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1. GAS AND OIL LEASES — INCLUDED WITHIN MEANING OF “REAL ESTATE” — SECTION 6373-25 G.C.
2. ANY PERSON, PARTNERSHIP, ASSOCIATION OR CORPORATION WHO SELLS, EXCHANGES OR PURCHASES GAS AND OIL LEASES FOR ANOTHER FOR A FEE, COMMISSION, ETC. IS A REAL ESTATE BROKER, UNLESS SUBJECT TO EXCEPTIONS, SECTION 6373-25 G.C.

SYLLABUS:

1. Gas and oil leases are included within the meaning of “real estate” as defined by Section 6373-25, General Code.
2. Any person, partnership, association or corporation who sells, exchanges or purchases gas and oil leases for another for a fee, commission or other valuable consideration, unless falling within the exceptions contained in Section 6373-25 of the General Code, is a real estate broker within the meaning of said section.

Columbus, Ohio, July 25, 1942.

State Board of Real Estate Examiners,  
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your letter wherein you inquire whether or not in my opinion the term "real estate," as defined in Section 6373-25, General Code, includes gas and oil leases. You also inquire as to whether or not the definition of "real estate broker," as used in said section, includes persons trafficking in gas and oil leases.

In 19 O. Jur., at page 954, it is stated:

"Petroleum *and gas*, so long as they remain in the ground, are a part of the realty." (Emphasis mine.)

In *Kelley v. The Ohio Oil Company*, 57 O. S. 317, the first branch of the syllabus holds:

"Petroleum oil is a mineral, and while it is in the earth, it forms a part of the realty; and when it reaches a well and is produced at the surface, it becomes personal property, and belongs to the owner of the well."

Subsequent decisions of that court involving oil and gas leases clearly indicate gas likewise forms a part of the realty while it is in the earth.

In this connection, however, I feel it should be pointed out that there is a recognized distinction between so-called "oil and gas leases" and the term "lease" as ordinarily understood. In 40 C.J., at page 1047, it is stated:

"A lease to mine oil or gas is a mere incorporeal right to be exercised in the land of another; a profit a prendre, which may be held separate and apart from the land itself; and ordinarily it is a mere option or right to drill and extricate oil or gas if found.

Strictly speaking an ordinary oil and gas lease is not a lease at all, but is merely a license to explore for oil or gas. It partakes of the nature of both a sale and a lease, and has features not applicable to either. And since the work which is to be done is ordinarily experimental and speculative, such a lease is apart by itself, and while it slightly resembles a coal

or solid mineral lease, there is scarcely any comparison between it and an ordinary farm or house lease. A grant of the exclusive right and privilege of digging and boring for oil and other minerals for a designated period is a lease for the production of oil, and not a sale of the oil or of an interest in the land."

In 19 O. Jur., at page 962, the following is found:

"What is generally denominated an oil and gas lease is one of the most common contracts for the development of lands for the production of these minerals by one other than the owner of the fee. While it is ordinarily denominated a 'lease,' subsequent discussion shows that it has many incidents that are not common to leases generally; in fact, oil and gas leases are in a class by themselves and must be so treated. The name that is given to the instrument, however, is unimportant; the important fact is how the rights of the parties have been affected thereby."

As further evidencing this distinction in Ohio, special provision is made by statute for the recording of leases relating to the operating, sinking or drilling of wells for natural gas and petroleum. Section 8518, General Code, provides:

"All leases and licenses and assignments thereof, or of any interest therein, given or made, for, upon, or concerning lands or tenements in this state, whereby any right is given or granted to operate, or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record, forthwith, and recorded in such lease record, without delay, and not be removed until recorded."

The term "real estate" within the meaning of the real estate brokers' licensing law is defined in Section 6373-25 of the General Code as follows:

"As used in this act: \* \* \*

The term 'real estate' shall include leaseholds as well as any and every interest or estate in land, whether corporeal or incorporeal, whether freehold of non-freehold, and whether said land is situated in this state or elsewhere."

In *Ohio Oil Company v. Toledo, Findlay & Springfield Railroad Company, et al.*, 2 O.C.D. 505, the first branch of the syllabus holds:

"An oil license is not a lease, but a right in the nature of an

incorporeal hereditament or contract, with a license to enter.”

In 32 O. Jur., at page 622, it is stated:

“The term ‘hereditaments’ has been declared in some cases to be almost as comprehensive as the word ‘property.’ It was stated by Marshall, Ch.J., that ‘hereditaments’ comprehends anything which may be inherited, whether *corporeal or incorporeal*, including both lands and tenements.”

(Emphasis mine.)

It should be manifest from the foregoing that the term “real estate,” as above defined, is sufficiently comprehensive to include oil and gas leases.

The term “real estate broker” is also defined by said Section 6373-25, General Code, to-wit:

“As used in this act:

The term ‘real estate broker’ shall include any person, partnership, association, or corporation, foreign or domestic, *who for another and for a fee, commission, or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration*, sells, exchanges, purchases, rents or leases, or negotiates the sale, exchange, purchase, rental or leasing of, or offers, or attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of, or lists or offers or attempts or agrees to list, or auction, or offers or attempts or agrees to auction, any real estate, or the improvements thereon; or who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon; or who operates, manages, or rents, or offers or attempts to operate, manage, or rent, other than as custodian, caretaker or janitor, any portion or portions of office or loft buildings to the public as tenants; or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or closing of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term ‘real estate broker’ shall also include any person, partnership, association, or corporation employed by, or on behalf of the owner or owners of lots, or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission basis or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate. \* \* \*

Neither of the terms 'real estate broker' or 'real estate salesman' hereinbefore defined includes a person, firm or corporation, or the regular salaried employees thereof, who performs any of the aforesaid acts:

(a) With reference to real estate or any interest therein owned by such person, firm or corporation, or acquired on his or its own account in the regular course of, or as an incident to the management of such property and the investment therein;

(b) In pursuance of a duly executed power of attorney from the owner of the real estate or any interest therein;

(c) As receiver or trustee in bankruptcy, as guardian, executor, administrator, trustee, assignee, commissioner, or any person doing the things hereinbefore mentioned, under and by virtue of authority or appointment of, or incident to a proceeding in, any court or courts or public officer, or as executor or trustee under any trust agreement, deed of trust or will;

(d) Nor shall this act apply to public officers while performing their official duties;

(e) Nor shall this act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law." (Emphasis mine.)

From the above section it will be noted that in order to fall within the definition of a real estate broker as contained therein, a person, partnership, association or corporation engaged in the sale, exchange, purchase, renting or leasing of real estate must be so engaged for another and for a valuable consideration.

It will likewise be noted that said section includes certain exceptions set out therein as paragraphs (a) to (e), inclusive.

In answer to your letter it is therefore my opinion that:

1. Gas and oil leases are included within the meaning of "real estate" as defined by Section 6373-25, General Code.

2. Any person, partnership, association or corporation who sells, exchanges or purchases gas and oil leases for another for a fee, commission or other valuable consideration, unless falling within the exceptions contained in Section 6373-25 of the General Code, is a real estate broker within the meaning of said section.

Respectfully,

THOMAS J. HERBERT  
Attorney General.