

1970

Real Property

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Recommended Citation

1970 Cal Law 389

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Real Property

*by Roger Bernhardt**

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The author extends his appreciation to Lee-Louise Priest, student at Golden Gate College, School of Law, for her assistance in the preparation of this article.

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I. Introduction

"Real property" as a topic exists only in a law professor's mind. Practicing attorneys may specialize in representing title companies or developers or brokers or any of the other entrepreneurs who make their living in one way or another from real estate, but none of these lawyers would claim that his proper field of expertise is real estate *per se*. Consequently, any article on developments in the field of real property law really becomes a series of separate articles on developments in some real estate specialties, rather than a cohesive whole. I have tried, here, to cover the three specialties which have undergone the greatest growth during 1969, and that may be of some interest to those who do not devote their entire time to these matters.

II. Third-Party Tort Liability

Suppose that while John Doe is visiting some friends in their home he is scalded when he turns on the hot water tap. He can show that the hot water system is defective, but can demonstrate no actual negligence in construction. Furthermore, the contractor who built the home has since gone out of business. Has he any chance of prevailing in an action against a savings and loan institution that made the original construction loan on the house? In 1968, no real estate lawyer would have taken the case (although a personal injury attorney would have seriously thought about it); in 1969, it would have looked like a beautiful case to any attorney; and, in 1970, the case has become doubtful again.

The reason that the case would have looked unpromising in 1968 was that it fell short of traditional real estate notions of liability in four respects: (1) Doe was not the owner or possessor of the premises, (2) he could not prove negligence,

(3) he was seeking personal injury relief rather than property damage, (4) he was not suing a party who "caused" the condition.

By 1969, each of these limitations standing in the way of recovery was discarded or at least weakened. Ultimately a new roadblock to recovery was thrown up by the legislature, but the judicial development that preceded it should first be described.

A. *Parties Plaintiff*

Until 1958, no one other than the direct purchaser of a house could recover from a contractor for negligent construction after the purchaser had accepted the completed house unless the premises were inherently dangerous.¹ Then in *Dow v. Holly Mfg. Co.*,² the State Supreme Court rejected this "completed and accepted" defense, and held that a remote purchaser could recover without privity. Three years later, in *Stewart v. Cox*,³ the State Supreme Court informed the legal profession that under the tests of *Biakanja v. Irving*,⁴ privity was not required in actions concerning the real estate construction field.

But in both of the cases just mentioned, the plaintiffs were either tenants or owners of the property. Whether a non-possessing, nonowning visitor could recover was not settled.⁵

In 1969, the State Supreme Court decided *Elmore v. American Motors Corp.*⁶ where a defect in a Rambler station wagon caused it to fishtail and cross over in front of an oncoming vehicle, killing the driver of the oncoming car. Strict liability had been applied long enough in the chattel field to make it

1. See *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948).

2. 49 Cal.2d 720, 321 P.2d 736 (1958).

3. 55 Cal.2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961).

4. 49 Cal.2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958).

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5. Except in the case where the contractor was still working on the premises. See *Chance v. Lawry's Inc.*, 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185 (1962).

6. 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969). For further discussion of this case, see Moreau, TORTS, in this volume.

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certain that the owner of the Rambler could recover from the manufacturer or retailer, but the question of whether "bystanders" could also recover was novel. The Court held that they could:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.⁷

Is the analogy between the pedestrian or oncoming motorist and the visitor on the premises sufficiently close to permit *Elmore* to work in the real estate field? The practical ability of the casual visitor to check out the plumbing of his host's house before washing his hands seems less real than for a pedestrian to watch oncoming cars. And earlier, in *Dow v. Holly Mfg. Co.*⁸ the State Supreme Court indicated that there is a substantial similarity between contractors and automobile manufacturers:

There is also a close analogy between a supplier of chattels and a general contractor for the construction of a building. The contractor supplies all of the materials used as well as the labor either by fabricating it himself, buying it from another or having an independent subcontractor do the same thing. The owner in effect buys a properly completed building from the contractor which the contractor is bound to supply. In the case of the supplier of chattels when he supplies the goods it is im-

7. 70 Cal.2d 578 at 586-587, 75 Cal. Rptr. 652 at 657, 451 P.2d 84 at 89.

8. 49 Cal.2d 720, 321 P.2d 736 (1958).

material to his liability that he may have had another supply the product; he is nevertheless liable because he has vouched for the chattels as his own by taking the contract. The same is true of a house where he supplies many parts, as well as labor, most of which are probably not fabricated by him but by independent contractors or sellers. In such case the supplier is liable to third persons for negligence.⁹

Until 1969, it could have been argued that the affording of protection to nonpossessors of chattels had no bearing on the protection to be given to nonpossessors of land, because of the historical rules making a nonpossessor's rights dependent on whether he was an invitee, licensee, or trespasser. But with the Supreme Court's landmark decision in *Rowland v. Christian*,¹⁰ abolishing these distinctions and making negligence the test in all cases, the analogy between personal and real property becomes difficult to resist. *Rowland*, even more than *Elmore*, shows that persons injured on land need not own or possess the land in order to recover. *Rowland*, alone, permits the invitee to recover from the possessor for negligence. But when *Rowland* is combined with *Elmore* and the mentioned contractor cases, it is also probable that the invitee can recover from whoever causes the dangerous condition of the premises leading to the injury, whether or not that person is the owner of the property.

B. Theory of Liability

Can such a plaintiff prevail only if he is able to show negligence, or may he rely on a theory of strict liability? Under the doctrine of strict liability, a person injured by use of a product may recover without showing that the manufacturer was guilty of negligence in its production, if the injured party can show it was defective and the manufacturer did not expect the injured party to inspect the product for defects.¹¹

9. 49 Cal.2d 720, 726, 321 P.2d 736, 739-740.

10. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). For a full discussion of this case see Moreau, TORTS, *Cal Law—Trends and Developments* 1969, p. 493.

11. See *Greenman v. Yuba Power*

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Between 1953 and 1968, strict liability was applied to almost every kind of tangible asset except land and houses. They were held not included because there is no warranty of fitness enumerated in section 1113 of the Civil Code, which was deemed to afford the sole basis for protecting purchasers.¹²

The big breakthrough of strict liability into real estate happened in 1969. After one false start,¹³ the Court of Appeal, in *Kriegler v. Eichler Homes, Inc.*¹⁴ held that a contractor could be strictly liable in tort to a remote purchaser for property damage resulting from a defective heating system that reduced the value of the property by over \$5,000. The contrary arguments which had earlier persuaded a different division of this Court, in *Conolley v. Bull*¹⁵—that the contractor was unable to limit his liability by express warranties and/or disclaimers, and that buyers had more opportunities to inspect—were rejected. Instead, the court brought in considerations from a New Jersey case, *Schipper v. Levitt, & Sons, Inc.*¹⁶ to the effect that buying a house from an advertised model entails as much reliance upon the developer's skill as when a car is bought, that there is no meaningful inspection by the average purchaser, and that injuries from the defect can best be borne by the contractor.

Kriegler was decided early enough in 1969, for several other districts of the Courts of Appeal to apply it. The second district did so in *Avner v. Longridge Estates*,¹⁷ extending *Kriegler* in two directions. The first direction was with regard to the product claimed defective, since here it was soil rather than a

Products, Inc., 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963). This doctrine represents a significant advance over the earlier "warranty" remedy of purchasers, since the niceties of the sales law do not have to be complied with by the plaintiff, and the defendant is unable to exculpate himself by contract.

12. See, e.g. *Gustafson v. Dunman, Inc.*, 204 Cal. App.2d 10, 22 Cal. Rptr. 161 (1962). See generally, *Dunham, Vendor's Obligation as to Fitness of*

Land for a Particular Purpose, 37 Minn. L. Rev. 108 (1953).

13. *Conolley v. Bull*, 258 Cal. App. 2d 183, 65 Cal. Rptr. 689 (1968).

14. 269 Cal. App.2d 224, 74 Cal. Rptr. 749 (1969).

15. 258 Cal. App.2d 183, 65 Cal. Rptr. 689 (1968).

16. 44 N.J. 70, 207 A.2d 314 (1965).

17. 272 Cal. App.2d 607, 695, 77 Cal. Rptr. 633 (1969).

house; instead of putting in a poor heating system, the defendant put in poor fill, on which he then built a house. There were some tenable distinctions to be made between manufacturing houses and working with soil, but the Court held that modern earth-moving and testing techniques made the distinctions irrelevant.

The other direction of extension over *Kriegler* was less obvious but more important. In *Kriegler*, a great deal of significance was put on the fact that Eichler was "mass producing" houses:¹⁸

We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same.¹⁹

If strict liability were going to be imposed in the mass production field alone, it might help people who bought Eichler or Levitt homes, but what about all those houses built and sold by the many little contractors who come into and out of the real estate market so rapidly?²⁰

In *Avner*, the defendant plainly graded more than one lot, but the Court gave no indication at all of how many lots. *Kriegler* was described and quoted, the fact of 4,000 homes was mentioned, but nothing was said about the number of homes this defendant built.

It makes sense not to confine the rule to the big contractors. Buyers are as unable to inspect homes built by little contractors as big ones; they are forced to rely as much on the builder's expertise in either case, and there is no reason why big but not little contractors should bear the loss of their defects.

It is possible that our Supreme Court, which has not yet passed on this question, will outlaw the application of strict

18. Over 4,000 homes had radiant heating systems like the one involved in this case.

19. 269 Cal. App.2d 224 at 227, 74 Cal. Rptr. 749 at 752 (1969).

20. See Note, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. Chic. L. Rev. 739 (1968).

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liability to the real estate field. But this seems hardly probable in light of the way that the Courts of Appeal have been deciding this precise question, and in light of the way the Supreme Court has extended the concepts of strict liability in the chattel field and general liability in the real estate field.

If strict liability now applies to real estate contractors, and if invitees can now recover from contractors for negligence, it is hard to see why the courts will limit application of the theory to cases where the plaintiff is an owner and reject it where he is an invitee, in light of *Rowland v. Christian*¹ and *Elmore v. American Motors Corp.*² But the question does remain whether this theory—in real estate at least—can do more than justify an award to an owner or guest for property damage caused by the property defect. Will personal injuries also be compensable?

C. Measure of Damages

In the chattel field, there is little question but that a person injured by a defective product can recover for both the cost of the damage to the product and for his own personal injuries. Since so many harm-producing chattels cost infinitesimally less than the amount of harm they do, not much attention is usually paid to compensation for loss to the product itself.³ In real estate, the situation is often reversed; a defective heating system may cause only \$10 worth of bodily injuries while requiring several thousand dollars to repair if it is built into the basic structure of the house. Thus there are at least as many cases going to court where the home owner is seeking the cost of repairs (or depreciation of property value) as where he is claiming for personal injuries.

Both *Kriegler v. Eichler*⁴ and *Avner v. Longridge Estates*,⁵

1. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

2. 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

3. Does anyone really know, or care, for instance, whether the plaintiff in *MacPherson v. Buick Motor Co.*, 217

N.Y. 382, 111 N.E. 1050 (1916), also wanted to recover the cost of the tire?

4. 269 Cal. App.2d 224, 74 Cal. Rptr. 749 (1969).

5. 272 Cal. App.2d 607, 77 Cal. Rptr. 633 (1969).

the two strict-liability real estate cases in California, involved property damage only. So did *Connor v. Great Western Savings and Loan*,⁶ now the main California case involving third-party liability. If the next defect in a house causes more serious personal injuries than property damage, will the injured party be able to recover for these?

The contractor negligence cases have been rather indifferent to the kind of loss involved. *Hale v. Depaoli*⁷ and *Dow v. Holly Mfg. Co.*⁸ both gave personal injury awards against contractors for defective conditions. But the next Supreme Court case, *Stewart v. Cox*,⁹ used precisely the same logic to justify an award for property damage (in the amount of \$25,000) resulting from a defective swimming pool. The case could apparently have involved a drowning as easily as water leakage. Finally, in *Sabella v. Wisler*,¹⁰ where another property damage award was upheld, the Supreme Court did observe that negligence by the contractor would permit a recovery for either personal injuries or property damage.

But it may be one thing to say that negligence permits recovery for either damage and another to say that a recovery in strict liability can include whatever loss results.¹¹ However, reverting to the chattel field, the Supreme Court has told us that bodily and property damage are both compensable under a theory of strict liability.

Plaintiff contends that, even though the law of warranty governs the economic relations between the parties, the doctrine of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Phys-

6. 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968). See section II D *infra*.

7. 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948).

8. 49 Cal.2d 720, 321 P.2d 736 (1958).

9. 55 Cal.2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961).

10. 59 Cal.2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963).

11. On the other hand, it is probable that, on the basis of the four cases just mentioned and those discussed in section IIA, *supra*, a contractor who is negligent may be liable both to the owner for property damage and to the invitee for personal injuries.

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ical injury to property is so akin to personal injury that there is no reason for distinguishing them.¹²

And in the New Jersey case of *Schipper v. Levitt & Sons, Inc.*,¹³ under a strict liability theory, a tenant in a home purchased from the builder was allowed to recover for personal injuries caused to his child by a defective hot water heater. There was no discussion at all of the question of whether the contractor's strict liability was limited to property damage. *Schipper v. Levitt* is important in California, not only because it has been cited with approval in three cases,¹⁴ but also because it itself was based in large part on the California decisions of *Dow v. Holly Mfg. Co.*¹⁵ and *Greenman v. Yuba Power Products, Inc.*¹⁶

These three considerations: (a) that contractors are liable for personal and property damage when negligent; (b) that suppliers of chattels are liable for both kinds of loss under a strict liability theory; and (c) that contractors are now held strictly liable for defective houses, make it almost inevitable that the damages recovered from contractors under a theory of strict liability will not be limited to property losses. Nor in light of *Rowland v. Christian*¹⁷ and *Elmore v. American Motors Corp.*¹⁸ will recoveries for personal injuries based on a strict liability theory be confined to home owners, tenants, or other possessors of land; even invitees will collect. The question remaining is whether these plaintiffs can recover such damages under a strict liability theory when a third-party lender is the defendant.

12. *Seely v. White Motor Co.*, 63 Cal.2d 9, 18, 45 Cal. Rptr. 17, 24, 403 P.2d 145, 151 (1965). The reference to "economic relations" referred to the plaintiff's claim for lost profits. The court held he could recover only on a warranty theory for them.

13. 44 N.J. 70, 207 A.2d 314 (1965).

14. *Connor v. Great Western Savings and Loan*, 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968), *Kriegler v. Eichler Homes, Inc.* 269

Cal. App.2d 224, 74 Cal. Rptr. 749 (1969), *Avner v. Longridge Estates*, 272 Cal. App.2d 607, 77 Cal. Rptr. 633 (1969).

15. 49 Cal.2d 720, 321 P.2d 736 (1958).

16. 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

17. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

18. 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

D. *Parties Defendant*

In order to be held liable for a defect in property, a third party need not necessarily have himself caused the condition to exist. Third parties aware of adverse information concerning the property may have a duty to disclose such facts to prospective purchasers, or sometimes may even have a duty to discover these conditions when specially employed to do so. Thus termite inspectors, soil engineers, and surveyors have been held liable for misrepresentation, nondisclosure, or negligent misrepresentation to purchasers who relied on their skill and/or knowledge.¹⁹ Lenders, too, have been held liable to purchasers for misstatements.²⁰ Generally these cases sound in fraud, which carries, as a special measure of damages, the difference between the price paid and the value of the property,¹ but the duty to warn may be treated as a duty of care² with the result that personal injuries become compensable under a negligence theory.³

In addition to fraud/negligence liability based on failure to warn, third parties may also be found liable under two other theories. On the one hand, they may be held liable under a rule of imputed liability, being charged with responsibility for what someone else did or did not do. Or, on the other hand, they may be charged with a duty of their own to take steps to avoid the creation of a defective condition, even though the condition was not brought about by their "direct" acts. Both of these latter theories underwent great expansion in 1969, when applied to real estate lending institutions. In two cases, decided on the same day, the State Supreme Court put the lending industry into a state of shock.

19. See e.g. *Gagne v. Bertran*, 43 Cal.2d 481, 275 P.2d 15 (1954); *Wice v. Schilling*, 124 Cal. App.2d 735, 269 P.2d 231 (1954); *Roberts v. Karr*, 178 Cal. App.2d 535, 3 Cal. Rptr. 98 (1960); *Greenberg v. Hastie*, 202 Cal. App.2d 159, 20 Cal. Rptr. 747 (1962); *Hardy v. Carmichael*, 207 Cal. App.2d 218, 24 Cal. Rptr. 475 (1962); *McCaulley v. Dennis*, 220 Cal. App.2d 627, 34 Cal. Rptr. 90 (1963).

20. See, e.g., *De Zemplen v. Home Federal Savings and Loan*, 221 Cal. App.2d 197, 34 Cal. Rptr. 334 (1963).

1. Civ. Code § 3343.

2. Not a duty to correct the defect, but a duty to discover it and inform the plaintiff about it.

3. See *Merrill v. Buck*, 58 Cal.2d 552, 25 Cal. Rptr. 456, 375 P.2d 304 (1962).

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*Morgan v. Reasor Corp.*⁴ was one of these two cases. There, the plaintiffs gave a contractor a note and deed of trust to secure payment for a house he was to construct on their land, and the contractor then transferred the paper to a finance company. The plaintiffs sued both the contractor and the finance company, claiming that the documents did not comply with the Unruh Act,⁵ and they won.

The Supreme Court first held that a construction contract came within the Unruh Act. Although a Court of Appeal had earlier intimated that this might be the case,⁶ the real estate industry had generally assumed that the Act did not apply to it. The legislature promptly repealed this part of the opinion by enacting Civil Code 1801.4,⁷ which eliminated most construction contracts from the scope of the Act.⁸

For purposes of this article, that part of the holding was less important than what the Supreme Court did next. The purchasers were asserting nonliability for any interest payments against a finance company which claimed to be a holder in due course. Would Unruh Act defenses apply? The answer was yes, for two reasons. First, the Court held that the policy of the Unruh Act compelled making an assignee of the paper responsible for its assignor's violations of the Act so long as the assignee had constructive notice of the violation. Second, and more important, the Court restated a rule it had made long earlier, that a finance company might be denied holder-in-due-

4. 69 Cal.2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968). For further discussion of this case, see McCall, COMMERCIAL TRANSACTIONS, in this volume.

5. Civil Code 1801 et. seq.

6. *Mann v. Earls*, 226 Cal. App.2d 155, 37 Cal. Rptr. 877 (1964).

7. The provisions of this chapter shall not apply to any contract or series of contracts providing for the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest there-

in, or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale. This act is intended to abrogate any contrary rule in *Morgan v. Reasor Corp.* 69 Cal. 2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968).

8. Had this part of the decision not been overturned, its sweep would have been immense. It would probably have applied to every sale in a real estate development where the house was not completed at the time the purchasers agreed to buy.

course status when it is so closely related to the seller/assignor as to create an agency relationship between them.⁹

The first argument may be ignored since it turns on the Unruh Act, which now no longer applies to most real estate transactions. But the second argument does not depend on the Act and may have repercussions far beyond it. The Court furnished a list of instances where the contractor might be deemed the finance company's agent:

If Midwest (the finance company) had provided IBC (the contractor) with forms for bills of sale or notes, that conduct would strongly suggest the required expectation, but the record contains no showing of any such arrangement. If Midwest had purchased a substantial number of such notes from IBC in the past, that factor too would weigh heavily, but plaintiffs do not establish any such practice. If Midwest's name had been on the note when the buyer signed it, or if Midwest had inquired into the buyer's credit rating, such evidence would indicate that IBC contemplated Midwest's acquisition of the note, but neither of these factors was present. If IBC had assigned the note to Midwest on the day plaintiffs executed it, such assignment might have raised a presumption as to IBC's expectations, but we know only that IBC assigned the note within three months.¹⁰

Many of these conditions fairly describe the relationship between a savings and loan institution and the speculative contractor developing a tract. Not only is the money for land acquisition and construction advanced, but there is then an arrangement between the parties for the handling of all purchase money loans on the individual houses. It is not even a question of purchasing the individual notes and deeds of trust, since they are made out in favor of the savings and loan association from the start. The Supreme Court has elsewhere held that a savings and loan association and a developer

9. See *Commercial Credit Corporation v. Orange County Machine Works*, 34 Cal.2d 766, 214 P.2d 819 (1950).

10. 69 Cal.2d 881 at 895, 896, 73 Cal. Rptr. 398 at 407-408, 447 P.2d 638 at 647-648 (1968).

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are normally not joint venturers,¹¹ but *Morgan v. Reasor Corp.*¹² seems to indicate strongly that they may be principal and agent nevertheless.

All that *Morgan* held was that a finance company too close to the contractor may be denied holder-in-due-course protection. But may it be affirmatively liable for damages for defective construction? The practical difference between these two issues is perhaps not as large as it seems. A purchaser who has a claim against his seller for some physical condition of the property, and who also owes the seller money for the balance of the price, may offset one against the other if he is successful in court.¹³ If that same offset can be asserted against the lending institution on the ground that the seller acted as agent for the lender, and if the extent of the damage does not exceed the amount of the loan, the buyer needs no further protection.

Defenses which the Court held applicable to the finance company in *Morgan* were those relating to the contractor's failure to comply with the Unruh Act in the preparation of the contract documents. Can defenses relating to the contractor's work on the job also be charged to the lending institution behind him? Nothing in the opinion indicated that the decision was intended to have a limited scope. One statement the Court made is particularly interesting:

The important function of section 1812.7 becomes particularly apparent in the case of a seller inclined frequently to violate the act. We recognize that stringent enforcement of section 1812.7 will tend to compel such a retailer to sell his paper at a greater discount and to charge a proportionately higher price for his goods. In all likelihood, this increase in retail prices will deter customers from dealing with such a seller. Moreover, such enforcement will effectuate a proper allocation of possible financial loss. The impact of the violations

11. See *Connor v. Great Western Savings and Loan Association*, 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968), *infra*.

12. 69 A.C. 919, 69 Cal.2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968).

13. Cf. *Lenard v. Edmonds*, 151 Cal. App.2d 764, 312 P.2d 308 (1957).

will be borne, not by a few consumers unable to pass on the loss or in any way “insure” against the effect of a harsh contract, but by finance companies that buy large numbers of notes. Such financiers are obviously better able than buyers to absorb the loss of an occasional bad deal. Finally, strict enforcement will give finance companies with the knowledge and economic leverage required effectively to police against Unruh Act violations, an incentive to do so.¹⁴

Compare this to the language of the same Court a few years earlier in *Vandermark v. Ford Motor Co.*,¹⁵ where a dealer was held strictly liable along with the manufacturer for a defective vehicle.

Retailers, like manufacturers, are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.¹⁶

The quotation from *Vandermark* manifestly invites consideration of whether *Morgan v. Reason Corp.*¹⁷ may not only be extended from Unruh Act violations to negligent construc-

14. 69 Cal.2d 881 at 889-891, 73 Cal. Rptr. 398 at 404, 447 P.2d 638 at 644 (1968).

15. 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

16. 61 Cal.2d 256 at 262, 263, 37 Cal. Rptr. 896 at 899-900, 391 P.2d 168 at 171-172.

17. 69 Cal.2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968).

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tion but in fact even lead to the imposition of strict liability on real estate construction lenders for defects in the finished product. The tests of *Vandermark* appear to be better met by the construction lender than by the automobile retailer:

(1). The savings and loan industry is an integral part of the manufacturing and marketing of houses. These institutions are far more indispensable to the real estate industry than are finance companies in the automobile field.¹⁸ They enter the picture before construction begins (with their acquisition and construction loans) and stay there long after it is completed (with their home purchase-money loans).

(2). Real estate lending institutions are often the only member of the home-producing enterprise reasonably available to injured plaintiffs. As has already been pointed out, contractors are not like automobile manufacturers, but flourish in far greater numbers, on a more petty and transient basis.

(3). Savings and loans can play a substantial part in insuring that the finished product—the house—is safe. Unlike finance companies, they are more concerned with the value of the product than with the plant and assets of the manufacturer,¹⁹ particularly in California, because of the antideficiency laws. Unlike automobile dealers, they are there at the beginning of construction, at least when a construction loan is made. The terms of their loan agreements permit them to supervise construction, and withhold progress payments when it is not to their satisfaction.²⁰ They maintain their own staff of experts, often more diligent than municipal building inspectors.

(4). These institutions can easily adjust the cost of protection with the contractor merely by requiring insurance or the posting of a bond.

One obstacle to applying the *Vandermark* doctrine of vicari-

18. See Lefcoe and Dobson, *Savings Associations as Land Developers*, 75 Yale L.J. 1271 (1966).

19. See Note, *Torts—Lender's Tortious Liability for Building Defects*, 1968 Wisc. L. Rev. 600.

20. See Note, *Torts—Building and*

Loan Association Which Finances a Housing Project Developed by an Inexperienced, Undercapitalized Builder is Under a duty to Protect Home Buyers in the Project from Major Structural Defects. 37 U. Cinc. L. Rev. 219, (1968).

ous strict liability to the savings and loan institution is that nowhere in California has a finance company been held strictly liable in the chattel field. *Vandermark* involved a dealer, and distinctions can be made between dealers and finance companies. But even if such distinctions will work in the chattel field, it is unlikely to work in the real estate field in light of the Supreme Court's companion decision to *Morgan, Connor v. Great Western Savings and Loan*.¹

In *Connor*, an inexperienced and undercapitalized contractor worked out a scheme to build and sell 2,000 homes in Southern California. To finance the plan, he worked out an arrangement with Great Western Savings & Loan whereby it was to purchase part of the land and warehouse it for him until he could pay for it out of the loans it made to him. Great Western profited from a markup on the resale and from the fact that all construction and ultimate purchase-money loans had to be made by it. The only drawback to the arrangement was that it left the contractor with so little money that he was forced to cut dangerous corners in construction.

One such corner was soil conditions. The houses were built on adobe soil, which can expand five times when wet and therefore requires special construction techniques which, sadly, were not employed. The result was inevitable: purchasers found their homes cracking, and sued. They sued not only the contractor, but also Great Western.

The purchasers were nonsuited in the trial court, but had much better luck at the appellate level. The Court of Appeal held, in 1967, that Great Western had a duty to the purchasers to protect them from defective construction because it had undertaken to provide almost total financing to a bad-risk contractor.² The Supreme Court also held Great Western

1. 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968). "Companion" is perhaps too strong. Both cases were decided on the same day and stand next to each other in the reports. Curiously enough, however, neither refers to the other.

2. *Connor v. Conejo Valley Development Co.* and *Burgess v. Conejo Valley Development Co.* 61 Cal. Rptr. 333 (1967).

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liable, less for its near-total financing than for the enthusiastic role it played in the project.

In undertaking these relationships, Great Western became much more than a lender content to lend money at interest on the security of real property. It became an active participant in a home construction enterprise Its financing, which made the enterprise possible, took on ramifications beyond the domain of the usual money lender. It received not only interest on its construction loans, but also substantial fees for making them, a 20 percent capital gain for "warehousing" the land, and protection from loss of profits in the event individual home buyers sought permanent financing elsewhere.

Great Western was held to be under a duty to its own shareholders to avoid construction of defective homes; it was held to have breached that duty through careless inspections; and that breach was held to make it liable to the purchasers of the homes even though there was no privity between them.

One paragraph of the opinion is particularly significant because it echoes so much the logic of *Vandermark* when that case extended strict liability to the third parties:

By all the foregoing tests, Great Western had a duty to exercise reasonable care to prevent the construction and sale of seriously defective homes to plaintiffs. The countervailing considerations invoked by Great Western and amici curiae are that the imposition of the duty in question upon a lender will increase housing costs, drive marginal builders out of business, and decrease total housing at a time of great need. These are conjectural claims. In any event, there is no enduring social utility in fostering the construction of seriously defective homes. If reliable construction is the norm, the recognition of a duty on the part of tract financiers to home buyers should not materially increase the cost of housing or drive small

3. 69 Cal.2d 850, 864, 73 Cal. Rptr. 369, 376, 447 P.2d 609, 616.

builders out of business. If existing sanctions are inadequate, imposition of a duty at the point of effective financial control of tract building will insure responsible building practices. Moreover, in either event the losses of family savings invested in seriously defective homes would be devastating economic blows if no redress were available.⁴

Were *Connor* the last work on the subject to date, the future would have been fairly clear. The similarity between the *Connor* and *Vandermark* policies is great enough to argue that strict liability would replace negligence as the basis of liability since the policing of the construction industry can be accomplished more effectively thereby. The distinction between property damage and personal injuries would not last long, in light of the way strict liability developed in the chattel field and negligence grew in the real estate field, so that a buyer who suffered personal injuries from the defect could also recover from the construction lender. In light of *Rowland v. Christian*⁵ and *Elmore v. American Motors*,⁶ invitees would also soon be able to recover for harm done to them. And finally, with *Morgan v. Reasor Corp.*⁷ as a basis, savings and loan institutions would be subject to liability even when they had not engaged in "lending plus," as had Great Western, but had merely made a regular construction loan to a developer.⁸

This last prediction, however, appears to have been demolished by the action of the legislature in its quick enactment of Civil Code section 3434:⁹

A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property for sale or lease to others, shall not be held liable to third persons

4. 69 Cal.2d 850, 867-868, 73 Cal. Rptr. 369, 378, 447 P.2d 609, 618.

5. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

6. 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

7. 69 Cal.2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968).

8. But see *Bradler v. Craig*, 274 Cal. App.2d —, 79 Cal. Rptr. 401 (1969).

9. Stats 1969, Ch. 1584, § 1.

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for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property.

Unlike the partial repeal of *Morgan v. Reasor Corp.*¹⁰ by section 1801.4, section 3434, does not abrogate any part of the *Connor* holding or abolish any previous judicial rules concerning lenders. Lenders are still liable when they exceed their traditional functions or when they engage in fraud. But merely by limiting *Connor* to its facts, the legislature has worked a far greater limitation here than it did in repealing *Morgan*. It was inevitable that had section 3434, not been enacted, the courts would soon have forgotten the fact that the savings and loan association in *Connor* had gone beyond a lender's normal role, because it was in fact irrelevant to the holding. Probably the main justification for imposing on lending institutions responsibility for carelessly inspecting their projects is the fact that they normally inspect them anyway. Even when the lender stays entirely within its normal bounds, it will be concerned—for the preservation of the security for its loan—with the quality of the job.¹¹ Thus its responsibility, and duty, is no greater in one case than the other. Just as the mass-production test of strict liability for contractors will vanish because in fact it has nothing to do with the real issues involved, so too would the excesses of the construction lender.

Nothing in section 3434, prohibits the development of strict liability, or the protection of invitees, or the recovery for per-

10. 69 Cal.2d 881, 73 Cal. Rptr. 398, 447 P.2d 638 (1968).

11. This is disputed by the lending industry. See Pfeiler, *Lender's Liability*

in *Tract Financing*, U.S.S. & L. Bull., 85 (Mar., 1969); but see *Torts—Lender's Tortious Liability for Building Defects*, 1968 Wisc. L. Rev. 600.

sonal injuries in the real estate field. But by limiting the lender's liability to cases where it does more than lend money, these other developments look better on paper than in reality. A judgment in favor of a guest in a strict liability case for his injuries against a defunct contractor is not the goal of most attorneys. And, even apart from the threat of section 3434, lending institutions are not—in the foreseeable future—going to move out of the lending arena and into the development field. *Connor* was a product of the plentiful money situation a few years back when the financial industry was almost forced into participation in development with speculators in order to rid themselves of the great reserves of cash coming into their coffers. The prospect today of inducing a savings and loan association into participating in a speculative development is virtually nonexistent.

It is too bad that the legislature cut off the opportunity for the courts to develop a scheme of adequate protection for owners and users of homes. It means that again the growth of protection in the real estate field will lag behind that developing for every other product. The statute may have been the result of visions by the lending industry of enormous new liabilities confronting them. But these fears were hardly that legitimate. No one expected lender's liability to reach every trivial defect in a house, but only those which a reasonable inspection might have uncovered.¹² Asking lenders to make reasonable inspections when they presumably are doing so anyway does not appear to create any costly new duties. And even if it does entail some expense (by way of higher interest), it is an expense most of the public will be glad to bear as payment for the protection an expanded liability would afford them.

12. See Lefcoe and Dobson, *Savings Associations as Land Developers*, 75 Yale L.J. 1271 (1966).

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III. Brokers and Their Commissions

A. Listings

The 1968 California Real Estate Association Exclusive Listing Form ("Exclusive Authorization and Right to Sell") provides that the listing broker will receive — % of the *selling* price if the property is sold during the listing period, or — % of the *asking* price if during that period the property is withdrawn from sale, transferred, conveyed or leased without the consent of the broker, or if the vendor voluntarily made the title "marketable."¹³ This is not the only way this clause could have been worded. The San Francisco Real Estate Board Multiple Listing Form, for instance, differs in two respects: by using only the selling price as the measure of compensation and by adding that a commission is also payable if the broker's authority is revoked during the period.

Several 1969 cases illustrate how important such textual variations may be. Although both forms provide equal and ample protection to the broker when the owner bypasses him in a sale of the property while a listing is in effect,¹⁴ problems arise if something other than a sale occurs. In *Al Herd, Inc. v. Isaac*,¹⁵ the broker used a Los Angeles listing agreement similar to the San Francisco form, and during the listing period the owner leased the property to a party originally contacted by the broker. Since the listing provided for payment of a commission in the event of withdrawal, transfer, or *lease* by the owner, it did not matter that the broker himself was never authorized to lease the property—he was still entitled to a commission. Therefore, the Court of Appeal reversed the trial court's decision against the broker. But since the form based the commission on the selling price, it was necessary to remand the case to decide whether a commission should be measured by the listing price, the value of the lease, or the cus-

13. Undoubtedly, "unmarketable" was intended.

14. See *Berzon v. U.L.C. Corp.* 274 Cal. App. 2d —, 79 Cal. Rptr. 277 (1969).

15. 271 Cal. App.2d 749, 76 Cal. Rptr. 697 (1969).

tomary commission in such cases. Had the parties used the CREA form instead, the broker would have been simply entitled to a percentage of the listing price regardless of the value of the lease or custom.

On the other hand, a drawback of the CREA form was revealed in *Never v. King*,¹⁶ where a loan broker's authority was prematurely revoked. His listing was similar to the CREA form in that it did not make a commission specifically payable on revocation. As a result, the Court of Appeal rejected the broker's claim for a commission and declared that he could recover only those damages he could actually prove.¹⁷ Earlier cases awarding a full commission after revocation were distinguished because the listing agreements there had so provided. Thus, here, had the San Francisco version been used, the broker's claim would have been measurably stronger, although the language of the opinion was such that the possibility is real that these older cases may no longer be followed.

B. Deposit Receipts

As if brokers did not have enough commission problems under the standard listing forms, they go farther and create new problems by signing deposit receipts that radically affect the amount of compensation to be paid in certain circumstances.¹⁸ *Barton v. White Oak Realty, Inc.*¹⁹ is a good example.

To understand *Barton*, one must understand a vendor's rights against a defaulting purchaser under a deposit receipt. If a purchaser defaults and the vendor resells elsewhere for a higher price, the purchaser may have restitution of his downpayment, less any amount actually paid by the vendor to the

16. 276 Cal. App.2d —, 81 Cal. Rptr. 161 (1969).

17. None were.

18. The new deposit form of the California Real Estate Association states that the broker can collect "one half that portion of the damages collected

. . . ." by the vendor. The older form provided that the broker could collect one-half the forfeited deposit.

19. 271 Cal. App.2d 579, 76 Cal. Rptr. 587 (1969). For further discussion of this case, see York, REMEDIES, in this volume.

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broker handling the aborted sale.²⁰ But under *Royer v. Carter*,¹ if there is no profitable resale, and the vendor sues the purchaser for damages for breach of contract, one item of special damages he may recover is the difference between: (1) the expenses he would have incurred had he resold the property at its market value on the date of breach; and (2) any expenses he was saved from incurring when the original sale failed.²

Barton showed that the *Royer* rule of vendor's damages also bears on the broker's right to recover his commission after a default. Here the defaulting purchaser sued to recover her deposit, the vendor cross-complained for damages, and the brokers also cross-complained against the purchaser for their full commission. The trial court denied restitution to the purchaser, awarded difference value damages to the vendor, and held the purchaser liable to the brokers for their commission. The brokers' theory was as follows: (1) by suing the purchaser for damages, the vendor becomes automatically liable to the broker for a full commission; (2) since the vendor is obligated for a commission to the broker, he can recover that much from the purchaser; (3) since the vendor owes the broker and the purchaser owes the vendor the same amount, the broker can go directly against the purchaser for his commission.

The Court of Appeal found this theory wrong in two respects. First, it proceeded on the false premise that the vendor could recover the full commission from the purchaser whenever he was liable for it to the broker. Since *Royer v. Carter*³ gives the purchaser the expenses of a hypothetical second sale less the savings of real expenses from the first sale, it cannot be maintained that the vendor can sue his purchaser for the actual expenses of the first sale.⁴

20. See *Freedman v. The Rector*, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951).

1. 37 Cal.2d 544, 233 P.2d 539 (1951).

2. Such as paying the broker only

half of the deposit instead of the full commission.

3. 37 Cal.2d 544, 233 P.2d 539 (1951).

4. Under the *Royer* formula, a vendor liable for the full commission to

If the second premise of the broker's theory is wrong (because a vendor cannot recover from the purchaser what he owes the broker), then the first premise also fails. Since a vendor's recovery from the purchaser is reduced by whatever savings he makes on first-sale expenses, it cannot be held that he becomes liable for all first-sale expenses the moment he sues the purchaser, because such full liability would automatically eliminate any possibility of a saving. In other words, whether the vendor is liable for a full commission after an aborted sale may depend on his contract with the broker, but it does not depend on whether or not he sues the purchaser. Precisely because the extent of the purchaser's liability to the vendor depends on the extent of the vendor's liability to the broker, the extent of that liability to the broker cannot (circularly) depend on the purchaser's liability to the vendor. The question of liability to the broker must be determined independently.⁵

However, this rejected circularity is exactly what the new CREA deposit receipt attempts to introduce into the picture. The listing agreement gives the broker a fraction of the selling price, and there is no adjustment for an aborted sale. The older forms of deposit receipt modified this to give the broker a share of the forfeited deposit. But the new form gives the broker one-half of the damages collected by the vendor from the purchaser. This is an impossible number. The vendor's recovery from the purchaser depends indirectly on his liability to the broker (under *Royer v. Carter*),⁶ but now the vendor's liability to the broker (under the new deposit receipt) will depend on how much he recovers from the purchaser. Not even a computer could work this out. Brokers would be far better off not signing deposit receipts and staying with their listing agreements.

the broker, even though the sale failed, would have no savings from the sale that could be offset against the hypothetical expenses of the resale. But that is not the same as giving him the real expenses of the first sale.

5. The third premise of the broker's theory was not examined and may be

valid, but only to the extent that it is first determined how much the vendor owes the broker and then shown that this amount does not exceed the extent of liability of the purchaser to the vendor.

6. 37 Cal.2d 544, 233 P.2d 539 (1951).

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IV. Landlord and Tenant

In two decisions this year, the State Supreme Court undertook exhaustive analysis of some problems commonly faced by landlords and tenants.

A. Repairs

The first case, *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*,⁷ involved an argument between a landlord and a tenant⁸ as to which had to pay the cost of alterations required to bring the premises up to Code. The landlord had some lease clauses in his favor, but the tenant was unwilling to do the work in light of the fact that it would cost \$7500 when he had only eleven months remaining on his three-year lease at \$600 rent per month. The Supreme Court held that a landlord is responsible for such costs except in three situations: first, the tenant has the duty to make small repairs arising from his ordinary use of the premises (similar to the common-law duty to avoid waste); second, the tenant must bear the entire cost of making the premises conform to Code when it is his new use of the premises which subjects them to hitherto inapplicable Code requirements; third, the tenant must bear the cost when he covenants to do so in his lease. All three exceptions are new since there has been almost no litigation in California on this matter, but the third exception is obviously the most important, since it may tell landlords how to draft printed form leases for maximum protection.

On the issue of drafting, the Court first held that a provision merely promising compliance to all laws by the tenant does not compel him to do "substantial" curative work. A Court of Appeal had previously reached a similar result in *Browning v. Aymard*,⁹ stating that such a covenant did not require the tenant to do any rebuilding or building of a new facility. But the Supreme Court did not utilize the rebuilding/repair test. "Substantial" went consciously undefined, al-

7. 70 Cal.2d 666, 75 Cal. Rptr. 889, 451 P.2d 721 (1969).

9. 224 Cal. App.2d 277, 36 Cal. Rptr 604 (1964).

8. Actually a tenant and subtenant.

though a footnote indicated that the word usually serves as a conclusionary label for considerations such as the cost of the work (compared to the rent), the length of the lease, the beneficiary of the improvement, the extent to which the work will interfere with the tenant's enjoyment of the premises, and whether the parties contemplated the matter. The Court was careful, however, to avoid indicating whether these tests will be the ones applied when such a covenant to comply is the only relevant clause in the lease.¹⁰

In this case, however, there was no need to stop with the covenant to comply. The Court held there were enough other factors present to permit shifting the risk for the required work to the tenant. The additional factors were: (1) an "as is" clause in the lease; (2) another clause relieving the landlord of any duty to repair or maintain the improvements; (3) a third clause compelling the tenant to assume all risks of injury by virtue of his use of the premises and to indemnify the landlord in this respect; (4) the character of the premises; (5) the testimony of the parties.

The last two factors were not stated very persuasively by the Court, which may make them all the more significant. They may well have been included to keep landlords from thinking that they need only amplify their covenant-to-comply language to include the other three clauses in order to make tenants responsible for everything. When that is the case, the Court may hold that by virtue of the nature of the premises (e.g. a single apartment in a large building) or the parol evidence offered (e.g. that the landlord made promises to repair some defect), the language is not effective to make the tenant bear the costs of expensive work required by the city or county.

Another related question not discussed by the Court is whether a landlord will be liable for personal injuries caused to third persons by uncorrected code violations. In *Finnegan v. Royal Realty*,¹¹ the Supreme Court held that a land-

10. Query: Would the tests then be obviated by a covenant to comply that states that "substantial" repairs were also included?

11. 35 Cal.2d 409, 218 P.2d 17 (1950).

lord has a nondelegable duty in tort to comply with the Code. Although *Glenn Sewell* shows that the duty is obviously delegable as a matter of contract, it is doubtful whether this would be a defense in tort when invitees are injured.¹² It is also doubtful that *Glenn Sewell* has overruled *Finnegan*. More likely is the possibility that *Finnegan* has been modified *sub silentio* by *Rowland v. Christian*,¹³ so that a covenant between landlord and tenant will be held to be merely evidence bearing on the question of a landlord's negligence.

If the Supreme Court has second thoughts about *Glenn Sewell* later, it will be easy to keep the holding of the case narrow. It does not say that the landlord may compel a tenant to make an improvement. All the case really "holds" is that a tenant may not abandon the premises and be excused from the rent when a local authority orders that operations cease unless changes in the premises are made.

B. Forcible Entry

The other important case, *Daluiso v. Boone*,¹⁴ did not even involve a landlord and tenant, but undoubtedly will have its greatest effect on these parties. There one landowner forcibly tore down his neighbor's encroaching fence, causing the neighbor to have a heart attack. Preexisting case law gave the stricken neighbor two options. He could bring a statutory action for forcible entry, in which event he would merely have to prove that he was in peaceable possession and that the defendant used some "force" to enter (the amount would be irrelevant), but his recovery would not cover his heart attack. Or he could sue in tort, and recover for his emotional distress,¹⁵ but he would have to prove either that the defendant lacked title or the right of possession to the fence, (e. g. that

12. Of course, the tenant may have to indemnify the landlord in such a case, but that will not help very much if the tenant is judgment-proof.

13. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). See section IIA, *supra*. Also see *Connor v. Great Western Savings and Loan Association*,

69 Cal.2d 887, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).

14. 71 Cal.2d —, 78 Cal. Rptr. 707, 455 P.2d 811 (1969).

15. See *Richardson v. Pridmore*, 97 Cal. App.2d 124, 217 P.2d 113, 17 A.L.R.2d 929 (1950).

plaintiff was not only in peaceable but also rightful possession) or that defendant's force was excessive (unreasonable). In other words, title plus reasonable force was a defense to a nonstatutory tort action.

The problem in *Daluiso*, that of forcible entry, is frequently faced by the legal aid lawyer in representing a tenant who has been locked out because of nonpayment of rent. He has no trouble proving that the lockout is a forcible entry,¹⁶ but he can recover no real damages by suing in forcible entry and detainer. The tenant's main injury, the mental distress which comes from suddenly being without a place to live, is not recoverable in a statutory action.¹⁷ The closest the tenant can come to this kind of recovery is through a prayer for punitive damages.¹⁸ There is the possibility of getting something by way of treble damages under the Code of Civil Procedure section 1174, but it is only the actual statutory damages that can be trebled, and they rarely exist.¹⁹ For these reasons, the tenant's attorney may choose to file a nonstatutory tort action instead, but then he immediately runs into the problem that the tenant's default on the rent gave the landlord a right of possession under the lease. Therefore, no tort was committed unless excessive force was used, and a lockout rarely entails excessive force.

In *Daluiso*, the Supreme Court ended the harshness of the plaintiff's choice by eliminating the restrictions applicable to one of his options. It held that a plaintiff bringing a nonstatutory tort action need not prove that his possession was rightful; that is, that title is no defense for the use of force, even when it is not excessive. Thus the plaintiff was allowed to recover for his heart attack.

16. See *Jordan v. Talbot*, 55 Cal.2d 597, 12 Cal. Rptr. 488, 361 P.2d 20, 6 A.L.R.3d 161 (1961), and *Lamey v. Masciotra*, 273 A.C.A. 767, 273 Cal. App.2d —, 78 Cal. Rptr. 344 (1969).

17. See *Anderson v. Taylor*, 56 Cal. 131, 38 Am. R. 52 (1880).

18. See *Wilkinson v. Singh*, 93 Cal. App. 337, 269 P. 705 (1928).

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19. While it is true that the tenant is entitled to rent for the time that he is out of possession, he also owes the landlord rent for the same period. The two will almost always offset each other. *Karp v. Margolis*, 159 Cal. App.2d 69, 323 P.2d 557 (1958).

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This result is less remarkable than the way in which it was reached. There were two ways by which a peaceable, albeit wrongful possessor, could be given pain and suffering damages. The Court here chose the hard way, by saying that they are recoverable in a nonstatutory action, thereby overturning the old rule that title was a defense. The easy way would have been to hold that pain and suffering are recoverable in a statutory forcible entry and detainer action, because there is nothing in the forcible entry statute limiting the plaintiff's damages in any fashion.²⁰ *Anderson v. Taylor*,¹ (quoted in *Daluiso*) held that a plaintiff may recover under the statute for all damages which are the natural and proximate result of a forcible entry.² *Anderson* then went on to hold, without any reasons at all, that bodily and mental pain were not the natural and proximate result of a forcible entry. The Supreme Court in *Daluiso* could then have said merely that the pain may not have been a natural and proximate result in *Anderson*, but that when it was proven to have resulted from the entry, it would be recoverable. Instead of having to overrule two earlier cases,³ it could merely have reinterpreted one earlier case.⁴

Indeed, this might have been even more beneficial for plaintiffs, since the award could then have been trebled if the entry were wanton or malicious.⁵

Perhaps the reason for choosing the "harder" way to reach this result was the opportunity it gave to the Court to make a different argument. The Court's reason for rejecting title as a defense to a nonstatutory action was that the legislative policy against forcible entry should be judicially aided by

20. Compare Code of Civ. Proc. §§ 1159 et. seq., especially § 1174.

1. 56 Cal. 131, 38 Am R. 52 (1880).

2. "The damages occasioned to the plaintiff spoken of in the statute as authorized to be assessed, are such only as are the natural and proximate result of the forcible entry or forcible or unlawful detainer, as the case may be." 56 Cal. 131 at 132.

3. *Canavan v. Gray*, 64 Cal. 5, 27 P. 788 (1883). *Walker v. Chanslor*, 153 Cal. 118, 94 P. 606, 126 A.S. 61, 17 Lns 455 (1908).

4. *Anderson v. Taylor*, 56 Cal. 131, (1880), 38 Am. R. 52.

5. See *San Francisco & Suburban Home Building Society v. Leonard*, 17 Cal. App. 254, 119 P. 405 (1911).

treating such an entry as a wrong (i.e., a trespass) in all cases, whether statutory or nonstatutory. The earlier rule that the legislative remedy (a statutory action) was exclusive was overruled because its application frustrated the legislative policy against forcible entries.

Thus two rules emerge from *Daluiso*. One rule is that title is not a defense in a nonstatutory action. But the other rule—that the creation of a legislative remedy for forcible entry does not preclude broader judicial remedies—may be more important. For elsewhere in the landlord-tenant field, the existence of sections 1941 and 1942 of the Civil Code have long stood as the major obstacle to tenants' attempts to correct slum housing conditions. Section 1941 declares that a landlord must keep dwellings in a condition for occupancy. But section 1942 declares that the tenant may leave, or spend up to one month's rent to make such repairs, if the landlord fails to do so. Our courts have traditionally held that the remedies under 1942 are the exclusive relief for violations of 1941.⁶

The *Daluiso* logic now permits an inference that this may no longer be the case. If the legislative policy against self-help evictions may be augmented by judicial tort actions, may it not also be held that the legislative policy against unsanitary housing may be judicially aided in a similar fashion? Just as the Supreme Court said in *Daluiso* that liberal interpretation of the remedy provision of the Code is not the only way to further a legislative policy against the legislative wrong, may not the same be said when the legislative wrong is slum housing?

Of course, merely holding that a tenant has other remedies for violations of section 1941 than are prescribed in section 1942, will do little for most tenants. Standard form leases are notorious for their provisions compelling tenants to waive their rights under these two sections, and if tenants may validly waive their rights under Civil Code 1941, it does not matter much that they could otherwise have had relief not mentioned

6. See, e.g., *Gately v. Campbell*, 124 Cal. 520, 57 P. 567 (1899).

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in section 1942. Until our courts conclude that the right to sanitary housing, like the right to peaceful possession, cannot be waived,⁷ tenants' attacks on slum housing will be a losing battle.

⁷ Jordan v. Talbot, 55 Cal.2d 597, 12 Cal. Rptr. 488, 361 P.2d 20 (1961).