

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

***Real Property***

**QUESTION**

Tenant entered into a written lease of an apartment with Landlord on January 1, 1995. The lease provided that Tenant would pay \$12,000 per year rent, payable in \$1000 per month installments, commencing immediately.

Tenant moved into the apartment. Soon thereafter Tenant was visited by Inspector, who told Tenant that Landlord had received numerous warnings over the years about the unsafe electrical wiring in the bathroom, and had been cited and fined once for it. Tenant called Landlord and asked him to fix the wiring. Landlord promised to send someone to fix the wiring, but when no one had come for several weeks, Tenant decided to fix the wiring himself. While he was doing the work, he also put mirrors on the ceiling and tore out the tub and replaced it with a whirlpool bath.

A few months later, a noxious slime began oozing from the fixtures in the kitchen sink. Tenant complained of this condition to Landlord, but Landlord refused to have it fixed. The ooze continued, and it became so bad that Tenant was forced to stop using the kitchen. Tenant reported the problem to Inspector, who caused Landlord to be cited and fined for the condition. Despite this, Landlord did not make the repairs and the kitchen remained unusable. Tenant has remained in the apartment but has stopped paying rent.

On December 1, 1995, Tenant received a registered letter from Landlord giving him notice to vacate the apartment on January 15, 1996. In a subsequent telephone conversation, Landlord told Tenant that the notice was given because he was tired of Tenant's demands for repairs and angry because of the fine.

What are Landlord's and Tenant's rights and obligations?

Discuss.

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**ANSWER A**

The parties have a LL/Tenant relationship which began on Jan. 1, 1995. It is unclear whether the parties have entered into a periodic tenancy, which is a lease term that goes on and on until one party gives the appropriate notice; or whether the parties have a one-year lease which will automatically terminate on Dec. 31, 1995. Nevertheless, this is a tenancy for a residence and the landlord must meet certain requirements.

Let's first consider the tenant's rights and obligations under the facts.

**Duty to Pay Rent**

A tenant has a duty to pay rent. This duty can be abated or excused by landlord's breaches. Although under the common law landlord and tenant duties were not dependant, modern statutes have established that a tenant's duty to pay rent can be lifted if landlord breaches certain of his duties.

**Duty to Repair**

A tenant also has a duty to make repairs under the common law. This duty is abated significantly by modern statutes which impose certain duties to landlord.

**I. BATHROOM WIRING**

**A. Warranty of Habitability**

Tenant was informed by Inspector (I) that the bathroom had "unsafe electrical wiring." Tenant properly reported this to landlord (LL) and thereafter waited for him to fix the problem. The LL did not fix the problem. Under common law, a tenant had duty to repair the leased premises. However, under the law now in most jurisdictions, a LL has a duty to make the premises habitable. This Warranty of Habitability attaches only to residential premises, and cannot be waived by either party.

Under this warranty, LL must repair the unsafe bathroom wiring, immediately. LL does not repair. At this point, Tenant has several options. Although under the common law, a landlord's and tenant's respective duties are independent, the law now views their duties as interdependent. Thus, when a landlord breaches his duty to make premises habitable, a tenant may be relieved from his duty to pay rent.

In this case, LL breached his duty to provide habitable premises, thus tenant has certain options under the law.

First, tenant may vacate the premises.  
Second, tenant may sue for damages.

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Third, tenant may abate rent and make repairs.

Tenant chooses to make the repairs himself. This allows him to reduce the rent according to the cost of the repairs. LL is not required to pay for the other changes tenant made to the bathroom; this is considered ameliorative waste and will be discussed more fully below.

B. Covenant of Quiet Enjoyment

A landlord also has a duty not to interfere with the tenant's right to quiet enjoyment of the premises. This duty is also implied in residential leases and cannot be waived by either party. The faulty bathroom wiring did not seem to interfere with tenant's quiet enjoyment of the premises, as the defect was latent and did not prevent use of the bathroom, it merely posed some threat of future harm which never came about.

II. NOXIOUS SLIME

A. Warranty of Habitability

As discussed above, the landlord must make the premises habitable. The noxious slime in the kitchen clearly breached this warranty. As discussed above, tenant may:

1. Vacate;
2. Sue for damages;
3. Repair and abate rent.

Here, Tenant chose to stay in the apartment, but stopped paying rent. Duties of LL and tenant are interdependent. But, tenant must try to make the repairs to stay in the apartment under this warranty. LL must repair the premises.

B. Covenant of Quiet Enjoyment

As discussed above, LL owes a duty to allow tenant's quiet enjoyment of the premises. LL clearly breaches this duty by failing to remedy the situation in the kitchen. This failure results in either a partial eviction or a constructive eviction under the Covenant of Quiet Enjoyment.

1. Partial Eviction

If a landlord partially evicts a tenant from the premises, tenant may stay in the premises, but may stop paying rent. Partial eviction occurs when a landlord locks the basement door and prevents tenant from full enjoyment of the premises. This is not the situation here, as tenant still has possession over the kitchen, but it just is unusable because of the slime.

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### 2. Constructive Eviction

This occurs when a landlord fails to provide a service which results in depriving the tenant from quiet enjoyment of the premises. The landlord must fail to provide a service, and the tenant must vacate within a reasonable time of discovering landlord's failure to provide the service. Here, tenant did not move out within a reasonable time of discovering the defect, and so constructive eviction does not apply.

### 3. Fixtures

When tenant fixed the bathroom, he also placed mirrors on the ceiling and installed a hot tub. When tenant moves out, LL will argue that these things are fixtures and cannot be removed from the premises. Tenant will argue that they were not intended to be fixtures and that they are his personal property which can be removed when he vacates.

Fixtures are items which are personal property, but that become part of the real property when they are attached or installed to a premises. When determining whether an item is a fixture, courts will consider:

- a. Degree of Attachment;
- b. Harm to Premises if removed;
- c. Custom;
- d. Intent of Person Installing Item;
- e. Length of Lease.

A bathtub/whirlpool is considered a fixture in most circumstances, depending on whether it is installed or whether it just sits on top of the floor. The mirrors will also probably be considered fixtures because they are probably attached to the ceiling with glue and would cause damage if removed.

## LANDLORD'S RIGHTS/OBLIGATIONS

### A. Right to receive rent

A landlord has a right to receive rent because a tenant has a duty to pay rent. However, as discussed above, landlord's breaches of his duties removes his right to receive rent because of the interdependence of landlord's and tenant's duties.

### B. Proper Notice

If a landlord wants tenant to vacate, he must give the proper notice.

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If this is a periodic tenancy measure by years, the landlord must give tenant 6 months notice. Landlord only gave 6 weeks notice. If this is a periodic tenancy measured by months, the landlord must give one month's notice and state an appropriate date to vacate. A periodic tenancy must end at the end of a period, so while landlord gives more than enough notice (6 weeks), he does not state the proper ending date. If it is a periodic tenancy for months, the ending date must be December 31, or January 31, 1996. Instead, landlord gives a termination date of January 15.

If, however, the lease was a one year lease, the tenancy will automatically end on December 31, 1995 and no notice need be given.

Thus, landlord may have a right to get his premises back on December 31, 1995, January 31, 1996 or June 30, 1996, depending on the type of lease.

### C. Retaliatory Eviction

A landlord's duty to provide Habitable Premise and his Covenant of Quiet Enjoyment are not waivable. They also prevent the landlord from taking action which is essentially retaliation for the tenant's exercising of his rights. Here, LL stated that he was tired of tenant's complaining. The notice to vacate then could be considered retaliatory eviction for tenant's enforcement of this Warranty and Covenant.

However, if the lease was not a periodic tenancy, but a one-year lease, then it will end automatically on December 31, 1995, and landlord will have no duty to renew the lease, and tenant cannot claim retaliatory eviction.

### D. Ameliorative Waste

Tenant has a duty not to commit waste, even ameliorative waste which increases the value of the property. Sometimes a tenant may commit waste if, the waste:

1. Increases the value of the premises;
2. It is a long-term lease;
3. Changes are in-keeping with the changes of the neighborhood.

Tenant does not meet these requirements, and Landlord may sue for damages for the changes made to the bathroom (mirrors and hot tub).

## **ANSWER B**

### LANDLORD'S RIGHTS

#### The Lease

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### Term of Years

A lease which has a definite beginning and end date is called a term of years. There is no notice required to end this lease. It will end automatically. The fact that rent payments are paid monthly or at some other interval does not change the nature of the leasehold.

### Periodic Tenancy

A lease which is for a specific length of time, which will repeat automatically unless notice is given, is a periodic tenancy. It can be week to week, month to month, year to year, or any length of time the parties agree. Notice of tenant's action is required equal to the term. However, a six month notice is required when the lease is year to year.

Here Tenant and Landlord entered into a written lease of an apartment to commence on January 1, 1995. No specific end date was indicated. The lease provided that the rent would be for \$12,000 per year. This appears to be a periodic tenancy, which will automatically renew unless six month notice is given. Like the tenancy for years, the fact that rent is paid in \$1,000 monthly installments does not alter the periodic tenancy's length.

Thus, Tenant is under a periodic tenancy with Landlord. It should be noted that leases greater than one year must be in writing to comply with the Statute of Frauds. Here, as the lease was written, no Statute of Frauds issue exists.

## TENANT'S DUTIES UNDER THE LEASE

### Duty to Repair

At common law, unless expressly assumed a tenant was under no duty to repair the premises. Today, courts imply a duty to repair, and liken that to the duty of a life-tenant to avoid waste. Tenant will not be required to repair for ordinary wear and tear.

### Waste

When a tenant acts in a manner to alter the leased premises she commits waste. Waste can be permissive, voluntary or ameliorative.

Ameliorative waste occurs when a tenant alters the premises in a manner which actually causes an increase in value. Here, the tenant tore out the tub from the apartment and replaced it with a whirlpool bath. As this directly increased the value it was ameliorative. Notwithstanding the increase, the tenant could be held liable to the tenant for costs of returning the bath to the original state.

Voluntary waste occurs when a tenant acts affirmatively to cause harm to the property. Here, tenant placed mirrors on the ceiling at the same time she had the whirlpool tub installed.

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Tenant may argue such decorative mirrors caused an increase, thus were ameliorative. Landlord would likely say the adhesive used to secure them was voluntary damage or waste. As such, tenant will be responsible for the costs of turning the ceiling to its original condition.

Duty to Pay Rent

The promise to pay rent is in the lease. Thus there is both contractual priority and privity of estate regarding this covenant, and the tenant will be required to pay.

However, at common law all covenants in the lease were independent. Today, covenants in the lease are dependant. Thus, unless landlord has acted in such a manner to breach a covenant either expressly in the lease, or implied, Tenant owes landlord any rent not yet paid under the lease.

Tenant's Rights

As stated above, if landlord breached any covenants, tenant's duty to pay rent may have been discharged.

Breach of Warranty of Habitability

Courts today imply a warranty of habitability into all residential leases. This covenant is usually tied to local housing codes, and requires the landlord to maintain the premises in a habitable condition. Here landlord breached this warranty on two occasions.

Unsafe Electrical Wiring

Tenant was contacted by a local inspector who informed tenant that there was unsafe wiring in the bathroom. Although landlord had been given notice of the violations, he refused to make repairs, even after promising tenant that he would. As no one came out to fix the wiring for several weeks, tenant chose to repair the wiring himself.

Tenant would argue that faulty wiring that was deemed unsafe by local housing inspectors makes the residence uninhabitable. A fire could occur at anytime, thus rendering it a dangerous residence to live or sleep in. Thus, Landlord's failure to repair this wiring resulted in a breach.

Tenant has many options to remedy the situation. He may stay in the premises, make the repair, and abate the rent, he may pay full rent and sue for damages, or he may choose to move out. Here, tenant made the repair himself and chose to remain in possession. Thus he is entitled to either a rent abatement for the weeks repair was not made, or/and reimbursement for the costs of said repair.

Green Ooze in Kitchen

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Landlord may have also breached the warranty of habitability when he failed to repair the kitchen. We are told that a noxious slime began oozing from the fixtures in the kitchen which rendered the kitchen unstable and unusable. Thus, a kitchen is necessary to have in a residence, so as to be able to prepare food. Thus, Landlord's failure to repair the kitchen after being cited and fined results in a breach. Tenant may choose from the safe remedies as previously mentioned.

Breach of the Covenant of Quiet Enjoyment

A landlord may cause an interference with a tenant's quiet enjoyment by causing either a constructive eviction, full eviction or partial eviction.

Constructive Eviction

A constructive eviction occurs when a landlord acts in such a way to cause a substantial interference with a tenant's possession or habitability of the premises. Here, landlord refused to maintain and repair the kitchen of the apartment. As this is a substantial interference, landlord breached this covenant.

Tenant may also argue that Landlord's failure to repair the unsafe wiring was a constructive eviction as well. If it is also deemed to be one, landlord breached here as well. Nevertheless, the green ooze emitting from faucets in the kitchen clearly renders a substantial interference. A residence without a kitchen is not a habitable premise. Thus, a breach occurred.

Under a constructive eviction, tenant must move out, and the obligation to pay rent is extinguished. Here, tenant has remained in possession, thus her obligation under constructive eviction has not been extinguished.

Partial Eviction

When a landlord acts in a manner to partially evict a tenant from the premises, the tenant's obligation to pay rent is entirely extinguished. (If it's a third person interfering, tenant merely abates in proportion to the interference). Here, landlord has partially evicted tenant from the premises, as she is forced to stop using the kitchen. As landlord's failure to make necessary repairs caused tenant to be unable to use this portion of the premises, a partial eviction has occurred. Tenant will not be liable for rent during that time period.

Retaliatory Eviction

A tenant who is evicted after reporting housing defects or requesting a landlord to make necessary repairs is presumed to be retaliatory evicted. This type of eviction is prohibited. When such a notice to abandon premises is given, typically within 90 days of the complaints, courts shift the burden to the landlord to prove such eviction is for other reasons.

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Here, Landlord sent notice to vacate to the tenant on December 1, 1995. Tenants complaints regarding the wiring occurred shortly after she took possession in January. As those inspections were made several weeks later, this would not likely trigger the retaliatory presumption.

The problems with the kitchen occurred a few months after taking possession, and have continued to date, thus giving rise to the presumption. Further, the landlord orally told tenant, in a telephone call subsequent to tenant receiving notice that his purpose was to make tenant vacate because he was tired of tenant's demands for repairs and angry because of the fine. Thus, the notice to vacate was retaliatory and landlord will not be successful.

Notice under the lease

Further, as stated at the outset, if this is deemed a periodic tenancy, a six-month notice is required. As no such notice was given, landlord may automatically renew the lease, should he so desire. If this is deemed a tenancy for years, no notice is required and tenant will be vacating the premises at the end of 1995. In any event tenant may move out due to the constructive eviction, and not be required to pay any remaining rent, receive an abatement if he chooses to stay, or if a partial eviction has in fact occurred, remain on the premises rent free.