CLAIM OF ISHI ISHIZAWA

[No. 146–35–1878. Decided November 10, 1950]

FINDINGS OF FACT

This claim, alleging a loss in the sum of $188, was received by the Attorney General on March 24, 1949. It involves the loss of personal property consisting of luggage, a bed, 2 mattresses, books, stove and kitchen utensils and garden tools. Claimant was born in Japan on January 15, 1896, of Japanese parents. On December 7, 1941, and for some time prior thereto the claimant actually resided at 2022 Blake Street, Berkeley, California, and was living at 2119 Haste Street, Berkeley, California, when he was evacuated on April 30, 1942, in accordance with miltary orders issued under authority of Executive Order No. 9066, dated February 19, 1942. He was sent to the Tanforan Assembly Center in California and from there to the Central Utah Relocation Center at Topaz, Utah. At no time since December 7, 1941, has the claimant gone to Japan. Inasmuch as the claimant was not permitted to take the aforementioned property with him to the assembly center, he acted reasonably in storing same in what he considered to be a safe place in a frame building at 2609 Dana Street, Berkeley, California. Despite the fact that reasonable precautions were taken to prevent unauthorized entry, such entry was nevertheless effected by person or persons unknown and claimant's property was unlawfully removed therefrom. Upon his return claimant made a reasonable effort to locate the said property but has been unable to do so. The reasonable and fair value of the property at the time of loss, exclusive of one mattress which claimant purchased some 6 months after his return, was $120.87. None of the claimant's losses have been compensated for by insurance or otherwise.

The claimant was married in Japan in 1914 to a native-born Japanese, also of Japanese ancestry, and a son was born of the marriage in 1915. In 1922 the claimant immigrated to the United States leaving his wife and child in Japan. The claimant has never returned to Japan nor has his wife or son at any time ever come to this country. Claimant offered testimony to the effect that he supports his wife who is living in Japan with his parents on land owned by him and that he considers his wife to have an interest in any property owned by him in this country.

Since the Immigration Act of May 26, 1924 (43 Stat. 153, 8 U. S. C. 201), prohibits admission into the United States of aliens ineligible to citizenship and aliens of Japanese ancestry, among others, could not qualify for naturalization under the Naturalization Act of 1906 (54 Stat. 1140, 8 U. S. C. 703), claimant's wife has been, and presently is, excluded from the United States.

REASONS FOR DECISION

Losses of the type hereinabove described have heretofore been held to be allowable. *Akiko Yagi, ante,* p. 11.

No allowance can be made for the loss of the mattress which claimant purchased some 6 months after his return from the relocation center inasmuch as the loss thereof was in no way occasioned by reason of his evacuation and was not a reasonable and natural consequence thereof. *Seiji Bando,* ante, p. 68.

Before payment of the allowable losses can be effected, however, a determination must be made as to whether the property herein concerned is community property or the separate property of the claimant. In the event the property is community property, it will be necessary to rule on the eligibility of claimant's wife, inasmuch as she would then have an interest in the property for which claim was made. Generally speaking, the earnings of either party to the marriage resident in a community property State during coverture is community property. See *Deering's Civil*

Code of California (1949), § 164. However, the question arises as to whether property acquired by a spouse domiciled in the State of California when the other spouse has never set foot therein, and is in fact prevented by law from so doing, is the separate property of the resident spouse or community property. In 11 *Am. Jur.* 182–183, § 13, the following statement appears: "Since, in contemplation of law, the domicile of the husband is that of the wife, regardless of her actual residence, a wife residing within the state has no greater privileges respecting community property than one residing without the state." In support of the above proposition is the case of *Commissioner of Internal Revenue* v. *Cavanaugh,* 125 F. 2d 366 (1942), where the husband, a citizen of England, domiciled in California, filed an income tax return computed on the basis of only one half of his income claiming that any income derived by him within the State of California was community property. His wife, domiciled in Canada, had never previously entered the State of California and although living apart from the taxpayer had never entered into any formal separation agreement with him. It was contended by the Commissioner that the marital domicile of the parties must exist within the State of California before the community property statutes of the State could apply and that any income earned by the taxpayer was her separate property. The court disagreeing with this contention stated: "It is true that a wife without fault may acquire a domicile separate from that of her husband for certain purposes and that her earnings while living separate and apart from her husband are her separate property (*Deering's Civil Code of California* (1949), § 169), but this does not affect the status of the earnings of the husband. They are and in such circumstances remain community property of the spouses." In the case of *Dixon* v. *Dixon,* 4 La. 188, it was held that a wife is entitled to her share of community property acquired in the State by her husband though

she was married abroad and never came into the State. To the same effect, see *Beemer* v. *Roher,* 137 Cal. App. 293; *Helvering* v. *Campbell,* 139 F. 2d 865; *Blumenthal* v. *Commissioner of Internal Revenue,* 6 F. 2d 716; *Succession of Dill,* 155 La. 49. All the aforementioned cases, similar in fact to the case at hand, were decided by applying the common law maxim that the domicile of the wife follows that of the husband, which in each of the above cases would have placed the marital domicile within the jurisdiction of the community property State regardless of the actual residence of the wife. Consequently any accumulation of property therein by the resident spouse would become community property. In the instant case, however, it is impossible to apply this maxim. In accordance with the Immigration Act of May 26, 1924, *supra,* the claimant's wife was, and is, not permitted to enter this country and consequently can never acquire the domicile of her husband. In the cases hereinabove cited, the outstanding characteristic to be noted is the fact that the nonresident spouse at all times possessed the option of joining her husband within the community property State. This characteristic is absent in the instant case. It would be paradoxical to hold that the domicile of the wife follows that of the husband when in fact the wife by operation of law is forbidden to enter the jurisdiction wherein her husband resides. Since the claimant's wife can never avail herself of the benefit of the community property laws of the State of California, it must therefore be held that any property or earnings acquired by the claimant must be his separate property.