BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ESTATE OF ELEANOR M. GANN, DECEASED,)
BANK OF AMERICA N T & S A, EXECUTOR)

Appearances:

For Appellant: Martin Gang
Attorney at Law

For Respondent: John D. Schell, Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of the Estate of Eleanor M. Gann, Deceased, Bank of America N T & S A, Executor, against proposed assessments of additional personal income tax in the amounts of $1,618.06 and $1,743.89 for the years 1961 and 1962, respectively.

The question presented is whether certain earnings of Ernest K. Gann constituted community property, one-half of which was taxable to his wife, now deceased.

Ernest and Eleanor Gann were married in Reno, Nevada, on September 18, 1933. Immediately prior to the years here in issue, their family home was located in Pebble Beach, California. As the result of marital discord, the Ganns separated in 1960 and thereafter lived separately and apart. Mrs. Gann continued to live in the Pebble Beach home and at all relevant times she was a California resident for tax purposes. After removing his personal effects from the family home in 1960, Mr. Gann went to San Francisco, where he consulted a lawyer concerning the separation and possible divorce.

The Ganns never obtained a legal separation, but in May of 1965 Mrs. Gann obtained an uncontested interlocutory decree of divorce. The final decree of divorce was obtained in 1966.

Early in 1961 Mr. Gann consulted other legal counsel relative to taking up residence outside the United States. As an author, Mr. Gann required peace of mind to perform his craft, and his marital difficulties had left him unable to write for some time. If he could get away and live abroad, he felt that he would be able to write and to do the research necessary to obtain material for future novels. Mr. Gann's lawyer advised him that Switzerland would be a favorable place to live, and Mr. Gann thereupon decided to become a bona fide Swiss resident and to relinquish his status as a resident of California and of the United States. Beginning in February 1961, Mr. Gann listed all his California real property for sale or rent, closed all his bank accounts in California, disposed of his automobiles, wrote to his clubs requesting that he be declared a nonresident, and wrote to the registrar of voters asking that his name be removed from the voting rolls since he intended to become a nonresident. He advised his business contacts that he would be living abroad indefinitely, and on June 18, 1961, he notified his employer, Twentieth Century-Fox Film Corp., that he was no longer a resident of the United States and that he would satisfy the bona fide foreign residence requirement prescribed by section 911 of the Internal Revenue Code of 1954.

Mr. Gann left California on March 17, 1961. On April 5, he sailed from New York on his yacht en route to Lisbon, Portugal. He entered Switzerland for the first time on July 3, 1961. On that day Mr. Gann opened a bank account in Geneva, depositing $50,000, and engaged a Swiss attorney to find a house for him and to obtain permission from the Swiss Government for him to live in Switzerland. After being told by the attorney that obtaining a home would take some months, Mr. Gann returned to his yacht and spent the next several months sailing in the Mediterranean and Aegean Seas, doing research for his sea stories. On October 8, 1961, he returned to Geneva and went to see a residence located in the Canton of Valais known as Chalet Cavu, Le Pathier, Verbier Village. Mr. Gann leased this property for a period of time commencing in October 1961, and he continued to lease it and to live in it for more than three years. An official document of the Swiss police certified that Mr. Gann "elected domicile at Verbier Station/VS. Switzerland on the 9th day of October 1961" and that he obtained a permit of residence on January 26,

1962. That permit was valid for two years and was renewable. Mr. Gann paid taxes to Switzerland for part of 1961 and for all of 1962 and 1963. All of his banking was done there, as were all of his securities transactions. He joined clubs in Switzerland and he socialized almost exclusively with his Swiss neighbors.

Subsequent to the time he left California, Mr. Gann received certain earnings which respondent claims were community property but which the appellant Estate contends were Mr. Gann's separate property. Under a contract with Darryl F. Zanuck Productions, Inc., Mr. Gann received the $50,000 which he deposited in a Swiss bank on July 3, 1961, and a further payment of $25,000 was received on November 7,1961. For services rendered to Twentieth Century-Fox Film Corp. for the screenplay based on his novel "Fate is the Hunter," Mr. Gann received $60,000 on January 6, 1962, $35,000 on September 4, 1962, and $32,500 on December 19, 1962. In 1962 he also received $75,000 from Simon and Schuster, Inc., for writing a novel entitled "Of Good and Evil."

For California income tax purposes, Mr. Gann filed separate nonresident returns for 1961 and 1962. Apparently, none of the income in dispute was reported as income from California sources. Mrs. Gann filed separate resident returns for the same years, and she did not report any part of the disputed income as community income taxable to her. For federal income tax purposes, the Ganns filed a joint 1961 return and separate 1962 returns. These returns likewise excluded the disputed income on the grounds that it was attributable to services performed and payments received by Mr. Gann after he became a resident of Switzerland in accordance with section 911 of the Internal Revenue Code of 1954. The Internal Revenue Service audited these returns and, on September 7, 1965, a Revenue Agent's Report was issued proposing to return the excluded amounts to income. Subsequently, a settlement was reached at the appellate level which substantially reduced the amount of additional income proposed in the original Revenue Agent's Report, Upon learning of the federal action, respondent issued Notices of Proposed Assessment against Mrs. Gann's estate incorporating the final federal settlement for 1962 and assessing the estate on its one-half community interest in the adjusted federal settlement inclusion to income for 1961. The estate protested these assessments and appeals from respondent's denial of those protests.

It appears that the assessment for 1961 includes only Mrs. Gann's alleged one-half community interest in

the $50,000 which Mr. Gann deposited in the Swiss bank on July 3, 1961. Since no assessment was made against her for the $25,000 received by Mr. Gann on November 7, 1961, the nature of that payment as separate or community property is not in issue. The assessment for 1962 includes only $30,000 of Mrs. Gann's total asserted community interest of $101,250 in Mr. Gann's 1962 earnings. Respondent has issued another assessment proposing to tax the additional $71,250, but action on the estate's protest against that assessment has been held in abeyance pending the outcome of this appeal.

Initially, we must decide what law should be applied to determine Mrs. Gann's interest, if any, in her husband's earnings during the years in question. The choice of law rule applied by California courts is that marital property rights in personal property acquired by a spouse are determined under the laws of the domicile of the acquiring spouse. (Schechter . Superior Court, 49 Cal. -2d 3, 10 [314 P.2d 10]; Rozan v. Rozan, 49 Cal. 2d 322, 326[317 P.2d ii).) On the basis of the facts previously stated, we find that Mr. Gann became a Swiss domiciliary on or about October 9, 1961, the date when he began to reside in Switzerland and when he declared to Swiss authorities that he intended to be domiciled in that country: Consequently, Mrs. Gann's interest in his earnings after that date is to be determined under Swiss law. Conversely, her interest in his earnings prior to that date is to be determined under California law, since Mr. Gann remained a California domiciliary until he acquired his new Swiss domicile.

Under these principles, Swiss law clearly applies to the $202,500 earned and received by Mr. Gann in 1962. We now must-decide whether the "Swiss law" to be applied is the internal substantive (local) law of Switzerland or the totality of Swiss law, including its choice of law rules. Although the -California courts apparently have never decided this issue, the position taken by the federal courts and by eminent legal authorities is that only the local law of- the foreign jurisdiction should be applied in a case such as this. (United States v. Rexach, 185 F. Supp. 465; Restatement (Second), Conflict of Laws, § 258.) By following these authorities we thuswould disregard the Swiss choice of law rule that marital property rights of foreigners are governed by the law of the first matrimonial domicile, which in this case is California. In United State's v. Rexach, supra, the court was confronted with determining a wife's interest in her husband's earnings under the law of the Dominican Republic and, like Swiss law, Dominican

law said look to the law of the matrimonial domicile, which in that case was Puerto Rico. The court held that the Dominican Republic's conflict of laws rule should be disregarded and that the law to be applied was the internal substantive law of the Dominican Republic as applied there to persons whose matrimonial domicile had always been the Dominican Republic. (185 F. Supp. at 477-478.) We think that is the proper course to follow. Consequently, we will apply the local law of Switzerland to determine Mrs. Gann's interest in her husband's 1962 earnings.

Respondent contends that Mr. Gann's earnings were community property under Swiss law. Appellant says that respondent's position is based on a misunderstanding of Swiss law, and we agree. Marital property rights are governed by the Sixth Title of the Swiss Civil Code of December 10, 1907. Article 178 of that Code 1/ contains the following general principle:

> Consorts are placed under the regulations as to union of property (Güterverbindung) save where by marriage contract another regime is adopted or they are subjected to the extraordinary property status. 2/

One of the régimes which the spouses may adopt by marriage contract is that called the "community of property." (See Art. 215, et seq.) This régime corresponds closely to the California community property system and, for California tax purposes, Mrs. Gann's interest in her husband's earnings would appear to be the same under both systems. The essential fact, however, is that the Swiss "community of property" does not apply unless the spouses expressly adopt it by marriage contract. Such contracts are formal written agreements which, to be valid, must be signed by the spouses and must be matters of public record. (Art. 181.) Since it is

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1/ All references to the Swiss Civil Code are to the English language translation by Robert P. Shick entitled The Swiss Civil Code, published under the auspices of the Comparative Law Bureau of the American Bar Association.

2/ The extraordinary property status is one of separate property, and it arises by operation of law when one of the spouses is bankrupt. (Art. 182.) Hence, it has no relevance to the present proceeding.

undisputed that the Ganns did not enter into a marriage contract meeting the requirements of Swiss law, they could not have adopted the "community 'of property" régime. Hence, under the general rule of Article 178, their marital property rights are governed by the regulations of "union of property. "

The regulations 'concerning "union of property" are contained in Article 194, et seq., of the Swiss Civil Code. For present purposes, the critical provisions appear in Articles 194 and 195, which state:

194.

> The union of property unites all property belonging to the spouses at the time of their marriage, or coming to them during the marriage, into marital property.
>
> The separate property of the wife is excepted therefrom. [Emphasis added.]

195.

> Whatever of the marital property at the time of the marriage belongs to the wife, or which comes' to her gratuitously during marriage, by way of inheritance or otherwise, is her contributed property (dowry, eingebrachte Gut) and remains her own.
>
> The husband has the property in all that he contributes and in all the marital property that is not the wife's.
>
> The wife's income: and the natural fruits of her property become the property of the husband at the time of their incidence, or separation, with the exception of the regulations as -to separate property. [Emphasis added.]

Under these provisions it is clear that the husband is the owner of his earnings during marriage and that the wife has no property interest in them. Consequently, California may not, as respondent has at-tempted to do here, tax Mrs. Gann on the theory that' under Swiss law she possessed a vested one-half interest in her husband's 1962 *earnings.*

As we noted earlier, California law governs Mrs. Gann's interest in her husband's earnings prior to October 9, 1961. If the general rule applies, Mr. Gann's earnings would be community property and Mrs. Gann would be taxable on one-half of them. Appellant contends, however, that Mrs. Gann "abandoned" her husband in October 1960, and that under Civil Code section 175, as it read during the years in question,3/ his earnings subsequent to the abandonment constituted hisseparate property. In response the Franchise Tax Board questions our jurisdiction to decide this matter, apparently on the theory that abandonment must be judicially determined in a divorce action. If that is respondent's theory, then we do not agree with it. In order to discharge our appellate functions properly, we necessarily must have jurisdiction to determine those matters which have tax consequences under the California Personal Income Tax Law. Since our decision on abandonment would be for tax purposes only, and not for purposes of effecting a division of property between the spouses, it can hardly be said that we would be usurping the exclusive jurisdiction of the superior court in divorce matters.

As used in Civil Code section 175, the term "abandonment" is synonymous with "willful desertion." (Polk v. Polk, 228 Cal. App. 2d 763, 773 [39 Cal. Rptr. 824].) Willful desertion is manifested by the refusal of either spouse to dwell in the same house with the other, when there is no just cause for such refusal. (Keesey v. Keesey, 160 Cal. 727, 731 [117 P. 1054].) It is immaterial which spouse leaves the marital home: The one who intends bringing the cohabitation to an end commits the desertion. (Danielson v. Danielson, 100 Cal. App. 168, 172 [279 P. 1052].) Appellant contends that in October of 1960, Mrs. Gann, wholly unexpectedly and without cause, told her husband that she no longer wanted to live with him as man and wife, that she wanted him to leave the house, and that she wanted a "legal separation." Assuming arguendo that these allegations, if proved, would constitute desertion by Mrs. Gann, the only evidence offered in support of them is Mr. Gann's affidavit that his wife said those things. The circumstances surrounding the separation of these spouses do

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3/ "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct, in abandoning him, and the earnings of the husband during the period of unjustified abandonment, prior to such offer, are his separate property;..."

not corroborate the affidavit. Indeed, the affidavit's probative value is nearly destroyed by the fact that in it Mr. Gann says he was completely unprepared for and was stunned by his wife's request for a separation, whereas the marital settlement agreement attending their divorce recites that they separated in February 1960, long before Mrs. Gann allegedly called an end to the marriage. We find, therefore, that appellant has failed to prove abandonment by Mrs. Gann, and that Civil Code section 175 does not apply. Consequently, the 1961 earnings in question were community property and Mrs. Gann was properly taxed on one-half of them.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of 'the Franchise Tax Board on the protest of the Estate of Eleanor M. Gann, Deceased, Bank of America N T & S A, Executor, against a proposed assessment of additional personal income tax in the amount of $1,618.06 for the year 1961, be and the same is hereby sustained, and that the action of the Franchise Tax Board on the protest of the Estate of Eleanor M. Gann, Deceased, Bank of America N T & S A, Executor, against a proposed assessment of additional personal income tax in the amount of $1,743.89 for the year 1962, be and the same is hereby reversed.

Done at Sacramento, California, this 13th day of December, 1971, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Acting Secretary