CLAIM OF TOSHIKO USUI

[No. 146–35–1622. Decided November 10, 1950]

FINDINGS OF FACT

This claim, alleging a loss in the amount of $1,805, was received by the Attorney General on March 17, 1949. It involves the loss of rental on a dwelling house, recovery of a fee paid to a real estate broker for his services in caring for claimant's house during her absence, loss through sale of a Philco radio-phonograph (shortwave band previously removed) and reimbursement for the destruction of a vanity bench. At the time of her evacuation the claimant was married and all of the property involved in the claim was community property. Claimant was born in Los Angeles, California, on July 19, 1919, and her husband in San Francisco, California, on September 15, 1905. Both are of Japanese ancestry. At no time since December 7, 1941, has the claimant or her husband gone to Japan, and for some time prior thereto claimant and her husband actually resided at 1912 South Sutter Street, Stockton, California, and were living at that address when they were evacuated on May 13, 1942, in accordance with military orders issued pursuant to Executive Order No. 9066, dated February 19, 1942. They were thereafter sent to the Rohwer Relocation Center, McGehee, Arkansas. Faced with her impending evacuation, the claimant acted reasonably in renting her home, engaging the services of a real estate broker to care therefor, and in selling her Philco radio-phonograph for the sum of $100 inasmuch as there was no free market at that time upon which the claimant could have disposed of same for a price commensurate with its fair value. The claimant rented her home, a five-room dwelling fully furnished, to one W. C.

Luman, a friend, for $40 per month, part of the consideration therefor being that the afore-named tenant would care for the home and the furnishings. Some months later while the claimant was in the relocation center, the said Luman removed from the premises. The real estate broker informed the claimant by letter of such removal and was instructed to again rent the premises for $80 per month. Evidence has been adduced to show that, at the time, the fair rental value of the house, furnished, was $75 to $80 per month. The real estate agent thereupon notified the claimant that he had already rented the house for $40 per month and that in any case he would have been unable to rent the house for more than that sum because of the maximum rental in the amount of $40 which had been fixed for the house by the Rent Control Board under the Emergency Price Control Act of 1942. After her return from the relocation center, the claimant and her husband again took up residence in their house. For his services, in looking after the property while she was gone, the claimant and her husband gratuitously paid to the real estate broker $180, although payment was neither demanded nor requested. In fact there is evidence to show that the real estate broker had previously offered his services gratis.

The claimant seeks to recover under the Act for the difference between the rent actually received in the sum of $40 per month and the reasonable rental value of the premises in the sum of $80 per month for the period during which she was unable to occupy the premises, namely, three years and three months. In addition, she asks reimbursement for the $180 which she paid to the real estate broker.

The claimant's husband, Henry A. Usui, did not join the claimant in the filing of this claim, inasmuch as he has filed a separate claim, received by the Attorney General on March 14, 1949, and thereafter amended by letter dated April 11, 1949, bearing claim No. 146–35–1525, involving loss in connection with a drug business. No claim is made

by the husband for any of the items mentioned in the instant claim.

The reasonable fair value of the Philco radio-phonograph which was sold and the vanity bench, which was completely destroyed during the claimant's absence, was $135. From the sale of the radio- phonograph, the claimant realized $100.

REASONS FOR DECISION

Section 172 of the Civil Code of California gives a husband the management and control of community property, subject to certain restrictions designed to protect the wife. Actions concerning community property should therefore be brought by the husband. *Johnson* v. *National Surety Co.,* 118 Cal. App. 227. The only exceptions to this rule are in actions for personal injury whereupon the recovery becomes community property, and where community property is disposed of for an inadequate consideration without consent of the wife. However, the question arises, in view of the aforementioned statute granting the exclusive power of management and control of the community property to the husband, as to whether the husband may delegate to the wife the power to act as his agent on behalf of the community. It would seem that this question can be answered in the affirmative.

Section 158 of the Civil Code of California states: "Either husband or wife may enter into any engagement or transaction with the other or with any other person respecting property which either might if unmarried; * * *." "The husband and wife may contract freely with each other with regard to community property * * *." *Riggle* v. *Rogan,* 37 F. Supp. 7. It would follow from the above that a husband could, by agreement, appoint his wife to act, as agent on his behalf, for the community. "The power of either spouse to act as agent for the other is undeniable." *Arnold* v. *Lumas,* 170 Cal. 95.

As a matter of fact, the California courts have gone even further in imposing an agency relationship between husband and wife where none was ever actually intended. In the case of *Hulsman* v. *Ireland,* 205 Cal. Reports 345 (1928), a wife using community funds entered into a business partnership. The business later failed and an action was brought by a creditor in which he joined the third party, the wife and the husband as defendants. Judgment was granted against the partner and the wife. Plaintiff appealed from so much of the judgment as dismissed the action against the husband. Despite the fact that the evidence clearly showed that the husband did not lend himself in any way to the transaction, the Supreme Court of California, reversing the lower court, held that inasmuch as any profits realized from the business would have been community property he must also be held accountable for any liabilities incurred and he was therefore properly joined in the action. The Court posed the following question: "Was the wife in her actions in the premises the agent of the husband, the head of the community, and if so, is not the husband liable not only as head of the community but personally for her acts so done and so performed. She could only bind the community as agent of the husband. Otherwise he would not be liable for her conduct." The court answered the question by stating: "If dividends had been declared or profits accumulated and later distributed, the result would be the same as if the profits were directly paid to him * * * To allow him to stand by and take the profits, had there been any, without assuming the burdens would be to support a principle which would work an injustice to creditors dealing in good faith with one spouse as representative of the other." To the same effect are *Meyer* v. *Thomas,* 37 Cal. App. 2d 720, and *Brown* v. *Oxtoby,* 45 Cal. App. 2d 702. The claimant in the instant case has filed a claim dealing solely with household matters, while the husband has filed a separate claim having to do only with damages to his drug business. Neither claim duplicates any items mentioned

in the other. From these facts, it can safely be assumed that an agreement existed between the parties whereby the husband was to claim for damages to his drug business and the wife was to claim as his agent to act on his behalf for the community for damages to the household. In further support of the above, the husband, as evidence of such intention, has also executed an instrument ratifying and confirming his wife's actions in submitting this claim and has executed a conditional release inuring to the Government in the event of an award is made. A sworn statement by the husband confirming his wife's actions in prosecuting this claim has also been filed. In *Stegeman* v. *Vandeventer,* 57 Cal. App. 2d 753, 759, the principle is laid down that the agency of a husband or a wife for the other may be proved by circumstantial as well as direct evidence, may be shown by less evidence than in other kinds of agency, and may be established by proof of ratification of acts already performed without previous authority. The husband's intention to appoint his wife as his agent to act for the community on his behalf is obvious.

Upon the facts presented no recovery can be permitted for the alleged loss of rental since Section 2 (b) (5) of the Act excludes consideration of any claim for loss of anticipated profits. It is the claimant's contention that she should have received $80 per month which she alleges is the fair and reasonable rental value of her house instead of the $40 per month which she did receive. There can be little quarrel with the fact that rent is in the nature of a profit. Webster's International Dictionary defines rent as "the return made by the tenant or occupant of land or incorporeal hereditaments to the owner for the use thereof; a certain periodical profit whether in money, provisions, chattels * * * issuing out of land * * * in payment for the use; * * *." Rent is a tribute which issues out of land as a part of its actual or supposed profits. *In re Eger's Will,* 247 N. Y. Supp. 527. The word "profits" as used in the phrase "rents, issues and profits" is synonymous with

"rents." *In re Vedder,* 15 N. Y. Supp. 798. Rent * * * is certain profit issuing yearly out of lands and tenements. *Brown* v. *Brown,* 33 N. J. Eq. 650, 659. Rent is profit in money, goods or labor issuing out of lands or tenants in retribution for their use. *Rummell* v. *N. Y. L. & W. Railway Co.,* 9 N. Y. Supp. 404; *Thorn* v. *DeBreteuil,* 86 N. Y. App. Div. 405; *Gugel* v. *Isaacs,* 21 N. Y. App. Div. 503. Rent is a certain profit issuing yearly out of lands or tenements corporeal as a compensation for the use thereof. *Kendall* v. *Uland,* 120 N. Y. 152.

The authorities cited above clearly establish the fact that rent is a profit derived from the use of the land. The question now presented is what the Congress intended by the term "anticipated profits." Perhaps the best answer is to be found in the legislative history of the Act. In the House Report on H. R. 3999 (House Report No. 732, 80th Cong., 1st sess.), there is included a letter from J. A. Krug, Secretary of Interior, dated March 17, 1947, in which the following statement is made: "At the same time the standard excludes claims that are largely speculative and less definitely appraisable such as claims for anticipated wages or profits *that might have accrued* * * *." [Emphasis supplied.] It is significant that in all previous drafts of the Bill no mention is made of "anticipated profits or earnings." Subdivision 5 of Section 2 (b) of the Act actually first makes its appearance in the final draft of the Bill as passed by the Congress. Evidently Congress, doubting the sufficiency of the statement in Mr. Krug's letter, inserted this section in the Act in order to forestall claims for profits that might have been earned by an evacuee after his evacuation but for the happenstance thereof. In the light of the authorities herein cited and the legislative history, there can be no doubt that the rent for loss of which claimant seeks reimbursement falls squarely within the meaning of "anticipated profits" as used in Section 2 (b) (5) of the Act and no consideration can therefore be given to this item of the claim. In a legal opinion filed by the Japanese

American Citizens League, as *amicus curiae,* the contention is made that "anticipated profits" are purely speculative in nature and distinguishable from rents which are fixed and certain. That rents are not necessarily fixed and certain is well illustrated by the case at hand. No showing has been made that any agreement existed whereby a certain amount was to be paid each month for a specified period of time. At best the facts show that nothing more existed than a month-to-month lease for $40 per month which might have been terminated by either of the parties at any time. Damage in a sum certain could perhaps have been arrived at if a lease had been executed calling upon the tenant to pay the sum of $80 per month for a specified period. Claimant's loss could then perhaps have been computed as the difference between the amount paid and the amount due. It is unnecessary at this time to determine whether such a loss would be reimbursable under the Act.

The claim for the $180 paid to the real estate broker must also be disallowed inasmuch as same must be considered as an operating cost and deducted from the gross income derived. No loss has been incurred as a result of this payment. The Japanese American Citizens League in its brief (*supra*) states that "there was a moral, if not a legal, obligation to pay * * *." While this may be true, reimbursement is nevertheless limited to losses sustained by claimant on account of those items which he was legally obligated to pay and which items would be eligible for payment under the terms of the Act. We therefore need not here be concerned with the question of the eligibility of a payment gratuitously made.

The claimant acted reasonably in selling the Philco radio-phonograph for $100. The combined reasonable value of the radio-phonograph and the vanity bench was $135 at the time of loss, leaving an uncompensated balance in the amount of $35. A loss on sale is allowable. *Toshi Shimomaye, ante,* p. 1.