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In the

Supreme Court of the United States

HUGH L. CAREY, Governor of the State of New York, et al.,

Appellants,

v. No. 74-858

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees,

and

CURTIS CIRCULATION COMPANY and CONTINENTAL CASUALTY COMPANY,

Appellants,

v. No. 74-859

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

Washington, D. C.
January 20, 1976

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Washington, D. C.,

Tuesday, January 20, 1976.

The above-entitled matter came on for argument at 11:47 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

PHILIP H. BUSNER, ESQ., Young, Sonnenfeld & Busner, 110 East 59th Street, New York, New York 10022; on behalf of Curtis Circulation Company, et al.

A. SETH GREENWALD, ESQ., Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047; on behalf of Carey, et al.

JOHN G. LEDES, ESQ., 48 East 43rd Street, New York, New York 10017; on behalf of the Appellees.

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C O N T E N T S

[Afternoon Session - pg. 13]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Carey against Randolph and Curtis Circulation against Randolph.

Mr. Busner.

ORAL ARGUMENT OF PHILIP H. BUSNER, ESQ.,

ON BEHALF OF CURTIS CIRCULATION CO., ET AL.

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

This case raises the question whether a State can devise prejudgment seizure remedies to protect its citizens against fraud, which will comport with due process under the Fourteenth Amendment of the United States Constitution.

It comes to this Court on direct appeal from a three-court judgment -- by a three-judge panel that was convened in the Southern District of New York, whose judgment held unconstitutional all of the provisions of the New York attachment statute, the grounds of which are based upon fraudulent activity by a defendant.

The provisions are found at subsections (4), (5) and (8) of Section 6201 of the New York Civil Practice Law and Rules.

Subdivision (4) provides that a judge, in his discretion, upon a prima facie showing by evidentiary facts that a defendant with an intent to defraud his creditors has

assigned, disposed of, or secreted his assets, or that he is about to do the same.

Subdivision (5) permits a judge in his discretion to issue such an order, upon a prima facie demonstration that the plaintiff has a cause of action in contract; and, secondly, that the defendant has committed a fraud at the inception of that contract.

Subdivision (8) permits a judge in his discretion to issue such an order upon a demonstration, prima facie, by the plaintiff that he has a cause of action for either fraud or deceit.

I think it would be helpful as a model if I briefly stated the facts which underlay the attachment in this action, and which led to the commencement of the action in the lower court.

The appellant, Curtis Circulation Company, a national distributor of magazines, entered into a written agreement with Bert Randolph Sugar, a publisher of sports magazines, and a corporation which he then called Champion Sports. Under the terms of the agreement, Curtis agreed to make advances to Champion, based upon estimates of the sales of the magazines. And the agreement provided that in the event that the payments they made were excessive because the estimates turned out to be wrong, they would have a right to recoup those overpayments from subsequent editions of the magazines that were covered by

this agreement.

At the time the contract was entered into, Sugar represented to Curtis that he controlled Champion and that Champion was the owner of the magazines.

After it had been in effect for some eighteen months, and at a time when substantial moneys were due to Curtis by Champion, and the contract still had three and a half years to run, Curtis discovered that Sugar had stripped Champion of all of its assets and had arranged to sell all of its magazines to two different purchasers.

It learned that the seller under the two purchase agreements was not Champion, with respect to whom Sugar represented was the owner of the magazines, but another corporation called Wrestling Revue, over which Sugar also had control.

And it also learned that all the consideration payable under these two agreements of sale were payable by the purchasers to Wrestling and not to Champion.

It learned that Sugar had represented to the purchasers that Wrestling was always the owner of the magazines, that Champion, although the ostensible owner, was just publishing these magazines under an alleged license agreement with Wrestling; that it had failed to pay its license fees; hence Wrestling revoked the license and now was in a position to come to these purchasers and sell all of these magazines free of any obligation under the Curtis distribution agreement.

Based upon those facts, Curtis determined that it must have been defrauded at the inception of the contract, when Sugar said that Champion was the owner of the magazines, or that Sugar had defrauded it after the contract and stripped Champion of its assets by concocting this alleged license agreement and the purported ownership by Wrestling.

Accordingly, the determinate had to act promptly to arrest the further flow of those assets into hands or places where it would not be able to satisfy its right to recoup, or its rights to damages for fraud, the contract still having three and a half years to run, and they having lost their opportunity to distribute those magazines.

Curtis applied, ex parte, pursuant to Section 6211 of the New York statute, for an order of attachment. In support of that application, as the statute requires, it submitted the sworn affidavit of its secretary, which contained evidentiary facts, the facts largely but in greater detail than those I've just described to Your Honors. Annexed to the affidavit was the verified complaint in the action, a copy of the distribution agreement, and the detailed statement of the account between Curtis and Champion, showing the moneys then due and owing to Curtis.

QUESTION: The verified complaint contained the same recitals as were contained, I suppose, in the affidavit and as you have orally told us about --

MR. BUSNER: The gravamen of the complaint was largely the same, but the complaint was broader and less detailed and did not go into the evidentiary facts to the same extent that the affidavit did.

QUESTION: The complaint was submitted to the judge along with the affidavit, is that right?

MR. BUSNER: Yes, Mr. Justice --

QUESTION: Generally in New York you continue to have pocket process -- you still do, don't you?

When you file a complaint, the first time that anything gets filed in a court in New York -- this used to be true, as I understand it; and tell me if it's still true -- the first time anything gets filed in a court is when you ask the court for some sort of action.

MR. BUSNER: That is correct. The statute talks about commencing an action at the time you ask for a provisional remedy.

QUESTION: Right.

MR. BUSNER: In this case it would be attachment.

Although I do want to make it plain, you don't have to serve the complaint or the papers in advance. It is an ex parte application.

QUESTION: Right. Right.

MR. BUSNER: The statute does require you to serve the complaint on 24 hours' notice what is demanded, and not

beyond sixty days. That length of period being designed primarily for in rem jurisdiction, where the defendant might be out of State and might take quite a while to serve him and possibly require an order of publication and so forth.

QUESTION: And this -- the issues here involve both -- involve all three subparagraphs, (4), (5) and (8) of 6201?

MR. BUSNER: Yes; yes, they do, --

QUESTION: Or just --

MR. BUSNER: -- Mr. Justice. We moved under all four sections, and the order was granted under all four sections.

QUESTION: What is -- what? Fraud at the inception of the contract?

MR. BUSNER: The first one is fraudulent secretion of assets. (5) is the contract action brought in the inception of the contract. And (6) is simply an action for fraud or deceit -- I'm sorry, that's (8).

QUESTION: (8), yes. (8) is any action for fraud or deceit.

MR. BUSNER: That's correct, Mr. Justice.

QUESTION: Yes.

MR. BUSNER: As --

QUESTION: Was there any finding here that these assets were being wasted so as to -- the defendants would be judgmentproof?

MR. BUSNER: You mean a finding by the court or --

QUESTION: Yes.

MR. BUSNER: -- what they -- No, there was no evidentiary hearing below, and there's been no such finding by a court.

Certainly not in the federal court and it's now on the ready calendar in the State court. We just don't have a record on that right now, Mr. Justice.

QUESTION: Unh-hunh.

MR. BUSNER: With respect to the grounds upon which the lower court relied for its decision, it really relied entirely upon three distinctions which it perceived this case had, from this Court's decision in Mitchell v. W. T. Grant.

It held, first, if I can paraphrase it -- it held first that although it recognized the defendants in the State of New York had a right to immediately move to vacate the attachment, one of the matters discussed at length in Mitchell, this Court found that under New York law the burden of proof upon the preliminary hearing was on the defendant, and they held that that did not comport with due process.

Secondly, reading Mitchell most narrowly, the Court seemed to require, as a sine qua non of any prejudgment seizure, that the plaintiff have a prior vendor's lien or statutory lien in the property which he sought to attach.

Finally, related to the second ground but somewhat different was the Court's finding that allegations of fraud

are not amenable to facile proof on a preliminary hearing. And as I read the Court's decision, that being the case, there really -- if one follows that to its logical conclusion, you just cannot get a prejudgment seizure based on fraud that will comport with due process.

Because the lower court certainly wrote, in view of the decision in Mitchell -- which, incidentally, was decided after the complaint was originally filed but before the three judges convened to hear and determine the action -- Mitchell, as I read it, certainly does not place the emphasis on whether there is issue in the first instance, ex parte, or whether it's done after notice. The emphasis there is the preliminary hearing.

I think the lower court correctly followed that concept, but in holding, from its reading of Mitchell, that fraud could not be easily proved at a preliminary hearing, therefore fraud could never be the basis for an attachment; I think is an extraordinary proposition on its face.

The court seems to go equally as far with respect to the vendor's lien. I don't think that this Court intended in Mitchell that, absent a vendor's lien or a statutory lien, a plaintiff could not, under any circumstances, get a pre-judgment seizure.

QUESTION: Suppose the New York law permitted a seizure -- an attachment prior to any notice of hearing, and

then provided for no hearing whatsoever after the attachment, and prior to final hearing and judgment, on whether or not the attachment was proper?

Would you argue that that law was valid?

MR. BUSNER: If I understand your question, absolutely no hearing between the ex parte taking and plenary trial.

QUESTION: Exactly.

MR. BUSNER: My understanding of your decision in Mitchell, Mr. Justice White, and --

QUESTION: That was the Court's decision.

MR. BUSNER: I'm sorry. You wrote it, but the Court's decision, and also the Court's decision in North Georgia v. Di-Chem, would indicate to me that I could not successfully make that argument. I think it's clear that there has to be some opportunity before the plenary trial --

QUESTION: To do what?

MR. BUSNER: For the defendant to come in and at least get the judge's ear, to test what the plaintiff has told the judge.

QUESTION: And that has -- that goes broader than whether or not there may be a danger of losing the assets?

It has to -- wouldn't you agree, it has to go to, at least to some extent, to the merits of the basic plan?

MR. BUSNER: Yes, but to a very limited extent.

QUESTION: All right. But whatever it is, it has to

bear on that claim, to that extent?

MR. BUSNER: That's correct. I think to be fair under --

QUESTION: Just as your affidavit did.

MR. BUSNER: Yes, I believe it did.

QUESTION: Unh-hunh.

Now, you say that the New York law -- well, I'll start over.

As I understand the district court, it said that under the New York law, as it understood it, the opportunity for the defendant to make any showing between the ex parte attachment and the plenary trial related solely to the danger of losing the assets.

MR. BUSNER: I'm sorry. I misunderstood what you were asking me before. You mean the so-called unnecessary security test that the court applied below?

When you talk about the danger of --

QUESTION: Well, I'll put it the other way then. I'll put it the other way, counsel.

MR. CHIEF JUSTICE BURGER: You can address yourself to that after lunch, if you understand the question.

MR. BUSNER: Thank you, Your Honor. I'm not sure that I do, but I'll see.

QUESTION: Give me an answer if you get it.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Busner, you may continue.

ORAL ARGUMENT OF PHILIP H. BUSNER, ESQ.,

ON BEHALF OF CURTIS CIRCULATION CO., ET AL. -Resumed

MR. BUSNER: I'd like to correct an impression I may have left by virtue of a question asked of me by Mr. Justice Blackmun earlier in the argument.

The question was asked, whether there was a finding in this case that there had been secretion of assets. I took the question to mean whether there had been a final determination or a judgment.

Of course there was a finding by the judge who signed the order of attachment based upon the allegations and proofs submitted to him on the ex parte application.

With respect to the question that Mr. Justice White left with me at the adjournment, I'm not sure what the question was, but I believe you were referring to the ground in the New York statute which permits a defendant to move to vacate the attachment upon a showing that the security is unnecessary to the plaintiff. Were you referring to that, Mr. Justice?

QUESTION: Well, let's suppose that the district court was correct in reading the New York law to mean that whatever hearing the defendant could precipitate didn't include

any opportunity for either him or the plaintiff to address the merits.

MR. BUSNER: As I read Mitchell and North Georgia v. Di-Chem, if that were the case, --

QUESTION: Yes.

MR. BUSNER: -- if the defendant were restricted to the question whether the security was necessary, I think the law would be unconstitutional.

QUESTION: Well, now, do you think the district court read the New York law that -- the applicable New York law that way?

MR. BUSNER: Absolutely. And it's clear from the face of the statute, it's clear from the legislative reports, it's clear from all of the decisions that have preceded the three-judge decision on that subject, including most of the decisions cited by the three-judge court, --

QUESTION: Yes.

MR. BUSNER: -- and since the decision of the three-judge court, there have been at least a half dozen, perhaps --

QUESTION: So that you say that the three-judge court just made the mistake in reading the New York law?

MR. BUSNER: Quite obviously. A most egregious error.

QUESTION: But if we accepted its reading of the New York law, its judgment would be correct?

MR. BUSNER: I think that that would have to follow from Mitchell and Di-Chem.

QUESTION: Yes.

MR. BUSNER: Because I think that those cases do require some sort of opportunity for the defendant, to immediately go to the judge and point out any improprieties that exist in the papers upon the initial application.

QUESTION: Well, was there any suggestion in this case by anybody that the district court either abstained or that it dismissed the case in light of the pending New York State proceedings, which involved all these parties?

MR. BUSNER: Yes. A motion was made on that ground, Mr. Justice White, before the three judges were convened to hear and determine. We made that motion to Judge Lasker, who had originally had the case, and he rejected that ground, and --

QUESTION: What did you -- did you just ask for abstention or did you ask for sort of a Younger v. Harris type dismissal of the whole case?

MR. BUSNER: Both. We asked the court to abstain and to dismiss, and to give the State court an opportunity to test the validity of the attachment, or, if the defendant cared to raise the constitutional objection, the State court to do it there.

QUESTION: Well, what do your courts decide in these later cases?

MR. BUSNER: Except for -- there was one appellate division, second department, case that's cited, that refused to follow the three-judge court, as did a number of other lower court decisions, --

QUESTION: Any attempt to get to the Court of Appeals with that?

MR. BUSNER: With that case? I just don't have any knowledge whether that case is being taken to the Court of Appeals.

QUESTION: Well, does this development since the judgment of the three-judge court suggest that there should be a vacation and a remand for reconsideration in light of these New York decisions?

MR. BUSNER: No, I don't think so, Your Honor, because I think the law was clear on that point before these -- this --

QUESTION: Yes, but the fact is that the three-judge court read -- looked at the New York law and it cited what it thought were controlling authorities in New York, including cases in courts higher than the courts that have acted since the decision.

You think they misread the --

MR. BUSNER: That's correct, but there is absolutely no authority that they cited --

QUESTION: Well, I know you don't agree with their

reading of it, but, nevertheless, they read it, they read the New York law that way.

MR. BUSNER: Yes, but I think my disagreement is more than simple advocacy on my own part. It's quite obvious from the language of the statute, it's quite obvious from the circumstance that the very decisions that they cited, except for two or three, were all decided upon grounds other than the unnecessary security test.

The lower court, for instance, said that they were interpreting cases -- the statement was that these cases, for fifty years, had so construed the statute.

The fact of the matter is that the unnecessary security test was only added to the statute in 1963, when our Civil Practice Law and Rules superseded the prior State Practice statute, which was known as the Civil Practice Act; without that provision at all, it has always been the law in the State of New York. I don't think there's any reasonable argument about it.

QUESTION: Well, as you know, I'm sure, it's most unusual for this Court to re-examine findings of federal district courts or Courts of Appeals on matters of State law.

MR. BUSNER: I think this is so obvious, Mr. Justice, if you'll forgive me, I just have to say, --

QUESTION: Well, I've heard that argument many times since.

MR. BUSNER: If that's so, I think this is the classic case. It is most obvious in this case, from the legislative reports and from all of the decisions -- not only the decisions which followed the lower court decision.

QUESTION: Do you think your opponent is going to agree with you?

MR. BUSNER: I wouldn't be at all surprised, Mr. Justice White. The point was never raised by my opponents in his briefs to the three-judge court. Where they got it from is just beyond me. It is that obviously bad, in my opinion.

Based on that basic misapprehension by the three-judge court, they also came to the conclusion which really formed the main ground of their decision, that the burden of proof was upon the defendant in New York upon the motion to vacate.

Numerous New York decisions have stated quite clearly that the burden of proof remains upon the plaintiff beyond his original application, and upon the motion to vacate. It is true other decisions have stated that upon the motion to vacate, the defendant carries the burden.

But I submit, when you view the entire statutory scheme, those cases really stand for no more than the proposition that the plaintiff already having submitted his proofs and his evidentiary facts, showing his prima facie case, now comes the defendant, when he makes his motion, it's incumbent

upon him to test or to try to rebut that prima facie showing.

And I think that procedure in New York obviously comports with due process.

QUESTION: Do you -- the opportunity that the defendant must have to either extract from you or to have you make a showing as to the validity of your case, do you think that showing can be wholly satisfied with papers?

Just with affidavits?

MR. BUSNER: Yes. Once we -- we make the -- once --

QUESTION: Let's assume the defendant moves to set aside the attachment, after this initial ex parte attachment, and you agree that there is open an issue on the merits.

Now, do you think that he's entitled to require that you have a live witness there, or witnesses?

MR. BUSNER: Unless the issue is extremely narrow, such as on a general release, or if the defendant was supposed to be somewhere that he can demonstrate he wasn't there, or some simple issue like that, upon which he can have an evidentiary hearing, under C.P.L.R. 2218, which is the general section covering motions, except for that, quite frankly, if all he's going to do is raise issues of fact or defenses, he will not get an evidentiary hearing, in all probability,in New York.

I do not think it's otherwise in Louisiana.

QUESTION: Or -- well, isn't -- do you think, then,

you have to make any showing other than -- on the merits -- other than what you demonstrated ex parte to get the attachment?

MR. BUSNER: No. No, I think we would go through the procedure of using live witnesses and the same documents on an oral hearing.

QUESTION: Oh, I know, but you say you don't need to get to an oral hearing at all.

MR. BUSNER: That's correct. Then I misunderstood your last question, Mr. Justice.

QUESTION: Well, I'm -- you think that -- you think the New York law now makes adequate provision for whatever hearing the defendant is entitled to?

MR. BUSNER: Yes, I do.

QUESTION: And I'm just trying to ask you whether you think he is entitled to have an evidentiary hearing.

MR. BUSNER: As a matter of comporting with due process, whether that's a -- no, I do not; I think the New York procedure comports with due process without offering that evidentiary hearing in every case.

I can conceive of certain cases where the judge would order an evidentiary hearing.

QUESTION: Well, then, you say you don't -- at this hearing, after the initial seizure, to which you think the defendant is entitled to, you're suggesting that the plaintiff needn't show anything other than what he's already shown in an

affidavit or --

MR. BUSNER: In most cases, I can't build specific models, but I should think if the defendant came forward with some compelling evidence, which would demonstrate that the plaintiff's initial showing was not correct, or created a substantial doubt with respect to that, that the plaintiff would have to come forward. And that often happens on these motions in the State courts.

QUESTION: The big difference is, as I understand it, the post-attachment hearing is an adversary hearing, at which the defendant may be present and take part. He makes the motion.

MR. BUSNER: That is correct.

QUESTION: But a pre-attachment hearing is ex parte.

MR. BUSNER: That's correct, Mr. Justice.

QUESTION: That's the big difference, isn't it?

MR. BUSNER: Yes, Mr. Justice.

QUESTION: So that there is the possibility, the opportunity, depending on the facts and circumstances, to have an evidentiary hearing after the attachment.

MR. BUSNER: That is true in New York, the opportunity is there.

QUESTION: Right. I just wanted to make that clear.

QUESTION: So he would at least have a chance to come in and say, "Look, you've made an awful mistake, a very bad

mistake, your computer has blown a fuse or something." But certainly it would be no time to resolve differences in -- in -- differences in conflict over the evidence?

MR. BUSNER: Correct.

QUESTION: Yes.

MR. BUSNER: You don't have the opportunity in New York, I suggest, any more than in Louisiana, to have a plenary trial of the underlying controversies, and I believe Mitchell was clear on that point, that a plenary trial resolving the merits or the controversies between the parties is just not necessary for -- before property is taken. That the issues can be narrow.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Greenwald.

ORAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF CAREY, ET AL.

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

The importance of the question on this appeal is rather obvious, certainly to the State of New York, because it brings into issue the types of situations where the provisionsal remedy of attachment is proper and constitutional. Basically, of course, the remedy of attachment is an ex parte order.

And this type of order, this ex parte type of order,

has been a matter of frequent concern to this Court in the past several years.

In fact, this is the fourth time, I think, within the last three or four years that this type of issue has come before this Court.

And I think we have to ask ourselves: In what circumstances, preliminary relief can be granted ex parte in a manner in accord with the due process clause of the Fourteenth Amendment to the United States Constitution?

And of course while the broad outlines are available in this area, and most recently in Mitchell v. W. T. Grant, and North Georgia v. Di-Chem, many of the specifics are still in doubt and the subject of much discussion.

I think the lower court decision and order in this instant case is a demonstration of the confusion that exists in this area.

Now, I think we should consider the basic rule or basic procedure that sequestrations, as in Louisiana in the Mitchell case, and attachments issue ex parte, and it's also clear that the fact at issue, ex parte, is constitutional.

And that the mere postponement of judicial inquiry is not a violation of due process.

However, I also recognize that there are safeguards necessary when ex parte orders issue.

And in this regard the Mitchell case is an example

of some of those safeguards, or what type of safeguards are sufficient.

But due process, of course, is not inflexible.

On the other hand, I'd say, at the other end of the spectrum, the decision in Di-Chem is an example of what is absolutely unacceptable.

Now, as to the purpose of attachment, I think there's no dispute that New York has a sufficient purpose for granting attachments in this area, which are basically fraud.

But that is a security aspect. Of course, there is another aspect, jurisdiction, which is not involved in the decision here.

But, as I say, we are dealing with the security type of attachment.

This is where the State seeks to protect the ultimate collectibility of a judgment, rather than to assert its jurisdiction in the first instance.

And, of course, in New York, these type of security attachments are only allowed in certain specified instances; they are not available in every lawsuit. You can't, just because you have a lawsuit, get an attachment or seek one.

And I would further state that it is a point for the Legislature to determine, that you need the remedy of attachment in this broad situation. Fraud, of course, is a pernicious vice. And it always has been a concern, I think, to any -- to the

courts and the Legislature.

Now, in the court judgment opinion below, they seem to make a finding that because the attaching party in the instant case did not have a vendor's lien, that it only had a claim of fraud,that it also had some evidence that assets were being secreted or taken out of the State, that attachment shouldn't be necessary.

I submit that in view of the legitimate purpose of the attachment in the instant case, that finding or determination is in error. Because it basically prevents a State from ever protecting its citizens against this type of fraud situation.

I would also submit that it's an unduly narrow reading of the holding of Mitchell v. W. T. Grant, or the tenor of that decision. And I would also submit that this view that it's a narrow reading of Mitchell was confirmed by the -- this Court's opinion in the Di-Chem case, where the Georgia attachment or garnishment statute was struck down, and the matter of a vendor's lien was not even mentioned; never mentioned once.

Thus, I think it still remains the rule, as was many years stated, that it is for the Legislature to determine what circumstances an attachment shall be granted, and of course it's for the court to decide whether the facts of any particular case warrant the remedy of attachment.

Now, as I have noted, the prevention of fraud is an important State interest. This was even recognized in the case of Fuentes v. Shevin, as one of its exceptions to that, the prior assertion of State power ex parte.

And I submit that this assertion by the State of its interest in the prevention of fraud or secretion of assets or rendering uncollectible judgments should be upheld by this Court in the instant case.

Because, as in Mitchell, it avoid self-help. If you don't have this remedy available, you will have instances of self-help; and since, by the way, this is a commercial case, it does facilitate commerce.

Now, I wish to emphasize that while we do have the question of fraud, there's a great deal of importance to be placed upon the fact that in New York a judge issues the writ of attachment. There is judicial supervision at every step of the way.

Now, I think it's important to note -- and this Court has placed emphasis on the judicial function -- it's not just that a judge is a more powerful official than a clerk, or a neutral official, it's rather, and I emphasize this, that he can exercise discretion. He can determine whether there is a course of action, whether there are evidentiary facts to support the remedy.

In New York, indeed, even if the papers formally

support the granting of the writ of attachment, a judge, in his discretion, can still refuse to grant that writ. It's not just simply plugging in the numbers in New York and getting your writ of attachment. That's quite different frommany other States. I submit it's quite different, even, from Louisiana statutes, or the facts of the Louisiana Mitchell case.

QUESTION: You don't just hand the affidavit to the judge and he automatically signs it?

MR. GREENWALD: Absolutely not. Indeed, the facts of this case, as I understand them, are that my co-counsel, who is the attorney for the private party, went up to Justice Fine with his affidavits and further papers -- and I might add, he was then sent back for further proof or evidence. He just didn't go once and get the writ of attachment. He had to produce more. The judge would not sign this order of attachment without even more.

There are no standard forms in New York -- we have form book publishers, I dare say -- there are no standard forms in New York for checking the boxes and getting a writ of attachment. I have seen examples of such forms in other States for getting writs of attachment. Indeed, I feel that -- it's rather obvious in the Mitchell Louisiana situation -- that you have the standard points asserted and you will get your sequestration. But that is definitely not the case in New York.

QUESTION: Mr. Greenwald, --

QUESTION: How often in your practice have you ever had an application turned down?

MR. GREENWALD: I would say I have never -- I have never made an application for writ of attachment. I'm in the Attorney General's office; we don't practice, generally, commercial law -- or at least my section doesn't. I'm sorry.

But I think my co-counsel, Mr. Busner, has stated that it has happened to him, I believe. It does happen. But that's --

QUESTION: Does the record show that it happens, or are you making just a general statement?

MR. GREENWALD: I'm just making a general statement. It's not part of the record.

QUESTION: Mr. Greenwald, could I get off one point?

I'm not clear as to just exactly how you move to -- when the attachment is made, how you move to vacate, and just what -- I mean, what grounds are there for it?

MR. GREENWALD: Well, --

QUESTION: Under the New York law.

MR. GREENWALD: -- Mr. Justice Marshall, under the New York law, as soon as the defendant learns of the attachment, he can immediately move, under CPLR 6223, to vacate that attachment.

QUESTION: Well, what --

MR. GREENWALD: The grounds under which he can move

are as broad as the grounds upon which the attachment was granted. He can challenge that there is a cause of action. He can challenge whether there is sufficient evidentiary facts there. He can raise factual issues. He can also -- and this is a final ground -- he can also state that the security is unnecessary to the plaintiff.

Now, that last point, which was the district court's conclusion as the only ground, led to an inference that while the grounds of the attachment might not have been proven, if it was still necessary to the security of the plaintiff, that the attachment would stand. And that is error. I submit that is fundamental error, because there are other grounds.

It was the basis of the lower court's decision that you really didn't get a meaningful hearing or opportunity to vacate the attachment in New York.

QUESTION: Well, what you've mentioned, all of these grounds, are they in the statute or is it general? That's what confuses me.

MR. GREENWALD: Well, all of these grounds are matters of judicial interpretation.

QUESTION: Yes.

MR. GREENWALD: This case does involve a great deal --

QUESTION: Would that be a hearing?

MR. GREENWALD: What?

QUESTION: Would there be a hearing?

MR. GREENWALD: Yes, this could --

QUESTION: Would there be an evidentiary hearing?

MR. GREENWALD: In the proper circumstances, yes, there would be an evidentiary hearing.

QUESTION: You'd have to make some kind of a showing to get an evidentiary hearing, I guess.

MR. GREENWALD: Yes, of course. You'd have to make -- that if the point that you make is the factual question, you would get with live witnesses.

Now, the example I'd like to give is when you make that unnecessary to the security of the plaintiff grounds, that is basically on jurisdictional attachments.

The defendant would say, for example, -- and I have a case cited in my brief, I think, Maitrejean in the appellate division -- that "I'm a national corporation. I have millions of dollars in assets. I'm not going any place. I've appeared in the case. You have jurisdiction."

Factually, you don't need this security.

Now, of course, if the plaintiff wanted to challenge this point, he could bring in his witnesses. But the point is there are factual issues oftentimes involved, but normally in New York, as my co-counsel has said, it is a matter of legal argument by attorneys.

QUESTION: One last question on that: Does the same judge usually hear it? Or does he go on the regular

motions calendar?

MR. GREENWALD: It will go on the regular motions calendar. In New York County, where the writ of attachment was issued here, it was a special -- what the judge, the ex parte judge signs the attachment and orders to show cause -- excuse me, just attachment and issues the writ; and if you make a motion to vacate, it goes on the regular litigated motions part, and another judge will normally hear it.

In smaller counties, --

QUESTION: Oh, well, that's different.

MR. GREENWALD: -- if it's done very quickly, the same judge would hear it.

QUESTION: Mr. Greenwald, do I correctly understand that the motion to vacate may, in some circumstances, not carry with it a general appearance by the defendant; whereas, in some situations, it would be a general appearance?

MR. GREENWALD: I think in some circumstances it might not be a general appearance.

QUESTION: And is it -- I think the statute indicates that it can be made without entering a general appearance.

MR. GREENWALD: Yes. That's jurisdictional attachments. And, once again, we'renot involved with that in this case.

QUESTION: I was wondering if there's any difference in the scope of the grounds which may be asserted for vacating

the attachment as between the two kinds of motions.

MR. GREENWALD: Well, I think you'd normally get into factual issues more frequently with jurisdictional attachments, such as, you get a jurisdictional attachment because the defendant is a non-resident. He may assert the fact that he is a resident, and then you have a factual issue: Is or is he not a resident?

The point to the matter is, as far as this fraud type attachment, the defendant is or is about to or has secreted assets, and while this may be an ultimate factual issue, there have been evidentiary facts submitted on the ex parte application to support this inference; and, once again, I emphasize that on the motion to vacate you're not trying the complete cause of action; you're not trying the defendant's defenses to the cause of action. And I would submit also it's quite clear that this is the same situation as in a Louisiana Mitchell motion to vacate in hearing. You're not trying the defenses.

QUESTION: Do you agree with your colleague that the district court misread the New York -- applicable New York laws to what is open on the motion to vacate the attachment?

MR. GREENWALD: Yes, it most certainly has misread the applicable New York law. And I wish to emphasize to this Court that in the area of what is the law of the State of New York, it is the courts of the State of New York that state

that law.

And most clearly -- because this has never really been in issue in the State of New York -- since the lower court decision here, as has been stated, any number of State courts have stated that the law of the State of New York is otherwise than the lower court said it was.

And, indeed, the point of abstention has been raised previously, and I believe there was some issue of whether it should be the abstention to get an interpretation of New York State law, or the Younger type abstention.

The lower court determined, No. 1, that it didn't have to abstain as to what New York law was, because it was positive it was clear.

Of course, the more positive a person is, the more frequently, I submit, he's in error!

And that was evidenced by the fact that leading New York commentators, leading New York judges, New York State court judges said: "Gee whiz, that's just not the law of the State of New York."

And I think it's --

QUESTION: I thought they said that the State -- the State was a party at that point, or not?

MR. GREENWALD: Well, the State -- the Attorney General's office has been a party to this case since its very inception.

QUESTION: Yes. And did you support any -- the motion to abstain?

MR. GREENWEALD: We had raised -- yes, the issue of abstention. I did not basically --

QUESTION: Now, abstention would just be staying the federal action until any State law issues would be settled.

MR. GREENWALD: No, I submit it was different. Basically I am now arguing also for a Younger type abstention.

QUESTION: Oh, you're talking about a dismissal, so that all the issues, including the federal issues, could be settled in the pending State court decision?

MR. GREENWALD: That is quite correct, because it might very well not be necessary.

QUESTION: Well, that kind of a motion was never made, was it, in the --

MR. GREENWALD: Yes, it was basically on the motion to dismiss.

The convening judge in his opinion stated -- and this is, I correct my brief -- the convening judge said that was an issue for a three-judge court. So he wasn't passing on it. And quite correctly.

Then, in the body of the three-judge court decision, it didn't even mention abstention. And, frankly, I did not push it because at that time the case of Huffman v. Pursue had not been decided, and it was generally considered that

abstention only applied solely to criminal cases.

But the three-judge court opinion, in a footnote -- I think it's footnote -- one of the last footnotes -- stated the single judge has already decided that this is not a proper case to abstain. And, by the way, the same judge who wrote the convening opinion wrote the three-judge court opinion, so you have a complete circle.

He says, the first time, "I'm not going to decide it" --

QUESTION: But you don't -- there's not any question here from neither you nor your colleague? That the error here was not abstaining --

MR. GREENWALD: That is frankly true.

QUESTION: Is that assumed under any of the questions presented here?

MR. GREENWALD: I grant that it was not, but I do think it is assumed in -- basically in the sense that -- I really think that in this area, this Court should recognize the discretion of a judge in granting or denying this writ.

There is a basic element of comity here. You have here in this case two State court judges --

QUESTION: Well, we should do this sua sponte, even though you haven't presented the question?

MR. GREENWALD: Well, I admit it's not one of the questions presented, and it wasn't one of the questions pre-

sented on our jurisdictional statement. But I do think frequently, if this is in the proper circumstances, this Court does render such a judgment.

QUESTION: But the difficulty is that if that question isn't -- you didn't present the question, and yet you -- and you are fundamentally, just essentially arguing that we should disagree with the three-judge court as to what New York law is.

MR. GREENWALD: Well, it's more than Your Honor -- Justice White, it's more than you should disagree.

You don't have to disagree. You have to -- it's been often said by this Court, you have to agree with what [sic] the State courts say State court law is, and there was an issue raised, or a question raised about the New York Court of Appeals.

I wish to emphasize that this is a provisional remedy, it's not a final judgment. The limit -- the jurisdiction of the New York Court of Appeals is quite limited. It is basically limited to final judgments. It only gets these issues after a final judgment, and whether an attachment ever survives all of that procedural matter is questionable.

Indeed, I'd say the only --

QUESTION: Just that the Court of Appeals lacks jurisdiction in this circumstance, or that ordinarily it won't exercise it. Which?

MR. GREENWALD: It, itself, under the statute, I believe, lacks jurisdiction. It is possible that the appellate division itself could certify the question. But that is a very rare circumstance.

And, indeed, the appellate divisions can pass on questions of fact and law, the exercise of discretion by that judge. You even, besides getting a motion to vacate, you get an appeal in New York.

QUESTION: Well, Mr. Greenwald, you've got kind of a tough row to hoe. If you're simply asking us to superimpose our judgment as to New York law on that of three New York federal judges, all of whom were at one time New York practitioners, I think you've got to put it to us some other way than simply for us to announce what New York law is.

MR. GREENWALD: I don't think it's necessary for Your Honors to announce what New York law is. New York law has been announced by the courts of the State of New York.

I submit that, while it's generally said the law --

QUESTION: These are trial judges you're talking about?

MR. GREENWALD: Also appellate division justices.

QUESTION: Well, do you think that we are bound by trial court judges?

MR. GREENWALD: I think that in this --

QUESTION: Do you?

MR. GREENWALD: I don't say that you are bound by trial court judges. But in this area, normally, the appellate divisions are bacially the final word as to what the law is.

QUESTION: Well, as I understand appellate divisions, they are just trial court judges that are assigned to the appellate division.

MR. GREENWALD: Well, they have appellate jurisdiction over these trial court judges, and I think it should be recognized that once again in the federal-State hierarchy the matter of comity in federalism, on matters of State law the State courts --

QUESTION: Any State judge --

MR. GREENWALD: I think --

QUESTION: Any State judge can bind this Court?

MR. GREENWALD: I'm not saying --

QUESTION: I hope you don't!

MR. GREENWALD: I think -- yes, they certainly are very, very persuasive, I'd say, on matters of State law as opposed to constitutional law. I think they do bind you on matters of State law.

QUESTION: A single judge? A trial judge?

MR. GREENWALD: I wouldn't say a single judge, because a single judge doesn't even bind the State of New York.

QUESTION: Well, can you give us -- can you give me

any case in which this Court said that?

QUESTION: I think you mentioned --

QUESTION: The cases you're talking about is when the Supreme Court, the highest court of the -- the State Supreme Court?

MR. GREENWALD: Yes, of course. I cited --

QUESTION: Well, I think you might cite an earlier diversity case in about 337 U.S., where this Court did hold that a South Carolina trial court decision was binding as a matter of State law, in the absence of any pronouncement from a higher court in the State.

MR. GREENWALD: Well, I think that -- while I'm not acquainted with that decision, I think that is a fair statement. And in view of the --

QUESTION: That's under the Erie Railroad doctrine.

MR. GREENWALD: Erie-Thompkins.

QUESTION: That's right.

QUESTION: And there are other cases where the intermediate Court of Appeals decision has been held expressing the State law.

MR. GREENWALD: Well, --

QUESTION: That's all on diversity.

MR. GREENWALD: -- I think -- well, it's rather obvious --

QUESTION: Didn't the three-judge court here,

though, cite the Court of Appeals cases?

MR. GREENWALD: Yes, they did cite Court of Appeals --

QUESTION: And they relied on the highest court in the State for its conclusion.

MR. GREENWALD: But I would also state they -- if you look at those Court of Appeals cases, they might not --

QUESTION: Well, I know you're going to say they misread them.

MR. GREENWALD: No, I'm not going to say they, quote, "misread them"; but also, as Justice, then Judge Cardozo said in the Zenith case in the New York Court of Appeals, against Bathing Pavilion, attachments are not for the asking, there must be evidence, there must be proof. Which is the statement of the general premise.

When an attachment case got up to the New York Court of Appeals, it was purely on a question of the jurisdiction to grant that attachment in the first place; a matter of law, not a question of the facts.

The New York Court of Appeals is called a court of law, it doesn't judge the facts. The facts are determined, or can be modified, say, by the appellate division; but once that case gets up to the New York Court of Appeals, the only way the Court of Appeals can change that judgment is to say, as a matter of law, on a very strong showing that the law was applied wrongly below, say, vacate that attachment.

Indeed, I think it was Wulfson v. Russian Republic, they said, this is going to be attached because -- this attachment is going to be vacated because the Russian Soviet Republic isn't --

QUESTION: Well, aren't you just -- all you're really telling us, I gather, is that the three-judge court simply, as you said earlier, misread New York law.

You're not familiar with the Hilecki? case in this Court, are you? That happened to be a case in which the Second Circuit read New Jersey law, as expressed in the opinion of the New Jersey Supreme Court, in a way that was clearly wrong; and yet this Court said it couldn't review it. And the reason I felt distrust about it was that I wrote the opinion for the New Jersey Supreme Court when I was a member of that Court.

And I knew how wrong it was.

MR. GREENWALD: Well, let me put it this --

QUESTION: But yet this Court would not review the holding of the Second Circuit as to what New Jersey law was.

MR. GREENWALD: But let me put it this way: We have in this case a statute of the State of New York that's been declared unconstitutional, on the basis that you do not have a meaningful opportunity to vacate an attachment under New York law.

Now, this flowed primarily, as we say, from an

erroneous ruling of New York law. I think that certainly this Court does have jurisdiction to decide that the New York statute, viewed as a whole -- and that is the basic test in this area -- viewed as a whole is a constitutional statute. It's not an ancient statute. It's a matter of the 1963 --

QUESTION: Yet your colleague agrees, as I understood him when he answered Mr. Justice White, if the three-judge court properly stated New York law, then its judgment was correct.

MR. GREENWALD: Well, I would explain that -- and I'm not trying to back away -- because if the only ground you could vacate an attachment on in the State of New York was that it was unnecessary to the security of the plaintiff, that would mean that,while the plaintiff has not proven his grounds, the attachment would still stand because it might be necessary to security.

And on that basis, of course, you would not have a meaningful hearing or a meaningful opportunity to vacate that attachment.

But that is simply not the case. It's obviously not the case. We do give -- we have a judge granting the writ in the first place, he's exercising discretion. You can immediately move to vacate that attachment. You go once again back to a judge who exercises his discretion as to whether that writ should be granted, should have been granted. There is no

doubt in my mind that the issues on that motion to vacate the attachment are as broad as the issues that it originally came up on the ex parte application.

QUESTION: Well, I know, but what if they aren't? What if they aren't?

How about the answer to Mr. Justice Brennan's question, if the issue is as limited on the motion as the three-judge court said it was, or that they were, do you agree with your colleague?

MR. GREENWALD: Not necessarily, because this Court has said a limitation on litigable issues is not a denial of due process. That was Lindsey v. Normet. A court or a procedure can limit the number of issues that you can litigate at any particular time.

Once again, we have emphasized that we have, I think, a statute that fully comports with due process. It is the necessary statute.

I would also -- one final point: the three-judge court made something about the fact that fraud was perhaps not as amenable to proof as a vendor's lien.

Well, assuming this is -- this may be the case -- and, by the way, the appellees and the amicus curiae seem to be at odds on this issue -- it's really insufficient reason to eliminate all prejudgment attachments involving allegations of fraud.

We certainly have the counterbalancing interest of the State.

And once again you have the situation where a judge determines the issues, he exercises his discretion, and, at this point, I would like to reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ledes.

ORAL ARGUMENT OF JOHN G. LEDES, ESQ.,

ON BEHALF OF THE APPELLEES

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

I think I should devote the first two minutes to removing this word and phrase, "fraud", from the discussion once and for all.

At page 55a of this Appendix is the agreement in the form prepared by Curtis. It is their form. It was prepared in their office by their employees, typed by them, and the publisher is Champion Sports.

Significantly, it has no date.

It was signed on the back side by Mr. Bert Sugar, on behalf of Champion Sports.

Not knowing when this contract was signed, we have a great course of fraud being conducted here, and we are at a loss to understand how we, in this ex parte proceeding and then

under 6223, can now address ourselves in affidavits and answer and take on this challenge, because, in spite of what my brothers have said, they have not cited a case -- not one isolated, singular case -- and it is not the law of New York conclusively; there is no right to a hearing and evidence. There is no right to adversary hearing.

The Court of Appeals of New York has said it three times. Only one case was mentioned in their brief, and I might point out that the reference to the Zenith case was in the reply brief, and it was the dictum of Mr. Justice Cardozo, the finding of the case, and the simple finding, was that there was no statement of a cause of action as against defendants B, C, D and E by simple implication of allegations made against A.

You could hold A, but you can't hold B, C and D with a jurisdictional defect.

That was the decision.

Of course, Mr. Justice Cardozo took the opportunity of writing some lovely words about the care of the courts. It wasn't the finding of the court.

American Reserve Insurance, many years later, certainly made it very clear that the finding in Zenith was correct -- two years later, I believe it was -- no, two years before, Wulfsohn made the rule. The rule was clear in Wulfsohn.

Jurisdictional defects in 6223 are not set forth, but it is an inherent right that -- we've got to remember Article 62 was a creation of the Legislature. What we did inherit in the body of law in the Thirteen States was certain basic common-law principles. And one of these common-law principles was the right to move against a complaint for failure to state a cause of action, the jurisdictional reasons.

In its interpretation of 6223, the New York Court of Appeals has three cases: Wulfsohn, Zenith and American Reserve. And my brothers, in answer to your questions, only cited Zenith for the dictum.

But, be that as it may, I know of no compelling reason why the other two cases weren't cited.

But I'd like to continue my argument on this minor element of fraud, and when we refer to a person here as Mr. Sugar as a substantial person, in the reply brief of the Attorney General a most interesting statement was made. At page 5, impact on the debtor, the appellees are utterly nonsensical here.

If Sugar is, quote, "a most substantial citizen", end quote, then he should be able to discharge the attachment CPLR 6222, the bonding provision.

The instant action involves a commercial transaction. The commercial transaction did not involve Mr. Sugar, according

to their document, except as a signatory. And I might point out that 55a in the Appendix, the contract, has no representations or warranties of ownership as a mandatory condition to the distribution arrangement; and it has that mystical last statement we lawyers prepare in one form or another, "This Agreement sets forthe the entire understanding of the parties" et al., and on and on and on, about nothing except things in writing shall amend it.

There's no representation and warranty here of ownership.

As an attorney and as a publisher for fifteen years, I have published over a thousand publications, ninety percent of them have been under license. By license, simply by license.

But, to get back away from the fraud and look at the cases that have come before the Court, there's no question this is a constitutionally cognizable interest.

I base my logic in this matter before the Court on a basic four-point theory:

The cognizable interest; the duality of the interest in ownership; the nature of the creditor's interest; and what was the process.

QUESTION: Couldn't you put all of that in on your motion to vacate?

MR. LEDES: No, Your Honor.

QUESTION: Why not?

MR. LEDES: Under 6223 the only basis upon which I can vacate is if --

QUESTION: Where will I find this section you're talking about?

MR. LEDES: 6223 you will find in the brief of Carey at --

QUESTION: Brief from who?

MR. LEDES: In the brief of Carey for the --

QUESTION: Oh, the government.

Well, where is it?

MR. LEDES: Appendix A in the brief of Carey.

QUESTION: I see three of them, all for Carey, now, which one are you talking about?

MR. LEDES: This is Brief for Appellants Carey, Fine.

At page 29, Your Honor.

QUESTION: Fine. I got it.

MR. LEDES: At page 29.

Entitled, "Vacating or modifying attachment".

QUESTION: And where is it that it says that you can't raise it?

MR.LEDES: The cases that have interpreted 6223 say that the only thing that I can --

QUESTION: And what are those cases?

MR. LEDES: Those cases are Wulfsohn -- if we may go

to the table of cases, but not in their brief, in my brief, Your Honor.

The cases -- and cited, I might point out, by the court most correctly -- American Reserve Insurance, which is at Roman numeral two (ii) page, v. China Insurance Company.

QUESTION: Well, maybe I can get it better.

In this particular case, did you move to vacate?

MR. LEDES: No, Your Honor, I did not move to vacate.

QUESTION: So how do you know what could have happened?

MR. LEDES: Your Honor, I know this. Your Honor, I would be trying a case before I could get to the Court of Appeals, for three to four years in New York without a dime in my client's pocket. There is not before this Supreme Court the issue of the Fourteenth Amendment and equal protection, but it's --

QUESTION: You just didn't --

MR. LEDES: -- inherent, without a darn attractive case --

QUESTION: You just didn't want the State court to try it, you'd rather have the federal court try it?

MR. LEDES: Your Honor, --

QUESTION: Right? Right?

MR. LEDES: Your Honor -- I didn't say that, Your Honor.

I would much prefer to try it in the federal court, but that is not the issue.

Your Honor, the issue here is how I could get into the court with this attachment, call witnesses. I don't want to go into the deprivations that have taken place here on my client, because it deals with my point later on on bonding.

Your Honor, it was stated, I believe, by Mr. Justice Blackmun, in pointing out the bonding question that was involved in Di-Chem. Fidelity of Baltimore is the, one of the leading bonding companies in this practice that we're engaged in.

I approached them several times and they said a bond would be readily available if we would deposit with them securities with an adequate margin over the principal amount, or a savings account passbook in the full amount.

And, as you appreciate, Your Honor, if I had either one of the two, my client did, that is, we wouldn't have been bothering with this motion. We would have had the funds to try this case.

This company --

QUESTION: You mean the funds to try the case or the funds to pay the debt?

MR. LEDES: No, Your Honor. Let me point out about the debt. Go into the plaintiff's appendix in the lower court case, which is part of this record. There's a series of five correspondents there. The debt has been variously alleged at

120,000, 66,000, 32,000, 67,000, and 17,000. And I might point out, Your Honor, that the money is not Champion's, it's Wrestling Revue's.

Wrestling Revue is in by virtue of this Tinkers-to-Evans-to-Chance type of practice we have in New York. You see, under this rule the transaction wasn't, as in Di-Chem, Company A selling to Company B.

Company C, who was due to receive the money, and hadn't received it as yet under a contract of sale, was wrapped into the deal by the allegations of fraud and deceit.

So, unlike Di-Chem and the law as it appears to be in Georgia, --

QUESTION: Well, that's a Harris v. Bach? type of garnishment, isn't it?

MR. LEDES: Not necessarily, Your Honor. Nothing that we have -- that -- the -- as I look at the Di-Chem situation, it's simple commercial transactions.

And, by the way, when we're talking commercial transactions, if we look at the entire thing -- in Sniadach we had an announcement that the promissory note had terms of garnishment -- in back of it, on front of it; somewhere -- we had the same situation in Fuentes. We had the same situation in Mitchell.

In Di-Chem we had a creditor-debtor relationship. In this case we have a situation where an individual has been

named supposedly as having committed fraud. What the fraud was or how it was in a licensing agreement, and a company, and they attach the money. If you look at the money they attach to Mr. Sugar, it is absolutely categorically clear that it's within Sniadach.

There is no departure. There was no prior notice, there was no hearing.

QUESTION: What do you submit you're entitled to here? As far as due process is concerned.

MR. LEDES: As far as due process, Your Honor, if I were to draft a statute for New York --

QUESTION: You don't suggest you're entitled to a pre-seizure hearing of any kind?

MR. LEDES: No. Oh, no.

QUESTION: But you do suggest that within a -- reasonably promptly thereafter you should have had an opportunity to do what?

MR. LEDES: First of all, we should have a prompt hearing on certain limited matters.

QUESTION: Well, let's --

MR. LEDES: The allegation and the burden of proving -- not the debt or the alleged debt -- the fraud, what constitutes the fraud, so that we can -- you see, Your Honor, for us to come in --

QUESTION: Well, that goes to whether or not there

should have been -- the attachment before judgment was justified.

MR. LEDES: Yes. Strictly that, Your Honor.

QUESTION: Yes. Now, how about the merits of the case?

How about on whether there was a debt?

MR. LEDES: On the issue of the debt, Your Honor, and we've been going around the circle on that, I notice --

QUESTION: Well, you and I haven't, this is --

MR. LEDES: Well, no, my adversary and I -- my apologies.

On the debt here, Your Honor, we -- they established with -- the so-called debt in a rather confused way. We have asked --

QUESTION: Well, do you think they have any -- in that hearing, do you think, when the hearing is held, do you think that the other side, the plaintiff in the case, should have to show anything more than what he's already shown; namely, affidavits and a decent paper case?

MR. LEDES: With respect to Wrestling, yes; with respect to Champion, upon which the Wrestling situation exists, there must be shown at least some clear, concise and final -- final numbers, Your Honor. Because when they attached, they attached for 28,000, and we have a statement in the file, in their handwriting, as of May, showing 17,000.

Now, what I'm trying to say, Your Honor, they have held us by the nose and by the arms and have been punching us, and we don't know. If we had the money to pay it and it was within our means, possibly it could have been paid out of this money. But we've gone too far down the road now, Your Honor. We've been out with this money for three years.

QUESTION: You don't -- if they refined their paper showing it would be enough, you don't suggest they have to call witnesses and submit them to cross-examination?

MR. LEDES: No. No. No, Your Honor. They will, at trial, have to prove --

QUESTION: Yes. But they can make their case adequately on paper, if they chose to.

MR. LEDES: Oh, yes, on paper, yes. This would get close vis-a-vis Champion, at a vendor-vendee relationship.

But with respect to Wrestling and with respect to Sugar, the standard was absolutely impossible. And I might point out -- now, Sugar is an indigent. But when I say he's a substantial man, it's not that he's substantial -- he's substantial in the community.

If I took the Attorney General's statement and took it in reverse and asked the question: If he wasn't substantial, would he not be entitled to due process?

They infer that if he had money, let him go bond it. If he doesn't have money, which is the interpretation -- the way

these courts in New York have viewed this -- if you don't have it, and you cannot defeat it by showing that there is no allegation of a cause of action, you're dead. You've got to go to trial without the money. As we do.

QUESTION: Yes. Well, now let's go back a minute to the fraud part.

I take it you are saying that in the post-attachment hearing the plaintiff in the case has to go forward with some evidence, beyond what he's already alleged in his affidavit?

MR. LEDES: But for sure!

QUESTION: I mean, with live witnesses?

MR. LEDES: Oh, with live ones, because the nexus of the grab here of attachment is the word "fraud".

QUESTION: Yes, I understand. I'm just trying to find out what your claim is with respect to the due -- to what due process requires.

MR. LEDES: Well, Your Honor, as to the interpretation --

QUESTION: And you say -- and you think that this is the final judgment on the fraud?

MR. LEDES: No. No, Your Honor, this is not final judgment on fraud.

QUESTION: Well, how much of a showing of fraud has to be made?

MR. LEDES: The showing of fraud has to be made with

witnesses.

QUESTION: Well, I know, but what's the standard, probable cause?

MR. LEDES: Your Honor, you -- I'd need a few days to think about it. I never looked at it that way.

QUESTION: Well, I know, but this is what -- this is inherent in what the issue is here, with respect to whether New York law is deficient or not.

MR. LEDES: You need more than probable cause, Your Honor. I would dare say, in my viewpoint, for the purposes of attachment, which is a drastic remedy, you really should reverse the standard set by the Court of Appeals about vacating, that the plaintiff, let's say, must ultimately fail.

In fraud, as to fraud, he must prove enough of a case up to show that the plaintiff most probably will succeed. Most probably.

Because when you put a situation here, they're holding --

QUESTION: But you're -- when you make your motion, you're entitled to walk in the courtroom and sit there and be wholly silent until and unless the plaintiff produces evidence, live witnesses, to sufficiently demonstrate fraud to the level that you've just suggested.

MR. LEDES: Your Honor, I would trust that they would permit me the delight of cross-examination for the courts to

make it.

But, absent that, I would think that that would be most helpful.

QUESTION: Well, I know it's helpful, but you think that this requires it --

MR. LEDES: It would be constitutional.

QUESTION: -- requires it --

MR. LEDES: Oh, absolutely, Your Honor. I'll go further than that. In New York, Your Honor, there are -- this, what was enacted here under 6223 is most intriguing, and I didn't take it up in my brief, but it's simple logic.

In New York we have a motion for summary judgment, and we have a motion also available to us to dismiss the action for failure to state a cause of action.

These motions are not statutory, they came down with us 200-some-odd years ago. Two hundred, to be precise.

We inherited this right. These are motions that, strangely enough, were not expanded upon when they gave the statutory right to garnish. In fact, it was constricted. Those very motions were constricted.

If you read 6223, there is a provision in 6223 that is most interesting. In 6223, the provision states very clearly that the court must mandatorily give the plaintiff an opportunity to correct the defect.

In effect, 6223 took from us the statutory -- not the

statutory, the inherent right to attack, if we can --

QUESTION: Well, you aren't -- are you saying there's a constitutional right to prevent somebody from amending their complaint? That's nonsense.

MR. LEDES: No, no, Your Honor. No, Your Honor. The garnishment statutes -- what I'm saying is the garnishment statutes took the standard that pre-existed, it didn't open up an opportunity, as has been argued, for an adversary hearing. There isn't a case in this whole file that talks about adversary hearings.

In fact, 6223 took from us what we had under -- I think it was 3002 or 3112 -- it took from us the right to strike for failure to state a cause of action, because under 6223, on which we could collect damages, we had to give up something. They apparently thought we should -- the motion -- the part -- 6223 is inapplicable, unusable, because it gives you the opportunity of correcting the plaintiff's defects. Because the statute specifically says that upon the motion -- meaning 6223 -- the court shall give the plaintiff a reasonable opportunity to correct any defect.

QUESTION: And you say that's unconstitutional. That has nothing to do with your case, of course.

MR. LEDES: No, I'm -- no, what I'm simply saying, Your Honor, it makes 6223 -- the creation of a right by the Legislature, we didn't need, because we had this right before

to vacate, by pulling the rug -- the complaint -- out from under the attachment.

But they put 6223, probably, prophetically to think some 75 or 80 years later I would be arguing here, so that someone could argue we have a right to a hearing. We had the right to that hearing back in those days.

This so-called hearing is a gag.

In New York the cases are unambiguously clear, and the cases they cite, most of which I have referred to in my brief, deal with jurisdictional points.

In Maitrejean there was a failure -- v. Levon Properties -- which is a lower, it's an appellate division case -- dismissed, it didn't -- it failed to establish a prima facie case of any intent to defraud.

Case after case after case, but those cases and those judges were very good. They took the --

QUESTION: Mr. Ledes, could I interrupt for just a minute, --

MR. LEDES: Yes.

QUESTION: -- to help me out on the New York law.

You read this statute as precluding an evidentiary hearing, as I understand it?

It does not say --

MR. LEDES: I read this statute as being worse than Georgia.

QUESTION: Well, let me get my question --

MR. LEDES: Because it took away the --

QUESTION: -- let me get my question out before you try to answer.

MR. LEDES: Oh. I'm sorry.

QUESTION: I don't find any words in the statute that say the judge may not hold an evidentiary hearing. I think it specifies one ground on which he must vacate the attachment; but, as I would read that, it might be optional with the judge to do it.

Is there a case which squarely holds that it would be error for the judge to hold an evidentiary hearing on a motion to vacate?

MR. LEDES: Your Honor, there is no case -- I'll answer the question -- there is no case that so states, nor is there a case that -- what has happened is the judiciary, through this -- my point, too, is this statute is so amorphous that it --

QUESTION: In your vast experience in this area of the law, have you ever been involved in a case in which a trial judge did hold an evidentiary hearing on a motion to vacate?

MR. LEDES: Your Honor, the only time I came close to it -- and it was, and it was an argument; it was a motion -- and that happened where an attachment was --

QUESTION: Is the answer no?

MR. LEDES: The answer is no. I've never known -- I've never -- and I don't think they're ever going to find a case of a hearing with witnesses.

I know there is none, Your Honor. And I might point out, in the motion practice in New York, a judge does sign the writ. But we go up with the papers, and we give it to the clerk -- and those are really competent clerks; they're unusual guys, they go through and make all the corrections. And I must say I've tried, about eight or ten times, on very important points, to try to get in to see a judge. I've never been successful in twenty years of law practice.

QUESTION: Well, what are you going to do? Is it true that this record shows that the judge did look at it and the judge did ask for further evidence?

MR. LEDES: Your Honor, the only --

QUESTION: Is that true in this case?

MR. LEDES: Your Honor, --

QUESTION: Is that true in this case? Yes or no.

MR. LEDES: No. As far as I'm concerned, Judge Fine called me up and said, "What's this all about?"

QUESTION: Doesn't the record show that the judge asked for additional facts?

MR. LEDES: Which judge?

QUESTION: The one that signed that attachment,

eventually.

MR. LEDES: No. No, Your Honor, --

QUESTION: It doesn't show it in the record?

MR. LEDES: -- that's their statements. That's their statements.

Your Honor, Judge Fine, who --

QUESTION: You say it's not in the record?

MR. LEDES: Your Honor, I am saying there are --

QUESTION: Yes or no?

MR. LEDES: -- corrections made either by the judge or by the clerk. I'm in no position --

QUESTION: Well, sir, I give up!

[Laughter.]

MR. LEDES: No, Your Honor, I deny that the judge did that. It was signed by him. But I don't know, and I can't personally say. They make that allegation in this -- in their brief.

But I know what my experience is, Your Honor, we bring it in, we never get by the clerk.

QUESTION: Mr. Ledes, let me put a simple case to you, and get away from the complications of this case.

One of the grounds for attachment in New York is that the defendant is a non-resident of the State. Is that correct?

MR. LEDES: Yes, Your Honor.

QUESTION: All right. Let's assume you have an attachment in which the only ground, alleged, is that the defendant is not a resident of the State of New York.

MR. LEDES: Yes, Your Honor.

QUESTION: You have the right under 6223 to make a motion. You represent the defendant and you know he is a resident of New York.

You make your motion. What do you say to the judge? Does he give you an opportunity to say that your client is not a resident of New York?

MR. LEDES: Your Honor, I can cite a specific case, and you --

QUESTION: Well, answer my question first.

MR. LEDES: You go directly to the judge, as I did, to make the argument with the certificate of doing business or incorporation in New York. The matter of Publishers Press vs. M.S. Publishing. And if that judge, Judge Amsterdam doesn't hear you -- and she did not, she refused to hear me -- I went, on an oral motion to the appellate division and was heard by Judge Markowitz, and I presented the document to him. And he heard me strictly on the issue of whether we were doing business and nothing else.

QUESTION: Well, if you prevail on the issue as to whether or not the defendant was a resident, that would dispose of the attachment, wouldn't it?

MR. LEDES: That disposes of the attachment in that particular case.

QUESTION: Well, that's all I'm asking you at the moment.

MR. LEDES: Yes, Your Honor.

QUESTION: Now, I understood you to say earlier, in your argument, that 6223 allowed the dismissal of an attachment only for the grounds specified by the three-judge district court in this case.

MR. LEDES: Ah, Your Honor, it's how you read it. They say vacator, the vacator provided --

QUESTION: Do you -- I'll put it to you this way: In light of what the three-judge district court said, do you read its decision as preventing a State judge in New York from dismissing an attachment on the ground that you have demonstrated the defendant does live in the State of New York?

MR. LEDES: Of course -- no, it does not preclude that.

QUESTION: It does not preclude that. So that's at least one other ground on which an attachment may be dismissed in New York.

MR. LEDES: Yes.

QUESTION: And there are any number of other grounds, if the defendant proves there is no ground for attachment.

MR. LEDES: Your Honor, --

QUESTION: There are seven or eight of them.

MR. LEDES: Yes, they recited several of them.

QUESTION: Right.

MR. LEDES: They didn't -- as I use the phrase in my brief about sweeping in the jurisdictional debris. If the court has no jurisdiction under the garnishment statute, and by the cases defining it, or the general jurisdiction right, failure to state the cause of action, and there are dozens of them. The -- as I mentioned, the Zenith Bathing case about a hull and five men and all that jazz, there was just -- there were numerous reasons, and the courts do dismiss --

QUESTION: You're saying that there's only one factual basis; that is, that --

MR. LEDES: No, one --

QUESTION: -- that the security of the defendant -- of the plaintiff is not implicated by the attachment? That the only factual basis -- that's what the three-judge court said.

MR. LEDES: Yes, that's the only factual basis, expressly specified by this statute, and it was written into the books, as my brother Busner here pointed out, twelve years ago, to accommodate the non-resident aspects of the attachment statute.

QUESTION: But you don't read 6223 as denying for the trial judge the right to consider any proper ground that

you may present for the dismissal of the attachment, do you?

MR. LEDES: No. In fact, I would go further, Your Honor. I would think 6223 would not have precluded the courts of New York to conduct an adversary hearing. And I might point out, at Appendix B of the -- very kindly, -- the Attorney General's brief of New York, cited Regnell vs. Page. At page 37, the civil court, the court below Supreme of New York, the court of common pleas, the presiding administrative justice, Thompson, set forth a rule that all orders of attachment must provide that the plaintiff, within three days after levy, shall move on notice to the defendant, the garnishee and the sheriff for leave to prove the grounds upon which the order of attachment was issued.

The burden of proof on such a motion is on the plaintiff, and the attachment will be deemed vacated if such a motion is not made.

Your Honor, the courts for eight years had the opportunity of interpreting the statute, so that they could build it up. But we've reached the time here, eighty years later, about the way this law could have been structured by the court. But it's too broad and too rambling, and with the public -- and the defendants of this area have been -- my defendant, Wrestling Revue, the moving party of this case, is totally out of business. It's been wiped out, under this case, because I have a stubborn individual named Sugar who

went to law school, which may have been a problem with his mentality -- he wanted to take this case on the strength of -- [inaudible].

I'm in this Court simply because we've had no opportunity to even prepare our case. On the bare allegation, and here we have no right to a hearing, and the Court, for all these years, has never set down the stands --

QUESTION: Let me just go over it once more, if I may, because I'm still thinking of your questioning with Mr. Justice White.

The issue you wanted to have tried in the New York courts, but, under your view of the law, could not have tried is the issue of fraud; is that right?

MR. LEDES: For the purposes of vacating the attachment, it would be my viewpoint, a full adversary hearing where the plaintiff would have had the burden to show that it would probably succeed in proving its fraud allegation.

QUESTION: And that is the -- that's the critical defect --

MR. LEDES: Yes, sir.

QUESTION: -- if you did not have the right, by statute, to a hearing on the fraud issue, at which the burden would have been on the plaintiff to establish probable cause, that he could prevail?

MR. LEDES: I would add one phrase: on the statute

and the cases interpreting that very broadness on the statute.

MR. CHIEF JUSTICE BURGER: Your time is up, counsel. You have five minutes left, Mr. Greenwald.

REBUTTAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF APPELLANTS CAREY, ET AL.

MR. GREENWALD: Thank you, Mr. Chief Justice.

I would make the brief observation that certainly my adversary would have been making a fine presentation to the litigated motion part of New York State Supreme Court, New York County, when he was arguing about whether there was fraud in this case or whether there wasn't fraud in this case, or whether the allegations were sufficient, and the like.

I think, though, that we should recognize that this is the United States Supreme Court, and it should be emphasized that basically this is a particular law based upon the unconstitutionality of the State statute. And we should always keep that in mind.

Now, I have been informed, by the way, when there was a question of adversary hearings, of the case -- I think it was a famous case a few years ago, called Lily Pons, a matter involving the singer Lily Pons.

And it was an adversary hearing on residency, which was a jurisdictional attachment, for example.

Once again, I think Your Honors have all recognized that residency is a factual issue.

But what seems to be mistaken here is that when we're dealing with questions of fraud, there's basically a compelling State interest to put the funds into an, in effect, escrow. And, mind you, in New York, under this attachment, the funds don't go to the plaintiff, they're kept by the sheriff. To keep these funds available.

This is, I believe, differing generally from the sequestration situation.

And there isn't this compelling necessity to have a fraud attachment, the concomitant that at the very institution of the suit you cannot expect the plaintiff to prove his case of fraud in toto, there is no question to convice the judge to sign that order ex parte, or to convince him to deny the motion to vacate the attachment. You're going to have to have some evidentiary facts, something more than a mere scintilla, something more than suspicion or surmise.

It definitely, I think, is clear from the New York cases that you do get a genuine hearing, it may be legal, it may be factual. And at this hearing, as I say, it's a real hearing because --

QUESTION: Could you tell us the strongest case you've got for the proposition that the moving party on a motion to vacate is entitled to an evidentiary hearing?

MR. GREENWALD: Well, I think the most recent case -- I'm not going to say the strongest case -- is, of course, the

exposition in Regnell v. Page, which I put in as an appendix to my brief -- that's the brief for Carey and --

QUESTION: You were asked for the strongest case.

MR. GREENWALD: The strongest case?

Well, I think that -- it is not a matter of whether a case is strong or weak, the fact of the matter is there are certain circumstances in which an evidentiary hearing is provided.

You have to realize that in the instant case, the defendant, Mr. Sugar, never moved to vacate that attachment. You don't have before you anything in this record to know what type of hearing you would have gotten. He just ignored the hearing in the State court, he came running into federal court.

QUESTION: Let me change the question. Is there a New York case prior to the decision of the three-judge court that sheds any light on this?

MR. GREENWALD: Well, I did mention, of course, the fact -- I think what was described as -- mentioned to me, the Lily Pons case.

I think also -- and I forget, it was an appellate, second department, one of the cases in my brief, it involved a national corporation that had been attached. And, mind you, -- and they showed the evidence, it was unnecessary -- it was determined that the attachment was unnecessary for the security of the plaintiff.

Now, mind you, I don't know if there was an evidentiary hearing. The basic point is that at the time of moving to vacate that attachment in New York, you're not going to be trying the case, you're not going to be trying the question of -- as a matter of law, was there fraud? You're simply determining whether that judgment, ex parte -- not judgment, ex parte writ was issued properly.

QUESTION: Again, what case says that?

I mean, you've given us all this area of what goes on, but, I mean, what case do you have?

MR. GREENWALD: Well, I think -- I can't offhand --

QUESTION: I think that's what my brother Stevens is trying to get.

MR. GREENWALD: -- state what case, and I think that's important.

QUESTION: Well, don't you feel obliged to find one?

MR. GREENWALD: Well, let me put it this way, Justice Marshall, the fact of the matter is that these were not issues in the State of New York, until this three-judge court opinion and judgment came down. It was not considered a problem in the State of New York, as to what happens here or what happens there.

Oh, excuse me, I have been pointed to the case of Eaton Factors, which discusses about the stand in fraudulent intent.

QUESTION: Where is that?

QUESTION: What page of the brief is that on?

MR. GREENWALD: I think that's on page 30 -- 26 of the Curtis brief.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:15 o'clock, p.m., the case in the above-entitled matter was submitted.]

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