Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

LELIA MAE SANKS, ET AL.,

Appellants,

vs.

GEORGIA, ET AL.,

Respondents.

Docket No. 28

Place Washington, D. C.

Date November 18, 1970

ALDERSON REPORTING COMPANY, INC.

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CONTENTS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

LELIA MAE SANKS, ET AL., Appellants,	:	
vs.	:	No. 28
GEORGIA, ET AL., Respondents.	:	

Washington, D. C.,

Wednesday, November 18, 1970.

The above-entitled matter came on for reargument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

MICHAEL D. PADNOS, ESQ.,
Atlanta, Georgia
Counsel for Appellants

ALFRED L. EVANS, JR., ESQ.,
Assistant Attorney General
of the State of Georgia

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will continue with No. 28, Sanks vs. Georgia. Mr. Evans -- no, Mr. Padnos, you have not finished your presentation in chief.

ARGUMENT OF MICHAEL D. PADNOS, ESQ.,

ON BEHALF OF APPELLANTS

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

If I may just respond to Justice White's question of yesterday, we have done a bit of research and we have -- I suspect some members of the Court may already know -- there is, in fact, a certain statute in Georgia, there is indeed a constitutional provision that says that laws shall not have retroactive effect.

If I might quote from a typical case, and there are a number of cases that make very clear that in our case Mrs. Sanks and Mrs. Monan will be subjected to double damages. But a typical case, language in a typical case says laws prescribed for the future, unless the statute either expressly or by necessary implication -- that is language that is used throughout the cases -- shows that the General Assembly intended that it operate retroactively, it will be given only prospective application.

A particularly relevant case in this context --

MR. CHIEF JUSTICE BURGER: You might get your papers away from the microphone.

MR. PADNOS: I'm sorry.

Q What was the citation of that case?

A That is Anthony vs. Penn, 212 Georgia 292. The statutory provision is the Constitution, which is part of the Georgia Code and is cited as Georgia Code Annotated 2-302. The statutory provision that says "laws prescribed only for the future, they cannot impair the obligation of contracts nor usually have a retroactive application," is Georgia Code Annotated 102-104.

The closest case we have been able to find for this -- on this issue, is the case of Leves vs. Turner, 75 Georgia Appeals 62. That is a 1947 case, and it involved the new NIL that was enacted in Georgia about the time, and the debtor in that case was attempting to have his rights determined under the old act and the court said only --and the creditor was asserting that his rights would appear under the new act -- and the court decided for the debtor and said only when there is only very express language in the new statute that says that the rights created under the new statute replace the rights under the old law, only with such express language that the new act apply. And there was no express language in this case, in the new Georgia statute. The rights of the debtor, Mrs. Sanks, will be determined by the old statute.

Q What is the page number of that case?

A That case is page 62, 75 Georgia Appeals 62. It

is a 1947 case.

I might say, in further reference to mootness, since I know how much that concerns the Court, that that raises a very interesting side issue that again I haven't thought of, and your question stimulated our thinking about that. If 305 is clearly applicable in this case, and I feel at least persuaded that it is, if 305 is clearly applicable, it is very interesting what happens should this Court decide that 305 is constitutional.

If you decide that 305 is constitutional or -- well, let's just present that -- the case goes back down presumably because the substantive issues haven't been raised yet. At that point, under 305, the landlord would be entitled to a double rent judgment. The only way the tenant will be able to do anything about the double rent judgment is if she goes in under 303, assuming that you will not decide 303 or decide adversely, she will have to go in under 303 and post the double rent bond.

When I talked yesterday, I was fairly certain that 303 was not applicable in this case. I think that has been kind of opened up by the questioning. I think that 303 -- if you hold 305 constitutional, we are going to be stuck with 303 as well, and I think the point that makes is that what you're faced with and what we have been dealing with is the whole statutory scheme of 303 and 305, and I think they really can't

be separated. One must be understood even in this narrow a case as this, they must be understood together.

Q Anway, you conclude the case as moot?

A I conclude the case as moot.

Q On the other hand, in order for this liability to be imposed upon your client, the landlord must take additional affirmative action, is that correct?

A As I understand Georgia procedure, sir, all the landlord has to do is go into court, after your decision, and ask for judgment, just literally walk into the court and ask for judgment. And we will not be able to assert affirmative defenses without filing the bond.

Q Has the landlord indicated any interest in doing that?

A Well, there are two landlords in this specific case, there is the Atlanta Housing Authority and then there is Mr. Sanks, and the Atlanta Housing Authority is not a vindictive agency. I suspect that there is every possibility that Mr. Sanks is.

Q My point is, could it be that to put that question to him you have got to express waiver of it?

A I don't know the answer to that, sir. I just don't know. I understand that Mr. Sanks is now represented by counsel. He was not represented by counsel before. And I just don't know the answer to that.

Q Let's assume that there was a hold-over tenant before the new statute came into evidence, but there just wasn't any law suit filed, and today the landlord sues for double rent, the tenant has long since gone out, but he sues him for double rent for having held over, brings an action today. Now, based on conduct which occurred before the new statute was passed, you say the old statute would apply, is that it?

A No, because there is no procedure at the present time for filing a law suit under the old statute. I think now they would have to file the law suit under the new statute.

Q Then why doesn't the new statute control this action, because you haven't even gotten into the substitute issues yet?

A Well --

Q How can there be a procedure for him to collect double rent from you when you haven't even got to that phase of the law suit yet?

A Well, I suspect -- it seems to me that the logical answer is that the case was filed before this new statute took effect, and that is the time at which he demanded, the landlord sought to have his rights vindicated.

Q Well, aren't we really swimming in a dark tunnel here in terms that the impact of this new statute on this law suit, doesn't it depend really on the complexities of

Georgia law and its saving statute, and this is sort of a cross between procedure in substance?

A I think that we're swimming in a dark tunnel as related to the question that you just posed, sir, the question of whatwould happen if a law suit were filed now. But I think the Georgia law is quite clear on a law suit that was filed previous to the enactment of the new statute.

Q Well, I know, but there has been no move in the case to get double rent here yet, has there?

A There has not. But there couldn't have been yet, could there?

Q Well, all right, there couldn't have been, and there is now no procedure to get it. Why wouldn't the new statute be a bar to getting double rent in this law suit just like it would be in a new law suit?

A Well, I think the answer to that is that the cases we have been able to find require very specific language saying that it is a bar in the new statute, and there is no such language.

Q Well, you're just assuming that the savings that in this context there is a difference between this pending law suit and a future law suit?

A I am.

MR. CHIEF JUSTICE BURGER: Mr. Padnos, we recognize that you have had some difficulties in trying to do this just

overnight with your friend. We are going to suggest to you that you file a supplemental memorandum, and Mr. Evans can respond to that, in which you can explore more fully and with more time and better facilities available and file that within ten days or two weeks.

MR. PADNOS: Thank you very much.

Q Mr. Padnos, would you straighten out one bit of confusion that remains with me? What is the relationship between Mr. Sanks and Mrs. Sanks nee Jones? Are they married? Are they living together or what?

A Well, they were ceremoniously married, I believe, some time ago, in the forties, I believe.

Q When?

A In the forties. Mr. Sanks then attempted to evict Mrs. Sanks from the premises, and that is why this is a somewhat confused kind of a landlord-tenant case to bring to this court.

Q Are they living together?

A No, they are not living together at this point because she is now out of that.

Q Were they living together --

A At that point, I might say.

Q -- at the time of the eviction?

A Excuse me?

Q Were they living together at the time of the

eviction?

A Yes, sir.

Q Is there any Georgia rule against suits between spouses?

A I don't know the answer to that.

MR. CHIEF JUSTICE BURGER: You can cover that in your supplemental memorandum.

MR. PADNOS: I would be delighted to. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Evans?

ARGUMENT OF ALFRED L. EVANS, JR., ESQ.,
ON BEHALF OF THE STATE OF GEORGIA

MR. EVANS: Mr. Chief Justice Burger, and may it please the Court, I have very few things to say about mootness. Quite candidly, I would much prefer a decision on the merits. I felt it was my obligation, in light of the change of statute, to present the question to the Court. I frankly am uncertain as to whether there is mootness or not.

I recognize, of course, the reason the case is here, to test the constitutionality of two statutes. That is, I suppose, realistically speaking, moot. As to whether there is mootness as to the particular appellants, I am uncertain.

Q Why would you so much prefer a decision on the merits, since this statute has now been repealed and there is a new statute?

A Because, sir, there is a great deal of confusion in this entire area right now, and I do feel that very likely a decision in this case could give guidelines which would undoubtedly spill over into distress warrants which are now under attack in Georgia, and many other instances where due process issues and equal protection issues are being raised in connection with pecuniary requirements generally.

I suppose I am looking at it a little bit from the viewpoint of the Georgia taxpayer. I started out, I anticipate, I win about ten of these cases on technicalities in the Georgia courts. I finally came to the conclusion that I didn't think I was doing the best service possible, that it came up over and over again, and we should have an adjudication. Therefore in this case I raised -- I didn't raise questions of the marriage, I left that -- I let that go by, I didn't raise any issue other than the merits, because I wanted adjudication.

Q Ordinarily we are not hospitable to language that gives opinions on future problems of the states and approach it very narrowly and decide only what must be decided.

A Well, I fully understand the jurisdictional problem, sir, but I was just indicating my own feelings why I raised the question. I might say that what would happen if it went back is also a picture of total confusion. In fact, the statute has not been followed in this case. In fact, the rents have been paid into the registry of court, which is

strictly contrary to the statute. How this would affect the double rent, I have no way of ascertaining.

I am in a somewhat unusual position in arguing in support of a statute which I hope to have repealed. But while the position is unusual, it does not present a conflict. I work for the new law not because I thought the old one was unconstitutional but because I thought we could perhaps do a little bit better.

Good, better, or best, of course, do not raise constitutional issues. And while the nebulous nature of equal protection and due process surely must provide a strong temptation to the contrary, this Court has repeatedly said that it does not sit to second-guess legislatures as to whether their solution to a particular problem is the wisest or best of the available alternatives.

Now, the problem presented to the legislature in this particular situation is a very difficult one. It goes to the heart of the landlord-tenant relationship. How do you handle the problem of a tenant who wants to possess another's property to which he may well have no right at all while he litigates his claims? If you allow the tenant to possess the property, how do you protect the landlord from irreparable injury in the event that the tenant's possession was in fact wrongful?

Inasmuch as the landlord-tenant relationship is

contractual, the answer may sometimes be found in the contract itself. But what if the contract is silent?

Over 140 years ago, the General Assembly of Georgia hit upon one solution to the problem. It decided that one reasonable way of protecting the landlord's interest and still allowing the tenant to remain in possession would be to require the tenant to post bond as a condition of continued possession.

Statutes dealing with the subject matter of the contract, of course, are traditionally deemed to be incorporated into and made a part of the contract. For this reason, it has been understood in the State of Georgia for over 140 years that if there is no stipulation to the contrary, the landlord is entitled to rely upon the state's statutory dispossession procedures.

I wish to emphasize at the very outset that the statutory procedure which appellants attack is a procedure which they in fact contractually agree to. I think the case could well be decided on this point without even reaching the constitutional issues involved.

Now, in their brief appellants attack Georgia's dispossession procedures under both the equal protection and due process clause of the Fourteenth Amendment. Now, Mr. Padnos indicated yesterday that he was less intriqued currently by equal protection and due process. I do not understand that he has wholly abandoned equal protection and, therefore, I

feel I must comment upon both.

It is true, of course, that these two provisions often overlap, but they are not identical. Because I believe that the questions raised under each of the two clauses are quite different in this case, I would proceed to discuss them separately rather than together.

Looking first at equal protection, I think it is rather obvious that to have intelligent, or I even dare say intelligible conversation on equal protection, one must first define what sort of equality one is talking about. There are two types of equalty.

The first is equality of treatment. The second is equality of result. The distinction is quite critical for the simple reason that the existence of one almost always negates the existence of the other. To illustrate the incompatibility, I might refer to tuition charges at State University.

Ordinarily, the fee is uniform, at least for state residents. This is equality in treatment. All students are treated alike. Yet this very equality of treatment could produce an inequality of result respecting the ability of indigent and affluent students to enroll in the university.

If, on the other hand, the word "indigent" could somehow be classified and students falling within the classification were permitted to attend the university tuition-free, there would obviously be at least a movement toward equality

of result. This would require, of course, a total absence of equality in treatment.

I suppose what would follow would be suits progressively by students just outside the classification of indigency until ultimately maybe everyone would go free.

For reasons which ought to be obvious, it is equality of treatment rather than equality of result which prevails in the legislatures and in the courts. We see this in public utility charges, public transportation, and admission fees and charges for public accommodations generally. These fees do not vary according to the pocketbook of the consumer. Sales taxes, excise taxes and automobile license plates fall upon rich and poor alike.

Theft is not excusable because the thief is indigent and therefore is under a greater pressure to steal than the person of means. And as we think we show in our brief, the authorities to date are rather uniform in holding that the great number of bonds, both in the federal system and in the state system, which are required in some situations as a condition of holding office and other situations as a condition of access to courts, are not to be pushed aside or enforced according to the economic means of the person required to post the bond.

It is this traditional test which the Supreme Court of Georgia applied in the case at bar. Having adopted the

equality of treatment view of the Fourteenth Amendment, the Georgia Supreme Court could hardly have concluded other than that there was simply no classification based upon economic means which existed. The sole classification which did exist was that of being a tenant which, like that of being student, had nothing to do with economic status.

Since this test negates the existence of the indigency classification upon which appellants chiefly rely in their equal protection argument, we feel they simply have no equal protection argument at all. The result, of course, would be different if this Court were to construe the Fourteenth Amendment as requiring equality of result rather than of treatment.

If equality result is the constitutional goal, there will have to be inequality of treatment. Under this approach, the Constitution would presumably require a sliding scale for bonds, bail, tuition and all other fees. In each instance, the individual's economic means would have to be very carefully scrutinized to achieve as equal a result as possible.

Carried to its natural conclusion, I suppose that the equality of result test would require the leveling of all differences attributable to economic circumstance. If not from each according to his ability, we would at least have to reach according to his needs.

I think it is not surprising that the courts, like

the legislatures, have been reluctant to so convert the equal protection clause into a socialist manifesto. Equality of result approaches have been very sparingly used by the legislatures. One example might be progressive income tax; another various welfare programs, and some educational programs which are specifically designed to alleva te the condition of the poor.

An arguably judicial example would be this Court's line of cases, starting in Griffin vs. Illinois, which hold that indigent prisoners must be given the same apparent remedies as are given to those prisoners who are not indigent. I say arguablye because, quite candidly, I really believe that the underlying rationale of these cases is not equal protection but is due process.

One of the difficulties of the equality of result approach is that it would require highly subjective and personal evaluations, with fine spun distinctions. This is not, of course, true of the equality of treatment approach. This is a traditional approach which is susceptible of an objective judgment.

All we can do --

Q How do you classify the lack of counsel for the indigent?

A I would classify the underlying rationale of due process. Recognize that in the courts, in this Court I

would have to say also, in many of these cases the two have been sort of lumped together and they have not been perhaps analyzed separately. But I would classify it as due process.

Q And you would take this -- I don't mean to load you down with another case -- but you would take the same approach in the case which preceeded it?

A I would say that the only -- in my own judgment, the only substantial constitutional issue in that case is due process.

Q And you would probably have the same -- come out with the same result there as you argue in your case?

A Not necessarily. That is a due process question. I have not yet come to due process. That, of course, requires the balancing of interests, and I don't know if the interests there are the same as they are here. In fact, I think they well might -- could differ.

Moding to due process, we come to one of the more unsettled areas of constitutional law. From review of this Court's decisions, it seems to me that the majority view is essentially a natural law concept of fundamental fairness. This test has been stated in terms of whether the attack procedure shocks the conscience or whether it runs contrary to essential principles of ordered liberty.

But of course important questions remain. Whose conscience must be shocked? This court has said that it is

not merely the subjective view of the justices on this Court which could control. If one looks for objective standards, is it not highly relevant that the statutory procedure in question has been in effect and very greatly relied upon in Georgia for over 140 years? It certainly hasn't shocked too many consciences over the past 140 years, and it is only now under attack.

I think if we are to fairly judge the essential fairness of Georgia's dispossessory procedures, we must look at these procedures in the light of history and also in the light of the totality of the landlord-tenant relationship.

As we point out in our brief, the common law situation was basically one of self-help. The landlord was ordinarily permitted to use such force as as was necessary to physically remove the tenant. This was obviously harsh.

This is not to say, of course, that the tenant was without remedy for a warrant for the eviction of common law. He could sue for breach of contract, he could bring an action in tort for wrongful eviction where he had the possibility of recovering punitive damages. He also could secure equitable relief in a proper case involving fraud. I hasten to add that indigency alone would not give the court equitable jurisdiction, but it could have equitable jurisdiction, it could enjoin eviction if there were other equitable grounds available, such as fraud.

Now, in past arguments appellants have conceded that Georgia could retain the common law situation. This being so, are not appellants in a rather strange position to be attacking a statutory procedure, the principal aim and effect of which has been to alleviate the condition of the tenant to improve his condition over that which he had at common law.

In addition to retaining all of his common law remedies, the tenant gained a very valuable albeit qualified right of retaining possession of someone else's property during litigation as to whether he had any rights to the same.

Moreover, the tenant was spared the self-help injuries inflicted by the landlord. The statutory procedure terminated this valuable right of the landlord to use such force as was necessary to eject the tenant.

The heart of appellant's due process claim, of course, is that now this qualification to the statutory right they gained must also be eliminated, for reason that it forecloses them from access to the courts.

We emphatically deny that appellants are foreclosed from asserting their claimed rights by the bond posting requirement. To start with, appellants, whether or not they post bond, retain all of the common law remedies. They can still sue for breach of contract, they can still bring an action in court for wrongful eviction where they can get punitive damages, and in a proper case they can secure injunctive

relief which could restrain eviction.

Additionally, there is a question of whether there is a denial of access such as would shock the conscience where the principal argument is the indigency of the particular persons involved. As this Court said in Owenby vs. Morgan, the question of whether a security condition is reasonable depends upon its general effect in operation, not upon instances of peculiar hardship arising out of exceptional circumstances.

In Owenby, which was very recelty treated as being consitutional and viable, the contention was not at all unlike the contention made here. There a defendant, in a foreign attachment action, had his stricken when he was unable to furnish security in the sum of $200,000, a rather substantial sum. It was contended that this denial of his right to appeal and present his defenses was a denial of due process.

This Court disagreed, saying that the statute expressly gave him an opportunit to appear and that the security condition did not as a matter of law take away his right notwithstanding the fact that he attempted to but was unable to obtain the security.

This Court, in cases as Union Iquano, and also in Cohen vs. Beneficial Loan, has consistently held that the Fourteenth Amendment does not prevent a state from prescribing reasonable and appropriation conditions to the seeking of

judicial relief in specific situations so long as first the basis of the distinction is real and, second, a legitimate governmental end is served.

Certainly, the situation here is specific. It involves purely possessory rights in only three specific situations. They are where the tenant has failed to pay rent, where the tenant is holding over beyond the term of the lease, and where the tenant occupies at will or by sufferance. As the Supreme Court of Georgia correctly, I think, noted, these are facts which ought to be easily within the knowledge of the tenant as well as within the knowledge of the landlord.

We think it is equally clear that the basis of the distinction is real. The interests involved here are a far cry from those presented in the line of cases such as -- starting with Griffin vs. Illinois, or Goldberg vs. Kelly. In both of those cases, the balancing involved was the balancing of the rights of individuals versus an interest in state funds, safeguarding state funds.

Under the circumstances presented in those cases, which were spelled out very carefully, this Court acted in favor of the individual. This is not a conflict -- the interests here are not state versus an individual. Here it is the clash of economic interests between two easily identifiable classes of private citizens.

On the one hand, you have the admitted -- we don't

deny the hardship of dispossession. There is admitted personal hardship of dispossession on one hand. Although this is a hardship, which is wrongfully inflicted, ought to be and is compensable by damages, including in a tort action punitive damages.

On the other hand, you have the danger of irreparable injury to the landlord through lost rental income. In most cases, this loss could never be recovered, particularly whereas here the tenants are indigent. This question of whether they would be liable for double damages and if it should go back is really an academic question. They are indigent. The landlord will never get initial damages, much less double damages.

I simply can't understand how this can be said not to be a very real basis of distinction, where you waive the interests of two competing groups of citizens.

Finally, we submit that protection of property from irreparable loss is a legitimate and indeed a compelling governmental objective. Under the Georgia Constitution, I think under the Constitution of most states, protection of person and property is one of the fundamental justifications for the very existence of any government. For over 140 years the General Assembly of Georgia has accorded a very high degree of protection to owners of property, including the owners of rental property, through the bond posting requirement of

its dispossessory proceedings.

It is, in the absence of a stipulation to the contrary, a part of the lease to which every tenant agrees. He can vary it by contract. If standards for shocking the conscience are truly objective, I fail to see how after 140 years this statute is suddenly in this category of unconstitutionality.

Frankly, it would shock my conscience if the state could not protect the owners of rental property. In conclusion,

Q Mr. Evans, whose conscience do you understand has to be shocked to make it unconstitutional?

A That is a very difficult question, Mr. Justice Black, and, of course, it is not a test that I personally think is a good one. But I would say it would have to be, as Mr. Justice Harlan said, at the very least it would have to be based upon the general view of society, which conceivably could change. But I do think that it would have to be based on the general views.

Q You mean of society?

A Sir?

Q You mean shock the conscience of soceity?

A Yes, sir, I think it would have to be one which would shock the conscience of civilized society. It should -- this should be the objective standard, which I

believe Mr.Justice Harlan says the court should move.

Q Would that make it something like the test we apply to obscenity?

A I dislike to even comment on the test of obscenity. I find it so difficult to grasp.

Q We won't press you for an answer to that one.

(Laughter.)

Q Why don't you use a less picturesque phrase in talking about fundamental fairness of the constitutional concept?

A Fundamental fairness is, of course --

Q And get away from histrionics a little bit.

Q Would you --

A No, sir, I think --

Q Again, talking about fundamental fairness, who would test it?

A I interpret the phrases as being identical, shocking the conscience or fundamental fairness to mean the same thing. If I am using histrionics, I am borrowing it from decisions of this Court.

I would say that, again, you should look for it, I think it should be looked for in what is the concensus of civilized society of our long-standing judicial traditions. I do not think it should be -- well, this Court has said it ought not to be merely the personal view of any individual

justice who sits on a court at any one time. That is what this Court has said.

Q Part of the difficulty is judging.

A Yes, I am sure it is. I would have only one further comment, and that is on the double bond which, of course, I agree with much of what Mr. Padnos has said, is it enmeshed -- excuse me, the double rent provision is enmeshed with the double bond in effect.

The only thing I would say about double damages, 305, which deals with double damages, this Court has consistently upheld the right of states and the federal government, for that matter, to require double or, for that matter, treble damages, such as you have in the Clayton Act, where an individual can be obliged to pay treble damages even for unintentional violations of the antitrust laws.

Q May I ask you if you, in your opinion, the question of double damages, if it would be governed by the new law or the old law? Do you know the answer or --

A I have no ready answer, for this reason; as I believe I indicated, these cases have not followed the statutory procedure. Now, if they are going to revert to the statutory procedure is something I do not know. I think, in fact, no double damages ever could possibly be recovered because they are indigent.

Q There aren't that many people to recover them,

but that doesn't make a case not --

A Well, you see, the problem is the court deviated from the statute and having the rent paid into the registry of the court. Now, whether this would cause an equitable reply to any assertion for double damages, I assume it would. Certainly I think there could be no recovery for double damages for the entire period of a litigation when pursuant to court order the rent has been paid into the court.

Q It would stop, do you think, from the time they paid it into the registry of the court?

A Certainly from that time there could be no double damages. I think if there are double damages, if there are -- and I am not very well certain there could be -- I don't know how the -- I think I will have to say I don't know how the courts would handle them because they have deposited so far from the statute to date in this problem that I don't know how or when or why or if they would go back. I am sorry I can't help on that, but I really can't.

Q The tenant is out of possession now?

A Yes, sir, in both cases the tenant is out of possession.

Q The tenant is out of possession and the only reason you have to put up a bond is if you want to stay in possession while you litigate?

A Yes, sir.

Q So the bond question is washed out of the case?

A The bond question is washed out of the case.

Q And the only question --

A Well, again, presumably if this Court, for example, were to rule on the merits, I don't know, it might be that being -- the Court might construe these to be vested rights and it might be going back to the trial court, assuming the Georgia Supreme Court is affirmed, the trial court might well take the position that -- well, I guess they can't --

Q There is no dispute between these parties now as to possession, is there?

A No, there really isn't.

Q Mr. Evans, you can't speak as to whether or not they are going to push for double damages or not, because they are not your clients, right?

A That's correct, sir.

Q So we don't know what they might --

A Now, I am saying assuming they --

Q Wouldn't you assume that if they said they weren't going to push for it, that would wash that point out?

A If the landlord states they will not push for it, obviously this would end it. I am assuming that if the landlord attempted to, I think it is very unlikely that they would attempt to -- if they attempted to, I don't know what the courts would do.

Q There is no way we can find out?

A No, sir, because of the fact that the court has departed from the statutory procedure in these cases.

Q Also because the landlord is not represented here in this court room.

A No, sir, not these particular landlords.

Q Nobody speaks for them, so we don't know.

A I am trying to the best of my ability to speak for the landlords of the state as a whole but not for these particular ones.

Q Well, you don't represent the landlords; you represent the state.

A Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Evans.

Mr. Padnos, you have a minute or so left, and if you have something you would like to add?

ARGUMENT OF MICHAEL D. PADNOS, ESQ.,

ON BEHALF OF APPELLANTS -- REBUTTAL

MR. PADNOS: I would just like to add one comment to Justice White's question. I don't think 303, the bond posting requirement, is out of the case at all, because if this Court holds 305 constitutional, the only way we can litigate the substantive issues, as I understand what is going on, is to post the bond required under 303.

Q Why?

A There is no other way to go into court; if 305 is constitutional --

Q Oh, I thought you just had to post the bond if you wanted to stay in possession while you litigate?

A Sir, that is the statutory intention, I think that was the intention, but this case, as Mr. Evans points out, the procedures have nothing to do with the statutorily constructed procedures. We are in a kind of never-never land, a dark tunnel, as you say, of procedure. And what has happened here, if this Court holds 305 constitutional, Mrs. Monan and Mrs. Sanks will be liable for double damages, and the issue, the substantive issues were never litigated, such as the question you raised about -- or Justice Blackmun raised, about whether or not you can sue, a husband and wife can sue one another.

All of these substantive defenses that Mrs. Sanks might want to make, she will have to post double bond to make those defenses and therefore 303 is in the case.

Q I assume that she was sued for double damages, there would be no doubt about the case being there, would there, no doubt about her right to raise that constitutional question? Your situation is that she just hasn't been sued for double damages.

A Well, sir, she has been sued for double damages. You see, it is only one procedure. The procedure that was

begun that led to this case is a procedure for possession and double damages, so she is liable for double damages, and the only way she can make a defense against that in the event that 305 is left standing is to go in and post the double bond. Obviously, we don't know what the lower courts of Georgia are going to do.

Q That has been done.

A That is true, sir, but she still is subject to double damages and the only way that she can get in and defend on the merits, which she wouldn't do on possession --

Q In other words, she is claiming she is liable to double damages but the other side is not?

A Well, as Mr. Justice Marshall points out, we don't know what the other side is going to claim.

Q Well, you know it because they are not here and there is no law suit.

A Well, I think there is, sir, a law suit between them. I think this suit is a law suit between them on the question of double damages.

Q You mean you are showing that there is?

A Well, we have cases in the brief to that effect. We say very clearly, in the supplemental brief we filed, the Georgia Supreme Court says very clearly that all they need to do -- the mere fact, for example, that a tenant vacates is not enough -- voluntarily, is not enough to relieve him of

double damages. He can't -- that can't get him out of double damages, and all they need to do is get a judgment from the dispossessory suit filed under 303, the landlord can have a judgment for double damages as well as possession.

Q Mr. Padnos, would you think it fair to say that this case and the issues have been complicated somewhat by the fact that the trial judge initially in Georgia tended to stretch that statute considerably, in other words, by calling for the event under these circumstances in lieu of bond, he was really ignoring the fact, wasn't he?

A Yes, sir.

Q That does have an impact on this case, as distinguished from the function of that statute in the abstract.

A A great impact, and I might say that, as you pointed out, when we appeared before, the Georgia court has been serving as a court of equity and really ignoring the statute, and the reason is that the court just felt, as many judges in Georgia feel, that the statute is so inequitable that there must be a way to get around it.

Q That makes it an atypical case under this statute.

A Well, only atypical in that somebody finally snuck a way in to let us get into court, and that is what many people have been trying to do for many years, is to get into court. Nobody could ever do it before, and the judges said

finally the heck with it, we are going to find a way to get them into court. The problem is not an atypical problem, the solution contrived is an atypical solution.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Padnos.

Now, you each remember that in your supplemental submission you will cover all the points that have been raised from the bench, including the right under Georgia statutes of husband or either spouse to sue the other.

MR. PADNOS: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

(Whereupon, at 10:48 o'clock a.m., argument in the above-entitled matter was concluded.)

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