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THE RIGHT OF A BONA FIDE OCCU-
PANT OF LAND TO COMPENSATION
FOR HIS IMPROVEMENTS.

It may be observed, in the first place, that the civil law afforded protection to the *bona fide* occupant of land, who had made useful or permanent improvements on the land, believing himself to be the true owner. The civil law never permitted one who was in the possession of land in good faith, to be turned out of his possession by the rightful owner, without any compensation for the additional value he has given to the soil by the improvements he had made; but it allowed him to offset the value of his improvements to the extent, at least, of the rents and profits claimed.¹ He was not entitled to compensation for all his expenditures upon the estate,

¹ Sandar's Justinian (Hammond's ed.) 175.

but only for such as had enhanced its value.² This principle, too, was adopted into the law of those modern nations whose jurisprudence was derived from the Roman law: into that of France,³ and Spain,⁴ and Scotland.⁵

At the common law, however, the rule was different. The policy of that law was averse to making any allowance to the *bona fide* occupant of land for the improvements he might have made upon the land; and this was upon the theory that the true owner was under no legal or moral obligation to pay for improvements which he had never authorized to be made, and which originated in wrongful occupancy. Accordingly, the improvements were considered as annexed to the freehold, and as passing with it. Consequently, when the owner recovered in ejectment, he was not subjected to the condition of paying for any improvements which might have been made upon the land by the occupant. And it was immaterial that the occupant was in possession in good faith, under color of title, believing himself to have the title to the land. As against the true owner, he was an intruder, a wrong-doer, who was not entitled to any compensation whatever for his improvements, which passed with the land to the owner upon a recovery in ejectment.⁶

It was well settled, however, that in case the true owner of an estate, after a recovery thereof at law from a *bona fide* purchaser for a valuable consideration without notice, sought an account in equity, as plaintiff,

² Dig., lib. 20, tit. 1, l. 29, sec. 2; Dig., lib. 6, tit. 1, l. 65; Id., l. 38. See 2 Story's Eq. Jur., sec. 1237; Putnam v. Ritchie, 6 Paige's Ch. (N. Y.) 390, 403, 404; Bright v. Boyd, 1 Story (U. S.), 478.

³ Code Napoleon, arts. 552, 555; *Pothier de la Propriete*, n. 343, 353.

⁴ Asa & Manuel's Inst. of Laws of Spain, 102.

⁵ Bell's Com. on Law of Scotland, p. 139, sec. 538; Ersk. Inst., b. 3, tit. 1, sec. 11.

⁶ Reed v. Reed, 68 Me. 568; Clark v. Hornthal, 47 Miss. 434, 476; Blanchard v. Ware, 43 Iowa, 530; Newland v. Baker, 26 Kan. 341, 344; Barton v. Land Co., 27 Kan. 634, 637; Pugh v. Bell, 2 Mon. (Ky.) 129; Clausen v. Rayburn, 14 Iowa, 136, 140; Webster v. Stewart, 6 Iowa, 401; Lunquet v. Ten Eyck, 40 Iowa, 213; McCoy v. Grandy, 3 Ohio St. 463, 466; Wilson v. Red Wing School District, 22 Minn. 488, 491; McMinn v. Mayes, 4 Cal. 209; Ford v. Holton, 5 Cal. 319; Chesround v. Cunningham, 3 Blackf. (Ind.) 82, 84; Westfield v. Williams, 59 Ind. 221, 224; Graham v. Connersville, etc. R. Co., 36 Ind. 463, 470; Rainer v. Huddleston, 51 Tenn. 223, 225; Townsend v. Shipp, Cooke (Tenn.), 294; Nelson v. Allen, 1 Yerg. (Tenn.) 360; Bonner v. Wiggins, 52 Tex. 125; Russell v. Blake, 2 Pick. (Mass.) 507.

against such possessor, for the rents and profits, the possessor so sued might recoup from the rents and profits the full amount of all the meliorations and improvements which he had beneficially made upon the estate. So, where one held merely the equitable title, and sought the aid of the equity court to enforce it, it was settled that the court would administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements.⁷ But an entirely different question was presented when the *bona fide* purchaser himself came into equity asking for affirmative relief against the true owner, after he had recovered the premises at law. The right to grant such affirmative relief was considered by Chancellor Walworth in the New York Court of Chancery in 1837. It was disposed of as follows: "I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle in its application to future cases might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State, for the purpose of giving the *bona fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit in all such cases."⁸

Four years afterwards the question again came up, and this time in the Circuit Court of the United States for the first circuit, Mr. Justice Story presiding. After alluding to the opinion of Chancellor Walworth, and to his admission that he could find no case in England or America where the point had been decided either way, Mr. Justice Story said;

⁷ See 2 Story's Eq. Jur., sec. 799, a, b.

⁸ Putnam v. Ritchie, 6 Paige's Ch. 405.

"Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." And after a careful consideration of the subject, he laid down the broad doctrine that so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, had, by his improvements and meliorations, added to the permanent value of the estate, he was entitled to a full remuneration, and that such increase of value was a lien and charge on the estate, which the absolute owner was bound to discharge before he could be restored to his original rights in the land.⁹ On the coming in of the Master's report, two years afterwards, this conclusion was adhered to. "It has," said Mr. Justice Story, "the most persuasive equity, and, I may add, common sense and common justice for its foundation."¹⁰ The cases of *Henry v. Pollard*,¹¹ and *Matthews v. Davis*,¹² decided in Tennessee, soon followed, and were to the same effect, being based on Judge Story's decision, and it was announced that affirmative relief would be granted to one who went into possession under a parol contract of sale, and made improvements on the land prior to eviction by the vendor. There are cases to the same effect in North Carolina.¹³

This opinion of Mr. Justice Story has been recognized and adopted elsewhere,¹⁴ but has rarely had occasion to be reviewed in this country, owing to statutory regulation of the question, and the opinion has been ex-

pressed in a recent case, that in consequence it is difficult to say whether or not it can be regarded as the established law.¹⁵ It can not be denied that where one has gone into the possession of land in good faith, believing himself to be the owner, and has expended money in making permanent improvements which have increased the value of the property, he has a strong natural equity, growing out of his own mistake and the neglect of the true owner, which would seem to entitle him to remuneration to the extent that his improvements have augmented the value of the land. In recognition of this equity, many of the States have adopted what are known as betterment or occupying claimant's acts. These statutes generally provide that after recovery in ejectment, the defendant, being a *bona fide* occupant, shall be entitled to recover of the plaintiff the full value of the improvements made upon the land, which value is to be assessed by a jury, or by commissioners, and to the extent that it is in excess of the *mesne* profits, is made a lien on the land, the payment of which constitutes a condition precedent to a recovery of the possession. The plaintiff has the option of taking possession, by paying the lien, or of receiving in lieu of the land, the sum which may be ascertained to be equitably due him. The constitutionality of these acts has been sustained in a number of decisions, which seem to effectually preclude any further doubt of their legality.¹⁶

In sustaining the constitutionality of one of these statutes, the court of Vermont so well explained the principle of betterment laws in general, that its repetition, in this connection, is of interest. "The action for betterments, as they are now termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the de-

⁹ *Bright v. Boyd*, 1 Story, 478.

¹⁰ 2 Story, 607.

¹¹ 4 Humph. (Tenn.) 362.

¹² 6 Humph. (Tenn.) 324.

¹³ *Albea v. Griffin*, 2 Dev. & Bat. (N. C.) Eq. 9; *Wetherell v. Gorman*, 74 N. C. 603; *Hill v. Brower*, 76 N. C. 124; *Smith v. Stewart*, 83 N. C. 406; *Wharton v. Moore*, 84 N. C. 479, 483.

¹⁴ *Hatcher v. Briggs*, 6 Oregon 31; *Union Hall v. Morrison*, 39 Md. 281; *Thomas v. Thomas, Ex'r.*, 16 B. Monr. (Ky.) 421; *Bell's Heirs v. Barnett*, 2 S. B. Mar. (Ky.) 516; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152.

¹⁵ *Griswold v. Bragg*, 48 Conn. 577, 581.

¹⁶ *Griswold v. Bragg*, 48 Conn. 577; *Ross v. Irving*, 14 Ill. 171; *Claypoole v. King*, 21 Kans. 602, 612; *Scott v. Mather*, 14 Texas 235; *Burke v. Mechanics' Savings Bank*, 12 R. I. 513, 515; *Whitney v. Richardson*, 31 Vt. 306; *Pacquett v. Pickness*, 19 Wis. 219; *Saunders v. Wilson*, 19 Texas 194; *Hunt's Lessee v. McMahan*, 5 Ohio 132; *Longworth v. Wolfington*, 6 Ohio 10; *Fowler v. Halbert*, 4 Bibb. (Ky.) 54; *Wilson v. Red Wing School District*, 22 Minn. 488; *Childs v. Shower*, 18 Iowa 261; *Lessee of Davis v. Powell*, 13 Ohio 308; *Bodley v. Galther*, 3 Mon. (Ky.) 58; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374; *Bacon v. Callender*, 6 Mass. 303.

fendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice, if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing the *bona fide* possessor the expense of his improvements if he was removed from his possession by the legal owner. It gives to the possessor, not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterment thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it and the value if no improvement had been made. If the owner takes the land, together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration.¹⁷ Such laws may be unconstitutional, however, by reason of some special and unusual provision, by means of which private rights of property are violated, and the limitations of legislative power are not duly observed. For instance, a provision in such a law requiring repayment to the occupant of the purchase money paid by him for the land, with interest on the same, can not possibly be sustained. It is impossible to support it on the ground upon which reimbursement for improvements rests.¹⁸

¹⁷ *Brown v. Storm*, 4 Vt. 37. See too, *Cooley's Constitutional Limitations*, 485, where this passage is also given.

¹⁸ *Madland v. Benland*, 24 Minn. 372.

So where the statute confers on the occupying claimant the option, after recovery of the judgment against him for the land, to demand payment from the successful claimant of the full value of his permanent improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. Such an option may be granted to the successful claimant, but can not be upheld when conferred on the occupying claimant,¹⁹ and in no case can the legislature constitutionally make the value of the improvements a personal charge against the owner of the land and authorize a personal judgment against him.²⁰

It is doubtful whether a betterment act, such as we have been considering, can constitutionally be made to apply to improvements made before its passage. If such improvements by the common law belong to the owner of the soil at the time they are made, his rights thereto would seem to be such a vested right of property as falls within the protection afforded by the constitution. In *Society, etc. v. Wheeler*,²¹ Mr. Justice Story held that such a law could not constitutionally be made applicable to improvements made before its passage. Mr. Justice Cooley, on the other hand, in his *Constitutional Limitations*,²² points out that this decision was made under the New Hampshire constitution, which forbade retrospective laws, and adds: "The principles of equity, upon which such legislation is sustained, would seem not to depend upon the time when the improvements were made."²³ But in *Burke v. Mechanics' Savings Bank*,²⁴ the above passage from Mr. Justice Cooley's *Limitations* is quoted, and the court says: "We can not assent to the reasoning. Morally, it may be as wrong for the owner of the land to become the owner of the improvements before as after the law; but before the law it is legally his right to become its owner, and therefore to make him pay for it by re-

¹⁹ *McCoy v. Grandy*, 3 Ohio St. 463, 467; *Childs v. Shower*, 18 Iowa 261.

²⁰ *Childs v. Shower*, 18 Iowa 261. "Such a law is unprecedented. It has neither reason, necessity, nor precedent to support it. It tramples under foot the constitutional rights of property and of the citizen." Per Dillon, J.

²¹ 2 Gall. (U. S.) 105.

²² p. 486 (4th ed).

²³ See *Davis v. Powell*, 13 Ohio 308.

²⁴ 12 R. I. 513, 515.

rospective legislation is to make him pay another for his own property, and thus in effect to deprive him of his own property without due process of law."

It is to be noted in conclusion, that an Indian owner of lands, holding the same under a treaty with the government of the United States, in regard to Indian lands within the State, can not be compelled to pay for improvements in accordance with the provisions of a betterment act enacted by the State.²⁵ And this is upon the principle that where there is a conflict between the law of the State and a treaty of the United States, the former must give way. But this immunity of the Indian owner is adjudged to be a personal privilege, and the grantee of such owner succeeds only to the title to the land, and is regarded as having no better right to improvements made by an occupying claimant than any other owner of the land would have.²⁶

HENRY WADE ROGERS.

²⁵ *Maynes v. Veale*, 20 Kans. 374.

²⁶ *Krause v. Means*, 12 Kans. 335.