Therefore, in light of the licensing requirements of Burns' 63-2409, *supra,* a non-licensed person could not sell real estate located outside of the State of Indiana to Indiana residents and a broker licensed in Indiana could not employ non-licensed salesmen to sell such real estate without being in violation of the real estate licensing laws of Indiana.

OFFICIAL OPINION NO. 40

August 22, 1961

Mr. Richard L. Worley, Chairman
State Board of Tax Commissioners
201 State Office Building
Indianapolis 4, Indiana

Dear Mr. Worley:

This is in response to your request for my Official Opinion in answer to the problem presented by your letter of July 26, 1961, which reads as follows:

> "In Section 19, Chapter 345, Acts of 1961, it is provided that 'Chapter 384 of the Acts of 1959 is hereby expressly repealed as of the effective date of this Act.'
>
> "Your official opinion is respectfully requested on the following question:
>
> > "Will the action now pending in the courts to test the constitutionality of the excise tax imposed by Chapter 345, Acts of 1961, have any effect upon the repeal of Chapter 384 of the Acts of 1959? In other words, is Chapter 384 of the Acts of 1959 expressly repealed as of the effective date of Chapter 345 irrespective of the decision which might be rendered by the court?"

As indicated in your letter, there is now pending on appeal to the Indiana Supreme Court an action questioning the validity of the Acts of 1961, Ch. 345, as found in Burns' (1961 Supp.), Section 47-3201 *et seq.,* said action having been commenced in the Superior Court of Marion County, Room No. 3 and being entitled Fred J. Wright *et al.,* plaintiffs v. Edwin

K. Steers, as Attorney General of the State of Indiana, *et al.*, defendants. Your question is one which seemingly could await the final decision of the Court of last resort as to the constitutionality of this act, so that, if its validity were upheld, there would be no doubt as to the effect of the repealing features contained within Section 19 of the Act. There would be no such problem unless the Acts of 1961, Ch. 345 were held to be unconstitutional.

However, because of the effective date of the repealing features of Section 19 of that Act, and because substantial sums will not need to be appropriated and expended and because considerable work and possible difficulty may be avoided if the Acts of 1959, Ch. 384 is no longer in effect, it is wise that this question be answered as soon as possible and irrespective of the pending litigation above mentioned.

The Acts of 1961, Ch. 345, Sec. 19, as found in Burns' (1961 Supp.), in the annotation following Section 47-3215, provides as follows:

> "SEC. 19. All acts or parts of acts now in effect inconsistent with the provisions of this act are hereby repealed and superseded to the extent of such inconsistency in so far as necessary to conform to and to give full force and effect to the provisions of this act, and Chapter 169 of the Acts of 1953, as amended, is hereby expressly and specifically repealed as of January 1, 1963 and Chapter 384 of the Acts of 1959 is hereby expressly repealed as of the effective date of this act."

As an examination of the above section discloses it contains not only a general provision for repealing acts and parts of acts inconsistent therewith to the extent of such inconsistency, but it also expressly states that it repeals the following statutes: The Acts of 1953, Ch. 169, as amended, as found in Burns' (1959 Supp.), Section 64-3301 *et seq.*, concerning the taxation of mobile homes, the repeal of which is specifically to be effective as of January 1, 1963; and the Acts of 1959, Ch. 384, as *formerly* found in Burns' (1959 Supp.), Sections 47-2602a to 47-2602d, concerning the registration of motor vehicles and the collection of the *ad valorem* tax imposed upon

them, the repeal of said statute being effective as of the effective date of said 1961 Act. (The Acts of 1959, Ch. 384, has been deleted from the 1961 Cumulative Pocket Supplement of Burns' Indiana Statutes and the only reference to it is in the annotation in the 1961 Supplement following Sec. 47-2602a to the effect that the 1959 Act was repealed by the 1961 statute.)

Although the operational effect of the overall plan of Ch. 345, *supra,* and of the imposition of the taxes and fees thereby imposed, is not to become effective until on and after January 1, 1963, as specifically provided by Section 16 of the Act, nevertheless, the act does contain an emergency clause in Section 22 providing for the immediate taking effect of the act from and after its passage. Thus, Ch. 345, *supra,* became a law upon passage but by its express terms the operational effect is postponed until January 1, 1963. This appears to have been so provided as an aid to the Bureau of Motor Vehicles in the sizable task of effecting the transition from the present manner by which motor vehicles and mobile homes are taxed to the plan provided by Ch. 345, *supra,* so that procedures and forms necessary for the administration thereof can be adopted so as to accomplish an orderly transition to the new system on and after January 1, 1963. Because Section 19 makes a distinction between the effective date of the repeal of the act concerning the taxation of mobile homes and that concerning the method of collection of the *ad valorem* tax imposed upon motor vehicles, it would seem that the repeal of the latter act, to wit: Acts 1959, Ch. 384, is intended to have been repealed as of the effective date of the 1961 Act on March 11, 1961, the date upon which it was filed in the office of the Secretary of State without the Governor's approval.

The test by which the answer to your question must be determined is that of legislative intent, and particularly as to whether the Legislature meant for Section 19, or any part thereof, to be separable and effective even though other sections, or the remainder of the act, may be construed to be unconstitutional. With respect to the general rule concerning separability, reference is made to Sutherland, Statutory Construction, 3rd Ed., Vol. 2, Sec. 2404, which provides as follows:

"In determining separability, legislative intent governs, but intent that the act be enforced in so far as valid is not the sole consideration. If the legislature so intended, the valid parts of an act will be upheld 'unless all the provisions are connected in subject matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.' To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether or not the legislature would have passed the statute had it been presented with the invalid features removed.

"Conversely, where the valid parts of an act are not independent, and may not be said to form a complete act separate from the invalid parts, the act must fall as a whole.

"In statutes not containing a separability clause, the independence of the valid portion of a statute will be a principal indicia of the legislative intent that the statute be separately enforced."

It has also been stated that, in the absence of a severability clause, the presumption is that the Legislature intended the statute to be indivisible, and that the effect of a severability clause is to reverse this presumption to that in favor of separability.

Sutherland, Statutory Construction, 3rd Ed., Vol. 2, Sec. 2409.

The Acts of 1961, Ch. 345 does contain a severability clause, being Sec. 20 thereof, as found in the annotation in Burns' (1961 Supp.), following Section 47-3216, which provides as follows:

"SEC. 20. If any provision of this act or the application thereof to any person or circumstance is invalid,

> such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable."

As a further aid in determining legislative intent, the case law has evolved rules of statutory construction particularly concerned with the question of whether, and under what circumstances, an act may be repealed by a subsequent statute which is unconstitutional. These rules are summarized in Indiana Law Encyclopedia, Vol. 26, § 92, p. 305 under the heading "Effect of Validity of Repealing Act" which states the following:

> "A statute which is invalid or unconstitutional and void will not operate to repeal another valid statute *unless the Legislature has employed language showing an intent to repeal irrespective of unconstitutional provisions.*
>
> "Unless the Legislature has employed language showing an intent to repeal in any event and irrespective of unconstitutional provisions, an act which is invalid or unconstitutional and void does not repeal another valid act, and the prior act remains in force and effect.
>
> *"Where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid,* but the repealing statute, although unconstitutional, may repeal the prior law where the repealing clause of the later act is constitutional, and is not affected by the unconstitutionality of the other parts thereof." (Our emphasis)

An example of a case in which the Legislature employed language indicating the intention to repeal a statute in any event and irrespective of unconstitutional provisions, is Tucker, Secretary of State v. Muesing *et al.* (1942), 219 Ind. 527, 39 N. E. (2d) 738. That case was unusual and factually strong in support of repeal in any event in that it concerned two Acts of 1941, both of which contained provisions expressly repealing a 1937 statute. The Acts of 1941, Ch. 220, Sec. 1

was held to be unconstitutional because it was entirely outside the title of the act and thereby did not comply with Art. 4, Sec. 19 of the Constitution of Indiana as such constitutional provision existed at that time. Chapter 220 of the Acts of 1941, *supra,* expressly stated that Ch. 255 of the Acts of 1937 should be repealed only in the event the licensing provisions in Sec. 1 of Ch. 220 should become law. However, another act, the Acts of 1941, Ch. 181, specifically and unconditionally repealed the same 1937 statute. In commenting upon this situation, the Supreme Court stated the following on pp. 531 and 532:

> "Chapter 181 is complete in itself, unambiguous, and on its face bears no direct relationship to chapter 220. In case of ambiguity in statutes, there are certain rules of construction to which the court resorts in arriving at the intention of the Legislature, but such rules have no application to a statute that is free from ambiguity. The language of chapter 181 is not subject to interpretation. The express intention to repeal is unqualified. To interpret the act as intended to be effective only in case section 1 of chapter 220 is effective would be to add an intention that cannot be found within the four corners of either act.
>
> "Chapter 181 is limited to the repeal of a specific statute. The same statute is repealed by chapter 220. If it was intended that chapter 181 was to be effective only if chapter 220 is upheld, chapter 181 was intended to accomplish nothing and to be a nullity. We cannot ascribe such an intention to the Legislature.
>
> "Our conclusion is that chapter 220, Acts 1941, is unconstitutional in its entirety, and that chapter 181 is a valid act."

In those situations in which the intent of the Legislature to repeal a former act is not clearly indicated to be effective in any event and irrespective of unconstitutional provisions, the cases in this state and elsewhere are not in harmony. This apparent conflict arises by virtue of the variation in legislative language under consideration by the Court in determining what the Legislature meant with respect to the repeal.

For example, in the old case of Meshmeier v. The State (1858), 11 Ind. 482, the Indiana Supreme Court then took the following broad view: (pp. 489 and 490)

> "It is insisted that inasmuch as the general provisions of the act of 1855 are void, because unconstitutional, nothing is repealed, because nothing is inconsistent with an unconstitutional law.
>
> "The reasoning, as applied to the case, we think, is not sound.
>
> "In the act we find a clause which, in terms, repeals all acts and parts of acts inconsistent with its provisions. Did the legislature intend, by such clause, to repeal absolutely such inconsistent acts, or make such repeal depend upon a future contingency, viz.: the contingency of the new act being held unconstitutional? Had the question as to the repeal arisen before any question had been made as to the constitutionality of the act of 1855, no Court would, for a moment, have hesitated to declare the former laws repealed.
>
> "An unconstitutional enactment would not, of course, repeal by implication any former law. But here is an express repeal. The repealing clause stands by itself, and is subject to no constitutional objection. It has the same effect, when taken by itself, as when taken in connection with the other parts of the act. It only refers to the other parts of the act incidentally, for the purpose of showing what is repealed. It repeals all former laws inconsistent with the provisions of that act. No reference is had to the validity or invalidity of those provisions. The terms, *inconsistency* and *validity* involve entirely distinct ideas. Whether a former law is inconsistent with the 'provisions' of the latter act, is one question. Whether the 'provisions' of the latter act, are valid or invalid, is another and different question. The legislature made certain 'provisions,' and repealed all laws inconsistent with them. We think that repeal was absolute, and not dependent upon the validity or invalidity of the provisions thus made. We are aware that there are some authorities that seem to look the other way; but we cannot make up our

minds to follow them, as in doing so we should be doing violence to the dictates of our judgment. We know of no rules of judicial interpretation that would authorize us to declare that a plain and positive legislative enactment was intended by the legislature to have effect only upon the condition that other enactments should be held valid, unless such intention is expressed or fairly implied. We must presume that the legislature, in framing the act of 1855, intended so to frame it as that it should all be constitutional and valid. If, when they enacted the repealing clause, they believed the entire act valid, and intended to repeal all laws inconsistent with its provisions, such repeal must be effectual, whatever may be the fate of the balance of the act."

However, the Meshmeier case, *supra,* has been subject to considerable criticism as, for instance, in the case of The State *ex rel.* Law *et al.* v. Blend *et al.* (1889), 121 Ind. 514, 23 N. E. 511, wherein the following is stated on pp. 518, 519 and 520:

"In the case of *Meshmeier* v. *State,* 11 Ind. 482, it was held that a repealing clause attached to an unconstitutional act of the Legislature might repeal a former valid statute upon the same subject. The general principle announced in that case is undoubtedly correct, for it must be conceded that the Legislature may use such language in the repealing clause attached to an unconstitutional law as to leave no doubt as to its intention to repeal a former law, in any event. In such case the law intended to be repealed would cease to exist even though the law to which the repealing clause was attached should fail by reason of being in conflict with the Constitution.

"Where, however, it is not clear that the Legislature, by a repealing clause attached to an unconstitutional act, intended to repeal the former statute upon the same subject, except upon the supposition that the new act would take the place of the former one, the repealing clause falls with the act to which it is attached. Bishop Written Laws, section 34; *Tims* v. *State,* 26 Ala. 165; *Sullivan* v. *Adams,* 3 Gray, 476; *Childs* v. *Shower,* 18 Iowa, 261; *Shephardson* v. *Milwaukee, etc.,*

R. R. Co., 6 Wis. 578; *State* v. *Burton*, 11 Wis. 50; *Devoy* v. *Mayor*, 35 Barb. 264; *People* v. *Tiphaine*, 3 Parker, 241; *Devoy* v. *Mayor*, 36 N. Y. 449; *State, ex rel.*, v. *Hallock*, 14 Nev. 202.

"In the case of *Meshmeier* v. *State, supra,* the learned judge who wrote the opinion admits that the authorities are against the conclusion there reached, but says that he is unable to bring his mind to agree with the authorities upon the subject then under consideration.

"It is believed that the conclusion reached in that case has never been followed either by this or any other court in the Union.

"Mr. Bishop, in commenting on this case in his valuable work 'On the Written Laws,' section 34, says: 'But not only the reason just suggested shows that this doctrine can not be sound in principle; it is also unsound, and it has been so adjudged, because, as observed in the Alabama court, if the new law is void, the provisions of the former law can not with propriety be said to be in conflict, or contravention of it.'

"The Supreme Court of Iowa, in considering this case in the case of *Childs* v. *Shower, supra,* said: 'In that case, the repealing clause in an unconstitutional statute was "that all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed," and the court held (HANNA, J., dissenting) that the prior law was repealed. The reasoning of the majority seems to be refined and technical. They admit that an unconstitutional law can not repeal a prior law by implication. But here they say is "an express repeal." This, as it seems to us, is where the error lies. There was no positive and unconditional repeal, a repeal *only* so far as the two should be *legally* inconsistent.'

"As a consequence of this reasoning the Iowa court refused to follow the case of *Meshmeier* v. *State, supra.* Indeed, it is in conflict with all the authorities above cited, and we know of no case to be found which in the remotest degree is supposed to give it any support.

"It is contended, however, by the appellee, that it is manifest from the language used that the Legislature intended to repeal the act of 1883 in any event. But we are unable to agree with counsel in this construction. We must accord to the Legislature the belief that the act of 1889 was constitutional, and the intention that the provisions of that act would take the place of the act of 1883. The manner of selecting police officers under the act of 1889 is not materially different from the mode prescribed by the act of 1883. The mode of selecting police commissioners was changed, but the intention of the Legislature to keep up the old system of selecting police officers is perfectly plain.

"We can not say that the Legislature would have passed the repealing clause in question had it not intended that the act of 1889 should take the place of the act which it attempts to repeal. Under such circumstances, according to all the authorities except *Meshmeier v. State, supra,* the repealing clause must fall with the act to which it is attached.

"We are of the opinion that the repealing clause in question is void, and that it does not repeal the act of March 5th, 1883.

"In so far as the case of *Meshmeier* v. *State, supra,* is in conflict with this opinion the same is hereby modified."

The Blend case, *supra,* is unquestionably correct in the proposition there stated that when it is not clear that the Legislature, by the repealing clause, intended to repeal a former statute, irrespective of the unconstitutionality of the act containing such repealing clause, then the supposition is that the new act was intended to take the place of the former one, in which event the repealing clause is effective or ineffective, dependent upon whether or not the basic act is constitutional.

In order to arrive at the legislative intent with respect to the statute now under consideration, it is necessary to break the section down into its component parts and apply the foregoing principles of statutory construction to each individual portion of the section. In studying Sec. 19 of Ch. 345, *supra,*

it seems that this repealer section is properly divided into three parts.

a. The first part thereof states in general terms that all acts, or parts of acts, now in effect, which, upon the administration and enforcement of Ch. 345, *supra,* are found to be inconsistent with the provisions of that act are repealed and superseded, but such general repeal is specifically stated to be only "to the extent of such inconsistency in so far as necessary to conform to and give full force and effect to the provisions of this act * * *." Thus, this general statement of repeal contained within the first clause of Sec. 19 of Ch. 345, *supra,* could not be said to be severable for the reason that its only and express purpose is that acts, or parts of acts, which are in conflict with the *enforcement* of Ch. 345 are to be repealed, by which it is clear that such repealing feature in that clause is to have effect only if Ch. 345 is constitutional.

b. The second part of Sec. 19 is an express statement of repeal of the Acts of 1953, Ch. 169, as amended, as found in Burns' (1959 Supp.), Section 64-3301 *et seq.* concerning the taxation on mobile homes. This 1953 statute is a special act and independent of the basic *ad valorem* tax law, in that said 1953 statute itself provides for the manner of assessing mobile homes and imposes a tax upon them which is payable in the year of assessment, unlike the manner by which *ad valorem* taxes are paid with respect to other forms of property in this state. The Legislature clearly intended that mobile homes continue to be taxed under the 1953 statute through the year 1962, so that assessments and taxes imposed pursuant to said act are to be made and paid in that year without interruption in the enforcement of the 1953 statute, as amended, until the Acts of 1961, Ch. 345 goes into operational effect. That is obviously the reason for the repeal of the Acts of 1953, Ch. 169, as amended, having been expressly stated as being effective as of January 1, 1963, which is the date of commencement of the operational effect of Ch. 345, *supra,* and definitely indicates that the repeal of the 1953 statute concerning the taxing of mobile homes is made to depend upon the validity of

Ch. 345, *supra*. As a consequence, it is clear that the Acts of 1953, Ch. 169, as amended, as is the case with respect to the first clause of Sec. 19, was not meant to be severable, so that if Ch. 345, *supra*, were held to be unconstitutional, then the repeal of the Acts of 1953, Ch. 169, as amended, would be ineffective.

c. The third part of the statement of repeal contained within Sec. 19 of Ch. 345, *supra*, provides for the specific repeal of the Acts of 1959, Ch. 384 to be repealed as of the effective date of the 1961 Act. There is a noticeable distinction in that the Legislature did *not* provide that *both* the Acts of 1953, Ch. 169, as amended, and the Acts of 1959, Ch. 384 are to be specifically repealed as of January 1, 1963. By reason of the contrasting language used, it would appear that the Acts of 1959, Ch. 384 was intended by the Legislature to be repealed at an earlier date, and, inasmuch as Sec. 22 is an emergency clause whereby the act shall be a law from and after its passage, it would seem that the repeal of the Acts of 1959, Ch. 384 was meant to be immediate, that is, on March 11, 1961, the time at which the act was filed with the office of Secretary of State without the Governor's approval.

Rather than being an independent taxing act, as in the case of the Acts of 1953, Ch. 169, as amended, concerning the taxation of mobile homes, the Acts of 1959, Ch. 384 did not impose any tax, but rather, provided for a new procedure by which to implement and enforce the *ad valorem* tax imposed upon motor vehicles pursuant to the general *ad valorem* tax statutes. Chapter 384, *supra*, proposed to accomplish this by means of the requirement that, from and after January 1, 1962, the application for the annual registration of motor vehicles must have had attached thereto a personal property tax receipt showing that the tax assessed against the particular vehicle described in the application had been paid, or, in lieu thereof, a certified statement by the county assessor showing that no personal property tax was assessable against the particular motor vehicle sought to be registered.

Pursuant to Ch. 384, *supra*, the State Board of Tax Commissioners was authorized to adopt and promulgate rules and

regulations for carrying into effect the provisions of said act, which said Board has heretofore promulgated on February 23, 1960. Since the procedure prescribed by Ch. 384, *supra,* was not to have commenced, from the standpoint of operational effect, until January 1, 1962, and because Ch. 345, *supra,* states that the tax thereby imposed on and after January 1, 1963 upon motor vehicles "shall be in lieu of the *ad valorem* property tax levied for state and local purposes" as provided in Sec. 2 thereof, it would appear that the Legislature, by the repeal of Ch. 384 as of March 11, 1961, has not only changed the procedural requirement provided by the 1959 statute for the collection of *ad valorem* taxes imposed upon motor vehicles, but has expressed complete dissatisfaction with the plan of the 1959 statute by abandoning it before it was ever tried. The apparent purpose of repealing the Acts of 1959, Ch. 384, immediately as of March 11, 1961, the date upon which the Acts of 1961, Ch. 345 became a law, is so that the procedure of said 1959 Act, not yet in operation, will not be put into effect on January 1, 1962 for only one year and then changed completely again on January 1, 1963 because of the tax imposed by Ch. 345 in lieu of *ad valorem* taxes formerly imposed upon such motor vehicles. Thus, the purpose appears to be that of not wasting any further time, effort and expense in putting the 1959 statute into operation since the plan proposed by that act would clearly be superseded a year later as of January 1, 1963, if it were not for the third clause of Sec. 19 of Ch. 345, *supra,* the effect of which is to terminate any further activity in connection with the 1959 statute immediately and on March 11, 1961.

Perhaps the situation presented by Sec. 19 of the Acts of 1961, Ch. 345 is not as strong a case for supporting the conclusion that the repeal of the Acts of 1959, Ch. 384 was intended to be a repeal in any event, as in the case of Tucker v. Muesing, *supra,* wherein there was a separate statute repealing a former act, as well as a repealing clause in another act of the same session of the General Assembly. Moreover, I would have no hesitancy in stating that in my opinion the repeal of the Acts of 1959, Ch. 384 was intended to be conditioned upon the constitutionality of the Acts of 1961, Ch. 345, if the effective date of the repeal of the 1959 statute were as of January 1, 1963, as is the case with respect to the repeal of

the Acts of 1953, Ch. 169, *supra,* concerning the taxation of mobile homes. However, because of the circumstance that the effective date of the repeal of these two statutes is so different, and that the repeal of the Acts of 1959, Ch. 384 appears to be as of March 11, 1961, long before said 1959 statute was to be put into operational effect, I can only conclude that the Legislature did not intend for the repeal of the 1959 statute to be dependent upon the constitutionality of the 1961 law. Rather, it seems that the Legislature, by differentiating in the effective dates of the repeals of the two statutes, and by evidencing an intent that the Acts of 1959, Ch. 384 should be repealed at the earliest possible date, meant that it was to be repealed in any event and irrespective of the constitutionality or unconstitutionality of the 1961 statute.

Therefore, in answer to your question it is my opinion that the action now pending in the courts to test the constitutionality of the Acts of 1961, Ch. 345 will not have any effect upon the repeal of the Acts of 1959, Ch. 384 because it appears to have been the intent of the Legislature that the procedure in Ch. 384, *supra,* shall not be put into effect in any event, which explains the provision for the immediate repeal of said 1959 statute, effective more than twenty-one months prior to the date of operational effect of the Acts of 1961, Ch. 345, *supra.* In conclusion, and as a consequence of my opinion herein stated, it follows that if Ch. 345, *supra,* should be held to be unconstitutional, in that event, mobile homes would continue to be taxed according to the provisions of the Acts of 1953, Ch. 169, as amended, and motor vehicles would continue to be taxed as other personal property according to the general *ad valorem* tax statutes, but without the requirements provided by the Acts of 1959, Ch. 384, *supra.*