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THE LAW OF PERSONS IN JAPANESE-AMERICAN CONFLICT OF LAWS

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On March 31, 1954, the United States and Japan celebrated the one hundredth anniversary of the signing of a "Treaty of Peace, Amity and Commerce"[1] between their respective sovereignties. Since the signing of the original treaty in 1854, there have been many treaties, conventions, and executive agreements affecting the status of nationals of the two countries.[2]

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1. See Senate Committee on Foreign Relations, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers, 1776-1909*, S. Doc. No. 357, 61st Cong., 2d Sess. 996 (1910).

2. The following is a complete list of treaties, conventions, and executive agreements between the United States and Japan:

Treaty	*Signed*	*Proclaimed*
Peace, Amity and Commerce	March 31, 1854	June 22, 1855
Commercial and Consular	June 17, 1857	June 30, 1858
Commerce and Navigation	July 29, 1858	May 23, 1860
Reduction of Import Duties	January 28, 1864	April 9, 1886
Shimonoseki Indemnities	October 22, 1864	April 9, 1886
Tariff of Duties	June 25, 1866	
Commercial	July 25, 1878	April 8, 1879
Reimbursing Shipwreck Expenses	May 17, 1880	October 3, 1881
Extradition	April 29, 1886	November 3, 1886
Commerce and Navigation	November 22, 1894	March 21, 1895
Protocol	November 22, 1894	
Patents, Trade Marks & Designs	January 13, 1897	March 9, 1897
Copyright	November 10, 1905	May 17, 1906
Extradition, Supplemental	May 17, 1907	September 26, 1907
Arbitration	May 5, 1908	September 1, 1908
Trade Marks in China	May 19, 1908	
Trade Marks in Korea	May 19, 1908	August 11, 1908
Exchange of Notes Declaring Policy in the Far East	November 30, 1908	
Commerce and Navigation	February 21, 1911	April 5, 1911
Convention for the Protection of Fur Seals	July 7, 1911	
Protocol between Consular Officials re Abolition of Foreign Settlements in Korea	April 21, 1913	
Extension of Arbitration Convention	June 28, 1913	May 26, 1914
Exchange of Notes re China	November 2, 1917	
Extension of Arbitration Convention	August 23, 1918	February 25, 1919

The Treaty of 1854, concluded after long and arduous negotiations between Commodore Perry and Hayashi Daigaku-no-kami, Prince Ido, Prince Izawa, and Udono, was the wedge opening the door of Japan that had remained closed since 1607. It opened the ports of Shimoda and Hakodate for trade between the two countries, provided for the treatment of shipwrecked persons, granted the United States most-favored-nation privileges, and provided for the establishment of a consulate at Shimoda. Article IV of the treaty provided that "citizens of the United States in Japan shall be amenable to just laws." Following the appointment of Townsend Harris as the first American Consul General to Japan, additional concessions were obtained in 1857. The United States was granted rights of extraterritoriality as to criminal cases, and the port of Nagasaki was opened for trade.

In the following year, a more detailed treaty was concluded. By the terms of this treaty, the jurisdiction of the consular court was extended to include civil cases instituted by Japanese citizens against Americans, as well as criminal jurisdiction over American citizens. Japanese courts were opened to American citizens to prosecute claims against the Japanese. Additional ports were opened at Kanagawa, Niigata, and Hyogo. Six months after the opening of Kanagawa, the port of Shimoda was to be closed to Americans. Trade between the United States and Japan was to be governed by a series of trade regulations appended to the treaty.

During the Civil War in America, contacts between Japan and the United States disappeared for all practical purposes. Japan was undergoing an internal revolution resulting in the restoration of the de facto power of government to the Emperor Meiji. Several treaties and conventions concerning commercial matters were concluded between the two governments, but they were ultimately superseded by the "Treaty of Commerce and Navigation" of 1894, which took as its model a similar treaty which England had concluded with Japan. Extraterritoriality and foreign settlements were abolished, most-favored-nation privileges were mutually extended, and the citizens of the contracting parties resident in each other's territory were

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Treaty with Respect to Islands of Pacific (particularly, Yap)	February 11, 1922	July 13, 1922
Extension of Arbitration Convention	August 23, 1923	April 26, 1924
Convention for Prevention of Liquor Smuggling	May 31, 1928	January 16, 1930
Income Tax on Shipping Profits	1926	
Narcotic Drugs	1928	
Passport Visa Fees	1926	
Perpetual Leasehold	1937	

In addition, Commodore Perry concluded a treaty with what was then known as the "Kingdom of Lew Chew" (actually, the Ryukyu Islands, over which Japan claimed hegemony) which was signed on July 11, 1854, and proclaimed on March 9, 1855.

exempt from military service. With respect to freedom of commerce, the treaty provided that:

> The citizens or subjects of each of the High Contracting Parties may trade in any part of the territories of the other by wholesale or retail in all kinds of produce, manufactures, and merchandise of lawful commerce, either in person or by agents, singly or in partnership with foreigners or native citizens or subjects; and they may there own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, conforming themselves to the laws, police and customs regulations of the country like native citizens or subjects.[3]

None of these stipulations, however, would "in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."[4]

During this same period, conventions were also successfully concluded with respect to extradition and the reciprocal protection of patents, trademarks, and copyrights.[5]

Upon the expiration of the Treaty of 1894, a new agreement was reached in 1911. The provisions with respect to freedom of commerce and navigation were generally repeated, but without the proviso mentioned above. A new provision was inserted, giving juridical persons, organized in one country and domiciled in the other, the privilege "to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party."[6] The power of either party to exclude such persons from doing business within the territory of the other, however, was specifically recognized.

In view of the gradual deterioration of Japanese-American relations during the nineteen twenties and thirties, it is not surprising that the Treaty of 1911 was never renewed.[7] Still, at the time of Pearl Harbor, eleven agreements[8] between the two nations remained in force.

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3. Treaty With Japan on Commerce and Navigation, Nov. 22, 1894, art. II, 29 STAT. 848, T.S. No. 192.
4. *Ibid.*
5. See note 2 *supra.*
6. Treaty With Japan on Commerce and Navigation, Feb. 21, 1911, art. VII, 37 STAT. 1504, T.S. No. 558.
7. See p. 157 *infra.*
8. Agreements in force between the United States and Japan at the time of Pearl Harbor were as follows:
(1) Copyright Treaty of 1905
(2) Extradition (1886) with Supplement (1906)
(3) Income Tax on Shipping Profits (1926)
(4) Narcotic Drugs (1928)
(5) Passport and Visa Fees (1926)
(6) Perpetual Leaseholds (1937)
(7) Shipwreck Expenses (1880)
(8) Trade Marks in China (1908)
(9) Trade Marks in Korea (1908)

The story of Japan's defeat and the subsequent seven-year occupation need not be repeated here. Suffice it to say that on September 8, 1951, a Treaty of Peace was signed between Japan and the Allied Powers at San Francisco.[9] At the same time, the United States and Japan signed a security pact wherein Japan granted the United States the right to station security forces in and about Japan.[10] An administrative agreement under this security pact was concluded on February 28, 1952.[11]

With the conclusion of a Peace Treaty and an agreement whereby the United States undertook the military defense of Japan, all that remained to be done in order for the two nations to enter upon an era of close harmony and cooperation was a new "Treaty of Friendship, Commerce and Navigation." Such a treaty was finally concluded on April 2, 1953, and ratified by the United States Senate on July 21, 1953,[12] just one hundred years after Commodore Perry's ships had first appeared off the coast of Japan.

I. Treaty Provisions

As might be expected, the problems of nationality and domicile are not mentioned in the 1953 Treaty. The position and capacity of aliens, however, are treated at some length. The alien is free to enter for purposes of trade between the two countries, to tend to enterprises in which he has invested, and for other purposes, subject to the law governing aliens.[13] Within the country, he may travel freely, reside where he pleases, worship freely, and communicate generally both within the country and abroad.[14] The security of his person is guaranteed,[15] and if arrested, he is assured of the fundamentals of procedural due process.[16] He has free access to the courts to protect his rights[17] and must be treated in the same way as a citizen so far as workmen's compensation, social security, and unemployment insurance are concerned.[18] His property is guaranteed protection,[19] and

(10) Treaty with Respect to the Islands of the Pacific, particularly the Island of Yap (1922)

(11) Exchange of notes declaring policy in the Far East (1908).

Of these agreements, the last four are no longer of any importance. The others presumably remain in force.

9. Treaty of Peace With Japan, Sept. 8, 1951, 3 U.S. Treaties & Other Int'l Agreements 3169, T.I.A.S. No. 2490.

10. Security Treaty Between the United States and Japan, Sept. 8, 1951, 3 U.S. Treaties & Other Int'l Agreements 3329, T.I.A.S. No. 2491.

11. Administrative Agreement With Japan, Feb. 28, 1952, 3 U.S. Treaties & Other Int'l Agreements 3341, T.I.A.S. No. 2492.

12. Treaty of Friendship, Commerce, and Navigation Between the United States and Japan, April 2, 1953, T.I.A.S. No. 2863.

13. *Id.* art. I, § 1.

14. *Id.* art. I, § 2.

15. *Id.* art. II, § 1.

16. *Id.* art. II, § 2.

17. *Id.* art. IV, § 1.

18. *Id.* art. III.

19. *Id.* art. VI, § 1.

he cannot be subjected to unreasonable search.[20] If his property is condemned by way of eminent domain, he is entitled to just compensation.[21] He is free to transmit his property within the country without being subject to transit dues.[22]

In a few respects, the rights of the alien have been limited. Earlier treaties exempted him from compulsory military service.[23] In the 1953 Treaty, this provision has been omitted, possibly because of the unwillingness of the United States Army to exempt aliens from the draft, or possibly because Japan, under her "no-war" constitution, theoretically has no army or navy.

As originally drafted, the treaty provided that the alien should "not be barred from practicing the professions . . . merely by reason of [his] alienage."[24] The United States Senate, however, placed a limitation on this section at the time of ratification:

> Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.[25]

The alien may acquire real property for residential or commercial purposes, and is entitled to most-favored-nation treatment with respect to the acquisition of personalty and disposition of property of all kinds.[26]

In the event that an alien should succeed to realty by way of testacy or intestacy to which he cannot take title because of his alienage, he is allowed five years to dispose of such property.[27] Finally, it should be noted that an alien is not permitted to engage in employment if

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20. *Id.* art. VI, § 2.
21. *Id.* art. VI, § 3.
22. *Id.* art. XX.
23. Treaty With Japan on Commerce and Navigation, Nov. 22, 1894, art. I, § 5, 29 STAT. 848, T.S. No. 192; Treaty of Commerce and Navigation Between the United States and Japan, Feb. 21, 1911, art. I, § 4, 37 STAT. 1504, T.S. No. 558.
24. Treaty of Friendship, Commerce, and Navigation Between the United States and Japan, April 2, 1953, art. VIII, § 2, T.I.A.S. No. 2863.
25. *Id.* at p. 7. The limitation was necessary because of the fact that a number of states bar aliens from the practice of law or medicine. It may be interesting to note that there has recently been some discussion among the members of the Japanese bar to the effect that admission to the bar should be limited to citizens of Japan. At present, aliens may be admitted to the Japanese bar if capable of passing the difficult bar examination (in Japanese). Mr. Thomas L. Blakemore, a graduate of the University of Oklahoma College of Law, was the first Westerner to successfully pass the examination. On the other hand, American lawyers who are not admitted may represent foreign clients, and such attorneys are not at all uncommon in the large cities of Japan. The proposal would limit the practice of foreign attorneys to the area of foreign trade.
This situation should be compared with the long-established system of reciprocity between attorneys of Japan and the United Kingdom.
26. *Id.* art. IX, §§ 1, 2.
27. *Id.* art. IX, § 3.

any such limitation is placed on him at the time of his admittance,[28] nor may he engage in any political activities.[29]

It is apparent that the 1953 Treaty is not an all-inclusive statement of the law of persons. To appreciate the large body of doctrine that underlies this treaty, one must look to the municipal law of Japan and the United States. The Japanese "Law Concerning the Application of Laws in General"[30] and "Nationality Law"[31] are particularly important. American doctrines appear in a multitude of statutes and cases, both state and federal. Moreover, the doctrines of constitutional law play an important role in determining the rights of Japanese persons within the borders of the United States.

II. NATIONALITY AND CITIZENSHIP

Japanese doctrine makes no distinction between "nationality" and "citizenship." What Americans commonly think of as a "citizen" is translated as "national" in English translations of the Nationality Law. An "alien" is defined as "one who is not a Japanese national."[32]

American doctrine, on the other hand, draws a distinction between "national" and "citizen." While all American citizens are also American nationals, the reverse is not necessarily true. The term "national" has been said to be "broader than 'citizen.' "[33]

The Immigration and Nationality Act of 1952 defines a "national" as a "person owing allegiance to a state."[34] An "alien" is defined as a "person not a citizen or national of the United States."[35] The term

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28. *Id.* art. XXI, § 4.
29. *Id.* art. XXI, § 5.
30. Law Concerning the Application of Laws in General (HŌREI), Law No. 10, June 21, 1898, as amended by Law No. 7 of 1942, and Law No. 223 of 1947 (Japan), hereinafter cited as HŌREI.
31. Law No. 147, May 4, 1950, repealing Law No. 66 of 1899, as amended by Law No. 27 of 1916, Law No. 19 of 1924, Law No. 195 of 1947, and Law No. 239 of 1947 (Japan).
32. Law No. 147 of 1950, art. 3. Japanese doctrine does not have the concept of a "national" who is not also a "citizen." Prior to World War II, nationality, under Japanese law, was dependent upon blood, rather than domicile. Such a doctrine was feasible in a country with an extremely high percentage of racial homogeneity. Thus, a Korean domiciled in Japan might, in a few limited situations, obtain Japanese nationality by naturalization.

After World War II, Japan amended its Nationality Law so that ethnic considerations are no longer determinative. Anyone domiciled in Japan may now become a Japanese national through naturalization, without regard to his racial background. On the other hand, since Japan lost its overseas possessions as a result of the war, there is presently no analogous area to which Japan might apply the doctrine of collective naturalization, with the attendant concept of nationality without citizenship, that characterizes American doctrine with reference to some of its overseas possessions.

It is interesting to note that the English language version of the 1953 Treaty between Japan and the United States uses the term "national" whereas the 1894 and 1911 treaties (written, officially, only in English) used "citizen" or "subject."
33. Guessfeldt v. McGrath, 89 F. Supp. 344 (D.D.C. 1950).
34. 66 STAT. 169, 8 U.S.C. § 1101(a)(21) (1952).
35. 66 STAT. 166, 8 U.S.C. § 1101(a)(3) (1952).

"citizen" is not defined in the statute, but includes all nationals, except those not specifically stated to be citizens.[36]

Nationality may be acquired in the United States either by birth[37] or by naturalization. A person may be naturalized either by means of a judicial proceeding,[38] or by way of collective naturalization.[39] A person who acquires his nationality either by birth or by way of individual naturalization also acquires citizenship, but one who acquires nationality by collective naturalization acquires citizenship only if extended at the time of naturalization, or by some later statute. Today, the only American "nationals" who are not also citizens are the inhabitants of American Samoa and the Swains Island.[40]

It has long been established that a person born of Japanese parents domiciled in the United States is an American national and citizen from birth,[41] but it has only been since 1952 that a Japanese alien could obtain American nationality and citizenship by way of individual naturalization proceedings.[42]

Despite the specificity of the term "national" in the Immigration and Nationality Act, its use remains ambiguous in other contexts. Two cases involving the Trading with the Enemy Act illustrate the difficulty of determining the meaning of the term "national" with reference to persons of Japanese blood domiciled in the United States. In one, an American citizen of Japanese ancestry was said not to be a "national," while in the other, a Japanese alien was treated as a "national."

In *Okihara v. Clark*,[43] the plaintiff sought to recover certain properties in Hawaii which had been transferred to her by her uncle, a Japanese national domiciled in Japan. The transfer was made after the effective date of the "Freeze Order" under the Trading with the Enemy Act. The court held the attempted transfer void, and accordingly the property was properly taken into custody by the Alien Property Custodian.

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36. 66 STAT. 238, 8 U.S.C. § 1408 (1952).
37. 66 STAT. 235, 8 U.S.C. § 1401 (1952).
38. 66 STAT. 239, 8 U.S.C. §§ 1421-59 (1952).
39. 66 STAT. 235, 8 U.S.C. §§ 1402-07 (1952) (codification of the provisions with respect to the collective naturalization of American Indians and inhabitants of outlying posessions).
40. *Quaere* the citizenship status of the inhabitants of the trusteed islands of the Pacific and Okinawa. They have not been collectively naturalized by any sovereignty.
41. Regan v. King, 49 F. Supp. 222 (N.D. Cal. 1942).
42. Prior to the Immigration and Nationality Act of 1952, the Japanese alien was ineligible for naturalization by reason of his race. Ozawa v. United States, 260 U.S. 178 (1922). Section 1422 of the new act provides, in part, as follows: "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married." 66 STAT. 239, 8 U.S.C. § 1422 (1952).
43. 71 F. Supp. 319 (D. Hawaii 1947).

While not necessary to the decision of the case, the court commented with reference to the plaintiff's citizenship:

> But it is said—correctly—that plaintiff is a citizen of the United States. True, but she is also a subject of Japan. . . . And while for most purposes while in the United States a dual citizen will be regarded as a United States citizen only, yet under an act such as the Trading with the Enemy Act, its scope, purpose and precise provisions require the consideration of realities as well. This conclusion is no more unusual than the familiar one, also dictated by this same Act, that a United States citizen resident in an enemy country in time of war is an "enemy alien" even though in fact he is neither an enemy nor an alien.[44]

Under the old Japanese Nationality Law, the plaintiff was a citizen of Japan by virtue of having been born of Japanese parents. While it was possible for her to renounce her Japanese citizenship, in all probability she had failed to do so.[45] By way of contrast, since 1950, Japanese law has required Americans of Japanese ancestry to take positive steps to preserve their Japanese nationality.[46]

In *Nagano v. McGrath*,[47] the plaintiff had emigrated from Japan to the United States in 1915. Having acquired a domicile in this country, she returned to Japan in 1924, and remained there until after World War II, returning to the United States in 1950. Throughout her long stay in Japan, plaintiff never voluntarily relinquished her domicile in the United States.[48] Accordingly, unless a Japanese "national" by reason of her Japanese citizenship, she would be entitled to recover certain property taken into custody by the Alien Property Custodian. In holding that the plaintiff had stated a cause of action, the Court of Appeals for the Seventh Circuit found that Congress had not intended to "deprive friendly alien residents of all opportunity to recover untainted American property,"[49] and stated:

> [T]hough literally speaking, plaintiff is a citizen of Japan, she is not a citizen within the meaning of the word and its connotation recognized by judicial decisions. We ordinarily think of a citizen as one who owes allegiance to a state and has a reciprocal right to protection by it. It is obvious that plaintiff, a loyal

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44. *Id.* at 322.

45. Under pre-war Japanese law, it was necessary for an American citizen of Japanese ancestry born before November 15, 1924, to make a renunciation of his Japanese nationality. Failure to make such a renunciation meant that the individual retained his Japanese nationality, although he was also an American citizen by American doctrine. Law No. 66 of 1899, art. 20-(2) as amended (Japan), cited note 31 *supra*.

46. Law No. 147 of 1950, art. 9 (Japan).

47. 187 F.2d 759 (7th Cir. 1951).

48. Since the district court had dismissed plaintiff's petition as failing to state a cause of action, the facts as alleged in her petition with reference to domicile were taken as true for the purpose of her appeal to the Seventh Circuit Court of Appeals. While these facts were quite peculiar, if true they would amply justify a finding that plaintiff had never given up her American domicile, despite her long absence from this country.

49. 187 F.2d 759, 768 (7th Cir. 1951).

American resident, unable to secure citizenship in this country, on the averments of her complaint, owed no allegiance to Japan and had no reciprocal rights to protection by it. . . . Her position, we believe, is not within the conception of citizenship of a foreign nation which Congress had in mind in defining a national.[50]

III. DOMICILE

In American doctrine, domicile has been described as "the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law."[51] The conventional American rule is that there are three classes of domicile: domicile of origin,[52] domicile of choice,[53] and domicile by operation of law,[54] and that every person can have one and only one domicile.[55] Once acquired, a domicile continues until a new one is obtained.[56] To establish a new domicile there must be an intention to abandon the old one,[57] physical presence in the place where domicile is alleged to have been acquired,[58] and an intention to remain there indefinitely.[59]

"Domicile" should not be confused with "residence." Domicile has acquired a technical meaning, while residence has many shades of meaning, from mere temporary presence, to the most permanent type of abode. As a statutory term, residence probably means domicile in most cases, but its meaning in a legal phrase must be determined in each case.[60]

Research reveals only one American case on domicile concerning Japanese persons in the United States.[61] Plaintiffs, American citizens

50. *Ibid.*

51. RESTATEMENT, CONFLICT OF LAWS § 9 (1934). For a complete discussion of the rules concerning domicile, see 1 BEALE, CONFLICT OF LAWS c. 2 (1935); GOODRICH, CONFLICT OF LAWS c. 2 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS §§ 9-41 (1934); STUMBERG, CONFLICT OF LAWS c. 2 (1937).

52. RESTATEMENT, CONFLICT OF LAWS § 14 (1934).

53. *Id.* § 15.

54. *Id.* §§ 26-41. In at least four situations the law attributes domicile: (1) Normally, the domicile of a married woman is the same as that of her husband. But most courts in the United States will allow a wife to establish a separate domicile to sue for divorce. (2) A minor has the same domicile as that of his father unless he is emancipated and has acquired a domicile of his own. If he has been awarded to the custody of his mother, or is illegitimate, his domicile is that of his mother. (3) An incompetent can change his domicile if he has sufficient reason and understanding; otherwise, his domicile is the same as that of his guardian. (4) A corporation is domiciled only in the state of incorporation.

55. RESTATEMENT, CONFLICT OF LAWS § 11 (1934). *But see* RESTATEMENT, CONFLICT OF LAWS § 11, comment *d* at 53 (Tent. Draft No. 2, 1954), indicating that domicile is not necessarily the same for all purposes; Reese, *Does Domicil Bear a Single Meaning?*, COLUM. L. REV. 589 (1955).

56. RESTATEMENT, CONFLICT OF LAWS § 23 (1934).

57. *Id.* § 18.

58. *Id.* § 16.

59. STUMBERG, CONFLICT OF LAWS 18-22 (1937).

60. For further discussion of domicile and its parallel, residence, see GOODRICH, CONFLICT OF LAWS c. 2 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS § 9, comment *e* (1934).

61. Hiramatsu v. Phillips, 50 F. Supp. 167 (S.D. Cal. 1943).

of Japanese ancestry, had been domiciled in California prior to being moved to a relocation center in Arizona during World War II. They brought an action against the defendant, a domiciliary of California, in the United States District Court for the Southern District of California. The defendant moved to dismiss the action on the ground that there was no diversity of citizenship. In granting the motion, the court found that the plaintiffs had no domicile in Arizona, since although they asserted their intention to remain in that state, they had not acquired a domicile of choice there.

> The intention to acquire domicile of choice necessarily involves an exercise of volition or freedom of choice not prescribed or dictated by any external necessity. It is established law that a person cannot acquire domicile by any act done under legal or physical compulsion.[62]

It has been suggested that the court might have reached a different result if the plaintiffs had demonstrated the good faith of their declaration of intention not to return to California by showing that they had obtained permission to leave the relocation center to move inland, had obtained permanent employment, and were making their new residence their home and center of affairs.[63]

In American law, the determination of domicile is, of course, of great importance in cases of personal status, such as legitimacy, adoption, marriage, divorce, custody, and the like. The disposition of personalty at death is largely controlled by the decedent's domicile. Questions of judicial jurisdiction and the jurisdiction to tax are likewise dependent upon domicile for their doctrinal solution.

While Japanese law, since the abolition of extraterritoriality in 1894, is of territorial application insofar as jurisdictional matters are concerned, choice of law is commonly governed by nationality, rather than domicile.[64] The law of the party's nationality is used to determine such matters as capacity,[65] incompetency,[66] marriage,[67] divorce,[68] legit-

62. *Id.* at 168.

63. 42 MICH. L. REV. 321, 323 n.10 (1943).

64. For a more complete discussion of nationality and domicile, see Baty, *Interconnection of Nationality and Domicile*, 13 ILL. L. REV. 363 (1919); 1 BEALE, CONFLICT OF LAWS § 18 (1935); GOODRICH, CONFLICT OF LAWS c. 2 (3d ed. 1949); WHARTON, CONFLICT OF LAWS §§ 7, 8, 34 (1905).

65. If an alien performs a juristic act in Japan, his capacity is determined by Japanese law, even though he might be incapacitated by the law of his nationality. Exceptions are made, however, in the case of the alien with respect to the doctrines of family law, succession, and real property outside Japan. In these matters, the law of his nationality governs. HŌREI art. 3.

66. A Japanese forum may judge an alien domiciled in Japan incompetent for any cause for which he would be deemed incompetent under the law of his nationality, unless "such cause is not recognized by Japanese law." HŌREI art. 4.

67. The capacity of the parties to enter into marriage is determined by the law of the nationality. The validity of the marriage, insofar as it is dependent upon form, is governed by the law of the place of formation. Legal relationships and "arrangements relative to marital property" are governed by the law of the nationality of the husband. HŌREI arts. 13-15.

68. The law of the nationality of the husband is determinative of the grounds

imation,[69] adoption,[70] the duty of support,[71] guardianship,[72] and succession.[73] If the individual has more than one nationality, then the law of that country "whose nationality he last acquired" will be the applicable law, except that if one of these nationalities should be Japanese, then Japanese law will be applied.[74]

Where the party has no nationality, the law of his domicile governs.[75] If his domicile is unknown, then the law of his residence will be followed.[76] One of the most interesting provisions of Japanese conflicts doctrine is a provision for "accepting the renvoi."[77] If, by Japanese doctrine, the law of the place of nationality is to be followed, and such law refers the court back to Japanese law, then "Japanese law shall govern."

IV. ALIENAGE

While the 1953 Treaty guarantees the Japanese alien in the United States many important rights,[78] such was not always the case. Indeed, there were times in the history of the United States when the rights of American citizens of Japanese ancestry, as well as the rights of Japanese aliens, were completely ignored.

(a) *The Privilege to Enter*

The earliest Japanese visitors to American shores were a number of scholars who managed to escape from Japan during the later days of the Tokugawa shogunate government. After the restoration of the Emperor to de facto, as well as de jure, power in 1868, the new government abandoned its two-century long seclusion policy and in 1885 removed barriers to labor emigration. Approximately one to two thousand Japanese entered the United States or its possessions each year

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which are available for divorce, but under Japanese conflicts rules such grounds must also be available under Japanese law, *i.e.*, the law of the forum. HŌREI art. 16.

69. Legitimacy is determined by the "law of the country to which the husband of the mother belonged" as of the time of the child's birth. HŌREI art. 17. The "conditions of acknowledgment" with respect to the father, mother, or child are determined by the "law of the country to which [the father, mother, or child, respectively] belonged, at the time of acknowledgment." HŌREI art. 18. Whether the law of the country to which one belongs refers to nationality or domicile is not clear; the validity of the acknowledgment is governed, however, by the law of the nationality of the father *or* mother. HŌREI art. 18.

70. The conditions of adoption are determined by the law of the nationality of the party to be adopted; the validity of the adoption by the law of the nationality of the adopting parent. HŌREI art. 19.

71. HŌREI art. 21 (law of the nationality of the person bound to furnish support).

72. HŌREI art. 23 (law of the nationality of the ward).

73. HŌREI art. 25 (law of the nationality of the "ancestor," *i.e.*, decedent).

74. HŌREI art. 27, para. 1.

75. HŌREI art. 27, para. 2.

76. HŌREI art. 27, para. 3.

77. HŌREI art. 29.

78. See pp. 148-49 *supra*.

during the last decade of the nineteenth century. The vast majority went to Hawaii to augment the labor supply in the sugar fields.

At the turn of the century, many Japanese began to settle on the West Coast. One demographer has explained this occurrence as follows:

> [T]he sharp rise in admissions to the mainland in 1900 reflects a fortuitous diversion to San Francisco of Hawaiian-bound immigrants whose ships were turned away from Honolulu because of an outbreak of bubonic plague in the Islands. Between 1901 and 1907, the curve of admissions ebbed to troughs of 4,000-5,000 and rose to a crest of almost 10,000, in response to the slackening and quickening of the demand for labor on the West Coast, and during these years . . . there was a striking covariation in curves of immigration and of American business cycles. From 1908 onward, however, the limits of fluctuation in admissions were set primarily by political restrictions.[79]

The influx of Japanese, as well as other immigrants, in the last decade of the nineteenth century, prompted Congress to enact the Immigration Act[80] to establish some qualitative control over persons entering the United States. That the sovereign has the power to place restrictions on the admission of aliens, or indeed to exclude them altogether, cannot be doubted.[81] But, once it has settled on a procedure for the admission of aliens, such procedure must insure the alien fair treatment. In *Nishimura Ekiu v. United States*,[82] a Japanese immigrant was excluded from admission to the United States by the inspector of immigration as a "person likely to become a public charge." Instead of taking an appeal from the finding of the local authority to a higher administrative official, she sued out a writ of habeas corpus in a circuit court of the United States. From a denial of the writ, she appealed to the United States Supreme Court which held that the determination of whether a particular immigrant fell within one of the classes to be excluded under the statute was a matter for administrative determination, and that her sole appeal from an adverse ruling was to higher administrative authority. Such appeal not having been taken, the writ was properly denied by the circuit court. So long as there was nothing to indicate that the administrative proceeding was unfair, the petitioner had not been denied due process.

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79. THOMAS, THE SALVAGE 6 (1952).

80. 26 STAT. 1084 (1891), 5 U.S.C. § 342(b) (1952). The first federal legislation concerning Asian immigration was enacted in 1875. 18 STAT. 477 (1875), 8 U.S.C. §§ 138, 336, 338-39 (1952). Prior to that time, some states had passed acts affecting entry into their jurisdictions, but these state statutes were held unconstitutional on the ground that the Constitution vested in Congress the exclusive power to regulate immigration. Chy Lung v. Freeman, 92 U.S. 275 (1875).

81. See the recent case of Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952), in which the Supreme Court, in reference to aliens, stated: "The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."

82. 142 U.S. 651 (1892).

Eleven years later, another Japanese immigrant sought by habeas corpus to obtain judicial review of her detention by immigration officials prior to deportation. The Supreme Court again held that the administrative determination that she came within one of the classes excluded by the statute was conclusive, and that this was true even though the immigrant's knowledge of English was not sufficient for her to understand fully the administrative proceeding which determined that she could not be admitted. The Court pointed out that the Treaty of 1894 did not give the petitioner any additional rights since it specifically excepted any laws relating to "police and public security," and the Immigration Act of 1891 was properly includible within this category.[83]

The continuing increase in the number of Japanese coming into California eventually caused persons on the West Coast to bring pressure on President Theodore Roosevelt to put an end to Japanese immigration.[84] Through diplomatic negotiations, the United States and Japan reached a "Gentlemen's Agreement" whereby Japan would confine the emigration of laborers from Japan to the United States to "those previously domiciled in the United States, or parents, wives, or children under twenty years of age of such persons."[85] The terms of this agreement became the basis upon which "picture brides"[86] were brought from Japan to the United States between 1907 and 1924.

In 1911, the two nations entered into a new treaty to supplant the earlier Treaty of 1894 which had expired. Despite the terms of the treaty which provided that the "citizens . . . of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade,"[87] Congress eventually succumbed to the pressures of West Coast racism, and enacted a statute providing for the complete exclusion of the Japanese.[88]

After World War II, the immigration rules with respect to Japanese aliens were finally modified. At first, brides and fiancées of service-

83. Yamataya v. Fisher, 189 U.S. 86 (1903).

84. See the San Francisco School Board's Resolution of 1906, requiring Orientals to attend segregated schools. Roosevelt finally persuaded the Board to rescind the resolution on the basis of a promise to "bring Japanese immigration to an end." Buell, *Japanese Immigration*, in 7 WORLD PEACE FOUNDATION PAMPHLETS, Nos. 5-6, at 287.

85. Letter from Ambassador Hanihara to Secretary of State Hughes, April 10, 1924, quoted in BUELL, *op. cit. supra* note 84, at 359.

86. The term "kekkon shashin" arose from the custom of Japanese alien bachelors domiciled in the United States exchanging photographs with potential brides in Japan. After a marriage by proxy, the bride could then emigrate to the United States and the bachelor was spared the expense of a trip to Japan to obtain a wife. See THOMAS, *op. cit. supra* note 79, at 7, 8.

87. Treaty of Commerce and Navigation Between the United States and Japan, Feb. 21, 1911, art. I, 37 STAT. 1504, T.S. No. 558.

88. Section 13(c) of the Immigration Act of 1924, 43 STAT. 153, provided that "No alien ineligible to citizenship shall be admitted to the United States."

men and bridegrooms and fiancés of servicewomen were admitted without regard to their racial origin.[89] Finally, in 1952, Congress abolished race as a criterion for exclusion.[90]

Since 1952, Japanese aliens may be admitted to the United States as either immigrants or non-immigrants. The immigrant classification is further subdivided into quota and non-quota immigrants. At present, 185 persons may be admitted each year as quota immigrants from Japan.[91] Within this quota, four categories are designated as having preference: (1) certain skilled workers, (2) parents of American citizens, (3) spouses and children of aliens admitted for permanent residence, and (4) certain close relations of American citizens.[92]

Non-quota immigrants include the following: (1) spouses and children of American citizens, (2) re-entering alien residents, (3) natives of the Western Hemisphere, (4) certain expatriated former citizens, (5) ministers of religious denominations, and (6) certain alien employees of the United States Government missions abroad.[93]

Non-immigrants are divided into the following classes: (1) officials of foreign governments, (2) temporary visitors, (3) transient aliens, (4) crewmen, (5) treaty traders or investors, (6) students, (7) international organizations personnel, (8) temporary workers, and (9) foreign correspondents.[94]

(b) *The Privilege of Naturalization*

Prior to 1952, it was impossible for an alien Japanese to become a citizen of the United States. In *Ozawa v. United States*,[95] a Japanese alien sought to obtain naturalization on the theory that the Naturalization Act of 1906 in no way limited the privilege of obtaining citizenship to persons of a particular race. The act simply stated that an "alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."[96] The petitioner contended that so long as he fulfilled the requirements of the 1906 statute, he was entitled to become a naturalized citizen. The Supreme Court, however, held that the Act of 1906 was limited by section 2169 of the Revised Statutes which restricted naturalization to members of the white and

89. 59 STAT. 659 (1945), 8 U.S.C. §§ 232-37 (1952); 60 STAT. 339 (1946), 50 U.S.C. § 1851 (1952).

90. Immigration and Nationality Act, 66 STAT. 166 (1952); 8 U.S.C. §§ 1101-503 (1952).

91. Proc. No. 2980, 17 FED. REG. 6019 (1952).

92. 66 STAT. 178, 8 U.S.C. § 1153(a) (1952).

93. 66 STAT. 167, 8 U.S.C. § 1101(a)(27) (1952).

94. 66 STAT. 166, 8 U.S.C. § 1101(a)(15) (1952).

95. 260 U.S. 178 (1922).

96. REV. STAT. § 2169 (1875), 8 U.S.C. § 703 (1952).

African races. Since the petitioner did not fall within either of these categories he was ineligible for citizenship.[97]

In striking contrast with the earlier attitude, the 1952 Act specifically provides that "the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race."[98] Accordingly, if a Japanese alien can satisfy the other requirements of the statute,[99] he can now become a citizen.

(c) *The Right to Work*

Every state in the Union, as well as the District of Columbia, has local legislation limiting the occupations in which an alien may seek employment.[100] These local laws, placing restrictions on every conceivable occupation from architecture to wrestling promotion, are found mostly in the professional fields and in public health.[101] The elimination of aliens from certain fields of endeavor has been justified on the ground that where a particular line of work affects the public in-

97. A similar result was reached with reference to a Japanese alien who served in the American armed forces. The Court held that the words "any alien," as used in a statute providing for the naturalization of those who had had military service, 40 STAT. 547 (1918), 8 U.S.C. § 703 (1952), and Act of July 19, 1919, c. 24, 41 STAT. 222, were limited by REV. STAT. § 2169 (1875), 8 U.S.C. § 703 (1952), so as to confine these words to the races therein specified. Toyota v. United States, 286 U.S. 402 (1952). See also Yamashita v. Hinkle, 260 U.S. 199 (1922) (naturalization certificate issued to a Japanese alien void on its face).

98. 66 STAT. 239, 8 U.S.C. § 1422 (1952).

99. The requirements are as follows:

1. Lawful admission for permanent residence.

2. Understanding the English language and the fundamentals of the history, principles, and form of government of the United States.

3. Attachment to the principles of the Constitution and a disposition to the good order and happiness of the United States.

4. Good moral character.

5. Continuous residence (*i.e.*, domicile) for 5 years in the United States, including at least 2½ years of physical presence in the United States, and 6 months of living in the state where the petition for naturalization is filed.

The above requirements are modified in the case of former citizens, spouses and children of citizens, aliens with service in the armed forces, alien seamen, and persons performing religious duties abroad. See 66 STAT. 239, 8 U.S.C. §§ 1423-40 (a) (1952).

A recent statute prevents loss of American citizenship by reason of voting in any political election in Japan during the period of the American occupation (September 2, 1945-April 27, 1952). 68 STAT. 495 (1954), 8 U.S.C. § 1438 (Supp. II, 1955). Such a statute was necessary to protect Nisei who voted in such elections to encourage the development of democracy in Japan during the post-war period.

100. For a fuller discussion of the alien's "right to work," see KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW c. 6 (1946); Chamberlain, *Aliens and the Right to Work*, 18 A.B.A.J. 379 (1932); Fellman, *The Alien's Right to Work*, 22 MINN. L. REV. 137 (1938); O'Connor, *Constitutional Protection of the Alien's Right to Work*, 18 N.Y.U.L.Q. REV. 483 (1941); Note, 49 COLUM. L. REV. 257 (1949); Comment, 52 MICH. L. REV. 1184 (1954).

101. For a compilation of state legislation, see KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 190-211 (1946); 5 VERNIER, AMERICAN FAMILY LAWS 295-402 (1938); Note, 53 HARV. L. REV. 112 (1939).

terest, a classification based on the distinction between aliens and citizens is not unreasonable.[102]

Until 1952, however, it was impossible for a Japanese alien to become a citizen. As a result, the statute which prevented aliens from entering a particular activity had a highly discriminatory effect against the alien Japanese. Moreover, local law was occasionally worded so as to prohibit "ineligible aliens" from various occupations.

In an earlier day, the Japanese alien obtained some protection by means of treaty provisions. In *Asakura v. City of Seattle,*[103] the Supreme Court struck down a municipal ordinance limiting issuance of pawnbrokers' licenses to citizens only, as being in conflict with the 1911 Treaty between the United States and Japan. After World War II, the Supreme Court ruled against local legislation directed against "ineligible aliens."

In *Takahashi v. Fish and Game Commission,*[104] the Court held that a California statute prohibiting the issuance of commercial fishing licenses to any "person ineligible for citizenship" constituted a violation of the equal protection clause of the fourteenth amendment and the federal civil rights statutes.[105]

Justice Murphy, in a concurring opinion, noted the obvious truth that the California statute was specifically directed against Japanese aliens:

> We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests. We need but unbutton the seemingly innocent words of § 990 to discover beneath them the very negation of all the ideals of the equal protection clause.[106]

Since a Japanese alien is no longer ineligible for citizenship, local statutes drawn in the manner of the statute in the *Takahashi* case can no longer operate in such a discriminatory fashion. Moreover, the

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102. See, *e.g.,* Heim v. McCall, 239 U.S. 175 (1915) (New York statute prohibiting employment of aliens on public works and giving preference to citizens of New York for employment upheld); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (Pennsylvania statute barring aliens from hunting wild game upheld); McCready v. Virginia, 94 U.S. 391 (1876) (Virginia law prohibiting citizens of other states from planting oysters in a Virginia tidewater river upheld).

103. 265 U.S. 332 (1924).

104. 334 U.S. 410 (1948).

105. 16 STAT. 140, 144 (1870), 42 U.S.C. § 1981 (1952).

106. 334 U.S. 410, 427 (1948).

Japanese alien may now become a naturalized citizen so as to be eligible to enter a profession from which he might otherwise be barred by reason of his alienage.

(d) *The Right to Hold Property*

During the second and third decades of the twentieth century, the West Coast states inaugurated a campaign to deny the Japanese alien the right to hold property for agricultural purposes.[107] Although the United States Supreme Court upheld the alien land laws,[108] these statutes actually had little effect in eliminating the Japanese alien from the agricultural scene. It has been pointed out that:[109]

> Strict enforcement of the land laws would have driven the Japanese back to the status of laborers or out of agriculture altogether, for the vast majority of tenants and owners were foreign born, and their American-born children were still too young to exercise citizenship rights. But these laws were inherently difficult to enforce, and they were extensively, continuously, and collusively evaded. Farms were bought or operated by aliens who acted as guardians of their minor American-born children;[110] land was leased under names "borrowed" from older Japanese-American citizens; and corporations were formed for the sole purpose of undercover leasing of land.[111] Tenants sought legal refuge by assuming the permissible status of farm managers, foremen, and laborers. In these and other evasive practices the Japanese had the active cooperation of the many Caucasian ranchers, shippers, and merchants to whom their tenancy was profitable and expedient.[112]

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107. See the following California statutes: Cal. Stats. 1913, c. 113, at 206; Cal. Stats. 1923, c. 441, at 1020; Cal. Stats. 1927, c. 528, at 880; Cal. Stats. 1943, c. 1003, at 2917, c. 1059, at 2999; Cal. Stats. 1945, c. 1129, at 2164; Cal. Stats. 1951, c. 1714, at 4035; Cal. Stats. 1953, c. 1816, at 3600. The statutes commonly denied the right to hold property to "aliens ineligible for citizenship," and excepted land held for purposes "prescribed by any treaty." Two treaties gave Japanese aliens in the United States the right to hold property for "residential or commercial purposes." Treaty With Japan on Commerce and Navigation, Nov. 22, 1894, art. II, 29 STAT. 848, T.S. No. 192; Treaty With Japan on Commerce and Navigation, Feb. 21, 1911, art. I, 37 STAT. 1504, T.S. No. 558. See also Jordan v. Tashiro, 278 U.S. 123 (1928) (construction of treaty as being confined to strictly commercial and residential purposes held unwarranted).

108. Porterfield v. Webb, 263 U.S. 225 (1923) (California statute); Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute).

109. THOMAS, THE SALVAGE 24 (1952). The original footnotes in the quotation have been deleted.

110. See, *e.g.*, In the Matter of Yano, 188 Cal. 645, 206 Pac. 995 (1922) (guardianship for purposes of holding minor's title held valid).

111. See, *e.g.*, Webb v. O'Brien, 263 U.S. 313 (1923), where the application of the statute so as to prohibit an arrangement whereby a Japanese alien had a "cropping" contract with a year lease was held not to violate any constitutional right of the alien. Similarly, in Frick v. Webb, 263 U.S. 326 (1923), the Court upheld the California Alien Land Law as applied to the sale of stock in a land corporation. *But see In re* Okahara, 191 Cal. 353, 216 Pac. 614 (1923) (cropping contract held not within Alien Land Law).

112. See, *e.g.*, Cockrill v. California, 268 U.S. 258 (1925) (upholding conviction of Caucasian for conspiracy to violate alien land laws).

Recently, in *Oyama v. California*,[113] the Supreme Court was presented with an opportunity to hold the alien land laws unconstitutional. An alien Japanese had taken title to agricultural land in the name of his son, a minor American citizen. The father was appointed guardian for the son, but failed to file the annual guardianship reports required of guardians of agricultural land belonging to minor children of ineligible aliens. The state brought escheat proceedings to recover the land on the ground that it had been acquired with the intention of evading the California Alien Land Law. Under the local statute, the son had the burden of overcoming a statutory presumption that the conveyance was with intent to evade escheat of the land. This inference was presumed from the fact that an ineligible alien had paid the consideration, and title had been taken in the name of a minor.

Rather than overrule its earlier decisions in the alien land cases, the Court struck down the statute on the ground that it denied the son, an American citizen, equal protection of the laws, by placing on him a burden of proof that was not placed upon other California minors.[114] Four of the justices[115] concurred with the result, but felt that the previous decisions of the Court should have been overruled and the alien land laws declared unconstitutional.

Four years after the decision in the *Oyama* case, the California Supreme Court, relying on the *Oyama* and *Takahashi* cases, ruled that the California Alien Land Law was unconstitutional because it violated the equal protection clause of the fourteenth amendment.[116] Oregon and Montana have also found their alien land laws to be violative of the equal protection clause.[117] While the alien land laws of other West Coast states have not been invalidated, they have been mooted by the abolition of the distinction between eligible and ineligible aliens.

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113. 332 U.S. 633 (1948).

114. The opinion of the Court represented the views of Chief Justice Vinson, who wrote the opinion, and three of the associate justices (Reed, Frankfurter, and Burton). Justice Jackson agreed with the majority opinion that it was not necessary to decide the constitutionality of the alien land laws to dispose of the case, but felt that the Court should not, while conceding "the state's right to keep the policy [of the statute] on its books . . . strip the State of the right to make its Act effective." *Id.* at 688 (dissenting opinion).

115. Black, Douglas, Murphy, and Rutledge (concurring opinions by Black and Murphy). *Id.* at 647, 650.

116. Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). The case is interesting from several points of view, other than the constitutional question, *viz.*, (1) the unsuccessful attempt to use the United Nations charter as a basis for outlawing the alien land laws, and (2) the large collection of sociological data with respect to the position of persons of Japanese ancestry domiciled in the United States. See especially the concurring opinion of Judge Carter. 38 Cal. 2d 718, 738, 242 P.2d 617, 630 (1952).

117. State v. Oakland, 287 P.2d 39 (Mont. 1955); Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

(e) *The Relocation Program*

Perhaps the blackest mark in the history of American democracy was the relocation of persons of Japanese ancestry from the Pacific Coast to the interior during World War II. While the program was foisted on the people of the United States as one of "military necessity," careful post-war studies have shown that it was nothing more than a way of articulating and implementing the racist thinking of a minority of persons in power in the West Coast states.[118] The lack of military necessity for such a program was demonstrated by the fact that the Japanese-Americans in Hawaii, much closer to the war front, were never evacuated. Moreover, the federal government had no difficulty in rounding up espionage agents, saboteurs, and the like, even prior to relocation.

Unfortunately for the history of civil liberties, the United States Supreme Court took the attitude that the war power overrode the usual constitutional rights of citizens (to say nothing of aliens), and that the question of military necessity was for military judgment and not subject to judicial review. In 1943, it sustained a curfew order, issued by the commanding general of the Western Defense Command, directing all persons of Japanese ancestry to remain in their homes from 8:00 p.m. to 6:00 a.m.[119]

By October 1944, when the constitutionality of the evacuation program was argued, a Japanese-American unit in Italy was fast becoming the most decorated unit in the history of the United States Army, the Marianas Islands had been secured, and the invasion of the Philippines was under way. A courageous Court would have welcomed an opportunity to rule the entire program unconstitutional, and prevent the establishment of a precedent that constitutional rights of citizens, as well as aliens, can be ignored in war.

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118. A large amount of non-legal materials are available for the study of various facets of the relocation problem. BLOOM & RIEMER, REMOVAL AND RETURN (1949) is a detailed study of the socio-economic effects of the war on Japanese-Americans domiciled in Los Angeles County. GRODZINS, AMERICANS BETRAYED (1949) traces regional pressures and how they were brought to bear on the instruments of national policy. THOMAS & NISHIMOTO, THE SPOILAGE (1946) is the best study of the actual evacuation and resettlement. THOMAS, THE SALVAGE (1952) is largely a collection of individual experiences of Japanese-Americans, describing the effects of the program on their lives. These materials uniformly demonstrate that the program was an expression of racism.

Some of the earlier legal materials sought to justify the evacuation on the grounds of military necessity and precedent upholding the program. See, *e.g.*, Alexandre, *The Nisei—A Casualty of World War II*, 28 CORNELL L.Q. 385 (1943); Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); Wolfson, *Legal Doctrine, War Power, and Japanese Evacuation*, 32 KY. L.J. 328 (1944). But later writing uniformly condemned the program. See, *e.g.*, Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175 (1945); Freeman, *Genesis, Exodus, and Leviticus—Genealogy, Evacuation, and Laws*, 28 CORNELL L.Q. 414 (1943); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

119. Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

But on the day after the Western Defense Command rescinded its exclusion orders, the Court held that the war-time relocation of American citizens of Japanese ancestry in no way violated their constitutional rights.[120]

One student of the program has summed up the tragedy of these cases as follows:

> Japanese-Americans were the immediate yictims of the evacuation. But larger consequences are carried by the American people as a whole. Their legacy is the lasting one of precedent and constitutional sanctity for a policy of mass incarceration under military auspices. This is the most important result of the process by which the evacuation decision was made. That process betrayed all Americans.[121]

(f) *Marriage*

Eleven states still have miscegenation statutes prohibiting the marriage of white persons and "Mongolians."[122] Prior to 1948, the constitutionality of such statutes was generally conceded. But in that year, the Supreme Court of California struck down a California statute which provided that a marriage license could not be issued to a white person who sought to marry a Negro, mulatto, Mongolian, or member of the Malay race.[123]

While the miscegenation statutes, like the alien land laws, may eventually be declared unconstitutional by the United States Supreme Court,[124] until that time the marriage of a white person and a person of Japanese ancestry will cause a number of problems.[125] Most of the

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120. Korematsu v. United States, 323 U.S. 215 (1944). In another case decided the same day, the Court, without considering the constitutional questions involved, held that the War Relocation Authority had no authority to subject "concededly loyal" American citizens of Japanese ancestry to its leave procedure. *Ex parte* Endo, 323 U.S. 283 (1944). The WRA abandoned its leave procedures on the same day that this decision was rendered.

121. GRODZINS, AMERICANS BETRAYED 374 (1949).

122. ARIZ. CODE ANN. § 63-107 (Supp. 1951); GA. CODE ANN. § 53-106 (1937); IDAHO CODE ANN. § 32-206 (1947); MISS. CODE ANN. § 459 (1942); MO. ANN. STAT. § 451.020 (Vernon 1952); NEB. REV. STAT. § 42-103 (1943); NEV. COMP. LAWS § 10197 (1929); UTAH CODE ANN. § 30-1-2(6) (1953); VA. CODE § 20-54 (1950); WYO. COMP. STAT. § 50-108 (1945). Montana and Oregon have repealed their miscegenation statutes which were directed, in part, against the marriage of whites and orientals. California has declared its miscegenation statute, CAL. CIV. CODE § 69 (1949), having similar provisions, unconstitutional. Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948).

123. Perez v. Sharp, *supra* note 122.

124. The Court may get its first opportunity to so rule in the recent case of Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955). Certiorari was granted in this case, but in a per curiam decision the Supreme Court ruled that the failure of the parties to present all the relevant questions prevented a ruling on the constitutional validity of the Virginia miscegenation statute. The judgment below was vacated and the case was remanded for further proceedings. 350 U.S. 891 (1955).

125. Despite legislative attempts to deter mixed blood marriages, they nonetheless occur, creating countless other legal problems such as legitimation, intestacy, divorce, duty of support, etc. See, *e.g.*, *In re* Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942).

states which prohibit mixed blood marriages also provide that domiciliaries cannot circumvent their miscegenation statutes by means of an out-of-state marriage which would be valid in the state where the marriage is performed. To date, like most of the miscegenation laws, the latter type of statute has not been held unconstitutional.

V. Conclusion

In recent years, Japanese nationals in the United States and American nationals in Japan have come to enjoy practically all the rights and privileges available to nationals domiciled in their respective home countries. Discrimination against the Japanese alien with regard to employment, acquisition of property, marriage, entry, and naturalization has been eliminated in the United States. The modification of the Nationality Law in Japan to place a greater emphasis on domicile for naturalization purposes has had the effect of broadening the class of persons who may seek Japanese citizenship. Americans are generally free to enter, marry, acquire property, and pursue an occupation, on much the same terms as the Japanese. Most of these privileges are further reinforced by specific provisions in the recent "Treaty of Friendship, Commerce, and Navigation."

Differences remain in the conflict of laws between the two countries insofar as choice of law is concerned. American doctrine emphasizes domicile, while Japanese law looks to nationality as its principal tool for the solution of conflicts cases. As more cases are litigated, many of the doubtful questions in this field will be resolved. In the meantime, the close associations of our two countries, as a result of the present world situation, will continue to make this small corner of the law of conflicts a peculiarly important area.