

## Opinion No. 57-212

August 26, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Hon. Norman Hodges, District Attorney, Sixth Judicial District, Silver City, New Mexico

### QUESTION

#### QUESTIONS

1. Where the debt sued on is for the necessities of life, is a judgment debtor entitled to an exemption of \$ 500.00 out of current wages in a garnishment action by virtue of Section 24-6-7?
2. Where the debt sued on is for the necessities of life, is a judgment debtor entitled to an exemption of 80 of the first \$ 75.00 (being \$ 60.00) of the earnings of the debtor for the thirty (30) days next prior to the service of the writ of garnishment by virtue of Section 24-6-7?
3. Where the debt sued on is not for the necessities of life, is a judgment debtor entitled to an exemption of \$ 500.00 out of current wages in a garnishment action by virtue of Section 24-6-7?
4. Where the debt sued on is not for the necessities of life, is a judgment debtor entitled to an exemption out of current wages by virtue of Section 24-6-7? If so, what exemption is allowable?
5. Where the debt sued on is not for the necessities of life, is a judgment debtor entitled to an exemption of \$ 80.00 of the first \$ 100.00 of wages (for the last 30 days' service), by virtue of Section 26-2-27?
6. Where the debt sued on is for the necessities of life, is a judgment debtor entitled to an exemption of \$ 80.00 of the first \$ 100.00 of wages (for the last 30 days' service) by virtue of Section 26-2-27?
7. Assume that a man earns approximately \$ 240.00 per month, but is paid at the rate of \$ 60.00 each week and is sued in a garnishment action for a debt incurred for the necessities of life. His wages for the 30 days next prior to the service of the writ of garnishment amount to \$ 240.00, \$ 180 of which he has already collected.

Has the exemption of \$ 60.00 (80% of the first \$ 75.00 of the earnings for the 30 days prior to the service of the writ of garnishment) already been collected by the judgment

debtor? In other words, is the judgment debtor's exemption restricted to the first \$ 60.00 of wages earned during a 30 day period prior to the service of the writ of garnishment by virtue of Section 24-6-7?

8. Assuming that a man earns approximately \$ 320.00 per month, but is paid at the rate of \$ 160.00 every two weeks and is sued in a garnishment action for a debt not incurred for the necessities of life, and that his wages for the 30 days next prior to the service of the writ of garnishment amount to \$ 320.00, \$ 160.00 of which he has already collected:

(a) Under Section 26-2-27, are the wages or salary of the judgment debtor for the last 30 days service to be counted back from the date of service of the writ of garnishment?

(b) Under Section 26-2-27, has the judgment debtor's exemption of \$ 80.00 already been collected by the judgment debtor? In other words, is the judgment debtor's exemption restricted to \$ 80.00 of the first \$ 100.00 of wages earned during a 30 day period prior to the service of the writ of garnishment by virtue of Section 26-2-27?

9. Assuming that the answer to either question 1 or question 3 is in the affirmative, and that a judgment debtor earns \$ 500.00 per month, being paid \$ 250.00 on the 10th and 25th of each month, and is sued in garnishment; and, assuming further that writs of garnishment, together with claims of exemption, are filed on the 10th day and the 25th day of a certain month; and assuming further that on the 10th day of the next succeeding month another writ of garnishment is served; Has the judgment debtor's exemption of \$ 500.00 out of current wages been exhausted, thereby entitling the judgment creditor to recover his judgment?

10. Are the following notes (following Section 26-2-27), prepared by the compiler, correct statements of the holding in *Hewatt v. Clark* (1940) 44 N.M. 453? "Exemptions. -  
- The \$ 500.00 exemption in lieu of homestead may be claimed out of current wages which have been garnished . . . *Hewatt v. Clark* . . . . "Even though a debt was for the necessities of life, wages are exempt from garnishment whether or not in excess of seventy-five dollars per month, when legally claimed in lieu of a homestead . . . *Hewatt v. Clark*. . . ."

## CONCLUSIONS

1. No.
2. Yes.
3. Yes.
4. See Opinion.
5. Yes.

6. No.
7. Yes.
8. Yes.
9. See Opinion.
10. No.

## **OPINION**

### ANALYSIS

This office wishes to depart from the usual function of an Attorney General's Opinion and remark at the outset that your inquiry has presented a situation calling for corrective and clarifying legislation covering the entire field of exemptions in garnishment, a problem which has been a vexing one for many years.

Prior to answering your questions in numerical order, it is well to turn to the statutes and decisions which bear upon the subject.

The exemption statute in its present form is compiled as Section 24-6-7, N.M.S.A., 1953 Compilation, as follows:

"Any resident of this state, who is the head of a family and not the owner of a homestead, may hold exempt from levy and sale, real or personal property, to be selected by such person, his agent or attorney, at any time before sale not exceeding five hundred dollars (\$ 500) in value in addition to the amount of chattel property otherwise by law exempted; Provided, however, that no exemption other than eighty per cent (80%) of the first seventy-five dollars (\$ 75.00) of the earnings of the debtor for the thirty (30) days next prior to the service of writ of garnishment shall be allowed under the provisions of this section where the debt sued on was incurred for the necessities of life furnished the debtor or his family, or for manual labor."

We note at the outset that the proviso was not added until 1937, being enacted as Laws 1937, Chapter 90, Section 1.

On the other hand, the garnishment statute with which we are concerned, Section 26-2-27, N.M.S.A., 1953 Compilation, 1957 Supplement, is as follows:

"No person shall be charged as garnishee, in any court in this state, on account of current wages, or salary due, from him to a defendant, in his employ, for more than twenty per cent (20%) of any wages or salary due such defendant for the last thirty (30) days' service, unless the wages or salary due said defendant exceeds one hundred dollars (\$ 100) per month, garnishment may be had for twenty per cent (20%) of one

hundred dollars (\$ 100), of such wages and salary and, in addition thereto, for full amount of the excess of such wages or salary above one hundred dollars (\$ 100). No exemption whatever shall be claimed, under the provisions of this section, where the debt was incurred for necessities of life, or for any debt, in either of the following, cases: in case the debtor is not the head of a family, or in case the debtor is the head of a family, where the family does not reside in this state."

Historically, both statutes have in one form or another, existed for many years. As above noted, the proviso to the exemption statute was added in 1937. The garnishment statute was amended in 1957 by Laws 1957, Chapter 125, Section 1, changing \$ 75.00 to \$ 100.00. Turning to the title to Chapter 125, we find that no mention was made of the companion statute, i.e., Section 24-6-7, supra. In short, no action was taken by the Twenty-Third Legislature to alleviate this whole difficulty.

In 1927, there was rendered the decision in *McFadden vs. Murray*, 32 N.M. 361, 257 P. 999. There the Court was considering a debt which was **not** incurred for the necessities of life, and it was held that the \$ 500 exemption in lieu of homestead may be claimed out of current wages which had been garnished, notwithstanding the garnishment statute's exemption of a much smaller sum. The Court reasoned that garnishment is not a device by which exempt property may be reached, and that exemption statutes are to be liberally construed in favor of debtors.

After a lapse of eight years our Court, in 1935, decided *Dowling-Moody Co. vs. Hyatt*, 39 N.M. 401, 48 P.2d 776, where the debt was incurred for the necessities of life. The result, however, was the same, the Court reasoning that the fact that the debt was for the necessities of life gave the creditor no greater right than it gave him to garnish 20% of the wages, or the excess over \$ 75.00 per month.

Both the foregoing decisions were rendered prior to the existence of the proviso now in Section 24-6-7, supra.

*Hewatt vs. Clark*, 44 N.M. 453, 103 P.2d 646, was decided in 1940. At the outset it should be observed that this case did **not** involve a garnishment action. Instead the plaintiff obtained judgment in a justice of the peace court upon an account for the necessities of life, and attempted to satisfy his judgment by means of execution upon an automobile owned by the defendant. Plaintiff-Appellee contended that the effect of the proviso in what is now Section 24-6-7, supra, supported the district court's conclusion that for **debts incurred for necessities of life**, the \$ 500.00 exemption in lieu of homestead no longer existed. In other words, it was appellee's contention that the 1937 proviso did away with the \$ 500.00 exemption for all purposes. This was denied by the Supreme Court (which allowed the \$ 500.00 exemption in this case) which, however, stated that the 1937 proviso had the effect only of limiting the right of exemption of the earnings of the debtor where such earnings are sought to be reached by means of garnishment. In other words, the only effect of the 1937 proviso is to remove the \$ 500.00 exemption in garnishment actions where the debt is for necessities of life, or

manual labor. Of course, this is precisely the legislative solution of the problems pointed out by the Supreme Court in the two prior cases above cited.

We do not reach this decision without some hesitation, inasmuch as we are aware of the fact that a certain portion of the Bar has always taken *Hewatt vs. Clark* to be authority for the principle that the \$ 500.00 exemption may be claimed in garnishment actions. Nevertheless, in view of the facts and the holding in such case, we can only hold that the \$ 500.00 exemption cannot be claimed in garnishment actions where the debt sued on was incurred for the necessities of life furnished the debtor or to his family or was for manual labor. If, however, the debt sued on in the garnishment action was **not** incurred for the necessities of life, or was **not** for manual labor, then by the very terms of the proviso itself the \$ 500.00 exemption still could be claimed.

To the extent above set forth, *Hewatt vs. Clark* must be limited.

Your first question is answered in the negative.

Your second question poses quite a problem. Under Section 24-6-7, *supra*, the percentage exemption is 80% of the first \$ 75.00 (\$ 60.00), but under Section 26-2-27 the percentage exemption is, after amendment by Laws 1957, Chapter 125, 80% of \$ 100.00 (\$ 80.00). However, we can only construe Section 24-6-7 as we find it, unamended by Laws 1957, Chapter 125, and answer your question in the affirmative.

Your third question is answered in the affirmative since the proviso in Section 24-6-7 is not called in to play where the debt is **not** for the necessities of life.

Since your fourth question assumes that the debt is **not** for the necessities of life, it is answered by our holding that a judgment debtor is entitled to the following exemptions out of current wages by virtue of Section 24-6-7, which are: \$ 500.00 as the in lieu exemption, and \$ 60.00 as the percentage exemption, or a total exemption of \$ 560.00.

We turn to Section 26-2-27 to answer your fifth question. We hold that under this section where the debt is **not** for the necessities of life that the \$ 80.00 is exempt as outlined by you. But your sixth question is answered in the negative since Section 26-2-27 denies **all** exemptions under its provisions where the debt **was for** the necessities of life.

The answer to your seventh question is in the affirmative, since the statute exempts, by express terms, the **first** \$ 60.00 of earnings during the 30 day period prior to service of the writ of garnishment. In other words, the \$ 60.00 has already been collected, and a contrary holding would be to allow a double or \$ 120.00 exemption during said 30 days, which is clearly not intended, the policy of liberal construction of exemption statutes, as set forth in the above three cited cases, to the contrary, notwithstanding.

We answer your eighth question in the affirmative. While Section 26-2-27 does not, in express terms, restrict the \$ 80.00 exemption to the **first** \$ 80.00 earned in the 30 day

period, to hold otherwise is to reach the objectionable result pointed out in answering your seventh question, e.g., a double exemption. Bearing in mind that the policy under Section 26-2-27 is to give a man \$ 80.00 a month, however inadequate such may be in this day and time, and that such \$ 80.00 has already been collected by the debtor-wage earner, it is thus seen that the statutory policy has been satisfied.

You will recall that the answer to your first question was in the negative, whereas the answer to your third question was in the affirmative. Now, in assuming that the answer to either question 1 or question 3 is in the affirmative, as you suggest in your ninth question, we turn to an analysis of the problem presented by your 9th question. Again, it should be pointed out that where the debt is for the necessities of life or for manual labor, then only the percentage exemption under Section 24-6-7 may be claimed. However, where the debt is not for manual labor or necessities of life, then the \$ 500.00 exemption would be claimable. In respect to the latter situation, since at the time of the service of the **second** writ of garnishment, only a total of \$ 500.00 has been previously paid to the debtor, thus exhausting the in lieu exemption, the plaintiff is still faced with the percentage exemption to the debtor, since there is no policy in the law which prohibits claiming both types of exemptions.

The headnotes quoted by you under Section 26-2-27 (appearing in the permanent part of the volumes) do not correctly reflect the holding and result of *Hewatt vs. Clark*, since that case did not involve a garnishment action. Again let us say that the \$ 500.00 exemption in lieu of homestead may only be claimed in a garnishment action where the debt is not for the necessities of life or is not for manual labor. For the same reason the second annotation or headnote relative to *Hewatt vs. Clark* is also erroneous.