

## Opinion No. 60-186

October 7, 1960

**BY:** OPINION of HILTON A. DICKSON, Attorney General

**TO:** Mr. Joseph B. Grant State Bank Examiner 341 Don Gaspar Santa Fe, New Mexico

### QUESTION

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May a trust company organized pursuant to Section 48-5-1, et seq., N.M.S.A., 1953 Compilation, as amended, invest a substantial portion of its required \$ 100,000 paid-in capital in the corporate common stock of an Abstract Company?

#### CONCLUSION

See Analysis.

### OPINION

#### {\*584} ANALYSIS

The statute that allows a trust company to invest its capital as well as other funds generally is Section 48-5-3, supra, which provides as follows:

"\* \* \* Seventh. To loan money upon real estate, personal and collateral security and to {\*585} purchase, invest in and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, and other investment securities."

The question resolves itself into whether corporate common stock is an "investment security" within the meaning of the above section. To answer this question we must ascertain the meaning of the words "investment securities."

In normal usage by the business world, the words "security" and "investment" are considered to include corporate stocks inasmuch as "security" is defined as any form of instrument used to finance and promote enterprises. Certainly corporate stock comes within this definition. "Investment" is normally thought to be the investing of money or capital for income or profit. Corporate stocks also fall within this definition. See **In re Graw's Estate**, 337 Pa. 93 10 A. 2d 377; **Burkhard v. U.S.**, 100 Fed. 2d 642; **Holloway v. Thompson**, 112 Ind. App. 229, 42 N.E. 2d 421; **Union Pacific Railroad Company v. Commissioner of Internal Revenue**, 69 Fed. 2d 67.

The ultimate question is, however, whether the Legislature intended to express some other meaning by arranging the two words so that the word "investment" modifies the word "securities." We think it did not. The Equity Court of New Jersey has defined "investment securities" as stocks and evidences of indebtedness that may be bought on the market. **Robaltham v. Prudential Insurance Company of America**, 64 N. J. Equity 673, 53 A. 842. The Supreme Court of the United States considered this problem in **United States v. Leslie Salt Company**, 350 U.S. 383, 76 S. Ct. 416, 100 L. Ed. 441 and arrived at the conclusion that the essence of the term "investment securities" was marketability. The rationale of these two decisions seems to be that it is the inherent marketability of the type of security rather than the marketability in the economic sense that controls. Applying this rationale it is apparent that a corporate common stock is marketable -- that is, there is normally no prohibition within the security itself that restricts its free transfer. It can be readily bought and sold on the open market.

We recognize that there is some authority to the effect that the term "investment security" includes only bonds and other interest-bearing securities as opposed to equity securities. Compare **Michelson v. Penney**, C.C.A., N.Y. 135 Fed. 2d 409. We also recognize the fact that the argument can be made that marketability should be used in the sense that a security is marketable only if there are buyers ready, willing and able to purchase the security. We do not, however, feel that this was the definition intended by the Legislature in its use of these words. It seems inconceivable to us that the Legislature intended to place a greater restriction on the investment of a trust company's capital than it chose to place upon the investment of trust funds by a fiduciary. See Section 33-1-16, N.M.S.A., 1953 Compilation.

We, therefore, conclude that corporate common stock as such constitutes an investment security within the meaning of Section 48-5-3, supra. Whether this specific investment is a proper one from the standpoint of security of capital and whether this investment will, in fact deplete the paid-in capital of the trust company, is an administrative decision to be made by the State Bank Examiner rather than by this office. We merely hold that as a matter of law, corporate common stock may be purchased with the paid-in capital of the trust company. Whether any specific stock is a proper investment with the capital of a trust company, the preservation of which is in the public interest, is not within the area of decision of this office but is rather for the State Bank Examiner.

We have searched the statutes covering banks and financial institutions {\*586} and have failed to find any section which is in conflict with the result we reach here.

By: Boston E. Witt

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