#42 3/30/65

Memorandum 65-14

Subject: Study No. 42 - Good Faith Improver

Status of Topic

This topic was assigned to the Commission at its own request in 1957. Professor Merryman of the Stanford Law School was hired as a research consultant. His study (previously distributed) was published in a slightly revised form in 11 STAN. L. REV. 456 (1959). The Commission previously considered this topic for a period of about a year during 1959 and 1960. Various policy decisions were made at that time but the Commission was unable to agree on the scope and content of corrective legislation. Further consideration of this topic was deferred in favor of turning attention to more pressing problems and the Commission has not considered this subject since May 1960.

The membership of the Commission has radically changed since this topic was last considered and the rationale for previous policy decisions is somewhat obscured by the passage of time. It appears inadvisable, therefore, to approach this problem within the restrictive framework of disputed past action. Accordingly, the staff suggests that prior decisions be disregarded; the Commission should get a fresh start on this topic by considering all matters de novo. (Favorable action on this suggestion is assumed in the balance of this memorandum.)

Scope of Topic

A threshold question that should be decided concerns the breadth of this topic. The Commission is authorized to study "whether the law relating to the rights of a good faith improver of property belonging to another should be revised." The bare language of this directive seemingly is broad enough to include a substantial segment of property law, restitution, and

equity (to name but a few); literally, it would include improvements made to personal as well as to real property; improvements made by lessees, conditional vendees, licensees, co-owners, and the like, as well as by the traditional trespasser. However, the description in the Commission's request for authority to study this topic (see 1957 Annual Report, pp. 17-18) and the study by the research consultant limit the intended scope as a practical matter to improvements made by a good faith trespasser on real property belonging to another.

The staff suggests that the Commission adopt a policy of self-restriction on the scope of its inquiry regarding this topic. There are several reasons for this recommendation. First, it appears to have been the Commission's intent to confine its inquiry to the narrower situation. Second, the research study deals almost exclusively with this narrow problem to the exclusion of substantial questions that undoubtedly would be relevant to a broader inquiry. (A new research study of expansive scope would be necessary to consider all facets of the broader problems.) Third, even though the law in broader areas may not be entirely satisfactory, it is at least more clearly defined and somewhat more equitable than the rather harsh, ill-defined law governing the good faith improver of realty belonging to another. Fourth, there are enough problems involved in the limited inquiry without inviting more. For these and other apparent reasons, the staff believes that self-restraint in this area is highly desirable. (Approval of this suggestion would preclude, for example, our becoming involved in a reformation of the law of fixtures.)

Relevant to the question of scope is the existing law concerning the good faith improver of property belonging to another. Hence, there follows a summary of the relief presently available together with some background material relating to the most recent statutory activity in this area.

Background

The basic statutory law that gives rise to this problem is Civil Code Section 1013:

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

This section thus states the general rule that, except for removal rights, improvements belong to the owner of the land. (An exception to this rule appears in Civil Code Section 1019, relating to removal of fixtures by tenants.) Although many states have enacted so-called "betterment" or "occupying claimants" acts, California has not. However, there are remedies available to the good faith improver under existing law.

Set-off. If the owner seeks damages for withholding in addition to seeking recovery of the land, the good faith improver is entitled to a set-off against such damages under the conditions specified in Code of Civil Procedure Section 741.

Estoppel. Estoppel of the owner is an available remedy but the courts have erected such a rigorous standard for relief under the doctrine of estoppel that instances of its favorable application have been extremely rare.

Removal. Perhaps the most valuable form of relief is the removal right granted by Section 1013.5 as an exception to Section 1013. Section 1013.5 was added to the Civil Code in 1953 upon the recommendation of the California Land Title Association. (Attached as Exhibit IV is an excerpt from the proceedings of that association that concerns this legislation.) The section was amended in 1955 upon the recommendation of the California Bankers Association to spell out in more detail the right of removal granted by this section. The present version of Section 1013.5 is set out as Exhibit I.

Although Professor Merryman's study indicates that Section 1013.5 is limited in its application to trespassing improvers (see the Study, p. 19), the literal language is not so limited; hence, other writers have taken a different view (see, e.g., the law review Note set out as Exhibit II) and suggest that the statute may apply not only to trespassers but also to tenants, licensees, and the like. That portion of the Senate committee's report (reporting in 1953) that pertains to this legislation is attached as Exhibit III. Note that the statement of the purpose of the bill does not limit its application to trespassing improvers. The Senate committee was aware of the "occupying claimants" acts of other states (which are expressly limited to trespassing improvers) but did not so restrict the legislation that resulted in adding Section 1013.5 to the Civil Code.

The cases do not shed any light on the scope of application of Section 1013.5. The section appears to have been cited in only one case (Talliferro v. Collasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956)), and was there cited to bolster the court's conclusion that the statutory relief presently provided (in Code of Civil Procedure Section 741 and Civil Code Section 1013.5) precluded a court from applying general principles of equity to a case involving a trespassing improver. Apparently, no other occasion for invoking Section 1013.5 has arisen since its enactment.

In addition to the brief background afforded by the foregoing summary, this review of existing law illustrates the advisability of restricting the scope of consideration of this problem to the narrow area suggested above. Thus, it is apparent that the present statutory and case law affords some relief to the trespassing improver (and affords a larger measure of relief to persons in other categories, such as tenants). It seems appropriate to determine within this existing framework, therefore, what further relief (if any) ought to be granted in this area.

Revisions in Existing Law

The principal deficiency in the existing law is that, as a practical matter, set-off is the only remedy available to a trespassing improver where removal is impossible. Hence, the Commission should consider whether additional relief should be provided in this situation and, as a part of the more general problem, whether alternative forms of relief should be provided even where removal is possible. For this purpose, it is appropriate as a starting point to determine exactly who should be benefitted.

Bad faith improver. So far as can be determined, no statute or case has been found where relief of any kind has been accorded to a trespasser in bad faith who improves the property of another. The principle underlying the common law reflected in Civil Code Section 1013--that an owner should not be "improved" out of his property ownership--applies with force to the bad faith improver. For example, a developer who knows that he has no right to do so should not be permitted to "improve" property belonging to another and expect to recoup anything. If the rule were otherwise, and forced sale a remedy to be provided (as it sometimes is in equity), a developer could improve a recalcitrant seller out of his property. In keeping with the staff's suggestion of restricting the scope of consideration to good faith improvers, it is suggested that no relief be provided a bad faith improver.

Good faith improver. The principal difficulty encountered in considering what relief ought to be granted a good faith improver is defining exactly who is a "good faith" improver. Should a subjective or an objective standard be applied? In other words, does a person act in good faith if he actually believes he owns the property even though the belief was unreasonable under the circumstances, as where he knows facts that would have put the prudent man on inquiry?

Attached as a last Exhibit is a list of problem cases referred to in the study. The Commission should consider these not for the purpose of concluding what the result should be in terms of ultimate relief but solely for the purpose of judging the standard (whether subjective or objective) that ought to be applied in determining whether any relief should be provided. The Commission should first agree on a standard to define the type of conduct for which relief should be granted before consideration is given to the form of relief to be accorded.

Owner. The conduct of the owner may have a bearing on the standard to be applied in defining the improver. For example, a subjective standard may be appropriate to define the improver where the owner is at least partially responsible through his own neglect or affirmative conduct. On the other hand, an objective standard might be appropriate when dealing with an innocent owner. Hence, consideration also should be given to defining the owner's conduct for the purpose of determining the standard to be applied to the improver. (Except for this limited purpose, the owner's conduct bears principally upon the type of relief to be afforded, which need not be considered in detail at this point.)

Summary

The foregoing presents the principal problems that the staff believes should be considered at this time. If the Commission determines that additional relief should be provided in this area and can agree upon the persons to whom such relief should be granted, consideration can later be given to the form of such relief to be provided.

Respectfully submitted,

Jon D. Smock
Associate Counsel

EXHIBIT I

Section 1013.5 of the Civil Code

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

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

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

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

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

EXHIBIT II

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

FIXTURES*

Right To Remove Fixtures from Real Property

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

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

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

---

* Prepared by Ronald Lee Schneider.

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

Memo 65-14

EXHIBIT III

EXTRACT FROM

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

E. SECTIONS 1013 AND 1013.5 OF THE CIVIL CODE

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

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

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

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

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

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

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

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

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

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

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

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

AMENDED DRAFT

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

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

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

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

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

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

Committee Memorandum on Amended Draft

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

EXHIBIT IV

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

REPORT OF EXECUTIVE VICE PRESIDENT

Richard E. Tuttle

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

* * *

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

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

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

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

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

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

(Study #42) 2/26/62
Rights of Good Faith Improvers

PROBLEM CASES

Case 1

Two years ago X, a clever imposter, posed as the owner of Blackacre and forged a deed to T who paid $15,000 in good faith. T cleared and drained the land at a cost of $10,000 and built a house and dairy barn on it at a cost of $50,000. Both the house and the barn have concrete slab foundations containing the plumbing, electrical, heating and sewer systems. Removal of either building will wreck it. T paid taxes on Blackacre for the two years and also a $1,000 street assessment. The unimproved land is worth $15,000; as improved it is worth $65,000. X has absconded. O, the owner, now brings an action to quiet title and recover possession. O's reasonable attorney's fees and costs in the action are $2,500.

Case 2

Two years ago T purchased lot 26 in a newly subdivided tract. He built a house on lot 27, solely because he mistook it for lot 26. Both lots were vacant at the time and of the same value. The mistake only became apparent when a proposed purchaser of lot 27 pointed out to the subdivider that it was occupied by T. S, the subdivider, now brings ejectment against T. T paid $10,000 for lot 26 and has spent $20,000

in building a home on lot 27. T paid taxes on lot 26 for the two years. The improved value of lot 27 is $35,000.

Case 3

T goes on Blackacre which a reasonable man would have known belongs to someone else. T, who is 65 years old and somewhat senile, believed that the land was "public domain" and would belong to anyone who took possession and improved it. He spends $5,000 for materials with which he constructs a frame building which can easily be removed without damage to the realty. As a result of the improvement the value of the land is increased by $10,000. O now brings ejectment.

Case 4

Suppose in case 1 the following additional facts appear. The concrete slabs for the house and dairy barn were poured by Contractor who has not been paid and claims $3,500 for his services. Lumber Co. supplied lumber and other materials for the house and dairy barn and has not been paid, the total claim of Lumber Co. being $10,000. The Dairy Barn Supply Co. is a conditional vendor of certain fixtures installed by T in the dairy barn, the value of such fixtures being $2,500. M held a $1,000 mortgage on Blackacre at the time X gave the deed to T. After the house and dairy barn were completed, O sold Blackacre to BFP subject to the $1,000 mortgage. Both O

and BFP live in New York and neither inspected Blackacre before the sale. BFP then borrowed $1,000 from Y, giving Y a mortgage on Blackacre as security for the loan. Y relied on the improvement to Blackacre as part of the security for the loan. BFP plans to subdivide the land and sell the lots. Assume that all parties act without actual knowledge of the true facts. Advise Contractor, Lumber Co., Dairy Barn Supply Company, M (the original mortgagee), BFP (subsequent purchaser) and Y (subsequent mortgagee) of their rights.

Case 5

Painting Company makes a contract with the owner of 331 Broad Street to paint the house located thereon. By mistake, two painters employed by Painting Company paint the house located at 313 Broad Street. The house painted was in serious need of painting. The painting increased the value of the house by at least $600. The out of pocket costs of Painting Company (cost of the paint, wages of painters, and other out of pocket costs) are $450. The owner of 313 Broad Street, a retired widow living on a pension of $150 a month, consults you. She says she can just make ends meet and cannot afford to pay anything for the paint job.

Case 6

Assume in Case 5 that the owner of the house is Realty Company which rents the house. Realty Company had decided to paint

the house and had obtained estimates ranging from $550 to $800 for the job. The two painters employed by Paint Company discussed the paint job with the tenant who selected the colors used. The tenant had heard that the house was to be painted and assumed that Realty Company had sent the painters. Realty Company finds no fault with the paint job but consults you as to whether it is required to pay anything to Painting Company.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Improvement By One Person Of Land Belonging To Another

June, 1959

THE IMPROVEMENT BY ONE PERSON OF LAND BELONGING TO ANOTHER *

* This study was made at the direction of the Law Revision Commission by Professor John Henry Merryman of the School of Law, Stanford University.

Introduction

The California law on this subject has long been considered unsatisfactory.[1] Its most recent application in the case of *Taliaferro* v. *Colasso*,[2] by a court which sharply criticized the doctrine it felt bound by statute and case authority to apply,[3] has renewed interest in the problem. This study has been prepared to assist the California Law Revision Commission in its consideration of the need for revision and the form that revision should take.[4]

In simplest form the problem is how to deal with the parties when *A* improves *B*'s land. There are three typical cases: (1) The defective title cases in which *A*'s title proves to be bad after he has made improvements on land which he believed he owned. (2) The wrong lot cases in which *A* improves *B*'s land because of a mistake in the identity of the land. *Taliaferro* v. *Colasso* is such a case. (3) The so-called bad faith cases, in which the trespass was deliberate rather than mistaken. Each of these can be complicated by the interests of third persons, as where *A* builds on *B*'s land with *C*'s materials and the land is sold or mortgaged to *D* without notice of the claims of *A* and *C*.

These problems are very old. The rules applicable in both the common and civil law jurisdictions today are directly traceable to the Roman law of accession, although the course of development in the two contemporary systems has been strikingly different. The outlines of this development are here set out because they offer considerable insight into the subject of this paper.

1. Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 Calif. L.R. 189 (1927); Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 So. Cal. L.R. 21, 31-40 (1952).
2. 139 Cal. App.2d 502, 294 P.2d 774 (1956).
3. The opinion is by Justice Devine and includes the following statements: "The case is one involving persons who are of that unfortunate and, in this state, undavored class known as innocent improvers of real property. . . . Innocent improvers of land receive very circumscribed relief under the laws of this state." *Id.* at 504-505, 294 P.2d at 776.
4. Cal. Stat. 1957, res. ch. 202, p. 4559. For description of the topic see 1 Cal. Law Revision Comm'n Rep., Rec. & Studies, 1957 Report at 17 (1957).

In the *Institutes* of Justinian the following passage appears:

Ex diverso si quis in alieno solo sua materia domum aedificaverit, illius fit domus, cuius et solum est. sed hoc casu materiae dominus proprietatem ejus amittit, quia voluntate ejus alienata intellegitur, utique si non ignorabat in alieno solo se aedificare: et ideo, licet diruta sit domus, vindicare materiam non potest. certe illud constat, si in possessione constituto aedificatore soli dominus petat domum suam esse nec solvat pretium materiae et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonae fidei possessor fuit qui aedificasset: nam scienti alienum esse solum potest culpa obici, quod temere aedificaverit in eo solo, quod intellegeret alienum esse.[4]

On the other hand, if anyone builds with his own materials on the land of another, the building belongs to the owner of the land. But in this case the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, though only, of course, if he knew he was building on another's land; and therefore, if the building should be destroyed, he cannot even then bring a real action for the materials. Of course, if the builder has possession of the land, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be defeated by an exception of dolus malus, provided the builder was in possession bona fide. For if he knew that he was not the owner of the soil, he is barred by his own negligence, because he recklessly built on ground which he knew to be the property of another.[4]

The meaning is quite clear. A bad faith trespasser loses everything, but a good faith improver may recover his materials if they are ever severed. If the owner of the land brings an action for possession, the good faith improver can recover the cost of materials and labor or retain possession if the owner refuses to pay. The elaboration of this passage in the *Digest* and in the work of numerous commentators is briefly summarized in Buckland.[7] It appears that the law on this subject was complex, subtle and somewhat fluid.[8] Buckland states that "there was evidently evolution and difference of opinion among the jurists themselves."[9]

[4] INSTITUTES 2. 1. 30.
[5] The translation is based on that of Moyle, THE INSTITUTES OF JUSTINIAN 41-42 (5th ed. Moyle transl. 1913).
[7] BUCKLAND, ROMAN LAW 213-215 (2d ed. 1950); BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW 87-88 (2d ed. Lawson 1952).
[8] See, for example, the discussion of *ius tollendi* in BUCKLAND, ROMAN LAW 213 (2d ed. 1950).
[9] *Id.* at 213.

The history of the remarkable resurgence of interest in the Roman law in Italy in the twelfth century and the subsequent Romanization of the more barbaric laws of Europe during the middle ages and through the period of codification in the eighteenth and nineteenth centuries has been told elsewhere.[10] It is only necessary here to make the point that the provisions of contemporary civil codes are products of evolution from the Roman law: that the civil law is Romanesque in character. Consequently it is not surprising that the rules applicable to one who improves the land of another bear a family resemblance to those of the parent system. The great Code Napoleon, the *Code Civil* of France, is an example. Article 555 provides:

Lorsque les plantations, constructions et ouvrages ont été faits par un tiers et avec ses materiaux, le propriétaire du fonds a droit ou de les retenir, ou d'obliger ce tiers à les enlever.	When the plantations, constructions and works have been made by a third party with his materials, the owner of the land has the right to keep them or to compel such third party to remove them.
Si le propriétaire du fonds demande la suppression des plantations et constructions, elle est aux frais de celui qui les a faites, sans aucune indemnité pour lui; il peut même être condamné à des dommages-intérêts, s'il y a lieu, pour le préjudice que peut avoir éprouvé le propriétaire du fonds.	If the owner of the land asks to have the plantations or constructions removed, it shall be done at the expense of the person who made them, without entitling him to any indemnity; he can be ordered to pay damages, if there is reason, for the injury suffered by the owner of the land.
Si le propriétaire préfére conserver ces plantations et constructions, il doit le remboursement de la valeur des matériaux et du prix de la main-d'œuvre, sans égard à la plus ou moins grande augmentation de valeur que le fonds a pu recevoir. Néanmoins, si les plantations, constructions et ouvrages ont été faits par un tiers évincé, qui n'aurait pas été condamné à la restitution des fruits, attendu sa bonne foi, le propriétaire ne pourra demander la suppression desdits ouvrages, plantations et constructions; mais il aura le choix, ou de rembourser la valeur des matériaux et du prix de la main-d'œuvre, ou de rembourser une somme égale à celle dont le fonds a augmenté de valeur.[11]	If the owner prefers to keep the improvements he owes payment of the value of materials and the price of the labor, without regard to the increase or loss in value resulting to the land. Nevertheless, if the improvements have been made by a third party who has been ejected and who was not ordered to return the income owing to his good faith, the owner cannot require that the improvements be removed; but he shall have the choice of paying either the cost of materials and labor or the additional value of the property due to the improvements.[12]

The similarities to the Roman law are obvious: both the *Institute* of Justinian above quoted and the *Code Civil* treat the problem as part of the general topic of acquisition of property by accession; both begin with the rule that the improvements belong to the owner of the land and then modify that rule drastically; both distinguish between good and bad faith improvers; both speak of the cost of materials and labor. But there are also important differences. By the *Code Civil* the bad faith improver is more generously treated than in the Roman law. At the option of the owner of the land he may be compelled to remove his materials or he may be paid the cost of materials and labor. The good faith improver cannot be required to remove his improvements; he must be paid the cost of materials and labor or the increase in value of the land, at the option of the land owner. The law of the *Code Civil* has been elaborated by commentators and decisions since its enactment.[13] Consequently France—and the other civil law jurisdictions[14]—have developed a rather complex and detailed body of doctrine applicable to such cases by building on the Roman law.

[10] SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 58-72 (1885); 2 WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 831-1041 (1928); WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 58-62 (1925).

[11] NOUVEAU CODE CIVIL art. 555 (Dalloz 1900-1905).

[12] This translation is based on that of CACHARD, THE FRENCH CIVIL CODE 177-178 (rev. ed. 1930).

[13] See the annotations to art. 555, NOUVEAU CODE CIVIL (Dalloz 1900-1905).

[14] CODIGO CIVIL arts. 2622-2624 (Argen. 1882); CÓDIGO CIVIL arts. 545, 547-549 (Braz. 1917); BÜRGERLICHES GESETZBUCH arts. 946, 951 (Ger. 10th ed. Palandt 1952); CÓDICE CIVILE arts. 936-937 (Italy 1924); CODIGO CIVIL arts. 358, 361-364, 453-454 (Spain 1889); CODE CIVIL SUISSE arts. 671-673 (Swit. 1907).

The rules of the common law which deal with this group of problems are also directly traceable to the Roman law, but the story is one of degeneration rather than development. It begins with Bracton.[15] His famous work, *De Legibus et Consuetudinibus Angliae*, was composed during the period of revival of the Roman law in Europe.[16] There is ample evidence that substantial parts of Bracton were taken directly from the *Summa* of Azo, one of the most influential of the commentators on the Roman law.[17] Whatever the quality of Bracton's scholarship in the Roman law, and whatever his reasons for borrowing so extensively from the civilians in a treatise on the English law,[18] it is clear beyond question that his treatment of accession is taken directly from Azo who, in turn, refers expressly to that portion of Justinian's *Institutes* discussed above.

Bracton's statement of the rule is quite brief:

E contrario autem si quis de suo in alieno solo ædificaverit mala fide materium præsumitur donasse, si autem bona fide, solvat dominus soli pretium materiæ et mercedem fabrorum. Hoc autem quod prædictum est locum habet si ædificium sit immobile, si autem mobile aliud erit. Ut ecce horreum frumentarium novum ex tabulis ligneis factum in prædio Sempronii positum, non erit Sempronii.[19]	And on the other hand if one builds with his materials on the land of another in bad faith he is presumed to have made a gift, but if in good faith the owner of the soil shall pay the price of the materials and the wages of the workmen. This, however, as said before, applies if the building is immovable; if movable it is otherwise, as for example a new corn storehouse made of wood planks placed on the land of Sempronius does not belong to Sempronius.[20]

There are obvious similarities to the rule of Justinian, both in the distinction drawn between good and bad faith improvers and in the terms used. But it is equally obvious that something has been lost. There is no mention of anything like the *ius tollendi* or the *exceptio doli mali*,[21] and the purely defensive nature of the good faith improver's right to the value of the labor and materials under Roman law has disappeared. The numerous refinements of the *Digest* and the commentators have vanished. We are left with a rule whose source is not the law of England, which it purports to represent, but the law of Rome, which it disfigures.

[15] Glanvil wrote some fifty years earlier than Bracton, but his work contains no reference to this kind of problem.

[16] The name of Irnerius of Bologna is generally associated with the revival, and the years 1100-1130 are given by the authorities as the time when he worked. A representative of his school, Vacarius, visited England to teach the Roman law and compiled a textbook for his poorer students, the *Liber Pauperum*, about 1149. Bracton's book is generally thought to have been written between 1250 and 1259, by which time Roman Law had been taught in England for more than a century. See generally BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, Introd. (Twiss ed.) (Rolls Series 1878) (This edition has been generally discredited, but the introduction may be more reliable than the translation and editing of the texts); GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW (Coxe transl. 1866); SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO, Introd. (8 Selden Soc'y, Maitland ed. 1895) [hereinafter cited as MAITLAND]; SCRUTTON, *op. cit. supra* note 10, at 78-121; 3 WIGMORE, *op. cit. supra* note 10, at 981-1041; WINFIELD, *op. cit. supra* note 10, at 54-69; Vinogradoff, *The Roman Elements in Bracton's Treatise*, 32 YALE L.J. 751 (1923); Woodbine, *The Roman Element in Bracton's De Adquirendo Rerum Dominio*, 31 YALE L.J. 827 (1922).

[17] Bracton himself refers to the *Summa Azonis*, *e.g.*, BRACTON, *op. cit. supra* note 16, f. 10. But the most striking proof is the similarity in passages of the two works. See MAITLAND, *op. cit. supra* note 16, and Woodbine, *supra* note 16. Maine said that Bracton "put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris." MAINE, ANCIENT LAW 78 (Pollock ed. 1864). This statement is generally thought to be, in Maitland's words, "stupendous exaggeration." MAITLAND, *op. cit. supra* note 16, at xiv. However, there is no doubt that the portion of Bracton dealing with accession is taken directly from Azo. The relevant passages from both writers are set out in Maitland. MAITLAND, *op. cit. supra* note 16, at 113 (Bracton) and 116 (Azo).

[18] There is substantial disagreement among the scholars on these related questions. See citations *supra* note 16.

[19] This version of Bracton, ff. 9b, 16, is taken from 2 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 46 (Woodbine ed. 1922).

[20] Translation by author.

[21] These refinements are discussed in BUCKLAND, ROMAN LAW 213 (2d ed. 1950).

Fleta and *Britton* were both written after 1290 and before 1300.[22] Both are summaries or epitomes of Bracton.[23] The evidence indicates that *Fleta* was written first and that the author of *Britton* had a copy of *Fleta* before him.[24] *Fleta* contains the following passage:

Qui autem in fundo alieno de suo construxerit, mala fide materiam præsumitur donasse; Et cum domino soli merito debeat materia remanere, eo quod ædificia solo cedunt, & pro possessore soli judicabitur, propter duplex beneficium possidendi, quamvis obscura fuerint utriusque jura.[25]	However, one who builds something of his own on the land of another in bad faith is presumed to have made a gift of the materials; both because the materials should remain with the owner of the soil, buildings ceding to the land, and since the owner will be deemed possessor of the soil, on account of the double benefit of possession, however obscure the rights of (under?) both shall be.[26]

Whatever this means, it is different from Bracton's statement. It appears to apply only to bad faith improvers and, as to them, to be simple in application; they lose their materials. Nothing is said of the cost of labor and there is no distinction between movable and immovable buildings.

Britton, an epitome of Bracton written soon after *Fleta*, was more successful and influential, partly because it was written in law French, the vernacular of the law courts, rather than in Latin.[27] The appearance of royal sponsorship (by Edward I) must have aided its popularity.[28] Being an epitome of Bracton, and having been written with *Fleta* at hand,[29] it is only to be expected that *Britton* would share in their reputations. How convenient for the English lawyer to have a book written in law French whose authority is that of Bracton, *Fleta*, Edward I and the author combined.

[22] SCRUTTON, *op. cit. supra* note 10, at 122-124; WINFIELD, The Chief Sources of English Legal History 262-269 (1925).

[23] Fleta has been described as "little better than an ill-arranged epitome" of Bracton. 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 210 (2d ed. 1899). Winfield states that Britton, although chiefly based on Bracton, is more than an abridgment of that treatise. WINFIELD, *op. cit. supra* note 22, at 263.

[24] 1 NICHOLS, BRITTON at XXVII (1865).

[25] FLETA, 3. 2.12.

[26] This translation is the product of what may have been the least fruitful collaboration in the history of legal scholarship. It all began when the writer found he was powerless in the face of the Latin of *Fleta* and sought help from those of his immediate colleagues who professed some ability as Latinists. The thing grew as a distinguished visitor from the Harvard Law School tried his hand and was followed by an English barrister and teacher of Roman law who happened to be on the premises. The version of each of these differed substantially from those that preceded it. Taken separately or together they did not seem to make much sense. The effort set out in the text is something of a composite of their products. It is barely possible that the fault is with Fleta; Winfield states that his work "seems to have been a failure." WINFIELD, *op. cit. supra* note 22, at 263. The Selden Society is publishing a translation which presently stops at the end of Book II. It will be interesting to see what eventually appears as the translation of this passage.

[27] 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 319-321 (3d ed. 1923); 1 NICHOLS, BRITTON, Introd. (1865); 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 210 (2d ed. 1899); SCRUTTON, *op. cit. supra* note 10, at 122-124; WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 262-264 (1925).

[28] The prologue is in the form of a message from the King, and the text speaks throughout of "our writ." Winfield remarks that "this remarkable peculiarity of official origin seems to have excited little interest in those who believed it to be true and to have been received with a tolerant scepticism in modern times." WINFIELD, *op. cit. supra* note 27, at 264.

[29] "Fleta was first written, and . . . [together with Bracton] was in the hands of the author of Britton, who appears to have more frequently made use of the compendium of Fleta than of the larger work." 1 NICHOLS, BRITTON XXVII (1865).

The statement in *Britton* is as follows:

> A purchase or acquisition may also accrue from the fraud and folly of another, as where persons by malice or ignorance build with their own timber on another's soil, or where they plant or engraft trees or sow their grain in another's land, without the leave of the owner of the soil. In such cases what is built, planted, and sown shall belong to the owner of the soil, upon the presumption of a gift; for there is a great presumption that such builders, planters, or sowers intend that what is so built, planted, or sown should belong to the owners of the soil, especially if such structures are fixed with nails, or the plants or seeds have taken root. But if any one becomes aware of his folly, and speedily removes his timber or his trees, before our prohibition comes against his removing them, and before the timber is fastened with nails, or the trees have taken root, he may lawfully do so.[30]

This is amplified by a further statement in the discussion of the assize of novel disseisin:

> Nor shall he recover by this assise, from whose soil buildings are removed, which were erected thereon through the ignorance of another and afterwards taken away as soon as the builder perceived his folly. But if the owner of the soil shall carry to the builder our prohibition against his removing them, or if he built them contrary to the forbiddance of the owner of the soil, or in ill faith, and not through ignorance, or where anything is sown or planted in another's soil through ignorance, and that plant remain till it has taken root, if the builder or planter afterwards carry it away without judgment, the owner of the soil shall recover damages as much as if they had been of his own building or planting.[31]

These passages are not entirely clear in meaning. They appear to say that a building actually attached to the land belongs to the owner whether the trespasser was in good or bad faith. Short of attachment with nails or roots the good faith improver is allowed to remove his improvements until the King's prohibition issues. However accurate this interpretation may be, it seems clear that the text of *Britton* differs radically from those of Bracton and *Fleta* on this point. The distinction between good and bad faith improvers, in terms of legal consequences, has all but vanished; unless he acts quickly the trespasser by honest mistake is in no better position than if he had acted with full knowledge, even though his building is not actually attached to the land. This is a far cry from *Fleta*, further yet from Bracton and bears only the most casual resemblance to Justinian. At each step substantial alteration has occurred; but more significantly, at each step the change has been in the nature of a regression. Each new version has fewer distinctions and qualifications than its predecessor.

[30] *Id.* 2. 2.6.
[31] *Id.* 2. 12.2.

The influence of the first quoted passage from *Britton*, in particular, has been very great. One reason may be the lack of any other ready authority. There is a most remarkable absence of reported litigation on the subject in England. A *Year Book* case in the reign of Edward III [32] denied damages to the plaintiff in an assize of novel disseisin because the disseisor had improved the property by building on it. This case also appears in the *Liber Assisarum* [33] and was included in the *Abridgments* of Brooke [34] and Fitzherbert.[35] In *Dike and Dunston's Case* [36] the defendant argued that "if a man do disseise me, and fells trees upon the land, and doth repaire the houses; in an assize brought against him, the same shall be recowped in damages; because that which was done was for his commodity." However the case was on an entirely different problem. In *Coulter's Case*,[37] which also involved an unrelated question, there is the following dictum: "The disseisor shall recoupe all in damages which he hath expended in amending of the houses," citing the *Year Book* case mentioned above. There is no other authority in the English law,[38] although in equity some cases deal with the problem.[39]

It may be that this lack of authority in the English law can be explained in part by the early development of the law of fixtures, based for centuries on the firm and inflexible rule that whatever is attached to the land becomes a part of it.[40] Clearly if one who had a right to go on the land, such as a tenant or mortgagor, lost his improvements, a trespasser could expect no better treatment. The futility of attempting to get legal relief may explain the lack of reported litigation. The rules which eventually developed allowing tenants to remove trade fixtures were based on a strong public policy in favor of trade and industry and were always regarded as exceptions to the annexation doctrine.[41] Trespassers, whether in good or bad faith, would not be able to make such a case for themselves.

[32] Y.B. Trin. 14 Edw. 3, pl. 2 (1340).
[33] Lib. Ass. 14, pl. 21 (1340).
[34] BROOKE, GRAUNDE ABRIDGEMENT, *Damages*, f. 202, pl. 99 (1576).
[35] FITZHERBERT, ABRIDGEMENT, *Damages*, f. 226, pl. 82 (1577).
[36] Godb. 53, 78 Eng. Rep. 32 (K. B. 1582).
[37] 6 Co. 16, 77 Eng. Rep. 98 (K. B. 1599).
[38] MAITLAND, *op. cit. supra* note 16, at xx, states: "The English courts have no law about 'accession' . . . . May we not, after six centuries, say that they will never feel the want of one? Where, in all our countless volumes of reports, shall we find any decisions about some questions that Azo has suggested to Bracton?" Ubi vero?
[39] If *A* begins, by mistake, to build on *B's* land and *B* knows of this and allows him to proceed without pointing out his error, equity will intervene to prevent *B's* profiting by *A's* mistake. See Ramsden v. Dyson, L.R. 1 H.L. 129 (1866); HANBURY, MODERN EQUITY 52-53 (6th ed. 1952) and cases cited therein. See also The Earl of Oxford's Case, 1 Rep. Ch. 1, 21 Eng. Rep. 485 (1615) and the discussion of the case of Peterson v. Hickman (apparently not reported) therein.
[40] See discussion in Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L.Q. Rev. 560 (1934). The earliest case cited by Niles is in Y.B. 17 Edw. 2, I, 518 (1323). The amount of litigation in fixtures cases not involving trespassers is very great, as the decisions cited by Niles indicate.
[41] Niles, *supra* note 40, at 564-577.

In the United States, unlike England, there has been a great deal of reported litigation and writing on the rights of improvers of others' land.[42] The premise of the American authorities is that the common law of the subject comes from England.[43] Some cases take the view that it was so clearly and firmly established that legislation altering it would be unconstitutional.[44] The pattern of authority is interesting. The later American cases and writers cite the earlier ones;[45] the earlier ones, however, either cite nothing or try to meet the question fairly, in which case they end up citing *Coulter's Case*.[46] Thus it seems likely that the isolated dictum in that case is the source of the American law. Coke's *Reports* undoubtedly were widely known and used in the United States in the eighteenth and nineteenth centuries, as were his *Institutes* and Blackstone's *Commentaries*, and probably constituted an important part of the lawyer's very limited library.[47]

As stated by the American authorities, the common-law rule is that the improvements, whether made in good or bad faith, belong to the owner of the land.[48] If the owner sues for rents and profits, the value of the improvements can be set off against them.[49] In equity the good faith improver will be protected if the owner stood by and allowed him to improve knowing of his mistake.[50] There is some authority to the effect that restitution will be allowed the good faith improver by way of defense in an equitable action brought by the owner, as where he brings an action to quiet title,[51] on the principle that he who seeks equity must do equity. And there are, finally, a few cases giving the improver an independent equitable action of his own for restitution.[52] However, the majority of the cases recognize no such equitable action or defense.

Thus the American common law on the subject is seen to be quite harsh and crude. In the early days of the Republic there was a great amount of litigation on these questions because of the lack of adequate surveys, the existence of constantly expanding wilderness frontiers and the absence of adequate records of titles. The manner in which the law operated resulted in many hard cases and, at the same time, tended to frustrate a then widely held view of public policy. According to this view, it was important that wild land be settled and improved and that the law encourage this kind of activity.[53] The common-law rule tended to discourage settlement and improvement by denying one who went on land in good faith and improved it any reasonable prospect of coming out whole if title should eventually be found in some one else.

[42] Green v. Biddle, 21 U.S. (8 Wheat.) [illegible] (1823) is a leading case. See also discussion and cases collected in 5 AMERICAN LAW OF PROPERTY § 19.9 (Casner ed. 1952); Ferard, FIXTURES 10-12 (2d ed. Hogan 1855); 2 KENT, COMMENTARIES ON AMERICAN LAW [illegible] (14th ed. Gould 1896); 5 POWELL, REAL PROPERTY 73-76 (1956); RESTATEMENT, RESTITUTION, REPORTERS' NOTES [illegible] (1937); Annots. 24 A.L.R.2d 11 (1952); 148 A.L.R. 335 (1944); 142 A.L.R. 310, 318 (1942); 137 A.L.R. 1078 (1942); 130 A.L.R. [illegible] (1941); [illegible] 955 (1934); 82 A.L.R. 921 (1933); 68 A.L.R. 288 (1930); 40 A.L.R. 282 (1926); Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L.Q. REV. 66, 78-80 (1934).

[43] See Green v. Biddle, 21 U.S. (8 Wheat.) [illegible] (1823); Niles, *supra* note 42, at 78.

[44] Green v. Biddle, *supra* note 43 (statute held unconstitutional); Billings v. Hall, 7 Cal. 1 (1857) (legislation held unconstitutional); Townsend v. Shipp's Heirs, 3 Tenn. (1 Cooke) [illegible] (1813) (statutes given restrictive interpretation to avoid [illegible]); Nelson v. Allen, 9 Tenn. (1 Yerg.) [illegible] (1830) (same legislation held unconstitutional).

[45] Most of the later cases and writers cite the *Green v. Biddle*, *supra* note 43.

[46] 5 Co. 30, 77 Eng. Rep. 98 (K. B. 1597). This was the sole authority cited in the *Green v. Biddle*, *supra* note 43.

[47] See HARNO, LEGAL EDUCATION IN THE UNITED STATES 19-21 (1953); WALLACE, THE REPORTERS 193-196 (4th rev. ed. 1882).

[48] See authorities cited *supra* note 1. The formulation in RESTATEMENT, RESTITUTION § 42 (1937), is a convenient summary of the American common law.

[49] *Ibid.*

[50] 2 POMEROY, EQUITY JURISPRUDENCE § 390 (5th ed. Symons 1941).

[51] See RESTATEMENT, RESTITUTION, REPORTERS' NOTES [illegible] § 42 (1937); Annot. 104 A.L.R. 577, 580 (1936).

[52] The leading case is Bright v. Boyd, 4 Fed. Cas. 127 (No. 1,875) (C.C.D. Me. 1841), *rep't of master and final decree*, *id.* at 135, (No. 1,876) (C.C.D.Me. 1843), which should be contrasted with Putnam v. Ritchie, 6 Paige Ch. 390 (N.Y. 1837). Note the analogous rule allowing a trustee to recover for unauthorized improvements on the res. 3 SCOTT, TRUSTS 1972 (2d ed. 1956). In England a series of cases allow one who builds on land leased from charitable trustees to recover for his improvements if the lease is set aside as improvident. Attorney General v. Green, 6 Ves. 452 (1801); Attorney-General v. Day, 3 L.T. (o.s.) 239 (1844).

[53] The point is discussed in Billings v. Hall, 7 Cal. 1, 15-16 (1857); Townsend v. Shipp's Heirs, 3 Tenn. (1 Cooke) [illegible] (1813).

At a very early date the states began to enact legislation altering the rule so as to encourage the settlement and improvement of lands.[54] A very few states made the change through judicial decision and thus did not immediately follow the trend toward enactment of betterment acts.[55] Whatever the course followed, however, all but twelve states now have, through one means or another, modified the so-called common law rule and afford some relief to the good faith improver.[56] Thus we have come full circle from the Roman law, with its distinctions and subtleties, through Azo, Bracton, *Fleta* and *Britton* with their successively cruder and less satisfactory paraphrases of their predecessors, through centuries of nearly unbroken silence about the problem in the English law, through the dubious position of the early American courts on the question, back to legislation more or less approximating the Roman law from which we began.

The "occupying claimant" or "betterment" acts adopted in the various American jurisdictions are in many ways similar to each other, although there are important variations among them. In general, the rights which they give the improver are only defensive in nature, although a few allow him to initiate the action.[57] Almost all are restricted to aiding trespassers in good faith,[58] and some require that the trespasser have entered under color of title,[59] that he hold adversely to the owner, and[60] that he have been in possession for some minimum period of time.[61] The form of relief likewise varies; under most statutes the true owner is allowed to choose whether to pay for the improvements or sell the land to the improver;[62] in others he has no choice.[63] The consequences of failure to exercise the option vary; in some states the interest is forfeited,[64] but in others the parties become tenants in common as their interests appear.[65] The court may be given power

[54] The earliest statute found was enacted in Virginia in 1642. It is reproduced in 1 [illegible], Statutes at Large act xxxii, p. 260 (2d ed. 1823).

[55] Union Hall Ass'n. v. Morrison, 38 Md. 281 (1873); Hardy v. Burroughs, 251 Mich. 572, 233 N.W. 260 (1930); Hatcher v. Briggs, 6 Ore. 31 (1876); Herring v. Pollard's Ex'r, 4 Tenn. (4 Humph.) 432 (1843); Murphy v. Benson, 245 S.W. 219 (Tex. Civ. App. 1922). The Reporters of the *Restatement of Restitution* suggest that this view probably would have prevailed in most of the states but for the prevalence of betterment acts. RESTATEMENT, RESTITUTION, REPORTERS' NOTES 29 (1937).

[56] The following states have [illegible] legislation of some sort: ALA. CODE tit. 7, §§ 846 - 849 [illegible]; ARK. STAT. ANN. §§ [illegible] (1947); CONN. GEN. STAT. §§ 47 - 50 (1949); D.C. CODE ANN. §§ 16-519 - 16-526 (1951); FLA. STAT. §§ 10.06 - 10.12 (1957); GA. CODE §§ 33-101 - 109 (1933); ILL. ANN. STAT. ch. 45, §§ 33 - 55 (Smith-Hurd 1944); IND. ANN. STAT. §§ 3-1861 - 3-1519 (Burns 1946); IOWA CODE §§ 560.1 - 560.7 (1958); KAN. GEN. STAT. ANN. §§ 60-1901 - 60-1913 (1949); KY. REV. STAT. §§ 381.460 - 381.670 (1959); LA. CIV. CODE ARTS. 3461 - 3487 (Dart 1947); ME. REV. STAT. ANN. ch. 172, §§ 29-47 (1954); MASS. ANN. LAWS ch. 237, §§ 14, 16 - 35 (1956); MICH. COMP. LAWS §§ 628.44 - 628.61 (1948); MINN. STAT. §§ 559.03 - 559.15 (1957); MISS. CODE ANN. §§ 821 - 826 [illegible]; MO. REV. STAT. §§ 524.160 - 524.260 (1949); NEB. REV. STAT. §§ 76-501 - 76-511 [illegible]; N.H. REV. STAT. ANN. §§ 524 : 2 - 524 : 4 (1955); N.M. STAT. ANN. §§ 22-8-14 - 22-8-20 (1953); N.C. GEN. STAT. §§ 1-340 - 1-351 (1953); N.D. REV. CODE §§ 32-1398 - 32-1711 (1943); OHIO REV. CODE ANN. §§ 5303.08 - 5303.17 [illegible]; OKLA. STAT. tit. 9, §§ 149 - 160 and tit. 12, §§ 1481 - 1489 (1951); S.C. CODE §§ 57-461 - 57-470 (1952); TENN. CODE ANN. § 23-1328 (1956); TEX. STAT., REV. CIV. ARTS. 7292 - 7401 (Vernon 1948); UTAH CODE ANN. §§ 57-6-1 - 57-6-5 (1953); VT. STAT. ANN. tit. 12, §§ 4811 - 4824 (1958); VA. CODE §§ 8-829, 8-830, 8-842 - 8-856 [illegible]; WASH. REV. CODE §§ 7.28.160 - 7.28.180 (1961); W. VA. CODE ANN. §§ 5441 - 5462 (1955); WIS. STAT. §§ 275.24 - 275.29 (1957); WYO. [illegible]. Similar legislation has been enacted throughout Canada. The cases are collected in CANADIAN ABRIDGEMENT, *Mistake*, div. VIII.

[57] See the Iowa, Missouri, New Mexico and Tennessee statutes cited *supra* note 56.

[58] Under the statutes in Alabama, Maine, Michigan and Massachusetts good faith is not essential to relief.

[59] Arkansas, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Washington, Wisconsin and Wyoming.

[60] Alabama, Maine, North Dakota.

[61] Alabama, Maine, Massachusetts (a minimum period prescribed except where trespasser acted in good faith), Michigan, New Hampshire, Texas.

[62] Alabama, Connecticut, District of Columbia, Florida, Georgia, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Texas, Vermont, Virginia, Washington, West Virginia and Wyoming.

[63] Illinois and Kentucky.

[64] Kansas, Massachusetts, Ohio and Wisconsin.

[65] Indiana and Washington. In North and South Carolina the land is sold at judicial sale and the proceeds divided between the parties.

to withhold possession from the owner until he pays for the improvements,[66] or the improver may be given a lien on the land.[67] If the improver is given the option to purchase the land at its unimproved value the statute may state the time within which and the terms according to which payment must be made.[68] And so on. In Maryland the lot of the good faith improver has been bettered by judicial decision.[69] In the remaining states, with the exception of California,[70] the improver is treated according to the so-called common law rule.

THE CALIFORNIA LAW

California has no such betterment act. One was enacted in 1856[71] but declared unconstitutional in 1857.[72] Both the act and the decision voiding it are interesting. The act was as follows:

AN ACT
For the Protection of Actual Settlers, and to Quiet Land Titles in this State.

SECTION 1. All lands in this State shall be deemed and regarded as public lands until the legal title is shown to have passed from the Government to private parties.

SEC. 2. Actual and peaceable possession of land shall be prima facie evidence of a right to such possession in the person so in possession.

SEC. 3. In all cases when lands are claimed under or by virtue of a patent from the United States, or from this State, the right of the party claiming under the patent to the land shall be deemed to begin at the date of the patent, and he shall not be entitled to recover for the use or enjoyment of such land prior to the date of such patent.

SEC. 4. In all actions of ejectments or other actions, involving the right to land or the right to the possession of lands hereafter to be commenced or hereafter to be tried in any court in this State, the defendant may deny the plaintiff's right to such land or to its possession, and he may also set up and aver in his answer that he and those under whom he claims, have made lasting and valuable improvements on such land, stating in what the improvements consist, and their value, and if a growing crop is upon said land, the defendant may state that fact also, and the court before which the action shall be tried shall direct the jury in their verdict to find—

First. Whether the plaintiff is entitled to the land or to the possession of the land, and if he is entitled to the land or to its possession.

Second. To find the value of the land in controversy without the improvements placed thereon by the defendant or by his grantors.

Third. The value of the improvements, and,

Fourth. The value of the growing crops then on said land.

Fifth. The value of the use and occupation of such land from the time when the patent issued.

[66] Alabama, Arkansas, Connecticut, Georgia, Minnesota, New Hampshire, Wisconsin.
[67] Arkansas, Kentucky. Compare the judicial sale in North and South Carolina, *supra* note 65.
[68] Florida, Georgia, Kansas, Maine, Massachusetts.
[69] The leading case is Union Hall Ass'n v. Morrison, 39 Md. 281 (1873).
[70] Discussed below.
[71] Cal. Stats. 1856, Ch. 47, p. 54, titled "An Act For the Protection of Actual Settlers, and to Quiet Land Titles in this State."
[72] Billings v. Hall, 7 Cal. 1 (1857).

SEC. 5. If the verdict is in favor of the plaintiff's right to the land, or to the possession of the same, the court shall cause the verdict to be entered on its minutes, and the plaintiff shall, within six months, pay the defendant or his lawful agent, or he may pay to the Clerk of the court in which such action was tried, for the use of the defendant, the value of his improvements as found by the jury, and of the growing crops on the land, if the same at the time of payment still remain uncut on the land, or the plaintiff may, within the time allowed him to make such payment, notify the defendant or his attorney, that he will not pay for said improvements and growing crops, and that he will accept the value of the land as assessed by the verdict of the jury; and the defendant shall have six months from the time of giving such notice within which to pay the plaintiff the value of the land as the same shall have been assessed by the jury, also the amount of the rents and profits as assessed by virtue of the preceding section, together with interest on said amount at the rate of ten per cent. per annum on said amount from the time he received such notice.

SEC. 6. Service of the notice provided for in the fifth section of this Act shall be made by the Sheriff of the county where the party entitled to such notice, or his Attorney, is found, or by his deputy; the notice shall be returned with the certificate of the officer of its service, with the date thereof, to the office of the Clerk of the court in which the action was tried. The notice shall be served by delivering a copy thereof to the party entitled to the same, or his attorney, or in case neither can be found, then with the Clerk of the court in which the action was tried, who shall cause the same to be published in some newspaper of general circulation in the county wherein said action was tried, and if there is no newspaper published therein, then in a newspaper published nearest thereto, and it shall be the duty of the Sheriff to serve such notice when requested, for which he shall receive the same fees as for similar services in other cases.

SEC. 7. If the plaintiff pay into court or pay to defendant the amount of the value of his improvements as assessed by the jury, and also of the growing crops, judgment shall be entered on the verdict of the jury immediately, and he shall have process for his costs, and the Sheriff, unless the defendant quits voluntarily, shall put him in possession of the land, the improvements and growing crops.

SEC. 8. If the defendant shall fail to pay the plaintiff, or to pay into court, within the time allowed by this Act, the value of the land as assessed by the jury, when he shall have been notified by the plaintiff, as is provided by the fifth section of this Act, the plaintiff may apply to the court, if in session, and if the court is not in session, to the Clerk, to have judgment entered in his favor on the verdict and have execution, as is provided in section six of this Act; in which case, defendant shall be deemed to have waived, and shall forfeit all right to value as assessed by the jury, of his improvements and growing crops.

SEC. 9. If the plaintiff shall fail to pay the defendant or his agent, or to the Clerk of the court, the amount of the value of defendant's improvements and growing crops, as assessed by the jury, within the time allowed by this Act, and shall fail to notify the defendant that he will not pay for said improvements, and that he will accept the value of the land as assessed by the verdict of the jury, as it is provided by the fifth section of this Act, the court if in session, and the Clerk in vacation, may, on application of the defendant, enter judgment against the plaintiff for costs and have execution therefor, and the plaintiff shall be deemed to waive all right to judgment on the verdict of the jury, and shall be estopped from maintaining any other action for the same land.

SEC. 10. The provisions of this Act shall extend to all litigation for lands, or for the possession of lands, claimed under or by virtue of any Spanish or Mexican Grant, or any grant made by the Governors of California, unless the said grants shall have been surveyed, and the boundaries plainly and distinctly marked out and kept so plainly and distinctly marked, that said boundaries could at any time when improvements were being made on said lands, be easily seen and certainly known, and unless said grant and the plat, and the field notes of the survey of the same shall have been recorded in the office of the Recorder of the county in which the lands lie before such improvements shall have been made.

SEC. 11. No action of ejectment or other actions to recover the possession of lands, shall hereafter be sustained unless such action shall have been commenced within two years after the cause of action accrued; and the cause of action shall be construed to commence at the date of the issuance of a patent as against all persons settled upon and occupying any part of the land patented, unless such persons hold or claim to hold under the patentee or his grantees; *provided, however*, that infants and married women shall have the same time allowed them to begin their action, after their disability shall be removed, as is by this section allowed.

SEC. 12. No person or persons shall claim the benefits of this Act for any improvements made on private lands after the confirmation of such lands by the Board of the United States Land Commissioners, or the United States Courts, where the occupant, or those under whom he claims, obtained possession of the land after such confirmation.

SEC. 13. The provisions of this Act shall not apply to the lands of the State lying below tide water mark; nor shall any person who has entered upon land of another through actual force or fraud, or who has entered upon inclosed land claimed by another under the Governments of Spain or Mexico, be entitled to the benefit of the provisions of this Act. Nor shall the provisions of this Act apply to actions between landlord and tenant when there is a contract of renting or lease.

As the caption and the text show, this legislation was designed to protect persons who settled on open lands, the titles to which were uncertain because of their origin, the lack of appropriate marks and failure to record. It is well known that for some years after admission to the Union vast areas of California lands were the subject of litigation and extra-legal dispute. Eventually, through the activities of the Board of the United States Land Commissioners, through decisions in cases involving disputed titles and through greater activity in surveying and marking boundaries, titles became more settled. But at the time of this legislation the problem was an important and practical one. California was a frontier whose lands were valuable for farming, timber and, most of all at the time, minerals. To encourage settlers was to encourage development of these resources and hence of the State.

This philosophy did not appeal to the California Supreme Court. To two of the three justices[73] it appeared that this was an effort to deprive persons of their property without compensation, contrary to natural right and the California Constitution. The case concerned land in Sacramento originally granted to John Sutter by the Mexican government and confirmed by the Board of United States Land Commissioners. The plaintiff was a successor in interest of Sutter and the defendant one who had settled on the lands and lived there for over five years before the action of ejectment was brought. The court, in an opinion by Chief Justice Murray, saw the question as one requiring it to decide the constitutionality of the Settlers' Act "so far as the same requires a party, recovering possession of lands in an action of ejectment, to pay the defendant the value of his improvements."[74] On this point it said that "this question is not free from embarrassment, not on account of any doubts we have upon the subject, treating it as purely a legal question, but because it has heretofore entered largely into the politics of this State, and become a most fruitful source of private animosity, and public discord."[75]

Embarrassed or not, the Supreme Court held that the Settlers' Act deprived Billings of his inalienable right to acquire possession and protect property under Article I, Section 1 of the California Constitution then in force. It did so by reading the act to apply equally in favor of bad faith trespassers who acquire possession by violence and good faith improvers (compare Section 13 of the act) and ignoring the fact that the owner, if he did not wish to pay for the improvements, was paid for his land (see Section 5 of the act). Worst of all in the eyes of the court was the fact that the owner was expected to pay for the improvements. How could this be so, since they were part of the land and hence belonged to the owner? The reasoning is classic and deserves to be quoted:

> The act does not discriminate between an innocent and a tortious possession. It is not an attempt to avoid a circuity of action, by providing for an equitable adjustment of the whole subject in one suit; it applies as well to the trespasser who has made unlawful and violent entry upon the lands of another, as to him who has used diligence to ascertain his neighbor's right, and whose conduct has been marked by good faith and fair dealing. It applies as well to past as future cases. That which, before, was mine, is by this act taken from me, either in whole or in part, for if I refuse to pay for the improvements which were put upon my land by a mere trespasser, and which were mine by the law, before the passage of the statute, I lose not only the improvements, but the land itself, and that which is mine today, may be taken from me tomorrow, by any intruder who wishes to enter upon it.
>
> * * * *
>
> Such legislation is repugnant to the plainest principles of morality and justice, and is violative of the spirit and letter of our Constitution. It divests vested rights, attempts to take the property acquired by the honest industry of one man, and confer it upon another, who shows no meritorious claim in himself.[76]

[73] The three justices were Hugh C. Murray, Peter H. Burnett and David S. Terry. Solomon Heydenfeldt had resigned in January of 1857. Chief Justice Murray died later in the same year, David S. Terry became Chief Justice and Stephen J. Field became an Associate Justice. It is interesting to speculate on the probable decision in the case had it come to the Supreme Court a few months later.

[74] Billings v. Hall, 7 Cal. 1, 3 (1857).

[75] *Id.* at 5. This is probably a reference to the fact that open war was being waged between "squatters" (actual settlers) and large landholders. See discussion in ROBINSON, LAND IN CALIFORNIA ch. 9 (1948). The Settlers' Act was a victory for the squatters. The Supreme Court must have found it difficult, if not impossible, to avoid viewing the dispute before it as the crucial phase of this conflict.

(9-10) [76] Billings v. Hall, 7 Cal. 1, [illegible] (1857). The court did not, as the quotation might suggest, restrict its holding to the case of improvements made before the statute was enacted.

There follows a long dissertation on the power of Legislatures to pass laws which, although technically constitutional, violate natural right and reason, justice and morality. The conclusion is, predictably, that such laws are invalid, at least in California. Justice Burnett, in his concurring opinion, agreed with everything Chief Justice Murray said but added a clincher of his own:

> [T]he hardships of particular cases, that will and must arise in the progress of human affairs, under any and all systems of government and law, do in fact constitute the true and stern test of the devotion of a free people to fundamental principles . . . . [T]he permanent evils inflicted upon free institutions, by a violation of these fundamental principles, will outweigh, immeasurably, all the temporary benefits that might accrue to individuals.[77]

Justice Terry dissented at length, making two significant points. The first was in answer to the complaint that the statute was unconstitutional because it was available to good and bad faith improvers alike, rather than being properly limited to good faith trespassers. As to this he said: "I do not perceive how this fact can affect the question of constitutionality. At common law, buildings erected upon land become a part of the freehold, and vest in the owner of the soil as well when erected by a person holding under color of title, as by a mere naked trespasser. In either case such a law would operate to divest vested rights by taking the property of one citizen and conferring it upon another."[78]

More interesting and convincing is his discussion of the purpose of the legislation:

> The sudden increase of population consequent upon the discovery of gold in California, created a large demand for the necessaries of life; the small quantity of land in actual cultivation was inadequate to supply this demand, and left us almost wholly dependent upon foreign countries.
>
> It has been policy of the Legislature from the commencement of our State government, to encourage the settlement and cultivation of the unoccupied lands of the State by the enactment of laws to protect the actual settler in the possession and enjoyment of a limited quantity of land.
>
> The wisdom of this policy has been demonstrated by the rapid development of our agricultural resources, which now afford not only an abundance of necessaries for home consumption but leave a surplus for exportation, a result never accomplished in any other country within so short a period.
>
> Upon the face of the inducements offered by the Legislature, and the promise of being protected in the possession of their homes, a number of hardy and enterprising citizens settled upon lands which, in most instances, had never been surveyed or occupied, nor in any manner segregated from the public domain. Nor was there any evidence within their reach to show that such lands were claimed by any private citizen. Most of this land was, before their settlement, of little value, paying revenue neither to the owner nor to the State; their present enhanced value is in a great measure owing to the energy and labor of the occupant, the improvements in many cases greatly exceeding the lands in value. There are no doubt instances of wrongful and tortious entries upon lands known to be claimed by individuals, but in a majority of cases, more especially in those portions of the State that were not inhabited before the discovery of gold mines, such entries have been made under the *bona fide* belief that the land settled upon was a portion of the public domain.

[77] *Id.* at 18.
[78] *Id.* at 25.

> Under these circumstances we may well doubt whether it would be a greater violation of natural justice to deprive hundreds of citizens and their families of the homes erected by the labor of years, without making any compensation for the improvements which constitute a great part of the value of those homes, or to permit them to retain possession of them upon paying to the owner of the soil the full value of all that is really his own. It appears to be settled that the Legislature may enact laws by which private property may be taken for private purposes in cases where the general good would be thereby promoted. The propriety, policy, and expediency of such acts, can be properly determined on by the Legislature.[79]

Although the opinion of Justice Terry seems clearly the better one today, it did not sway his colleagues on the court and the Settlers' Act was lost. It has never been replaced in California by anything similar, perhaps in part because of the expectation that its constitutionality could successfully be attacked under the reasoning of *Billings* v. *Hall*. While it is true that the *Billings* decision was given under the old Constitution of 1849 the corresponding section of the Constitution of 1879 is taken directly from it and uses the same words.[80] Thus proposed legislation can be expected to survive in the courts only if the reasoning of the majority in *Billings* v. *Hall* is repudiated or the terms of the act are distinguishable. Both seem possible. Certainly any legislation adopted today would have different objectives than that of 1856. Land titles are now not so unsettled. The number of settlers on open lands is now very small. The uncertainties of most Spanish and Mexican grants have long since been resolved. Adequate surveys have been made, and it is usually a simple matter for any man to ascertain the precise location and limits of his land. It seems unlikely that the *Billings* case poses any threat to properly designed modern legislation.

The California Civil Code of 1872 included, in Section 1013, the following provision:

> When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

This provision was new to the statute law of the State but did not vary from the position adopted earlier in the cases.[81] It merely restated the American common-law position.[82] It has survived to the present day except as modified by legislation in 1953 which allows a good faith improver to remove his annexations. This legislation is discussed below. Until 1953, however, every case involving improvers started from a position identical with the one in the statute quoted.[83] The only possible relief available to the improver was by set-off or equitable estoppel.

[79] *Id.* at 25-26.

[80] The same provision constitutes Art. I, §1 of both Constitutions.

[81] Billings v. Hall, 7 Cal. 1 (1857); McMinn v. Mayes, 4 Cal. 209 (1854); Rand v. Hastings, 1 Cal. Unrep. 307 (1856).

[82] See discussion of the American law *supra* at 9-09.

[83] Its application has not always been uniform. In Cal.P.R.R. v. Armstrong, 46 Cal. 35 (1873), the railroad went on the land and improved it and subsequently brought an action to condemn the land. The defendant claimed that the improvements became his property, since the railroad was a trespasser when they were installed, and that their value should be included in the award. *Held* for the railroad, on unclear grounds. The next year a similar case came before the court. The United States erected a lighthouse on land belonging to the defendant and subsequently brought a condemnation action. Again the defendant sought to have the value of the improvements included in the award and this time was successful. The majority of the court distinguished the *Armstrong* case, with difficulty. The concurring judge found it impossibel to distinguish but thought the earlier case wrongly decided. United States v. Land in Monterey County, 47 Cal. 515 (1874). A few years later another railroad case came to the court in Albion River R.R. v. Hesser, 84 Cal. 435, 24 Pac. 288 (1890). *Held* for the railroad, on the authority of the *Armstrong* case, and distinguishing, with difficulty, the lighthouse case.

For other interesting applications of the rule see Calnon v. Calnon, 7 Cal. App.2d 676, 46 P.2d 988 (1935), and cases there cited (if husband uses community funds to improve wife's separate property the improvements become her separate property and he has no claim for them); Carpentier v. Mitchell, 29 Cal. 330 (1865) (trespasser improved land and subsequently acquired interest as co-tenant. Rule that a co-tenant cannot recover increased value of rents and profits from improvements made by co-tenant, in action against him, not applicable).

The provisions for set-off originally appeared as Section 257 of the 1851 Civil Practice Act. It was re-enacted without substantial change as Section 741 of the Code of Civil Procedure of 1872 and is still in force. It provides:

> When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

This legislation has consistently been applied in a most restrictive way. If the plaintiff does not seek damages in the action for possession, the improver has no set-off for improvements.[84] If damages are sought, the improver must plead his right to set-off [85] and include all the elements set out in the statute.[86] Thus he must allege and prove that he took possession under color of title,[87] in good faith [88] and adversely to the plaintiff.[89] There are very few reported cases in which the claim to set-off has been successful.[90]

The California doctrine of estoppel in improvement cases is also a restricted one. The leading case is *Biddle Boggs* v. *Merced M. Co.*[91] It was there held that in order for an estoppel to arise against the owner the following must appear:

1. That the party making the representation by his declarations or conduct was apprised of the true state of his own title.
2. That he made the representation with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud.
3. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge.
4. That he relied directly on such representation, and will be injured by allowing its truth to be disproved.[92]

[84] Yount v. Howell, 14 Cal. 465 (1859); Ford v. Holton, 5 Cal. 319 (1855); Trower v. Rentsch, 94 Cal. App. 168, 270 Pac. 749 (1928); Wood v. Henley, 88 Cal. App. 441, 263 Pac. 870 (1928); Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370 (1913). Of course if damages are sought but none awarded the set-off fails. Taliaferro v. Colasso, 139 Cal. App.2d 803, 294 P.2d 774 (1956).

[85] Moss v. Shear, 25 Cal. 38 (1864); Carpentier v. Gardiner, 23 Cal. 160 (1865) (alternative holding).

[86] White v. Moses, 21 Cal. 34 (1862).

[87] Martin v. Bartmus, 189 Cal. 37, 207 Pac. 550 (1922) (one who entered what he thought was open land, with the intention of acquiring title under preemption acts, lacked color of title); Love v. Shartzer, 31 Cal. 487 (1867) (same); Trower v. Rentsch, 94 Cal. App. 168, 270 Pac. 749 (1928) (land contract vendee in possession who defaulted).

[88] Wood v. Henley, 88 Cal. App. 441, 263 Pac. 870 (1928). In this case the court suggested that negligence in determining the facts as to the title might constitute lack of good faith.

[89] Hannan v. McNickle, 82 Cal. 122, 23 Pac. 272 (1889) (land contract vendee in possession not holding adversely); Bay v. Pope, 18 Cal. 694 (1861) (trespasser who thought he was on public land not holding adversely to private owner); Kilburn v. Ritchie, 2 Cal. 145 (1852) (one who entered under bond from owner to deliver a deed when a land has been surveyed does not hold adversely); Trower v. Rentsch, 94 Cal. App. 168, 270 Pac. 749 (1928) (land contract vendee in possession not holding adversely).

[90] Huse v. Den, 85 Cal. 390, 24 Pac. 730 (1890); Welch v. Sullivan, 8 Cal. 513 (1857).

[91] 14 Cal. 279 (1859), *appeal dismissed sub nom.* Mining Co. v. Boggs, 70 U.S. 304 (1865).

[92] [redacted] 14 Cal. 367-368.

The case involved land acquired by John C. Fremont from a grantee of the Mexican government. The grant was what was then called a "floating grant" in that it conveyed ten square leagues of an area of over one hundred, the grantee being given the power to choose which precise area he wished to take. After California became a part of the Union this grant was the subject of much litigation, as a result of which the title was confirmed in Fremont and made specific by a government survey. As located by the survey Fremont's land included that on which the defendant had erected and maintained gold mining and refining equipment costing over $800,000. These improvements had been built in reliance on an earlier survey made by Fremont in which he purported to choose land not including that developed by defendant. Fremont had published the survey and had told defendant that his land did not come within a mile of defendant's. However, after the government survey Fremont's lessee brought this action for possession.[93]

The case was originally heard by a California Supreme Court (Chief Justice Terry, and Justices Burnett and Field), which decided that defendant was entitled to continue in possession and mine the gold. Justice Field dissented. Subsequently Chief Justice Terry resigned, Field became Chief Justice and Baldwin and Cope became Associate Justices. On rehearing the court, by Chief Justice Field and Justice Cope, awarded possession to Boggs, Justice Baldwin not sitting because he had been of counsel to one of the parties. One of the defendant's strongest arguments on rehearing was that plaintiff was estopped by conduct and representations to claim the land occupied by defendant. A sympathetic court could easily have taken that view, but instead the extremely rigorous test above quoted was adopted. It has survived to the present day.[94] Consequently very few improvers have been successful in pleading estoppel.[95]

The net effect is that the trespassing improver was, until very recently, limited to the defensive remedies of set-off and estoppel in an action brought by the owner. Both of these defenses were so narrowly formulated and applied that they were, as a practical matter, seldom actually available to him. Professor Ferrier, in an article published in 1927,[96] drew attention to the problem and proposed a model betterment act similar to those in a number of other states, but no legislation re-

[93] It is difficult to avoid the impression that Fremont's interest in the land was quickened by the successful gold mining operations of defendant and that he used his influence in having that land included in the area described by the government survey. *Id.* at 356-361.

[94] *E.g.*, Taliaferro v. Colasso, 139 Cal. App.2d 905, 294 P.2d 774 (1956); see Leonard v. Flynn, 89 Cal. 526, 26 Pac. 1082 (1891); Stockman v. Riverside L. & Irr. Co., 64 Cal. 57, 28 Pac. 112 (1883); Love v. Shartzer, 31 Cal. 487 (1867); Maye v. Yappen, 23 Cal. 306 (1863); Green v. Freuyman, 17 Cal. 491 (1861). See also McGarrity v. Byington, 12 Cal. 426 (1859) and Ferrie v. Coover, 10 Cal. 589 (1858), both of which preceded the *Boggs* decision.

[95] Godeffroy v. Caldwell, 3 Cal. 489 (1852) preceded the *Boggs* case and thus escaped its influence. Of those which followed it only three held that an estoppel existed: Baillargé v. Clark, 145 Cal. 583, 79 Pac. 265 (1904); Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175 (1902); Pacific Imp. Co. v. Carriger, 6 Cal. Unrep. 884, 68 Pac. 315 (1902). The *Carriger* case is a sport. On the facts the doctrine of *Boggs* would prevent an estoppel arising. The opinion does not cite the *Boggs* case or any other authority. The *Beardsley* case is distinguishable in that the plaintiff actually participated in the improving process by selling materials to the defendant knowing they were to be used for that purpose. In the *Baillargé* case the estoppel was based on one of the "Maxims of Jurisprudence" set out in Part Four of the Civil Code. This one, enacted as Section 3519, provides that "He who can and does not forbid that which is done on his behalf, is deemed to have bidden it." The *Boggs* case is ignored by the court. There is no case in which the court applies the *Boggs* doctrine and finds an estoppel.

Two other estoppel cases deserve mention. In Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44 (1898), the court refused to estop the plaintiff because estoppel should be invoked against a municipality only in "exceptional cases," this not being an exceptional case. In Humboldt County v. Van Duzer, 48 Cal. App. 640, 192 Pac. 192 (1920), it was refused because the defendant had profited from using the land in excess of the expense of improving it and had not paid taxes on it. If these restrictions are added to those of the *Boggs* case it becomes almost impossible to find an estoppel in an improvement case.

[96] Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CALIF. L. REV. 189 (1927).

sulted. However, in 1953 Section 1013.5 was added to the Civil Code, providing:

> (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.[97]

The right of removal established by this section is obviously different than the right to compensation provided in the typical betterment acts. Minnesota is the only other state having a similar provision,[98] but Minnesota also has a betterment act.[99] California thus is unique among the states in its treatment of trespassing improvers.

[97] Cal. Stats. 1953, Ch. 1175, §2, p. 2674. The version set out in the text is as amended by Cal. Stats. 1955, Ch. 73, p. 514. The change was in the language of what is now paragraph (e) and does not alter the meaning of the original legislation in any significant way. Ogden states that "The enactment of this statute in 1953 was sponsored by the California Land Title Association as a necessary measure to relieve the hardship of the common law rule . . ." OGDEN, CALIFORNIA REAL PROPERTY LAW 12 (1956). At the same time Section 1013 was amended by [redacted] the last clause, which gave the owner the option to require the improvements to be removed.

[98] MINN. STAT. § 559.09 (1957).

[99] *Id.* §§ 559.10 - 559.18.

In 1953,

The statutory right to remove improvements has not been discussed in any reported case,[100] but certain of its features are obvious. It applies only to a good faith improver, but it does not require that he enter under color of title. Thus, unlike the set-off provided in Code of Civil Procedure Section 741, it is available to persons who improve the wrong property because of a mistake in its identity. There is no requirement that the improver hold adversely, and the provision that his mistake can be either of law or fact can be taken to intend that he not be held to the utmost diligence in determining the facts. Thus the relief afforded should be available to a larger group than could successfully defend by estoppel or plead set-off.

The remedy is limited, however, by the requirement that the improver pay the owner of the land and other persons whose interests might be affected all damages "proximately resulting from the affixing and removal of such improvements." The requirements of service of notice, *lis pendens* and payment of costs and attorneys' fees tend to make the remedy a cumbersome and expensive one and thus reduce its value to the improver. A final, and perhaps crucial, objection is that the improvement may be of a kind which cannot be removed at all or is valueless when removed but is of value to the owner of the land. Examples come easily to mind: painting a barn, digging irrigation ditches or drainage canals, clearing brush land, building a concrete driveway or patio. The "right of removal" in such cases is a useless right.

As recently as the *Taliaferro* case an appeal was made to the court to employ its general equity powers to provide relief to a good faith improver. Such a proposal is not entirely without merit, although its chances of success in California in the absence of legislation are very small. The attitude of courts and Legislature towards improvers has been an unfriendly one, as the limited nature of the remedies just discussed suggests. In addition, however, it was held in *Trower* v. *Rentsch*[101] and reiterated in the *Taliaferro* case that the existence of Code of Civil Procedure Section 741 prevents application to the improver cases of the general equitable maxim that he who seeks equity must do equity. Were it not for this holding the courts might logically have extended the principles developed in dealing with encroachment cases to the closely analogous improver disputes.[102]

[100] It is mentioned but not discussed in Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956).

[101] 94 Cal. App. 168, 270 Pac. 749 (1928).

[102] Encroachment cases are factually similar to and might be expected to receive the same treatment as the trespassing improver cases. However, the action brought usually is one to compel removal of the encroaching structure, and no claim is made that the defendant has lost ownership of the improvement to the plaintiff under Civil Code Section 1013. The equitable nature of the action, which is one for a mandatory injunction, thus dominates the proceeding, the court using what can best be called a "balance of hardship" approach. When the encroachment is slight and causes no great inconvenience to the plaintiff and its removal would be difficult and expensive, the California courts refuse to issue the injunction and leave the plaintiff to his remedy in damages. This approach is similar to that taken by RESTATEMENT, TORTS § 941, especially comment c (1939).
The following cases are representative: McKean v. Alliance Land Co., 200 Cal. 396, 253 Pac. 124 (1927) (Brick building encroached less than one inch. Injunction refused. $10 damages awarded); Phillips v. Isham, 111 Cal. App.2d 537, 244 P.2d 716 (1952) (Frame garage without foundation movable at slight expense. Injunction awarded); Morris v. George, 57 Cal. App.2d 666, 135 P.2d 195 (1943) (Concrete box encroaching 2 to 4 feet ordered removed since expense of doing so slight); Fay Securities Co. v. Mortgage G. Co., 37 Cal. App.2d 637, 100 P.2d 344 (1940) (Encroachment of one to six feet. Injunction refused because of laches); Ukhtomski v. Tioga Mutual Water Co., 12 Cal. App.2d 726, 55 P.2d 1251 (1936) (Encroachment covered ¼ acre of rural land. Injunction refused because of great expense and inconvenience of removal to defendant and slight importance to plaintiff); Blackfield v. Thomas (Alec) Corp., 128 Cal. App. 348, 17 P.2d 165 (1932) (One to 3½ inch overhang which would cost $6,875 to remove. Injunction denied and $200 damages awarded); Rothaerhal v. Amerige, 55 Cal. App. 273, 203 Pac. 833 (1921) (1¾ inch encroachment. Injunction denied); see Annot., 28 A.L.R.2d 679 (1953).

SHOULD THE LAW BE REVISED?

There is no easy answer to this question; the matter is one of legislative judgment. However, several factors which might be thought to bear on the exercise of that judgment are discussed here.

The Fixture Fallacy

The entire problem arises from rote repetition of an old Latin catchword phrase that has become, like so many Latin phrases, a powerful influence on our law. The maxim is "*Quicquid plantatur solo, solo credit.*" For several centuries it has been firmly embedded in the common law, and it is doubtful that any other slogan has been as troublesome as the dogma that what is attached to the land becomes part of it.[103] The history of the law of fixtures can accurately be described as a long, tedious and painful series of efforts to overcome its effect. Although the rule has been submerged by exceptions it survives today as Section 1013 of the Civil Code, where it stands firmly in the path of proper consideration of a number of legal problems it is inadequate to solve.[104]

The fixtures cases actually fall into separate categories, each of which involves entirely different considerations. Without attempting a full discusssion here it can be stated that the majority of the problems are of two kinds: the common ownership and the divided ownership cases.[105]

The common ownership cases are those in which the owner of the land also owns the chattel installed on the land. Typical questions are whether the chattel passes with a conveyance of the land or is subject to a mortgage of it. Application of the annexation maxim is a crude method of deciding these cases when the parties have failed to make express provision concerning the chattels.

The divided ownership cases, involving annexation by tenants, licensees, trespassers and conditional vendors, are of an entirely different nature. In them the problem becomes one of deciding whether the owner of a chattel by attaching it, or allowing it to be attached, to the land of another, thereby loses his ownership. Use of the maxim in these cases leads to loss of ownership by the mere fact of annexation, rather than merely to supplying a presumed intention when the parties have failed to express one, as in the common ownership cases. The unsuitability of the annexation test in divided ownership cases is amply demonstrated by the fact that, except as to bad faith trespassers, it is qualified by statute and decision in California. Tenants,[106] licensees,[107] good faith trespassers[108] and conditional vendors[109] are all allowed to remove their annexations to the land of another. Thus the annexation test is almost entirely excepted away in the divided ownership cases.

Such cases are still dealt with, however, as exceptions to an otherwise universal and valid rule. The premise is that the maxim states a universal truth lying at the heart of the law of property and that any alteration of it must be carefully limited and confined. Hence the reasoning in the *Billings* case, holding the California Settlers' Act unconstitutional, and the restricted interpretations given Code of Civil Procedure Secton 741 and the defense of equitable estoppel.

---

[103] For a discussion of the origin of the maxim and the difficulty it has caused see Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L.Q. Rev. 560 (1934); Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 So. Cal. L. Rev. 21 (1952).

[104] Section 1013 is particularly objectionable because it is stated in terms which make it applicable solely to the divided ownership cases. These are the ones in which the maxim is most troublesome.

[105] See 5 American Law of Property §§ 19.1-19.16 (Casner ed. 1952) and Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L.Q. Rev. 66 (1934), for general discussions. Application of this analysis to the California law is set out in the article by Horowitz, *supra* note 103.

[106] Cal. Civ. Code § [redacted] 1019.

[107] Taylor v. Heydenreich, 92 Cal. App.2d 684, 207 P.2d 599 (1949).

[108] Cal. Civ. Code § 1013.5.

[109] The right of the conditional vendor to remove his fixtures is subject to the rights of subsequent purchasers or encumbrancers of the land without notice of his separate ownership. The leading California case is Oakland Bk. of Sav. v. California P. B. Co., 183 Cal. 295, 191 Pac. 524 (1920).

History

It has been shown above that the rules concerning improvers came into the common law from the Roman law through Azo, Bracton, *Fleta* and *Britton*. The rules stated by these writers were based on the writings of their predecessors and not, so far as can be determined, on any actual English authority. Each succeeding version of the Roman law was more garbled than its predecessor. Following *Britton* the problem almost entirely disappeared from the English law, finally emerging again in the United States in the nineteenth century. In this country, on authority which is at best extremely dubious, the impression was created that there was a clear, firm rule in the English common law received in the Colonies. As a matter of legal history this impression was unwarranted. The California law of today is based on this dubious historical development. To the extent that it is supported by an assumption of historical growth and development in the English common law its foundation is insubstantial.

More recently, during the early years of statehood, the California law acquired a character and history of its own. At that time land titles were unsettled and much property was the subject of dispute between squatters, on the one hand, and claimants under Spanish and Mexican grants on the other. The battle between these factions was waged on political and legal fronts as well as in actual physical conflict. Out of this context it is not surprising that a rigid and somewhat uncompromising victory should have been achieved by the winners at the expense of the vanquished. Since the legal battles were won by the grantees the resulting law set itself sternly against the squatters.

Whether this result was right at the time is irrelevant. The point is that rules developed then in order to deal with a peculiar problem of social order are not necessarily appropriate to the California of today. The squatter problem is now well in hand. Titles are, on the whole, settled. Boundaries are clearly marked or at least easily ascertainable. Public lands can readily be distinguished from private lands. Land records are more complete, accurate and accessible. The services of title companies are available (at a price). The problem of the trespassing improver today is an entirely different one than that of 100 years ago.

Informed Opinion

The great majority of the states, as well as the civilized nations whose modern civil codes are based on the law of Rome, have taken a much more liberal attitude toward the trespassing improver than California. Commentators on the California rules generally criticize them for their rigidity and illiberality.[110] No authority has been found in which, after measured discussion, the *status quo* is thought to be satisfactory. To the extent that informed opinion exists and has been expressed its weight is against the California law.

A decision whether or not to give serious consideration to proposals for revising the California law depends on one's judgment as to the importance of these factors. In the writer's opinion they make an impressive case for revision. What follows is a discussion of the form such revision might take.

[110] Gordon, *op. cit. supra* note 97; Ferrier, *supra* note 96; Horowitz, *supra* note 103.

OBJECTIVES OF REVISION

Broadly stated the purpose of revision should be to substitute for the existing law a new method of solution which is responsive to the criticisms developed above. This purpose may be more specifically considered in the context of three hypothetical cases.

> *Case 1.* *X*, a clever imposter, posed as the owner of the land in question and forged a deed to *T*, who paid $15,000 in good faith. *T* cleared and drained the land at a cost of $10,000 and built a house and dairy barn on it at a cost of $50,000. Both the house and the barn have concrete slab foundations containing the plumbing, electrical, heating and sewer systems. Removal of either building will wreck it. The unimproved land is worth $15,000; as improved it is worth $65,000. *X* has absconded. The owner now brings an action to quiet title and recover possession.

On these facts *T* is out of luck under California law. Although he took possession under color of title in good faith and might be said to hold adversely he has no right of set-off because the plaintiff does not seek damages. His right of removal is of little or no value. There is no basis for an estoppel. *T* is $75,000 poorer. The owner has received a windfall of $50,000 at *T*'s expense and *T* is entirely without fault. The case is a hard one; it would not seem entirely illogical to try to find some solution which is less harsh to *T* while still holding the owner harmless.

One possible approach is to withhold possession from the owner until he pays *T* the cost of the improvements or the increased value of the land due to them, whichever is less (in this case $50,000). If the owner did not wish to pay for the improvements then *T* could be given the option of purchasing the land for its unimproved value. Fair terms could be set for payment, with unpaid amounts bearing a reasonable rate of interest. As an alternative the parties could be made tenants in common, the interest of the owner being $15,000 and that of *T* $50,000, or an equitable lien could be placed on the land in favor of one or the other. In any case the owner should also be given judgment for the reasonable rental of the land in its unimproved state up to the time of the action. In this way the owner would lose nothing and *T* would lose $25,000, rather than $75,000. The solution is not perfect, but it attempts to protect the property interest of the owner and, at the same time, give some measure of relief to the innocent trespasser. Under California law no such solution is now possible.

If the facts are slightly altered the case becomes more difficult. The owner may not wish to sell and may have no interest in operating a dairy farm. He might prefer to leave the land in its natural state or to use it for some other purpose for which the improvements are valueless. The case now becomes a classic one of relative hardship, in which no solution is ideal but some solution is necessary.[111] The owner's interest is in using and disposing of his property as he wishes, subject only to certain well-established limitations. On the other hand is the idea that the law should not be the instrument by which undeserved enrichment comes to one person at the expense of another who is entirely without fault.[112] Shall the owner's desire to use his land as he wishes be allowed to prevail, so that *T*'s investment of $75,000 is entirely lost, or must it give way to some extent to the equities of *T*? The encroachment cases, which are treated according to equitable principles, are a good analogy.[113] It should be equally possible to give the court in the improver cases power to frame a decree which, under the facts, does as much justice as the case will permit.

[111] See discussion of relative hardship in RESTATEMENT, TORTS § 941 (1939).
[112] See discussion in RESTATEMENT, RESTITUTION, Introductory Note and §§ 1, 2 (1937).
[113] These are briefly discussed *supra* note 102 and accompanying text.

There are a number of facts which could raise additional questions. What of the income received by T from his use of the property? Should it be considered where it has been substantial and has, to some extent, amortized his investment in improvements?[114] How shall good faith be defined? If the problem arises because of T's negligence or stupidity should the court be less considerate of him?[115] What of the owner's own responsibility; are there facts which indicate that he allowed the situation to develop? Suppose he stood by while T improved; it seems clear that the *Boggs* case should be overruled to the extent that it would prevent the court considering such deliberate inaction as a factor in framing the decree.[116] Who has paid taxes and assessments, and what effect should this have?[117] What if the improvements are easily removable and will retain their value if removed? Or suppose some are of this kind and others not so?[118] What damage was caused by the trespass?[119] Suppose the improvements were erected on public rather than private land?[120] Who shall pay costs? Shall attorney's fees be awarded to one of the parties as part of the remedy?[121] Does a third person own or have an interest in the chattels installed?[122]

[114] In Humboldt County v. Van Duzer, 48 Cal. App. 640, 192 Pac. 192 (1920), the fact that defendant's profits from the land exceeded his expense in improving it, coupled with the fact that, since it was public land, he paid no taxes on it, were given as reasons for refusing to find an estoppel against the owner. While such facts do tend to show that the loss suffered by the plaintiff is less than it otherwise might be, two questions are raised by this reasoning: (1) Could the court's point not be more precisely made by charging the improver a reasonable rental for the period of possession and requiring him to pay for any loss in value of the premises due to his acts? (2) The plaintiff still receives a windfall at the expense of a good faith improver. Should the law require this result?

[115] The distinction between good and bad faith trespassers, particularly when complicated by such concepts as inquiry, notice, negligence, recklessness and malice, is both artificial and difficult to apply. Any attempt to draw a clear line is bound to fail. There are an infinite number of possible cases between the extremes of malicious bad faith and utterly blameless good faith. Dividing them into two groups is arbitrary, particularly when the names traditionally attached to these groups ("good faith" and "bad faith") have such obvious ethical overtones. But if it is assumed that this line must be drawn, does it follow that all those within either group must be treated in exactly the same way? If bad faith trespassers are to be left entirely without a remedy need it follow that all good faith trespassers be treated alike?

[116] One difficulty with the present California law is that it usually ignores the facts on one side of the problem. The owner's acts and the extent of relief needed to protect his interests are proper considerations in the case, but they are seldom given adequate attention. Instead the law looks to the acts of the improver and bases its remedy solely on them. Relaxation of the rigid attitude toward estoppel is one obvious step toward improving the law, but only if the result is to allow the owner's acts or his inaction to be considered as one of a number of factors which properly affect the form of relief given. It should not follow that because the owner has been somewhat at fault he is entirely without a remedy. This, like the good faith-bad faith dichotomy, is much too crude.

[117] The amount of taxes and other charges paid might most effectively be considered in determining the rent to be charged the improver for the period of his occupation. If the owner has paid them the rental should be large enough to allow for this fact.

[118] If the improvements can be removed without doing permanent injury to the land and without their own destruction it would seem proper to allow, or even require, their removal, depending on the owner's wishes. But to require the removal of improvements which would be destroyed by removal is unsatisfactory as a remedy and results in economic waste. The appropriateness of removal depends on the facts of the case.

[119] Unless the trespass is to some extent the fault of the owner it would seem clear that the damages should be found and credited to him as one element in the ultimate relief granted.

[120] In other jurisdictions there appears to have been a tendency to treat trespassing improvers more kindly when the land was publicly owned. See 5 AMERICAN LAW OF PROPERTY § 19.9 (Casner ed. 1952). In California the cases speak as if public ownership of the land has the opposite effect of diminishing the equities of the improver. Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44 (1898); Humboldt County v. Van Duzer, 48 Cal. App. 640, 192 Pac. 192 (1920). If a major consideration is protection of the right of "private property" it would seem that public ownership is a proper distinguishing factor and that it should operate in favor of, rather than against, the improver.

n.5

[121] It will be recalled that the improver pays costs and attorney's fees if he wishes to assert his right of removal under Civil Code Section 1013.5. In general it would seem that if the owner is not at fault, either because of his acts or his failure to act, such costs should be paid by the improver.

[122] In other jurisdictions the common law rule that annexations belong to the owner of the land does not apply where the article annexed belonged to a third person, was attached without his consent and could be removed without irreparable injury to the owner's property. See 5 AMERICAN LAW OF PROPERTY § 19.9, at 26 (Casner ed. 1952). There are no California cases in point. The typical case of annexation of a chattel in which a third person has an interest and knows it is to be attached is the conditional sale of a fixture. See id. § 19.12. California has taken a position on these cases similar to that in other states. See note 109 *supra*. In either type of case it is of course necessary to protect the interests if persons who take interests in the land in good faith, relying on the presence of the improvements as part of it.

The number and variety of these questions make it obvious that an adequate statute must be extremely complex and detailed if it is to anticipate and prescribe reasonable solutions for all conceivable variations of the problem.

> *Case* 2. *T* purchased lot 26 in a newly subdivided tract. He built a home on lot 27, solely because he mistook it for lot 26. Both lots were vacant at the time. The mistake only became apparent when a proposed purchaser of lot 27 pointed out to the subdivider that it was occupied by *T*. *S*, the subdivider, now brings ejectment against *T*. *T* has spent $10,000 for the lot and $20,000 in building a home on it. The improved value of the land is $35,000.

As the law stands *T* is not entitled to any relief and is consequently out of pocket $20,000. *S* will acquire the house free of charge. It is another hard case. But not quite as hard as the bad deed case. Here the problem arose because of *T*'s mistake. It is the sort of mistake that could easily have been prevented. He could have taken the precaution of determining precisely which lot was his, ordinarily a simple enough matter, particularly on subdivided land. There is less reason for the wrong lot cases than there was a century ago. In most areas of California a landowner can quickly and cheaply learn the exact location and boundaries of his land. His failure to do so borders on negligence.[123] On the other hand, *S* is still receiving a windfall of $25,000; in the absence of any substantial equity in *S* there is no reason to reward him so handsomely for *T*'s mistake. The best solution in the case given might be to require *S* to sell lot 27 to *T* at its unimproved value. This could make both *T* and *S* whole.

Other wrong lot cases can be imagined in which there are obvious equities in the person on whose land *T* has mistakenly built. If this occurred it would be necessary to consider some compromise solution, and the fault of *T* might become an important factor limiting the extent of his relief. There are many possible variations, all of which might become relevant in the proper case. As in the bad deed cases, it seems desirable to give the court the power to frame a decree which fits the precise facts before it and attempts to do substantial justice to the parties. It seems doubtful that any statute could be drafted that would satisfactorily anticipate and specifically dispose of all the problems that might arise.

> *Case* 3. *T* goes on land which he knows, or should know but for his recklessness, belongs to someone else. He spends $10,000 in improvements, as a result of which the value of the land is increased by $10,000. *O* now brings ejectment.

T could be classified as a bad faith trespasser under the law of any jurisdiction and would be entitled to no relief under California law. Here the enrichment of the owner is offset by two considerations: the lack of any excuse for *T*'s conduct and the danger to the institution of private property of allowing deliberate trespassers to acquire some claim against the owner of the land by officiously improving it.[124] Consequently it is not entirely illogical to withhold all relief from *T* in such a case.

[123] In the *Tolloferro* case, on similar facts, the court did not discuss this factor and appeared to think the trespasser was entirely without fault. Compare Maye v. Yappan, 23 Cal. 306 (1863) (where party has means of determining boundary line he is guilty of negligence in not ascertaining its location); Ferris v. Coover, 10 Cal. 589 (1858) (no estoppel where trespasser has means of ascertaining title in recorder's office.

[124] Or, as a colleague has put it, "Should a barn painter who is out of work be able to make a living by going around painting barns without the assent of their owners?"

However, there is authority in California to the effect that a deliberate trespasser is liable for punitive, as well as actual, damages.[125] If this is so it can be argued that any general tendency on the part of individuals to acquire claims against the land of others by deliberately improving it can be discouraged by awarding both actual and exemplary damages for the trespass. If they are also required to pay a reasonable rental for the period of their occupation of the land, and if the extent of their equity is limited to the cost of the improvements or the increase in value of the land, whichever is less, then they should be amply discouraged. *T*, in the case given, would recover something less than his investment and might, if the court chose, find himself limited to a right to buy the land for its present unimproved value and still be required to pay rents and actual and exemplary damages. Forfeiture does not seem necessary in order to protect private property from such trespasses.

The other opposing consideration is that the problem has been created by *T*'s deliberate, inexcusable act. Consequently he has few, if any equities. If there are facts which indicate that a forced sale of the improvements to the owner, or of the land to the improver, would interfere with some substantial interest of the owner the balance would necessarily be against the improver. However it still might be desirable to allow the improvements to be removed, if they are removable, and limit the owner to recovering rents and damages for the trespass or to allow the value of the improvements (or their cost) to be set off against rents and, possibly, damages. The point is that the wilfulness, malice or recklessness of the trespasser can be of varying degrees, and the extent of inconvenience to the owner can likewise differ from case to case. It seems desirable to leave some latitude to the court in dealing with the precise facts of the case before it, rather than to establish some blanket rule applicable to all deliberate or reckless trespassers in all kinds of cases.

Each of the above cases has assumed that the only parties interested in the dispute are the owner of the land and the trespassing improver. The matter becomes somewhat more complex if other parties are involved. For example, the land may be subject to a mortgage at the time the improver comes on it. If so it would be necessary to allow the mortgagee to appear in order to protect his security interest in the land. There might be no danger to his interest, because the remedies suggested would usually leave the owner of the land and those claiming under him in at least as good a position as they were before the trespass. However, if the remedy were to include a sale of the land to the trespasser, as it well might, the mortgagee should be given an opportunity to participate in the proceeds of the sale. Other situations are conceivable in which it would be equally desirable to allow him to appear. As a general rule provision should be made for notice to the mortgagee in any such action.

[125] CAL. CIV. CODE § 3294; Morgan v. French, 76 Cal. App.2d 785, 161 P.2d 809 (1945); Griffin v. Northridge, 67 Cal. App.2d 69, 153 P.2d 806 (1944). Although it has been held that allegation and proof of actual damage is a condition to the award of exemplary damages it would always be possible to show that actual damage had occurred as a result of the trespass. See Comment, *Nominal Damages as a Basis for Awarding Punitive Damages in California*, 3 STAN. L. REV. 341 (1951).

If a mortgage is taken or the land is purchased by a third person after the improvements have been made a somewhat different problem arises. The danger is that the improvements will have been relied on by the encumbrancer or purchaser without notice of the claim of the improver. Ordinarily this would not be a serious problem, since the possession of the trespasser would be sufficient to require the prospective purchaser or encumbrancer to inquire concerning his interest.[126] Consequently the case usually differs from the prior mortgagee problem only when the improver or one claiming under him is not in possession. In those cases it would be necessary to protect the person who has taken an interest in the land in reliance on improvements which appear to be part of it and who has paid value for them as a result of his reliance. This could easily mean that the improver would be left entirely without a remedy, not because he trespassed, but because he was responsible for creating a situation which misled a good faith purchaser of an interest in the land.[127]

FORM OF REVISION

On the whole the approach of the betterment acts in other states is in the direction indicated in this discussion. Legislation which adopted a similar approach would thus not be a bold new experiment on California's part but merely a belated recognition of factors which have been accepted in other jurisdictions.

Appropriate revision involves two steps: abolition of certain undesirable aspects of the existing law and substitution of a new method of dealing with the cases. The first step can be accomplished in part by statutory amendment and repeal. Specifically, Code of Civil Procedure Section 741 should be repealed. It affects only the improver cases and its continued existence is incompatible with the objectives of revision. In addition, two decisions have held that the otherwise applicable principles of equity are inapplicable to improver cases because this section exists.[128] Its repeal would thus remove the premise of these decisions. Section 1013.5 of the Civil Code, which provides for a right of removal in some situations, should also be repealed. While such removal might be appropriate in certain cases it seems better to include it as only one possible form of relief under the proposed new legislation than to permit it to exist independently in the code. Civil Code Section 1013 should then be amended to delete the reference to the right of removal under Section 1013.5. As amended it should read as follows:

> When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land.

The extremely narrow restriction of the doctrine of estoppel in improver cases originated in *Biddle Boggs* v. *Merced M. Co.* and perpetuated in later cases[129] should also be changed. This can be accomplished by the use of appropriate language in the new statute.

Mining

The second stage of revision, substitution of a new method of disposing of the improver cases, is a matter of greater complexity. It has already been indicated that the view taken of these cases is that they require exercise of equitable powers developed to deal with "unjust enrichment." They are, in other words, restitution problems. The suggestion is that they be treated according to the principles applicable to other cases in which one person mistakenly confers a benefit on another.

[126] Compare the analogous treatment of purchasers or encumbrancers of land improved by tenants in possession. 5 AMERICAN LAW OF PROPERTY § 19.11, at 46 (Casner ed. 1952).

[127] The principles are the same as those governing the improvements of licensees, tenants and conditional vendors. See 5 AMERICAN LAW OF PROPERTY §§ 19.10 - 19.12 (Casner ed. 1952).

[128] See note 101 and text *supra*.

[129] See notes 91-95 and text *supra*.

The *Restatement of Restitution* considers this type of problem in Sections 40-42. Section 42 deals specifically with the improver cases and takes the traditional American view that the improver is limited to a set-off against damages unless the owner is at fault or unless the owner seeks equitable relief. However, Comment *a* to that section states:

> The rule stated is consistent with the common law principle that a person who intermeddles with the property of another assumes the risk as to his right to do so, and it is consistent with the rules with regard to trespass and conversion. *It is, nevertheless, not wholly consistent with the principles of restitution for mistake,* and in spite of the occasional hardship to the recipient, its harshness to the one rendering the services has been substantially relieved, in most cases, either by statute or by equity. (Emphasis added.)

This philosophy is consistent throughout Sections 40-42. Benefits rendered other than money paid are not dealt with in the same way as other restitution cases because, historically, they have not been. It is also suggested that

> frequently it would be unfair to the person benefited by services to require payment since, although benefited, he reasonably may be unwilling to pay the price; he does not have the opportunity of return, which usually exists in the case of things received, nor the definite and certain pecuniary advantage which ensues where money has been paid.[130]

The difficulty of requiring the recipient to pay for the improvements can, of course, be met in other ways. The most obvious is to give him the option of selling the land to the improver at its unimproved value, although the result sought might be obtained in appropriate cases by making the parties tenants in common or by imposing an equitable lien on the land in favor of the improver. If he wishes to pay for the improvements (at a value which will usually be quite favorable to him) the court can establish reasonable terms for deferred payment. If the improvements are easily severable without their own destruction the "opportunity of return" is available as one aspect of relief. The basis for valuation of the improvements which remain will be the cost of labor and materials or the increase in value of the land to them, whichever is less. This would necessarily insure no less than that "definite and certain pecuniary advantage which accrues where money has been paid."

Perhaps the most effective observation on the fears expressed in the *Restatement* is that the betterment acts in most states include provisions of the kind here advocated.[131] Indeed, it is possible to read such acts as attempts to achieve, through legislation rules similar to those applying in the absence of legislation to other unjust enrichment cases. Such legislative reform has been necessary in order to correct the peculiar historical development outlined above. No substantial reasons of policy have been advanced for continuing the existing law.

[130] RESTATEMENT, RESTITUTION §40, comment *a* (1937).
[131] See notes 53-70 and text *supra*.

Consequently one possible approach to the problem of revision is a very brief general statute placing the improver cases in the equity jurisdiction of the courts, to be decided according to traditional restitution doctrine and procedure. It would not attempt to state in any detail the cases to be so treated or the remedies to be decreed. This would be left to the judge. He would simply be directed to frame a decree which, on the facts of the case, most nearly achieved the ends traditionally sought by courts of equity in restitution cases.

One argument for such a statute is that it is brief and general. The hazards of legislative drafting are such that the longer and more detailed the law the greater the possibility of using language which will produce unintended results. The odds are against the draftsman in the longer statute with the more detailed provisions. They are with him in the short, generally phrased draft.

A similar but more substantial argument is that this problem is so complex and the possible variations so numerous that it is not possible to anticipate all the cases. A detailed statute will contain provisions so precise as to make adjustment for unforeseen cases very difficult without additional legislation. The general directive type of statute assumes that such adjustments are part of the normal process of decision and that the court will make them. Thus the possibility of appropriate relief in the individual case is greater. This is, after all, the method of the common law.

Finally it can be argued that the improver cases do not require the same kind of certainty and predictability in the law as do other problems. The improver is not expected to have relied on the law in acting. He has, at least in the good faith cases, made a mistake which the betterment act could not have prevented. Such cases are different from those in which the law is intended to provide persons with the means of determining the legal effect of proposed action. For example, it makes sense to know whether an instrument when issued is or is not negotiable. The issuing party performs a deliberate act and can be expected to do so on the basis of the rules. In such situations it is frequently more important that the rule be definite and precise than that it be just. But in the improver cases this is not true.

Unfortunately, in California there is not much accumulated learning on the subject of unjust enrichment.[132] A statute of the type suggested would be an "empty" statute; it would not carry with the reference any great body of law. Thus neither counsel nor the court would be given much guidance by such legislation until it had been supplied with content by the trial and error of litigation. Perhaps this might be thought to place too much confidence in the judicial process. The good lawyer and the good judge both could be expected to read and apply such a statute reasonably well, but the argument has been made that they are in the minority. If so it might be better to give up the opportunity for creative use of the legal process in favor of detailed legislative directions which the poor lawyer or judge could not easily misunderstand or misuse.

[132] The development of restitution doctrine in California law has been limited in scope and extent, compared to the development in some other states. Although California cases can be found which appear to support almost any restitution doctrine they do not, taken as a whole, provide a sturdy base on which to build. It is the rare problem that has been explored in depth by the California courts. See generally RESTATEMENT, RESTITUTION, CALIF. ANNOT. (1940). One example of such an exception is the group of cases providing relief from forfeiture for the vendee's breach of an executory contract to purchase land. See Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957); Union Bond & Trust Co. v. Blue Creek Redwood Co., 128 F. Supp. 709 (N.D. Cal. 1955); Freedman v. The Rector, 37 Cal.2d 16, 230 P.2d 629 (1951); Baffa v. Johnson, 35 Cal.2d 35, 216 P.2d 13 (1950); Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367 (1949); Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898); Comment, 2 STAN. L. REV. 235 (1949); Note, 40 CALIF. L. REV. 593 (1952); [25 So. CAL. L. REV. 387 (1952).] Note,

At the opposite extreme is the statute which attempts to spell out in detail what it hopes to accomplish. Its weaknesses are the brief general statute's strengths, and vice versa. The attempt to anticipate all variations of all cases is bound to fail. The detail this involves magnifies the problem of the unforeseen case. The hazards of drafting are greatly increased. The opportunity for individual justice is greatly reduced. The end result is loss of the opportunity for adjustment to the demands of the individual case. The advantage is that the hazards of the judicial process are greatly reduced. The judge is left with the mechanical job of supervising the finding of facts and is given little or no discretion to decide what the consequences of these facts should be. Persons who think that judges should be little more than referees and that the law should be "made" only by legislatures should be attracted by such a statute.[133]

The type of revision most strongly recommended for consideration by the Law Revision Commission is a third possibility which lies between these extremes. Such a statute would provide a framework for decision, thus giving the lawyer and judge an indication of the ends sought and the relief to be granted. At the same time it would leave the court some latitude in framing a decree which would meet the requirements of the case before it. In this way the advantages of both extremes could be retained while minimizing their disadvantages.

[133] It is worth noting that the jurisprudential problems inherent in a choice between the general directive and the spelled-out approaches to statute law have not received other than incidental discussion. As the text indicates, the question necessarily involves consideration of fundamental notions about the functions of courts and legislature, but thoughtful analysis of the matter is hard to find. For recent typical comments see Nutting, *Research for Legislation* in AIMS AND METHODS OF LEGAL RESEARCH 35, 38-40 (Univ. of Mich. 1955) and the commentary on Nutting's remarks by Jones, *id.* at 44-47.