#42 8/5/66

Memorandum 66-46

Subject: Study 42 - Good Faith Improvers

We distributed a tentative recommendation on this subject for comments in May. A copy of the tentative recommendation (dated May 10, 1966) is attached.

Interested persons were informed by notices in legal newspapers and State Bar publications that a tentative recommendation on this subject was available. The tentative recommendation also was printed in at least one legal newspaper.

We received two comments on the tentative recommendation. These are attached as exhibits to this memorandum:

Exhibit I (pink) - Professor Merryman (our consultant on this topic)

Exhibit II (yellow) - Richard D. Agay, Los Angeles attorney

Unless substantial changes are needed in the recommended legislation, we suggest that the recommendation (including proposed legislation) be approved for printing. Accordingly, please mark any suggested revisions of the recommendation and comments on the enclosed tentative recommendation so that we can make any necessary changes before we approve it for printing at the August meeting.

The following is an analysis of the comments on the tentative recommendation.

Background portion of tentative recommendation

Professor Merryman suggests that the first sentence under Background "seems to me to miss a point I tried very hard to make in the article." Although the first sentence is an accurate statement of the American

common-law rule, perhaps the following footnote should be added to this sentence:

> [1]This is the American common-law rule as stated in the cases. The research consultant points out that this rule is based on a dubious historical development. See research study infra at 460-468, 482.

Comments on recommended legislation

Professor Merryman approves the recommended legislation except for Section 871.6 which he recommends be deleted. He takes the view that this section "tries to spell it out too clearly, at the risk of making the procedure particularly cumbersome and expensive and of limiting judicial discretion beyond what is reasonably necessary or even desirable. I always resist statutes that try to make judges into clerks. This section of this statute does just that." See Exhibit I (pink).

Mr. Agay, on the other hand, takes the lawyer's view and offers a number of questions and comments, most of which are designed to demonstrate that the statute does not answer all the questions that might arise. See Exhibit II (yellow). We discuss his comments below. References are to the numbered paragraphs of his letter.

We think that the recommended legislation represents a good compromise between the flexibility desired by Professor Merryman and the certainty desired by Mr. Agay.

Section 871.1

No comments.

Section 871.2

Mr. Agay suggests that "at least two additional requirements be imposed upon the improver to take advantage of the new legislation: (1)

That he have a title insurance policy indicating his ownership (or a policy of his landlord should the party be a tenant) and (2) That he have a survey conducted by a licensed surveyor such that it appears that his construction is being physically done on the property he owns."

The addition of these two requirements would, in the opinion of the staff, make the legislation inapplicable in the cases where it is most needed: (1) where the improver's title is defective and he has no title insurance, and (2) where the improver builds on the wrong land because he failed to have a survey made. If these two additional requirements were imposed to qualify a person as a good faith improver, the statute ordinarily would be of benefit only to the title insurance company or surveyor from whom the actual improver will normally have recovered his damages. Moreover, it would not appear to be desirable to propose a statute the primary purpose of which would be to permit negligent title insurance companies or surveyors to recover but not to permit negligent improvers to recover.

The view we took in preparing this statute was that a landowner should not be unjustly enriched at the expense of a good faith improver, even though the good faith improver was negligent in not having a survey made or in not obtaining title insurance. We think that this is a sound position. It is recognized that the improver's negligence has created the situation, and the court is given authority to take this into account in devising appropriate relief under the recommended statute.

Section 871.3

No comments.

Section 871.4

Mr. Agay comments: "Is it impossible to comply under Section 871 [the series of sections beginning with Section 871.1?] without likewise qualifying under Sections 741 and 1013.5? If it be possible to do so, then the language of Section 871.4 would seem to require some modification."

We do not understand this comment. Section 871.4 states that if relief under Section 741 or Section 1013.5 would provide adequate relief, then relief is not to be granted under the new statute. See also Section 871.5 (introductory clause). If relief under Sections 741 and 1013.5 is not adequate relief, then the new statute applies. We do not believe that any modification of Section 871.4 is necessary.

Section 871.5

No comments.

Section 871.6

Mr. Agay raises a number of questions concerning this section. It is apparent from the questions that he does not recognize that Section 871.5 authorizes the court to devise an appropriate remedy in any case where the form of relief provided in Section 871.6 would not substantially achieve the objective stated in subdivision (a) of Section 871.5. We discuss below the specific questions raised by Mr. Agay.

In his comment 2, Mr. Agay assumes a case where "there is an entire city block with all but one or a few houses being located, and the physical boundaries being located, one-half of a lot off of the true legal boundaries as shown by the recorded instruments." He asks: "Should not some consideration be given for this type of problem such that the elections must be consistent by the persons in their capacities as landowners and by the group

of persons in their capacities as improvers?" The answer to this question is that the case would not be decided under Section 871.6 but would be decided under Section 871.5 if the various owners of the houses were not able to agree on the remedy for all parties under Section 871.6. (If an action were commenced between only two of the many owners and improvers on the block, a judge possibly could treat the owners and improvers who were not joined as necessary parties and require that they be joined in the action. This would help to avoid multiplicity of actions. We have not researched this point.)

In his comment 5, Mr. Agay suggests that the wording of the valuation sections should be clarified to show that the value of the improvement is the value to the landowner and not to the improver. "By way of an example the value of half a living room to one who has an entire house attached to it and the other half of the living room is substantial. The value of half of a living room totally unattached would be practically valueless if not valueless to a land owner and it should be this zero valuation which should be taken into account it would seem to me." The value of the improvement is recognized as "the amount by which the improvement (other than one financed by a special assessment) enhances the value of the land." This language appears to take care of the problem that concerns Mr. Agay. As far as his specific case is concerned, the court would probably decide the case under Section 871.5 rather than Section 871.6.

In his comment 10, Mr. Agay reiterates his concern that the value of the land be its value to the owner. He is particularly concerned with the case where the taking of a portion of the owner's land will reduce the value of the remainder. In view of Mr. Agay's comments, we suggest that paragraph (c)(1) on page 16 be revised to read:

(1) Determining the sum of (i) the value of the land reasonably necessary to the convenient use of the improvement, (ii) the reasonable value of the use and occupation of such land by the good faith improver and his predecessors in interest, ~~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 (iv) where the land to be transferred to the improver is a portion of a larger parcel of land held by the owner, the reduction in the value of the remainder of the parcel by reason of the transfer of the portion to the improver; and

In his comment 7, Mr. Agay asks what in the statute prevents the improver from acquiring a land locked piece of property? In his comment 9, he asks what is "land reasonably necessary to the convenient use of the improvement? Does this refer only to the land surrounding the actual improvement or include land upon which the improvement is constructed as well?"

We think that Section 871.6 is satisfactory in its present form. The "land reasonably necessary to the convenient use of the improvement" includes not only the land upon which the improvement is constructed, but also the land needed in connection with the improvement (which would include sufficient land so that the improver would have access to the improvement). See the Comment to Section 871.6 which states:

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

We recommend no change in Section 871.6 in response to the comments concerning this point.

In his comment 11, Mr. Agay objects to the method of election. He fails to recognize that the improver is entitled to make an election only if the owner fails to do so within such time as the court prescribes. We recommend that no change be made in the statute.

In his comment 11, Mr. Agay also suggests that the court require that the improver post security in the event that he is forced to purchase the land, such security to cover the cost of the land and other costs in the proceeding. We see no need for such a provision. If the improver does not pay the cost of the land and the costs of the action within such time as the court specifies, the title to the land and the improvement thereon is quieted in the owner as against the good faith improver. See § 871.6(d). Furnishing security would be a needless requirement in view of our statutory scheme.

In his comment 12, Mr. Agay states that under some circumstances the owner should be entitled to have the improvement removed and to recover the cost of removal. If this is the appropriate relief in the particular case, the court can grant such relief under Section 871.5.

In his comment 13, Mr. Agay asks what happens if the owner fails to make an election under Section 871.6 and the improver likewise fails to make an election under that section. It is unlikely that such a case will ever occur because the statute only applies if the good faith improver seeks relief under the statute. Nevertheless, the statute does not specify what relief should be afforded the parties when they both waive their right to make an election under Section 871.6. Probably, if such a case arose, the court would deny any relief under the statute. This could be stated in the statute by adding the following sentence to subdivision (e) of Section 871.6:

> If the owner of the land fails to make the election authorized by subdivision (b) within the time specified by the court and the good faith improver fails to make the election authorized by this subdivision within a reasonable time, which upon motion of any party shall be fixed by the court, the court shall not grant any relief under this chapter.

In his comment 14, Mr. Agay asks "Should not any payments required of the improver to the land owner be secured by a mortgage on the property being transferred?" Under the recommended statute, the owner must be paid for the land within such time as is designated by the court and installment payments are not permitted. Hence, there is no occasion to use a mortgage.

In his comment 15, Mr. Agay suggests that a maximum period of time should be set forth in subdivision (g) of Section 871.6. Such a provision is unnecessary and might unduly restrict the court's power to achieve substantial justice.

In his comment 16, Mr. Agay asks: "How is the following problem resolved: The owner decides to sell but at the time has a large existing deed of trust on his property. Must the improver take the property subject to this trust deed and if not how is such a result avoided?" The holders of the deeds of trust would be owners within the meaning of the statute, and, thus, would be entitled to a voice in the election provided in subdivision (b) of Section 871.6 and to part of the purchase price paid by the improver under that section. Since the improver is required to pay full value for the land as determined under subdivision (c), not only the possessory owner but also the holders of the deeds of trust are entitled to be paid.

The statute does not state specifically what the court is to do with the money paid by the improver for the land and does not make it clear that all persons having an interest in the land must join in the election that the owner is entitled to make. We suggest that subdivision (g) be revised as indicated below and that a new subdivision (h) be added:

(g) If the offer provided for in paragraph (2) of subdivision (b) is made and accepted or if the election authorized in subdivision (e) is made, the court shall set a reasonable time within which the owner of the land shall be paid the entire amount determined under subdivision (c). If more than one person has an interest in the land, the persons having an interest in the land are entitled to receive the value of their interest from the amount paid under this subdivision.

(h) If more than one person has an interest in the land upon which the improvement was constructed, all such persons must join in any election under subdivision (b) in order that the election be effective.

Where the trust deeds on the property exceed its value, the various trust deed holders will be paid the value of their interest in the property. The result may be that the "owner" will receive nothing and the last trust deed holder will receive only the value of his interest which may be less than his trust deed. In such a case, if the court determines that this would not result in substantial justice, it may devise other relief under Section 871.5.

Another situation where Section 871.6 would not apply would be where only a portion of a larger tract is being taken and the deed of trust is on the entire tract. There would be no easy way to segregate the trust deed to the parcel taken and the part remaining. The proper remedy in such a case would have to be devised under Section 871.5. This could be made clear in the comment to Section 871.6 if the Commission believes that such an addition to the comment would be desirable.

In his comment 17, Mr. Agay asks: "Likewise, how does an owner protect himself against liens on the improvement should he desire to acquire the improvement instead of selling his land?" The answer is that the amount paid by the owner is to be paid to the persons having liens. See the second sentence of subdivision (f) of Section 871.6. Perhaps this should be stated in the comment. Subdivision (f) could be revised to read:

(f) If the election provided for in paragraph (1) of subdivision (b) is made, the court may provide in the judgment that the payment required by that paragraph may be made in such installments and at such times as the court determines to be equitable in the circumstances of the particular case. In such a 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. The money so paid shall first be applied to discharge any liens on the improvement.

We do not understand the relevance of Mr. Agay's comment 4.

Respectfully submitted,

John H DeMoully
Executive Secretary

STANFORD UNIVERSITY SCHOOL OF LAW
STANFORD, CALIFORNIA 94305

May 17, 1966

Mr. John H. DeMoully
California Law Revision Commission
Room 30 Crothers Hall
Stanford, California

Dear John:

Thank you for showing me the Tentative Revision. I have only two comments.

On the first page, the first sentence under Background seems to me to miss a point I tried very hard to make in the article. I suggest, in particular, reference back to pages 460-464 and 482 of my study in 11 Stanford Law Review.

The other comment goes to your proposed Section 871.6. I think this tries to spell it out too clearly, at the risk of making the procedure extremely cumbersome and expensive and of limiting judicial discretion beyond what is reasonably necessary or even desirable. I always resist statutes that try to make judges into clerks. This section of this statute does just that.

I know I need not lecture to you about the legal process. I would just ask you to remind your Commission that there is a judicial function; that legislators are not terribly good at it, particularly when they are dealing in advance with a range of problems rather than with one concrete case; and that if you treat judges as clerks they will become clerks.

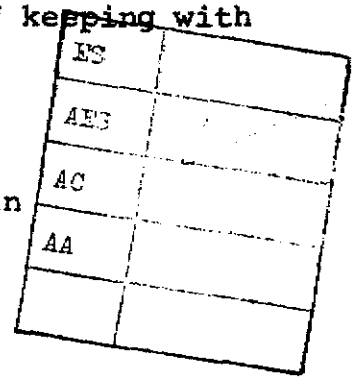
The rest of the statute seems to me to be very good, to restrict itself to the legislative process, properly conceived, and to make Section 871.6 look odd - quite out of keeping with the other provisions.

Cordially,

John

John Henry Merryman
Professor of Law

JHM:ecr



Memo 66-46

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June 2, 1966

IN REPLY PLEASE REFER TO:

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Gentlemen:

I believe that I have read an entire copy of your tentative recommendations concerning the improvements upon land owned by another person as same appeared in the May 30, 1966 edition of the Los Angeles Metropolitan News. I would like to have another copy, however.

The article in the paper indicated that you desired to have comments, and it is with respect to that that I offer the following questions and comments:

1. First, I assume that a basic assumption of those considering this problem is that if one of the two persons (the improver and the land owner upon which the improvement is made) must suffer, then such suffering must be borne by the improver since the land owner is entirely blameless. In part the following comments stem from the foregoing assumption.

2. Assume, for the moment, that there is an entire city block with all but one or a few houses being located, and the physical boundaries being located, one-half of a lot off of the true legal boundaries as shown by the recorded instruments. Without going into a detailed example, it appears to me that one or several of the owners could be caught between inconsistent elections by their neighbors and thereby be left with either too much or too little land. Should not some consideration be given for this type of problem such that the elections must be consistent by the persons in their capacity as land owners and by the group of persons in their capacities as improvers?

3. The compensation to the land owner includes nothing for his loss of time and effort in connection with the problem or the litigation following the problem. Thus it is that the improvers negligence will or can force an undesirable and uneconomic result upon the land owner. The proposed Section 871.2 recognizes that there is some degree of care required by the improver (he cannot ignore facts which should cause him to question his right to so construct). I would suggest that at least two additional requirements be imposed upon the improver to take advantage of the new legislation: (1) That he have a title insurance policy indicating his ownership (or a policy of his landlord should the party be a

tenant) and (2) That he have a survey conducted by a licensed surveyor such that it appears that his construction is being physically done on the property he owns.

4. My brief reading of the proposals left questions in my mind as to whether or not the existence of local ordinances in terms of property lines or existing easements in terms of property lines as shown on recorded maps especially with relationship to distance requirements for improvement purposes had been taken into account in the proposed legislation.

5. I felt that the wording of the valuation sections should be clarified to show that the value of the improvement is the value to the land owner and not to the improver. By way of an example the value of half a living room to one who has an entire house attached to it and the other half of the living room is substantial. The value of half of a living room totally unattached would be practically valueless if not valueless to a land owner and it should be this zero valuation which should be taken into account it would seem to me.

6. Is it impossible to qualify under Section 871 without likewise qualifying under Sections 741 and 1013.5? If it be possible to do so, then the language of 871.4 would seem to require some modification.

7. What if a tenant under a long term lease constructed the improvement at a place which did not border any public street or highway? At the end of the lease if he were to have acquired the property under Section 871 he would appear to have acquired a land locked piece of property bounded in part by his landlord and in part by the true owner. What protection is there against such circumstances arising?

8. It would seem to me that one who desires to bring himself within Section 871 should be willing to post security to meet the obligations which might be imposed upon him in any judgment rendered in the action.

9. Under Section 871.6 the actual land itself upon which the improvement has been made is apparently referred to simply as "land reasonably necessary to the convenient use of the improvement". Upon my first reading I assumed that the foregoing description meant to apply only to the land surrounding the actual improvement. Could not the language be clarified such that it was evident that both the land upon which the improvement was located as well as the surrounding land was intended to be covered?

10. Again in connection with value, it should seem that in ascertaining the value of the land (as opposed to the improvement) the value should not be less than the value to the owner. Again this might differ from the value to the improver. For example an acquisition by the improver under Section 871 might so reduce the size of the remaining parcel for the land owner as to totally elminate the use for which its acquisition was intended.

11. I personally quarrel with the method of election. I see no reason for giving the improver (the more responsible party of the two) the last chance in selecting whether to buy or sell. It seems to me that once the land owner has been put to the election of either buying the improvement or selling the land that the improver should be bound by this decision and that this should be a risk he takes by seeking the aid of the courts under Section 871. In this connection it may well come to pass that the improver is forced to puchase the land and for that purpose as well as for the purpose of meeting other costs I suggest security being deposited.

12. Under Section 871.6 (d) should not mention be made of the fact that the owner shall also be entitled, should he so choose, to have judgment for the cost of removing the improvement should he desire to do so in lieu of keeping it. I can conceive quite readily of improvements on the land which would be of detriment and no benefit to the land owner as opposed to the improver.

13. Under Section 871.6 (e) what happens if the owner fails to make an election and the improver likewise fails to make an election?

14. Should not any payments required of the improver to the land owner be secured by a mortgage on the property being transferred?

15. Under Section 871.6 (g) I believe that a maximum period of time should be set forth.

16. How is the following problem resolved: The owner decides to sell but at the time has a large existing trust deed on his property. Must the improver take the property subject to this trust deed and if not how is such a result avoided?

17. Likewise, how does an owner protect himself against liens on the improvement should he desire to acquire the improvement instead of selling his land?

Yours very truly,

RICHARD D. AGAY

RDA:mg