

determination to appoint counsel was wrong. It might also cause the judge to make a pretrial determination of guilt or innocence before hearing all the evidence. This procedure might *benefit* a defendant if a judge decides that counsel is *not* necessary but determines after the trial that incarceration, although not possible, would be appropriate.

Until the United States Supreme Court finally reviews the matter,⁵⁰ it is uncertain exactly what standards are constitutionally required in appointing counsel to the indigent defendant. Presently, the right of appointed counsel depends upon how the courts of the jurisdiction in which the defendant is charged have interpreted the conflicting authority. It is certain, however, as a result of *Empy v. State*,⁵¹ that the indigent defendant charged in Texas with a misdemeanor is entitled to appointment of counsel only when punishment actually results in incarceration.

Clinton J. David

Landlord-Tenant Law—A Tenant Has a Cause of Action for Retaliatory Eviction Due to His Reporting of Housing Code Violations. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

Willie Sims was a tenant at Century Kiest Apartments for approximately nine years under an oral, weekly tenancy. The landlord gave notice to Sims to vacate the premises. When Sims refused, the landlord gained possession through forcible detainer proceedings. Sims then brought an action against the landlord, claiming the eviction was in retaliation for his reporting violations of various housing, building, and health codes.¹ The trial court rendered summary judgment for the landlord on the pleadings. The Dallas Court

50. After this article was sent to print, the United States Supreme Court in *Scott v. Illinois*, 47 U.S.L.W. 4250 (U.S. Mar. 8, 1979) (No. 77-1177), declined to extend the right to counsel to misdemeanor prosecutions in which a statute authorizes imprisonment, but none is imposed. The Court held, in accord with *Empy*, that actual imprisonment is the line defining the constitutional right to appointment of counsel.

51. 571 S.W.2d 526 (Tex. Crim. App. 1978).

1. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 527 (Tex. Civ. App.—Dallas 1978, no writ). Sims had complained to the management of deteriorating conditions and had organized a tenants' council to attempt to have the conditions repaired. Acting for himself and as an officer of the council, Sims reported several violations of city codes to Dallas city officials. *Id.*

of Civil Appeals reversed and remanded.² The appellate court held that a tenant has a cause of action for the alleged termination of his periodic tenancy and eviction in retaliation for the reporting of housing code violations.³

The court initially had to determine whether the tenant had any rights that were infringed by the landlord. Some federal courts that have granted relief for retaliatory eviction had considered whether "state action" was involved.⁴ These courts found the tenant's right to a cause of action in section 1983 of the Civil Rights Act.⁵ The *Sims* court avoided the "state action" question by concluding that a determination was unnecessary if any other grounds existed to hold retaliatory eviction to be a legal wrong.⁶

The court held that these grounds existed in the general public policy to encourage the reporting of violations of law to the proper authorities.⁷ The court noted that this public policy exists in all states and had been expressly recognized in Texas.⁸ Having determined that a right did exist, it had to determine whether a cause of action arose upon infringement of this right. The court in *Sims* recognized that no particular state statute existed to imply a prohibition against retaliatory eviction.⁹ The tenant alleged that the tenancy was terminated with the specific intent to retaliate against him for reporting violations of the housing, building, and health codes of the city of Dallas. Although the provisions of the Code were not before the court, it presumed that the tenant's petition could have been amended to include specific allegations of the ordinances alleged to have been violated.¹⁰ The burden would then fall upon the defendant in a summary judgment proceeding to meet the plaintiff's case as pleaded.¹¹ Thus the court had to decide whether the health ordinances, if proved, would establish that a tenant is within the class of persons for whose benefit the ordinances were enacted

2. *Id.* at 533.

3. *Id.* at 527.

4. *Id.* at 529.

5. 42 U.S.C. § 1983 (1976).

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

7. *Id.*

8. *Id.* at 530, citing *Goodyear Tire & Rubber Co. v. Sanford*, 540 S.W.2d 478, 484 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

9. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 530 (Tex. Civ. App.—Dallas 1978, no writ).

10. *Id.*

11. *Id.* at 531.

in order to provide a basis for a cause of action.¹²

The ordinances were enacted under authority of article 1175.¹³ Although this statute was not a comprehensive system of housing regulations, the court concluded that the statute imposed various duties on the owner of rental property for the health, safety, and welfare of the tenants. The court reasoned, therefore, that sufficient reason existed to imply a prohibition against retaliatory eviction.¹⁴

The landlord argued that he had an absolute right to terminate the periodic tenancy upon proper notice.¹⁵ The majority in *Sims* recognized that the landlord had the *power* to terminate, but that alone did not establish a legal *right* to terminate for the purpose of retaliation against a tenant.¹⁶ The court stated that the main question was whether his termination for that purpose was wrongful,¹⁷ and held that retaliatory eviction was a legal wrong for which an action for damages would lie.¹⁸ The court limited its holding, however, by refusing to address the issue of whether retaliatory eviction could be a defense to a forcible detainer proceeding.¹⁹

Justice Akins wrote a strong dissent²⁰ in which he made three main arguments: First, he stated that the holding of the majority

12. *Id.*

13. TEX. REV. CIV. STAT. ANN. art. 1175, § 35 (Vernon Supp. 1977). The statute expressly authorizes the enactment of city ordinances that require "the demolition or repair of buildings which are dilapidated, substandard, or unfit for human habitation and which constitute a hazard to the health, safety, or welfare of the citizens." *Id.*

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

15. *Id.* The landlord based his argument on article 5236a. *Id.* See TEX. REV. CIV. STAT. ANN. art. 5236a (Vernon Supp. 1978). This statute is the only provision concerning termination of tenancies in Texas. It provides the following: "[W]hen the rent reserved in a lease is payable at periods of less than a month, the time of the notice of termination is sufficient if it is equal to the interval between the times of payment." TEX. REV. CIV. STAT. ANN. art. 5236a (Vernon Supp. 1978).

16. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 531 (Tex. Civ. App.—Dallas 1978, no writ). The court recognized that power may be exercised effectively, but nonetheless wrongfully, if exercised in violation of a duty. *Id.* at 531 n.2. See Hohfield, *Some Fundamental Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16, 52-53 (1913); see also RESTATEMENT OF PROPERTY § 3, Comment a, Illustrations 2, 3 (1936).

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

18. *Id.*

19. *Id.* Further, the court made no decision on the question of infringement upon constitutional rights of freedom of speech, freedom of assembly, and freedom to petition for grievances; refused to hold this kind of wrong a "prima facie tort"; refused to extend the holding to cases in which the tenant was not acting in good faith, or in which the landlord had affirmative grounds for eviction; and made no decision on the question of damages. *Id.*

20. *Id.* at 533.

usurps the function of the legislature by the judiciary. Justice Akins noted that the legislature had revised the landlord-tenant statutes in both 1973 and 1975. Although these revisions gave tenants more rights than under prior law, the legislature apparently chose not to grant them a cause of action based on retaliatory eviction.²¹ Second, Justice Akins noted that the public policy of the state did not support the majority's conclusions. The majority drew its public policy conclusion from the ordinances of the city of Dallas. Justice Akins argued that the public policy of the state could not be found in city ordinances.²² He also maintained that the majority's reliance on article 1175 was unfounded because that statute applied only to home rule cities, and the question would remain regarding whether the majority's holding would only apply to home rule cities. Further, he noted that home rule cities could adopt many conflicting local ordinances. Thus, article 1175 could not be interpreted to reflect a statewide public policy.²³ Finally, Justice Akins argued that article 5236a gave the landlord a statutory right to terminate a periodic tenancy. He stated that the majority's holding not only altered the contract between landlord and tenant, but was in direct conflict with this statute.²⁴

The court in *Sims v. Century Kiest Apartments*²⁵ relied on public policy and the legislative intent behind article 1175 to hold that retaliatory eviction gave rise to an affirmative cause of action for damages.²⁶ The court interpreted article 1175 as a legislative man-

21. *Id.* The majority agreed that a well-drawn statute would be a superior solution, but that such a solution was not available in this case. Because the legislature had not addressed the particular problems presented here, it was for the court to decide. The majority noted that a decision in this case, as in any case of first impression, set a precedent, but it did not preclude any subsequent legislative action on the question. *Id.*

22. *Id.* at 534. In so doing, Justice Akins distinguished the major cases relied upon by the majority: *In re Quarles*, 158 U.S. 532 (1895) (involved a breach of the peace as well as the violation of a specific statute); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (based on specific congressional acts); *Goodyear Tire & Rubber Co. v. Sanford*, 540 S.W.2d 478 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (involved a contractual agreement not to report violations).

23. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 535-36 (Tex. Civ. App.—Dallas 1978, no writ). Although Justice Akins' interpretation of article 1175 is legally sound, it ignored a recent Texas Supreme Court decision that held that article 1175 did support a statewide public policy of habitable rental dwellings. See *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978), discussed note 29 *infra* and accompanying text.

24. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 536 (Tex. Civ. App.—Dallas 1978, no writ). The majority answered this argument by distinguishing between the landlord's "power" to terminate and his "right" to do so. See note 16 *supra* and accompanying text.

25. 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

26. *Id.*

date that rental housing be fit for human habitation.²⁷ A strong argument against the court's interpretation of this article is that article 1175 merely authorized cities to enact housing ordinances within certain limitations. These are limitations on the pre-existing power of the city, not mandates for a new public policy of habitability.²⁸ The majority's interpretation, however, receives support from the Texas Supreme Court in *Kamarath v. Bennett*.²⁹ The supreme court adopted essentially the same interpretation as that of the majority in *Sims*, relying on article 1175 as a legislative recognition that rental dwellings be fit for human habitation.³⁰ With the supreme court's support, the majority's interpretation in *Sims* must be considered correct.

A greater problem is created by the court's recognition of retaliatory eviction as a separate cause of action for damages.³¹ This concept is not novel. One writer suggested that although retaliatory eviction arises naturally as an affirmative defense, courts and legislatures should allow it to be raised as a counterclaim.³² In this way, the court would be permitted to award damages as a further deterrent to retaliatory evictions by a landlord.³³ At least one state court also allowed damages in a retaliatory eviction action. In *Markese v. Cooper*,³⁴ the Monroe County court in New York allowed damages for retaliation under an equitable defense theory. Even in these situations, however, the claim for damages arose from a defensive position. Presently, no jurisdiction has taken the position that retaliatory eviction gives rise to a separate and distinct cause of action.

On first impression, this "new" cause of action appears to be a

27. *Id.* at 531.

28. Brief of Amicus Curiae Texas Apartment Association, Inc. In Support of Appellee's Motion for Rehearing at 9, *Sims v. Century Kiest Apartments*, 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

29. 568 S.W.2d 658 (Tex. 1978).

30. *Id.* at 660. The supreme court decided *Kamarath* on April 12, 1978. The court of civil appeals originally issued an opinion in *Sims* on February 17, 1978. Subsequently, the Texas Apartment Association submitted its amicus curiae on March 17, 1978. The final opinion in *Sims*, which withdrew the original opinion, was delivered on May 5, 1978, after the decision in *Kamarath*. Thus the court's interpretation of article 1175 acquired much stronger precedential support from the time of the original opinion to the final one.

31. Generally, retaliatory eviction has been applied as a defense to forcible eviction proceedings brought by the landlord. See generally Note, *Retaliatory Eviction: The Unsolved Problem*, 25 DE PAUL L. REV. 552 (1976); Note, *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches?* 22 HASTINGS L.J. 1365 (1971).

32. Comment, *Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals*, 54 N.C.L. REV. 861, 883 (1976).

33. *Id.*

34. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

major advancement for tenants' rights. Upon closer examination, however, the value of the action becomes questionable. Under the court's theory, a tenant must initially be ejected by the landlord. After he has lost possession, the tenant may sue the landlord on the grounds of retaliatory eviction. If successful, the tenant will recover damages.³⁵ The procedure is similar to the common-law actions brought by tenants for a breach of the covenant of quiet enjoyment.³⁶ Even under the traditional concepts of independent covenants in a lease, the obligation to pay rent was dependent upon the landlord's duty not to interfere with the tenant's possession.³⁷ When the tenant was deprived of possession, he was no longer under an obligation to pay rent. In addition, the tenant was given the usual remedy for breach of a covenant, an action for damages.³⁸

It is questionable whether the court has recognized a "new" cause of action, or whether it has merely expanded a traditional common law concept. Under a periodic tenancy, the landlord has the statutory right to evict a tenant, upon proper notice, at the end of the term.³⁹ In these cases, the covenant of quiet enjoyment would not apply. However, the basic premise for an action for retaliatory eviction and for breach of the covenant of quiet enjoyment is the same: possession of the property is dependent on payment of rent; once possession is gone, so is the obligation to pay rent, and the tenant is entitled to a cause of action for damages.

Another problem with the holding in *Sims* is the court's refusal to allow retaliatory eviction as a defense to a forcible eviction.⁴⁰ This holding presents a possible conflict with the supreme court's holding in *Kamarath v. Bennett*.⁴¹ In *Kamarath*, the supreme court recog-

35. What the measure of damages would be is unclear because the court did not address the issue in its opinion. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ).

36. 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) (hereinafter cited as Quinn & Phillips).

37. *Id.* at 229 n.5.

38. *Id.* at 229 n.6.

39. TEX. REV. CIV. STAT. ANN. art. 5236a (Vernon Supp. 1978). See *supra* note 15.

40. *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ). The court stated that because the issues in a forcible detainer proceeding are narrow, the issue of whether the termination was wrongful could not properly be decided. *Id.*

41. 568 S.W.2d 658 (Tex. 1978). For a thorough discussion of landlord-tenant law prior to *Kamarath*, see Note, *There is an Implied Warranty in a Residential Lease That the Dwelling is Habitable and Fit for Living. Kamarath v. Bennett*, 10 TEX. TECH L. REV. 228 (1979) (hereinafter cited as Note: *Kamarath v. Bennett*).

nized the doctrine of implied warranty of habitability.⁴² Other courts that have recognized this doctrine have begun to view the lease as a contract between landlord and tenant consisting of mutual and dependent covenants.⁴³ If Texas adopts this idea of dependent covenants, then the rights and duties of the tenant are dependent on those of the landlord, as the landlord's are upon the tenant's. The landlord has a statutory duty to comply with the housing code. The implied warranty of habitability would apparently obligate a landlord to keep a dwelling free of violations of the applicable housing code.⁴⁴ Therefore, in an eviction action brought by the landlord, the tenant should be allowed to raise the landlord's breach of his statutory duty as a defense. By not allowing the defense of retaliatory eviction, the *Sims* court is adhering to the common-law concept of independent covenants.⁴⁵

Another potential conflict exists with the Texas Forcible Entry and Detainer (F.E.D.) laws.⁴⁶ These laws allow a landlord to enforce the covenant to pay rent regardless of any covenants made to the tenant.⁴⁷ This is inconsistent with the idea of dependent covenants and must be settled; otherwise, retaliatory eviction as a defense would be in direct conflict with these rules.

Finally, the court's holding in *Sims v. Century Kiest Apartments*⁴⁸ raises several policy issues. First, the court, by refusing to allow retaliatory eviction as a defense, has placed the burden on the tenant. The tenant, once evicted, must find a new place to live. He must also suffer the delay of filing another suit to recover his damages. The court offers the evicted tenant no earlier compensation or no protection. This procedure may be enough to dis-

42. *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978).

43. Note: *Kamarath v. Bennett*, *supra* note 41, at 235-36. The author also notes that nothing precludes a court from adhering to the common-law rule of independent covenants. *Id.* at 235-36 n.60, 246 n.118 and accompanying text.

44. *Id.* at 246.

45. This assumes that the supreme court will adopt the concept of dependent covenants. Although the court gave no indication of its position in *Kamarath*, its interpretation of public policy in article 1175 and its reliance on other state courts, which have adopted the concept of dependent covenants, leads to a reasonable assumption that Texas will adopt it. For a thorough discussion on mutual and dependent covenants, see Quinn & Phillips, *supra* note 36, at 252-54.

46. TEX. REV. CIV. STAT. ANN. arts. 3973-3975a, 3992, 3994 (Vernon 1966); TEX. R. CIV. P. 738-55.

47. TEX. R. CIV. P. 746.

48. 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

courage any tenants from reporting violations of housing codes.⁴⁹ Second, the requirement of a second suit for damages following an F.E.D. action simply serves to create a multiplicity of suits when all the issues could be tried in a single action.⁵⁰

*Sims v. Century Kiest Apartments*⁵¹ recognizes a necessary cause of action, but it falls short of creating needed reform. After *Sims* and *Kamarath v. Bennett*,⁵² the state of landlord-tenant law will remain in confusion until the legislature⁵³ can make definitive statements on the law.

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49. This is similar to the remedies allowed in common-law actions. The tenant was free to go into court to seek redress for a breached service contract, "but the route was so cumbersome, time consuming, and costly that it was neither practical nor realistic." Quinn & Phillips, *supra* note 36, at 234. Even under the doctrine of constructive eviction, the best the tenant could hope to do was to abandon the premises and be rid of the rent obligations. If the tenant stayed, the full rent was due. *Id.* at 237.

50. See Note: *Kamarath v. Bennett*, *supra* note 41, at 247.

51. 567 S.W.2d 526 (Tex. Civ. App.—Dallas 1978, no writ).

52. 568 S.W.2d 658 (Tex. 1978).

53. The need for legislative action is imperative, especially when considering the potential conflicts between the statutes and the judicially-created law. Most states that have adopted the concepts of implied warranty of habitability and retaliatory eviction have done so on the basis of statewide statutory schemes of housing reform. Without such statutory support in Texas, the Texas courts will continue to be restricted in their efforts to modernize the landlord-tenant relationship.