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Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position

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CONVERSION OF COMMUNITY PROPERTY INTO JOINT TENANCY PROPERTY IN CALIFORNIA: THE TAXPAYER'S POSITION

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In California there is a popular and increasing practice on the part of husband and wife to take title to real or personal property purchased with community funds as joint tenants with a right of survivorship. This is often done at the instance of real estate brokers and title insurance companies with the property owners entirely unaware of the consequences of such a conversion. At other times it is done in the belief that the avoidance of probate expense is of paramount importance. The layman usually does not consider his tax position emanating from such a conversion until one of the spouses has died. At this point the surviving joint tenant finds himself beset with federal estate income tax difficulties. The purpose of this article is to outline the federal tax consequences of holding property purchased with community funds in that form as opposed to joint tenancy; and to discuss the taxpayer's burden of proof in this situation in an attempt to indicate what the taxpayer must show and do in order to obtain the maximum tax advantage.

It should be assumed in the subsequent discussion that the husband and wife use community property to purchase either real or personal property, title to which is taken as joint tenants, and that all the formal requirements of California law with respect to the creation of such a property interest have been satisfied.

The net income from property held in joint tenancy is taxable in proportion to the shares of ownership in the property. Specifically, where property is owned by two persons as joint tenants, the income will be taxable to each joint tenant in equal shares.[1] This has been so held in a case involving husband and wife owning property as joint tenants.[2]

Surviving Spouse

A further income tax consequence arises upon the death of one of the joint tenants followed by a sale or exchange. For purposes of computing the gain upon the sale or exchange of capital assets, the

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[1] H. D. Webster, 4 T.C. 1169 (1945).

[2] F. J. Haynes, 7 B.T.A. 465 (1927).

amount realized by the taxpayer is reduced by the taxpayer's "adjusted basis" for that particular asset. Generally the taxpayer's "adjusted basis" is the cost of the asset less any allowable depreciation thereon.[3] However, in the case of property acquired by the taxpayer from a decedent, the basis is the fair market value of the property at the date of the decedent's death, or, in the case of an election under the alternative valuation procedure provided by Section 2032 of the Internal Revenue Code of 1954, the fair market value at the applicable date.[4] The distinction between community property and joint tenancy here becomes important as Section 1014(b)(6), provides as follows:

> In the case of decedent's dying after December 31, 1947, property which represents the *surviving spouse's one-half share* of community property held by the decedent and the surviving spouse under the community property laws of any state, territory, or possession of the United States or any foreign country if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate . . . shall be considered to have been acquired from the decedent and therefore entitled to the stepped-up basis. (Italics added).

Thus, in the case of community property, both the deceased spouse's one-half and the surviving spouse's one-half would assume a "basis" of the fair market value at the date of the decedent's death.[5] In the case of joint tenancy property, however, only the amount of the property included in the decedent's gross estate for federal estate tax purposes is entitled to the stepped-up basis.[6] Under California law, each spouse has a present, existing and equal interest in post-1927 community property.[7] Therefore, under Section 2040 of the Internal Revenue Code, one-half of the value of joint tenancy property purchased with post-1927 community property funds could be included in the gross estate of the first spouse to die.

Section 2040 of the Internal Revenue Code requires the inclusion in the deceased joint tenant's gross estate of the entire value of such property at death (or at the optional valuation date) except such part as may be shown to have originally belonged to the other joint tenant and never to have been received by the latter from the decedent for less than an adequate and full consideration in money or money's worth. The surviving joint tenant must actually demonstrate his or her "con-

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[3] INT. REV. CODE OF 1954 § § 1011, 1016.

[4] INT. REV. CODE OF 1954 § 1014.

[5] See Comment, 3 U.C.L.A. L. REV. 636 (1956).

[6] INT. REV. CODE OF 1954 § 1014(b)(9). For a criticism of this apparent inequity and recommendation for legislative change, see Robinson, *The Basis of a Surviving Spouse's Interest in Transmuted Community Property*, 32 So. CAL. L. REV. 244, Spring, (1959); see also, Revenue Ruling 56-215, 1956-1 C.B. 324.

[7] CAL. CIV. CODE, § 161 (a).

tribution" to the joint tenancy estate in order that an amount less than the whole be included in the decedent's gross estae. As explained above, under such circumstances in California, one-half of the value of jointly held property would be includible in the gross estate of the first spouse to die. The inclusion of one-half of the value of the property would also result if the property were held as community property.[8]

With regard to the marital deduction, the rule with respect to community property which has been converted to joint tenancy property prior to December 31, 1941 is different than the rule applied to conversions occurring after that date.[9] Only one-half of the community property converted into joint tenancy prior to December 31, 1941 is included in the decedent's gross estate. The included half, in turn, qualifies for the marital deduction.[10] Thus, only one-quarter of the total value of the specific joint tenancy property is subject to tax. Use of the marital deduction as to the one-half included in the decedent's gross estate is not available when community property is converted to joint tenancy subsequent to December 31, 1941.[11] Thus, it becomes important, even for federal estate tax purposes, to ascertain whether property held in joint tenancy is community or separate.

BURDEN OF PROOF

When either the federal estate tax return or the taxpayer's individual income tax return, which reports a gain or loss upon the sale of an asset acquired from the decedent, is audited by the revenue authorities, the taxpayer's burden of proof becomes of paramount importance. It is to sustain the taxpayer's position that his attorney makes a detailed resume of the manner in which the property was acquired by the taxpayer and his deceased spouse, the price thereof and acquisition dates. For purposes of ascertaining the basis under Section 1014 of the Internal Revenue Code, the burden of proof as to the nature of the property is on the

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[8] INT. REV. CODE OF 1954, § 2033. However, a disadvantage exists if the property is held in joint tenancy because of the double tax when the husband and wife die in rapid succession. For example, if securities were purchased for $200,000 with community funds and title taken in joint tenancy, $100,000 would be subject to federal estate tax on the husband's death. On the wife's death, the entire value ($200,000) would likewise be included in her gross estate since she became the complete owner thereof by surviving the husband. This result is partially ameliorated by the credit provided by § 2013 of the INTERNAL REVENUE CODE OF 1954.

[9] For example, H and W use post-1927 community property to purchase $200,000 of securities, title to which is taken as joint tenants, prior to December 31, 1941. Five years later H dies. The $100,000 includible in his estate is entitled to the marital deduction resulting in $50,000 subject to estate tax. (No expenses or other deductions are considered). This is more than of academic interest since the treatment extends to such pre-December 31, 1941 joint tenancy property sold or converted into other property held in joint tenancy after that date.

[10] INT. REV. CODE OF 1954 § 2056; Treas. Reg. 20.2056 (c) -2 (g).

[11] Treas. Reg. 20.2056 (c) -2 (c) (2).

taxpayer.[12] The taxpayer must introduce sufficient evidence to make a prima facie showing that the property acquired from a deseased spouse was the community property of the spouses. Once the petitioner establishes that the Commissioner's determination is wrong, he is not required to show the exact amount of tax which lawfully might be assessed against him.[13]

Where the question of the amount of property held in joint tenancy, which is includible in the gross estate is in issue, the burden of proof as to the contribution of the surviving joint tenant is on the executor, or if no probate estate is involved, upon the surviving joint tenant.[14] The surviving joint tenant's burden, absent any probate estate, is even more crucial since he or she is liable for the federal estate tax to the extent that he or she receives property included in the gross estate under Section 2040 of the Internal Revenue Code.[15] The burden of proof on the issue of contribution is strictly construed against the taxpayer.[16] This rule of construction and the requirement of definite proof of contributed amounts would seem to harness the taxpayer with a more stringent burden than that under Rule 32. In fact his burden would seem tantamount to that placed on the taxpayer in a suit for refund.[17] Where contributions are made at various intervals by either of the spouses, accurate accounts are imperative.[18] Proper estate planning in the case of spouses holding property in joint tenancy requires a complete investigation of the fact and amount of respective contributions.[19]

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[12] Rule 32, Rules of Practice of the Tax Court by the United States, provides: "The burden of proof shall be on the petitioner, except as otherwise provided by statute, and except that in respect of any new matter placed in his answer, shall be on the respondent."

[13] Helvering v. Taylor, 293 U.S. 507 (1935). This is in sharp contrast to the taxpayer's burden of proof in a refund suit where in addition to showing that the Commissioner's determination is erroneous, the taxpayer must prove that a specific amount of tax is due by way of refund because of that erroneous determination by the Commissioner. See Roybark v. United States, 104 F.Supp. 759 *aff'd* 218 F.2d 164 (9th Cir. 1955).

[14] Regulations § 20.2041-1; Foster v. Commissioner, 90 F.2d 486 (9th Cir. 1937), *aff'd per curiam* 303 U.S. 618 (1938).

[15] INT. REV. CODE OF 1954 § 6324(a)(2).

[16] Estate of Elwood Mead, B.T.A. Memo Docket 99460 (April, 1942). See also Estate of Lewis Bendet, 5 T.C.M. 302 (1946). In this connection, it has been held that the rule of Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) is available to the taxpayer. See Estate of Mary L. Selecman, 9 T.C.M. 997 (1950). The Cohan case held that deductions based on estimates or inadequate records will be allowed in absence of proof to the contrary. However, in instructing the field offices, the Commissioner has urged that the Cohan Rule be applied "cautiously."

[17] See note 12 *supra* and authorities cited.

[18] In Murphy v. Shoughnessy, 54-2 U.S. Tax Cas. para.10970 (N.D.N.Y. 1953), the decedent and his son opened a joint bank account with the decedent contributing $1,600.00 and the son contributing $800.00 to the initial deposit. On death of the father, the balance of $1,265.36 was included into the decedent's gross estate, notwithstanding a showing that no withdrawals were made by decedent and no additional deposits were made by decedent or his son.

[19] This author has found the preparation (in chronological order) of the following schedules to be helpful in this regard:-

With the exception of the "contribution" issue, the taxpayer in sustaining his position on audit of the federal estate tax return or the federal income tax return must eventually substantiate that the joint tenancy property is either separate or community, depending upon the result sought to be achieved. Where the tax consequences depend upon a property right possessed by the taxpayer, the nature of that right must be ascertained by reference to applicable local law.[20] In this connection local law is controlling upon the tax forum. In *Brooks v. United States*,[21] the court noted that whereas the state law creates legal interests and rights, the province of the Federal Revenue Acts is to designate which interests or rights so created shall be taxed; and unless there is found some infirmity in the state court decree settling such property rights and interests, the determination of the local forum as to the nature and extent of such rights is *conclusive* as to their validity. Presumably, the effect of local law would be the same in a case involving the marital deduction as to conversion of community property to joint tenancy property prior to December 31, 1941.

CALIFORNIA LAW

What is the status of California law with respect to community funds being used to purchase property title to which is taken as joint tenants? The precise issue is whether the property held in joint tenancy, so purchased, is the separate or community property of the taxpayer and his or her spouse.

The leading case is *Siberell v. Siberell*,[22] which held that a conveyance

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		Property Acquisitions		
Date	Description of Property	Price Paid	Contributions By Spouse to Purchase Price	How Title Held

		Property Dispositions	
Date	Description	Sale Price	Disposition of Funds

[20] Blair v. Commissioner, 300 U.S. 5 (1937); Poe v. Seaborn, 282 U.S. 101 (1930).

[21] 84 F.Supp. 622, (1949). For purposes of stepped-up basis under § 1014 (b) (6) INT. REV. CODE OF 1954, local law is controlling. I. McCollum (DC) 58-2 U.S. Tax Cas. - paragraph 9957, *cf.* I. Massaglia T.C. 379 (1959). It is generally settled that in determining the nature and status of property for purposes of the federal estate tax local law shall govern. Lang v. Commissioner, 304 U.S. 264 (1938); United States v. Goodyear, 99 F.2d 523 (1938).

[22] 214 Cal. 767, 7 P.2d 1003 (1932). The Court said, *inter alia*, "On its face, Section 162 of the Civil Code of the State of California has no application to a case where 'a different intention is expressed in the instrument' and it seems to us to be clear . . . that a joint tenancy the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of the intention to hold the property otherwise than as community property and that the equal interest of the spouses must therefore be classed as their separate but joint estate of the property."

The Court also relied upon Section 161 of the Code of Civil Procedure which declares that a husband and wife may take, hold, and enjoy property either as joint tenants in common, or, community property. See also Conard v. Conard, 5 Cal.App.2d 91 41 P.2d 81 (1935); Schindler v. Schindler, 126 Cal.App.2d 597, 272 P.2d 566 (1954); and Benom v. Benom, 173 Cal.App.2d 286, 343 P.2d 632 (1959), all of which cite Siberell v. Siberell, *supra*, as controlling on this point.

to husband and wife as joint tenants raises a presumption that the parties hold jointly a separate property interest. However, this presumption is not conclusive, and, upon sufficient evidence, may be rebutted with the result that the joint tenancy property is held to be community property.[23] The fact that property was purchased with community funds will not, by itself, result in a determination that the property was the community property of the spouses.[24] According to *Tomaier v. Tomaier*,[25] however, extrinsic evidence is admissible to show that the spouses intended the property to be community property, notwithstanding the form of the deed. In such a case, the intent to hold as community property must be mutual, and the hidden intent of one of the spouses will not be sufficient to rebut the presumption.[26]

An oral agreement between the spouses as to the nature of the property is recognized as sufficient to rebut the presumption of separate property.[27] Declarations in a joint and mutual will,[28] a declaration in a husband's will coupled with the wife's consent thereto,[29] and declarations by the spouses in separate wills, separately executed, are admissible to rebut the presumption of separate property with respect to jointly owned property.[30] The presumption of separate property is overcome by evidence that the parties merely referred to the property as their community property.[31] If both parties believe that they have a power of testamentary disposition over their one-half interest, this will aid in the rebuttal of the presumption.[32] For purposes of determination of federal estate tax liability, it has been held that the statutory presumption that a married woman's property is her separate property, coupled with an unsigned will to the effect that the surviving wife's property was her separate property and with the rule that community property was her separate

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[23] Socol v. King, 36 Cal.2d 342, 223 P.2d 627 (1950); LaMar v. LaMar, 30 Cal.2d 898, 186 P.2d 678 (1947); Thompkins v. Thompkins, 83 Cal.App.2d 71, 187 P.2d 840 (1947); Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656 (1953).

[24] Socol v. King, *supra* note 23; Rauer's Collection Company v. Higgins, 87 Cal.App. 2d 248, 196 P.2d 803 (1948); Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106 (1952); Benom v. Benom, *supra* note 22.

[25] 23 Cal.2d 754, 146 P.2d 905 (1944). The Tomaier Rule has been adopted in the 9th Circuit in a case involving the nature of property held in joint tenancy. United States v. Pierotti, 154 F.2d 758 (9th Cir. 1956).

[26] Tomaier, *supra* note 25; Watson v. Payton, 10 Cal.2d 156, 73 P.2d 906 (1937); *cf.* Palazuelos v. Palazuelos, 103 Cal.App.2d 826, 230 P.2d 431 (1951); and Turkenette v. Turkenette, 100 Cal.App.2d 271, 223 P.2d 495 (1950), where the decisions rested on evidence of the wife's belief alone. A rationale for these decisions is found in 28 CAL. S.B.J. 163.

[27] Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708 (1946); Van Every v. Commissioner, 108 F.2d 650 (9th Cir. 1940); *cert. denied* 309 U.S. 689 (1940).

[28] Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417 (1940).

[29] Security First National Bank v. Stack, 32 Cal.App.2d 586, 90 P.2d 337 (1939).

[30] Jamesons' Estate, 93 Cal.App.2d 35, 208 P.2d 724 (1949).

[31] Buehler v. Buehler, 73 Cal.App.2d 472, 166 P.2d 608 (1946).

[32] Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 244 P.2d 742 (1952)..

property by oral agreement, was insufficient to sustain the taxpayer's burden of proof on the issue of whether determination by the Commissioner was erroneous.[33] However, the presumption of the *Siberell* case has been applied and adopted by the federal court in California in a tax dispute.[34] Also the rule of the *Tomaier* case, regarding the introduction of parol evidence, is applicable in federal tax controversies in order to ascertain the true nature of the property.[35]

In this area, where the intent of the spouses seems to be the crucial factor, it may be assumed that the Commissioner, or his representative, will take the position on the question of intent which will result in maximum tax liability. For example, if the taxpayer attempts to avail himself of the marital deduction as described above, the revenue agent would undoubtedly contend that, notwithstanding the joint tenancy form, it was intended by the decedent and his surviving spouse that the property be community property. As a matter of proof, the Commissioner would seem to be at a disadvantage in such a case because he would have to rebut the presumption established by the *Siberell* case, and the showing of the requisite mutual intent would be difficult inasmuch as one spouse is dead. In such a case, damaging admissions of the survivor should be avoided. Whenever the spouses are desirous of transmuting community property to separate property, or vice versa, a writing signed by both is imperative. The presence of such a writing could effectively rebut the Commissioner's contention that an oral agreement existed between the spouses as to the nature of the property. Proper estate planning would require a decision as to whether declarations (by the spouses as to the nature of their property) should appear in wills or other documents having a proper testamentary effect. If the primary consideration is to obtain the stepped-up basis under Section 1014(b)(6) of the Internal Revenue Code, it would seem that such declarations in the will are advisable in view of California law on the subject.[36] It can be expected that the tax forum and the Commissioner will urge the use of the *Tomaier* doctrine in such cases. The attorney for a husband and wife during the course of estate planning should anticipate any problems of proof in this area and draft all instruments or agreements accordingly.

Effect of Prior Adjudication

If the taxpayer has obtained a decree in a state court which determines

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[33] Estate of Vogel v. Commissioner, 60-1 U.S. Tax Cas. para. 11, 945 (9th Cir. (1960).

[34] Bordenave v. United States, 150 F.Supp. 820 (N.D.Cal.1957); Where this presumption was recognized absent any evidence of the mutual intent of the spouses to the contrary.

[35] United States v. Pierotti, *supra* note 25. The Court there indicated that an oral agreement between the spouses would be considered for tax purposes.

[36] See Estate of Watkins, *supra* note 28; Security First National Bank v. Stack, *supra* note 29; and Jameson's Estate, *supra* note 30.

the nature of the property in question, the effect of that decree on the tax forum must be considered. When the particular facts in issue before the tax forum have been adjudicated by the state court, the general rule is that such an adjudication is binding.[37] Since the taxing authorities were not a party to the state action, this seems to be an exception to the general rule that a party is not bound by a prior adjudication if he was not a party thereto.[38] Where tax liability is determined with reference to state defined property rights, it is held that the tax forum is bound by the local court decrees. However, if the state decision is the result of fraud or collusion on the part of the taxpayers, the tax forum is not required to give binding effect to such a decision.

In *Rainger v. Commissioner*,[39] the question was whether the state probate decree holding that community property of decedent and his spouse had been transmuted into the separate property of the surviving spouse was binding on the tax forum. Collusion was found in the lack of a real controversy on a local level. The record on the local court level is replete with statements made by the attorney for the surviving spouse and executrix that there was no tax controversy between the estate and the California inheritance tax authorities, who were also represented at the hearing. A careful reading of that case would disclose the tax court's complete reliance on the record made at the local level, especially the statements made by the attorney for the executrix. As a tactical matter, such assertions and statements should be avoided.

In light of Revenue and Taxation Code, Section 13671.5, the effect of the *Rainger* case becomes even more far reaching. That section provides generally that for California inheritance tax purposes property originally community and thereafter held in joint tenancy is treated as though it were community property. Thus, when the qustion of the nature of the property for either federal estate or income tax purposes is an issue in the tax forum and the local decree considered, there never would be a "controversy" for California inheritance tax purposes. The Commissioner logically would argue that the *Rainger* case was determinative and that the state court decree was not binding on the Commissioner. Notwithstanding the lack of a tax controversy at local level, it would seem that an adjudication as to disputed property rights between the heirs of a

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[37] Freuler v. Halvering, 291 U.S. 35 (1934); Eisenmenger v. Commissioner, 145 F.2d 103 (1944); Lang v. Commissioner, *supra* note 21; Blair v. Commissioner, *supra* note 20. However, there must have been a determination of the precise issue on the local level in order to bind the tax forum. See Duncan v. United States, 247 F.2d 845 (5th Cir. (1957).

[38] See Bagley v. General Fire Extinguisher Company, 212 U.S. 477 (1909). For a detailed discussion of the principles of res judicata and collateral estoppel to this situation, see Oliver, *Estate Law in Federal Tax Proceedings*, 41 CAL. L. REV. 638 (1953), and RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION, § 72.07.

[39] 12 T.C. 483, *aff'd per curiam* 183 F.2d 587 (1950).

decedent would constitute a sufficient controversy to avoid the Commissioner's argument of collusion.

Because the establishment of collusion on the local level is a rather delicate subject, the courts in tax cases have spoken of other factors which disqualify the local decree.[40] There is a further line of authority which holds that unless the local proceeding is adversary in nature the decree will not be binding on the tax forum.[41] However, there is authority excepting probate proceedings from the supposed ban of non-adversary court action on the ground that such proceedings are *in rem* in nature.[42] Further, the more recent cases seem to indicate a trend away from the requirement of an adversary proceeding. In *Gallagher v. Smith*,[43] the district court, holding for the commissioner, relied heavily on the non-adversary nature of the local court's proceeding. The appellate court, in reversing, was more concerned with whether there had been "an adjudication" under local law and whether the proceeding in the local court was collusive in the tax sense.

A determination by a local probate court in California, made after notice duly given pursuant to California Probate Code Section 1200, is an *in rem* proceeding and binds all persons. Even if uncontested, there is an adjudication of property rights, and, because of the difficulty of showing collusion, such an adjudication may prove helpful in a later tax dispute.[44]

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[40] A State proceeding staged deliberately for its ultimate tax effect is disqualified as collusive. Saulsbury v. United States, 199 F.2d 578, (5th Cir. 1952; *cert. denied* 345 U.S. 906; Arthur Sweet Estate, 24 T.C. 488 (1955); *aff'd* 234 F.2d 401, *cert. denied* 352 U.S. 878, in which the Court said: "An Order of Judgment obtained through collusion or attended with some other badge of fraud in a non-adversary proceeding is not binding as between one or more parties to such proceeding and the United States in respect to income or estate tax imposed by federal legislation."

[41] Arthur Sweet Estate, *supra* note 40. These cases seem to require a substantial conflict between the parties, but the distinction between the adversary nature of the proceeding and a collusive proceeding is unclear. When the local probate proceeding is uncontested, the adversary nature would seem to be lacking. See First Mechanic's National Bank v. Commissioner, 117 F.2d 127 (3rd Cir. 1940).

[42] Henricksen v. Baker-Boyer National Bank, 139 F.2d 877 (9th Cir. 1944); Goodwin's Estate v. Commissioner, 201 F.2d 576 (6th Cir 1953); and Estate of Vose, 20 T.C. 597 (1953).

[43] 223 F.2d 218 (3rd Cir. 1955).

[44] Thus, it would seem to be advantageous to the taxpayer to have this problem adjudicated in the probate court as long as he will subsequently be able to fit within the requirement set forth in Brooks v. United States, *supra* note 21. Mr. Alva C. Baird was quoted in 40 CAL. L. REV. 501 at 509 as follows: "We know that a revenue agent would scrutinize very carefully any attempt on the part of the taxpayer to gain a tax advantage by contending that facts are other than what the written record shows (joint tenancy) and we know from practical experience that all revenue agents will look with suspicion on every attempt to establish property as community property which was held as a matter of record as joint tenancy. This suspicion will not be allayed in any way by any proceeding in Court which treats the property as though it were in joint tenancy. Therefore, in any case where there is doubt as to the sufficiency of the evidence, the property should be subject to probate administration. If that is done, and the probate court administers the property as though it were community property, no difficulty will be encountered with the Internal Revenue Department."

The question has been raised whether a taxpayer could maintain inconsistent positions in the local probate court and in the tax forum. For example, property held in joint tenancy might be administered pursuant to petition under Section 1170 of the California Probate Code and a decree establishing the fact of death of one of the joint tenants. Later, the taxpayer might attempt to obtain a stepped-up basis on the theory that the property, although held in joint tenancy, was in fact the community property of the spouses. It has been held that a decree under Section 1170 of the California Probate Code was not binding on the taxpayer who later attempted to obtain a stepped-up basis for the property for income tax purposes.[45] The theory was that the decree did no more than establish the fact of death of one of the joint tenants and did not necessarily determine the parties' property interests. This is a dubious result since upon the death of one joint tenant the surviving tenant becomes immediately entitled to the sole ownership of the entire property under California law.[46] The Internal Revenue Service can be expected to vigorously resist any attempt to take inconsistent positions. If the Commissioner of Internal Revenue is bound by a local decree under certain circumstances, it would seem that the taxpayer likewise should be bound. Also, the Commissioner could raise the argument that the taxpayer is estopped from maintaining an inconsistent position.[47]

In summary, it should be obvious that the difficulties of proof may be insuperable to the taxpayer when the conversion from community property to joint tenancy has occurred. These problems of proof may be mitigated by the means suggested throughout this article. An adjudication by the local probate court can aid the taxpayer in this situation, and the exercise of foresight by the attorney in this regard could pay handsome dividends. However, such an adjudication is no panacea and its limitations should also be considered.

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[45] United States v. Pierotti, *supra* note 25.

[46] In the Matter of Kessler 217 Cal. 32, 17 P.2d 117 (1932).

[47] In this connection, see Bertha L. Crosby, T.C. Memo 1961-272, where it was held that the taxpayer had failed to establish the elements of estoppel when the Commissioner took the position that for income tax purposes, property found to be community for estate tax purposes, was in fact the separate property of the spouses. This decision suggests that the argument of estoppel can be utilized when either the taxpayer or the government or Commissioner take inconsistent positions if the elements of estoppel are shown to exist.

Institute of Contemporary Law

The publication in this issue of the *Santa Clara Lawyer* of two articles on the California grand jury system marks the first report of the Institute of Contemporary Law. Under its auspices, a project was begun in 1959 under the student editorship of Harry W. Feldman, Victor A. Bertolani, William H. Collard, and Fred B. Maguire, Jr., to examine various phases of public law and county governments.

The project was continued in 1960 under the editorial leadership of Clarence M. Madsen, William A. Riordan, Charles A. Borgerding and Aidan R. Gough. At that time, the present study of the grand jury was begun. The project contemplates a series or reports on this and other areas of public law and governmental structure, by students, and members of the legal profession and allied fields.

The Institute of Contemporary Law will continue to sponsor this study, as well as symposia and conferences on public law subjects. The publication in the *Santa Clara Lawyer* of these reports represents the fruition of the early efforts of the student staff of the Santa Clara Legal Series.