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Recommended Citation

Richard E. Flint, Raborn v. Davis—Paycheck in Employee's Possession: A Limitation of the Current Wage Exemption in Texas, 21 *St. Mary's L.J.* 939 (1990).

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COMMENTARY

RABORN v. DAVIS—PAYCHECK IN EMPLOYEE'S POSSESSION: A LIMITATION OF THE CURRENT WAGE EXEMPTION IN TEXAS

Richard E. Flint*

Extensions of credit generally help both the debtor and creditor. However, one of the results of our credit-based economy is that individuals are free to make poor economic decisions as well as good ones, and that they should for the most part, suffer the consequences of their poor decisions. Legal rules have had a role in ensuring that debtors are protected from overzealous creditors. On the other hand, commercial transactions as we know them, can only exist if obligations of debtors are legally enforceable, such that creditors can use legal means to enforce and collect valid obligations. The role of government is to set the parameters on the procedures to enforce and collect these obligations, while at the same time setting a floor of protected assets or exempt assets so that debtors will not become wards of the state. Texas has had a long history of "liberal" exemptions as a matter of public policy to permit debtors to support themselves and their families.¹ This historical heritage has come under attack and the

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1. McKnight, *Protection of the Family Home from Seizure by Creditors: The Source and Evolution of a Legal Principle*, 86 S.W. HIST. Q. 364, 375 (1983). This liberality began in the area of homestead and has since spread to personal property. Professor McKnight in examining the sources of modern homestead law noted: "[T]he perception of Texas as a refuge for debtors was a consequence of several factors: Texas' primitive judicial system, the difficulty of finding debtors there, and most particularly, the reluctance of local judges to enforce foreign debts against fellow colonists." *Id.* The first constitution of Texas following statehood provided for a homestead exempt from forced sale for debts. TEX. CONST. art. VII, § 22 (1845).

status of debtors *vis a vis* creditors recently has changed drastically. The floodgates once opened may be hard to close.

Following the rendition of a judgment for \$22,761.35 in unpaid attorney's fees, Burta Rhoads Raborn sought relief under the Texas turnover statute² to satisfy the unpaid judgment. After an evidentiary hearing the district court ordered the judgment debtor "to endorse and turn over to a court-appointed receiver 'all cash, checks, or other negotiable instruments,' . . . received from his employer."³ The receiver was to distribute a portion of the debtor's income to the creditor and return the remainder to the debtor "so that he could meet his necessary living expenses."⁴ The debtor also was ordered to continue

Personal property exemptions, unknown at common law, were part of the Spanish heritage and carried over as part of the fundamental law of the republic. 2 H. GAMMEL, LAWS OF TEXAS 125-26 (1898). The present constitution gives the legislature the mandatory duty to protect from forced sale a certain portion of the personal property of citizens of Texas. TEX. CONST. art. XVI, § 49. Even during the time of the republic an individual could not be imprisoned because he could not pay his debts. TEX. CONST. Declaration of Rights, Twelfth (1836).

2. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1986 & Supp. 1990). This statute provides in part:

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

(1) cannot readily be attached or levied on by ordinary legal process; and

(2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control . . .

. . . .

(3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

Id. In 1989, the legislature added a new subsection which places a limitation on the court's turnover powers. That subsection states:

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including section 42.0021 of the Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

Id. § 31.002(f).

3. *Davis v. Raborn*, 754 S.W.2d 481, 482 (Tex. App.—Houston [1st Dist.] 1988), *rev'd*, 33 Tex. Sup. Ct. J. 249 (Feb. 21, 1990).

4. *Raborn v. Davis*, 33 Tex. Sup. Ct. J. 249, 249 (Feb. 21, 1990).

this turnover until the judgment was satisfied.⁵ The court of appeals reversed the trial court's order holding that the turnover order was invalid because it required the turnover of future wages at a time when the wages had not been paid to and received by the debtor, and therefore were exempt.⁶ On February 21, 1990, the Texas Supreme Court reversed the appellate court's decision and held that an order directing a judgment debtor to turn over his future paychecks does not violate the Texas constitutional prohibition against garnishment.⁷ The Texas Supreme Court noted that as the turnover order directed the debtor, not a third party, to turn over current and future property there was no garnishment.⁸ By way of dictum, the court then stated that "because a paycheck in the hands of the judgment debtor is no longer 'current wages'";⁹ the proceeding, even if characterized as a

5. *Davis*, 754 S.W.2d at 482.

6. *Id.* at 483-84. The court of appeals had no trouble determining that a paycheck lost its exempt status when the wage earner was paid by his employer. However, the court held that the trial court was not empowered to order a judgment debtor to turn over exempt property—those wages to be paid and received in the future. "The potential consequence of an order allowing a creditor to reach property that is currently exempt will weaken and destroy our constitutional guarantees and render such protection useless." *Id.* at 483. Chief Justice Evans dissented, noting that the trial court's order did not violate the constitutional or statutory provisions because "wages are no longer current when the employee receives a paycheck from the employer." *Id.* at 484 (Evans, C.J., dissenting).

7. *Raborn v. Davis*, 33 Tex. Sup. Ct. J. 249, 249 (Feb. 21, 1990). This holding conflicts with the Texas Constitution which provides that "[n]o current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments." TEX. CONST. art. XVI, § 28 (1876, amended 1982). In the court of appeals, the debtor had argued that his paycheck represented "current wages" and that an order requiring him to turn it over to a receiver was tantamount to garnishment in violation of the constitutional protection. *Davis v. Raborn*, 754 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1988), *rev'd*, 33 Tex. Sup. Ct. J. 249 (Feb. 21, 1990); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 1986)(prohibiting garnishment of current wages). Garnishment in Texas involves three separate entities—the judgment creditor, the judgment debtor, and the garnishee (the individual who is alleged to owe the judgment debtor money or holds the judgment debtor's property).

8. *Raborn*, 33 Tex. Sup. Ct. J. at 249-50. Garnishment is a statutory proceeding that "necessarily involves a third party who has possession of the debtor's property or owes the debtor money." *Id.* at 249; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 63.001-005 (Vernon 1986).

9. *Raborn*, 33 Tex. Sup. Ct. J. at 250. The Texas Supreme Court merely said that there was precedent for the proposition that "wages cease to be current wages at least for purposes of the exemption statutes, upon their being paid to a wage earner and coming under his control." *Id.* No statutory references were cited. In Texas, however, in addition to the constitutional prohibition against garnishment of current wages, another statutory scheme protects current wages from seizure in satisfaction of debt. Section 42.001 of the Texas Property Code provides "[e]ligible personal property . . . is exempt from attachment, execution, and seizure for the

garnishment, would not violate the constitutional prohibition against garnishment of current wages.¹⁰ Finally, the Texas Supreme Court stated that a trial court has the authority to order a judgment debtor to turnover future paychecks to a receiver upon receipt by the debtor.¹¹ The cursory opinion of the Texas Supreme Court fails, in

satisfaction of debts, except for encumbrances properly fixed on the property." TEX. PROP. CODE ANN. § 42.001 (Vernon 1984). Section 42.002 includes "current wages for personal services" among property which is eligible for the exemption. *Id.* § 42.002. These two sections were enacted by the legislature in response to the constitutional mandate to enact legislation to protect by law from forced sale a certain portion of the personal property of individuals. TEX. CONST. art. XVI, § 49. As current wages in the hands of the employer are protected from garnishment by the prohibitions found in the constitution and related statute, the above statutory prohibition against seizure of current wages appears to be meaningless unless it is interpreted to mean that the protection for current wages continues in some manner following their leaving the employer's possession. *Cf. Gaddy v. First Nat'l Bank*, 115 Tex. 393, 400, 283 S.W.2d 472, 474-75 (1926). For specific language, see *infra* note 50.

10. *Raborn*, 33 Tex. Sup. Ct. J. at 250. If the court had found the paycheck to represent current wages, it was clear that even the protection granted against garnishment of current wages was broad enough to protect the debtor against other types of seizure. *See City of Houston v. Nelius*, 693 S.W.2d 567, 569 (Tex. Civ. App.—Houston [14th Dist.] 1985, writ *dism'd*)(prohibiting withholding of employee's wages by his employer to pay employer's judgment against employee). Furthermore, a 1943 attorney general opinion stated:

It can make no difference that the bill authorizes the creditor to reach by law the wages of his debtor "save and except garnishment." In what other method could it be reached than by garnishment? The bill does not undertake to provide another method to accomplish this end, but if it were to do so, and should provide a remedy and call it "impounding", "distrain", or what not, such a bill would nevertheless violate the very spirit and purpose of the Constitution. Especially mentioning "garnishment" in the Constitution is no limitation whatsoever upon the obvious purpose to exempt all current wages for personal service from the exaction of creditors, and would forbid legislative enactments setting up a proceeding under another name, the effect of which would be to subject the current wages of [sic] personal service to an impounding for debt.

Op. Tex. Att'y Gen. No. O-5148 (1943)(proposed law sought to authorize seizure of current wages above stated dollar amount, except by garnishment). Furthermore, since a court's turnover order can only reach nonexempt property, if the Texas Supreme Court had determined that a paycheck represented current wages and, therefore, was exempt under the turnover statute, a discussion of the garnishment statute would have been unnecessary. As noted above, this was the precise reason the court of appeals had reversed the trial court's order seeking a turnover of the future paychecks. *See supra* note 7 and accompanying text.

11. *Raborn*, 33 Tex. Sup. Ct. J. at 250. To hold otherwise the court argued would force the judgment creditor to obtain a separate turnover order for each pay period. *Id.* The court stated that such an order would not be an assignment of wages, because it merely required the judgment debtor to turnover nonexempt property, if and when, it came into his possession. *Id.* This holding contradicts the prohibition against the assignment of future wages. *McKneely v. Armstrong*, 109 Tex. 363, 366-67, 210 S.W. 192, 193 (1919). A voluntary or involuntary assignment of future wages when permitted under law also might be subject to other statutory restraints. *See TEX. BUS. & COM. CODE ANN. §§ 23.01-.33 (Vernon 1987)*(assignment for creditors); *id.* §§ 24.001-.013 (Uniform Fraudulent Transfer Act).

this author's opinion, to interpret properly the term "current wages" found in the Texas Constitution's prohibition against the garnishment of "current wages" from seizure for debts. The majority opinion also fails to give any consideration to the serious ramifications of its decision on judgment debtors.¹² The purposes of this observation are to critically analyze the development of the present interpretation given to the term "current wages" and to suggest a meaningful alternative to that interpretation in light of the clear mandates in the Texas Constitution and legislative enactments.

Prior to *Raborn* there was no doubt that cash *in and of itself* in the hands of the judgment debtor was nonexempt in Texas.¹³ Furthermore, it was clear that funds in the possession of the employer for past due wages of an employee were not exempt and were subject to garnishment.¹⁴ The unresolved issue was whether a paycheck representing wages for the current pay period in the employee's hands had lost its exempt status. Although no prior Texas Supreme Court decision had addressed this issue specifically, the case of *Bell v. Indian Live-Stock Co.*¹⁵ is cited frequently for this proposition.¹⁶ In *Bell* the court

12. See *Raborn v. Davis*, 33 Tex. Sup. Ct. J. 249, 250-52 (Feb. 21, 1990)(Mauzy & Cook, J.J., concurring separately). The concurring opinions discussed one of the more pressing issues left in the wake of the court's decision, that being the possibility of being held in contempt for failing to comply with a court's turnover order. Justice Mauzy, joined by Justices Ray, Hightower, and Doggett, stated that enforcement of the turnover order by imprisonment for contempt clearly would violate the constitutional prohibition of imprisonment for debt. *Raborn*, 33 Tex. Sup. Ct. J. at 250 (Mauzy, J., concurring); see also TEX. CONST. art. I, § 18. Justice Cook, on the other hand, wrote that such a result—imprisonment—is a necessary corollary of the court's decision. *Raborn*, 33 Tex. Sup. Ct. J. at 251-52 (Cook, J., concurring). Justice Cook stated:

I believe that we should also consider the broad effect of stripping a court of its power to enforce an order that we have already declared valid and constitutional. Such a position would threaten the rights of creditors to satisfy judgments. More important, that position would undermine the power of the courts to enforce their legal orders.

Id. at 252 (Cook, J., concurring). None of the opinions focused on the additional leverage that this decision will give the judgment creditor. This increased leverage will have the unintended—or perhaps expected—result of increasing the number of bankruptcy filings in the state.

13. See TEX. PROP. CODE ANN. § 42.002 (Vernon 1984)(cash itself is not listed among list of personal property exemptions although current wages for personal services are listed). Prior to the adoption of the turnover statute there was no effective way to reach cash or paychecks in the debtor's possession. See *infra* notes 25-28 and accompanying text.

14. See *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 346 (Tex. Comm'n App. 1889, opinion adopted).

15. *Id.*

16. See *Highland Park State Bank v. Salazar*, 555 S.W.2d 484, 486 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.); *King v. Floyd*, 538 S.W.2d 166, 168 (Tex. Civ. App.—Hous-

held that earned wages which were retained by the employer lost their exempt status, and the employer was subject to a writ of garnishment.¹⁷ The logic of the case is clear—current wages lose their exempt status when they are past due. The wages earned but unpaid for the current pay period were exempt and not subject to garnishment according to the court.¹⁸ The court described the underlying purpose of the current exemption as follows:

We prefer to attribute such legislation to the more humane and philanthropic purpose of protecting to the employee his current earnings to meet and defray the current expenses of his living, that he may enjoy a credit to the extent of his current earnings, and not be forced into a condition of abject dependence and want.¹⁹

From this beginning the assault on the citadel began.

The apparent fountainhead of the proposition that wages for current personal services once paid to the employee lose their exempt status is the case of *Sutherland v. Young*.²⁰ That case involved a garnishment action on a bank on the same day following the deposit of a payroll check.²¹ The *Sutherland* court, relying on the earlier *Bell* decision and the case of *Davidson v. F.H. Logeman Chair Co.*,²² con-

ton [1st dist.] 1976, writ ref'd n.r.e.); *Sutherland v. Young*, 292 S.W. 581, 582 (Tex. Civ. App.—Waco 1927, no writ). *But cf.* *Gaddy v. First Nat'l Bank*, 283 S.W. 277, 279 (Tex. Civ. App.—Beaumont 1923), *aff'd by certified question*, 115 Tex. 393, 397, 283 S.W. 472, 473 (1926)(workmen's compensation recovery in employee's segregated bank account retains exemption and exemption under workmen's compensation statute not limited to "current" compensation). Although the *Gaddy* court did not need to distinguish the future, current and past compensation, the courts' reasoning would apply to protect current wages in the employee's hands. *See infra* note 50.

17. *Bell*, 11 S.W. at 346. The court did not address the issue of what happened after the wages were paid to the employee.

18. *Id.* The court stated "the wages were payable monthly, and were exempt for the month current at the time of the service of the writ, but the exemption ceased to apply when the wages became past due." *Id.* (emphasis added).

19. *Id.*

20. 292 S.W. 581, 582-83 (Tex. Civ. App.—Waco 1927, no writ).

21. *Id.* at 582. The facts of the case show that on April 1, 1926, the judgment debtor received the check representing his previous month salary. He deposited the check in the bank on the same day, and the judgment creditor caused the bank to be served with a writ of garnishment. *Id.* at 582.

22. 41 S.W. 824, 825 (Tex. Civ. App. 1987, no writ). In *Davidson* the court had stated: Whenever the wages become subject to the control of the employee, and he voluntarily leaves them with his employer, or collects and deposits them with someone else, he has robbed them of their character as current wages, and the protection extended to them by constitution and statute is lost.

Id. The *Sutherland* court also cited *Lee v. Emerson-Brantingham Implement Co.*, 222 S.W.

cluded that the money deposited was no longer current wages and could be garnished.²³ All three of these cases involved garnishment proceedings against third parties holding funds that had been left or deposited voluntarily by the employee and which represented moneys for past wages for personal services. Of course, once the paycheck comes into the hands of the employee at the end of the pay period, the question of current wage's exemption from garnishment becomes moot.²⁴ None of these three cases dealt with the status of cash or paychecks in the hands of the employee received for the current pay period.

The reason that this issue was neither addressed nor answered in earlier cases was because judgment creditors arguably had no effective remedy to reach the debtor's paycheck prior to the enactment of the turnover statute in 1979. The check, a negotiable instrument, was considered beyond the reach of legal writs.²⁵ Furthermore, the judgment creditor was unable to invoke the equitable injunctive and contempt powers of a court to compel the judgment debtor to produce nonexempt property in the form of cash or otherwise.²⁶ The turnover statute merged legal and equitable postjudgment collection remedies and was specifically aimed at assisting judgment creditors in reaching *nonexempt* property that could not be levied upon readily by other legal process.²⁷

283, 284 (Tex. Civ. App.—Dallas 1920, no writ). *Sutherland*, 292 S.W. at 582. The *Lee* court held that earned wages involuntarily left with the employer did not lose their exempt status and were not subject to garnishment. *Lee*, 222 S.W. at 284.

23. *Sutherland*, 292 S.W. at 582.

24. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 63.001-005 (Vernon 1986). On this point the *Raborn* court correctly interpreted the statutes and the constitution. 33 Tex. Sup. Ct. J. at 249. This fact in and of itself, however, does not mean that the current wages in the form of the paycheck are not exempt from attachment, execution, and other forms of seizure for the satisfaction of debts when in the possession of the employee. In fact, the Texas Property Code states that current wages are exempt and such exemption is not dependent on the form in which those current wages exist, i.e., cash or paycheck. TEX. PROP. CODE ANN. §§ 42.001, 42.002(8) (Vernon 1984). Nothing in the statute indicates that current wages lose their current status when they are transferred from the employer to the employee. Current wages are still current wages. Whenever current compensation for personal services in the hands of the employee is clearly identifiable as such, it should be considered current wages because that is the primary purpose of the exemption statute. Unless and until such are deposited or converted to other property the exemption should remain.

25. See *Price v. Brady*, 21 Tex. 614, 616-17 (1858).

26. See, e.g., *White Sewing-Mach. Co. v. Atkeson*, 75 Tex. 330, 333-34, 12 S.W. 812, 813 (1889); *Noyes & Fish v. Brown*, 75 Tex. 458, 462, 13 S.W. 36, 37 (1889).

27. TEX. CIV. PRAC. & REM. CODE ANN. §§ 31.002(a)(1), (2) (Vernon 1986).

The statute changed creditor collection practices in Texas. The effect of the turnover statute was to require the burden of production of property which was subject to execution (nonexempt) to be placed on the debtor instead of on the creditor.²⁸ In the abstract, there is nothing fundamentally wrong with the statute's shifting of this burden to the judgment debtor where it rightfully belongs. The existence of such a remedy shifts the economic leverage of collection of a debt to the creditor. The real problem is that this procedure reaches the only source of livelihood for most honest debtors and their families—the paycheck representing current wages.²⁹ The turnover statute gives the diligent creditor a reasonable remedy to obtain the property of the judgment debtor. However, if the statute forces the wage-earner to relinquish a paycheck already received and representing wages for the immediately preceding pay period and all future paychecks, it violates the spirit of the exemption statutes. In fact, such a court order would deprive the employee of his exemption for current wages. Such a narrow, technical construction would defeat the very purposes of the exemption statutes.

In the last several years, however, several courts relying on *Sutherland* and its progeny have recognized the possibility that a court could order the turnover of a paycheck in the hands of an employee.³⁰

28. See generally Hittner, *Texas Post Judgment Turnover and Receivership Statutes*, 45 TEX. B.J. 417 (1982)(citing SENATE COMM. OF JUDICIAL AFFAIRS, BILL ANALYSIS, TEX. S.B. 965, 66th Leg. (1979)).

29. The turnover statute vests substantial discretion in the hands of a trial court. A court may order the judgment debtor to turn over nonexempt property. The purpose of the statute was to "put a reasonable remedy in the hands of a diligent judgment creditor, subject to supervision of the Court." See *id.* (citing from the Texas House and Senate Committee Reports). Thus, as in *Raborn* the court may permit the judgment debtor a portion of the turned over paycheck for his own support and that of his family. One commentator states that the court has no discretion in ordering the turnover of the paycheck once its nonexempt status is determined. See Toben & Toben, *Using Turnover Relief to Reach the Nonexempt Paycheck*, 40 BAYLOR L. REV. 195, 195 (1988). The authors served as co-counsel for the judgment debtor in the *Barlow* case where the court after determining that the paycheck was not exempt did not order its turnover. See *Barlow v. Lane*, 745 S.W.2d 451, 453-54 (Tex. App.—Waco 1988, writ denied)(appellate court said such action was not abuse of discretion).

30. See *Buttles v. Navarro*, 766 S.W.2d 893, 895 (Tex. App.—San Antonio 1989, n.w.h.)(refusal to order turnover of paycheck not an abuse of discretion); *Barlow v. Lane*, 745 S.W.2d 451, 453 (Tex. App.—Waco 1988, writ denied)(refusal to order turnover of paycheck not an abuse of discretion); see also *Davis v. Raborn*, 754 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1988)(turnover of future paychecks prohibited), *rev'd*, 33 Tex. Sup. Ct. J. 249 (Feb. 21, 1990). *But see Salem v. American Bank of Commerce*, 717 S.W.2d 948, 948-49 (Tex. App.—El Paso 1986, no writ)(turnover of future paychecks permitted).

Each of these recent decisions initially determined that a paycheck in the hands of the employee was not current wages. Absolutely no consideration was given in any of these opinions to the significant public policies encompassed in the exemption statutes of Texas. Furthermore, none of these opinions even attempted to construe the term "current wages" liberally to include the paycheck in the employee's hands.³¹ In *Maumus v. Lyons*,³² however, the court, after rejecting the precedential value of these earlier decisions, held "that wages for services performed during the pay period immediately preceding payment to the employee, whether such wages [were] paid in cash, by check or other means, [were] current wages and exempt property under the purview of the turnover statute."³³ The *Maumus* court based its holding on their interpretation of the intent of the drafters of the Texas Constitution and statutes as well as on the public policy evidenced in those writings. It was against this legal backdrop that the Texas Supreme Court entered the stage and rendered its *Raborn* decision.

Although not writing on an entirely clean slate, it is clear that the Texas Supreme Court could have followed the *Maumus* decision. Perhaps the court was misled by an expressed concern that if the term "current wages" were defined to include more than those wage obligations yet owed by an employer to an employee, the judgment debtor would be able to accumulate an unlimited amount of exempt cash.³⁴ Such a concern, however, would have been misplaced. The

31. See *Cobbs v. Coleman*, 14 Tex. 594 (1855). Since before the war between the states, it has been the practice of courts to broadly and liberally construe the meaning of words contained in remedial statutes. *Id.* The exemption statutes are uniformly considered to be remedial statutes and the courts in Texas have always given them the most comprehensive and liberal construction possible. See *Green v. Raymond*, 58 Tex. 80, 83 (1882). What good is the current wage exemption given by statute if such exemption ends the very instant that the wages are received by the employee? Although current wages may not be garnished from the employer until they are passed due or retained voluntarily, how is the employee to take advantage of the exemption if he can never freely receive them in their exempt status. It is interesting to note that the same day the *Raborn* decision was issued the Texas Supreme Court issued a highly technical decision construing contractual language. In that case the Texas Supreme Court noted that although words contained in an instrument should be used as controlling guides, that punctuation marks can also aid in the construction of the document. *Criswell v. European Crossroads Shopping Center, Ltd.*, 33 Tex. Sup. Ct. J. 252, 253 (Feb. 21, 1990). But the Court did not construe the plain language of the Texas Constitution to protect Davis from the turnover of his paycheck which was in effect garnishment.

32. 771 S.W.2d 191 (Tex. App.—Fort Worth 1989, n.w.h.).

33. *Id.* at 195.

34. See *Toben & Toben, Using Turnover Relief to Reach the Nonexempt Paycheck*, 40

term "current wages" has a known and readily identifiable meaning.³⁵ Furthermore, *Bell* and its progeny already had determined the accumulation issue by holding that past due wages accumulated by the employer were not current wages.³⁶ Thus, it is logical to expand that principle to deny the exemption to accumulated paychecks in the employee's possession. A court could look to the specific facts of each employee-employer relationship and make a determination of which paycheck in the employee's possession represents wages for personal services performed for the preceding pay period and grant the limited exemption. This approach is consistent with the intent of the constitution.³⁷ However, the Texas Supreme Court failed to even consider the policies sought to be served by the current wage exemption.

The court also failed to consider the interaction between the effects of its decision and title III of the Consumer Credit Protection Act.³⁸

BAYLOR L. REV. 208, 209 (1988). The authors argue that the liberal exemption of real and personal property in Texas would pale before such unlimited accumulations. From this naive statement the authors then state "these observations lead to the conclusion that a paycheck, once in the hands of a judgment debtor, is no longer exempt and is subject to the reach of a turnover order." *Id.* at 209. The Texas Supreme Court in the *Raborn* case cited to this law review article. *Raborn*, 33 Tex. Sup. Ct. J. at 249, n.1.

35. *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 346 (1889). In the *Bell* case an employee was receiving \$200 a month for his services, but drew on the money only when he needed it. At the time that the employer was garnished there was a credit of over \$600 in the employee's account. *Id.* The court relied on common non-legal dictionaries to define the words current and wages. In Webster the court found the word "current" meant "running or moving rapidly; now passing or present in its progress, as, a current month or year." *Id.* Bouvier, another dictionary used by the court, defined "current" as "a term used to express present time, current month, etc." *Id.* Without referring to the source the court stated that wages "are the compensation given to a hired person for services." *Id.* "Current wages" are those "paid periodically, or from time to time as the services are rendered or the work is performed; more particularly, wages for the current period, hence not including such as are past-due or deferred." BLACK'S LAW DICTIONARY 345 (5th ed. 1979). In *Dempsey v. McKennell*, the court stated that current wages are "such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered." 23 S.W. 525, 525 (Tex. Civ. App. 1893, no writ).

36. *See supra* notes 14-23 and accompanying text.

37. TEX. CONST. art. XVI, § 28, interp. commentary (Vernon 1955). "[I]t was better that some creditor go unpaid than to take away from the debtor and his family the current wages essential to preserve the family from want and make them independent." *Id.* The commentary notes that the opportunity for self-support is important to prevent the individual from becoming a burden upon the public. *Id.*

38. Consumer Credit Protection Act, Title III—Restrictions on Garnishment, 15 U.S.C. § 1671 (1989). The report of the House Banking and Currency Committee concluded that there was a substantial direct impact on the various states' garnishment laws upon commerce and upon personal bankruptcies. H.R. REP. NO. 1040, House Committee on Banking and

This federal statute places a ceiling of twenty-five percent on the amount of an employee's disposable earnings³⁹ that is subject to garnishment,⁴⁰ with the exception that the ceiling may be raised as high as sixty-five percent if the garnishment is to enforce family support orders.⁴¹ The statute has been interpreted broadly to accomplish the purpose of Congress, and it applies to all proceedings in aid of execution as well as to attachment proceedings.⁴²

In a situation where it was alleged that the statute did not protect a paycheck because it had lost its identity as earnings, a federal court interpreting the Consumer Protection Act found that such an argument was specious and was not in keeping with the spirit of the statute.⁴³ The court noted that it would be relatively simple for a sheriff to ascertain when an employer issues payroll checks and avoid the restriction of the Act by simply waiting and levying on the debtor's wages after issuance.⁴⁴ It is this author's opinion that the turnover of the paycheck in the hands of the employee clearly violates the spirit of the federal law, if not its very terms.⁴⁵ Although this issue apparently

Currency, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 1962, 1977-79. The report concluded its discussion of title III with the following statement:

The limitations on the garnishment of wages adopted by your committee, while permitting the continued orderly payment of consumer debts, will relieve countless honest debtors driven by economic desperation from plunging into bankruptcy in order to preserve their employment and insure a continued means of support for themselves and their families.

Id. at 1979.

39. 15 U.S.C. § 1672(b) (1989). "Disposable earnings" is defined as that part of an individual's gross compensation for personal services that remains after deduction of amounts required by law to be withheld. *Id.*

40. *Id.* § 1672(c). "Garnishment" is defined as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of debt. *Id.*

41. *Id.* § 1673.

42. *Hodgson v. Hamilton Mun. Court*, 349 F. Supp. 1125, 1139 (S.D. Ohio 1972); *see also Kokoszka v. Belford*, 417 U.S. 642, 651 (1974). In *Kokoszka*, the Supreme Court noted that "there is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." *Id.*

43. *See Hodgson v. Christopher*, 365 F. Supp. 583, 587 (D.N.D. 1973). The district court held that insofar as the North Dakota statute permitting levy on a judgment debtor's paycheck operated to deprive the employee debtor of all his earnings, it comes with restrictions of the Act. *Id.* at 585-86.

44. *Id.* at 587; *see also Kokoszka*, 417 U.S. at 651 ("earnings" means periodic payments or compensation).

45. *Katzenbach v. McClung*, 379 U.S. 294 (1964). Time honored principles of statutory construction dictate that a court should give prominence to the Congressional findings in-

was not raised, the Texas Supreme Court could have relied upon this federal authority in shaping its definition of the term "current wages."

As a result of the Texas Supreme Court's decision a Texas judgment debtor is faced with the choice of continuing to work almost entirely for the benefit his judgment creditor, of being held in contempt for failing to comply with a court's turnover order,⁴⁶ or of filing bankruptcy⁴⁷ to avoid the overwhelming burden imposed upon him by the court's decision. Given the rich history of exemptions in Texas beginning with the Constitution of 1845⁴⁸ and given the liberal construction which courts since 1855⁴⁹ have given to the exemption statutes, it seems inconceivable that a Texas court could impose this burdensome decision upon its citizens. This opinion has placed the judgment debtor on the horns of a dilemma. It is hoped that upon intelligent reflection on the purposes of the current wages exemption that the Texas Supreme Court will reconsider its decision, or in the alternative that an enlightened legislature will remedy this decision by protecting cash or paychecks reflecting payment for current wages while in the hands of the judgment debtor.⁵⁰ A time for immediate

volved. *Id.* Congress found among other things that "the great disparities among the laws of the several states relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country." 15 U.S.C. § 1671(a)(3) (1989).

46. See *Raborn v. Davis*, 33 Tex. Sup. Ct. J. 249, 250 (Feb. 21, 1990). The court's opinion noted that it did not reach the issue of whether the state statute violated the constitutional prohibition against imprisonment of debtors [TEX. CONST. art. I, § 18 (1955)], because *Davis* had neither been imprisoned nor held in contempt. *Id.* For a discussion of the concurring opinions which did address this issue, see *supra* note 12.

47. See 11 U.S.C. § 1325(b)(1), (2) (1989). If the debtor were to file a Chapter 13 bankruptcy proceeding he could propose a plan subject to approval by a bankruptcy court dedicating only his projected disposable income to the repayment of debts. *Id.* As a result an unsecured judgment creditor could receive only a mere fraction of his claim. While under Chapter 7 the debtor would not be required to turnover any of his future income to the creditors, as only his nonexempt assets would be subject to creditor claims. *Id.* §§ 541, 726 (1989). Under the federal exemption scheme, if elected, the debtor would be able to exempt cash or paychecks in his possession, or earned but unpaid wages or salary, limited to \$400 plus up to \$3,750 of his unused interest, not to exceed \$7,500 in his homestead. *Id.* § 522(d)(1), (5).

48. TEX. CONST. art. VII, § 22 (1845).

49. *Cobbs v. Coleman*, 14 Tex. 594, 599 (1855); *Gaddy v. First Nat'l Bank*, 115 Tex. 393, 399, 283 S.W. 472, 474 (1926).

50. See TEX. CIV. STAT. ANN. art. 8306, § 3(b) (Vernon Supp. 1990)(workmen's compensation recovery exemption). The Texas workmen's compensation statute provides the following exemption:

All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of

decision is at hand.

action and no such compensation and no part thereof or of either shall be assignable except as otherwise herein provided, and any attempt to assign same shall be void.

Id. The Texas Supreme Court held that the exemption provided by the workmen's compensation statute protected workmen's compensation in the hands of the employee and in a segregated bank account. *Gaddy*, 115 Tex. 393, 400, 283 S.W.2d at 474-75. The court quoted the following language in *Gaddy*:

If the exemption shall obtain only until the employee receives the compensation, it would never benefit him. He cannot use it, because nonassignable, until he actually collects it. Then, if at that very minute, it is subject to debts and legal writs, there would not be a minute when he could call it his own. He really would have no exemption. . . . If the fund be subject to garnishment the instant it reaches his possession or that of his bank, then it could be taken away before the employee could pay any debts he might owe or buy necessities and supplies for himself.

Id. at 397-98, 283 S.W.2d at 473 (quoting Judge Powell's withdrawn Commission of Appeals opinion interpreting TEX. CIV. STAT. ANN. art. 5246—3 (Vernon Supp. 1918)). When the legislature revised the civil statutes, article 8306, § 3 replaced article 5246—3. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967 & Supp. 1990). Therefore, if the legislature defines current wages with reference to the intent of the constitutional exemption and adopts similar language to protect current wages, the Supreme Court should recognize the exemption.

