



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

GERALD C. MANN  
~~WILLIAM H. HESSON~~  
ATTORNEY GENERAL

Honorable Wm. J. Lawson  
Secretary of State  
Austin, Texas

Dear Sir:

Attention: Honorable Frank D. Wear

Opinion No: 0-3366

Re: Necessity of registration of  
employees of oil companies under  
the Texas Securities Act when  
operating in manner set forth.

We are pleased to comply with your request of April 1, 1941, for an opinion on the above question, which was submitted to us by letter of the Secretary of State on April 16, 1940, and subsequently withdrawn before release of our opinion. We quote from your letter setting out the questions and facts relating thereto:

"1. Is an employee of an oil company who is employed for the purpose of securing oil and gas leases for such company and who is paid by them on a salary basis required to register with the Securities Division of the office of the Secretary of State under the provisions of the Texas Securities Act when he obtains such leases in his own name and later assigns them to the company?

"2. Is an employee of an oil company employed by them for the purpose of obtaining leases required to register with the Securities Division of the Office of the Secretary of State when he obtains such leases in his own name and assigns them to the company and is paid for securing such leases a commission based on the number of acres obtained and the price paid for such leases?"

In connection with these questions you state that:

"The major oil companies of Texas, such as the Gulf, Magnolia, Sun Oil and others, employ men to represent them in the purchase of oil and

gas leases. In order to prevent information from reaching the public and other lease buyers that such major companies are purchasing in a certain location, these men so employed by such major companies, purchasing leases, take such leases in their own name and at a later date assign them to the company. Some of these men so employed by the major oil companies are paid a straight salary by the month or year. Other men so employed by the major oil companies are paid on a commission basis of so much per acre at the time the assignment is made to the companies."

It is noted at the outset that your question is not concerned with the possible ultimate sale of such oil and gas leases by the oil company employer or with respect to its duty to register under the Securities Act, but solely with the purchase by the employee of such leases and royalties for the benefit of the company and the subsequent assignment by employee to employer of the leases and royalties. We have carefully considered your inquiry as so qualified and have reached the conclusion that House Bill No. 521, Acts 44th Legislature, 1935, as amended, known and cited as the Texas Securities Act (Article 600a, Vernon's Annotated Civil Statutes), does not apply to transactions in the nature of those set forth.

Section 2 (a) of the Securities Act defines a "security" to include "a certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title." Under this definition, the ordinary type of oil and gas lease or royalty contract has been held a "security." *Atwood v. State*, 139 Tex. Cr. R. 43, 121 S. W. (2d) 353.

Section 2 (c) defines a "dealer" as including "every person or company, other than a salesman, who engages in this State, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to, or orders for, or undertaking to dispose of, or to invite offers for, or dealing in any other manner in any security or securities within this State.

In Section 2 (d) a "salesman" is defined as including "every person or company employed or appointed or authorized by a dealer to sell, offer for sale or delivery, or solicit subscriptions to or orders for, or deal in any other manner, in securities within this State, whether by direct act or through subagents; provided, that the officers of a corporation or partners of a partnership shall not be deemed salesmen, where such corporation or partnership is registered as a dealer hereunder."

Section 2 (e) reads as follows:

"The terms 'sale,' or 'offer for sale' or 'sell' shall include every disposition, or attempt to dispose of a security for value. The term 'sale' means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other thing of value, or any transfer or agreement to transfer, in trust or otherwise. Any security given or delivered with or as a bonus on account of, any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The term 'sell' means any act by which a sale is made, and the term 'sale' or 'offer for sale' shall include a subscription, an option for sale, a solicitation of sale, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this State of a letter, circular or other advertising matter; provided, however, that nothing herein shall limit or diminish the full meaning of the terms 'sale,' 'sell' or 'offer for sale' as used by or accepted in courts of law or equity. Provided, further, that the sale of a security under conditions which entitle the purchaser or subsequent holder to exchange the same for, or to purchase some other security shall not be deemed a sale or offer for sale of such other security; but no exchange for or sale of such other security shall ever be made unless and until the sale thereof shall have been first authorized in Texas under this Act, if not exempt hereunder, or by other provisions of law."

Section 12 of the Act provides that:

"Except as provided in Section 3 of this Act, no person, firm, corporation or dealer shall, directly or through agents or salesmen, offer for sale, sell or make a sale of, any securities in this State without first being registered as in this Act provided. No salesman or agent shall, in behalf of any dealer, sell, offer for sale, or make sale of, any securities within this State unless registered as a salesman or agent of a registered dealer under the provisions of this

Act. A list of dealers, agents and salesmen registered under the provisions of this Act shall, at all times, be kept by the Secretary of State and be open to the public."

Other sections of the Act provide methods of registration for dealers, salesmen and issuers of securities, and Section 23 makes it unlawful for any dealer, agent or salesman "to sell any securities" until the dealer has been registered, temporarily or permanently.

Section 30 (Article 1083a, Vernon's Annotated Penal Code) of the Act is its penal provision, providing:

"Any dealer, agent, salesman, principal, officer, or employee, who shall, within this State, sell, offer for sale or delivery, solicit subscriptions to or orders for, dispose of, invite offers for, or who shall deal in any other manner in any security or securities, without being registered as in this Act provided, or who shall within this State, sell, offer for sale or delivery, solicit subscriptions to and orders for, dispose of, invite orders for, or who shall deal in any other manner in any security or securities issued after the effective date of this Act without having secured a permit as herein provided, or who knowingly makes any false statement of fact in any statement or matter of information required by this Act to be filed with the Secretary of State, or in any advertisement, prospectus, letter, telegram, circular, or any other document containing an offer to sell or dispose of, or in or by verbal or written solicitation to purchase, or in any commendatory matter concerning any securities, with intent to aid in the disposal or purchase of the same, or who knowingly makes any false statement or representation concerning any registration made under the provisions of this Act, or who is guilty of any fraud or fraudulent practice in the sale of, offering for sale or delivery of, invitation of offers for, or dealing in any other manner in any security or securities, or who shall knowingly participate in declaring, issuing or paying any cash divided by or for any person or company out of any funds other than the actual earning of such person or company or from the lawful liquidation of the business thereof, shall be

deemed guilty of a felony and, upon conviction thereof, shall be sentenced to pay a fine of not more than One Thousand Dollars (\$1000), or imprisoned in the penitentiary for not more than two (2) years, or by both such fine and imprisonment."

From a careful analysis of the Act it is clear that emphasis has been placed upon "sale," "offer for sale," "exchange" or "dealing in securities." There is nothing in the Act either express or implied to indicate that the Legislature had in mind a regulation of the purchase as distinguished from the sale of securities. As stated in *Smith v. Fishback* (C. C. A. 1938), 123 S.W. (2d) 771, writ refused:

"The Act makes it the duty of all persons dealing in securities, good or bad, to first secure from the Secretary of State a permit before entering upon the business of 'selling' or 'Exchanging' same for anything of value 'for all or part of his time' either 'directly or through an agent' within this State."

And as stated in a passage from the opinion of *Kneeland v. Emerton*, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1, quoted with approval in the *Fishback* case, supra:

"The plaintiff as purchaser in ignorance of the fact that as to the share of stock sold him by the defendant there had been failure to comply with the statute was not in pari delicto with the defendant. The prohibitions of the statute did not apply to him at all but only to the seller. The aim of the statute was to protect the class to which the plaintiff belongs against that to which the defendant belongs."

As stated in *Culver v. Cockburn* (C.C.A. 1939), 127 S. W. (2d) 328, writ dismissed:

"The Securities Act indicates a legislative intent to protect the investing public by providing a more efficient and effective means of preventing fraud in the sale of securities."

In that case it was held that there was nothing in the Act which would justify the presumption that the Legislature intended to regulate the type of contract which might be made by the owner of real property with an agent for the payment of com-

compensation for procuring a purchaser therefor. Likewise, we feel that there is nothing in the Act which would justify the presumption that the Legislature intended to regulate the purchase of oil and gas leases by individual oil company principals through agents.

Let us examine more minutely the transactions described in your letter. A person is employed as an agent by an oil company to purchase oil and gas leases and royalties on its account. The oil company remains an undisclosed principal throughout the transaction. When the lease is purchased it is taken in the name of the agent. No violation of the Securities Act has occurred at this point. Yet we assume that company funds have been used by the agent in the procurement of the lease and equitable title to the property in question is in the oil company. Subsequently, in accordance with the terms of his employment the agent transfers legal title to the company by an assignment of the lease.

If the prohibitions of the Securities Act were not intended to apply to the purchasers, can it be that the Act was nevertheless intended to apply to an assignment by the agent to his principal in accordance with the terms of his employment? As so construed the only safeguard afforded in such instances would be protection to principals against the likelihood of unscrupulous acts by their agents. We hardly believe that this was the intent of the Legislature.

Nor can the act of the agent in assigning the lease or royalty to his company properly be classed as a "sale" as that term is defined in Section 2 (e) of the Act. There has been no transfer for value.

Consequently, it is the opinion of this department and you are respectfully advised that an employee of an oil company (paid either on a salary or commission basis) whose duty it is to secure oil and gas leases and royalties in his own name and later assign them to his employer is not required to register under the Securities Act either as a dealer or salesman in the consummation of such transactions.

JDS:RS:wc

APPROVED APR 10, 1941  
s/Grover Sellers  
FIRST ASSISTANT  
ATTORNEY GENERAL

Approved Opinion Committee by  
s/BWB Chairman

Very truly yours  
ATTORNEY GENERAL OF TEXAS

By s/James D. Smullen  
James D. Smullen  
Assistant