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Benjamin J. Lambiotte

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COMMENTS

DEFENSIVELY PLEADING COMMERCIAL LANDLORDS’ BREACHES IN SUMMARY ACTIONS FOR POSSESSION: A RETROSPECTIVE AND PROPOSAL

Reforms in landlord-tenant law may generally be traced to a dynamic tension between principles of equity and fairness and expedient, judicially supervised recovery of property. Harsh results demanded by traditional doctrines have driven statutory and judicial reforms in the tenant’s favor, but pressure to maintain swift and uncomplicated eviction procedures to promote the continuing productive use of real property remains steady. In addition, general movements in civil procedure and a huge volume of modern, urban landlord-tenant cases have made considerations of judicial economy an influential factor. The development of landlord-tenant procedure in the District of Columbia provides a compelling example of interaction among these forces.

Since the late 1960’s, the District of Columbia has served as a crucible for reforms benefitting the residential tenant. However, the District of Columbia Court of Appeals has compensated for expansion of residential tenants’ substantive and procedural protections by denying these same benefits to commercial tenants, primarily to ensure swift and simple recovery of property for the landlord. Courts administer substantive reform through the instrument of landlord-tenant procedure. Procedural “adjustments” often follow perceptions that the substantive balance may have tipped too far in favor of either the landlord or the tenant.

This Comment will focus on the development of defensive pleading in the District of Columbia in the context of a landlord’s suit for possession for nonpayment of rent. Specifically, this Comment will explore the extent to which the tenant may defend on the basis of breaches of express lease covenants by the landlord. It will survey the history of defensive landlord-tenant


3. See infra note 115-16 and accompanying text.
pleading in the District of Columbia, and examine the District of Columbia Court of Appeals' shift to a narrow reading of tenant's rights to plead breaches by the landlord in defense to a possessory action. It will then note certain disparities between two classes of tenant, residential and commercial, produced by this restrictive construction. Finally, the Comment will critically analyze the underlying rationale for excluding commercial tenants' defenses based on the landlord's breach in a suit for nonpayment of rent and propose that the commercial tenant be permitted to plead material breaches of the lease by the landlord in defense to a suit for possession for nonpayment of rent.

I. EARLY DISTRICT OF COLUMBIA LANDLORD-TENANT ACTIONS: DEVELOPMENT OF LANDLORDS' REMEDIES AND TENANTS' RELIEF

A. Early Sources of Law

In 1801, Congress adopted the common and statutory law of Maryland, as it then existed, as the law of property in the nascent District of Columbia.4 English statutes and decisions controlled in Maryland, an original colony.5 Thus, the English feudal tradition, which favored the landlord, governed early landlord-tenant relations in the District of Columbia.6

The doctrine of independent covenants prominently figured in the traditional system, affecting both substantive and procedural rights of parties to a lease. As the term for years developed, the courts came to view the transaction as primarily a conveyance of an interest in real property in exchange for rent, which relegated any contractual covenants to secondary status. Thus, the preferred contractual construction of covenants as mutually dependent, such that one party's failure to perform generally relieved the other from contractual obligations, did not apply.7 Therefore, breaches of covenant by

5. See generally W. ABERT & B. LOVEJOY, THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA ch. 38, at 314-36 (1894) (indicating English statutes in force in early District of Columbia landlord-tenant law, and Maryland and District of Columbia cases decided thereunder); J. ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND (2d ed. 1912) (fully annotated three volume set of statutes dating from time of the Magna Carta) [hereinafter ALEXANDER'S BRITISH STATUTES].
7. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70 (1985). The doctrine of independent covenants is a product of an antiquated perspective of the nature of
the landlord did not excuse the tenant’s partial or total default in rent.\footnote{8}

From a theoretical property law standpoint, a corresponding burden fell upon the landlord. Once the landlord made the conveyance, he had no possessory rights in the premises despite any lapse in the tenant’s obligations.\footnote{9} Landlords, however, invariably reserved an express right to reenter, making any technical reciprocity academic.\footnote{10} This lease provision secured the landlord’s right of self-help, the most potent common law remedy for nonpayment of rent. The landlord who had reserved this right could forcibly oust the defaulting tenant,\footnote{11} or seize his chattels as security for payment of rent.\footnote{12}

the lease transaction. In the early history of the term for years, the essence of the bargain was the right to cultivate and derive produce from the land in exchange for money rent. Because rent “issued from the land,” any structures which happened to be on the premises were incidental to the essential exchange. The principal duty of the landlord was to ensure undisturbed possession by the tenant, and breaches of other lease covenants did not affect the tenant’s duty to pay rent. See 3 A. Corbin, Contracts, § 686, at 240 (3d ed. 1960); 2 R. Powell, The Law of Real Property § 221.1, at 178-79 (P. Rohan comp. 1986); Note, Commercial Leases: Behind the Green Door, 12 Pac. L.J. 1067, 1075 (1981).

8. See Pinching v. Wurdeman, 12 F.2d 164, 166 (D.C. Cir. 1926). The equally harsh concomitant doctrine of caveat lessee, which still applies in commercial leases, has its roots in this view of leasehold tenure. The law imputed a duty to inspect premises for suitability upon the tenant, whose “eyes were his bargain.” See Lawler v. Capital City Life Ins. Co., 68 F.2d 438, 439 (D.C. Cir. 1933); see also Hughes v. Westchester Dev. Corp., 77 F.2d 550, 551 (D.C. Cir. 1935).


12. This was known as distress. See 1 F. Pollock & F. Maitland, A History of English Law 334 (1895); Lesar, The Landlord-Tenant Relationship in Perspective: From Status to Contract and Back in 900 Years?, 9 KAN. L. REV. 369, 371 (1961); see also Tutt v. Doby, 459 F.2d 1195, 1198 (D.C. Cir. 1972); C. Moynihan, supra note 7, at 70 n.3; Gerwin II, supra note 10, at 642 n.5.

Several English distress statutes were part of the law of the District. See, e.g., 11 Geo. 2, ch. 19 (1738), reprinted in 2 Alexander’s British Statutes, supra note 5, at 981; 2 W. & M., ch. 5, § 3 (1690), reprinted in W. Abert & B. Lovejoy, supra note 5, at 324; 11 Geo. 2, ch. 19, §§ 7-8 (1738), reprinted in W. Abert & B. Lovejoy, supra note 5, at 330.

In 1867, Congress supplanted the right of judicially unsupervised distress in the District with a statute allowing the landlord to establish a lien on the nonpaying tenant’s personal property which could be enforced in the courts. Act of Feb. 22, 1867, ch. 64, § 12, 14 Stat. 403 (codified as amended at D.C. Code Ann. § 45-1413 (1981)).

Self-help was expedient and economical, but led to violence and bloodshed. See Lindsey, 405 U.S. at 71-72. Despite the availability of judicial remedies, self-help, a vestige of a harsh medieval world where force was equated with justice, was remarkably tenacious in the Dis-
For centuries, maligned tenants struggled for recognition of property rights in the leased premises in the form of a possessory action for wrongful ouster. By the seventeenth century, courts acknowledged that a wrongfully ousted tenant could bring an action in ejectment for possession of the premises. This formed the genesis of a recognition of the lease as a conveyance of an estate in land.

It is a recurring irony of landlord-tenant law that landlords often appropriated, to their own purposes, tenants’ common-law remedies originally developed to redress and prevent abuses of self-help. Because the tenant’s new possessory remedy had much to recommend it over older real actions, landlords enjoyed its benefits as a means to try disputed title, entering fictitious leases under assumed names to invoke standing as lessees. In light of this tortured application, it is not surprising that landlords eventually used ejectment, originally a defensive remedy to establish the tenant’s right to possession, as their chief means of recovering leased premises with the aid of judicial process. Limitations on rights of self-help developed as the law of landlord-tenant emerged from its feudal origins, leading landlords to resort to strict. See Simpson v. Lee, 499 A.2d 889, 896 (D.C. 1985); Mendes, 389 A.2d at 787 (statutory remedies exclusive substitute for self-help distress), overruling Snitman v. Goodman, 118 A.2d 394 (D.C. 1955) (validity of landlord’s self-help recognized).

In the District of Columbia, a tenant seeking recovery of wrongfully distrained goods could bring an action for replevin. See D.C. CODE ANN., ch. 52, §§ 1549-1562 (1925) (replevin) (currently codified at D.C. CODE ANN. §§ 16-3701 to -3740 (1981)). Virtually the only basis upon which the tenant could obtain relief was to deny default in the rent. The “defense” was known as the plea of no rent-arrear. See, e.g., Roach v. Burgess, 4 D.C. (4 Cranch) 449 (1834); White v. Cross, 2 D.C. (2 Cranch) 17 (1810). But see Baker v. Jeffers & Gideon, 4 D.C. (4 Cranch) 707 (1836). It is important to note the relationship between the landlord’s and tenant’s respective remedies. Self-help distress is, by definition, extrajudicial, while the replevin action requires the tenant whose goods have been wrongfully seized to seek the offices of the court for relief. See D.C. CODE ANN., ch. 52, §§ 1549-1562 (1925) (currently codified at D.C. CODE ANN. §§ 16-3701 to -3740 (1981)).

13. 2 F. POLLOCK & F. MAITLAND, supra note 12, at 107-08; Lesar, supra note 12, at 370.
14. See 1 A. CASNER, AMERICAN LAW OF PROPERTY § 3.1, at 176 (1952); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 574 (5th ed. 1956); 2 R. POWELL, supra note 7, § 221.1, at 179.
15. See T. PLUCKNETT, supra note 14, at 574 (“And so by a curious twist of history, the freeholder was glad in the end to avail himself of remedies originally designed for the protection of the humble termor.”).
17. In Pernell, the Supreme Court majority noted that the use of ejectment, originally a tenant’s remedy, as a landlord’s possessory device became “so widespread that a statute [4 Geo. 2, ch. 28 (1731)] was enacted to simplify its application to these cases.” 416 U.S. at 373-74 n.16. This English statute, in force in the early history of the District of Columbia, governed landlords’ possessory actions. See, e.g., Connor v. Bradley, 42 U.S. (1 How.) 211, 217 (1843).
more frequently to the courts to sanction their activities. The tenant could invoke few defenses to an action for ejectment for nonpayment of rent, aside from denying default.

From the landlord’s standpoint, ejectment procedures involved time-consuming, expensive, and almost ritualistic formal requirements. New substitutes affording summary relief developed. These statutory summary remedies functioned to try the right of possession between landlord and tenant in a swift and expeditious matter. The early “forcible entry and detainer” statutes formed the basis of the modern landlord’s summary action for possession.

Courts achieve speed and efficiency in summary possessory actions in part, by curtailing the defendant’s procedural rights. Two factors particu-


19. See supra note 12 (discussion of “no rent-arrear” cases). To the extent possible under the unbalanced substantive law of landlord-tenant, courts invoked equitable powers to mitigate the harshness of forfeiture in the tenant’s favor. The “equity of redemption” was one example in which the court would dismiss the action if the tenant paid rent arrearage and costs before execution of judgment. See Gerwin II, supra note 10, at 646, 647; see also Sheets v. Selden, 74 U.S. (7 Wall.) 416, 421 (1868) (rule stated and applied); 4 Geo. 2, ch. 28 § 4 (1731), reprinted in 2 ALEXANDER’S BRITISH STATUTES supra note 5, at 953, 961.

20. Lindsey, 405 U.S. at 71 & n.19. See, e.g., Connor v. Bradley, 42 U.S. (1 How.) 211, 217 (1843) (listing and comparing prerequisites to ejectment at common law and under 4 Geo. 2, ch. 28.)

21. See Shipley v. Major, 44 A.2d 540, 541 (D.C. 1945); see also Act of Maryland of 1793, ch. 43 reprinted in 2 W. KILTY, LAWS OF MARYLAND (1800). This was unmistakably a landlord’s remedy, its object, “to give a brief and summary remedy to the claimants of estates as against possessor with an estate less than the estate of freehold.” Miller v. Johnson, 6 D.C. (1 Mackey) 51 (1864).

22. The modern landlord’s summary eviction remedy, like ejectment, has its roots in statutory regulation of self-help. See, e.g., 8 Hen. 6, ch. 9 (1402); 21 Jac. 1, ch. 15 (1623). The purpose of these tenant possessory remedies was “to furnish a means whereby a person who had been forcibly put out of possession, or unlawfully and forcibly kept out, might obtain a speedy and complete remedy, by restitution of possession . . . the remedy was statutory and summary.” Adams v. Horr, 6 D.C. (1 Mackey) 41, 42 (1864). In 1864, Congress consolidated various common law actions into one statutory remedy to try the right of possession between landlord and tenant which was available to the tenant in cases of wrongful forcible entry, and to the landlord when the tenant held over after the lease had expired or was breached. Act of July 4, 1864, ch. 243, § 2, 13 Stat. 383; see also Pernell v. Southall Realty Corp., 416 U.S. 363, 377 (1976); Harris v. Barber, 129 U.S. 366, 370 (1888). A modern statute replaced the 1864 Act in 1953, and formed the basis of the current landlord-tenant eviction statute. Act of June 18, 1953, ch. 130, 67 Stat. 66 (codified as amended at D.C. CODE ANN. § 16-1501 (1981)).

23. In Lindsey, the United States Supreme Court rejected a constitutional equal protec-
larly constrain the tenants' rights to defend and assert counterclaims based on breaches of the lease by the landlord. First, traditional substantive landlord-tenant law, particularly the doctrine of independent covenants, may eliminate the issue of whether the landlord has breached obligations under the lease from a suit for possession for nonpayment of rent. Secondly, rules of landlord-tenant procedure preclude assertion of certain defenses and most counterclaims.

This combination of features creates an inhospitable litigation environment for the defendant-tenant, frequently contributing to forfeiture for nonpayment of rent. In recognition of the disparate legal and procedural advantages of the landlord in comparison with the tenant, and to avoid the anathema of forfeiture, courts traditionally exercised broad chancery powers in the defendant's favor. More recently, courts have begun to inject con-

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24. See supra note 7 and accompanying text.


26. D.C. SCR L&T 5(b) (1987). The tenant may only counterclaim if the possessory action is based on nonpayment of rent, rather than for nonmonetary default or holding over past the lease term. See, e.g., Johnson v. Hawkins, 81 A.2d 467, 468 (D.C. 1951). Tenants in nonmonetary default may assert counterclaims only if the landlord also sues for back rent as well as possession. D.C. SCR L&T 5(b) (1987).

27. In Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970), the court observed: "The vast majority of suits for possession instituted in that [the landlord-tenant branch] court result in default judgments for the landlord; in thousands of others, the tenant simply confesses judgment." Id. at 481.

28. See supra note 19 and accompanying text. In the District of Columbia, the tenant may avoid forfeiture at any time before judgment is executed by tendering the amount of rent in arrears. This mitigates, to some degree, the harshness of rigid property doctrine. The rationale for this rule is set forth in Sheets v. Selden, 74 U.S. (7 Wall.) 416 (1868): "[R]ent is the object of the parties, and the forfeiture only an incident intended to secure its payment . . . ." Id. at 421; see, e.g., Molyneaux v. Town House, Inc., 195 A.2d 744, 746-47 (D.C. 1963); Burrows Motor Co. v. Davis, 76 A.2d 163, 165 (D.C. 1950); Trans-Lux Radio City Corp. v. Service Parking Corp., 54 A.2d 144, 147 (D.C. 1947); cf. Frog, Inc. v. Dutch Inns of Am., 488 A.2d 925, 931 (D.C. App. 1985).

In Frog, the District of Columbia the Court of Appeals enforced forfeiture against the tenant for allowing solicitation of prostitution, failure to pay insurance, and failure to submit certified financial statements. The court noted that equity against forfeiture rule applies only to the duty to pay rent and not nonmonetary defaults. Frog, Inc., 488 A.2d at 931; see also Saks v. B.H. Steinmetz & Son Co., 293 F. 1005, 1010 (D.C. Cir. 1923); Smith v. Warren Petroleum
tractual principles which challenge historical property assumptions to reach an equitable result.29

B. Counterclaim, Recoupment, Set-off, and Equitable Defenses: Landlord-Tenant Actions Under Code Pleading

In landlord-tenant procedure, strict adherence to the independent covenants doctrine promotes duplicative and wasteful litigation. Under a traditional analysis, a tenant aggrieved by a landlord's breach of an express lease covenant could bring a separate action to recover damages, but could not defend or counterclaim on that basis because courts regarded the contractual breach as unrelated to the landlord's right to possession.30 As long as the tenant remained in possession, the duty to pay rent continued regardless of the breach. In addition, at common law, rigid forms of action and repetitive pleading rules fostered waste and delay.31 Legislatures responded to cumbersome anachronisms in the rules of civil procedure with a system of concerted reforms.32 The reforms sought to streamline complex common law pleading and to avoid duplicative litigation involving identical issues.33 In the District of Columbia, these procedural conveniences helped to offset the substantive disabilities of independent covenants in landlord-tenant procedure.

Liberal joinder of action provisions adopted in the District of Columbia allowed various claims among parties to a civil action to be tried in one

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29. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 n.13 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). This practice arises from acknowledgement that the essence of the lease transaction has fundamentally changed in character. Because the essence of the bargain is for a functional structure, the tenant's desire for a "property" interest is inseverably integrated with, and subordinate to, expectations that the premises will meet his needs. See Green v. Superior Ct., 10 Cal. 3d 616, 623-24, 517 P.2d 1168, 1180-81, 111 Cal. Rptr. 704, 710 (1974). The warranty of habitability in residential leases is based upon these principles, which are derived from contract and consumer protection law. See infra notes 141-46 and accompanying text.


31. See 20 Am. Jur. 2d, Counterclaim, Recoupment and Set-off, § 36 (1965). At early common law, defensive pleading was circumscribed by rigid forms of action. If the plaintiff sued in tort, the defendant could not assert defensive claims based on breach of contract, but if the action was in debt or assumpsit, the defendant could seek a set-off based on contractual debt. Id.

32. See generally Blume, A Rational Theory for Joinder of Causes of Actions and Defenses, and for the Use of Counterclaims, 26 Mich. L. Rev. 1 (1927). The New York Field Code was the acknowledged vanguard of the new procedure. Id. at 17.

33. Id. at 18-19 (quoting D. Field, First Report of the Commissioner on Practice and Pleading 123-24 (1848)).
proceeding, thus encouraging judicial economy.\textsuperscript{34} In addition, rules of civil pleading recognized common law equitable defenses of recoupment and set-off permitting use of a defendant's claims for damages to defeat the plaintiff's action, provided both claims arose from the same transaction.\textsuperscript{35} Significantly, these general rules of pleading applied in District of Columbia landlord-tenant proceedings.\textsuperscript{36}

In \textit{Smith v. O'Connor}, \textsuperscript{37} a landlord's action for possession, the defendant asserted that the lessor made fraudulent representations concerning the condition of the plumbing and that the cost of repairs was $751.10 in excess of the amount in arrears.\textsuperscript{38} The tenant also claimed that the landlord failed to move his goods, delaying the tenant's entry into the dwelling.\textsuperscript{39} The defendant denied default and also pleaded recoupment and set-off.\textsuperscript{40}

Holding denial of default a cognizable defense, the court cited a District of Columbia Code pleading provision allowing interposition of equitable defenses in all actions at law.\textsuperscript{41} With respect to recoupment and set-off, the court relied on rules of equitable pleading set forth in a typical mechanic's

\begin{itemize}
\item \textsuperscript{34} See, e.g., D.C. CODE ANN. §§ 16-1901 to -1903 (1940), amended by D.C. CODE ANN. § 13-501 (1981) (mutual debts and claims under contract may be set off against one another regardless of whether for liquidated debt or unliquidated damages for breach). Economy was further promoted under the rubric of a code provision which dissolved the barrier between chancery and law, and permitted all equitable defenses to be interposed in an action at law. See, e.g., Smith v. O'Connor, 88 F.2d 749, 751 (D.C. Cir. 1936); Mitchell v. David, 51 A.2d 375, 379 (D.C. 1947); D.C. CODE ANN. § 13-214 (1951) (superseded by D.C. SUP. CT. R. CIV. P. 2).
\item \textsuperscript{35} The United States Supreme Court stated the seminal rule in 1852, in \textit{Winder v. Caldwell}, 55 U.S. (14 How.) 434, 443 (1852).
\item \textsuperscript{37} 88 F.2d 749 (D.C. Cir. 1936).
\item \textsuperscript{38} \textit{Id.} at 750.
\item \textsuperscript{39} \textit{Id.} Notably, the court found the representations of the landlord as to the condition of the plumbing to abrogate the traditional rule of caveat lessee, \textit{cf.} Lawler \textit{v. Capital City Life Ins. Co.}, 68 F.2d 438, 439 (D.C. Cir. 1933), despite the fact that both the tenant and her agent had inspected the premises. \textit{Smith}, 88 F.2d at 751.
\item \textsuperscript{40} \textit{Smith}, 88 F.2d at 750.
\item \textsuperscript{41} \textit{Id.} at 751; \textit{see also} Mitchell \textit{v. David}, 51 A.2d 375, 379 (D.C. 1947). Current rules of landlord-tenant pleading reflect these equitable powers of the Landlord-Tenant Division, allowing the tenant to assert claims "for equitable relief related to the premises" in defense to a landlord's action for nonpayment of rent, or when a claim for rent in arrears accompanies an action for possession. D.C. SCR L&T 5(b) (1987).
\end{itemize}
lien contract case.\textsuperscript{42} Under these rules, a defendant could plead unliquidated tort damages for the repairs arising from the fraudulent misrepresentation claim as a recoupment.\textsuperscript{43} The claim that the landlord failed to deliver possession to the tenant by the stipulated day represented a contractual breach of covenant count, and a proper subject for a set-off.\textsuperscript{44}

Following Smith, the District of Columbia Municipal Court of Appeals recognized the tenant's right to plead defensively a variety of claims against the landlord in a suit for nonpayment of rent.\textsuperscript{45} The court construed these rights broadly. At this point, it appeared that the rules, despite their salu-

\textsuperscript{42} Smith, 88 F.2d at 751 (citing Winder v. Caldwell, 55 U.S. (14 How.) 434, 443-44 (1852)). Smith's significance includes its application of procedural rules developed in a purely contractual context, growing out of exchanges of goods and services, to the summary possessory remedy. In setting forth the defensive pleading rule, supra note 35, the court also cited Dushane v. Benedict, 120 U.S. 630 (1887), a case arising out of the sale of racing mares. 88 F.2d at 752.

\textsuperscript{43} See supra note 31 and accompanying text.

\textsuperscript{44} Smith, 88 F.2d at 752. Despite its framing of the defensive issues in contractual terms, Smith may not be characterized as a complete procedural abrogation of the substantive disabilities of independent covenants. The court appears to have followed the English rule with respect to delivery of possession. Under this view, delivery of possession by the landlord was one of the few covenants upon which the tenant's duty to pay rent was dependant. See generally Gerwin, A Study of the Evolution and Potential of Landlord-Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia—Pt. 1: The Substantive Law and the Nature of the Private Relationship, 26 Cath. U.L. Rev. 457, 475 n.80 (1977) [hereinafter Gerwin I].

The covenant of quiet enjoyment represents another example of a covenant upon which the tenant's duty to pay rent depends. The covenant, which may be expressly set forth in the lease, see e.g., Rittenberg v. Donahoe Constr. Co., 426 A.2d 338, 342 (D.C. 1981), assures the tenant a right to possession undisturbed by acts of the landlord or those claiming rights through him. See R. Schoshinski, American Law of Landlord and Tenant § 3.3, at 94-95 (1980). The landlord may breach the covenant by actually evicting the tenant without right, \textit{id.} at 95-97 (actual eviction), or by so interfering with the tenant's right to possession that the tenant is forced to abandon the premises (constructive eviction). See Hughes v. Westchester Development Corp., 77 F.2d 550, 551 (D.C. Cir. 1935); Rittenberg, 426 A.2d at 342. The limitations on defensive pleading described in this Comment, outgrowths of the independent covenants doctrine, generally do not apply to the eviction defenses, which arise from breaches of dependent covenants.

\textsuperscript{45} See supra note 36 and accompanying text. A clearer departure from the harsh results demanded by traditional property principles appears in cases immediately following Smith. In Geracy, Inc. v. Hoover, 133 F.2d 25 (D.C. Cir. 1942), the circuit court held a plea of recoupment for the landlord's negligent damage to chattels on the leased premises to be within the jurisdiction of the court, despite the fact that the counterdemand exceeded the jurisdictional limit of the municipal court. \textit{Id.} at 27.

In Mitchell v. David, 51 A.2d 375 (D.C. 1947), the municipal court of appeals remedied a landlord's action for possession and back rent in which the trial court struck certain counterclaims based on the landlord's failure to repair. The court, relying on Smith, ordered a new trial on whether the landlord's covenant to repair existed, and whether it had been breached. \textit{Id.} at 376, 379. Perhaps most importantly, the court accepted the defendant's argument that the landlord's failure to make repairs as required by the lease constituted a cognizable equitable defense. \textit{Id.} at 378-79; cf. Pinching v. Wurdeman, 12 F.2d 164, 166 (D.C. Cir. 1926).
tary policy objective of efficiency and economy, had the incidental effect of expanding the defendant-tenant’s ability to complicate an action for eviction. Judges perceived liberal pleading as a force undermining the simple and summary character of landlord-tenant proceedings.\(^4\)

In 1946, the municipal court promulgated a new rule covering pleading and motions in landlord-tenant proceedings.\(^4\) In deference to the summary nature of the possessory action, rule 4(c) barred counterclaims and recoupment, except when the landlord claimed possession based on nonpayment of rent.\(^4\) The new rule barred such pleas in actions for possession for holding over past the lease term, and for nonmonetary defaults under the lease.\(^4\)

The court further amended rule 4(c) to expressly limit the amount of a defensive set-off in a possessory action based on nonpayment of rent to the amount of rent claimed in arrears.\(^5\) The change more clearly effectuated the rule’s equitable principle: to allow the tenant to defeat the landlord’s claim that rent was due, and not to provide the tenant with a forum for

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4. See Rubenstein v. Swagart, 72 A.2d 690, 691-92 (D.C. 1950). By 1946, defendant tenants had developed a standard practice of entering pleas in abatement and demanding jury trials, which led to a large backlog of cases. Id. at 691-92 n.4.


(c) In suits of this Branch for recovery of possession of property, no counterclaim, cross claim, or claim by way of recoupment shall be set up therein, except where the basis of recovery of possession is non-payment of rent, but the exclusion of prosecution of said claims in this Branch shall be without prejudice to the prosecution of said claims in other Branches of the Court.

74 Daily Wash. L. Rep. at 1215 (emphasis added).

48. Compare Bellmore v. Baum, 68 A.2d 588, 591-92 (D.C. 1949) (tenant’s counterclaims denied under rule 4(c) against claim for possession based on unlawful entry) with Johnson v. Hawkins, 81 A.2d 467, 468 (D.C. 1951) (rule 4(c) counterclaim may be entertained only when suit for possession is based on nonpayment of rent).

49. 74 Daily Wash. L. Rep. at 1215. Logically, nonmonetary defaults fall outside the scope of recoupment, set-off, and counterclaim rules. These rules allowed a tenant’s unliquidated claim for tort or contract damages arising from the landlord’s breach of the lease to be asserted as a counterdemand against the landlord’s claim that rent was owed, thus defeating forfeiture of the lease. Rent was considered to be a liquidated debt as of the day it fell due. See Crowder v. Lackey, 46 A.2d 699, 700 (D.C. 1946).

50. As of 1966, rule 4(c) provided:

Rule 4. Verification, pleading and motions. (c) In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless the plaintiff asks for money judgment for rent.

8 D.C. CODE ENCYCLOPEDIA, GENERAL SESSIONS COURT RULES, § II rule 4 (1967).
pressing affirmative claims. However, if the landlord sued for back rent as well as possession, the tenant could counterclaim for a sum in excess of the rent claimed due.

In Seidenburg v. Burka, the municipal court of appeals confronted the substantive implications of rule 4(c)'s approach to defensive pleading. A tenant of commercial property defended a landlord's suit for possession by claiming that the landlord owed him a sum for roof repair expenditures which exceeded the amount of rent in arrears. The court held that the tenant carried its burden in establishing a breach of covenant and found the breach an appropriate subject of a set-off, but granted the landlord judgment for possession because the tenant failed to prove, with adequate certainty, the cost of repairs incurred.

Significantly, the claimed set-off related to a breach of the covenant to repair, which the courts historically regarded as independent of the duty to pay rent. Moreover, the rule cited by the court recognized that the tenant could plead total or partial failure of consideration as a set-off when the landlord sued for possession for nonpayment of rent to avoid circuity of action. This rule represents the pinnacle of liberal landlord-tenant pleading. The procedural approach reflected in the cases following Smith implied that a tenant aggrieved by a landlord's breach of a lease covenant now had alternatives in pursuing his claim. The tenant could either initiate a suit, or defeat the landlord's action for possession by asserting the breach defensively.

II. THE JAVINS REVOLUTION: THE ASCENDANCY OF CONTRACT IN RESIDENTIAL LEASES

In 1970, the United States Court of Appeals for the District of Columbia Circuit revolutionized substantive law governing leases of residential hous-

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51. Id. at 224-25 (commentary describing rule and associated case law).
52. See Zindler v. Buchanon, 61 A.2d 616, 618 (D.C. 1948) (when landlord sues only for possession, and does not ask for money judgment for rent, equitable defense or claim by way of recoupment is the limit of the tenant's remedy).
54. Id. at 499.
55. Id. at 500.
57. A. CORBIN, CORBIN ON CONTRACTS § 658, at 635 (1982). ("When the courts speak of 'failure of consideration' . . . [t]hey mean that a promisor has not received something for which he bargained; and they give that as a reason why his promise should not be enforced").
ing units. In *Javins v. First National Realty Corp.*, the court abrogated traditional property law doctrine, which allowed forfeiture of a lease for nonpayment of rent regardless of the condition of the leased premises.

The appellant tenants asserted numerous housing code violations as an equitable defense, by way of recoupment or set-off, in order to defeat the landlord's claim that rent was due, invoking rule 4(c). The *Javins* court observed that modern leases represent predominantly a series of contractual exchanges, and that a warranty of habitability, independent of any express lease covenants, should be implied into residential leases and measured by standards set forth in the housing code. Not only did the court imply a covenant to repair, but it constructively conditioned the tenant's duty to payment upon the landlord's performance of that covenant.

The warranty of habitability changed the character of proceedings in landlord-tenant court. It incorporated into the summary possessory action another fundamental issue: whether the premises complied with housing code provisions during the period for which the landlord claimed unpaid rent. The new substantive rights resulted in procedural complications. In light

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60. *Id.* at 1074-75.
61. *Id.* at 1073. The landlord-tenant judge below rebuffed these defenses without adequately stating his reasons. *Id.* at 1073 n.4. It is interesting to note that rule 4(c) was the procedural vehicle for recognition that leases for modern urban dwellings should be governed by the substantive law of contract. *Id.* at 1073 n.3.
62. *Id.* at 1074. The historical justification for the shift from property to contract is summarized in the comment accompanying the Purposes and Rules of Construction, Uniform Residential Landlord-Tenant Act, which indicates that property "doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect." Uniform Residential Landlord-Tenant Act § 1.102 comment, 78 U.L.A. 434 (1985).
63. *Javins*, 428 F.2d at 1080.
64. *Id.* at 1082.
65. *See* Bell v. Tsintolas Realty Co., 430 F.2d 474, 481-82 (D.C. Cir. 1970). The substantive right of the tenant to withhold rent in the event the landlord breaches the duty to maintain the premises in accordance with housing code standards is a powerful self-help remedy exercised without judicial supervision, essentially at the tenant's discretion. The District of Columbia Court of Appeals was apprehensive of sanctioning any departure from the housing code as an identifiable standard measuring the right to withhold. See Winchester Management Corp. v. Staten, 361 A.2d 187, 191-92 (D.C. 1976); *see also* 2 R. *Powell*, supra note 7, § 260.2(2), at 17-A10 to -A11.

Moreover, the existence of habitability defenses resulted in procedural delays. *See Javins*, 428 F.2d at 1082 & n.62 (tenant must be given opportunity to prove housing code violations); Brown v. Southall Realty Corp., 237 A.2d 834, 837 (D.C. 1970) (lease void ab initio if housing code violations exist at time lease is entered); *see also* Bell, 430 F.2d at 481-82. In addition, the United States Supreme Court has recognized a seventh amendment right to a jury trial in proceedings brought under the District's summary eviction statute. *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).
of a staggering landlord-tenant case volume, courts began to view the habitability defenses as a threat to the simplicity and speed of summary possessory actions.

III. PROCEDURAL IMPACT OF HOUSING CODE DEFENSES: THE GENESIS OF THE RESIDENTIAL/COMMERCIAL DISTINCTION

A. Preserving the Landlord’s Right to Derive Income from the Leased Premises: Development of the Protective Order

In direct acknowledgment of the landlord’s loss of income during the pendency of litigation when the tenant interposed warranty of habitability defenses, the court adopted a device whereby a tenant invoking such defenses was required to pay the rent as it fell due during the suit into the registry of the court. In Bell v. Tsintolas Realty Co., the United States Court of Appeals for the District of Columbia Circuit considered the effects of new defenses on the landlord’s ability to derive income from his property. The trial judge ordered the tenant to pay rent as it fell due into the registry of the court. On appeal, the United States Court of Appeals for the District of Columbia Circuit recognized a prepayment requirement in civil litigation as an extraordinary measure, but noted that the assertion of housing code violations as defenses had the effect of denying the landlord the benefit of the summary proceeding.

To ensure that judges accounted for the interests of the tenant, the court declined to set forth a strict rule requiring protective order payments in all cases. It found a protective order appropriate only when the defendant demanded a jury trial, or asserted housing code violation defenses, and only after motion by the landlord, notice to the tenant, and opportunity for argument.

66. Gerwin II, supra note 10, at 753. In 1976, six years after Javins, 114,408 cases were filed in Landlord-Tenant court, id. at 752, of which 19,491 received the attention of a judge, resulting in an average daily landlord-tenant docket of 77 cases. Id. at 753.

67. The “protective order” blossomed from a suggestion in a footnote in Javins, 428 F.2d at 1083 n.67, into an institutional fixture of landlord-tenant procedure. “The issuance of a protective order requiring a tenant to pay an amount equal to the agreed upon monthly rent, or sometimes a lesser amount, into the registry of the court has become the norm rather than the exception in the landlord-tenant branch.” Mahdi v. Poretsky Management, Inc., 433 A.2d 1085, 1086 (D.C. 1981); see also 2 R. Powell, supra note 7 §§ 260.2(2), 17-A10 to -A11.

68. 430 F.2d 474 (D.C. Cir. 1970).

69. Id. at 479.

70. Id. at 479, 481. The court observed that in most civil litigation, the plaintiff has no advance assurance of the defendant’s solvency when commencing litigation. Id. The court’s perception of the protective order’s inevitable constrictive effect on a tenant’s ability to proceed in forma pauperis further heightened this concern. Id.

71. Id. at 482.
In upholding the trial court’s order, the court called for a careful weighing of the respective interests of landlord and tenant. The court concluded that, in certain limited circumstances, the landlord-tenant court could draw on its equitable powers and require protective order payments to avoid placing the landlord at a disadvantage during the litigation.

In McNeal v. Habib, the District of Columbia Court of Appeals recognized the tenant’s right to a hearing on the issue of the final disbursement of proceeds held by the court in escrow. The tenant asserted retaliatory eviction and housing code violations in defense to a suit for possession and demanded a jury trial. The court granted the landlord’s motion for a protective order. Shortly before trial, the tenant removed herself from the premises. She sought either return of the protective order money or an evidentiary hearing to determine if the court should withhold and return to her a portion of the landlord’s payment due to housing code violations which existed prior to her surrender of the premises. Instead, the trial court ordered the entire sum to the landlord.

The court of appeals reversed, holding that due process requirements entitled the tenant to proffer evidence as to the extent to which the protective order should be abated for housing code violations prior to disbursement to the landlord. The court further noted that, in proper circumstances, a hearing on whether the landlord’s motion for a protective order should be granted is also appropriate, thus introducing two distinct potential strata of delay into final disposition of the action.

The court in Habib v. Thurston resolved a critical question regarding rights to trial in a McNeal hearing. It concluded that the tenant had a seventh amendment right to a jury trial on the issue of disbursement of funds deposited into court, even when the tenant demanded no jury trial in the

72. Id. at 483.
73. Id. at 484-85.
74. Id. at 482. While due process does not require a full-fledged evidentiary hearing on the issue of whether a motion for a protective order should be granted, the court may hear argument and take limited evidence if appropriate. See McNeal v. Habib, 346 A.2d 508, 513-14 (D.C. 1973); see also Dameron v. Capitol House Assocs., 431 A.2d 580, 583 (D.C. 1981).
76. Id. at 510.
77. Id. at 510-11.
78. Id. at 511.
79. Id. at 514.
80. Id. at 514 & nn.12, 13.
underlying possessory action. The court accepted the tenant’s view of the protective order hearing as “a separate and distinct equitable proceeding, not part of the underlying possessory action.” Thus, it found a full evidentiary trial before a jury adjudicating the rights between the parties to the money in escrow an available predicate to final disbursement of the funds.

McNeal & Habib v. Thurston introduced hearing rights to protect the tenant. These procedures stemmed from the District of Columbia Circuit Court’s rather grudging sanction of the protective order device in Bell. The requirement that the tenant place the rent in escrow when a protracted trial is likely, however, has become more the rule than the exception the Bell court envisioned. Originally adopted as a device to offset the effects of procedural delay, the protective order, and the availability of hearings associated with it, developed into a potentially virulent source of delay and complexity in its own right.

Dameron v. Capitol House Associates Ltd. represents an attempt to restore the original function of the protective order. This case suggests that the judge, in proper circumstances, may order rent escrowed during the pendency of the suit paid directly to the landlord. In Dameron, the court of appeals upheld a carefully drawn protective order which allowed the judge to release a portion of the protective order payment to the landlord on a monthly basis during the suit. The court held that it lies within the trial court’s discretion as to whether it must hold the full amount of the monthly rent in its registry as a protective order, in view of the preliminary showing of de minimus housing code violations in the case. The decision indicates that if the trial judge at the early pre-trial stage determined that the pleadings and oral argument on the landlord’s protective order motion failed to place a certain portion of the protective order payment in legitimate dispute, the court could release such amount directly to the landlord during the suit.

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83. Thurston, 517 A.2d at 17 (quoting Smith v. Interstate General Corp., 462 A.2d 1133, 1134 (D.C. 1983)).
84. Id.
87. Bell, 430 F.2d at 482.
89. Id. at 582.
90. Id. at 584-85.
B. Reaction to the Contractual Revolution: Resurrection of Independent Covenants: The Commercial/Residential Distinction

Shortly after the United States Court of Appeals for the District of Columbia Circuit decided *Javins*, District of Columbia courts underwent reorganization. The District of Columbia Court of Appeals assumed jurisdiction as the appellate court of last resort. No longer subject to reversal by the United States circuit court, the court of appeals declined to give full scope to the *Javins* court's perspective of the urban lease as a contract. Instead of carrying the contractual revolution forward, the District of Columbia Court of Appeals revitalized the discredited independent covenants doctrine and embarked on a course of constricting the tenants' ability to plead defenses.

This reaction began with a refusal to apply a contractual construction to commercial leases. Three years after *Javins*, the District of Columbia Court of Appeals made it absolutely clear that the breach of covenants by a landlord would not bar enforcement of forfeiture of a commercial lease. In *Interstate Restaurants, Inc. v. Halsa*, the landlord sought possession based on the tenant's default under a lease provision requiring that the leased restaurant remain open on weekends. The trial court refused to admit evidence proffered by the tenant showing that the landlord had breached its obligations to maintain and repair the premises; it found such evidence unrelated to the breach asserted by the landlord. On appeal, the tenant argued that *Javins* represented a rule of construction requiring that courts treat leases like any other contract. According to this argument, the court should not enforce forfeiture of a contract unless the party seeking it had strictly performed his obligations.

The court of appeals, relying on the rule that courts in landlord-tenant disputes generally consider covenants in leases independent, rejected the argument. The *Javins* defenses, the court observed, arose from the unique
nature of residential urban housing and its associated problems.100 The
court reasoned that, because housing code violations did not apply in com-
mercial settings, the implied warranty of habitability did not apply. The
court found it significant that tenants in commercial leases generally retained
counsel to negotiate on their behalf.101 Thus, the court denied commercial
tenants any substantive defenses based on Javins policy analysis.

For the commercial tenant, Halsa revitalized the substantive force of in-
dependent covenants and caveat lessee doctrines challenged by the court in
Javins. The court distinguished construction of lease covenants based upon
the nature of the property as residential or nonresidential. It thus found one
means of containing the impact of the warranty of habitability defenses.
However, judicial reaction to the new defenses went far beyond distinctions
in substantive analysis, and soon changed long-established procedural rules
governing defensive pleading, even in residential leasehold disputes. Six
years after Javins, the court of appeals adopted a myopic view of the tenants’
rights to plead defenses, a sharp break from the expansiveness of prior case
law.

Winchester Management Corp. v. Staten,102 marked the beginning of this
departure. The case arose when twenty-four tenants of the Winchester-Un-
derwood apartment building, organized and acting in concert, sent reduced
rent checks to the landlord after negotiations failed to result in improved
maintenance.103 The landlord refused the tender, and possessory actions en-
sued. At trial, the tenants asserted that they went without hot water and air
conditioning for sixty-nine days in the summer of 1973.104 The trial court
judge, adopting the approach set forth in Smith105 calculated reductions in
rent attributable to the landlord’s breaches, and instructed the tenants to pay

100. Id. at 110-11.
101. Id. at 110.
5(b), the successor to rule 4(c). Id. at 191 n.13. Rule 5(b) now states:

Counterclaims. 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 re-
coupment or set-off or a counterclaim for a money judgment based on payment of
rent or on expenditures claimed as credits against the rent or for equitable relief
related to the premises. No other counterclaims, 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. SCR L&T 5(b) (1987).
103. Winchester, 361 A.2d at 188.
104. Id. at 188-89.
105. Id. The trial judge’s actions clearly followed the code pleading model set forth in the
Smith line of cases. See supra notes 35, 36, 57, 58, and accompanying text.
only the balance, or they would forfeit their leases. The District of Co-
lumbia Court of Appeals reversed in part holding that, because absence of
air conditioning did not amount to a per se housing code violation, the land-
lord's breach of an express covenant to provide this service did not constitute
a proper subject for the equitable defenses of recoupment and set-off. The
court held the tenants liable for the entire amount of back rent. The court
conditioned a tenant's long-established procedural right to plead breaches of
covenant upon the existence of significant housing code violations, which
gave rise to a substantive right to withhold rent. The court's power to
determine the amount of back rent to afford the tenant the equity against
forfeiture did not give rise to "expanded authority to adjudicate all conflicting
claims between the landlord and tenant."

Judge Fickling dissented, eulogizing the abandoned expansive ap-
proach. He noted that the majority's conclusion ignored both the plain
language of rule 5(b) governing equitable defenses and counterclaims, and
established case law in the District of Columbia. He decried the major-
ity's failure to cite any authority whatsoever indicating that it should predi-
cate the right to plead equitable set-off and recoupment defenses upon either
payment of rent or the existence of housing code violations. Judge
Fickling found the requirement that the tenants file an independent action in
another branch of the court unjustified, and a repudiation of the policies
formerly evinced in rules of pleading in landlord-tenant court.

In Winchester, the District of Columbia Court of Appeals measured the
mutuality of the contractual obligations in a lease to extend only as far as the
provisions of the housing code. Winchester thus brought defensive land-
lord-tenant pleading full circle by returning to the ancient view that breaches
of covenant not dependent upon the duty to pay rent were essentially irrele-

106. Winchester, 361 A.2d at 188.
107. Id. at 190. Commentators have recognized this holding as a retreat from Javins' liberal
trend and a resurrection of the doctrine of independent covenants. See Gerwin I, supra
note 44, at 491-93. Another commentator has also noted that it represents a break from prior
case law allowing recoupment or set-off in the event of the landlord's breach of covenant. J.
KARPOFF, supra note 4, at 88.
108. Winchester, 361 A.2d at 192 n.13. The majority reasoned: "In the unique context of a
landlord's summary suit for possession, a defense premised upon a failure of the landlord to
perform other obligations is inappropriate [and] . . . irrelevant, for a tenant is not entitled to
withhold rent based on any other asserted breach of contract." Id.
109. Id.; see also Tutt v. Doby, 459 F.2d 1195, 1199 (D.C. Cir. 1972); cf. supra notes 19,
28, and accompanying text (discussion of "equity against forfeiture").
110. Winchester, 361 A.2d at 193 (Fickling, J., dissenting).
111. Id. at 193-94 (Fickling, J., dissenting).
112. Id. at 194 (Fickling, J., dissenting).
113. Id. (Fickling, J., dissenting); see also J. KARPOFF, supra note 4, at 34-35.
114. See supra note 108.
Defensively Pleading Landlord's Breaches

In a landlord's possessory action. Although decided in the context of a residential lease, Winchester's narrow approach to defensive pleading effectively foreclosed equitable defenses formerly available to commercial tenants. Because commercial properties are not covered by the housing code, these tenants enjoy no substantive rights to withhold rent. Thus, Winchester effectively denies procedural rights recognized under the Smith line of cases to nonresidential tenants in a landlord's action for nonpayment of rent.

In addition, this result and analytical approach lacks consistency in comparison with those of Javins, which demands that contractual aspects of the modern urban lease, not discredited property fiction, govern modern urban landlord-tenant relations.

The majority's active restriction of tenants' procedural rights may be explained in light of two factors. First, Javins endowed residential tenants with a substantive right to withhold rent, which the court of appeals had perceived as tipping the scales too far in their favor. Second, by 1976, the sheer volume of cases before the landlord-tenant division had grown to such staggering proportions that any procedural complications compromised the ability of the court to expeditiously manage its docket.

In Campos v. Aguila, the court of appeals confronted a glaring conflict between the broad language of landlord and tenant rule 5(b) and the court's narrow approach favoring swift and summary disposition of commercial lease disputes without procedural complications. The dispute between landlord and tenant arose from the lease of a building and the sale of the grocery business located therein.

The tenant alleged that she made a cash payment to the landlord, which the court later found to be a partial payment for the grocery business. She argued that such payment could be asserted defensively under rule 5(b) as a

115. Winchester's resurrection of independent covenants cannot be easily reconciled with Javins' emphasis on contractual principles. Gerwin I, supra note 44, at 492-95. In answer to Justice Fickling's criticism of the court's departure from established rules of landlord-tenant pleading, the majority explained that, while the old emphasis on avoidance of multiple actions was laudable, "an equally valid and well-recognized objective is the prompt settlement of possessory disputes. We decline to further defeat the summary nature of a possessory action by sanctioning the resolution therein of additional claims which the tenant might seek to interpose." Winchester, 361 A.2d at 192 n.14.


117. See supra note 115.

118. See supra note 65.


121. Id. at 132.
credit against the rent "related to the premises." The trial court granted the landlord’s motion in limine, refusing to allow the tenant to plead the payment defensively. The court of appeals agreed, holding that rule 5(b)’s reference to equitable defenses related to the premises applied only to payment of the rent or expenditures claimed as credits against the rent. Despite the fact that both agreements arose from the same set of dealings, the Campos court found that the amount tendered was not payment of rent, and therefore, the defensive claim was outside the jurisdiction of the landlord-tenant court. The court construed the primary function of the rule as expeditious resolution of landlord-tenant disputes.

Millman Broder & Curtis v. Antonelli placed the court’s current emphasis on the commercial landlord’s interest in swift and uncomplicated recovery of leased property, in derogation of tenant’s procedural rights, in sharp focus. In an action for possession and back rent, the commercial tenant attempted to assert the landlord’s breach of a promise to locate a subtenant as a rule 5(b) defense. The tenant claimed that liability for rent due would have been reduced or extinguished if the management agent had performed as promised. The court of appeals referred to the unique status of commercial leases in holding that, despite the broad language of rule 5(b), a counterclaim “related to the premises” referred exclusively to claims based on a payment or credit against the rent in the context of a commercial tenancy.

While Halsa clearly established that the Javins implied warranty defenses, or defenses based upon its broad policy underpinnings, are not available to commercial tenants, Campos and Millman essentially left open the question as to whether expenses directly incurred by the tenant as a result of the landlord’s failure to perform under an express lease covenant could be pleaded as either “rent credits” or as a claim for “equitable relief related to

122. Id. at 132-33; see also supra note 102.
123. Campos, 464 A.2d at 133.
124. Id. The references in rule 5(b) to recoupment or set-off defenses “based on payments of rent or credits against the rent,” and “equitable defenses related the premises” are disjunctive, connected with the word “or.” See D.C. SCR L&T Rule 5(b) (1987); supra note 2. Nevertheless, the Campos court held that only payments of rent or credits against the rent qualified as an “equitable defense related to the premises” for the commercial tenant, thus merging two separate bases for defenses into one. See 464 A.2d at 133.
125. Campos, 464 A.2d at 132. Former emphasis on avoidance of multiplicity of action over issues arising from the same transactional core was clearly subordinated to swift and simple recovery of the landlord’s property. Cf. supra text accompanying notes 34-36, 58.
127. Id. at 484.
128. Id.
the premises" under 5(b). However, reading the cases together, and in light of the court's special treatment of nonresidential leases, the commercial tenant suffering damages due to the landlord's breach of covenant must either negotiate for a rent credit acknowledged by the landlord or pay the rent and any expenses flowing from the landlord's breach in order to preserve procedural rights to defend on that basis in a landlord's eviction action.

IV. ANALYSIS: BRINGING COMMERCIAL LEASES INTO THE TWENTIETH CENTURY

The court currently links the tenant's procedural right to defensively plead landlord's breaches under rule 5(b) to a substantive right to withhold rent due to housing code violations. A commercial tenant is placed at a severe disadvantage in a landlord's summary action for nonpayment of rent. Prior to the advent of the housing code violation defenses, a distinction between the nature of the tenancy as either residential or nonresidential made little difference in pleading defenses. There was no requirement that the tenant have a substantive right to withhold rent in order to defensively assert recoupment, set-off, or counterclaim against the landlord's breaches. Case law focused on avoiding separate trials over two claims between the same parties arising out of a dispute involving the lease instrument.

Currently, housing code violations are virtually the only trigger of a right to plead landlord's breaches of lease covenants defensively. However, housing code violations do not apply to commercial leases. Thus, even the most egregious failure to perform express lease covenants by the landlord may not form the basis of a cognizable defense by a commercial tenant. In a typical dispute, the commercial landlord enjoys the full benefit of summary re-

130. The agreement at issue in Millman was entered some three years after the lease. 489 A.2d at 484. The court indicated that the fact that the alleged promise by the landlord was not contemporaneous with the lease, and that the landlord disputed responsibility under such agreement led to complexities which would unduly hamper expeditious resolution in landlord-tenant court. Id. It was unclear whether the exclusion of the counterclaim was based on insufficient transactional identity between the lease and the agreement, as in Campos, or the independent covenant doctrine set forth in Winchester, although strong undercurrents of both theories run through the opinion. Id.

131. See Winchester Management Corp. v. Staten, 361 A.2d 187, 191 & n.13 (D.C. 1976); see also supra text accompanying note 108.

132. See, e.g., Greenfield & Margolies, supra note 9, at 860 n.31.

133. See supra note 116 and accompanying text.

134. See supra note 112 and accompanying text.


136. See, e.g., Greenfield & Margolies, supra note 9, at 860 n.31.
covery of leased property for the tenant's breaches, while the tenant must await resolution of his claim in the severely overburdened civil division in order to obtain redress for the landlord's wrongdoing.\footnote{137}

The court of appeals has clearly limited the scope of defensive pleading in commercial tenancy to claims arising from rent payments or acknowledged rent credits.\footnote{138} Two key rationalizations justify this anomaly. First, the District of Columbia Court of Appeals tenaciously clings to obsolete notions of caveat lessee and independent covenants in explaining the residential/commercial distinction.\footnote{139} Second, restrictions on defenses may be founded in the court's unwillingness to further delay and complicate the summary nature of the proceeding in the tenant's favor.\footnote{140}

A. The Case for the Contractual Approach to Commercial Leases

Any decision rooted in the "traditional special character of landlord-tenant law"\footnote{141} in justifying a distinction between residential and nonresidential leases essentially has its foundation in fiction. \textit{Javins} rested its departure from property doctrine upon three premises. First, the nature of the lease bargain changed with the transformation of an agrarian society into an urban one.\footnote{142} Rather than an estate in property, the modern tenant bargains for "a well known package of goods and services," including heat, light, ventilation, and proper sanitation and maintenance.\footnote{143} Second, the tenant is generally ill-equipped to effect repairs himself, and relies on the diligence and honesty of the landlord to ensure that the premises may be used for their intended purpose, a precept extracted from consumer protection law.\footnote{144} Third, the typical residential lease transaction involves gross inequality of bargaining power between landlord and tenant, making the lease a virtual adhesion contract.\footnote{145} The features of a modern urban residential lease indicate that the essence of the bargain is an exchange of contractual promises, rather than conveyance of a property interest.

\footnote{140} \textit{Winchester}, 361 A.2d at 192 n.14.
\footnote{143} \textit{Id.} at 1074.
\footnote{144} \textit{Id.} at 1075-77, 1078-79.
\footnote{145} \textit{Id.} at 1079-80.
The nature of the bargain involved in a lease of urban commercial property has changed apace with that of the lease for housing. Without a doubt, a modern lease of office or retail space involves a more complex and detailed exchange of promises intended to address a broader range of "goods and services" than a residential lease, and most of these covenants are contractual in nature. Thus, the first Javins premise applies with equal force in leases of office or retail space. Further, it is noteworthy that Javins adopted principles derived from Uniform Commercial Code warranties of fitness for purpose. This bolsters the argument that an implied warranty of fitness for purpose, measured by the mutual expectations of the parties memorialized in the lease document, should be read into modern commercial leases. Significantly, the Uniform Commercial Code is primarily designed to protect commercial relations, and the warranty of fitness manifests the commercial buyer's reasonable expectations and reliance upon the seller's honesty and diligence.

146. Cf. id. at 1074-75. The view of a lease as primarily a conveyance of an interest in property "may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself." Id. at 1074. Clearly, the modern lease of office or retail space does not fall into this category.


148. See Greenfield & Margolies, supra note 9, at 877 (commercial office leases ripe for reform); accord Comment, Modernizing Commercial Lease Law, supra note 147, at 949-50.

149. Javins, 428 F.2d at 1075. For a discussion of cases in other jurisdictions where "warranties of fitness" have been implied in commercial leases, see Comment, Modernizing Commercial Lease Law, supra note 147, at 945-49 & n.106 (analyzing seminal case Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) and other cases); see also Kratovil, The Restatement (Second) of Contracts and the UCC: A Real Property Law Perspective, 16 J. MARSHALL L. REV. 287, 289-90 (1983) (noting reliance on Uniform Commercial Code analogy in recent retreat from caveat lesee in residential leases); Comment, Behind the Green Door, supra note 147, at 1085-91.

The landlord and commercial tenant do not always stand in equal bargaining positions. Market forces could conceivably place certain business tenants in the same disadvantageous position to which *Javins* alluded. While no shortage in the general commercial rental market currently exists, desirable rental property may be priced beyond the reach of a small business entering the market. If limited resources combine with an unsophisticated commercial tenant, the potential for abuse of bargaining power by the landlord cannot be denied. Finally, *Javins* reflected a judicial desire to combat urban blight by ensuring a minimum standard of performance on the part of the residential landlord. While safe and habitable housing is essential to revitalization of an urban core in decline, another immediate measure of economic recovery is the strength of small, neighborhood business ventures. Commercial landlords who fail to adhere to their lease obligations to small business tenants should not be permitted to enforce a forfeiture under terms any more favorable than those which restrain their residential counterparts. In sum, the nature of a commercial lease in the District of Columbia is surely as alien to medieval England as a residential lease. No feature of the commercial lease justifies the court's refusal to emphasize its contractual aspects as compared to a residential lease.

**B. Complication and Delay in Summary Possessory Actions**

In *Winchester*, the District of Columbia Court of Appeals made passing reference to the abandoned policy of avoiding circuity of action by indicating that its relative value was outweighed by a need to "draw the line" on delays and complications in summary possessory actions. The court, however, continues to foster delays in final resolution of the rights and obligations of parties to the lease. Most of these procedural delays are directly attributable to the warranty of habitability defenses. While commercial tenants as a class have keenly felt compensatory limitations on defensive pleading, the substantive defenses which foster delays are not available to them. Thus, com-

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*see also* Greenfield & Margolies, *supra* note 9, at 880-85. The office or retail tenant reasonably expects that the commercial landlord, engaged in the business of managing and leasing property, will provide the services required under the lease.


152. *See* Winchester Management Corp. v. Staten, 361 A.2d 187, 192 n.14. (D.C. 1976); *see also* *supra* note 115 and accompanying text.
commercial tenants do not contribute to the problem for which they are penalized.

In addition to the delays and expense associated with trying the merits of housing code violation defenses, several other related factors may seriously undercut the landlord-tenant division's ability to swiftly and efficiently dispose of possessory actions in the manner envisioned by the court of appeals. First, the United States Supreme Court has upheld a tenant's right to a jury trial in the summary possessory action in the District of Columbia.\textsuperscript{153} Although most lease forms include a waiver of this right, the Landlord-Tenant procedural rules provide a mechanism by which a party with cognizable defenses may have the case certified for a jury trial in the civil division on an expedited basis.\textsuperscript{154} Second, the protective order procedure, originally designed to offset the effects of procedural delay caused by the housing code defenses, introduces further complexity, which may delay final resolution of claims between landlord and tenant.\textsuperscript{155}

\textit{Bell, McNeal, Thurston,} and \textit{Dameron} address the intricate implications of landlord-tenant protective orders. Although these cases grew in the first instance from the innovation of residential housing code defenses,\textsuperscript{156} entry of protective orders has become more the rule than the exception contemplated in \textit{Bell,} and the court routinely imposes them in commercial landlord-tenant disputes.\textsuperscript{157}

If future courts construe \textit{Dameron} as authorizing disbursement of the amount of a protective order determined not to be a potential subject for an

\textsuperscript{154} D.C. SCR L&T 6 (1987). Rule 6 requires the tenant to submit a statement of facts underlying a defense before the case is certified to the civil branch for an expedited trial.
\textsuperscript{155} See supra notes 85-87 and accompanying text. The protective order introduces two discrete strata of delay and issue proliferation into final resolution of landlord-tenant disputes. First, the judge may take limited evidence on whether a protective order is justified, and its amount. See McNeal v. Habib, \textit{346 A.2d} 508, 512 n.8, 513-14 (D.C. 1973) (in appropriate cases, the interests of justice may call for a hearing on a motion for a protective order); \textit{id.} at 514 n.12 (court may conclude that some testimony would be of assistance in setting the amount of the protective order). Second, the tenant is entitled to a hearing on the disbursement of rental funds held in escrow. \textit{id.} at 514 n.15. The tenant is entitled to a jury trial on this issue. Habib v. Thurston, \textit{517 A.2d} 1, 24 (D.C. 1985).
abatement on the basis of housing code violations,\textsuperscript{158} no obstacle to requiring the commercial tenant to pay the rent as it falls due directly to the landlord during the suit would remain.\textsuperscript{159} In a suit for nonpayment of rent, the tenant, pursuant to \textit{Dameron}, must make a preliminary showing that a valid set-off claim exists. Because, under current rules of pleading, commercial tenants may not invoke defenses based on housing code violations or breaches of fitness for purpose, this presents a virtually impossible burden to meet for such a tenant. If the courts accept this view of \textit{Dameron}, the disabilities placed on a commercial tenant will be compounded considerably.

\textbf{C. Restoring Fairness and Economy to Commercial Landlord-Tenant Procedure}

To restore equity and economy to commercial landlord-tenant procedure, it would not be necessary to read into commercial leases implied warranties of fitness for purpose or any other Javins analog.\textsuperscript{160} The linkage of a substantive right to withhold rent to a procedural right to plead defensively recoupment or set-off for landlord's breaches is a judicial innovation that unfairly disadvantages commercial tenants.\textsuperscript{161} If the lease imposes specific duties\textsuperscript{162} on the landlord, there is no principled reason for refusing to allow breaches of those duties to be pleaded defensively in the landlord's suit for possession for nonpayment of rent. A small business lease may represent the tenant's sole means of livelihood. As a matter of equity, the court should not permit the landlord to enforce forfeiture of the lease if he has not performed his obligations in good faith.\textsuperscript{163} When both the landlord and tenant

\textsuperscript{158} In \textit{Dameron}, the court utilized its discretionary powers to set a landlord's protective order at an amount less than the rent due. 431 A.2d at 584. Because a fixed amount less than the monthly rent was in dispute, the court found that refusing to release the balance to the landlord during the pendency of the suit would afford the tenant "an economic weapon of unreasonable proportion." \textit{Id.} at 585.

\textsuperscript{159} Bunn, supra note 91, at 40.

\textsuperscript{160} A strong argument, however, for so doing may be made. See supra notes 146-51 and accompanying text.


\textsuperscript{162} The drafters of the Restatement (Second) of Property originally imposed a duty on the landlord of both residential and commercial property to maintain the premises in a manner "suitable for the use contemplated by the parties." Comment, Behind the Green Door, supra note 147, at 1090-91; see also Restatement (Second) of Property Landlord and Tenant § 5.1 (1976) (reporter's note at 174, 176). The reporter's notes expressed the opinion that this rule should be extended to nonresidential property. \textit{Id.} The small commercial tenant is in particular need of attention. \textit{Id.}

\textsuperscript{163} See supra notes 146-50 and accompanying text.
are in breach, the court should not allow the landlord to use truncated landlord-tenant proceedings to disadvantage the tenant and force settlement or forfeiture.

The modern commercial tenant contracts for more than the bare right of possession. Typically, landlord and tenant exchange a detailed series of contractual promises memorialized in a lease. With its ability to limit issues and evidence, the landlord-tenant division is ideally suited to resolve disputes arising between landlord and tenant under this instrument in an expedited manner that benefits both parties. When the landlord has breached express lease covenants, the tenant should not be forced to forfeit the business and pursue a delayed remedy in another division of the court.

If the court remains steadfast in its insistence that the tenant pursue breach claims in civil division, continuance of the landlord's possessory action pending final resolution of the parties' rights and obligations under the lease presents an expedient and just alternative to immediate judgment for the landlord. Once the tenant made a preliminary showing that a bona fide defense based on breach of express lease covenants existed, the court could stay the possessory action, or at minimum, judgment for possession, pending final judgment on the defendant-tenant's breach of contract claim. If successful in civil division, the tenant should then be able to apply damages recovered, if any, on his breach of covenant claim against the rent claimed due to avoid forfeiture of the lease. This would give the landlord an incentive to negotiate a settlement in more balanced proportion to that of the tenant's under current conditions. It would also ensure that both parties enjoy vindication of their respective rights on roughly the same schedule.

Perhaps a more level battleground would limit the current distinct advantage to a race to the courthouse for the landlord, thus helping in some measure to alleviate case management difficulties in landlord-tenant division. It would certainly ensure that only landlords who came before the court with clean hands could avail themselves of the benefits of summary recovery of rental property.

V. CONCLUSION

The foregoing discussion demonstrates that the development of substantive and procedural reforms in favor of the residential tenant have resulted in significant erosion of the swift and simple nature of summary actions for

164. Both parties should equally benefit from the advantages of summary justice, as well as to bear the burdens imposed by procedural rules designed to ensure expeditious disposition. The landlord-tenant branch has considerable latitude to limit issues and evidence in proceedings within its jurisdiction. See, e.g., D.C. SCR L&T 1, 3, 6, 10.
possession. The District of Columbia Court of Appeals has reacted by declining to give full scope to a contractual perspective of the leasehold relationship and adopting a restrictive view of permissible defensive counterdemands not based on housing code violations. This perspective represents a retreat from an earlier expansive approach to defensive pleading in landlord-tenant matters. Although nonresidential tenants have suffered procedural disabilities resulting from this narrow view, this class of tenants has not benefitted from the substantive rights extended to residential counterparts.

The practical consequences of the current situation are significant. In upholding the tenant's right to a jury trial on warranty of habitability issues in summary landlord-tenant proceedings, the United States Supreme Court in *Pernell v. Southall Realty* indicated that landlord-tenant courts should not serve as "rubber stamps" for landlords seeking to evict tenants, but to provide both parties with a fair opportunity to present their cases.165 Yet disparate treatment of commercial tenants has precisely that effect. The inescapable threat of summary dispossession weighed against the prospect of slow and expensive civil litigation necessarily affects the distribution of bargaining power in lease negotiations as well as landlord-tenant litigation tactics. The reservation of the tenant's right to pursue claims for breach of covenant by the landlord in civil division is no answer to the dilemma. The tenant's ability to bring a separate action may indeed ensure swift and summary disposition of the landlord's claim for possession within the landlord-tenant division, but it surely promotes further litigation within the sorely overburdened superior court system, while exposing the tenant to forfeiture of the lease in the meantime.

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165. *Pernell v. First Nat'l Realty*, 416 U.S. 363, 385 (1973). The *Pernell* Court also discounted the District of Columbia Court of Appeals trepidation over recognizing a tenant's right to a jury trial on a counterclaim based on housing code violations, finding it "doubtful" that such rights would impair expeditious resolution of landlord-tenant disputes. *See id.* at 383-85. Commercial landlord-tenant disputes could also be resolved on an expedited basis under the specialized rules of procedure applicable in the landlord-tenant branch. *See supra* note 164 and accompanying text. The interests of the landlord could be secured through the protective order device, using the procedures set forth in *McNeal v. Habib*, 346 A.2d 508, 512 (D.C. 1975). *See Dameron v. Capitol House Assocs.*, 431 A.2d 580 (D.C. 1981); *see also supra* notes 75-80, 88-91.