

make the investigation, we have no occasion to consider the extent of the review provided.

It is suggested that, while the Board has the right and duty to make, under section 5 of the act, 29 U.S.C.A. § 155, a preliminary informal inquiry before public action, for the purpose of informing itself whether a particular concern is subject to its authority, the District Court may entertain a suit to prevent the Board from conducting a public investigation under section 10, 29 U.S.C.A. § 160, if the concern claims that it is not engaged in interstate or foreign commerce. The limitation suggested would, in large measure, defeat the purpose of the legislation. There is no basis in the act for such a contention.

[3] *Third.* The Circuit Court of Appeals having refused to grant an injunction staying the action by the Board pending the contemplated appeal, application for a stay was made to Mr. Justice Butler of this Court, after filing of the petition for a writ of certiorari. It has been called to our attention that, upon his denial of that application, the hearing was held before the trial examiner of the Board from August 30 to September 8, 1937, and has apparently been closed. To the extent that relief was sought to prevent the injury resulting from a hearing, the cause appears to be moot. But the cause cannot be disposed of as moot, as the trial examiner has not yet made his report to the Board; the Board has made no decision; and thus there is a possibility of further proceedings.

Decree affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.



303 U.S. 1  
KAY v. UNITED STATES.  
No. 61.

Argued Dec. 10, 13, 1937.

Decided Jan. 31, 1938.

#### 1. Criminal law ⇨1031(4), 1179

Where question concerning whether defendant had consented to judgment of con-

viction by allegedly failing to withdraw plea of guilty to one of counts within 10 days permitted had not been raised either in District Court or in Court of Appeals and was based solely upon dates of entries in criminal docket without any supporting proof, question would not be considered by Supreme Court. Rules of Practice and Procedure in Criminal Cases, rule 2(4), 28 U.S.C.A. following section 723a.

#### 2. False pretenses ⇨9

That mortgagee's false statements concerning amount of her claim, knowingly made with intent to mislead officials of Home Owners' Loan Corporation, were not influential or that information was not important, constituted no defense to prosecution against mortgagee for knowingly making false statements for purpose of influencing action of corporation. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a).

#### 3. False pretenses ⇨8

Congress in providing for loans to home owners was entitled to require that information relating to loans be given in good faith and not falsely with intent to mislead. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a).

#### 4. False pretenses ⇨14

Actual damage on part of Home Owners' Loan Corporation was not a necessary ingredient of offense of knowingly making false statement for purpose of influencing action of corporation. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a).

#### 5. False pretenses ⇨22

That operations of government under Home Owners' Loan Act might be unconstitutional was no defense to prosecution for knowingly making a false statement for purpose of influencing action of Home Owners' Loan Corporation. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a).

#### 6. Statutes ⇨64(6)

Congress was entitled to secure protection against false representations while Home Owners' Loan Act was being adminis-

tered, and provision making it an offense to make knowingly any false statement for purpose of influencing action of Home Owners' Loan Corporation was separable from other provisions, regardless of whether other provisions of act were valid. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, and § 9, 12 U.S.C.A. §§ 1467(a), 1468.

#### 7. Constitutional law ⇨258

##### False pretenses ⇨2

The provision of Home Owners' Loan Act, making it a crime to knowingly make any false statement for purpose of influencing action of Home Owners' Loan Corporation, did not offend due process clause as being vague and uncertain. Home Owners' Loan Act of 1933, § 8(a), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a).

#### 8. United States ⇨53

Congress, in providing for loans to home owners under Home Owners' Loan Act, was entitled not only to prevent misapplication of public funds and to protect officials from being misled, but also to protect borrowers from being imposed upon by improper charges for services in connection with their applications. Home Owners' Loan Act of 1933, § 8(a) and § 8(e), as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(a, e).

#### 9. United States ⇨53

The provision of Home Owners' Loan Act prohibiting receipt of fees other than those authorized and required by Home Owners' Loan Corporation was separable from other provisions of act, since public funds and public transactions required protection, regardless of ultimate determination concerning validity of enterprise. Home Owners' Loan Act of 1933, § 8(e), as amended by Act April 27, 1934, § 12, 48 Stat. 647, and § 9, 12 U.S.C.A. §§ 1467(e), 1468.

#### 10. United States ⇨53

In seeking to prevent improper charges for services in connection with applications for loans under Home Owners' Loan Act, Congress had power to provide for determination of authorized fees by the board of directors of Home Owners' Loan Corporation. Home Owners' Loan Act of 1933, § 8(e) as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(e).

#### 11. Constitutional law ⇨258

The provision of Home Owners' Loan Act prohibiting receiving of fees other than those authorized and required by Home Owners' Loan Corporation, where resolution of board of directors of corporation had set forth nature of ordinary charges, set up an ascertainable standard and possessed requisite definiteness under due process clause. Home Owners' Loan Act of 1933, § 8(e) as amended by Act April 27, 1934, § 12, 48 Stat. 647, 12 U.S.C.A. § 1467(e).

#### 12. Criminal law ⇨1092(9)

Under Criminal Appeals rule giving Circuit Court of Appeals complete supervision of appellate procedure, that court, in exercise of its sound discretion, may provide for correction of any miscarriage of justice connected with any action of trial judge relating to settlement and filing of a bill of exceptions. Rules of Practice and Procedure in Criminal Cases, rule 4, 28 U.S.C.A. following section 723a.

#### 13. Criminal law ⇨1179

Where Circuit Court of Appeals, in refusing to consider errors arising on bill of exceptions which had not been settled and filed in time, may have proceeded upon assumption that it could not approve settlement and filing and pass upon rulings, Supreme Court vacated judgment and remanded cause in order that Court of Appeals could exercise its discretion under Criminal Appeals rule. Rules of Practice and Procedure in Criminal Cases, rule 4, 28 U.S.C.A. following section 723a.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Gertrude Kay, alias Gertrude Klein was convicted of violations of the Home Owners' Loan Act. To review a judgment of the Circuit Court of Appeals, 89 F.2d 19, sustaining the conviction, the defendant brings certiorari.

Judgment vacated, and cause remanded.

Messrs. Frank R. Serri, of Brooklyn, N. Y., and Wm. S. Culbertson, of Washington, D. C., for petitioner.

Mr. Golden W. Bell, Asst. Sol. Gen., for the United States.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioner was convicted of violations of section 8(a)<sup>1</sup> and (e)<sup>2</sup> of the Home Owners' Loan Act of 1933. Act of

4

June 13, 1933, c. 64, 48 Stat. 128, 134, amended by Act of April 27, 1934, c. 168, § 12, 48 Stat. 643, 647, 12 U.S.C. § 1467(a) and (e), 12 U.S.C.A. § 1467(a, e). The Circuit Court of Appeals sustained the conviction, 89 F. 2d 19, and because of the importance of the questions presented certiorari was granted. 301 U.S. 679, 57 S.Ct. 943, 81 L.Ed. 1338.

The conviction was upon eight counts of the indictment, viz., counts 5 and 15 under section 8(a) and counts 8, 12, 14, 20, 24, and 25 under section 8(e). To count 12 petitioner had pleaded guilty, but later was permitted to withdraw that plea, pleaded not guilty, and went to trial. On count 8, imposition of sentence was suspended and petitioner was placed upon probation. On the remaining seven counts, petitioner was sentenced to a year and a day in prison, the sentences to run concurrently.

The Circuit Court of Appeals refused to consider errors arising on the bill of exceptions, as it had not been settled and filed within the time permitted by Rule 9 of the

Criminal Appeals Rules, 28 U.S.C.A. following section 723a. The court accordingly limited its consideration to the sufficiency of the indictment, entertaining and deciding the questions of the constitutional validity of the Home Owners' Loan Act and of the provisions of section 8(a) and (e) in particular.

[1] The Government contends that the convictions should be sustained, irrespective of questions of the validity of any part of the statute, upon the ground that, the sentences being concurrent, the judgment should be affirmed if good under any one of the counts. In that view, the Government submits that petitioner consented to the judgment on count 12. The point is that petitioner was permitted to withdraw her plea of guilty to that count, although eleven days had intervened, while Rule 2 (4) of the Criminal Appeals Rules, 28 U. S.C.A. following section 723a, requires such a motion to be made within ten days. The Government argues that the provision of the rule is mandatory and hence the judgment, as one upon consent, should be

5

affirmed without consideration of the merits. Petitioner answers that the Government by going to trial is now estopped to raise the question, and, further, that a plea of guilty does not prevent the defendant

<sup>1</sup> Section 8(a) of the Home Owners' Loan Act, 12 U.S.C. § 1467(a), 12 U.S.C.A. § 1467(a), is as follows: "Sec. 8. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal, deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

<sup>2</sup> Section 8(e) of the act, 12 U.S.C. § 1467(e), 12 U.S.C.A. § 1467(e), as originally enacted by the Act of June 13, 1933, c. 64, 48 Stat. 134, was as follows: "(e) No person, partnership, association, or corporation shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered

for examination and perfecting of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned not more than five years or both."

By the Act of April 27, 1934, c. 168, § 12, 48 Stat. 643, 647, § 8(e) was amended so as to read: "(e) No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned not more than five years or both."

from challenging the sufficiency of the indictment. 2 Bishop on Criminal Procedure, 2d Ed., § 795. The point does not appear to have been raised either in the District Court or in the Court of Appeals and it is based solely upon the dates of certain entries in the criminal docket without any supporting proof. We are not disposed to deal with a question of that importance presented in this manner.

*First.—As to the counts under section 8(a).*<sup>3</sup>—Counts 5 and 15, under that provision, charge that petitioner, being the holder of a second mortgage upon certain premises, in executing the consent to accept bonds of the Home Owners' Loan Corporation in full settlement, and for the purpose of influencing the action of the Corporation, knowingly and falsely stated that her claims were respectively in the sums of \$590 and \$650, whereas in fact they were respectively only in the sums of \$285 and \$150.

[2-4] Petitioner argues that there is no allegation that a loan to the owner was made or approved, or that any payment was made to petitioner; that the second mortgagee's consent is temporary and may be withdrawn; that it is not under oath; and that there is no warranty of the truth of the information given. Petitioner argues, further, that any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation; that the second mortgagee is not an applicant; and that the practice in such cases negatives reliance on the consent, as the essential factors are the value of the property, as to which the Corporation makes its appraisal, and the earning capacity of the owner. None of these arguments is impressive. It does not lie with one knowingly making

<sup>6</sup> false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability, and actual damage is not an ingredient of the offense.

[5] Petitioner's main argument is that the whole scheme of the statute is invalid; that Congress had no constitutional authority to create the Home Owners' Loan Corporation—to provide for the conduct of a business enterprise of that character. There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

[6] We recently dealt with a similar contention that the false claims statute, Criminal Code, § 35, as amended, 18 U.S.C.A. § 80, did not apply to a conspiracy to cheat the United States by false representations in connection with operations under a statute which this Court found to be unconstitutional. We said that such a construction was inadmissible. "It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. \* \* \* Congress was entitled to protect the government against those who would swindle it regardless of questions of constitutional authority as to the operations that the government is conducting. Such questions cannot be raised by those who make false claims

<sup>7</sup> against the government." *United States v. Kapp*, 302 U.S. 214, 58 S.Ct. 182, 184, 82 L.Ed. 205, decided December 6, 1937; *Madden v. United States*, 1 Cir., 80 F.2d 672. While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the act was being administered, and the separability provision of the act, section 9, 12 U.S.C.A. § 1468, is clearly applicable. *Utah Power Co. v. Pfof*, 286 U.S. 165, 184, 52 S.Ct. 548, 553, 76 L.Ed. 1038.

[7] There is the further argument that the provision of section 8(a), separately

<sup>3</sup> See note 1.

considered, offends the due process clause as being vague and uncertain. We find no merit in that contention. The statute defining the crime is sufficiently explicit.

*Second.—As to the counts under section 8(e).*<sup>4</sup>—The Government points out that count 14 is based on the statute as it was originally enacted in 1933. That count charges that petitioner on or about April 1, 1934, made a contract with an applicant for a loan for the payment to petitioner of a certain sum for services in connection with the loan, and that the contract was not for “an ordinary charge or fee authorized and required by the Home Owners’ Loan Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services.”

Counts 12, 20, 24, and 25, under the statute as amended, charge that petitioner in or about June, July, and September, 1934, made similar contracts for the payment of unauthorized charges.

It appears that the board of directors in January, 1934, specifically provided that “The ordinary charges author-

ized and required” for services should consist of: (1) An appraisal fee as approved by the board; (2) a fee for a character report; (3) necessary recording and similar fees; (4) necessary charges for perfecting title in a sum not exceeding \$75 in any case and larger necessary charges if approved by the board; (5) necessary and usual fees for abstracts, examination of title, opinions, certificates of title, or title insurance; (6) charges of attorneys or title companies for escrow services or closing loans; and (7) any other necessary charge for like necessary services as specifically approved by the board.

[8,9] Section 8(e) is also separable from the other provisions of the statute. It is plainly designed to prevent the exploitation of applicants. It rests upon the same principle as that which underlies section 8(a) as to false and misleading representations to the officials of the Corporation. Congress was entitled not only to prevent misapplication of the public funds and to protect the officials concerned from being misled, but also to protect those who sought loans from being imposed upon by extravagant or improper charges for services in connection with their applications.

This would be in the interest “not only of themselves and their families but of the public.” See *Yeiser v. Dysart*, 267 U.S. 540, 541, 45 S.Ct. 399, 400, 69 L.Ed. 775; *Nebbia v. New York*, 291 U.S. 502, 535, 536, 54 S.Ct. 505, 515, 78 L.Ed. 940, 89 A.L.R. 1469. Authority to penalize such exploitation while the enterprise is being conducted cannot be regarded as dependent upon the validity of the general plan. That plan might or might not be assailed. If assailed, a long period might elapse before final decision. Meanwhile, the governmental operations go on, and public funds and public transactions require the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise. *United States v. Kapp*, supra.

[10,11] As a separable provision, the validity of section 8(e) is challenged as lacking the requisite definiteness under the

due process clause. Section 8(e), as amended in 1934, omitted the words “in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act” which were in the original provision. But the context in the amended section, sufficiently shows that the forbidden charges are those in connection with applications “for a loan, whether bond or cash.” The resolution adopted by the board of directors sets forth the nature of the ordinary charges that “are authorized and required,” and the power of Congress to provide for such action by the Board is not open to question. See *United States v. Grimaud*, 220 U.S. 506, 521, 31 S.Ct. 480, 55 L.Ed. 563; *United States v. Shreveport Grain Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175. The phrase “like necessary services” in the section describes services which are cognate to those mentioned in the preceding clause “for examination and perfection of title” and “appraisal.” And the resolution of the board, after stating the categories of authorized charges, provides for “any other necessary charge for like necessary services, as specifically approved by the Board of Directors.” We think that the statute sets up an ascertainable standard and is “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.” *Connally v. General Construction Co.*, 269

<sup>4</sup> See note 2.

U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; *United States ex rel. Handler v. Hill*, 3 Cir., 90 F.2d 573, 574. Compare *Old Dearborn Co. v. Seagram Corporation*, 299 U.S. 183, 196, 57 S.Ct. 139, 145, 81 L.Ed. 109, 106 A.L.R. 1476.

[12] *Third*.—We have considered the objections to the indictment which were open in the absence of a bill of exceptions. The Circuit Court of Appeals rightly held that the bill of exceptions was not settled and filed in time under the rule. But its decision was rendered before our decision in *Ray v. United States*, 301 U.S. 158, 57 S.Ct. 700, 81 L.Ed. 976, construing Rule 4 of the Criminal Appeals Rules, 28 U.S.C.A. following section 723a. See, also, *Forte v. United States*, 302 U.S. 220, 58 S.Ct. 180, 82 L.Ed. 209, decided December 6, 1937. That rule gives to the Circuit Court of Appeals full supervision and control of the proceedings on appeal, "including the proceed-

58 S.Ct.—30½

10

ings relating to the preparation of the record on appeal." The appellate court, in the exercise of its sound discretion, has authority to provide for the correction of any miscarriage of justice in connection with any action of the trial judge relating to the settlement and filing of a bill of exceptions.

[13] As the Circuit Court of Appeals may have proceeded in this case upon the assumption that it had no power to approve the settlement and filing of the bill of exceptions and to pass upon the rulings it disclosed, its judgment will be vacated and the cause will be remanded so that the appellate court may be free to exercise its discretion in that relation. It is so ordered.

Remanded.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.