Opinion No. 58-189

September 16, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Mr. F. F. Weddington, State Bank Examiner, Santa Fe, New Mexico

QUESTION

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In its capacity as receiver for the Espanola Credit Union, may the State Banking Department, upon the receipt of adequate consideration, execute an assignment to a third party of a certain secured note of which it is the holder thereof under circumstances outlined in the body of this opinion?

CONCLUSION

Yes.

OPINION

ANALYSIS

It is our understanding that the following factual situation gave rise to the request for this opinion. Approximately two years ago, the State Banking Department became receiver for the Espanola Credit Union. It is now approaching the point where it would like to make final liquidation.

There still remain among the assets of the Espanola Credit Union, several notes of doubtful value. However, included among them is an obligation of the Espanola Valley Co-operative Exchange, Inc., which is secured by a second mortgage covering property in Espanola listed as follows: A store building, attached office, attached storage building, warehouse, feed grinding and mixing equipment, office furniture and equipment and warehouse equipment. This same mortgage secures a series of notes as follows:

$ 848.00 in favor of Delfin Garcia

285.60 in favor of Mr. and Mrs. Abelino Sanchez

1,938.00 in favor of the Espanola Credit Union

627.39 in favor of Felix A. Armijo

3,856.58 in favor of the Producers Grain Corporation of Amarillo, Texas

The Reverend Walter Cassidy has solicited a number of people in Espanola to obtain funds for the purchase of the note in question from the State Banking Department. Of course with the purchase of the note, the receiver would execute an assignment of the Espanola Credit Union's interest in the mortgage. It is our further understanding that the Espanola Valley Co-operative Exchange, Inc., maker of the note in question has experienced some difficulty in meeting this obligation. The State Bank Examiner is of course desirous of ascertaining whether the above outlined action meets all legal requirements, so as not to subject himself to liability on his bond. We conclude that such action would be proper.

In our opinion, the only question of legality presented by the action contemplated is one of preferential transfer under section 3 (a) of the National Bankruptcy Act (11 U.S.C.A. sec. 21 (a)). That is to say, if the note in question were purchased from the receiver, and if the maker thereof should subsequently in the following four months go into bankruptcy, could the purchase be considered a preferential transfer under the Bankruptcy Act? We think not. The section in question prohibits transfers by a debtor while insolvent, of any portion of his property to one or more of his creditors with the intent to prefer such creditors over his other creditors. The manifest purpose of this provision is to protect creditors against the voluntary act of the bankrupt in preferring one creditor over another. Shingleton v. Armour Boulevard Corp., (CA8th) 96 F.2d 473.

In the instant case, the note is being purchased by a group of people who constitute a third party to the transaction, and not by the debtor. Consequently, no preferential transfer could possibly take place.