threat over this individual during the remainder of his natural life? I am inclined to think not.

In expressing the opinions herein it is not my intention to express any opinion conflicting with Chapter 289 of the Acts of 1935 (9-3001 et seq. Burns' 1942 Replacement). That act was to make provision for interstate contacts whereby a parolee of Indiana might be subjected to supervision in Ohio. Except for the fact that extradition is not necessary in those cases, the same general considerations would apply.

STATE CHEMIST: Advertising on package of Vitamin B1 tablets is not false or misleading; license to sell in Indiana may not be refused on that ground.

March 14, 1944.

Opinion No. 29

Hon. F. W. Quackenbush,
State Chemist,
c/o Purdue University,
Lafayette, Indiana.

Dear Sir:

Your letter of February 23, 1944, received requesting an official opinion as to the legality of your refusal to issue a permit to sell X-Vitamin B1 tablets in the State of Indiana which authority you exercise pursuant to Chapter 281, Acts of 1937, same being Section 15-1901, et seq., Burns' 1943 Supplement.

Your letter states that you have conducted extensive experiments with this product, which is sold for the purpose of stimulating plant growth, and failed to obtain any favorable results from such experiments. Such experiments are, in my opinion, contemplated by Sections 4 and 5 of said statute, same being Sections 15-1904 and 15-1905, Burns' 1943 Supplement.

Enclosed with your official request you have furnished me with an original package of X-Vitamin B1 tablets which shows, among other things, the following: (1) On the front of the envelope is found the following statement: "For Flowers, Plants, Trees, Shrubs, Lawns, Vegetables, etc., etc.";
(2) A picture of two potted plants, one much smaller than the other, the smaller plant bearing a label "Not Treated" and the larger plant bearing the label "Vitamin Treated." Under this picture is the following statement "Chinese Primroses—Actual Photograph"; (3) On the back of the package, among other statements, appears the following: "X—GIVES YOU MORE! ALL the Proven Vitamin B Growth Factors in a Greater Value Package for Flowers, House Plants, Shrubs, Trees, Lawns, Vegetables, etc., etc." Then follows directions for mixing and application. Then follows the following further statement: "PLANT STIMULATION—Saturate plants twice weekly first month of each growing season and weekly thereafter with Standard Strength Solution. Soak solution into soil sufficient to reach entire root system."

Enclosed with your letter I also find a photostatic copy of a report from the United States Department of Agriculture, Bureau of Plant Industry, Beltsville, Maryland, showing their investigation of Vitamin B1 of plant growth and stimulation which shows that most experiments throughout the country have been negative for favorable results, however, showing some favorable results on particular species of plants in some instances when used under certain conditions.

Section 15-901, Burns' 1943 Supplement, being Sec. 1, Ch. 281, Acts of 1937, provides as follows:

"Before any pure or mixed cultures of micro-organisms or materials used for promoting plant growth are sold or offered for sale in the state of Indiana, the manufacturer, dealer, importer, agent or person who causes such materials to be sold or offered for sale, by sample or otherwise, within the state of Indiana, shall file with the state chemist a statement that he desires to offer for sale in the state of Indiana such materials, and also a certificate for registration, stating the name of the manufacturer, the location of the principal office of the manufacturer, the name under which the product will be sold, the name or names of the plants for which the product is to be used, the composition of the substance, and the kinds of micro-organisms contained therein which promote the growth of plants, and shall secure a permit therefor from the state chemist. The state chemist is hereby empowered
The court was called upon to decide the legality of the finding of the Conservation Department of this State of the existence of an area of farm land infected with the "European Corn Borer." Under that statute said department was authorized to make such finding of the existence of such infected area
and then require the destruction of the crops in such area. In upholding such State Department in that case, the court on page 420 of the opinion states:

"Appellees do not contend that the Conservation Act, or any part of it, is unconstitutional. That such legislation is within the police power of the state, and is constitutional, * * *. (Citing Cases.)

"Courts have uniformly held, and the law is well settled, that valid rules and regulations, when adopted by an administrative body in accordance with the provisions of the act by which the administrative body was created, are, in effect, a part of the statute. Chicago, etc., R. Co. v. People (1907), 136 Ill. App. 2. However, a rule, to be valid, must be reasonable and within the authority delegated by the statute.

"In view of the facts as shown by the evidence in this case, there was an emergency which justified action on the part of the officers, and the rules and regulations embraced in the quarantine order were reasonable and well within the authority delegated by the statute."

It is, therefore, my opinion that the statute here involved is constitutional and the only question to be determined is whether or not such refusal of such license by you is a reasonable regulation to carry out the purpose of the Act. This depends upon whether or not such advertising contained on such package is, in fact, "false" or "misleading" and whether or not such label on such package is, in fact, "false" or "inaccurate."

In the case of Sachs v. Blewett (1933), 206 Ind. 151, the court, in holding defendant not liable in failing to purchase real estate under an auction sale, where fraud was alleged, said on page 156 of the opinion:

"A fraudulent intent alone is not actionable. There must be some fraudulent, overt act, or failure to act when duty requires it, or a breach of trust or confidence, and such must be the efficient or proximate cause of injury.

"Fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the
non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of." Franklin Insurance Co. v. Humphrey et al. (1879), 65 Ind. 549."

In Edwards v. Hudson (1937), 214 Ind. 120, at page 122, the court, in deciding actionable fraud did not exist sufficient to set aside sale of certain building and loan stock, defines the elements of fraud as follows:

"* * * The essential elements of actionable fraud are representations, falsity, scienter, deception and injury. Rochester Bridge Co. v. McNeill (1919), 188 Ind. 432, 122 N. E. 662. * * *.""

In the case of Milk Control Board v. Pursifull (1941), 219 Ind. 396, the court, in holding milk produced and marketed by one who sold in bulk, was not a producer-distributor within the meaning of the Milk Control Act, said on page 405 of the opinion:

"* * * Since the statute requires certain persons as therein defined to procure a license before engaging in the business of producing and handling milk and provides for a penalty for failure to comply with the provisions of the act, all doubts or ambiguities in the act should be resolved in favor of the appellee. Bienz v. State (1934), 206 Ind. 482, 485, 190 N. E. 170; Manners v. State (1936), 210 Ind. 648, 654, 5 N. E. (2d) 300. As said by this court in the latter case:

"'It is fundamental that penal statutes are to be strictly construed; that a statute in derogation of a common right and highly penal in character is only to be applied to cases clearly within its provisions; that penalties may not be created by construction, but must be avoided by construction unless they are brought within the letter and the necessary meaning of the act creating the penalty. This requires that where there is ambiguity it must be resolved against the penalty, and only those cases brought within the statute that are clearly within its meaning and intention.'"
Applying the above authorities to the statements on the package in question, it is my opinion that such language used is not false or misleading. The picture of the two plants may be an actual photograph. No statement is made that such product will, in fact, stimulate growth. The act in question, being penal in nature, must be strictly construed. Therefore, I do not believe you would be justified in withholding the license on the ground that an advertisement is fraudulent or misleading.

STATE BOARD OF ACCOUNTS. Ordinances, Penal. Publication. Necessary to publish in newspaper in addition to pamphlet or booklet form.

March 17, 1944.

Opinion No. 30

Hon. Otto K. Jensen,
State Examiner,
Department of Inspection and Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

This will acknowledge receipt of your letter dated March 15th, 1944, in which you request an opinion upon the question as to whether or not it is necessary to advertise ordinances with a penalty clause in the newspaper in cases where the same have been ordered by the common council of a city to be published and distributed in pamphlet or booklet form.

It is my opinion that the answer to your question is found in the opinion of the Supreme Court of Indiana in the case of Bartley v. Chicago and E. I. R. Co. (1940), 216 Ind. 512.

In this case the common council of the city of Evansville enacted traffic ordinance No. 1454 and caused the same to be printed in pamphlet form, showing on the cover of the pamphlet that the ordinance was published on July 23, 1930, under the order of the common council of the city of Evansville. The Supreme Court of Indiana, in considering the question as to whether or not this was a sufficient publication of the ordinance without being published in a newspaper, uses the following language: