

The suit was not between a water user and the city of Columbus. The question of how the free water which the board of education contended it was entitled to receive by virtue of the statute was to be paid for was not involved. Whether the city of Columbus, if required to furnish this water as the statute provided, must provide for the cost of furnishing the water by direct taxation, or whether it might spread this cost out among the other water users and add the cost thereof to their normal water rents was not raised in any stage of the case. It was not mentioned in any of the pleadings or briefs of counsel, and was not an issue in the case. The court held, as stated in paragraphs one and two of the syllabus of the opinion, as follows:

“1. That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article 18 of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland vs. Board of Education*, 112 Ohio St., 607 overruled.)

2. That portion of Section 3963, General Code, above referred to is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I, of the Ohio Constitution.”

Clearly, if the requirement to furnish water free of charge for public school purposes, “results” in taking private property for public use, without compensation, the furnishing of it voluntarily, would also “result” in taking private property for public use, without compensation, and would therefore be illegal. If the furnishing of water for public school purposes free of charge would bring about the result stated by the Supreme Court and would, therefore, be illegal, the furnishing of this water for hospitals and similar institutions would surely bring about the same result, and if furnishing water would bring about this result, manifestly the furnishing of the use of a system of sewerage, sewage pumping works and sewage treatment or disposal works would bring about a like result and would therefore be illegal.

I am therefore led to the conclusion, in the light of the decision so lately enunciated by the Supreme Court in the Columbus School case above referred to, that the council of a municipal corporation cannot legally provide that public schools, parochial schools and hospitals giving some free service, be permitted to use the city sewers free of charge, when all other premises must pay therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2300.

GASOLINE TAX—“GAS-O-LITE” NOT SUBJECT TO TAX.

SYLLABUS:

In order to be taxable under Sections 5527 and 5541-1, General Code, respectively, imposing an excise tax of two cents and one cent on the sale and use of each gallon of

motor vehicle fuel, such fuel must be used for the purpose of generating power by means of internal combustion motors, or such fuel as is commonly or commercially used or usable for the purpose of generating power for the propulsion of motor vehicles upon the public highways.

COLUMBUS, OHIO, June 30, 1928.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent request for my opinion, which request reads as follows:

“I am enclosing copy of a letter submitted by K. M. & B. relative to the taxation of a certain gas known as Gas-o-lite, which, according to the statements contained in the letter indicate that same is not a motor fuel, and therefore not taxable under the gasoline tax laws of Ohio.

Question: Is Gas-o-Lite, a product made by the compression process from casing-head gas and containing a gravity of 84 to 88 degrees and initial flash point of 69 degrees and an end point of 242 degrees Fahrenheit, taxable under the laws of Ohio imposing a motor fuel tax?

Other features explanatory of ordinary gasoline is contained in the letter enclosed herewith. If said Gas-o-Lite, as represented, can not be used as motor fuel it would save a great deal of effort and annoyance in the granting of refunds, if they could be made tax exempt. Your advice will be, of course, transmitted to the Gasoline Tax Division.”

Accompanying the above request is a letter which, in so far as pertinent to this inquiry, reads:

“ * * *

Gas-o-Lite is made by the compression process from casing-head gas. It has a gravity of 84 to 88 degrees and initial flash point of 69 degrees, and an end point of 242 degrees Fahrenheit. It is manufactured to be used and is used in what is known as cold process gas machines, for lighting and heating purposes only. Ordinary gasoline, according to United States Navy gasoline tests, has a gravity from 58 to 60 degrees, an initial flash point of 95, and an end point of 437 degrees Fahrenheit. It would be impossible for Gas-o-Lite to be used in any internal combustion engine or as a motor vehicle fuel. Were it attempted to be used for that purpose, it would evaporate through the carburetor without giving any results.

The name ‘Gas-o-Lite’ is a trade-mark name and the product has been manufactured by this corporation and its predecessor since about 1913, and many years before the company engaged in the manufacture of gasoline for motor cars. It is sold only in steel barrels, each containing fifty-four gallons, and the output is distributed throughout the United States mostly to farming communities.

* * *

We may add that Wisconsin and one of the other western states have exempted this product from the operation of this motor vehicle tax law.

* * * ”

At the outset, I am assuming that the facts quoted in the above accompanying letter are true. I have not appealed to any scientific source to learn whether or not

Gas-o-Lite can be used in an internal combustion engine and I am basing this opinion on the assumption that it can not be so used.

Sections 5527 and 5541-1 of the General Code impose an excise tax of 2 cents and 1 cent, respectively, "on the sale and use of each gallon of *motor vehicle fuel*" sold or used by any gasoline dealer within the State of Ohio.

The term "motor vehicle fuel" is defined in Sections 5526 and 5526-1 of the General Code, these sections, in so far as pertinent, reading as follows:

"Sec. 5526. * * *

* * * 'Motor vehicle fuels' shall include gasoline and all other volatile and inflammable liquids derived from petroleum, which are produced, refined, prepared, distilled, compounded or used for the purpose of generating power by means of internal combustion motors, by whatever name such fuels may be known or sold. The term 'motor vehicle fuel,' however, shall not include the product commonly known as kerosene oil.

* * * "

"Sec. 5526-1. (112 O. L. 59.) In addition to its meaning as defined in original Section 5526, the term 'motor vehicle fuel' shall be held to mean and include any volatile or inflammable liquid commonly or commercially used or usable for the purpose of generating power for the propulsion of motor vehicles upon the public highways, by whatever name such fuels may be known or sold. The term 'motor vehicle fuel' shall not include the product commonly known as kerosene oil, except when mixed or compounded with a motor vehicle fuel or except when used in operating motor vehicles on the public highways."

Section 5526, *supra*, was under consideration by the Supreme Court of Ohio in the case of *Caldwell vs. State*, 115 O. S. 458. After discussing the strictness with which tax levying statutes must be construed, Chief Justice Marshall said on page 462:

"By reference to Section 1 of this act (Section 5526, General Code), it will be found that the definition of motor vehicle fuels includes 'gasoline and all other volatile and inflammable liquids derived from petroleum.'

Those words are followed by a limitation as follows:

'Which are produced, refined, prepared, distilled, compounded or used for the purpose of generating power by means of internal combustion motors
* * * .'"

In other words, fuel, to be classed as "motor vehicle fuel" and subject to the excise taxes, here involved, must not only be derived from petroleum, but must also be such fuel as can be used in an internal combustion motor for the purpose of generating power.

You inform me that Gas-o-Lite is a distillate of petroleum, but that it cannot be used for the purpose of generating power in an internal combustion motor. Because of this latter fact Gas-o-Lite is not subject to the excise taxes provided for in Sections 5527 and 5541-1 of the General Code.

It might be argued that Gas-o-Lite would come within the purview of "motor vehicle fuel," as defined by Section 5526-1, (112 O. L. 59) *supra*. You will note, however, that this definition includes "any volatile or inflammable liquid commonly or commercially used or usable for the purpose of generating power for the propulsion of motor vehicles upon the public highways." Reference to Section 5526, *supra*, re-

veals that motor vehicles are defined as those vehicles "which are propelled by internal combustion of motor vehicle fuel" and since Gas-o-Lite cannot generate power in an internal combustion motor, said product does not come within the purview of this definition.

Specifically answering your question, therefore, it is my opinion that the product known as Gas-o-Lite is not subject to the excise taxes imposed on motor vehicle fuels under Sections 5527 and 5541-1 of the General Code of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2301.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN FAIRFIELD, JEFFERSON AND TRUMBULL COUNTIES.

COLUMBUS, OHIO, July 2, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

2302.

APPROVAL, LEASES TO MIAMI & ERIE CANAL, OHIO CANAL, HOCKING CANAL, PORTAGE LAKES, BUCKEYE LAKE, INDIAN LAKE AND LAKE ST. MARYS LANDS.

COLUMBUS, OHIO, July 2, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 23, 1928, in which you enclose the following leases in triplicate for my approval:

MIAMI & ERIE CANAL	<i>Valuation</i>
Annie E. Armstrong, land.....	\$1,200 00
Gale Brush, land.....	2,000 00
Daniel Lieberthal, land.....	500 00
Lowell P. & Nelson M. Rieger, land.....	800 00
Village of Spencerville, water.....	400 00
Trustees, Washington Township, land.....	550 00
OHIO CANAL	<i>Valuation</i>
The Bridgewater Machine Co., land.....	\$5,000 00
Cherry Street Holding Co., land.....	18,300 00
G. R. DeShon, boat-landing.....	100 00