

UNITED STATES

v.

ROHLEDER, et al. (two cases).

[Nos. 9093, 9123.](#)

Circuit Court of Appeals, Third Circuit.

Argued May 23, 1946.

Decided August 15, 1946.

The defendants contend that there can be no recovery under Section 3490 unless actual damages, pecuniary or proprietary, are alleged and proved. They argued that as Section 5438 stood at the time it was incorporated into Section 3490, it required pecuniary loss in order that a conviction be sustained. The question is not wholly free from doubt. It is somewhat complicated by the circumstances that Section 5438 was amended in 1918 among other particulars not presently important by inclusion of the phrase "or for the purpose and with the intent of cheating or swindling or defrauding the Government of the United States." [United States v. Cohn, 270 U.S. 339, 46 S.Ct. 251, 70 L.Ed. 616](#), was decided under the 1918 amendment and the Supreme Court specially stressing the above amendment language held that actual loss to the government was necessary to sustain a conviction. [Capone v. United States, 7 Cir., 51 F.2d 609](#), and [United States ex rel. Starr v. Mulligan, 2 Cir., 59 F.2d 200](#), are much to the same effect.

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The judgment of the District Court including the forfeitures allowed for eight projects as to which no damage had been proven was affirmed by the Supreme Court, supra. The no damage forfeitures were not referred to specifically in the opinion but the concluding paragraph thereof did say [\[317 U.S. 537, 63 S.Ct. 388\]](#), "We have examined the other contentions of the respondents and approve of the disposition of them by the courts below." The petition for rehearing specially called the attention of the Court to the circumstances surrounding the particular eight projects; nevertheless the petition was denied as stated.

In view of the attitude toward just such claims as are before us, by the Supreme Court in the Hess litigation, we conclude that Section 3490 embracing Section 5438 as the latter was when incorporated into Section 3490, permits recovery of a forfeiture thereunder without actual damage being proven.

[1] Section 3490 of the Revised Statutes, 12 Stat. 696, reads as follows: "Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title `CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such an act, together with the costs of the suit; and such forfeiture and damages shall be sued for in the same suit."

Section 5438 of the Revised Statutes, 12 Stat. 696, as it appeared at the time of its incorporation in Section 3490, reads as follows: "Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, \* \* \* every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."