.

DEPARTMENT OF INSURANCE: Whether insurance agents may be legally classified for licensing upon the sole basis of method of payment.

Validity of section 209 of insurance code.

POLICE POWER: Classification of insurance agents.

February 8, 1943.

Department of Insurance,
State House,
Indianapolis, Indiana.

Gentlemen:

I have your letter of February 3, in which you request an opinion upon the apparent constitutionality of Section 209, of the Indiana Insurance Law, relative to qualifications for agents’ licenses and particularly that part of Section 209 which provides that only those representatives may qualify for a license who operate “on a commission basis only.”

In Hartford Co. v. Harrison, 301 U. S. 459, 1936, a similar provision of a Georgia Statute was held unconstitutional, because in Georgia there was additional statutory provision for licensing mutual agents who were on either a salary or commission basis and stock company agents only if they operated on a commission basis. Obviously, the Indiana Statute contains no such discrimination against agents of stock companies.

The more recent case of Osborne v. Ozlin, 310 U. S. 53, although involving a somewhat similar statute of Virginia, does not pass directly upon the police power aspect of the question.

As a question of police power, the connection between public health, safety or welfare and a requirement that agents be compensated on a commission basis only appears to be rather tenuous. Concededly, any opinion as to the ability of the statute to withstand a charge that it unreasonably interferes with property rights or liberty of contract must necessarily
deal in probabilities, but under all of the circumstances I am of the opinion that the imposition of such a requirement as a condition of securing a license to engage in a lawful occupation is arbitrary and a violation of both state and federal constitutions.

An excellent statement of the problem involved is found in the case of Weisenberger v. State, 202 Ind. 424, at page 429, and reads as follows:

"While the State, in the exercise of this power, may subject persons and property to all kinds of restraints and burdens, even to an encroachment upon the natural rights of the citizen, yet where it manifestly appears that the action of the Legislature is not supported by any reason and is purely arbitrary, thereby invading property rights of an individual, or unnecessarily and unreasonably restraining a lawful business or trade under the guise of police regulation, courts may look to the character and reasonableness of the limitation for the purpose of determining whether or not it reaches beyond the scope of necessary protection and prevention."

Further serious consideration must be given to this statutory provision in the light of the "equal protection" clause of the 14th amendment to the United States Constitution and of Sec. 23 of Art. 1 of the Indiana Constitution, the latter of which reads:

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The general problem of classification is well exemplified and discussed in Fountain Park Co. v. Hensler, 199 Ind. 95, in which the court emphasizes that classification under both the Indiana and United States' Constitutions must be founded upon some reasonable difference and must not be capricious or arbitrary.

Compare Martin v. Loula, 208 Ind. 346, with Spangler v. Bolinger, 216 Ind. 28, for examples of proper and improper classifications for exemption purposes.
In my opinion, an attempted classification for the purpose of licensing founded upon the mode of compensation only is not "* * * just and reasonable, and based upon substantial distinctions germane to the subject matter and the object to be obtained." See McErlain, Tr. v. Taylor, 207 Ind. 240, at page 242.

PUBLIC INSTRUCTION: May privately owned school busses be condemned for public use?

February 9, 1943.

Dr. Clement T. Malan,
Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Dr. Malan:

In answer to your inquiry concerning state acquisition of privately-owned school busses or of the use of such busses, legislation therefor must be consistent with Section 21 of Article 1 of the Constitution of Indiana which reads:

"No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

and must also be consistent with the 14th amendment of the Federal Constitution. Naturally, such acquisition would have to be under the State's power of eminent domain, of which the Indiana Courts have repeatedly said:

"* * * The power of eminent domain is an attribute of sovereignty and inures in every independent state. * * * It is superior to all property rights, and extends to all property within the jurisdiction of the state. * * *" So. Ind. Gas & Elect. Co. v. City of Boonville (1939) 215 Ind. 552.

To conform to constitutional provisions the first of the minimum requirements for eminent domain legislation is