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CONTRACTS—SEVERABILITY OF CLAIMS UNDER 28 U. S. C. § 2514

Plaintiff had a cost-plus-a-fixed-fee construction contract with the United States Government. He brought suit before the United States Court of Claims to recover the balance of the fixed fee due under the contract. Previously, in a criminal prosecution,¹ plaintiff had been found guilty of fraudulently padding his costs of performance of the contract involved here. Defendant, government contracting agency, relying on a federal statute² which provides for forfeiture of a claim in which fraud has been practiced, alleged the fraud in those claims for the costs and sought the forfeiture of the present claim for the balance of the fixed fee. On demurrer to this special plea in fraud, *held*, demurrer sustained. Since these claims are severable, fraud practiced in previous claims will not support the forfeiture of another non-fraudulent claim arising out of the same contract; only that claim in connection with which fraud was practiced is forfeited. *Branch Banking & Trust Co. v. United States*, 87 F. Supp. 777 (Ct. Cl. 1950).

Because of the varied definitions of the word *claim*³ the determination of the question of severability of claims turns on the judicial construction of the intent of Congress. It has been held that, as a matter of pleading, a plaintiff may not be allowed to split up his demand,⁴ and is precluded from recovering in a separate action any sum due under different provisions of a single contract.⁵ However, the contracting agency of the Government is authorized to make partial payments on presentation of proper vouchers before completion of the contract,⁶ unless otherwise specifically provided in the contract.⁷ Congress went further in manifesting its intent to permit severance of claims in the case of suspected fraud: the contracting agency is

1. *United States v. Grannis*, 172 F.2d 507 (4th Cir. 1949), *cert. denied*, 337 U.S. 918 (1949).

2. 28 U.S.C. § 2514 (Supp. 1950), ("A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture.").

3. BL. LAW DICT., 3d Ed., 333 (1933) (Claim is synonymous with right and has also been applied to any demand held or asserted as of right.); *Hobbs v. McLean*, 117 U.S. 567 (1886) (any demand for money); *Furay v. United States*, 34 Ct. Cl. 171 (1889) (a petition); *Jerman v. United States*, 96 Ct. Cl. 540 (1942) (an invoice); *Butler Mfg. Co. v. Wallace & Tiernan Sales Corp.*, 82 F. Supp. 635 (W.D. Mo. 1949) (a cause of action); 58 STAT. 667 (1944), as amended, 41 U.S.C. § 119 (Supp. 1950) (Claim is referred to along with "bill, receipt, voucher, statement, account, certificate, affidavit, or deposition . . . for the purpose of securing . . . any benefit, payment, compensation, allowance, loan, advance, or emolument . . .").

4. *Hughes v. United States*, 25 Ct. Cl. 472 (1890).

5. *Baird v. United States*, 96 U.S. 430 (1877).

6. 41 CODE FED. REGS. § 12.23 (Cum. Supp. 1943) (Standard form, construction contract).

7. See note 6 *supra*.

authorized to withhold the amount of the settlement or the *portion* thereof which, in its opinion, was affected by fraud.⁸ The courts, however, have held that rigid enforcement of the provisions of the statute which require forfeiture in case of fraud⁹ is essential for the protection of the Government,¹⁰ and have rendered judgment of forfeiture of several contracts included in one fraudulent claim,¹¹ several closely linked claims arising out of one contract,¹² the claims of several claimants because of fraud of one claimant,¹³ and several causes of action on the same claim because of fraud in one cause of action.¹⁴ In every case the fraud was either present in the particular claim, or of such a nature as to affect the evidence necessary to support the other claims. Where the element of fraud was not present, it was held that the branches of a demand are severable only if the same evidence is necessary to support them all.¹⁵ Likewise in cases involving fraud, this test appears to have been applied *sub silentio*.

In the instant case, the court, in effect, applied the aforementioned test when it pointed out that the vouchers involved in the alleged fraudulent claim for the costs were not involved in the present claim for the fixed fee; the evidence necessary to sustain the present claim was not the same as the evidence involved in the claim for costs. The court distinguished between fraud in the presentation of the particular claim and fraud in the performance of the contract, the latter necessarily affecting all claims arising out of the contract (since evidence of performance is necessary to sustain *any* claim on the contract). While application of the test in former cases resulted in severe forfeitures, the use of the test in the noted case resulted in aligning the court with the intent of Congress to cause the forfeiture of only the *particular* claim in which fraud was practiced.

It is submitted that the claim for the fixed fee in the noted case would have been forfeited with the claim for costs if it had been included therein. By acknowledging the severability of claims, claimant has been allowed to take advantage of his failure to combine all parts of his demand in a single claim. This may lead to an increase of small one-item claims by claimants unwilling to expose all items of their claim to forfeiture, but, no doubt, will be offset by the procedural rule which does not allow a plaintiff to split up

8. 58 STAT. 666 (1944), 41 U.S.C. § 118 (c) (1946), as amended, 41 U.S.C. § 118 (Supp. 1950).

9. See note 2 *supra*.

10. *Furay v. United States*, *supra*; *N.Y. Market Gardeners' Ass'n v. United States*, 43 Ct. Cl. 114 (1908).

11. *Jerman v. United States*, *supra*.

12. *Irwin & Leighton v. United States*, 65 F. Supp. 800 (Ct. Cl. 1946).

13. *Globe Indemnity Co. v. United States*, 84. Ct. Cl. 587 (1937) (surety).

14. *Mervin Contracting Co. v. United States*, 94 Ct. Cl. 81 (1941) (quantum meruit).

15. *Maine v. United States*, 36 Ct. Cl. 531 (1901).

his demand. To make the entire contract the unit of forfeiture might yield to facility of interpretation and administration. Yet this seems to be no reason why the unit should not be the claim, if the latter sufficiently meets the requirements of protecting the Government against fraud.

CRIMINAL LAW — SELF-DEFENSE — NECESSITY OF RETREATING FROM THE HOME

Defendant and deceased had known each other for two years during which time they had, at intervals, lived together in defendant's home. On the night deceased was killed he and the defendant had been drinking together at a club and upon returning to defendant's home engaged in a quarrel. Deceased threatened defendant with a knife whereupon she stabbed and killed him. Defendant testified that she had no opportunity to get away from him although there were three exits from the kitchen. On appeal from a judgment of conviction for first degree manslaughter, *held*, that since defendant did not retreat from her home to avoid killing deceased she may not invoke the doctrine of self-defense. *State v. Grierson*, 69 A.2d 851 (N.H. 1949).

"Retreat to the wall" composes part of the law of self-defense,¹ and compliance with the doctrine is a condition precedent to reliance upon self-defense as a justification for homicide.² The doctrine is to the effect that one who, through no fault of his own, is suddenly attacked and placed in a position of peril, must retreat from his assailant, if to do so will not place him in a more perilous position, and might relieve him of the necessity of killing his assailant.³ This duty to retreat usually applies even when the one assailed is in a place where he has a lawful right to be.⁴ Justification for this theory is found in the concept that it is desirable to save human life even at the expense of imposing upon one guilty of no wrong, the humiliation of having to retreat from an assailant.⁵

Because the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, even to save human life,⁶ the doctrine of "retreat" has

1. See *Smith v. State*, 29 Ala. App. 212, 195 So. 290 (1940); *State v. Emery*, 236 Iowa 60, 17 N.W.2d 854 (1945); *State v. Sedwig*, 235 Iowa 609, 16 N.W.2d 247 (1944); *State v. Cox*, 138 Me. 151, 23 A.2d 634 (1941).

2. *Key v. State*, 27 Ala. App. 189, 168 So. 602 (1936); *State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257 (1944).

3. See *Miller v. State*, 31 Ala. App. 329, 329, 16 So.2d 803, 804 (1944); *King v. State*, 233 Ala. 198, 200, 171 So. 254, 256 (1936); *State v. Stevenson*, 8 Harr. 105, 109, 188 Atl. 750, 751 (Del. 1936); *State v. Sedwig*, *supra* at 610, 16 N.W.2d at 250; *State v. Cox*, *supra* at 610, 16 N.W.2d at 250; *State v. Cox*, *supra* at 152, 23 A.2d at 636.

4. *State v. Cox*, *supra*. *Contra*: *State v. Hiatt*, 187 Wash. 226, 60 P.2d 71 (1936).

5. See *Springfield v. State*, 96 Ala. 81, 82, 11 So. 250, 252 (1892).

6. See *Runyan v. State*, 57 Ind. 80, 84 (1877).