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CONSTITUTIONAL LAW - HOME OWNERS LOAN CORPORATION ACT - PENALTIES CLAUSE

CONSTITUTIONAL LAW — HOME OWNERS LOAN CORPORATION ACT — PENALTIES CLAUSE — An indictment under the penalties clause of the Home Owners Loan Corporation Act, brought before the promulgation of authorization of charges for services rendered, was dismissed on the ground that, prior to such authorization, the act was not sufficiently definite to satisfy the Sixth Amendment to the Constitution of the United States. *United States v. Willard,* (D. C. W. D. Mich. No. 4057, September 27, 1934)[1] 2 U. S. LAW WEEK, index p. 99.

Congress, in enacting subsection (e), apparently contemplated that authorization of charges by the corporation would issue in time to prevent situations like that in the principal case; or failed to contemplate the possibility of such situations. The question then is whether the subsection should be extended by implication to cover the principal case. According to the common law rule, penal statutes are to be construed narrowly in favor of the accused; that is to say, the meaning and operation of a penal statute is not by implication to be extended to include situations which are not clearly within its terms.[2] The rule has been carried to extremes and considerable argument can be advanced against it.[3] That

[1] "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 chapter 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." 48 Stat. 134, c. 64, sec. 8, June 13, 1933; U. S. C. tit. 12, sec. 1467 (e). Amended by 48 Stat. 647, c. 168, sec. 12, April 27, 1934; U. S. C. tit. 12, sec. 1467 (e).

[2] 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2d ed., sec. 518 *et seq.* (1904); McLoughlin v. Raphael Tuck Co., 191 U. S. 267, 24 Sup. Ct. 105 (1903); People v. Dolan, 5 Wyo. 245, 39 Pac. 752 (1895); Hall v. Norfolk & W. R. R., 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757 (1897).

[3] See the comment in 32 MICH. L. REV. 967 (1934) and the cases there cited. There seems to be a definite relation between this common-law rule and the require-

argument is not pertinent here. It is submitted that even though the common law rule be disregarded, the subsection cannot be enforced as to the period prior to the promulgation of regulations by the corporation because such enforcement necessarily conflicts with the Fifth and Sixth Amendments to the federal Constitution. The provision in question, as it applies to the period before the authorization of charges, is susceptible of two interpretations: it can be interpreted to prohibit all charges (since none have been authorized by the corporation); or it can be interpreted to allow some charges and prohibit others. The former construction is here considered to be in conflict with the due process clause of the Fifth Amendment. That clause, as applied, limits the power of Congress to regulate the right to contract with reference to one's business or the right to carry on business to regulation tending to achieve some end deemed to be necessary to the general welfare.[4] It cannot be contended that a prohibition of all charges during the period in question is a regulation of such nature. The alternative construction, allowing some charges to be made, immediately raises the question as to what charges are allowed. The Fifth and Sixth Amendments require Congress, in making any act criminal, to establish a definitely "ascertainable standard of guilt."[5] This requirement has been held to mean that the statute must be so definite that men of common understanding and intelligence need not guess at its meaning and differ as to its application.[6] The only word in subsection (e) which suggests a standard as to charges allowed is the word "ordinary." A possible implication that usual or reasonable charges are allowed might be based on the use of that word. But "reasonable" and "customary" charges or prices have

ment of definiteness under the due process clause and under the Sixth Amendment. The reason at the bottom of both principles is a desire to give the person accused fair warning of what conduct is expected of him before he is convicted. From that viewpoint, the question in the principal case might be considered one of statutory interpretation and construction; but even then the question of standard of guilt would arise, it being not at all clear from the subsection that its provisions apply before such time as the corporation authorized a system of charges, or that if it did apply, what charges it allowed. See on the question of statutory construction and interpretation as applied here, de Sloovere, "Textual Interpretation of Statutes," 11 N. Y. UNIV. L. Q. REV. 538 (1934).

[4] Mugler v. Kansas, 123 U. S. 623 at 661, 8 Sup. Ct. 273 (1887), where the Court said, "There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute which, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." See also Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427 (1897), recognizing the right to contract with reference to one's business. *Cf.* Weed v. Bergh, 141 Wis. 569, 124 N. W. 664 (1910), and Advance-Rumely Thresher Co., Inc. v. Jackson, 287 U. S. 283, 53 Sup. Ct. 133, 87 A. L. R. 285 (1932). See Butchers' Union Slaughter-House Co. v. Crescent City Livestock Co., 111 U. S. 746, 4 Sup. Ct. 652 (1884); and Slaughter House Cases, 16 Wall. (83 U. S.) 36, 21 L. ed. 394 (1873), recognizing the right to follow any one of the common occupations. *Cf.* Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257 (1888), and annotations to Fifth Amendment in U. S. C. A., Const., part 2, p. 517.

[5] U. S. C. A., Const., part 2, pp. 517, 577; United States v. Sharp, Pet. C. C. 118 (1815); United States v. Brewer, 139 U. S. 278, 11 Sup. Ct. 538 (1891).

[6] Conally v. General Constr. Co., 269 U. S. 385, 46 Sup. Ct. 126 (1926).

been consistently rejected as standards of guilt.[7] It must be concluded that this construction is also repugnant to the Constitution. It follows that the subsection cannot be applied to the period in question.

W. H. C.

[7] United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 14 A. L. R. 1045 (1921); Conally v. General Constr. Co., 269 U. S. 385, 46 Sup. Ct. 126 (1926); Cline v. Frink Dairy Co., 274 U. S. 445, 47 Sup. Ct. 681 (1927). See the cases following the authority of the Cohen Grocery case, all concerning the Lever Act, 255 U. S. 98 ff., 41 Sup. Ct. 303 ff. (1921), no discussion.