incumbrances and that to effect a release of such incumbrances, release instruments have been prepared and submitted with the deeds.

Although there are some inaccuracies in the release instruments relating to the mortgages on the John J. White property, I am inclined to the view that the intention of the several mortgagees to release the parcel of land in question from the operation of such mortgages, is sufficiently clear.

The incumbrances on the Davis property, above referred to, was an oil and gas lease and the same has been properly released and discharged so far as the property here in question is concerned.

I am, therefore, accordingly approving these deeds as to legality and form, as is evidenced by my approval endorsed upon the several deeds, all of which, together with the other files, above referred to, are herewith enclosed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2930.

TRUST—REGISTRATION OF TRUSTS WHERE CO-TRUSTEES ARE COMMON CO-TRUSTEES OF TWO OR MORE TRUSTS.

SYLLABUS:

When two or more trusts, the security-holders or beneficiaries in which do not exceed ten in number, have co-trustees who are authorized to perform their trust duties only in conjunction with each other, the mere fact that one of such co-trustees is a common co-trustee to the two or more of such trusts does not in and of itself, prevent such trusts from being registered by description, pursuant to the provisions of Sections 8624-6 *and* 8624-7, *General Code.*

COLUMBUS, OHIO, July 17, 1934.

HON. SAM L. SUMMERS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads:

> "When several common law trusts are created, each having three trustees, one of which trustees is a common trustee to two or more of such trusts, the remaining trustees being different, and certificates of beneficial interest are issued to the beneficiaries of such trust in an aggregate number in excess of ten (10) but in no event to more than ten (10) beneficiaries or certificate-holders in each particular trust; the question has arisen as to whether such transactions are such as would constitute the trustees a dealer within the provisions of Section 8624-6, subsection 3, in view of your opinion rendered recently. In other words, my question is whether or not the fact that one trustee may be common to more than one trust would prevent such trusts from being registered by description, under the provisions of Section 8624-6, subsection 3 and Section 8624-7, of the General Code."

Your inquiry undoubtedly arises by reason of my opinion No. 2662, rendered under date of May 14, 1934, the syllabus of which reads:

> "When a corporation segregates portions of its assets into parcels or pools and issues a series of certificates of participation or declarations of trust, as to each of such segregated parcels of assets, and sells such certificates to investors, not to exceed ten in number in each such parcel or pool, such corporation is a dealer within the provisions of the Ohio Securities Act (§§ 8624-1 to 8624-47 G. C.). As such, it must obtain a dealer's license for the corporation and a salesman's license for each of the agents through which it offers such securities for sale to investors in Ohio."

From the facts presented in connection with the request for such opinion, it would appear that the trustee, in each of the trusts referred to therein, was the same identical trustee and the title legal and equitable to the trust res, prior to the issuance of the trust certificates, was in the person who later became trustee. The same trustee issued all of the trust certificates in property formerly owned absolutely by him and to which he retained the legal title. In other words, from the facts submitted with such request, it would appear that an owner of certain oil royalties separated his property into lots or parcels; he then declared that he held each in trust for the benefit of the holders of not to exceed ten trust certificates in or to such parcel of royalties. Such certificates he then sold to whomsoever was willing to purchase. Upon such set of facts I ruled, and I believe rightly so, that such method of doing business would constitute such trustee "a dealer" within the meaning of the Ohio Securities Act.

Such question I do not understand to be presented by your present inquiry. If such be a fact, my opinion is the same as at the time of the rendition of such Opinion No. 2662, supra.

From the language of your request I assume that the three trustees are co-trustees. If such be the fact, their authority is equal and joint; they cannot act separately but must act as a unit, except where the instrument creating the trust authorizes action by a majority.

Loughery vs. *Bright,* 267 Mass., 584;

Bascom vs. *Weed,* 105 N. Y. S., 459;

Ratcliffe vs. *Sangston,* 18 Md., 383.

Under such type of trust it has been held that if the trust instrument does not authorize action by a majority and one co-trustee refuses to join in any action with reference to the trust, the trustees cannot take action without him, but must make application to a court of competent jurisdiction for authority. *Dingman* vs. *Boyle,* 285 Ill., 144. Such action being brought under the theory that a court will not permit a trust to fail for want of, or the incapacity of a trustee. *Warner* vs. *Rogers,* 255 Ill. App., 78.

An action could not be maintained by one of such co-trustees without joinder of the other trustees. (§ 11254, G. C.)

It is highly improbable that an action could be maintained against a single co-trustee if founded upon alleged misfeasance, malfeasance or nonfeasance of *the trustee.* (§ 11262, G. C.)

It would therefore appear to me that the three trustees must be regarded as *the trustee,* rather than any single co-trustee. The co-trustee has no powers, rights or duties in connection with the trust except when acting in conjunction

with the others. It might be said that he is a part of the trustee, but it can scarcely be said he is the trustee or a trustee, since he in and of himself, has no powers whatsoever. He can do no acts as trustee alone, but must act in conjunction with the other trustees.

I have examined a copy of the trust indenture submitted in connection with your request, and from which I am informed your request arose. In such indenture the duties as trustee are imposed on *the trustee* and not upon the individuals composing such "trustee". In such trust indenture is contained a grant of power to such "trustee" to adopt by-laws and authority to perform its acts by resolution, but I find no grant of power therein, to authorize any co-trustee to perform acts except in conjunction with the other co-trustees.

Section 8624-6, General Code, in defining the exemption as to when an issuer shall not be deemed a dealer, uses the following language:

> "The following transactions in securities may be carried on and completed upon compliance with section 7 of this act:
>
> An issuer engaging in any transaction specified in this section shall not be deemed to be a dealer.
>
> * * * * *
>
> The sale of securities representing an interest in a partnership, limited partnership, partnership association, syndicate, pool, trust or trust fund or other company or association, not a corporation, when the security holders do not and will not, after such sale, exceed ten (10)."

Since the trust certificates in question, can only be issued by the trustee; that is, the co-trustees acting as an entity, it is self-evident that they cannot be a part of another trust the ownership of which is in a different individual or trustee. If such be a correct deduction, it necessarily must follow that such trusts need only be registered under the provisions of Section 8624-7, General Code.

I am not herein expressing any opinion on the subject of the legality of common law trusts in Ohio. No such inquiry is contained in your request. My opinion as herein set forth is not to be construed as holding that a transaction which would otherwise be subject to specific provisions of the Securities Act is exempted therefrom when set up in the form of fictitious trusts, for a court of equity may look beyond the fiction and at the substance. My opinion herein is predicated on the assumption that the transactions in question are not a guise to conceal an avoidance of a statute designed for the protection of the public.

Specifically answering your inquiry it is my opinion that when two or more trustees, the security-holders or beneficiaries in which do not exceed ten in number, have co-trustees who are authorized to perform their trust duties only in conjunction with each other, the mere fact that one of such co-trustees is a common co-trustee to two or more of such trusts does not in and of itself, prevent such trusts from being registered by description, pursuant to the provisions of Sections 8624-6 and 8624-7, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General