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# Necessaries—Common or Otherwise

By LELAND F. SEID\*

SECTION 690 of the Code of Civil Procedure of the state of California introduces the subject of property exempt from execution or attachment,<sup>1</sup> stating:

The property mentioned in sections 690.1 to 690.25, inclusive, this code, is exempt from execution or attachment, except as therein otherwise specially provided, when claim for exemption is made to the same by the judgment debtor or defendant as hereinafter in section 690.26 provided.

Code of Civil Procedure section 690.11 discusses earnings as one item of exempt property:

One-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30 days next preceding the levy of attachment or execution shall be exempt from execution or attachment without filing a claim for exemption as provided in section 690.26.

All of such earnings, if necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) incurred by such debtor, his wife or family, for the common necessities of life; or (b) incurred for services rendered by any employee, or former employee, of such debtor.

## *Legislative History*

Code of Civil Procedure section 690.11 is derived from one of the original sub-sections of section 690, enacted in 1872,<sup>2</sup> which provided for the exemption of:

the earnings of the judgment debtor for his personal services, rendered at any time within thirty days next preceding the levy of execution, or levy of attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this State, supported wholly or in part by his labor.

This above-quoted sub-section extended the possibility of exemption from execution or attachment of all the earnings of the debtor for

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<sup>1</sup> Statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Am. & Eng. Ann. Cas. 88, 69 L.R.A. 67 (1905).

<sup>2</sup> 1871-2 Stats., p. 864.

services rendered within 30 days prior to the levy. However, it left the burden of proof as to the exemption with the defendant or judgment debtor. It required a showing that he had a family residing in this state, supported wholly or in part by his labor, and it left him the burden of showing that all of such earnings were necessary for the use of his family.

The Code of Civil Procedure Amendment of 1875-76<sup>3</sup> introduced the distinguishing concept of the *common necessities of life*, adding:

but where debts are incurred by any such person, or his wife or family, for the common necessities of life, the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment to satisfy debts so incurred.

This still only gave protection to a defendant or judgment debtor with a family residing in this state. It took away the possibility of a complete exemption if he, his wife, or other member of his family, incurred a debt for the "common necessities of life." In such a case he was required to show one-half of his earnings to be necessary for current needs, in which case only that one-half would be exempt; while in the case of a debt for other than common necessities, if he could show that all of the earnings were necessary for current needs, an exemption of both halves of the earnings was allowable. This system as to the burden of proof remained essentially unchanged until the 1955 Amendment.

In the present form of the statute, which dates from 1955, if any defendant or judgment debtor has earnings regardless of the nature of the debt, and regardless of whether or not he has a family residing in the state, one-half of his earnings for services rendered 30 days preceding the levy of attachment or execution are exempt. However, if the debt is for common necessities incurred by the debtor, or his wife, or other member of his family, or if the debtor has no family, or if there is a family but they are out of state, there is no further exemption allowed. But if the debt is for other than the common necessities of life, and if there is a family and such family is in the state of California, and if the defendant or judgment debtor maintains the burden of showing his earnings to be necessary for the current needs of the family, then an exemption may lie for the full amount (or at least for the amount necessary for the family).<sup>4</sup>

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<sup>3</sup> Code Amdts. 1875-6, p. 94.

<sup>4</sup> It must be remembered that only earnings incurred 30 days preceding the levy are eligible for exemption. See *Le Font v. Rankin*, 167 Cal. App. 2d 433, 334 P.2d 608 (1959).

### ***Basis for and Extent of the Exemption***

The case of *Perfection Paint Products v. Johnson*<sup>5</sup> dealt with two problems: First, how to determine what is necessary for the use of the debtor's family, *viz*: what items can be listed on the claim of exemption, and secondly, what happens if it is ever determined that all of the earnings are not necessary for the use of the debtor's family? Mr. Justice Peters, then Presiding Judge of the First District, wrote the opinion of the court. He stated:<sup>6</sup>

The basic theory of such exemption is that a debtor and his family, regardless of the debtor's improvidence, will retain enough money to maintain a basic standard of living in order that the debtor may have a fair chance to remain a productive member of the community. The statute should be liberally construed in order to effectuate this purpose. But the burden of proof is upon the judgment debtor to establish his right to such an exemption. In determining whether the debtor has met this burden of proof the trial court is necessarily vested with wide discretion. This is so because the determination of what is "necessary for the use of the debtor's family" is not subject to precise definition, and differs with each debtor. Thus, the determination must be largely left to the discretion of the trial court.

Then noting that the trial court had found that the debtor did not meet the burden of proof as to \$38.00 of his earnings, that amount was held to be subject to execution.

*Sanker v. Humborg*<sup>7</sup> discussed in somewhat more detail the definition of necessities, listing prior cases on the subject. It cites and approves the old case of *Evans v. Noonan*,<sup>8</sup> and cites and approves such applications of the rule as:

- 1) Proper medical attention
- 2) Domestic services
- 3) Services of a nurse
- 4) A fur coat costing \$372.50
- 5) Dental services
- 6) Legal services rendered an incompetent wife in restoring her to competency.

*Sanker v. Humborg* goes on to uphold the trial court in allowing \$5.00 for miscellaneous expenses and recreation, \$5.00 a month for music lessons for the child, and \$4.50 for insurance for wife and child.

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<sup>5</sup> 164 Cal. App. 2d 739, 330 P.2d 829 (1958).

<sup>6</sup> *Id.* at 741, 330 P.2d at 830-31.

<sup>7</sup> 48 Cal. App. 2d 205, 119 P.2d 433 (1941).

<sup>8</sup> 20 Cal. App. 288, 128 Pac. 794 (1912).

### *Common Necessaries of Life*

*Los Angeles Finance Company v. Flores*<sup>9</sup> involved the problem of defining *common necessities of life*.<sup>10</sup> The debt was for a gold wrist watch at the price of \$73.77 sold to the defendant's wife for presentation to the defendant as a birthday gift. However, before litigating the substantive liability of whether this was an article "necessary for her support," plaintiff caused an attachment to be levied on all of defendant's earnings. Since this was prior to the 1955 Amendment of section 690.11 there was no automatic exemption as to the first one-half of the earnings. Nevertheless, the trial court did allow the claim for the first half of the earnings, but for that one-half only. The court had to construe section 690.11 as it then stood. However, the second paragraph—the matter at issue—was the same prior to the 1955 Amendment as it is now. It was stipulated by counsel that if the claim (of plaintiff) was determined to be not for the common necessities of life, that the exemption would lie and be granted in full.

The court noted that the word "necessary" was used many times in the exemption section of the Code of Civil Procedure,<sup>11</sup> while the exact phrase "common necessities of life" was used only three times,<sup>12</sup> and only in those provisions which limit the *type of debt* for which property of the debtor, otherwise exempt, may nevertheless be levied upon. The court, overruling a prior case before it,<sup>13</sup> distinguished, on the one hand, the phrase "necessary wearing apparel" as used in Code of Civil Procedure section 690.2, as meaning necessary to the particular debtor considering all the circumstances—his station in life and his particular type of employment—from, on the other hand, "common necessities of life" as used in section 690.11, as meaning those things which are commonly required for the sustenance of life, *regardless* of either employment or status. The court went on to state:<sup>14</sup>

A tuxedo may be necessary wearing apparel to a waiter at a top-notch café, but not to a laborer who has never attended a type of dinner or other gathering where tuxedos are customarily worn; and under no circumstances could it be called a "common necessary of life." The determination of whether or not a certain article is exempted in the hands of a debtor under the term "necessary wearing apparel" involves a determination of whether or not under all the circumstances *that*

<sup>9</sup> 110 Cal. App. 2d Supp. 850, 243 P.2d 139 (App. Dept., Super. Ct., Los Angeles, 1952).

<sup>10</sup> In both the prior cases, the nature of the debt was not in issue. Here, as we shall see, that is the whole issue.

<sup>11</sup> *E.g.*, CAL. CODE CIV. PROC. §§ 690.2, 690.4.

<sup>12</sup> CAL. CODE CIV. PROC. §§ 690.10, 690.11, 690.20.

<sup>13</sup> *So. Cal. Merchants Assn. v. Thomasen*, (1931) Civ. A. 383.

<sup>14</sup> 110 Cal. App. 2d Supp. at 856, 243 P.2d at 143-44.

*article* is necessary to be worn by *that debtor*; on the other hand, the decision of whether or not a certain article previously sold to a debtor is a common necessary of life so that *one-half of the debtor's earnings* of the past 30 days, elsewhere exempted by the statute for the support of his family, shall nevertheless be taken to pay for *it*, involves a determination of whether or not it is such an article that *in the hands of anyone* it is to be regarded universally, or substantially so, as necessary to sustain life. Obviously, the Legislature, cognizant of the fact that to the great majority of persons supporting a family the earnings of the past 30 days are required for such basic things as food, heat, shelter, etc. (*common* to all) desired to make sure that these earnings shall not be taken to pay for something less basic.

Thus, the debt for Mr. Flores' watch is not a debt for a common necessary of life; and in case Mr. Flores had a debt for a tuxedo, that similarly would not be a debt for a common necessary of life.

It so happened that on the facts as given, the debt for Mr. Flores' watch may not have been a debt for any kind of necessary,<sup>16</sup> nor does it appear from the facts as given that a tuxedo would have been any kind of necessary. But these latter considerations do not bear on the possibility of Mr. Flores' listing them as items of current needs on a claim of exemption; for, in the items for the claim of exemption, we consider not the nature of the *debt*, but the nature of the *debtor*.

If Mr. Flores had happened to be a waiter, then payments on a debt for the purchase of a tuxedo (although still not a debt for a common necessary of life) would be a possible item to list on a claim of exemption. Similarly, if Mr. Flores had happened to be a time-keeper, then the debt for the purchase of a watch (and probably even a gold watch) would be a permissible item to list on a claim of exemption. But Mr. Flores, as we have knowledge of him (or lack of knowledge), could list neither debt for tuxedo, nor debt for watch, on his list of current needs for claim of exemption.

For one concerned with seeing a liberal interpretation of exemption statutes, the trouble with the doctrine of *Los Angeles Finance Company v. Flores* does not lie with the results of this case or a case with the same or similar facts where the nature of the debt is such that consideration may be given to the situation of the debtor, his income, number of dependents and current obligations. The difficulty is limited to the residue of cases wherein the debt is of such a nature,

<sup>16</sup> The court stated ". . . that the defendant had never owned a watch other than this one nor had any necessity for one; that he had no need for a watch in his work and had never worn this one at his place of employment except upon one occasion, and at that time accidentally broke the face thereof and had never had it repaired; and he concluded that it was not practical to wear a wrist watch in his particular work." 110 Cal. App. 2d at 851, 243 P.2d at 140.

or the debtor is without dependents residing within the state, so that as to the one-half of the debtor's earnings, other than the one-half automatically exempt, no consideration may be given to the debtor's circumstances—neither to his occupation, nor his earning level, nor even to the number of his dependents.

Should any creditor take precedence over the current needs of the debtor's children? Or is it that the difficulty is tied to the lack of legislative clarity as to the meaning of common necessities? Should we perhaps specifically enumerate, just as an example, the landlord, the corner grocer, the family physician who treats an emergency, the family dentist who remedies an emergency, the family attorney who secures child support?<sup>16</sup>

By distinguishing the nature of the debt, the California statute in effect sets up a priority as to creditors. As for the one-half of the debtor's earnings which are automatically exempt from garnishment, we need not concern ourselves; however, for the other one-half of the salary of the defendant or judgment debtor we have the following set of priorities-debts:

- 1) Common necessities
- 2) Current needs
- 3) Other debts.

If the wage earner finds his family in the situation where debts for common necessities take priority over his family's current needs for one-half his salary, he may very well find himself in a situation where he cannot meet those current needs with the other half left. He may be left with bankruptcy as the only alternative short of quitting his job, if he hasn't already been fired as a result of the garnishment, and separating himself from his family for 90 days or more, so that they can qualify for Aid to Needy Children.<sup>17</sup>

### ***Comparative Exemption Statutes***

There is no conformity in American jurisdiction as to the laws governing exemption of earnings from attachment or execution. The laws are about as individual as snowflakes. A detailed survey is far beyond the scope of this article. But a rather grossly over-simplified classification is instructive as to the range of variation of the statutes

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<sup>16</sup> As to the family attorney who secures child support, see *Henry v. Henry*, 182 Cal. App. 2d 707, 6 Cal. Rptr. 418 (1960), *overruling* *Lentfoehr v. Lentfoehr*, 134 Cal. App. 2d Supp. 905, 286 P.2d 1019 (App. Dept., Super. Ct., Los Angeles, 1955).

<sup>17</sup> If his wife chooses to file for divorce or separate maintenance, she can lessen the waiting period. Assistance to intact families who need income maintenance is only from County General Relief funds and is often minimal, or even non-existent.

of several states. The idea of distinguishing as to the nature of the debt, in determining the basis for exemption of part or all of the wages, appears only in a very small number of jurisdictions. Evidently, only California, Idaho,<sup>18</sup> Montana,<sup>19</sup> Nebraska,<sup>20</sup> Nevada,<sup>21</sup> and Oregon<sup>22</sup> consider the nature of the debt in determining the right to a claim of exemption. The distinction was recently abolished in New Mexico.<sup>23</sup> The special terminology, "common necessities of life," appears only in the laws of California, Nevada, and Montana. Elsewhere, probably the more common pattern of exemption is either a fixed amount or a fixed percentage of the defendant or judgment debtor's earnings.<sup>24</sup> Many other jurisdictions allow for a fixed amount or a fixed percentage to be exempt only if the defendant or judgment debtor is the head of a family.<sup>25</sup> The state of Florida, however, allows a complete exemption for the head of a family.<sup>26</sup> A few other states

<sup>18</sup> IDAHO CODE 1947, § 11-205(7): Allowing 75% of earnings to be exempt if necessary for use of family in the State, but no exemption over 50% if for "actual necessities."

<sup>19</sup> MONT. REV. CODE § 93-5816 (1947): Allowing the possibility of complete exemption, if it is shown that the earnings are necessary for the use of the debtor's family; but where debts are incurred by such person, or his wife, or family, for *gasoline* and for the *common necessities*, one-half of the earnings are subject to exemption.

<sup>20</sup> NEB. REV. STAT. §§ 25-1557, 1558 (1943): Wages of heads of families may be exempt to 90%, but nothing in the Chapter to be construed to exempt property of the value of more than \$500.00 for debts contracted by a person in the purchase of actual necessities for himself and his family.

<sup>21</sup> NEV. REV. STAT. § 21.100(h) (1957): The earnings of the judgment debtor for his personal services rendered at any time within 30 days next preceding the levy of execution or attachment where it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the care of his family, residing in the State, supported in whole, or in part by his labor. But where debts are incurred by any such person, or his wife, or family, for the common necessities of life, or have been incurred when the debtor had no family residing in this State, supported in whole, or in part by his labor, the one-half of such earnings above mentioned, is nevertheless subject to execution, garnishment, or attachment to satisfy debts so incurred.

<sup>22</sup> OR. REV. STAT. § 23.180 (1961): Earnings up to \$175.00 are exempt if necessary for family, but if debt is for *family expenses*, then 50% of earnings are subject to execution.

<sup>23</sup> N. M. STAT. § 26-2-27 (1953) as amended by Ch. 8, Laws 1961 § 1. Now only 25% of earnings can be garnished (20% if wages under \$100.00) unless the debtor is not the head of a family, or not the head of a family in the State. Previously, there was no such exemption if the debt was for necessities.

<sup>24</sup> *E.g.*, ILL. REV. STAT. ch. 62 § 73 (1961): Either \$45.00 per week or 5%, whichever is greater, is exempt and \$200.00 per week is the maximum that can be garnished. N. Y. CIV. PRAC. ACT ch. 684: It is possible to execute only on 10% of earnings and the earnings must be more than \$25.00 or \$30.00 a week (depending on the size of the city wherein the debtor resides). These exemptions in Illinois and New York apply regardless of marital status or size of family.

<sup>25</sup> WASH. REV. CODE § 7.32.280 (1956): Current wages up to \$20.00 per week are exempt if there are family dependents.

<sup>26</sup> FLA. STAT. § 222.11 (1961). See *Noland Co. v. Linning*, 132 So.2d 802 (Fla. 1961) which put the burden of proof on the creditor to affirmatively aver that the garnishee is not exempt under the statutes.

allow one percentage, or one amount, of exemption for a single person, and another percentage, or another amount, for the head of a family.<sup>27</sup>

Alaska,<sup>28</sup> Arizona,<sup>29</sup> and Kansas<sup>30</sup> allow a fixed amount or a fixed percentage to be exempt upon a showing that such amount or percentage is necessary for the defendant or judgment debtor's family. The state of South Carolina allows a complete exemption of wages earned within 60 days upon showing that the money is necessary for the use of the family.<sup>31</sup>

Three states specifically set up a scale for exemption to depend on the number of dependents. In Iowa the resident head of a family is allowed an exemption of \$35.00 a week plus \$3.00 a week for each dependent under eighteen, but no creditor can garnish for more than the amount of \$150.00, plus costs.<sup>32</sup> In Tennessee a single person is allowed \$30.00 exemption; the head of a family is allowed \$60.00 exemption and \$5.00 for a child and each additional child.<sup>33</sup> An even more complicated system holds in the state of Wisconsin.<sup>34</sup>

As implied above, the great majority of jurisdictions allow garnishment of wages either under a levy of attachment before judgment, or under a levy of execution after judgment. In the state of Pennsylvania,<sup>35</sup> on the other hand, all wages in the hands of the employer are exempt except for debts of under \$100.00. In Texas all current wages are now exempt.<sup>36</sup> In Massachusetts<sup>37</sup> and New Hampshire<sup>38</sup> garnishment is possible only under the procedure of the trustee process.

The Connecticut procedure,<sup>39</sup> under which there is no garnishment in the form of attachment prior to judgment, is worthy of special

<sup>27</sup> *E.g.*, OHIO REV. CODE §§ 2329.62, 2326.66 (1953).

<sup>28</sup> ALASKA COMP. L. § 55-9-78 (Cum. Supp. 1958).

<sup>29</sup> ARIZ. REV. STAT. § 12:1594 (1957): The amount is one-half.

<sup>30</sup> KAN. G. S. 1949, 60-3495.

<sup>31</sup> CODE OF LAWS OF SOUTH CAROLINA § 10-1731 (1952). The judge, in applying property to execution in his discretion, may order not more than 15% of salary to apply to judgments for *food, fuel, or medicine*. The judge must take into special consideration the needs of the debtor's family, as well as the rights of the creditors. The section shall not apply to judgments in excess of \$100.00.

<sup>32</sup> IOWA CODE § 627-10 (1957).

<sup>33</sup> TENN. CODE §§ 26-207, 208, 209 (1955).

<sup>34</sup> WIS. STAT. § 272.18(15) (1958): Allows a basic exemption of 60% but not less than \$75.00, nor more than \$100.00 for each 30-day period. You then add \$20.00 per each dependent, up to a maximum of 85% of the monies.

<sup>35</sup> PA. STAT. tit. 42 § 886 (1930).

<sup>36</sup> TEX. CIV. STAT. art. 4099 (1960), TEX. CONST. art. 16, § 28. See *Smith v. Oak Cliff Bank & Trust*, 99 S.W.2d 1103 (Tex. Civ. App. 1936) applying these provisions to current wages when they are uncollected.

<sup>37</sup> MASS. GEN. LAWS ch. 246 § 28 (1960).

<sup>38</sup> N. H. REV. STAT. 512:21 (1955).

<sup>39</sup> CONN. GEN. STAT. REV. § 52-361 (1958) as amended by 1961 PA. 264, S.8.

attention. The court, after entry of judgment, as either a part of the final judgment or a part of the supplementary judgment, may make the necessary orders for payments to be made by the defendant to the Clerk of the Court, or in any other manner as the court may determine, and the money may be disbursed by the Clerk of the Court to the judgment creditors. "In fixing the amounts to be paid and the manner of payment, the court may take into consideration the circumstances of the defendant, including any other actions pending, or judgments outstanding against him, the amount of the defendant's income, and the amount of the claim or demand." Upon necessary notice and proof of change of circumstances, the order may be changed or set aside. Upon a showing of the defendant's failure to comply with the court order, garnishment may be directed, although \$25.00 of the defendant's weekly earnings remain exempt even in case garnishment is ordered.

### ***Conclusion***

In conclusion, the California law follows the great majority of American jurisdictions in allowing garnishment of wages both under a levy of attachment prior to judgment and under a levy of execution after judgment has been entered. The California law follows a not uncommon pattern in allowing one-half of the earnings of the defendant or judgment debtor, rendered for his personal services at any time within 30 days next preceding the levy, to be automatically exempt. As to the other one-half of the defendant or judgment debtor's earnings, a claim for exemption will lie if the showing is made that all of the earnings are necessary to meet the current needs of the defendant's family residing in the state of California. But if the defendant or judgment debtor has no family residing in the state, or if the debt is incurred for personal services rendered by any employee or former employee of such debtor, *or* if the debt is incurred by such debtor, his wife, or his family for the common necessities of life, there is no exemption beyond the automatic exemption of one-half of the earnings.

The concept of a debt for common necessities of life as set forth and defined in the admirably liberal case of *Los Angeles Finance Company v. Flores* not only places California within a slim minority of jurisdictions wherein the nature of the debt has bearing on the eligibility for exemption from garnishment, but further refines the distinction. The possibility of extending protection to current wages of wage earners with families in California, under the authority of Code of Civil Procedure section 690.11, is so interpreted as to give

full priority to all the current needs of the wage earner only if the debts are not for the common necessities.

When the debt is for the common necessities, whatever current needs can be met out of the one-half of the debtor's salary automatically exempt, of course take priority—but whatever current needs cannot be met out of that one-half are just not going to be met regardless of how small the debtor's salary may be and regardless of how many dependents he may have. The debtor thus is left under California law with the burden of: 1) facing garnishment in the form of attachment prior to the judgment, 2) the burden of proving the debt is not for the common necessities of life, 3) and even if the debt is not for the common necessities of life, the burden of proving he needs all of his salary for his family.

Obviously, if these burdens are too great, the judgment debtor still has open to him the alternative of bankruptcy. But, for every such debtor (and perhaps the number is already too great) who seeks the remedy of bankruptcy, how many are there who follow the path of separation and family break-up, leaving children economically and emotionally deprived instead of being members of a cohesive and self-supporting family?