Opinion No. 55-6320

November 15, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Charles B. Barker, Assistant District Attorney, County Court House, Santa Fe, New Mexico

Receipt is acknowledged of your letter dated November 3, in which you request an opinion on two problems concerning fees of justices of the peace. We will answer your letter in the order in which you have asked the questions.

First: What charge, if any, should a justice of the peace make, when a garnishment is asked for at the time of filing the original action, under the provisions of Chapter 223, Laws of 1955?

The pertinent part of Chapter 223, New Mexico Session Laws of 1955, reads as follows:

"That Section 1, Chapter 22, Laws 1889, as amended by Section 1, Chapter 29, Laws 1909, and by Section 1, Chapter 103, Laws 1921, (being Section 36-19-1, New Mexico Statutes Annotated, 1953 Compilation) is hereby amended to read as follows:

For each civil or criminal case docketed $ 5.00"

We believe that in order to arrive at the intention of the Legislature that we should first go back into the history of the garnishment statutes and the amendments since the original statute was passed by the Territorial Legislature of New Mexico up to the time of the last statute hereinabove quoted.

Section 6808 of the 3rd Volume of Sutherland on Statutory Construction reads as follows:

"At an early date it was ruled that statutes allowing costs should be taken strictly, and this rule has generally prevailed under the modern cases. Since statutes permitting costs to be recovered are intended to facilitate the prosecution of rightful claims, it seems that such statutes should be given a liberal interpretation to assist in the accomplishment of that purpose."

Also Section 5002, on page 482, of Volume 2 of Sutherland on Statutory Construction, reads as follows:

"The courts will look at the contemporary history of the statute and the historical background of the statute to obtain aid in interpreting the statute. These aids will show the circumstances under which the statute was passed, the mischief at which it was aimed and the object of the statute. The courts often speak of the mischief at which the

statute was aimed, or the purpose of the statute, without referring to the background of the statute further. All of these statements by the courts can be traced directly to the statement in Heydon's Case as to the methods and purpose of interpretation of a statute.

The history of the legislation is also an important aid. By history of the legislation the courts mean the prior statutes on the same subject -- the legal history of the statute. The courts may also use other recent statutes on similar subjects. This is really the rule of statutes **in parimateria** in a different phraseology.

The state courts use these historical aids, including enactment history, rather freely; often combining all of them in one statement in resorting to them."

Without quoting all of the statutes passed by the New Mexico Legislature since Chapter 22, Laws of 1889, was passed, it was evident that writs of garnishment issued out of justice of the peace courts in the following cases:

"(1) In any case where an original attachment may be issued as provided by the attachment laws of the Territory of New Mexico.

(2) Where the plaintiff in any suit sues for a debt and he or some one for him makes affidavit that such debt, is just, due and unpaid, and that the defendant has not within his knowledge property in his possession within this Territory subject to execution sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.

(3) Where the plaintiff has a judgment against the defendant in some court of this Territory and he or some one for him makes affidavit that the defendant has not within his knowledge property in his possession within this Territory subject to execution sufficient to satisfy such judgment."

The important amendment was made in 1931, when Chapter 121, which reads as follows, was passed:

"WRIT -- HOW OBTAINED -- BOND. In the cases mentioned in Subdivisions (1) and (2) of the preceding section, such garnishment writ shall issue out of the original suit; but before such writ shall issue the application and bond hereinafter provided for shall be filed in said cause.

In the case mentioned in Subdivision (3) of the preceding section the plaintiff in judgment, upon filing the application required by section 59-103 may either procure a writ of garnishment out of the original suit in which such judgment was entered or said plaintiff in judgment may file original action setting forth his claim against the defendant as in ordinary suits, exhibiting therewith a copy of his judgment, and in neither case shall any garnishment bond be required before the writ may issue: Provided, further, that it shall not be necessary to file any bond in garnishment in attachments suits where

a sufficient attachment bond providing for the protection of garnishees and defendants has been filed; but a writ of garnishment in such cases shall be issued by the Clerk upon the plaintiffs filing the proper application therefor, as provided by Section 59-103."

It is plain from the reading of this statute that it was the intention of the Legislature that under subdivisions (1) and (2) of the original law such garnishment writs were issued out of the original suit. In the third subdivision of the original statute, it was optional for the party applying for the writ to either procure a writ of garnishment out of the original suit in which such judgment was entered or he could file an original action setting forth his claim against the defendant as in ordinary suits.

In the 1955 amendment, which is Chapter 223 of the Laws of 1955, the Legislature specifically provided that for each civil or criminal case **docketed** the sum of $ 5.00 should be paid. Chapter 223 of the Laws of 1955 goes on to state that no other fees except the $ 5.00 for docketing any civil case shall be charged.

It is evident that the Legislature was aware of the exorbitant and irregular fees that were charged by justices of the peace all over the State of New Mexico as justice of the peace courts costs and constable and sheriff's fees. Some of the combined justices of the peace fees and constable fees which have been presented to this office show that as high as $ 35.00 in court costs and constable fees have been charged in a garnishment case where less than $ 100.00 was involved.

It is, therefore, the opinion of this office in answer to your first question that a charge of $ 5.00 is the only charge that a justice of the peace can make when a garnishment is asked for at the time of filing of the original action.

Your second question is: "What charge, if any, may a justice of the peace make when judgment has been entered and subsequent thereto a garnishment proceeding is filed?"

From the history of the garnishment statutes, as hereinbefore explained in answer to your first question, it is shown that when garnishment is sought in aid of execution that said garnishment proceedings is part of the original action, is, in other words, supplemental and auxiliary to the original proceeding, and therefore when filed in the original proceeding is docketed under the same number and the justice of the peace cannot charge more than the $ 5.00 which is provided for in Chapter 223, New Mexico Session Laws of 1955.

I find the following cases which support our interpretation of the statute in question:

In the case of Kelley v. Ryan, Clerk, 36 P. 478, the Supreme Court of Washington in a case where a judgment had been obtained and a writ of garnishment against one Williams was issued, the court refused to issue writ until the payment of $ 4.00 was made. The court granted the writ and an appeal was prosecuted. On the question of whether garnishment proceedings were auxiliary to the original cause and in affirming the District Court, the Supreme Court held that garnishment proceedings being auxiliary

to the original cause, mandamus will lie to compel the Clerk of the Superior Court to issue the writ without further payment of fees than that required by the Laws of 1893, Chapter 130, Section 2, providing that the fees to be paid by a party when he files the first papers in a cause shall be in full for all services of the clerk down to and including the entry, collection, and satisfaction of the final judgment, except for certain services prescribed therein. The court went on to say:

"If a proceding in garnishment under this act is an independent action or proceeding, a grave question would arise, as to whether it is not unconstitutional, in failing to specifically provide for a notice to the principal defendant. If it be but a proceeding in the original action, it may be that the defendant would be bound to take notice thereof, and would be held to have had notice of all proceedings therein prior to the satisfaction of the judgment obtained against him. The act should receive such a construction as will allow it to be sustained, under the constitution, if possible. The fact that the garnishment case is to be separately docketed is not incompatible with a legislative intention that it should be a proceeding in the original action. It may retain the same number as the original action. It can well be held to be but a step or proceeding instituted in an action pending, or, if brought after judgment, only one of the steps or proceedings to which resort may be had to enforce the collection of that judgment. It is inseparably connected with the result of the pending action, and, if the original action has been concluded to judgment, then it is limited by that judgment."

See also cases of Cole v. Utah Sugar Co., et al, 99 P. 681; Loewe v. Savings Bank of Danbury, 236 F. 444; Zimek v. Illinois Nat. Casualty Co., 19 NE 2d 620; State ex rel. Pioneer Mining and Ditch Co. v. Superior Court for King County, et al, 183 P. 74; Gillman v. Gray, et al, 1 P. 2d 318; Thorson v. Weimer, et al, (Fillmore Equity Elevator Co., Garnishee), 230 NW 596; Jones v. National Bank of Commerce of El Dorado, et al, 157 F.2d 214.

Our own Supreme Court in the case of Mayo v. George, 31 N.M. 593, in which rehearing was denied, held that garnishment is an auxiliary remedy and falls with the main action. See also annotation in 39 A.L.R., at page 1491, Section 13.

In view of the above quoted authorities and the statutory interpretation from the history of the garnishment statutes and the intention of the Legislature as construed, it is the opinion of this office that no additional charge of any kind can be made by a justice of the peace when a judgment has been entered for a debt, as the garnishment is merely auxiliary to the original action and the original $ 5.00 allowed under Chapter 223, New Mexico Session Laws of 1955, is the only charge that he can make for court costs and no others.

Trusting that this fully answers your inquiry, I remain

By Hilario Rubio

Assistant Attorney General