CRIMINAL LAW:--Misbranding of motor oil an offense under Section 4302, R. S. Mo. 1929.

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Hon. R. S. Peterman
Prosecuting Attorney
Marble Hill, Missouri

My Dear Mr. Peterman:

Acknowledgment is herewith made of your letter of August 21, 1933, supplementing your previous request for an opinion of this office. Your original request reads as follows:

> "Complaint has been made to me that a certain Oil Company which is doing business in this state has in the course of its business had its employees in this state rebrand a number of barrels of oil and then sell same under a different name and at a higher price than said product was originally offered for sale under its original brand. This was done by having said employees paint the heads of the barrels and then rebrand same under a different name.
>
> Do you believe that this is in violation of the Laws of the State of Missouri?"

Your supplementary letter reads as follows:

> "In reply to your letter of the 11th. inst., with reference to the rebranding of motor oil by a certain oil company, please be advised that these brands are trade-marked, and that the rebrand is known and recognized by the customers of this company to be of a higher quality or grade of oil than the original brand, and the original brand was known as a cheaper or inferior grade of oil. Please be further advised that the rebrand is not an imitation of the brand of any other company. Trusting that the above fully covers your enquiries, and that I may hear from you very shortly."

After due consideration it is the opinion of this office that the acts referred too, in themselves, are not prohibited by any law of this State. That is to say, there is no law which would prohibit the oil company from changing a trade-mark, or brand on its own products to another trade-mark or brand, both of which trade-marks or brands are owned and controlled by the said company. This is not to be construed as to state that the sale of such rebranded oil would not constitute an offense, but the act of rebranding it not, in itself, a violation of any law of this state. It seems peculiar that no legislation has been enacted covering the labeling, branding, or inspection of motor vehicle lubricating oils. The oil inspection laws of this State are confined to such petroleum products as may be used as, or combined with other elements and used as motor vehicle fuels, or such petroleum products as may be used for illuminating, heating or power purposes. No provision is made for the inspection, labeling or branding of lubricating oils. Accordingly, there is no penalty fixed for the violation of such inspection laws, and it seems that the matter of branding and labeling lubricating oil has entirely escaped the attention of the legislature.

An examination of Art. 1 of Chap. 36, pertaining to trade-marks, dies, and brands reveals that no section contained in that article is applicable to the facts as related in your supplementary letter. Those sections referred to the infringement of the trade-marks, brands, and labels belonging to others; to the use of dies and plates imitating the labels, brands, and trade-marks of others, and do not apply where the brand or trade-mark is owned, controlled or first used by the party using such brand on another product.

While we find many sections prohibiting the misbranding or mislabeling of various items of merchandise, such as flour and meal, (Art. 6 of Chap. 93), foods and drugs, (Art. 3 of Chap. 93), beverages, (Art. 8, Chap. 93), trees, shrubs, plants, etc., (Sec. 12392), silver ware, (Secs. 4411 and 4412), vinegar, (Secs. 4393 and 4394), oleomargarine, (Secs. 4384 and 4385) and various other specific items of merchandise, yet none of these sections are broad enough to cover the subject of your inquiry.

It is the further opinion of this office that the sale of such misbranded oil would, if proper facts are proved, constitute an offense under section 4304, R. S. Mo. 1929, portions of which section reads as follows:

> "Sec. 4304. Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person; * * *any money* * * * by means or by use of any* * * *deception, or false and fraudulent representation, or statement or pretense,* * * *shall be deemed guilty of a felony,* * * *."

Without question, the entire purpose of the rebranding was to obtain the price of the quality product for the inferior product by selling the inferior product as the quality oil. But no offense was committed until such greater price was obtained through a sale wherein the rebranded product was represented to be and was sold as the product having a higher quality and value. Such an act would constitute a deception or false pretense, obtaining from the customer the difference in price between the two grades or qualities of oils. Each sale would constitute a separate offense. If the necessary facts can be proved a charge might be brought under Section 4095, which refers to the obtaining of money under false pretenses; or under Section 4308, which refers to the publication and circulation of untrue, misleading, and deceptive advertising. It is probable that the oil company has at various times advertised their better oil as containing qualities and properties which the rebranded product did not contain. However, from a practical standpoint, it would seem that Section 4304 is more applicable to the situation.

We trust that the foregoing may be of some assistance to you.

Respectfully submitted

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APPROVED:

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