4/28/60

Memorandum No. 42 (1960)

Subject: Study No. 42 - Good Faith Improvers.

Some time ago the Commission decided to repeal Section 1013.5 of the Civil Code (attached as Exhibit I) and directed the staff to draft legislation covering trespassing improvers. However, an examination of Section 1013.5, its legislative history and comments by writers thereon indicates that the section is ambiguous and may apply not only to a trespassing improver but also to a licensee, perhaps to a conditional vendor and maybe even to a tenant who makes a good faith improvement. If Section 1013.5 does have this broader application, its repeal will take away from improvers who are now covered by the section (but would not be covered by the Commission's statute which will be limited to trespassing improvers) a valuable right.

When the Commission decided to repeal Section 1013.5 it made its decision on the basis of our consultant's opinion that Section 1013.5 is limited in its application to trespassing improvers. See Professor Merryman's study, pages 22-23. Other writers have taken a different view. See the Law Review Note set out as Exhibit II. This note was written shortly after Section 1013.5 was enacted and suggests that the statute may apply not only to trespassers but also to licensees, conditional sellers and tenants. Ogden, California Real Property Law 12 (1956) notes the comments of the writer of the note and while Ogden does not object to the application of the statute to a licensee, Ogden states "The statute was not intended to change the general rights of conditional vendors to remove fixtures from land. However, it has been suggested that the enactment, read literally, has such broader application." Professor Harold Horowitz, who is also a property law expert,

told me informally that he believes that Section 1013.5 is ambiguous and may well apply to improvers who are not trespassing improvers.

In an effort to determine the meaning of Section 1013.5 the staff has resorted to certain materials prepared by the persons who sponsored the bill. The bill was considered by the Senate Interim Judiciary Committee (reporting in 1953) and the portion of that Committee's report that pertains to the bill is attached as Exhibit III. Note that the statement of the purpose of the bill does not limit its application to trespassing improvers, although the discussion following is in terms of trespassing improvers. The interim committee was aware of the "occupying claimants acts" of other states (which are expressly limited to trespassing improvers) but did not so restrict the legislation.

Section 1013.5 was originally prepared and submitted to the interim committee by the California Land Title Association. Exhibit IV, attached, an excerpt from the proceedings of that association, is a report by the Executive Vice President concerning the legislation with which we are here concerned.

The cases do not shed any light on the scope of the application of Section 1013.5.[1] This is probably because the case of a trespassing improver or of a licensee who makes an improvement is rare. Apparently the section has never been relied on in a case involving a tenant who made an improvement but recently decided cases involving improvements by tenants were cases that arose before Section 1013.5 was enacted.

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[1] A passing reference is made to Section 1013.5 in Taliaferro v. Collasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956).

There are a number of courses of action the Commission could take. Some of these are indicated below:

(1) Determine that Section 1013.5 is limited to trespassing improvers and repeal it and enact legislation relating to trespassing improvers.

(2) Determine that even though Section 1013.5 is ambiguous its scope is probably limited to trespassing improvers and repeal Section 1013.5 and enact legislation relating to trespassing improvers.

(3) Repeal Section 1013.5 and enact legislation providing relief for those persons described in Section 1013.5 -- in other words adopt the ambiguous language of Section 1013.5 to describe the persons entitled to request relief under the Commission's statute.

(4) Repeal Section 1013.5 and enact legislation limited to trespassing improvers. In other words, overlook the problem of the application of Section 1013.5.

(5) Repeal Section 1013.5 and enact legislation describing clearly the coverage of the Commission's legislation but covering more than just trespassing improvers.

(6) Retain Section 1013.5 and enact legislation designed to provide an adequate remedy in those cases where the remedy under Section 1013.5 is inadequate. The supplemental legislation could be limited to trespassing improvers or could be phrased in the same terms as Section 1013.5 or could clearly provide coverage for more than just trespassing improvers. If this course of action is adopted, the Commission could draft either a so-called relief oriented statute or a statute based on the so-called occupying claimants acts.

EXHIBIT I

Section 1013.5 of the Civil Code

(a) Right of removal; payment of damages. When any person, acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, affixes improvements to the land of another, such person, or his successor in interest, shall have the right to remove such improvements upon payment, as their interests shall appear, to the owner of the land, and any other person having any interest therein who acquired such interest for value after the commencement of the work of improvement and in reliance thereon, of all their damages proximately resulting from the affixing and removal of such improvements.

(b) Parties; lis pendens; costs and attorney's fee. In any action brought to enforce such right the owner of the land and encumbrancers of record shall be named as defendants, a notice of pendency of action shall be recorded before trial, and the owner of the land shall recover his costs of suit and a reasonable attorney's fee to be fixed by the court.

(c) Interlocutory judgment. If it appears to the court that the total amount of damages cannot readily be ascertained prior to the removal of the improvements, or that it is otherwise in the interests of justice, the court may order an interlocutory judgment authorizing the removal of the improvements upon condition precedent that the plaintiff pay into court the estimated total damages, as found by the court or as stipulated.

(d) Consent of lienholder. If the court finds that the holder of any lien upon the property acquired his lien in good faith and for value after the commencement of the work of improvement and in reliance thereon, or that as a result of the making or affixing of the improvements there is any lien against the property under Article XX, Section 15, of the Constitution of this State, judgment authorizing removal, final or interlocutory, shall not be given unless the holder of each such lien shall have consented to the removal of the improvements. Such consent shall be in writing and shall be filed with the court.

(e) Nature of right created. The right created by this section is a right to remove improvements from land which may be exercised at the option of one who, acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, affixes such improvements to the land of another. This section shall not be construed to affect or qualify the law as it existed prior to the 1953 amendment of this section with regard to the circumstances under which a court of equity will refuse to compel removal of an encroachment.

EXHIBIT II

27 So. Cal. L. Rev. 89-91

FIXTURES*

Right To Remove Fixtures from Real Property

(1) In General.--The common law "fixtures" doctrine, codified in 1872 in section 1013 of the Civil Code, permitted a landowner to become the owner of chattels affixed to his land, in the absence of any agreement permitting the affixer to remove the thing affixed.[157] The potential harshness[158] of this doctrine was softened a year later by an amendment[159] to section 1013 which provided that title would pass to the landowner only if the provisions in section 1019 were not applicable. Section 1019[160] allows a tenant to remove chattels affixed to the land of another for the purpose of "trade, manufacture, ornament, or domestic use if the removal can be effected without injury to the premises," unless the thing affixed has become an "integral part of the premises."[161]

(2) The New Fixtures Rule.--This year the Legislature has amended section 1013 and added section 1013.5 to the Civil Code. As amended,[162] section 1013 gives a person, who affixes his chattels to the land of another, an optional right to remove as provided in section 1013.5. Section 1013.5 creates a right to remove in a person who "acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so" affixes his chattels to the land of another. The exercise of the right to remove is conditioned upon the payment of damages to the landowner for any injuries resulting from the affixing and removal of the chattel. Applying this new law of fixtures, any affixer seems to be given a right of removal merely upon payment of the appropriate damages, regardless of injury to the premises, as long as the chattel was affixed in good faith.

(3) Right of a Tenant to Remove.--Such a conclusion raises the question

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* Prepared by Ronald Lee Schneider.

157. Earle v. Kelly, 21 Cal.App. 480, 132 Pac. 262 (1913).
158. Gett v. McManus, 47 Cal. 56 (1873).
159. Cal.Stats. (1873), § 128, p. 224 (Amendments to the Codes).
160. Cal. Civ. Code (1951), § 1019.
161. See, for example, Gordon v. Cohn, 220 Cal. 193, 30 Pac(2d) 19 (1934)(injury to premises); and Alden v. Mayfield, 163 Cal. 793, 127 Pac. 44 (1912).
162. Cal.Stats. (1953), c. 1175, p. 2674.

of the present applicability of section 1019.[163] For example, suppose that a tenant affixes his chattel to the land of another under the mistaken belief that he will be able to remove it as a trade fixture without injury to the premises. Is this mistake sufficient to bring the tenant within the purview of section 1013.5? If so, section 1019 may well be rendered useless as to lessors, for whenever a landowner invokes the provisions of section 1019, the tenant may be able to invoke section 1013.5 and remove the chattel irrespective of the injury to the premises, merely by paying damages.

(4) Right of a Trespasser to Remove.-- Prior to this year, when a chattel was affixed to the land of another by a trespasser, section 1013 has been applied rigidly,[164] apparently disregarding the argument that the good or bad faith of the trespasser-annexer is a factor that should be considered.[165]

A trespasser now can show his good faith by proving that he affixed the chattel under a mistake of law or fact, thus creating in himself a right to remove and avoiding the absolute forfeiture formerly suffered by trespasser-annexers.

(5) Right of Licensees to Remove.--Where a licenseee annexed chattels to the land of another, many California courts backed away from the indiscriminate use of section 1013 by implying, from the relationship of the parties, the necessary agreement allowing the licensee to remove the "fixture."[166]

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163. A problem arises in this connection as to whether § 1013.5 impliedly repeals the "trade fixtures" exception to the law of fixtures embodied in § 1019. It may be argued that the Legislature intended a comprehensive revision of the rights of annexers to remove "fixtures" when it added § 1013.5. If the entire subject matter was in fact dealt with, section 1019 should be held to have been superseded by § 1013.5. Homestead Valley Sanitary District v. Donohue, 27 Cal.App.(2d) 548, 81 Pac.(2d) 471 (1938); Mack v. Jastro, 126 Cal. 130, 58 Pac. 372 (1899). On the other hand, there is a strong presumption against implied repeal. Chilson v. Jerome, 102 Cal.App. 635, 283 Pac. 862 (1929). "The enactment of a general law broad enough in its scope . . . to cover the field of operation of a special . . . statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law. . . ." Sutherland Statutory Construction (1943), 486, § 2021. Since there is no irreconcilable conflict between §§ 1013.5 and 1019, the latter should be construed as remaining in effect as a qualification or an exception to § 1013.5. City of Oakland v. Hogan, 41 Cal. App.(2d) 333, 106 Pac.(2d) 987 (1940). In view of the fact that courts will resort to any reasonable construction in order to avoid a repeal by implication, In re Mitchell, 120 Cal. 384, 52 Pac. 799 (1898), it is submitted that § 1019 is not impliedly repealed by the addition of § 1013.5 to the Civil Code.

164. United States v. Land in Monterey County, 47 Cal. 515 (1874).

165. 5 Am. Law of Prop., Fixtures (1952), 36, § 19.9.

166. City of Vallejo v. Burrill, 64 Cal. App. 399, 221 Pac. 676 (1923); Taylor v. Heydenreich, 92 Cal. App.(2d) 684, 207 Pac.(2d) 599 (1949).

Under the new fixtures rule, courts may just as easily grant a licensee the right to remove the chattel, for it will be simple to show a mistake in law or fact in that the licensee affixed his chattels at a time when his use of the land was of a temporary nature.

(6) Right of Conditional Seller of Chattel.--As a general rule, in the absence of any applicable recording statute, the conditional seller will prevail over a bona fide purchaser.[167] Since, in California, only two types of conditional sales contracts must be recorded,[168] it would seem that in all other cases the conditional seller would necessarily prevail even though he had not recorded the contract. However, this has not been the result. The California rule[169] is that where a chattel bought pursuant to a conditional sales contract is affixed to the realty, the purchaser for value of the realty, without notice of the conditional sales contract, will prevail.[169a] As a result of this rule, a conditional seller has had to comply with the law relating to recordation of instruments affecting title to or possession of real property, in order to protect his security interest in the chattel.[170]

By virtue of section 1013.5, however, even though the conditional sales contract is not recorded in the appropriate records, the conditional seller may now be able to exercise the newly created right to remove chattels and defeat a subsequent bona fide purchaser of the land.[170a] If such a result is reached, a problem may arise as to a possible qualification of the seller's right to remove. Will the seller be allowed to remove the chattel even though someone else, for example, the conditional buyer, accomplished the annexation?

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167. Harkness v. Russell, 118 U.S. 663, 7 Sup.Ct. 51, 30 L.Ed. 285 (1885). But see Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 Pac. 524 (1920). See also Vold, Sales (1931), 296, § 97, and cases cited.

168. Cal.Civ.Code (1951), §§ 2980, 2980.5, relating to conditional sales contracts involving mining equipment and animate chattels. These two sections have been amended this year. See Cal. Stats. (1953), c. 1885, p. 3679, amending § 2980; and Cal. Stats. (1953), c. 1783, p. 3562, § 2980.5.

169. The reason for this rule has been suggested to be that if the conditional vendor knew the chattel would be affixed to the conditional buyer's land, the seller presumably intended that the chattel become "realty." Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 Pac. 524 (1920). Another reason advanced is that "where one of two innocent persons must suffer, he should bear the loss who caused the deceitful appearance." Peninsula Burner and Oil Co. v. McCaw, 116 Cal. App. 569, 3 Pac.(2d) 40 (1931).

169a. Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 Pac. 524 (1920).

170. Cal. Govt. Code (1953), § 27280. See Horowitz, The Law of Fixtures in California--A Critical Analysis, 26 Southern California Law Review 21, 47, 49-50 (1952).

170a. If this view is accepted, will § 1013.5 work an implied amendment of the scope of the recording law as it has been applied to conditional sales contracts? As to what constitutes an implied amendment, see Sutherland Statutory Construction (1943), 365, 447, § 1913, 2002.

(7) Rights of Lienholders.--Section 1013.5, in addition to conditioning the right to remove upon the payment of damages, has placed another limitation on the exercise of this right. If, after the annexer has commenced the acts that culminate in the annexation of the chattel to the realty, a person in reliance thereon, in good faith and for value, acquires a lien[171] upon the property, or if a lien[171a] results from the making or affixing of the chattel, authorization to remove will not be given until such lienholder gives written consent to the removal.

This provision appears to be a limitation not only on the rights of annexers such as tenants and the like, but also on the right of a conditional seller to remove chattels affixed to the land of another. If a lien is acquired as a result of the affixing of the chattel to the land, the holder of the lien may prevent the conditional seller from exercising his right to remove the chattel until the lienholder's written consent is obtained or until his lien is satisfied.[172]

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171. The language of § 1013.5 would seem to be broad enough to include a subsequent bona fide mortgagee of the real property to which the chattel was annexed.

171a. Liens resulting under Cal. Const. (1879), Art. XX, § 15 (mechanics' liens).

172. However, if the property remaining after the removal would be sufficient to protect the lienholder's security interest, will the courts feel that refusal to allow removal is unreasonable under the circumstances and order that consent be given?

EXHIBIT III

EXTRACT FROM

Second Progress Report to Legislature, SENATE INTERIM JUDICIARY COMMITTEE (1953) (Pages 111-113) (Contained in Volume 2, Appendix to Journal of California Senate, 1953 Regular Session).

E. SECTIONS 1013 and 1013.5 OF THE CIVIL CODE

An act to amend Section 1013 of the Civil Code and to add a new section to said code to be numbered 1013.5, relating to removal of improvements from real property.

The people of the State of California do enact as follows:

SECTION 1. Section 1013 of the Civil Code is hereby amended to read:

1013. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in ~~section ten hundred and nineteen~~ this chapter, belongs to the owner of the land, unless he chooses to require the former to remove it.

SEC. 2. Section 1013.5 is added to the Civil Code, reading as follows:

1013.5. When any person, acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, affixes improvements to the land of another, such person may bring an action in the superior court of the county where the property is situated to permit the removal of such improvements, on such terms as the court shall prescribe. The court by its judgment of removal shall make such award to the owner of the land as it shall deem equitable to compensate him for his damages and expenses, including attorneys' fees, resulting from such affixation and removal and for defending the action.

Memorandum on Amendment to Civil Code Section 1013 and Proposed New Section 1013.5.

Purpose. This measure is designed to improve the position of one who, because of a good faith mistake, affixes permanent improvements to the land of another. The proposed legislation would extend to such person the right to remove the improvements, pursuant to a court order authorizing such removal. Provision is made for full compensation to the owner of the realty, including the amount of attorneys' fees he might incur in defending the action in which removal is sought.

Background. The general rule of the common law is that whatever a trespasser attaches to the land at once passes to the owner of the realty. There can, of course, be no quarrel with the rule as it applies to one who

in bad faith appropriates the land of another as a building site. It is, however, equally clear that the rule is harsh and unjust when applied against an improver who is the innocent victim of a good faith mistake. There is no reason to bestow an undeserved gift upon the owner of the land.

For this reason the rigid common law rule has been modified in most jurisdictions, in varying degrees, to protect one who makes improvements under the good faith belief that he has a right to the land. Most states have enacted statutes, known as "occupying claimants acts" or "betterment acts" permitting a good faith improver to recover the value of the improvements. (Tiffany, Real Property, 3d Ed., 1939, Section 625.) The statutes so enacted are not uniform in their provisions. (See discussion in 137 A.L.R. 1078.) In general, however, they provide that the landowner must, as a condition of his recovery of the land pay for the value of the improvements over and above the value of rents and profits during the period of the occupancy. (42 C.J.S., page 430.)

In California the law is well settled that, barring circumstances upon which to raise an estoppel against the landowner, a good faith improver has no rights beyond those accorded him by Section 741 of the Code of Civil Procedure. This section permits an innocent improver to offset the value of the permanent improvements against a claim of the owner of the realty for the recovery of rents, issues and profits. (Huse v. Den, 85 Cal. 390, 401; Wood v. Henley, 88 Cal. App. 441, 462.) And if the owner of the realty does not seek to recover such damages, the innocent improver cannot assert the value of the permanent improvements at all, since "the value of the permanent improvements * * * may be allowed only as a set-off to such damages as may be claimed for the withholding of the property sued for." (Kinard v. Kaelin, 22 Cal. App. 383, 389, emphasis added.) (Other cases collected in the California Annotations to the Restatement of Restitution, Section 52.)

It appears, therefore, that the California rule is more harsh than that of most other states. These other states have attempted varying solutions to the problem, all based on the idea that the owner of the land has no just claim to anything except the land itself and fair compensation for damage and loss of rent. Most of the "betterment acts" provide that the landowner must pay for the permanent improvements. (See, e.g. Ill. Anno. Stats. Vol. 45, Sections 53 to 58.) Provisions of this nature raise a problem as to whether or not it is fair to insist that the owner of land pay for improvements that he did not request and may not want. For this reason it is felt that something short of the conventional "betterment act" would be more desirable. The proposed amendments are designed, therefore, to accomplish the narrow purpose of permitting removal of the improvements with full compensation to the landowner. Such an enactment would protect the good faith improver in most cases, and would neither compel the landowner to purchase unwanted improvements nor cause him any other expense.

AMENDED DRAFT

An act to amend Section 1013 of the Civil Code and to add a new section to said code to be numbered 1013.5, relating to removal of improvements from real property.

The people of the State of California do enact as follows:

SECTION 1. Section 1013 of the Civil Code is hereby amended to read:

1013. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in ~~section ten hundred and nineteen~~ this chapter, belongs to the owner of the land, unless he chooses to require the former to remove it~~.~~, or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter.

SEC. 2. A new section is hereby added to said code, reading as follows:

1013.5. When any person, acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, affixes improvements to the land of another, such person shall have the right to remove such improvements upon his obtaining, in an action brought in the superior court of the county where the property is situated, a judgment permitting the removal, on such terms as the court shall prescribe. The court by its judgment of removal shall make such award to the owner of the land as it shall deem equitable to compensate him for his damages and expenses, including attorneys' fees, resulting from such affixation and removal and for defending the action.

Committee Memorandum on Amended Draft

Some members of the committee felt that it might be said of the first draft of this measure that it did not clearly create a substantive right of removal. For this reason the proposed legislation was amended as above set forth.

EXHIBIT IV

EXCERPT FROM PROCEEDINGS, CALIFORNIA LAND TITLE ASSOCIATION, FORTY-SIXTH ANNUAL CONVENTION, JUNE 18, 19, 20, 1953 (pages 25, 28 and 29)

REPORT OF EXECUTIVE VICE PRESIDENT

Richard E. Tuttle

Among the measures which we sponsored, and which were outlined in the Newsletter of last December, were the following:

* * *

5. Innocent Improver. (S.B. 678) The general rule of the common law is that whatever a trespasser attaches to the land at once passes to the owner of the realty. There can, of course, be no quarrel with the rule as it applies to one who in bad faith appropriates the land of another as a building site. It is, however, equally clear that the rule is harsh and unjust when applied against an improver who is the innocent victim of a good faith mistake. There is no reason, other than the traditional common law dogma, to bestow an underserved gift upon the owner of the land.

For this reason the rigid common law rule has been modified in most jurisdictions, in varying degrees, to protect one who makes improvements under the good faith belief that he has a right to the land. Most states have enacted statutes, known

as "occupying claimants acts" or "betterment acts" permitting a good faith improver to recover the value of the improvements. (Tiffany, Real Property, 3rd Ed., 1939, Section 625.) The statutes so enacted are not uniform in their provisions. (See discussion in 137 A.L.R. 1078.) In general, however, they provide that the landowner must, as a condition of his recovery of the land pay for the value of the improvements over and above the value of rents and profits during the period of the occupancy. (42 C.J.S. page 430.)

In California the law is well settled that, barring circumstances upon which to raise an estoppel against the landowner, a good faith improver has no rights beyond those accorded him by Section 741 of the Code of Civil Procedure. This section permits an innocent improver to offset the value of the permanent improvements against a claim of the owner of the realty for the recovery of rents, issues and profits. (Huse v. Den, 85, Cal. 390, 401; Wood v. Henley, 88 Cal. App. 441, 462.) And if the owner of the realty does not seek to recover such damages, the innocent improver cannot assert the value of the permanent improvements at all, since "the value of the permanent improvements . . . may be allowed only as a set-off to such damages as may be claimed for the withholding of the property sued for." (Kinard v. Kaelin, 22 Cal. App. 383, 389.) (Other cases collected in the California Annotations to the Restatement of Restitution, Section 52.)

It appears, therefore, that the California rule is more harsh than that of most other states. These other states have attempted varying solutions to the problem, all based on the idea that the owner of the land has no just claim to anything except the land itself and fair compensationfor damage and loss of rent. Most of the "betterment acts" provide that the landowner must pay for the permanent improvements. (See, e.g. Ill. Anno. Stats., Volume 45, Sections 53 to 58.) Provisions of this nature raise a problem as to whether or not it is fair to insist that the owner of land pay for improvements that he did not request and may not want. For this reason it was felt that something short of the conventional "betterment act" would be more desirable. The proposed amendments are designed, therefore, to accomplish the narrow purpose of permitting removal of the improvements with full compensation to the landowner. Such an enactment protects the good faith improver in most cases, and neither compels the landowner to purchase unwanted improvements nor causes him any other expense.

The bill has been amended at the suggestion of the California Bankers' Association to provide in more detail and in somewhat different form the purpose and intent of the bill. Further, there is an express provision to protect good faith holders of a lien, including lenders and mechanics' lien claimants.