

Date of Meeting: June 19-20, 1959  
Date of Memo: June 9, 1959

Memorandum No. 5

Subject: Study #42 - Trespassing Improvers

As will appear from what follows, it is difficult to draft statutes to meet the problems which exist in this area. There are attached three items which exemplify somewhat different approaches to the drafting problem:

1. Item A attached is the statute proposed by Professor Merryman (Study, pages 40-41) with some minor changes indicated in strike-out and underline. It may be that the Commission will conclude ultimately to confine its recommendation to this proposal or one much like it. As I recall, there were two questions raised concerning Professor Merryman's draft at the May meeting: (1) It is perhaps too terse to convey meaning to a busy trial judge who had not had the benefit of reading the Commission's recommendation and study; and (2) it may be substantively defective in that it ignores the fault of the owner if the trespassing improver is also at fault.

2. Item B is a draft which we have prepared which undertakes to give effect to Professor Merryman's theory as to the form which legislation should take but to spell out the ideas involved at somewhat greater length. In common with Professor Merryman's draft, this draft states how a court should decide a case between a trespassing improver and an owner rather than spelling out what the legal rights of the

parties are when such a situation arises. Thus, we have entitled Item B "Relief-oriented Statutes." These statutes depart from Professor Merryman's substantively in that they take the culpability of the owner into account even though the trespass is wilfull or reckless and that they contemplate the possibility of forfeiting the interest of the trespasser in an aggravated case.

3. Item C, entitled "Legal Rights-oriented Statutes" has been drafted in an attempt to give effect to Mr. Stanton's view that ~~the remedial~~ legislation here should take the form of spelling out the legal rights of the parties in various circumstances rather than directing a court how to decide a case between them. His view here, as I understand it, is parallel to the view which he has taken in connection with the rescission study -- i.e., that statutes should not be drafted in such a way as to suggest that the parties can only find out what their rights are by going to court.

Because so many combinations of factors must necessarily be taken into account in drafting statutes which spell out rights we have found it difficult to draft statutes along the lines suggested by Mr. Stanton; those here offered merely exemplify the type of approach which we assume would be made. They should serve to pinpoint at least some of the specific questions which would have to be resolved by the Commission if statutes along this line are to be recommended. If the legislation is to take this form the Commission must, of course, undertake to anticipate all of the kinds of cases which will arise in the future and state specifically what the rights of the parties are to be in each type of fact situation. If this

approach were approved, it would probably be necessary to draft a substantial additional number of provisions to deal with particular combinations of facts which might arise.

I suggest that at the June meeting the Commission consider and discuss items A, B and C with a view to giving the staff guidance as to how to proceed from here.

Respectfully submitted,

John R. McDonough, Jr.  
Executive Secretary

6/5/59

## STATUTES PROPOSED BY PROFESSOR MERRYMAN

SECTION 1. If a trespasser improves land and the owner of the land is not at fault, as fault is defined in this ~~Section~~ Article, the court shall decree such relief, in its discretion, as will protect the owner against loss but avoid, insofar as possible, enriching him at the expense of the trespasser, except that exemplary damages may be awarded if the trespass was deliberate. If the owner is at fault the court shall decree such relief, in its discretion, as will protect the trespasser against loss but avoid, insofar as possible, enriching him at the expense of the owner.

SEC. 2. The owner is at fault if the trespass was the result of a mistake of fact or of law and the owner: (1) caused, encouraged or participated in the mistake, or (2) knowing of the trespass failed to warn the trespasser.

SEC. 3. The court may employ any legal or equitable remedies which will aid it in achieving the objectives of this ~~Section~~ Article. Such relief may be awarded in an action brought by the trespasser or the owner for the purpose or in any action affecting the land. All persons asserting any interest in the land or the improvements may be made necessary parties, and the court shall decree such relief as may be necessary to protect their interests. The case shall be tried by the court sitting without a jury.

## RELIEF-ORIENTED STATUTES

SECTION 1. As used in this article the following terms have the meaning stated:

(a) "Culpable trespassing improver" means a trespasser who acts wilfully or recklessly in improving land owned by another person.

(b) "Trespassing improver" means a trespasser who improves land owned by another but does not act either wilfully or recklessly.

(c) "Culpable owner" means an owner of land who causes or encourages a trespasser to improve his land or, knowing that the trespasser is doing so, fails to warn him.

(d) "Owner" means an owner other than a culpable owner whose land is improved by a trespasser.

(e) "Enrich" means to award relief beyond that necessary to avoid loss to the person to whom the relief is awarded.

SEC. 2. When as a result of the fact that one person has trespassed upon and improved the land of another, a suit is brought by one against the other or a claim for relief is made by one or the other in the course of any other judicial proceeding, the matter shall be tried by the court sitting without a jury. Subject to the provisions of this article, the court shall decree such relief as will achieve as fair and equitable an adjustment of the interests of the parties as is possible under the circumstances while taking into account such public interests

as may be involved. To this end, the court may employ any established legal or equitable remedies, including but not limited to the following: judicial sale of the improved land and division of the proceeds, sale of the improvements to the landowner, sale of the land to the improver, an order that the parties be made tenants in common of the land and improvements, an order that the improvements be removed from the land, forfeiture of the interest of a culpable trespassing improver, imposition of an equitable lien on the land and improvements, damages, reasonable value of the use and occupation of the land, attorneys' fees, set-off.

All persons asserting any interest in the land or the improvements may be made parties and the court shall decree such relief as may be necessary to protect their interests.

SEC. 3. As between a trespassing improver and an owner, the court shall, in its discretion, decree such relief as will protect the owner against loss but, insofar as possible, avoid enriching him.

SEC. 4. As between a culpable trespassing improver and an owner, the court shall decree the relief specified in Section 2 and may, in addition and in its discretion, award exemplary damages to the owner or, in an aggravated case, forfeit the interest of the trespasser in the improvements to the owner, or do both.

SEC. 5. As between a trespassing owner and a culpable owner, the court shall, in its discretion, decree such relief as will protect the trespassing improver against loss but, insofar as possible avoid enriching him.

SEC. 6. As between a culpable trespassing improver and a culpable owner the court may not award exemplary damages or forfeit the improver's interest. The court shall decree such relief as will protect the less culpable party from loss but, insofar as possible, avoid enriching him.

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C

LEGAL RIGHTS-ORIENTED STATUTES

SECTION 1. Subject to the provisions of Section 2, when a trespasser has improved land owned by another, the owner has the following rights:

1. To have the improvement removed and his land restored to its condition before the improvement was made, at the expense of the trespasser.

2. To recover from the trespasser the reasonable value of the use and occupation of the land for such period as the owner was unable to use it because of the erection and removal of the improvement.

3. To recover from the trespasser compensatory damages for any damage to the land or other improvements thereon attributable to the improvement or its removal.

4. To recover from the trespasser exemplary damages if he acted wilfully or recklessly in making the improvement or if he refused to remove the improvement on demand.

5. Upon tendering to the trespasser a valid deed conveying all of the owner's right title and interest therein, to recover from the trespasser the value thereof on the date of tender.

SEC. 2. An owner who causes or encourages a trespasser to improve the owner's land or who, knowing of the trespass, fails to warn the trespasser does not have the right to recover exemplary damages from



the trespasser. Nor does such an owner have the right to other particular kinds of relief specified in Section 1 if (a) the trespasser did not act wilfully or recklessly and (b) the cost of the relief to the trespasser is substantially disproportionate to its value to the owner.

SEC. 3. A trespasser who has improved land owned by another has the following rights:

1. To remove the improvement if such removal can be made without substantial permanent injury to the land and other improvements thereon, upon tendering the owner (a) adequate compensation for the use and occupation of the land; (b) adequate compensation for any damage to the land; and (c) if the trespasser acted wilfully or recklessly, exemplary damages.

2. If removal of the improvements is not practicable, to require the owner to convey the land to him upon tendering its fair market value in its unimproved state on the date of the tender if the trespass was neither deliberate nor reckless and if (a) the owner caused or encouraged the trespass or, knowing thereof, failed to warn the trespasser or (b) the land has no special or unique value to the owner and the loss of the value of the improvements by the trespasser would be substantially greater than the loss which the owner would suffer in being required to sell the land to the improver at its fair market value.