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SECURITY—WHERE CORPORATION PLACES ITS OWN VALUATION ON ITS INTEREST IN REAL ESTATE, SUBJECT TO FIRST MORTGAGE, THEN DEEDS REAL ESTATE TO TRUSTEE—REAL ESTATE LEASED FROM TRUSTEE AT YEARLY RENTAL AND THEN OFFERED FOR SALE TO PUBLIC—UNDIVIDED FRACTIONAL INTERESTS, SUBJECT TO MORTGAGE AND TO LEASE—INVESTMENT OPPORTUNITY LEASED TO PAY 6% NET—AGREEMENT EXECUTED AND WARRANTY DEED DELIVERED FOR UNDIVIDED FRACTIONAL INTEREST—SUCH CONTRACT OF PURCHASE AND DEED CONSTITUTE A "SECURITY"—EITHER A CERTIFICATE OR INSTRUMENT WHICH REPRESENTS TITLE TO OR INTEREST IN PROPERTY, OR LEASEHOLD CERTIFICATE OR WRITTEN INSTRUMENT IN OR UNDER PROFIT SHARING AGREEMENT, OR AN INVESTMENT CONTRACT—SECTION 8624-2, PART 2, G. C.

SYLLABUS:

Where a corporation places its own valuation on its interest in real estate subject to a first mortgage, then deeds said real estate to a trustee, and thereupon leases the same real estate from its trustee at a yearly rental to yield a certain per cent based upon its valuation, and then offers for sale to the public undivided fractional interests therein, subject to the mortgage and to the lease, as an investment opportunity leased to pay 6% net and upon sale takes from said purchaser an agreement as fully set forth in the opinion here and thereupon gives a warranty deed for said undivided fractional interest containing the clauses as set out in the opinion herein, the contract of purchase and the deed constitute a "security" within the provisions of Section 8624-2, Part 2, General Code, as being either a certificate or instrument which represents title to or interest in property, or leasehold certificate, or written instrument in or under profit sharing agreement, or an investment contract.

Columbus, Ohio, July 6, 1945

Hon. James W. Huffman, Director, Department of Commerce
Columbus, Ohio

Dear Sir:

I am in receipt of your recent letter requesting my opinion as follows:

"We have received numerous complaints concerning the sale by the A Realty Company and the B Investment Company, ———— Street, Columbus, Ohio, of undivided fractional interests in real estate and/or apartment buildings. The companies in question own the fee title to said real estate, which is conveyed to the T Trust Company, as Trustee, for the purchasers of said undivided fractional interests. In connection therewith, there is an option to be exercised by the realty company to repurchase said fee property for a stipulated sum. Said fee property is subject to a real estate mortgage and to a lease from the T Trust Company, Trustee, to the said real estate companies.

The purchasers are induced to purchase said undivided fractional interests by the selling corporations which represent that they are offering an investment opportunity which will pay purchasers of said fractional interests in real estate 6% net, payable monthly. (See Exhibit 'A' attached hereto.)

The purchasers of said undivided fractional interests are further induced to sign a contract of purchase, a specimen of which is attached hereto and marked Exhibit 'B'. Said purchasers also receive deeds for said undivided fractional interests in said real estate, a copy of said deed being attached hereto and marked Exhibit 'C'.

We desire to learn whether or not this plan of business—the selling of undivided fractional interests in real estate as an investment, is a security as that term is defined in the Ohio Securities Act.

It is the unequivocal opinion of the Division of Securities that said plan of business and/or transactions fall within the purview of the Ohio Securities Act, embraced in Sections 8624-1 to 8624-49, inclusive, General Code of Ohio.

There is also attached hereto a brief prepared by Mr. Ernest Cornell, Chief of the Division of Securities, giving further details concerning said transactions, and containing a statement of the facts and the law and legal citations bearing upon the subject."

I am also in receipt of the following exhibits: "Exhibit A," newspaper advertisement offering the investment; "Exhibit B," purchase contract; "Exhibit C," deed to trustee; "Exhibit D," lease form, and also brief prepared by Mr. Cornell.

From the information furnished by you, I have gathered the following set of facts: A. Realty Company owns a fee to certain real estate subject to a first mortgage; pursuant to a trust agreement (which is not furnished) the real estate is conveyed to T. Trust Company, Trustee, in fee, subject to the first mortgage, the terms of the trust not appearing in the deed of trust, the trustee then leases back the property to A. Realty Company on a yearly rental basis, which lease provides, among other things, for renewals thereof, option to purchase, payment by the lessee of the rent, taxes, mortgage payments, etc., the result being that if the lessee performs his agreement the amount paid to the trustee-lessor as rent would be distributable to the owners of the fee. The value of the realty subject to the mortgage is fixed by the A. Realty Company. For example, should this value be fixed at $200,000, the yearly rental would then be fixed at $12,000 and the investment interest at 6%. Investments are solicited from the public on the following terms and through the A. Realty Company:

"6% NET
PAYABLE
MONTHLY

INVESTMENT OPPORTUNITY
THROUGH EXCHANGE

You can exchange your property at Today's Market, for a like interest in New, Close-in, Productive Real Estate, leased to pay you 6% net, payable monthly, trouble free. Escape all management problems, better insure a fixed monthly return.

THE SMART WAY TO OWN AND
OPERATE GOOD INCOME PROPERTY."

The purchaser enters into a purchase contract for an undivided fractional interest with the trustee as follows, (the trustee acting as the agent of the A. Realty Company, who is the seller):

"AGREEMENT

The undersigned hereby offers to purchase from The T. Trust Company, Trustee, for the sum of $..... an undivided interest in the real estate known as '..... Apartments' located at the southeast corner of..... Avenue and ..... Street,....., Ohio, subject to the balance due on a real estate mortgage to Metropolitan Life Insurance Company on said premises and subject to a lease from The T. Trust Company, Trustee, to The .....Investment Company, it being understood and agreed that the said real estate shall be sold for a total sum of $200,000.00 subject to the mortgage and lease aforesaid and that the undersigned will receive a deed from The T. Trust Company, Trustee, for an interest in said real estate proportionate with the amount paid by the undersigned by virtue of this agreement as compared with the total price of $200,000.00.

The undersigned further proposes and agrees and by these presents does appoint said The T. Trust Company, Trustee, to represent the Undersigned as Agent in collecting the rents under the lease above described and enforcing the other provisions of said lease on behalf of the undersigned, it being understood and agreed that the rents shall be collected and the proportionate share of the undersigned shall be distributed monthly to him and that no fee, commission or other charge shall be due The T. Trust Company, Trustee, from the undersigned for its services in accepting rental payments under the lease and making distribution to the undersigned of his proportionate share.

In Witness Whereof the undersigned has hereunto set his hand this.....day of....., 194....

.....

.....

The above offer is hereby accepted in accordance with the terms and conditions thereof this.....day of....., 194....

The T. Trust Company

By .....

Its"

Whereupon the trustee gives the purchaser a warranty deed for the undivided fractional interest, subject to the lease and subject to the mortgage and containing, among other clauses, the following clause:

"As a part of the consideration for this conveyance and for the benefit of the grantor and the other owners of the premises, an undivided interest in which is hereby conveyed, the grantee,

> for self and heirs, successors, executors, administrators and assigns, covenants and agrees that no action shall be instituted by said grantee heirs, successors, executors, administrators or assigns, the object or purpose of which shall be to partition the premises, an undivided interest in which is hereby conveyed, at any time during the term of the lease to..... ..... or any renewal thereof."

Analyzing the transaction, you have a situation where the seller, seeking capital, places his own valuation on his interest in the real estate, capitalizes on that basis, takes a lease from his own trustee at rent based on his own capitalization to yield a certain rental; undivided fractional interests are then offered to yield a certain percent as indicated by the capital and the total income (the lease rental). The purchaser and the trustee sign the purchase contract above referred to and thereafter a warranty deed is given. In the event the general income of the property remains the same or increases in amount, it is to the advantage of the A. Realty Company then to exercise its option to purchase provided for in the lease.

Your question is: "Is the undivided fractional interest in real estate, as evidenced by the above transaction, a 'security' as that term is defined in the Ohio Securities Act?"

The claim is made that the above transaction is not a sale of a security but a sale of real estate. Section 8624-2, sub-section 2, General Code, provides in part as follows:

> "The term 'security' shall mean any certificate or instrument which represents title to or interest in or is secured by any lien or charge upon, the capital, assets, profits, property or credit of any person * * * and shall include * * * land trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit sharing or participation agreements, * * * certificates evidencing an interest in any trust or pretended trust, any investment contract, * * * but the provisions of this act shall not apply to bond investment companies or to the sale of real estate.
>
> The term 'security' shall, for the purposes of this act, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state."

The bona fide sale of real estate located in Ohio never has been included in the definition of the term "security." Section 8624-2, sub-section

2, General Code of Ohio, as enacted in 1929 (113 O. L. 16), did not specifically exempt the sale of real estate in Ohio from the provisions of the Security Act but certainly such a sale did not come under any definition of a "security" as defined in that act at that time. Said section, however, did contain the following paragraph which has been retained from 1929 up to the present time:

> "The term 'security' shall, for the purposes of this act, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state."

The above section and sub-section was amended in 1935 as to the first paragraph thereof and the following was added (see 116 O. L. 261):

> "* * * but the provisions of this act shall not apply to bond investment companies or to the sale of real estate or any interest in real estate intended for burial purposes."

Thereafter, a sale of real estate for burial purposes or a sale of an interest in real estate for burial purposes was excluded. This amendment had the effect of permitting the sale of burial lots or interest therein without complying with the requirements of the Securities Act. This same paragraph of Section 8624-2, sub-section 2, was again amended in 1941 (119 O. L. 645) to read as follows:

> "* * * but the provisions of this act shall not apply to bond investment companies or to the sale of real estate."

which provision remains in the statute at this time. This last amendment occurred after public concern over the sale of burial lots for speculation. While the term "sale of real estate" was retained, this did not change the law for, as previously pointed out, the sale of real estate located in Ohio never was considered a "security." It is interesting to note that a sale of real estate situated outside of Ohio or *an interest therein was defined* as a security, while the statute has not excluded the sale *of an interest in real* estate situated in Ohio from being a security. In the one paragraph the term is the "sale of real estate" in Ohio, while in the other, "real estate not situated in this state and any interest in real estate not situated in this state."

In the facts before us, "Exhibit B," the purchase contract, provides for the purchase of "an undivided interest in the real estate." It could

well be claimed that the Legislature intended that a sale of real estate located in Ohio was not a security, while a sale of an interest therein, whether an equitable or a legal interest, could be considered as a sale of security. However, assuming that the "sale of real estate" in Ohio includes the sale of an interest therein, in determining whether this transaction is a bona fide sale of real estate only or whether it is a sale of a security with one part of the transaction evidenced by a warranty deed, we must look through the entire transaction and not merely to the giving of the deed to an undivided fractional interest.

And in this connection I wish to quote from 47 Am. Jur. 575, Section 16, "SECURITIES," as follows:

> "As to the scope and application of so-called 'blue sky laws' with respect to instruments not covered by express statutory definition, it has been said that to lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without registration or official sanction would be to aid the unscrupulous in circumventing the law, and that it is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the scope of the statute. * * * There is likewise no hard and fast rule as to what constitutes a 'security' within the meaning of that term as used in the federal securities act of 1933. It has been said that the statute is to be construed broadly, in this respect, in view of its remedial purpose. The substance of the transaction and of the relationship between the alleged issuer and the alleged security holder will control as against the form of the instrument."

In an interesting note found in 28 California Law Review, page 410, on the question of the definition of the term "SECURITY," we wish to quote at page 411, as follows:

> "The problem has often arisen in the interpretation of various blue-sky laws as to whether instruments in form of contracts of sale of commodities, or oil leases, or deeds of land are 'securities.' The general term 'security' is defined by enumeration in both the Federal Securities Act, and the California Corporate Securities Act. The suggestion is approved in the opinion of the principal case that a 'security' is: 'the investment of money with the expectation of profit through the efforts of other persons.'
>
> This formula, which is also suggested in a leading California case, contains two elements: (1) an investment with the right to participate in the income, profits, or assets of a business project

> or venture; (2) the conduct of the business project or venture by the issuer with 'other people's money.' Thus, any investment arrangement for sharing in the profits of an enterprise or venture in which the investor has no direct control over direction, management, or operation is a 'security.' "

And in an article found in 10 Southern California Law Review, beginning at page 483, the writer, in determining what constitutes a security in rationalizing the cases, lays down the following test as found on page 486 of that Review:

> "The test appears to be what control does the investor have over the property or business venture in which he has acquired an interest. If the investor is to share in the gross proceeds or net profits of operations managed by the one who is disposing of the interest, the instrument evidencing the interest transferred is an investor's contract. Contrarywise, if he himself has to conduct the enterprise the instrument evidencing his interest is not an investor's contract nor a security of any sort. Since a, b and c, in the instant case acquired no right to go on the land for drilling purposes or to participate in the operations thereon, the instrument should be classified as an investor's contract."

The case of People v. McCalla (1923) reported in 63 California Appeals 783, 220 Pac. 436, appears to be squarely in point. The facts were as follows:

The company had executed to the purchaser of the instrument, a deed for a small parcel of land,—1/4000 part of a large tract,—the grant being subject to an oil lease and two other agreements. At the same time the grantee received a certificate from the company and the defendant, its president, containing a declaration and acceptance of trust, and providing for the renting of the large tarct of land by the company and the collection and disbursement of the income therefrom. The court said:

> "In construing this certificate the trial court held, as a matter of law, that the instrument is a 'security,' within the meaning of the act, and, so holding, instructed the jury that it is a 'security,' refusing to allow the defendant E. E. McCalla, to show that he had been advised by reputable counsel that it was not a 'security' within the definition of the act.
>
> In making these rulings the court committed no error. Section 6 of the act, reads in part, as follows: 'The word "security" includes: * * * (c) Any instrument issued or offered to the

> public by any company, evidencing or representing any right to participate or share in the profits or earnings or the distribution of assets of any business carried on for profit.' The certificate issued to Mrs. Lake falls within this definition of a 'security.' The certificate, so called, is an instrument in writing. It is an instrument which was issued or offered to the public. The evidence fully justifies the inference that it was one of a series of similar certificates every one of which was offered to the public. It was issued by the 'company' through its president, the appellant E. E. McCalla. It evidences the right of its holder, Mrs. Lake, to participate and share in the profits or earnings of a business carried on for profit by the E. E. McCalla Company. The document, therefore, and the act of issuing it, contain all the essential elements of a 'security,' as that word is defined in subdivision c of Section 6 of the Act."

The cases on this question are collected in a note found in 87 A. L. R., beginning at page 42.

In the case of People v. Blankenship, 305 Mich. 81, defendant appealed from his conviction for selling certain mineral deeds, held to be "securities" in violation of the so-called blue sky laws, the defense there being made that the transaction was a sale of real estate and not securities. In upholding the conviction the court says on page 85:

> "To determine whether or not the mineral deeds in question were securities, we must look through such rather ingenious device of conveyance and, in the light of the circumstances surrounding their execution and sale, ascertain the substance of the transaction and the real intent and purpose of the parties. The legal appearance and technical phraseology of the mineral deeds should not be permitted to obscure their intended purpose."

And continuing on page 88, the court says:

> "Examination of the mineral deeds in question and the circumstances surrounding their execution and sale indicates that they are designed for investment purposes and not merely for the purpose of conveying an interest in land. These mineral deeds evidenced a purely speculative investment against which the blue sky law was intended to protect."

And the court, in the course of its opinion, on page 87, quotes with approval from the case of State v. Pullen, 58 R. I. 294 (192 Atl. 473), as follows:

"In *State* v. *Pullen, supra,* the court considered the mineral deed granting a fractional part of the royalty interest reserved by a lessor. In construing a statute substantially similar to the above-quoted provisions of our blue sky law the court said, page 303:

'It is difficult to read these documents and not come to the conclusion that, notwithstanding the legal verbiage in which the transaction is clothed by such documents, they are, nevertheless, securities evidencing an investment by the purchaser in a share of oil produced and brought to the surface by the lessee of the land described therein. * * * Really and actually behind the form of a conveyance of an interest in land set out in these documents is an investment contract, and it is peculiarly the kind of investment contract which lends itself readily to the perpetuation of the evil which the securities act is designed to eradicate.' "

In the case of Securities & Exchange Commission v. Bailey, 41 Fed. Supp. 647, the facts were as follows: Promoters of the tung oil business conceived the plan of selling small tracts of their land said to be especially suitable for growing tung trees to the public. The sale included an agreement on the part of an affiliated company to cultivate the tung trees on the tung oil land. These development contracts usually ran for a period of four years, with an option of the purchaser to renew the same, with added provisions for marketing and harvesting the tung nuts. The District Court said, beginning at page 650:

"Solution of the question depends upon the perspective in which defendants' activities are viewed. In their formalistic or purely 'bare bones' aspect, these contracts might be regarded, as defendants contend, as merely contracts for the sale and development of lands. If that were all, and the transactions involved only the sale or development of land, as such, these contracts probably would not be regarded as 'investment contracts' within the meaning of the Securities Act, for contracts for the sale and purchase of a tangible and identifiable commodity, title to and possession of which passes to the purchaser, are not ordinarily regarded as 'investment contracts.'

But such a view does not adequately portray the true situation here presented. It exalts form over substance. To consider only the formalistic aspect of these contracts is to lose sight of the background and underlying spirit of these transactions, thus seeing only the skeleton while disregarding the flesh surrounding it.

The Securities Act is remedial in nature, to be liberally construed. It affects, not ordinary land sale contracts, but 'investment contracts' which evidence primarily a right to participate in the proceeds of an income-producing venture, membership in which is secured through entrusting an investor's capital to the management of others. In appraising contracts for the purpose of determining the applicability of the statute, courts readily look through the form to discover the real nature of the transaction. Labels affixed by the parties are of little moment. Securities and Exchange Comm. v. Universal Service Ass'n., 7 Cir., 106 F 2d 232; Securities and Exchange Comm. v. Crude Oil Co., 7 Cir., 93 F. 2d 844; Securities and Exchange Comm. v. Wickham, D. C., 12 F Supp. 245.

As contemplated by the Securities Act, 'securities' are evidence of obligations to pay money, or of a right to participate in the earnings or distribution of property. Oklahoma-Texas Trust v. Securities and Exchange Comm., 10 Cir., 100 F 2d 888.

An 'investment contract', as contemplated by the Act, is one which contemplates the entrusting of money or other capital to another, with the expectation of deriving a profit or income therefrom, to be created through the efforts of other persons. Otherwise stated, it is a contract providing for the investment or laying out of capital in a way intended to secure income or profit from its employment, which will arise through the activities and management of others than the owner. Securities and Exchange Comm. v. Universal Service Ass'n., 7 Cir., 106 F 2d 232, 237; State of Minnesota v. Evans, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165.

It is significant that these small tracts are rarely purchased by farmers who wish to cultivate them as an individual farming enterprise. The overwhelming percentage of purchasers are persons wholly inexperienced in tung tree cultivation, who live at a great distance from these lands, and who have no intention of occupying the same or cultivating them by their own efforts, but who are attracted thereto solely by the income to be derived through cultivation of the lands by the defendants.

In essence, what the defendants are really offering, and certainly what the average purchaser is really buying is, not land for its intrinsic value, but a producing tung grove as a source of income, without which he would not be interested in purchasing the land. Purchase of the land is merely the conduit by which the investment is accomplished. Instead of a stock certificate evidencing a share in a common ownership of capital assets, these purchasers receive a deed evidencing an ownership in severalty. But the paramount emphasis is always upon the income to accrue, which is the chief, if not the sole, attraction to the purchaser

Separability of ownership does not deprive the transaction of its character as an investment contract. In its ultimate analysis, the formal purchase is a profit-making venture with others, in which there is a complete separation of ownership and management, and in which the owner takes no part, other than investing in the land. Based upon the defendants' representations, the purchaser's expectation is that for a sum of money invested in a small tract of land which the purchaser places in the hands of the defendants for cultivation, along with many similar and contiguous tracts owned by others he will ultimately receive an income from the yield produced by defendants' development activities. This is not an ordinary purchase of land, as such. It is an investment for the purpose of producing an income.

Although the investors own a tangible property interest in severalty, the method of cultivation followed by the developers is such that each purchaser is in effect a unit holder in an extensive enterprise carried on by the defendants, in which the expected income, not the land itself, is the attraction. It is no answer to say that the defendants do not definitely promise or assure the purchasers a profit. Such a promise has not been found essential in any of the decisions hereinafter cited. It is enough that, as here, the purpose of the transaction is to produce a profit on invested capital, through the management of others.

True, the purchasers become the fee owner of the land, and are entitled to possession. But this right is more colorable than real. Obviously it is not practicable, nor contemplated, that these purchasers living in distant places shall come to Florida and take possession of these small tracts. And if they did, expert cultivation by the defendants is still urged as necessary to successful production.

The court concludes therefore, in harmony with other courts, that these transactions constitute 'Investment contracts' within the meaning of the Securities Act. Securities and Exchange Comm. v. Tung Corp. of America, D. C. 32 F. Supp. 371; Kert v. Nelson, 171 Minn. 191, 213 N. W. 904, 54 A. L. R. 495; State v. Evans, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165; State v. Gopher Tire Co., 146 Minn. 52, 177 N. W. 937; State v. Agey, 171 N. C. 831, 88 S. E. 726; Rebator v. United States I. Realty Co., 170 Minn. 360, 212 N. W. 806; Prohaska v. Hammer-Miller Co., 256 Ill. App. 331; In re Waldstein, 160 Miss. 763, 291 N. Y. S. 697; Note, 87 A. L. R. 82."

And in connection with the above Federal case, it is to be noted that Title 15, Section 77B, United States Code Annotated, the Securities Act of 1933, defines "security" as follows:

"The term 'security' means * * * investment contract * * *."
This is the same definition as contained in Section 8624-2 of the General Code of Ohio.

The same question was presented to the Attorney General of the State of California and his opinion, given March 17, 1942, is reported in Vol. 11, Paragraph 7910 of the Commerce Clearing House Reports—Stocks and Bonds—from which opinion I desire to quote.

"ATTORNEY GENERAL: I have before me your letter of February 26, reading as follows:

> '* * * The hypothetical question which these attorneys have presented is as follows:
>
> That a lot with a 100 foot frontage on Blank Blvd., Los Angeles, with a depth of 150 feet, is leased to a national chain store for a period of forty years. It is proposed that the owner of the property sell undivided fractional interests in the real estate subject to the lease to the national chain stores, each fractional interest being entitled to receive its pro rata of the rentals. The initial purchasers of the fractional interests would agree among themselves not to ask for a partition of the property at least during the term of the lease. Such agreement would be recorded, and each successive purchaser of an undivided fractional interest would take such interest, subject to such agreement, and be bound by it. In this agreement, the owners of the undivided fractional interests would bind the client of the attorneys, namely, the real estate broker, as their agent for the purpose of collecting and distributing the rentals among the holders of the interests, or a bank or trust company could be appointed for that purpose. Such agent would have no authority or powers, except that if the property should be subject to a mortgage, the agent would also disburse the necessary mortgage payments from the rentals before distributing them. It is expected that the value of the undivided fractional interests would range from $5,000 to $50,000 each. The undivided interest would be transferable only by great deed or other form of real estate conveyance, and the purchaser would receive the usual policy of title insurance. The holders of the undivided interests would hold title to the real estate as tenants in common.' * * *

> In our opinion, the proposed plan of business as set forth in your letter falls squarely within the purview of the Corporate Securities Act.
>
> While the thing which it is proposed to sell under the plan as set forth is denominated an undivided fractional interest in real estate, which interest is to be transferable only by grant, deed or other form of real estate conveyances, it is at once apparent that any such deed evidencing such undivided fractional interest would constitute a certificate of interest in a profit-sharing agreement or a beneficial interest in title to property, profits or earnings, and hence would fall within the definition of a security as contained in subdivision 7 of section 2 of the Corporate Securities Act. * * *
>
> * * * In our opinion the proposed deeds transferring an undivided interest in the real property in question subject to the lease as set forth in your letter would constitute a 'certificate of interest in a profit-sharing agreement,' or a 'beneficial interest in title to property, profits, or earnings,' or both and would therefore be securities under the Corporate Securities Act of this State for the issuance of which a permit would be required."

To the same effect see the Opinion of the Attorney General of the State of Oregon, rendered on November 27, 1942, reported in Vol. II, Commerce Clearing House Reports,—Stocks and Bonds—Paragraph 7946.

In keeping with the court's remarks in the case of Securities and Exchange Commission v. Bailey, as previously noted, I submit the transaction presented by you is the same—in essence what the realty company, through its trustee, is really offering, and certainly what the average purchaser is really buying, is not land for its intrinsic value, but an investment contract as a source of income, without which he would not be interested in purchasing an interest in the land. The giving of the warranty deed is merely the conduit by which the investment is accomplished. Instead of a stock certificate evidencing a share in a common ownership of capital assets, the purchasers receive a deed. But the paramount emphasis is always upon the income to accrue, which is the chief, if not the sole attraction to the purchaser. Separability of ownership does not deprive the transaction of its character as an investment contract. In its ultimate analysis, the formal purchase is a profit-making venture with others in which there is a complete separation of ownership and management and in which the owners can take no part during the life of the

lease, either by way of partition of his interest or of collecting his share of the rent. This is not an ordinary purchase of land, as such, it is an investment for the purpose of producing an income.

In specific answer to your question, I am of the opinion that the contract of purchase and the deed to an undivided fractional interest in real estate signed and given under the facts and circumstances as set forth in your letter and containing the provisions as set forth in your letter and inclosures, constitute a "security within the provisions of Section 8624-2, Part 2, General Code, as being either a certificate or instrument which represents title to or interest in property, or leasehold certificate, or written instrument in or under profit sharing agreement, or an investment contract.

Respectfully,

HUGH S. JENKINS

Attorney General