

of Rocky Mountain Oil and Gas Association mailed to you a complaint against the sale of a petroleum product designated "autofuel", which is in fact gasoline but which contains in excess of two-tenths of one per cent sulphur. You have made an investigation and have submitted the following statement of facts:

"The Independent Refining Company, a corporation, owns and operates a refinery near Laurel, Montana. In addition to refining gasoline, i. e. a product which meets up with the standards of quality and strength prescribed for gasoline by Chapter 192, Laws of 1931, the company also produces a product which sells within the State of Montana under the name and designation 'autofuel'. From retail stations in the Cities of Billings and Bozeman, the Commission, during the months of August and September, obtained samples of the product being retailed as 'autofuel' and transmitted the same to the State Chemist at Bozeman, Montana, for analysis and reports on the contents thereof. In due season the Commission received reports from the State Chemist disclosing that the samples of 'autofuel' analyzed contained in excess of two-tenths of one per cent sulphur. In all other respects the samples measured up to the requirements for gasoline as prescribed in Chapter 192, Laws of 1931. For your information we append herewith true, full and correct copies of our inspectors' reports on the taking of said samples and the reports of the State Chemist as to his analysis.

"Our investigation further disclosed that the Independent Refining Company in invoicing 'autofuel' to retailers designates the product on the invoice as 'autofuel' and there is printed or stamped on the invoice the legend that the product 'contains more than 2-10 of 1 per cent sulphur.' Further, the company maintains a signboard on the Billings-Laurel highway advertising its gasoline and its 'autofuel.' The fact that 'autofuel' contains more than 2-10 of 1 per cent sulphur is shown on the advertisement (see Picture No. 1 attached). The company also does some newspaper advertising of its 'autofuel'.

#### Opinion No. 365

#### Gasoline — Autofuel, Sale of — Sulphur Content—Gas and Oil.

HELD: The sale of autofuel, a petroleum product containing more than two-tenths of one per cent of sulphur, is not illegal under the facts presented.

October 19, 1933.

We have your request for an opinion in which you state that under date of July 24, 1933, the Montana chapter

For your information we enclose a copy of one of their advertisements taken from the Billings Gazette of September 15, 1933. We also enclose a shop window advertisement for the company's products. (Picture No. 4 attached). Retail pumps inspected show that the machines used for vending or dispensing 'autofuel' are marked in two places with the legend that the product contains more than 2-10 of 1 per cent sulphur. (See attached pictures Nos. 2 and 3). The sign on the side of the vending machine (not discernible in the attached pictures) carries the following:

**'AUTOFUEL**

Contains more than  
2-10 of one per cent  
non-corrosive sulphur.

**HI-OCTANE'**

"At the time of our investigation 'autofuel' was retailing for two cents per gallon less than so-called standard gasoline. We understand that the Independent Refining Company pays to the state 5 cents on each gallon of 'autofuel' refined and sold by it in the state, pursuant to the provisions of Chapter 19, Laws of 1927, as amended by Chapter 6, Laws of 1931."

You request our opinion whether or not the sale or offering for sale of such product is unlawful under the provisions of Chapter 19, Laws of 1927, as amended.

The product in question is a useful commodity. So far as the evidence shows, its propulsive force is equal to that of the so-called standard gasolines. It is lower in price than the standard gasolines and offers to thousands of consumers a welcome relief from the high prices of gasoline persistently exacted in this state.

The evidence before your Board shows nothing harmful in the product itself; it is not dangerous to public health or safety; all the tests made by the State Chemist show it to be non-corrosive. In no respect, except that it contains more than two-tenths of one per cent sulphur, does it differ from the standard gasolines. It is not dangerous to public health or safety, as is recognized by the legislature itself when it permits the sale

of a lower grade motor fuel containing an unlimited amount of sulphur, either corrosive or non-corrosive. (Chapter 110, Laws of 1931.) For several months thousands of consumers, eager to take advantage of its lower price, have been using this commodity, and it is significant that no complaint against its sale comes from these consumers.

The act must be held not to prohibit the sale of this commodity if it be properly labeled, and if it be sold under conditions that the public will not be deceived concerning its sulphur content. The state may not suppress entirely the sale of a useful and legitimate articles of commerce, where its traffic and use have no substantial relationship to public health or safety.

The facts in the case at hand bear a remarkable resemblance to those in the case of Atlantic Refining Co. v. Trumbull, 43 Fed. (2d) 154. In that case the State of Connecticut sought to prohibit the sale of lubricating oils which did not conform to prescribed specifications, but which nevertheless were useful and not dangerous to public health or safety. The court held the act unconstitutional and in discussing the question said: "\* \* \* the only warrant for the suppression of a legitimate business in a useful commodity of commerce lies in the lawful exercise of the police power. It is shown by the record that the lubricating oils in question are useful and harmless substances, and so long as sales are made honestly there can be no reason to prevent purchasers from obtaining what they wish, even though the article may be cheaper or inferior to that specified in 323B." \* \* \* "We are aware of the fact that it is contended that any oil which is not of an expensive and very high grade may be represented to be of that grade and may lead in some cases to deception. But legislation like the present, where there is no proof of deception, is, under the decisions of the Supreme Court, interfering too greatly with legitimate transactions to be justified by any possible or slight gain. The act seems too unreasonable and arbitrary in its provisions as not to meet the test of the decisions we have cited."

There are numerous authorities to

the effect that a statute which absolutely prohibits the sale of a commodity or the transaction of a business where there is no substantial relationship to public health or safety, works a deprivation of liberty and property and violates the Fourteenth Amendment to the Constitution of the United States. (*Weaver v. Palmer Bros. Co.*, et al., 264 U. S. 504, 68 L. Ed. 654; *Jay Burns Baking Co. v. Chas. W. Bryan*, et al., 264 U. S. 504, 68 L. Ed. 813, 32 A. L. R. 661; *People v. Weiner*, 271 Ill. 74; *Greensboro v. Ehrenreich*, 80 Ala. 579; *State v. Taft*, 118 N. C. 1190; *Kosciusko v. Slomberg*, 68 Miss. 469; *Adams v. Tanner*, 244 U. S. 590, 596, 61 L. Ed. 1336, L. R. A. 1917 F 1163, Ann. Cas. 1917D 973; *Weil v. Ricord*, 24 N. J. Eq. 169; *Freund on Police Power*, Section 58, 63; *Tiedeman on Police Power*, p. 301.)

We have not overlooked the case of *Powell v. Pennsylvania*, 127 U. S. 678, but that decision has been weakened by later decisions. (*Freund on Police Power*, 62.) In *Weaver v. Paymer Bros. Co.*, 270 U. S. 402, cited above, the Supreme Court limited the application of the *Powell* case by saying that the Supreme Court in that case assumed that most kinds of the product there in question were or might become injurious to health.

In order to sustain the constitutionality of the act, which, with its amendments, contains many desirable provisions, it must be held that it was not the intent of the legislature to prohibit the sale of such commodity, and that the sale is not unlawful if it be done without deception as to the sulphur content.

The complaint which you have received requests you to take such steps "as may be necessary to prevent the foisting upon the public of gasoline containing an excess of sulphur." Without doubt, if this product is being offered for sale to the public under conditions that deceive the public as to the sulphur content, then it is your duty to curb the practice.

After considering the facts before us, and in the absence of any complaint on the part of the consuming public which gratefully takes advantage of the lowered price at which the product is sold, we are not prepared to say that any deception is being

practiced in its sale. However, the question whether or not deception is being practiced is one of fact for your board to determine from all the circumstances surrounding the sale of the product at each place of sale.