In the

Supreme Court of the United States

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DONALD LINDSEY, ET AL.,

Appellants,

v.

DOROTHEA M. NORMENT, ET AL.,

Appellees.

No. 70-5045

Washington, D. C.
November 15, 1971

Pages 1 thru 45

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IN THE SUPREME COURT OF THE UNITED STATES

DONALD LINDSEY ET AL., Appellants	:	
v.	:	No. 70-5045
DOROTHEA M. NORMET ET AL., Appellees.	:	

Washington, D.C.
Monday, November 15, 1971

The above-entitled matter came on for argument at 11:15 o'clock, a.m.

BEFORE:

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

APPEARANCES:

JOHN H. CLOUGH, ESQ., Legal Aid Service, Portland, Oregon; Hawaii Legal Services Project, 201 Community Service Center, 200 N. Vineyard Bldg., Honolulu, Hawaii 96817, for Appellants.

THEODORE B. JENSEN, ESQ., 623 S.W. Oak Street, Portland, Oregon, 97205, for Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5045, Lindsey against Normet. Mr. Clough.

ORAL ARGUMENT OF JOHN H. CLOUGH, ESQ.

ON BEHALF OF DONALD LINDSEY ET AL., APPELLANTS

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

This is an appeal from a three-judge court's denial of injunctive and declaratory relief sought by Donald and Edna Lindsey on behalf of themselves and a class of appellants, including all tenants in the State of Oregon.

The Lindseys attack the constitutionality of Oregon's eviction law seeking to enjoin its enforcement of its objectionable provisions by appellee judges.

The Lindseys had been having difficulties in getting their landlord, Appellee Normet, to repair the condition of their home, which condition included lack of plaster, downstairs toilet out of order, missing rear steps, et cetera. Since pictures are better than words, we specifically refer the Court to Appellant photographs in evidence marked as Plaintiff's Exhibits No. 25 to 37 in the record.

On November 10--

Q Those photographs are not in the appendix, are they?

MR. CLOUGH: No, they're not; we were unable to

print them because they are color photographs.

On November 10, 1969, their home had been condemned by the Bureau of Building Inspections of the City of Portland because of violation of Portland's housing and building codes. Since Donald Lindsey was substantially confined to a wheelchair with crippling arthritis of both arms and legs, and neither he nor his wife could drive a car, they did not have the mobility to search for another home. Furthermore, a search would have been rendered more difficult by the fact that the overall vacancy rate in Portland was less than 2 percent, and for low income families, less than 1 percent.

Q Would your case be any different if this was a 25-year-old professional football player in the peak of physical condition and health?

MR. CLOUGH: In some respects it might, in some respects it might not. There are some aspects of the case--

Q Constitutionally?

MR. CLOUGH: Yes, some aspects of the case would make a difference because of the indigency and ability to search for a home, although constitutionally you're quite correct.

Q Let's take an unemployed professional football player then.

MR. CLOUGH: You're right, constitutionally it would make no difference.

Low income housing is that which has rents within

the financial reach of a typical family of four whose income is from zero to $4,000 a year. In Portland, an estimated 75 percent of the low income families rent. The Lindseys' home was a low income home. Most housing available for low income families is quite often substandard, and the condition is generally very poor in Portland. Low income people pay a higher portion of their monthly income in rent, and they generally pay higher utility and heating bills because of deficiencies in plumbing, insulation, and wiring.

Q Mr. Clough, is all this general material in the record?

MR. CLOUGH: Yes, it is, your Honor. The last statement, Mr. Justice Blackmun, was in the deposition of Josephine Brown, our expert, which was admitted into evidence as Plaintiff's Exhibit No. 24 at page 26.

Low income people generally have a difficult time finding a place because of the advance month's rent or cleaning deposits often required.

After a request of the landlord to repair these conditions, and no action was forthcoming, they decided to attempt to improve their lot where they lived, and withheld their rent on December 1, 1969, to compel their landlord to repair the premises.

Q At any time in the course of these proceedings, was there a tender of the rent into the custody of the court?

MR. CLOUGH: The tender was offered at the institution of the proceedings, and the court preferred that we as their attorneys keep the money in our escrow account, and specifically condition the temporary restraining order based upon that.

Q Well, then, it was really in the custody of the court, and you were holding it as an officer of the court?

MR. CLOUGH: Yes, that is correct.

On December 15, 1969, they were sent a letter from their landlord's attorney demanding them to pay rent or vacate. At this point they were faced with the realities of having an eviction action filed against them pursuant to the statute under attack in this appeal. There was no question that an eviction would cause the Lindseys irreparable harm. Evictions of low income families often result in a continuing downward and frightening spiral, which they find an emotional block to overcome. They don't have the costs of moving and they can't find housing. They are often forced into less adequate housing. They lose standing in the community, and in their children's eyes, and large families are often split up.

With this background, this action was started in the federal district court, prior to any eviction action being filed by the Lindseys' landlord. The best way to describe the operation of the eviction statute is by taking the Lindseys

through their eviction, had one been filed by their landlord.

A complaint and summons would be filed and served upon the Lindseys setting a time for trial within two to four days, which may include week ends.

Q This didn't actually happen to the Lindseys though?

MR. CLOUGH: No.

Q This action was filed in the district court before alleging they were threatened with this, is that right?

MR. CLOUGH: That is correct. I am using the Lindseys as to what would happen, in describing the operation of the statute. For example, they could be served on a Friday, with a trial set for Monday or Tuesday. However, two days is all the time for trial that the tenant has as a matter of right. Within this time, they would have to contact a lawyer, make an appointment, and get him to take the case. His first move would be to ask for a continuance, and all that he could get without posting cash security would be two days, the granting of which is only discretionary under the statute.

Even though the defenses the Lindseys would like to raise could not be heard by the Oregon courts because of the statute he is challenging. He might still have conventional defenses based on issues of fact regarding what rent was agreed to, or if it were truly paid. Litigation of these issues may well require interviewing potential witnesses, subpoenaing them, legal research, and trial preparation.

At trial, Lindsey would want to raise defenses based upon his landlord's refusal to obey the housing codes, but these defenses will not be heard or adjudicated on their merits. The reason for this is found on the face of the Oregon statutes. They provide that the landlord's complaint is sufficient if it states: (1) a description of the premises; (2) that the defendant is in possession; (3) that the defendant unlawfully holds by force, which is deemed to include failure to pay rent within 10 days after it is due; and (4) that the landlord is entitled to possession.

The statute goes on to provide that if the court or jury finds the complaint to be true, the tenant shall be evicted.

Thus these statutes on their face preclude the raising of affirmative legal defenses, and they have been so construed by the Oregon courts.

Q Well, Mr. Clough, how old are the Oregon statutes? How long have they been on the books?

MR. CLOUGH: The last time that the F.E.D., the eviction law, was changed in any manner was in 1909, although the case of Friedenthal v. Thompson goes into historical analysis, where they were in effect back in the middle 1800s.

Q Has there been any endeavor to change the statutes legislatively?

MR. CLOUGH: There's been an effort, yes, Mr. Justice Blackmun.

Q I just wonder if one could say that possession of the premises during a controversy such as you envision here with the Lindseys, is a matter at issue and that your legislature has come down on the side of the landlord rather than on the side of the tenant, in deciding a policy question.

I take it you don't agree with that?

MR. CLOUGH: No. No, I don't, Mr. Justice Blackmun.

Q For the first time in a century, you are raising the question?

MR. CLOUGH: The question has been raised, Mr. Justice Blackmun, in several cases that have gone up to the Oregon Supreme Court on various aspects; for example, Friedenthal v. Thompson involved the constrictions on limitations of time. There were several cases that sought to raise equitable types of offenses, and these were interpreted by the Oregon Supreme Court.

The double rent bond on appeal has been construed by the Oregon Supreme Court and been upheld as constitutional. Legal defenses have been specifically disallowed by the Oregon Supreme Court.

Q Well, of course you could resolve this dilemma by appropriate legislation, could you not?

MR. CLOUGH: Of course that would be a very welcome

response, but the legislature of Oregon has not seen fit to do so. One of the main lines of attack that we have here on the statute is due process, which--that doesn't matter. The statute either procedurally constricts the courts and the litigant, so that it denies due process. That is true of any statute. Any statute could be changed at any given time by the state legislature.

Under the Oregon statutes, the fact that the tenant may have withheld rent because the landlord failed to make proper repairs, or the fact that the landlord brought the action in retaliation because the tenants had reported code violations to a city agency or complaint to the landlord, or even the fact that the action is brought because of the tenant's race, such facts are not only considered irrelevant, they are not even heard. These defenses are not judged on their merits. They are not even heard and are stricken.

At the conclusion of the trial, the tenant loses and desires to remain on the premises, pending an appeal to the circuit court, he must post an open-ended double rent bond to guarantee twice the amount of rent to be paid, from the inception of the action until final determination by the appellate court.

Q Do you object to paying into the court the rent while the action is going on?

MR. CLOUGH: Not at all, as long as it becomes due because the indigent tenant--there's no objection to that.

Q And you do object to paying it to the landlord?

MR. CLOUGH: If the situation is that--

Q That's what the case is all about, isn't it?

MR. CLOUGH: Yes, if the case is such that paying it to the landlord would defeat the whole purpose.

Q You could sue the landlord in an independent action in an attempt to collect for breach of lease or something.

MR. CLOUGH: That's true, but that action would not stay this proceeding, and the whole issue here--

Q You aren't giving us any rights, under the Oregon law you don't give up any rights to sue the landlord?

MR. CLOUGH: Not in an independent action for contract, but the issue here is possession of the premises.

Q I understand.

MR. CLOUGH: And that is the key issue that the tenant is interested in.

Q Well, he can retain possession by paying the rent to the landlord.

MR. CLOUGH: By continuing to pay the rent to the landlord, but then it defeats his whole purposes.

Q What does it defeat, if he can nevertheless recover what you paid him?

MR. CLOUGH: The problem with that is that it forces

every tenant into litigation.

Q But you can see that in tenant litigation, you have to pay the rent as it accrues anyway. You pay it into the court; you're not keeping the money.

MR. CLOUGH: That's quite correct.

Q You are paying the money, you're being separated from the rent as it falls due, and you are going to separate it as long as the issue between you and the landlord isn't settled.

MR. CLOUGH: And you will also be separated from your property, if the landlord decides to follow this procedure.

Q Not as long as you're paying the rent into the court.

MR. CLOUGH: He could give a 30-day notice in retaliation for your invoking the court procedures. What this action would do is force him to invoke court procedures.

Q I guess I don't understand. When the landlord brings this action, this forcible entry and retainer action against the tenant--

MR. CLOUGH: Yes.

Q --now the tenant can retain possession if he pays rent into the court?

MR. CLOUGH: Only for the time of the continuance, if he gets a continuance, and it must be cash in advance; in other words, if he's an indigent tenant who has his money

carefully budgeted, he could not financially afford to pay enough to get a continuance for two or three months.

Q What do you mean--get a continuance?

MR. CLOUGH: A continuance of hearing the possessory action, the action for eviction.

Q What does the action have to put up to get a continuance, how much money?

MR. CLOUGH: That would vary depending on how much time he asked for the continuance.

Q Suppose he has to put up any money in any event that he's in default on, in the first place?

MR. CLOUGH: Presumably under our situation he'd have that money he was in default on, and there would be no objection to that.

Q And then as rent falls due, he has to put up some money.

MR. CLOUGH: We would have no objection to that, but that's not the way the statute operates, as it's written. You have to post cash in advance. In other words, if he desires a continuance for two months, he would right then and there have to put up cash and guarantee it for two months.

Q Mr. Clough, I seem to have missed something. When I first asked you about depositing the rent in the custody of the court or under the control of the court, I thought your response was this was done as a discretionary matter by the

judge, not as a matter of any requirement under the Oregon statute. Will you clear that up for me? Does the Oregon statute require the payment of the money, the rent in escrow?

MR. CLOUGH: Oh--no, it does not, Mr. Chief Justice.

Q My first impression was correct then.

MR. CLOUGH: Your first impression was correct. I thought that you were referring to the Federal court action. The court below adopted the escrow arrangement.

Q That was the three-judge court?

MR. CLOUGH: Yes.

Q And would you think that was a reasonable condition, uniformly to be attached to any right to maintain possession?

MR. CLOUGH: Perfectly reasonable, or some variation. However, the court felt this would be something for the state courts to work out.

Q If you didn't have that deposit in escrow, might you not be confronted with a counter-suggestion that this a taking of property without due process, without compensation?

MR. CLOUGH: Of course; that is correct.

Q But you would accept that as an invariable condition to maintaining possession?

MR. CLOUGH: Yes, we'd have no problem with that whatsoever.

The double rent bond on appeal is in addition to the usual cost bond. This bond may be filed as a cash bond,

personal bond, or appropriate surety bond, in any event with two sureties. It is open-ended and may last for a month or a year. Within five days after the posting of the bond, the landlord can require justification of the sureties by their presence in court. At the conclusion of the appeal, if the tenant loses, the landlord simply executes on the bond, or if the money has been paid into court, upon the filing of the order, it is simply disbursed.

The landlord collects the entire amount of the bond, not just his damages or expenses, if any. If the tenant loses in the circuit court, he may appeal to the state supreme court, and the same process is again repeated.

We are challenging the three major restrictions on the low income tenant's ability to properly defend himself in Oregon.

These are, first, the short time to prepare for trial.

Two, the refusal of the court to hear his defenses.

And three, the denial of his ability to appeal because of the double rent bond requirement.

We contend that these restrictions violate both equal protection and due process clauses of the Fourteenth Amendment because they affect certain fundamental interests of the tenant. The first of these fundamental interests is his right to retain peaceful possession of his home or the

sanctity of the home. Second is his right to decent housing. Third, his right to meaningful access to and equal treatment in the courts.

While all of these interests have been treated as fundamental in this Court in various decisions, the right to retain peaceful possession of one's home has received the most attention of the Court, being protected under the Third, Fourth, Fifth, Ninth and Fourteenth Amendments. For example, in Silverman v. United States, 365 U.S., this Court rejected evidence obtained by the use of a "spike mike," which intruded several inches into the wall of the defendant's home, as it was obtained by actual intrusion into a constitutionally protected area. In Camara v. Municipal Court at 387 U.S., this Court held that a warrant must be obtained before homes can be inspected by the city agencies, and in Rowan v. United States Post Office Department, this Court upheld in the face of a First Amendment attack the statute protecting householders from junk mail intrusions.

If this Court has found the sanctity of the home to be worthy of constitutional protection against these sporadic intrusions, how much more worthy of protection is the right to be free from a total ousting of possession; total ousting by the county sheriff is what faces a tenant who loses an eviction action in Oregon, as is almost inevitable under the procedures we are challenging. In addition,

certain of the restrictions we are dealing with involve a suspect classification, one based upon wealth, since indigent tenants do not have the resources to post either the continuance bond or the double rent appeal bond.

We do not feel we are asking for anything unreasonable in this case. We fully recognize that there are certain interests of the landlord that the State of Oregon may reasonably protect if it wishes to do so. The main interest meant to be protected by the restrictions that we are challenging is the landlord's desire to see that he will not lose rent money he may have coming to him during the litigation that he eventually might win. Statutes designed to protect this interest should be constitutional if they are reasonable but the restrictions involved here go too far. They are unreasonable at the expense of the tenant's interest in protecting his home.

We can understand, for example, shortening the time to prepare for trial in an eviction action to something less than that available to other defendants, but only two days as a matter of right is so short as to make a mockery of the judicial system.

Q Would you be here if that were 20 days, Mr. Clough?

MR. CLOUGH: If that were 20 days, probably not on that issue. It would depend entirely on how the Oregon courts set up the procedure.

Q Well, what are the defenses available under the Oregon system? Payment is one, isn't it?

MR. CLOUGH: Yes, payment is one. There are certain equitable types of defenses, such as showing that the agreement between the parties was something aside from what its apparent nature was, and their true relationship was not that of landlord-tenant, such as a deed is really a mortgage, and therefore the eviction procedure should not be used, the other Oregon procedure should be used in that circumstance.

Q What appears to be a tenancy at will might be a month-to-month, what appears to be a month-to-month might be an actual lease for a year?

MR. CLOUGH: No, they'd still be landlord-tenant,

Q Is it available as a defense is what I mean.

MR. CLOUGH: That there is in fact a lease for a year, a hidden lease, that may be a defense depending on the circumstances of the case, but again we're dealing with that fourth item in the complaint, the landlord's right to possession, not the third item which we are concerned with, with raising any contractual defenses.

Q My thought was that it can't be both ways. In other words, you say on the one hand that Oregon doesn't allow you to make any real defense; and on the other, that you should be given more time to make defenses. Well, if there are not defenses to be made, length of time isn't very--

MR. CLOUGH: Length of time is contingent on the ability to raise these defenses, of course.

Q May I ask you in the F.E.D. suit, in response to it, you not only claim you're not in default but the statute itself is not constitutional, and you'd get a constitutional decision in that case, and if you could afford the appeal bond, appeal any rejection on constitutional grounds?

MR. CLOUGH: In theory that would be available.

Q Now these F.E.D. suits were pending at the time you went to Federal court?

MR. CLOUGH: There was none filed in the Lindsey case.

Q They were in the others?

MR. CLOUGH: There were three others, and for various reasons those three cases were settled and were never appealed.

Q And what is the case of controversy between the one person and that landlord? Had he threatened eviction, or--

MR. CLOUGH: The case in controversy is he threatened eviction and invoked the use of the courts.

Q But he never did?

MR. CLOUGH: But he never did because of this action.

Q I see.

MR. CLOUGH: Because there was a restraining order issued in this action.

Q Let's back up to a case where there is a tenancy from month to month, and for reasons not disclosed, the landlord decides that he wants to terminate the tenancy. He gives the appropriate notices and at the end of the notice period, the tenant declines to leave, claiming that it is very inconvenient, there is no other housing available to him, et cetera. Now do you say there's a due process right to remain which in turn will enable him to remain in possession notwithstanding the landlord's compliance with the statute in giving him notice?

MR. CLOUGH: Not in the facts of the situation you gave to me, Mr. Chief Justice.

Q In other words, in that situation, the landlord can evict?

MR. CLOUGH: He would have no defenses.

Q No defense.

MR. CLOUGH: However if he were raising the defense that he should be entitled to at least raise and be heard on the defense that the landlord is evicting him, for example, in retaliation, put testimony in, but that is not the facts of the situation you gave.

Q Or perhaps the one-year lease or the things Mr. Justice Stewart was talking about, as an alternative.

MR. CLOUGH: Yes.

Q If you have a clear case of that kind, where there

is no valid defense, then you concede the landlord can evict?

MR. CLOUGH: Of course. There is no denial of due process because a defense hasn't been raised.

Q Then the two cases wouldn't be a problem for you in that circumstance?

MR. CLOUGH: Yes, but the statute is over-inclusive because it includes these other situations, too. There's no differentiation between that type of situation and the type of situation where the tenant seeks to raise retaliatory eviction as a defense.

Q Then you come down to a claim of unconstitutionality of the statute as applied rather than facially, isn't that right?

MR. CLOUGH: It would be on its face, because the statute is over-inclusive on its face.

Q I suppose it's six of one and a half a dozen of the other as applied to this specific case, isn't it?

MR. CLOUGH: It might be both, yes.

I'd like to reserve my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jensen.

ORAL ARGUMENT OF THEODORE B. JENSEN, ESQ.

ON BEHALF OF THE APPELLEES.

MR. JENSEN: Mr. Chief Justice, Members of the Court: I am appearing here for the defendant, Mrs. Normet.

The factual situation in the case actually, as we see it, was that Mrs. Normet was the record owner of the property but had become so with an outstanding contract of sale on the property to a party who had in turn rented the property to the Lindseys.

When Mrs. Normet on default on this contract under which the property had been sold, and a more or less of an abandonment of it by the contract purchaser, Mrs. Normet began to and she did receive the rent payments from the Lindseys up through November, applied them on the contract of sale, and commenced a suit to foreclose the contract in order to clear up the title of the property.

Then in November the City of Portland, under its housing code, notified both the Lindseys, they being the tenants, and Mrs. Normet that the property was substandard in a good many respects and posted a notice that the property be vacated or the repairs made. At that point, Mrs. Normet through her attorney gave a notice to the Lindseys requesting them to vacate the property in accordance with the order of the City of Portland, she not wanting to go ahead and spend the money which would be required to make the repairs, because of the existing cloud on the title to the property at that particular time.

Now the trial court made a finding that there was a landlord-tenant relationship between Mrs. Normet and the Lindseys

and treat it as if it were an ordinary landlord-tenant relationship.

In this case we view the summary of the argument and the briefs of the Appellant that they are saying on two grounds, that the Oregon eviction statutes are unconstitutional because they do not grant equal protection and due process at law, and that they deprive tenants of rights and privileges accorded to them in the civil eviction actions in Oregon by denying basic rights needed to enable them to receive fundamentally fair hearings on their defenses.

Now I would like first of all to direct my remarks to the Oregon eviction law briefly. First of all, the Oregon eviction law is only available or is only used when there exists a landlord-tenant relationship. It doesn't apply in any other situation. It protects,our position is that it protects all tenants equally. It doesn't make any distinction as to what their funds may be that they have available to them, whether they're rich or poor, it just applies and gives equal protection to all tenants.

First of all, we have no self-help procedure in Oregon; that is, where the landlord can go in and evict the tenant himself. If he wants to evict a tenant from the property, he has to go in to the court and get a determination that he has the right to take possession from the tenant. He can do this if the tenant has failed to pay the rent within

ten days after due, or if the tenant's lease has expired and the tenant has refused to get out, or if the tenant's month to month or what tenancy or whatever the term is, has been terminated on either 30 days' notice, or if it's a longer tenancy, why, then on a notice equivalent to the term. And then if the tenant refuses to vacate the landlord must, in order to have a determination then of his right to take possession, he must go in and file a complaint in court. It is setting forth a kind of notice sort of a complaint, at least the equivalent of the Federal Rules requirements in which he in effect says that the tenant is withholding the premises unlawfully and with force, and that the landlord is entitled to possession. That's the only issue in the F.E.D. case at that point in the complaint.

Q As I understand it, under Oregon law the landlord is not permitted to join with that F.E.D. complaint any other claim; e.g., a claim for the payment of back rent. Is that right?

MR. JENSEN: Mr. Justice, that is correct, and if he does join--he can join an action for rent, if he wishes to do so, or any other action that might be joinable under our statute, but if he does, then the F.E.D. procedure is not followed, the summary procedure is not followed and the case is subject to the ordinary trial procedure, and instead of the two to four days which the summons would state, it would

be ten days if served in the county, 20 days in any other county where the individual did not actually reside.

Q And it becomes just like any other contract action?

MR. JENSEN: Yes, sir, and any and all defenses, including counterclaims, could be raised then in the action.

Q If the Plaintiff joins anything except the eviction, then defenses would be available, and it would become an ordinary lawsuit? This summary procedure would no longer take place.

MR. JENSEN: Yes, that is correct, Mr. Justice.

As a matter of practice, most F.E.D. cases in the simple landlord-tenant relationship of rental of a residence on a month-to-month basis are filed just for possession without joining any rent or any other cause of action with it. Now, I think the court should realize that the F.E.D. eviction laws of Oregon apply not only to the rental of residences but it applies and is available and used in connection with commercial properties, where there is a lease for example, and the tenant has refused to vacate at the end of the lease, with most leases providing if they hold over at the end of the term, then they are month-to-monthy tenants; then you would have to give 30 days' notice and bring your F.E.D. action. But you can see that in cases involving commercial property where the tenant may find it a tremendous financial

advantage to him to remain in a particular property for another year or so, it would be unfair to permit him to stay in just by continuing to pay his rent, if the landlord has given him the 30 day's notice and his lease term is over.

Now, we have personal service in Oregon of the summons and complaint on the tenant, and the summons provides that the matter will come before the court and the return made from two to four days; the day of service is not counted. So it comes up then before the court at that time, and there need not be any written answer filed. We have a procedure in the Oregon law which grants to the defendant tenant two more days continuance without any showing of any kind. He can have an additional two days continuance, and then if that isnot a sufficient amount and he wishes to have a further continuance, that can be obtained by posting security for the payment of his rent to cover the period of the time for the continuance he wants. In other words, the practical aspect of that is that he doesn't have to go back and pay his delinquent rent; that isn't an issue in the case--it's possession. If he wants to remain in possession and get a continuance of the case for more time for preparation or for whatever the reason may be, he can do so from a practical aspect by paying the month's rent, and that would give him a 30-day extension of time.

Q Pays it into court?

MR. JENSEN: There's no provision, Mr. Chief Justice, for the payment of the rent into court. I assume that the trial court could make that provision.

Q Does the court have inherent power to do that?

MR. JENSEN: I believe it would. It has been the practice in Oregon particularly.

Q Did thathappen in this case?

MR. JENSEN: No, it did not. The thing about this case is that there was no F.E.D. eviction commenced by Mrs. Normet against the Lindseys. The claim here is that Mrs. Normet had threatened commencing an eviction case against them, but there actually was no case filed.

Q I thought there was a letter from the lawyer to the Lindseys threatening a lawsuit? Is that correct?

MR. JENSEN: I think that counsel would agree with me that we have a different interpretation of the notice that was sent by Mrs. Normet's attorney to the Lindseys. It appears it was a letter--it appears in the appendix--it's an exhibit in the case, Exhibit No. 14. The appellees' interpretation of the letter was that it was a notice or demand or request for the Lindseys to comply with the order issued by the City of Portland Building Department for the premises to be vacated because it was substandard.

Q Mr. Jensen is personal service required in Oregon?

MR. JENSEN: Yes, it is.

Q In the amicus brief there's a good deal of talk about so-called sewer service, because I gather that in many states service by attaching the process to the door of a house is sufficient, and process servers often find it more convenient to do that. I wonder if failure to make personal service would be a defense in this action?

MR. JENSEN: Yes, it would be. Now, I would say--

Q Suppose the defendant comes into court, enters an appearance, could he make that defense under a special appearance?

MR. JENSEN: Yes, he could enter a special appearance to quash the service.

Q If there was no personal service.

MR. JENSEN: Yes, to quash whatever the service was, and he can reserve that by making a special--

Q If for want of personal service, the tenant never did have actual notice of this proceeding, then what happens?

MR. JENSEN: Well, the service in the F.E.D. case is the same as in any other action in the State of Oregon. We have personal service, but you can have substituted service by publishing; there could be a publishing, which if the person is concealed within the state or is outside the state and his location is not known, but in support of that there would have to be an affidavit prepared and filed, which contains facts sufficient to show there had been a reasonable

search made for the party before the publication of the summons.

Q Outside the state you wouldn't bring an eviction proceeding, would you?

MR. JENSEN: Well, depending on had he left some of his belongings in the property perhaps, or something of that nature, you might be taking a chance to go in and have self-help of taking possession of the property, but the service is no different in an F.E.D. eviction case in Oregon than it is in any other case, so we do not have what is called conspicuous service or so-called sewer service. I noticed in the Amicus briefs they have it in New York and Florida. We do not have that; werequire personal service.

Either party can request and have a jury trial. If the tenant--and that's to determine the possession--and the tenant can interpose defenses which are relevant to the question of possession.

Q And those defenses would mainly be whether or not he paid the rent?

MR. JENSEN: Payment of rent or that he has a lease on the property, he's not been given notice, things of that nature which are relevant to the possession.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

(Whereupon, at 11:42 o'clock, a.m. the argument

was recessed, to be resumed after lunch.)

AFTERNOON SESSION (1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Jensen, you may proceed with your argument. You have 13 minutes remaining.

MR. JENSEN: Mr. Chief Justice and Members of the Court:

The Oregon eviction procedure does not deprive either the tenant or the landlord of the right to assert other claims they may have under the general court procedure which is available to all. In other words, they have open to them the general court procedure for litigating any other claims they may have against each other, arising out of the rent agreement or the rent contract.

Now the Appellants seem to argue here that all defendants should be treated equally and that it's wrong to have a separate eviction procedure to determine possession of rented property between the landlord and tenant. In support of that they compare a mortgage foreclosure with an F.E.D. case under Oregon law and then say that since the procedure is different, that the tenant defendants in an F.E.D. case do not receive equal protection or the same protection as an owner of real property whose mortgage is being foreclosed. They claim therefore that the F.E.D. procedure or eviction is unconstitutional. Certainly there's a vast difference between the owner of real property who is delinquent in payment of a mortgage and a tenant who does

not pay his rent. It seems to me that we certainly wouldn't require a landlord first to obtain a judgment for the rent, and then hold some sort of judicial sale to evict the tenant terminating his right to possession of the property, perhaps even with some redemption rights or have some sort of strict foreclosure proceeding which would grant the tenant some period of time to pay up his delinquency before the landlord could retake possession of his property from a defaulting tenant.

I submit that the summary eviction procedure is justified because of the intending rights existing in a landlord-tenant relationship, and the Oregon eviction law grants equal protection to all landlords and tenants. The State of Oregon has the right to establish by legislative enactment a summary procedure to determine the issue of possession between landlords and tenants and that is what it has done with its statutes and laws.

Now I'd like to make a comment or two with regard to the amicus curiae briefs that were filed in this case, primarily to make the point that the Oregon eviction laws do provide due process to tenants in compliance with the United States Constitution. First of all, we have no self-help provision in Oregon for the landlord as there is in Arkansas and Arizona, under their unlawful detainer statutes which require some sort of bond from the tenant to keep

possession prior to trial. Before the landlord in Oregon can take any steps toward recovering possession, he has to file and commence a case in court under the eviction statute, filing a complaint. We do not have what is called conspicuous service or so-called sewer service in Oregon, as they apparently have in New York and Florida; Oregon requires personal service or the same service as in any other litigation in the Oregon courts.

We do not permit an oral complaint as in Kentucky. Oregon requires a written complaint filed and a summons issued. We permit continuances; we do not refuse to grant a continuance as in New Hampshire. Oregon grants a two-day continuance without any cause on request, and an unlimited continuance if security is posted for the rent, which may be found due during a continuance period. In other words, you could pay your current rent, get a 30-day continuance.

In Kentucky from its amicus curiae brief is a statement that the trial is before a court not presided over by judges. Oregon courts are all presided over by legally trained judges, and jury trial on request.

Oregon does not allow in the F.E.D. eviction, the landlord to recover both possession and judgment of money damages as in the California and New Hampshire States; in Oregon if you join the rent claim or any other claim that you have, then you have to make the usual service as you would

in other cases, and it proceeds accordingly.

In some states, referring primarily to California, observed from the amicus curiae brief they allow the F.E.D. eviction procedure to be used by the purchaser at an execution mortgage foreclosure, to recover possession I suppose, after the sale of the property at sheriff's sale, if the former owner doesn't voluntarily surrender possession of the property. They also allow to be used, to recover possession under and after a trustee's sale under a trustee's deed, to evict the former owner. Oregon has no such statute. Our eviction statute is related and confined entirely to the landlord-tenant relationship.

Oregon does not deny defenses to be raised in eviction proceedings, as in Arizona. We permit in Oregon equitable defenses relevant to the right of possession.

Oregon does not require a bond to appeal covering the past, present and future rent as in Vermont and New York. The bond in Oregon on appeal, if the tenant wishes to remain in possession, is for twice the rental value only for the period, only for the period from commencement of action to final judgment.

Q What is the purpose of the double rent?

MR. JENSEN: The purpose of that is stated in the case of Scales v. Spencer, Oregon Supreme Court, 1967, in which it said that inasmuch as a final judgment for

restitution does not include a judgment for rent pending appeal, it appears obvious that the legislative purpose for requiring this particular bond on appeal was to guarantee that the rent pending on appeal would be paid.

Q But it's double.

MR. JENSEN: That the bond must provide for double surrender value was no doubt intended to prevent frivolous appeals for the purpose of delay. If there were not some added cost or restriction, every ousted tenant would appeal regardless of the justification. It can also be assumed that the additional payment would compensate for waste or is in lieu of damages for the unlawful holding over.

Q Is there any other provision in Oregon law that requires double the amount?

MR. JENSEN: No, there's not, Mr. Justice. If the tenant wants to appeal and remain in possession, then the Oregon eviction law provides for the double rent bond. If he surrenders possession, and wants to appeal, which was done in the Priester v. Thrall case cited in the briefs, then he does not have to put up the double rent bond; he can put up the bond provided for in the usual undertaking section of the Oregon statute which would be for --

Q Costs?

MR. JENSEN: --costs and disbursements and any damages that might be incurred in the nature of waste, I think.

Q Would you say that posting of a bond for double the rent might discourage a person from appealing?

MR. JENSEN: I think it would discourage frivolous appeals, and I suppose as the Appellants here are claiming, that--

Q How does Oregon handle other frivolous appeals, in other cases?

MR. JENSEN: Well, we have a supersedeas bond which in damage cases, if you want to stay the execution of any judgment or court order, you have to put up a supersedeas bond.

Q But that's only liable for what is actually lost, is it not?

MR. JENSEN: Yes, it is.

Q But this is double what's lost.

MR. JENSEN: Yes. Our position with regard to that is to permit the tenant to remain in possession by just continuing to pay just the rent would mean that he could stay in for a year, probably, or longer, depending on how long it took the case to progress through the courts; and I would point out that, that he could do that if the landlord--now this applies, the eviction procedure applies not just to delinquent rent cases but applies where the landlord might want to take the property, we'll say, off the market. Maybe he has other use he wishes to put the property to. Maybe

he wants to have it occupied by some member of his own family. In other words, our position is there are rights in the landlord, in his property, and he's entitled to that protection and if you do not preserve or protect the rights of the landlord, then you would be depriving him of his property rights without some due process.

Q Mr. Jensen, Judge Goodwin in his opinion for the three-judge district court, referred to this appeal on provision as perhaps the most difficult question in this case, and the statute provides for the posting of the bond for double the amount of rent that will accrue pending the appeal. How can you tell how much that will be? How can you tell how long the appeal will take? How in actual operation does this work?

MR. JENSEN: Well, I don't know that you could actually tell. The court then would have to set the amount of the bond which is what is generally done.

Q By making an estimate of how long the appeal will take?

MR. JENSEN: Yes.

Q Then can it be increased or decreased?

MR. JENSEN: Well, generally that is not the case. It is generally fixed and that goes on in connection with the appeal.

Q Is it generally a sort of arbitrary estimate, three

months, four months, five months, or don't you know?

MR. JENSEN: I am not certain of that because there have not been very many appeals.

Q What kind of bond is commonly employed?

MR.JENSEN: In other cases--

Q In this case?

MR. JENSEN: What kind of bond?

Q Yes.

MR. JENSEN: It can be a personal or a surety bond.

Q What kind is usually used in Oregon?

MR. JENSEN: Well, the landlord would have a right to question the sureties, if it's a personal surety, and if they could not justify by showing that they had twice the property, equal to twice the value of the bond, over and above property exempt from execution, why then the court would not approve those sureties. But it's up to the court, and in many cases, the answering party would question the sureties if they're personal sureties, but that doesn't mean he would have a right to discredit them if they qualified. That would be up to the court.

Q And if the tenant loses the appeal, does the Appellee landlord automatically get payment of the full amount?

MR. JENSEN: That is the theory of the eviction statute and the bond.

Q That is because of the fact that he cannot, in the

eviction action, collect the rent?

MR. JENSEN: That's correct. He would not collect any rent and he would be being deprived of possession of the property, and it's sort of a liquidated damage amount is the way it is treated and viewed.

Q Are there any decisions as to whether or not this can be waived by the court?

MR. JENSEN: It could be waived by the parties. I don't believe the court would have the right to waive the bond.

Q In view of the explicit statutory--

MR. JENSEN: Yes, if the tenant surrenders possession, then he can go ahead and appeal.

Q Suppose the court says it will be three months, "I want you to post three months' rent, a bond of twice the value of three months' rent," and the case is decided in one month. Does he get that whole bond?

MR. JENSEN: No, he would get only the amount which has accrued, as I understand it, up to the time of the determination of the case.

Q The statute is cast in terms of double the rent, and therefore if it were 30 days, he would get double 30 days' rent; is that right?

MR. JENSEN: That is my understanding, Mr. Chief Justice.

Q That's all he would get?

MR. JENSEN: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jensen. You have four minutes left, Mr. Clough.

REBUTTAL ARGUMENT BY JOHN H. CLOUGH, ESQ.

ON BEHALF OF THE APPELLANTS

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

I have just a few comments. Contrary to the apprehensions here that have been cast, we still need time to prepare for conventional defenses, and we still maintain that the two-day time limit, as a matter of right, is too short to even prepare for those, such as to find out the issues as to what was agreed to; there may be witnesses to testify as to whether or not in fact rent has been paid, or whether rent receipts are available. In connection with that, the attorney still has to ascertain whether or not there is, in fact, a valid defense, and he needs more time in order to do that.

The third point is regarding the joining of the action for rent and the F.E.D. In our brief at page 48, Footnote 13, we cited two statutory provisions which provide that the action for rent can be joined with an F.E.D. but at that pont, the case is severed and the action for rent proceeds as any other lawsuit; the F.E.D. proceeding goes

forward.

The fourth point I refer to Plaintiff's Exhibit No. 14, which is the letter sent to the Lindseys by the Normets' attorney; it speaks for itself regarding whether or not it threatened eviction.

Essentially all that Appellants are asking for is a chance to be able to change the law in Oregon. We do not ask this Court to change any substantive rule of law; that is for the courts of Oregon to do, and that is for them to use the principles of the common law and we would seek to have them adopt the consumer protection principles that have been analogized in landlord-tenant law in other jurisdictions, which they are free to do absent this statute. We are essentially asking for a chance.

Q Within the framework of this case and the issues posed, could this statute hypothetically be saved by saying that Oregon must give the same time to answer in these cases as in any other civil action by reference to the particular statute, the 10- and 20-day statute?

MR. CLOUGH: You mean by construction of the statute? There is no construction of the statute--the statute is very explicit.

Q But you want 10 or 20 days, don't you?

MR. CLOUGH: We want whatever is a reasonable enough period of time in order to answer.

Q You conceded earlier this morning that the conventional statutory time to answer in actions in Oregon of 10 to 20 days was a reasonable time.

MR. CLOUGH: Oh, yes.

Q If you got that, you'd be satisfied, wouldn't you?

MR. CLOUGH: Sure, on the time limitation.

Q I'm not suggesting it can be done that way. I ask whether that is what you want.

MR. CLOUGH: On the time limitations that would be true.

Q And that would dissolve this whole case?

MR. CLOUGH: No, it would not dissolve this whole case.

Q What would remain?

MR. CLOUGH: The ability to raise defenses would still remain and the double rent bond on appeal, and the continuance bond. Those issues are still in this case, no matter what happens to the time limitations.

You still have the constrictions of the statute that would apply, no matter whether he had 10 days, 50 days, or 2 days.

Q Do you know how this double rent bond on appeal actually works in practice?

MR. CLOUGH: It is an open-ended bond, Mr. Justice. It is for no specified amount. It's a virtual impossibility

to obtain a surety bond. The surety bond companies just won't write them.

Q How many appeals have there been?

MR. CLOUGH: We have the Oregon cases that are listed in the brief, Scales v. Spencer and Priester v. Thrall specifically dealing with the double rent bond on appeal, and describe how it operates. The other types of cases are appeals that have been taken, but quite effectively it does preclude almost any right to appeal, and most of those cases involve commercial leases, not residential leases.

Q Scales v. Spencer and what were the others?

MR. CLOUGH: Scales v. Spencer and Priester v. Thrall involve the double rent bond on appeal. Friedenthal v. Thompson involves the time limitations and the ability to raise an equitable defense. There the equitable defense was of the nature of asserting a subsequent modification of a written lease, an oral modification. Hopka v. Forbes, Leathers v. Peterson, Share v. Williams are similar type cases, and that is it--and Menefee Lumber Company v. Abramson--those cases.

Q Mr. Clough, did I understand Mr. Jensen to say that all equitable remedies were available?

MR. CLOUGH: I believe that is what he implied, but that is not the case under Oregon law.

Q How do we find that out--by reading those cases? Do those cases reveal it?

MR. CLOUGH: Those cases reveal it, and an analysis of the statutes. You see, the cases involving raising of so-called equitable matter do not operate as a stay per se of the eviction action; they must then proceed to determine whether or not the issues raised would operate to stay. In other words, an example in Leathers v. Peterson, the question was whether or not there was a deed or mortgage in conveyance of the land. There the parties were dealing at less than arm's length. It was a question of fraud in the inducement.

Well, if it did operate as a mortgage as opposed to a deed, then there wouldn't be any validity to using the F.E.D. action. There would be another action that would have to be available, so it goes to Item 4 on the allegations of the complaint, whether or not the landlord has a right to possession. What we are dealing with is Item 3, which explicitly says if the rent has not been paid within 10 days after it comes due, that's it, he's cut off, and he has no more defenses in Oregon courts. He just seeks a fair chance is all.

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

Q Priester v. Thrall I can't find listed in your brief.

MR. CLOUGH: It's listed in the Appellees' brief.

Q How do you spell Priester?

MR. CLOUGH: Priester, P-R-I-E-S-T-E-R.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Clough and Mr. Jensen. The case is submitted.

(Whereupon, at 1:22 o'clock, p.m. the case was submitted.)