

1/9/67

## Memorandum 67-9

Subject: Study 42 - Rights of Good Faith Improver

The pink sheets attached to this memorandum are a portion of an advance private copy of the report of the Committee on Administration of Justice to the Board of Governors. This portion of the report relates to the Commission's recommendation on the rights of a good faith improver. The attached white sheets contain minutes of CAJ that amplify the comments on the pink sheets.

Recommendation Generally

CAJ has "serious doubts" as to the merits of this proposal. It suggests that the proposed act will cause hardships to landowners and will lend itself to the possibility of abuse by unscrupulous persons.

Encroachment Cases

The principal concern of CAJ seems to stem from a fear that the act will be applied in encroachment cases as well as in classic trespassing improver cases. CAJ's members were in disagreement as to whether the act was intended to apply to encroachment cases. Trespassing improver cases are so rare that, apparently, CAJ was not particularly concerned with those cases.

The comment to Section 871.5 tends to meet this concern of CAJ. The last paragraph provides:

This chapter has no effect on the equitable defenses that are available in an encroachment case. There should be no necessity for relief under this chapter in such cases since the existing law provides the good faith encroacher with adequate relief. See Recommendation and Study relating to the Good Faith Improver of Land Owned by Another, 8 CAL. LAW. REVISION COMM'N REP., REC. & STUDIES 845 n. 101 (1967).

In any event, it is difficult to see how the buy-sell provisions of proposed Section 871.6 can be applied in the usual encroachment case. Section 871.6 provides in substance that the court must determine (1) the amount by which the improvement enhances the value of the land and (2) the reasonable value of the use and occupation of the land by the good faith improver. Only if the amount by which the improvement enhances the value of the land exceeds the value of the improver's use and occupation of the property can the court require the owner to exercise the buy-sell option provided in Section 871.6. If Section 871.6 is not made applicable in this fashion, Section 871.5 requires the court to do equity between the parties while protecting the owner against loss. In the usual encroachment case, it is difficult to see how the portion of the improvement encroaching on the land of the owner could improve its value. A corner of a house divorced from the remainder of the house is worthless. The same may be said of virtually any other portion of an improvement that is divorced from the remainder of the improvement. Thus, it is difficult to see how an encroachment could enhance the value of the land upon which the encroachment is placed. It ought to follow, therefore, that the court in any encroachment case--even if it decided that this chapter is applicable--should apply Section 871.5 which merely invokes the equitable rules that would be applied in the encroachment case anyway.

Moreover, it is difficult to see how the buy-sell remedy provided in Section 871.6 could be applied in an encroachment case. The owner's purchase option consists of a right to buy a corner of a house, a wall of a building, or an overhang of a roof. Plainly, the court cannot give the owner any significant buy-sell option, for the "buy" part of the option is worthless.

It seems to us, therefore, that it is fairly clear that Section 871.6 cannot be applied in the usual encroachment case, and even if the rest of the chapter were considered applicable, no serious harm would result because Section 871.5 merely requires the application of equitable principles that would be applicable anyway.

The Commission may do nothing concerning the objection and rely on the paragraph of the comment to Section 871.5 that was quoted above. The Commission can amend Section 871.6 to exclude the encroachment cases specifically. This could be accomplished by adding a subdivision to Section 871.6 providing that Section 871.6 does not apply to any case where the improvement that has been constructed on the owner's land is a portion of a larger improvement. Another means of meeting the objection would be to add an entirely new section to the chapter providing substantially as follows:

871.7. This chapter does not apply where any portion of the improvement made by a good faith improver is made upon land owned by him.

We do not think that it is desirable to add such limitations to the statute. It seems to us that the encroachment cases will shade into the trespassing improver cases as more and more of the improvement is located on the owner's land. When substantially all of the improvement is on the owner's land and a small corner is left on the improver's own land, it may be that the court would want to apply this statute. We think the statute gives the court power to deal with the situation without injustice to the owner while protecting the rights of the good faith improver.

Definition of "Good Faith Improver"

CAJ has expressed concern over the definition of a good faith improver contained in Section 871.1. It believes that an improver deserves protection

only if he acted as a reasonable man exercising due diligence under all of the circumstances. Usually this would require that he at least obtain a title report or make a title search. The statute does not now require "due diligence." The definition in Section 871.1 requires only that the improver act in good faith as a result of an erroneous belief arising from a mistake of law or fact. The comment to Section 871.5 points out that "the relative negligence of the parties to the action may be considered by the court in determining what form of relief is consistent with substantial justice to the parties in the circumstances of the case." The question raised is should the improver be held to a standard of reasonable diligence before he is entitled to relief. The Commission has previously resisted this higher standard because of the serious nature of the forfeiture that results from a denial of relief under the statute.

CAJ also expressed concern over the inclusion of "public agencies" in the act. The concern arises over the effect the act may have on the law relating to inverse condemnation.

If a public entity builds an improvement on land that does not belong to it, the owner could bring an action for inverse condemnation in which the entity could assert its rights under this chapter. The effect would probably be that the measure of compensation to the owner would be fixed by this chapter. This should place the owner in a better position than he is in ordinarily because Section 871.6 provides that he is entitled to his appraisal and attorney's fees as well as compensation for the value of the land and severance damages.

Finally, CAJ is concerned about the application of the act to cases where the improvement is partially finished when the right of the owner to

the land is first revealed. The statute makes it clear that improvements placed upon property after the improver knows that he is not the owner are not made in good faith. The statute does not deal specifically with this problem. We believe that the statute now requires the court to determine the amount by which the partially finished improvement would enhance the value of the land. This may be a difficult determination to make, but it is not impossible. One measure might be the amount by which the improvement if completed would enhance the value of the land less the cost of completion. If the partially finished structure does not enhance the value of the land, the condition for requiring the owner to exercise the buy-sell option does not exist and the owner cannot be deprived of his land under Section 871.6. In any event, the problem does not seem to be of sufficient magnitude to warrant an adjustment in the statute.

#### Municipal Court Jurisdiction

CAJ notes that Section 871.3 confers jurisdiction upon the municipal court to adjust the equities between the parties when the rights of the improver are raised by cross-complaint or counterclaim filed in an action in municipal court. CAJ believes that a request for relief under this chapter should deprive the municipal court of jurisdiction and require a determination of the action in the superior court. This is the usual way in which municipal court actions are handled when the defendant asserts a right to affirmative equitable relief as distinguished from an equitable defense. It should be noted, however, that the action is in the municipal court only in cases where the action is commenced there by the landowner.

#### Sections 871.5 and 871.6

CAJ suggests that the relationship between Sections 871.5 and 871.6 is not clear. Section 871.5 indicates that if the remedy under Section 871.6

would achieve substantial justice, the court may not grant relief other than under Section 871.6. However, Section 871.6 appears to grant the court discretionary authority, for it provides that the court may grant the relief described.

Under the statute, Section 871.5 describes the conditions under which the court should grant relief under Section 871.6. Section 871.5 provides:

871.5: (a). Subject to Section 871.4 [no relief under this chapter if right of set off or right of removal would provide adequate relief], the court may effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties . . . as is consistent with substantial justice to the parties under the circumstances of the case. The relief granted shall protect the owner of the land upon which the improvement was constructed against pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver.

(b) Where the form of relief provided in Section 871.6 would substantially achieve the objective stated in subdivision (a), the court may not grant relief other than as provided in that section. In other cases, the court may grant such other or further relief as may be necessary to achieve that objective.

(c) This chapter does not affect any legal or equitable defenses, such as adverse possession, estoppel, or laches, that may be available to a good faith improver.

As a drafting matter, it seems proper to use "may" in Section 871.6 because it was not our intent to require the court to order the owner to exercise the buy-sell option whenever the value of the enhancement to the owner's land exceeded the value of the improver's occupation thereof. It was our intent to require the buy-sell form of relief only when the court determined that that form of relief would "effect such an adjustment of the rights, equities, and interests" of the parties "as is consistent with substantial justice to the parties under the circumstances of the case."

But, because it is Section 871.5 that prescribes the conditions under which the 871.6 remedy should be used, the uncertainty pointed out by CAJ might be removed by amending Section 871.5 to eliminate the use of "may" in that section. By the use of the word "may," Section 871.5 now literally provides in subdivision (a) that the court may, but need not, effect such an adjustment of the rights and equities of the parties as is consistent with substantial justice. And subdivision (b) literally permits the court to deny relief under Section 871.6 even though it has found that the 871.6 relief would effect such an adjustment of the rights and equities of the parties as is consistent with substantial justice. Accordingly, we suggest that the word "may" in subdivision (a) of Section 871.5 be changed to "shall." Subdivision (b) should then be revised as follows:

(b) Where the form of relief provided in Section 871.6 would substantially achieve the objective stated in subdivision (a), the court ~~may not~~ shall grant the relief ~~other-than-as~~ provided in that section. In other cases, the court ~~may~~ shall grant such other or further relief as may be necessary to achieve that objective.

#### Statute of Limitations

CAJ complains that the proposed statute does not specify when the cause of action created by the statute accrues, nor does the act specify the length of the statute of limitations.

Section 871.3 contemplates that the right created by the statute may be asserted as a defense to any action for the recovery of the land. Hence, the right should not be barred as long as such an action can be brought against an improver in possession. But an improver out of possession should be barred from asserting the right after some period has elapsed. If an action brought by an improver under Section 871.3 were regarded as an action for the recovery of real property, it would be barred after 5 years from the

time the improver surrendered possession. The action is somewhat analogous to an action for the recovery of real property. The improver wants either the land or compensation for the improvement.

Should the statute specify the applicable statute of limitations?

If so, we recommend that Section 871.3 be revised to read:

871.3. A good faith improver may bring an original action in the superior court or may file a cross-complaint or counterclaim in a pending action in the superior or municipal court for relief under this chapter.

An action for relief under this chapter shall be commenced within the time prescribed for the commencement of an action for the recovery of real property under Chapter 2 (commencing with Section 315) of Title 2 of Part 2 of the Code of Civil Procedure.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary



### III

#### GOOD FAITH IMPROVER OF LAND OWNED BY ANOTHER

##### GENERAL PURPOSES OF MEASURE:

The tentative "recommendation" of the Commission of May 10, 1966 states, in part:

"At common law, structure and other improvements constructed by a trespasser on land owned by another belong to the owner of the land.....The rule is harsh and unjust when applied to an improver who is the victim of a good faith mistake.

(T)he great majority of jurisdictions have modified the common law rule in varying degrees....(A)t 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.

The betterment acts are not uniform but they are all based on the idea that the land owner's just claims against the innocent improver are limited to recovery of the land itself, damages for its injury, and compensation for its use and occupation. Generally, the betterment acts undertake to effectuate this principle by providing that the owner who seeks to recover possession of his land must choose whether to pay for the improvements or sell the land to the improver.

The California law is less considerate of the innocent improver than the law in most other states. Absent circumstances that give rise to an estoppel against the landowner, the 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 the improver to set off the value

of permanent improvements against the landowner's claim for damages for use and occupation of the land. Section 1013.5 permits the improver to remove the improvements if he compensates the landowner for all damages resulting from their being affixed and removed." (Tentative Recommendation, May 10, 1966, p. 1-2.)

#### DETAILS OF MEASURE

First, the Act would apply to any action commenced after its effective date, "whether or not the improvement was constructed prior to its effective date." A "severability" sentence, as to unconstitutionality would be included. Act, Sec. 3.

Second, existing CCP 741 (allowing the good faith improver the right of set off against damages claimed by the real owner) would be amended to eliminate the "color of title" requirement and substitute the definition of "good faith improver" contained in the remedial Act (proposed CCP 871.1-871.6). In this respect, CCP 741 would be made more consistent with the principle of present CC 1013.5.\* In addition, a wording change is made. The set off is of the amount by which the improvements "enhance the value of the land," rather than the "value of such improvements."

Third, the remedial act (CCP 871.1-871.6) would

- Define "good faith improver," which definition would include among those who might apply for relief "a state, county, city and county city, district, public authority" and other public agencies. (CCP 871.1)

\*Apparently CC 1013.5 (right of removal) would not be amended. There would be at least a literal variance in the CC 1013.5 and the Act in defining "good faith improver."

- Provide that "good faith improver" does not include one who, at the time of making the improvement, has either actual knowledge of an outstanding paramount right to possession of the land or actual knowledge of any circumstances that reasonably should cause him to suspect that his own title or right to possession is invalid or that he is constructing the improvement on the wrong land. (CCP 871.2)

- Provide that a good faith improver may bring an original action in the superior court or may file or cross complaint or counter claim in a pending action in the superior or municipal court for relief under the Act (CCP 871.3).

- Provide that the court shall not grant relief under the Act if it determines the right of set off (CCP 741) or to remove the improvements (CCP 1013.5) provides an adequate remedy. (CCP 871.4)

- Provide (subject to the foregoing) that in granting relief to the good faith improver, the court shall determine (by specific amounts) certain items (a) in favor of the improver, such as "enhancement" of the value of the land by the improvement, taxes and special assessments paid by the improver, and (b) certain items in favor of the real owner, such as reasonable value of the use and occupation of the land, amounts reasonably incurred or expended for appraisal and attorney's fees. If the total of the items in favor of the improver exceeds the total of the items in favor of the real owner, the court "may require" the owner to make an election. The election is between paying the difference so determined or offering to transfer all of his right, title and interest in the improvement and the land reasonably necessary to the convenient use of the improvement to the improver upon the latter's payment of an amount computed as follows: The real owner is to be credited with

the value of the land so determined, the value of past use and occupancy by the improver, and the amount reasonably incurred or expended by the owner in the action, including appraisal and attorney's fees. The improver is to be credited with amounts paid by him as taxes on the land itself and as special assessments. Detailed provisions are made for carrying out the foregoing, including discretionary authority to the court to permit the true owner to pay the amounts due the improver (under one alternative) in installments, with a lien in favor of the improver. For further details see text of proposed CCP 871.6 and the comments thereon of Commission, Tentative Recommendation May 10, 1966, p. 15-18.

- Provides that the court shall utilize the relief outlined in the preceding paragraph (CCP 871.6), but, in other cases (where the right of set off and the right of removal are not adequate), the court may grant such other and further relief as may be necessary to effect an equitable adjustment of the rights, equities and interests of the good faith improver, real owner and other parties. See text as proposed CCP 871.5, and Report cited, p. 13-14.

#### RECOMMENDATION OF THIS COMMITTEE

By a substantial majority, this committee expresses serious doubts as to the merits of this Act in its present form.

It is believed that the Act will cause hardships to landowners and will lend itself to the possibility of abuse by unscrupulous persons.

The Southern Section devoted one meeting to a discussion of the Act and problems that might arise in its application, having had the benefit of a report by one of its members (John P. Pollock).\*

\*A copy of Mr. Pollock's report is available if desired.

Basically, the Southern Section (by a substantial majority) is concerned about the application of the Act in situations other than the somewhat isolated case where an improvement is constructed wholly upon the land of another by a good faith improver (i.e., erection of a house upon the wrong lot).

It is not clear whether the Act is intended to apply to encroachments, of which there are many. Some members of the Section felt that it was so intended. Others did not.

If the Act does cover encroachments, then it is felt that its provisions could work substantial disadvantage to real owners. No statute of limitations is imposed upon the right of the encroacher to bring the action. Under the "formula" wording of Sec. 871.6, it might often be found that the real owner had to pay a substantial sum to the encroacher or sell the strip to the encroacher, even though he derived no actual benefit from the encroachment.

Other points of concern to the Southern Section were: (1) definition of "good faith improver" - to what extent is the improver required to exercise diligence by obtaining a title report or making a survey, or both; (2) inclusion of "public agencies" in the Act - what is the effect upon existing law and principles of law relating to just compensation when property is taken for public use by inverse condemnation, and non acquisition of title against the state and public entities by adverse possession; (3) application of the Act to a situation where an improvement is started in good faith, but is left partially completed when the true ownership of the land comes to light.

This Act, it will be noted, is intended to apply retroactively,

so far as constitutionally permitted. If the Act applies to encroachments, it is felt that this would subject many landowners to lawsuits which could involve reconstruction of events of many years past.

Additionally, it is felt that two matters of form or procedure should have further consideration by the Commission. First, Sec. 871.3 may vest additional equitable jurisdiction in the municipal court. (See present CCP 89.) When relief is sought under the Act by counterclaim or cross complaint in a municipal court action, it is believed the entire action should be transferred to the superior court because of the equitable nature of the issues and relief. Second, it is believed that the relationship between Sec. 871.6 and 871.5 is clear, and that the court's duty and authority under each section should be clarified.

For further details, see the attached minutes of the Southern Section (EX. A). The Northern Section has concurred therein.

As in the case of the previous item, the committee did not consider the extent to which the proposal may involve questions of substantive law and public policy. See earlier discussion.

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(So. Sec. 11/28/66)

AGENDA NO. 66-21 - Good Faith Improver

ACTION TAKEN: The Southern Section by a substantial majority has serious doubts as to the merits of this Act, because of hardships it may cause landowners and the possibility of abuse by unscrupulous persons.

Subject to this "policy" observation:

The Southern Section a) recommends that the Act be changed to provide in Sec. 871.1 that a person, to qualify as a good faith improver must show that he erroneously believed himself to be the owner of the land or of a possessory interest of fifteen years or more, and furthermore that such belief was that of a reasonable man exercising due diligence under all the circumstances.

b) The Southern Section calls attention to the fact that inclusion of "public agencies" in the Act raises substantial questions as to (i) the rights of private good faith improvers of State or other public property; and (ii) as to the right of the government to claim as a good faith improver, in inverse condemnation situations.

c) The Southern Section recommends that if action under the proposed Act is invoked by cross-complaint or counter-claim in the municipal court, the action should be transferred to the Superior Court, regardless of the amount involved, because of the equity aspects.

d) The Southern Section recommends attention be called to the fact that the Act is silent as to the statute of limitations and is uncertain in respect of what statutory period limits the bringing of an action by the trespasser ("improver") and when the cause of action arises.

e) The Southern Section recommends that the Commission's attention be called to the problem of the partially completed improvement and the question of encroachments, each of which present serious problems in the Section's view.

f) The Southern Section suggests that there should be an express statement in Sec. 871.6 or elsewhere defining whether the relief therein authorized is mandatory or discretionary when the stated conditions are satisfied.

DISCUSSION: Mr. Pollock reported orally having filed a written report dated October 12, 1966. Among the points discussed:

1. Definition of good faith improver: Is there an inconsistency in the description of good faith improver in Sections 871.1 and 871.2? Sec. 871.1 defines a good faith improver as one who believes he owns or has a possessory interest of fifteen years or more in property on which he places the improvement. On the other hand, Sec. 871.2, in describing what does not constitute a good faith improver, includes an objective test of whether the improver has actual knowledge of any circumstance that reasonably should cause him to suspect he is not the owner or entitled to possession or that he is constructing the improvement on the wrong site. After discussion, it is the view of the Section

(Agenda No. 66-21 cont)

that the good faith improver should be protected only if he acted as a reasonable man exercising due diligence under all the circumstances of the case. Would this mean that the good faith improver would be required to obtain a title report or search on the property on which he intends to build? It was the informal view that such would be acquired as a minimum in most cases. The example of a 10 story building was given. On the

other hand, a small improvement in the country might not require such report or search.

2. Inclusion of public bodies in the definition of "person" in Sec. 871 (b): Such bodies may become good faith improvers where they build on the land of others. Furthermore, persons may become "improvers" with respect to government land.

In the first case described, are the owner's rights under the rule of inverse condemnation curtailed or enhanced by the proposed legislation? Are constitutional rights of property owners affected, without a saving clause re jury trial and just compensation? In the second situation, it appears that a private person could become the owner of public land by improving such land and forcing the government to either pay for the improvements or sell the land at a court-fixed price. These situations should be called to the Commission's attention. Some members feel that public bodies should be excluded.

3. Municipal court jurisdiction: It is the sense of the Section that relief should be in the superior court because of the complexity and equitable nature of the issues. When relief under the Act is sought by cross-complaint or counterclaim in the municipal court, the case should be transferred to superior court.

4. Sec. 871.5 and 871.6 particularly with respect to the effect of these Sections on encroachment and partial improvement cases: It was pointed out that in the typical encroachment case, there is no additional value or small value only is added to the encroached land. This would indicate that Sec. 871.6 is not applicable to the encroachment situation.

On the other hand Sec. 871.5 may cover the encroachment case. It was not clear to those present whether encroachments are intended to be covered. Some feel the Act is directed to improvements solely on the land of another, as for example, building the wrong lot. If encroachments are covered, some members point out that many old surveys were inexact and a flood of suits may result, causing problems for the true owners.

Partially build structures erected by a good faith improver also may present a practical problem, if the Act is to be applied according to the Section's understanding. Suppose the improver discovers in the midst of the construction (for example, an 8-story building) that he does not own the land on which he is building. He may stop construction. In some cases the improvements would not enhance the value of the owner's property. In other cases, they might not fit in with the owner's plans for development of his property. Or, the owner might not wish to undertake to complete the project—financing might not be available to him, the interest rate might be too high in his view, or he might not wish to assume management of the structure when completed. Removal of the partial improvements might well be impractical. Does the owner lose his land?



(Agenda No. 66-21 cont)

5. Sec. 871.6 - Mandatory or Permissive? It appears to the Section that there is uncertainty with respect to the interplay between Sec. 871.5 and 871.6. Sec. 871.5 indicates that if an appropriate remedy is available under Sec. 871.6, the court may not grant relief other than under Sec. 871.6. However, Sec. 871.6 appears to be discretionary, in that it provides that the court may grant the relief described. The Section feels that a clear statement should be included in Sec. 871.6 or elsewhere indicating whether the important provisions of Sec. 871.6 are permissive or mandatory.

As to the serious doubts felt by the majority of the Section, there is apprehension that in actual operation the Act will place landowners at a disadvantage.

Particularly this is true if the Act is intended to apply to encroachments.

Those members holding this view are not swayed by the fact that "betterment acts" have been adopted in many other states.

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(So. Sec. 11/28/6)  
(Agenda No. 66-21)

**RECOMMENDATION  
OF THE  
CALIFORNIA LAW REVISION COMMISSION**

relating to

**The Good Faith Improver of Land Owned By Another**

**BACKGROUND**

At common law, structures and other improvements placed by a trespasser on land owned by another belong to the owner of the land.<sup>1</sup> This rule is justified as applied to one who, in bad faith, appropriates land as a building site. The rule is harsh and unjust when applied to an improver who is the victim of a good faith mistake. In the latter case, there is no justification for bestowing an undeserved windfall upon the landowner if his interests are fully protected by an equitable adjustment of the unfortunate situation.

For this reason, the great majority of jurisdictions have modified the common law rule in varying degrees. The rule has been changed by judicial decision in a few jurisdictions. In most of them, however—at least 35 states and the District of Columbia—statutes have been enacted, 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. Uniformly, the effort has been to protect one who makes improvements believing, in good faith, that he owns the land.

The betterment acts are based on the principle that the landowner's just claims against the innocent improver are limited to recovery of the land itself, damages for its injury, and compensation for its use and occupation. Generally, these acts undertake to effectuate this principle by providing that the owner who seeks to recover possession of his land must choose whether to pay for the improvements or to sell the land to the improver.

The California law is less considerate in its treatment of the innocent improver than the law in most other states. California enacted a betterment act in 1856, but it was declared unconstitutional by a divided court in *Billings v. Hall*, 7 Cal. 1 (1857). Under the existing law, in the absence of circumstances giving rise to an estoppel against the landowner, the 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 the improver to set off the value of permanent improvements against the landowner's claim

<sup>1</sup> This is the American common law rule as stated in the cases. The research consultant points out that this rule is based on a dubious historical development. See the research study, *infra* at ~~821-833~~ 821-833.

for damages for use and occupation of the land. Section 1013.5 permits the improver to remove improvements if he compensates the landowner for all damages resulting from their being affixed and removed.

The existing California law is inadequate and unfair in those cases in which the value of the improvement greatly exceeds the value of the interim use and occupation of the land and the improvement either cannot be removed or is of little value if removed.<sup>2</sup> The "right of removal" in such a case is a useless privilege and the "right of setoff" provides only limited protection against an inequitable forfeiture by the good faith improver and an unjustified windfall for the landowner.

### RECOMMENDATIONS

The Law Revision Commission recommends that California join the great majority of the states that now provide for some form of appropriate relief for the improver who is the innocent victim of a bona fide mistake.<sup>3</sup> Accordingly, the Commission recommends:

1. Relief in a trespassing improver case should be available only to a good faith improver. The recommended legislation defines a good faith improver as a person who acts in good faith and erroneously believes, because of a mistake either of law or fact, that he is the owner of the land or that he is entitled to possession of the land for not less than 15 years following the date that he begins to improve the land. This definition is based in part on language contained in Civil Code Section 1013.5 but is more limited than Section 1013.5 which appears to include short term tenants, licensees, and conditional vendors of chattels. Because of the nature of the relief it provides, the recommended legislation applies only to a person who believes that he owns a substantial economic interest in the land—i.e., the fee or at least a 15-year right to possession.

Some of the betterment acts limit relief to good faith improvers who hold under "color of title." Such a limitation is undesirable. It makes relief unavailable in the type of case where it is most needed—where the improver owns one lot but builds on another by mistake. Moreover, the term "color of title" is of uncertain meaning. While the limitation imposed by its use may have been justified in an era

<sup>2</sup> *Taliaferro v. Colasso*, 130 Cal. App.2d 906, 294 P.2d 774 (1956), illustrates the unjust result obtained under present California law. A house was built by mistake on lot 20 instead of lot 21. The owner of lot 20 brought an action to quiet title and to recover possession. The defendant was a successor in interest to the person who built the house. The trial court gave judgment quieting title and for possession on the condition that \$3,000 be paid to the defendant. The district court of appeal affirmed that portion of the judgment awarding possession of the lot and house to the landowner, but reversed that portion requiring any payment to the defendant as a condition for obtaining possession. The court held that the "right of removal" (Civil Code Section 1013.5) and the "right of setoff" (Code of Civil Procedure Section 741) are the exclusive forms of relief available to a good faith improver and that, for this reason, the general equity powers of the court cannot be brought into play even though the landowner seeks equitable relief (quiet title). As a result, the landowner obtained possession of the lot and house without any compensation to the defendant for the value of the house.

<sup>3</sup> 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. With respect to the good faith improver, title policies do not cover matters of survey or location; 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, Mallett, *Title Insurance*, §17.1-1.2 (Cal. Cent. Ed. Bar 1960).

when property interests were evidenced by the title documents themselves, the limitation is not suited to present conditions since virtually universal reliance is now placed upon the recording, title insurance, and escrow systems for land transactions.

2. The good faith improver should be permitted to bring an action (or to file a cross-complaint or counterclaim) to have the court determine the rights of the parties and grant appropriate relief. This will permit the improver to obtain some measure of relief whether or not he is in possession of the property. It also will permit him to take the initiative in resolving the unsatisfactory state of affairs.

3. If the court determines that either the right of setoff (Code of Civil Procedure Section 741) or the right to remove the improvement (Civil Code Section 1013.5) is an adequate remedy under the circumstances of the particular case, no additional form of relief should be available to the improver.

4. Where exercise of the right of setoff or the right of removal would not be an adequate remedy, the court should require the landowner to elect whether to purchase the improvement or to sell the land at its unimproved value to the improver in any case where this form of relief would result in substantial justice to the parties. Nearly all of the betterment acts require that the landowner make such an election.

The landowner should be required to make this election only if the value of the improvement plus the amount of taxes and special assessments paid by the improver exceeds the value of the use and occupation of the land plus the expenses to the landowner (including reasonable attorney's and appraiser's fees) in the action to determine the rights of the parties.

For this purpose, the value of the improvement should be considered to be the amount by which it enhances the value of the land, i.e., the amount by which the improvement has increased the market value of the land. This is the interpretation usually given to the betterment acts in other states. See SOULLOCK, *RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 55 n.88 (1953).

If the improver has paid taxes and special assessments, the justice of providing an allowance for such payment is as great as providing an allowance for the improvement. The landowner is allowed the full value of the use and occupancy of the land, and the payment of taxes and special assessments by the improver has the effect of defraying an expense that otherwise would have been borne by the landowner. A number of the betterment acts include a comparable provision. See Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CAL. L. REV. 189, 193 (1927).

The landowner should be fully protected against pecuniary loss. Hence, he should be credited for the value of the use and occupation of the land and for all expenses he incurs in the action to determine the rights of the parties, including reasonable attorney's and appraiser's fees. This principle has already been adopted in Civil Code Section 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 improvement).

To provide flexibility in the time allowed for payment for the land (by the improver) or for the improvement (by the owner), the court should be authorized to fix a reasonable time within which payment shall be made. The court should also be authorized to permit the landowner to make the required payment in installments. If the landowner elects to buy the improvement, the improver should be given a lien on the property to secure payment. Where the improver is purchasing the land, the court should not be authorized to provide for payment in installments or to fix a time for payment that exceeds three months. Since the judgment in the action will perfect the improver's title, he should be able to arrange financing from an outside source within this period. Some of the betterment acts have comparable provisions.

5. In cases where none of the forms of relief described above—i.e., setoff, right to remove the improvement, or forced election by the landowner—would provide an adequate remedy, the court should be free to grant such other or additional relief as may be necessary to achieve substantial justice. The variety of the circumstances under which an improvement may be constructed on land not owned by the improver makes it difficult, if not impossible, to draft legislation that will provide an exact and equitable solution in every situation. The additional statutory remedy recommended above would be adequate in most situations where injustice results under the present law. Nevertheless, the court should not be foreclosed from granting some other form of relief designed to fit the circumstances of a particular case after it has determined that none of the existing or proposed statutory remedies will suffice.

6. The relief provided should be available to a public entity or unincorporated association that is a good faith improver and to a good faith improver who constructs an improvement on land owned by a public entity or unincorporated association.

7. Section 741 of the Code of Civil Procedure should be amended to eliminate the "color of title" requirement and to make applicable the recommended definition of a "good faith improver." This would extend the right of setoff to the situation, among others, where the improver constructs the improvement on the wrong lot because of a mistake in the identity or location of the land.

8. The recommended legislation should apply to any action commenced after its effective date, whether or not the improvement was constructed prior to such date. The Commission believes that the decision in *Billings v. Hall*, 7 Cal. 1 (1857) (which held the 1856 betterment act unconstitutional), does not preclude application of the recommended legislation to an improvement that was constructed prior to its effective date. Unlike the recommended legislation, the 1856 betterment act made no distinction between good faith improvers and bad faith improvers, and this aspect of the statute was stressed by the court in holding the statute unconstitutional. Nevertheless, a severability clause is included in case the act cannot constitutionally be applied to improvements constructed prior to its effective date.

### PROPOSED LEGISLATION

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

*An act to amend Section 741 of, and add Chapter 10 (commencing with Section 871.1) to Title 10 of Part 2 of, the Code of Civil Procedure, relating to real property.*

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

#### RIGHT OF SETOFF

##### § 741 (Amended)

SECTION 1. Section 741 of the Code of Civil Procedure is amended to read:

741. (a) As used in this section, "good faith improver" has the meaning given that term by Section 871.1 of this code.

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

*Comment.* Section 741 is amended to eliminate the requirement that the defendant claim the property under "color of title" before he is entitled to a setoff. The amended section requires a setoff when the defendant is a good faith improver as defined in Section 871.1. This amendment makes Section 741 consistent with the later-enacted Civil Code Section 1013.5. See the Comment to Section 871.1. Thus, the limited protection afforded by Section 741 is extended to include the situation, for example, 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 clarifies the former wording and assures that the value of the improvement, for purposes of setoff, will be measured by the extent to which the improvement has increased the market value of the land.

#### GOOD FAITH IMPROVER OF PROPERTY OWNED BY ANOTHER

SEC. 2. Chapter 10 (commencing with Section 871.1) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

#### CHAPTER 10. GOOD FAITH IMPROVER OF PROPERTY OWNED BY ANOTHER

**§ 871.1. "Good faith improver" defined**

871.1. As used in this chapter, "good faith improver" means:

(a) A person who makes an improvement to land in good faith and under the erroneous belief because of a mistake either of law or fact that he (1) is the owner of the land or (2) is entitled to possession of the land for not less than 15 years from the date that he first commences to improve the land.

(b) A successor in interest of a person described in subdivision (a).

*Comment.* The definition of "good faith improver" in Section 871.1 is based in part on the description given in Civil Code Section 1013.5 of a person who has a right to remove improvements affixed to the land of another. The section limits the definition, however, to a person who believes he is the owner of the land or the owner of a long-term possessory interest in the land; unlike Section 1013.5, the definition does not include licensees, short-term tenants, and conditional vendors of chattels. See *Comment*, 27 So. CAL. L. REV. 89 (1953).

Under this section, a person is not a "good faith improver" as to an improvement made after he becomes aware of facts that preclude him from acting in good faith. For example, if a person builds a house on a lot owned by another, he is entitled to relief under this chapter if he acted in good faith under the erroneous belief because of a mistake either of law or fact that he was the owner of the land. However, if the same person makes an additional improvement after he has discovered that he is not the owner of the land, he would not be entitled to relief under this chapter with respect to the additional improvement.

Under clause (2) of subdivision (a), the improver must believe that he is entitled to possession of the land for not less than 15 years following the date that he first begins to improve the land. Thus, if he begins construction of an office building at a time when he believes in good faith that he is entitled to at least 15 years of possession under a lease, he would be a good faith improver. If he constructs an additional improvement—such as grading and surfacing an area to serve as a parking lot for the office building—when he believes he has less than 15 years of possession remaining under the lease, he is still a good faith improver with respect to the additional improvement if he made it in good faith.

**§ 871.2. "Person" defined**

871.2. As used in this chapter, "person" includes a natural person, corporation, unincorporated association, government or governmental subdivision or agency, two or more persons having a joint or common interest, and any other legal or commercial entity, whether such person is acting in his own right or in a representative or fiduciary capacity.

*Comment.* Section 871.2 is included to make it clear that relief is available under this chapter to a public entity or unincorporated

association that is a good faith improver and to a good faith improver who makes an improvement on land owned by a public entity or unincorporated association.

§ 871.3. Action for relief

871.3. A good faith improver may bring an original action in the superior court or may file a cross-complaint or counterclaim in a pending action in the superior or municipal court for relief under this chapter.

*Comment.* Section 871.3 is based on Code of Civil Procedure Section 1060, relating to declaratory relief.

§ 871.4. Right of setoff or removal

871.4. The court shall not grant relief under this chapter if the court determines that the right of setoff under Section 741 of the Code of Civil Procedure or the right to remove the improvement under Section 1013.5 of the Civil Code provides the good faith improver with an adequate remedy.

*Comment.* In some cases, the right of setoff under Section 741 of the Code of Civil Procedure or the right to remove the improvement under Section 1013.5 of the Civil Code provides an adequate remedy. In such cases, the other forms of relief under this chapter may not be utilized by the court.

§ 871.5. Court may grant appropriate relief

871.5. (a) Subject to Section 871.4, the court may effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with substantial justice to the parties under the circumstances of the case. The relief granted shall protect the owner of the land upon which the improvement was constructed against pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver.

(b) Where the form of relief provided in Section 871.6 would substantially achieve the objective stated in subdivision (a), the court may not grant relief other than as provided in that section. In other cases, the court may grant such other or

✓ further relief as may be necessary to achieve that objective. (c) This chapter does not affect any legal or equitable defenses, such as adverse possession, estoppel, or laches, that may be available to a good faith improver.

*Comment.* Section 871.5 authorizes the court to exercise any of its legal or equitable powers to adjust the rights, equities, and interests of the parties to achieve substantial justice under all of the circumstances of the case.



There are three basic limitations on this general authorization:

(1) The relief granted must protect the owner of the land against pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver.

(2) Section 871.4 requires the court to utilize the "right of setoff" and the "right of removal" in cases where one of these remedies will provide the good faith improver with an adequate remedy.

(3) The court is required to use the form of relief provided in Section 871.6 in cases where this form of relief is consistent with substantial justice to the parties and will protect the owner of the land against loss but avoid, insofar as possible, enriching him at the expense of the good faith improver.

This chapter does not preclude or diminish any legal or equitable defenses that may be available to the good faith improver. Moreover, the relative negligence of the parties to the action may be considered by the court in determining what form of relief is consistent with substantial justice to the parties under the circumstances of the case. Generally, however, the form of relief provided in Section 871.6 should be consistent with substantial justice in cases where the right of setoff or the right of removal does not provide the improver with adequate relief.

This chapter has no effect on the equitable defenses that are available in an encroachment case. There should be no necessity for relief under this chapter in such cases since the existing law provides the good faith encroacher with adequate relief. See *Recommendation and Study Relating to the Good Faith Improver of Land Owned by Another*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES

845 n.101 (1967).

§ 871.6. Purchase of improvement or land

871.6. (a) As used in this section, "special assessment" means a special assessment for an improvement made by a public entity that benefits the land.

(b) In granting relief to a good faith improver under this section, the court shall first determine:

(1) The sum of (i) the amount by which the improvement enhances the value of the land and (ii) the amount paid by the good faith improver and his predecessors in interest as taxes, and as special assessments, on the land as distinguished from the improvement.

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

(c) If the amount determined under paragraph (1) of subdivision (b) exceeds the amount determined under paragraph (2) of subdivision (b), the court may require the owner of the land upon which the improvement was made to elect, within such time as is specified by the court, either:

(1) To pay the difference between such amounts to the good faith improver or to such other parties as are determined by

the court to be entitled thereto or into court for their benefit; and, when such payment is made, the court shall enter a judgment that the title to the land and the improvement thereon is quieted in the owner as against the good faith improver; or

(2) To offer to transfer all of his right, title, and interest in the improvement, the land upon which the improvement is made, and such additional land as is reasonably necessary to the convenient use of the improvement to the good faith improver upon payment to the owner of the amount specified in subdivision (d).

(d) The amount referred to in paragraph (2) of subdivision (c) shall be computed by:

(1) Determining the sum of (i) the value of the land upon which the improvement is made and such additional land as is reasonably necessary to the convenient use of the improvement, excluding the value of the improvement, (ii) the reasonable value of the use and occupation of such land by the good faith improver and his predecessors in interest, (iii) the amount reasonably incurred or expended by the owner of the land in the action, including but not limited to any amount reasonably incurred or expended for appraisal or attorney's fees, and (iv) where the land to be transferred to the improver is a portion of a larger parcel of land held by the owner, the reduction in the value of the remainder of the parcel by reason of the transfer of the portion to the improver; and

(2) Subtracting from the amount determined under paragraph (1) the sum of the amounts paid by the good faith improver and his predecessors in interest as taxes, and as special assessments, on such land as distinguished from the improvement.

(e) If the owner makes the election provided for in paragraph (2) of subdivision (c) and the good faith improver does not accept the offer within the time specified by the court, the court shall enter a judgment that the title to the land and the improvement thereon is quieted in the owner as against the good faith improver.

(f) If the owner of the land fails to make the election authorized by subdivision (c) within the time specified by the court, the good faith improver may elect to pay to the owner the amount specified in subdivision (d); and when such payment is made, the court shall enter a judgment that title to the improvement and the land reasonably necessary to the convenient use of the improvement is quieted in the good faith improver as against the owner.

(g) If the election provided for in paragraph (1) of subdivision (c) is made, 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 good faith improver, or other person entitled to payment, shall have a lien on the property to the extent that the amount so payable is unpaid.

(h) If the offer provided for in paragraph (2) of subdivision (c) is made and accepted or if the election authorized in subdivision (f) is made, the court shall set a reasonable time, not to exceed three months, within which the owner of the land shall be paid the entire amount determined under subdivision (d). If the good faith improver fails to pay such amount within the time set by the court, the court shall enter a judgment that the title to the land and the improvement thereon is quieted in the owner as against the good faith improver. If more than one person has an interest in the land, the persons having an interest in the land are entitled to receive the value of their interest from the amount paid under this subdivision.

*Comment.* Section 871.6 gives the landowner, in effect, an election to pay for the improvement or to offer to sell the land to the improver. If the landowner does not make the election within the time specified by the court, the improver may elect to buy the land.

In computing the amount of taxes and special assessments that are to be credited to the good faith improver, the taxes and special assessments paid by the person claiming relief (and not those paid by the owner, if any) are to be included. In addition, if the person claiming relief did not make the improvement, the amount of taxes and special assessments paid by his predecessors in interest (consisting of the person who made the improvement in good faith and his successors in interest) are to be included.

Where the improvement is made on a large tract of land, a problem may arise as to how much land is to be transferred to the improver if the election is made to sell the land. The statute provides that in such case the improvement, the land upon which the improvement is made, and such additional land as is reasonably necessary to the convenient use of the improvement are to be transferred to the improver. This is the same in substance as the standard used in mechanics' lien cases. Code Civ. Proc. § 1183.1(a) (land subject to mechanics' lien is "the land upon which any building, improvement, well or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment").

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. To assure that the owner will receive compensation or possession of the land promptly, no such authorization is provided where the owner elects to sell the land to the improver and the court is not authorized to defer payment for more than three months. Since the effect of the owner's election to sell and the ensuing judgment perfects the improver's title, the improver should be able to arrange financing from an outside source within this time.

## RECOMMENDATION ON GOOD FAITH IMPROVEMENTS

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 deed of trust on the land executed either by the improver or the owner. There also may be a lien on the improvement. When the improvement is purchased by the landowner, Section 871.6 permits the court to give the lender who intervenes rights against the fund to be paid as compensation for the improvement (subdivision (e)(1)) or a lien on the composite property (subdivision (g)). When the land is sold to the improver, the statute gives the holders of security interests rights against the fund to be paid as compensation for the land (subdivision (h)).

### APPLICATION OF STATUTE

Sec. 3. 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 circumstance is held invalid, such invalidity shall not affect other provision 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 date. 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 (1963). *Cf. Billings v. Hall*, 7 Cal. 1 (1857). 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 18 STAN. L. REV. 514 (1966). The Law Revision Commission believes that the statute can constitutionally be applied to improvements constructed prior to its effective date, but a severability clause is included in case such an application of the act is held unconstitutional.

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