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12/16/86

First Supplement to Memorandum 87-7

Subject: 1987 Legislative Program (Letter from Professor Dukeminier)

At the last meeting, the Commission declined to propose a comprehensive definition of "personal property" and "real property" for the Probate Code. We have received a letter from Professor Dukeminier, a Commission consultant, that supports the status quo in this regard. A copy of this letter is attached to this supplement.

Professor Dukeminier's letter is being distributed for your information. We do not plan to discuss these definitions.

Respectfully submitted,

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December 5, 1986

Mr. John DeMouilly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear John:

Re: 1st Supp. to Memorandum 86-98
Study L-1045

The State Bar Study Team's suggestion, resisted by your staff, that "personal property" and "real property" be defined in the Probate Code gave me a case of the dry grins. I do not envy you trying to find all the places in probate law where these different categorical labels might lead to different results and, further, determining how various claims to property should be categorized so as to reach the desired result. Moreover, if you define these terms for probate law, what will be the effect of these definitions in the law of remedies, in the Statute of Frauds, in the law of eminent domain, in the law of taxation--in every pocket of law where these different categories have different consequences?

Just for a starter, here are some items that have given courts some classification trouble over the years. Which is real property and which is personal property? (Some may be real property for one purpose and personal property for another purpose.)

- Leaseholds of various types
- License to enter land
- Covenant by a neighbor benefiting land
- Standing timber
- Minerals before severance
- Contract to purchase land
- Note secured by a lien or mortgage on land
- Equitable charge on land
- Mineral royalties
- Trade fixtures
- Chandeliers in houses
- Statues in gardens
- Mobile homes (attached to utilities)
- The Queen Mary

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If you decide to define real and personal property, shouldn't you define "property" first? For example, should Elvis Presley's heirs have a property right to control Elvis dolls after his death? How will you define property so as to enable a court to fit some new claim worthy of protection into the definition?

I am glad no one has asked me for a single fixed definition of property or real property or personal property, for after more than a quarter of a century teaching the subject I am still unable to define precisely what I am teaching. Property is the focus of a scheme of legal relationships that seem always to be developing, contracting, and changing. I do not believe you will be able to fix this focus permanently in the Probate Code or elsewhere. Rather than attempting this, you are probably better off dealing statutorily with specific problems. What would be wrong with a simple statute saying, "A leasehold is real property"? Or would you want to qualify it by saying, "For purposes of [probate and trust law], a leasehold is real property"? In any case, I think you ought to narrow your definitional project to something specific you want to fix.

Sincerely,



Jesse Dukeminier
Professor of Law

JD:mrs