

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

The Good Faith Improver of Land  
Owned By Another

October 1966

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California

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## NOTE

This pamphlet begins on page 801. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

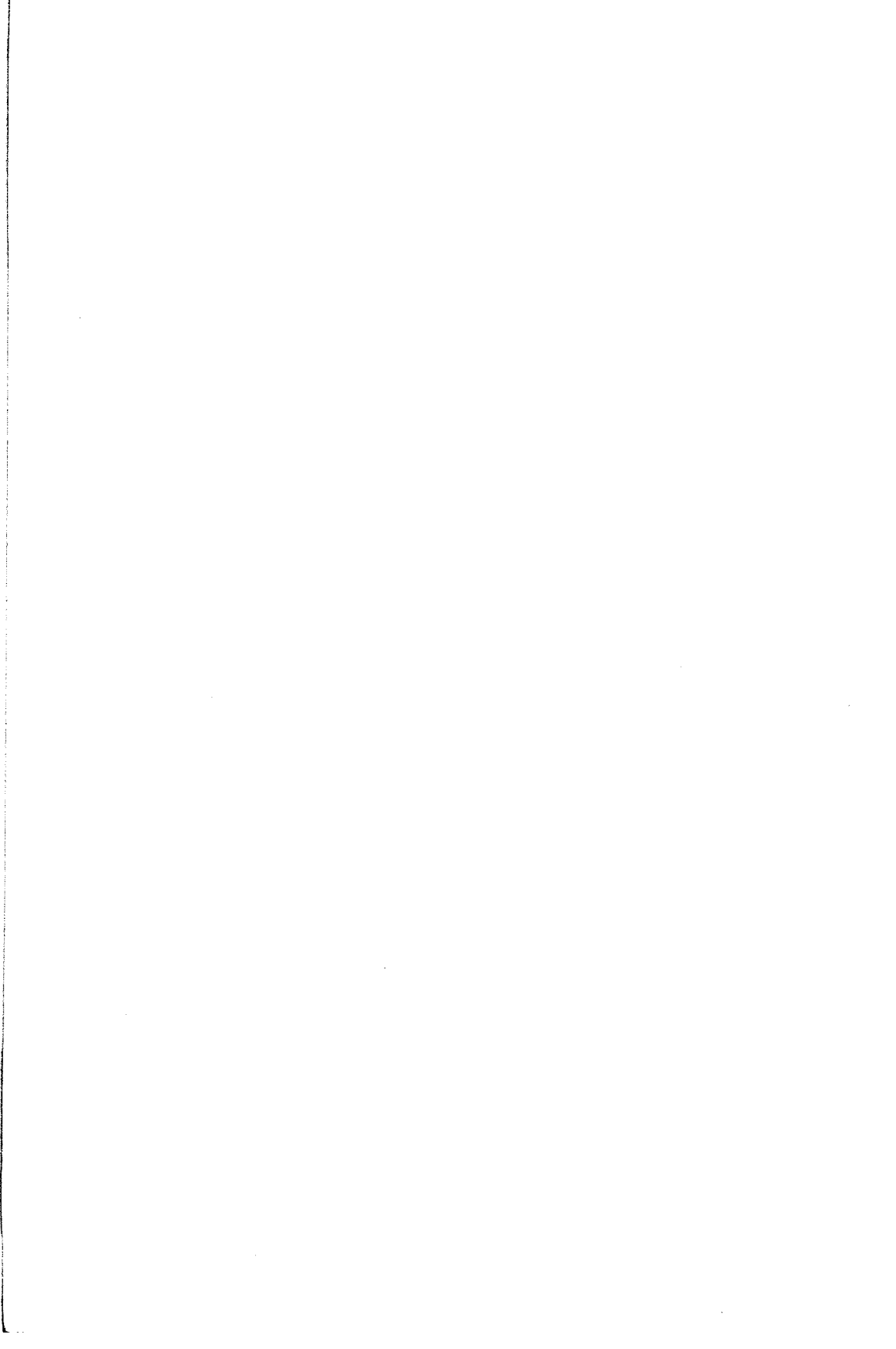
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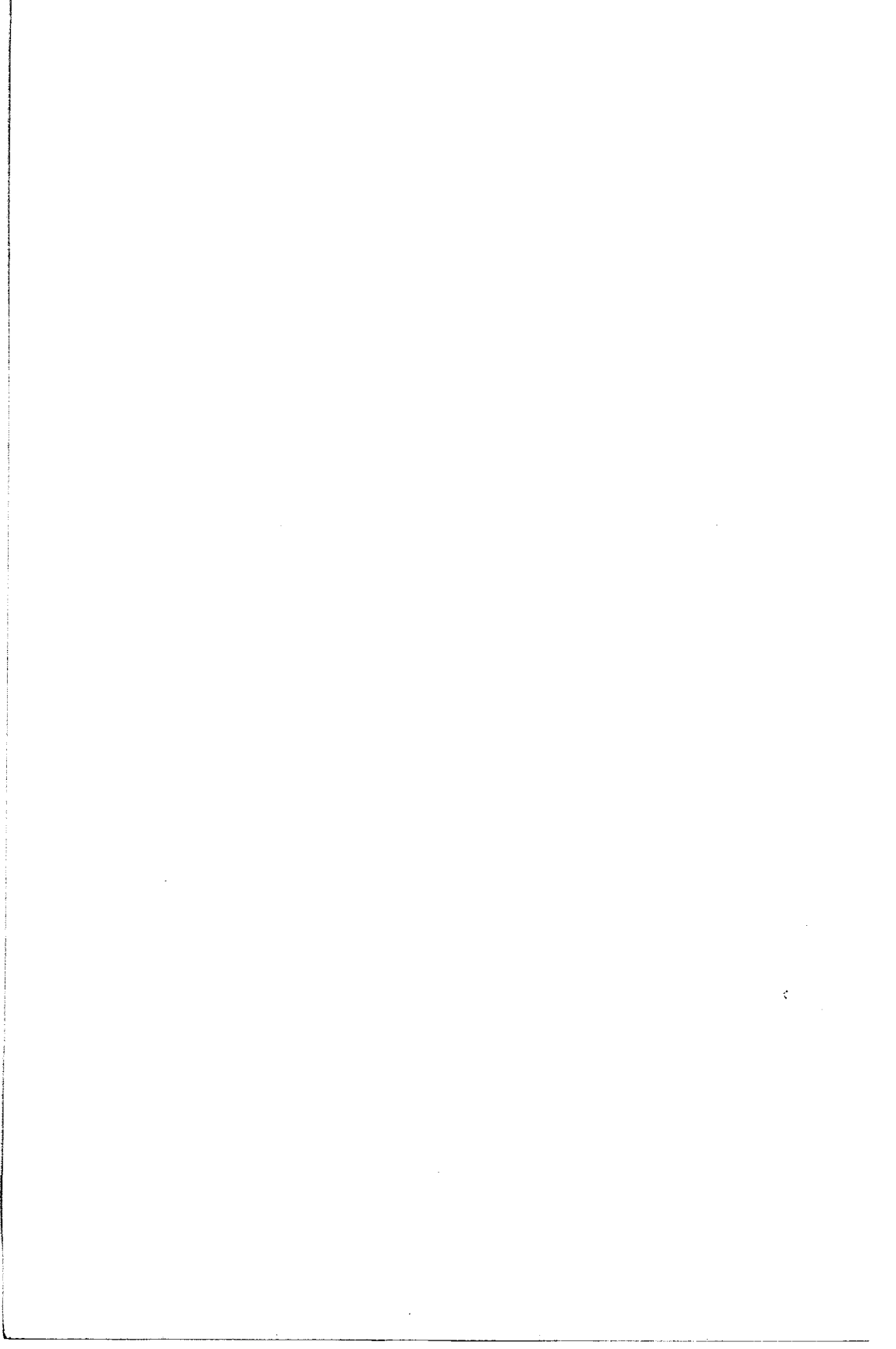
October 21, 1966

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 study) is expressive of Commission intent.

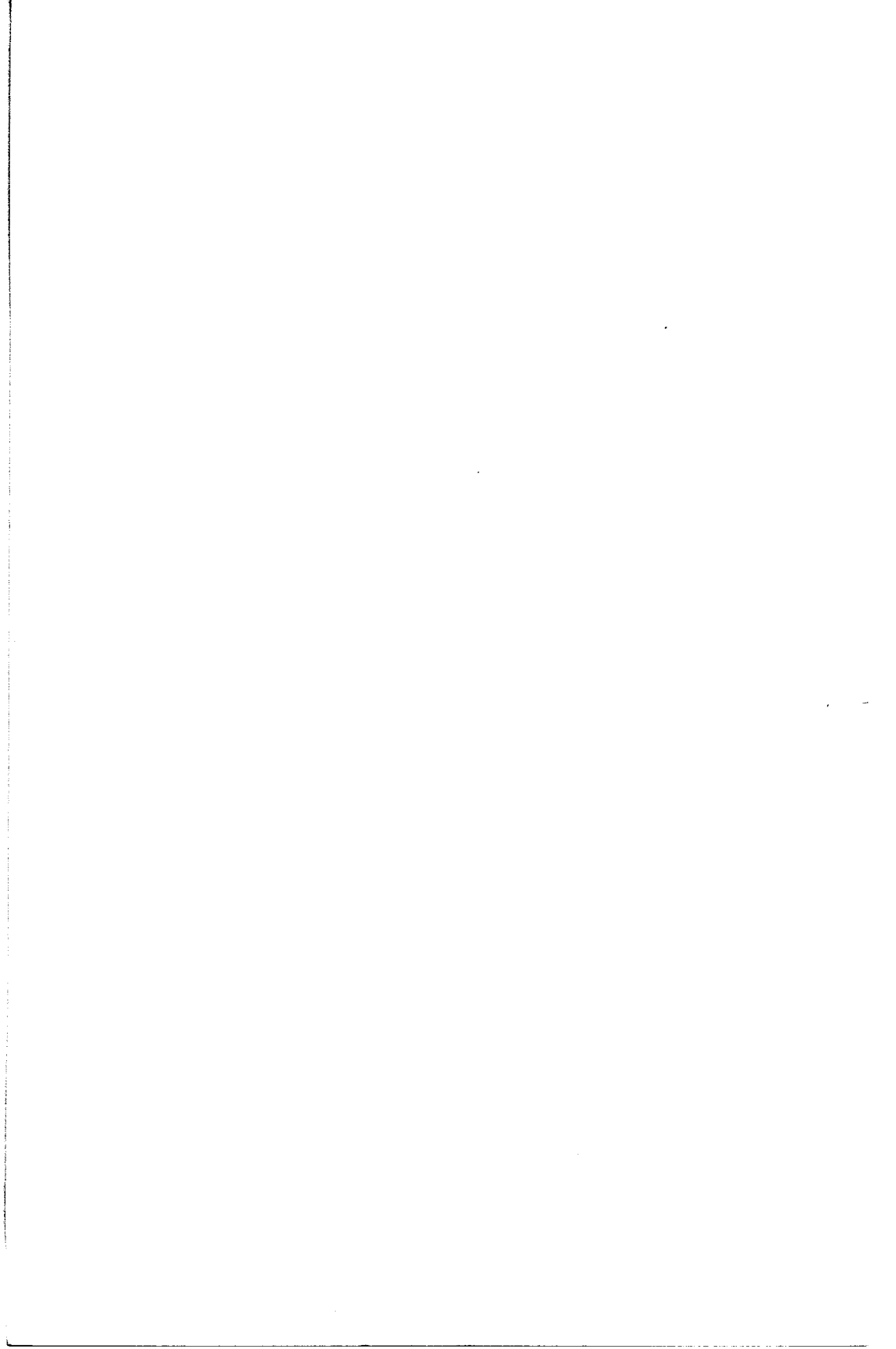
Respectfully submitted,  
RICHARD H. KEATINGE  
Chairman



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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 trespasser on land owned by another belong to the owner of the land.<sup>1</sup> 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 landowner 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 common law rule to provide relief to the good faith improver. Similar statutes have been enacted throughout Canada. Uniformly, the effort has been to protect one who makes improvements believing, in good faith, that he owns the land.

The betterment acts are based on the principle that the landowner’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. California enacted a betterment act in 1856, but it was declared unconstitutional by a divided court in *Billings v. Hall*, 7 Cal. 1 (1857). Under the existing law, in the absence of circumstances giving 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

<sup>1</sup> 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 821-833.

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.<sup>2</sup> The "right of removal" in such a case is a useless privilege and the "right of setoff" provides only 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.<sup>3</sup> 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 that he is entitled to possession of the land for not less than 15 years following the date that he begins 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 substantial economic interest in the land—*i.e.*, the fee or at least a 15-year right to possession.

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

<sup>2</sup> *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 cannot 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.

<sup>3</sup> 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, Mallette, *Title Insurance*, §§7.1-7.21 (Cal. Cont. Ed. Bar 1960).

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, no additional form of relief should be available to the improver.

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 appraiser's 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 appraiser's 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 a "good faith improver." This would extend the right of setoff to the situation, 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 recommended 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.

## PROPOSED LEGISLATION

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

*An act to amend Section 741 of, and add Chapter 10 (commencing with Section 871.1) to Title 10 of Part 2 of, the Code of Civil Procedure, relating to real property.*

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

### RIGHT OF SETOFF

#### § 741 (Amended)

SECTION 1. 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 of this code.*

(b) *When damages are claimed for withholding the property recovered, upon which permanent and improvements have been made on the property by a defendant; or his predecessor in interest as a good faith improver those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of amount by which such improvements enhance the value of the land must be allowed as a setoff 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 setoff. The amended section requires a setoff 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 the situation, 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 the value of the improvement, for purposes of setoff, will be measured by the extent to which the improvement has increased the market value of the land.

### GOOD FAITH IMPROVER OF PROPERTY OWNED BY ANOTHER

Sec. 2. 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 *Comment*, 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 following the date that he first begins 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, unincorporated association, government or governmental subdivision or agency, two or more persons having a joint or common interest, and any other legal or commercial 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

association 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 association.

**§ 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, lienholders, 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.

This chapter has no effect on the equitable defenses that are available in an encroachment case. There should be no necessity for relief under this chapter in such cases since the existing law provides the good faith encroacher with adequate relief. See *Recommendation and Study Relating to the Good Faith Improver of Land Owned by Another*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 845 n. 101 (1967).

#### § 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. 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 those paid by the owner, if any) 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.

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").

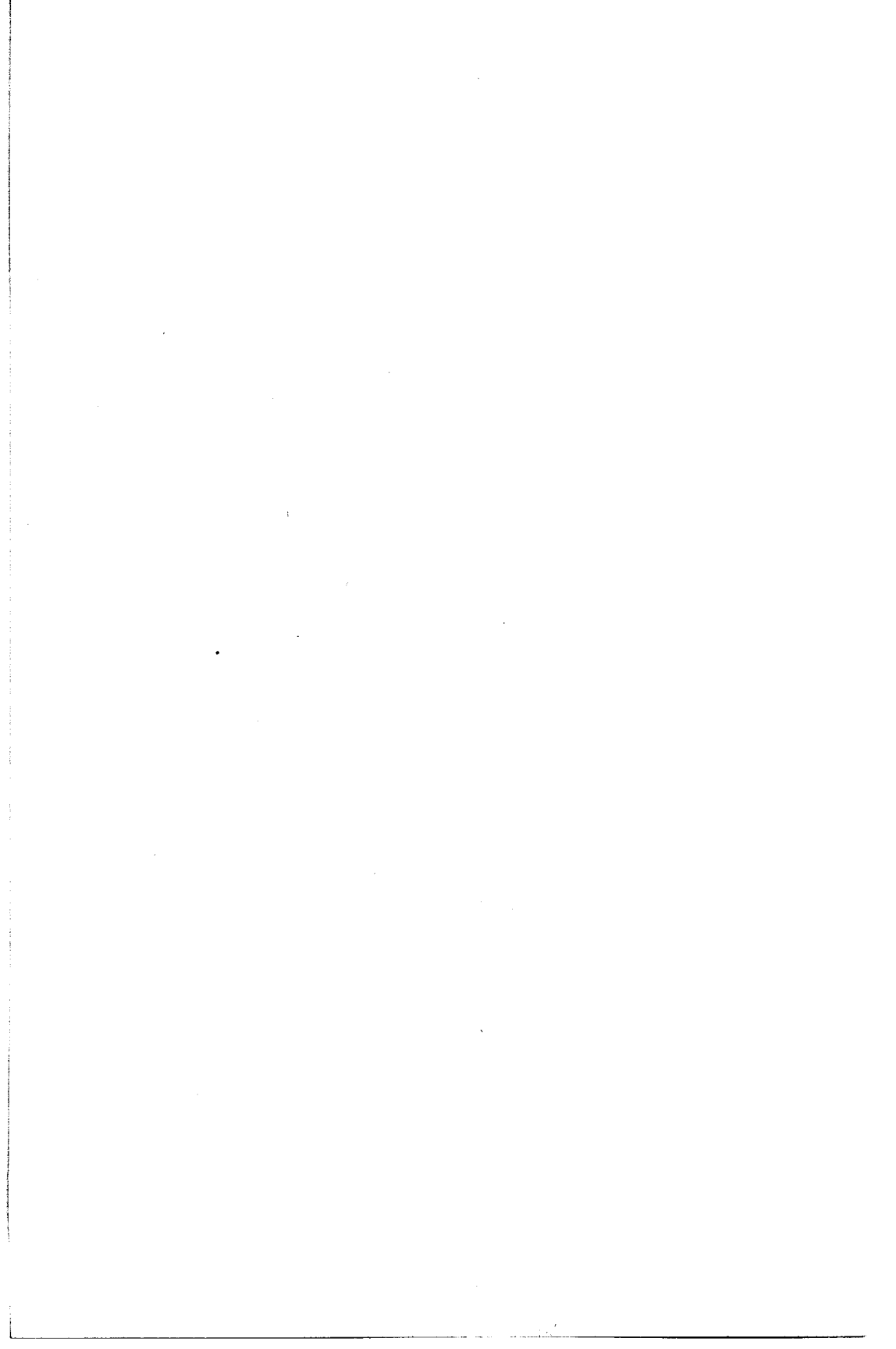
The court is given flexibility in fixing the time of payment for the land or the improvement so that the requirement of payment can be adapted to the circumstances of the particular case. If the owner elects to purchase the improvement, the court is further authorized to provide for payment in installments. 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 landowner, 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 composite 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)).

#### 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 provision 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 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.



**A STUDY RELATING TO IMPROVING THE LOT  
OF THE TRESPASSING IMPROVER \***

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\* This study, beginning on page 821, is reprinted with permission from the *Stanford Law Review*, Volume 11, page 456 (1959).



## Improving the Lot of the Trespassing Improver

JOHN HENRY MERRYMAN\*

There is something irresistibly comic about the bumbler who builds his house on someone else's lot. In California, where legislators and judges enjoy a belly laugh as much as the next man, he who makes such a ludicrous mistake deserves, and gets, hilarious, rib-digging retribution. The house—this is rich—belongs to the owner of the land. True, there have been occasional murmured remonstrances from the loges,<sup>1</sup> and the legislature tampered with the script in 1953,<sup>2</sup> but on the whole all efforts to view what clearly is comedy as tragedy have been sternly rebuffed.<sup>3</sup>

The most recent performance was billed as *Taliaferro v. Colasso*.<sup>4</sup> The straight man (Colasso) bought the house and lot in 1947, some years and several grantees after the original mistake had been made by an unlisted bit player. However, he added \$3,000 worth of improvements of his own before the heavy (Taliaferro) entered and brought the usual action to quiet title and recover possession. The trial court's performance was marred by an order that Taliaferro pay Colasso \$3,000 as a condition of recovering possession, but the district court of appeals saved the act by holding the condition invalid. Thus Taliaferro got the lot, the house and the improvements. Colasso got the bill for costs. And the crowd, presumably, rolled in the aisles.

In simplest form the problem is how to deal with the parties when A trespasses and improves B's land. There are three typical cases: (1) The defective title cases, in which A's title proves to be

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1. Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CALIF. L. REV. 189 (1927); Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 So. CAL. L. REV. 21, 31-40 (1952).

2. Cal. Stat. 1953, ch. 1175, §§ 1-2, at 2674 (see CAL. CIV. CODE §§ 1013-1013.5). This legislation is discussed at pp. [843-44] *infra*.

3. E.g., *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 355 (1859), *writ of error dismissed sub nom*; *Mining Co. v. Boggs*, 70 U.S. 304 (1865), see pp. [841-42] *infra*; *Billings v. Hall*, 7 Cal. 1 (1857); see pp. [833-39] *infra*; *Trower v. Rentsch*, 94 Cal. App. 168, 270 Pac. 749 (2d Dist. 1928), see p. [845] *infra*.

4. 139 Cal. App.2d 903, 294 P.2d 774, 24 A.L.R.2d 11 (1st Dist. 1956).

bad after he has made improvements on land which he believed he owned. (2) The wrong lot cases, in which A improves B's land because of a mistake in the identity of the land. *Taliaferro v. Collaso* is such a case. (3) The so-called bad faith cases, in which the trespass was deliberate rather than mistaken. Each of these can be complicated by the interests of third persons, as where A builds on B's land with C's materials and the land is sold or mortgaged to D without notice of the claims of A and C.

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

#### THE ROMAN LAW

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

Ex diverso si quis in alieno solo sua materia domum aedificaverit, illius fit domus, cuius et solum est. sed hoc casu materiae dominus proprietatem eius amittit, quia voluntate eius alienata intellegitur, utique si non ignorabat in alieno solo se aedificare: et ideo, licet diruta sit domus, vindicare materiam non possit. certe illud constat, si in possessione constituto aedificatore soli dominus petat domum suam esse nec solvat pretium materiae et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonae fidei possessor fuit qui aedificasset: nam scienti alienum esse solum potest culpa obici, quod temere aedificaverit in eo solo, quod intellegeret alienum esse.<sup>5</sup>

On the other hand, if anyone builds with his own materials on the land of another, the building belongs to the owner of the land. But in this case the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, though only, of course, if he knew he was building on another's land; and therefore, if the building should be destroyed, he cannot even then bring a real action for the materials. Of course, if the builder has possession of the land, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be defeated by an exception of *dolus malus*, provided the builder was in possession bona fide. For if he knew that he was not the owner of the soil, he is barred by his own negligence, because he recklessly built on ground which he knew to be the property of another.<sup>6</sup>

5. INSTITUTES 2.1.30.

6. The translation is based on that in THE INSTITUTES OF JUSTINIAN 41-42 (5th ed. Moyle transl. 1913).



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

### THE CIVIL LAW

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

Lorsque les plantations, constructions et ouvrages ont été faits par un tiers et avec ses matériaux, le propriétaire du fonds a droit ou de les retenir, ou d'obliger ce tiers à les enlever.

Si le propriétaire du fonds demande la suppression des plantations et constructions, elle est aux frais de celui qui les a faites, sans aucune indemnité pour lui; il peut même être condamné à des dommages-intérêts, s'il y a lieu, pour le préjudice que peut

When the plantations, constructions and works have been made by a third party with his materials, the owner of the land has the right to keep them or to compel such third party to remove them.

If the owner of the land asks to have the plantations or constructions removed, it shall be done at the expense of the person who made them, without entitling him to any indemnity; he can be ordered to pay dam-

7. BUCKLAND, *ROMAN LAW* 213-15 (2d ed. 1950); BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW* 87-88 (2d ed. LAWSON 1952).

8. See, e.g., the discussion of *ius tollendi* in BUCKLAND, *ROMAN LAW* 213 n.8 (2d ed. 1950).

9. *Id.* at 213.

10. SCRUTTON, *THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND* 58-73 (1885); 3 WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 981-1041 (1928); WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 58-62 (1925).

avoir éprouvé le propriétaire du fonds.

Si le propriétaire préfère conserver ces plantations et constructions, il doit le remboursement de la valeur des matériaux et du prix de la main-d'œuvre sans égard à la plus ou moins grande augmentation de valeur que le fonds a pu recevoir. Néanmoins, si les plantations, constructions et ouvrages ont été faits par un tiers évincé, qui n'aurait pas été condamné à la restitution des fruits, attendu sa bonne foi, le propriétaire ne pourra demander la suppression desdits ouvrages, plantations et constructions; mais il aura le choix, ou de rembourser la valeur des matériaux et du prix de la main-d'œuvre, ou de rembourser une somme égale à celle dont le fonds a augmenté de valeur.<sup>11</sup>

ages, if there is reason, for the injury suffered by the owner of the land.

If the owner prefers to keep the improvements he owes payment of the value of the materials and the price of the labor, without regard to the increase or loss in value resulting to the land. Nevertheless, if the improvements have been made by a third party who has been ejected and who was not ordered to return the income owing to his good faith, the owner cannot require that the improvements be removed; but he shall have the choice of paying either the cost of materials and labor or the additional value of the property due to the improvements.<sup>12</sup>

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

11. NOUVEAU CODE CIVIL art. 555 (Daloz 1900-1905).

12. The translation is based on that of CACHARD, *THE FRENCH CIVIL CODE* 177-78 (rev. ed. 1930).

13. See the annotations to art. 555 in NOUVEAU CODE CIVIL (Daloz 1900-1905).

14. CÓDIGO CIVIL arts. 2622-24 (Argen. 1882); CÓDIGO CIVIL arts. 545, 547-49 (Braz. 1917); BÜRGERLICHES GESETZBUCH arts. 946, 951 (Ger. 10th ed. Palandt 1952); CÓDICE CIVILE arts. 936-37 (Italy 1924); CÓDIGO CIVIL arts. 358, 361-64, 453-54 (Spain 1889); CODE CIVIL SUISSE arts. 671-73 (Swit. 1907).

complex and detailed body of doctrine applicable to such cases by building on the Roman law.

### THE COMMON LAW

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

Bracton's statement of the rule is quite brief:

E contrario autem si quis de suo in alieno solo ædificaverit mala fide materium præsumitur donasse, si autem bona fide, solvat dominus soli preti-	And on the other hand if one builds with his materials on the land of another in bad faith he is presumed to have made a gift, but if in good faith
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15. Glanvil wrote some fifty years earlier than Bracton, but his work contains no reference to this kind of problem.

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

17. Bracton himself refers to the *Summa Azonis*, e.g., BRACTON, *op. cit. supra* note 16, at f. 10. But the most striking proof is the similarity in passages of the two works. See MAITLAND, *op. cit. supra* note 16; Woodbine, *supra* note 16. Maine said that Bracton "put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris . . ." MAINE, *ANCIENT LAW* 79 (Pollock ed. 1884). This statement is generally thought to be, in Maitland's words, "stupendous exaggeration." MAITLAND, *op. cit. supra* note 16, at xiv. However, there is no doubt that the portion of Bracton dealing with accession is taken directly from Azo. The relevant passages from both writers are set out in *id.* at 113 (Bracton) and 116 (Azo).

18. There is substantial disagreement among the scholars on these related questions. See authorities cited note 17 *supra*.

um materiæ et mercedem fabrorum. Hoc autem quod prædictum est locum habet si ædificium sit immobile, si autem mobile aliud erit. Ut ecce horreum frumentarium novum ex tabulis ligneis factum in prædio Sempronii positum, non erit Sempronii.<sup>19</sup>

the owner of the soil shall pay the price of the materials and the wages of the workmen. This, however, as said before, applies if the building is immovable; if movable it is otherwise, as for example a new corn storehouse made of wood planks placed on the land of Sempronius does not belong to Sempronius.<sup>20</sup>

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

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

Qui autem in fundo alieno de suo construxerit, mala fide materiam præsumitur donasse; Et cum domino soli merito debeat materia remanere, eo quod aedificia solo cedunt, & pro possessore soli judicabitur, propter duplex beneficium possidendi, quamvis obscura fuerint utriusque jura.<sup>25</sup>

However, one who builds something of his own on the land of another in bad faith is presumed to have made a gift of the materials; both because the materials should remain with the owner of the soil, buildings ceding to the land, and since the owner will be deemed possessor of the soil, on account of the double benefit of possession, however obscure the rights of (under?) both shall be.<sup>26</sup>

19. This version of Bracton, ff. 96-10, is taken from 2 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 46 (Woodbine ed. 1922).

20. Translation by the author. See note 26 *infra*.

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

22. SCRUTTON, *op. cit. supra* note 10, at 122-24; WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 262-63 (1925).

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

24. 1 NICHOLS, BRITTON xxvii (1865).

25. FLETA 3.2.12.

26. This translation is the product of what may have been the least fruitful collaboration in the history of legal scholarship. It all began when the writer found he was power-

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

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

Britton's statement is as follows:

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

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

27. See 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 319-21 (3d ed. 1923); 1 NICHOLS, BRITTON, intro. (1865); 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 210 (2d ed. 1899); SCRUTTON, *op. cit. supra* note 10, at 123-24; WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 262-64 (1925).

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

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

before the timber is fastened with nails, or the trees have taken root, he may lawfully do so.<sup>30</sup>

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

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

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

The influence of the first quoted passage from Britton has been very great. One reason may be the lack of any other ready authority. There is a most remarkable absence of reported litigation on the subject in England. A *Year Book* case in the reign of Edward III<sup>32</sup> denied damages to the plaintiff in an assize of novel disseisin because the disseisor had improved the property by building

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30. *Id.* 2.2.6.

31. *Id.* 2.12.2.

32. Y.B. 14 Edw. 3 (Trin.) pl. 2 (1340).

on it. This case also appears in the *Liber Assisarum*<sup>33</sup> and was included in the abridgments of Brooke<sup>34</sup> and Fitzherbert.<sup>35</sup> In *Dike & Dunston's Case*<sup>36</sup> the defendant argued that

if a man do disseise me, and fells trees upon the Land, and doth reparaire the houses; in an Assize brought against him, the same shall be recouped in damages; because that which was done was for his Commodity.

However, the case was on an entirely different problem. In *Coulter's Case*,<sup>37</sup> which also involved an unrelated question, there is the following dictum: "The disseisor shall recoupe all in damages which he hath expended in amending of the houses . . .," citing the *Year Book* case mentioned above. There is no other authority in the English law,<sup>38</sup> although in equity some cases deal with a related problem.<sup>39</sup>

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

33. LIB. ASS. 14, pl. 12 (1340).

34. BROOKE ABRIDG., *Damages* pl. 99 (1576).

35. FITZ. ABRIDG., *Damages* pl. 92 (1577).

36. Godb. 52 pl. 65, 78 Eng. Rep. 32 (K.B. 1586).

37. 5 Co. 30, 77 Eng. Rep. 98 (K.B. 1599).

38. SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO xx (8 Selden Soc'y, Maitland ed. 1895) states: "The English courts have no law about 'accession' . . . . May we not, after six centuries, say that they will never feel the want of one? Where, in all our countless volumes or reports, shall we find any decisions about some questions that Azo has suggested to Bracton?" Ubi vero?

39. If A begins, by mistake, to build on B's land and B knows of this and allows him to proceed without pointing out his error, equity will intervene to prevent B profiting by A's mistake. See *Ramsden v. Dyson*, L.R. 1 H.L. 129 (1866); HANBURY, *MODERN EQUITY* 52-53 (6th ed. 1952) and cases cited. See also the *Earl of Oxford's Case*, 1 Rep. Ch. 1, 21 Eng. Rep. 485 (1615), and the discussion of the case of *Peterson v. Hickman* (apparently not reported) therein.

40. See discussion in Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L. Rev. 560 (1934). The earliest case cited by Niles is in Y.B. 17 Edw. II 1, 518 (1323). The amount of litigation in fixture cases not involving trespassers is very great, as the decisions cited by Niles indicate.

41. Niles, *supra* note 40, at 564-77.

## THE AMERICAN LAW

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

As stated by the American authorities the common-law rule is that the improvements, whether made in good or bad faith, belong to the owner of the land. If the owner sues for rents and profits the value of the improvements can be set off against them.<sup>48</sup> In equity the good faith improver will be protected if the owner stood by and allowed him to improve knowing of his mistake.<sup>49</sup> There is some authority to the effect that restitution will be allowed the good faith improver by way of defense in an equitable action brought by the owner, as where he brings an action to quiet title,<sup>50</sup> on the principle

42. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), is a leading case. See generally the discussion and cases collected in 5 AMERICAN LAW OF PROPERTY § 19.9 (Casner ed. 1952); FERRARD, FIXTURES 10-12 (2d ed. Hogan 1855); 2 KENT, COMMENTARIES ON AMERICAN LAW \*334-38; 5 POWELL, REAL PROPERTY 73-76 (1956); REPORTERS' NOTES TO RESTATEMENT, RESTITUTION § 42 (1937); ANNOT., 24 A.L.R.2d 11 (1952); 148 A.L.R. 335 (1944); 142 A.L.R. 310 (1943); 137 A.L.R. 1078 (1942); 130 A.L.R. 1034 (1941); 104 A.L.R. 577 (1936); 89 A.L.R. 635 (1934); 82 A.L.R. 921 (1933); 68 A.L.R. 288 (1930); 40 A.L.R. 282 (1926); Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L. REV. 66, 78-80 (1934).

43. See *Green v. Biddle*, *supra* note 42; Niles, *supra* note 42, at 78.

44. *Green v. Biddle*, *supra* note 42 (statute held unconstitutional); *Billings v. Hall*, 7 Cal. 1 (1857) (same); *Townsend v. Shipp's Heirs*, 3 Tenn. (1 Cooke) 293 (1813) (statutes interpreted narrowly to avoid unconstitutionality); *Nelson v. Allen*, 9 Tenn. (1 Yerg.) 360 (1830) (same legislation held unconstitutional).

45. Most of the later cases and writers cite *Green v. Biddle*, *supra* note 42.

46. 5 Co. 30, 77 Eng. Rep. 98 (K.B. 1599). This was the sole authority cited in *Green v. Biddle*, *supra* note 42.

47. See HARNO, LEGAL EDUCATION IN THE UNITED STATES 19-21 (1953); WALLACE, THE REPORTERS 193-96 (4th rev. ed. 1882).

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

49. 2 POMEROY, EQUITY JURISPRUDENCE § 390 (5th ed. Symonds 1941).

50. See RESTATEMENT, RESTITUTION § 42 (1937); REPORTERS' NOTES TO RESTATEMENT, RESTITUTION § 42, at 31 (1937); ANNOT., 104 A.L.R. 577, 580 (1936).



that he who seeks equity must do equity. And there are, finally, a few cases giving the improver an independent equitable action of his own for restitution.<sup>51</sup> However, the majority of the cases recognize no such equitable action or defense.

Thus the American common law on the subject is seen to be quite harsh and crude. In the early days of the Republic there was a great amount of litigation on these questions because of the lack of adequate surveys, the existence of constantly expanding frontiers and the absence of adequate records of titles. The manner in which the law operated resulted in many hard cases and, at the same time, tended to frustrate a then widely held view of public policy. According to this view it was important that wild land be settled and improved and that the law encourage this kind of activity.<sup>52</sup> The common-law rule tended to discourage settlement and improvement by denying one who went on land in good faith and improved it any reasonable prospect of coming out whole if title should eventually be found in someone else.

At a very early date the states began to enact legislation altering the rule so as to encourage the settlement and improvement of lands.<sup>53</sup> A very few states made the change through judicial decision and thus did not immediately follow the trend toward enactment of betterment acts.<sup>54</sup> Whatever the course followed, however, all but twelve states now have, through one means or another, modified the so-called common-law rule and afford some relief to the good faith improver.<sup>55</sup> Thus we have come full circle from the

51. The leading case is *Bright v. Boyd*, 4 Fed. Cas. 127 (No. 1875) (C.C.D. Me. 1841), which should be contrasted with *Putnam v. Ritchie*, 6 Paige Ch. 390 (1837). Note the analogous rule allowing a trustee to recover for unauthorized improvements on the res. 3 SCOTT, TRUSTS § 245.1 (2d ed. 1956). In England a series of cases allow one who builds on land leased from charitable trustees to recover for his improvements if the lease is set aside as improvident. *Attorney-Gen. v. Day*, 3 L.T.R. (o.s.) 239 (1844).

52. The point is discussed in *Billings v. Hall*, 7 Cal. 1, 15-16 (1857); *Townsend v. Shipp's Heirs*, 3 Tenn. (1 Cooke) 293, 296, 300 (1813).

53. The earliest statute found was enacted in Virginia in 1643. It is reproduced in 1 Statutes at Large 260 (2d ed. Hening 1823) (Virginia).

54. *Union Hall Ass'n v. Morrison*, 39 Md. 281 (1873); *Hardy v. Burroughs*, 251 Mich. 578, 232 N.W. 200 (1930); *Hatcher v. Briggs*, 6 Ore. 31 (1876); *Herring v. Pollard's Ex'rs*, 23 Tenn. (4 Humph.) 362 (1843); *Murphy v. Benson*, 245 S.W. 249 (Tex. Civ. App. 1922). The reporters of the *Restatement of Restitution* suggest that this view probably would have prevailed in most of the states but for the prevalence of betterment acts. REPORTERS' NOTES TO RESTATEMENT, RESTITUTION 29 (1937).

55. The following states have betterment legislation of some sort: ALA. CODE tit. 7, §§ 945-49 (1941); ARK. STAT. ANN. §§ 34-1423-34-1428 (1947); CONN. GEN. STAT. § 47-30 (1958); D.C. CODE ANN. §§ 16-519-16-526 (1951); FLA. STAT. §§ 70.06-70.12 (1957); GA. CODE §§ 33-107-33-109 (1933); ILL. ANN. STAT. ch. 45, §§ 53-58 (Smith-Hurd 1944); IND. ANN. STAT. §§ 3-1501-3-1510 (1946); IOWA CODE §§ 560.1-560.7 (1958); KAN. GEN. STAT. ANN. §§ 60-1910-60-1913 (1949); KY. REV. STAT. §§ 381.460-381.570 (1956); LA. CIV. CODE ANN. art. 3451-53 (Dart 1947); ME. REV. STAT. ANN.

Roman law, with its distinctions and subtleties, through Azo, Bracton, Fleta and Britton with their successively cruder and less satisfactory paraphrases of their predecessors, through centuries of nearly unbroken silence about the problem in the English law, through the dubious position of the early American courts on the question, back to legislation more or less approximating the Roman law from which we began.

The "occupying claimant" or "betterment" acts adopted in the various American jurisdictions are in many ways similar to each other, although there are important variations among them. In general the rights which they give the improver are only defensive in nature, although a few allow him to initiate the action.<sup>56</sup> Almost all are restricted to aiding trespassers in good faith,<sup>57</sup> and some require that the trespasser have entered under color of title,<sup>58</sup> that he hold adversely to the owner,<sup>59</sup> or that he have been in possession for some minimum period of time.<sup>60</sup> The form of relief likewise varies: under most statutes the true owner is allowed to choose whether to pay for the improvements or sell the land to the improver;<sup>61</sup> in others he has no choice.<sup>62</sup> The consequences of failure to exercise the option vary; in some states the interest is forfeited,<sup>63</sup> but in others the parties become tenants in common as their inter-

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ch. 172, §§ 20-47 (1954); MASS. ANN. LAWS ch. 237, §§ 14, 16-35 (1956); MICH. COMP. LAWS §§ 629.44-629.47 (1948); MINN. STAT. §§ 559.09-559.13 (1957); MISS. CODE ANN. §§ 825-26 (1956); MO. REV. STAT. §§ 524.160-524.210 (1949); NEB. REV. STAT. §§ 76-301-76-311 (1958); N.H. REV. STAT. ANN. §§ 524:2-524:4 (1955); N.M. STAT. ANN. §§ 22-8-14-22-8-20 (1953); N.C. GEN. STAT. §§ 1-340-1-351 (1953); N.D. REV. CODE §§ 32-1708-32-1712 (1943); OHIO REV. CODE ANN. §§ 5303.08-5303.17 (Page 1954); OKLA. STAT. tit. 4, §§ 149-50 & tit. 12, §§ 1481-86 (1951); S.C. CODE §§ 57-401-57-410 (1952); TENN. CODE ANN. § 23-1328 (1955); TEX. REV. CIV. STAT. art. 7393-7401 (1948); UTAH CODE ANN. §§ 57-6-1-57-6-8 (1953); VA. CODE ANN. §§ 8-829-8-835 (1957); VT. STAT. ANN. tit. 12, §§ 4811-15 (1958); WASH. REV. CODE §§ 7.28.150-7.28.180 (1951); W. VA. CODE ANN. §§ 5449-62 (1955); WIS. STAT. §§ 275.24-275.27 (1957); WYO. COMP. STAT. ANN. §§ 3-7007-3-7017 (1945). Similar legislation has been enacted throughout Canada. The cases are collected in CANADIAN ABRIDGMENT, *Mistake*, div. VIII.

56. See the Iowa, Missouri, New Mexico and Tennessee statutes cited note 55 *supra*.

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

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

59. Alabama, Maine, and North Dakota.

60. Alabama, Maine, Michigan, New Hampshire, and Texas. Massachusetts prescribes a minimum period unless the trespasser acted in good faith.

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

62. Illinois and Kentucky.

63. Kansas, Massachusetts, Ohio and Wisconsin.

ests appear.<sup>64</sup> The court may be given power to withhold possession from the owner until he pays for the improvements,<sup>65</sup> or the improver may be given a lien on the land.<sup>66</sup> If the improver is given the option to purchase the land at its unimproved value the statute may state the time within which and the terms according to which payment must be made.<sup>67</sup> And so on. In Maryland the lot of the good faith improver has been bettered by judicial decision.<sup>68</sup> In the remaining states, with the exception of California,<sup>69</sup> the improver is treated according to the so-called common-law rule.

### THE CALIFORNIA LAW

California has no such betterment act. One was enacted in 1856,<sup>70</sup> but declared unconstitutional the following year in *Billings v. Hall*.<sup>71</sup> Both the act and the decision voiding it give some indication of the struggle then going on between squatters and grantees. The act was as follows:

#### An Act

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

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

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

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

Section 4. In all actions of ejectments or other actions involving the right to land or the right to the possession of lands hereafter . . . tried in any court in this State, the defendant may deny the plaintiff's right to such land or to its possession, and he may also set up and aver in his answer that he and those under whom he claims, have made lasting and

64. Indiana and Washington. In North and South Carolina the land is sold at a judicial sale and the proceeds divided between the parties.

65. Alabama, Arkansas, Connecticut, Georgia, Minnesota, New Hampshire and Wisconsin.

66. Arkansas and Kentucky. Compare the judicial sale in North and South Carolina, note 64 *supra*.

67. Florida, Georgia, Maine and Massachusetts.

68. The leading case is *Union Hall Ass'n v. Morrison*, 39 Md. 281 (1873).

69. Discussed below.

70. Cal. Stat. 1856, ch. 47, at 54.

71. 7 Cal. 1 (1857).

valuable improvements on such land, stating in what the improvements consist, and their value, and if a growing crop is upon said land, the defendant may state that fact also, and the court before which the action shall be tried shall direct the jury in their verdict to find—

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

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

Third. The value of the improvements, and,

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

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

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

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

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

Section 9. If the plaintiff shall fail to pay the defendant or his agent, or to the Clerk of the court, the amount of the value of defendant's improvements and growing crops, as assessed by the jury, within the time

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

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

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

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

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

As the caption and the text show, this legislation was designed to protect persons who settled on open lands, the titles to which were uncertain because of their origin, the lack of appropriate marks and failure to record. It is well known that for some years after admission to the Union vast areas of California lands were the

subject of litigation and extra-legal dispute. Eventually, through the activities of the Board of United States Land Commissioners, through decisions in cases involving disputed titles and through greater activity in surveying and marking boundaries, titles became more settled. But at the time of this legislation the problem was an important and practical one. California was a frontier whose lands were valuable for farming, timber and, most of all at the time, minerals. To encourage settlers was to encourage development of these resources and hence of the state.

This philosophy did not appeal to the California Supreme Court. To two of the three justices<sup>72</sup> it appeared that this was an effort to deprive persons of their property without compensation, contrary to natural right and the California constitution. The case concerned land in Sacramento originally granted to John Sutter by the Mexican Government and confirmed by the Board of United States Land Commissioners. The plaintiff was a successor in interest of Sutter and the defendant was one who had settled on the lands and lived there for over five years before the action of ejectment was brought. The court, in an opinion by Chief Justice Murray, saw the question as one requiring it to decide the constitutionality of the Settlers' Act "so far as the same requires a party, recovering possession of lands in an action of ejectment, to pay the defendant the value of his improvements."<sup>73</sup> On this point it is said that

this question is not free from embarrassment, not on account of any doubts we have upon the subject, treating it as purely a legal question, but because it has heretofore entered largely into the politics of this State, and become a most fruitful source of private animosity, and public discord.<sup>74</sup>

Embarrassed or not, the supreme court held that the act deprived Billings of his inalienable right to acquire possession and protect property under article I, section 1 of the California constitution then in force. It did so by reading the act to apply equally in favor of bad faith trespassers who acquire possession by violence and

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

73. 7 Cal. at 3.

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

good faith improvers (compare section 13 of the act) and by ignoring the fact that the owner, if he did not wish to pay for the improvements, was paid for his land (see section 5 of the act). Worst of all in the eyes of the court was the fact that the owner was expected to pay for the improvements. How could this be so, since they were part of the land and hence belonged to the owner? The reasoning is classic and deserves to be quoted:

The act does not discriminate between an innocent and a tortious possession. It is not an attempt to avoid a circuitry of action, by providing for an equitable adjustment of the whole subject in one suit; it applies as well to the trespasser who has made unlawful and violent entry upon the lands of another, as to him who has used diligence to ascertain his neighbor's right, and whose conduct has been marked by good faith and fair dealing. It applies as well to past as future cases. That which, before, was mine, is by this Act taken from me, either in whole or in part, for if I refuse to pay for the improvements which were put upon my land by a mere trespasser, and which were mine by the law, before the passage of the statute, I lose not only the improvements, but the land itself, and that which is mine today, may be taken from me to-morrow, by any intruder who wishes to enter upon it.

Such legislation is repugnant to the plainest principles of morality and justice, and is violative of the spirit and letter of our Constitution. It divests vested rights, attempts to take the property acquired by the honest industry of one man, and confer it upon another, who shows no meritorious claim in himself.<sup>75</sup>

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

[T]he hardships of particular cases, that will and must arise in the progress of human affairs, under any and all systems of government and law, do in fact constitute the true and stern test of the devotion of a free people to fundamental principles . . . . [T]he permanent evils inflicted upon free institutions, by a violation of these fundamental principles, will outweigh, immeasurably, all the temporary benefits that might accrue to individuals.<sup>76</sup>

Justice Terry dissented at length, making two significant points. The first was in answer to the complaint that the statute

75. 7 Cal. at 9-10; see Cal. Stat. 1856, ch. 47. The court did not, as the quotation might suggest, restrict its holding to the case of improvements made before the statute was enacted.

76. 7 Cal. at 18.

was unconstitutional because it was available to good and bad faith improvers alike, rather than being properly limited to good faith trespassers. As to this he said:

I do not perceive how this fact can affect the question of constitutionality. At common law, buildings erected upon land become a part of the freehold, and vest in the owner of the soil as well when erected by a person holding under color of title, as by a mere naked trespasser. In either case such a law would operate to divest vested rights by taking the property of one citizen and conferring it upon another . . . .<sup>77</sup>

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

The sudden increase of population consequent upon the discovery of gold in California, created a large demand for the necessaries of life; the small quantity of land in actual cultivation was inadequate to supply this demand, and left us almost wholly dependent upon foreign countries.

It has been policy of the Legislature from the commencement of our State government, to encourage the settlement and cultivation of the unoccupied lands of the State by the enactment of laws to protect the actual settler in the possession and enjoyment of a limited quantity of land.

The wisdom of this policy has been demonstrated by the rapid development of our agricultural resources, which now afford not only an abundance of necessaries for home consumption but leave a surplus for exportation, a result never accomplished in any other country within so short a period.

Upon the face of the inducements offered by the Legislature, and the promise of being protected in the possession of their homes, a number of hardy and enterprising citizens settled upon lands which, in most instances, had never been surveyed or occupied, nor in any manner segregated from the public domain. Nor was there any evidence within their reach to show that such lands were claimed by any private citizen. Most of this land was, before their settlement, of little value, paying revenue neither to the owner nor to the State; their present enhanced value is in a great measure owing to the energy and labor of the occupant, the improvements in many cases greatly exceeding the lands in value. There are no doubt instances of wrongful and tortious entries upon lands known to be claimed by individuals, but in a majority of cases, more especially in those portions of the State that were not inhabited before the discovery of gold mines, such entries have been made under the *bona fide* belief that the land settled upon was a portion of the public domain.

Under these circumstances we may well doubt whether it would be a greater violation of natural justice to deprive hundreds of citizens and their families of the homes erected by the labor of years, without making any compensation for the improvements which constitute a great part of the value of those homes, or to permit them to retain possession of them upon paying to the owner of the soil the full value of all that is really his

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77. *Id.* at 25.



own. It appears to be settled that the Legislature may enact laws by which private property may be taken for private purposes in cases where the general good would be thereby promoted. The propriety, policy, and expediency of such acts, can be properly determined on by the Legislature.<sup>78</sup>

Although the opinion of Justice Terry seems clearly the better one today it did not sway his colleagues on the court and the Settlers' Act was lost. It has never been replaced in California by anything similar, perhaps in part because of the expectation that its constitutionality could successfully be attacked under the reasoning of *Billings v. Hall*. While it is true that the *Billings* decision was given under the old constitution of 1849, the corresponding section of the constitution of 1879 is taken directly from it and uses the same words.<sup>79</sup> Thus proposed legislation can be expected to survive in the courts only if the reasoning of the majority in *Billings v. Hall* is repudiated or the terms of the act are distinguishable. Both seem possible. Certainly any legislation adopted today would have different objectives than that of 1856. Land titles are now not so unsettled. The number of settlers on open lands is now very small. The uncertainties of most Spanish and Mexican grants have long since been resolved. Adequate surveys have been made, and it is usually a simple matter for any man to ascertain the precise location and limits of his land. It seems unlikely that the *Billings* case poses any threat to properly designed modern legislation.

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

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

This provision was new to the statute law of the state but did not vary from the position adopted earlier in the cases.<sup>80</sup> It merely restated the American common-law position.<sup>81</sup> It has survived to the present day except as modified by legislation in 1953 which allows a good faith improver to remove his annexations. This legislation is discussed below. Until 1953, however, every case involving im-

78. *Id.* at 25-26.

79. The same provision constitutes art. I, § 1 of both constitutions.

80. *Billings v. Hall*, 7 Cal. 1 (1857); *McMinn v. Mayes*, 4 Cal. 209 (1854); *Rand v. Hastings*, 1 Cal. Unrep. 307 (1866).

81. See discussion of the American law, pp. 465-68 *supra*.

provers started from a position identical with the one in the quoted statute.<sup>82</sup> The only possible relief available to the improver was by set-off or equitable estoppel.

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

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

This legislation has consistently been applied in a most restrictive way. If the plaintiff does not seek damages in the action for possession the improver obviously has no set-off for improvements.<sup>83</sup> If damages are sought the improver must plead his right to set-off<sup>84</sup> and include all the elements set out in the statute.<sup>85</sup> Thus he must allege and prove that he took possession under color of

82. Its application has not always been uniform. In *California Pac. R.R. v. Armstrong*, 46 Cal. 85 (1873), the railroad went on the land, improved it, and subsequently brought an action to condemn the land. The defendant claimed that the improvements became his property, since the railroad was a trespasser when they were installed, and that their value should be included in the award. *Held* for the railroad, on unclear grounds. The next year a similar case came before the court. The United States erected a lighthouse on land belonging to the defendant and subsequently brought a condemnation action. Again the defendant sought to have the value of the improvements included in the award and this time was successful. The majority of the court distinguished the *Armstrong* case, with difficulty. The concurring judge found it impossible to distinguish but thought the earlier case wrongly decided. *United States v. Land in Monterey County*, 47 Cal. 515 (1874). A few years later another railroad case came to the court in *Albion River R.R. v. Hesser*, 84 Cal. 435, 24 Pac. 288 (1890). *Held* for the railroad, on the authority of the *Armstrong* case, and distinguishing, with difficulty, the lighthouse case.

For other interesting applications of the rule see *Callnon v. Callnon*, 7 Cal. App.2d 676, 680-81, 46 P.2d 988, 990 (1st Dist. 1935) (dictum), and cases there cited for the proposition that if a husband uses community funds to improve his wife's separate property, the improvements become her separate property and he has no claim for them. In *Carpentier v. Mitchell*, 29 Cal. 330 (1865), a trespasser improved land and subsequently acquired an interest as cotenant. The court said the rule that a cotenant cannot recover the increased value of rents and profits from improvements he has made is not applicable in an action against him.

83. *Yount v. Howell*, 14 Cal. 465 (1859); *Ford v. Holton*, 5 Cal. 319 (1855); *Trower v. Rentsch*, 94 Cal. App. 168, 270 Pac. 749 (2d Dist. 1928); *Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370 (1st Dist. 1913); *Wood v. Henley*, 88 Cal. App. 441, 462-64, 263 Pac. 870, 880 (3d Dist. 1928) (alternative holding). Of course, if damages are sought but none awarded the set-off fails. *Taliaferro v. Colasso*, 139 Cal. App.2d 903, 294 P.2d 774 (1st Dist. 1956).

84. *Moss v. Shear*, 25 Cal. 38 (1864); *Carpentier v. Gardiner*, 29 Cal. 160 (1865) (alternative holding).

85. See *White v. Moses*, 21 Cal. 34 (1862).

title,<sup>86</sup> in good faith,<sup>87</sup> and adversely to the plaintiff.<sup>88</sup> There are very few reported cases in which the claim to set-off has been successful.<sup>89</sup>

The California doctrine of estoppel in improvement cases is also a restricted one. The leading case is *Biddle Boggs v. Merced Mining Co.*<sup>90</sup> It was there stated that in order for an estoppel to arise against the owner the following must appear:

- 1) That the party making the representation by his declarations or conduct was apprised of the true state of his own title;
- 2) That he made the representation with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud;
- 3) That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and,
- 4) That he relied directly on such representation and will be injured by allowing its truth to be disproved.<sup>91</sup>

The case involved land acquired by John C. Fremont from a grantee of the Mexican Government. The grant was what was then called a "floating grant" in that it conveyed ten square leagues of an area of over one hundred, the grantee being given the power to choose which precise area he wished to take. After California became a part of the Union this grant was the subject of much litigation, as a result of which the title was confirmed in Fremont and made specific by a government survey. As located by the survey Fremont's land included that on which the defendant had erected and maintained gold mining and refining equipment costing over

86. *Love v. Shartzer*, 31 Cal. 487 (1867) (entered apparently open land to acquire pre-emption title; lacked color of title); *Trower v. Rentsch*, 94 Cal. App. 168, 171, 270 Pac. 749, 750 (2d Dist. 1928) (dictum) (vendee in possession defaulted).

87. *Wood v. Henley*, 88 Cal. App. 441, 463-64, 263 Pac. 870, 880 (3d Dist. 1928) (dictum). In this case the court suggested that negligence in determining the facts as to the title might constitute lack of good faith.

88. *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 272 (1889) (vendee in possession not holding adversely); *Bay v. Pope*, 18 Cal. 694 (1861) (thought it was public land; possession not adverse to owner); *Kilburn v. Ritchie*, 2 Cal. 145 (1852) (entered under bond from owner to deliver deed after survey; did not hold adversely); *Trower v. Rentsch*, 94 Cal. App. 168, 171, 270 Pac. 749, 750 (2d Dist. 1928) (dictum) (vendee in possession not holding adversely).

89. See *Huse v. Den*, 85 Cal. 390, 24 Pac. 790 (1890); *Welch v. Sullivan*, 8 Cal. 511 (1857).

90. 14 Cal. 279 (1859), writ of error dismissed sub nom. *Mining Co. v. Boggs*, 70 U.S. 304 (1865).

91. *Id.* at 367-68. The court used the word "admission" rather than "representation." The latter term is used in this paraphrase because it more accurately reflects the present meaning of the *Boggs* doctrine.

\$800,000. These improvements had been built in reliance on an earlier survey made by Fremont in which he purported to choose land not including that developed by defendant. Fremont had published the survey and had told defendant that his land did not come within a mile of defendant's. However, after the government survey Fremont's lessee brought this action for possession.<sup>92</sup>

The case was originally heard by a California Supreme Court of Terry, C. J., Burnett and Field, which decided that defendant was entitled to continue in possession and mine the gold. Field dissented. Subsequently Terry resigned, Field became chief justice and Baldwin and Cope became associate justices. On rehearing the court, per Field and Cope, awarded possession to Boggs, Baldwin not sitting because he had been of counsel to one of the parties. One of the defendant's strongest arguments on rehearing was that plaintiff was estopped by conduct and representations to claim the land occupied by defendant. A sympathetic court could easily have taken that view, but instead the extremely rigorous test above quoted was adopted. It has survived to the present day.<sup>93</sup> Consequently very few improvers have been successful in pleading estoppel.<sup>94</sup>

The net effect is that the trespassing improver was, until very

92. It is difficult to avoid the impression that Fremont's interest in the land was quickened by the successful gold mining operations of defendant and that he used his influence in having that land included in the area described by the government survey. See *id.* at 356-61.

93. *Taliaferro v. Colasso*, 139 Cal. App.2d 903, 294 P.2d 774 (1st Dist. 1956); see *Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097 (1891); *Stockman v. Riverside Land & Irrigating Co.*, 64 Cal. 57, 28 Pac. 116 (1883); *Love v. Shartzer*, 31 Cal. 487 (1867); *Maye v. Yappen*, 23 Cal. 306 (1863); *Green v. Prettyman*, 17 Cal. 401 (1861). See also *McGarrity v. Byington*, 12 Cal. 426 (1859) (fraud), and *Ferris v. Coover*, 10 Cal. 589 (1858), both of which preceded the *Boggs* decision.

94. *Godeffroy v. Caldwell*, 2 Cal. 489 (1852), preceded the *Boggs* case and thus escaped its influence. Of those which followed it only three held that an estoppel existed: *Baillarge v. Clark*, 145 Cal. 589, 79 Pac. 268 (1904); *Beardsley v. Clem*, 137 Cal. 328, 70 Pac. 175 (1902); *Pacific Improvement Co. v. Carriger*, 6 Cal. Unrep. 884, 68 Pac. 315 (1902). The *Carriger* case is a sport. On the facts the doctrine of *Boggs* would prevent an estoppel arising. The opinion does not cite *Boggs* or any other authority. The *Beardsley* case is distinguishable in that the plaintiff actually participated in the improving process by selling materials to the defendant knowing they were to be used for that purpose. In the *Baillarge* case the estoppel was based on one of the "Maxims of Jurisprudence" set out in part 4 of the Civil Code. This one, enacted as § 3519, provides that "he who can and does not forbid that which is done on his behalf, is deemed to have bidden it." The *Boggs* case is ignored by the court. There is no case in which the court applies the *Boggs* doctrine and finds an estoppel.

Two other estoppel cases deserve mention. In *Sacramento v. Clunie*, 120 Cal. 29, 52 Pac. 44 (1898), the court said that an estoppel should be invoked against a municipality only in "exceptional cases," this not being an exceptional case. *Id.* at 30-31, 52 Pac. at 45. In *Humboldt County v. Van Duzer*, 48 Cal. App. 640, 192 Pac. 192 (1st Dist. 1920), it was refused because the defendant had profited from using the land in excess of the expense of improving it and had not paid taxes on it. If these restrictions are added to those of the *Boggs* case it becomes almost impossible to find an estoppel in an improvement case.

recently, limited to the defensive remedies of set-off and estoppel in an action brought by the owner. Both of these defenses were so narrowly formulated and applied that they were, as a practical matter, seldom actually available to him. Professor Ferrier, in an article published in 1927,<sup>95</sup> drew attention to the problem and proposed a model betterment act similar to those in a number of other states, but no legislation resulted. However, in 1953 section 1013.5 was added to the Civil Code, providing:

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

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

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

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

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

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

regard to the circumstances under which a court of equity will refuse to compel removal of an encroachment.<sup>96</sup>

The right of removal established by this section is obviously different than the right to compensation provided in the typical betterment acts. Minnesota is the only other state having a similar provision,<sup>97</sup> but Minnesota also has a betterment act.<sup>98</sup> California thus is unique among the states in its treatment of trespassing improvers.

The statutory right to remove improvements has not been discussed in any reported case,<sup>99</sup> but certain of its features are obvious. It applies only to a good faith improver, but it does not require that he enter under color of title. Thus, unlike the set-off provided in Code of Civil Procedure section 741, it is available to persons who improve the wrong property because of a mistake in its identity. There is no requirement that the improver hold adversely, and the provision that his mistake can be either of law or fact can be taken to intend that he not be held to the utmost diligence in determining the facts. Thus the relief afforded should be available to a larger group than could successfully defend by estoppel or plead set-off.

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

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

97. MINN. STAT. § 559.09 (1957).

98. MINN. STAT. §§ 559.10-559.14 (1957).

99. It is mentioned but not discussed in *Taliaferro v. Colasso*, 139 Cal. App.2d 903, 907, 294 P.2d 774, 777 (1st Dist. 1956).

As recently as the *Taliaferro* case an appeal was made to the court to employ its general equity powers to provide relief to a good faith improver. Such a proposal is not entirely without merit, although its chances of success in California in the absence of legislation are very small. The attitude of courts and legislature toward improvers has been an unfriendly one, as the limited nature of the remedies just discussed suggests. In addition, however, it was held in *Trower v. Rentsch*<sup>100</sup> and reiterated in the *Taliaferro* case that the existence of Code of Civil Procedure section 741 prevents application to the improver cases of the general equitable maxim that he who seeks equity must do equity. Were it not for this holding the courts might logically have extended the principles developed in dealing with encroachment cases to the closely analogous improver disputes.<sup>101</sup>

#### SHOULD THE LAW BE REVISED?

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

*The Fixture Fallacy.* The entire problem arises from rote repetition of an old Latin catchword phrase that has become, like so many Latin phrases, a powerful influence on our law. The maxim is "*quicquid plantatur solo, solo cedit.*" For several centuries it has been firmly embedded in the common law, and it is doubtful that any other slogan has been as troublesome as "what is attached to the land becomes part of it."<sup>102</sup> The history of the law of fixtures can accurately be described as a long, tedious and painful series of efforts to overcome its effect. Although the dogma has been submerged by exceptions it survives today as section 1013 of the Civil

100. 94 Cal. App. 168, 270 Pac. 749 (2d Dist. 1928).

101. Encroachments made by one landowner on adjoining land are never held subject to the rigors of Code of Civil Procedure § 741, even though it would be quite logical to do so. Instead the equitable nature of the action usually brought (for an injunction to abate a nuisance or to terminate a continuing trespass) is allowed to dominate the proceeding and the interests of the parties consequently are adjusted by the court in an entirely different, and often preferable, way. See *McKean v. Alliance Land Co.*, 200 Cal. 396, 253 Pac. 134 (1927); *Phillips v. Isham*, 111 Cal. App.2d 537, 244 P.2d 716 (3d Dist. 1952); *Fay Securities Co. v. Mortgage Guarantee Co.*, 37 Cal. App.2d 637, 100 P.2d 344 (4th Dist. 1940); *Blackfield v. Thomas Allec Corp.*, 128 Cal. App. 348, 17 P.2d 165 (1st Dist. 1932); Annot., 28 A.L.R.2d 679 (1953). The general problem is discussed in RESTATEMENT, TORTS § 941 (1939), particularly in comment c.

102. For discussions of the origin of the maxim and the difficulty it has caused see Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L. REV. 560 (1934); Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 So. CAL. L. REV. 21 (1952).

Code, where it stands firmly in the path of proper consideration of a number of legal problems it is inadequate to solve.<sup>103</sup>

The fixtures cases actually fall into separate categories, each of which involves entirely different considerations. Without attempting a full discussion here it can be stated that the majority of the problems are of two kinds: the common ownership and the divided ownership cases.<sup>104</sup> The common ownership cases are those in which the owner of the land also owns the chattel installed on the land. Typical questions are whether the chattel passes with a conveyance of the land or is subject to a mortgage of it. Application of the annexation maxim is a crude method of deciding these cases when the parties have failed to make express provision concerning the chattels.

The divided ownership cases, involving annexation by tenants, licensees, trespassers and conditional vendors, are of an entirely different nature. In these the problem becomes one of deciding whether the owner of a chattel by attaching it, or allowing it to be attached, to the land of another, thereby loses his ownership. Use of the maxim in these cases leads to loss of ownership by the mere fact of annexation, rather than merely to supplying a presumed intention when the parties have failed to express one, as in the common ownership cases. The unsuitability of the annexation test in divided ownership cases is amply demonstrated by the fact that, except as to bad faith trespassers, it is qualified by statute and decision in California. Tenants,<sup>105</sup> licensees,<sup>106</sup> good faith trespassers<sup>107</sup> and conditional vendors<sup>108</sup> are all allowed to remove their annexations to the land of another. Thus the annexation test is almost entirely excepted away in the divided ownership cases.

Such cases are still dealt with, however, as exceptions to an otherwise universal and valid rule. The premise is that the maxim states a great truth lying at the heart of the law of property and that

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

104. See generally 5 AMERICAN LAW OF PROPERTY §§ 19.1-19.16 (Casner ed. 1952); Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L. REV. 66 (1934). Application of this analysis to the California law is set out in Horowitz, *supra* note 102.

105. CAL. CIV. CODE § 1019.

106. *Taylor v. Heydenreich*, 92 Cal. App.2d 684, 207 P.2d 599 (2d Dist. 1949).

107. CAL. CIV. CODE § 1013.5.

108. The right of the conditional vendor to remove his fixtures is subject to the rights of subsequent purchasers or encumbrancers of the land without notice of his separate ownership. The leading California case is *Oakland Bank of Sav. v. California Pressed Brick Co.*, 183 Cal. 295, 191 Pac. 524 (1920).



any alteration of it must be carefully limited and confined. Hence the reasoning in the *Billings* case, holding the California Settlers' Act unconstitutional, and the restricted interpretations given Code of Civil Procedure section 741 and the defense of equitable estoppel.

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

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

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

*Informed Opinion.* The great majority of the states, as well as the civilized nations whose modern civil codes are based on the law of Rome, have taken a much more liberal attitude toward the trespassing improver than California. Commentators on the California rules generally criticise them for their rigidity and illiberality.<sup>109</sup> No authority has been found in which, after measured discussion, the *status quo* is thought to be satisfactory. To the extent that informed opinion exists and has been expressed its weight is against the California law.

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

#### OBJECTIVES OF REVISION

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

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

On these facts T is out of luck under California law. Although he took possession under color of title in good faith and might be said to hold adversely he has no right of set-off because the plaintiff does not seek damages. His right of removal is of little or no value. There is no basis for an estoppel. T is \$65,000 poorer. The owner has received a windfall of \$50,000 at T's expense and T is entirely without fault. The case is a hard one; it would not seem entirely illogical to try to find some solution which is less harsh to T while still holding the owner harmless.

One possible approach is to withhold possession from the owner until he pays T the cost of the improvements or the increased value

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109. OGDEN, *op. cit. supra* note 96; Ferrier, *supra* note 95; Horowitz, *supra* note 102.

of the land due to them, whichever is less (in this case \$50,000). If the owner did not wish to pay for the improvements then T could be given the option of purchasing the land for its unimproved value. Fair terms could be set for payment, with unpaid amounts bearing a reasonable rate of interest. As an alternative the parties could be made tenants in common, the interest of the owner being \$15,000 and that of T \$50,000, or an equitable lien could be placed on the land in favor of one or the other. In any case the owner should also be given judgment for the reasonable rental of the land in its unimproved state up to the time of the action. In this way the owner would lose nothing and T would lose \$15,000, rather than \$65,000. The solution is not perfect, but it attempts to protect the property interest of the owner and, at the same time, give some measure of relief to the innocent trespasser. Under California law no such solution is now possible.

If the facts are slightly altered the case becomes more difficult. The owner may not wish to sell and may have no interest in operating a dairy farm. He might prefer to leave the land in its natural state or to use it for some other purpose for which the improvements are valueless. The case now becomes a classic one of relative hardship, in which no solution is ideal but some solution is necessary.<sup>110</sup> The owner's interest is in using and disposing of his property as he wishes, subject only to certain well-established limitations. On the other hand is the idea that the law should not be the instrument by which undeserved enrichment comes to one person at the expense of another who is entirely without fault.<sup>111</sup> Shall the owner's desire to use his land as he wishes be allowed to prevail, so that T's investment of \$65,000 is entirely lost, or must it give way to some extent to the equities of T? The encroachment cases,<sup>112</sup> which are treated according to equitable principles, are a good analogy. It should be equally possible to give the court in the improver cases power to frame a decree which, under the facts, does as much justice as the case will permit.

There are a number of facts which could raise additional questions. What of the income received by T from his use of the property? Should it be considered where it has been substantial and has,

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110. See discussion of relative hardship in RESTATEMENT, TORTS § 941 (1939).

111. See discussion in RESTATEMENT, RESTITUTION, Introductory Note and §§1-2 (1937).

112. These are briefly discussed *supra* note 101 and accompanying text.

to some extent, amortized his investment in improvements?<sup>113</sup> How shall good faith be defined? If the problem arises because of T's negligence or stupidity should the court be less considerate of him?<sup>114</sup> What of the owner's own responsibility; are there facts which indicate that he allowed the situation to develop? Suppose he stood by while T improved? It seems clear that the *Boggs* case should be overruled to the extent that it would prevent the court from considering deliberate inaction as a factor in framing the decree.<sup>115</sup> Who has paid taxes and assessments, and what effect should this have?<sup>116</sup> What if the improvements are easily removable and will retain their value if removed? Or suppose some are of this kind and others not so?<sup>117</sup> What damage was caused by the trespass?<sup>118</sup> Suppose the improvements were erected on public rather than private land?<sup>119</sup> Who shall pay costs? Shall attorney's fees be

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

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

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

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

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

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

119. In other jurisdictions there appears to have been a tendency to treat trespassing improvers more kindly when the land was publicly owned. See 5 AMERICAN LAW OF

awarded to one of the parties as part of the remedy?<sup>120</sup> Does a third person own or have an interest in the chattels installed?<sup>121</sup>

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

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

As the law stands T is not entitled to any relief and is consequently out of pocket \$20,000. S will acquire the house free of charge. It is another hard case. But not quite as hard as the bad deed case. Here the problem arose because of T's mistake. It is the sort of mistake that could easily have been prevented. He could have taken the precaution of determining precisely which lot was his, ordinarily a simple enough matter, particularly on subdivided land. There is less reason for the wrong lot cases than there was a century ago. In most areas of California a landowner can quickly and cheaply learn the exact location and boundaries of his land. His failure to do so borders on negligence.<sup>122</sup> On the other hand, S

PROPERTY § 19.9 (Casner ed. 1952). In California the cases speak as if public ownership of the land has the opposite effect of diminishing the equities of the improver. *City of Sacramento v. Clunie*, 120 Cal. 29 (1898); *Humboldt County v. Van Duzer*, 48 Cal. App. 640, 192 Pac. 192 (1st Dist. 1920). If a major consideration is protection of the right of "private property" it would seem that public ownership is a proper distinguishing factor and that it should operate in favor of, rather than against, the improver.

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

121. In other jurisdictions the common-law rule that annexations belong to the owner of the land does not apply where the article annexed belonged to a third person, was attached without his consent and could be removed without irreparable injury to the owner's property. See 5 AMERICAN LAW OF PROPERTY § 19.9, at 36 (Casner ed. 1952). There are no California cases in point. The typical case of annexation of a chattel in which a third person has an interest and knows it is to be attached is the conditional sale of a fixture. See *id.* § 19.12. California has taken a position on these cases similar to that in other states. See note 108 *supra*. In either type of case it is of course necessary to protect the interests of persons who take interests in the land in good faith, relying on the presence of the improvement as part of it.

122. In the *Taliaferro* case, on similar facts, the court did not emphasize this factor and appeared to think the trespasser was entirely without fault. Compare *Ferris v. Coover*, 10 Cal. 589 (1858), in which no estoppel was found where the trespasser could have ascertained title in the recorder's office.

is still receiving a windfall of \$25,000; in the absence of any substantial equity in S there is no reason to reward him so handsomely for T's mistake. The best solution in the case given might be to require S to sell lot 27 to T at its unimproved value. This could make both T and S whole.

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

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

T could be classified as a bad faith trespasser under the law of any jurisdiction and would be entitled to no relief under California law. Here the enrichment of the owner is offset by two considerations: the lack of any excuse for T's conduct and the danger to the institution of private property of allowing deliberate trespassers to acquire some claim against the owner of the land by officiously improving it.<sup>123</sup> Consequently it is not entirely illogical to withhold all relief from T in such a case.

However, there is authority in California to the effect that a deliberate trespasser is liable for punitive, as well as actual, damages.<sup>124</sup> If this is so it can be argued that any general tendency on the part of individuals to acquire claims against the land of others by deliberately improving it can be discouraged by awarding both actual and exemplary damages for the trespass. If they are also re-

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123. Or, as a colleague has put it, "Should an unemployed barn painter be able to make a living by going around painting barns without the assent of their owners?"

124. CAL. CIV. CODE § 3294; *Morgan v. French*, 70 Cal. App.2d 785, 161 P.2d 800 (1st Dist. 1945); *Griffin v. Northridge*, 67 Cal. App.2d 69, 153 P.2d 800 (2d Dist. 1944). Although it has been held that allegation and proof of actual damage is a condition to the award of exemplary damages it would always be possible to show that actual damage had occurred as a result of the trespass. See Comment, *Nominal Damages as a Basis for Awarding Punitive Damages in California*, 3 STAN. L. REV. 341 (1951).

quired to pay a reasonable rental for the period of their occupation of the land, and if the extent of their equity is limited to the cost of the improvements or the increase in value of the land, whichever is less, then they should be amply discouraged. T, in the case given, would recover something less than his investment and might, if the court chose, find himself limited to a right to buy the land for its present unimproved value and still be required to pay rents and actual and exemplary damages. Forfeiture does not seem necessary in order to protect private property from such trespasses.

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

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

If a mortgage is taken or the land is purchased by a third person after the improvements have been made a somewhat different problem arises. The danger is that the improvements will have been relied on by the encumbrancer or purchaser without notice of the claim of the improver. Ordinarily this would not be a serious problem, since the possession of the trespasser would be sufficient to require the prospective purchaser or encumbrancer to inquire concerning his interest.<sup>125</sup> Consequently the case usually differs from the prior mortgagee problem only when the improver or one claiming under him is not in possession. In those cases it would be necessary to protect the person who has taken an interest in the land in reliance on improvements which appear to be part of it and who has paid value for them as a result of his reliance. This could easily mean that the improver would be left entirely without a remedy, not because he trespassed, but because he was responsible for creating a situation which misled a good faith purchaser of an interest in the land.<sup>126</sup>

#### FORM OF REVISION

On the whole the approach of the betterment acts in other states is in the direction indicated in this discussion. Legislation which adopted a similar approach would thus not be a bold new experiment on California's part but merely a belated adjustment of the sort long ago made in other jurisdictions.

Appropriate revision involves two steps: abolition of certain undesirable aspects of the existing law and substitution of a new method of dealing with the cases. The first step can be accomplished in part by statutory amendment and repeal. Specifically, Code of Civil Procedure section 741 should be repealed. It affects only the improver cases and its continued existence is incompatible with the objectives of revision. In addition, two decisions have held that the otherwise applicable principles of equity are inapplicable to improver cases because this section exists.<sup>127</sup> Its repeal would thus remove the premise of these decisions. Section 1013.5 of the Civil Code, which provides for a right of removal in some situations, should also be repealed. While such removal might be ap-

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

126. The principles are the same as those governing the improvements of licensees, tenants and conditional vendors. See 5 *id.* §§ 19.10-19.12.

127. See note 100 *supra* and accompanying text.



propriate in certain cases it seems better to include it as only one possible form of relief under the proposed new legislation than to permit it to exist independently in the code. Civil Code section 1013 should then be amended to delete the reference to the right of removal under section 1013.5. As amended it should read as follows:

When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land.<sup>128</sup>

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

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

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

The rule stated is consistent with the common law principle that a person who intermeddles with the property of another assumes the risk as to his right to do so, and it is consistent with the rules with regard to trespass and conversion. *It is, nevertheless, not wholly consistent with the principles of restitution for mistake*, and in spite of the occasional hardship to the recipient, its harshness to the one rendering the services has been substantially relieved, in most cases, either by statute or by equity . . . .<sup>130</sup>

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128. One is tempted to recommend outright repeal of § 1013. The principle it enunciates is clearly wrong and causes a great deal of trouble. However, its scope of application is much broader than the subject of this Article and affects problems not here considered. Repeal will have to wait upon further study.

129. See notes 90-94 *supra* and accompanying text.

130. (Emphasis added.)

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

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

The difficulty of requiring the recipient to pay for the improvements can, of course, be met in other ways. The most obvious is to give him the option of selling the land to the improver at its unimproved value, although the result sought might be obtained in appropriate cases by making the parties tenants in common or by imposing an equitable lien on the land in favor of the improver. If he wishes to pay for the improvements (at a value which will usually be quite favorable to him) the court can establish reasonable terms for deferred payment. If the improvements are easily severable without their own destruction the "opportunity of return" is available as one aspect of relief. The basis for valuation of the improvements which remain will be the cost of labor and materials or the increase in value of the land to them, whichever is less. This would necessarily insure no less than that "definite and certain pecuniary advantage which ensues where money has been paid."<sup>131</sup>

Perhaps the most effective observation on the fears expressed in the *Restatement* is that the betterment acts in most states include provisions of the kind here advocated.<sup>132</sup> Indeed, it is possible to read such acts as attempts to achieve through legislation rules similar to those applying in the absence of legislation to other unjust enrichment cases. Such legislative reform has been necessary in order to correct the peculiar historical development outlined above. No substantial reasons of policy have been advanced for continuing the existing California law.

Consequently one possible approach to the problem of revision is a very brief general statute placing the improver cases in the equity jurisdiction of the courts, to be decided according to traditional restitution doctrine and procedure. It would not attempt to state in any detail the cases to be so treated or the remedies to be

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131. *RESTATEMENT, RESTITUTION* §§ 40-42 & comments (1937).

132. See notes 53-69 *supra* and accompanying text.

decreed. This would be left to the judge. He would simply be directed to frame a decree which, on the facts of the case, would most nearly achieve the ends traditionally sought by courts of equity in restitution cases.

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

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

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

Unfortunately, in California there is not much accumulated learning on the subject of unjust enrichment.<sup>133</sup> A statute of the

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133. The development of restitution doctrine in California law has been limited in scope and extent, compared to the development in some other states. Although California cases can be found which appear to support almost any restitution doctrine, they do not, taken as a whole, provide a sturdy base on which to build. It is the rare problem that has been explored in depth by the California courts. See generally *RESTATEMENT, RESTITUTION, CALIF. ANN.* (1940). One example of such an exception is the group of cases providing relief from forfeiture for the vendee's breach of an executory contract to purchase land. See *Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957); *Union Bond & Trust Co. v. Blue Creek Redwood Co.*, 128 F. Supp. 709 (N.D. Cal. 1955); *Freedman v. The*

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

At the opposite extreme is the statute which attempts to spell out in detail what it hopes to accomplish. Its weaknesses are the brief general statute's strengths, and vice versa. The attempt to anticipate all variations of all cases is bound to fail. The detail this involves magnifies the problem of the unforeseen case. The problems of drafting are increased. The opportunity for individual justice is reduced. The end result is loss of the opportunity for adjustment to the demands of the individual case. The advantage is that the hazards of the judicial process are reduced. The judge is left with the mechanical job of supervising the finding of facts and is given little or no discretion to decide what the consequences of these facts should be. Persons who think that judges should be little more than referees and that the law should be "made" only by legislatures should be attracted by such a statute.<sup>134</sup>

The type of revision most strongly recommended for consideration is a third possibility which lies between these extremes. Such a statute would provide a framework for decision, thus giving the lawyer and judge an indication of the ends sought and the

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Rector, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951); *Baffa v. Johnson*, 35 Cal.2d 36, 39-40, 216 P.2d 13-14 (1950); *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367 (1949); *Comments*, 40 CALIF. L. REV. 593 (1952); 25 So. CAL. L. REV. 387 (1952); 2 STAN. L. REV. 235 (1949). Compare *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713 (1898).

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

Recently a very provocative set of teaching materials which explore this and related problems has been prepared by professors Hart and Sacks of the Harvard Law School. See generally Hart & Sacks, *The Legal Process* (tent. ed., mimeo, 1958).

relief to be granted. At the same time it would leave the court some latitude in framing a decree which would meet the requirements of the case before it. In this way the advantages of both extremes could be retained while minimizing their disadvantages.

The theory of such a statute would be that the court sits as a court of equity and is given discretion to fit the relief to the facts of the specific case. The precise form the relief should take would not be described. However, certain equitable objectives might be set out in order to guide the court in determining what interests are to be protected. For this purpose two basic distinctions would seem important. The first would be between those improvers who trespass deliberately and those who do not. The second would distinguish those landowners who are "at fault" from those who are not. For this purpose fault might be defined in the statute to include the landowner who would have been estopped to recover the land from the improver in a jurisdiction which applied the doctrine of estoppel rather generously in favor of the improver. The consequences of either distinction, however, would not be as drastic as under the present law.

If the trespass were found to be deliberate, two consequences might follow: (1) The landowner could not be at fault. (2) The improver would be required to pay exemplary damages. The amount of such damages would be determined by the discretion of the court. Their purpose would be to provide some means, short of outright forfeiture, of discouraging deliberate trespassing improvers. The device of exemplary damages would allow the court to vary the penalty according to the gravity of the interference with rights of private property. This would provide a degree of flexibility absent when forfeiture is the rule as to deliberate trespassers.

If the landowner was not at fault the primary obligation of the court would be to protect him against loss. In addition to preserving the value of his interest in the land such relief would compensate him for any damage suffered as a consequence of the trespass and for use and occupation of the land by the trespasser. The owner should not, however, receive a windfall at the expense of the improver. That would constitute a forfeiture and thus be repugnant to the equitable philosophy of the statute. Consequently the court should be directed to avoid enriching the owner at the expense of the improver. Since it is conceivable that cases might arise in which the landowner's interest could not be adequately

protected without some measure of enrichment, the statute should provide that if there was a conflict between the objective of compensating the owner and that of preventing his enrichment at the expense of the improver then enrichment would be permissible to the extent necessary to resolve the conflict. If the landowner was at fault the reverse approach would be taken: the primary object of relief would be to protect the improver against loss while avoiding his enrichment at the expense of the owner.

The statute should make it clear that the choice of remedies to achieve these objectives is left to the discretion of the court, which should be free to select from the full range of equitable and legal remedies. Provision should be made for either party to initiate an action under the statute or to introduce the dispute into any other appropriate action. A provision for protection of the interests of third persons would merely state the obvious but might be inserted in order to avoid uncertainty. Since the purpose and method of the statute would be equitable it seems both reasonable and constitutional to provide for trial by the court rather than by jury.<sup>135</sup> Finally, in order to avoid the possibility of a successful attack on constitutional grounds, it might be desirable to limit operation of the statute to improvements made after its enactment.

Such a statute would strive to combine direction by the legislature and discretion in the court. The limits and objectives of

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135. The right to a jury trial is guaranteed by CAL. CONST. art. 1, § 7. This has frequently been held to mean that the right to a jury trial is that existing at the common law at the time the constitution was adopted and consequently that jury trial is a matter of right in a civil action at law but not at equity. *E.g.*, *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 231 P.2d 832 (1951). The matter has been complicated by the procedural reforms which allow equitable and legal matters to be considered by the same court in the same action. Thus a party may be entitled to a jury trial on some issues and not on others. See, *e.g.*, *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430 (1946).

The difficulty lies in determining what proceedings are legal and what equitable. Where the action is one which existed at common law the problem is a historical one: Was a jury trial a matter of right? But where the relief is newly created by statute the rule is that if it is an old legal proceeding in new statutory dress a jury trial is a matter of right. Thus the question becomes more complex. As stated in *People v. One 1941 Chevrolet Coupe*, *supra*, "In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law." *Id.* at 299, 231 P.2d at 843, quoting *People v. One 1941 Chevrolet Coupe*, 222 P.2d 473, 485 (Cal. App. 2d Dist. 1950). While it seems fairly clear that the gist of the statute recommended is equitable it cannot be said with absolute confidence that a court would consider the provision for trial without a jury constitutional.

There are a large number of cases on the problem, but they do not clarify it very much. See Comments, 25 CALIF. L. REV. 565 (1937); 25 SO. CAL. L. REV. 141 (1951); cases collected in 29 CAL. JUR. 2d 482-97 (1958). However, the question of right to a jury trial under this statute would exist whether the statute included any specific mention of it or not. Consequently it seems sound to state the position which, on the merits, is preferable.

decision would be set out in the statute; the judge would work within these limits and mold the relief to the facts in such a way as to achieve legislative objectives. This would appear to be an appropriate distinction in this and, very likely, in many other situations. In any event it has the virtue of consciously attempting a distribution of functions between legislature and court according to stated premises as to the proper role of each. This seems the right way to go at the thing.

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All the trespassing improvers in California taken together do not add up to much. The Republic will not totter if they continue to receive the sort of drastic treatment they have had in the past. They represent no large social interest, no vital sector of the economy. The court calendars are not overcrowded with trespassing improver litigation. They do not clog the relief rolls or turn to crime as a way of life after their encounters with the law. No one has yet argued that they are essential to the national defense. So why bother?

The best answer probably is that this small dark corner of the law of property ought to be swept out. It is a clutter of bad doctrine accumulated through haplography, historical accident, overweighted dictum, and poor scholarship. Solely as a matter of good housekeeping, revision is long overdue. This is reason enough. Property has more than its share of the sort of thing Holmes complained of when he wrote:

“It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>186</sup>

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136. HOLMES, COLLECTED LEGAL PAPERS 187 (1920).

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