In the

Supreme Court of the United States

CLOVER PATTERSON,

Appellant,

vs

GEORGE WARNER, et al.,

Appellees.

No. 72-5830

Washington, D. C.
January 9, 1974

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CLOVER PATTERSON, Appellant, v. GEORGE WARNER, etc., et al., Appellees.	No. 72-5830

Washington, D. C.,

Wednesday, January 9, 1974.

The above-entitled matter came on for argument at 2:07 o'clock, p.m.

BEFORE:

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

APPEARANCES:

GEORGE R. HIGINBOTHAM, ESQ., 1116-B Kanawha Blvd.,E., Charleston, West Virginia 25301; for the Appellant.

PHILLIP D. GAUJOT, ESQ., Assistant Attorney General of West Virginia, Room 26-E, State Capitol, Charleston, West Virginia 25305; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-5830, Patterson against Warner.

Mr. Higinbotham.

ORAL ARGUMENT OF GEORGE R. HIGINBOTHAM, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case arises from the State of West Virginia. It was a three-judge federal court below that held a State statute in the State of West Virginia as being constitutional.

That statute provides that one who seeks to appeal from a hearing and a judgment, of a justice of the peace in the State of West Virginia, is required to post a double bond, a bond twice the amount of the judgment.

We challenge that as unconstitutional, denying equal protection and due process of law.

Before I begin with the merits of the case, I would like to deal with the subject of mootness. We have made the unusual move, perhaps, for an appellant who is bringing the case before the Court, of suggesting that our case may be moot.

I would like to point out to the Court that I am not arguing for mootness, that I am fulfilling what I believe is my duty to the Court in informing the Court of all the

issues and all the circumstances of the case. That there was a case in the State of West Virginia that went to the State Supreme Court in West Virginia, that was virtually identical, practically it's not much different.

That case raised the same issues as are presented here. The West Virginia Supreme Court declared the judgment of the justice of the peace in that case void.

Another case, an older case, by the West Virginia Supreme Court said that when you have a pecuniary interest of a justice of the peace, in his judgment, then the judgment is void, ab initio. That was in a criminal context.

The State Supreme Court in this Reece case, that's the name of the case, Reece vs. Gies --

QUESTION: That's since the judgment below?

MR. HIGINBOTHAM: Since the three-judge court, yes, sir. It's just very recent, 1972.

QUESTION: What's the cite?

MR. HIGINBOTHAM: Reece vs. Gies. I've cited it in my motion, or suggestion of mootness. It's 198 SE 2d.

QUESTION: What's that, again?

MR. HIGINBOTHAM: 198 SE 2d, I'm not sure what page it is, sir. It is in the record, I have cited it in my motion.

QUESTION: Has the statute since been amended?

MR. HIGINBOTHAM: No, sir. There's been no change

in the statute at all.

QUESTION: Was this to suggest, perhaps, if the three-judge court was permitted to address the significance of this recent decision, perhaps it would not have reached the conclusion it reached?

MR. HIGINBOTHAM: No, sir. I think the conclusion would be the same. We have a decision by the West Virginia Supreme Court, and by the three-judge court, that the double bond has a rational basis.

Getting back to the mootness thing, let me refer to that again. The effect of that case, it said that the judgment was moot, the judgment was void. That restored the status quo of the parties.

In other words, that judgment of the J.P. was void, but it wasn't the underlying claim that was void.

Therefore, the creditor could go right back in to the same J.P. court and again sue the same debtor. The same situation applies here.

And for those reasons I don't think that the case is moot.

QUESTION: What, then, would happen? Under Gies, would the J.P. have to disqualify himself or something?

MR. HIGINBOTHAM: Well, as a practical matter now, that's what they're supposed to do, as a practical matter now, even though they haven't done anything. The J.P. waives

the collection of fees that he would have received.

QUESTION: Oh, then it would resolve -- I see.

MR. HIGINBOTHAM: Yes, sir.

QUESTION: That's the infirmity in his judgment, that he was receiving --

MR. HIGINBOTHAM: That's the one that the Reece court found was infirm.

QUESTION: I see.

QUESTION: That is to say that he was receiving financial benefit if he decided in favor of the plaintiff; is that it?

MR. HIGINBOTHAM: Yes, sir; exactly. Two dollars and fifty cents for execution; thirty-five cents for mailing out --

QUESTION: Which he didn't get if he decided in favor of the defendant.

MR. HIGINBOTHAM: Yes, sir.

They said that was why it was void.

But, practically speaking, I think this is the key to that thing, the Reece court declared the judgment void below.

Now, there's been no rush by creditors or J.P.'s alike in the State of West Virginia to suddenly come around and say: If that statute was void, we're going to return all the moneys that we have collected through the years.

Therefore, it's not a retroactive application.

QUESTION: Well, the most that could happen here, if I understand you correctly, is -- in this case he collected the two-fifty, I gather?

MR. HIGINBOTHAM: He hasn't executed it yet, Your Honor.

QUESTION: Beg pardon?

MR. HIGINBOTHAM: He did not execute it.

QUESTION: No execution.

MR. HIGINBOTHAM: We sought to appeal, sought to post the bond and so on. We could not post the bond.

QUESTION: Right.

MR. HIGINBOTHAM: And that's what gave rise to this case.

QUESTION: Right.

MR. HIGINBOTHAM: Went into federal court and enjoined him, and so on. That's --

QUESTION: Supposing you went to the West Virginia State Court, if the judgment here were affirmed, and sought to enjoin execution on the grounds -- on the J.P. judgment, on the grounds that that judgment was void. Would you prevail under the Reece case, do you think?

MR. HIGINBOTHAM: There again, that's the question of retroactivity, and I don't know what the three-judge court, I mean a West Virginia court would do. But that

would -- they would have to decide whether Reece was retroactive. And if they decided Reece was retroactive, that means that everybody, all through the years, would have to return their moneys. And I would hope to get attorney's fees, if I could get something like that.

But I don't think that's very likely.

But I think the more important thing is here, there's the fact that the creditor can go back into the J.P. court and, considering the cases on mootness that this Court has decided, if there's a likelihood of repetition of the conduct complained of, then the case is not moot. And there's a good reason to believe that the creditor would do that, because it's cheaper for him to go to a J.P. court, he's gone to the same J.P. before and won, there's a good reason to believe that he would win again. And he doesn't have to have an attorney.

QUESTION: You mean that capable of repetition and needing review language of Moore v. Ogilby, and cases like that, as being the general doctrine of mootness, or perhaps an exception in election cases and things --

MR. HIGINBOTHAM: No, I don't think it's just election cases. The general rule that I understand mootness is that there must a controversy at all stages of the litigation.

In the W. T. Grant case, U. S. vs. W. T. Grant,

that was a case where they had the interlocking directorship. And the director says -- they sought an injunction against him, and he says: I've dropped my directorship, so there's no longer an interlocking situation.

That is only one factor to be considered, that he said he would drop it. That's what the courts --

QUESTION: That turned on the availability of an injunction, though, not on mootness, didn't it? W. T. Grant.

MR. HIGINBOTHAM: No, sir, I think -- that was a mootness case. That was a mootness case.

QUESTION: Oh, was it?

MR. HIGINBOTHAM: Yes, sir.

And he said that the fact that it may be -- it was like the judgment here, it's void. He's not doing what was complained of. But it's very likely to come up again. The act could repeat itself.

Another case that I would rely upon is --

QUESTION: Did the court find the statute unconstitutional or not?

MR. HIGINBOTHAM: Sir? I'm sorry.

QUESTION: Did the Supreme Court of West Virginia find this statute unconstitutional --

MR. HIGINBOTHAM: No, sir. It didn't consider --

QUESTION: Well, is that the one point that's involved here?

MR. HIGINBOTHAM: They considered the second half of this statute. The second half of this statute is a double bond also, in eviction cases plus one year's rent.

QUESTION: They didn't hold the statute that we have before us --

MR. HIGINBOTHAM: No, sir.

QUESTION: -- unconstitutional.

MR. HIGINBOTHAM: No, sir. They didn't have -- did not have this part of the statute before it.

QUESTION: Well, how can that be moot now?

MR. HIGINBOTHAM: I don't think it is. I'm not arguing for mootness, sir. I'm just saying that there may be a question of mootness. It's not my function to decide whether it's moot or not, by avoiding the issue.

I submit to you that the case is not moot.

QUESTION: Does the respondent believe that -- raise this?

MR. HIGINBOTHAM: No, sir. I raise it. I think that it was -- he did not do it, and I thought it was my function to do it; so I did raise it.

QUESTION: Is there any problem of the statute of limitations having run, if the creditor has to bring another suit?

MR. HIGINBOTHAM: No, sir. Ten years --

QUESTION: Ten years.

MR. HIGINBOTHAM: -- in West Virginia. So he can go right back there and sue him again.

QUESTION: Is this the only State law against it?

MR. HIGINBOTHAM: No, sir. It has not, see, he -- what he's doing is he's suing on the note.

QUESTION: Could the action have been instituted in some court of record, under your practice?

MR. HIGINBOTHAM: Yes, sir. I think that's one of the keys to this case.

There is a concurrent jurisdiction in the J.P. court with a court of record, and I think that gives rise to our equal protection argument here, which I would like to turn to now, if the Court has no further questions on mootness.

We have painted a picture of the J.P. system in West Virginia, warts and all. We pointed out a lot of flaws in it. The Reece case bears us out on one of the flaws. That a J.P. has an interest in the judgment.

We've also pointed out that a J.P. is not an expert in law, he's not a learned judge, he's not required to be an attorney --

QUESTION: Mr. Higinbotham, are you relying on that as a matter of due process in this case?

MR. HIGINBOTHAM: Your Honor, what I am doing is -- what I'm suggesting is, when you focus upon the double bond,

to whether it is constitutional or unconstitutional, to look at the entire system. We're saying that the double bond is unconstitutional because we have very compelling reasons to want to get into a court of record.

When we have raised a question of law, and I think it's pretty well indicated in the record here, we said that we had a substantive defense under the UCC, and the creditor's attorney, when he answered the complaint in this action, said, We admit it, this is not a case of obstruction, you really do have a good question of law.

I think that's very significant.

QUESTION: What is the West Virginia bond requirement provision for an appeal from a court of record?

MR. HIGINBOTHAM: Single bond. And that raises the first two classes.

QUESTION: Single bond, covering what items?

MR. HIGINBOTHAM: Judgment plus interest -- so far that's the way the statute reads. There's no damages for delay demanded on a single bond.

The statute which covers that is West Virginia Code 58-5-14, which would indicate that in a court of record only a single bond would be required. That would be on the judgment and perhaps on the interest of six percent that can be awarded to the appellant if he ultimately loses.

So what the court of record appellant must post, if

he must post a bond like a J.P. appellant must, he would post a bond in the amount of $318 -- we're posing $300 judgments in two different systems -- he would post a bond of $318, whereas the J.P. appellant must post a bond of $600.

QUESTION: No provision for costs?

MR. HIGINBOTHAM: Not in the court of record system. However, there is a provision for cost in the J.P. system; as a matter of fact, that's one of the things brought out by Reece. They said it had a rational basis, because the double bond was for the judgment plus costs plus interest, and as appellee points out, and as provided in our State statute, you're entitled to damages for delay.

When you add these up, mathematically, -- and this is something I think is very important -- just the simple mathematics indicates that there is not a rational basis for a double bond.

QUESTION: What are damages for delay, other than interest, Mr. Higinbotham?

MR. HIGINBOTHAM: I don't know, Your Honor. That seems to me to be interest.

Let me point it out to you exactly.

You're entitled to, in the J.P. system, the bond under the Reece decision would be to cover the judgment, which would be $300, six percent interest, that adds up to

$318, total. Six percent on $300 is $18 more, so you have $318.

QUESTION: You mean for one year's interest?

MR. HIGINBOTHAM: Yes, sir. Yes, sir.

And you have court costs to appeal, the costs to go from a J.P. court to a court of record is ten dollars. Then you're entitled, on that, ten percent on the cost, the judgment, the interest, the six percent, and the court costs of ten dollars, you're entitled to ten percent damages for delay on that.

That adds up to a maximum judgment that could ever be rendered against an appellant from the J.P. system, if he loses, is $360.80.

Now, if you're posting a bond of $600, there's $290 left, that has not been articulated as -- I don't know what it's for. There is no articulated State standard for why the $293 is called for.

QUESTION: In the court of record, did I understand you to say that the bond would be what, only the $380?

MR. HIGINBOTHAM: $318.

QUESTION: $318. That's all.

MR. HIGINBOTHAM: Yes, sir, the judgment and the interest.

QUESTION: Now, are you challenging the J.P. bond for --

MR. HIGINBOTHAM: Yes, sir, we say it denies --

QUESTION: Independently of any other ground, on the ground that that's a denial of equal protection --

MR. HIGINBOTHAM: Yes, sir.

QUESTION: -- to require you to do that with the J.P. judge, but not for a court of record judge?

MR. HIGINBOTHAM: Yes, sir.

QUESTION: Which of your points, of the seven points, presents that question?

MR. HIGINBOTHAM: It's in our equal protection argument, Your Honor. It is Part III -- are you referring to the brief itself?

QUESTION: I'm looking at III now.

MR. HIGINBOTHAM: Yes, sir. It's in Part III, in A.

QUESTION: I'm looking for the question presented as five.

QUESTION: It's III-A.

QUESTION: III-A?

MR. HIGINBOTHAM: The argument is III-A.

QUESTION: Thank you.

QUESTION: But what's the delay between judgment in the West Virginia court of record and judgment in the West Virginia Court of Appeals or Supreme Court?

MR. HIGINBOTHAM: Well, generally I would -- I'm not

an expert in that, Your Honor. I don't think it would be any longer than a year.

QUESTION: If it were two years, I take it that the court of record would be entitled to require two years' interest.

MR. HIGINBOTHAM: Yes, sir.

QUESTION: Rather than one.

MR. HIGINBOTHAM: But generally, practically speaking, was we've pointed out in our brief and as State cases have indicated, that generally your bond from a court of record to go to the highest court in the State, and we only have a one-step appellate system, is only in the amount of the judgment plus the interest.

QUESTION: Of one year.

MR. HIGINBOTHAM: Of one year, yes, sir. That, practically speaking, is what is done. There's not many cases on it.

QUESTION: Who fixes one year's interest? Is that in the statute?

MR. HIGINBOTHAM: That's the judge below, whoever is --

QUESTION: So it's up to the judge.

MR. HIGINBOTHAM: It's up to the judge to decide what it's going to be. But, practically speaking, it's the judgment plus one year's interest.

But here we have two years.

We also suggest that the difference in treatment in the J.P. system and in the court of record system is -- goes much further. And we also argue that the compelling State interest test should be applied here, not just the rational basis test.

We have tried to paint the picture of a non-expert deciding questions of law.

QUESTION: Well, as I understand, this rests on the distinction between bonds, J.P. bonds and court of record bonds, and we don't have to reach anything else, do we?

MR. HIGINBOTHAM: Yes, sir. But if you decide the -- it leaves me the same argument to the West Virginia Supreme Court, and they decided it had a rational basis. You could do the same thing.

So I would prefer to argue my entire case, to play it safe.

QUESTION: Right. Right.

MR. HIGINBOTHAM: What we have tried to present is that there is a difference in treatment all through the court of record system and the J.P. system. We have --

QUESTION: What is the rational basis that the Supreme Court of your State found?

MR. HIGINBOTHAM: They didn't, Your Honor. They

said that the bond protects the judgment costs and interest, and that's as far as they went in the Reece case. That's the most recent definition of why you're required to double bond.

QUESTION: Well, I misunderstood you. I thought you said you'd said that you had presented this whole argument to the Supreme Court of West Virginia, and that Court found that this had a rational basis.

MR. HIGINBOTHAM: It did.

QUESTION: Well, what --

MR. HIGINBOTHAM: They just said it has a rational basis, because a double bond protects the judgment costs and interest. Now, how -- where they came -- mathematically, I don't see that it does. But that's what they said.

So that's the close, latest definition of what the bond's function is. They have defined the function of that double bond.

QUESTION: And in what case did they do that?

MR. HIGINBOTHAM: Reece vs. Gies.

QUESTION: In the Reece.

MR. HIGINBOTHAM: That's the Reece one, yes, sir.

QUESTION: Were you counsel in that case?

MR. HIGINBOTHAM: Yes, sir, I was.

QUESTION: Unh-hunh.

QUESTION: Mr. Higinbotham, in a commercial bond,

what's the difference in the premium between $318 and $600?

MR. HIGINBOTHAM: I think -- twice $18.

I think that is probably very close to what Lindsey, very close to the Lindsey analogy in this case.

In Lindsey you had a double bond, also. So if you had to put up a surety, you would probably have not had the greater difference.

But if you go all the way down the line --

QUESTION: In Lindsey it involved a double bond that was automatically forfeited --

MR. HIGINBOTHAM: Yes, sir; winner take all. We don't have a winner-take-all situation here.

But if you follow the mathematics of it all the way down the line, you figure out the State objectives of protecting the interest and ten percent damages for delay and so on, what you wind up with is ultimately, maybe not a winner-take-all situation, but if the appellant in the J.P. system loses, he loses sixty dollars more than does an appellant in the court of record system.

It's going to cost him sixty dollars more than it will cost a court of record appellant, if he loses. And I don't see that that's really right.

QUESTION: You're not talking just about bond premiums, then, you're talking --

MR. HIGINBOTHAM: No, just premiums, sir.

We're talking about the State's objectives, also, deny equal protection of the law. As the way they have spelled it out as a result of the Reece case, you're paying interest twice, you're paying twice the premium, and that adds up to sixty dollars more than a court of record appellant pays.

QUESTION: Well, but in the long run, an unsuccessful appellant to the Supreme Court of West Virginia can be held for costs that aren't covered by a bond, I would think, if West Virginia procedure is like most States.

MR. HIGINBOTHAM: That's right.

QUESTION: You know, you can be assessed cost on appeal and be liable for them, even though you may not have put up a bond.

MR. HIGINBOTHAM: Yes, sir. But we're posing here an indigent; proposing an indigent in -- that's the frame of reference. We have an indigent who cannot post the bond in the J.P. system.

QUESTION: Well, in that case, you can make the same argument for a single bond.

MR. HIGINBOTHAM: No, sir; not quite. This is where our argument comes to -- as Lindsey recognized, there is this gray area, in that there are going to be some people that are not going to be able to post that bond. We agree. We do not ask this Court to overturn Union National, or Arnold vs. Union National. We're asking only for a single

bond. What --

QUESTION: Let's go back to these premium figures that you so glibly throw around. Where do you get that sixty dollars?

MR. HIGINBOTHAM: All right. Let me take it again.

QUESTION: After all, we don't know West Virginia premium rates.

MR. HIGINBOTHAM: Yes, sir.

Well, it was stipulated -- it was found, as a matter, by the court below that it would be six percent surety. So that's what it would cost on the bond.

Let me go through the mathematics again for you.

In the J.P. system, we have a judgment of $300. Interest to be charged on that, that's under Code 47-6-5, is six percent. That adds up to eighteen.

QUESTION: As fixed by the judge.

MR. HIGINBOTHAM: Sir?

QUESTION: As fixed by the judge.

MR. HIGINBOTHAM: No, sir. No, sir. This is statutory.

QUESTION: One year's interest?

MR. HIGINBOTHAM: One year's interest.

QUESTION: A little while ago you said it was fixed by the judge.

MR. HIGINBOTHAM: That's in the court of record

system. I'm just talking about the J.P. system now.

QUESTION: Well, then you can't know it's one year's interest, when you're talking about a simple double bond, as Mr. Justice Blackmun was asking you about. You're saying it's one year's interest, but if there should be more than a year's delay, it could be more than a year's interest.

MR. HIGINBOTHAM: Yes, sir, that's possible. But that's not the way the statute was set up. If you look at the second half of that statute, and I think you're going to have to construe them together, the second half of the statute is also an appeal statute, double bond to appeal an eviction plus one year's rent.

That means that when this statute was enacted, this was what was anticipated by the Legislature, that it would only take one year to appeal a decision of a J.P. It would not take any longer than one year.

In addition to which we have a two-term rule in the State of West Virginia. That is, if you appeal from a J.P. to a court of record, you have got to bring that on for hearing within two terms of court. That's within one year.

So, when you take it in that frame of reference, it's not going to be any longer than one year.

When you look at the statute itself, the second half of the statute, which refers to one year's rent in an eviction situation, plus the two-term rule, then it's very

reasonable to assume that the interest will not be for more than one year.

I'd like to return again to the compelling State interest argument that we have.

We suggest that there is not equal treatment in the two systems, in the court of record system or in the justice of the peace system.

You have a bias which is built into the law, the Reece case bears us out on that argument. You do have an admitted J.P. faced with a question of law, and he is not an expert in it.

We have, in the same situation, a person who has the money, can afford to go into a court of record, he can post that bond; whereas an indigent cannot post the bond.

Now, I realize this raises the question of wealth classification, and this Court has not seen fit to go so far as to say ccmpelling State interest standard applies to wealth classification.

But what I'm suggesting is it's just not the wealth classification, and there is something more here than a wealth classification.

That is the unequal treatment in the two court systems. When you have concurrent jurisdiction, a creditor could have gone into either one of those courts, it's his choice; he could go into either the court of record system,

where my client would have had a learned judge, who is not biased, he had no fees that were going to be accrued to him. Then the compelling State interest standard applies here.

And it's the burden, of course, then, of the State to show that there is a compelling State interest for the discrimination on the bond.

We also suggest that this is like the Boddie case, I'm not saying that this is a Boddie case; we're not saying that the contract creates a fundamental interest. What we're saying is that equal treatment in the court is a fundamental interest, like the fundamental interest found in Boddie.

Boddie stands alone. That's clear from Kraus and the Ortwein decisions. We're not saying that the contract equals marriage.

What we're saying is that the right to be heard and to be treated equally within a court system, equal treatment within a court system is a matter of due process of law.

QUESTION: Is there any limitation in West Virginia on whether a lawyer may appeal in a justice court? Do they permit them?

MR. HIGINBOTHAM: Yes, sir.

QUESTION: Do they permit a prosse appearance ordinarily, for trial in the court of record?

MR. HIGINBOTHAM: You can, you can appear on your own in a court of record.

One of our arguments, of course, is that if you have a lawyer who is trying to argue matters of law before a J.P., that more than likely he's not going to know what you're talking about.

QUESTION: Well, that's the function of a lawyer in the whole system of justice, isn't it, to instruct the judges on what the law is?

MR. HIGINBOTHAM: Well, if -- judges usually have had some training, sir. And that --

QUESTION: England does pretty well, with lay justices of the peace.

MR. HIGINBOTHAM: Yes, sir. We think, as on questions of fact, that they do just very well here, also.

But when you have a situation where you have a sophisticated question of law, then it's very unlikely that the J.P. is going to understand what you're talking about.

QUESTION: But it's not apparent to me, immediately, is that an ignorant J.P. automatically benefits the plaintiff rather than the defendant.

Suppose you have a sophisticated question of release or something like that, that can be to the advantage of --

MR. HIGINBOTHAM: Yes, sir, it's very possible.

QUESTION: -- of the defendant.

MR. HIGINBOTHAM: You would discriminate against either party. It would discriminate against either party.

What we suggest is that -- well, what I would like to see in replacing this is perhaps a single bond, but a method whereby questions of law could be presented to -- a system of certification, so that a question of law could be presented to the learned judge. Then you wouldn't have any discrimination at all. We wouldn't have any complaint. Wouldn't have any complaints about a J.P. not being learned.

Because if you have a sophisticated question of law, then you can present it to the J.P., and a single bond would not discriminate against anybody.

QUESTION: Would you make the same point if the justice of the peace had been a member of the bar for six months, and the judge on the trial court had been a judge for forty years; would you say that the J.P. had to have forty years' experience in judging?

MR. HIGINBOTHAM: We're not asking for a -- we're not asking for the maximum. We're not asking for the most learned judge, Your Honor.

QUESTION: What are you -- I'm trying to get what kind of justice of the peace do you want?

MR. HIGINBOTHAM: We're not asking, we're not even asking for a justice of the peace who is learned. That is one alternative, like the State of Pennsylvania has trained their justices of the peace. That's an expensive proposition.

But if you have -- if a sophisticated question of

law arises, there can be an alternative method.

QUESTION: Well, who would decide what is a, quote, "sophisticated point of law"?

MR. HIGINBOTHAM: That could be raised by --

QUESTION: Underscore "sophisticated".

MR. HIGINBOTHAM: Yes, sir. That could be raised on motion of any of the parties, --

QUESTION: Well, tell me what --

MR. HIGINBOTHAM: -- or the justice of the peace.

QUESTION: -- what is a sophisticated one?

MR. HIGINBOTHAM: I think here -- I think we have a situation right here where it's a relatively sophisticated question of law.

QUESTION: "Relatively" --

MR. HIGINBOTHAM: Whether or not --

QUESTION: -- now you're "relatively sophisticated".

MR. HIGINBOTHAM: Well, Your Honor, any -- any question of law that there is a feeling on any party that the J.P. does not understand it, then, if you certify that question, then you would do away --

QUESTION: Who does the certifying? You do?

MR. HIGINBOTHAM: Any -- either party. Either party, the plaintiff or the defendant --

QUESTION: You would apply to certify --

MR. HIGINBOTHAM: -- or the justice of the peace.

QUESTION: Have you ever had a client who didn't think his case was sophisticated --

MR. HIGINBOTHAM: Your Honor, if it's just a --

QUESTION: -- and absolutely important, in life and death; have you got any clients that don't think that?

MR. HIGINBOTHAM: There are -- again, Your Honor, there are sanctions, there could be sanctions for a thing like that.

QUESTION: Like what?

MR. HIGINBOTHAM: If you're wasting the court's time, if you're waiting -- wasting, rather, the court's --

QUESTION: You just want to change the whole system, don't you?

MR. HIGINBOTHAM: Do I want to change it? No, sir.

QUESTION: No, you want us to.

MR. HIGINBOTHAM: No, sir. I'm not asking for any, any type of legislation. What I'm saying is, if you have a single bond --

QUESTION: Well, how can you do this without legislation?

MR. HIGINBOTHAM: That, of course, is for the Legislature of West Virginia. But if the double bond does not stand, and if the single bond is replaced, it would be very simple -- you're still going to always have a complaint, that the J.P. doesn't understand what we're talking about.

That's the easy way out of that, is just to provide a system of certification, so that when a party feels that his question of law is not being properly handled, he may go --

QUESTION: But do we make the State of West Virginia adopt such a law?

MR. HIGINBOTHAM: No, sir, I'm not asking for that. All we're saying is --

QUESTION: You certainly are.

MR. HIGINBOTHAM: -- is that --

QUESTION: Because they do now have a law which says no to you.

MR. HIGINBOTHAM: I'm suggesting, Your Honor, that there are less restrictive alternatives than posting a double bond. That's all I'm suggesting.

That there are other ways out.

QUESTION: That's a question of law.

QUESTION: Your client is a pauper, is he not?

MR. HIGINBOTHAM: Yes, sir.

QUESTION: Then how could he pay for even a single bond?

MR. HIGINBOTHAM: Again you're going to have that gray area. This is what was recognized in the Lindsey decision. There are going to be some people who cannot post that bond, that cannot post that single bond.

QUESTION: Well, I mean how would that even --

MR. HIGINBOTHAM: But there are going to be --

QUESTION: How would it help your client at all? I mean, you're --

MR. HIGINBOTHAM: Well, Your Honor, if -- quite frankly, I think if the double bond is struck down, then the only bond left is the single bond. If he can't post that, then it's our hope that ultimately we can persuade the Legislature that when you have sophisticated questions of law there should be a method of certifying questions of law to a court of record. That would be the simple way out.

I'm not saying in every case that you're going to have sophisticated questions of law that need -- a J.P. can find facts just as well as a judge can.

QUESTION: But one of your complaints is this double bond, particularly when compared to an appeal from a court of record, which is a single bond plus one year's interest -- generally set by the trial judge, you told us. But if we declare that a violation of the equal protection clause, your client couldn't appeal anyway, could he?

MR. HIGINBOTHAM: Not likely. I don't know.

QUESTION: You hardly even have to make that complaint, if your client couldn't appeal anyway.

MR. HIGINBOTHAM: Your Honor, what we're posing here is the difference in treatment between a court of record appellant and a -- you know, I can't conjecture, make a

hypothesis that he can make a double bond when he can't make a single bond.

We're not asking for you to say that bonds, appeal bonds, per se, are unconstitutional.

What we're suggesting is that a double bond is discriminatory. That's as far as we're --

QUESTION: Well, it doesn't discriminate against your client, because he can't make any bond. Isn't that right?

MR. HIGINBOTHAM: At the time this case arose, he could not have made any bond.

QUESTION: He filed an affidavit in forma pauperis, I think, didn't he?

MR. HIGINBOTHAM: Yes, sir.

We're not asking you to throw out all bonds.

QUESTION: Well, but that's the only thing that would help your client -- only thing that would enable your client to appeal, wouldn't it?

MR. HIGINBOTHAM: Well, again, my suggestion is, is for the State Legislature in West Virginia to look for the least restrictive alternative. Otherwise, we're still going to have a justice of the peace system with flaws in it. We're still going to have a judge who is looking at matters of law, he is not an expert in them, and as long as that continues, there's still going to be unequal treatment in the

West Virginia J.P. system. Yes, sir.

But that can be eliminated. There is a less restrictive alternative, and that's the method of certification that I'm suggesting.

Your Honor, --

QUESTION: But that, I think you told us, is for the West Virginia Legislature.

MR. HIGINBOTHAM: That's for the Legislature. I'm not asking this Court to do that.

QUESTION: That's what I'm wondering.

MR. HIGINBOTHAM: All I'm asking of this Court is to strike down the double bond.

QUESTION: Why couldn't you have presented this issue to the West Virginia courts rather than coming to the federal courts? Once you had a case going in the West Virginia courts.

MR. HIGINBOTHAM: Well, you can't appeal it, Your Honor. The only thing -- at that point in time.

QUESTION: Well, you could if it were found to be unconstitutional, I suppose you could appeal it. I mean, if the West Virginia courts had agreed with you that denying an appeal because of failure to file a bond was unconstitutional, there would have ended up being an appeal.

MR. HIGINBOTHAM: Oh, it's possible. We did that in the Reece case. That was what we did in the Reece case.

QUESTION: That's what I thought.

MR. HIGINBOTHAM: But this case was brought before the Reece case.

QUESTION: So why should you come over to the federal District Court, instead of taking your issue up to the State system?

MR. HIGINBOTHAM: Well, Your Honor, I quite frankly can't answer that. I didn't bring -- I didn't argue the case before the three judges below. I didn't file the action.

QUESTION: Well, there's a --

MR. HIGINBOTHAM: I think it was just a matter of tactics. You do have --

QUESTION: If Younger v. Harris applies to civil actions, why shouldn't you have presented your constitutional issue inside the State system?

MR. HIGINBOTHAM: It's possible to do it, but, again, it's a question of discretion. When we went in on Reece, we went into that court on --

QUESTION: Well, it isn't a question of discretion if -- if Younger -- if the principles of Younger v. Harris apply to pending civil cases in the State system.

MR. HIGINBOTHAM: Well, let me put it this way, Your Honor, maybe I can explain it better.

Reece was in the original jurisdiction of that

court, we couldn't get up to the appellate system in West Virginia, because the only way we can get up there is on original jurisdiction.

We went in on prohibition, and asked them to prohibit the enforcement of a State statute.

They don't have to give us a hearing on that. In the Reece case, it just so happens that they did, because --

QUESTION: Did the State object to the jurisdiction of the three-judge court?

MR. HIGINBOTHAM: No, sir. I don't believe there was any objection whatsoever.

QUESTION: Unh-hunh.

Thank you.

MR. HIGINBOTHAM: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gaujot.

ORAL ARGUMENT OF PHILLIP D. GAUJOT, ESQ.,

ON BEHALF OF THE APPELLEES

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

As occurred with counsel for the appellant, I must assume that it was quite unusual for the appellee to submit some information to this Court in opposition to his suggestion for mootness.

At the time, it was my opinion that this case before this honorable Court was not moot, because of Reece vs.

Gies.

However, upon further research, it is my conclusion now that this case is moot, based upon Reece vs. Gies, and, therefore, this Court need not concern itself with the issues now presented before this Court.

If the Court please, I would like to --

QUESTION: You don't have the problem of judging mootness, have you?

MR. GAUJOT: No, Your Honor, I haven't. I --

QUESTION: Is this your usual procedure before you argue it?

MR. GAUJOT: Yes, Your Honor. My original -- I was requested to respond to the suggestion of mootness on behalf of counsel for the appellant. So I would assume now that the motion is before the Court that I could change my position and argue that, yes, it is moot.

QUESTION: Well, the normal procedure is that you file as a judge to the mootness.

MR. GAUJOT: Yes, Your Honor, I think normal procedure is that the appellees --

QUESTION: When did you change your mind? Just now?

MR. GAUJOT: No, Your Honor. Within the last -- quite frankly, though, within the last several weeks.

First, I would like to begin with the threshold issue of whether this case is moot. And I would like to

refer back to Reece vs. Gies, in that the case as before this Court now originated in 1969, and Reece vs. Gies started, I believe, in 1972 or possibly '73, and was decided in June 1973.

In that case we had basically the same issues. We had a justice of the peace, who had a statutory fee due him, which was two dollars and fifty cents on each case or each judgment that he executed on.

The court in Reece vs. Gies ruled that because of this two-dollar-and-fifty-cent fee it was a pecuniary interest that the J.P. possessed, and therefore the J.P. was disqualified from giving a judgment on the case.

And, as a result, that judgment that he did give, because of this pecuniary interest, was void.

Now, we contend now that Reece vs. Gies does apply to the instant case, and therefore Warner, Justice Warner in this case, his judgment as to Patterson is likewise void.

Now we get into the question of retroactivity. Does Reece, in that Patterson started before Reece, does Reece v. Gies apply now to Patterson vs. Warner?

QUESTION: Well, if you're right, do we decide the question of mootness here or would we have to vacate and remand to the three-judge District -- it was a three-judge court, wasn't it?

MR. GAUJOT: Yes.

QUESTION: -- to the District Court and let them decide whether there's a question of mootness, because under -- this being a federal case, --

MR. GAUJOT: I'm not sure --

QUESTION: -- where it's moot, what we do is wipe the slate clean all the way down. That's the way it's done.

MR. GAUJOT: Yes, Your Honor. I'm not -- quite frankly, I'm not sure what this Court can do as to whether -- as to decide whether it is moot or whether to remand it to the District Court.

QUESTION: Well, I must say, I have difficulty, in light of your retroactivity question that both of you raise, knowing how we can determine here that the case is moot.

MR. GAUJOT: Well, if you let me continue, Mr. Justice Brennan, --

QUESTION: Yes.

MR. GAUJOT: Justice Cardozo, in answer to whether State decisions are retroactive or not, said, and I state: That a State may make a choice for itself between the principle of forward operation and the relation backward.

And I would like to submit that the West Virginia law is that -- and I cite the case of Falconer vs. Simmons, it's not in the brief, 51 West Virginia 172, 41 Southeastern 193. It's a 1902 case. Which says that -- it makes every

decision of the West Virginia Supreme Court of Appeals retroactive except for one particular exception. And of course this case does not fall within that exception.

QUESTION: In the first instance, isn't it primarily the business of West Virginia courts to decide the retroactivity matter, anyway?

MR. GAUJOT: Yes, Your Honor.

QUESTION: And you say they have decided it back in 1902.

MR. GAUJOT: Yes, Your Honor.

So, therefore, what I'm saying is Reece vs. Gies does apply to Patterson, therefore the judgment of Patterson or Warner v. Patterson is likewise void. And therefore this Court should not concern itself with the question of whether, in fact, there was a proper hearing below in the justice of the peace court, or whether the appeal bond is constitutional or not.

QUESTION: You mean that everybody that's had a judgment against them in a J.P. court from 1900 to date is entitled to get his money back? The way you interpret it?

MR. GAUJOT: As well as I can interpret that case, Your Honor, yes, that's the way I interpret it.

If not that, at least this Court, we could assume that there's limited retroactivity and that the West Virginia court surely follows the common law or the rules as were

reflected and set out in United States vs. Schooner Peggy and Linkletter vs. Walker.

We contend that this case is now moot, and this Court should not have to consider the question of the constitutionality of -- or whether due process was afforded Mr. Patterson in the justice of the peace court, and whether the appeal bond is constitutional.

QUESTION: But that so far relates to mootness. All you're saying is that there is a defense on the merits to this, by reason of the Reece case. The controversy still goes on.

MR. GAUJOT: I don't understand, Justice Douglas.

QUESTION: Well, I think -- if you don't understand, then it's too late.

[Laughter.]

QUESTION: Well, what if it is retroactive, so that you can't get execution on this judgment. The controversy still exists. That is, this man --

MR. GAUJOT: Well, that's my next argument. In support of mootness, I suggest to this Court that you use the reasoning behind the abstention doctrine. This isn't an abstention doctrine, as such, because we're not asking this Court to abstain and let the State court rule, because in fact the State court has already ruled.

And under the abstention doctrine, this Court, even

though it has jurisdiction of cases under the federal Constitution and federal statute, you will not -- you will avoid making a federal constitutional decision on a federal question, when you can leave it to the State to determine.

And in this case the State of West Virginia has determined. So, for the reasoning under the abstention doctrine, even though this isn't an abstention doctrine, in that we're not asking you to abstain until the court has ruled -- what I'm saying is that our court has already ruled. There's no reason for this Court to rule.

QUESTION: Well, I guess what you're saying is that had Gies been decided when the three-judge court got this case, the three-judge court would have determined then and there that the judgment was void, and there was no case here. That's what you're saying, isn't it?

MR. GAUJOT: Yes, Your Honor, that's exactly what I'm saying. Yes, Your Honor.

QUESTION: And now you say if we give it to the three-judge court now, they will apply Gies --

MR. GAUJOT: Yes, Your Honor.

QUESTION: -- and hold the underlying judgment void, and dismiss the suit.

MR. GAUJOT: That's right, Your Honor. That's correct.

QUESTION: At least that's what you would propose

to them.

MR. GAUJOT: Yes, Your Honor.

I would suggest also that this would be similarly what happened in the Texas Railroad Commission vs. Pullman, in that here we have Patterson, Mr. Patterson, who has enjoined the enforcement of the judgment of Justice Warner, saying that the judgment denies him rights under the federal law and State law, and that therefore the justice lacks jurisdiction to make any judgment in the case.

And I would assume that this case is very similar to that, and again reiterate that it leaves nothing for this Court to decide as regards to -- what I'm speaking of, only to the questions of due process, whether due process was afforded Mr. Patterson in the justice court, or whether the appeal bond is constitutional or not.

Now, to his argument as to whether -- I think the Court may be a little confused now as to what appellant is trying to argue. He is saying this, I think, basically, to try to simplify it some.

He's saying that justice -- that Patterson was denied a fair hearing in the justice court because Warner had a pecuniary interest, and therefore he didn't have a fair hearing; so it's no hearing at all.

So, as a result, he has an absolute right to an appeal.

And we contend and say that -- we contend that there is no absolute right to appeal, and we cite Ortwein vs. Schwab, in that, in Ortwein vs. Schwab, this Court determined that one did not have an absolute right to appeal from an administrative hearing to the judicial -- for judicial review. We say, likewise, one does not have an absolute right to appeal from a justice court to -- for judicial review.

And we could assume that the appeal bond that one pays to appeal from a justice court is very comparable to the fee of $25 that one had to pay to appeal from the administrative hearing in Ortwein to a court there.

QUESTION: You don't see any difference between 25 and 300?

MR. GAUJOT: Pardon me?

QUESTION: You don't see any difference between $25 and 300?

MR. GAUJOT: As far as being a fee. What I'm saying is that there is not an absolute right to an appeal; that's what I'm saying.

As in Ortwein, you don't have an absolute right to appeal from a J.P. court --.

QUESTION: I understood his complaint was that it cost 318 or 600.

MR. GAUJOT: Yes, Your Honor. I'm directing my

argument to this --

QUESTION: Oh, I see.

MR. GAUJOT: -- due process argument now, not to his equal protection argument.

Now, if this Court should determine that the J.P. did in fact have a pecuniary interest and therefore he should have disqualified himself, and in that he didn't his judgment is void; and should you further question whether the appeal bond acts as a bar to access to a court of record, then I cite the Kras case, for the proposition and rule that one does not have an absolute rule to initial judicial determination of one's claim.

And again I would compare the appeal bond to that of the fifty-dollar filing fee that one had to pay in Kras.

Another argument that appellant uses is that, well, here we have Patterson, Mr. Patterson, who is forced into a J.P. court and supposedly had a hearing, but yet it wasn't a fair hearing, so it's no hearing; but to appeal, you're making the man pay a double bond.

Well, if the Court is to believe that argument, then, as has been mentioned earlier, any amount -- a fee of any amount would stand in the way, not only of appeal bond but you'd have to give an absolute right for everyone to appeal, and therefore you would be -- it would necessitate you overruling yourselves in Ortwein vs. Schwab, and United

States vs. Kras, and, really, what you would be doing is extending the rule in Boddie.

QUESTION: Do Mr. Justice Stewart's questions to Mr. Higinbotham, Mr. Gaujot, suggest any additional ground of mootness to you, that perhaps the remedy which he sought, if it isn't going to avail him, his client, anything, perhaps there isn't any real case or controversy here because of the pauper status of the petitioner?

In other words, if it doesn't do this -- if it doesn't facilitate this man's appeal in order to get the double bond provision stricken down and have a single bond substituted for it, is that a real live case in controversy between the J.P. and Mr. Patterson?

MR. GAUJOT: Well, what we have here, Your Honor, is a situation where one has to post a double bond, but that is to protect the judgment that the plaintiff had received in the justice court. But if the defendant appeals and wants to stay the execution, then that's where the double bond comes in. It's to protect -- for instance, if one wants to appeal from a justice court in West Virginia, you can appeal by only posting a bond equal the amount of the judgment.

It's only the execution that one is denied.

QUESTION: I read it differently. You say it's just where you want to supersede that you have the double bond, or stay execution.

MR. GAUJOT: Yes, Your Honor. That's correct. In other words, if a J.P. rules against the defendant in the J.P. court, and if the defendant wants to appeal to a court of record, all he has to post is $300 to cover the judgment. Plus costs.

But if he wants to stay, then he has to post double the bond, unless --

QUESTION: What's the rule of the appeal from the court of general jurisdiction?

MR. GAUJOT: Well, there was also a statement made that this Court is concurrent, and it's not --

QUESTION: From the court of general jurisdiction to the Supreme Court of West Virginia, how much is the bond, --

MR. GAUJOT: That's --

QUESTION: -- supersedeas bond?

MR. GAUJOT: That's left to the discretion of the court.

QUESTION: The trial court.

MR. GAUJOT: Yes, Your Honor.

QUESTION: And how much is it usually?

MR. GAUJOT: I think there's some court -- I think it's generally the amount of the judgment.

QUESTION: So then there is still a difference between the two.

MR. GAUJOT: Well, there's been some specific question concerning concurrent jurisdiction, and it's actually not concurrent jurisdiction.

For instance, you cannot get in the circuit court, the first court of record in West Virginia, if you're seeking anything less than fifty dollars. You don't have a right. You have to go to the justice of the peace court.

Also consider this: Here you have -- you can't consider only $300. A justice of the peace can award fifteen dollars.

Now, if he awards fifteen dollars, the double bond is even going to be -- it isn't going to be sufficient. Because, automatically, you've got interest, cost, and you've got this ten-dollar fee that goes to the circuit court, which has to come out of the fifteen dollars over the original judgment.

QUESTION: But here we have 300. This case is 300, it's not 15, it's $300 involved. To protect $28. Am I right?

MR. GAUJOT: That is, Your Honor, if the higher court does not see that -- if the higher court has -- the higher court does have the opportunity to, if damages occur, the higher court can assess for damages. That would come out of the additional $300. As well as other costs.

QUESTION: The higher court can assess damages?

QUESTION: Or you mean costs.

MR. GAUJOT: Costs. Excuse me, Your Honor.

QUESTION: Well, I thought the costs were ten dollars.

MR. GAUJOT: Well, there's a whole list of costs, Your Honor.

For instance, there's a five-dollar fee for bringing the action, there's a two-dollar fee for servor, of course there's a dollar fee for the bond. You have a dollar-and-fifty-cent fee for summoning and returning a jury --

QUESTION: Which adds up to how much?

Less than three hundred?

MR. GAUJOT: Yes, Your Honor, it does.

QUESTION: So, you're not really arguing that the extra, the double bond is to protect anybody other than whom?

MR. GAUJOT: The judgment -- the plaintiff who received the judgment down below.

QUESTION: Well, the plaintiff can't get that three hundred.

MR. GAUJOT: That's right, Your Honor.

QUESTION: Not when it's involved.

MR. GAUJOT: That's right. That's right, Your Honor.

QUESTION: So the only purpose of the three hundred

is to prevent people from appealing. Or discourage them.

MR. GAUJOT: No, Your Honor, -- again --

QUESTION: Well, what is the other reason?

MR. GAUJOT: Well, we must consider all --

QUESTION: The State of West Virginia isn't making a living on this, I hope.

MR. GAUJOT: If the -- if the defendant, who posts the $300 bond, or the $600 bond in this instance, should he lose on appeal, he only loses the $300 plus costs, interest, et cetera.

QUESTION: And the use of the $300 during the period of time the case is pending.

MR. GAUJOT: Well, Your Honor, as I stated before, you can't, I don't think, concern yourselves strictly with cases that involve $300. As I stated earlier, many times this is a limited -- a court of limited jurisdiction, and many times people come into this court with fifty dollars, for instance, they're asking for judgments for fifty dollars. In that case it would be double the amount.

And it's not too hard to believe that costs will amount to fifty dollars, is what I'm trying to say.

Consider also that the justice of the peace is a layman and possibly the Legislature felt that they should try, in setting the double bond, would set up a rule of thumb, and that the J.P., in that he is a layman, should not

have to exercise discretion and decide: Well, what -- how much will I assess to A for his appeal to a court of record, and how much should I asses B. It's just a rule of thumb.

QUESTION: Well, he has enough aplumb to assess that two-fifty, though, doesn't he?

MR. GAUJOT: Yes, Your Honor.

[Laughter.]

QUESTION: Under the West Virginia Constitution, could the Legislature bar any appeal in any case if it's less than three hundred or two hundred or one hundred?

MR. GAUJOT: Could they bar appeal?

QUESTION: Yes.

MR. GAUJOT: No, Your Honor. No, Your Honor.

QUESTION: They could not?

MR. GAUJOT: No.

QUESTION: What's the provision of the Constitution that requires that an appeal be allowed in every case?

MR. GAUJOT: Oh, excuse me. What's in the Constitution is that one has the right to appeal, but as set out by law. And of course, our Legislature decided that double the -- the double bond is what is needed.

Now, again, I wish to reiterate that the -- to appeal, the defendant in the justice of the peace court doesn't have to post a double bond. All he has to do is post -- Justice Marshall, all he has to do is post a bond that equals

the judgment, that just covers the judgment.

So what we're concerning ourselves here now -- does he have a right, an absolute right to an execution? And of course it's our contention that he does not.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:00 o'clock, p.m., the case in the above-entitled matter was submitted.]

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