

SEPTEMBER 14, 1953.

MR. ELMER G. BAGGALEY, *Secretary,*
Consolidated Police and Firemen's Pension Fund Commission,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 35.

DEAR MR. BAGGALEY :

You will recall that under date of April 27, 1953, this office furnished you with its Formal Opinion No. 12, 1953. That opinion was rendered in reply to your inquiry of April 8, 1953, requesting advice as to what action should be taken by the Consolidated Police and Firemen's Pension Fund Commission in connection with executions directed against pension allowances made by local police and firemen's pension commissions, in causes wherein the defendant was a retired pensioner.

You were advised in that opinion that pension allowances made by local police and firemen's pension commissions were exempt from liability to execution, in view of the authorities cited in the opinion, and more particularly so, in view of the provisions of Section 7 of Chapter 358, P. L. 1952 (R. S. 43:16-7) stating, "that all pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration or other legal process".

Since the rendering of our opinion, of April 27, 1953, aforementioned, there has been a new development in the law on the subject of executions against pension payments, which I desire to discuss with you in this present opinion, in order that you may be guided accordingly in the administration of the Fund, which you serve as secretary.

Very recently, our Supreme Court, in the case of *Fischer vs. Fischer*, 13 N. J. 162 (1953), had before it the specific question as to whether the pension provided by the statute administered by your commission (R. S. 43:16-1 to R. S. 43:16-7.2) "is wholly immune from judicial appropriation, before the individual installments reach the hands of the pensioner, to the satisfaction of alimony established by judgment".

The facts in the *Fischer* case disclosed that the Police and Firemen's Pension Fund Commission of Irvington, had been directed by order of the Chancery Division to deduct a stated amount monthly from respondent's pension check, to be applied to alimony and counsel fees, under a divorce decree. Subsequently, the Chancery Division vacated the order, under the authority of *Hoffman vs. Hoffman*, 8 N. J. 157 (1951). The wife then appealed to the Appellate Division. That court (*Fischer vs. Fischer*, 24 N. J. Super. 180) affirmed the vacating of the order directed to the Pension Commission, stating: (Pages 184 and 189) :

"We are faced with the question as to whether the pension moneys of the defendant may be attached or sequestered, at least to the extent of the monthly payments required under the alimony decree, while in the hands of the pension commission. The defendant contends that so far as New Jersey is concerned, this question has been settled adversely to the plaintiff's contention in the case of *Hoffman vs. Hoffman*, *supra*, wherein Mr. Justice Burling, speaking for the Supreme Court, stated, *inter alia* :

"That the policy of this State is in favor of exemptions from civil process in cases of public pension funds appears from an analysis of legislative treatment thereof," citing the several New Jersey statutes dealing with such exemptions.

"In view of the language employed by Mr. Justice Burling in the *Hoffman* case, we feel that its holding is controlling here. In that case the court did not distinguish between a general creditor's rights against the defendant's retirement payments and those under an alimony judgment. In the *Hoffman* case, although the question of a wife's right under an alimony judgment to sequester her husband's pension moneys under a statutory governmental pension plan, exempting the same from 'execution, garnishment, attachment, sequestration or other legal process' was not the factual issue involved, it seems to us that in view of the language employed by the court we must conclude that the Supreme Court regarded the alimony claim in the same category as any other creditor's rights."

When the *Fischer* case reached our Supreme Court, a majority of the Court, speaking through Mr. Justice Heher, reversed the Appellate Division, holding that the pension in question was not immune from judicial appropriation to satisfy a court order based on an award for alimony. I quote from Mr. Justice Heher's decision:

"The exemptive clause of the statute is in these words: 'All pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration, or other legal process.' R. S. 43:16-7, as amended by L. 1944, c. 253, p. 829. The amendment introduced this provision into the statute. . . .

"A pension such as this is a stated allowance or stipend to one retired from service, in consideration of past services. The pensioning of civil servants, as well as those in private employment, is designed primarily to attain suitable standards of service at a relatively low wage cost, by a guarantee against want when the servant's years of productivity have ended, thus heightening the morale of the workers and enhancing the quality of the service. *Plunkett vs. Board of Pension Commissioners of Hoboken*, 113 N. J. L. 230 (Sup. Ct., 1934), affirmed 114 N. J. L. 273 (E. & A., 1935). Considered in context, the immunity clause constitutes a protection against improvidence and creditors in the broad general sense of persons whose claims are grounded in contract or tort, or a penalty or forfeiture, to insure sustenance and a measure of economic security for the pensioner and his dependent family in the evening of life when earning power has diminished or ceased altogether. It is akin to the policy of the law that limits execution upon the worker's wages for the satisfaction of the claims of creditors. . . .

". . . it is abundantly clear that the policy of the immunity provision is to shield the pensioner against the coercive remedial and executorial processes available to creditors, and thus to secure the pensioner and his family against improvidence and want. 'Legal' process undoubtedly has this generic sense, *i. e.*, legal and equitable remedies in favor of those having a right of action grounded in contract or tort, a penalty or a forfeiture. The word 'alimony', presumably derived from the Latin 'alere,' meaning to nourish or sustain, signifies the sustenance or support which a husband may be required to supply to his wife when she is living separate and apart from him, or has been divorced. It was the method by which the ecclesiastical courts of England conferred the duty of support owed by the husband to the wife during such time as they were legally separated pending the marriage relation. *Lynde vs. Lynde*, 64 N. J. Eq. 736, 751 (E. & A., 1902). It is a periodic allowance determined by the wife's needs and the husband's means, and varies from time to time according to changing circumstances. In its very nature, it is not comprehended in the terms of the exemptive clause of the statute under review, designed as it is to secure the pension against the claims of third persons as a means of support for the pensioner and his family.

"Such is the outstanding policy of the statute. There is provision for a pension to the dependents of the retired member, his widow and children under the age of 18 years, and his dependent parents if he dies without leaving a widow or children. Amended R. S. 43:16-3; 43:16-1. But no pension shall be payable to a child or children of a female member unless it is established that "such child or children would otherwise become a public charge." R. S. 43:16-4.1.

"A holding barring recourse to the statutory pension to absolve the public from the burden of supporting the pensioner's wife or children would be perverse of the true intent and meaning of the act. And a decree of divorce in favor of the innocent wife does not relieve the guilty husband from the obligation of support; this is the significance of a provision for alimony. *Lynde vs. Lynde*, cited *supra*. . . .

"The interpretive principle in general application elsewhere is that the essential purpose of such immunity from process is the protection not only of the pensioner, but of his family as well, from destitution and the need for public relief, and, absent a clear and definite expression *contra*, the provision will not be read to enable the husband to claim the full benefit of the pension as against his dependent wife and children; and thus to subvert the laws enjoining upon the husband the performance of this basic obligation of the marriage state. This was the ruling in *Schlaefter vs. Schlaefter*, 112 Fed. (2d) 177, 130 A. L. R. 1014 (Ct. App. D. C., 1940). *Vide, Holmes vs. Tallada*, 125 Pa. St. 133, 17 Atl. 238 (S. Ct., 1889); also 11 A. L. R. 123 and 106 A. L. R. 669.

"The Hoffman case cited *supra* is plainly not to the contrary. There, the subject matter was a group insurance contract which made the retirement annuity and death payments 'nonassignable, whether by voluntary act or by operation of law;' and the holding was that if the annuity benefits were made available for the satisfaction of the foreign decree for alimony 'that contractual undertaking' would be violated. There, the contract of the parties was enforced *inter partes*; here, the determinative is the policy of the statute.

"The judgment is accordingly reversed; and the cause is remanded for further proceedings in conformity with this opinion."

A vigorous dissent was filed in this matter by Mr. Justice Burling, concurred in by Mr. Justice Wachenfeld, stating in part:

"It is difficult to conceive language more comprehensive than that used in R. S. 43:16-7 as amended, *supra*. Patently it includes any order, writ or other formal writing required or permitted by law to be issued by a court of this State. The premise of the majority opinion writes words into the statute which do not expressly exist therein. This is foreign to the method whereby the Legislature has treated the subject of exemption of pensions, namely to specifically designate the exception from the exemption.

"For the reasons herein expressed I would affirm the judgment of the Superior Court, Appellate Division."

I have quoted at length from the decisions of the Appellate Division and those of the Supreme Court, so that the honorable members of your commission and you, may see some of the problems, social, philosophical and legal, that are involved.

As a result of the recent holding of the majority of our Supreme Court in the *Fischer* case (*supra*) the views of this office on the question of executions directed

against pension allowances paid by your commission, are stated as follows: pension payments made by your fund, are exempt from executions, garnishments, attachments, sequestration or other legal process, prior to the time such payments reach the hands of the pensioner; except, however, that such payments are "not immune from judicial appropriation, before the individual installments reach the hands of the pensioner" to satisfy the alimony portion of alimony judgments. Alimony judgments, in other words, by judicial determination, are to be considered as the exception to the general exemption of such payments from appropriation to satisfy judgments or court orders.

It is observed that some court orders for alimony before you, have been directed against local pension funds, rather than against the Consolidated Pension Fund Commission. I would suggest that in the case of such orders, so directed, that you notify the plaintiff to obtain and serve on you a new court order directing the payment to be made to the plaintiff by the Consolidated Fund Commission. In the interim, until the new court order is delivered to you, I suggest the deductions be made by you, and withheld in your account.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

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SEPTEMBER 18, 1953.

MR. ERNEST R. KERR, *Chief Clerk,*
Department of State,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 36.

MY DEAR MR. KERR:

Receipt is acknowledged of your letter of September 16, 1953, enclosing letter addressed to you under date of September 15, 1953 by Edward C. Gardner, Secretary, Camden County Board of Elections, requesting an opinion "as to whether or not it is legal to register voters in industrial plants in Camden county without first advertising in our local newspapers".

Section 19:31-6 of the Revised Statutes, as amended by Chapter 60 of the Laws of 1952, provides that "the commissioner, in counties having a superintendent of elections and the members of the county board in all other counties, or a duly authorized clerk or clerks acting for him or it, as the case may be, shall receive the application for registration of all eligible voters who shall personally appear for registration during office hours at the office of the commissioner or the county board, as the case may be, or at such other place or places as may from time to time be designated by him or it for registration."