

As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner. *Draper v. Davis*, 102 U. S. 370, 371; *Keyser v. Farr*, 105 U. S. 265, 266; *Spirou v. United States*, 24 F. (2d) 796, 797; *United States v. Radice*, 40 F. (2d) 445, 446; *United States v. Habib*, 72 F. (2d) 271.

The judgment of the Circuit Court of Appeals is reversed so far as it dismissed the first appeal and affirmed the later judgment imposing the fine, and the cause is remanded to that court for further proceedings in conformity with this opinion.

*Reversed.*

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UNITED STATES *v.* KAPP ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 97. Argued November 12, 1937.—Decided December 6, 1937.

1. Within the meaning of the Criminal Appeals Act, an indictment for conspiracy (Criminal Code, § 37) to commit a substantive offense may be treated as founded on the statute defining the substantive offense. P. 216.
2. The District Court sustained a demurrer to an indictment for conspiracy to violate the False Claims Act (§ 35 Criminal Code), upon the ground that that Act does not apply to an attempt to defraud the United States by obtaining approval of claims to payments of money through false representations, if the statute authorizing such payments is invalid. *Held*:
  - (1) A construction not of the indictment but of the False Claims Act. P. 217.
  - (2) An inadmissible construction. *Id.*
3. Those who attempt to obtain payments from the Government by false representations are estopped to defend upon the ground that the statute providing for such payments has been declared unconstitutional. P. 218.

Reversed.

APPEAL from a judgment sustaining a demurrer to an indictment and dismissing the cause.

*Assistant Attorney General McMahon*, with whom *Solicitor General Reed* and *Messrs. W. W. Barron* and *William C. Lewis* were on the brief, for the United States.

*Mr. William J. Hughes, Jr.*, with whom *Mr. William E. Leahy* was on the brief, for appellees.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case comes here under the Criminal Appeals Act. 18 U. S. C. 682.

The second count of an indictment charged appellees with conspiracy to defraud the United States by furnishing false information and making false statements to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31; Criminal Code, §§ 35, 37; 18 U. S. C., §§ 80, 88. The District Court sustained a demurrer to this count and the Government appeals.

The contention of the Government is that the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold and the continued ownership by such producers. Appellees' demurrer went upon the ground, among others, that the provisions of the statute and the regulations of the Secretary of Agriculture to which the count referred are void (*United States v. Butler*, 297 U. S. 1) and that the acts set forth in the indictment do not constitute an offense against the laws of the United States.

The false claims statute under which the prosecution was brought penalizes one who "for the purpose and with the intent of cheating and swindling or defrauding

the Government of the United States . . . shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations" (Criminal Code, § 35; 35 Stat. 1095, as amended, 40 Stat. 1015). After referring to the statute, the District Judge said in his opinion:

"The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

"There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

"This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls."

1. Appellees contend that if any statute was construed, it was not the statute on which the indictment is founded and hence that this Court has no jurisdiction. The point is that the indictment charged a conspiracy under Criminal Code, § 37. But the conspiracy charged is one to violate the false claims statute, Criminal Code, § 35. In similar cases the jurisdiction of this Court has been sustained. The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States v. Bowman*, 260 U. S. 94, 95; *United States v. Walter*, 263 U. S. 15, 16, 17. See, also, *United States v. Keitel*, 211 U. S. 370, 387.

2. Appellees contend that the court below construed the indictment and not the statute. *United States v. Colgate & Co.*, 250 U. S. 300, 306; *United States v. Hastings*, 296 U. S. 188, 192. The argument is that a conspiracy to violate § 35 must involve a pecuniary fraud. *United States v. Cohn*, 270 U. S. 339, 345, 346. In that view appellees urge that the court below has simply ruled that there was no pecuniary loss under the facts alleged. But the District Court found no flaw in the indictment as a pleading. Nor does the court appear to have considered the question of pecuniary loss. The court rested its decision upon the point that the facts alleged in the indictment with respect to the identity of the producers of the hogs, or the sources from which the hogs originated, had ceased to be material because of the unconstitutionality of the provisions of the Agricultural Adjustment Act. This did not purport to be a construction of the indictment but a ruling that the indictment in view of the invalidity of that Act failed to state an offense. The substance of the decision thus appears to be that the false claims statute does not apply to an attempt to defraud the United States by obtaining the approval of claims and benefit payments through false representations, if the statute providing for such claims and payments is found to be invalid. That is clearly a construction of the statute. *United States v. Patten*, 226 U. S. 525, 535; *United States v. Birdsall*, 233 U. S. 223, 230.

3. Such a construction is 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. See *Madden v. United States*, 80 F. (2d) 672, 674. Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against

frauds. It is cheating the Government at which the statute aims and 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 against the Government. See *Langer v. United States*, 76 F. (2d) 817, 824, 825; *Madden v. United States*, *supra*; *United States v. Harding*, 65 App. D. C. 161; 81 F. (2d) 563, 568; *United States v. MacDonald*, 10 F. Supp. 948.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

*Reversed.*

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HARRY FLEISHER ET AL. *v.* UNITED STATES.\*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SIXTH CIRCUIT.

No. 202. Argued November 15, 1937.—Decided December 6, 1937.

1. Registration of stills for the production of distilled spirits should be with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. P. 219.

A count charging conspiracy to commit the offense of possessing such stills "without having the same registered with the Collector of Internal Revenue, as required by law," is therefore bad. (Cf. Rev. Stats. § 3258; 26 U. S. C. § 1162.)

2. When the first of several counts upon which consecutive sentences are based is defective the sentences should be corrected so as to fix a definite date for their commencement. P. 220.

91 F. (2d) 404, reversed.

CERTIORARI, *post*, p. 673, to review judgments affirming judgments sentencing petitioners after conviction upon four counts of a joint indictment for conspiracy.

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\* Together with No. 203, *Sam Fleisher v. United States*; and No. 204, *Stein v. United States*, also on writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit.