In the

Supreme Court of the United States

NORTH GEORGIA FINISHING, INC.,

Petitioner,

v. No. 73-1121

DI-CHEM, INC.,

Respondent.

Washington, D. C.
November 18, 1974

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v.	:	No. 73-1121
DI-CHEM, INC., Respondent.	:	

Washington, D. C.

Monday, November 18, 1974

The above-entitled matter came on for argument at 2:28 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WARREN N. COPPEDGE, JR., ESQ., 101 North Thornton Avenue, Dalton, Georgia 30720 For Petitioner

L. HUGH KEMP, ESQ., Corner of Craford and Selvidge Streets, Dalton, Georgia 30720 For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1121, North Georgia Finishing against Di-Chem.

Mr. Coppedge, you may proceed whenever you are ready.

ORAL ARGUMENT OF WARREN N. COPPEDGE, JR., ESQ.,

ON BEHALF OF PETITIONER

MR. COPPEDGE: Mr. Chief Justice, and may it please the Court:

The case presented to the Court today is a garnishment action involving Title 46, Section 101 ed sec of the Code of Georgia which provides for prejudgment garnishment by a plaintiff upon a defendant's bank account without notice to the defendant.

The authority for our position before this Court today is contained in this Court's decision in Sniadach, Fuentes versus Shevin, and Mitchell versus W. T. Grant, Company.

We also consider the authority of Boddie versus Connecticut 401 US 371 to be especially applicable to the facts of this case.

Now, the facts are that on August the 20th, 1971, Di-Chem, Inc. filed a suit on account against North Georgia Finishing and concurrently therewith and in immediate

sequential order, filed a garnishment action and served a summons of garnishment upon the First National Bank of Dalton, Georgia.

Now, the summons of garnishment was issued by a clerk of the court. It was based only upon the conclusory allegation that the plaintiff had reason to apprehend the loss of a sum of money or a part thereof and by this process of garnishment issue.

The summons required the garnishee to answer in not less than 30 nor more than 45 days all of the property that it had at the time of service belonging to the defendant and all of the property that might have come into its possession in the interim and this is notwithstanding the fact that all of the property may have been more or less than was sued for by the plaintiff in the case. Now --

QUESTION: The issuing and the affidavit follows the statute, doesn't it?

MR. COPPEDGE: Yes, sir, it is exactly parallel to the statute and as a matter of fact, it is a printed allegation supplied to people by the local printing industry in courts and you merely fill in the blanks.

QUESTION: Well, what's wrong with that if you have to have it?

MR. COPPEDGE: Nothing is wrong with it.

QUESTION: If it isn't true, then you don't sign

the affidavit.

MR. COPPEDGE: Insofar as form, nothing is wrong with it.

Now, the Georgia practice, as stated in Powell versus Powell at at 95 Georgia Appeals 122 provides that a defendant in such a case is not even a party to the case and is not entitled to any notice, either preseizure or postseizure.

He is just not a party to the case until he posts bond.

In this case, North Georgia Finishing posted bond as soon as the courthouse opened after the weekend was over. The garnishment was issued on Friday afternoon. And in doing so --

QUESTION: So he is party to the main action, isn't he?

MR. COPPEDGE: Pardon?

QUESTION: He is a party to the main action.

MR. COPPEDGE: He is a party to the main action, but he is not a party to this action.

QUESTION: But the main action is then pending in contrast to the Sniadach situation, maybe, in Wisconsin.

MR. COPPEDGE: The main action continues to pend and it must be filed prior to the garnishment action. In this case, it was the immediate preceding sequentially-filed

case.

And then North Georgia Finishing posted its bond to do two things. One is, to substitute property. That is, to substitute a bond for its bank account which was a commercial bank account which had been tied up by virtue of the garnishment.

And, secondly, under the authority of the Georgia court, it posted bond in order to gain access to the court, in order to establish standing.

QUESTION: Mr. Coppedge --

MR. COPPEDGE: Yes, sir?

QUESTION: Did your client have an opportunity, at the time they posted the bond, to challenge the accuracy of the statements in the affidavit?

MR. COPPEDGE: No, sir and there is no statutory provision provided by Georgia law for either a preseizure hearing or a postseizure hearing.

As a matter of fact, we have no standing in the case until we post a bond and this is why we think the authority of Boddie versus Connecticut would be especially applicable because, as we understand that case, it says that access to the court shall not be a function of a financial requirement.

QUESTION: Well, after you posted the bond in this case, did you contest the affidavit anywhere?

MR. COPPEDGE: No, sir.

QUESTION: I was under the impression you did. I don't know where I got it from.

MR. COPPEDGE: No, sir, there was a hearing before the trial judge. There were allegations in the motion to set aside that the affidavit was groundless.

However, there was nothing heard on that particular allegation. We do not consider that we have authority under the Georgia statute to assert such.

There was an allegation in our motion to set aside the garnishment.

QUESTION: You made an allegation but you don't think it had any basis or justification under the law.

MR. COPPEDGE: Yes, I don't think it had any and there was no evidence presented. We merely argued this Court's Sniadach opinion.

QUESTION: Did you attempt to introduce any evidence?

MR. COPPEDGE: No, sir.

QUESTION: Mr. Coppedge, is your client still in business?

MR. COPPEDGE: Yes, sir.

QUESTION: It hasn't gone into bankruptcy?

MR. COPPEDGE: No, sir. My client is not in business as North Georgia Finishing Company any longer. It

changed its name to Beaver Creek Carpet Mills, Inc., to more correctly reflect its nature of business and that is, the general manufacture of carpets rather than carpet finishing.

It is a wholly-owned subsidiary of Beaver Creek Mills, Inc., which is a subsidiary of another company. They are no longer active in manufacturing and selling carpet but they are still a corporate entity and still in existence.

QUESTION: What happened to the underlying litigation here?

MR. COPPEDGE: The underlying litigation still pends and there has been no hearing on it.

Our purpose today, may it please the Court, is not necessarily to rehash the route and base previously filed but there have been a number of recent cases following Mr. Justice White's opinion in Mitchell versus W. T. Grant case.

QUESTION: I would say that was the Court's decision.

MR. COPPEDGE: Mr. Justice White speaking for the Court.

We would take an opportunity to call this Court's attention to several of those cases that have flowed from this Court's opinion in Mitchell versus W. T. Grant and we would take this opportunity to state that we are in

agreement with all that we have found.

The first is a case of September the 4th, 1974 in the Supreme Court of Georgia, is the case of Roberts versus McCauley at 232 Georgia 660.

QUESTION: Are these here, too?

MR. COPPEDGE: No, sir, they are not. They are subsequent cases.

QUESTION: Would you mind stating that again?

MR. COPPEDGE: Roberts versus McCauley 232 Georgia 660 wherein Justice Hall, speaking for six of the seven justices of that court, quoted with approval Mitchell versus W. T. Grant and stated that the one overriding constitutional problem presented by the Georgia possessory warrant statute which was the statute under consideration in that case, was the absence of judicial control over the institution of the proceedings which could be begun by application to a court clerk.

In this case, in the garnishment case before this court, it was commenced by application to a court clerk.

In this case of Roberts versus McCauley, the court recognized the Fuentes decision of this Court, which it did not recognize when we were before that court.

It declared the Georgia possessory warrant statute unconstitutional.

QUESTION: It doesn't suggest this ought to go

back to the Georgia Supreme Court for reconsideration, does it?

MR. COPPEDGE: No, sir, I don't believe so and I don't --

QUESTION: I gather you suggest, under the divestage statute they reached a conclusion contrary to this one --

MR. COPPEDGE: Yes, sir.

QUESTION:--based upon the subsequent decision about Mitchell and they didn't deal with Fuentes and now they consider Fuentes.

MR. COPPEDGE: No, sir, they did not deal with Fuentes when we were before that court. They dealt with the case of American Olean Tile Company versus Zimmerman, a Hawaiian case and cited that as their authority.

Subsequent to that time, the Supreme Court of Hawaii has declared non-notice seizures of bank accounts to be unconstitutional.

QUESTION: Based again on Mitchell?

MR. COPPEDGE: No, sir, that was pre-Mitchell. In the case of Brunswick Corporation versus Galaxy Cocktail Lounge at 513 Pacific 2nd 1390.

QUESTION: What is the title?

MR. COPPEDGE: Brunswick Corporation versus Galaxy Cocktail Lounge, Inc.

QUESTION: What is the nature of the possessory warrant in Georgia?

MR. COPPEDGE: Possessory warrants in Georgia were first enacted in 1822 and were a means of summarily bestowing possession of runaway slaves or other property.

QUESTION: I take it it has a different purpose now.

MR. COPPEDGE: Pardon?

QUESTION: I take it it has a different purpose now.

MR. COPPEDGE: Well, runaway slaves or other property and it has been applied to other property since 1865.

Now, it is no different, in effect, from the provisions of the garnishment statute in that it alters possession of property pending suit and prior to hearing.

QUESTION: Well, does garnishment really alter possession of property? What kind of a property right do you claim against the garnishment statutes?

MR. COPPEDGE: Mr. Justice Rehnquist, our position is that this particular piece of property -- and this is one of the reasons we feel this case is distinguishable from the Mitchell case is that we are entitled to the money in the bank.

The bank is --

QUESTION: Well, are you under Georgia law? Supposing that the bank went into receivership and went bankrupt? Your claim wouldn't be regarded as a trustee fund claim, would it?

MR. COPPEDGE: No --

QUESTION: Just an ordinary debt.

MR. COPPEDGE: I suppose we would have to look to the FDIC to satisfy our ordinary debt.

QUESTION: Of course you would if it were insurance, but typically, a depositor's claim against a bank isn't property in the sense of having a right to a particular group of bills in the bank's vault, it just shows an action. It is a contract.

MR. COPPEDGE: It is a creditor-debtor relationship, that is correct.

QUESTION: And nothing was transferred by this garnishment, was it?

MR. COPPEDGE: Yes, sir. We have a right under our contract with that bank to make use of the funds that we have deposited in that bank and it is the deprivation of the use of the funds. The use is the only purpose to which bank accounts and money can be put, to my knowledge. It is the only thing --

QUESTION: Well, what was the Supreme Court of GEorgia's analogy in this case, that it is like a lis

pendens on property?

MR. COPPEDGE: Because --

QUESTION: It prevents you from using the property, but it doesn't transfer possession.

MR. COPPEDGE: Mr. Justice Rehnquist, the lis pendens in Georgia pertains only to a situation where there are equities on the property.

Number one, lis pendens cannot be asserted in Georgia unless an equitable claim of title is asserted against property.

Secondly, lis pendens leaves the property in the use and possession of that person against whom the lis pendens writ is filed.

Lis pendens is applicable, in our opinion, only to real estate or perhaps to a mechanics-type lien, laborers lien, a materialman's lien wherein that property is left in the possession, use and enjoyment of the contended debtor and only can be issued in an equitable situation and there are several cases on that point, Watson versus Whatley at 218 Georgia 86.

QUESTION: Are these cited in your brief?

MR. COPPEDGE: No, sir. Yes, sir, they are. They are footnoted in the brief, excuse me. Now --

QUESTION: When you speak of not being able to use this money, you can use it by putting up the bond,

can't you?

MR. COPPEDGE: Yes, sir, but in that instant, all we have done is substituted one form of our property with another and we believe that this Court's opinion in the Fuentes case, where it indicated that we have been deprived of our property -- and we are still deprived of our property because that bond shows up on our corporate financial statement as a binding obligation of the corporation.

All we have done is substituted the type of property that we have been deprived.

QUESTION: Well, if you had a debt outstanding, would it be any different on your balance sheet?

MR. COPPEDGE: Sir, this debt is very much a contested debt and we submit to the Court that the principal use of prejudgment garnishments in Georgia are as an economic bludgeon to either force settlement on more favorable terms or surrender.

QUESTION: Well, I don't know that the condition of your balance sheet is very crucial to this kind of a case but the fact is that honest accounting would require you to show some kind of a contingency liability based upon the maximum possible claim that might be established against you, wouldn't it?

MR. COPPEDGE: Your Honor, I don't believe so. I think, certainly, we do have to properly account and post

our balance sheets. But if we honestly contend that we don't owe anybody any money and we are sued for this money on open account, I think -- I am not familiar with accounting practices enough to say whether or not we have got to show that except as a contingent liability under suits.

QUESTION: If you have a liability against you, your accountant would unquestionably tell you you had better put something in your statement if you are issuing a statement to a bank.

MR. COPPEDGE: In the statement, your Honor, concerning a contingent liability and litigation, but I don't think we would have to list it in the assets and liabilities of the corporation that it is an acknowledged debt.

As a matter of fact, I have had a case where that was done and I used it as evidence against the debtor.

QUESTION: Mr. Coppedge, what assets did North Georgia have in the State of Georgia? It was a foreign corporation.

MR. COPPEDGE: Yes, sir. It had a finishing house. It had a carpet mill and it had a bank account.

QUESTION: Were these plant facilities subject to mortgage?

MR. COPPEDGE: I am sure they were. I would state to the Court that they were but I have no independent

knowledge of that. But I am certain that there were real estate mortgages and I am certain that there were factoring contracts with various of the factoring corporations.

QUESTION: You averred in your motion that there was no reason to believe that there was any danger of assets not being sufficient. There was no proof one way or the other on that.

MR. COPPEDGE: No, sir, there was no proof one way or the other.

QUESTION: Right.

MR. COPPEDGE: To answer your Honor's question in a little more detail, we believe that Mr. Justice Stewart's opinion in the Fuentes case that due process tests should be based upon the merits of the case and not upon the relative financial strength of the parties and at page 1996, Fuentes states clearly that a bond is no replacement to due process hearing before a neutral hearing officer with discretion and notes that a bond merely replaces one piece of property with another and does nothing to advance the cause of due process.

We agree with the Court in that decision that a bond offers only minimal protection and we note that the deprivation is for 30 to 45 days of all of the property which that bank would have in its possession on deposit from our company is not limited by the amount we put in.

QUESTION: What do you mean by offering only minimal protection? This is a double-bond, isn't it, that the other side has to put up?

MR. COPPEDGE: Yes, sir, but it just doesn't address the issue of fairness and due process. It doesn't establish the Mitchell case test required, as we read the Mitchell case, that there must be some judicial officer with discretion to issue this seizure warrant, that there must be some facts stated upon which to base the seizure warrant, that there must be some reasonable hearing following the issuance of the seizure warrant.

None of these things are provided for in the Georgia statutory scheme. Further, we think that the Mitchell decision is support for our position before this Court in that the Mitchell decision limits itself, or apparently limits itself to property wherein both the debtor and the creditor have a legal and equitable interest, that is, by virtue of title retention contract.

QUESTION: Well, you can distinguish the facts in Mitchell as the other side can distinguish the facts in Sniadach, too.

You are kind of in between them, aren't you, under the Georgia system?

MR. COPPEDGE: I think not, for this reason. The Wisconsin statute, as I understand it, number one, you did

not have to post a bond to gain access to the courts as you do in Georgia.

Number two, in Wisconsin, the garnishment automatically dissolved after ten days. There is no such disillusion feature in Georgia.

QUESTION: And number three, I may be wrong as to this, in Wisconsin, couldn't your garnishment action antedate the main action?

MR. COPPEDGE: I am not sure, your Honor. I am not sure and I did not consider that in this case.

QUESTION: Of course, for a wage garnishment, when you are talking about dissolution after ten days, that probably means two pay days. It certainly doesn't mean that after ten days you give back the money held during those two pay days. It just means it doesn't apply beyond ten days, doesn't it?

MR. COPPEDGE: I believe that is correct.

QUESTION: And in your case, I take it, once your bank account is garnished, you don't go on depositing money in there. You get a new bank account.

MR. COPPEDGE: I certainly hope so.

QUESTION: I would hope.

MR. COPPEDGE: Yes, sir, but they'll go after any other bank account I have. All they have to do is issue a new summons.

QUESTION: Well, but that might be evidence of harrassment or attempt at leverage. If they have enough tied up to satisfy their claim, I would presume they wouldn't do any more.

MR. COPPEDGE: You don't know, your Honor, for 30 days it could be considerably more that they have tied up. They can tied up $200,000 on a $100,000 bond, if that is what is in the bank.

QUESTION: Subject to an interlocutory motion?

MR. COPPEDGE: There is no statutory provision for it. In practice, I'll call the other lawyer up and say, hey, you got too much. How about reducing it?

QUESTION: Well, wouldn't there be inherent power in the court to issue an order to trim it down to enough to give you your protection?

MR. COPPEDGE: I know of no such order ever having been issued in my practice and I know that I have not made an application. I have done it informally with counsel.

I would call two other cases to the Court's attention. The first is a case of the United States District Court in Texas and it is cited at 43 Law Week 2120, GArcia versus Crouse. When that court held the Texas statute which appears to be parallel to the Georgia statute in material part unconstitutional following the opinion of this Court in the Mitchell case and also a three-judge court

of the Southern District of New York in Sugar versus Curtis Circulation Company at 43 Law Week 2183 which also followed the Mitchell opinion of this Court and held the New York statute unconstitutional.

QUESTION: Mr. Coppedge, if this Court were to agree with you as to the infirmities of the present Georgia statute and the Georgia legislature wanted to go back and try to make some constitutional provision whereby a plaintiff in a case like this suing an out-of-state corporation could get some sort of security that would ultimately satisfy a judgment if it got it, what could the legislature do?

MR. COPPEDGE: Mr. Justice Rehnquist, I have no objection whatsoever and so stated in my brief that we do not oppose what we consider to be this Court's attempt to reach a constitutional accommodation between the rights of debtors and the rights of creditors by providing some safeguard, either immediately prior to the issuement of the attachment or the right of hearing after the attachment --

QUESTION: A hearing prior to the attachment is useless if you have got a debtor with a tendency to abscond. He won't have any money in the bank the minute he gets notice of the hearing.

MR. COPPEDGE: Your Honor, I said either and I think that the courts could issue an interlocutory order requiring property under injunction to be held for three

or four days --

QUESTION: So you say --

MR. COPPEDGE: -- till they could have a hearing.

QUESTION: -- there could be some sort of seizure prior to the hearing on the merits.

MR. COPPEDGE: Absolutely. Absolutely. We think that there should be a constitutional accommodation somewhere but a clerk issuing a seizure upon conclusion without even preseizure or post seizure hearing just doesn't measure up, in our opinion.

QUESTION: Is your interest that you want protected just your interest in having an erroneous judgment issued against you? Is it the risk of error that worries you?

MR. COPPEDGE: I think --

QUESTION: You are not claiming that there is really a debt here. You are not claiming that there should not be prejudgment security.

MR. COPPEDGE: No, sir. If it is properly issued under proper control and safeguards. I am claiming that we can be bludgeoned economically by interrupting the commercial course of business.

QUESTION: But if a creditor went to a judge with a piece of paper and swore before the judge these facts and the judge thought that gave him probable cause, at least,

pending some further hearing, you wouldn't have any objection to that?

MR. COPPEDGE: No, sir. No, sir.

QUESTION: So what it boils down to is a difference between a clerk here and a judge in the case positive adjusted way.

MR. COPPEDGE: We think that is one of the basic reasons. The other is the fact that it is issued upon conclusory allegations without saying anything.

QUESTION: Do you take it even as between two farily equal people, debtor and creditor, you don't think from your client's standpoint that you get any -- you get sufficient protection against the risk of error against the claim of a debt that really isn't there from the plaintiff posting a double bond?

MR. COPPEDGE: No, sir. It is a devastating --

QUESTION: Well, it may be devastating but it has cost him some money. If he is wrong it is really -- he isn't --

MR. COPPEDGE: No, but the condition of the bond is not to pay him double. The condition of the bond is only to pay what money I am out in defending it.

QUESTION: I know, but it costs him. It costs him money to put up the bond.

MR. COPPEDGE: If he has a professional bonding

company. If he gets the vice-president of the company to sign the bond as he did in this case, it doesn't.

QUESTION: What are the elements of damages in an action on the bond in Georgia?

MR. COPPEDGE: Only to pay what money you are out in defending the bond should it appear that it should not have been issued.

QUESTION: You mean, the only fee you can recover is the cost of defense?

MR. COPPEDGE: Yes, sir.

QUESTION: Not damage?

MR. COPPEDGE: All damages which, in my opinion, don't go to double the bond. They go to wherever we can show we are out.

QUESTION: In other words, there isn't any penalty. It is just compensatory damages.

MR. COPPEDGE: It is whatever I can prove. Maybe I can prove interest expense. Maybe I can prove my lawyer's fee. But it is not a penalty. It is not a punitive bond and it certainly won't go double the bond. It won't even go the principal obligation.

QUESTION: Mr. Coppedge, I just want to be sure I understand your position. Would you be content if Georgia law provided a prompt hearing after the garnishment at which you could raise all of the issues that you have in mind?

MR. COPPEDGE: Absolutely.

QUESTION: In other words, you don't insist on a prior hearing, but you --

MR. COPPEDGE: I insist that a judge issue the sequestration warrant and not a clerk.

QUESTION: Yes. But you don't insist on a hearing at that point.

MR. COPPEDGE: I insist at the least that it be ex parte before a judge who exercises discretion and hears something other than a conclusion.

I don't insist that I have to be present.

QUESTION: Right.

MR. COPPEDGE: Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

You may have now about seven minutes, Mr. Kemp, but you can get started that way.

ORAL ARGUMENT OF L. HUGH KEMP, ESQ.,

ON BEHALF OF RESPONDENT

MR. KEMP: Mr. Chief Justice and may it please the Court:

I will end when the clock sounds. I have my family here and I have to take them back on the train tonight but I think I can cover the essential points.

Mr. Chief Justice and may it please the Court:

I will take up three points and rely on my brief

on my constitutionality of the Georgia statute.

The first is, as indicated by Mr. Justice Powell, we think they waived their rights. The garnishment issued. They filed a bond, not to create standing but to free up this bank account.

Three weeks later, as an afterthought, after having read a little law, perhaps, they came in and filed an assault and an attack and paragraph 11, to answer Mr. Justice Powell's paragraph three, said Plaintiff had no reason to apprehend the loss of any judgment and then three weeks after they filed the bond, not to create standing but to free the bank account, they came in and had an opportunity to have a complete and a full hearing of any kind and at their insistence it was heard and the judge of the Whitfield Superior Court entered an order in which he denied each and every of the grounds on page 10 and 11 of the Appendix of the North Georgia's brief.

We say they waived any rights. Secondly, they had many other ways which they could have attacked. The main action would remove the federal court. Or they could have filed a separate suit in federal court. They could have filed an inter pleada. They could have filed a declaratory judgment. They could have raised it in many different issues.

The reason they filed a bond was to free the bank

account.

Now, the second point is that under the authority of _____ versus Odegard, the issues are moot.

First, because they filed the bond. Once they filed the bond under Georgia law, Roberts versus Cena, the dissolution bond takes the place of the property or the foreign garnishing. There is no issue any more. It is moot. Just as when the lawsuit is graduated, the issue out of Washington or Oregon became moot.

Secondly, and I don't want to get into an argument of counsel as to whether or not his client is solvent or not but I respectfully submit and state in my place that what has happened is exactly what Mr. Foster said when he filled out this affidavit, that the funds will not be forthcoming to answer the garnishment and we submit that if the Court does want to make an inquiry, it is not in the record, but the insolvency of the debtor, if it, in fact, existed, would make the garnishment moot.

Thirdly, and the third point is, we make the point in our brief that the Georgia statute -- and your Honors, I think, have inquired into the barest areas that I cover in my brief, is constitutional and we distinguish it, we think, from Fuentes and bring it under the Mitchell decision and the recent decisions on the last week of the Court on seizure of automobiles and similar recent cases which I

don't have cited in my brief because they came down after the brief was typed.

The main point I want to make otherwise is that even if this Court should reach Mr. Coppedge's conclusion and assertions that the statute is unconstitutional, unconstitutional for failure to provide notices, that it should not be applied retroactively.

This case was filed in August of 1971. Sniadach had been decided. But it certainly didn't presage Fuentes. That was limited to the specialized wagers.

Fuentes had not been decided when the case was argued in the trial court in December of 1971 and when the trial court had issued its order.

Under the case of Linkletter versus Walker, cited in our case and the other cases cited in our brief, this Court has held that it will not apply retroactively so as to dislodge established reliance on a statute.

Most recently in the case of Lemon versus Kurtzman, which involved the Pennsylvania State reimbursing sectarian schools notwithstanding the fact that the statute had been declared unconstitutional, the Court refused to apply the statute or the unconstitutional holding backwards.

In that case, the Court stated, "Statutory or even judge-made rules of law are hard facts on which people must rely in making decisions. This fact of legal life

underpins our modern decisions, recognizing a doctrine of nonretroactivity."

So we say in this case, your Honor, we respectfully submit, we don't think the statute is unconstitutional. We don't think that you should ever reach the issue because of waiver and because of mootness.

But even if you do reach it and agree with Counsel for Petitioner, we respectfully submit that Di-Chem has relied on it. The only thing they have got is this bond now, if they are going to get anything. That there was no holding or foreshadowing of Fuentes. That, therefore, it would be unequitable and under this Court's doctrine as stated in the Kurtzman case and in the Walker and Linkletter case, that if the Court does reach a conclusion that the Georgia statute is unconstitutional for any reason whatever, that it should be given prospective application only and it should not be applied retroactively because what we are talking about here is Di-Chem's right to get this $51,000 and I am not sure that even the bond is solvent at this time because of the various and sundry things that have gone on in these corporations, but at least, we respectfully submit that we should have our right to go after North Georgia and after its bondsman.

Thank you for your attention.

QUESTION: Mr. Kemp --

MR. KEMP: Yes, your Honor.

QUESTION: Why hasn't the main litigation been tried in three years?

MR. KEMP: We have been waiting to see what the ultimate outcome is going to be, whether there is going to be a bond available and if there is no bond available, we are on this case on a contingency and aside, we have got about 300 or 400 hours in it and unless there was a bond available, there was no use going ahead and trying the main action because that would just eat up more judicial time and more effort.

QUESTION: There is a direct conflict now between your state court and the District Court for the Northern District of Georgia in the Atlanta Division.

MR. KEMP: Yes, your Honor.

QUESTION: What is the practical situation down there now, with this conflict existing?

MR. KEMP: I don't really know. As far as I know, in Atlanta, I can't understand it. If I want to issue a garnishment in Atlanta, I have no problems. Of course, our superior court judge will not let us issue one. He follows the suggestion somewhat suggested by Justice REhnquist.

We go over with an order and say -- and take our client with us and swear him in and say that they are going to run off with this money, your Honor, if you don't issue

this garnishment. He issues the garnishment, gives them three days to show why it shouldn't be dissolved.

QUESTION: And that, in his view, satisfies what was held by the Federal Court in Morrow Electric Company against Cruse?

MR. KEMP: To my knowledge, yes, sir. That is the practice and as a matter of fact, Mr. Coppedge is the one that thought up this procedure where we could keep on tying up people's money.

QUESTION: Mr. Kemp, when the judge -- you mentioned -- gives three days, is that provided by statute in Georgia, or is that just a policy?

MR. KEMP: Just a policy. Usually, on any kind of -- any type of judgment we have three days to show cause and on that point, a wife can tie up a man's property by filing a suit and he has got a client of mine with $3 million that has got everything he has got tied up right now with a lis pendens in a divorce action and she wants it all. We can't sell it. We can't borrow on it. We can't sell our stock.

So a lis pendens is a pretty effective item in our state.

Thank you again, your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything more? You have about three minutes.

REBUTTAL ARGUMENT OF WARREN N. COPPEDGE, ESQ.

MR. COPPEDGE: Mr. Chief Justice and may it please the Court:

I would just like to answer Mr. Justice Stewart's question.

Because of the situation in Georgia created not only by the Morrow Electric case, but also Aaron versus Clark at 342 Fed. Supp. 898, we have jury-rigged a situation whereby if we want to restrain property, we contend under the Georgia general equity statutes that we have no adequate legal remedy, that because of the conflict and the decisions of the Court, we have no adequate legal remedy.

We take our client in. We swear him in before the judge. He testifies and the Court issues an ex parte injunction requiring the Defendant to appear in a very short time and show cause and we think that the GEneral Assembly of Georgia should render this the dignity of statute because without it, we don't have a fair system of sequestering property.

QUESTION: Mr. Coppedge, what the Superior Court of Whitfield County did was to refuse to dissolve the garnishment. Isn't that right?

MR. COPPEDGE: The Superior Court of Whitfield County denied our motion to dismiss the case.

QUESTION: To dismiss the --

MR. COPPEDGE: The garnishment case on the constitutional grounds asserted which at the time were the Sniadach case.

QUESTION: Well, the Supreme Court of Georgia upheld that rule.

Now, if we were to reverse that, what would be the effect of our reversal on the liability on the bond?

MR. COPPEDGE: I think that there would be no liability on the bond because the liability of the condition of the bond is set forth in the Appendix which your Honor has before you, is to pay such judgment as may be rendered in this case and that refers to the garnishment case.

In Georgia, what you do is, you get a judgment in your main case and then if it is not paid, then you go through the other case and now they have not pursued the main case and there is a counterclaim pending in the main case and I assume that that would be pursued later.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 3:03 o'clock p.m., the case was submitted.]