

3/14/66

## First Supplement to Memorandum 66-16

Subject: Study 42 - Good Faith Improvers

Attached to Memorandum 66-16 is a revised tentative recommendation that, we believe, meets the various objections made to the tentative recommendation on good faith improvers that was considered at the February meeting. We believe that the revised tentative recommendation will provide a good legislative scheme for solving the good faith improver problem. The proposed legislation in the revised tentative recommendation provides a considerable degree of certainty in the ordinary good faith improver case and, at the same time, permits the court broad discretion in framing a decree in cases that cannot be resolved using one of the three statutory remedies (the right of set-off, the right of removal, and the so-called buy-sell choice of the owner of the land).

Nevertheless, in order that the Commission will have before it another possible solution to the problem, we have prepared the attached statutory provisions which provide, in substance, that the court may provide whatever equitable relief it considers appropriate in any case where leaving the good faith improver to his right of set-off or right of removal would not result in substantial justice under the circumstances of the particular case. The alternative statutory provisions are attached to this supplement as Exhibit I.

We believe that the revised tentative recommendation attached to Memorandum 66-16 is a better solution to this problem because, in the ordinary good faith improver case, the statute would provide a clear statement of the rights of the various parties and would permit settlement of the case without need for a court determination. Under the alternative statute attached to this supplement, in almost every case the parties will have to go to court to determine the type of relief that is appropriate.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

EXHIBIT I

An act to add Sections 740.5 and 741.5 to, and to amend Section 741 of,  
the Code of Civil Procedure, relating to a good faith improver  
of property owned by another.

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

SECTION 1. Section 740.5 is added to the Code of Civil Procedure, to read:

740.5. (a) As used in Sections 741 and 741.5, "good faith improver" means:

(1) A person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes an improvement to land owned by another person.

(2) A person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is entitled to possession of land under a lease for a period of not less than 25 years, affixes an improvement to land to which another person is entitled to possession.

(b) As used in this section, "person" includes a natural person, firm, association, organization, partnership, business trust, corporation, the United States, a state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

Comment. The definition of "good faith improver" in Section 740.5 is similar to the description given in Civil Code Section 1013.5 of a person who has a right to remove improvements affixed to the land of another. However, this section, unlike Section 1013.5, is clearly limited to a person who believes he is the owner of the land or the owner of a long term lease on the land. Section 1013.5 not only applies to such persons, but may also apply to licensees, tenants, and conditional vendors of chattels. See Note, 27 SO. CAL. L. REV. 89 (1953).

This definition provides a subjective standard of good faith. Thus, actual notice is the test of good faith; the improver would not meet the good faith test if he had either actual knowledge of an outstanding paramount title or actual knowledge of any circumstance that reasonably should cause him to suspect that his own title or long term lease was invalid or that he was constructing the improvement on the wrong site.

Subdivision (b) is included to make it clear that relief is available under this chapter to a public entity that is a good faith improver and to a good faith improver who constructs an improvement on land owned by a public entity.

SEC. 2. Section 741 of the Code of Civil Procedure is amended to read:

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

Comment. Section 741 is amended to eliminate the "color of title" requirement and substitute the standard set out in new Section 740.5, thus making Section 741 consistent with Civil Code Section 1013.5 which is a later enactment. See the Comment to Section 740.5. Thus, the limited protection afforded by Section 741 is extended to include the wrong lot cases, i.e., the cases where the defendant owns one lot but builds on the plaintiff's lot by mistake.

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

SEC. 3. Section 741.5 is added to the Code of Civil Procedure, to read:

741.5. (a) A good faith improver or his successor in interest may bring an original action in the superior court or may file a cross-complaint in a pending action in the superior or municipal court for such relief as he may be entitled to obtain under the general equity power of the court.

(b) Section 741 of the Code of Civil Procedure and Section 1013.5 of the Civil Code are not the exclusive remedies available to a good faith improver or his successor in interest, but the court shall not grant relief under subdivision (a) of this section in any case where the right of set-off under Section 741 of the Code of Civil Procedure or the right to remove the improvements under Section 1013.5 of the Civil Code provides the good faith improver or his successor in interest with a remedy the exercise of which would result in substantial justice under the circumstances of the particular case.

Comment. Subdivision (a) is based on Code of Civil Procedure Section 1060 relating to declaratory relief. Subdivision (b) changes the existing rule that the "right of set-off" under Section 741 of the Code of Civil Procedure and the "right of removal" under Section 1013.5 of the Civil Code are the exclusive remedies available to a good faith improver. See Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956).

Under Section 741.5, in any case where the right given the good faith improver by Code of Civil Procedure Section 741 or Civil Code Section 1013.5 provides him with a remedy the exercise of which would result in substantial justice under the circumstances, the court has no authority to

grant any other form of relief. But in other cases, Section 741.5 brings the general equity power of the court into play and authorizes the court to frame a decree that will provide the form of equitable relief that is appropriate under the circumstances of the particular case.

SEC. 4. This act applies to any action commenced after its effective date, whether or not the improvement was constructed prior to its effective date. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

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

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

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

For this reason, the rigid common law rule has been modified in the great majority of jurisdictions, in varying degrees, to protect one who makes improvements under a good faith belief that he has a right to the land. Although only a very few states have changed the common law rule by judicial decision, at least 35 states and the District of Columbia have enacted statutes--known as "occupying claimants acts" or "betterment acts"--which modify the common law rule to provide relief to the good faith improver. Similar statutes have been enacted throughout Canada. California enacted a betterment act in 1856, but it was declared unconstitutional by a divided court in Billings v. Hall, 7 Cal. 1 (1857).

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



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

The present California law is more harsh than the law in most other states. Barring circumstances which give rise to an estoppel against the landowner, a good faith improver apparently has no rights beyond those accorded him by Section 741 of the Code of Civil Procedure and Section 1013.5 of the Civil Code. Section 741 permits a good faith improver to set-off the value of permanent improvements against a claim of the landowner for damages for the use and occupation of the land. If the landowner does not seek to recover such damages, the improver cannot recover the value of the improvements at all. Section 1013.5 permits a good faith improver to remove the improvements if he compensates the landowner for all damages resulting from the affixing and removing of the improvements.

The case of Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956), illustrates the unjust results that occur under the present California rules. In that case, a house was built by mistake on lot 20 instead of lot 21. The owner of lot 20 brought an action to quiet title and for eviction against the defendant who was the successor in interest of the person who built the house. The trial court awarded the landowner judgment quieting title and for eviction on the condition that he pay to the defendant the sum of \$3,000. The district court of appeal affirmed the judgment insofar as it awarded the landowner possession of the lot and the house, but reversed insofar as the judgment required him to pay the defendant \$3,000 as a condition for obtaining possession. The appellate court held that the "right of removal" under Civil Code Section 1013.5 and

the "right of set-off" under Code of Civil Procedure Section 741 were the exclusive forms of relief available to a good faith improver and that, for this reason, the general equity power of the court could not be brought into play. As a result, the landowner obtained possession of the lot and house without any compensation to the defendant for the value of the house.

The Taliaferro case demonstrates that the existing California law is inadequate in cases where the improvement is one which cannot be removed at all or one that is of little value when removed but of considerable value if it remains on the land. The "right of removal" in such cases is a useless right and the "right of set-off" does not assure that the landowner will not receive an unjustified windfall.

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

#### RECOMMENDATIONS

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

1. Relief in a trespassing improver case should be available only to one who is a good faith improver. The statute should define a good faith improver as "a person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes an improvement to land owned by another person."

A person who constructs an improvement in good faith but erroneously believing that he has a long term lease (at least 25 years) on the land on which the improvement is constructed also should be considered a good faith improver.

The recommended good faith improver definition is based on the standard contained in Civil Code Section 1013.5. Like Section 1013.5, the recommended definition provides a subjective standard of good faith. This is consistent with the interpretation generally given the betterment acts in other states. Usually it is held that actual notice is the test of good faith; i.e., the improver may not have actual knowledge of either an outstanding paramount title or of any circumstance that reasonably should cause him to suspect the invalidity of his own title. See SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 55 n.86 (1953). Of course, the improver has the burden of proof to establish that he is a good faith improver.

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

2. The good faith improver should have the right to bring an action (or to file a cross-complaint in a pending action) to have the court determine the rights of the parties in the land and the improvement. This will permit the good faith improver to institute an action whether or not he is in possession of the property and will permit him to request equitable relief by a cross-complaint in a quiet title or similar action brought by the land-owner.

3. When a good faith improver requests equitable relief, if the court determines that the exercise of the right of set-off (Code of Civil Procedure Section 741) or the right to remove the improvement (Civil Code Section 1013.5) would result in substantial justice under the circumstances of the particular case, it is neither necessary nor desirable for the court to resort to other forms of relief. Hence, no additional forms of relief should be available in such cases.

4. To provide relief in cases where the exercise of the right of set-off or the right of removal would not result in substantial justice, the court should be authorized to grant such equitable relief as is appropriate in the particular case. However, in order to provide some certainty in the type of relief that should be granted in the ordinary good faith improver case, a statutory provision should be enacted which would adopt the best features of the betterment acts now in force in most states. Such a provision should provide in substance that the landowner is required to choose whether to purchase the improvement or to sell the land at its unimproved value to the improver. The landowner should be forced to make this choice only if the value of the improvements and the amount of taxes and special assessments paid by the improver exceed the value of the use and occupation of the land and the expenses to the landowner (including reasonable attorney's and appraisal fees) in the action to determine the rights of the landowner and the improver. Nearly all of the betterment acts require that the landowner make a similar election.

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

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

The owner should be fully protected against any loss. Hence, he should be credited for the value of the use and occupation of the land and should be given an allowance for all expenses he incurs in the action to determine the rights of the parties, including the expenses he incurs in establishing the value of the land and improvements. Cf. CIVIL CODE § 1013.5 (landowner entitled to recover "his costs of suit and a reasonable attorney's fee to be fixed by the court" in any action brought by the improver to enforce his right to remove the improvements).

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

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

5. In those rare cases where the type of relief described above would not provide an adequate remedy, the court should be permitted to utilize any other appropriate form of equitable relief. The variety of situations that may exist where an improvement is constructed on land not

owned by the improver makes it impossible to draft legislation that will provide a certain solution in every situation. The Commission has concluded that the additional statutory remedy recommended above would provide a satisfactory solution in most situations where injustice results under the present rules. Nevertheless, the existing remedies and the additional remedy are in no way intended to inhibit the court from granting some other form of relief designed to fit the circumstances of the particular case where use of one of the statutory remedies would not provide adequate relief to the parties.

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

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

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

#### ~~RECOMMENDED LEGISLATION~~

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

An act to add Chapter 10 (commencing with Section 871.1) to Title 10 of Part 2 of, and to amend Section 741 of, the Code of Civil Procedure, relating to good faith improvers of property owned by another.

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

SECTION 1. Chapter 10 (commencing with Section 871.1) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

Chapter 10. Good Faith Improver of Property Owned by Another

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

(1) A person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is the owner of the land, affixes an improvement to land owned by another person.

(2) A person who, acting in good faith and erroneously believing because of a mistake either of law or fact that he is entitled to possession of the land under a lease for a term of not less than 25 years, affixes an improvement to land to which another person is entitled to possession.

(3) A successor in interest of a person described in paragraph (1) or (2).

(b) As used in this section, "person" includes a natural person, firm, association, organization, partnership, business trust, corporation, the United States, a state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.



Comment. The definition of "good faith improver" in Section 871.1 is similar to the description given in Civil Code Section 1013.5 of a person who has a right to remove improvements affixed to the land of another. However, this section, unlike Section 1013.5, is clearly limited to a person who believes he is the owner of the land or the owner of a long term lease on the land. Section 1013.5 not only applies to such persons, but may also apply to licensees, tenants, and conditional vendors of chattels. See Note, 27 SO. CAL. L. REV. 89 (1953).

This definition provides a subjective standard of good faith. Thus, actual notice is the test of good faith; the improver would not meet the good faith test if he had either actual knowledge of an outstanding paramount title or actual knowledge of any circumstance that reasonably should cause him to suspect that his own title or long term lease was invalid or that he was constructing the improvement on the wrong site.

Subdivision (b) is included to make it clear that relief is available under this chapter to a public entity that is a good faith improver and to a good faith improver who constructs an improvement on land owned by a public entity.

871.2. A good faith improver may bring an original action in the superior court or may file a cross-complaint in a pending action in the superior or municipal court for such relief as he may be entitled to obtain under this chapter.

Comment. This section is based on Code of Civil Procedure Section 1060 relating to declaratory relief.

871.3. The court shall not grant relief under this chapter if the court determines that the right of set-off under Section 741 of the Code of Civil Procedure or the right to remove the improvement under Section 1013.5 of the Civil Code provides the good faith improver with a remedy the exercise of which would result in substantial justice under the circumstances of the particular case.

Comment. In some cases, the exercise of the right of set-off under Section 741 of the Code of Civil Procedure will result in substantial justice as, for example, in a case where the value of the use and occupation of the land exceeds the amount by which the improvement enhances the value of the land. In other cases, the exercise of the right to remove the improvement under Section 1013.5 of the Civil Code will result in substantial justice as, for example, in a case where the improvement can be easily removed to another site without substantial loss to the good faith improver.

871.4. Subject to Section 871.3, the court may grant a good faith improver such relief as will protect the owner of the land upon which the improvement was constructed against loss but avoid, insofar as possible, enriching him at the expense of the good faith improver. Where the form of relief provided in Section 871.5 substantially achieves this objective, the court may grant relief as provided in that section. In other cases, the court may grant such relief as the good faith improver is entitled to obtain under the general equity power of the court.

Comment. This section authorizes the court to exercise its general equity powers in framing a decree that will protect the owner of the land against loss but will avoid, insofar as possible, enriching him at the expense of the good faith improver.

There are two basic limitations on this general authorization:

(1) Section 871.3 requires the court to utilize the "right of set-off" and the "right of removal" in cases where one of these remedies will provide the good faith improver with an adequate remedy.

(2) The court is required to use the form of relief provided in Section 871.5 in cases where this form of relief will substantially protect the owner of the land against loss but avoid, insofar as possible, enriching him at the expense of the good faith improver.

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

(1) The sum of (i) the amount by which the improvement (other than one financed by a special assessment) enhances the value of the land; and (ii) the amount paid as taxes on the land (as distinguished from the improvement), and the amount paid as special assessments on improvements that benefit the land, by the good faith improver and his predecessors in interest to the extent that such taxes and special assessments were not paid by the owner of the land upon which the improvement was constructed or his predecessors in interest.

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

(b) If the amount determined under paragraph (1) of subdivision (a) exceeds the amount determined under paragraph (2) of subdivision (a), the court may require the owner of the land upon which the improvement was constructed to make an election within such time as is specified by the court to:

(1) Pay the difference between such amounts to the good faith improver or to such other parties as are determined by the court to be entitled thereto, or into court for their benefit; and, upon such payment being made, judgment shall be granted that the owner of the land has all the interest in the property of the good faith improver;

or

(2) Have the good faith improver pay to the owner of the land the amount computed under paragraph (c) and, upon payment thereof, judgment that the good faith improver has all the interest of the owner of the land in the property shall be entered.

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

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

(2) Subtract from the amount determined under subdivision (1) the sum of the amount paid as taxes on the land (as distinguished from the improvement), and the amount paid as special assessments on improvements that benefit the land, by the good faith improver and his predecessors in interest to the extent that such taxes and special assessments were not paid by the owner of the land or his predecessors in interest.

(d) If the owner of the land fails to make such election within the time specified by the court, the good faith improver is entitled to make the election.

(e) If the election is as provided in paragraph (1) of subdivision (b), the court may provide in the judgment that the payment

required by that paragraph may be made in such installments and at such times as the court determines to be equitable in the circumstances of the particular case. In such case, the good faith improver, or other person entitled to payment, shall have a lien on the property to the extent that the amount so payable is unpaid.

(f) If the election is as provided in paragraph (2) of subdivision (b), the court shall set a reasonable time within which the owner of the land shall be paid the entire amount determined under that paragraph. Upon payment of such amount, judgment shall be entered that the good faith improver has all the interest of the owner of the land in the property. If the entire amount so payable is not paid to the owner of the land within the time set by the court, judgment shall be granted that the owner of the land has all the interest in the property of the good faith improver.

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

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

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

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



SEC. 2. Section 741 of the Code of Civil Procedure is amended to read:

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

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

Comment. Section 741 is amended to eliminate the "color of title" requirement and substitute the standard set out in new Section 871.1, thus making Section 741 consistent with Civil Code Section 1013.5 which is a later enactment. See the Comment to Section 871.1. Thus, the limited protection afforded by Section 741 is extended to include the wrong lot cases, i.e., the cases where the defendant owns one lot but builds on the plaintiff's lot by mistake.

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

SEC. 3. This act applies to any action commenced after its effective date, whether or not the improvement was constructed prior to its effective date. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

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