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Retaliatory Eviction--Is California Lagging Behind

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to compel the doctor to fulfill his moral duty to disclose all pertinent facts.[77] Traditionally, this disclosure was not necessary until the requirements of *res ipsa* had been established. But the *Quintal* doctrine forces the defendant doctor to prove his freedom from negligence without the plaintiff establishing the traditional requirements.[78] This recent extension in medical malpractice cases will have a detrimental effect on the practice of good medicine.[79]

The legitimate interests of the injured patient can be safeguarded without distorting the doctrine of *res ipsa*. The plaintiff would encounter no serious problem in establishing the first requirement.[80] Securing expert evidence to support the general proposition that the injury is of a kind that does not ordinarily occur absent negligence would be an easier chore than obtaining expert testimony establishing specific acts of negligence.[81] Doctors would be more prone to respond to questions regarding inferences which may be drawn from the nature of the act itself than to testify that the defendant doctor did indeed deviate from the standard of care in the community.

If the courts continue to give *res ipsa* instructions without compelling the plaintiff to establish the first requirement, the doctrine of *res ipsa* will become an "open sesame resulting in a rule of absolute liability whenever injury follows services of physicians and surgeons."[82]

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[77] Louisell & Williams, *supra* note 2, at 255.

[78] The same conclusion as to the effect of the *Fowler* case was drawn in Note, 38 So. CALIF. L. REV. 740, 744 (1965).

[79] "To permit an inference of negligence under the doctrine of res ipsa loquitur solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of operations or new procedures involving an inherent risk of injury even after due care is used." Siverson v. Weber, 57 Cal. 2d 834, 839, 372 P.2d 97, 99 (1962).

[80] See note 9 *supra*.

[81] Note, 60 MICH. L. REV. 1153 (1962).

[82] Clark v. Gibbons, 240 A.C.A. 776, 790, 50 Cal. Rptr. 127, 136 (1966).

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RETALIATORY EVICTION—IS CALIFORNIA LAGGING BEHIND?

In a city such as Washington D.C., where housing is scarce and one-sixth of all dwellings are inadequate,[1] obtaining a place to live can be a difficult task. On March 24, 1965, Yvonne Edwards ended her search for lodging by entering a month to month tenancy agreement with Nathan Habib; shortly thereafter she took possession of her newly rented home. Her elation soon subsided, as she discovered the premises were in a condition below the minimum standards prescribed by statutes and regulations governing housing in the District of Columbia.

[1] See San Francisco Examiner & Chronicle, Jan. 1, 1967, p. 13, col. 8.

Desiring the benefits of a safe and sanitary dwelling, she notified the proper authorities of the violations. They, in turn, notified her landlord of the repairs and improvements that would have to be made. Nathan Habib promptly sought to evict the complaining tenant.

In the District of Columbia were Habib brought his suit, the existing law permitted a landlord to evict a tenant for any reason or no reason, in a summary proceeding, after notice to quit had been given.[2] Thus he had every reason to believe he would succeed, and he was successful in the trial court by a default judgment.[3] Granted a rehearing, Edwards sought to show that the cause of her eviction was retaliation, but the trial court refused to admit the evidence and directed a verdict for the landlord. She appealed to the United States Court of Appeals for the District of Columbia; in a per curiam decision the court held that while rent must be paid, a defense of retaliation *was* admissible.[4] Judge Wright, in a concurring opinion, said that a person has a constitutional right to inform the authorities of violations of the law,[5] and a court will not aid a landlord in his attempt to deprive a tenant of this right: "A landlord may evict for any legal reason or no reason. What he may not do is evict for an illegal purpose such as punishing the tenant for exercising her constitutional right to report law violations on the premises to the proper authorities."[6] This decision marks a major departure[7] from the well settled rules of landlord and tenant law.

[2] D.C. CODE ANN. § 45-910 (1961) (summary possession statute); *e.g.*, Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955) (dictum).

[3] A motion to set aside the default judgment was denied, and that refusal was appealed in Habib v. Edwards, Civil No. 75895-65, D.C. Ct. Gen. Sess. Ll. & Ten. Branch, Oct. 28, 1965. Judge Harold M. Greene, in a memorandum decision, declared such an eviction to be unconstitutional and granted a rehearing.

[4] Edwards v. Habib, 366 F.2d 628 (D.C. Cir. 1965) (per curiam) (Wright, J., concurring; Danaher, J., dissenting).

[5] Judge Wright relies heavily upon United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) where the court held that landlords could not evict or threaten to evict Negro tenants for registering to vote.

[6] 366 F.2d at 629 n.3. Judge Wright relied upon *In re* Quarles and Butler, 158 U.S. 532 (1895) which holds that there is a constitutional right to inform the authorities of a violation of a *federal* law. This right "does not depend upon any Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *Id.* at 536. It would seem that the reasoning of *Quarles* would also apply to the report of a violation of any local law or ordinance, since such local regulation is inherent in our governmental system. Furthermore, it appears feasible to assert that the fundamental first amendment right to petition the government for a redress of grievances, applied to the states through the fourteenth amendment, might be a sound basis for finding a constitutional right to report local law violations to the local authorities.

[7] This is not the first time a court has commented on retaliatory eviction. Hotel & Restaurant Employees Union v. Boca Raton Club, Inc., 73 So. 2d 867 (Fla. 1954). In this case, a resort hotel in an isolated area provided housing for employees. When the employees struck, the employer evicted them. The court noted that a temporary restraining order should have been granted when the employees applied for it, as "the employer's primary purpose was retaliatory. Certainly the employer could not have been enjoined permanently from evicting striking employees from the premises, nor should the temporary injunction have been one of long standing. But temporary relief should have been granted " *Id.* at 872 (dictum).

Background—The Common Law and Modern Society

Under the common law rule a tenant without a provision for duration in his lease has no defense against an action for eviction by the landlord.[8] A landlord may demand possession of his premises for any reason or no reason, and a court of competent jurisdiction will give him possession after reasonable notice has been served.[9] The tenant does have some recourse when the landlord is a wrongdoer. Under the doctrine of constructive eviction, a tenant may move without liability for rent when the landlord acts or neglects to act and the condition of the premises so interferes with the tenant's enjoyment and possession as to force him, acting as a reasonable man, to move from the premises.[10] The tenant *must* vacate the premises to avail himself of the doctrine of constructive eviction.[11] Although the courts have tended to broaden the scope of the factors constituting a constructive eviction,[12] the tenant's problem of finding and renting a safe, sanitary home at a price he can afford has not been solved. The ability to move when other housing in the same price range is scarce and substandard is no remedy.[13] The *Habib* decision clearly puts the tenant in a better position by allowing him to seek enforcement of the building, health and safety codes without being forced to move to another dwelling that might be in worse condition.

At one time, the common law right of summary possession may have fulfilled the needs of society. But American society constantly changes. A technological revolution has taken place; Americans have more leisure time and more goods than ever before. As the standard of living and housing increases, it would seem that slums and substandard housing would become less of a problem. Such is not the case. The trend toward urbanization has led to overcrowded cities. The 1960 census indicates that there were over 58 million housing units in the United States in that year,[14] and almost one-half of these were located in the standard metropolitan areas;[15] of this one-half, almost twenty per cent of the dwellings

[8] Without a provision for duration, a lessee has a tenancy at will or a periodic tenancy. For a discussion of the applicable common law rules, see Angel v. Black Band Consol. Coal Co., 96 W Va. 47, 122 S.E. 274 (1924).

[9] See Blum v. Robertson, 24 Cal. 127 (1864); Waring v. King, 8 Mees. & W 511, 151 Eng. Rep. 1166 (1841); 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 145-67 (1947).

[10] Veysey v. Moriyama, 184 Cal. 802, 195 Pac. 662 (1921); 2 WALSH, *op. cit. supra* note 9, at 306.

[11] Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Palumbo v. Olympia Theatres, 276 Mass. 84, 176 N.E. 815 (1931).

[12] For example, a disturbance of the beneficial enjoyment of the premises is sufficient to constitute a constructive eviction. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 155 P.2d 24 (1944); Sierad v. Lilly, 204 Cal. App. 2d 770, 22 Cal. Rptr. 580 (1962); Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N.Y.S. 1050 (1913).

[13] While one tenant or a few tenants might be able to find housing in better condition, a substantial number of the tenants living in substandard housing, if they moved, would have no place to go.

[14] U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1960 CENSUS OF HOUSING, 1 STATES & SMALL AREAS 40 (1960) [hereinafter cited as 1960 CENSUS].

[15] *Ibid.* A standard metropolitan area is a heavily populated area, composed of the central city and surrounding suburbs, determined by the existence of contiguous dwellings, not political boundaries.

were in a deteriorating or dilapidated condition.[16] Tenants occupied twice as many of these substandard dwellings as did owners.[17] This indicates that the problem is of great magnitude, and that tenants bear the brunt of substandard housing.[18] The number of units classified as substandard is increasing as old dwellings are not repaired and new ones are built defectively.[19]

California also is beset with problems of substandard housing. With over 5 million dwelling units in the state in 1960, 9.4 per cent were deteriorating or dilapidated,[20] and over one-half of these were tenant occupied.[21] In Los Angeles and San Francisco, substandard housing occupied by tenants outnumbers such premises occupied by owners in even greater proportions.[22]

The existing common law is inadequate to provide relief from the substandard conditions which exist in California and other areas of the United States.[23] When a landlord fails to adequately maintain his premises, the substandard condition

[16] 5,044,150 of the 36,386,215 dwellings located in standard metropolitan areas were deteriorating or dilapidated. *Ibid.*

[17] *Ibid.*

[18] While the precise effects of living in substandard conditions cannot be measured, there is a definite correlation between a substandard neighborhood and a high crime rate. See San Francisco Examiner & Chronicle, Jan. 1, 1967, p. 13, col. 8.

[19] See TEBBEL, THE SLUM MAKERS 48-49 (1963). See generally TEBBEL, *supra* THOMPSON, A PREFACE TO URBAN ECONOMICS (1965).

[20] In 1960 there were 5,465,870 dwelling units in the state; 585,540 of these were deteriorating or dilapidated. 1960 CENSUS 5.

[21] Tenants occupied 322,377 out of the 585,540 deteriorating or dilapidated dwellings. *Ibid.*

[22] In Los Angeles, out of 936,202 total units, 77,541 were substandard; of these, only 16,392 were owner occupied, while 52,100 were tenant occupied (a ratio of over 3 to 1). *Id.* at 67. In San Francisco, out of 310,552 total units, 27,785 were substandard; of these only 3,569 were owner occupied, while 19,993 were tenant occupied (a ratio of over 5 to 1). *Id.* at 70.

[23] If substandard housing were eliminated there would not be retaliatory eviction, as tenants would no longer have violations to report to the authorities. Present practices are not eliminating substandard housing. Public housing lacks adequate funds to make a significant difference in the general trend of housing conditions. Telephone Interview With Fred S. Threefoot, Manager, Rental Office, San Francisco Housing Authority, Oct. 1966. Strict code enforcement meets the objection that in many instances it would be unjust to the property owner. Financing improvements is a major problem for the owners; to provide adequate time to raise the necessary capital, San Francisco violators are given eighteen months to comply with code requirements after discovery. Interview With Mr. Robert Bullock, Inspector, Dep't of Public Health, Bureau of Sanitation & Housing Inspection, San Francisco, California, Oct. 1966. Mr. Bullock indicated that many times the Inspection Bureau itself is forced to evict tenants, when the landlord cannot or will not repair his premises. Owners of dwellings in the worst condition are no longer able to evict a complaining tenant and replace him with another, unless they repair the substandard conditions. While inspections were made only once a year in the past, they are now made continuously in the case of flagrant violation of the building codes. Large scale removal of substandard housing does not have any lasting effect, as new slums spring up to take the place of old ones. See MILLSPAUGH, HUMAN SIDE OF URBAN RENEWAL 230-31 (1958); THOMPSON, *op. cit. supra* note 19, at 296-98. In any event, elimination of substandard housing will be a gradual process. It does not seem justifiable to permit retaliatory eviction simply because the conditions fostering it may someday disappear.

may be corrected if the tenant is able to inform the authorities of that condition without fear of retaliatory eviction. But the tenant who is faced with the threat of retaliatory eviction is not likely to report substandard conditions to the authorities. In this manner, the threat of retaliatory eviction may contribute to substandard housing.

Other States Have Acted

Progressive jurisdictions, recognizing the problem, have taken affirmative action. In New York, the Spiegel Law,[24] enacted in 1962, allows public welfare officials to withhold rent where tenants who are welfare recipients live in housing with conditions which are dangerous or detrimental to life or health. Realizing the negative effect a retaliatory eviction would have on this statute, the legislature amended the law in 1965 to provide for a stay of eviction.[25] Now, when rent is withheld because of substandard conditions, the landlord cannot regain possession as long as deleterious conditions exist. Although this provision applies only to tenants who are also welfare recipients, it seems indicative of the change in the law necessary to improve substandard housing everywhere.[26]

Massachusetts[27] and Connecticut[28] have modified the landlord and tenant relationship, by enacting statutes which are similar in nature. Taking notice of the housing shortage, the Massachusetts legislature has given the courts the discretionary power to stay a judgment and execution of eviction for a period of up to nine months.[29] This judicial power can be exercised only when the tenant is not a wrongdoer, and when he has searched diligently but unsuccessfully for similar housing in the same city.[30] The tenant must comply with any terms the

[24] N.Y. Sess. Laws 1962, ch. 997, effective July 1, 1962. The act states, in part: "The legislature hereby finds and declares that certain evils and abuses exist which have caused many tenants, who are welfare recipients, to suffer untold hardships, deprivation of services and deterioration of housing facilities because certain landlords have been exploiting such tenants by failing to make necessary repairs and by neglecting to afford necessary services in violation of the laws of the state. " This statement appears in the legislative history section of the codification; see N.Y. Soc. Welfare Law § 143-b (McKinney 1966).

[25] N.Y. Sess. Laws 1962, ch. 997, effective July 1, 1962, as amended by N.Y. Sess. Laws 1965, ch. 701, effective July 2, 1965, N.Y. Soc. Welfare Law § 143-b(5)b (McKinney 1966). Subsection (5)b of this amendment provides: "In any such action or proceeding the plaintiff or landlord shall not be entitled to an order or judgment awarding him possession of the premises or providing for removal of the tenant, or to a money judgment against the teant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law relating to dangerous or hazardous conditions or conditions detrimental to life or health."

[26] While the Spiegel Law avoids the problems of the vague doctrine of constructive eviction, see notes 10-13 *supra*, by providing relief for a condition dangerous to life, health or safety [N.Y. Soc. Welfare Law § 143-b(2) (McKinney 1966)], it has been criticized because its rent-withholding provisions might prevent a poor property owner from improving the premises [see Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 Buffalo L. Rev. 572, 584-85 (1966)], especially if the owner has no income except that which he collects from his tenants.

[27] Mass. Gen. Laws Ann. ch. 239, §§ 9-13 (1959).

[28] Conn. Gen. Stat. Rev. § 52-546 (Supp. 1964).

[29] Mass. Gen. Laws Ann. ch. 239, §§ 9-13 (1959).

[30] Mass. Gen. Laws Ann. ch. 239, § 10 (1959).

court may prescribe.[31] Perhaps the most vital part of the Massachusetts law is the statement that "any provision of a lease whereby a lessee or tenant waives the benefits of any provision [for a stay of eviction] shall be deemed to be against public policy and void."[32] Thus, it appears that retaliatory eviction can be effectively prevented for a brief period.

Illinois changed the common law in 1963 by expressly prohibiting retaliatory eviction:

> It is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation. Any provision in any lease, or any agreement or understanding, purporting to permit the landlord to terminate or refuse to renew a lease or tenancy for such reason is void.[33]

While this statute would seem to effectively prevent retaliatory eviction, attorneys in Illinois have found that as a practical matter it is often difficult to prove that the reason for the eviction was retaliation.[34]

Although the attempts of these states to prevent retaliatory eviction is laudable, most of the statutes are subject to the criticism that they do not prohibit *indirect* retaliatory action by the landlord. There is no express restriction to prevent the landlord from raising the tenant's rent in retaliation of the tenant's complaint to the authorities.[35] If the landlord has the power to raise the rent above the tenant's ability to pay, without regard to the market rental value of the premises, the landlord could claim non-payment of rent as his reason for eviction. As a practical consideration, a landlord would favor a rent increase to force his tenant to move rather than a formal action to effect the same result.[36] It would seem that this practice as well as direct retaliatory eviction should be prohibited.

Why Eliminate Retaliatory Eviction?

It seems unjust to permit the retaliatory eviction of a tenant who has aided law enforcement, promoted public policy, and improved health conditions. Re-

[31] MASS. GEN. LAWS ANN. ch. 239, § 10 (1959).

[32] MASS. GEN. LAWS ANN. ch. 239, § 12 (1959).

[33] ILL. REV. STAT. ch. 80, § 71 (1965). In Illinois, out of 3,275,799 dwellings, 503,438 were substandard; of these, over one-half were tenant occupied in 1960. 1960 CENSUS at 6. With less than 7% of the dwellings substandard, the Illinois legislature thought it advantageous to prevent retaliatory eviction.

[34] Letter From Edward Flitton, student participant in the Conference on the Landlord-Tenant Relationship at the University of Chicago Law School, Nov. 1966. Attorneys at the conference noted the difficulty of proof. *Edwards v. Habib* did not solve this problem, as it merely gave the tenant a chance to prove that she was being evicted in retaliation; no guidelines were drawn. See notes 58-62 and accompanying text *infra*.

[35] The laws of New York are not completely subject to this criticism, as local rent control (for cities over one million population) prevents this action by the landlord. N.Y. Sess. Laws 1962, ch. 21, as amended by N.Y. Sess. Laws 1965, ch. 318, as amended by N.Y. Sess. Laws 1966, ch. 13.

[36] Interview With Mr. Robert Bullock, *supra* note 23. Of course, improvements in housing will justify some increase in rent as an amortized investment; this should not be too difficult to distinguish from a retaliatory increase in rent.

taliatory eviction should be allowed *only* if there are factors which outweigh the policy in favor of encouraging the tenant to complain about substandard housing. Indeed, landlords of slum properties often contend that the tenants cause the delapidation in their buildings.[37] But this contention may be refuted by the argument that the landlord's rental practices are the major cause of substandard housing.[38] By permitting too many tenants to occupy a dwelling, the landlord may increase his rental income. But this will probably lead to more wear and tear on the building, which in turn will cause substandard conditions. If the landlord must repair the delapidation resulting from increased tenancy, his increased profits will be diminished. Since most slumlords are interested in maximizing profits, they do not make the necessary repairs, and thus housing conditions fall below standard. However, if retaliatory eviction is eliminated, tenants might complain more often, necessitating more repairs. This would make overcrowding less profitable for the landlord, as the increase of tenants would lead to a greater cost of repairs. Thus, eliminate retaliatory eviction and it is probable that the rental practices of the slumlord will change.

While there are possible disadvantages in prohibiting retaliatory eviction, they are not sufficient to justify a continued sanction of the practice. For example, tenants might harass the landlord with excessive complaints to the authorities.[39] In such a situation, eviction should not be barred, as the tenant is not seeking the enforcement of the law.

One authority suggests that "the long-run success or failure of rehabilitation [of the slums] is inextricably tied up with the attitudes of the people living in the neighborhoods to be renewed."[40] The people living in substandard housing must believe that their efforts will be of some benefit, if they are to seek improvement of their environment. Yet if tenants are evicted when they complain to the authorities, they are apt to feel that they are helpless, and complacently accept their substandard housing. While it is true that the attitude of a landlord is not likely to be improved when a tenant complains, once the landlord realizes that he cannot evict the tenant in retaliation, he will be more likely to repair the premises before a complaint is made. Without retaliatory eviction it is possible that the relationship between landlord and tenant will be improved, in the long run. If retaliatory eviction is prevented, housing problems will not be solved. But a step in the right direction will have been taken.

Status of the Law in California

California has the same problem of substandard housing as other jurisdictions which have already attempted to prohibit retaliatory eviction.[41] Yet the laws of

[37] Simmons, *supra* note 26, at 591. Assuming that this is true, it should not relieve the landlord of his duty to keep his premises in standard condition, as other tenants in the building who have not caused the deleterious conditions should not be made to suffer. *Ibid.*

[38] See THOMPSON, *supra* note 19, at 296-98.

[39] Interview With Mr. Robert Bullock, *supra* note 23. Mr. Bullock indicated that even now, tenants sometimes exceed the bounds of reasonableness in their demands.

[40] MILLSPAUGH, HUMAN SIDE OF URBAN RENEWAL 230 (1958).

[41] For one example, compare note 33 *supra* with the statistics in notes 20-22 *supra* and accompanying text.

California are seemingly inadequate to afford the tenant relief from substandard housing[42] and totally inadequate to prevent retaliatory eviction.

When a tenant rents from month to month, at will, or at sufferance, the landlord in order to end the tenancy must provide written notice to remove from the premises within not less than thirty days.[43] If the tenant does not move, the landlord may bring summary proceedings for possession[44] under the unlawful detainer statute.[45] As it is a summary proceeding for possession, neither a cross-complaint nor a counterclaim may be properly filed by the defending tenant.[46]

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[42] The California legislature of 1872 recognized the tenant's need for relief from substandard housing and attempted to fill that need by enacting Civil Code §§ 1941 and 1942. CAL. CIV. CODE § 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are [caused by the tenant's failure to exercise reasonable care]." Section 1942 states: "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions."

The courts have held that when there is an express waiver of any obligation of the landlord to repair, no covenant to repair may be implied against the owner. Bakersfield Laundry Ass'n v. Rubin, 131 Cal. App. 2d 862, 280 P.2d 921 (App. Dep't, Super. Ct., Kern 1955). Even if the parties do not agree to waive the provisions in the code, the court may find that the tenant has impliedly waived his rights, by not seeking enforcement of the code provisions. If the landlord does not repair, and the tenant neither applies one month's rent for such repairs nor moves, he has impliedly waived the provisions. Moroney v. Hellings, 110 Cal. 219, 42 Pac. 560 (1895). At best, the legislative modifications of the common law in 1872 were of little real benefit to the tenant of substandard housing.

More recently, California has attempted to improve the position of a limited number of tenants living in substandard housing. The rules of the California Department of Social Welfare, governing aged, totally disabled, or blind welfare recipients states that when a member of this class of persons lives in substandard housing, that portion of his monthly check which is to be used for rent is lowered to twenty-one dollars a month until the conditions are corrected or the tenant moves. Cal. State Dep't of Social Welfare, Old Age Security—Manual of Policies and Procedures, § A-202.05 (1964). This has not worked well and in many instances has created a great hardship for the welfare recipient tenant. In practice, the rent allowance is restored to normal as soon as the landlord applies for a building permit; as it is usually eighteen months before the work is completed, the tenant continues to live in substandard housing for that period. Even if the landlord does not repair, he often collects the full amount of the rent from that portion of the welfare recipient tenant's check that is intended for food. Interview With Mrs. Else Reisner, Housing Co-ordinator of Adult Programs, City and County of San Francisco, Oct. 7, 1966.

[43] CAL. CIV. CODE § 789.

[44] CAL. CIV. CODE § 792 (summary possession statute). When the tenancy is ended, the tenant must surrender the premises. Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190 (1887).

[45] CAL. CODE CIV. PROC. § 1161.

[46] A tenant cannot enter a cross complaint that he entered the lease under fraud,

There are a few exceptions to the summary nature of the unlawful detainer statute.[47] Perhaps the most important exception is found in the recent case of *Abstract Investment Co. v. Hutchinson*,[48] where the alleged denial of a constitutional right was held to be a proper ground for a full hearing before the court.[49] A Negro tenant with a month to month lease was served with notice to quit, but he refused to move. The landlord brought an action for possession under the unlawful detainer statute, and the court held that the alleged constitutional defense (denial of equal protection) could be entered against the summary suit for possession.[50] The court decided that a summary judgment of eviction based on grounds of race alone would violate the equal protection clause of the fourteenth amendment, and the general principles of equity.[51] "Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice."[52]

With the reasoning in the *Abstract* decision that the denial of a constitutional right is a proper defense in a summary proceeding for possession, it is to be hoped that the California courts will adopt the reasoning in the *Habib* case[53] and construe retaliatory eviction as an infringment of constitutional rights.[54] But even if *Abstract* and *Habib* are interpreted together to provide a defense to retaliatory eviction, it would apparently be a defense only;[55] that may not be sufficient. There

or deny the landlord's title in a suit for unlawful detainer. Knowles v. Robinson, 60 Cal. 2d 620, 36 Cal. Rptr. 33, 387 P.2d 833 (1963).

[47] There is a statutory provision for discretionary relief from forfeiture of a lease, where hardship would otherwise result. CAL. CODE CIV. PROC. § 1179. Equity has allowed a lessee to prove the existence of an oral lease to prevent a forfeiture. Schubert v. Lowe, 193 Cal. 291, 223 Pac. 550 (1924). And equity will allow oral proof of an agreement that a more formal lease was contemplated, to prevent a forfeiture. Rishwain v. Smith, 77 Cal. App. 2d 524, 175 P.2d 555 (1947). But relief from forfeiture has been denied where the tenant withheld rent due to the landlord's failure to make repairs. Cambridge v. Webb, 109 Cal. App. 2d 936, 244 P.2d 505 (App. Dep't, Super. Ct., San Francisco 1952). Since a lease without a provision for duration is not a sufficient estate to constitute a forfeiture if the tenant is evicted, it seems there is no equitable relief for the majority of tenants living in substandard housing. See City of Marysville v. Poole, 76 Cal. App. 478, 245 Pac. 248 (1926) (forfeiture of growing crops not sufficient for equitable action).

[48] 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

[49] "The court has the power to look beyond the allegations of the complaint in an unlawful detainer proceeding and to inquire into the constitutional issue [of equal protection] placed before it by the affirmative defenses of the action." *Id.* at 247, 22 Cal. Rptr. at 313.

[50] *Ibid.* Since the suit for unlawful detainer was brought in a state court, the necessary state action was involved in the denial of equal protection. *Id.* at 245-46, 22 Cal. Rptr. at 311.

[51] *Id.* at 249, 22 Cal. Rptr. at 314.

[52] *Ibid.*

[53] See note 6 *supra* and accompanying text.

[54] *Ibid.*

[55] When a Negro sought an injunction to restrain his landlord from evicting him when the landlord gave notice to quit solely on the grounds of race, he was granted no relief. The court noted that as the state was not a party to the wrongdoing, there was no denial of the equal protection of the laws. Hill v. Miller, 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P.2d 33 (1966).

may be instances where a right of action, in the form of an injunction, would be the more desirable remedy.[56]

Guidelines for California

If California is to maintain its leadership in the law, retaliatory eviction should be prohibited. An exception to the summary nature of an action for possession, allowing the tenant to allege retaliatory eviction as a defense, would be desirable. Such an exception, however, should extend only to the question of the retaliatory motive.[57] To aid the proof of a retaliatory motive,[58] it would also be desirable to permit a presumption of retaliatory eviction when the tenant complains to the authorities, and the landlord seeks eviction within a definite period thereafter.[59]

[56] For example, when the landlord refuses to rent to the tenant solely because he thinks the tenant will report violations to the authorities, a situation analogous to Hill v. Miller, *supra* note 55, an injunction would be a more adequate remedy for the tenant. A discussion of the injunctive relief is beyond the scope of this paper and is mentioned only to indicate another possible method of defeating a retaliatory motive.

[57] A summary proceeding can be heard and decided quickly, with little difficulty; a defense would undoubtably extend the time required in court. If the summary nature of the action is to be preserved, defenses less important than retaliatory eviction should not be allowed.

At present, CAL. CODE CIV. PROC. § 1179a requires that the courts give precedence to actions for the recovery of real property in order to obtain a rapid hearing and determination. Other exceptions to the summary nature of the proceedings for possession indicate that a full hearing in a limited area of possessory actions would not greatly disrupt present procedure. A constitutional defense may be asserted, Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) and an equitable defense may be heard where forfeiture of an estate in land is involved, Schubert v. Lowe, 193 Cal. 291, 223 Pac. 550 (1924); Rishwain v. Smith, 77 Cal. App. 2d 524, 175 P.2d 55 (1947). Once landlords realize that retaliatory eviction is not possible, it is probable that they would institute fewer suits for eviction. Thus, allowing a defense against retaliatory eviction should not overburden the courts.

If experience were to prove that the increased work would be too great a burden on the courts, it might be desirable to create a new branch of the municipal court to hear and determine landlord-tenant cases exclusively. This has been suggested by Mrs. Else Reisner, *supra* note 55, and has been done in the District of Columbia. The dissenting opinion of Judge Danaher in Edwards v. Habib, 366 F.2d 628, 631-32 (D.C. Cir. 1965) indicates that this system has been very successful.

Such a specialized court would not only relieve the regular courts of some of their presently excessive workloads but would probably increase the rapidity of possessory actions, since there would be no precedence of other suits as CAL. CIV. CODE PROC. § 1179a presently requires.

[58] For a discussion of methods to overcome the difficulites of proof see Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966). *But see* Schier, *Protecting the Interests of the Indigents Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 682 (1966) (proof thought to be almost impossible).

[59] A definite period, established by the legislature, would seem to be more desirable than a reasonable time determined by the courts. If the tenant has to prove that the landlord's eviction proceeding reasonably (i.e., within a period that would logically support the inference of retaliation under all the circumstances) followed the complaint, the proof required of the tenant would be of the same nature as that which the presumption was designed to eliminate, thus diminishing the effect of the presumption.