tirement System as a condition of employment. Accordingly, it is our conclusion that the interpretation to be given to N.J.S.A. 43:10-18.6a is that only those persons employed by the county subsequent to March 26, 1961, the effective date of the resolution, shall be eligible for membership in the Public Employees' Retirement System.

Very truly yours,
ARTHUR J. SILLS
Attorney General

By: Richard Newman
Deputy Attorney General

December 31, 1964

HONORABLE CHARLES R. HOWELL
Commissioner, Department of Banking & Insurance
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1964 - No. 12

Dear Commissioner Howell:

You have requested our advice as to whether savings banks and banks may, for investment purposes, acquire by assignment from the Administrator of Veterans Affairs an installment sale contract of real property.

It is our opinion, for the reasons stated hereinafter, that savings banks and banks may hold as such investments installment sale contracts of real property.

In reaching our opinion we have considered the following facts which you have furnished. The installment sale contract, VA Form 26-169 (3009), is a result of the mortgage loan guarantee program of the Veterans Administration. Under this program, title to a parcel of real property is conveyed to the Administrator following a default in an obligation which has been guaranteed by the Administration under the aforementioned mortgage loan guarantee program. 38 U.S.C. 1820 (a). The underlying obligation is cancelled. The policy of the Administrator is to sell the real property so acquired as soon as possible. If a purchaser cannot make a sufficient down payment, the Administrator will enter into an installment sale contract, this being in lieu of the conventional deed and bond and purchase money mortgage. The term of this agreement provides that title to the real property, which is the subject matter of the sale, will remain in the Administrator or his assignee until there is a performance of the payment schedule specified in the agreement. In the event that the buyer is in default for 30 days or more, the Administrator has the right to declare the entire unpaid balance due, and, if this balance is not paid, he may terminate all of the buyer's rights under the agreement. Any payments made under the agreement and all improvements constructed in or on the property are retained by the Administrator or his assignee as compensation for the use and occupancy by the buyer. Under the terms of this agreement, no foreclosure proceedings are necessary to divest the buyer of his interest in the property. *Dorman v. Fisher,* 31 N.J.

13 (1959) affirming 52 N.J. Super. 70 (App. Div. 1958).

Should the Administrator desire to convey his interest in the installment sale contract, he does so by assignment; simultaneously, he also conveys the title to the real property, which is not only the subject matter of the contract but also security for the payment of the obligation to the assignee of the contract. The conveyance of title to the real property is evidenced by a deed which is recorded with the proper county official.

An assignee of the Administrator takes the installment sale contract under the provisions of the mortgage loan guarantee program. Two or more months after a default by the buyer, the assignee may require that the Administrator repurchase the installment sale contract at the price paid by the assignee, less principal payments received prior to default.

The installment sale agreement further provides that upon receipt of the payment in accordance with the terms of the specified payment schedule, "* * * the Seller shall execute and deliver a Special Warranty Deed conveying to the Buyer the aforementioned title to said property, * * *." VA Form 26-169 (3009) para 18.

The Administrator has adopted the use of installment sale contracts to facilitate the re-sale of real property acquired through defaults. As is apparent from the foregoing, under an installment sale contract, title to the real property, which is the subject matter of the contract, remains in the name of the vendor or his assignee for the purpose of securing the performance of the contract.

The first problem to be considered is whether the Banking Act of 1948, as amended, N.J.S.A. 17:9A-1, *et seq.*, expressly or impliedly permits a bank or savings bank to hold an installment sale contract of real property as an investment.

The analysis of this question must consider separately the investments which may be made by a bank and those investments which may be made by a savings bank. N.J.S.A. 17:9A-24 deals with certain basic powers which both a bank and a savings bank shall possess, whether or not such powers are specifically set forth in its certificate of incorporation. The powers of banks, not including savings banks, are amplified by N.J.S.A. 17:9A-25 which provides in part:

> "In addition to the powers specified in section 24, every bank shall, subject to the provisions of this act, have the following powers, whether or not such powers are specifically set forth in its certificate of incorporation:
>
> (1) to discount, buy, invest in, hold, assign, transfer, sell, and negotiate promissory notes, drafts, bills of exchange, mortgages, trade acceptances, bankers' acceptances, bonds, debentures, bonds or notes secured by mortgages, installment obligations, balances due on conditional sales, and other evidences of debt for its own account, or for the account of customers; * * *." (P.L. 1948, c. 67, p. 205, §25; P.L. 1962, c. 219, §1).

The term "installment obligation" as it is employed in N.J.S.A. 17:9A-25(1) is not defined, nor is it made subject to words of limitation. The term, "installment obligation", as used therein should be interpreted according to the most natural and obvious import of the language, and without resorting to a subtle or a forced construction for the purpose of either limiting or extending its operation. *Weinacht v. Bd. Freeholders, Bergen County*, 3 N.J. Super. 174 (App. Div. 1949), *aff'd* 3 N.J. 330 (1949). The most obvious and natural import of the term, "installment obliga-

tion" is that of a debt, which by its terms, is to be repaid in installments. The installment sale contract VA Form 26-169 (3009) is evidence of a debt, which by its terms is to be repaid in installments, and, therefore, meets the requirements of N.J.S.A. 17:9A-25(1). Therefore it is our opinion that pursuant to the powers enumerated in N.J.S.A. 17:9A-25(1), a bank may invest in installment sale contracts of real property.

The powers of savings banks are controlled by N.J.S.A. 17:9A-181Q, which reads in part:

> "Q. A savings bank may invest in
>
> * * *
>
> (2) (a) mortgages or deeds of trust or other securities of the character of mortgages which are first liens on the fee of real property or a lease of the fee of real property, wherever located, which * * * (iv) any other officer or agency of the United States or of this State which the commissioner shall have approved for the purposes of this section as an insurer or guarantor, has fully insured or guaranteed or made a commitment to fully insure or guarantee. * * *" (P.L. 1948, c. 67, p. 319, §181; P.L. 1950, c. 313, p. 1061, §2; P.L. 1951, c. 186, p. 687, §1; P.L. 1953, c. 210, p. 1567, §1; P.L. 1954, c. 98, p. 561, §1; P.L. 1955, c. 170, p. 718, §1; P.L. 1957, c. 164, p. 585, §1; P.L. 1962, c. 227, p. 1112, §1).

Savings Bank Regulation Number 13, which was promulgated on April 25, 1962, approved the Administrator as an insurer for the purposes of the preceding section.

A mortgage has been held to be essentially security for the payment of a debt. *Vineland Savings and Loan Assn. v. Felmey*, 12 N.J. Super. 384, 391 (Chan. Div. 1950). A lien at common law signified such a hold or claim upon an object for satisfaction of a debt so that the object of the lien could not be taken away until the debt was satisfied or paid. This right to hold was a right superior to that of any other person claiming an interest in the object. *Agnew v. American Ice Company,* 2 N.J. 291 (1949). With the exception of certain statutory liens, *e.g.*, local real property taxes, the priority of a lien on real property is determined by the doctrine of first in time, first in right. See *Camden County Welfare Bd. v. Federal Deposit Ins. Co.*, 1 N.J. Super. 532 (Chan. Div. 1948).

The security interest of the Administrator or his assignee arises upon the signing of the contract, VA Form 26-169 (3009). The retention of title by the Administrator or his assignee subject to conveyance upon the complete execution of the contract, is a "lien". Under particular facts, it may constitute a first lien on the underlying property under the doctrine, "first in time, first in right". Hence the installment sales contract, VA Form 26-169 (3009), which is security for the payment of a debt, has the character of a mortgage and may constitute a first lien on the fee of real property within the meaning and intendment of N.J.S.A. 17:9A-181Q authorizing investments for savings banks. Such a contract, however, may still be regarded as an installment obligation under N.J.S.A. 17:9A-25(1) since the terms of the respective statutes are not mutually exclusive.

The second question which must be decided is whether the statutory provisions which limit the holding of real property by regulated financial institutions prohibit a bank or savings bank from investing in VA installment sale contracts of real estate as described herein.

N.J.S.A. 17:9A-24(5) provides as follows:

"Every bank and savings bank shall, subject to the provisions of this act, have the following powers, whether or not such powers are specifically set forth in its certificate of incorporation:

* * *

(5) to purchase, hold, lease and convey real property or any interest therein for the following purposes, and for no others:

(a) such as may be necessary or convenient for the use, operation or housing of its principal office or any branch office, or an auxiliary office, or for the storage of records or other personal property, or for office space for use by its officers or employees, or which may be reasonably necessary for future expansion of its business, or which is otherwise reasonably incidental to the conduct of its business; and which may include, in addition to the space required for the transaction of its business, other space which may be let as a source of income. In exercising the powers conferred by this subparagraph, the bank or savings bank shall be subject to the limitations imposed by paragraph (13) of this section;

(b) such as may be conveyed to it in whole or part satisfaction of debts previously contracted in the course of its dealings;

(c) such as it shall purchase at sale under judgments and decrees in its favor, and on foreclosure of mortgages held by it; and

(d) such as it shall purchase or acquire to minimize or prevent the loss or destruction of any lien or interest therein; provided that all real property not held for any purpose specified in subparagraph (a) of this paragraph, shall be sold within 5 years of its acquisition, or within 5 years after the time it ceases to be held for any purpose specified in subparagraph (a) of this paragraph, unless the commissioner shall extend the time within which such sale be made; * * *" P.L. 1948, c. 67, p. 201, §24; P.L. 1956, c. 222, p. 782, §1).

The precise question to be considered is whether the proscriptions set forth in N.J.S.A. 17:9A-24(5) include the holding of title to real property as security for the performance of an obligation owed to the bank or savings bank in connection with an otherwise lawful investment.

It is our opinion that the above statute does not prohibit a bank or savings bank from holding title to real property to secure the payment of an obligation owed to it as an investment. The purpose of this legislation was to circumscribe and regulate the acquisition and disposition of real estate by banks. The rationale of this limitation on the ownership of realty by banks was expressed in the early case of *Leggett, et al. v. The N.J. Manufacturing and Bank Co., et al.*, 1 N.J. Eq. 541, 549 (Chan. 1832) where the Court said:

"No bank should be allowed to speculate in real porperty. It is contrary to the spirit and design of such institutions, and is liable to abuse. It always results in injury, and sometimes in ruin."

The Federal law contains similar limitations. 12 U.S.C. 29. The legislative his-

tory of the National Bank Act of 1864 reveals several instances of debate in the Senate on the preceding section; the views expressed therein show that the primary purposes of this section were to prevent banks from accumulating a large amount of real estate, and to prevent them from having the power to acquire and to hold indefinitely this real property. Cong. Globe, 36 Cong., Second Sess. 2020 (1864). The underlying purposes of the restriction were construed in *Union Nat. Bank v. Matthews,* 98 U.S. 188, 189 (1879) wherein the Supreme Court stated:

> "The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter of the statute, constitutes the law."

The obvious intent of N.J.S.A. 17:9A-24(5) is to prohibit banking institutions from accumulating and speculating in real property and to keep their capital flowing through the daily channels of commerce. However, subparagraphs (b), (c) and (d) of 17:9A-24(5) are evidence that the prohibition was not to be all inclusive. These subsections permit a bank or savings bank to hold title to real property to protect their investment in other obligations.

It is apparent that the transaction described hereinbefore is an executory contract for the sale of land. Under this type of contract, the seller becomes a trustee holding legal title for the benefit of the buyer. The seller can do nothing to defeat the transfer of title to the buyer, *Amster v. Tenny,* 139 N.J. Eq. 335 (Chan. 1947), and therefore the seller does not hold unrestricted title to the property. However, by the terms of the contract the parties thereto may covenant that if the terms of the contract are not fulfilled, there will be specific sanctions including termination of all the buyer's rights under the contract. *Dorman v. Fisher, supra.* Absent a breach of the contract, if follows that the seller must upon full payment by the buyer convey title to the real property once he has entered into the contract for sale. The termination provisions of the contract are inserted so that the seller may be secured as to his underlying obligation.

The termination of the buyer's rights and unrestricted title revesting in the buyer is analogous to the situations contemplated by 17:9A-24(5), (6). Therefore, in the present situation, we conclude that the Administrator of Veterans Affairs, or his assignee, as seller, does not have unrestricted title to the real property, but retains title only for the purpose of securing the payment of an underlying obligation which is an otherwise valid investment. The acquisition of such an installment sales contract would not constitute a purchase, holding or conveyance of real estate or any interest therein prohibited by N.J.S.A. 17:9A-24(5).

For the reasons stated hereinbefore, it is our opinion that installment sale contracts of real property are installment obligations and securities of the character of mortgages and may therefore be acquired from the Administrator of Veterans Affairs by banks and savings banks for investment purposes.

Very truly yours,
ARTHUR J. SILLS
Attorney General

By: HAROLD LEIB
Deputy Attorney General