

Date of Meeting: July 24-25, 1959

Date of Memo: July 8, 1959

Memorandum No. 2

Subject: Study No. 42 - Trespassing Improvers.

Toward the end of the discussion of this study at the June meeting it was suggested that consideration be given to whether any legislation which the Commission might propose in this area should be broad enough to include not only trespassers but also persons who, being rightfully on property, make unauthorized improvements thereon -- for example, lessees.

I have discussed this suggestion with Professor Merryman at some length. He is of the view that the proposed legislation should be limited to trespassers. He tells me that when improvements are made on land on which the improver is not a trespasser the situation is dealt with under either the law of fixtures or the law of meliorating waste. (It so happens that Professor Merryman is something of an expert on these subjects, having written the parts of the eight-volume American Law of Property on fixtures and waste.) He reports that from the very beginning courts and legislatures have treated the trespassing improver problem as unique, developing in connection therewith the principles and rules of law discussed in his study. The law of fixtures and waste, applicable to persons who are not trespassers, has been developed through a separate long historical evolution and provides somewhat different principles and

rules by which to determine cases of this kind. Professor Merryman is of the view that before the Commission could undertake to make a recommendation which would make new law for non-trespassing improvers two new studies would be required -- one of the California law of fixtures and the other of the California law relating to meliorating waste. He recommends strongly that the Commission confine its recommendations to trespassing improvers. Professor Merryman's argument has persuaded me and I believe that it will be persuasive to the Commission. Therefore, in preparing the material which is set forth below for consideration at the July meeting I have limited the proposed statutes to trespassing improvers.

I began my memorandum on this subject for the June meeting with the statement that it is difficult to draft statutes to meet the problems which exist in this area. I take it that the statutes I then drafted and our discussion of them at that meeting tended to substantiate this statement.

It may well be, I think, that the best proposal which the Commission could make to the Legislature on this subject would be that it enact a single relatively brief code section which would, in effect, simply hand the whole problem over to the courts, without any limitation or guidance as to the relief which might be granted in a particular case. If such a section were to be recommended it might take about the following form:

When one person has trespassed upon and improved the land of another an action for appropriate relief may be brought by either against the other. The court shall decree such relief as will achieve as fair and equitable an adjustment of the interests of the parties as is possible under the circumstances. To this end, the court may award relief including but not limited to one or more of the following: judicial sale of the improved land and division of the proceeds, sale of the improvements to the landowner, sale of the land to the improver, an order that the parties be made tenants in common of the land and improvements, an order that the improvements be removed from the land, forfeiture of the interest of either of the parties in the land or the improvements, imposition of an equitable lien on the land and improvements, damages, an award of the reasonable value of the use and occupation of the land, an award of attorneys' fees.

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

All proceedings hereunder shall be tried by the court sitting without a jury.

The argument for legislation in this brief and general form is, of course, that as soon as the draftsman begins to formulate principles to delineate and limit the relief which can be granted in particular cases he gets involved in

the almost impossible task of anticipating the kinds of cases which will arise and deciding a priori what relief shall be granted in particular situations. This is exceedingly hazardous because of the difficulty of anticipating precisely what particular combination of facts will be before a court in an individual case. There is always the risk that the draftsman's imagination will prove unequal to the task and that a rule will be laid down which will not produce the wisest result in a particular instance. The principal arguments against a single broadly drawn section of type set forth above are, I take it, that (1) it gives the court too much discretion and does not adequately protect against an unwise decision; (2) it permits too much diversity of result in factually similar cases depending on how different courts react and (3) it does not provide sufficient guidance to a trial judge who may not have the imagination to see the possibilities in a situation or who may assume that the statute is a directive to go on applying the existing common law rules.

If the Commission desires to recommend a more detailed statute, one form which it might take is that of combining the section set forth above with the first two sections of the statute drafted by Professor Merryman (with minor revisions which he has since suggested or in which he has concurred), viz.:

SECTION 1. When one person has trespassed upon and improved the land of another an action for appropriate relief may be brought by either against the other. The court shall decree such relief as will achieve as fair and equitable an adjustment of the interests of the parties as is possible under

the circumstances. To this end, the court may award relief including but not limited to one or more of the following: judicial sale of the improved land and division of the proceeds, sale of the improvements to the landowner, sale of the land to the improver, an order that the parties be made tenants in common of the land and improvements, an order that the improvements be removed from the land, forfeiture of the interest of either of the parties in the land or the improvements, imposition of an equitable lien on the land and improvements, damages, an award of the reasonable value of the use and occupation of the land, an award of attorneys' fees.

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

All proceedings hereunder shall be tried by the court sitting without a jury.

SEC. 2. If a trespasser improves land and the owner of the land is not at fault, as fault is defined in this Article, the court shall, in its discretion, decree such relief as will protect the owner against loss but avoid, insofar as possible, enriching him at the expense of the trespasser, except that exemplary damages may be awarded if the trespass was deliberate. If the owner is at fault the court shall, in its discretion, decree such relief as will protect the trespasser against loss but avoid, insofar as possible, enriching him at the expense of the owner.

SEC. 3. The owner is at fault if the trespass was the result of a mistake of fact or of law and the owner: (1) caused, encouraged or participated in the mistake, or (2) knowing of the trespass failed to warn the trespasser.

A third possibility, as I see it, is to proceed further along the line of the so-called "Relief Oriented Statute" on which we worked at the June meeting. A new draft of such a statute is set forth below, each section being followed by a comment:

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

(a) "Culpable trespassing improver" means a trespasser who improves land with actual [or constructive] knowledge that it is owned by another person.

(b) "Trespassing improver" means a trespasser, other than a culpable trespassing improver, who improves land owned by another.

(c) "Culpable owner" means an owner of land who, having actual [or constructive] knowledge that he owns such land, causes or encourages a trespasser to improve such land or, having actual [or constructive] knowledge that the trespasser is doing so, fails to warn him.

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

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

Comment: Subsection (a) has been changed somewhat from the form in which we had it at the end of the discussion at the June meeting which was: "(a) 'Culpable improver' means a person who, knowing that he does not have the right to do so, improves land owned by another." Subsection (c) has also been changed somewhat from its form at the end of the June meeting which was: "(c) 'Culpable owner' means one who, knowing that he owns land, causes or encourages another person to improve such land or, having actual knowledge that the other is doing so, fails to warn him."

It should be noted that the principal substantive questions which Section 1 presents are (1) what should make a trespassing improver "culpable" and (2) what should make an owner "culpable." As the section is drafted (apart from the material in brackets) it penalizes both improver and owner only where they have actual knowledge. The other possibilities, which could be achieved by including some or all of the bracketed material, are (1) to penalize both as well on the basis of constructive knowledge or (2) to penalize one (the owner?) only on the basis of actual knowledge but to penalize the other (the trespasser?) on the basis of either actual or constructive knowledge.

SEC. 2. When one person has trespassed upon and improved the land of another an action for appropriate relief may be brought by either against the other. Subject to the provisions

of this article, the court shall decree such relief as will achieve as fair and equitable an adjustment of the interests of the parties as is possible under the circumstances. To this end, the court may award relief including but not limited to one or more of the following: judicial sale of the improved land and division of the proceeds, sale of the improvements to the landowner, sale of the land to the improver, an order that the parties be made tenants in common of the land and improvements, an order that the improvements be removed from the land, forfeiture of the interest of either of the parties in the land or the improvements, imposition of an equitable lien on the land and improvements, damages, an award of the reasonable value of the use and occupation of the land, an award of attorneys' fees.

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

All proceedings hereunder shall be tried by the court sitting without a jury.

Comment: The principal changes in this section from its form in June are the following:

(1) Either party is expressly authorized to bring an action for appropriate relief.

(2) The reference to making a claim for relief in "any other judicial proceeding" is deleted on the theory that if the right

of action is recognized it will be obvious enough that it can be asserted in another proceeding where it would be appropriate to do so under existing statute relating to joinder, intervention, etc.

(3) The third sentence speaks in terms of awarding relief rather than employing a remedy.

(4) At Professor Merryman's suggestion, the statute authorizes forfeiture of the interest of either of the parties, whereas the June statute provided only for forfeiture of the interest of a culpable trespassing improver.

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

Comment: This section is in the same form as it was when considered by the Commission in June except that "in its discretion" has been deleted after "shall" on the theory that Section 2 makes it clear that the court has a free hand to fashion an appropriate remedy under all of the circumstances. If this is true, "in its discretion" is either redundant or else it limits appellate review. I doubt that the Commission would intend the latter. Professor Merryman is of the view that it is desirable to leave "in its discretion" in the statute. He thinks that it is necessary to let the trial court know that he has a pretty free hand here and that as his statute is presently drafted it would not preclude appellate review to determine whether its guiding or limiting provisions had been complied with.

SEC. 4. As between a culpable trespassing improver and an owner the court shall decree the relief specified in Section 3 and may, in addition, award exemplary damages to the owner or, in an aggravated case, forfeit the interest of the trespasser in the improvements to the owner, or do both.

Comment: See Comment to Section 3.

SEC. 5. As between a trespassing improver and a culpable owner the court shall decree such relief as will protect the trespassing improver against loss and may, in addition, award exemplary damages to the improver or, in an aggravated case, forfeit the interest of the owner in the land to the improver, or do both.

Comment: "in its discretion" is omitted. This section has been changed considerably to make it parallel to Section 4 - i.e., to authorize an award of exemplary damages or forfeiture of his interest against a culpable owner when the improver is not culpable. This is consistent with the amendment of Section 2, authorizing forfeiture of the owner's interest in appropriate cases, but it raises new substantive questions for decision by the Commission.

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

Comment: This is in the same form as it was when considered in June except that "the interest of either party" has been substituted for "the improver's interest" to conform Section 5 to the change made in Section 2, authorizing the forfeiture of the owner's interest in appropriate cases. Professor Merryman has raised a question concerning the advisability of including this section. He acknowledges that it does complete the logical scheme of the statute, providing for the case where both are culpable, but he doubts that the situation purported to be covered would ever occur in real life.

Finally, I have drafted a modified version of a "Relief-oriented statute" for your consideration. This statute is intended and believed to be identical in substance with the statute set forth immediately above. It is different in that it eliminates the definition section and the concept of a "culpable trespassing improver" and of a "culpable owner."

SECTION 1. When one person has trespassed upon and improved the land of another an action for appropriate relief may be brought by either against the other. Subject to the provisions

of this article, the court shall decree such relief as will achieve as fair and equitable an adjustment of the interests of the parties as is possible under the circumstances. To this end, the court may award relief including but not limited to one or more of the following: judicial sale of the improved land and division of the proceeds, sale of the improvements to the landowner, sale of the land to the improver, an order that the parties be made tenants in common of the land and improvements, an order that the improvements be removed from the land, forfeiture of the interest of either of the parties in the land or the improvements, imposition of an equitable lien on the land and improvements, damages, an award of the reasonable value of the use and occupation of the land, an award of attorneys' fees.

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

All proceedings hereunder shall be tried by the court sitting without a jury.

SEC. 2. As between a trespasser who improves land without actual [or constructive] knowledge that it is owned by another person and the owner of the land, other than an owner who, having actual [or constructive] knowledge that he owns the land, causes or encourages

the trespasser to improve the land or, having actual [or constructive] knowledge that the trespasser is doing so, fails to warn him, the court shall decree such relief as will protect the owner against loss but, insofar as possible, avoid otherwise enriching him at the expense of the trespasser.

SEC. 3. As between a trespasser who improves land with actual [or constructive] knowledge that it is owned by another person and the owner of the land, other than an owner who, having actual [or constructive] knowledge that he owns the land, causes or encourages the trespasser to improve the land or, having actual [or constructive] knowledge that the trespasser is doing so, fails to warn him, the court shall decree the relief specified in Section 2 and may, in addition, award exemplary damages to the owner or, in an aggravated case, forfeit the interest of the trespasser in the improvements to the owner, or do both.

SEC. 4. As between a trespasser who improves land without actual [or constructive] knowledge that it is owned by another person and the owner of the land who, having actual [or constructive] knowledge that he owns the land, causes or encourages the trespasser to improve such land or, having actual [or constructive] knowledge that the

trespasser is doing so, fails to warn him, the court shall decree such relief as will protect the trespasser against loss and may, in addition, award exemplary damages to the trespasser or, in an aggravated case, forfeit the interest of the owner in the land to the trespasser, or do both.

SEC. 5. As between a trespasser who improves land with actual [or constructive] knowledge that it is owned by another person and the owner of the land who, having actual [or constructive] knowledge that he owns the land, causes or encourages the trespasser to improve such land or, having actual [or constructive] knowledge that the trespasser is doing so, fails to warn him, the court may not award exemplary damages or forfeit the interest of either party. The court shall decree such relief as will protect the party who is less at fault than the other from loss but, insofar as possible, avoid otherwise enriching him at the expense of the other.

Respectfully submitted,

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Executive Secretary