

#42

6/2/65

Memorandum 65-27

Subject: Study No. 42 - Rights of Good Faith Improver

BACKGROUND

At the May meeting, it was suggested that a series of propositions be presented for Commission consideration so that the general principles to be reflected in any legislation on this subject could be determined. This memorandum is in response to that suggestion; the principles for consideration are reflected in a general scheme that balances competing interests. After decisions are made in regard to these principles, the staff will prepare tentative legislation for Commission consideration and a separate memorandum raising policy questions relating to the detail of the statute.

For the purpose of this memorandum, "improver" refers to a trespasser who, believing that he owns the property, acts in good faith in improving the property of another; hence, he is a good faith improver in all cases. (Excluded from this proposed scheme are persons who innocently improve property known to belong to another; the common law relating to restitution, implied contract, unjust enrichment, etc. provides remedies in these cases.) A reference to "owner" means only an owner who acts in good faith. "Premises" refers exclusively to the owner's property; "improvement" refers exclusively to the improver's property placed upon the premises.

The general scheme recommended by the staff proceeds on the basic principle that the owner should never suffer a loss because of an improvement that has been placed upon his premises. In other words, without regard for specific remedies given to the parties, the improver has the obligation of making the owner whole in every case. In brief, this scheme may be summarized as follows:

Improver's Remedies

1. Removal of improvement (statute indicates when improver can exercise this right).

or

2. Where owner does not or cannot compel removal, improver can serve notice requiring owner to elect to purchase improvement or sell premises to improver. If owner does not so elect, improver may petition court for such relief as is appropriate.

Owner's Remedies

1. Compel removal of improvement (statute indicates when owner can exercise this right).

or

2. Where improver does not or cannot exercise his right of removal, owner can elect:
  - a. To sell premises to improver; or
  - b. To purchase improvement; or
  - c. To petition court for such relief as is appropriate.

SPECIFIC PROPOSITIONS

Improver's right to remove improvement

1. An improver has the right to remove an improvement under the conditions specified in Section 1013.5 of the Civil Code (set out as Exhibit I (pink)).

or

2. An improver has the right to remove an improvement subject to the following conditions:

(a) Improver must pay all damages caused by affixing and removing the improvement, including damages for restoring premises to former condition; payment to be made or guaranteed before removal.

(b) Improver must pay for value of use and occupancy of premises; payment to be made or guaranteed before removal.

(c) Improver must obtain consent of lienholders and other holding security interests in the [improvement only? improved premises?] before removal.

(d) Removal of improvement must not result in any significant permanent damage to the remaining premises.

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Approval of the first alternative (the existing law re. removal rights of the improver) would eliminate the need for further consideration of conditions limiting the right of removal. Attention could then be directed to a consideration of alternative remedies where this right of removal is not or cannot be exercised. However, because there were some expressions of dissatisfaction with the existing removal statute, an alternative is presented as to which the following comments apply.

It seems reasonable to require the improver to pay or to guarantee to pay for all damages and for the use and occupation before the improvement is removed. This will insure that the owner will not suffer a loss as a result of the affixing and removal of the improvement.

Consent of lienholders should be required because otherwise their security interest might be impaired by removal of the improvement. However, persons holding security interests in the improvement alone have, as a practical matter, an interest only in the severed improvement. Hence, consideration should be given to the extent to which consent should be required from persons having (1) a secured interest in the premises only which presently ripens into an interest in the improved premises and (2) a secured interest in the improved premises where the interest arises because of reliance upon the premises as improved. Lienholders and others having security interests will be protected to the extent possible where the improvement is not removed.

Although the improver has no right to remove an improvement where any significant permanent damage to the remaining premises would result, the owner

can compel removal even though permanent damage would result; thus, it is left to the owner to decide whether he wants the improvement removed where permanent damage would result. See infra.

3. Before an improver can remove an improvement which has become a part of the real property, he must give 30 days' notice to the owner. The owner has 30 days from the time of such notice within which to object to removal: If the owner does not object, improver may remove the improvement; if owner objects, the improver has 30 days from notice of objection within which to petition a court for an order permitting removal of the improvement. If no petition is filed within 30 days, improver waives his right to remove the improvement. If a petition is filed within 30 days, the court shall permit removal if the improver establishes to the court's satisfaction the conditions precedent to removal. The improver must accomplish removal within 60 days from the time he first has the right to remove the improvement, but such time may be extended by agreement of the parties or by order of the court.

With the owner's consent, the improver may remove the improvement without complying with the procedure outlined above.

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Note that no court proceeding is required unless the owner disputes the removal of the improvement. If the owner disputes the removal, the improver has the burden of instituting a court proceeding and establishing that removal is authorized by statute.

Owner's right to compel removal of improvement

1. An owner whose property has been improved by an improver has a right to compel removal of the improvement in every case.

or

2. An owner whose property has been improved by an improver has a right to compel removal of the improvement, and to have the premises restored to their former condition or to receive damages in lieu thereof, if:

(a) The improvement can be removed at an expense not in excess of one-half of the value of the improvement (only the cost of removal and relocation considered; cost of land for the new location not to be considered in making this determination); or

(b) The improvement does not add any significant value to the value of the premises; or

(c) The hardship to the improver in requiring removal of the improvement and restoration of the premises is substantially outweighed by the hardship to the owner if removal is denied.

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The first alternative states the existing law as contained in Section 1013 of the Civil Code. The grant of an unrestricted power to compel removal would effectively block any consideration of the equities involved. Hence, the second alternative is recommended for consideration as to which the following comments are applicable.

Note that removal can be required if any one of the conditions specified above is met. Subdivision (a) may be too rigid, but it is included for the purposes of discussion. One-half obviously is an arbitrary figure presented for certainty. Subdivision (b) is designed to cover the case of the worthless improvement that the owner needs to have removed from the land before it can be used for some other purpose. Naturally, in such a case, the improver ordinarily will not wish to remove the improvement. Subdivision (c) is designed to provide an equitable remedy in cases where both parties would

suffer hardship and is designed to require removal where the owner would suffer undue hardship.

3. An owner who desires removal of an improvement shall give notice to the improver to require removal. Within 60 days from receipt of notice (or within such longer time as a court or the parties provide), the improver may petition the court for an order that he need not remove the improvement. The court shall make such an order if:

(a) The improver establishes that it is not economically feasible to move the improvement (language to conform to substantive section establishing standards as to when removal can be required); and

(b) The improver establishes to the court's satisfaction that the hardship to him in removing the improvement and restoring the premises substantially outweighs the hardship to the owner if removal is granted; and

(c) The owner fails to establish that the improvement does not add any significant value to the value of the premises.

Note that a court order is not required unless the improver disputes the propriety of requiring removal of the improvement.

#### Right of owner to remove improvement

If removal is required and the improver fails to remove the improvement within the time specified by the statute (or by the court or the parties by agreement) and fails to petition the court for an order that he need not remove the improvement, the owner can remove the improvement and charge the improver with the cost of removal and the cost of restoring the premises. The owner also can recover for any permanent damages to the premises.

Right of owner to recover for use and occupation of premises

Whether or not the improvement is removed, the owner is entitled to the value of the use and occupancy of the premises by the improver and for any damages resulting from such use and occupancy. However, in an action by the owner to recover such value and damages, the improver may set off the amount by which the improvement has enhanced the value of the premises (if the improvement has not been removed).

Right of owner to elect to sell premises or purchase improvement

In any case where the improver has not elected to remove the improvement (where authorized to do so), the owner may elect either to sell the premises to the improver (at its fair market value without the improvement) or to purchase the improvement at its cost to the improver or the amount by which the improvement enhances the value of the premises, whichever is the lesser. Owner also may elect to petition court for other equitable relief. Note that the owner can make these elections even though he might also be entitled to compel removal of the improvement. Consent of any lienholders on the premises should be required before the owner can elect to sell the premises to the trespasser. Lienholders on the improvement should have first claim on any amounts paid for the improvements. If owner elects to sell the premises to the improver, the improver forfeits all interest in the improvement unless full payment is made within 90 days or within such later time as a court determines or parties agree.

Right of improver for relief where improvement not removed

In any case where the owner has not elected to compel removal of the improvement (where authorized to do so), the improver may serve a notice on the owner that he elect whether to sell the premises to the improver or

purchase the improvement from the improver (at the same values as above). If the owner makes the election it has the effect indicated above. If the owner does not make this election within 60 days from receipt of such notice, the trespasser should be permitted to institute a special proceeding to have the court determine the relief that should be granted.

In such proceeding, the court shall decree such relief, in its discretion, as will protect the owner against loss but avoid, insofar as possible, enriching him at the expense of the improver. To this end, the court may employ any established legal or equitable remedies, including but not limited to the following: Judicial sale of the improved land and division of the proceeds; sale of the improvements to the landowner; sale of the land to the improver; an order that the parties be made tenants in common of the land and improvements; an order that the improvements be removed from the land; imposition of an equitable lien on the land and/or improvements; damages to the landowner; reasonable value of the use and occupation of the land; attorneys' fees; costs; setoff.

All persons asserting any interest in the land or the improvements may be made parties and the court shall decree such relief as may be necessary to protect their interests.

#### Time for performance

The various periods of time specified above in several different contexts may be varied to more nearly dovetail into a comprehensive scheme for expeditious disposition of the problem.

#### Bad faith improver

A bad faith improver has no rights except that the cost of the improvement (or the amount by which the improvement enhances the value of the premises)

may be offset against the damages and value of use and occupancy due to the owner (if improvement not removed from land). (Giving setoff rights to a bad faith improver would require adjustment of present Section 741 of the Code of Civil Procedure, which is limited to persons acting in good faith.) Consideration might be given to authorizing recovery of exemplary damages against a bad faith improver.

Bad faith owner

Nothing in the statute would affect any additional rights a good faith improver would have against a bad faith owner under general equitable principles.

Respectfully submitted,

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EXHIBIT I

Section 1013.5 of the Civil Code

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

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

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

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

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