In the

Supreme Court of the United States

ALFREDO GONZALEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

APPELLANT

V.

AUTOMATIC EMPLOYEES CREDIT UNION ET AL

No. 73-858

Washington, D. C.
October 21, 1974

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Appellant	:	
v.	:	No. 73-858
AUTOMATIC EMPLOYEES CREDIT UNION ET AL	:	

Washington, D. C.

Monday, October 21, 1974

The above-entitled matter came on for argument at 11:25 o'clock a.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:

JAMES O. LATTURNER, ESQ., 4564 N. Broadway, Chicago, Illinois 60640 For the Appellant

ALBERT E. JENNER, JR., ESQ., One IBM Plaza, Suite 4400, Chicago, Illinois 60611 For the Appellee

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 Gonzalez versus Automatic Employees Credit Union.

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

ORAL ARGUMENT OF JAMES O. LATTURNER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LATTURNER: Thank you, Mr. Chief Justice and may it please the Court:

Mr. Gonzalez brought this action against his criditor, Mercantile National Bank, challenging the constitutionality of the repossession and resale provisions of the Illinois Commercial Code and against the Title Officer of the State of Illinois, the Secretary of State, challenging the constitutionality of those provisions of the Illinois Motor Vehicle Code that authorize and compel the involuntary transfer -- termination and transfer of certificate of title.

A three-judge court was convened and subsequently dismissed the action. A direct appeal was then brought to this Court and this Court postponed the question of its jurisdiction pending this hearing.

Mercantile has raised two objections to this Court's jurisdiction.

First, that a three-judge court was not properly

convened under Section 2281 and, second, that a direct appeal does not lie pursuant to Section 1253.

Because of the nature of the jurisdictional questions, a brief review of the underlying facts and a summary of the lower court's actual holding is necessary.

Mr. Gonzalez had purchased a used automobile pursuant to a retail installment contract which was, in turn, assigned to Mercantile. When Mercantile repossessed the automobile, they had received an amount in excess of what was then due and owing on the contract.

Although Mr. Gonzalez had not made one payment, Mercantile had received an insurance rebate which they were required to credit to Mr. Gonzalez.

Mercantile, however, credited the rebate to the final payment, not to the current one, and repossessed the automobile.

Upon consideration of these facts, the three-judge district court found that Mr. Gonzalez was not in default at the time his automobile was repossessed and they thereupon dismissed the case for lack of standing. They held that the challenged statute provides for a repossession only in the event of default and, since Mr. Gonzalez was not in default, Mercantile violated the statute rather then acting pursuant to it.

Q Could that have happened to Mr. Gonzalez in any

state proceedings? His car had been seized.

MR. LATTURNER: His car had been seized. There is no state proceeding following a repossession. It is seized. The certificate of title is transferred from, his name is eliminated from the certificate of title by the Secretary of State. It is issued only in the name of the creditor. The creditor then resells the car, being able to obey good title.

Q And had all this happened to Mr. Gonzalez and his automobile?

MR. LATTURNER: This had all happened to Mr. Gonzalez.

Q And what remedies, if any, had he been given in the state?

MR. LATTURNER: He had not been given any remedies. He was given neither notice nor a hearing concerning the creditor's right to possession of the automobile. The repossession is without notice or a hearing. The transfer of title is without a hearing. The resale is without a hearing.

Q Was there any other remedy available to him under state law?

MR. LATTURNER: He could have sued for an injunction in state court to enjoin the resale of the automobile.

Q What about conversion?

MR. LATTURNER: He would have a remedy for conversion also. However, the claim in this case is that due process of law requires that he have a hearing before he is deprived of his property and the fact that he may have a subsequent action for damages does not affect his ability to bring this action asking for a prior due process hearing.

Q If you prevail, what relief would he now receive?

MR. LATTURNER: If we prevail ultimately, in the lower court --

Q Here.

MR. LATTURNER: -- upon remand or --

Q Here.

MR. LATTURNER: If we prevail here, the case would be remanded to the three-judge district court for a determination of whether the creditors and Secretary's actions violate due process.

Q And then what?

MR. LATTURNER: If they are determined that they violate due process, then there would have to be a hearing either before or concurrently with the repossession and before the certificate of title is terminated and transferred to the creditor.

Q Well, now, will you relate this, for me at least,

to the particular automobile that he lost?

MR. LATTURNER: The particular --

Q You are not getting him back his automobile?

MR. LATTURNER: No, he has not requested the return of that particular automobile. He is going for future, for prospective declaratory and injunctive relief against the future enforcement and execution of the challenged statutes and this future relief is very --

Q Well, were the proceedings under and pursuant to this statute here?

MR. LATTURNER: The repossession was pursuant to Section 9503 of the Illinois Commercial Code. The certificate of title was terminated and transferred pursuant to Section 3114 and 116 of the Illinois Motor Vehicle Code. They were pursuant to those statutes, without hearing.

When the lower court dismissed the --

Q Mr. Latturner, would you straighten me out on the insurance? The insurance payment that Mercantile received came about because of the cancellation of the policy, did it not?

MR. LATTURNER: Correct.

Q And when that happened, was Mr. Gonzalez in any way in default under his contract obligation to keep the car insured?

MR. LATTURNER: The -- I cannot remember the exact dates of the insurance cancellation and the one missed payment -- were very close together.

I believe the missed payment was -- the first accident was before the missed payment and I believe the actual cancellation was after the missed payment. They had not repossessed at that time, though.

Q Well, it must have been because there were two accidents, were there not?

MR. LATTURNER: There were two accidents, yes.

Q And I am merely asking whether he was under an obligation to keep the car insured?

MR. LATTURNER: He was under an obligation to keep the car insured. If not, the creditor is under an obligation to purchase the insurance, and in this case, the creditor, Mercantile, had not purchased the insurance.

They had also -- had not signed for the release of the automobile from the repair. He was in a dispute with Mercantile over the entire question of this insurance.

The insurance had been purchased for him by the creditor.

When the court dismissed the action for lack of standing because Mr. Gonzalez was not in default, they held that he did not have standing to adjudicate the denial of a prior hearing because if he would have had such a

hearing, he would have prevailed. They held, instead, that only those persons who would have lost a due process hearing have standing to contest the fact that they were denied such a hearing.

As noted before, Mr. Gonzalez' automobile, prior to his intervention in this action, had been repossessed and the title transferred and resold and the court thereupon held that his request for an injunction was useless and that he was not entitled to either declaratory or injunctive relief.

However, Mr. Gonzalez did not request the return of that particular car. He sued to enjoin the future enforcement of the challenged statute and it is this prospective relief that is important and necessary to Mr. Gonzalez.

The repossession and title transfer statutes are still on the books and are still being enforced.

Q Is he in default under any new contract?

MR. LATTURNER: No, he is not.

Q Has he bought another car?

MR. LATTURNER: He has not purchased another car on credit. With a credit record already showing one repossession, Mr. Gonzalez is particularly vulnerable to these statutes.

Q But he is not vulnerable if he hasn't bought a

car.

MR. LATTURNER: But this is part of these statutes and the presence of them and their enforcement, are part of his continuing decision on whether or not to purchase a car on credit and, if so, whether or not he can maintain and enforce any rights that he may have against his creditor.

This is the same type of situation as is present in Super Tire versus McCorkle, where the strike had ended, all of the strikers went off of welfare, but if there was ever another labor dispute, Super Tire Company knew that their strikers could receive public aid payments, that it would have an effect upon their labor negotiations, it would have an effect upon their decisions in any negotiating session.

Mr. Gonzalez is in the same type of situation, particularly since he has suffered one repossession and it is on his credit record.

This Court has recognized that there are occasions when a debtor is justified in not making a payment. However, future creditors of Mr. Gonzalez cannot be expected to tolerate such happenings, whatever the reason. If he moves into the situation, he would either have to concede his rights vis-a-vis his creditors, or take the chance on losing his car.

Q Mr. Latturner, if your law suit is boiled down now

to the proposition that you just feel chilled, if you will, by the existence of these repossession statutes on the books, you run into cases, don't you, like Boyle against Landry, where -- even where First Amendment interests were allegedly involved and even where the statutes concerned were criminal statutes. The court said that just the fear of a potential application of those criminal laws at some time in the future by the Chicago Police Department -- this case came from your same circuit -- was insufficient to create a controversy.

MR. LATTURNER: It is not just fear of the potential application. Mr. Gonzalez has been directly harmed by the operation of these statutes. It can happen again.

Q Well, he --

MR. LATTURNER: If a past wrong -- pardon me.

Q As was pointed out by the three-judge district court, he has a state remedy for that harm, because it was the abuse of the statutes, not the proper application of the statutes. Isn't that correct?

MR. LATTURNER: The entire question of a prior hearing is to avoid such an abuse.

Q But he doesn't want his car back now, you told us.

MR. LATTURNER: He has been paid for it.

Q And he has been paid for it.

MR. LATTURNER: He sued instead of --

Q And now his cause of action remaining, if any, is controversy with the state, is on the presence on the books of these statutes. Isn't that it? That he fears may be invoked in the future by some future asignee of his installment contract if he, sometime in the future, may buy an automobile on credit.

MR. LATTURNER: Having been harmed by the statutes, he also sued as representative of a class and the enforcement and execution of these statutes is still proceeding with regard to the class.

Having been harmed by the operation of these statutes, Mr. Gonzalez can represent this class.

Q What is the class?

MR. LATTURNER: The class are debtors under contracts with security interests whereby the creditor has a right to repossess, according to Illinois law.

If I --

Q Mr. Latturner,did I hear you say he has been paid for the car?

MR. LATTURNER: Yes. If I may get to that?

Mr. Gonzalez did not sue for an injunction returning that car. He sued for damages because of that repossession. If he would have obtained an injunction from the court returning that car, there would be no question

he would have a valid claim. Instead, he sued for damages and Mercantile has paid him damages for --

Q Where did he sue for damages?

MR. LATTURNER: In this Court.

Q Under this complaint?

MR. LATTURNER: Under this complaint, yes.

Q Well, don't you have, as well as -- is part of your damage claim that the car was taken without a hearing?

MR. LATTURNER: Yes, that is the damage claim here.

Q Well, has he been paid? Has he settled this?

MR. LATTURNER: He has been -- they have tendered the stipulated maximum of the damage. He has been paid pursuant to coming forward with this complaint.

Q Has he accepted it?

MR. LATTURNER: Yes.

Q In full, for all of his 1983 damage claim?

MR. LATTURNER: For the denial of the prior hearing, yes.

Q And then, what is left, except for his apprehension?

MR. LATTURNER: What is left is, he has been injured by these statutes. They are still on the books. They have a continuing effect upon his present decisions.

Q Well, but Mr. Justice Stewart just pointed out,

and I think someone else did, it not the use of this statute, but the abuse of it, the misuse of it. You're not operating under the statute, you are operating outside of it.

MR. LATTURNER: In Monroe versus Pape, the defendants there acted in direct violation of the statutes and the question was whether, when state officials operate in violation of a statute, whether there is a cause of action under 1983 and the court's holding is that when they act under color of law pursuant to a statute, that even their violation of it.

Q Did you sue some state official here?

MR. LATTURNER: Yes, sir, the Secretary of State.

Q He is included along with Automatic?

MR. LATTURNER: He is included along with Mercantile National Bank, yes, sir.

Q And did he pay any damages?

MR. LATTURNER: No, he did not.

Q But were all the claims against all the defendants settled by your disposition, your settlement with what you have described?

MR. LATTURNER: There were originally four defendants and -- pardon me, four plaintiffs in this case. Mr. Gonzalez --

Q Excuse me, Mr. Latturner, may I ask? I had not

appreciated he had been compensated for his full damage claim. Does that put this case in the posture of the Burney case? You are familiar with that one?

MR. LATTURNER: No, as a matter of fact, it would put the case in the same posture as if he would have gotten an injunction getting his car back.

The Burney case went through a separate proceeding, not the case at bar, achieving the same results.

Q Before she got her full payment.

MR. LATTURNER: She proceeded a completely separate action, apart from the suit, for the injunctive and declaratory relief.

This case puts it in the same situation as Moore versus Ogilvie, where even though the act has happened, the case is not moot.

Q Well, let's see, if the defendant said the minute you filed your complaint, said, you are dead right, we'll give you everything you ask, right now, I suppose you wouldn't be in very good shape to litigate up to this Court, would you?

MR. LATTURNER: Yes. I think I would because the defendants cannot be allowed to continually pay off individual plaintiffs and particularly poor plaintiffs, in order to maintain an unconstitutional system of repossession.

Q Nobody told him to take this settlement.

MR. LATTURNER: No, that is true.

Q Then, what is left of your response to the question?

MR. LATTURNER: The response to the question is that, having been injured by the statute, he can sue to enjoin a future enforcement because the presence of those laws on the books continue to affect him in his business dealings of whether or not to purchase a car on credit and, if so, whether or not he maintains his rights against his creditors. It is in that respect no different than Super Tire versus McCorkle, decided last term.

Q Now let's get back to my earlier question which you had not completely answered.

MR. LATTURNER: Yes.

Q When Automatic -- I assume it was Automatic who paid -- Mercantile --

MR. LATTURNER: Mercantile.

Q Mercantile paid the settlement, did that discharge all the defendants from all liability under 1983?

MR. LATTURNER: No.

Q Have you still got --

MR. LATTURNER: The other plaintiffs are not a party to this Court. For example, Mr. Mojica, due to illness in his family --

Q Well, I am talking about the people who are still

here.

MR. LATTURNER: Okay. Mr. Gonzalez is the only plaintiff still here.

Q And are all his claims against all the named defendants washed out?

MR. LATTURNER: Only the claim for damages. The claim for --

Q Well, all the damage claims?

MR. LATTURNER: Yes.

Q They are all washed out.

MR. LATTURNER: I might add that this case was brought on two counts. One against the creditor and one against the Secretary of State. And the claim against the Secretary of State can stand on its own regardless of being attached to a claim against the creditor; this is on the certificate of transfer or the certificate of title.

Q Do you still have a damage claim against the Secretary of State?

MR. LATTURNER: There was never a damage claim against the Secretary of State. He is a state official and pursuant to state statutes, I believe that a damage claim would not lie in federal court under Edelmann versus Jordan.

Q Would it be reasonable to assume that the settlement agreement that was signed when the check was delivered

recited generally, as is done, that all claims of every kind and nature --

MR. LATTURNER: No, it did not. In fact --

Q What was omitted?

MR. LATTURNER: It referred only to the count four. It did not even refer to the count for declaratory and injunctive relief against Mercantile.

Q Well, may I ask, was there any negotiations in connection with that settlement that we dismiss this suit?

MR. LATTURNER: No, there was not.

Q None? That wasn't even asked for by Mercantile?

MR. LATTURNER: That is correct.

Q They paid the full amount without asking?

MR. LATTURNER: That is correct.

Q What about the change in rules the Secretary of State put in?

MR. LATTURNER: The change in rule by the Secretary of State was accomplished in order to avoid a temporary restraining order in this case. It is a mere administrative procedural change.

Q Is it still in operation?

MR. LATTURNER: Pardon? They are still in operation, but they can be as easily shifted back the morning after this litigation as they were --

Q Are you satisfied with them as they are now?

MR. LATTURNER: No, I am not satisfied.

Q Why not?

MR. LATTURNER: Because, under the present rules, the Secretary of State has delegated what should be his duties and responsibilities to the creditors. Thus, the notice of the proposed application for the new certificate of title is drated and sent by the creditor.

The creditor drafts a proposed affidavit of defense that may be sent back in.

The affidavit, if the debtor files it, is sent, not to the Secretary of State, but to the creditor. The Creditor then can determine whether or not it is a valid affidavit of defense and if he rejects it and then applies for a new certificate of title stating that an affidavit was not received.

There is never any hearing or notice sent by the Secretary.

Q Let's assume we decided that we thought the case was moot. Would we -- should we take action on that or should we determine whether the case is properly here in this Court at all?

MR. LATTURNER: I think you have to determine whether the case is properly here first.

Q So that the question of whether this case was required to be heard by a three-judge court and whether,

even if it was properly here are threshold issues?

MR. LATTURNER: Correct.

Q You are going to say something about those, I gather.

MR. LATTURNER: I was getting to them. I notice my time has expired. I would like to -- well, pardon me, let me stay with those for a moment.

The action was brought against a state official, the Secretary of State, suing to enjoin him from the enforcement and execution of state statutes of statewide application, determination and transfer provisions of the Illinois Motor Vehicle Code pursuant to -- because they violate due process.

Thus, all of the technical requirements of 2281 are met and the only question is whether or not there is substantial constitutional question against the Secretary.

Mercantile alleges that the Secretary is not the actual means of enforcement of their statutes, but that argument could not be more incorrect. He is the only means of enforcement of those statutes.

Mercantile also alleges that he is only a nominal defendant because the certificates of title and their transfer are meaningless and ministerial.

However, the State of Illinois, by another statutory provision, provides for due process protection

to certificates of title in all instances except when it is terminated after a repossession.

In all other instances, before the Secretary of State can involuntarily terminate a certificate of title, he must send notice. He must set a hearing. He must issue subpoenas. He must hold the hearing and his decision is subject to judicial review.

Q May I ask you, could the determination -- the district court -- that was made by a three-judge court?

MR. LATTURNER: Yes, it was.

Q Could that determination with respect to standing have been made by a single judge?

MR. LATTURNER: No, it could not.

Q You mean -- couldn't the single judge look at the complaint and say -- and decide there is no standing in this case without getting to the three-judge court question?

MR. LATTURNER: Under Idlewild versus Epstein, when an application for a three-judge court is made, the single judge must look to see if the technical requirements are met and if the substantial constitutional question is alleged.

Q All right, well what about technical requirements? What about that?

MR. LATTURNER: State officer. State statute of

statewide application.

Q How about a proper plaintiff?

MR. LATTURNER: The questions of standing and mootness are more properly decided by three-judge courts. In the past, they have been and this Court has accepted numerous of those cases on direct appeal.

In making the determination as to standing in this case, it required an analysis of the statute by the three-judge court. They went, in reaching the standing issue, into the statutory scheme itself. It was not a cursory analysis at the very beginning.

Q Well, it didn't require any ruling on validity.

MR. LATTURNER: It did not require --

Q It just required a construction of the statute.

MR. LATTURNER: That is correct.

Q What is required about a three-judge court? Why is a three-judge court required for that purpose?

MR. LATTURNER: Because when there is an application for a three-judge court, the single judge does not have power to either grant or withhold release. He specifically, by 2284 subparagraph 5, cannot dismiss the action.

Q If he decides that there is no case, that it is moot, are you telling us that a single judge could not dismiss it as moot?

MR. LATTURNER: If there is a substantial constitutional question, the proper procedure is to convene the three-judge court.

Q That is not quite an answer to my question.

MR. LATTURNER: Okay.

Q Do you say a single judge could not dismiss it? If he decided that there was no lawsuit there any longer, there was no case or controversy live in existence and the case was moot and dismissed.

MR. LATTURNER: The --

Q He has no power? Are you telling us that? To do that?

MR. LATTURNER: He can only decide whether or not there is a substantial constitutional question. If he determines there is no substantial constitutional question, he can dismiss the case. If he determines there is a substantial constitutional question, he must convene the three-judge court to determine all of the other issues which may result in either the granting or denial of relief.

Q Well, if he decided and recited that he was holding -- that there was no substantial constitutional question because -- because there was no live case or controversy and that it was moot, he'd have that power, wouldn't he?

MR. LATTURNER: He would have that power if he made such a holding.

Q That comes down to a question of semantics, then.

MR. LATTURNER: It basically comes down to how far deeply into the statute and into the case they have to go and many questions concerning the standing of mootness go very hard. In this case of mootness, they went to the ultimate issue in the case, whether or not the injunction should issue.

Clearly, the single judge could not dismiss on the grounds dismissed here because it involved the direct explicit denial of an injunction.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jenner.

ORAL ARGUMENT OF ALBERT E. JENNER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

Q Mr. Jenner, would you tell me something about that settlement? How come you didn't get them dismissed?

MR. JENNER: Yes. There was a damage claim and the amount of the damage claim was ultimately determined to be $750. A tender was made of the $750. That damage claim was the subject of one of the counts. I have forgotten the number. That count was solely one of damage.

So that the issue of damages with respect to the alleged tort on the part of Mercantile in seizing by self-help the automobile when there was no default, that is, per the pleadings there was no default and the district, the three-judge court, taking the matter on the pleadings, ruled on the basis that there was no default. So that that issue is out because that was set up.

Q Perhaps -- maybe I should have put it this way. A practical lawyer like you, how do you come to settle a case, the full amount of the damage claim, without getting rid of the whole lawsuit?

MR. JENNER: Well, I didn't happen to be in it at that particular time.

Wouldn't you have done it?

MR. JENNER: I would have done exactly what my partners did, and that is, because at that particular point, that was the only viable issue in the case. And when that was settled, there was no longer any case or controversy presented here.

Q Well, when I was in practice, we got rid of the lawsuit if we were going to pay anything.

MR. JENNER: Mr. Justice Brennan, that has always been my practice in 44 years, but if I can't get that kind of agreement, I get the best I can get and that is really what the answer is here.

May it please your Honors, there is the threshold issue of whether this Court has jurisdiction at all, which I will discuss. There then follows whether the case is moot, which I will discuss, and also whether the plaintiff has standing.

There is a measure of confusion with respect to what the facts are here and cases are best determined on the facts and may I be helpful to the Court and review, just for a minute or two -- or four or five minutes of my time -- as to the facts in the case.

First, this is an attack upon the constitutionality of sections 503, 504 and 507 of the Uniform Commercial Code. As this Court knows, the Illinois Uniform Commercial Code is the most pure of all the codes in the 49 states and in the Virgin Islands and especially 503, 504 and 507 of the original code. Chapter --

This is Article 9, 503, 504, 507, was reexamined by the American Law Institute and by the Uniform Law Commissioners in 1973 and the whole chapter was rewritten so that you have presented here a carefully-thought-out and considered system with respect to the administration of motor vehicle repossessions and effort on the part of the American Law Institute and the Commission as to prepare a -- have a system which comports as near as may be and principally with due process.

Now, this 503, 504 and 507, may your Honors please, is before you on applications for certiorari in several cases which your Honors have deferred, presumably awaiting the argument of this particular case. So that the merits of the constitutionality of the self-help repossession provisions of the Uniform or Commercial Code are awaiting your decision as to whether you will accept, on certiorari, this several -- I think there are four, maybe five -- that are now pending before you which you haven't acted on.

Important here is the fact that that issue was not determined by the district court, the three-judge court here at all. The merits of unconstitutionality have been unconstitutional of 503, 504 and 507 -- is not before the Court.

The dismissal here was on purely procedural grounds.

Now, Mr. Gonzalez purchased this Pontiac used car on the 22nd of January, 1972. He made a down payment and then he was to pay 15 monthly installments thereafter of $120.74, commencing on the 28th of February of the following month.

He paid that first installment.

He paid none other, to this day, at any time.

Now, the contract provided, consistent with sections 503, 4 and 7, that on default, the creditor was

entitled to immediate possession with or without judicial process. The contract expressly so provides.

Sections 503 and 504, as has been said in all of the cases that are now pending before you on certiorari are pure codification of the old common law doctrine that you may enter into a contract of self-help possession upon a proper default.

This contract was assigned to Mercantile by the used car dealer.

Now, he was -- Gonzalez was involved in two automobile accidents; one on March 26th, '72, one on April 16, 1972, resulting in repairs that had to be paid of $542.68.

The insurance company only paid $322. On April 18th, the insurance company, in the face of two accidents --

MR. CHIEF JUSTICE BURGER: We will resume there right after lunch, Mr. Jenner.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION 1:02 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Jenner, you may resume.

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

I wouldn't want the members of this Court to think that I was having the client pay money to settle a particular claim without some good reason.

On the 16th of August, 1973, the district court, three-judge court entered an order dismissing the entire case as moot. That decision was corrected I will, I think successfully, argue. There remained, however, the damage claim, count four and while, since the issues involving constitutionality and the injunction under the Injunction Act were moot and the damage claim would then drop also, I was concerned that that particular matter still remained at large and that this was in the nature that we knew my distinguished and able, dedicated opponent had in mind making this a test case.

But the record should be made clean. Since he would not agree to dismiss the whole case in the payment of the $750, we just went ahead and paid it and that at least dropped that one possible viable claim and that was the reason.

Q But nevertheless, did you understand that the

damage settlement, or damage payment was in satisfaction of all kinds of damages that might have resulted from this taking?

MR. JENNER: Yes, it did.

Q A damage that might have resulted from a taking without notice as well as the cost of the car?

MR. JENNER: The alleged wrongful taking.

Q That does raise a Burney question, then, doesn't it?

MR. JENNER: I beg your pardon.

Q That raises a Burney question, then, doesn't it? You know, the lady who had a claim which, before the case got here, was fully satisfied by complete payment? Burney and Indiana.

MR. JENNER: Oh, the Burney case, yes.

Q Yes.

MR. JENNER: I intend to advert to that, if I may, in a moment or two. I also say, if your Honors please, I did mention that the constitutional issue is not involved here because the case was dismissed for mootness.

I did advert to the fact that there are several petitions for certiorari pending before this Court.

In that connection, there are eight decisions of courts of appeal in this nation in all of which sections 503, 504, 507 were sustained, have been sustained as to

constitutionality. Those eight cases are in six courts of appeals, the Ninth, the Eighth, the Fifth, the Third, the Sixth and the Second.

Five of those eight cases are pending on certiorari in this Court. In the first of those cases, that is, Adams versus Southern California First National Bank, the permanent editorial board of the Uniform Commercial Code consisting, as you know --

Q Are you going to argue about the three-judge court or are you --

MR. JENNER: I am not going to argue about the three-judge court because we did not move nor did we contend that the three-judge court was imporperly convened.

Q Do you think it is essential that that -- do you think we should determine whether we have jurisdiction here?

MR. JENNER: Yes, and may I turn directly to that point.

Q That is what I was asking, yes.

MR. JENNER: Finishing, if I may, Mr. Justice White, the facts so we'll have the perspective. The insurance company cancelled the insurance on the 18th of April with respect to the two accidents, one occurring in March and one occurring in April and rebated $229.84 of the unearned premium.

The repairs were $542.68. Mercantile

repossessed the repaired automobile on the 25th of April and paid the repairman at that particular time his repair bill of $542. So it was a quiet taking of possession.

Now, it is alleged in the complaint and since the case was disposed of on the pleadings, it is alleged in the complaint that Mr. Gonzalez was not in default at the time of the repossession.

If you take the figures, it would appear that that is probably not so. That he was, in fact, in default, but for the disposition to this case, the case was taken on the pleadings and so it is presumed, on the pleadings -- there has been no proof taken on this case whatsoever -- that at the time of the repossession, Mr. Gonzalez was not in default. So it was a -- on the pleadings of this, it was a wrongful taking. So it was a breach of 503 and 504 because 503 and 504 permit self-help only there is a default under the contract.

The Mercantile, having repossessed under the Illinois statutes dealing with issuance of certificate of title, which do not affect those certificates that are [in effect[?] not, in fact,[affect actual title and the statute so provides.

The certificate of title is issued for the purpose of recording, for keeping track of the car from a policeman point and that sort of thing and driver's license. It is

a ministerial act.

A repossession license was issued under the Illinois statute,here again, not affecting actual title.

Now, notice of the sale of the auto -- the repaired used car -- was given to Mr. Gonzalez by registered mail. He did not act. He took no action whatsoever and the automobile was then sold to a bona fide purchaser and that bona fide purchaser acquired actual title, as provided under the statute and also under common law.

That purchaser, in turn, sold to a second party and whether the automobile has been sold again, we don't know, but at least we know of those two sales that are alleged in the pleadings.

Now, after all this had occurred, after all this had occurred, Mr. Gonzalez then intervened and a pending suit, the Mojica suit, which is not involved here, and for the first time, on September 28th, 1972, after all these months of time had passed, he filed the intervening complaint which is this matter before your Honors on this particular case.

So at that particular time, the title of the car could not be reclaimed in any form, fashion or otherwise, nor relief of the district -- three-judge district court -- and as we urge here -- no relief whatsoever could be granted to Mr. Gonzalez at the time he filed this suit that would

be of any possible benefit to him.

Now, to a dedicated and able young lawyer, as Mr. Latturner is, the Legal Services Group in uptown Chicago, it appeared to him that here was a case in which the issue, broad issue of the constitutionality of the Uniform Commercial Code re self-help repossession provisions could be obtained and so he filed the claim at that particular time.

Now, the district court, the three-judge, dismissed this case because of mootness and lack of standing and that is the first point, Mr. Justice White, on a -- it is our --

Q You said mootness or just standing?

MR. JENNER: Mootness and standing, both. It was dismissed because of mootness and lack of standing.

Having done that, it is the position --

Q You mean, lack of a case or controversy? Is that it?

MR. JENNER: Lack of a case or controversy. Lack of a case or controversy, mootness and lack of standing in the sense of the absence of the right of the plaintiff to maintain the suit in his own name and the suit on behalf of the alleged class.

Now, it is our position that there is no direct appeal, under the three-judge pact, to this Court, forcing

this Court to accept the case or on examination of the jurisdiction of --

Q Well, why was the three-judge court required? If it was. If it was.

MR. JENNER: Because, under the counts of the complaint, the Secretary of State of Illinois was made a party defendant, as a purely nominal party.

As you will notice, the Attorney General of Illinois is not before this Court and the Secretary of State is not before this Court. They just ignored the case.

Having the Secretary of State as a party defendant, we say nominally, it was the position of counsel for Mr. Gonzalez that that involved state action to bring the case within the injunction provision.

Q Mr. Jenner, you say the state -- the Secretary was a nominal party. Do you mean by that that no relief was sought against him?

MR. JENNER: No, I don't. I mean that his function here is so peripheral, that is, issuing a certificate of title, that is, this ministerial act of issuing a certificate of title when advised following a sale or that repossession, that the automobile has sold, has been sold and now is in good title in someone else and the statute provides expressly that only when the Secretary

of State is, in fact, advised that title has, in fact, passed, does he issue, or may he issue, a certificate of title.

Q Well, couldn't a single judge make the determination the three-judge court made, no matter what other issues were down the line if the determination is made otherwise on mootness?

MR. JENNER: It is our position that that is clearly so, that a single judge, here,could have.

Q But you don't know that at the start of the suit.

MR. JENNER: We don't know that at the start of the suit.

Q But it is just from the face of the complaint that you have to determine that this man doesn't have standing.

MR. JENNER: That is correct, Mr. Justice White, and that is what the three-judge court did, including the single district judge, Judge Austin.

Q You think that the single judge could have made whatever determination was made here?

MR. JENNER: I do, on the pleadings.

Q In which event it goes to the court of appeals.

MR. JENNER: In which event, it goes to the court of appeals which is where this case should have gone, instead of burdening this Court with a direct appeal from the

three-judge court.

Q Do you think a single judge would have disagreed with the three-judge court and decided it was not moot? Then it would have to go back to a three-judge court.

MR. JENNER: Yes, if the three -- Mr. Justice Douglas, if the -- after the convening of the three-judge court, in my judgment, the single district judge could have Entered an order dismissing the case.

Q Because it was moot?

MR. JENNER: Because it was moot.

Q Was it argued before the single judge?

MR. JENNER: We never argued it before the single judge because --

Q All right. Well, how could he decided if you didn't argue?

MR. JENNER: How did I what?

Q How could he decide it if you didn't argue?

MR. JENNER: Well, I was answering Mr. Justice White's question in the abstract, that it is my judgment that the district judge could, as of his own, have dismissed this case as being moot.

Q Without any argument from anyone?

MR. JENNER: Without any argument from anyone.

Q Well, on direct appeals, they are only cases that must be tried by a three-judge court, must be decided by a

three-judge court. Not that are, but must be.

MR. JENNER: Must be. That is one point. Must be decided by a three-judge court and, secondly, it is our position that a direct appeal from this Court under the three-judge court act, applies -- does not apply when the dismissal is on procedural grounds.

Q Well, would this be -- even if the three-judge court were properly convened, the judgment it entered is not not correctly appealed? Does that enter into it?

MR. JENNER: That is my position. That is the correct position we argue in this case.

Q And if the plaintiff feels aggrieved, he can go to the court of appeals.

MR. JENNER: That is correct, your Honor.

Q If they agree with him, then they send it back and direct the convening of a three-judge court.

MR. JENNER: That is correct.

Q So if the three-judge court were convened and it looked at it all and said, well, this is a frivolous constitutional question, the federal district court has no jurisdiction, dismissed. That goes to the court of appeals.

MR. JENNER: That goes to the court of appeals. It is not, as my learned opponent argues in his brief, taking the statute literally. The statute does say, an appeal from a dismissal may be taken directly to this Court

but --

Q How is it moot for the one-judge court?

MR. JENNER: It was --

Q In the original pleadings he hadn't been paid yet. You hadn't paid the damage claim.

MR. JENNER: That is correct, Mr. Justice Marshall.

Q He didn't have his car. His car was gone and he was without his car.

MR. JENNER: That's right. The title had passed so that no relief in connection with that car could be obtained.

Q How is it moot then?

MR. JENNER: The damage claim is not a three-judge court claim. It is only ancillary to --

Q Well, the other part was to enjoin you from the procedure that you took in seizing his car. And you had seized it and on his pleadings, you had seized it without justification. How is it moot?

MR. JENNER: Mr. Justice Marshall, the complaint was filed after the automobile had been seized, repossessed, after it had been sold twice so that the car could not be -- in other words, no possibility of Mr. Gonzalez again obtaining his automobile.

Q That was in your pleadings?

MR. JENNER: That was in the plaintiff's pleadings. The pleading here to which, on which the dismissal was made, was the plaintiff's pleading. It was all laid out in the complaint as I have stated these facts to you.

Q Is that because the car had been twice sold since then?

MR. JENNER: Yes and notice of the first sale had been given to Mr. Gonzalez as required by statute so he knew that the car was about to be sold to someone who would buy it as a bona fide purchaser, acquire actual title which could not be defeased by him or anyone else.

Q And what did you file in response thereto?

MR. JENNER: We filed an answer to the complaint and then moved to dismiss.

Q And what did you allege in your answer?

MR. JENNER: We alleged in the answer these facts that I have related to you and alleged also that the complaint failed to state a cause of action upon which any relief could be granted.

Q And on your motion to dismiss, did you ask that it be dismissed because it was moot?

MR. JENNER: Because of mootness, because of lack of standing.

Q Before the single judge?

MR. JENNER: No, before the three-judge court.

Q I was backwards. You filed nothing before you went to the three-judge court.

MR. JENNER: That is correct, Mr. Justice Marshall.

Q That is what I want. You didn't file a "suggestion of mootness" any place? You did not, of course.

MR. JENNER: You will forgive my inattentiveness. May I ask --

Q Oh, I'm sorry. You of course, you didn't file anything, but you could have filed a suggestion of mootness, couldn't you?

MR. JENNER: Yes, your Honor. I should say this, that the three-judge court was convened before I was retained in this case and when I came into the case with a three-judge court already in existence wishing to get the case dismissed because of what I thought was mootness and lack of standing, I did not attack the three-judge court, though I think in the first instance, had I been in it at the first instance, I would have moved the district judge to dismiss the case for mootness and lack of standing.

But in any event, the Three-judge Court Act that provides an appeal for this Court on dismissal, while it appears on its face to enable an appeal directly to this Court on any dismissal, as this Court has said, that statute is to be strictly construed because it is a technical

statute and that, in substance, what that appeal provision provides is that if the decision goes to the issue of constitutionality of a state statute and the state action, then, of course, it comes within the spirit and purpose of the Three-judge Court Act and of the appeal provisions of that act and a direct appeal to this Court is entirely proper but where the case is dismissed not involving the merits whatsoever, which is true here, then, under your honors' interpretation of the Phillips case and others cited in the briefs, that appeal goes to the court of appeals and not to the United States Supreme Court to burden this Court with appeals involving purely procedural matters Now --

Q How much time, Mr. Jenner, we spend deciding whether the case should be here or it shouldn't.

MR. JENNER: I quite agree with you. I don't know what the status of the repeal of the Three-judge Court Statute is in the Congress. I do know that the Bar very much favors the repeal of that statute and I was hoping that Congress would have acted on it this present Congress but I don't know whether that is a fact or not. Let's hope it will be because the American Law Institute, the Uniform Law Commissioners and others have urged the American Bar -- urged the repeal of that Three-judge Court Act.

Now, I turn to mootness inquiry of Mr. Justice

Marshall and others. What is left here? The automobile has been repossessed. On the face of the pleadings, it was repossessed in violation of the statute which authorizes self-help repossession only if there is a default.

Notice of the sale was given to Mr. Gonzalez. He took no action. Title -- sale was held and title passed so that at the time he filed his suit two and a half -- three and a half months later, there was nothing in this case insofar as any relief could be granted to him. He couldn't get his automobile back. He couldn't obtain a declaratory judgment because the Declaratory Judgment Act says expressly, in case of a controversy you may apply for a declaratory judgment.

There is no controversy here between Mr. Gonzalez and anybody else because he can't get any relief.

Q But that isn't the -- the three-judge court didn't act on the basis that the car had been sold and he had settled with you, did it?

MR. JENNER: Well, the --

Q The three-judge court decided, because there was a damage remedy under the statute, that he could not ask for an injunction.

MR. JENNER: The three-judge court decided -- if I may, Mr. Justice White, at the time / that this three-judge court entered its order on August 16, 1973, the damage

damage claim called for was still viable, except that if the case was to be dismissed on other grounds, that is, under the grounds given the Three-judge Court Act viability, then the damage claim would fall with the other --

Q That isn't what the three-judge court decided.

The three-judge court decided standing because he said that he wasn't in default, in which event he had a remedy under the statute, namely, damages.

MR. JENNER: That is correct.

Q And so there couldn't be any so-called "constitutional claim" resulting in an injunction, no standing to ask for that kind of relief.

Now, you are not arguing that here. You are not sustaining that reason, I take it. Would you really try to do that?

MR. JENNER: Really try to sustain --

Q Would you think they were right on that basis?

MR. JENNER: I certainly do.

Q You mean, before any settlement of the damage claim?

MR. JENNER: Yes, sir.

Q That just because there is a damage remedy under the statute for an improper, wrongful taking.

MR. JENNER: Yes.

Q That there is no standing to bring this three-judge

court action and ask for an injunction having -- and ask the statute be declared unconstitutional.

MR. JENNER: I do most certainly urge that position.

Q Well, isn't that the position contrary to the -- what this Court did and the three-judge court did in the Fuentes against Shevin, at least with respect to the Pennsylvania plaintiffs?

MR. JENNER: No, I think not and in Fuentes, there was state action. In this case there is no state action.

Q Well, that is a different question.

Q Now you are swimming off in another ocean.

Q Right.

Q You had better -- you haven't answered his question, yet.

MR. JENNER: I don't think that I am inconsistent with your Honors' decision in Fuentes.

Q Opinion.

MR. JENNER: Yes, your Honor, your opinion, the Court's opinion.

In Fuentes, this Court held --

Q Particularly with respect to the Pennsylvania plaintiffs. I don't have it too clearly in mind but I seem to remember that there was an allegation that, at least on the part of the woman plaintiff, that there had

been a wrongful taking there, but that didn't stop the three-judge court from allowing her to attack the constitutionality of the basic repossession statute, nor did it stop this Court from reviewing it.

Am I mistaken? Is there a difference? Maybe there is.

MR. JENNER: Well, there is this difference that in Fuentes the issues viable for the three-judge court remained viable but here that is not so.

Q Just because of events that have happened since.

MR. JENNER: Well, because the -- before the suit was filed, and in Fuentes, the suit, the litigation commenced very quickly, contemporaneously with the issuance of the Ritter Republic, in each of those two cases, but here when one looks at what had commenced, the title had -- to the property had been repossessed, had been sold on notice and title had passed.

Q But no settlement?

MR. JENNER: But no settlement of the damage claim.

Q That's right.

MR. JENNER: That is correct. That was settled on December 28th, 1973.

Q And the court says because he has a damage remedy under the statute, there is nothing for us to decide here.

He has no standing in the suit, which is -- not -- what? Fuentes --

Q And I suppose, Mr. Jenner, even as hard as you try, you can't persuade us that they were right on that ground. I gather you are here in a position where you can defend this judgment, since you are Respondent or Appellee, on any ground that is available to you unless it was a post-judgment settlement intervening today.

MR. JENNER: Well, intervening, one, as in Burney and other cases.

Q And you don't have to fight quite so hard to defend what they did.

MR. JENNER: This issue must now be decided in this Court on the record as it now is before this Court.

Q I take it that is why you said you had three bullets in your gun, standing -- jurisdiction, first standing and mootness.

MR. JENNER: That is correct, your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Latturner.

REBUTTAL ARGUMENT OF JAMES O. LATTURNER, ESQ.

MR. LATTURNER: First counsel indicates that this is my case and not Mr. Gonzalez' case. That is totally incorrect. I have indicated this morning the interest that Mr. Gonzalez has in the resolution of the questions

presented here. That resolution is important enough for him that he has personally borne the costs of this appeal. This is his case. I am representing him as his attorney.

Secondly, Mr. Brennan referred to the time spent--Mr. Justice Brennan referred to the time spent on jurisdictional questions. Since 1960, this Court has taken, on direct appeal, nine cases in the same procedural posture as this case. A three-judge district court has been improperly convened and has dismissed the case without going to the ultimate issue.

Overruling that well-established rule is not going to lessen the burdens on this Court. It is going to increase it. You are going to be faced with a proliferation of cases having to do with this Court's jurisdiction.

The direct appeal rule in this instance is one of the few areas in the three-judge court litigation practice which is well-settled. It should stay that way.

Overruling it would create additional confusion and new burdens for both courts and litigants alike.

Q Well, what you are talking about now goes to the jurisdiction of this Court to hear this direct appeal.

MR. LATTURNER: Yes.

Q Here was a lawsuit brought attacking the constitutionality of state statutes. The three-judge court was convened. The court declined to issue the prayed-for

injunction and dismissed the case. You say that falls squarely within the statute which authorizes the direct appeal to this Court?

MR. LATTURNER: That is correct.

Q And that many cases so hold, nine, you say.

MR. LATTURNER: Yes.

Q I would have thought there might have been more than that.

But in any event, that doesn't really answer -- that answers only one of the questions, doesn't it?

MR. LATTURNER: Correct.

Q Now, let's say the case is properly here on appeal. It still leaves open whether or not the correct disposition for us isn't to say that the case has now become moot.

MR. LATTURNER: Mr. Justice Stewart, this case is in the same procedural position now that Fuentes versus Shevin was when this Court reached its opinion there. In Fuentes, the property of the plaintiff had already been replevied. It was gone. They did not get the property back. They sued to enjoin the future enforcement and execution of the replevin statutes.

Mr. Gonzalez' automobile has been repossessed. It is gone. He will not get it back. He has sued to enjoin the future enforcement in the statutes.

Q He has been made whole and the Fuentes plaintiffs had not been made whole.

MR. LATTURNER: The Fuentes plaintiffs did not request damages. They sued only for the future enforcement of the statutes.

Q And therefore, it is not the same. It is different.

MR. LATTURNER: It would not go to the injunctive relief. The question pending in both cases is future enforcement because of the effect that this is going to -- the continuing enforcement will have on the plaintiffs and the class that they represent. The payment to the individual plaintiff here does not affect either of those issues.

Q Mr. Latturner, is it your position, with respect to our jurisdiction that once the three-judge district court is convened, if it dismisses the case for any reason, that is -- amounts to a denial of injunction and you say that is where our cases support?

MR. LATTURNER: Yes, sir. This case is -- on that question has so held in Lynch versus Household Finance, that a dismissal --

Q That's right.

MR. LATTURNER: -- of the case is a denial of all relief requested, including the injunction and comes here on direct appeal.

Q That's right.

Q For whatever reason.

MR. LATTURNER: That is correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:31 O'clock p.m., the case was submitted.]