

#42

1/21/66

Memorandum 66-8

Subject: Study 42 - Good Faith Improvers

We believe it will be helpful to review briefly our past work on this topic. The research study on this topic was sent to the printer in 1959 and the State Printing Division has been holding the type since July, 1959. During the months of May to October 1959, this topic was considered at each meeting and various policy problems and alternative drafts of legislation were discussed. However, the Commission was unable to agree on any statutory scheme to solve the problem. In May 1960, the topic was again considered and a motion was adopted that further consideration be deferred because it was apparent that no agreement could be reached on the statutory scheme. The topic was recently considered (during May-July 1965) and some tentative policy decisions were made which are set out in the Minutes of the July 1965 Meeting.

In the supplement of this memorandum we will submit a draft of legislation designed to carry out the tentative policy decisions made at the July 1965 meeting. However, the staff believes that it would be undesirable to proceed along the lines of the tentative decisions made at that meeting. We believe that the statute drafted to effectuate those decisions will be exceedingly complex. More important, we believe that the statute will not provide the certainty we believe is necessary so that the parties will know their legal rights and can settle the matter without going to court. For example, the rights turn on whether the improvement significantly enhances the value of the land, where there will be irreparable damage to the land if the improvement is removed, and whether removal is economically feasible. Combined with these standards for determining rights is a complex

set of elections that the owner or improver may make in a particular case. The combination of the various standards which will be applied to determine which elections are available in the particular case will make it next to impossible in some cases for the parties to determine their rights until the matter has been considered by the court. Finally, we doubt that the Legislature could be persuaded to enact the complex legislation that surely would result from effectuation of the decisions made at the July 1965 meeting. We fear that the view would be taken that we are using an atom bomb to kill a fly.

The staff has reached two basic conclusions. First, while there probably will only be a few cases over the next 50 years that will be affected by the proposed legislation, we believe that remedial legislation is needed and we do not believe the study should be dropped from our agenda. Second, we believe that we should dispose of this topic by reaching some decisions that will result in fairly simple legislation (that will make the property owner whole and at the same time not unjustly enrich him at the expense of the improver) and that such legislation should be submitted to the 1967 legislative session.

So that you will have something before you to consider (other than the legislation effectuating the decisions made at the July 1965 meeting), we have prepared the attached tentative recommendation and proposed legislation which, we believe, provides a good statutory scheme for solving this problem. We hope that you will read the attached material with care prior to the February meeting so that you will understand exactly what the staff is proposing.

Briefly, the staff suggests the following scheme. The statute would apply only where the landowner brings an action to recover the possession

of the land or to compel the removal of the improvement. If the landowner is otherwise entitled to a judgment in such action, judgment would not be entered except in accordance with the proposed legislation. The court would first determine if the improver is a good faith improver. If he is not, judgment for the landowner would be entered. In the case of a good faith improver, the court would next determine if the right of removal would substantially achieve equity in the particular case. If so, the only remedy the improver would have would be to remove the improvement (in accordance with the existing statute which now gives him this right). If removal is not an adequate remedy, the court would determine whether (1) the amount by which the improvement enhances the value of the land and the taxes and special assessments paid by the improver on the land exceeds (2) the value of the use and occupation of the land and the owner's costs in the action. If there is no such excess, the judgment would be for the landowner (with the improver entitled to set-off the value of the improvement against a claim for damages for use and occupation of the land). If there is an excess, the landowner is required to choose whether to sell the land to the improver or to purchase the improvement from the improver. The proposed scheme is conservative in giving rights to the improver.

We believe this relatively simple scheme will provide substantial equity in trespassing improver cases. Moreover, we believe that it would probably be acceptable to the Legislature and others since it is substantially the same as the scheme used in most other states. We believe it would not be difficult to prepare a statute along the lines of the attached tentative recommendation in time for the 1967 legislative session.

In the event the Commission approves this as a tentative working scheme, the following policy questions are presented by the tentative recommendation. References are to the attached tentative recommendation.

1. Definition of good faith improver. Statute pages 9-10. Discussion page 3.

2. Application of statute to public entities. Statute pages 9-10. Discussion page 7.

3. Statute applies only where landowner brings an action to recover possession or to compel removal of improvement. Statute pages 11-12. Discussion pages 5-6.

4. Right of removal only right where court determines that removal "would substantially achieve equity in the particular case". Statute pages 11-12. Discussion pages 3-4. Note that no amendment of Civil Code Section 1013.5 (text on page 4) is recommended.

5. Various other doctrines not affected:

(a) removal of encroachments

(b) doctrine of laches

(c) doctrine of estoppel.

Statute pages 11-13.

6. If statute of limitations bars landowner's action, recommended legislation does not revive it. Statute pages 11, 13.

7. Right to relief under recommended legislation must be claimed by improver in his answer. Statute page 11.

8. Section 740.3. See Statute page 14.

9. Method of computation of allowances for landowner and improver. See Section 740.4, page 15. Discussion page 6-7.

10. Section 740.5. See Statute page 16.

11. Election of landowner to sell land or buy improvement. Statute (Section 740.6) pages 17-19. Discussion pages 6-7.

12. Time and method of payment. Statute pages 18-19. Discussion page 7.

13. Forfeiture of improver's interest for nonpayment. Statute pages 18-19. Discussion page 7.

14. No right to jury trial. Statute page 14. Discussion page 7.

15. Elimination of "color of title" requirement from existing Code of Civil Procedure Section 741. Statute page 20. Discussion page 8.

16. Application of statute to improvements constructed prior to its effective date. Statute page 21. Discussion page 8.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

#42

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
THE GOOD FAITH IMPROVER OF LAND OWNED BY ANOTHER

The general common law rule is that structures and other improvements constructed by a trespasser on land owned by another belong to the owner of the land. This rule can be justified when applied to one who in bad faith appropriates the land of another as a building site. However, the rule is harsh and unjust when applied against an improver who is the innocent victim of a good faith mistake. In these circumstances, there is little justification for bestowing an undeserved windfall upon the owner of the land.

For this reason, the rigid common law rule has been modified in the great majority of jurisdictions, in varying degrees, to protect one who makes improvements under a good faith belief that he has a right to the land. Although only a very few states have changed the common law rule by judicial decision, at least 35 states and the District of Columbia have enacted statutes--known as "occupying claimants acts" or "betterment acts"--which modify the common law rule to provide relief to the good faith improver. Similar statutes have been enacted throughout Canada. California enacted a betterment act in 1865, but it was declared unconstitutional by a divided court in Billings v. Hall, 7 Cal. 1 (1857).

The betterment acts are not uniform, but all are based on the idea that the owner of the land has no just claim against an innocent improver for anything except the land itself, damages for injury to the land, and compensation for the use and occupation of the land. Generally the betterment

acts provide that the owner seeking to recover possession of his land must choose whether to pay for the improvements or sell the land to the improver.

The existing California law is well settled. Barring circumstances which give rise to 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 and Section 1013.5 of the Civil Code. Section 741 permits a good faith improver to off-set the value of permanent improvements against a claim of the landowner for damages for the use and occupation of the land. If the landowner does not seek to recover such damages, the improver cannot recover the value of the improvements at all. Section 1013.5 permits a good faith improver to remove the improvements if he compensates the landowner for all damages resulting from the affixing and removing of the improvements.

It is apparent that the present California rules are more harsh than those of most other states. The major defect in the existing California law is that the improvement may be one which cannot be removed at all or one that is of little value when removed but of considerable value if it remains on the land. The "right of removal" in such cases is a useless right and the "right of set-off" does not assure that the landowner will not receive an unjustified windfall.

The need for corrective legislation is not alleviated by the prevalence of title insurance, nor would such legislation have any impact upon title insurance protection. Briefly, with respect to the good faith improver, title policies do not cover matters of survey or location, and with respect to the landowner, policies do not cover matters or events subsequent to his acquisition of the property. See CALIFORNIA LAND SECURITY AND DEVELOPMENT 173-205 (Cal. C.E.B., 1960).

The Law Revision Commission has concluded that California should join the great majority of the states which now provide more adequate relief for the improver who is the innocent victim of a good faith mistake. Accordingly, the Commission makes the following recommendations:

1. Relief in a trespassing improver case should be available only to one who is a good faith improver, i.e., "a person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes an improvement to land owned by another person." This definition, to be added to the Code of Civil Procedure as Section 740.1, is based on the standard contained in Civil Code Section 1013.5.

The definition provides a subjective standard of good faith. This is consistent with the interpretation generally given the betterment acts in other states. Usually it is held that actual notice is the test of good faith; i.e., either knowledge of an outstanding paramount title or of some circumstance from which the trier of fact may fairly infer that the improver had cause to suspect the invalidity of his own title. See SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 55 n.86 (1953). Of course, the improver has the burden of proof to establish that he is a good faith improver.

Some of the betterment acts limit relief to good faith improvers who hold under "color of title." Such a limitation is undesirable for it makes relief unavailable in those cases where it is most needed--where the improver owns one lot but builds on another by mistake. Moreover, "color of title" is of uncertain meaning. Such a requirement made more sense in an era prior to the virtually universal reliance upon the recording, title insurance, and escrow systems for land transactions.

2. If the court determines that the removal of the improvement would substantially achieve equity in the particular case, it is neither necessary nor desirable for the court to resort to other forms of relief. Hence, in

such a case, the relief available to the improver should be limited to the right of removal provided by existing Civil Code Section 1013.5.*

* Civil Code Section 1013.5 provides:

1013.5. (a) 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) 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) 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) 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) 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.

3. To provide relief in cases where the right of removal is not an adequate remedy, Sections 740.2 to 740.6 should be added to the Code of Civil Procedure. The significant provisions of these sections, which adopt the best features of the betterment acts now in force in most states, are indicated below:

4. Sections 740.2 to 740.6 should apply only where the property owner brings an action to recover possession of the land or to compel the removal of the improvement. Where the landowner neither seeks to recover possession nor to compel removal of the improvement, the improver's only remedies should be to remove the improvement (Civil Code Section 1013.5) or to set-off the value of the improvement if the landowner seeks to recover damages for the use and occupation of the land (Code of Civil Procedure Section 741).

The great majority of the betterment acts in other states likewise give the improver rights which are only defensive in nature. Adopting this scheme eliminates the possibility of applying the statute in such cases as one where a person claims compensation for painting another's house by mistake.

Ordinarily, the improver will be in possession of the land and the recommended statute will be applicable. The instances where an improver may lose possession other than through legal proceedings instituted by the landowner are rare. Possibly circumstances might arise where the improver would not be considered to be in possession of the land even though he has commenced the construction of an improvement. But the equities in such a case are more on the side of the owner than in the usual case where the owner may be largely responsible for the improvements having been built by not promptly asserting his claim.

The improver should also be entitled to relief--even though he is not in possession--if the landowner seeks to compel him to remove the improvements.

This will enable the court to prevent economic waste that would otherwise occur if the improver were compelled to remove a valuable improvement. The court's power in such a case should be limited, however, and the court should be required to order the removal of the improvement in any case where its removal "would substantially achieve equity in the particular case," i.e., where the improvement is not of substantial value or where its removal is economically feasible.

5. Where Sections 740.2 to 740.6 are applicable, the landowner should be required to choose whether to purchase the improvements or to sell the land at its unimproved value to the improver. However, the landowner should be forced to make this choice only if the value of the improvements and the amount of taxes and special assessments paid by the improver exceed the value of the use and occupation of the land and the expenses to the landowner (including reasonable attorney's and appraisal fees) in recovering possession of the land. Nearly all of the betterment acts require that the landowner make a similar election.

The value of the improvements should be the amount by which they enhance the value of the land. This is the interpretation usually given to the betterment acts in other states. See, SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 55 n.88 (1953).

Where the improver has paid taxes and special assessments which the owner has not paid, the justice of an allowance to the improver for such payment would seem to be as great for the improvements. A number of the betterment acts make provision for such an allowance. See Farrier, A Proposed California Statute Compensating Innocent Improvers of Realty, 15 CAL. L. REV. 189, 193 (1927).

The owner should be fully protected against any loss. Hence, he should

be credited for the value of the use and occupation of the land and should be given an allowance for all expenses he incurs in recovering possession of the land and in establishing the value of the land and improvements. Cf. CIVIL CODE § 1013.5 (landowner entitled to recover "his costs of suit and a reasonable attorney's fee to be fixed by the court" in any action brought by the improver to enforce his right to remove the improvements).

If the landowner elects to sell the land to the improver, the improver should forfeit his interest if he fails to pay for the land within the time fixed by the court. A similar provision is included in some of the betterment acts.

6. To provide flexibility in the time allowed for payment for the land (by the improver) or the improvements (by the owner) in view of the circumstances of the particular case, the court should be authorized to fix a reasonable time within which payment shall be made. Some of the betterment acts have a similar provision.

7. Since the relief provided by Sections 740.2 to 740.6 is of an equitable nature, neither party should have a right to a jury trial.

8. The relief provided good faith improvers should be available to a public entity that is a good faith improver and to a good faith improver who constructs an improvement on land owned by a public entity. Where the public entity constructs an improvement on land owned by another as a result of a good faith mistake, the entity should not be limited to the right of removal. In many cases, it will not be practical to remove the improvement and the result will be that the taxpayers will lose the benefit of the improvement or will have to pay for it twice. Where the improvement is constructed on land owned by a public entity, the same considerations that justify relief in the case of an improvement constructed on private land apply.

9. Section 741 of the Code of Civil Procedure, relating to the "right of set-off," should be amended to eliminate the "color of title" requirement and to make applicable the standard set out in new Section 740.1. This would extend the right of set-off to the cases where the improver constructs the improvement on the wrong lot because of a mistake in the identity of the land.

10. The recommended legislation applies to any action commenced after its effective date, whether or not the improvements were constructed prior to such effective date. Despite Billings v. Hall, 7 Cal. 1 (1857), which held the 1856 betterment act unconstitutional, the Commission believes that the proposed legislation can constitutionally be applied where the improvements were constructed prior to its effective date. An important consideration in holding the 1856 betterment act unconstitutional was that the act made no distinction between improvements made by a trespasser who made unlawful and violent entry upon the lands of another and improvements made by a good faith occupier. Nevertheless, a severability clause is included in case the act cannot constitutionally be applied to improvements constructed prior to its effective date.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Sections 740.1, 740.2, 740.3, 740.4, 740.5, and 740.6 to, and to amend Section 741, of the Code of Civil Procedure, relating to good faith improvers of property owned by another.

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

SECTION 1. Section 740.1 is added to the Code of Civil Procedure, to read:

740.1. As used in Sections 740.2 to 740.6, inclusive, and in Section 741, "good faith improver" means a person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes an improvement to land owned by another person. As used in this section, "person" includes a natural person, firm, association, organization, partnership, business trust, corporation, the United States, a state, county, county and city, city, district, public authority, public agency, or any other political subdivision or public corporation.

Comment. This section adopts a standard similar to that contained in Civil Code Section 1013.5 (right of good faith improver to remove improvements). However, this section, unlike Section 1013.5, is clearly limited to a person who believes he is the owner of the land. Section 1013.5 not only applies to such persons, but may also apply to licensees, tenants, and conditional vendors of chattels. See Note, 27 SO. CAL. L. REV. 89 (1953).

This definition provides a subjective standard of good faith. Thus, actual notice is the test of good faith, i.e., either knowledge of an outstanding paramount title or of some circumstance from which the judge may fairly infer that the improver has cause to suspect the invalidity of his own title. Of course, the burden of proof is on the person claiming that he is a good faith improver or the successor in interest of a good faith improver to establish that fact.

C

The second sentence of this section makes it clear that relief is available under Sections 740.2 to 740.6 and 741 to a public entity that is a good faith improver and to a good faith improver who constructs an improvement on land owned by a public entity.

C

SEC. 2. Section 740.2 is added to the Code of Civil Procedure, to read:

740.2. (a) In any action to recover the possession of real property or to compel removal of an improvement, a judgment shall not be entered except in accordance with Sections 740.2 to 740.6, inclusive, against any defendant who the court determines is a good faith improver or the successor in interest of a good faith improver.

(b) Sections 740.2 to 740.6, inclusive, do not apply where the court determines that enforcement of the rights provided by Sections 1013 and 1013.5 of the Civil Code would substantially achieve equity in the particular case.

(c) Sections 740.2 to 740.6, inclusive, do not affect or qualify the law with regard to:

(1) The circumstances under which a court of equity will refuse to compel removal of an encroachment or will apply the doctrine of laches.

(2) The circumstances under which the doctrine of estoppel will be invoked.

(d) Nothing in Sections 740.2 to 740.6 revives a cause of action to recover the possession of land or to compel the removal of an improvement that is barred by the applicable statute of limitations.

(e) Sections 740.2 to 740.6, inclusive, apply only if the defendant, in addition to, or in lieu of, denying the plaintiff's right to possession or to compel removal, sets forth in his answer that he is a good faith improver or the successor in interest of a good faith improver and requests equitable relief under those sections.

Comment. This section provides a number of limitations on the availability of relief under Sections 740.2 to 740.6:

1. Relief is available only if the person who made the improvement is a "good faith improver" or the successor in interest of "a good faith improver." See Section 740.1 and the Comment thereto.

2. Relief is available only where the property owner brings an action to recover possession of the land from the improver or to compel the improver to remove the improvement. Thus, the improver's rights under Sections 740.2 to 740.6 are only defensive in nature. Where the landowner neither seeks to recover possession nor to compel removal of the improvements, the improver's only remedies are to remove the improvements (Civil Code Section 1013.5) or to set-off the value of the improvements if the landowner seeks to recover damages for the use and occupation of the land (Code of Civil Procedure Section 741).

3. Relief is not available under Sections 740.2 to 740.6 if the court determines that enforcement of the landowner's right to compel removal (Civil Code Section 1013) or the improver's right of removal (Civil Code Section 1013.5) "would substantially achieve equity in the particular case." In such a case, it is neither necessary nor desirable for the court to resort to other forms of relief. Thus, for example, where the landowner brings an action to compel the improver to remove an improvement, the court should order such removal where the improvement is not of substantial value or where its removal is economically feasible.

4. Sections 740.2 to 740.6 are applicable only where the improver requests relief under such sections in his answer.

5. Sections 740.2 to 740.6 do not apply where the landowner seeks to compel removal of an encroachment. In view of the equitable nature of the action usually brought to compel removal of an encroachment (request for an injunction to abate a nuisance or to terminate a continuing trespass),

the interests of the parties in such a case are adjusted by the court according to well established equitable principles and there is no need for the application of Sections 740.2 to 740.6.

6. Sections 740.2 to 740.6 do not prevent the application of the doctrine of estoppel or laches in an appropriate case.

7. If the plaintiff's action to recover the possession of the land or to compel the removal of an improvement is barred by the applicable statute of limitations, the plaintiff's action will be barred notwithstanding the existence of Sections 740.2 to 740.6.

SEC. 3. Section 740.3 is added to the Code of Civil Procedure, to read:

740.3. If it is determined that the plaintiff is otherwise entitled to a judgment giving him possession of the property or compelling the defendant to remove the improvement, the court shall then determine whether the defendant is a good faith improver or the successor in interest of a good faith improver. If the court determines that the defendant is neither a good faith improver nor the successor in interest of a good faith improver, the court shall enter judgment giving the plaintiff possession of the property or requiring the defendant to remove the improvement, as the case may be. If the court determines that the defendant is a good faith improver or the successor in interest of a good faith improver, the court shall proceed as provided in Sections 740.4 to 740.6, inclusive.

Comment. This section prevents the entry of judgment until the court has determined whether Sections 740.2 to 740.6 are applicable in the particular case. If those sections are not applicable because the defendant is not a good faith improver or the successor in interest of a good faith improver, the judgment shall be entered the same as if the defendant had made no request for relief under Sections 740.2 to 740.6.

The nature of the relief provided under Sections 740.3 to 740.6 being equitable, neither party is entitled to a jury trial in the proceedings under those sections.

SEC. 4. Section 740.4 is added to the Code of Civil Procedure, to read:

740.4. The court shall determine:

(a) The sum of (i) the amount by which the improvement (other than one financed by a special assessment) enhances the value of the land; and (ii) the taxes and special assessments which were paid on the land (as distinguished from the improvement), or for an improvement benefiting such land financed by special assessment, by the defendant and his predecessors in interest and were not paid by the plaintiff or his predecessors in interest.

(b) The sum of (i) the reasonable value of the use and occupation of the land by the defendant and his predecessors in interest, and (ii) the amount reasonably incurred or expended by the plaintiff in the action, including but not limited to any amount reasonably incurred or expended for appraisal and attorney's fees.

Comment. The computation required by this section may result in a determination that the improver is entitled to no relief under Sections 740.2 to 740.6 (Section 740.5) or may result in the landowner being required to choose whether he will sell the land to the improver or purchase the improvement from the improver (Section 740.6).

SEC. 5. Section 740.5 is added to the Code of Civil Procedure, to read:

740.5. If the amount determined under subdivision (b) of Section 740.4 equals or exceeds the amount determined under subdivision (a) of that section, judgment giving the plaintiff possession of the property or compelling the defendant to remove the improvement, as the case may be, shall be entered. Nothing in this section affects the right of set-off provided by Section 741.

Comment. The improver is not entitled to relief under Sections 740.2 to 740.6 unless the value of the improvement and the amount of taxes and special assessments he paid exceed the value of the use and occupation of the land and the cost to the landowner of the action to obtain possession of the land or to compel removal of the improvements.

Even though the improver is not entitled to relief under Sections 740.2 to 740.6, he may be entitled to a set-off of the value of the improvement against the damages claimed by the landowner for the improver's use and occupation of the land. See Section 741.

SEC. 6. Section 740.6 is added to the Code of Civil Procedure, to read:

740.6. (a) If the amount determined under subdivision (a) of Section 740.4 exceeds the amount determined under subdivision (b) of that section, the plaintiff shall make an election within such time as is specified by the court to:

(1) Pay the difference between such amounts to the defendant or other parties determined by the court to be entitled thereto, or into court for their benefit; and, upon such payment being made, judgment giving the plaintiff possession of the property shall be entered; or

(2) Have the defendant pay to the plaintiff the amount computed under paragraph (b) and, upon payment thereof, judgment that the defendant has all the interests of the plaintiff in the property shall be entered.

(b) The amount referred to in subdivision (2) of paragraph (a) shall be computed as follows:

(1) Determine the sum of (i) the value of the land, excluding the improvement, (ii) the reasonable value of the use and occupation of the land by the defendant and his predecessors in interest, and (iii) the amount reasonably incurred or expended by the plaintiff in the action, including but not limited to any amount reasonably incurred or expended for appraisal or attorney's fees; and

(2) Subtract from the amount determined under subdivision (1) the taxes and special assessments which were paid on the land (as distinguished from the improvement), or for an improvement benefiting such land financed by a special assessment, by the defendant and his predecessors in interest and were not paid by the plaintiff or his predecessors in interest.

(c) If the plaintiff fails to make such election within the time specified by the court, the defendant is entitled to make the election.

(d) If the election is as provided in paragraph (1) of subdivision (a), the court may provide in the judgment that the payment required by that paragraph may be made in such installments and at such times as the court determines to be equitable in the circumstances of the particular case. In such case, the defendant, or other person entitled to payment, shall have a lien on the property to the extent that the amount so payable is unpaid.

(e) If the election is as provided in paragraph (2) of subdivision (a), the court shall set a reasonable time within which the plaintiff shall be paid the entire amount determined under that paragraph. Upon payment of such amount, the plaintiff shall execute such documents as may be necessary to transfer all his interest in the property to the defendant. If the entire amount so payable is not paid to the plaintiff within the time set by the court, judgment giving the plaintiff possession of the property shall be entered.

Comment. This section gives the landowner an election whether he will, in effect, pay for the improvement or will, in effect, sell the land to the improver. If the landowner does not make such election within the time specified by the court, the improver may make the election.

The court is given flexibility in fixing the time of payment for the land or the improvement so that the requirement of payment can be adapted to the circumstances of the particular case. If the owner elects to purchase the improvement, the court is further authorized to provide for payment in installments. So that the owner will either receive his compensation or

possession of the land, no such further authorization is provided where the owner elects to sell the land to the improver. Since the effect of the owner's election to sell and the ensuing judgment perfects the improver's title, presumably the improver can arrange financing from an outside source to pay the landowner.

Persons having security interests may intervene in the action in order to protect their interests. CODE CIV. PROC. § 387. For example, there may be a mortgage on the premises executed by the improver. The statute is drafted so that the court can give such a mortgagee who intervened rights against the fund to be paid as compensation for the improvements.

SEC. 7. Section 741 of the Code of Civil Procedure is amended to read:

741. When damages are claimed for withholding the property recovered, ~~upon which~~ and permanent improvements have been ~~made on~~ the property by the defendant, or ~~those under whom he claims, holding~~ under color of title adverse to the claim of the plaintiff, in good faith his predecessor in interest, as a good faith improver, the ~~value of~~ amount by which such improvements enhance the value of the land must be allowed as a set-off against such damages.

Comment. Section 741 is amended to eliminate the "color of title" requirement and substitute the standard set out in new Section 740.1, thus making Section 741 consistent with Civil Code Section 1013.5 which is a later enactment. See the Comment to Section 740.1. Thus, the limited protection afforded by Section 741 is extended to include the wrong lot cases, i.e., the cases where the defendant owns one lot but builds on the plaintiff's lot by mistake.

The amendment also substitutes "the amount by which such improvements enhance the value of the land" for "the value of such improvements." The new language is more precise and clearly indicates that only the amount by which the improvements enhance the value of the land is to be allowed as a set-off.

SEC. 8. This act applies to any action commenced after its effective date, whether or not the improvement was constructed prior to its effective date. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Comment. This act applies to any action commenced after its effective date, whether or not the improvement was constructed prior to such effective date. Although Billings v. Hall, 7 Cal. 1 (1857), held the 1856 California betterment act unconstitutional, an important factor influencing this holding was that the act made no distinction between improvements made by a trespasser who made unlawful and violent entry upon the lands of another and improvements made by a good faith occupier. Decisions in other states are about equally divided as to whether a betterment statute can constitutionally be applied where the improvements were constructed prior to its effective date. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND, 58 (1953). The California Supreme Court has recently taken a liberal view permitting retroactive application of legislation affecting property rights. Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). See Comment, 18 STAN. L. REV. 514 (1966). Although the Law Revision Commission believes that the statute can constitutionally be applied to improvements constructed prior to its effective date, a severability clause has been included in case such an application of the act would be held unconstitutional.