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RETALIATORY EVICTION IN TEXAS—AN ANALYSIS AND A PROPOSAL

JANE E. BOCKUS

At early common law a lease was considered to represent the sale of an estate for a term of years.¹ Consequently, the tenant under a lease, like the vendee in a conveyance of real property, took subject to the doctrine of caveat emptor.² Since the tenant's rights stemmed from property law,³ the contract remedies of mutually dependent covenants and implied warranties were not available.⁴ As a result, if the dwelling on the leased land was totally uninhabitable or even if it was destroyed, the tenant remained liable for the rent.⁵ The only implied covenants in a lease agreement were the promise of the tenant to pay the rent and the promise of the landlord to provide quiet enjoyment.⁶ Since the transfer of possession of land was the main purpose of a lease,⁷ these implied covenants were sufficient to protect the interests of both parties.⁸

URBANIZATION AND THE LANDLORD-TENANT RELATIONSHIP

This system worked well in an agrarian society in which most lease agreements involved tracts of farm land.⁹ The lessee-farmer was generally

1. See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 65-69 (1962).

2. 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952).

3. 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1110, at 377 (repl. 1959).

4. *Id.* § 1129, at 471. The covenants were considered independent, so even if the landlord failed to deliver possession the tenant was still bound to pay the rent. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 228 (1969); see 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70-71 (1962); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-89 (3d ed. 1962). No implied warranty that the dwelling was habitable or fit for its intended use at the time of the lease agreement existed at common law. Thus the tenant could not allege unfitness of the dwelling as the basis of a suit against his lessor or as a defense in an action by the landlord for rent. 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952).

5. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70-71 (1962).

6. See 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1129, at 472 (repl. 1959). The legal implications of a covenant for quiet enjoyment are that the landlord has an adequate title to the leasehold estate and that the tenant will be permitted to enjoy his interest without disturbance. *Id.* at 471; see *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 354, 233 S.W.2d 286, 289 (1950).

7. *Green v. Superior Court*, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974). See also 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1129, at 468-71 (repl. 1959).

8. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 445 (1972).

9. *Id.* at 445.

self-sufficient and needed no more from his landlord than quiet peace and enjoyment.¹⁰ The industrial revolution, however, with its consequent urbanization, resulted in many significant changes in the landlord-tenant relationship.¹¹ The average tenant was less capable of making needed repairs,¹² and dwelling facilities became more complex, requiring greater sophistication to repair.¹³ Unlike the rural farmer, the urban dweller could not realistically be expected to make all necessary repairs.¹⁴ Legally, however, the tenant was still responsible for them.¹⁵

Another effect of industrialization was the increasing need for a large labor force in a centralized area.¹⁶ The migration to the cities gave rise to a housing market so tight that many tenants had no choice but to accept a tenancy on whatever terms the landlord dictated.¹⁷ Frequently, an oral agreement creating a periodic tenancy resulted.¹⁸ The duties of the landlord under such an agreement were merely those prescribed by common law.¹⁹ In return for paying rent every week or month, the tenant received a place to live.²⁰

In crowded urban areas, dwellings deteriorated more rapidly than they

10. See ABF, MODEL RESIDENTIAL LANDLORD-TENANT CODE, Introduction at 6 (Tent. Draft 1969) [hereinafter cited as MRLTC].

11. *Id.* at 6. The industrial revolution initiated a major migration to the cities. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369, 372 (1961).

12. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369, 373-74 (1961).

13. MRLTC, *supra* note 10, at 6.

14. *Id.* at 6; see Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369, 373-74 (1961).

15. 1 AMERICAN LAW OF PROPERTY § 378, at 347 (A.J. Casner ed. 1952); see Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279, 1281 (1960). Absent an express agreement to the contrary, a landlord in Texas has no duty to repair any defect in the premises. See *Morton v. Burton-Lingo Co.*, 136 Tex. 263, 266, 150 S.W.2d 239, 241 (1941); *Kallison v. Ellison*, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, no writ).

16. See Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1254-55 (1966).

17. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 520 (1966).

18. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 253 (1977). A substantial portion of the population presently lives under this type of tenancy. *Id.* There are three basic types of tenancies. An estate for years lasts for a specified period of time and terminates without notice. 1 AMERICAN LAW OF PROPERTY § 3.13 (A.J. Casner ed. 1952). A periodic tenancy continues from term to term and is automatically renewed until proper notice of termination is given. The tenancy is created when the parties do not fix the duration of the tenancy or when a tenant holds over after the expiration of a lease. *Id.* § 3.23. A tenancy at will arises when the parties agree that either may terminate the tenancy at any time without notice. *Id.* § 3.28.

19. See 1 AMERICAN LAW OF PROPERTY § 3.1 (A.J. Casner ed. 1952).

20. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 253 (1977).

could be replaced.²¹ Low income tenants, having no bargaining position as a result of housing shortages, were forced to accept substandard housing.²² In an attempt to mitigate this problem, many legislatures established housing codes.²³ Such codes did little, however, to improve the tenant's position²⁴ because he was still liable for the rent whether his apartment was habitable or not.²⁵ Further, if a periodic tenant reported housing code violations in an attempt to improve the condition of his dwelling, he was vulnerable to eviction²⁶ because the landlord could evict for any reason simply by giving notice.²⁷

MODERN REFORMS IN THE COMMON LAW

Many courts and legislatures have realized that the agrarian concept of landlord-tenant law does not adequately represent the needs of the modern tenant.²⁸ Resultant changes in the law have done much to reduce the harshness of the common law doctrine of caveat emptor.²⁹ Warranties and remedies for the tenant as well as housing codes to be enforced by local authorities have been created.³⁰ To implement and protect these newly

21. 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1129, at 468 (repl. 1959).

22. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 521 (1966).

23. Comment, *California's Common Law Defense Against Landlord Retaliatory Conduct*, 22 U.C.L.A. L. REV. 1161, 1164 (1975). See generally Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966). Congress provided additional motivation for the enactment of housing codes with the Housing Act of 1954, section 303, as amended. See 42 U.S.C.A. § 1451(c) (West Supp. 1978). This act made a workable program for the prevention of the spread of slums a prerequisite to obtaining urban renewal loans and grants and other federal assistance. *Id.*

24. See generally Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Comment, *Housing Codes and a Tort of Slumlordism*, 8 HOUS. L. REV. 522 (1971).

25. See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 71 (1962).

26. See *Aluli v. Trusdell*, 508 P.2d 1217, 1220 (Hawaii), *cert. denied*, 414 U.S. 1040 (1973); TEX. REV. CIV. STAT. ANN. art. 5236a (Vernon Supp. 1978). This statute provides for the termination of a periodic tenancy, by the giving of proper notice. The landlord need not show a reason for termination.

27. See, e.g., *Snitman v. Goodman*, 118 A.2d 394, 398 (D.C. 1955); *Fowel v. Continental Life Ins. Co.*, 55 A.2d 205, 207 (D.C. 1947); *Gabriel v. Borowy*, 85 N.E.2d 435, 438 (Mass. 1949).

28. E.g., *Green v. Superior Court*, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974); *Kamarath v. Bennett*, 568 S.W.2d 658, 660 (Tex. 1978); *Pines v. Perssion*, 111 N.W.2d 409, 413 (Wis. 1961). "The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*." *Id.* at 413. See also CAL. CIV. CODE §§ 1941, 1942 (Deering 1972); OHIO REV. CODE ANN. §§ 5321.04, .07 (Baldwin Supp. 1978); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1977).

29. See 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 489-98 (1972).

30. See *Green v. Superior Court*, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974)

created tenant rights, courts have developed the defense of retaliatory eviction.³¹ If a landlord initiates an eviction proceeding after a tenant takes advantage of his remedies or reports code violations, the tenant may defend by showing that the landlord's motive was retaliatory.³²

The Judicially Created Defense of Retaliatory Eviction

Traditionally, a landlord could evict a periodic tenant for any or no reason if proper notice was given.³³ With few exceptions,³⁴ the courts upheld this power of the landlord.³⁵ In 1968 the landmark decision of *Edwards v. Habib*³⁶ held that a tenant could successfully defend a suit for possession if he showed that the notice to quit was issued in retaliation for his complaints to housing authorities.³⁷ Two distinct theories for justifying the retaliatory eviction defense have emerged from subsequent decisions which have relied upon *Edwards*: a constitutional theory,³⁸ and a public policy theory.³⁹

(implied warranty of habitability in rental agreements); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970) (tenant may repair and deduct cost from rent when landlord has failed to make necessary repairs); TEX. REV. CIV. STAT. ANN. art. 1175, § 35 (Vernon Supp. 1978) (home-rule cities may establish housing codes).

31. See, e.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972); *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); *Dickhut v. Norton*, 173 N.W.2d 297, 301 (Wis. 1970).

32. *Schweiger v. Superior Court*, 476 P.2d 97, 98, 90 Cal. Rptr. 729, 730 (1970) (tenant evicted for exercising statutory right to repair and deduct); *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544, 545 (N.J. Super. Ct. App. Div. 1971) (tenant evicted for complaining to city health officials about lack of water pressure); *Markese v. Cooper*, 333 N.Y.S.2d 63, 65 (Monroe County Ct. 1972) (tenant evicted for reporting housing code violations).

33. See 1 AMERICAN LAW OF PROPERTY § 3.23 (A.J. Casner ed. 1952). A landlord could also evict a tenant at will for any reason and without any notice. *Id.* § 3.28.

34. Four exceptions have generally been recognized to the landlord's unfettered right to evict a tenant. Three exceptions were set out in *Edwards v. Habib*: when the landlord is a governmental body it cannot act arbitrarily towards its tenants; emergency rent control legislation may restrict the landlord's rights; a landlord cannot evict in retaliation for the tenant's registering to vote or actually voting. *Edwards v. Habib*, 397 F.2d 687, 689-90 n.5 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). A fourth exception was recognized in *Walker v. Pointer*: a landlord cannot evict for reasons of racial discrimination. *Walker v. Pointer*, 304 F. Supp. 56, 63 (N.D. Tex. 1969).

35. See, e.g., *Snitman v. Goodman*, 118 A.2d 394, 396 (D.C. 1955); *Gabriel v. Borowy*, 85 N.E.2d 435, 438 (Mass. 1949); *Holcomb v. Lorino*, 124 Tex. 446, 454, 79 S.W.2d 307, 310 (1935).

36. 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

37. *Id.* at 690.

38. See, e.g., *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544, 546 (N.J. Super. Ct. App. Div. 1971); *Engler v. Capital Management Corp.*, 271 A.2d 615, 617 (N.J. Super. Ct. Ch. Div. 1970); *Church v. Allen Meadows Apts.*, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972). See generally 3 HARV. C.R.-C.L. L. REV. 193 (1968).

39. See, e.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972); *Markese v. Cooper*, 333 N.Y.S.2d 63, 69 (Monroe County Ct. 1972); *Dickhut v. Norton*, 173 N.W.2d 297, 299 (Wis. 1970).

Constitutional Theory. The constitutional theory is founded on the assertion that allowing a landlord to evict a tenant in retaliation for reporting housing code violations or for exercising other protected rights violates the first and fourteenth amendments.⁴⁰ To prevail under this defense a tenant must show that his constitutional rights of freedom of speech and freedom to petition the government for redress of grievances have been violated by his landlord.⁴¹ Additionally, a sufficient connection must be shown between the landlord's action and the state to satisfy the color of state law requirement necessary to invoke the fourteenth amendment's due process clause.⁴² Although it has been held that judicial application of a state's common law in a suit between private parties may constitute state action,⁴³ it is not clear what degree of judicial involvement is necessary to invoke constitutional restraints.⁴⁴ As a result of this uncertainty, many courts have chosen not to base their decisions on the constitutional theory.⁴⁵

40. See, e.g., *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544, 546 (N.J. Super. Ct. App. Div. 1971) (evicting tenant for participation in tenants' union violates his first amendment right of freedom of speech); *Engler v. Capital Management Corp.*, 271 A.2d 615, 617 (N.J. Super. Ct. Ch. Div. 1970) (evicting tenant for reporting code violations or joining tenants' union violates his first amendment rights); *Church v. Allen Meadows Apts.*, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972) (evicting tenant for joining tenants' union is violation of his constitutional rights). *But see* *Aluli v. Trusdell*, 508 P.2d 1217, 1220 (Hawaii) (retaliatory eviction does not violate first amendment rights), *cert. denied*, 414 U.S. 1040 (1973).

41. See *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

42. *Id.* at 691; see *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544, 546 (N.J. Super. Ct. App. Div. 1971); *Church v. Allen Meadows Apts.*, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972). See also *Toms Point Apts. v. Goudzward*, 339 N.Y.S.2d 281, 286 (Dist. Ct. 1972), *aff'd per curiam*, 360 N.Y.S.2d 366 (Sup. Ct. 1973). In *Toms Point Apts.*, as affirmed, the court established guidelines for proving that an eviction is retaliatory and unconstitutional. To prevail, the tenant must prove he exercised his constitutional rights in the action he undertook; his complaint is bona fide, reasonable, serious in nature and with foundation in fact; he did not create the condition upon which the complaint was based; and the overriding reason for the landlord's seeking eviction is to retaliate against the tenant for exercising his constitutional rights. *Id.* at 286.

43. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948). In order to meet the requirement of state action when asserting the defense of retaliatory eviction most courts have required more than the use of the court by the landlord in a summary eviction proceeding. Generally, the courts require that there be additional connections between the landlord and the government. See *Weigand v. Afton View Apts.*, 473 F.2d 545, 547 (8th Cir. 1973) (federal financing of privately owned apartments not sufficient connection); *Lavoie v. Bigwood*, 457 F.2d 7, 14 (1st Cir. 1972) (sufficient connection where court enforced eviction and local zoning created leasing monopoly in landlord); *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189, 1190 (2d Cir. 1970) (receipt of federally insured mortgage benefits by landlord not sufficient connection), *cert. denied*, 401 U.S. 994 (1971).

44. See *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). See also *Lindsey v. Normet*, 405 U.S. 56, 64 (1972) (upheld Oregon statute which precluded raising defense of retaliatory eviction in eviction proceedings).

45. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968) *cert. denied*, 393 U.S.

Public Policy Theory. This theory is founded on the proposition that public policy requires that tenants be free to report housing code violations to governmental authorities without fear of eviction in retaliation for their reports.⁴⁶ It is generally recognized that housing codes were enacted primarily to secure safe and sanitary dwellings for the tenant.⁴⁷ Governmental agencies charged with enforcing these codes depend heavily on the reports of tenants for information about code violations.⁴⁸ The effectiveness of the codes would be significantly undermined if landlords, through retaliatory evictions, were allowed to discourage those reports.⁴⁹ To allow such evictions would not only punish the tenant for making a complaint he had a constitutional right to make, but would also inhibit the enforcement of codes enacted for the tenant's benefit.⁵⁰

Some courts have rested their public policy arguments on the theory that the government has an obligation to protect any person reporting a violation of the law.⁵¹ This obligation arises not only from the inherent duty of the government to protect the individual, but also from the necessity that the government administer and enforce an effective minimum housing standard.⁵² In light of either of these public policy arguments and in view of existing housing shortages,⁵³ the threat of eviction must not curtail re-

1016 (1969); *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 529 (Tex. Civ. App.—Dallas 1978, no writ); *Dickhut v. Norton*, 173 N.W.2d 297, 301 (Wis. 1970).

46. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Schweiger v. Superior Court*, 476 P.2d 97, 99-100, 90 Cal. Rptr. 729, 731-32 (1970); *Portnoy v. Hill*, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968).

47. *Edwards v. Habib*, 397 F.2d 687, 700 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). The court emphasized the need for protection of the slum dweller. *Id.* at 700; see *Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255 (1966); *Schoshinski, Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 543 (1966). In *Frank v. Maryland*, 359 U.S. 360, 371 (1959), the Supreme Court observed:

[t]he need to maintain basic, minimal standards of housing, to prevent the spread of disease and of the pervasive breakdown in the fiber of the people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government.

48. See *Edwards v. Habib*, 397 F.2d 687, 700 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

49. See *State v. Field*, 257 A.2d 127, 129 (N.J. Super Ct. App. Div. 1969); *Markese v. Cooper*, 333 N.Y.S.2d 63, 67 (Monroe County Ct. 1972).

50. See *Schweiger v. Superior Court*, 476 P.2d 97, 100, 90 Cal. Rptr. 729, 732 (1970); *Markese v. Cooper*, 333 N.Y.S.2d 63, 67-68 (Monroe County Ct. 1972).

51. See *In re Quarles*, 158 U.S. 532, 535-36 (1895); *Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884). See also *Goodyear Tire & Rubber Co. v. Sanford*, 540 S.W.2d 478, 484 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ). "For the orderly functioning of our society, people must be completely free from all forms of coercion against reporting violations of the law." *Id.* at 484.

52. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 529 (Tex. Civ. App.—Dallas 1978, no writ).

53. ABA ADVISORY COMMISSION ON HOUSING & URB. GROWTH, *HOUSING FOR ALL UNDER LAW* 415 (1978).

ports of code violations from low income tenants.⁵⁴

Retaliatory Eviction as a Statutory Defense

In most jurisdictions it was the courts which were first to recognize and initiate the defense of retaliatory eviction.⁵⁵ Today many states have enacted statutes which codify this defense.⁵⁶ Statutory defenses are an improvement over the judicially created defense because they clarify the elements of proof necessary to raise the defense and define which acts of the tenant are protected.⁵⁷

Several legislatures have adopted statutes⁵⁸ based on the standards set out in the Uniform Residential Landlord and Tenant Act.⁵⁹ The standards in this Act provide that a landlord may not retaliate by increasing rent, decreasing services, or bringing or threatening to bring an action for possession.⁶⁰ Thus, the tenant is protected from various forms of constructive eviction.⁶¹ Other legislatures, however, have adopted statutes which only

54. *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

55. *See, e.g., Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 507 (S.D.N.Y. 1969); *Schweiger v. Superior Court*, 476 P.2d 97, 99, 90 Cal. Rptr. 729, 730 (1970); *Toms Point Apts. v. Goudzward*, 360 N.Y.S.2d 366, 367 (Sup. Ct. 1973).

56. Twenty-seven states and the District of Columbia have adopted statutes that allow retaliatory eviction as a defense. *See* ALASKA STAT. § 34.03.310 (1975); ARIZ. REV. STAT. § 33-1491 (Supp. 1977); CAL. CIV. CODE § 1942.5 (Deering 1972); CONN. GEN. STAT. ANN. § 47a-33 (West 1978); DEL. CODE tit. 25, § 5516 (1975); D.C. CODE ENCYCL. § 45-1624 (West Supp. 1977); FLA. STAT. ANN. § 83.56-.60 (West Supp. 1978); HAW. REV. STAT. § 521-74 (1976); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); KAN. STAT. § 58-2572 (1976); KY. REV. STAT. § 383.705 (Supp. 1976); ME. REV. STAT. tit. 14., § 6001 (Supp. 1977); MD. REAL PROP. CODE ANN. § 8-208.1 (Supp. 1977); MASS. ANN. LAWS. ch. 186, § 18 (Michie/Law. Co-op Supp. 1978) & ch. 239, § 2A (Michie/Law. Co-op 1974); MICH. STAT. ANN. § 27A.5720 (Supp. 1978); MINN. STAT. ANN. § 566.03 (West Supp. 1977); NEB. REV. STAT. § 76-1439 (1976); N.H. REV. STAT. ANN. §§ 540:13-a, -b (1974); N.J. STAT. ANN. §§ 2A:42-10.10 to .12 (West Supp. 1978); N.M. STAT. ANN. § 70-7-39 (Supp. 1975); N.Y. REAL PROP. LAW § 230 (McKinney Supp. 1977); OHIO REV. CODE ANN. §§ 5321.02, .03 (Baldwin Supp. 1978); OR. REV. STAT. § 91.865 (1975); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS §§ 34-20-10, -11 (1970); TENN. CODE ANN. § 53-5505 (1977) & § 64-2854 (1976); VA. CODE § 55-248.39 (Supp. 1977); WASH. REV. CODE ANN. §§ 59.18.240, .250 (Supp. 1978). *See generally* RESTATEMENT (SECOND) OF PROPERTY, §§ 13.8, .9 (Tent. Draft No. 4) (1976).

57. *Markese v. Cooper*, 333 N.Y.S.2d 63, 74 (Monroe County Ct. 1972). *See generally* Comment, *Landlord and Tenant—Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals*, 54 N.C. L. REV. 861, 881 (1976).

58. *See, e.g.,* ALASKA STAT. § 34.03.310 (1975); ARIZ. REV. STAT. § 33-1491(c)(2) (Supp. 1977); KAN. STAT. § 58-2572 (1976).

59. UNIFORM RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (1972) [hereinafter cited as URLTA].

60. *Id.* § 5.101(a).

61. The District of Columbia Code, for example, provides that a landlord cannot recover possession, increase rent, decrease services, bring undue or unusual inconvenience, violate privacy, harass, reduce the quality of service, threaten, or coerce or otherwise cause the tenant to abandon the premises involuntarily. D.C. CODE ENCYCL. § 45-1624 (West Supp. 1977).

protect a tenant in an action for possession.⁶² Acts of the tenant most commonly protected include attempts to enforce legal rights,⁶³ complaints of conditions to his landlord,⁶⁴ complaints of health, safety, or housing code violations to a government agency,⁶⁵ or involvement in an organization of tenants.⁶⁶

In order to successfully defend under any of these statutes, it must be established that the landlord's actions were in retaliation for an act of the tenant.⁶⁷ Thus, the landlord's motive is an important factor in any action arising under these provisions.⁶⁸ In many cases, however, establishing a landlord's motive is very difficult.⁶⁹ Recognizing this obstacle, several states provide that the landlord's eviction of the tenant is presumed to be retaliatory if it follows the tenant's protected act within a time period specified in the statute.⁷⁰ In other jurisdictions the tenant retains the burden of proving that the landlord's motive is retaliation.⁷¹

62. See, e.g., ME. REV. STAT. tit. 14, § 6001 (Supp. 1977); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN LAWS §§ 34-20-10, -11 (1970).

63. The statutes of fourteen jurisdictions include this provision. See, e.g., MASS. ANN. LAWS ch. 186, § 18 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 53-5505 (1977); VA. CODE § 55-248.39 (Supp. 1977).

64. The statutes of eleven jurisdictions include this provision. See, e.g., DEL. CODE tit. 25, § 5516 (1975); OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1978); OR. REV. STAT. § 91.865 (1975).

65. The statutes of twenty-four jurisdictions include this provision. See, e.g., FLA. STAT. ANN. § 83.60 (West Supp. 1978); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); MD. REAL PROP. CODE ANN. § 8-208.1 (Supp. 1977).

66. The statutes of fourteen jurisdictions include this provision. See, e.g., KAN. STAT. § 58-2572 (1976); KY. REV. STAT. § 383.705(c) (Supp. 1976); NEB. REV. STAT. § 76-1439 (1976).

67. See, e.g., MINN. STAT. ANN. § 566.03 (West Supp. 1977); N.M. STAT. ANN. § 70-7-39 (Supp. 1975); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977). See also *Toms Point Apts. v. Goudzward*, 360 N.Y.S.2d 366, 367 (Sup. Ct. 1973).

68. See *Parkin v. Fitzgerald*, 240 N.W.2d 828, 831 (Minn. 1976) (landlord had burden of proving nonretaliatory motive). See generally Comment, *Landlord-Tenant: Proving Motive in Retaliatory Eviction—Minnesota's Solution*, 61 MINN. L. REV. 523 (1977).

69. Landlords occasionally try to mask their primary motive by complaining of other things. See *Clore v. Fredman*, 319 N.E.2d 18, 20 (Ill. 1974) (eviction allegedly necessary to allow for upgrading physical condition of premises); *Parkin v. Fitzgerald*, 240 N.W.2d 828, 833 (Minn. 1976) (eviction allegedly due to insufficient funds check and tardiness in rent payment); *Cornell v. Dimmick*, 342 N.Y.S.2d 275, 278 (Binghamton City Ct. 1973) (eviction allegedly necessary to install new heater).

70. Eleven states provide this protection. See, e.g., ARIZ. REV. STAT. § 33-1491(c)(2) (Supp. 1977) (six months); DEL. CODE tit. 25, § 5516 (1975) (ninety days); KY. REV. STAT. § 383.705 (Supp. 1976) (one year).

71. See, e.g., *Dickhut v. Norton*, 173 N.W.2d 297, 302 (Wis. 1970) (sole motive); CAL. CIV. CODE § 1942.5(a) (*Deering* 1972) (dominant motive); CONN. GEN. STAT. ANN. § 47a-33 (West 1978) (sole motive); cf. MINN. STAT. ANN. § 566.03 (West Supp. 1977) (eviction was in whole or in part a penalty for tenant's acts); R.I. GEN LAWS § 34-20-10(A) (1970) (eviction must have been a penalty for tenant's acts).

Retaliatory Eviction as a Cause of Action

Although it is generally recognized that a tenant may raise the defense of retaliatory eviction,⁷² retaliatory eviction as a cause of action is not widely recognized.⁷³ An exception to this general trend is the line of federal cases in which tenants, asserting constitutional violations, have employed federal statutes to recover damages for retaliatory eviction.⁷⁴ The Civil Rights Act of 1871 provides injunctive relief or damages to one who has been deprived, under color of state law, of any rights protected under the Constitution.⁷⁵ To qualify for the relief established by this statute, the tenant must show that an act of the landlord has deprived him of a protected right and that some connection exists between the landlord's action and state law.⁷⁶ As a result of these evidentiary requirements this cause of action has had limited use.

RETALIATORY EVICTION IN TEXAS

Until recently, the rights of a tenant in Texas were controlled almost entirely by common law doctrines.⁷⁷ The harshness of these doctrines was mitigated to a certain extent by judicial recognition of the doctrine of constructive eviction.⁷⁸ In addition, the contractual nature of the lease has been recognized, resulting in a statutory remedy for wrongful eviction for

72. See Comment, *Landlord and Tenant—Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals*, 54 N.C. L. Rev. 861, 868 (1976).

73. See *Aweeka v. Bonds*, 97 Cal. Rptr. 650, 652 (App. Ct. 1971) (tenant allowed to recover damages); *Pohlman v. Metropolitan Trailer Park, Inc.*, 312 A.2d 888, 892 (N.J. Super. Ct. Div. 1973) (tenants awarded compensatory damages).

74. See *Lavoie v. Bigwood*, 457 F.2d 7, 10 (1st Cir. 1972); *McQueen v. Druker*, 438 F.2d 781, 784-85 (1st Cir. 1971); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 503 (S.D.N.Y. 1969).

75. 42 U.S.C. § 1983 (1970).

76. See *Lavoie v. Bigwood*, 457 F.2d 7, 10 (1st Cir. 1972); *McQueen v. Druker*, 438 F.2d 781, 784-85 (1st Cir. 1971). In at least two instances tenants have attempted to use 42 U.S.C. § 1985 (1970) which provides for the recovery of damages when the injured party shows that two or more persons conspired to deprive him of equal protection of the law. See *Fallis v. Dunbar*, 386 F. Supp. 1117, 1121 (N.D. Ohio 1974); *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1224 (S.D.N.Y. 1970). Although neither case upheld the tenant's claim, the theoretical advantage of this approach is that in order to prevail the tenant need show only a conspiracy rather than the existence of state action.

77. See, e.g., *Holcomb v. Lorino*, 124 Tex. 446, 452, 79 S.W.2d 307, 310 (1935) (lease is grant of estate for a term of years); *Cameron v. Calhoun-Smith Distrib. Co.*, 442 S.W.2d 815, 816 (Tex. Civ. App.—Austin 1969, no writ) (tenant remains liable for rent when premises become unsuitable); *Jackson v. Amador*, 75 S.W.2d 892, 893 (Tex. Civ. App.—Eastland 1934, writ dismissed) (no implied covenant of habitability).

78. See, e.g., *Michaux v. Koebig*, 555 S.W.2d 171, 177 (Tex. Civ. App.—Austin 1977, no writ); *Rust v. Eastex Oil Co.*, 511 S.W.2d 358, 361 (Tex. Civ. App.—Texarkana 1974, no writ); *Richker v. Georgandis*, 323 S.W.2d 90, 95-96 (Tex. Civ. App.—Houston 1959, writ refused n.r.e.).

tenants holding under a lease.⁷⁹ A lessee facing wrongful eviction may obtain a writ enjoining the landlord from taking such action,⁸⁰ or may sue to recover actual and punitive damages after a wrongful eviction has occurred.⁸¹

There has also been some improvement in the position of the periodic tenant. The legislature, cognizant of the large number of substandard dwellings in Texas,⁸² enacted a statute that allows home-rule cities to adopt ordinances which establish minimum standards of habitation, and grants those cities the power to enforce such standards.⁸³ Most importantly, a recent supreme court decision has held that an implied warranty of habitability exists in every rental agreement;⁸⁴ an assurance that the residence is free from latent defects rendering it uninhabitable is implied in every rental agreement.⁸⁵

79. See *Rohrt v. Kelley Mfg. Co.*, 162 Tex. 534, 537-40, 349 S.W.2d 95, 97-99 (1961); *Warncke v. Tarbutton*, 449 S.W.2d 363, 365 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.); *Henson v. B & W Fin. Co.*, 401 S.W.2d 261, 264-65 (Tex. Civ. App.—Tyler 1966, no writ); TEX. REV. CIV. STAT. ANN. art. 5236c (Vernon Supp. 1978).

80. See, e.g., *Schnitzer v. Southwest Shoe Corp.*, 355 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1962), *rev'd on other grounds*, 364 S.W.2d 373 (1963); *Obets & Harris v. Speed*, 211 S.W. 316, 318 (Tex. Civ. App.—El Paso 1919, writ dismissed); *Birchfield v. Bourland*, 187 S.W. 422, 423 (Tex. Civ. App.—Fort Worth 1916, no writ).

81. *Bifano v. Econo Builders, Inc.*, 401 S.W.2d 670, 677 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.). A lessee can recover damages which are shown to have been the foreseeable consequence of the eviction. The measure of damages is the difference between the reasonable value of the unexpired term of the lease and the amount agreed to be paid under the lease. *Id.* at 677. A lessee can recover special damages if the landlord knew or should have known that such damages would result from his act. *Stafford v. Powell*, 148 S.W.2d 965, 968 (Tex. Civ. App.—Eastland 1941, no writ). A lessee can recover punitive damages by showing fraud, willfulness, malice or oppression with a showing of actual injury. *Van Sickel v. Clark*, 510 S.W.2d 664, 669 (Tex. Civ. App.—Fort Worth 1974, no writ); see TEX. REV. CIV. STAT. ANN. art. 5236c (Vernon Supp. 1978).

82. In Texas substandard housing is not just an urban problem. Statistics from the Texas Department of Community Affairs show the percentage of substandard, renter-occupied units in different areas of Texas. In San Antonio, 12.9% of such units were substandard; in Dallas, 10.7%; Houston, 9.2%; East Texas, 29.3%; South Texas, 28.2%. See TEXAS DEPARTMENT OF COMMUNITY AFFAIRS, TEXAS STATE HOUSING PLAN 25, April, 1978.

83. See TEX. REV. CIV. STAT. ANN. art. 1175, § 35 (Vernon Supp. 1978). The following are examples of ordinances enacted under this statute: DALLAS, TEX., CODE ch. 27-3 (1976); HOUSTON, TEX., CODE §§ 10-161 to 172 (1970); SAN ANTONIO, TEX., CODE ch. 19A-1 (1972).

84. See *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978). An implied warranty of habitability is a term of implied contract obligating the landlord to provide housing that is fit for habitation. *Id.* at 317. See generally Comment, *The Implied Warranty of Habitability in Landlord-Tenant Relationships: The Necessity of Application in Texas*, 5 ST. MARY'S L.J. 64 (1973). Twenty-eight states recognized the implied warranty of habitability prior to its adoption by Texas. See Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L.L. REV. 1, 7 n.28 (1976).

85. *Kamarath v. Bennett*, 568 S.W.2d 658, 661 (Tex. 1978); accord, *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972); *Steele v. Latimer*, 521 P.2d 304, 309-10 (Kan. 1974).

In *Sims v. Century Kiest Apartments*⁸⁶ the Dallas Court of Civil Appeals recognized the possible adverse effect which retaliatory eviction could have upon these new developments.⁸⁷ Faced with this problem for the first time, the court held that to allow a landlord to evict a tenant in retaliation for reporting housing code violations would violate public policy.⁸⁸ *Sims* involved a tenant who, after his eviction, brought a suit for damages against his landlord.⁸⁹ The court in *Sims* reasoned that it is wrongful for a landlord to interfere with a tenant exercising his right to report violations.⁹⁰ Consequently, if the tenant probably would not have been evicted if he had not reported violations an action for damages will lie.⁹¹ Although the reasoning of the court was based on well accepted authority,⁹² the court emphasized that its holding was narrow in scope.⁹³ As a result the opinion leaves many questions unanswered.

The majority, for example, held that this decision did not condone the use of retaliatory eviction as a defense in a forcible detainer case.⁹⁴ The reasoning behind this limitation was that a forcible detainer proceeding is not the proper proceeding in which to determine the wrongfulness of an eviction;⁹⁵ the primary purpose of a forcible detainer suit is to determine who has the right of immediate possession.⁹⁶ While the scope of a forcible detainer suit is statutorily limited,⁹⁷ the right to possession, contrary

86. 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

87. *Id.* at 531.

88. *Id.* at 532.

89. *Id.* at 527.

90. *Id.* at 532. The court pointed out that it would be violative of public policy to allow a landlord to inhibit reports of violations of a housing code by persons for whose benefit the code was enacted. *Id.* at 531.

91. *Id.* at 532. The burden of proof is on the tenant to prove he "probably" would not have been evicted had he not reported code violations. *Id.* at 532.

92. See, e.g., *In re Quarles*, 158 U.S. 532 (1895); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

93. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ).

94. *Id.* at 532. A forcible entry and detainer action is the method provided by statute through which a landlord can lawfully regain possession of rental property. See TEX. REV. CIV. STAT. ANN. art. 3992 (Vernon 1972).

95. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 531-32 (Tex. Civ. App.—Dallas 1978, no writ).

96. See, e.g., *Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 277, 354 S.W.2d 368, 371 (1962); *Johnson v. Highland Hills Drive Apts.*, 552 S.W.2d 493, 495 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *Dews v. Floyd*, 413 S.W.2d 800, 805 (Tex. Civ. App.—Tyler 1967, no writ).

97. See TEX. R. CIV. P. 738-755. Most significantly, TEX. REV. CIV. STAT. ANN. art. 3992 (Vernon 1972) provides that the judgment of the county court shall be conclusive of the issue of right to possession. See also *Lincoln Square Apts. v. Davis*, 295 N.Y.S.2d 358, 361 (Civ. Ct. N.Y. 1968) (forcible entry and detainer action not proper forum to determine constitutionality of retaliatory eviction).

to the view espoused by the *Sims* court, cannot properly be determined without considering the wrongfulness of the eviction.⁹⁸ The limitations of a forcible detainer suit should not prevent a tenant from raising a valid defense to a landlord's suit for ejectment, especially considering the difficulty an impecunious tenant will encounter in finding another place to live.⁹⁹ Although the tenant may be entitled to damages in a subsequent suit, he should be allowed the more immediate recourse of raising the defense of retaliatory eviction. The possibility of receiving damages in the future is small consolation to the evicted tenant whose immediate concern is securing a place to live.¹⁰⁰

STATUTORY PROPOSAL

The most effective way to properly balance the conflicting interests of the landlord and tenant would be to enact a statute which would provide a clear definition of the elements of a defense and a cause of action for retaliatory eviction.¹⁰¹ The following discussion sets forth a statutory proposal based on the statutes presently in effect in other jurisdictions and the Uniform Residential Landlord and Tenant Act.¹⁰² All of the current statutes provide a defense for the tenant in a suit by the landlord for possession.¹⁰³ Few statutes, however, provide a remedy for the tenant who has already been evicted.¹⁰⁴ Since the indigent tenant is less likely to be familiar with the relevant laws,¹⁰⁵ a statute should provide both a defense for the tenant still in possession and a cause of action for the tenant who was evicted prior to learning of his right to a defense.¹⁰⁶

98. Schoshinski, *Remedies for the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 551 (1966).

99. See Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URB. L. 695, 698 (1969).

100. See Schoshinski, *Remedies for the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 551 (1966). The acute housing shortage makes such a remedy of no practical value for a large percentage of urban dwellers. *Id.* at 551.

101. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 533 (Tex. Civ. App.—Dallas 1978, no writ).

102. See generally MRLTC, *supra* note 10, § 2-407; URLTA, *supra* note 62, § 5.101. State Senator Carlos Truan of Corpus Christi introduced S.B. 315 during the 65th legislative session in 1977. It included provisions making retaliatory eviction a defense similar to those in URLTA. See TEX. S.J. 108-09 (1977). The bill did not get past the committee.

103. See statutes cited note 56 *supra*.

104. See, e.g., ARIZ. REV. STAT. § 33-1491(B) (Supp. 1977); MASS. ANN. LAWS. ch. 186, § 18 (Michie/Law. Co-op Supp. 1978); OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1977). But see DEL. CODE tit. 25, § 5516(d) (1975) (tenant allowed three times actual damages or three months' rent, and cost of suit); HAW. REV. STAT. § 521-74(c) (1976) (tenant, if dispossessed, allowed actual damages and cost of suit); WASH. REV. CODE ANN. §§ 59.18.240, .250 (tenant allowed cost of suit or arbitration, including attorney's fees).

105. See K. CLARK, DARK GHETTO 56 (1965).

106. See Schoshinski, *Remedies for the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-52 (1966).

Because the tenant in *Sims* was evicted for participating in a tenant's council and reporting violations of the housing code, these are the only acts protected under the present Texas law.¹⁰⁷ To provide effective protection for tenants, a statute should be broader in scope. Tenants have been evicted for a wide variety of acts, ranging from refusal to cooperate in a scheme to violate antitrust laws¹⁰⁸ to agitation of other tenants.¹⁰⁹ The tenant's acts which ought to be protected, however, are those directed towards legitimately maintaining the habitable condition of the dwelling¹¹⁰ and reporting violations of the law.¹¹¹

Most statutes provide that a tenant may not assert the defense of retaliatory eviction if he is delinquent in rent payments.¹¹² Generally, such a provision is equitable since a tenant should not be permitted to remain in possession of an apartment if he is not paying rent. Yet there are some situations in which a tenant should be permitted to withhold rent lawfully.¹¹³ An effective statute, therefore, should contain a provision permitting a tenant to raise retaliation as a defense when he has withheld rent in an attempt to force his landlord to correct conditions which have rendered the dwelling unit uninhabitable, or when he has made a long requested repair himself and has deducted the cost from his rent.¹¹⁴ The

107. See *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 527 (Tex. Civ. App.—Dallas 1978, no writ).

108. See *Mobil Oil Corp. v. Rubenfeld*, 370 N.Y.S.2d 943, 945 (Sup. Ct. 1975).

109. See *Evans v. Rose*, 182 S.E.2d 591, 593 (N.C. App. 1971) (defense of retaliation for airing grievances irrelevant to landlord's right to recover possession); *Lincoln Fin. Corp. v. Ferrier*, 567 P.2d 1102, 1104 (Utah 1977) (allegations of retaliation for agitating other tenants no defense in suit for eviction).

110. See, e.g., ALASKA STAT. § 34.03.310 (1976); KAN. STAT. § 58-2572 (1976); OR. REV. STAT. § 91.865 (1975).

111. See RESTATEMENT (SECOND) OF PROPERTY § 13.9, commentary (Tent. Draft No. 4, 1976). All of the statutes now in existence provide protection for a tenant who is evicted in retaliation for reporting housing code violations. *Id.*

112. See, e.g., KY. REV. STAT. § 383.705 (Supp. 1976); NEB. REV. STAT. § 76-1439 (1976); TENN. CODE ANN. § 64-2854 (1976).

113. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082-83 (D.C. Cir.) (tenant allowed to withhold rent on uninhabitable apartment), *cert. denied*, 400 U.S. 925 (1970); *Schweiger v. Superior Court*, 476 P.2d 97, 99, 90 Cal. Rptr. 729, 731 (1970) (tenant allowed to repair and deduct cost from rent payments). *But see Coburn v. Moore*, 538 S.W.2d 137, 138-39 (Tex. Civ. App.—Dallas 1975, no writ) (tenant evicted for withholding rent on uninhabitable apartment).

114. See CAL. CIV. CODE § 1942.5(a)(1) (West Supp. 1975); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); MRLTC, *supra* note 10, § 2-407(1). Such a provision would require codification of a repair and deduct statute in Texas. The right of a tenant to repair and deduct the cost of repairs from his rent has been recognized when the landlord has expressly covenanted to repair. See *McCrary v. Nacol*, 428 S.W.2d 414, 416 (Tex. Civ. App.—Beaumont 1968, writ *ref'd n.r.e.*). In light of the recognition of an implied warranty of habitability, the legislature should extend the availability of the repair and deduct remedy to all tenants. Several other jurisdictions have enacted statutes providing this remedy. See, e.g., CAL. CIV. CODE § 1942 (Deering 1972); DEL. CODE tit. 25, §§ 5306-07 (1974); OKLA. STAT. ANN. tit. 41, § 32 (West 1951).

uninhabitable condition of the dwelling may be caused by such intentional acts of the landlord as decreasing the water pressure, or discontinuing the heat and electricity. Recognizing this, a cause of action should exist following a landlord's retaliatory attempt to constructively evict a tenant.¹¹⁵ A tenant should also be protected when the landlord has raised the rent in retaliation. Otherwise a landlord could circumvent the statute by raising the rent to an unreasonable amount and then legally evicting the tenant because he was in arrears.¹¹⁶

The burden of proving the motive of the landlord is another factor which should be addressed in such a statute. The *Sims* decision, dealing with retaliatory eviction as a cause of action, places the burden on the tenant.¹¹⁷ In other jurisdictions, a significant number of statutes that provide for retaliation as a defense, place the burden on the landlord to prove that the eviction was not retaliatory.¹¹⁸ In view of the difficulty involved in proving the landlord's motive, when retaliation is raised as a defense or a cause of action,¹¹⁹ the most equitable solution in both situations, is to create a rebuttable presumption¹²⁰ that the eviction is retaliatory if notice to quit is served within a specified period after the protected act of the tenant occurs. The presumption can be overcome by proving that the landlord's decision to evict was motivated by a legitimate business purpose, independent of any consideration of the protected activities of the tenant.¹²¹

The *Sims* decision did not determine whether retaliatory eviction, when alleged as a cause of action, is an action in contract or in tort.¹²² As a

115. See, e.g., N.M. STAT. ANN. § 70-7-39 (Supp. 1975); OHIO REV. CODE ANN. § 5321.02 (Baldwin Supp. 1978); OR. REV. STAT. § 91.865 (1975).

116. Raising the rent to a prohibitive amount is a common tactic of retaliating landlords. See *Schweiger v. Superior Court*, 476 P.2d 97, 99, 90 Cal. Rptr. 729, 731 (1970); *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544, 545 (N.J. Super. Ct. App. Div. 1971).

117. See *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ). Several other jurisdictions place the burden on the tenant to prove that retaliation played a certain role in the landlord's decision to evict. See CAL. CIV. CODE § 1942.5 (Deering 1972) (retaliation was landlord's dominant purpose); CONN. GEN. STAT. ANN. § 47a-33 (West 1978) (retaliation was landlord's sole purpose).

118. The statutes in eleven jurisdictions place the burden of proof on the landlord. See, e.g., ARIZ. REV. STAT. § 33-1491B (Supp. 1977); DEL. CODE tit. 25, § 5516(b) (1977); KY. REV. STAT. § 383.705 (Supp. 1976). See also MRLTC, *supra* note 10, § 2-407(1).

119. See generally Comment, *Landlord-Tenant: Proving Motive in Retaliatory Eviction—Minnesota's Solution*, 61 MINN. L. REV. 523 (1977).

120. See generally C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 53 (1956). A presumption may relieve one of the duty of presenting evidence, but the presumption may be overcome by positive evidence from the opposing party. *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 529, 143 S.W.2d 763, 768 (1940).

121. E.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972); *Parkin v. Fitzgerald*, 240 N.W.2d 828, 831 (Minn. 1976); *Silberg v. Lipscomb*, 285 A.2d 88 (N.J. 1971); cf. *Appelstein v. Quinn*, 281 N.E.2d 228, 229 (Mass. 1972) (landlord prevailed after making good faith rent increase).

122. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ).

consequence it is uncertain whether the two year¹²³ or the four year¹²⁴ statute of limitations will apply in such a situation. To avoid limitation problems any statute in this area should delineate a limitations period.¹²⁵

Another issue raised but not answered by the *Sims* decision concerns the damages recoverable by the wrongfully evicted tenant.¹²⁶ In Texas, a lessee who has been wrongfully evicted can recover both actual and punitive damages.¹²⁷ In other jurisdictions these damages are available to tenants who have been evicted in retaliation.¹²⁸ Because Texas law has determined retaliatory eviction to be wrongful,¹²⁹ the same remedies available to the wrongfully evicted lessee should be given the tenant who is wrongfully evicted in retaliation.

In considering the issue of damages, the legislature should also weigh the extent to which a tenant is protected by the Deceptive Trade Practices Act (DTPA).¹³⁰ Leased property is included in the Act's definition of goods¹³¹ and failure by any person to comply with an express or implied warranty is defined as a deceptive act.¹³² Since Texas now recognizes an implied warranty of habitability in every residential rental agreement,¹³³ it seems likely that leasing or maintaining an uninhabitable dwelling is a deceptive act. A tenant who is paying rent for an uninhabitable dwelling, therefore, will likely have an action against his landlord under the DTPA.¹³⁴ The

123. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958).

124. *Id.* art. 5527.

125. *Cf. id.* art. 4590i, § 10.01 (Vernon Supp. 1978) (limitations on health care liability claims). Prior to the enactment of this statute it was unclear whether tort or contract limitations were applicable when injuries were sustained by health care patients. *See Huizar v. Four Seasons Nursing Centers*, 562 S.W.2d 264, 265 (Tex. Civ. App.—San Antonio), *dismissed as moot*, 21 Tex. Sup. Ct. J. 450 (July 5, 1978).

126. *See Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 532-33 (Tex. Civ. App.—Dallas 1978, no writ).

127. *See Van Sickel v. Clark*, 510 S.W.2d 668, 669 (Tex. Civ. App.—Fort Worth 1974, no writ) (tenant recovered punitive damages); *Bifano v. Econo Builders, Inc.*, 401 S.W.2d 670, 677 (Tex. Civ. App.—Dallas 1966, writ *ref'd n.r.e.*) (tenant recovered actual damages). In *Sims* the tenant sought recovery for his moving expenses, the additional rent he paid for a comparable dwelling, punitive damages, and attorney fees. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 528 (Tex. Civ. App.—Dallas 1978, no writ).

128. *See, e.g., ARIZ. REV. STAT. § 33-1491B* (Supp. 1977) (two months' rent plus twice actual damages); *DEL. CODE tit. 25, § 5516* (1975) (three times actual damages or three months' rent, plus cost of suit); *KY. REV. STAT. § 383.705* (Supp. 1976) (maximum three months' rent plus attorney fees).

129. *Sims v. Century Kiest Apts.*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ).

130. TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1978). *See generally* Comment, *Texas Landlord-Tenant Law And the Deceptive Trade Practices Act—Affirmative Remedies for the Tenant*, 8 ST. MARY'S L.J. 807 (1977).

131. TEX. BUS. & COM. CODE ANN. § 17.45 (1) (Vernon Supp. 1978).

132. *Id.* § 17.50(a)(2).

133. *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978).

134. *See* Comment, *Texas Landlord-Tenant Law and the Deceptive Trade Practices*

DTPA, however, provides relief only to tenants who have resided in uninhabitable dwellings. It is possible that a tenant could be evicted from a dwelling that is habitable for reporting a minor code violation or for exercising other protected rights.¹³⁵ The statute must recognize a cause of action in favor of a tenant evicted from a habitable, as well as from an uninhabitable dwelling, if the eviction was retaliatory.¹³⁶

While the impetus for recent legislation in the landlord-tenant area has originated primarily from an interest in protecting the tenant, the rights of the landlord must not go unguarded. Recognizing that in some cases the uninhabitable condition of a dwelling may be in part attributable to the willful acts of the tenant,¹³⁷ the landlord should not be absolutely barred from evicting a tenant.¹³⁸ Rather, the landlord should be permitted to make good faith rent increases and evictions when necessary without incurring liability for damages.¹³⁹

Any statute in this area of the law should impose a good faith requirement on both parties.¹⁴⁰ Implicit in every decision allowing the defense of retaliatory eviction has been the recognition that the landlord has acted in bad faith toward the tenant.¹⁴¹ As in any business transaction, a good faith determination is essential to an equitable resolution of the dispute.¹⁴² In essence, the main issue to be settled in any suit concerning retaliatory eviction is the good faith of the parties.¹⁴³ If the tenant acted in bad faith in reporting code violations or in creating the violations, he should not be

Act—Affirmative Remedies for the Tenant, 8 ST. MARY'S L.J. 807, 812-22 (1977).

135. See *Church v. Allen Meadows Apts.*, 329 N.Y.S.2d 148, 149 (Sup. Ct. 1972).

136. See MRLTC, *supra* note 10, § 2-407(3).

137. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 873 (1967).

138. See, e.g., ALASKA STAT. § 34.03.310 (1976); ARIZ. REV. STAT. § 33-1381 (Supp. 1977); DEL. CODE tit. 25, § 5516 (1977).

139. See KAN. STAT. § 58-2572 (1976). The MRLTC provides that the landlord can recover possession of the dwelling unit, notwithstanding a protected act of the tenant, if: (1) the tenant is committing waste or violating the rental agreement; (2) the landlord seeks in good faith to recover possession of the unit for his own use, for the purpose of remodeling, or to terminate use as a dwelling unit; (3) the dwelling unit was in compliance with housing codes on date of complaint; (4) the landlord has contracted to sell the property; (5) the landlord's notice to quit was given prior to a complaint. MRLTC, *supra* note 10, § 2-407(2).

140. MRLTC, *supra* note 10, § 2-407; cf. TEX. REV. CIV. STAT. ANN. art. 5236e, § 4(c) (Vernon Supp. 1978) (presumption of bad faith if landlord fails to return security deposit).

141. See *Parkin v. Fitzgerald*, 240 N.W.2d 828, 831 (Minn. 1976); cf. *Garfield v. Mayflower Equities*, 327 N.Y.S.2d 885, 887 (App. Term 1971) (bad faith gives rise to implied right of action under Rent Stabilization Law); *Queenan v. Frishwasser*, 314 N.Y.S.2d 879, 880-81 (App. Div. 1970) (landlord's good faith in evicting required reversal of judgment for tenant), *aff'd*, 276 N.E.2d 227, 326 N.Y.S.2d 390 (1971).

142. See TEX. BUS. & COM. CODE ANN. § 1.102(c) (Tex. UCC 1968).

143. Several statutes require a showing of good faith to prevail. See, e.g., N.H. REV. STAT. ANN. § 540.13-b (1975); R.I. GEN LAWS § 34-20-10 (1970); WASH. REV. CODE ANN. § 59.18.240 (Supp. 1976).

permitted to prevail.¹⁴⁴ If the landlord acted in bad faith in evicting a tenant in retaliation, he should not be allowed to obtain possession.¹⁴⁵ Further, in a suit to recover damages a showing of bad faith should raise a presumption in favor of the tenant.

CONCLUSION

The legal power of the landlord to evict a periodic tenant for any or no reason has long been protected as a necessary incident of the property owner's right to rent to whom he chooses. At the same time, tenants must be protected from abuses of this power. Eviction is frequently used by the landlord to rid himself of troublesome tenants. If the acts of the tenant are proscribed by the lease, the law, or by common decency, the eviction is justified. On the other hand, a tenant may be troublesome because he is attempting to improve the condition of his dwelling through legally protected means. Such tenants will be protected under this proposed statute.

In response to the public policy of providing adequate housing, landlord-tenant law has undergone important changes. *Sims* evidences the continuing trend of Texas law to protect tenants, particularly low income tenants, with whom the disparity in the bargaining power between landlord and tenant is greatest. Clear definition of the cause of action and the defense of retaliatory eviction is necessary to further reduce that disparity. While judicial decision-making might eventually define these matters, expeditious legislation will more properly balance the interests of both the landlord and the tenant.

144. Several statutes allow the landlord to evict a tenant who has reported code violations if the violation was caused primarily by the lack of ordinary care of the tenant. See, e.g., KY. REV. STAT. § 383.705 (Supp. 1976); NEB. REV. STAT. § 76-1439 (1977); OR. REV. STAT. § 91.865(3)(a) (1975).

145. See generally Comment, *Retaliatory Evictions: A Study of Existing Law and Proposed Model Code*, 11 WM. & MARY L. REV. 537 (1969).