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Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law

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Contemporary Dilemmas of the *Javins* Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law

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In the last twenty years, agitation for significant alteration in residential landlord-tenant law[1] has produced a remarkable deluge of decisions permitting residential tenants to raise violations of health and safety codes as defenses to actions by landlords for possession for nonpayment of rent.[2] If the

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1. *See* Lesar, *Landlord and Tenant Reform,* 35 N.Y.U. L. REV. 1279, 1290 (1960) (need exists for specific legislative changes and application of contract law to contractual provisions of leases); Sax & Hiestand, *Slumlordism as a Tort,* 65 MICH. L. REV. 869, 875 (1967) (actionable tort for illegal maintenance of indecent housing conditions against landlords would be more effective than present public enforcement of housing laws); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change,* 54 GEO. L.J. 519, 558 (1966) (fundamental revision of antiquated common-law landlord-tenant rules long overdue). *See also* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653, 667 (1957) (authority exists for extension of implied warranties to situations in which sale has not occurred).

2. Residential implied warranties are certainly the general rule. The principal early reform cases include Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.) (tenant may prove breach of landlord's warranty of habitability as defense to landlord's suit for possession for nonpayment of rent), *cert. denied,* 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 620, 637, 517 P.2d 1168, 1170, 1182, 111 Cal. Rptr. 704, 706, 718 (1974) (warranty of habitability implied by law in residential leases; breach of such warranty may be raised as defense in unlawful detainer action); Lemle v. Breeden, 51 Hawaii 426, 436, 462 P.2d 470, 475-76 (1969) (material breach of implied warranty of habitability justified recission of rental agreement); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972) (oral or written contract governing tenancy in multiple-unit dwelling carries implied warranty of habitability fulfilled by substantial compliance with city building code; this warranty may be raised as an affirmative defense); Mease v. Fox, 200 N.W.2d 791, 796, 798 (Iowa 1972) (trial court must consider defendant's claim of material breach of implied warranty as defense to landlord's suit for default of rental agreement); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843, 845 (Mass. 1973) (breach of implied warranty of habitability, which may be based on health codes, may be raised as defense to eviction if tenant follows legislatively mandated procedure); Fritz v. Warthen, 298 Minn. 54, 61, 213 N.W.2d 339, 343 (1973) (breach of statutorily required covenants of habitability may be asserted as a defense in unlawful detainer actions); Marini v. Ireland, 56 N.J. 130, 140, 144, 265 A.2d 526, 531, 535 (1970) (landlord's failure to repair or replace vital facilities may be raised as equitable defense in dispossess proceeding). Other courts have very recently followed this trend. *See* Pugh v. Holmes, 384 A.2d 1234, 1240 (Pa. Super. Ct. 1978) (tenant may assert breach of implied warranty of habitability as defense to landlord's action for possession or unpaid rent), *aff'd,* 48 U.S.L.W. 2037, 2038 (Pa. July 6, 1979); Kamarath v. Bennett, 568 S.W.2d 658, 660-61 (Tex. 1978) (implied warranty of habitability by landlord in rental of dwelling unit). A growing number of cases also provide damage remedies to tenants suing landlords for breach of the implied warranty of habitability. The classic case is Berzito v. Gambino, 63 N.J. 460, 467-68, 469, 308 A.2d 17, 21, 22 (1973) (lessee may sue to recover security deposit or rent when he alleges lessor has broken covenant to maintain premises in habitable condition). Over half the states have also adopted statutes placing on the landlord the duty to repair defects arising or discovered during the lease term. Most of the statutes are limited to residential property. RESTATEMENT (SECOND) OF PROPERTY, Statutory Note to Chap. 5, at 3a-g (Tent. Draft No. 2, 1974). *See also* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.105 (allowing tenant's counterclaim to landlord's action for possession and rent).

tenant's defense, as exemplified by *Javins v. First National Realty Corp.*,[3] is successful, relief is provided in the form of a rent abatement.[4] Most courts have used an implied warranty of habitability as the legal vehicle for allowing the defense.[5] The use of constructive contract theory has been described as the natural conclusion to centuries of grappling with the relationship betweeen contract and property in leasehold law.[6]

In this Note I question the continued utility of property-contract analysis in leasehold possession cases.[7] Rather, I suggest that the solution to the dilemmas of modern possession cases may be found in civil procedure rules, not in substantive property or contract concepts.[8] I conclude that legislatures and courts must begin to focus on the reasons justifying summary dispossession of tenants prior to the trial of any defense or counterclaim. Just as courts of equity routinely decide whether preliminary relief should be granted to a party claiming potentially harmful consequences during the pendency of

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3. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

4. *See id.* at 1082-83.

5. Early in the development of tenant remedies, some cases held that violations of housing codes provided tenants with the defense that the lease was an illegal contract. *See* Brown v. Southall Realty Co., 237 A.2d 834, 837 (D.C. 1968). This defense, however, appeared to be available only for violations in existence at the inception of the tenancy. *See* Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. 1968), *rev'd on other grounds*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir) (rejecting argument that housing code has no effect on lease after it is signed; housing code must be read into housing contracts), *cert. denied*, 400 U.S. 925 (1970). The tenant was also obligated to pay the reasonable value of his possession. *See* Davis v. Slade, 271 A.2d 412, 414, 416 (D.C. 1970). An explicit rejection of this illegality theory is found in Posnanski v. Hood, 46 Wis. 2d 172, 178-83, 174 N.W.2d 528, 531-33 (1970) (legislative bodies have indicated intent that housing codes be enforced administratively, not by terms implied in lease). The illegal contract defense did create an anomalous remedy. If a lease is illegal, why should a tenant be able to retain possession at a reduced value? The implied warranty of habitability theory, which leads naturally to a simple damage award, quickly became the judicially favored approach.

6. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-80 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U.L. REV. 204, 204-05 (1976) (a number of state courts that have implied into residential leases a warranty of habitability suggest contract law should govern residential landlord-tenant relationship); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KANSAS L. REV. 369, 377 (1961) (landlord-tenant relation has moved from status to contract to property to modern contract); note 1 *supra*. *But see* Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649, 686, 687 (1975) (lease is neither contract nor conveyance; contract based model for modern leasing inappropriate).

7. This article focuses primarily on problems associated with suits for possession of leased premises. There are certainly situations in which the result of a case will differ depending on whether a lease is perceived as a conveyance of a right to possession or as a contractual relationship. For example, if a tenant abandons the leased premises, courts have disagreed over the duty of a landlord to mitigate damages before suing the tenant for rent. Under the traditional rule, the landlord had no duty to mitigate on the theory that tenants were conveyed a right to possess property for a period of time. As long as the lease was extant, the landlord could only recover for rent arrears. Conversely, when the possessory rights terminated, the landlord could obtain his full reward. This caused many landlords to insert clauses in their leases permitting the premises to be relet for the tenant's account, or to accept routinely the abandonment. These reasonable business practices led to de facto mitigation in many situations. The recent movement of courts to require mitigation is, therefore, a fairly minor step and, for purposes of this article, unimportant. Property-contract disputes such as mitigation have nearly played themselves out. Procedure is the most important area of review for present day lease law afficionados. For a brief account of the traditional mitigation rules in actions for rent, see J. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT 454-67 (5th ed. Boston 1869) (1st ed. New York 1844). A good discussion of modern mitigation law may be found in Sommer v. Kridel, 74 N.J. 446, 452-59, 378 A.2d 767, 770-74 (1977).

8. *See* notes 77-84 *infra* and accompanying text (discussing dispossess statutes).

litigation, so must landlord-tenant courts confront the possessory rights of lessor and lessee during the pendency of litigation. Both the summary dispossess acts adopted in the nineteenth century and the growing number of *Javins*-oriented amendments to these outdated statutes[9] should be replaced with new procedure-oriented legislation.

I. *Javins* AND SUCCESSOR CASES: THE CURRENT DILEMMAS

Prior to the thirteenth century the leasehold was viewed as more of a contract than a conveyance of an interest in land; only later did property concepts become dominant.[10] As originally developed, leases were devices to guarantee the repayment of loans.[11] By the sixteenth century these basically contractual loan agreements had given way in England to agricultural leases.[12] This development both protected the possessor from arbitrary self-help ejection by the landlord and placed primary responsibility for the care of the land on the tenant.[13] Industrial development in nineteenth century England and the United States led to significant alteration in the typical agrarian leasehold; both commercial and urban leases became heavily laden with express contractual provisions.[14]

The nineteenth century's mixture of possessory and contractual obligations resulted in a peculiar legal structure. Failure to obey the contractual obligation to pay rent justified termination of the tenant's possessory interest. Conversely, a landlord's destruction of the tenant's right of possession terminated the obligation to pay rent.[15] A breach of other contractual

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9. The most prominent statutory scheme is the *Uniform Residential Landlord and Tenant Act*, which has now been adopted in 12 states. *See* 7A U.L.A. 499 (1978). Individual state statutes are also common. For example, New Jersey has enacted a number of statutes in this area. *See* N.J. STAT. ANN. §§ 2A:42-85 (West Supp. 1978-1979) (enabling tenants to deposit rents with court appointed administrator until dwellings satisfy minimum standards of safety and sanitation); *id.* §§ 2A:42-10.10 to-10.16 (West Supp. 1978-1979) (forbidding landlord from serving notice to quit or instituting action for possession of premises if done in reprisal against tenant); *id.* § 2A:18-61.1 (West Supp. 1978-1979) (forbidding removal of tenants from residential properties by county district court or superior court except upon established grounds); *id.* §§ 46:8-18 to-20.3 (West Supp. 1979-80) (enabling tenants to secure performance of leases through regulation of security deposits).

10. *See* 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1] (1977)(summary history of property-contract tension in landlord-tenant law).

11. *Id.*

12. A fascinating study of early American landlord-tenant practices may be found in SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK (1978).

13. The doctrinal repository for this development was the law of waste. Tenants had an obligation not to waste the reversionary interest of the landlord. *See* J. TAYLOR, *supra* note 7 , at 249-69; 1 H. TIFFANY, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 109 (1910).

14. *See* 2 R. POWELL, *supra* note 10, ¶ 222[1], at 178-79.

15. Constructive eviction was an important theory for tenants attempting to avoid rental obligations. Some tenant reformers in this century sought to modify constructive eviction rules to provide a more hospitable remedy for lessees. A little progress was made. *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 460-61, 251 A.2d 268, 276-77 (1969) (tenant's right to vacate following constructive eviction may be viewed as stemming from breach of covenant of quiet enjoyment or material breach of implied warranty against latent defects). *Reste* provided much of the theoretical underpinning for the later implied warranty cases. There has also been one successful use of declaratory judgment procedures to obtain prior judicial sanction for a tenant's departure from leased premises. *See* Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 129, 163 N.E.2d 4, 7 (1959). Another theory pursued as a tenants' remedy was illegality of contract. *See* note 5 *supra*.

provisions, however, generally did not affect the rental obligations of either party. The possessory and contractual remedies were separated, both by the pre-Field Code pleading systems and by the substantive notion that rental obligations were legally independent of other contractual provisions. The law largely, although not completely,[16] treated the lease as two separate documents—a conveyance of land for a price and a contract defining additional and distinct obligations of the respective owners of the lease term and the reversionary interest.

This landlord-tenant law was dramatically altered by *Javins v. First National Realty Corp.*,[17] the most lucidly written and frequently cited of the many opinions that have impled a warranty of habitability into urban residential leases. First, the court in *Javins* reaffirmed the once dominant notion that leases are basically contracts.[18] Second, the court found inapplicable to residential leases the most pernicious of the old rules: that the tenant's obligation to pay rent is independent of any express or implied contractual duty of the landlord to repair the leased premises.[19] Third, an implied duty to repair was imposed upon landlords of urban residences.[20] Finally, the local housing code was deemed to be the appropriate standard for defining the scope of the implied duty to repair.[21] The court then reversed a judgment for possession entered against the tenants and remanded the case to landlord-tenant court for a new trial in which the implied warranty defense could be raised.[22]

The *Javins* court listed several familiar reasons for implying a warranty of habitability into leases covered by the housing code, including lack of tenant bargaining power,[23] the reliance of tenants on the landlord's greater ability to inspect and repair the premises,[24] and growth of consumer protection in many areas of commerce.[25] Despite its heart lifting prose, however, the *Javins* opinion has been read in a remarkably narrow manner. District of Columbia and New Jersey cases provide excellent examples of the national trends.

A. DISTRICT OF COLUMBIA

The *Javins* decision dealt explicitly only with urban housing.[26] District of Columbia courts have refused to apply the *Javins* rationale in commercial lease cases. In *Interstate Restaurants, Inc. v. Halsa Corp.*,[27] the lessee of a

16. Some equitable relief was available to tenants seeking delay of eviction pending resolution of various disputes. *See* notes 85-92 *infra* and accompanying text. In addition, a finding of fraud could alter the traditional inability of a tenant to offset contract damages against rent. *See* Dennison v. Grove, 52 N.J.L. 144, 147, 19 A. 186, 187 (1889).

17. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

18. *Id.* at 1074-75; *cf.* note 10 *supra* and accompanying text (leases originally viewed more as contracts than conveyances).

19. 428 F.2d at 1082.

20. *Id.* at 1077-81.

21. *Id.* at 1080-82.

22. *Id.* at 1082-83.

23. *Id.* at 1079.

24. *Id.* at 1078-79.

25. *Id.* at 1075-76.

26. *Id.* at 1073.

27. 309 A.2d 108 (D.C. 1973) (per curiam). Holdings on this point in other jurisdictions are scarce. The

hotel restaurant was denied the right to raise heating, air-conditioning, draft, and water leak problems in a possessory action brought by the lessor hotel.[28] The court indicated that it was inappropriate "to intrude into established business practices in the hotel-restaurant commerce, as delineated in a negotiated lease."[29]

The court's reasoning in *Halsa* is unsatisfactory. In some cases, commercial lessees may have as little bargaining power as typical residential tenants. The proprietor of a small store who is seeking a lease renewal may be in a particularly poor negotiating position. If *Javins* was partially motivated by concern for tenants who lacked bargaining power, why should business lessees operating in a tight market automatically be excluded from the benefits of that decision? Similarly, the belief expressed in *Javins* that residential tenants rely on their landlords' greater abilities to inspect and repair applies with equal force to many commercial lessees. Although reliance on a landlord's expertise before agreeing to a long-term commercial ground lease is rare, a tenant operating a small business may depend on the owner's goodwill and experience.[30] There is no obvious policy reason for providing *all* residential tenants an opportunity to delay eviction during litigation of a housing code defense, while denying the same opportunity to *all* commercial tenants.[31]

The results in *Brown v. Young*[32] and *Winchester Management Corp. v. Staten*[33] are even more disturbing than the result in *Halsa*. In *Brown* the tenants had leased a restaurant from Alfred Greene and Robert Bennett. The lease included a right of first refusal if the lessors offered the property for sale.[34] In June, 1974, Greene and Bennett sold the property to another party, in alleged violation of the terms of the lease.[35] The rental agency, however, continued to accept rent from the tenants without mentioning that the restaurant had a new owner.[36] In July, 1975, the buyer gave the tenants notice

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New Jersey case law, however, might lead to a different result than found in *Halsa*. *Cf.* Reste Realty Corp. v. Cooper, 53 N.J. 444, 461, 251 A.2d 268, 276-77 (1969) (constructive eviction from commercial office may be viewed as stemming from landlord's breach of implied warranty against latent defects); 35 U. PITT. L. REV. 901, 901 (1974) (examining New Jersey and District of Columbia cases to demonstrate differing treatment of commercial and residential leases). New Jersey has also imposed good cause eviction requirements on some commercial landlords. *See* Shell Oil Co. v. Marinello, 63 N.J. 402, 409, 307 A.2d 598, 603 (1973) (gas station lease and dealer agreement basically a franchise that cannot be terminated by lessor without good cause), *cert. denied*, 415 U.S. 920 (1974). *See also* Kruvant v. Sunrise Mkt., Inc., 58 N.J. 452, 456, 279 A.2d 104, 106 (per curiam) (refusing to hold that *Marini* doctrine, which allows tenant to make necessary repairs and deduct cost from future rents, is inapplicable to commercial leases), *modified*, 59 N.J. 330, 333, 282 A.2d 746, 748 (1971) (landlord does not have enforceable judgment for possession); Demirci v. Burns, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (Super. Ct. App. Div. 1973) (per curiam) (at least some nonresidential tenants may raise equitable defenses such as failure to provide services required by specific covenant in summary dispossess actions).

28. 309 A.2d at 109 & n.1.

29. *Id.* at 111.

30. It should be noted that the courts and legislatures have not limited implied warranties of goods to retail customers. *See* U.C.C. §§ 2-314, 2-315.

31. Only an opportunity to delay is provided because most courts require a defending tenant to deposit rents pending the outcome of the dispossess action. A residential tenant's failure to make whatever deposit a court requires may terminate the eviction delay. *See* notes 95-110 *infra* and accompanying text.

32. 364 A.2d 1171 (D.C. 1976).

33. 361 A.2d 187 (D.C. 1976).

34. 364 A.2d at 1172.

35. *Id.*

36. *Id.* at 1171.

to quit the premises. When they refused to vacate, an action for possession was commenced in landlord-tenant court.[37] The tenants' attempt to raise the terms of the lease granting a right of first refusal as a defense failed. The court was unwilling to permit the breach of a lease provision that was unrelated to the parties' duties under the housing code to be raised in a suit for possession based upon a notice to quit.[38]

The *Brown* decision indicates that neither breach of implied warranty defenses nor breach of express contract defenses will be available to commercial lessees in landlord-tenant court. By explicitly rejecting the applicability of *Javins* to actions for possession based upon notices to quit, the *Brown* court implicitly rejected the *Javins* holdings that leases are contracts and that possessory and contractual obligations are dependent.[39] Although the tenants in *Brown* were forced to pursue their breach of contract case without possession of the rental property, the court did not analyze why it was appropriate to deny them possession pending resolution of the contract dispute.

In *Winchester Management Corp. v. Staten*,[40] residential tenants who were sued in possession actions for nonpayment of rent claimed that their landlord had failed to provide hot water and air-conditioning. The District of Columbia housing codes required the provision of hot water,[41] but did not explicitly require air conditioning. The lease, however, specifically required the lessor to provide air-conditioning.[42] The court permitted the tenants to raise only the lack of hot water as a defense to the landlord's action.[43] Despite *Javins*, the tenants' obligation to pay rent was in effect held to be independent of the landlord's express agreement to provide air-conditioning.[44]

Read together, *Halsa*, *Winchester*, and *Brown* significantly narrow the impact of *Javins*. Of the four-part *Javins* holding only the two parts implying into residential leases a warranty of habitability—as defined by the housing code—have been left intact. The notion that leases are contracts with

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37. *Id.* at 1172. The tenants also filed an action in a court of general jurisdiction seeking various forms of relief, including a preliminary injunction. The injunction was denied. *Id.* Although it is certainly possible that this suit altered the prospects of the landlord-tenant case, the appellate court specifically noted that equitable defenses such as Brown's were nevertheless properly considered only by a court of general jurisdiction, not by the landlord-tenant court in a summary action for possession. *Id.* at 1173. In a remarkable footnote, the court indicated that the tenants could delay eviction if they claimed legal title, but not if they claimed equitable title. *Id.* at 1173 n.3. Why this should be an important distinction was not discussed. Both Bentham and Field, as leading nineteenth century reformers of law courts, would turn over in their graves. *See* notes 92-93 *infra* and accompanying text.

38. 364 A.2d at 1172.

39. *Id.* at 1173.

40. 361 A.2d 187 (D.C. 1976).

41. *Id.* at 189-90.

42. The trial court in *Winchester* found that the landlords' advertisements for tenants contained promises of air-conditioning and that these promises were part of the leasehold agreement. That part of the trial court's decision was not disturbed on appeal. Winchester Management Corp. v. Staten, No. L 65215-73, slip. op. at 4 (D.C. Super. Ct., Landlord-Tenant Branch, Dec. 6, 1973).

43. 361 A.2d at 187, 189-90, 191.

44. *Id.* at 190-91. Express contract defense cases do not exist in great number. One interesting contrast to *Winchester* is Bullen v. Fellner, 86 Wis. 2d 116, 271 N.W.2d 673 (1978). In *Bullen* the tenants successfully argued that the landlord's breach of a contract to repair housing code violations prevented their eviction. *Id.* at 121, 271 N.W.2d at 675. *But cf.* University Community Properties, Inc. v. Norton, 246 N.W.2d 858 (Minn. 1976) (breach of collective bargaining contract obtained by tenants' union not available defensively in a possession action to those not directly affected by the breach).

mutually dependent covenants has been discarded. The possibility of implying warranties on matters not included in the housing codes has also been eliminated. In practical terms, a summary action for possession of residential rental property can now be defended in the District of Columbia only on the grounds that the housing code has been violated, that the service of process or notice to quit was deficient, or that the action for possession was in retaliation for tenant efforts to enforce rights under housing codes.[45] In traditional legal terms, the possessory and contractual aspects of leaseholds are still separate in all cases except those involving residential tenants living in dwellings with housing code violations.[46] *Javins* has turned out to be a narrow break with old legal theory.

The impact of the *Javins* decision has been limited in the District of Columbia for two reasons. First, the District of Columbia Court Reform and Criminal Procedure Act of 1970 shifted most local disputes from the federal district and circuit courts to the more conservative local District of Columbia courts.[47] The second and far more important reason, however, is that the rules of procedure governing the landlord-tenant court provide that defenses may be raised in possession actions only if the defenses involve a request for "equitable relief related to the premises."[48] *Halsa* and *Winchester* were decided under this rule.[49] The language of the rule is ambiguous. Results contrary to those in *Halsa* and *Winchester* are possible, but not inevitable. The language "related to the premises" could be construed to refer only to those defenses closely connected with the expectations of an average tenant. Implied warranties in a commercial setting, options to renew, and express agreements to provide air-conditioning in a residence are arguably separate and distinct from the basic rental agreement. In addition, enforcement of express contracts historically has been left to courts of law, not equity. Thus, although the language of the *Javins* opinion appeared to relegate the

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45. *See* Robinson v. Diamond Hous. Corp., 463 F.2d 853, 857, 866 (D.C. Cir. 1972) (although landlord withdraws unit from housing market, tenant may assert defense of landlord's retaliatory motive when served with notice to quit); Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968) (landlord may not evict in retaliation for tenant's report of housing code violations to authorities), *cert. denied*, 393 U.S. 1016 (1969).

46. This was explicitly stated in *Winchester*. *See* Winchester Management Corp. v. Staten, 361 A.2d at 190.

47. *See* Pub. L. No. 91-358, §§ 11-721-22, 11-921-23, 84 Stat. 473 (1970).

48. The rule provides as follows:

> In actions in this branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or set-off or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaim, whether based on personal injury or otherwise, may be filed in this branch. This exclusion shall be without prejudice to the prosecution of such claims in other branches of the court.

D.C. SUPER. CT. R., LANDLORD TENANT BRANCH 5(b).

49. Rule 5(b) explicitly applies only to nonpayment cases. *Brown v. Young* involved a holdover tenant. *See* Brown v. Young, 364 A.2d 1171, 1172 (D.C. 1976). The facts of the *Brown* case left the court free to develop a sensible procedural solution to the situation. Instead the court decided the case as if rule 5(b) and contemporary common law embodied the same basic principles. Although the court in *Halsa* did not specifically mention rule 5(b) in its decision, the case clearly was governed by the rule because it was a nonpayment action.

distinction between contract and property to the ash heap, the procedural rules have, in effect, reinvigorated pre-*Javins* principles.[50]

Comparing possession actions with suits for rent highlights the procedural problems of current landlord-tenant law. Although an express agreement to provide air-conditioning in a residence may not be "related to the premises" for purposes of defending a possession action, counterclaims for breach of such a contract may be freely raised in an action for rent brought in a court of general jurisdiction.[51] A tenant, although subject to speedy eviction through a summary dispossess action, may still pursue an affirmative suit in contract in the regular court. The difference between possession and rent cases raising the same substantive issues can only be explained by the special procedural needs of possession cases, not by the historic tension between contract and property law.

The District of Columbia cases have protected the summary nature of possession actions by drawing artificial boundaries around *Javins*. Without saying so, the courts have effectively limited *Javins* to enforcement of housing codes. Although landlord-tenant court may be a viable forum for code enforcement,[52] there are several reasons for concluding that possession courts should not be limited to applying only that aspect of the *Javins* decision. First, the implied warranty opinions usually do not dwell exclusively on the implication of a private remedy from statutory enactments. To the contrary, the post-*Javins* cases have used housing codes as one possible source for defining a judicially created common law remedy. Some cases have gone well beyond the codes in defining the warranty.[53] Second, the early implied warranty opinions focused on the artificiality of separating the obligation to pay rent from other contractual obligations. The amount of rent may, in many cases, reflect the value of services or facilities that are much more luxurious than housing codes require. Although there may be many valid reasons for implying a warranty for the benefit of the poor, those reasons do not compel the conclusion that a contract, whether implied or express, should be unenforceable in possession court. Implication of contracts and availability of a delay in loss of possession pending litigation of a lease dispute are completely different issues; judicial linkage of the two is untenable. Third, multiple litigation may often be a waste of time and effort. In fact, efficiency

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50. There is pre-1970 case law that appears to permit any equitable defense to be raised in a possession action for nonpayment of rent "in order to avoid circuity of action." George Y. Worthington & Son Management Corp. v. Levy, 204 A.2d 334, 335, 336 (D.C. 1964) (trial court had jurisdiction to determine fair monthly rent and whether defendant was in default when defendant raised these claims as defenses to landlord's action for possession).

51. *See* D.C. R. CIV. P. 13. The District of Columbia court rule governing counterclaims is very similar to its federal counterpart. *See* FED. R. CIV. P. 13.

52. It is certainly not the intent of this author to enter into the debate on the utility of housing codes. Others have dealt extensively with this problem. *See* Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Polity*, 80 YALE L.J. 1093 (1971); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 80 YALE L.J. 1093 (1971); Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 83 YALE L.J. 1194 (1973); Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirabilitiy of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976). Nor is it my intention to add to the debate on the impact of the *Javins* defense on housing quality. *See* note 95 *infra* (citing authorities).

53. *See* Timber Ridge Tounhouse v. Dietz, 133 N.J. Super. 577, 583, 338 A.2d 21, 24 (Super. Ct. Law Div. 1975) (mud and water from retaining wall construction rendered patio unusable).

issues are likely to be more prominient when middle-class tenants are sued for possession. Such tenants are more likely to know their legal rights and have legal counsel. To place such tenants on a judicial treadmill, in effect because they have money, makes little sense. The New Jersey cases are particularly good vehicles for displaying these points.

B. NEW JERSEY

The New Jersey cases create a set of procedural issues similar to those raised in the District of Columbia. The string of well known reform decisions—*Reste Realty Corp. v. Cooper*,[54] *Marini v. Ireland*,[55] and *Academy Spires, Inc. v. Brown*[56]—accomplished in New Jersey what *Javins* accomplished in the District of Columbia. The *Reste-Marini-Academy Spires* path, however, has been rocky at best. The New Jersey summary dispossess statutes provide that only "jurisdiction" issues may be appealed in possession cases[57] and that jurisdiction lies in landlord-tenant courts for actions brought after a "default in the payment of rent."[58] In *Marini,* the New Jersey Supreme Court construed the term "default" to include money due, unpaid, *and owing*, not just due and unpaid.[59] It further defined "jurisdiction" for appellate purposes to include defensive allegations of breach of an implied warranty of habitability and found that all rent was due *and owing* only if the premises were habitable and fit for living.[60] Although these results are laudable, this statutory construction is defensible only if the modern needs of tenants justify ignoring the original purposes of the summary dispossess statutes.[61]

Subsequent opinions have revealed significant difficulties with the *Reste-Marini-Academy Spires* line of cases. Despite an attempt by the New Jersey Supreme Court to define explicitly the scope of the implied warranty,[62] judges

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54. 53 N.J. 444, 461, 251 A.2d 268, 276-77 (1969) (tenant's right to vacate may stem from breach of covenant of quiet enjoyment, material failure of consideration or breach of implied warranty against latent defects).

55. 56 N.J. 130, 140, 144, 146, 265 A.2d 526, 531, 534, 535 (1970). *Marini* stands for three propositions: A tenant may raise equitable as well as legal defenses asserting payment or absolution from payment in whole or in part; there is an implied covenant of habitability in residential leases; and a tenant may make vital repairs and deduct the cost from future rents if the landlord fails to make repairs.

56. 111 N.J. Super. 477, 484, 268 A.2d 556, 560 (Essex County Ct. 1970) (apartment building tenant may receive abatement of rent due to landlord's breach of implied warranty of habitability without moving out of or repairing premises); *see* Berzito v. Gambino, 63 N.J. 460, 469, 308 A.2d 17, 21 (1973) (covenant to pay rent and covenant to maintain premises in habitable condition are mutually dependent).

57. N.J. STAT. ANN. § 2A:18-59 (West 1952).

58. N.J. STAT. ANN. § 2A:18-53(b) (West Supp. 1978-79).

59. *See* Marini v. Ireland, 56 N.J. 130, 139, 265 A.2d 526, 531 (1970).

60. *Id.* at 140, 144, 265 A.2d at 531, 533.

61. *See* notes 79-84 *infra* and accompanying text (discussing purpose of summary dispossess statutes).

62. *See* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973). In *Berzito*, the New Jersey Supreme Court, relying on an Iowa case, found the following considerations pertinent in determining if a breach of the implied warranty of habitability existed:

> 1. Has there been a violation of any applicable housing code or building or sanitary regulations?
> 2. Is the nature of the deficiency or defect such as to affect a vital facility?
> 3. What is its potential or actual effect upon safety and sanitation?
> 4. For what length of time has it persisted?

are still struggling with the propriety of using possession courts as a forum for litigating all issues surrounding a landlord-tenant relationship. This difficulty does not arise simply because some tenant defenses are on the border of warranty law. Express contract claims also have been difficult for the New Jersey courts to resolve.

In *Timber Ridge Town House v. Dietz*,[63] for example, tenants in a townhouse withheld rent because the promised community swimming pool and playground had not been completed, and their patio and courtyard were surrounded by mud running off from construction work on a nearby retaining wall.[64] The court held that the mud surrounding the house was a serious defect and that the tenants were "deprived of a substantial attribute" of the rented premises, justifying use of the implied warranty defense in a possession case.[65] Despite finding an express contract to provide the swimming pool and playground, however, the court declined to award a rent abatement for deprivation of the use of the pool and playground in the possession action.[66] The tenants were forced to seek a contractual remedy in the regular courts.[67] Why relief for breach of an implied contract should be available, while relief for breach of an express contract should not, was never carefully discussed. From a purely contractual perspective, the difference is obtuse. It may, in fact, be more important to permit defenses based on actual rather than constructive agreements. If, as in *Dietz*, the tenants have agreed to high rental fees,[68] why should they not be entitled to all the possessory rights for which they have paid? To the extent that the implied warranty theory connotes a general coalescence of contract and property theory in landlord-tenant law, it is anomalous to maintain separate forums for express contract and possession cases.

Two plausible explanations for the *Timber Ridge* outcome appear in the opinion. First, it is arguable that swimming pools and playgrounds are factually distinguishable from mud, even if express and implied contract defenses are, as a procedural matter, similarly treated. The swimming pool and playground were physically distant from the residence, not mentioned in the housing codes, and unrelated to habitability. The contract to provide these facilities was arguably separate from the leasehold arrangements. The mud, on the other hand, surrounded the tenants' house, made ingress and egress difficult, destroyed the use of the patio, and severely affected only this

5. What is the age of the structure?
6. What is the amount of the rent?
7. Can the tenant be said to have waived the defect or be estopped from complaining?
8. Was the tenant in any way responsible for the defective condition?

Id. at 470, 308 A.2d at 22 (citing Mease v. Fox, 200 N.W.2d 791, 796-97 (Iowa 1973)). As the text demonstrates, this list is not very helpful. For another "fringe" implied warranty case in which tenants claimed noise from a neighbor's apartment created habitability problems, see Millbridge Apartments v. Linden, 151 N.J. Super. 168, 376 A.2d 611 (Camden County Ct. 1971). The court agreed that repeated loud noise that could be stopped by the landlord could be a defense to a dispossess action, but found that the defendants in this action were not entitled to an abatement. *Id.* at 173, 376 A.2d at 614.

63. 133 N.J. Super. 577, 338 A.2d 21 (Super. Ct. Law Div. 1975).
64. *Id.* at 579, 338 A.2d at 22.
65. *Id.* at 580-81, 338 A.2d at 22-23.
66. *Id.* at 585, 338 A.2d at 25.
67. *Id.* at 584-86, 338 A.2d at 25.
68. *Id.* at 583, 584, 338 A.2d at 24.

particular residence.[69] The court found that it caused "very special and individualized harm . . . with respect to the exterior habitability of . . . [the tenants'] premises."[70] Second, the court noted that "[w]here the living vitality of the rented facility and its immediate environs is not specially affected by the failure to perform, the court believes tenants' remedy, individually or in combination with other similarly aggrieved tenants, would be best handled in a more conventional legal proceeding."[71] It deemed the possession action to be an inappropriate forum for the resolution of disputes about express promises to provide "social amenities."[72]

The court's explanations are unacceptable. If, as the court admitted, the promise of a swimming pool and playground was a "substantial inducement offered by the landlord to procure the rental agreement,"[73] why should the portion of the rent attributable to these facilities be "due and owing" under the default provisions of the New Jersey summary dispossess statutes?[74] If the procedural statutes are to be rationally construed, a landlord's breach of an implied warranty of habitability may not be the only logical basis for defending a possession action. In *Dietz*, the court in effect decided that the tenants had taken the wrong procedural path; rather than raising as a defense in the summary dispossess action the lessor's failure to provide a playground and swimming pool, the tenants should have filed a separate contract action and then moved to transfer the landlord's possession action from landlord-tenant court to a regular civil forum and to consolidate the possession and contract actions.[75] Because the *Dietz* case *was* successfully transferred,[76] there is little reason to believe that a consolidation motion, if made, would have been denied. Only prejudice to the landlord would have justified a refusal to

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69. *Id.* at 580, 338 A.2d at 22-23.

70. *Id.* at 585, 338 A.2d at 25.

71. *Id.*

72. *Id.*

73. *Id.* at 584, 338 A.2d at 25.

74. An interesting comparison to *Timber Ridge* is provided by University Court v. Mahasin, 400 A.2d 133 (N.J. Super. Ct. App. Div. 1979) (per curiam). In *University Court* the court affirmed a decision holding that when the lease expressly provides for it, a landlord can demand as part of rent "due and owing" a reasonable counsel fee for bringing a dispossess action. *Id.* at 134. If this result is correct, why should a tenant be forbidden to claim that rent is not due and owing if the landlord breaches an express contract to provide a service?

75. *See* N.J. STAT. ANN. § 2A:18-60 (West 1952) (New Jersey transfer statute). For other interesting transfer cases, see Shell Oil Co. v. Marinello, 63 N.J. 402, 405, 307 A.2d 598, 600 (1973) (landlord's dispossess action consolidated with tenant's suit for injunction and reformation of franchise agreement and transferred to superior court), *cert. denied*, 415 U.S. 920 (1974); Morrocco v. Felton, 112 N.J. Super. 226, 233, 270 A.2d 739, 742 (Super. Ct. Law Div. 1970) (when court must determine legal rights of parties in important, undefined area of law, removal from county district court to superior court warranted); Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 403, 404, 261 A.2d 413, 417 (Super. Ct. Law Div. 1970) (because county district court had jurisdiction to consider lack of habitability in summary action for possession and transfer sought to avoid rule forbidding joinder, counterclaim, or third-party complaint in such a summary action, transfer to superior court not merited). *Academy Spires v. Jones* involved the same dispute considered in *Academy Spires v. Brown*. *See* Academy Spires v. Brown, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (Essex County Ct. 1970) (landlord failed to provide lighting for parking lot in violation of local housing ordinance, and failed to provide essential service, rendering apartment uninhabitable). The court in *Jones* declined transfer on the ground that landlord-tenant court could consider the equitable defenses being raised. *But see* Morrocco v. Felton, 112 N.J. Super. at 233, 270 A.2d at 742-43 (*Jones* must be reexamined in light of *Marini v. Ireland*).

76. *See* Timber Ridge Town House v. Dietz, 133 N.J. Super. at 578-79, 338 A.2d at 22.

consolidate. Furthermore, because the defense stemming from the run-off of mud was already available to the Dietzs in the transferee court, good reasons existed to try all issues at the same time. The swimming pool defense involved many similar facts, required the production of no additional witnesses, and would have added little time to the trial. The procedural inefficiencies caused by the court's decision, together with the anomalous independence of the express contractual provisions of a lease from the obligation to pay rent, strongly indicate the need for substantial procedural changes in the New Jersey summary dispossess statutes.

II. THE DISPOSSESS FORUM AND PRELIMINARY INJUNCTION LAW

A. THE ROLE OF SUMMARY DISPOSSESS STATUTES

It is ironic that modern landlord-tenant literature continues to focus on the contract-property tension in the law of leases. As Professor Siegel points out, the "reintroduction" of contract principles into lease analysis may be causing nothing more than the demise of contract principles introduced into landlord-tenant law in the last century.[77] But the irony runs deeper; concentration on contract or property law misses the primary problem. In most jurisdictions, neither the post-Civil War revolution in civil procedure under the Field Codes nor the post-depression reforms under state analogs to the Federal Rules of Civil Procedure significantly altered the operation of summary eviction courts. As the District of Columbia and New Jersey cases demonstrate, courts have been forced to run an obstacle course created by local summary eviction laws when attempting to deal sensibly with landlord-tenant cases.[78]

Summary dispossess statutes were passed to provide landlords with a speedy method by which to recover the possession of property.[79] Self-help reentry, distress, and ejectment were thought to provide inadequate relief for early nineteenth century landlords who sought possession from nonpaying or holdover tenants. Although landlords were free to evict tenants through self-

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77. *See* Siegel, *supra* note 6, at 650.

78. *See* notes 26-76 *supra* and accompanying text. Illinois provides another perfect example of this problem. In that state, only defenses "germane to the distinctive purpose" of the summary dispossess statue may be raised. *See* ILL. ANN. STAT. ch. 57, § 5 (Smith-Hurd 1972). The Illinois state courts have developed some interesting constructions of this phrase. *See* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 358, 280 N.E.2d 208, 213 (1972) (whether rent is due is not only germane, but decisive when asserted right to possession based on nonpayment of rent); Rosewood Corp. v. Fisher, 46 Ill. 2d 249, 256, 257, 263 N.E.2d 833, 838 (1970) (defenses based on validity of contracts for sale of land germane to distinctive purpose of forcible entry and detainer actions; equitable defenses may be pleaded), *appeal dismissed*, 401 U.S. 928 (1971). A lower Illinois court has found that an express covenant defense was germane to the purpose of the summary dispossess statute. *See* South Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 94, 361 N.E.2d 795, 798 (1977). The state supreme court, however, has not yet decided this issue.

79. Source material on summary dispossess statutes and related matters may be found in 2 R. POWELL, *supra* note 10, ¶ 250, at 372.126-.128; J. TAYLOR, *supra* note 7, at 418-54 (remedy of distress for rent), 515-52 (remedies of ejectment and summary proceedings); and 2 H. TIFFANY, *supra* note 13, §§ 272-89, at 1716-1817. *Cf.* McGann v. La Brecque Co., 91 N.J. Eq. 307, 308-11, 109 A. 501, 501-02 (1920) (history of adoption of New Jersey summary dispossess statute). *See generally* Comment, *Defects in the Current Forcible Entry and Detainer Laws of the United States and England*, 25 U.C.L.A. L. REV. 1067 (1978) (discussing history and drawbacks of present forcible entry and detainer laws).

help action, use of force sometimes led to damage suits and restitution of the premises to the evicted tenant.[80] There was thus some financial and physical risk associated with the use of the remedy.[81] Although a simple lockout would not violate the forcible entry and detainer statutes, more strenuous efforts might do so. The remedy of distress, by which the landlord seized from the rented premises the personal property of the tenant, provided some monetary relief for nonpayment of rent, but did not terminate possession.[82] Moreover, because the remedy could produce property less valuable than the rent due or fail to convince the tenant to pay rent on time, the landlord could be left with a nonpaying tenant still in possession. Ejectment also provided little effective relief because it was a slow, technical process. For example, common law ejectment generally was available against a tenant who breached a rental covenant only if the lease provided for a right of reentry.[83] Without such a reservation, which was rarely found in oral leases, the landlord was required to wait until the conclusion of the term to obtain possession.

Summary dispossess statutes filled these gaps by guaranteeing a speedy judicial resolution of possession disputes and by diminishing the need to rely on self-help procedures for relief. Although the statutes often provided for a separate cause of action for damages against a landlord who wrongfully brought a dispossess action,[84] the likelihood of a tenant obtaining such an award was significantly reduced by the early involvement of the court in the summary dispossess process.

Speedy resolution of possessory disputes is still often in the landlord's best interest. The recent introduction of the implied warranty and other defenses into the traditional action for possession may delay significantly the final resolution of a dispute. These developments have caused a significant conflict between the landlord's need for rental income and the tenant's desire for a forum to resolve disputes before loss of possession. To date, courts have had difficulty defining situations in which a tenant should be able to delay eviction by introducing new matter into the proceeding.

B. EQUITABLE INTERVENTION IN SUMMARY DISPOSSESS PROCEEDINGS

A partial answer to the difficulties present in contemporary landlord-tenant proceedings may lie in injunction cases decided in the late nineteenth and early twentieth centuries. Although the purpose of the summary dispossess statutes was to provide a speedy possession remedy to lessors, a number of equity courts intervened in dispossess actions to provide tenants

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80. *See* N.J. STAT. ANN. 2A:39-1 (West Supp. 1979) (prohibiting entry into residences unless made pursuant to legal process); *id.* § 2A:39-8 (West Supp. 1979) (plaintiff recovering judgment under forcible entry and detainer chapter entitled to damages and possession of the real property); 23 LEWINE, NEW JERSEY PRACTICE § 2481, at 230 (1962)(review of statutes giving remedy against person entering and detaining real estate by force).

81. *See* Thiel v. Bull's Ferry Land Co., 58 N.J.L. 212, 215, 33 A. 281, 282 (1895) (person in peaceable occupation of realty may not be forcibly evicted even if lease by which occupier held land was terminated).

82. *See* N.J. STAT. ANN. § 2A:33-1 (West Supp. 1979) (authorizing reasonable distraint except in cases involving residential tenants). The statute authorizing distress for rents by landlords was found unconstitutional by an intermediate New Jersey court in Van Ness Indus. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 515, 324 A.2d 102, 106 (Super. Ct. Ch. Div. 1974).

83. *See* J. TAYLOR, *supra* note 7, at 517.

84. *See* N.J. STAT. ANN. § 2A:18-59 (West 1952 & Supp. 1978-79).

with a forum for various equitable claims. Some jurisdictions permitted a party in possession claiming title to the property to shift his dispute to courts of equity without losing possession prior to judgment.[85] In many states, title disputes actually became a statutory exception to the jurisdiction of summary dispossess courts. In addition, some courts of equity asserted the right to delay the landlord's recovery of possession when tenants claimed fraud,[86] breach of lease renewal clauses,[87] inequitable forfeitures,[88] or estoppel.[89]

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85. Generally, having once recognized their landlord's title by agreeing to the lease, tenants were estopped from pleading in any action at law or equity that they had title superior to that of their landlord. *See* W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY *24; J. TAYLOR, *supra* note 7, at 521-22; 2 H. TIFFANY, *supra* note 13, § 277, at 1778. A tenant could plead his landlord's title after possession had begun, however, by alleging that the petitioner in the action was not, in fact, the landlord. *See* 2 H. TIFFANY, *supra* note 13, § 277, at 1779. In addition, by the early twentieth century many jurisdictions had adopted statutes either transferring title dispute litigation to courts of general jurisdiction or limiting summary dispossess courts to disputes between landlords and tenants. *See* D.C. CODE ENCYCL. § 45-914 (West 1968); N.J. STAT. ANN. § 2A:18-52 (West Supp. 1978-79). Some case law also developed in support of the notion that summary dispossess or ejectment actions could be delayed by possessor's claims of equitable title. *See* Boole v. Johnson, 11 Del. Ch. 364, 366, 102 A. 782, 783 (1917) (equity will interfere in ejectment suit when equitable title is set up as a defense against holder of legal title); Porter v. Meigs, 74 So. 2d 82, 85 (Fla. 1954) (determination of which party has paramount title and right of possession can be fairly determined in ejectment action); Crawford v. Smith, 151 Ga. 18, 20, 105 S.E. 477, 478 (1921) (defendant in ejectment action may obtain equitable relief when title to land transferred by plaintiff to his wife in colorable transaction); Lott v. Lott, 146 Mich. 580, 583, 109 N.W. 1126, 1127 (1906) (in absence of homestead interest, defendant in ejectment suit had legal title to land and must prevail in ejectment action); Mathis v. Campbell, 117 S.W.2d 764, 767 (Tenn. App. 1938) (chancery court had jurisdiction under ejectment bill to inquire into and settle title); *cf.* Heller v. Jentzsch, 303 Mo. 440, 440, 260 S.W. 979, 979 (1924) (unlawful detainer action consolidated with suit seeking specific performance of contract to convey land and injunction against prosecution of unlawful detainer action).

86. *See* 2 H. TIFFANY, *supra* note 13, § 288, at 1814-15 & n.586 and sources cited therein.

87. *See* Winestine v. Rose Cloak & Suit Co., 93 Conn. 633, 638-39, 107 A. 500, 501-02 (1919) (summary process may be enjoined when landlord has attempted to prevent tenant from exercising right of renewal and tenant has expended large sums believing landlord would not prevent renewal); Shaw Bros. Oil Co. v. Parrish, 99 So. 2d 610, 613 (Fla. 1958) (injunction against eviction proceedings proper when lessee relied on renewal covenant and could not be adequately compensated except by renewal of the lease); Hobbs v. Chamberlain, 55 Fla. 661, 661, 664, 45 So. 988, 989, 990 (1908) (reversing on procedural grounds dissolution of injunction restraining summary proceedings against tenants who had expended large amounts of money in reliance on renewal right provided for in lease); *cf.* Sambataro v. Caffo, 20 F.2d 276, 277 (D.C. Cir. 1927) (equity court may grant specific performance requiring lessor to execute lease renewal and need not defer action until lessor has brought ejectment action); City Garage & Sales Co. v. Ballenger, 214 Ala. 516, 518, 108 So. 257, 259 (1926) (lessee entitled to specific performance of renewal agreement and incident to this is entitled to enjoin lessor's unlawful detainer suit); Blount v. Connolly, 110 Mo. App. 603, 608, 85 S.W. 605, 606 (1905) (bill of equity to compel landlords to perform renewal covenant and enjoin prosecution of unlawful detainer suit properly brought). *See also* Goldberg's Corp. v. Goldberg Realty & Inv. Co., 134 N.J. Eq. 415, 422, 426, 36 A.2d 122, 126, 128 (1944) (renewal right does not vest until lessee complies with lease conditions; here lessee rejected option; preliminary injunction modified to allow landlords to institute action for possession). There are also cases holding that because the agreement to renew the lease could be raised as a defense in the possession action, the tenants had no standing to bring an equitable action. *See* Donart v. Stewart, 61 Or. 396, 398, 122 P. 763, 764 (1912) (forcible entry and detainer action); Bard v. Jones, 96 Ill. App. 370, 373 (1901) (forcible detainer action).

88. Bartelstein v. Goodman, 340 Ill. App. 51, 57, 90 N.E.2d 796, 799 (1950) (plaintiff could invoke jurisdiction of court of equity, rather than assert equitable defense in forcible detainer action, to prevent forfeiture of lease); *see* Westfield Airport, Inc. v. Middlesex-Union Airport Co., 140 N.J. Eq. 263, 269, 54 A.2d 204, 208 (1947) (injunction to restrain prosecution of ejectment action will be granted when equitable defense or right such as forfeiture is involved; because agreement here creating limitation of term of lease is not an equitable defense or right, injunction denied), *aff'd mem.*, 141 N.J. Eq. 365, 57 A.2d 383 (1948).

89. *See* First Lutheran Church v. Rooks Creek Evangelical Lutheran Church, 316 Ill. 196, 202, 147

Although a tenant could not routinely delay a dispossess action by requesting a preliminary injunction, the summary dispossess forum was not treated as a completely insular institution. When a tenant met the requirements for obtaining a preliminary injunction against the landlord's eviction efforts, courts would occasionally act to ameliorate the harshness of the speedy eviction process.[90] Even today, courts may use their equitable powers to prohibit the landlord's use of the summary dispossess remedy.[91]

The view that the nineteenth century tenant was unable to delay eviction because of the denial of most defenses in summary dispossess cases must therefore be colored by the willingness of some equity courts to intervene. The recent introduction of habitability defenses into landlord-tenant court serves a function similar to that performed by the old equity law. Nonetheless, equitable defenses other than the narrow claims permitted by cases such as *Javins* are rejected without much thought,[92] and tenants' requests for damages or injunctive relief are often relegated to other forums. The resulting paper chase may be a lawyer's delight, but it is hardly an efficient method of resolving possession disputes. The artificial procedural boundaries of present law should be abolished, and replaced with a general rule permitting tenants to delay eviction when they are eligible for the equivalent of preliminary injunctive relief.

In essence, this reform would demand no greater change in landlord-tenant court procedure than was effected in the nineteenth century courts of law through the efforts of such reformers as Bentham and Field.[93] Although the merger of law and equity ended most occasions for the issuance of injunctions against proceedings at law, landlord-tenant actions still present forum conflicts. The logical response to this procedural conflict is to remove the artificial limitations on the types of issues that possession courts may hear.[94]

N.E. 53, 56 (1925) (plaintiff in ejectment suit estopped from any claim to recover premises; ejectment suit should be enjoined until rights of plaintiff in equitable action determined); Westfield Airport, Inc. v. Middlesex-Union Airport Co., Inc., 140 N.J. Eq. 263, 269, 54 A.2d 204, 208 (1947) (only when equitable right or defense such as estoppel is involved and there is no adequate remedy at law will court of equity restrain prosecution of ejectment action), *aff'd mem.*, 141 N.J. Eq. 365, 57 A.2d 383 (1948).

90. The history of equitable intervention in New York state is nicely summarized in Horton v. Roy, 116 Misc. 707, 709-10, 190 N.Y.S. 454, 455-56 (Sup. Ct. 1921). The *Horton* court also noted the general unwillingness of equity to act when the remedy at law was adequate. *See id.* at 710-11, 190 N.Y.S. at 456-57; *accord, e.g.*, Alpert v. Peloquin, 96 Conn. 626, 630, 115 A. 81, 82 (1921); City of Grand Rapids v. Central Land Co., 294 Mich. 103, 112, 292 N.W. 579, 583 (1940); Crest Drug Store, Inc. v. Levine, 142 N.J. Eq. 652, 656, 61 A.2d 190, 192 (1948).

91. *See* Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598, 600 (1973) (landlord's summary dispossess action consolidated with tenant's chancery suit to enjoin landlord from terminating lease and dealer agreement), *cert. denied*, 415 U.S. 920 (1974).

92. *See* notes 26-76 *supra* and accompanying text (discussing District of Columbia and New Jersey cases limiting impact of early landlord-tenant reform decisions).

93. A summary of the English reforms may be found in 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 402-17 (1914). The American analog is described in L. FRIEDMAN, A HISTORY OF AMERICAN LAW 340-58 (1973).

94. The creation of unified housing courts in some jurisdictions has resulted in some progress in the reform of eviction procedures. Some of these new courts have virtually complete jurisdictional and procedural authority in landlord-tenant disputes. *See* ABA SPECIAL COMMISSION ON HOUSING & URBAN DEVELOPMENT LAW, URBAN HOUSING COURTS & LANDLORD-TENANT JUSTICE: NATIONAL MODELS AND EXPERIENCE (1977); Nebron & Ides, *Landlord Tenant Court in Los Angeles: Restructuring the Justice System*, 11 LOY. L.A. L. REV. 538 (1978); Comment, *Housing Abandonment and the Courts: An Innovative Approach to Housing Court Reform*, 21 ST. LOUIS L.J. 795 (1978). The growing trend to create housing courts with complete jurisdictional and procedural powers confirms the validity of the thesis of this article.

By treating these courts as courts of general jurisdiction, a tenant would not need to file a separate case in another forum and then file motions to preliminarily enjoin the landlord's action and to consolidate it with his newly filed case in the possession action. Instead, the tenant would simply file an answer and move to preserve possession pending final determination of the case. At the motion hearing the relation between possession and the tenant's defenses would be analyzed, and the need for speedy resolution would be investigated.

C. THE LESSEE'S RIGHT TO RETAIN POSSESSION PENDING RESOLUTION OF AN ACTION FOR POSSESSION

The habitability defenses now available in most landlord-tenant courts do not always prevent eviction pending resolution of the litigation.[95] Appellate tribunals routinely have suggested that summary dispossess courts may condition a delay of the eviction process on the deposit of rents into the court.[96] This suggestion has generally been made as if the notion of rent deposits was an obvious consequence of *Javins*. Only the courts in the District of Columbia have analyzed the problem with much care. Beginning with *Bell v. Tsintolas Realty Co.*,[97] the District of Columbia Circuit has taken the unique position that landlords should not expect to obtain routinely the benefits of protective orders, which is the local term for deposit decrees, during the pendency of dispossess actions. The court in *Tsintolas* noted that civil litigants rarely obtain judicial intervention designed to guarantee the solvency of their opposition[98] and that protective orders may indirectly restrict the tenant's right to proceed in forma pauperis.[99] Despite the delays in the summary process caused by tenants' expanded rights,[100] those considerations justified protective orders only when the landlord showed "obvious need."[101]

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95. Tenants, of course, often fail to raise a defense for reasons that include tenants' ignorance and their lack of legal counsel. *See* Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 J.L. REF. 8, 42-45, 62 (1973); Note, *The Great* Green *Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 739-40, 776 (1976). *But see* Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 57 (1978) (although tenants have little specific knowledge of the doctrine of implied warranty of habitability, most realize they may withhold rent when landlord fails to maintain rental property). This article is concerned with those situations in which a tenant does raise a defense.

96. *See* Javins v. First Nat'l Realty, 428 F.2d 1071, 1083 n.67 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974); Fritz v. Warthen, 298 Minn. 54, 61, 213 N.W.2d 339, 343 (1973); Marini v. Ireland, 56 N.J. 130, 147, 265 A.2d 526, 535 (1970).

97. 430 F.2d 474 (D.C. Cir. 1970); *see* Blanks v. Fowler, 459 F.2d 1282, 1283 (D.C. Cir. 1971) (upholding court order that tenant make monthly deposits into court pending trial); Cooks v. Fowler, 459 F.2d 1269, 1277 (D.C. Cir. 1971) (when landlord entitled to definite part of in-court fund and demonstrates dire need for it, court may, in exercise of its equitable powers, disburse deposited fund pendente lite).

98. Bell v. Tsintolas Realty Co., 430 F.2d at 479.

99. *Id.* at 479-80, 481.

100. *Id.* at 481-82.

101. *Id.* at 483-84. The court also held that a protective order may only require the tenant to pay *future* rent into the court, not amounts alleged to be due prior to the filing of the law suit. *Id.* at 483. This result, the court noted, was dictated by local law. Under District of Columbia law a landlord may not routinely

Taking some liberty with the actual result, it is fair to say that the *Tsintolas* opinion is in the mainstream of jurisprudence in which the litigants' needs are carefully balanced before a preliminary injunction is issued or a bond is required as a condition to preliminary equitable relief.[102] *Tsintolas* could be both a possible solution to the problems caused landlords by delays in summary dispossess proceedings and an indication that any attempt to move possession actions into regular civil forums will raise a new series of questions about the law of leases. If there is substance to my suggestion that a wide variety of defenses and counterclaims should be routinely pleadable in possession actions, future courts must focus on when eviction may be delayed and what security must be posted to obtain the delay.

Title disputes[103] provide a convenient arena in which to analyze my conclusions that the substantive nature of the dispute before a possession court should not govern the pleading process and that summary possession court judges should decide at an early stage of the litigation the circumstances under which a possessor may remain on the premises until judgment.[104] In many jurisdictions, a tenant alleging title to the leased premises may often avoid immediate eviction by transforming the proceeding into the equivalent of an action to quiet title. As previously mentioned, a number of early twentieth century courts and legislatures concluded that summary dispossession of a tenant claiming title was inappropriate. It could be just as easily argued, however, that the landlord who is claiming the reversionary interest is entitled to access to the property on breach of the lease. Similarly, one could contend either that a *Tsintolas* protective order is inappropriate when a tenant claims there is no obligation to pay rent, or that a rent deposit is necessary to secure the rights of the reversionary claimant.

These conflicting views may best be resolved by invoking the procedural norm[105] that the order in which the pleadings are filed should not determine

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merge rent and possession actions. *Id.* Service of process rules are more stringent in rent cases than in pure possession cases. *Id.* at 477. The court's rationale is weak; if the court wants to avoid judicial bill collecting in circumstances in which procedural obstacles preclude the merger of rent and possession cases, why does it require rent deposits at all? Why should a landlord be forced to try a possession action involving a habitability issue only to obtain possession later because the tenant is unable to pay even an abated rent? If the rent has been withheld for a long period of time without the landlord taking any action, access to a protective order arguably has been waived. If the rent is recently due, however, why not compel the tenant to deposit some of it?

102. *Cf. id.* at 484-85 (discussing considerations trial court must weigh in determining if and to what degree deposit will be required). The best recent article on preliminary injunctions is Leubsdorf, *The Standard For Preliminary Injunctions,* 91 HARV. L. REV. 525 (1978). For discussion of bonds see Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?,* 52 N.C. L. REV. 1091 (1974) and Note, *Interlocutory Injunctions and the Injunction Bond,* 73 HARV. L. REV. 333 (1959).

103. *See* note 85 *supra* and accompanying text.

104. Security may also pose a problem if the tenant wishes to retain possession pending appeal. Bond statutes requiring the posting on appeal of double the rent value of the premises have been held unconstitutional. *See* Lindsey v. Normet, 405 U.S. 56, 79 (1972). More rational security systems, however, may survive constitutional challenge. The appellate security system must also take into account the outcome of the trial court process. If, for example, the tenant won an abatement below, the court should require deposit of only the abated rent. This is the tenor of the District of Columbia cases. *See* Cooks v. Fowler, 459 F.2d 1269, 1273-75 (D.C. Cir. 1971) (protective order that requires tenant to deposit more than landlord could claim is unsupportable; deposit less than rent due desirable when tenant makes very strong showing dwelling is in violation of housing regulation norms).

105. It is certainly true that the order in which pleadings are filed may have an impact on the outcome of

the substantive outcome of the case. Both parties, knowing of the potential title claim, could file actions to quiet title. Similarly, property relationships during the pendency of a landlord-tenant proceeding should be the same whether a landlord's action for possession or a tenant's suit for breach of contract to provide an air-conditioner, for example, is filed first. This simple observation is a natural consequence of the position that possession courts be absorbed into contemporary civil forums. It is fair to suggest, however, that today these two cases might be handled differently in many jurisdictions. Although it is unlikely that the tenant suing first on the air-conditioning contract would lose possession before judgment, a landlord winning the race to the courthouse may well gain possession summarily.[106]

Resolution of the interim procedural battles requires use of rules other than those applicable to the game of courthouse racing. Preliminary injunction law provides a useful, if not compelling, analogy. Professor Leubsdorf suggests that "[t]he danger of incorrect preliminary assessment is the key to the analysis of interlocutory relief."[107] In particular, it is the "harm [from an interim order] that final relief cannot redress"[108] that is key. In the title cases landlords want both title to their reversion and rent for the periods of occupancy. If the possessors may continue their occupancy during the proceedings without paying rent into the court, the landlords may lose their interim rent and the value of its use as a result of the litigation even if they eventually win their cases. The tenants, on the other hand, want title. If the tenants lose possession during the litigation but later prevail on the title issue, they will lose the market value of possession and incur moving or other consequential costs. Both the landlords' and the tenants' potential costs can be significantly minimized by allowing the tenants to stay in possession under a protective order with the deposited money drawing interest. Another course of action should be taken only if the likelihood of one side prevailing on the merits is high.[109]

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a case. For example, the party filing a complaint often has a great deal of discretion in picking a forum. The substantive outcome of a case, however, should not turn on the pleading system. Much of civil procedure law is devoted to protecting the party responding to a complaint from loss simply because of his status as a defendant. Although there are certainly limits on the degree to which a defendant may expand the scope of any particular litigation, there is general agreement that all matters arising out of the same set of facts should be litigated in one place.

106. A landlord suing first for possession would have the advantage of the summary dispossess forum. Speedy eviction is the norm unless the tenant can plead a *Javins* defense. A tenant suing in contract before his landlord takes any legal action, however, can use two tactics to avoid loss of possession if the landlord subsequently files an action in landlord-tenant court: First, the tenant can plead that the eviction action was retaliatory and ask for a delay in the possession case; second, he or she can simply ask the court of general jurisdiction trying the contract case to accept a rent deposit and request that the court merge the possession action with the contract case. As a general proposition, rent deposits should be appropriate no matter who sues first, because in either case a certain portion of rent will usually be in dispute.

107. Leubsdorf, *supra* note 102, at 541.

108. *Id.*

109. Most possession disputes involve only two parties, the lessor and the lessee. Occasionally, as in *Brown v. Young*, which was discussed earlier in this Note, the possessory dispute involves three parties, the original lessor, the lessee, and the purchaser of the reversionary interest. Cases such as *Brown* may not be any more difficult to resolve than a *Javins* dispute. The purchaser and the party in possession will often be the only vitally interested parties. Only if the purchase agreement terminates because of an inability to remove the party in possession is the lessor interested in the interim outcome of the possession dispute. But the mere fact that three parties may be involved in the interim battle does not negate my basic thesis. If

The interim outcome of title cases can be generalized. Requiring the tenant to abide by a protective order while maintaining possession best minimizes the risk of an erroneous interim judgment in most closely contested cases. It does not necessarily follow from this conclusion, however, that the decision in *Bell v. Tsintolas Realty Co.* was totally incorrect. Because serious housing code violations are easy to prove, even as a preliminary matter, by reference to such materials as inspection reports and photographs, the probability of a tenant prevailing on the merits of a *Javins* defense may be so high that a protective order requiring payment of the full contractual rent would significantly alter the risks of loss associated with an erroneous interim decision. The appropriate result, therefore, is somewhere between the *Tsintolas* decision and current procedure in most other jurisdictions. At least for cases in which the tenant raises a *Javins* defense, the courts should not presume either that a protective order is inappropriate or that the tenant should deposit the full contractual rent with the court.[110] Instead, to minimize the harm from an interim order that a final order could not redress, the court must make an interim decision on the probable amount of any rent abatement likely to result from the proceeding.

CONCLUSION

The recent landlord tenant reform movement has left a remarkable legacy. Landlord-tenant court is now a significantly different forum for many contemporary tenants than it was for their nineteenth century counterparts. The rapidity of these changes, however, has left behind a rigid and untenable procedural structure incapable of properly applying the substantive reforms. Courts and legislatures now preoccupied with condominium conversion moratoria and rent controls should not permit the almost universal acceptance of implied warranty theory to obscure the need for further action. Without change in the procedural form of possession actions, the potential of *Javins* and its progeny will remain unfulfilled.

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anything, it strengthens it. The interim possessory arrangements in a three party dispute should not be resolved by reference to the limitations on defenses imposed by rule 5(b) of the Landlord-Tenant Branch of the District of Columbia Superior Court. The paper chase run by the tenants in *Brown*, *see* note 37 *supra*, simply confirms the lack of logic in the present system. Rather, the courts should attempt to measure the potential loss from an erroneous interim decision in determining who should gain possession pending resolution of the dispute. The likelihood that the purchaser has made financial arrangements for buying the property significantly complicates the judgment to be made. Nevertheless, attempting to minimize harm makes much more sense than a knee-jerk reaction to eject the party in possession.

110. In *Bell v. Tsintolas Realty Co.* the court indicated that payment of the full contractual rent should be the norm when the court imposes a protective order. 430 F.2d at 484. This decision is somewhat anomalous in light of the court's decision to make it difficult to obtain protective orders. *See id.* at 482. The court, however, did give the tenant the right to obtain a reduction in the deposit if he made a "very strong showing" that the dwelling was in violation of housing regulation norms. *Id.* at 484. Requiring such a strong showing conflicts with the proper criteria for granting preliminary relief. Although the burden of introducing evidence may properly be placed on the tenant, the ultimate inquiry should focus on the balance between economic considerations and the likelihood of success on the merits. If the potential harm to a landlord from an erroneous interim decision is nominal, then the tenant's showing on the habitability claim need not be strong in order to reduce the protective order below contract rent. Such a situation might arise when the tenant has significant available assets, the landlord holds a substantial security deposit, or timely collection of rent has been waived by the landlord.