



12-1-1969

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Recommended Citation

Karen J. Ruble, *In Construing Sufficient Cause of Texas Rule of Civil Procedure 329b(5), the Requisites for Equitable Relief in a Garnishment Default Judgment Are (1) A Meritorious Defense, (2) Lack of Fault by Garnishee in Failing to Answer, (3) and Fraud or Wrongful Act of the Other Party in Preventing Garnishee from Defending the Action.*, 1 ST. MARY'S L.J. (1969).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol1/iss2/6>

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CASE NOTES

GARNISHMENT—EQUITABLE RELIEF FROM DEFAULT GARNISHMENT JUDGMENTS—IN CONSTRUING “SUFFICIENT CAUSE” OF TEXAS RULE OF CIVIL PROCEDURE 329b(5), THE REQUISITES FOR EQUITABLE RELIEF IN A GARNISHMENT DEFAULT JUDGMENT ARE (1) A MERITORIOUS DEFENSE, (2) LACK OF FAULT BY GARNISHEE IN FAILING TO ANSWER, (3) AND FRAUD OR WRONGFUL ACT OF THE OTHER PARTY IN PREVENTING GARNISHEE FROM DEFENDING THE ACTION. *Texas Machinery and Equipment Co. v. Gordon Knox Oil and Exploration Co.*, 442 S.W.2d 315 (Tex. Sup. 1969).

Respondent corporation, in a proceeding in the nature of a bill of review, sought relief from a default garnishment judgment taken by petitioner corporation. In 1962 a money judgment of \$11,080 was taken by petitioners against the defendant in the main suit in which respondent corporation was not a party. Unable to obtain satisfaction of its judgment, petitioners brought an ancillary garnishment proceeding in 1967 against respondent who allegedly owed money to the original defendant. Service was had upon the secretary-treasurer of the respondent corporation who noted on his copy of the writ that respondent did not owe the original defendant. President of respondent corporation was not informed of the writ until all other remedies for relief were unavailable. Because respondent failed to answer the garnishment writ, petitioners obtained a default judgment. Garnishee was granted relief in the district court. On appeal the court of civil appeals affirmed.¹ Held—*Reversed*. In construing “sufficient cause” of Texas Rule of Civil Procedure 329b(5),² the requisites for equitable relief in a garnishment default judgment are (1) a meritorious defense, (2) lack of fault by garnishee in failing to answer, (3) and fraud or wrongful act of the other party in preventing garnishee from defending the action.

A bill of review is an equitable proceeding,³ its prime objectives being to reverse a judgment after it has become final⁴ and to prevent a gross miscarriage of justice.⁵ The phrase “sufficient cause” has been

¹ *Texas Machinery & Equipment Co. v. Gordon Knox Oil & Exploration Co.*, 434 S.W.2d 182 (Tex. Civ. App.—Amarillo 1968, writ granted).

² Tex. R. Civ. P. 329b (5). “After the expiration of thirty (30) days from the date the judgment is rendered or motion for new trial overruled, the judgment cannot be set aside except by bill of review for sufficient cause, . . .”

³ *French v. Brown*, 424 S.W.2d 893 (Tex. Sup. 1967); *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. Sup. 1964); *American Spiritualist Ass’n v. City of Dallas*, 366 S.W.2d 97 (Tex. Civ. App.—Dallas 1963, no writ).

⁴ *American Spiritualist Ass’n v. City of Dallas*, 366 S.W.2d 97 (Tex. Civ. App.—Dallas 1963, no writ).

⁵ *French v. Brown*, 424 S.W.2d 893 (Tex. Sup. 1967); *Hanks v. Rosser*, 378 S.W.2d 31 (Tex.

interpreted many times by the courts of Texas. The often cited default judgment case of *Alexander v. Hagedorn*⁶ clearly sets out the qualifications for relief by bill of review. This case was neither the first nor the last case to state that, in order for a default judgment to be set aside by a bill of review, petitioner must allege and prove a meritorious defense to the cause of action supporting the judgment, that he was prevented from presenting by the fraud, accident or wrongful act of the opposite party, unmixed with any fault or negligence of his own, and that he exercised due diligence in overturning the cause.⁷

Generally, all of these elements must be present for a bill of review to be successful.⁸ An exception to this rule was the case of *Hanks v. Rosser*⁹ in which, through the fault of a clerk of the court, the defendant failed to answer. The Texas Supreme Court set the default judgment aside holding that "the failure to answer was not intentional or due to conscious indifference" and that the judgment creditor would not be unduly inconvenienced.¹⁰ Thus a new criterion was substituted in place of the requisite of proving extrinsic fraud of the opposite party. Later cases seem to indicate that this qualification was a peculiar incident and should not be considered as a modification of the *Hagedorn* rule in all cases.¹¹

The relief sought by the bill of review in the instant case concerns a garnishment proceeding. In Texas, garnishment is a purely statutory,¹² ancillary proceeding taking its jurisdiction from the main suit and cannot be separated from the primary suit.¹³ Garnishment has

Sup. 1964); *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961); *Perez v. Perez*, 427 S.W.2d 703 (Tex. Civ. App.—Waco 1968, no writ); *Kelly Moore Paint Co. v. Northeast National Bank of Fort Worth*, 426 S.W.2d 591 (Tex. Civ. App.—Forth Worth 1968, no writ).

⁶ 148 Tex. 565, 226 S.W.2d 966 (Tex. Sup. 1950).

⁷ *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 966 (Tex. Sup. 1950); see *Hanks v. Rosser*, 378 S.W.2d 31, 38-39 (dissent) for exhaustive listing of cases prior and subsequent to the *Hagedorn* holding. *Gracey v. West*, 422 S.W.2d 913 (Tex. Sup. 1968); *Armstrong v. Jacobs*, 439 S.W.2d 848 (Tex. Civ. App.—Dallas 1969, no writ); *Washington v. Golden State Mutual Life Insurance Company*, 436 S.W.2d 554 (Tex. Civ. App.—Houston 1968, writ ref'd n.r.e.); *Smith v. Brown & Root, Inc.*, 430 S.W.2d 549 (Tex. Civ. App.—Houston 1968, no writ); *Trinity River Authority of Texas v. McMurrey*, 411 S.W.2d 422 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.); *Powell v. State of Texas*, 410 S.W.2d 1 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); *Woods v. Gamboa*, 229 S.W.2d 1021 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.).

⁸ *Powell v. State of Texas*, 410 S.W.2d 1 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).

⁹ 378 S.W.2d 31 (Tex. Sup. 1964).

¹⁰ *Id.* at 35.

¹¹ *Gracey v. West*, 422 S.W.2d 913 (Tex. Sup. 1968); *Ivy v. Carrell*, 407 S.W.2d 212 (Tex. Sup. 1966), *dicta*.

¹² *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Snyder National Bank v. Pinkston*, 219 S.W.2d 606 (Tex. Civ. App.—Dallas 1949, no writ); *Smith v. Houston Nat. Exch. Bank*, 202 S.W. 181 (Tex. Civ. App.—Beaumont 1918, no writ).

¹³ *King & King v. Porter*, 113 Tex. 198, 252 S.W. 1022 (Tex. Sup. 1923); *Kelly v. Gibbs*, 84 Tex. 143, 19 S.W. 563 (1892); TEX. R. CIV. P. 657 and following pertaining to *ancillary proceedings*.

been described as a mode of enforcing execution,¹⁴ a process of attachment,¹⁵ and in the nature of a bill of discovery.¹⁶ The original meaning of the word "garnishment" comes from the French word "garnir", meaning to warn or give notice.¹⁷ As an inquisitorial process, a garnishment writ seeks to ascertain "facts on which to base liability, if any, of the garnishee, or to ascertain whether he has effects in his hands, or knows of anyone who has effects belonging to the debtor which may be reached and subjected to the payment of the garnishor's debt."¹⁸ In Texas, the writ creates a lien from the date of levy,¹⁹ but the proceedings impound only those debts owing by the garnishee to the defendants and those effects in the hands of the garnishee.²⁰

Being a harsh statutory remedy, garnishment will be construed strictly and against the one resorting to the remedy.²¹ The purpose of garnishment is to notify the garnishee that he must answer the questions propounded and to impound a debtor's assets and property. Garnishment is used when writs of execution and attachment cannot be used.²² The only issues that are to be determined in a garnishment action are whether the garnishee is indebted to the defendant in the main suit and to whom the garnishee shall pay the fund.²³ Being remedial in nature, garnishment pertains exclusively to the remedy and not to the right. A Texas case held that since garnishment pertained only to remedies, the suing out of a writ to enforce collection of a judgment was not equivalent to the institution of a suit to vindicate a right.²⁴

After the court acquires jurisdiction over the garnishee by the writ,

¹⁴ *Kelly v. Gibbs*, 84 Tex. 143, 19 S.W. 563 (1892); *New Amsterdam Casualty Co. v. Keith*, 260 S.W. 695 (Tex. Civ. App.—El Paso 1924), *rev'd on other grounds*, 273 S.W. 836.

¹⁵ *United States v. Liverpool & London & Globe Ins. Co.*, 209 F.2d 684 (5th Cir. 1953), *rev'd on other grounds*, 348 U.S. 215, 75 S. Ct. 247, 99 L. Ed. 268.

¹⁶ *Hanson v. Guardian Trust Co.*, 150 S.W.2d 465 (Tex. Civ. App.—Galveston 1941, writ *dism'd jdgmt cor.*).

¹⁷ *Bugg v. Consolidated Grocery Co.*, 118 S.E. 56 (Ga. 1923).

¹⁸ *McKesson & Robbins Inc. v. Southwestern Drug Corp.*, 165 S.W.2d 758, (Tex. Civ. App.—Dallas 1942), *rev'd on other grounds*, 141 Tex. 284, 172 S.W.2d 485.

¹⁹ *United States v. Liverpool & London & Globe Ins. Co.*, 209 F.2d 684 (5th Cir. 1953), *rev'd on other grounds*, 348 U.S. 215, 75 S. Ct. 247, 99 L. Ed. 268.

²⁰ *First National Bank in Dallas v. Lampman*, 442 S.W.2d 858 (Tex. Civ. App.—Eastland 1969, no writ).

²¹ *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039 (1937); *Kruger v. Sheffield, Garret & Carter*, 341 S.W.2d 564 (Tex. Civ. App.—Waco 1960, writ *ref'd n.r.e.*); *United States Fidelity & Guaranty Co. v. Daniels*, 107 S.W.2d 400 (Tex. Civ. App.—Texarkana 1937, no writ); *New Amsterdam Casualty Co. v. Keith*, 273 S.W. 836 (Tex. Comm'n App. 1925, *judgmt adopted*); *Security State Bank & Trust Co. v. Higginbotham Bros. & Co.*, 250 S.W. 790 (Tex. Civ. App.—Fort Worth 1923, no writ); *Durfee Mineral Co. v. City Nat. Bank of Temple*, 236 S.W. 516 (Tex. Civ. App.—Austin 1921, writ *dism'd w.o.j.*).

²² *Hanson v. Guardian Trust Co.*, 150 S.W.2d 465 (Tex. Civ. App.—Galveston 1941, writ *dism'd jdgmt cor.*).

²³ *Smith v. Houston Nat. Exch. Bank*, 202 S.W. 181, 183 (Tex. Civ. App.—Beaumont 1918, no writ).

²⁴ *First National Bank in Bronte v. Little*, 6 S.W.2d 819 (Tex. Civ. App.—Dallas 1928, no writ).

the proceedings are given a strict construction because the garnishee is brought into the controversy between others when he is not charged with having done a wrong to either party in the main suit.²⁵ If a garnishee answers a writ and that answer is contested by the plaintiff, the garnishee then becomes a "party litigant." In a garnishment proceeding only one of the parties claims the fund; the other claims he has the right to have the fund applied to the amount the defendant owed him.²⁶

When the garnishee fails to answer, the authority to grant default garnishment judgments is found in the rules relating to ancillary proceedings of the Texas Rules of Civil Procedure.²⁷ When no answer is given by the garnishee, a judgment is permitted for the amount of indebtedness that the garnishor seeks to recover.²⁸ *Freeman v. Miller*, an early garnishment case, held that "the law does not seek to impose the payment of the debt due the principal debtor upon the garnishee as a penalty for his failure to make full answer, but proceeds upon the theory that, by not having made such answer, he tacitly admits that he has the means in his own hands, or knows of property by which such payment could be made."²⁹

In order to set aside a judgment by a bill of review, the companion case to *Freeman* enunciated the rule that if by "accident or mistake or other cause, injustice has been done the garnishee, he himself must take the initiative, and by motion made in due time, or other proper proceedings, seek to set aside the judgment."³⁰ Subsequently the same garnishee brought a bill of review³¹ to set aside the default judgment that was taken against him without his knowledge and after he had partially answered. In this later case the Texas court stated that the garnishee must have a good defense and that the failure to answer must not be due to garnishee's own neglect or omission. The garnishee must show positively that it would be unjust and inequitable to permit the judgment to be enforced. A mere showing that the garnishee did not owe the defendant in the main suit is not enough.³² The "clearest and strongest" reasons must be asserted for a court of equity to step in and overturn a judgment.³³

²⁵ *Zimmerman v. First Nat. Bank of Bowie*, 235 S.W.2d 720 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

²⁶ *May v. Donaldson*, 141 S.W.2d 702 (Tex. Civ. App.—San Antonio 1940, no writ).

²⁷ TEX. R. CIV. P. 667.

²⁸ *Kentucky Oil Corporation v. David*, 285 S.W. 290 (Tex. Comm'n App. 1926, jdgmt. adopted).

²⁹ *Freeman v. Miller*, 53 Tex. 372 (1880).

³⁰ *Freeman v. Miller*, 51 Tex. 443 (1879).

³¹ *Freeman v. Miller*, 53 Tex. 372 (1880).

³² *Id.*

³³ *Trammell v. Ullman, Lewis & Co.*, 96 S.W. 648 (Tex. Civ. App. 1906, writ dism'd w.o.j.).

An 1884 Texas case, *Nevins v. McKee*,³⁴ seems to agree with the strict rules of *Hagedorn* by stating that fraud of the opposite party must also be shown in order to obtain relief. The opinion in this case was based on another default judgment case that was not a garnishment action. In *Nevins*, the garnishee was given actual notice of the suit. Because of the attorney's error, the default was granted and was not allowed to be set aside after adjournment. Another case has allowed relief where the attorney was negligent but the garnishee was diligent in asking the attorney to file his cause.³⁵ Following the *Freeman* reasoning, rather than *Nevins*, other cases state that the garnishee must present a good defense and show an absence of negligence in failing to prosecute by appeal or by writ of error.³⁶ In *Kelly Moore Paint Co. v. Northeast National Bank of Fort Worth*,³⁷ the president of garnishee bank never saw the writ that was in the hands of an employee until after the default judgment had become final. The court based its decision to allow relief by bill of review on the fact that the person named in the citation was never served, but the court found that the president was not negligent or was at most guilty of excusable neglect in failing to answer. The court stated that it would be a manifest injustice to disallow relief because the bank as garnishee never owed the money except by virtue of the default judgment taken against the bank. The president also never received the statutory notice of default that was enacted after the *Hagedorn* ruling. Commenting on the *Kelly Moore Paint* case, Lowe and Archer state in their treatise³⁸ that for bill of review relief "it is not essential to establish that the default was brought about by wrongful conduct on the part of garnishor."³⁹

In the instant case the court in defining "sufficient cause" applied the *Hagedorn* rule. Since the garnishee was unable to show that his failure to answer was the fault of the garnishor, the court held that he could not succeed in the bill of review. The court further held that, since the corporation president did not file a motion for new trial within the time allowed, he was also negligent. The majority found that, since the instant cause was joined with the original writ under the same number, the proceeding was an adversary one and therefore the *Hagedorn* rule was applicable. The court stated that the garnishee did not allege and prove that the failure to answer was unmixed with

³⁴ 61 Tex. 412 (1884).

³⁵ *First State Bank of Big Spring v. Wood*, 242 S.W. 781 (Tex. Civ. App.—El Paso 1922, no writ).

³⁶ *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706 (1961), a non-garnishment bill of review; *Murchison Oil Co. v. Hampton*, 21 S.W.2d 59 (Tex. Civ. App.—Fort Worth 1929, writ ref'd); *Eagle Pharmacy v. Lamb*, 265 S.W. 594 (Tex. Civ. App.—San Antonio 1924).

³⁷ 426 S.W.2d 591 (Tex. Civ. App.—Fort Worth 1968, no writ).

³⁸ TEXAS PRACTICE, *Remedies*, Lowe & Archer (1957), § 181, n.85.

³⁹ *Id.*

any fault or negligence of its own. The majority reasoned that there was negligence for, although the president testified that he was not notified of the writ or the judgment, another employee received the service. Respondent in the instant case did allege fraud upon the court, but the basis, the court pointed out, was a mistaken allegation that the corporation was nonexistent, and therefore, no valid jurisdiction existed. By applying the *Hagedorn* rule, the majority held that this rule would now cover garnishment default cases because it covers any action between adversaries and gives finality to judgments.

The dissent in the instant case spoke of the differences between a garnishment action and a suit between adverse parties. A garnishee, it stated, "is no more than a stakeholder," and no right or remedy of the garnishor can be denied if there are no funds on which to base liability. Justice Steakley (joined by Justice Reavley), dissenting, also pointed out that the trial judge found that the person served with the writ was a bookkeeper with no administrative authority over the affairs of the company or those of the president. The trial judge also found that the failure to answer was not the result of conscious indifference and was unintentional. The failure to answer was due to mistake or accident because the bookkeeper thought it unnecessary to take further action when he realized that his employer did not owe anything to the defendant in the main action and did not inform the president of the issuance of the writ of garnishment against the company. The president also never received the statutory notice⁴⁰ of the default judgment after it was taken.

The dissent in the instant case stated that *Rosser*⁴¹ relaxed the harshness of the *Hagedorn* rule and that this more lenient rule should be followed in garnishment cases. Justice Steakley notes that this is the first instance in Texas where the term "sufficient cause"⁴² has been interpreted in garnishment default actions when a bill of review is the only remedy left to the garnishee.

The minority reasoning seems to be more just and in the spirit of the law that an equitable action seeks to protect. Because of the nature of garnishment, the garnishee has suffered the consequences of a judgment to which he was not a party and in which he had no interest. The majority view is that the garnishee is an adversary, and as such he is subject to all the rules of ordinary adversary cases. Garnishment, as pointed out, is not an ordinary case. In the New England states, the garnishee is called a trustee,⁴³ and in Louisiana he is called a stake-

⁴⁰ TEX. R. CIV. P. 239a.

⁴¹ *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. Sup. 1964).

⁴² TEX. R. CIV. P. 329b(5).

⁴³ *Matthews v. Smith*, 12 N.W. 821 (Neb. 1882).

holder.⁴⁴ In Texas garnishment is not an independent action and comes within the realm of ancillary proceedings.⁴⁵ The garnishee in the instant case had no adverse interest in the suit to which he must look for jurisdiction. He was merely a stranger to the main suit. The *Nevins* case, although a garnishment case, is not applicable to the instant case since that decision was based on a case that was an adversary proceeding and not a garnishment action.⁴⁶ The court mistakenly assumed that garnishment is a true adversary proceeding.

The garnishee in the instant case did show that, since he did not owe the money, he had a meritorious defense and that his failure to answer was not due to a conscious indifference on his part. At most, the failure of the employees to notify could be termed excusable neglect under the circumstances. A case similar to the instant action allowed relief stating that it would allow excusable neglect.⁴⁷ The court seemed to be more lenient in allowing relief when the garnishee or president of garnishee corporation was not given actual notice of the impending garnishment action. It seems that this court should have followed this reasoning.

One purpose for granting default judgments is to afford some finality to judgments so that parties may know their respective rights and liabilities.⁴⁸ In garnishment actions the rights were adjudicated in the main case, and the garnishee enters the picture only where the remedy is concerned. The harm to an innocent garnishee who owed nothing to the garnishor, far outweighs the harm to the successful party in the main action. The successful party still has his final judgment. He may still obtain satisfaction of that judgment from another source. To interpret "sufficient cause" for garnishment cases in light of *Rosser*⁴⁹ and similar cases by not imposing the necessity of showing fraud of the opposite party, would not be changing a hard, fast rule in garnishment actions. There would still be the necessity of showing the strongest reasons for overturning the judgment. By allowing bill of review relief in cases like the instant one, another main objective of preventing manifest injustice will be fulfilled. Certainly the fact that the garnishee must pay an \$11,080 judgment that he did not owe and did not know about because of excusable neglect should be enough reason to allow relief.

The Federal courts have another solution to the problem of overturning default judgment cases where there is a showing of manifest

⁴⁴ *Newsom v. Savell*, 90 So. 2d 474 (La. App. 1956).

⁴⁵ *Tex. R. Civ. P. 357 et seq.*

⁴⁶ *Nevins v. McKee*, 61 Tex. 412 (1884).

⁴⁷ *Kelly Moore Paint Co. v. Northeast National Bank of Fort Worth*, 426 S.W.2d 591 (Tex. Civ. App.—Fort Worth, no writ).

⁴⁸ *Crouch v. McGaw*, 134 Tex. 633, 138 S.W.2d 94 (1940).

⁴⁹ *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. Sup. 1964).