

Supreme Court of the United States

October
[REDACTED] TERM, 1969
1970

In the Matter of:

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LELIA MAE SANKS, et al.
Appellants
vs.
GEORGIA, et al.
Appellees
----- X

Docket No.

~~266~~
28

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Date December 8, 1969

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ARGUMENT OF:

P A G E

Michael D. Padnos, Esq., on
behalf of the Appellants

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Alfred L. Evans, Jr., Assistant Attorney
General of Georgia, on behalf of
Appellees

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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

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 LELIA MAE SANKS, ET AL,)
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 Appellants)
)
 vs) No. 266
)
 GEORGIA, ET AL,)
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 Appellees)
)

The above-entitled matter came on for argument at
11:45 o'clock a.m., December 8, 1969,

BEFORE:

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

APPEARANCES:

- MICHAEL D. PADNOS, ESQ.
Atlanta Legal Aid Society, Inc.
153 Pryor Street, S.W.
Atlanta, Georgia 30303
Counsel for Appellants

- ALFRED L. EVANS, JR.,
Assistant Attorney General
of Georgia
Atlanta, Georgia
Counsel for Appellees

1 with the court a counter-affidavit and with that another bond
2 which the statute doesn't even stipulate, to guarantee that the
3 landlord will not lose either his money or double his money at
4 the final determination of the issue.

5 The question these statutory provisions present must
6 go to the heart of the notion of due process, for the Georgia
7 statute permits landlord to assert rights in a way completely
8 different from the rights that the tenant has. It's important
9 to emphasize that this statute affects all landlords and all
10 tenants and it doesn't matter whether they are individual or
11 corporate; it doesn't matter whether they have a valid claim or
12 have no claim whatsoever; it doesn't matter whether the tenant
13 is scrupulous or totally disreputable; everybody is affected by
14 this statute.

15 This Court has previously dealt with an issue which
16 we feel is directly on point in the Sniadach case. The Sniadach
17 case which was a due process case, like this one, involved the
18 taking of property from a person before there was any court
19 hearing. And that's the crucial question: may a statute take
20 away somebody's property without a court hearing? In Sniadach
21 the Court held that it could not do so, and in many ways, this
22 case is even a better case than the Sniadach case. We feel
23 completely within that case the Court need break no new ground
24 to decide in favor of the tenant in the Sanks case.

25 We feel we have a much narrower than theirs. For

1 example, as Mr. Justice Black pointed out in the Sniadach case,
2 there there was a question of whether the action taken that led
3 to the case being brought in, was a final disposition of the
4 matter. In this case there is no issue of that; it's very
5 clear that once the tenant is out that's the final disposition
6 of that matter.

7 There was also a question in the Sniadach case of
8 whether the matter involved was de minimus; that question was
9 raised. There is no question about this case being de minimus.
10 Again, the tenant is out on the street and that's the end of the
11 issue.

12 There was also a question in the last case of whether
13 the tenant had -- whether the parties to that case had demon-
14 strated poverty and whether they were actually going to be
15 affected by the operation of the statute. Here there is a
16 specific judicial finding in the Lower Court opinion of indigency
17 and it was impossible for the tenants to obtain bond. They
18 will be affected by the statute; indeed they would be affected
19 were the action of the court not held up by these proceedings.

20 MR. JUSTICE STEWART: I notice in your brief, Mr.
21 Padnos, the statutes involved, you give 61-303 and I gather this
22 proceeding is to be done under 61-301?

23 MR. PADNOS: Yes, sir.

24 MR. JUSTICE STEWART: And that it's not an action for
25 money and cannot be?

1 MR. PADNOS: Yes, sir; that is correct.

2 MR. JUSTICE STEWART: Which, of course, Sniadach
3 did involve, a money judgment.

4 MR. PADNOS: Yes, sir.

5 MR. JUSTICE STEWART: This is an action only for
6 possession by the landlord and only upon certain limited grounds;
7 am I correct?

8 MR. PADNOS: Well, the theory of the statute is only
9 when a tenant is holding over may a landlord go into court under
10 this statute, but in fact, under any conditions. There is no
11 condition when a landlord can't go into court.

12 MR. JUSTICE STEWART: Well, he has to go into court
13 and he has to take an oath, like a statement under oath in
14 court; does he not?

15 MR. PADNOS: Yes, sir.

16 MR. JUSTICE STEWART: That what?

17 MR. PADNOS: He has to make a statement under oath
18 that the tenant is either holding over or owes -- I believe its
19 or owes money to the landlord.

20 MR. CHIEF JUSTICE BURGER: Holding over beyond the
21 lease.

22 MR. PADNOS: Holding over beyond the term of his
23 lease hold. And as Judge Williams pointed out in the Lower
24 Court, the tenants in this case are tenants at will, and that's
25 a good illustration of the problem with this statute. The

1 tenants are tenants at will, therefore under the law they are
2 entitled to a 60-day notice to vacate; and theoretically the
3 landlord can't do anything against them, or take any action to
4 evict them until he has given them a 60-day notice. But, it
5 doesn't work that way and what happens is the landlord can go
6 in under any condition.

7 Now, as you point out, Mr. Justice Stewart, it
8 certainly would be possible for a tenant later on to bring an
9 action for false eviction, and indeed, the Georgia Supreme Court
10 makes the same suggestion, but that doesn't do the tenant any
11 good once he has been evicted.

12 Again, as you point out, the issue involved here is
13 not money; the issue involved is possession and that's what the
14 statute is all about.

15 MR. JUSTICE HARLAN: Is this an old statute?

16 MR. PADNOS: The statute was first enacted in 1827,
17 I think, and has been periodically modified since then, but
18 nothing of substance has really changed since 1827.

19 It's a curious anachronism. There just isn't a
20 statute in the country in which tenants are subjected to such
21 a rigorous and immediate eviction and landlords are given such
22 gracious privileges as the Georgia Eviction Statute.

23 Indeed, in thinking about asking other people to be
24 -- to submit amicus briefs in the case, we couldn't think of
25 going anyplace else, because nobody else has a statute like this.

1 We're just unique in Georgia in having this statute.

2 And I think it's important when we are talking about
3 due process in the Sniadach case, to make it clear that we
4 don't feel that Sniadach was an aberration of the Court's
5 thinking. Sniadach was in complete context with what the Court
6 has been doing for a long time, indeed, in Hovey v. Elliott,
7 again, which was certainly years ago, the Court there also took
8 the position that not only notice was necessary in order for
9 due process, but also an opportunity to be heard.

10 The usual requisites, as Mr. Justice Harlan said in
11 the Sniadach case, the usual requisites of due process are
12 notice and a prior hearing. Indeed, there is some wonderful
13 language in the Hovey case where the Court really gets quite
14 excited about the procedure in that case, which did not afford
15 an opportunity for a hearing, and said that a judgment issued
16 under those conditions wants all the attributes of the judicial
17 determination in its judicial usurpation in oppressing and can
18 never be upheld where justice is justly administered.

19 This case, we feel, is quite like that. There has
20 been notice but there is no opportunity to be heard unless the
21 tenant presents a bond which in our case, certainly, our
22 tenants are never able to present to the court.

23 MR.JUSTICE WHITE: Would you say that it was only
24 unconstitutional for the state to require the tenants to pay rent
25 pending the outcome of the suit?

1 MR. PADNOS: No, sir; as a matter of fact, that's
2 what we do in our cases. We have sort of invented a procedure
3 in this cases. We have applied to the courts for a rule of
4 nisi , as it is called in Georgia, and we do pay our rent in
5 the court. Indeed, in this case --

6 MR. JUSTICE WHITE: Even if you claim without a
7 defense to the payment of rent or even if you claim that rent has
8 already been paid, you pay it into court?

9 MR. PADNOS: Well, we haven't had a case such as the
10 latter one, but we do have cases where the rent is in contest,
11 every day; and we also pay the rent into court. The Georgia
12 Supreme Court, when this was argued before them, said, "How can
13 you do it, there is no statutory provision for that." And,
14 indeed, they are right.

15 The Lower Courts have taken the position that that's
16 fair and reasonable; that the contested matter be put into the
17 court and we will decide who gets it in the end; and we have
18 always paid our rent into court and it's being paid in the
19 moment case.

20 MR. CHIEF JUSTICE BURGER: Well, have they expressed
21 that in terms of the inherent equity power of the court?

22 MR. PADNOS: Well, sir, actually we're not before an
23 equity court; we're before a civil court which has no equity
24 jurisdiction.

25 MR. CHIEF JUSTICE BURGER: There are none in Georgia

1 no equity jurisdictions in a civil court?

2 MR. PADNOS: No, sir.

3 MR. CHIEF JUSTICE BURGER: Do you have a separate
4 equity court?

5 MR. PADNOS: WE have a separate equity court, which
6 also has other powers, but --

7 MR. CHIEF JUSTICE BURGER: Have they then expressed
8 this mechanism in terms of inherent judicial power? I suppose
9 they must have had something like that in mind if they were
10 accepting it.

11 MR. PADNOS: I think they had something like that in
12 mind.

13 MR. CHIEF JUSTICE BURGER: Or was it by stipulation
14 of the parties, where no judicial discretion was involved?

15 MR. PADNOS: I think the way it's worked here is that
16 the judge has just issued an order so stating and saying that's
17 the only conditions under which --

18 MR. JUSTICE WHITE: And foregoing the bond?

19 MR. PADNOS: Foregoing the bond.

20 MR. JUSTICE WHITE: And the Supreme Court of Georgia
21 now says that's not so?

22 MR. PADNOS: Yes, sir; but even since then it's been
23 operating this way.

24 MR. JUSTICE WHITE: In the lower Courts?

25 MR. PADNOS: In the lower Court.

1 MR. JUSTICE WHITE: But not in the Supreme Court?

2 MR. PADNOS: Nothing has gone to the Supreme Court.
3 It may be improper to say so, but many people think that it's
4 an unconstitutional statute and have been giving us the benefit
5 the doubt on that question, so we have been allowed to bring
6 cases in the lower court and the judges all the time just look
7 down and say, "Well, I shouldn't be doing this, but I'm going
8 to let you file it anyway."

9 That's about the way it has worked.

10 MR. CHIEF JUSTICE BURGER: That's the way equity
11 developed in the first place; didn't it?

12 MR. PADNOS: But we have excellent lower court
13 judges.

14 MR. JUSTICE DOUGLAS: What is this provision for
15 bond for double the rent? Double what rent? For what length
16 of time?

17 MR. PADNOS: Sir, if you could tell us that you
18 would make a major addition to Georgia jurisprudence. Nobody
19 has any idea whatsoever. The statutory language is: "Double
20 the rent reserved or stipulated to be paid." That doesn't say
21 that it was only at the time; it doesn't say it might be a
22 little later --

23 MR. JUSTICE DOUGLAS: In this one sentence it says,
24 "future double rent until the tenant surrenders possession."

25 MR. PADNOS: Well, one court interprets it that way.

1 Indeed, the Fulton County civil courts, until we began to
2 present these cases, the Fulton County Civil Court attributed
3 that to be future double rent, and as far as I know, where the
4 Legal Aid Society has not counseled in the cases, they may still
5 do so. They take a year's rent, because the court has just
6 decided that six months is the amount of time that these cases
7 may last and therefore they double that and they require every
8 tenant to pay a year's rent.

9 MR. JUSTICE WHITE: But your point would be the same
10 whether it was a bond for single rent or quadruple rent.

11 MR. PADNOS: Yes, sir.

12 MR. JUSTICE WHITE: It's the bond?

13 MR. PADNOS: It's the bond; it's the fact that all
14 tenants must pay it.

15 MR. JUSTICE WHITE: So, there's no denial of equal
16 protection between the rich and the poor in terms of whether
17 it's single or double or quadruple?

18 MR. PADNOS: Well, it could be.

19 MR. JUSTICE WHITE: Well, I mean not if you are an
20 indigent.

21 MR. PADNOS: Not if you are an indigent, it scarcely
22 matters.

23 MR. JUSTICE WHITE: Which you claim to be?

24 MR. PADNOS: Which we claim to be.

25 MR. JUSTICE BRENNAN: Do you have a finding?

1 MR. PADNOS: There is a finding; yes, sir. Judge
2 Williams' opinion on Page 38 of the appendix; there is a
3 specific finding of indigency.

4 The issue that we present to the Court is the due
5 process issue. It seems to me that on this case there are so
6 many different ways we can go; the statute is wrong for so many
7 reasons; there are so many defects in the statute. But, in order
8 to present the simplest issue, I present to the Court the due
9 process issue, which is just obviously wrong on other cases; on
10 common sense; on decency and on the law.

11 We could also argue the equal protection cases. We
12 feel it's a clear violation of equal protection; equal protec-
13 tion between landlords and between tenants.

14 I could get into the question of equal protection
15 between rich people and poor people, but I don't think we ever
16 need to reach that issue, because the statute violates the equal
17 protection simply by landlords and tenants.

18 That, Your Honors, is the essence of our case.

19 MR. JUSTICE DOUGLAS: What does the Court mean on
20 Page 42, that we could have gone into equity and gotten a
21 remedy. The next to the last paragraph on Page 42.

22 MR. PADNOS: The Court there lists two very specific
23 situations where we can go into equity: where there no land-
24 lord-tenant relationship, I believe is one of them. If the
25 relationship of landlord and tenant does not exist and the

1 occupant is unable to post bond and the second one: if the
2 landlord attempts to oust a tenant who is complying with the
3 terms of his lease.

4 But the equity courts don't want these cases and
5 we find it very difficult to get into equity courts, because
6 there is the separation of the jurisdiction. Landlord-tenant
7 cases are civil court cases, at least in Fulton County. Every-
8 body recognizes that and acts accordingly.

9 The Superior Court, ^{which} is our Court of Equity, doesn't
10 wish to have these cases and always says: "Go find your remedy
11 in civil court; that's where you belong."

12 That's one of the other problems.

13 I should also state that unlike Connecticut -- I'm
14 not too clear on the Connecticut situation -- the Georgia bond
15 is not waivable. There is a Georgia Supreme Court opinion that
16 says you can't waive the bond and again, the lower court
17 judges have just sort of been clearing their throats and looking
18 in a different direction and allowing landlords to waive the
19 bond when they wish to come in. But, as a general rule they are
20 not supposed to be able to do that.

21 MR. JUSTICE WHITE: Is there anything in the Georgia
22 Legislature --

23 MR. PADNOS: Yes, sir. The bill passed the Georgia
24 Senate last year, and was up for the House on the last day of the
25 the session, but nothing came of it. I feel certain that the

1 Legislature will act on it during 1972.

2 MR. JUSTICE DOUGLAS: In this case --

3 MR. PADNOS: Well, sir, my certainty of what the
4 Georgia Legislature will do, I wouldn't like to rely on that.

5 MR. CHIEF JUSTICE BURGER: Well, you seem to have
6 an ambivalent position on that. You first suggested that you
7 thought it would pass. I thought you were saying that in the
8 next session you thought it would pass.

9 MR. PADNOS: Well, I think I was substituting hope
10 for certainty. I certainly hope that we'll have a better law.

11 (Whereupon, at 12:00 o'clock p.m. the argument in
12 the above-entitled matter was recessed to reconvene at 12:30
13 o'clock p.m. this day)

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AFTERNOON SESSION

12:30 o'clock p.m.

MR. CHIEF JUSTICE BURGER: MR. Evans.

ORAL ARGUMENT BY ALFRED L. EVANS, JR.,

ASSISTANT ATTORNEY GENERAL OF GEORGIA, ON

BEHALF OF APPELLEES

MR. EVANS: Mr. Padnos did not, in his oral argument, deal with the poverty question. It is undoubtedly raised in the briefs; therefore, I would like to say a few things right at the outset.

First of all, not every owner of rental property is a wealthy slum landlord; nor is every owner of rental property a public authority or governmental agency. In Georgia many, and I daresay most, landlords are very ordinary people, who themselves have to meet mortgage payments if they desire to continue to be owners of rental property.

Now, the relationship between the owner of the property and the man who has possession or use right, is based upon contract. In lease contracts, as in contracts generally, the agreement is deemed to include all statutory provisions flowing to the subject matter of the contract, unless the parties, by stipulation in the agreement, waive the statute.

In Georgia for over 140 years a lease agreement has been deemed to include the agreement by the tenant that if he doesn't pay the rent or if he holds over or if he is a tenant

1 at will or by sufferance he has agreed that the landlord has the
2 rights granted by Georgia's dispossesory statutes.

3 Appellant's constitutional contentions are based on
4 equal protection and due process under the 14th Amendment. I
5 shall address myself first to equal protection and presently
6 come to due process.

7 Working with equal protection I might start out by
8 observing that the mystique of the words "equality and equal
9 protection" are somewhat like the trinity; it's much easier to
10 accept by faith than to understand; yet I think if there is to
11 be meaningful discussion on equal protection or equality, we
12 must determine what kind of equality we're talking about.
13 There are, as I see it, two types: one is equality of treatment;
14 this is sort of a numerical equality.

15 The other type of equality is equality of result,
16 which is a proportional equality. The distinction is really
17 quite important for the simple reason that the existence of one
18 would invariably negate the presence of the other.

19 To illustrate: college tuition at a state university.
20 There is equality of treatment if there is a standard tuition
21 charge. That is equality of treatment; it is numerical equality.
22 However, it is obviously a denial of equality if you use an
23 approach of equality of result. To have equality of result you
24 would have to, in effect, deny equality of treatment by provid-
25 ing that one student must pay for something while another student

1 does not have to pay for it; obviously a denial of the equality
2 of treatment.

3 Now, the first equality, equality of treatment is
4 the traditional approach used by the legislatures and courts.
5 I have given an example of tuition at a state university. Other
6 examples would be sales and excise taxes, payment of gas, water
7 light and utility charges, bond posting requirements for public
8 officials to enter into office; to assume the duties of their
9 office. All of these things are based upon equality of treat-
10 ment; there is no exception, based upon the result to an indi-
11 vidual, his financial needs.

12 This same approach has been traditionally used by
13 this court and I think all other courts, the decisions of which
14 I have read, in connection with fiscal requirements for narrow
15 situations or narrow proceedings where it involves access to the
16 court; and I am emphasizing "court" in a very narrow type of
17 proceeding.

18 Cases of this Court would include, of course,
19 Union Guano and Cohen versus Beneficial Loan. In Cohen versus
20 Beneficial Loan, the situation, unlike the situation here, in-
21 volved the complete denial of access to the courts, by the
22 owner of stock, if he didn't have a certain amount; and this
23 Court held there was no denial of equal protection there.

24 MR. JUSTICE WHITE: Do you think that a person has a
25 constitutional right to present a defense in a trial?

1 MR. EVANS: I would say to present a defense in a
2 holding-type situation; yes. Of course, you would have a con-
3 siderable problem in the present case as to who is presenting
4 the defense; who was seeking access to the court. We would
5 maintain that under Georgia procedure it is, in actuality, the
6 tenant who seeks access to the court. The proceeding does not
7 go before a judge ordinarily. The landlord goes down; he swears
8 out an affidavit; goes to the Sheriff and the tenant is noti-
9 fied that he must within so many days, vacate the premises or
10 he will be evicted.

11 There is no judicial procedure; it is the tenant --

12 MR. JUSTICE WHITE: At the determination of one of
13 these proceedings, isn't it possible that the landlord gets a
14 judgment for rent?

15 MR. EVANS: This dispossessory proceeding? The land-
16 lord can get a judgment for rent; yes.

17 MR. JUSTICE WHITE: For double?

18 MR. EVANS: Yes, sir.

19 MR. JUSTICE WHITE: It seems to me he is resorting
20 to the courts to get a judgment; isn't he?

21 MR. EVANS: And this is only if the tenant takes it
22 before a judicial officer. If the tenant does not resist the
23 eviction --

24 MR. JUSTICE WHITE: But he files it; doesn't he?

25 MR. EVANS: Excuse me?

1 MR. JUSTICE WHITE: The landlord files the case;
2 doesn't he?

3 MR. EVANS: The landlord files an affidavit, but it
4 is not an adversary proceeding at this point.

5 MR. JUSTICE WHITE: And if the tenant doesn't even
6 answer it the landlord can get a judgment against him.

7 MR. EVANS: It's really not so much a judgment as
8 just the Sheriff will go down and notify the person to evict.
9 It is not an adversary proceeding; maybe that would clarify it.
10 It is not an adversary proceeding unless and until the tenant
11 files a counter-affidavit.

12 MR. CHIEF JUSTICE BURGER: If you use that theory to
13 define an adversary proceeding, then no case in which de-
14 fault judgment was entered, would be an adversary case; but
15 they really are; aren't they?

16 A default case is as much adversary as a contested
17 one, in terms of the potential.

18 MR. EVANS: The courts in Georgia in a default case,
19 you still usually have to prove damages, which would be a little
20 different.

21 MR. CHIEF JUSTICE BURGER: But here the affidavit is
22 accepted as proof. I would assume the rationale of that is that
23 if a man filed a false affidavit in a dispossessory action, he
24 would be subject to the penalties of perjury; would he not?

25 MR. EVANS: Among other things, he would be subject

1 to that penalty. When I come to due process I will go into the
2 remedies of the tenant, where there is a wrongful eviction.
3 I think that really deals with due process more than equal pro-
4 tection.

5 MR. CHIEF JUSTICE BURGER: Does it help you much to
6 describe this as a nonadversary proceeding at the early stage?

7 MR. EVANS: I think it is significant, because as I
8 said, I think the General Assembly of Georgia invariably take a
9 common or practical viewpoint. This is not a very broad pro-
10 ceedings; it's limited to very narrow grounds; all of which
11 should be easily within the mind and knowledge of the tenant.
12 He should know whether he's paid rent; he should know whether
13 he's holding over; it's not that complicated. I think in this
14 context it is safe to say it becomes an adversary proceeding
15 when the tenant desires --

16 MR. CHIEF JUSTICE BURGER: As soon as he wants to
17 assert a right then he converts it into an adversary proceeding?

18 MR. EAVNS: I would say yes, sir; at that point it
19 becomes an adversary proceeding.

20 MR. CHIEF JUSTICE BURGER: Can he be dispossessed for
21 holding over and nonpayment of rent? Suppose there was damage
22 and waste to the property.

23 MR. EVANS: No, sir; this would be a different
24 procedure.

25 MR. CHIEF JUSTICE BURGER: Another civil action,

1 would it?

2 MR. EVANS: Yes, sir.

3 MR. JUSTICE BLACK: Isn't it like a local detainer
4 in a lot of cases?

5 MR. EVANS: I haven't explored that statute recently
6 in Georgia.

7 I have discussed the first equality, which is the
8 equality of treatment. The second sort of equality, and we're
9 talking equal protection, has to do with trying to obtain
10 equality of results. This is seen in such items as a progress-
11 ive income tax, and I would concede that it is also seen in the
12 right of indigent prisoners to secure access to judicial
13 machinery; that's the line of cases starting with Griffin versus
14 Illinois.

15 This test is less favored, probably in part because
16 it involves subjective value judgments as opposed to the
17 equality of treatment, which is an objective test.

18 Now, moving to due process; due process, I think
19 to do with essential fairness; that is what this Court has
20 generally said in the past. One test is whether it shocks the
21 conscience. Now, I think if we are to be fair in judging the
22 fairness of Georgia's dispossessory proceedings, I think we
23 have to examine this requirement both in the context of history
24 and in the context of the existing landlord-tenant relationship.

25 In our brief we point out that at common law the

1 situation was one where the landlord could use such force as
2 was necessary to evict a wrongfully possessed tenant.

3 The tenant, on the other hand, is not without his
4 rights to common law. He had an obvious right on contract, for
5 breach of the contract where, in a situation where dispossession
6 was wrongful. In addition he had an action in tort and he could
7 recover punitive damages in the tort action. In addition, in
8 the proper case, should he be able to prove fraud or some other
9 proper equitable grounds, he could go into a court of equity.

10 Now, the statute which the Appellants attack here
11 in large part, it is interesting to note, was designed to help
12 the tenant; it did away with the self-help right of the land-
13 lord, while at the same time preserving all of the common-law
14 rights which the tenant possessed.

15 MR. JUSTICE MARSHALL: It also gave the landlord
16 the right to move the Sheriff, which he didn't have at common
17 law.

18 MR. EVANS: No, he didn't have this at common law,
19 but I think the answer to that is that all things being con-
20 sidered, the chance of injury to a tenant would be far less
21 where dispossession is by a disinterested party, such as a
22 judicial official, sure.

23 MR. JUSTICE MARSHALL: The Sheriff is not dis-
24 interested; he is a direct representative of the state; he is
25 using the full force of the state and the full force of the

1 state is put behind the landlord.

2 MR. EVANS: Yes, sir; this is correct.

3 MR. JUSTICE MARSHALL: In a nonadversary proceeding.

4 MR. EVANS: Yes, sir; a nonadversary proceeding.

5 MR. JUSTICE MARSHALL: And you see nothing wrong with
6 it?

7 MR. EVANS: Not in the context, because I think we
8 might come to it right now, what are the equities balanced
9 here? I agree, this is a harsh remedy. But I don't think it's
10 unfair. It may be harsh but I don't think it is unfair, because
11 what are the equities balanced here?

12 On the one hand you have the, admittedly, harsh effects
13 of the dispossession. I'm not denying that's harsh. On the other
14 hand, this injury is not irreparable. It can be remedied
15 through the usual common-law of an action after the fact of an
16 injury; this is the normal common-law approach. The tenant can
17 go into tort and recover punitive damages; he can sue in con-
18 tract; he has remedies.

19 Now, conversely, if there is no protection, such as
20 this bond, for the landlord, he is apt to be without any remedy,
21 particularly if the tenant is indigent. If the tenant truly is
22 indigent, how do you protect the landlord from his pecuniary
23 loss?

24 MR. JUSTICE MARSHALL: Well, why couldn't the land-
25 lord bring him into court before hand and have, in your words,

1 "an adversary proceeding?" That would take time; wouldn't it?

2 MR. EVANS: It would take time and loss of rent.

3 MR. JUSTICE MARSHALL: And money.

4 MR. EVANS: There would be a loss of rent to the
5 property owner who may have to meet a mortgage payment. This
6 is why the Georgia procedure is to require a bond to protect
7 the landlord. Because --

8 MR. JUSTICE MARSHALL: I'm not arguing at this point
9 why; I'm arguing one point: adversary proceeding. Why couldn't
10 we have the adversary proceeding before the man's kicked out,
11 rather than afterwards?

12 MR. EVANS: One adequate procedure undoubtedly would
13 be a rapid adversary proceeding. Undoubtedly, in a small state,
14 urban state, this would be a preferable means of handling the
15 situation.

16 Now, let me point out that Georgia is the largest
17 state east of the Mississippi; in many counties the Superior
18 Court has but two terms a year and it would require complete
19 revamping of the present judicial system in many rural areas t
20 to --

21 MR. JUSTICE MARSHALL: Well, what do the other rural
22 states do?

23 MR. EVANS: Some, as Indiana, have a statute quite
24 similar to Georgia's.

25 MR. JUSTICE MARSHALL: Who else? I think it's only

1 one more; I have forgotten the name of it.

2 MR. EVANS: I believe there are two others.

3 MR. JUSTICE MARSHALL: Well, I mean, it seems to me
4 that Georgia is no different from 47 States.

5 MR. EVANS: Well, sir, as I understand the test of
6 due process, it does not require uniformity of response or
7 treatment of given situations by legislatures; it requires that
8 the treatment be reasonable.

9 What I am trying to argue is the treatment here is
10 reasonable in view of the different equities being balanced.
11 This is not a situation such as Griffin where it's a fee to the
12 state, versus personal liberty. This is a case where it is the
13 balance of the economic interests of two classifications of
14 private citizens. One, the dispossession, it's true that it's
15 harsh, but it can be remedied by an appropriate judicial
16 action, where the dispossession is wrongful.

17 On the other hand, if the tenant is allowed to stay
18 in possession throughout the trial and presumably, throughout
19 the appeal, how would the landlord ever recoup his losses?
20 He can't.

21 MR. JUSTICE WHITE: Just because some court might
22 say that this bond requirement is illegal and a denial of
23 equal protection, doesn't mean that the state would also be
24 disentitled to have some lesser protection for the landlord,
25 like requiring the payment of rent during the proceedings. Why

1 isn't that ample protection; why wouldn't that be ample protec-
2 tion to the landlord? Saying that the bond requirement is bad
3 doesn't mean that the tenant don't need to pay rent.

4 MR. EVANS: Mr. Justice White, in a failure to pay
5 rent situation, I would think this probably is quite adequate;
6 however, it would not be very adequate in a holdover situation,
7 where the landlord wants his property back; he may have a higher
8 use for it. It would only be adequate in --

9 MR. JUSTICE WHITE: What kind of a case is this?

10 MR. EVANS: This is a failure-to-pay-rent situation.

11 MR. JUSTICE WHITE: Well, we don't need to talk about
12 the other ones, do we?

13 MR. EVANS: Well, actually there was no bond require-
14 ment in this case, either, yet we are talking about the bond
15 requirement. There was no bond required in this case.

16 I might point out --

17 MR. JUSTICE WHITE: Well, there is no bond required
18 because the lower court held this statute unconstitutional.

19 MR. EVANS: Yes, sir; that is true, but --

20 MR. JUSTICE WHITE: And the Supreme Court says it is
21 and there should be a bond requirement; right?

22 MR. EVANS: Yes, sir; that is absolutely correct.

23 MR. JUSTICE WHITE: All right; so the issue here is
24 about the bonds, not about the requirement to make the tenant
25 pay rent; it's the bond requirement that's here.

1 MR. EVANS: The bond requirement is here; yes, sir,
2 I would say so.

3 MR. JUSTICE WHITE: And you say it's quite reasonable
4 for a state to say that a person who can afford to put up a
5 bond may litigate with the landlord his eviction, but that a
6 person without money may not litigate his differences with the
7 landlord in a court, even if he pays rent while he's doing it?

8 MR. EVANS: If the landlord is also considered to
9 have a right to property which shall not be expropriated, I
10 would say that is reasonable; perhaps not in a case -- the
11 statute is designed --

12 MR. JUSTICE WHITE: What expropriation is there to the
13 landlord's property if the tenant wants to present what might be
14 what anyone would say, that on the basis of the pleadings, is
15 a good defense to the landlord's claim; and the tenant, while
16 he is litigating, is willing to pay rent. Now, tell me what
17 property the landlord, in a failure-to-pay-rent case, is
18 appropriate.

19 MR. EVANS: In a failure-to-pay-rent situation/^{if}that
20 is the only issue, if it has not gone beyond that where the
21 landlord just frankly, wants to repossess his property, I would
22 say that this would be adequate protection in this one case.

23 MR. JUSTICE WHITE: Well, that's this case.

24 MR. EVANS: But the statute is designed for three
25 situations; not just one, and we think that looking at three

1 situations the statute is designed to cover --

2 MR. JUSTICE WHITE: Well, the Georgia Court has held
3 that the statute is valid in this case.

4 MR. EVANS: Yes, sir, it did.

5 MR. JUSTICE BRENNAN: Mr. Evans, may I ask -- Mr.
6 Padnos suggested a bill had been introduced and passed, I
7 think he said one of the houses of the Georgia Legislature?

8 MR. EVANS: A bill --

9 MR. JUSTICE BRENNAN: Well, has it done something
10 with this statute?

11 MR. EVANS: No significant development was the
12 passage in the last session of the bill authorizing a payment-
13 of-the-cost bond, rather than a bond for any set length or
14 period. As I read the new statute it would be perfectly --
15 the tenant, again -- this is discretion of the lower court --
16 as I read the new statute, the lower court would have the dis-
17 cretion to allow, say, double the rent being paid monthly. If
18 the rent is \$50 a month that every month the tenant could pay
19 \$100 into court. As I read the new statute that would be
20 an authorized --

21 MR. JUSTICE BRENNAN: Well, how does that differ
22 from this situation? The present statute.

23 MR. EVANS: Well, it really doesn't, in a sense,
24 because for this reason: bond -- the amount of the bond is
25 really left to the discretion of the lower court; it's a matter

1 of the court's discretion as to how much bond is required.

2 MR. JUSTICE BRENNAN: That's the only difference?
3 Here the penalty is fixed by the statute: double the rent.

4 MR. EVANS: Yes, sir; that's the penalty, but when I
5 say it is indefinite -- now you have two statutes involved.
6 The bond-posting requirement merely states that you must post
7 bond for the damages which may be recovered. You have to look
8 to the other statute to see what the damages are and that
9 statute provides it shall be double the amount of the rent in-
10 volved, and of course, if you tied up the litigation for six
11 months, this could be fairly substantial; although, under the
12 new statute, I do think it can be paid on a monthly basis by
13 paying double the monthly rental.

14 MR. JUSTICE MARSHALL: Mr. Evans, suppose the rent
15 is due on the first and on the second the landlord files this
16 proceeding and it so develops that the money comes in on the
17 second after he files it; the tenant's in trouble; isn't he?

18 MR. EVANS: Mr. Justice Marshall, this was defended
19 -- what the contract provided.

20 MR. JUSTICE MARSHALL: The contract said "payable on
21 the first," period.

22 MR. EVANS: Yes, sir; I would say the tenant would
23 be in trouble.

24 MR. JUSTICE MARSHALL: Now he has to go to court now,
25 and put up this double amount of money; right?

1 MR. EVANS: Yes, sir, he would have to post a bond.
2 This does not mean he loses all remedy.

3 MR. JUSTICE MARSHALL: What remedy would he have?

4 MR. EVANS: Possibly if there is a fraud involved --

5 Mr. JUSTICE MARSHALL: No, no; there was no fraud
6 in here at all.

7 MR. EVANS: If the landlord desires -- it's a con-
8 tractual situation. The landlord, if he desires to hold a
9 person to a contract, I think has the right to hold the person
10 to the contract, the same as any other contract default.

11 MR. JUSTICE MARSHALL: And that's to require him to
12 go to court in order to remain in the property --

13 MR. EVANS: Yes, sir --

14 MR. JUSTICE MARSHALL: -- and to put up double the
15 amount of the bond.

16 MR. EVANS: This is what the tenant, Mr. Justice
17 Marshall, this is what the tenant agreed to when he entered into
18 the lease contract, unless he could stipulate that provision
19 away.

20 MR. JUSTICE MARSHALL: Well, suppose the contract
21 said that the party of the second part was always a poor tenant;
22 the party of the second part waives all of the due process rights
23 under the constitution? That's his contract. Would you enforce
24 it?

25 MR. EVANS: On that sweep I would not try to; no, sir.

1 On the other hand, I think rights under the constitution can be
2 waived by contract. Many rights, I think, can be waived by
3 contract. Certainly this Court has held that in criminal
4 situations it is used to waive certain rights --

5 MR. JUSTICE MARSHALL: When he clearly waives them.
6 Clearly.

7 MR. EVANS: Well, if we have a statute that's been in
8 effect 140 years and people have been accepting it for that
9 long, I would say that's rather clear.

10 MR. JUSTICE MARSHALL: And constitutional?

11 MR. EVANS: Yes, sir; I would say it's constitutional.

12 MR. JUSTICE MARSHALL: Because of longevity. You
13 don't want to decide many cases on that, now do you?

14 MR. EVANS: No, it was not because of longevity, Mr.
15 Justice Marshall, it is because of the equities balanced that
16 we feel that a landlord, too, has property rights which must be
17 protected.

18 MR. JUSTICE MARSHALL: Well, why not make the landlord
19 put up a bond before he gets this action?

20 MR. EVANS: Some states do this. The point is this
21 probably is not as necessary, in that the landlord is a property
22 owner. He has something --

23 MR. JUSTICE MARSHALL: I thought you just said in
24 Georgia they are just as bad off as the tenants. They are very
25 poor people.

1 MR. EVANS: He has mortgage payments, perhaps, but he
2 does own property; the property as the subject of recovery, if
3 the tenant sues the landlord. But if the landlord sues the
4 tenant, and I'm saying particularly where the tenant is indigent,
5 that it is apt to be no chance of recovery at all.

6 MR. JUSTICE STEWART: Mr. Evans, I notice that under
7 61-304 of the Code, if a counter-affidavit and bond is put up
8 by the tenant, then it becomes the duty of the Sheriff or his
9 deputy to return the proceedings to the next Superior Court
10 of the county where the land lies. Then it says, "And the fact
11 in issue shall be there tried by a jury."

12 MR. EVANS: That is correct.

13 MR. JUSTICE STEWART: Does the losing party after
14 that jury trial, pay for the jury, also?

15 MR. EVANS: No, sir. I know of no provision for that.

16 MR. JUSTICE STEWART: Tell me, who pays for the jury?
17 Is that public money?

18 MR. EVANS: I'm not sure, it might, but my colleagues
19 advise me, so I can't answer the question; I don't know who will
20 pay the jury.

21 MR. JUSTICE STEWART: But there is a mandatory jury
22 trial, apparently, according to the language of the statute.

23 MR. EVANS: On the facts of the issues presented.

24 MR. JUSTICE BLACK: Is there any charge for a jury in
25 an ordinary case?

1 MR. EVANS: I'm not aware of one, Mr. Justice Black.
2 I have not heard of a charge for the jury in Georgia. I don't
3 think that's considered part of court costs.

4 MR. JUSTICE BLACK: It might be and I might never
5 have seen it.

6 MR. EVANS: Well, I am not aware of it.

7 MR. PADNOS: Mr. Chief Justice, I would just like to touch on
8 several things Mr. Evans dealt with.

9 First of all, Mr. Justice Marshall was asking
10 questions about the common-law issue. I'm afraid I don't think
11 that was too clearly presented; in fact, in common law the
12 landlord did not have a right in common law just to evict a
13 tenant who was overdue on his rent. The payment of rent is a
14 covenant which required the landlord to go into court and the
15 only way the landlord could use self-help is if the tenancy had
16 come to an end but that was not because the rent wasn't paid;
17 so this is not an improvement on common law, as the state has
18 represented; indeed, on the contrary, it's a much worse condi-
19 tion than common law.

20 MR. CHIEF JUSTICE BURGER: Well, in eviction cases
21 the statute provided for a summary remedy, let us say in the
22 form of a requirement to respond within 48 hours, you'd have
23 almost the same kind of summary procedure you have got in this
24 case. So, you are not challenging the right of the state to
25 have a statute which calls for and permits a summary disposition.

1 of such a case.

2 MR. PADNOS: What we're talking about is our right
3 to present defenses in court; indeed, one of the cases here
4 really illustrates the badness of this statute. The Moment
5 case, which is one of the cases before the Court. This is one
6 of the cases that we were not allowed to present a defense on,
7 and in that case what had happened was that this was a tenant
8 with the Atlanta Housing Authority and Mrs. Moment is a white
9 woman and a number of people had objected to the fact that she
10 was having black visitors to her house and it was on that basis
11 that the project manager decided to convict here and we were
12 going to correct that in court. Now, that issue, obviously,
13 is not before this Court and it's not before any court and we
14 wanted to bring it to the Court and that's what brought Mrs.
15 Moment into --

16 MR. JUSTICE BLACK: Doesn't this statute give him a
17 right to defend if he files an affidavit?

18 MR. PADNOS: Files an affidavit with a double bond and
19 Mrs. Moment is --

20 MR. JUSTICE BLACK: Is that what you are complaining
21 about; the double bond?

22 MR. PADNOS: We're complaining about the entire pro-
23 cedure, sir; that we could not get --

24 MR. JUSTICE BLACK: He has a right to appear and file
25 and affidavit and then it has to be tried. Why wouldn't that be

1 all right if he had plenty of time?

2 MR. PADNOS: Well, he doesn't have a right to appear
3 unless he files a double bond.

4 MR. JUSTICE BLACK: That's why I asked you if that's
5 the chief point in your case; the bond?

6 MR. PADNOS: You are asking, I take it, is if there
7 were no bond would we object to -- I think it would be all
8 right, then, if there was no bond.

9 MR. JUSTICE BLACK: Well, that's what I thought.

10 MMR.PADNOS: That's what keeps us out of court.

11 MR. JUSTICE BRENNAN: How about this new statute?
12 The way Mr. Evans described it to me it doesn't sound much
13 different from the present one.

14 MR. PADNOS: I'm not familiar with that, sir. I
15 really can't comment at all. What I was referring to when I
16 talked about statute is that I know some statute passed the
17 State Senate. I'm not familiar with what Mr. Evans is referring
18 to.

19 MR. JUSTICE STEWART: The bill we are talking about.
20 There has been no statutory enactment; am I right?

21 MR. PADNOS: Yes. It just passed the State Senate.

22 MR. JUSTICE STEWART: A bill.

23 MR. PADNOS: I know of nothing that has passed the
24 House of Representatives.

25 I would also like to clear up what I am afraid might

1 be a misleading impression impression that I gave about the
2 Georgia Legislature and also about the courts in Georgia. I
3 didn't mean to give the Court the impression that we have a
4 sort of happy situation down there where everybody agrees and
5 everybody can do what they want, even though the law says the
6 opposite.

7 The Legislature, if this Court should hold this statute
8 constitutional, I would presume there is no possibility that a
9 legislature is going to change the present law.

10 Now, as far as the courts operating in our benefit in
11 a kind of casual way that I talked about before, the courts are
12 doing that in Fulton County to a certain extent. To the best
13 of my knowledge they are doing it nowhere else and, indeed, it
14 has not come to an end in Fulton County, because only last
15 Friday one of the judges in the Civil Court said, "No more; I'm
16 not waiving any more; I'm not going to hold up these evictions."

17 We now have 52 tenants in one apartment building that
18 are about to be evicted unless we can find a way to prevent
19 that.

20 MR. JUSTICE BLACK: Is that because of the bond?

21 MR. PADNO: That's because of the bond.

22 MR. JUSTICE BLACK: Is that the trouble with the claims
23 you are talking about?

24 MR. PADNOS: Yes, sir. We can't post the bond in this
25 case, because the tenants are not in any position to post a bond.

1 in those cases and the tenants are not in any position to post
2 a bond and we're likely to be evicted and --

3 MR. JUSTICE STEWART: Are you going to be evicted
4 because of nonpayment of rent?

5 MR. PADNOS: No, sir. What they've been doing in those
6 cases is that rent is all paid into court in those cases, but
7 we're not willing to turn the rent over to the landlord.

8 MR. JUSTICE STEWART: Well, then the grounds there for
9 eviction is nonpayment of rent; is that right?

10 MR. PADNOS: Right, Your Honor.

11 MR. JUSTICE WHITE: Just as a matter of curiosity, what
12 is your defense to the landlord's suit. Do you admit nonpayment
13 of rent at the time the suit was filed?

14 MR. PADNOS: Are you speaking of the incident case or
15 the ones we were just talking about?

16 MR. JUSTICE WHITE: Well, this one and the ones you
17 were just talking about.

18 MR. PADNOS: Well, in the Sanks case, the defense --
19 or the Moment case, let's talk about that, which is the Housing
20 Authority case. The defense is the one to which I just alluded
21 that the Housing Authority has no right to evict a person just
22 because she's having visitors from the opposite race.

23 In the Sanks case, our contention: were we ever able to
24 present it would be that there is no landlord-tenant relation-
25 ship, because there's apparently a common-law marriage between

1 the landlord and the tenant in that case.

2 (Laughter)

3 MR. PADNOS: That's a very complicated case.

4 MR. JUSTICE BLACK: Is the judgment appealable?

5 MR. PADNOS: The judgment of the lower court?

6 MR. JUSTICE BLACK: Yes. If they were to oust him,
7 could he appeal? What about the judgment against him; could
8 he appeal?

9 MR. PADNOS: Well, the present posture -- I'm not sure
10 I understand the question.

11 MR. JUSTICE BLACK: Well, what I mean is: what court
12 does this start in? Is this like some that start in the Justice
13 of Peace Court in some states?

14 MR. PADNOS: It can start in a Justice of the Peace
15 Court, see -- we can ever even get into court --

16 MR. JUSTICE BLACK: You can get into court if they deny
17 it.

18 MR. PADNOS: If they post the bond.

19 MR. JUSTICE BLACK: What I'm talking about, suppose
20 they put up the bond and are denied can they then appeal?

21 MR. PADNOS: Yes.

22 MR. JUSTICE BLACK: And how long does it take to get up
23 to the Supreme Court of Georgia?

24 MR. PADNOS: That has been rapid, in our case, at least.
25 I'm not sure what the usual length of time is, but it was

1 fairly rapid in our case.

2 MR. CHIEF JUSTICE BURGER: Would you think that
3 Georgia would have the constitutional right to require, as a
4 tradition for the relief you seek, the payments in the court
5 of all rent then overdue and monthly payments during the
6 pendency of the appeal?

7 MR. PADNOS: I believe so, sir. I think they could,
8 That seems to me equity in fairness and that's what we've been
9 trying to do, even in these cases as it now stands.

10 MR. CHIEF JUSTICE BURGER: Now, what the Georgia
11 Legislature, at least arguably has done, is make an estimate
12 that double the rent will accomplish that same objective. Is
13 that inaccurate?

14 MR. PADNOS: I think that is a correct decision of what
15 they have done. It will protect the landlord's interest.

16 MR. CHIEF JUSTICE BURGER: But you think the one is
17 all right, but the other is not?

18 MR. PADNOS: Yes; I have to say that. I think that is.
19 There may be inconsistencies, but it just -- the rule of reason,
20 it seems to me that --

21 MR. CHIEF JUSTICE BURGER: Well, until I can think my
22 way out of that it does seem to be an inconsistency in your
23 position. Perhaps there is an explanation.

24 MR. PADNOS: Well, I'll pass to the next question.

25 I'd just like to make one final point. The state

1 continues in these cases to talk about the landlord's property
2 interest and how we're expropriating it. At one point in the
3 brief the State says, "A tenant's private war on poverty."
4 I think it should be emphasized that the tenant does have a
5 property interest. He has leasehold and indeed, the Georgia
6 Supreme Court has specifically held that a tenant's leasehold
7 is a property right that is entitled to as much protection as
8 the landlord's right in his property.

9 So, there are two conflicting property rights involved
10 here: leasehold versus feehold, and what it involves is just
11 the issue of letting the court make the determination in which
12 its right is superior.

13 We want the right to go into court and that's what this
14 case is all about.

15 Thank you.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Padnos.
17 Thank you gentlemen for your submissions. The case is sub-
18 mitted.

19 (Whereupon, at 1:05 o'clock p.m. the argument in the
20 above-entitled matter was concluded)