

10/3/66

Memorandum . 66-63

Subject: Study 42 - Good Faith Improvers

Attached are two copies of a revised Recommendation relating to good faith improvers. The changes made at the September meeting have been incorporated in the revised draft. The revised draft also includes revisions suggested by various members of the Commission.

We have received the comments of the California Land Title Association. See Exhibit I attached.

The following matters are noted for your attention:

Section 871.1

We have revised this section to include former subdivisions (a) and (b) in a new subdivision (a). We believe that this revision eliminates unnecessary duplication of language and also meets the objections some Commissioners had to the former phrasing of the section.

The California Land Title Association suggests that the 15-year limitation be deleted. If this change were made, the statute would apply not only to short term tenants but also to licensees. We believe that such a broad application would be undesirable.

At the direction of the Commission, we added the first full paragraph to the Comment on page 9.

Section 871.2 (old section - deleted at September meeting)

The California Land Title Association suggests a revision of former Section 871.2 (which was deleted by the Commission at the September meeting). We believe that it would be undesirable to restore the section.

Section 871.2 (new section)

We have used language in this section that is consistent with the definition of "person" we have included in the legislation contained in other recommendations.

Section 871.5

We have revised subdivision (a) of this section to include the language suggested by the California Land Title Association. See their Recommendation Number Three.

We suggest that we add a paragraph to the Comment to Section 871.5, to read:

Subdivision (b) also makes it clear that this chapter has no effect on the equitable defenses available in an encroachment case. Existing law provides the good faith encroacher with adequate relief. See 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES *** n. *** (1968).

Section 871.6

Recommendation Number Four of the California Land Title Association asks:

What would happen if a set of facts fit the formula in 871.6 but the court went on to grant relief under provisions of 871.5(b). The specific question is, would this affect the validity of the judgment granted under the provisions of 871.5(b)?

If the court grants relief under 871.5(b) when it should have granted relief under 871.6, the aggrieved party could appeal from the judgment. Once the judgment becomes final, it would be valid even though the court granted relief under 871.5(b) rather than 871.6.

Respectfully submitted,

John H. DeMouly
Executive Secretary

Memo 66-63

EXHIBIT I

California Land Title Association

Office of the Executive Vice President

PRESIDENT
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September 15, 1966

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CARL E. WEIDMAN

Mr. John DeMouilly
California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

Dear John:

A subcommittee of the Legislative Committee of our Association reviewed your proposed legislation regarding Good Faith Improvers. The subcommittee reported to the full Legislative Committee of the Association and after review and discussion the following recommendations are respectfully submitted to the California Law Revision Commission.

Recommendation Number One.

Amend Section 871(a)(2) by deleting the words "for not less than 15 years".

Comment: The consensus of the committee was regardless of the period of possession, once the improvement has been placed on the property the damage has been done. Fifteen years is an arbitrary figure. It should be left up to the court to determine whether or not the Good Faith Improver could reasonably have placed the type of structure he did upon the land for the period of possession for which he thought he was entitled.

Recommendation Number Two.

Section 871.2 should be amended as follows:
After the word "improvement" in the third line thereof delete the remainder of the section

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and add "he has actual knowledge that, or actual knowledge of, any circumstance that reasonably should cause him to suspect that he has no title or right to possession or that he is constructing the improvement on the wrong site".

Comment: The consensus of the committee was that this language was clearer and more precisely expressed the intent of what the commission was attempting to accomplish.

Recommendation Number Three.

That the third line of Section 871.5(a) be amended by deleting the words "the other parties" and adding the words "other interested parties included, but not limited to, lessees, lienors, or encumbrancers".

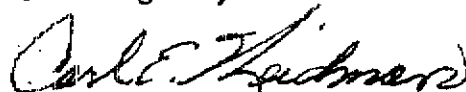
Comment: The meaning of "the other parties" was not clear and the consensus was that the proposed amendments would clarify the meaning of this phrase.

Recommendation Number Four.

It was suggested that the California Land Title Association inquire of the Law Revision Commission what would happen if a set of facts fit the formula in 871.6 but the court went on to grant relief under provisions of 871.5(b). The specific question is, would this affect the validity of the judgment granted under the provisions of 871.5(b)?

We sincerely appreciate the opportunity to review this proposed legislation. The attorneys on our Legislative Committee greatly respect the fine work the Law Revision Commission is doing and hope that we can continue the fine cooperation on problems relating to real property we have enjoyed in the past.

Best regards,



Carl E. Weidman
Executive Vice President

Revised October 1, 1966

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

THE GOOD FAITH IMPROVER OF LAND OWNED BY ANOTHER

October 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

October 21, 1966

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the law relating to the rights of a good faith improver of property belonging to another should be revised.

The Commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Professor John Henry Merryman, Stanford School of Law. Only the recommendation (as distinguished from the research study) is expressive of Commission intent.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

THE GOOD FAITH IMPROVER OF LAND OWNED BY ANOTHER

BACKGROUND

At common law, structures and other improvements placed by a trespasser¹ on land owned by another belong to the owner of the land. This rule is justified as applied to one who, in bad faith, appropriates land as a building site. The rule is harsh and unjust when applied to an improver who is the victim of a good faith mistake. In the latter case, there is no justification for bestowing an undeserved windfall upon the land owner if his interests are fully protected by an equitable adjustment of the unfortunate situation.

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

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 the research study, infra at 460-468, 482.

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

The California law is less considerate in its treatment of the innocent improver than the law in most other states. Absent circumstances that give rise to an estoppel against the landowner, the good faith improver has no rights beyond those accorded him by Section 741 of the Code of Civil Procedure and Section 1013.5 of the Civil Code. Section 741 permits the improver to set off the value of permanent improvements against the landowner's claim for damages for use and occupation of the land. Section 1013.5 permits the improver to remove improvements if he compensates the landowner for all damages resulting from their being affixed and removed.

The existing California law is inadequate and unfair in those cases in which the value of the improvement greatly exceeds the value of the interim use and occupation of the land and the improvement either cannot be removed or is of little value if removed.² The "right of removal" in such a case is a useless privilege and the "right of setoff" provides only

² Taliaferro v. Colasso, 139 Cal. App.2d 903, 294 P.2d 774 (1956), illustrates the unjust result obtained under present California law. A house was built by mistake on lot 20 instead of lot 21. The owner of lot 20 brought an action to quiet title and to recover possession. The defendant was a successor in interest to the person who built the house. The trial court gave judgment quieting title and for possession on the condition that \$3,000 be paid to the defendant. The district court of appeal affirmed that portion of the judgment awarding possession of the lot and house to the landowner, but reversed that portion requiring any payment to the defendant as a condition for obtaining possession. The court held that the "right of removal" (Civil Code Section 1013.5) and the "right of setoff" (Code of Civil Procedure Section 741) are the exclusive forms of relief available to a good faith improver and that, for this reason, the general equity powers of the court can not be brought into play even though the landowner seeks equitable relief (quiet title). As a result, the landowner obtained possession of the lot and house without any compensation to the defendant for the value of the house.

limited protection against an inequitable forfeiture by the good faith improver and an unjustified windfall for the landowner.

RECOMMENDATIONS

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

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

³ The need for corrective legislation is not alleviated by the prevalence of title insurance, nor would such legislation have any impact upon title insurance protection. With respect to the good faith improver, title policies do not cover matters of survey or location; with respect to the landowner, policies do not cover matters or events subsequent to his acquisition of the property. See CALIFORNIA LAND SECURITY AND DEVELOPMENT 173-205 (Cal. Cont. Ed. Bar 1960).

Some of the betterment acts limit relief to good faith improvers who hold under "color of title." Such a limitation is undesirable. It makes relief unavailable in the type of case where it is most needed--where the improver owns one lot but builds on another by mistake. Moreover, the term "color of title" is of uncertain meaning. While the limitation imposed by its use may have been justified in an era when property interests were evidenced by the title documents themselves, the limitation is not suited to present conditions since virtually universal reliance is now placed upon the recording, title insurance, and escrow systems for land transactions.

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

3. If the court determines that either the right of setoff (Code of Civil Procedure Section 741) or the right to remove the improvement (Civil Code Section 1013.5) is an adequate remedy under the circumstances of the particular case, it is neither necessary nor desirable for the court to resort to other forms of relief. Hence, no additional form of relief should be available in such cases.

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

betterment acts require that the landowner make such an election.

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

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

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

The landowner should be fully protected against pecuniary loss. Hence, he should be credited for the value of the use and occupation of the land and for all expenses he incurs in the action to determine the rights of the parties, including reasonable attorney's and appraisal fees. This

principle has already been adopted in Civil Code Section 1013.5 (landowner entitled to recover "his costs of suit and a reasonable attorney's fee to be fixed by the court" in any action brought by the improver to enforce his right to remove the improvement).

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

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

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

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

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

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. "Good faith improver" defined

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

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

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

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

See Note, 27 SO. CAL. L. REV. 89 (1953).

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

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

871.2. "Person" defined

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

Comment. Section 871.2 is included to make it clear that relief is available under this chapter to a public entity or unincorporated organization that is a good faith improver and to a good faith improver who makes an improvement on land owned by a public entity or unincorporated organization.

871.3. Action for relief

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

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

871.4. Right of setoff or removal.

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

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

871.5. Court may grant appropriate relief

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

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

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

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

There are three basic limitations on this general authorization:

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

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

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

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

871.6. Purchase of improvement or land

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

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

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

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

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

(1) To pay the difference between such amounts to the good faith improver or to such other parties as are determined by the court to be entitled thereto or into court for their benefit; and, when such payment is made, the court shall enter a judgment that the title to the land and the improvement thereon is quieted in the owner as against the good faith improver; or

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

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

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

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

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

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

(g) If the election provided for in paragraph (1) of subdivision (c) is made, the court may provide in the judgment that the payment required by that paragraph may be made in such installments and at such times as the court determines to be equitable in the circumstances of the particular case. In such case, the good faith improver, or other person entitled to payment, shall have a lien on the property to the extent that the amount so payable is unpaid.

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

Comment. Section 871.6 gives the landowner, in effect, an election to pay for the improvement or to offer to sell the land to the improver.

C If the landowner does not make the election within the time specified by the court, the improver may elect to buy the land.

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

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

C The court is given flexibility in fixing the time of payment for the land or the improvement so that the requirement of payment can be adapted to the circumstances of the particular case. If the owner elects to purchase the improvement, the court is further authorized to provide for payment in installments. To assure that the owner will receive compensation or possession of the land promptly, no such authorization is provided where the owner elects to sell the land to the improver and the court is not authorized to defer payment for more than three months. Since the effect

of the owner's election to sell and the ensuing judgment perfects the improver's title, the improver should be able to arrange financing from an outside source within this time.

Persons having security interests may intervene in the action in order to protect their interests. CODE CIV. PROC. § 387. For example, there may be a deed of trust on the land executed either by the improver or the owner. There also may be a lien on the improvement. When the improvement is purchased by the owner Section 871.6 permits the court to give the lender who intervenes rights against the fund to be paid as compensation for the improvement (subdivision (c)(1)) or a lien on the property (subdivision (g)). When the land is sold to the improver the statute gives the holders of security interests rights against the fund to be paid as compensation for the land (subdivision (h)).

Amendment--Code of Civil Procedure Section 741

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 requirement that the defendant claim the property under "color of title" before he is entitled to a set-off. The amended Section requires a set-off when the defendant is a good faith improver as defined in Section 871.1. This amendment makes Section 741 consistent with the later-enacted Civil Code Section 1013.5. See the Comment to Section 871.1. Thus, the limited protection afforded by Section 741 is extended to include cases, for example, where the defendant owns one lot but builds on the plaintiff's lot by mistake.

The amendment also substitutes "the amount by which such improvements enhance the value of the land" for "the value of such improvements." The new language clarifies the former wording and assures that value of the improvement, for purposes of set-off, will be measured by the extent to which the improvement has increased the market value of the land.

Application of statute

SEC. 3. This act applies to any action commenced after its effective date, whether or not the improvement was constructed prior to its effective date. If any provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other 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 date. Decisions in other states are about equally divided as to whether a betterment statute can constitutionally be applied where the improvements were constructed prior to its effective date. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 58 (1953). Cf. Billings v. Hall, 7 Cal. 1 (1857). The California Supreme Court has recently taken a liberal view permitting retroactive application of legislation affecting property rights. Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). See Comment, 18 STAN. L. REV. 514 (1966). The Law Revision Commission believes that the statute can constitutionally be applied to improvements constructed prior to its effective date, but a severability clause is included in case such an application of the act is held unconstitutional.