September 18, 1951.

Honorable Arthur M. Thurston,
Superintendent,
Indiana State Police,
Stout Field,
Indianapolis 21, Indiana.

Dear Mr. Thurston:

I have your request for an official opinion which reads as follows:

"Our attention has been called to the recent amendment of the store license law which provides that persons offering products for sale from motor vehicles under certain conditions are required to buy a store license. Below are two questions that we will undoubtedly be confronted with when enforcement action is started regarding this law.

1. Is it legal for a person to offer for sale or sell products after they have made application for a store license but have not received the license?

2. In Section 5 of the law it defines the criminal offense as—'offering for sale or delivered from and sold at wholesale or retail'. The law makes no mention of the violation 'offering for sale' but only states that the truck shall be impounded by the arresting authorities after a sale has been made. It is possible to impound the vehicle when the only violation has been 'offering for sale'?

There are two sections of the Indiana Store License Law which are concerned in the answer to your first question: Section 1 of the original act as amended by Sec. 1 of chapter 263 of the Acts of 1951, which reads as follows:

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"That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the Indiana department of state revenue, store license division, as hereinafter provided. * * *" (Our emphasis.)

and Section 8 of the original act, as amended by Section 5 of the 1951 act, same being Burns 42-308, which reads in part as follows:

"The term 'store' as used in this act (§§42-301—42-312) shall be construed to mean and include, in the singular or in the plural, any place, area, location, establishment, or mercantile establishment, permanent or temporary, with or without shelter, fixed or mobile, which is or are owned, operated, maintained, or controlled by the same person, firm, corporation, co-partnership, or association, either domestic or foreign, in, at, or from which goods, wares, merchandise, or any tangible personal property of whatever kind are sold, offered for sale, or delivered from and sold at wholesale or retail: * * *." (Our emphasis.)

Under this second quoted provision, any place from which goods are offered for sale is a store and under the first quoted section it is unlawful to conduct a store without a license.

It has been frequently held that the application for or the refusal of a license, even if the refusal is wrongful, is not the equivalent of a license; e.g., State ex rel. Board, etc. v. Cole (1939), 215 Ind. 562, 566.

Thus, inasmuch as the act specifically requires the obtaining of a license, it is my opinion that your first question must be answered in the negative.

In order to answer your second question, it is important to examine the provisions of Sec. 6 of the 1951 act, found in Burns 42-309, which reads as follows:

"Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of
this act (§§ 42-301—42-312) shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not less than twenty-five dollars ($25) nor more than one hundred dollars ($100), and each and every day that such violation shall continue shall constitute a separate and distinct offense. Provided, that any moveable store making a sale or sales within this state without having first made application for and obtained the licenses heretofore specified shall be subject to being and shall be impounded by the arresting authorities and shall be held as security for payment of any fine assessed for said violation; Provided, further, however, that the owner or operator of said movable store may post a good and sufficient bond, to be approved by the judge of the court wherein said cause is to be tried, for the release of said impounded vehicle. * * *

As you point out, Section 5 defines a store as a place in which goods are offered for sale or sold. However, the portion of Section 6 which deals with impounding of moveable stores, provides that they may be impounded only if they make a sale or sales within the state. Had Section 6 provided that a moveable store could be impounded if it operated without a license, the offering for sale would be sufficient to impound. However, as the Legislature did not so provide, there must be an actual sale. This construction is supported by the general rule that the penal provisions of the statute must be strictly construed against a penalty and may not be extended by intendment.

Morris v. State (1949), 227 Ind. 630, 88 N. E. 2d 328;
Gingerich v. State (1950), — Ind. —, 93 N. E. 2d 180;
City of Ft. Wayne v. Bishop (1950), — Ind. —, 92 N. E. 2d 544;
Manners v. State (1936), 210 Ind. 640, 5 N. E. 2d 300.

Thus, your second question must be answered in the negative.