

BETTERMENTS AND DEFENSES

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Introduction

Real property law isn't always fair. Sometimes someone believes they have good title to land and they start working on it. They treat it as their own – and then improve it with the good faith belief that they will be able to enjoy the fruits of their labor and expense. Along comes someone with superior title and sues him. Now instead of a happy land owner, he is a defendant. Hopefully, he has title insurance and he calls his title company. What are the title company's defenses? If there is no title insurance, what can the defendant do? After all of his legal defenses fail and there is a judgment against him in the suit dispossessing him of the improved property, there is always the possibility of a claim for betterments. Before reading the following article, there is one more thing you need to know. The law is interesting and the issues are challenging; but if you don't like math, get help. The whole area of betterments requires only addition and subtraction but it is very confusing never the less. The article below starts with a prose version of the mathematical calculation necessary to compute your potential recovery for betterments. If your brain starts to hurt, go right to the legal discussion and the parts will make sense. Come back to the summary when you are done with each element and it puts it all together – and gives you a roadmap to calculating whether it is economically reasonable to pursue betterments. If the math is not in your favor, there is no point in pursuing it. When the math is in your favor, it is a very sweet outcome.

Summary

In the legal discussion below, the betterments statutes are discussed. "Betterments" is a statutory defense. If *D* holds the land under a color of title believed in good faith to be good (G.S. 1-340) and if the value of the improvements (G.S. 1-340) (not exceeding the amount *D* expended in making the improvements and not exceeding the amount by which the value of the land is actually increased by the improvements (G.S. 1-342)) made before *D* receives notice in writing of *P*'s claim of title (G.S. 1-342) exceeds the value of the land (exclusive of the use of the improvements on the land (G.S. 1-341)) plus the damages for waste or injury to the land by *D*, *D* can recover that excess in a proceeding commenced under the betterments statutes after *P* wins a judgment against *D* for the land. (G.S. 1-340.) *P*'s offsetting amounts can go back more than three years. (G.S. 1-341.) Any balance due *D* will be a lien on *P*'s land. (G.S. 1-344.) *P* can allow *D* to keep the land if *D* pays *P* for the land as unimproved. (G.S. 1-347.)

Legal Discussion

G.S. 1-340 through G.S. 1-351 are where the North Carolina statutes on betterments are found. These statutes are particularly helpful to a defendant in a lawsuit over title to land. See, generally, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37 (1985).

G.S. 1-340 provides that a defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the land under a color of title believed to be good, has or have made permanent improvements on the land and stating that the defendant may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action, this inquiry and assessment may be made upon the trial of the cause.

First, some preliminary thoughts about when a claim for betterments can be asserted. Obviously, by virtue of G.S. 1-340, the defendant can wait until after judgment is rendered and before execution is allowed to submit a claim for betterments. In *Board of Commissioners v. Bumpass*, 237 N.C. 143, 74 S.E. 2nd 436 (1953), the court stated that the wording of G.S. 1-340 clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of

possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession *and* obtains a judgment which entitles him to eject the occupant, though the last sentence of G.S. 1-340 would seem to permit the defendant to assert his claim in his answer and have the issue of betterments submitted to the jury on the trial of the main issue.

G.S. 1-340 requires the defendant to have made permanent improvements while “holding the premises under a color of title believed to be good...” With regard to this element, a claim of title by virtue of seven years color of title under G.S. 1-38 is not required. In *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306 (1959), the court said that the defendant must have a bona fide belief of good title when the improvements were made and a reasonable grounds for the belief.

See *Hackett v. Hackett*, 31 N.C. App. 217, 228 S.E. 2d 758, cert. den., 291 N.C. 448, 230 S.E. 2d 765 (1976). This case did not allow recovery under the betterments statutes because the defendant made the improvements not under any color of title, but while he was a tenant of his parents.

See *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966). The court noted that the betterments statutes did not apply since the plaintiff was not in a defensive position as one claiming under a color of right, but instead was a person who had improved real property under the mistaken belief that the person with whom the plaintiff contracted was the owner. The court stated, “We, therefore, hold that where through a reasonable mistake of fact one builds a house upon the land of another, the landowner, electing to retain the house upon his property, must pay therefor the amount by which the value of his property has been so increased.” The *Beacon* court cited *Rhyme v. Sheppard*, 224 N.C. 734, 32 S.E. 2d 316, where the plaintiff acquired title to two lots, but in good faith built a house on two other lots, believing these other lots to be the lots described in the plaintiff’s deed. The plaintiff sued the true owner for the value of the improvement. In *Rhyme*, the right to betterments was not applicable since the plaintiff was not being sued and had no color of title to the lots upon which the house was constructed.

See *Prichard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918), reh. den., 178 N.C. 444, 101 S.E. 85 (1919). In *Prichard*, it was held that the defendant was entitled to betterments, the court remanding the case and stating that

The good faith which will entitle to compensation for improvements has been defined to mean simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negate good faith in his occupancy.

There are many cases where it has been held that although aware of an adverse claim, the possessor may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be a possessor in good faith, and as such entitled to compensation for improvements. The principle here declared has been recognized and applied by this Court in *Alston v. Connell*, 145 N.C. 1, 58 S.E. 441, and *Faison v. Kelly*, 149 N.C. 282, 62 S.E. 1086, as well as by the Courts of other States.

In *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E. 2d 167 (1943), it had been judicially determined, in the former suit between the plaintiff and defendant Timberlake, that in 1937 Timberlake acquired the legal title to the land (which had originally belonged to the plaintiff) at a foreclosure sale under and subject to an agreement to hold the land in trust for the plaintiff to reconvey the land to him upon the payment of \$1,500 on or before 2 October, 1942. While Timberlake, in the former suit, denied making such an agreement, it was therein determined that he had done so at the time he acquired the title to the land. Therefore, defendant Timberlake did not meet the betterments statutes’ requirement of improving the land under a mistaken belief that his title was good against the plaintiff.

In *Clontz v. Clontz*, 44 N.C. App. 573, 261 S.E. 2d 695, cert. den., 300 N.C. 195, 269 S.E. 2d 622 (1980), the case did not involve betterments since the person making the improvements was the plaintiff suing for unjust enrichment.

The court, in *Sweeten v. King*, 29 N.C. App. 672, 225 S.E. 2d 598, cert. den., 290 N.C. 667, 228 S.E. 2d 458 (1976), stated that the good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negate good faith in his occupancy. There must be shown not only an honest and bona fide belief in the petitioner’s title, but the petitioner must also satisfy the jury, that he had good reason for such belief. The jury is to judge the reasonableness of such belief, based upon the evidence. Constructive notice of record of the existence of a paramount title or interest does not deprive an occupying claimant of the right to be reimbursed for his improvements on being ejected from the land.

A claimant holding under a tenant for life, who makes substantial and permanent improvements on the land, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments. *Harriett v. Harriett*, 181 N.C. 75, 106 S.E. 221 (1921). But where the grantee knows that his grantor

has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for the betterments as against a remainderman, since the betterments were not made under the belief that the grantees' color of title to the interest of the remainderman was good. *Lovett v. Stone*, 239 N.C. 206, 79 S.E. 2d 479 (1954).

An individual who purchased land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, was not a bona fide holder of title to the land under a color of title believed by him to be good, and was therefore not entitled to the value of his improvements. *Hallyburton v. Slagle*, 132 N.C. 957, 44 S.E. 659 (1903).

The trial court properly granted summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) to a railway company in a summary ejectment action. An oil company's sublease of land from an advertising company terminated when the lease between the railway company and the advertising company terminated, and the oil company's claim for betterments under G.S. 1-340 failed based on the company's status as a tenant. *Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 594 S.E.2d 425 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 38 (2004).

A deed issued at a tax foreclosure is color of title for the purpose of asserting betterments. *Jenkins v. Richmond County*, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

G.S. 1-340 does not apply to tenants in common. *Pope v. Whitehead*, 68 N.C. 191 (1873). However, while the betterments statutes do not apply to tenants in common or to mortgagors and mortgagees, upon equitable principles, a tenant in common placing improvements upon the land is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of his cotenants. However, this equitable principle does not apply as between mortgagor and mortgagee. *Layton v. Byrd*, 198 N.C. 466, 152 S.E. 161 (1930). See also, *Jenkins v. Strickland*, 214 N.C. 441, 199 S.E. 612 (1938). G.S. 1-351 codifies the rule that nothing in the betterments statutes applies to any action brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged land.

Regarding the "permanent improvements" requirement, evidence that the land in question was farmland which had been abandoned and had become a piece of wasteland, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, was sufficient to show "permanent improvements" within the purview of G.S. 1-340. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306 (1959). See *Prichard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921) discussing "permanent."

One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. *Eaton v. Doud*, 190 N.C. 14, 128 S.E. 494 (1925).

Statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in G.S. 41-10.1 cannot be broadened to include a claim for betterments under this section. The betterments statutes do not create a right against the state. *State v. Taylor*, 322 N.C. 433, 368 S.E.2d 601, cert. denied, 322 N.C. 838, 371 S.E.2d 284 (1988). Construing G.S. 41-10.1 strictly, a claim for betterments is not a claim of title to land. The State, therefore, has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. *State v. Taylor*, 322 N.C. 433, 368 S.E.2d 601 (1988).

Where a remainderman had a tax foreclosure sale set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure sale was not affected, persons in possession under the tax foreclosure sale were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

G.S. 1-341 provides that, in the proceedings to determine betterments, the jury, in assessing the damages, shall estimate against the defendant the clear annual value of the land during the time the defendant was in possession, exclusive of the use of the improvements on the land made by himself or those under whom he claims, and also the damages for waste or other injury to the land committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the action, unless he claims for improvements.

Rents and rental values of the lands, which were obtained by the defendants solely by reason of improvements put on the lands by the defendants, could not be used to offset compensation to the defendants for these improvements. *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943). Where defendants disclaim all right and title to a part of the land in an action for ejectment,

plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. *Hughes v. Oliver*, 228 N.C. 680, 47 S.E.2d 6 (1948). However, where one in possession of lands is entitled to recover against the true owner for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. *Whitfield v. Boyd*, 158 N.C. 451, 74 S.E. 452 (1912); *Pritchard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied. 178 N.C. 444, 101 S.E. 85 (1919).

Rightful owners of a lot must compensate the defendants who purchased the land by quitclaim deed at a foreclosure sale for improvements. However, as this alternative may be impractical, the rightful owners may elect to relinquish their estate to the defendants pursuant to G.S. 1-347 who in turn must pay the rightful owners the value of the land in its *unimproved* condition. Rightful owners are also entitled to the rents and profits from the land in its *unimproved* condition for the period of defendants' possession. If the rightful owners fail to exercise one of these options, the value of the improvements becomes a lien, and if not paid, a sale of the land will be ordered. *Jenkins v. Richmond County*, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

G.S. 1-342 provides that if the jury is satisfied that the defendant, or those under whom he claims, made on the land, at a time when there was reason to believe the title was good under which he or they were holding the land, permanent and valuable improvements, the jury shall estimate in the defendant's favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount by which the value of the land is actually increased by the improvements at the time of the assessment.

The measure of the value of the betterments is not the actual cost of the improvements' erection, but the enhanced value the improvements impart to the land, without reference to the fact that the true owner did not desire the improvements, or could profitably be used by him in the conduct of his business. *Carolina Cent. R.R. v. McCaskill*, 98 N.C. 526, 4 S.E. 468 (1887). However, if unsuitable improvements are placed upon the land, no matter what the cost, the jury can find that there was no enhancement to the land, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. *Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144. (1921). It is a jury question of fact, rather than one of law.

G.S. 1-343 provides that if the sum estimated for the improvements exceeds the damages estimated against the defendant, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as it necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, or such rents, profits, or damages beyond the value of improvements. If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. *Barker v. Owen*, 93 N.C. 198 (1885); *Whitfield v. Boyd*, 158 N.C. 451, 74 S.E. 452 (1912).

G.S. 1-344 states that after offsetting the damages assessed for the plaintiff, and the allowances to the defendant for the improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid.

G.S. 1-345 deals with recovery against a remainderman by a life tenant. If the plaintiff claims only a life estate in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the termination of his estate from the remainderman or reversioner, the value of the improvements as they then exist, not exceeding the amount paid by him, and he has a lien on the land for that amount as if the land had been mortgaged for the payment, and may keep possession of the land until it is paid. This section did not apply to a situation where the tenant made improvements upon the land during his occupation, as tenant, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor did the fact that the lessor silently acquiesced in the putting up of the improvements change the situation. *Dunn v. Bagby*, 88 N.C. 91 (1883).

G.S. 1-346 states that, when the defendant claims allowance for improvements, the plaintiff may require that the value of his estate in the land without the improvements shall also be ascertained. The value of the land in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner provided for estimating the value of improvements.

G.S. 1-347 states that the plaintiff winning a judgment, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney, enter on the record his election to relinquish his estate in the land to the defendant at the value as ascertained, and the defendant shall hold all the estate that the plaintiff had therein at the commencement of the action, if he pays the value with interest in the manner ordered by the court. If

the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property" he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. *Barker v. Owen*, 93 N.C. 198 (1885).

G.S. 1-348 provides that the payment must be made to the plaintiff, or into court for the plaintiff's use. If the defendant fails to make the payment within or at the times limited, the court may order the land sold and the proceeds applied to the payment of the value and interest. Any surplus is to be paid to the defendant. However, if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency.

If the party by or for whom the land is claimed in the action is a minor or an insane person, the value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. G.S. 1-349.

If the defendant, his heirs or assigns, after the land is relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the land, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. G.S. 1-350.