UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

In the Matter of:

LAWRENCE FUMIO MIWA,
AS SUCCESSOR-IN-INTEREST OF
SEIGO MIWA, a/k/a J. S. MIWA

Title Claim No. 36891

Docket No. 57 T 41

BEFORE WILLIAM C. LEVY, HEARING EXAMINER

REPLY BRIEF OF LAWRENCE FUMIO MIWA

1. The physical presence of Seigo Miwa within Japan during part of the time while the United States was at war with that country was for a special purpose and a brief period, and was a deportation in effect and therefore under duress.

Without specifically challenging the evidence adduced (あげる。) in establishing that the late Seigo Miwa retained residence in Hawaii continuously from his first entry in 1914, the Claims Section suggests that Miwa's occasional sojourns in Japan for family business matters constituted his taking up residence in that country. This approach ignores the over-all pattern of Seigo Miwa's life, which was essentially that of an Hawaiian business man who had branch offices in the United States and in Japan.

The occasional business and family purposes which prompted Seigo Miwa's six trips to Japan were limited and specific ones which, we submit, did not and were not intended to derogate (とりさる。) from the continuity of his status as a resident of Hawaii. The circumstances of this case are not analogous to those in the Matter of F. K. Antelmann, Dir. Febr. 10, 1956, reversing H. E. Febr. 24, 1955, cited on page 8 of the brief of the Claims

Section. In that case Antelmann was assigned to manage the sales branch of his employers in Breslau, Germany and moved there with his family in 1933, retaining that position until 1945. This had been occasioned by a decrease of his employers' business in Czechoslovakia and during that period Antelmann had no responsibilities outside of Germany.

By contrast, the main holdings and business interests of Seigo Miwa always remained at his main office in Hawaii (Tr. 11, 12); in fact, after the outbreak of the war, his Japanese business practically evaporated and he was forced to rely on a very modest income from a few rental properties (Tr. 23).

Viewing his life as a whole, one reasonably concludes that the sympathies, activities, and statements of the late Seigo Miwa centered more in Hawaii than anywhere else. Although he languished for a year and a half in various American internment camps and was then returned to Japan while under deportation order, as soon as the war was over he sought to return to his home in Hawaii. Failing this, he placed his services at the disposal of the United States occupation forces and served America in this way (Tr. 28, 29). There is no trace of enemy taint to defeat his claim and, in fact, this is not even suggested by the Claims Section.

Instead, the primary basis for contesting this claim is the contention that Seigo Miwa is an enemy on the technical ground of residence in Japan during the war. But for his removal from the United States under order of deportation, this contention would not exist. The Immigration and Naturalization Service relied upon this deportation in denying Seigo Miwa's application to return to Hawaii. Admittedly, this deportation effected the physical presence of Seigo Miwa in Japan during part of the war

but this action should not be held to have done any more than just that - it should not be treated as having made his home in Hawaii (from which he was forcefully uprooted and to which he wanted to return) any the less his residence during the period in question.

The Claims Section seeks to palliate the duress of deportation by characterizing Seigo Miwa's return to Japan as pursuant to a request for repatriation. This contention relies (Claims Section Brief, pp. 9, 10) on secondary evidence and on conjecture: upon Exhibit H entitled "Petition for Reuniting Family in Family Internment Center", and upon Exhibit 4, which was a letter from Seigo Miwa in 1952 asking review of his application to be allowed to return to Hawaii. A careful reading on the latter document in no way discloses a statement that Seigo Miwa had applied for repatriation; it merely summarized his immigration status during his several exits and entries from Hawaii in the twenty-seven years before Pearl Harbor and then reported concerning his internment and return to Japan as follows:

> "Suddenly and unexpectedly this hostility started by Japan. Even though being an enemy Alien (not by heart and soul) I was appointed one of the Food Committee representing Japanese community of Honolulu by the then governor Poindexter and worked day and night continuously and diligently inspite of facing hardships until I was detained with some unknown reasons at Sand Island Detention Camp, Honolulu on 13th February 1942. From Honolulu, I was transferred to San Antonio Detention Camp, San Antonio, Texas, then to the Lordsburg Internment Camp, Lordsburg, New Mexico and finally to Santa Fe Detention Camp, Santa Fe, New Mexico until I was repatriated on 1st September 1943 from New York to Japan via South America, Port Elizabeth, Goa, Singapore and Manila.
>
> "During my intern at Lordsburg, I received a letter from Japan through Swiss Red Cross, stating that my mother was so ill and wanted to see me at her bedside. One day I talked with our Commanding Officer, Captain Dole of the Camp about my family and business in Japan, which made me worries day and night. Soon after, I was called by one of the Immigration officers of El

Paso and was told by the investigator that there might be an exchange boat sailing very shortly. After a few days passed away, we were shifted to the Santa Fe Detention Camp where the most of Japanese internees were detained."

Moreover, the suggestion that Seigo Miwa had applied for repatriation depends not upon the best evidence (Tr. 44), which would be the production of a repatriation application in the name of Seigo Miwa, but upon a form which he signed while in Lordsburg Internment Camp. This form (Exhibit H) recites that Miwa's "last residence address" was "1765 B Lusitana St., Honolulu, T. H.", and the word "(not)" appears to have been crossed out in the sentence "I have (not) applied for repatriation." We submit that, if this alleged filing of an application for repatriation be material, it should have been proven by introducing the application form itself, a document peculiarly within the Government's possession. Furthermore, if this form is accepted as evidence of such application, it should <u>also</u> be accepted as evidence that Seigo Miwa's residence was in Hawaii and not in Japan as the Claims Section suggests.

If, however, it be decided that the filing of a repatriation application, if proven, would be material under <u>Brownell v. Oehmichen</u> (CA, DC, Feb. 28, 1957 cited p. 10 of Claims Section Brief), the additional facts upon which the decision in that case hinged are not here present. For example, the opinion in Oehmichen makes clear that in addition to repeated requests (proved by documentary evidence) of Oehmichen for repatriation to Germany, Mr. Oehmichen wanted to go to Germany so much that he even wrote the United States authorities that he would not accept parole in the United States. As the Circuit Court commented: "Thus he refused freedom in America." By contrast, the freedom in America, which was taken from Seigo Miwa by his

internment, was the thing that he sought first, last, and always, subject only to the exigencies (危急。) which sometimes called for his travel on business or on family matters outside of Hawaii.

Moreover, even if it be found that the evidence of this record justifies a finding that Seigo Miwa applied for repatriation, this does not establish that such application was voluntary. At the Hearing counsel objected to the admission of documents and reports originating during the incarceration (監禁。) of Seigo Miwa in various internment camps to which he was transferred and retransferred, because of the force and duress implicit in that situation. Just as the more extreme action of renunciation of citizenship under the pressures of the Tule Lake situation were held in Acheson v. Murakami, 176 F (2) 953 (9th Cir. 1949) to be void because of duress, so here we submit that the alleged lesser act of Seigo Miwa under the circumstances of his incarceration should be attributed to duress and his application, for the purposes of the Act, treated as though he had never left the United States. See Akata v. Brownell, 125 F. Supp. 6 (D. Hawaii 1954)

Aside from this, the Brief of the Claims Section relies upon a description of Seigo Miwa as "residing in Japan since April 1, 1941" appearing in a J. S. Miwa Co., Ltd. report (Exhibit E) signed by Seigo Miwa as President on October 30, 1941. No significance should be attached to this language in a corporate report for the Treasury with regard to the issuance of securities. Without extraneous (えんのない。) evidence the document itself proves nothing. There is no showing who prepared this document whether in the Corporation's offices or those of the Treasury Department, or that Seigo Miwa gave any particular personal attention to its

contents other than just another form to be signed by a busy corporate executive. Furthermore, the specific language in question here does not appear to have any connection with the question to which it purports to be an answer; this surplusage obviously had not been carefully thought out and should be ignored. Finally, and perhaps most important, there is no evidence that the connations of that word "residing" were the same as those given to the word residence as interpreted and defined in decisions under the Trading with the Enemy Act. "Residing" frequently connotes merely "living in" or "being physically present in", and this is the connotation which we believe was there intended.

Finally, on the broad factual questions of fact concerning duress, there is the similar situation presented in Akata v. Brownell, 125 F. Supp. 6 (D. C. Hawaii 1954) wherein a Japanese salesman from Hawaii was held not to have disqualified himself under (2) (a) and 9 (a) from recovery of his vested property, even though he and his family had all requested and accepted repatriation to Japan during the war. This decision realistically analyzes the situation of such responsible, pro-American Japanese in Hawaii who found themselves interned shortly after Pearl Harbor, and it concludes, on a basis of facts in some respects not so strong as those of the instant case, that there was no such acquiring of Japanese residence as to bar recovery. The same result should follow here.

2. Lawrence Fumio Miwa, Successor-in-Interest to Seigo Miwa, is eligible for return of vested property under Section 9 (a) of the Act because his physical presence within Japan while the United States was at war with that country was not such residence as would make him an enemy under Section 2.

Residence in an enemy country in order to bar recovery must have been freely and voluntarily acquired. Claimant here was a native born American citizen. Because of his health, family custom or other reasons over which he had no control, he was taken to Japan at the age of three. He returned to his place of birth, Hawaii, as soon as he could. "Residence being mostly a matter of intention" and the earliest effected intention which Lawrence Fumio Miwa had, being to return to the United States, he should not be barred under Section 9 (a). Nagano v. McGrath, 187 F. (2) 759, 764 (C.A. 7, 1951). Also see Sarthow v. Clark, 78 F. Supp. 139, 142 (S. D. Cal. 1948).

In summary, it is our contention that within the meaning of Sections 2 (a) and 32 (a) of the Act, neither Seigo Miwa nor Lawrence Fumio Miwa, his Successor-in-Interest, was either resident in, present in, or engaged in business in Japan during the war because in neither case was the presence voluntary. With respect to Seigo Miwa there is the background of forced incarceration in internment camps which, when coupled with the circumstances of his transmission to Japan, spells out duress. With respect to Lawrence Fumio Miwa, the fact that he had no choice about whether he should leave his American birthplace at the age of three and go to Japan, when added to the fact that he left Japan forever at the first opportunity he got, establishes that by no free voluntary act of his own did he ever live in or reside in Japan.

3. If, as admitted by the Claims Section, Lawrence Fumio Miwa is eligible for return under Section 32 (a) (2) (C) or (D) of the Act, he can qualify for return if his predecessor in interest was eligible only under Section 9 (a).

It is agreed by both sides in this proceeding that

Lawrence Fumio Miwa is eligible under Section 32 (a) (2) (C) or (D) (Conclusion of Law 4, Claims Section Brief pp. 15, 16). His eligibility under Section 9 (a) and his father's eligibility under Section 32 have been urged above, but assuming arguendo that such contention is overruled, the Claims Section raises the proposition that Lawrence Fumio Miwa's eligibility under Section 32 avails him nothing if his predecessor in interest could take under 9 (a) but not under 32.

No decision squarely on this particular point is cited nor is any legislative history adduced to establish that Congress in enacting Section 32 considered and rejected our instant contention that if Seigo Miwa had been entitled to return under 9 (a) because not an "enemy", his Successor-in-Interest can recover under 32 (a) because of his United States citizenship.

In considering what appears to be a novel question under the Trading with the Enemy Act, the counsel of Justice Frankfurter in the majority opinion in Guessefeldt v. McGrath, 342 U. S. 308, 319, should be followed. "Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes." More specifically favoring claimant's contention in this particular context is Judge Kaufman's expression in Cordero v. United States, 111 F. Supp. 556, 558, that the judicial interpretations of the Trading with the Enemy Act " . . . all lead to the conclusion that the status of the beneficial owners is crucial." Here the claimant and beneficial owner, Lawrence Fumio Miwa, admittedly can take under one provision of the Act, and if his predecessor in interest can take

under a different section, the return of the property should not be defeated by an attempted literalness of construction not solidly supported by decision or legislative history. Thus the Cordero case, holding as it does that there can be no recovery under Section 9 where the ultimate beneficial owners were not qualified under Section 9 because enemies as defined in Section 2 (a) is consistent with the result here sought, and does not, as indicated in the Brief of the Claims Section, page 13, support the proposition that a beneficial owner eligible under 32 (a) cannot recover where his predecessor qualified under Section 9.

Similarly, the ruling of the Director in the Matter of Eva and Kate Tonder-Haugland, October 31, 1955, (cited in Brief of Claims Section, page 12) is not in point because, although there as here the successor was qualified under Section 32 (a) (2), the original claimant, Mrs. Schultz, was found not to be eligible for return under any section of the Act. In fact, in that case the Hearing Examiner's Decision of February 16, 1955, which was not overruled by the Director, stated flatly: "Sections 9 (a) and 32 of the Act bars a return of vested property unless it is established that both the owner of the property at the time of vesting and her successors-in-interest by inheritance, devise, bequest or operation of law are eligible for such return." This is what we contend. Both are eligible and the successor thereof should take.

Respectfully submitted,

O. E. Stone

June 3, 1957