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# EXEMPTIONS TO THE SECURITIES ACT OF 1957 AND THEIR IMPORTANCE TO PERSONS DEALING IN OIL AND GAS INTERESTS

## I. INTRODUCTION

The Texas Securities Act of 1957<sup>1</sup> is of particular importance to persons dealing in oil and gas properties in Texas.<sup>2</sup> The vast majority of oil and gas securities transactions, however, are carried on with a casual disregard for the potential liabilities and penalties imposed by the act<sup>3</sup> despite the startling decision in *Brown v. Cole*.<sup>4</sup>

There are three principal means of avoiding the onerous burdens of the act: (1) registering both the dealer and the security under the act;<sup>5</sup> (2) discovering and keeping within the terms of one of the exemptions to the act; and (3) *successfully* defending against an

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<sup>1</sup> Tex. Rev. Civ. Stat. Ann. art. 581 (Supp. 1957).

<sup>2</sup> There appears to be a popular misconception that the Texas Securities Act applies only to brokers and dealers, as those terms are popularly understood, and not to securities owners when selling their own securities. This is not the case. All persons selling securities of any nature are under the operation of the act, and it is only by the application of some exemption that a transaction is not within the act.

<sup>3</sup> See Meer, *The Security Laws and Oil and Gas Financing*, 20 Texas B.J. 211, 212 (1957).

<sup>4</sup> 155 Tex. 624, 291 S.W.2d 704 (1956), affirming 276 S.W.2d 369 (Tex. Civ. App. 1955). Brown, who was not a registered dealer under the Texas Securities Act, had been approached by one Fields, a mining operator in Mexico, who sought to interest Brown in lending \$30,000 to develop certain Mexican mining properties. Fields agreed to repay the loan "within a reasonable time" with interest at five per cent, and to give to the lenders a  $\frac{1}{4}$  interest in a Mexican corporation at no additional cost. Brown brought this "opportunity" to the attention of Cole, and secured additional information as Cole requested it. Brown also took Cole's auditor to investigate the Mexican properties. Brown and his partner participated in the amount of \$5,000 and Cole and another invested \$10,000 on the endorsement of their auditor, who himself invested \$1,250. Brown acted for Cole in forwarding the money to Fields in Mexico. It soon became apparent that the investors had been duped and that their money was lost. The Cole interests then tendered to Brown the "security" they had purchased from Fields, and sued Brown for their money. Brown's principal defense was that he had not made a "sale" of a security to the Cole interests, but that it was Fields who had sold the securities, just as it was Fields who had taken their money to his own use. The Court refused to accept Brown's defense and said: "As we interpret the Act the seller may be any link in the chain of the selling process or in the words of the Act he is one who performs 'any act by which a sale is made.'" 155 Tex. at 629, 291 S.W.2d at 708. The Court then enunciated a test which is as broad as the statutory definition justifies: "It is clear that but for Brown's activities and repeated efforts the respondents would not have participated in the transaction." 155 Tex. at 630, 291 S.W.2d at 709. Thus, in spite of the fact that the Cole interests did not rely on Brown's statements, but instead parted with their money based on the investigations of their own auditor, and in spite of the fact that Brown made no profit from the transaction, but instead shared a common loss, the Court held Brown liable under section 33a (now section 33) of the act. Brown would apparently have been subject to penal action under the provisions of what is now section 29 of the act since he dealt in unregistered securities and was not registered as a dealer or salesman. The case is commented upon at length by Hill, *Pitfalls in the Texas Securities Act*, 10 Sw. L.J. 265 (1956).

<sup>5</sup> See Reavley and Barnes, *Operation of the Texas Securities Act*, 10 Sw. L.J. 249, 257 (1956); Cox, *The Securities Act*, 2 Tex. Rev. Civ. Stat. Ann. XIII (1953) (Commentary).

action brought under the act when (1) and (2) are not used. This Comment examines the scope and availability of the express and implied exemptions to the act with emphasis on their availability in oil and gas transactions.

## II. BURDEN OF PROOF WHEN CLAIMING AN EXEMPTION

Section 37 of the 1957 act provides:

It shall not be necessary to negative any of the exemptions in this Act in any complaint, information or indictment, or any writ or proceeding laid or brought under this Act; and the *burden of proof* of any such exemption shall be upon the party claiming the same. (Emphasis added.)

There appears to be no reported appellate case interpreting section 37 (section 4 under the 1935 act; section 39 under the 1955 act). Although the phrase "burden of proof" is capable of more than one construction, it seems apparent that this section of the act is designed to place the burden of going forward with the evidence on the party claiming an express exemption in any action, whether civil or criminal. Logically, one claiming an implied exemption from the act likewise carries this burden although the exemption is extrastatutory, and section 37 would appear not necessarily to control.

## III. EXPRESS EXEMPTIONS TO THE ACT

There are two types of exemptions to the act: first, those specifically provided for in the statute itself; and second, those implied. Since there is probably a greater predictability and certainty in the explicit statutory exemptions, these will be considered first under the headings of (1) exempt *securities* provided for in section 6, and (2) exempt *transactions* provided for in section 5.

### A. Exempt Securities

For the purposes of dealers in oil and gas interests the exempt securities provision (section 6) is of no practical value because it exempts from registration only such securities as the following: securities issued by the United States Government, by a foreign government, by a corporation owning a railroad or public utility, and securities listed on the principal national stock exchanges.

### B. Exempt Transactions

Section 5 contains the four statutory exemptions of greatest value to the dealer in mineral interests.

### 1. *The Personal Investment Exemption*

Section 5C(1) of the act provides:

Sales of securities made by or in behalf of a vendor, whether by dealer or other agent, in the ordinary course of bona fide personal investment of the personal holdings of such vendor, or change in such investment, if such vendor is not engaged in the business of selling securities and the sale or sales are isolated transactions not made in the course of repeated and successive transactions of a like character; provided, that in no event shall such sales or offerings be exempt from the provisions of this Act when made or intended by the vendor or his agent, for the benefit, either directly or indirectly, of any company or corporation except the individual vendor (other than a usual commission to said agent), and provided further, that any person acting as agent for said vendor shall be registered pursuant to this Act. . . .

Thus, a person claiming this exemption has the burden of showing these elements: (1) the sale is in the ordinary course of investment of personal holdings; (2) the vendor is not "in the business of selling securities"; (3) the sale is an "isolated transaction"; and (4) the sale is not for the benefit of "any company or corporation except the vendor."

This is the most thoroughly litigated exemption to the act. In the 1957 act its form is slightly different from earlier acts, but its substance is not markedly changed.<sup>6</sup> The principal change is the addition of a new requirement, namely, that the sale must be an "isolated transaction." Although this expression is not new to Texas cases dealing with the securities acts, it is new to the acts themselves.<sup>7</sup> A second change in the act is the addition of a specific provision extending this exemption to sales by agents.<sup>8</sup> In the past this type of sale has been validated by case authority,<sup>9</sup> but not explicitly in the acts themselves.

Very little success has attended the efforts of those attempting to use section 5C(1) (section 3(c) under the 1955 and earlier acts). In the cases decided under the securities acts where this exemption has been pleaded, it was found to apply only once, and this case is subject to some question.<sup>10</sup> Perhaps this is not so much an indica-

<sup>6</sup> The 1955 revision of the Texas Securities Act is contained in Tex. Rev. Civ. Stat. art. 579 (Supp. 1956). See art. 579-3(c) for the personal investment exemption.

<sup>7</sup> The meaning of the phrase "isolated transaction" is discussed in *Breeding v. Anderson*, 152 Tex. 92, 254 S.W.2d 377 (1953), 2 Oil & Gas Rep. 358.

<sup>8</sup> This change first appeared in the 1955 revision of the Texas Securities Act. Tex. Rev. Civ. Stat. art. 579-3(c) (Supp. 1956).

<sup>9</sup> *Sibley v. Coffield*, 193 S.W.2d 239 (Tex. Civ. App. 1946) error ref. n.r.e. The fact that the agent was not registered does not deprive the owner of the security of his exemption under 5C(1).

<sup>10</sup> *Winslow v. Boyd*, 195 S.W.2d 384 (Tex. Civ. App. 1946), is the only case in Texas in which this personal investment exemption was found to apply. The plaintiffs were a

tion that the courts are reluctant to apply the exemption as it is that the persons offering the defense were grasping at straws.

One danger of invoking §C(1), particularly in criminal prosecutions, is that it gives the state an opportunity to show every other transaction where alleged "securities" were sold by the defendant. This creates a risk that the jury will convict him of selling in violation of the act not only on the basis of the single transaction in question, but also on past sales as well.<sup>11</sup>

An analysis of this section may best be made by a consideration of the elements of which it is composed.

a. *Sales Must Be in the Ordinary Course of Investment of Personal Holdings.*—The most important aspect of this requirement is that the security sold must be owned by the vendor. The Texas courts have been demanding as to this requirement and have carefully sought out artifices designed to avoid it. *Atwood v. State*,<sup>12</sup> a landmark case in Texas securities law, illustrates a scheme which ran afoul of this requirement. In the *Atwood* case the state prosecuted Atwood for selling interests of which he was not the bona fide owner. Atwood had procured leases on the condition that if he made a sale of such leases he would pay the landowner an agreed sum; otherwise, he would surrender the leases to the landowner. Among other defenses, Atwood offered 3(c) of the 1935 Securities Act (section 5C(1) of the 1957 act). The Court of Criminal Appeals held that since Atwood was not the bona fide owner of the leases which he attempted to sell, the transaction was not exempt under 3(c). A similar searching analysis of the ownership of certain oil and gas leases was made by the Supreme Court in *Mecom v. Hamblen*,<sup>13</sup> with the same result as that reached in the *Atwood* case.

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widow and her daughter. They alleged that the defendant defrauded the deceased husband-father by inducing him to sign a deed while drunk and that the defendant concealed the fact that he had a purchaser for the partnership property. Cf. *Flournoy v. Gallagher*, 189 S.W.2d 108 (Tex. Civ. App. 1945). The facts in the Winslow case are reminiscent of those in the case of *Ogier v. Pacific Oil & Gas Development Corp.*, 135 Cal. App. 2d 776, 228 P.2d 101 (1955), 5 Oil & Gas Rep. 11 (1956), where the plaintiff was an eighty-four year old semi-invalid single woman with failing eyesight. The court in that case negated the possibility that the plaintiff was in *pari delicto*. As Richard C. Maxwell observed in his note at 5 Oil & Gas Rep. 15: "Obviously a buyer who was a 'single woman, aged 84, partially blind' is not such a party as could be found 'in pari delicto.'"

<sup>11</sup> To the extent that intent, motive, system, or scheme is relevant to conviction, evidence of offenses against the Securities Act other than the one charged is admissible. See *People v. Dutton*, 51 Cal. App. 2d 866, 107 P.2d 937 (1940); *McCormick and Ray*, Texas Law of Evidence § 1521 (2d ed. 1956). *People v. Shalhoob*, 305 P.2d 264 (Cal. App. 1957), 7 Oil & Gas Rep. 3, presents a very interesting case in which evidence as to the sale of other interests was properly admitted as relevant on the issue of *joint* venture. See also *People v. Dickelman*, 304 Ill. App. 482, 26 N.E.2d 404 (1940).

<sup>12</sup> 135 Tex. Crim. 543, 121 S.W.2d 353 (1938).

<sup>13</sup> 155 Tex. 494, 289 S.W.2d 553 (1956).

Although this is the most fully explored of all of the exemptions to the act, there are still many unanswered questions concerning this particular requirement.<sup>14</sup>

b. *The Vendor May Not Be in the Business of Selling Securities.*—When is one in the securities business? Is the test whether or not it is a person's principal means of livelihood, or is it the frequency with which he consummates sales, or is there some other test? There have been several Texas cases<sup>15</sup> which held that the seller in each case was in the securities business but they do not clearly answer the questions posed above. It does appear from the cited cases that the selling of securities need not be the principal means of livelihood. The importance of this requirement in the 5C(1) exemption is to some degree eclipsed by the new requirement that the transaction be an "isolated" one.

c. *The Sale Must Be an "Isolated Transaction."*<sup>16</sup>—The requirements of *b*, *supra*, and *c* are to some degree co-extensive. Element *c* deals essentially with the relationship of individual sales to one another; that is, if the sale is "isolated" from other sales the exemption may be claimed; element *b* deals essentially with the relationship between the seller and securities dealings generally. The requirement that a sale be "isolated" is perhaps more stringent and demanding than the requirement that the seller not be in the securities business. For example, sales of three securities over a period of time would probably not place one in the securities business under an ordinary interpretation. However, three sales of fractional parts of a single royalty interest of a mineral landowner would raise a nice question as to whether the requirement that the transaction be isolated had been violated. As pointed out earlier,<sup>17</sup> the phrase "isolated transaction" is not new to the Texas cases dealing with securities law, although the value of the Supreme Court's interpretation of that expression in *Breeding v. Anderson*<sup>18</sup> is probably not substantial, since the Court was dealing with the exemption of brokers and dealers rather than land or securities owners.

d. *The Sale May Not Be for the Benefit of "Any Company or Corporation except the Individual Vendor (other than a usual com-*

<sup>14</sup> One such question is the following: If the agent is not registered as 5C(1) now requires, would this fact destroy the owner's exemption? It did not in the past but the statutory requirement of the agent's registration did not exist in the past. See note 9 *supra*.

<sup>15</sup> *Mecom v. Hamblen*, 155 Tex. 494, 289 S.W.2d 553 (1956); *Flournoy v. Gallagher*, 189 S.W.2d 108 (Tex. Civ. App. 1945); *Muse v. State*, 137 Tex. Crim. 622, 132 S.W.2d 596 (1939); *Atwood v. State*, 135 Tex. Crim. 543, 121 S.W.2d 353 (1938).

<sup>16</sup> This phrase is common to several state blue sky laws. It was recommended by Cox in 2 Tex. Rev. Civ. Stat. Ann. XXI, XXI. (1953) (Commentary).

<sup>17</sup> See note 7 *supra*.

<sup>18</sup> 152 Tex. 92, 254 S.W.2d 377 (1953).

*mission to said agent*).”—The statement that the sale may not be for the benefit of “any company or corporation except the vendor” implies that a corporate owner or an owner organized as a “company” may use the 5C(1) exemption. This means more than would appear at first since the act in section 4B defines “company” to include a host of other business forms, *viz.*, joint stock company, partnership, association, person, syndicate trust, company, or firm.

Since the 1955 revision, this section makes explicit the previously case-enunciated command that the agent for a vendor employing this exemption *must* be licensed and the mere fact that the vendor need not register his security does not free his agent from the registration requirement.<sup>19</sup> Since the 1955 revision, this section also *expressly* permits the securities owner to deal through agents.<sup>20</sup> Prior to 1955 this had been established by the cases only.<sup>21</sup>

## 2. *The Exemption of Sales to Dealers and Finance Institutions*

Section 5H of the act provides that

The sale to any bank, trust company, loan and brokerage corporation, building and loan association, insurance company, surety or guaranty company, savings institution or to any registered dealer, provided such dealer is actually engaged in buying and selling securities. . . .

is an exempt transaction. Thus by this section the sale to a limited group of purchasers is exempt. The reason behind this exemption is apparently twofold: first, purchasers such as dealers in securities, finance institutions, insurance companies and the like do not need the protection of the act since presumably they possess a degree of sophistication and information sufficient to protect themselves; and second, a registration requirement would unduly burden the free exchange of securities.

As is apparent, this exemption is of limited usefulness and the Texas cases fail to reveal even one attempt to employ it.<sup>22</sup>

One caveat should be inserted here, *viz.*, the mere fact that a transaction is exempted in section 5 does not mean that all further concern with the act is unnecessary. Any sale, even if exempt under section 5 or section 6, is still subject to the enforcement provisions of sections 29, 32, and 33. For example, though a sale is made directly to a licensed and active dealer in securities, if any fraudulent device or scheme is employed, the party employing

<sup>19</sup> See *Sibley v. Coffield*, 193 S.W.2d 239 (Tex. Civ. App. 1946) error ref. n.r.e.

<sup>20</sup> Tex. Rev. Civ. Stat. art. 579-3(c) (Supp. 1956).

<sup>21</sup> *Sibley v. Coffield*, supra note 19.

<sup>22</sup> This exemption was not changed by the 1955 or 1957 acts. Prior to the 1957 act this exemption was found in section 3(i) of the Securities Acts.

the scheme is subject to being enjoined under section 32 and the purchaser may rescind under section 33.

### 3. *Exemption Where Limited Number of Participants*

Section 51 of the act provides that

The sale by any corporation of its securities or by any unincorporated association or partnership of interests, where the total membership or stockholders will not thereafter exceed thirty-five (35), and where the sale is made without the use of advertisements or any form of public solicitation. . . .

is an exempt transaction. Section 51 as it presently stands is the result of a merger of 3(j) under former acts (which provided a limited membership exemption for domestic corporations) with 3(k) under former acts (which provided a limited membership exemption for partnerships and unincorporated business forms). Section 3(k) was applied in the case of *Winslow v. Boyd*<sup>23</sup> but the court did not discuss the exemption, merely concluding that it did apply. This exemption found in section 51 is composed of three elements.

a. *The Seller Must Be a Corporation, an Unincorporated Association, or a Partnership.*—The class of sellers who are exempt under this section is an unusually large one. The phrase “unincorporated association” encompasses a very large number of business organizations and possibly includes joint ventures and mining partnerships (two business forms favored by developers of oil and gas properties).

b. *The Membership of the Group Must Not Exceed Thirty-Five After the Sale.*—This is a relaxation of the requirements of sections 3(j) and (k) of the earlier acts, which respectively allowed twenty-five and ten participants.<sup>24</sup> An interesting and as yet unanswered question suggests itself. If the issuer sells to more than thirty-five purchasers, is the exemption inapplicable to all the transactions (presuming the exemption is otherwise satisfied) or only to the sales in excess of those to the first thirty-five purchasers? It is suggested that once the sale is made to a purchaser in compliance with the act the fact that subsequent sales do not comply is immaterial. In other words, the legality of sales where 51 is invoked must be tested as of the time of the sale in question, and subsequent changes in status of the issuer and other parties should not operate to alter the legality of an already consummated sale. A similar question is pre-

<sup>23</sup> 195 S.W.2d 384 (Tex. Civ. App. 1946).

<sup>24</sup> See *Smith v. Fishback*, 123 S.W.2d 771 (Tex. Civ. App. 1938) error ref., where the court held that the 3(j) exemption did not apply because the corporation had over twenty-five participants during its organizational stages.



sented when the number of members in an organization increases through inheritance or sale by a shareholder other than the "issuer."

c. *Advertisement or Public Solicitation Must Not Be Used.*—Although no Texas cases have been found outlining approved means of circulating information concerning a proposed enterprise, cases from other jurisdictions suggest that very little in the way of advertisement or public solicitation is required to overreach the limits of permissive conduct. The Michigan Supreme Court in the case of *People v. Montague*<sup>25</sup> determined that the word "advertising" ". . . as used in the act is certainly not limited to a notice or offer printed in a newspaper or periodical having general or local circulation . . ." and proceeded to hold mailed form letters such advertising as to negate the exemption in the Michigan act. The Michigan court refused to set out any general test which it would apply in the future, saying that, "in this field of law as in others, each situation must be determined by its own particular set of facts. . . ."<sup>26</sup>

Concerning public solicitation, the Oregon Supreme Court in the case of *State v. Simons*,<sup>27</sup> when defining "public offering" (a somewhat similar expression common to many state securities acts) said, "In our opinion, a public offering . . . does not require the extension of an invitation to the general public by means of a prospectus, advertisement, public invitation or house-to-house canvass"<sup>28</sup> and found a public offering under the facts in that case.

#### 4. *The Exemption of an Execution of an Unsolicited Order*

Section 5P of the act provides that

The execution by a dealer of an unsolicited order for the purchase of securities, where the initial offering of such securities has been completed and provided that the dealer acts solely as an agent for the purchaser, has no direct or indirect interest in the sale or distribution of the security ordered, and receives no commission, profit, or other compensation from any source other than the purchaser. . . .

is an exempt transaction.<sup>29</sup> The elements of the exemption are: (1) *the order* must be unsolicited; (2) *the dealer* presumably must be licensed (although the section does not specifically so direct and a contrary argument could be made), must act solely as the

<sup>25</sup> 280 Mich. 610, 274 N.W. 347, 351 (1937).

<sup>26</sup> 274 N.W. at 350.

<sup>27</sup> 193 Ore. 274, 238 P.2d 247 (1951).

<sup>28</sup> 238 P.2d at 251.

<sup>29</sup> The exemption of execution of unsolicited offers first made its appearance in section 5(s) of the 1955 revision of the Act. Tex. Rev. Civ. Stat. art. 579-3(s) (Supp. 1956).

agent for the purchaser, must receive no compensation other than from the purchaser, and must have no direct or indirect interest in the sale or distribution of the security ordered; and (3) *the security* must be one in which the initial offering is complete.

The elements of this exemption are detailed and specific, and as yet have been neither judicially applied nor interpreted.

#### IV. IMPLIED EXEMPTIONS TO THE ACT

The Texas courts have suggested by dicta, and even held, that certain extrastatutory exemptions are to be inferred when applying the act.

##### A. *The Joint Venture*<sup>30</sup>

The Supreme Court in the case of *Brown v. Cole* said through Justice Culver, who wrote for the majority:

It is well settled that the Act does not apply to a joint adventurer and to transactions between joint adventurers. Joint adventurers and partners are not to be denied the right to recover their interest merely because of a failure to comply with the Securities Act and we think it equally true that a dissatisfied joint adventurer may not recover from other joint adventurers merely because of the failure of the latter to comply with the Act.<sup>31</sup>

As the majority opinion developed, this was but dictum since the majority held that no joint adventure existed because joint control of the enterprise was lacking. However, Justice Smith in a dissenting opinion declared that transactions between joint adventurers are exempt from the act and further stated that "all the evidence shows a joint venture. . . ."<sup>32</sup> and on this basis found no violation of the act.

Commentators have reacted variously to the foregoing statements. One commentator has said:<sup>33</sup>

I do not want to leave the impression that I feel optimistic about the availability of [the joint venture exemption] . . . for extensive

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<sup>30</sup> Discussing the elements necessary for a joint venture in Texas, see *Brown v. Cole*, 155 Tex. 624, 291 S.W.2d 704 (1956); *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256 (1951); *Holcombe v. Lorino*, 124 Tex. 446, 79 S.W.2d 307 (1935). One very important question suggests itself here—are mining partnerships similarly exempt from the act? Mining partnerships are substantially like joint ventures in legal contemplation, the principal difference between the two being an absence of *delectus personae* in the mining partnership. No ground for a different treatment suggests itself because of the absence of *delectus personae*. On the elements of a mining partnership, see Grover, Co-ownership of Mining Properties and Mining Partnerships, Second Rocky Mt. Mineral L. Inst. 217 (1956). See also Sullivan, Handbook of Oil and Gas Law § 256 (1955).

<sup>31</sup> 155 Tex. 624, 631, 291 S.W.2d 704, 709 (1956).

<sup>32</sup> 155 Tex. at 635, 291 S.W.2d at 712.

<sup>33</sup> Meer, The Security Laws and Oil and Gas Financing, 20 Texas B.J. 211, 212 (1957).

oil and gas ventures which are sold to investors who are not otherwise in the oil business. I doubt that the Texas courts would go beyond those ventures which involve sophisticated investors adequately represented during the negotiations in which the terms of the deal are formulated, and believe that the various interest holders would have to have the right to designate the operator in accordance with the general form of operating agreement used among oil companies.

This appears to be a justifiably cautious acceptance of the exemption. Alfred Hill, in his article "Pitfalls in the Texas Securities Act," expresses a mixed reaction—favorable, yet with a suggested limitation:<sup>34</sup>

[T]he declared readiness of the Court to find an implied exemption for activity incidental to the organization of a joint adventure marks a step in the right direction. It must be remembered, however, that the theory of the joint adventure is useful only as a tool in determining whether there has been a sale of securities within the meaning of the Act. A promotion in which relatively small participations are sold to scattered investors with meager resources of investigation and financial comprehension may be a joint adventure for many purposes, but it is the very sort of thing the Blue Sky Law was designed to regulate. The need for such regulation, it may be added, is particularly strong in the highly speculative oil and gas business.

One unreservedly favorable reaction has been found:<sup>35</sup>

Since the objective of the Securities Act is to protect purchasers where protection is necessary and not to restrict sellers per se, the court seems correct in concluding . . . that a joint adventure is an implied exemption from the act's coverage. . . .

The joint venture exemption is not so "well-established" as the Supreme Court seems to suggest in *Brown v. Cole*. The exemption has been recognized in the courts of a limited number of states, but it is far from having wide acceptance. The courts in Michigan,<sup>36</sup> Minnesota,<sup>37</sup> and California<sup>38</sup> have apparently held this exemption is implied in their acts. Subsequently, in Michigan<sup>39</sup> and California,<sup>40</sup> the legislatures adopted the case-created exemption and made joint ventures statutorily exempt to varying degrees. The Attorney General of Louisiana has also expressed his view that joint ventures are exempt from the Louisiana Blue Sky Law.<sup>41</sup>

<sup>34</sup> 10 Sw. L.J. 265, 279 (1956).

<sup>35</sup> 35 Texas L. Rev. 129 (1956).

<sup>36</sup> *Lindemulder v. Shoup*, 258 Mich. 679, 242 N.W. 807 (1932).

<sup>37</sup> *Hanneman v. Gratz*, 170 Minn. 38, 211 N.W. 961 (1927).

<sup>38</sup> *Oakley v. Rosen*, 76 Cal. App. 2d 310, 173 P.2d 55 (1946).

<sup>39</sup> See Mich. Comp. Laws § 451.103(j) (1946).

<sup>40</sup> Cal. Corp. Code Ann. § 25100(m) (Supp. 1955).

<sup>41</sup> La. Ops. Att'y Gen. (Jan. 7, 1947).

The courts which have established this joint venture exemption rarely explain the reasons behind it. Two principal arguments in favor of the exemption are that the joint venturer already has much of the protection which the securities acts seek to provide since the law imposes fiduciary burdens of good faith and full disclosure on his co-venturer, and that to bind the joint venturer to a religious observance of the detailed and stringent regulations of the act would render that business form unwieldy and inflexible and unnecessarily deprive him of his legitimate advantages. It is difficult to determine what considerations prompted the Texas Supreme Court to enunciate the exemption of joint ventures as it did in the *Brown* case.

Since the *Brown* case was decided before the passage of the 1957 act, and in fact applied the act as it existed before the 1955 act, the question arises as to how subsequent legislation has affected that decision. It should be pointed out that the section 51 statutory exemption to the 1957 act offers far greater certainty than does the implied exemption we are now considering and would appear to be available under much the same circumstances. Unless section 51 can be said to include joint ventures by its use of the phrase "any unincorporated association," then no other portion of the act appears to be inconsistent with the exemption of joint ventures. Therefore, it probably cannot be said that the 1957 act affirmatively or impliedly denies the exemption.

Numerous unanswered questions can be posed concerning this exemption: (1) Does the exemption apply only to organizational transactions between venturers or also to subsequent transactions between such venturers? Or perhaps only to sales to the public of interests in the venture? The Court offers little by way of a guide when it says that ". . . [T]he Act does not apply to a joint adventurer and to transactions between joint adventurers."<sup>42</sup> (2) Is this exemption to the act of the same nature as other exemptions under section 5? Justice Smith said that, "One reason [the transaction] . . . comes under section 3 [now section 5] is the fact that all the evidence shows a joint venture . . . ." <sup>43</sup> This suggests that Justice Smith somehow regards the implied joint venture exemption as having the same character as the transactions expressly exempted under section 5. (3) Fraud in dealing with *any* security is subject to the penal provisions of section 29, and is likewise subject to injunction under section 32 and rescission

<sup>42</sup> 155 Tex. 624, 631, 291 S.W.2d 704, 709 (1956).

<sup>43</sup> 155 Tex. at 635, 291 S.W.2d at 712.

under section 33 for proper cause. Does this apply to a judicially exempt transaction just as it does to one which is statutorily exempt under section 5? The unequivocal language of the above sections seems to compel an affirmative answer.

Perhaps the best available advice concerning this exemption is that offered by Sterling in his article entitled "Impact of State and Federal Securities Acts on Everyday Oil and Gas Transactions," where he says:<sup>44</sup>

In brief, it is my opinion that the use of the joint venture as a means of financing oil and gas development may well prove to be a booby trap rather than the panacea for avoidance of troublesome securities laws *unless it is used with great care and circumspection*—and by that I mean that not only should the joint venture have the essential elements of such an arrangement . . . but there should be some pre-existing relationship between the parties that would make it natural for them to associate themselves in the venture in order to avoid the risk of it being deemed a public offering of an investment or speculation. (Emphasis added.)

### B. Purchasers

The Texas courts have repeatedly stated that the act does not undertake to regulate purchasers or to protect sellers against purchasers; only sellers and sales are regulated.<sup>45</sup> Pursuant to this proposition the Texas courts have allowed a partner to maintain an action to establish his interest in partnership property acquired by purchase without registration under the act,<sup>46</sup> and have allowed recovery of a commission by an unlicensed dealer for acquiring a security for a purchaser.<sup>47</sup>

The exact limits of a purchaser's exemption have not been established.<sup>48</sup> The first indication of legislative intention to regulate purchases under the acts was the passage of section 33(b)<sup>49</sup> in 1941. This section provided essentially that no person should bring an action for compensation for services rendered in the sale or *purchase* of any securities without alleging that he was duly licensed. The Supreme Court attempted to explain away this unequivocal language in the case of *Lewis v. Davis*.<sup>50</sup> In the Court's view,

<sup>44</sup> Eighth Annual Institute on Oil and Gas Law and Taxation 33, 65 (1957).

<sup>45</sup> *Herren v. Hollingsworth*, 140 Tex. 263, 167 S.W.2d 735 (1943); *Fowler v. Hults*, 138 Tex. 636, 161 S.W.2d 478 (1942).

<sup>46</sup> *Winslow v. Boyd*, 195 S.W.2d 384 (Tex. Civ. App. 1946).

<sup>47</sup> *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947).

<sup>48</sup> For a thorough discussion of this exemption, see Cox, *The Securities Act*, 2 Tex. Rev. Civ. Stat. Ann XII at XIV (1953) (Commentary).

<sup>49</sup> Tex. Rev. Civ. Stat. art. 600a (1948).

<sup>50</sup> 145 Tex. 468, 199 S.W.2d 146 (1947).

The reasonable construction to be placed on Section 33b is that it means that a person, *who is required by the terms of the Act to register as a dealer*, salesman or agent or obtain a permit, may not bring or maintain an action for commission or compensation for his services . . . without alleging and proving that he was duly licensed and the securities duly registered under the Act. (Emphasis added.)<sup>51</sup>

This explanation is not altogether satisfactory in view of the fact that there was no apparent ambiguity in the terms of the statute needing construction or interpretation. The Supreme Court paid lip-service to this exemption in *Brown v. Cole*.<sup>52</sup>

It is suggested that this exemption is one of diminishing value and importance. In 1955 the Legislature significantly altered the penal and injunctive sections of the act, and these changes were carried over into the 1957 act. These sections regulate purchases to a limited degree.<sup>53</sup> Certainly these new provisions cannot be explained away as was section 33(b) of the 1941 amendment. This is not to say that purchasers of securities are subject to broad regulation under the act today, but that they are merely regulated as specifically provided for in the enumerated sections. It is probably correct to say that purchases are otherwise unregulated by the Texas Securities Act.

The question of whether an agent for the purchaser need be licensed is still unanswered by statute in spite of the fact that section 5P expressly permits dealer representation of the purchaser, since this section does not specifically dictate that the "dealer executing an unsolicited order for the purchase of securities" be licensed. Perhaps this can be taken as an indication that the Legislature acquiesces in the Supreme Court's construction of section 33(b).

## V. CONCLUSION

As Meer observes in his article, "The Security Laws and Oil and Gas Financing,"<sup>54</sup> "[A]s a practical matter the security laws, particularly the Texas Securities Act, are being violated every day in the week by ordinary oil and gas transactions carried out in blissful ignorance . . ." It is only by an awareness and understand-

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<sup>51</sup> 145 Tex. at 474, 199 S.W.2d at 150.

<sup>52</sup> See Note 4 supra.

<sup>53</sup> Section 32, in defining fraudulent practices enjoinable under the act, includes engaging in a course of business in the *purchase* or sale of securities which is in violation of law. Section 29, in delimiting felonious conduct punishable by penitentiary terms, states that knowingly making any false statement of fact concerning securities "with intent to aid in the disposal or *purchase* of the same" is a felony. (Emphasis added.)

<sup>54</sup> Meer, *The Security Law and Oil and Gas Financing*, 20 Texas B.J. 211, 212 (1957).

ing of the Texas Securities Act that the attorney is enabled properly to represent his client in transferring many oil and gas properties.

Although a great body of oil and gas transactions come within some exemption to the Texas act, particularly those treated on the foregoing pages, there is much which is not discussed in this paper with which the attorney can profitably acquaint himself, *e.g.*, defenses to a civil action for rescission under the act, the Texas Real Estate Dealers Act contained in article 6573a, and the question of when registration is required under the federal securities laws.

Although every man is presumed to know the law, he is an unhappy man who must demonstrate the falsity of that presumption as did Brown in *Brown v. Cole*.

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