In the

Supreme Court of the United States

DAVE PERNELL,

Petitioner,

vs

SOUTHALL REALTY,

Respondent.

No. 72-6041

Washington, D. C.
February 19, 1974

Pages 1 thru 24

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SOUTHALL REALTY,

Respondent.

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Tuesday, February 19, 1974.

The above-entitled matter came on for argument at 10:13 o'clock, a.m.

BEFORE:

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

APPEARANCES:

NORMAN C. BARNETT, ESQ., 471 H Street, N. W., Washington, D. C. 20001; for the Petitioner.

HERMAN MILLER, ESQ., 400 Fifth Street, N. W., Washington, D. C. 20001; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-6041, Pernell against Southall Realty Company.

Mr. Barnett, you may proceed whenever you're ready.

ORAL ARGUMENT OF NORMAN C. BARNETT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BARNETT: Mr. Chiar Justice, may it please the Court:

The present case comes before the Court under writ of certiorari to the District of Columbia Court of Appeals, and it presents the question of the right to a trial by jury in an action brought by a landlord to recover possession of real property pursuant to the District of Columbia statutory eviction proceeding. And also raises the question of the right to a jury trial on the tenant's counterclaims for money damages brought in that same proceeding.

Briefly stated, the facts of the case are as follows:

In August of 1971 the respondent landlord sued the petitioner for possession of premises held under a lease, alleging nonpayment of rent for a three-month period.

On the answer day, the tenant filed an answer denying that any rent was owed because of the failure of the landlord to maintain the premises in compliance with the District of Columbia housing regulations. The case law of the District of

Columbia and the administrative regulations there permit a tenant to raise this defense in a possessory action.

The tenant also filed affirmative claim seeking a money judgment for expenses incurred by him to repair the premises and for return of rent paid while the landlord was in breach of his warranty.

The applicable rules of the Superior Court of the District of Columbia permit the tenant to raise these affirmative defenses.

At the same time, on the answer day, the tenant demanded a trial by jury, paid the requisite fees, and complied with all necessary requirements for demand of a jury trial.

The trial judge struck the jury demand, over the objection of the tenant that he was constitutionally entitled to a trial by jury. The case was subsequently tried by the court, and a judgment for possession was rendered for the landlord.

On appeal, the court below affirmed the decision of the trial court, holding that Congress in 1970 had repealed the statutory right to a jury trial in these eviction proceedings, and that there was no constitutional right to a jury trial under the Seventh Amendment in such proceedings.

QUESTION: Did the trial court deal with the tenant's counterclaims?

MR. BARNETT: I would think that they did, Your Honor. The trial court and the -- the proceeding of the trial court ended in a judgment for the landlord. We presume that it was a judgment on the counterclaims as well.

In this respect, evidence tending to prove the counterclaims was submitted at the trial court. It wasn't admitted into evidence, because of the lack of an authenticating witness. But, nevertheless, the proffer was made and we assume that the trial judge did rule on the counterclaims.

QUESTION: And ruled against the tenant on them?

MR. BARNETT: Yes, Your Honor.

QUESTION: Well, doesn't Judge Reilly's opinion, in the Court of Appeals, give the impression that that rule of the Superior Court permits the raising of that claim as a defense only; but that if you want a money judgment on your counterclaim you have to simply pursue a different remedy in the Superior Court?

MR. BARNETT: The thrust of the opinion, Your Honor, is to require the tenant to bring his affirmative claims in a separate proceeding.

The point here is, though, that the rule of the court permits the tenant to bring it in this proceeding.

QUESTION: Well, but the Court of Appeals has interpreted that rule.

MR. BARNETT: Yes, Your Honor. What the Court of

Appeals has done is put a condition on the exercise of the constitutional right, and certainly hasn't shown any predominant State interest, for the reason, to put this condition on the right --

QUESTION: Well, you're not asking us, at any rate, to second-guess the Court of Appeals as to what the rule of the Superior Court means, are you?

MR. BARNETT: No, Your Honor, we're not -- we're not at all asking that. The rule seems to be clear that the tenant could assert the counterclaim in the possessory action. If the counterclaim is one which arises -- one which would be tried by jury in 1791, then --

QUESTION: But that's just what the Court of Appeals said that the rule didn't mean, as I read it.

MR. BARNETT: Well, as I read it, Your Honor, the Court of Appeals said that the tenant may very well have the right to a jury trial if he brings his affirmative claims in a subsequent proceeding.

And --

QUESTION: Yes.

MR. BARNETT: -- we assume that that means that he has the right of jury trial, on those claims.

QUESTION: Does the rule say he can recover damages?

MR. BARNETT: Yes, Your Honor, the rule --

QUESTION: What is the rule?

MR. BARNETT: -- specifically says that he can recover a money judgment.

QUESTION: Money judgment in that action?

MR. BARNETT: Yes, Your Honor. I'll read the rule to you.

QUESTION: Then the Court of Appeals is wrong, you say?

MR. BARNETT: Pardon, Your Honor?

QUESTION: Then you say the Court of Appeals is wrong in its interpretation of its statute?

MR. BARNETT: Your Honor, the Court of Appeals didn't say that the tenant couldn't bring the counterclaims in the possessory action. It only said that when he does bring those claims in the possessory action, he waives his right to a jury trial on those claims.

QUESTION: Well, couldn't he file another claim for the damages, with a jury, --

MR. BARNETT: In a separate proceeding.

QUESTION: -- in a separate proceeding?

MR. BARNETT: Yes, Your Honor. We assume that he could. There's a question there of whether or not there would be some collateral estoppel effect of the possessory action.

QUESTION: But on the opinion of the Court of Appeals you could sue and you could recover?

MR. BARNETT: Yes, Your Honor.

QUESTION: And that means the difference of filing another lawsuit.

MR. BARNETT: Yes, Your Honor.

QUESTION: Which means thirty dollars -- that's all it is, isn't it? Court costs.

MR. BARNETT: Well, it may be court costs, Your Honor, but the problems, in terms of administration of justice, are quite serious, because here we have two trials instead of one, the same witnesses, the same evidence, the issues on the possessory action and the counterclaim clearly overlap.

QUESTION: Well, don't you have some actions in equity where you can't recover damages, and if you want damages you have to go over in the law side?

MR. BARNETT: Yes, that might be the case, Your Honor, but --

QUESTION: Might be?

MR. BARNETT: -- we're not dealing here with any equitable claims. All the claims here --

QUESTION: You're dealing with damages.

MR. BARNETT: Your Honor?

QUESTION: You're dealing with damages.

MR. BARNETT: Yes, Your Honor.

QUESTION: What is the section you rely upon? For damages.

MR. BARNETT: The rule of the Superior Court, Your Honor.

QUESTION: Where is it?

MR. BARNETT: It might be helpful if I read this rule to you.

QUESTION: Yes. Where is it?

QUESTION: In the Appendix or brief?

MR. BARNETT: I'm not sure where it is in the brief at this point, Your Honor. It's quite brief. I think I could read it.

The rule provides, it's Rule 5(b) of the Landlord and Tenant Rules of the Superior Court: 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 setoff or a counterclaim for a money judgment, based on the payment of recent or on expenditures claimed as credits against rent.

That's the particular portion. It's found in our main brief, Your Honor, at page 7, quoted in part -- our main brief at page 7, Your Honor.

It is quite clear at this date that the Seventh Amendment applies to the District of Columbia, and Capital Traction vs. Hof, decided in 1899, this Court squarely held

that the Seventh Amendment was applicable to the District.

The question, then, is the standard to be applied under the Seventh Amendment.

It is quite clear from various decisions of this Court that the Seventh Amendment preserves the right to jury trial, as it existed in England in 1791, at the time of the adoption of the Bill of Rights.

Since 1830, this Court, in Parsons v. Bedford, and subsequently and most recently in Ross v. Bernhard in 1970, stated that the test to be applied to determine the Seventh Amendment right is to look to the closest historical counterpart at common law, and determine there if the nature of the issue to be resolved is legal and thus triable by jury.

In other words, the reference must be to the right asserted and the remedy sought and then to the actions in England in 1791.

The test does not require that there be a precise counterpart. This was clearly pointed out. It doesn't matter if the statute, if the present-day action is embodied in a statute. I think the point there is it's quite obvious that much of the common law has undergone an evolution, and if any precise counterpart were required then certainly the Seventh Amendment would be an anachronism.

Most of the recent cases involving the Seventh Amendment, such as Beacon Theatres vs. Westover, Dairy Queen

v. Wood and Ross v. Bernhard, have arisen as a result of the merger of law and equity by way of the Federal Rules of Civil Procedure.

The problems of merger are not involved in this case, because it's never been suggested that a suit for possession, such as the present one, was ever within the jurisdiction of the court of equity.

It's quite clear that actions for possession of real property present, perhaps, the classic case of actions tried by juries at common law.

This Court, in Whitehead v. Shattuck and again restated in Ross v. Bernhard, indicated that action seeking to recover possession of real property are unmistakably legal actions, and jury trial would thus be permitted.

At common law, since feudal times, there were several actions available to determine the rights of possession. Each had to do with the particular circumstances of the case. In our brief we deal with the three principal actions: the writ of assize of novel disseisin; the writ of entry, and the writ of ejectment.

These most closely --

QUESTION: Ejectment, as I understand it, or as I remember it from law school, was an action to try title, and forcible entry and detainer was an action to try the right of possession. This is the latter, isn't it?

No issue of title is involved in this case.

MR. BARNETT: No issue of title is involved in this case, --

QUESTION: Purely the issue of the right of possession, wasn't it?

MR. BARNETT: Purely the right of possesion, Your Honor; right.

QUESTION: And as I remember that, that was tried at common law by a justice of the peace, with twelve good men and true, but who were not considered to be the equivalent of a common law Seventh Amendment jury; isn't that correct?

MR. BARNETT: Your Honor, I think that the --

QUESTION: Or am I -- I'm going pretty far back, I never had any practice in this, and I haven't thought about it in a long time.

MR. BARNETT: The forcible entry and detainer, which you speak of, Your Honor, is not precisely the same thing as what we have here. What forcible entry and detainer is today in the United States is not the same as it was in England in 1791.

QUESTION: Well, I thought -- but the point is, your point is, isn't it, that whether or not the Seventh Amendment right to jury is applicable depends upon the historical roots of what this --

MR. BARNETT: No question, Your Honor. But our --

QUESTION: -- the District of Columbia action is.

MR. BARNETT: Yes, that is our point, Your Honor.

QUESTION: Right.

MR. BARNETT: And our point is that in England in 1791, which is the critical date for application of this under --

QUESTION: Right. Right.

MR. BARNETT: -- the Seventh Amendment, the forcible entry and detainer actions were purely criminal actions, they had nothing to do with the right to possession. They merely punished a person who entered by force.

QUESTION: And those were justice of the peace actions, weren't they?

MR. BARNETT: They certainly were, Your Honor. But justice of the peace --

QUESTION: Not King's Bench actions, is that correct?

MR. BARNETT: No, Your Honor. Ejectment was tried in the King's Bench, the assize of --

QUESTION: Ejectment was to try title, isn't it?

MR. BARNETT: Not necessarily, Your Honor.

QUESTION: I thought it was.

MR. BARNETT: Ejectment, as it first evolved, was purely to try possession. In most of the cases which talk about ejectment, it always says that the question in ejectment is first the right to possession and then the right to title.

Title became -- the reason title came into ejectment is because the early title actions were very complicated. The courts, the King's Bench made it quite easy for parties to try title in ejectment.

What happened, ejectment became the one form of action to try possession around the 1700's. During this period it was the simplest action, where anyone could try either possession or title.

But there's no question but in 1791 they did try possession. But the forcible entry and detainer actions did not try possession. They merely restored a party who was ousted by force back to possession, whether or not he had a right to possession, and then they left the parties to go their own way through the civil actions, to determine their right to possession.

Another point, Your Honor, the justices of the peace in England, in 1791, bear no correspondence to the justices of the peace as we think of them today, or as they existed in the District of Columbia in the early 1800's. They were courts of record, they were held -- they were appointed by the King, they held grand juries, they tried all cases involving felonies except treason. In short, they were just the correspondents of our modern criminal courts.

There's no question that a right to jury trial

applied there, and we presume that the jury trial there was much the same as we consider it today.

QUESTION: Well, then you do say that that justice of the peace, twelve men and true, was the equivalent of a common law Seventh Amendment jury, do you? I had thought --

MR. BARNETT: We believe it was, Your Honor. There's --

QUESTION: I thought I had learned otherwise in law school. Maybe I was mistaught.

MR. BARNETT: It's possible Your Honor is concerned about the question of twelve men versus more than twelve, questions of challenges to juries. It's our understanding from what the authorities say there is a problem here, that there isn't a lot of information available. We've attempted to research all the authorities, and the most that we can find is that there was a jury trial and there was a jury trial in the sense that we have a jury trial today.

QUESTION: The -- what is it, the Hof case?

MR. BARNETT: Yes, Your Honor.

QUESTION: -- held, that decision by this Court held that a jury before the criminal justice of the peace here in the District of Columbia was what, not a Seventh Amendment jury, didn't it?

MR. BARNETT: Yes, Your Honor. The basis for the decision in Hof was the fact that the justice of the peace in

the District of Columbia did not have the power to instruct or superintend the jury. He was a man not learned in the law. The base -- the decision really was that it wasn't a court of record.

What Hof said, essentially, was that -- well, maybe the premise should be laid in -- between 1801 and 1864, the justice of the peace court in the District, being the lowest court, had exclusive jurisdiction over all eviction proceedings. They had jury trials. The judge did not instruct them, the jury merely decided the issue once the evidence was presented.

In 1899, long after this period of between 1801 and 1864, the Court, looking back, said that the justice of the peace trials were not common law jury trials.

The court below attempted to rely on that as a break in the history of the right to jury trial. But there's no question that Congress didn't intend that these be jury trials. The courts in the District had always thought that the justice of the peace jury trials were common law jury trials.

Today the entire problem doesn't exist, since we have available a court which can give a constitutional jury trial.

The point that we have made, Your Honor, I believe is the fact that the three common law actions which we cite, assize, entry, and ejectment, were the principal actions to

try the right to possession, and those actions were prevailing in 1791, the critical date for the Seventh Amendment. And, therefore, today we should be -- we should have a jury trial on those, on the action in the statutory proceeding.

Much has been said by the respondents in the amicus curiae about the fact that the proceeding that we have is a summary proceeding. The argument there is that the summary proceeding is inconsistent with the right to jury trial. They rely very heavily on this Court's decision in Lindsey v. Normet.

In Lindsey, it was held that the State of Oregon did not violate the equal protection or due process clauses of the Fourteenth Amendment by restricting the issues which could be raised in an eviction proceeding.

The law of the District of Columbia, as we've noted, however, permits a tenant to defend a suit for nonpayment on the basis of a breach of warranty. Moreover, it also permits the counterclaims to be filed in the same proceeding. It's not a summary proceeding in the sense of the Oregon case.

But even, notwithstanding that,Oregon itself permits a jury trial in a far more summary proceeding than we have here in the District. The term "summary" only applies to a shortened or simplified procedure, such as restricting the litigable issues, short return dates, unnecessary responsive pleadings, and limited discovery.

The historians generally agree that assize of novel disseisin and entry were equally as summary as the present-day eviction statutes.

QUESTION: Can you give me any other case involving a jury trial that's a summary trial?

Today, where you take three weeks to pick a jury.

MR. BARNETT: The point is, Your Honor, these cases go very quickly. They are very simple cases to try before a jury. There's not reason why a jury trial can't be granted the same day, as a judge trial is. It's merely a scheduling problem.

We have six-man juries in the District of Columbia, the --

QUESTION: How many cases does the Landlord and Tenant Court hald a day, now?

MR. BARNETT: Well, that may be a little misleading, Your Honor, the number of cases. It's obvious that Landlord and Tenant Court handles thousands and thousands of cases. Most --

QUESTION: A day?

MR. BARNETT: Pardon?

QUESTION: A day?

MR. BARNETT: Well, it's hard to say a day, Your Honor --

QUESTION: Hundreds a day; hundreds a day.

MR. BARNETT: -- in the year 1971 the Court handled 122,000 cases.

QUESTION: Well, could they do that many cases with juries?

MR. BARNETT: No, Your Honor, it's quite clear that they couldn't.

QUESTION: So that's --

MR. BARNETT: Right.

QUESTION: -- that's the difference between a summary and a jury trial, isn't it?

MR. BARNETT: It may not, Your Honor; it's a misleading question. The point is -- my answer, I'm sorry. The 122,000 figure really is meaningless, because 97 percent of those cases are ended at the threshold. They are either default judgments, they're settled, they're dismissed. It's obvious that the landlords use the Landlord and Tenant Courts as a collection agency. And the question is the payment of rent.

The jury trials --

QUESTION: I specially don't think you need to put that much time on the word "summary", because I think we know what "summary" means.

MR. BARNETT: All right.

One other point I think that is quite important is the practicabilities and limitations of jurors, which the Court

referred to in the Ross vs. Bernhard -- the Court noted there that this may have a consideration on the applicability of the Seventh Amendment right.

The present action presents, perhaps, the best example of a case suitable for jury determination. As I indicated, the issues are not complex or technical. They merely involve the question of habitability. A term very easily comprehended by jurors. They can apply their common experience and their common sense to such a problem.

It's judged in terms of the local housing code, which requires things like sanitary and safe conditions, adequate heat and hot water. The suitability is certainly amplified in light of the highly complex commercial disputes which are routinely submitted tojuries in antitrust matters or trademark infringements and the like.

Also I think it's important to note that the social consequences of an eviction are very serious, perhaps the harshest of any civil remedy. It results in eviction of the tenant; his family is thrown in the street.

Certainly this may be equally severe to a criminal conviction, and the use of a jury is certainly appropriate in such a proceeding.

If I may reserve --

QUESTION: Do you suppose that even if you shouldn't prevail upon your historic argument, your basic constitutional

argument, that you could still make an argument that Congress intended -- Congress intended that there be a jury trial, that there's, therefore, an implicit statutory right to a jury trial here, whatever the constitutional or common law right may or may not have been?

In other words, --

MR. BARNETT: Yes, I see --

QUESTION: -- as I understand it, there always was a statutory right until 1970, and in 1970, in the reorganization of the courts here in the District of Columbia, that language was omitted, but that the clear legislative history shows that the reason it was omitted is that Congress thought it wasn't necessary, that it was, to use the words of the committee report, superfluous.

And don't you think you could make an argument that there's a statutory right to a jury, regardless of whether you're right or wrong on your historic and constitutional analysis?

MR. BARNETT: I'm not quite sure, Your Honor, because the statute itself was repealed. It's clear that Congress didn't intend to repeal the --

QUESTION: But it's very clear that Congress -- is it not, or am I mistaken? -- that Congress thought it was unnecessary --

MR. BARNETT: Congress thought -- right.

QUESTION: -- and that Congress intended to give a right to a jury.

MR. BARNETT: There is no question, Your Honor.

QUESTION: But isn't it more accurate to say that Congress thought the Constitution gave a right to a jury?

MR. BARNETT: Well, that's what they said, Your Honor. They specifically stated that we consider it superfluous, in light of the Constitutional right.

I think another important point is that, irrespective of the possessory action, we would have been entitled to a jury trial on our counterclaims as a result of the Beacon-Dairy Queen doctrine.

As I indicated, the issues overlap, there may be serious questions of collateral estoppel and the like.

If I may reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Barnett.

Mr. Miller.

ORAL ARGUMENT OF HERMAN MILLER, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. MILLER: Mr. Chief Justice, and members of the Court:

In connection with this particular question, I might say that the statute was repealed in 1970; the statute was passed by Congress in 1921.

When the District of Columbia took the Maryland law,

in 1899, they took it as a start in that particular time. And the question about forcible entry and detainer was a modern method, then, to get possession. They had, of course, ejectment actions. But most of the time they used the forcible entry and detainer.

This was not a jury trial, because it was referred to two justicies of the peace, or commissioners, who had no right to instruct the jury, had no right to grant a new trial, or tell the jury what the law was.

Now, this continued on until 1964, when a statute was passed giving the Supreme Court at that time a right to hear these cases de novo, and a jury trial in the Supreme Court, if there was a loss in the justice of the peace court.

QUESTION: What year was that, Mr. Miller?

MR. MILLER: In 1964 -- I'm sorry, 1864.

QUESTION: 1864, yes.

MR. MILLER: Now, this continued on until the Hof case was decided, where a comprehensive discussion and review of the historical situation was made by Mr. Justice Gray. And it was held at that time that the justice of the peace was not a comon law court, it was not a court of law, because of the fact I've just mentioned, and decided that since the second part of the amendment said that no facts should be reviewed by another court. The issue in that case was whether there was a review of the facts in the Supreme Court, and it

was held that where there was a hearing or trial before a justice of the peace, this was not a common law action and therefore was not a review.

This went on, as I said, until 1921, with the demurrer proceedings. Now, it was then when there was a reorganization of the court, and the Municipal Court came into being, giving the right and power to pass on slander and tort actions, and so forth, that they passed the law to state that a jury trial would be had in cases involving possession.

It was almost a repetition of the Seventh Amendment. All the language of the Seventh Amendment was there, plus "in all actions involving possession".

So Congress gave the court the right to hear cases involving possession with a jury trial. Then took it away in 1970.

Congress having the power to give it had certainly the power to take it away.

And whatever may be the reason, it was taken away, the fact is there's no more jury trials in Landlord and Tenant cases.

Now, I might say in that same connection that although there is some attempt to show an analogy with respect to ejectment, the ejectment statute is still on the books. It's a cumbersome method. It requires a number of elements

to be shown before you can have a judgment. You have to show title, you also have to give the tenant a right to redeem in six months, and causes a lot of damage and a lot of harm.

So there's no similarity between that and ejectment.

With respect to the other two, has to do with the justice of the peace, you still couldn't get any common law trial before a justice of the peace, because they were not a court.

Now, we got the statute in nineteen --

QUESTION: But you could get it on a trial de novo.

MR. MILLER: You could have it on a trial de novo --

QUESTION: So you had a right eventually to a jury trial.

MR. MILLER: Yes. In the Supreme Court, a right to --

QUESTION: Well, what do you say about that?

MR. MILLER: Well, in that connection, that was repealed in 1921. In 1921 they gave the Municipal Court, which was a general reorganization of that court, the right to hear jury trials for actions --

QUESTION: So there has been continuously a right to a jury trial.

MR. MILLER: This was a statutory proceeding. Did not exist in 1799 in England, had no relevancy between the two procedures. There was no trial de novo in England. There

was no --

QUESTION: Do you think there was a constitutional right to a jury trial before 1921, under the -- in connection with the procedure that was then employed?

MR. MILLER: No. Because of the number of cases showing that there was no common law court in which such an action could be had --

QUESTION: Well, there was a common law court on appeal, on trial de novo.

MR. MILLER: This was a statutory proceeding, in 1864. It never existed before that particular date. So therefore it couldn't have been in existence in England in 1799, when the matter first came to the attention of the District of Columbia.

So I don't see how they could say that you had a jury trial at that particular time as a result of legislation and not common law. There was no common law right to it. Because the Hof case said there was no common law proceeding in such a proceeding. And the only kind of a jury trial you could have is before the commissioners, who merely drew the twelve men, and had no right to instruct the jury or otherwise.

Now, in 1921, as I say, the right was given to the Municipal Court, and then it was taken away.

Now, with respect to the second point made by the

petitioner, that because he has filed a counterclaim, recruitment and setoff, this gives him a right to a jury trial. Of course, if that is so, that would be present in every one of these 122,000 cases; such a claim could be made in that, and deprive the landlord of his property while the tenant litigates what he claims to be his rights. As criticized by this Court in the Normet case.

The Normet case said that the landlord shouldn't be required to stand by while he litigates those things, and when you go into that particular branch of the procedure, it will be discovery and all kinds of reasons for delay.

My experience has been -- and I guess I've had more landlord and tenant cases than anybody in this city -- that these -- when we did have a jury right under 13702, the jury claim was made and interposed merely for delay. Because practically every one of the cases resulted in a tenant moving out, owing four or five months' rent, or a settlement of some kind.

And as I am informed by the Clerk, out of 600-some-odd cases where jury demands were made, there were only six that were tried in the last year before the abolition of the jury system by this particular case.

Now, it was also shown, and it seems to me that the creation of the right to claim the money for violations of the housing regulations in Javins was never recognized by the

Javins case as a legal claim. It was purely an equitable claim.

And on page 19 of the amicus curiae brief, there's a recital by Judge Wright as to what had happened with respect to the doctrine. And it concludes by this language:

"A remedy for every wrong not cognizable by courts of law, and the complexities of the present social order have brought about conditions which were unknown when the English courts of Equity were established."

It was realized and the lower court's decision was on the basis that when a claim of this type is made, it is purely equitable, because in the cited case, Molyneaux vs. Town House, the claim for nonpayment of rent is made, and if a tenant can show he paid the rent, or he had a right to pay it, this would give him a right to equitable conversion, and have his tenancy reestablished.

In other words, it was purely a suit as to whether the rent was due. If the rent was due, he, the tenant, had a right to tender all the rent and that would reinstate the tenancy.

So that was all purely equitable, and the defense of recruitment and counterclaim were considered by the lower court as being purely equitable in nature, and therefore not triable by a jury; and therefore the Dairy Queen case has no application, because there the issues were legal and equitable,

and here they are purely equitable.

To show, with respect to a jury trial, the summary action would be destroyed completely. The Code Title 15, 16-1501, makes the complaint returnable in seven clear days. It is only necessary, if you cannot find the defendant, to post the summons on the door.

QUESTION: Mr. Miller, I understand your opponent's contention to be that this really isn't a summary action in the classic sense of the word, that the rule itself allows the pleading of these defenses.

MR. MILLER: You mean Rule 5?

QUESTION: Yes.

MR. MILLER: Well, I have some difficulty with Rule 5. Although it's not mentioned in my brief, it does not do complete justice. It's recited that Rule 3 allows a landlord to ask for a personal money judgment if the tenant makes a claim for recruitment set out in a counterclaim.

But in footnote No. 64 in the Javins case, it has been said that if the tenant caused the damage, then this will not be a defense of the landlord's claim.

Now, if the tenant caused the damage, the landlord has the right of action for that damage. He can't make it in this particular claim, because there's no provision in the rule. Then he's got to file his own independent action to make his claim, while the tenant goes ahead with his claim,

and it's highly unfair, it seems to me.

In order to have a due process situation, all the claims should have to be litigated in one particular action. And this cannot be done under Rule 5(c), unless --

QUESTION: Well, you don't challenge Rule 5(c), do you, as being governing in a case like this, unless there's a constitutional impediment to it?

MR. MILLER: I say that that may be interposed, but not in a jury trial; instead of enlarge the remedy to a jury trial. The tenant may file these kinds of claims in the particular action, have a court trial, and if he can show by these defenses that there is no rent due, the case of the landlord falls. That would be the end of it.

But to litigate these kinds of things to a full-blown action of law would destroy the summary nature of the proceeding.

MR. CHIEF JUSTICE BURGER: Mr. Barnett.

REBUTTAL ARGUMENT OF NORMAN C. BARNETT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BARNETT: Your Honors:

Just briefly, I'd like to reply to a question that Mr. Justice Stewart had asked earlier regarding the twelve men good and true on the juries which existed at common law.

I think that I failed to indicate the fact that this Court has certainly recognized the fact that the jury system

has been evolving for centuries. The point being that the Seventh Amendment doesn't protect the procedural incidence of a jury trial, it merely protects the substance. And it's quite clear that the substance of jury trial in 1791 was quite the same as it is today.

As we have traced the history, perhaps maybe too far back to the Eleventh, Twelfth Century, of course we have to realize that juries were undergoing a change during that time, and this was when juries were first being formulated.

Mr. Miller's argument appears to be directed at what occurred after 1791. The Hof case, most of the problems there. Anything occurring after 1791 appears to be irrelevant for the jury determination.

The Ross test seems to be clear, that we have to look to the common law of England in 1791.

In Hof, I think it's important to show that the mistake that was made, that the courts and everyone in the District of Columbia thought that the justice of the peace jury trials were common law jury trials. They tried debt actions over twenty dollars.

Their jurisdiction, their exclusive jurisdiction was up to fifty dollars, I believe, at some point during that time.

Mr. Miller has also indicated that the -- for some reason the tenants are going to file counterclaims in the

122,000 cases. This is really unrealistic.

It's quite clear that jury trials are not demanded except in a very few cases. As he indicated, himself, only eight trials occurred in 1971, eight jury trials. I think seventeen cases went to jury and nine settled before the jury rendered a verdict.

QUESTION: He said six hundred demands were made for dilatory purposes.

MR. BARNETT: Yes, Your Honor. Well, of course, he characterized this as a dilatory purpose. It's quite obvious that in landlord and tenant cases, like any other case, where jury demands are filed, that most cases settle. The trial problems, attorneys not having time to go to trial, this type of problem.

And the parties just wanting to settle. These cases settle much easier than the normal civil actions.

The question of dilatoriness is certainly in Mr. Miller's characterization. In fact, the landlord is quite adequately protected in these proceedings because of this protective procedure which Judge Wright set out in the Javins decision and later amplified in another case, Bell vs. Tsintolas Realty.

That procedure permits the landlord, or requires the tenant to put into the registry of the court the pending rent during the -- the rent pending the proceeding, until the

trial date comes up. Certainly what the landlord is seeking in these cases is the rent, and of course as long as he's protected, the court has hold of the money in an escrow account, which it can disburse at the end of the case, he's fully protected.

So it's certain now that the backlog doesn't affect the landlord. If there is a backlog at all.

In 1971 the Chief Judge of the Superior Court issued a ruling whereby jury trials in landlord and tenant cases were to take place three weeks after the return date, within three weeks after the return date.

QUESTION: What if the tenant fails to put the money into escrow in a given month, what consequences befall him?

MR. BARNETT: Judgment would be rendered for the landlord.

QUESTION: In effect a default judgment on the landlord's complaint?

MR. BARNETT: Yes, Your Honor.

As I indicated, the Chief Judge had imposed a three-week limit on jury trials. This is at the time when the question was in dispute, before the decision of the court below.

In practice today, judge trials in the landlord and tenant court are backlogged anywhere from four to six weeks. So the delay argument, the dilatoriness, I think really means

nothing.

Finally, I'd like to conclude, Your Honor, just by noting that the historical lineage in this case being so clear, and Mr. Miller certainly hasn't shown us anything that takes away from that, and the Court has, on numerous occasions, indicated that all possible doubts regarding the Seventh Amendment should be resolved in favor of a jury trial.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:54 o'clock, a.m., the case in the above-entitled matter was submitted.]

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