

## TO AMEND SECTION 215 OF PENAL CODE

FEBRUARY 22, 1927.—Referred to the House Calendar and ordered to be printed

Mr. DYER, from the Committee on the Judiciary, submitted the following

### REPORT

[To accompany H. R. 16256]

The Committee on the Judiciary to whom was referred the bill (H. R. 16256) to amend section 215 of the Penal Code, having held oral hearings and considered written memoranda submitted upon the subject, report the same with the recommendation that the bill do pass.

The object of the bill is to amend section 215, of the Penal Code. The object of section 215 is to prevent and punish the use of the United States mail in the execution or attempted execution of any scheme or artifice devised to defraud, etc. Your committee is in sympathy with the general purpose, object, and effect of section 215, which was enacted to protect the public and whose operation has in the main been salutary and satisfactory. But a species of prosecutions has grown up and is still growing which can hardly be harmonized with the letter and spirit of the statute itself and much less with the spirit of the sixth amendment to the Constitution of the United States which provides among other things that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. \* \* \*

The sixth amendment was adopted as a part of "The American Bill of Rights" in order to prevent under our system of free government and constitutional liberty, the recurrence of that grievance imputed to George III in the Declaration of Independence in the following allegation:

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws \* \* \* for transporting us beyond seas to be tried for pretended offenses.

During the 10 years between July 1, 1916, and July 1, 1926, there were 3,917, cases in which citizens of the United States have

been indicted in States or districts outside of their own State or district and on the date last mentioned there were 1,142 prosecutions of this character pending in the Federal courts of the country. A number of these prosecutions involved indictments under section 215 of the Penal Code. The statistics cited above are taken from a report of the Department of Justice made in response to a Senate resolution.

Disregarding for the moment the fundamental question as to the justice or injustice of such a policy it is certain that the expense of these distant prosecutions, both to the Government and to the accused, is out of all proportion to the expense which would be entailed if the prosecutions were instituted and carried on in the district where the accused resided or in the district in which the material acts alleged against him were committed and where a majority of the material witnesses must of necessity or as a general rule reside. No official statistics have been available upon this point but the committee has reason to believe that in some cases of removal these distant prosecutions cost many thousand dollars more than local prosecutions would cost.

The argument which the committee is now advancing was given judicial recognition by Judge Hutcheson in the following language:

I am not unmindful of the fact that the election by the Government to bring this action in California, the place of the receipt of the letters charged to have been sent in pursuance of the fraudulent scheme, imposes upon the defendants, all of whom live in Texas, and whose operations were conducted entirely from Texas, a tremendous hardship, if it will not entirely prevent them making an adequate defense, while the Government can as easily, and perhaps with more ease, conduct the prosecution in Texas, where the defendants reside. (*United States v. Audrade et al*, 10 Fed. Rep. (2d) 576-577.)

The excessive expense to which the accused is subjected in making his defense in distant States and districts, the difficulty of securing the attendance of his witnesses in distant and remote parts of the country amount in many cases to a practical denial of justice. The inherent injustice of these distant prosecutions where the Government has the option and every facility to proceed in the district, or vicinage, of the accused; the plain repugnance of such prosecutions to the spirit and history of our institutions must be evident to those who are familiar with the present practice or who give serious consideration to this subject.

Upon this point the committee prefers to let the voice of the judiciary speak through the lips of Judge Anderson, of Indiana. Discussing this injustice, this un-American practice, he says:

To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guaranties are worth anything, this proceeding must fail.

If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if government has that power and can drag citizens from distant States to the Capital of the Nation there to be tried, then, as Judge Cooley says, "this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial." (Defendants discharged.) (*United States v. Smith et al*, 173 Fed. Rep. 232.)

The bill herewith reported is designed to remove the evil complained of so far as that can be done consistently with the protection and security of the public. The change from the existing law is slight and will be pointed out in detail further on in this report.

Section 215, of the Penal Code defines three separate and distinct offenses. The three offenses have one element in common and that is the use of the mail in the execution or in the attempted execution of any scheme or devise to defraud:

(a) Any person who shall mail or cause to be mailed any letter, circular, etc., in execution or attempted execution of such a scheme is guilty of the first offense defined in section 215. Upon conviction he is punished as prescribed in the section and should be. But under all the authorities it must be prosecuted in the district where the matter is mailed. No change is proposed respecting such offense, its venue or prosecution.

(b) Any person who takes or receives any letter, circular, etc., through the mail in execution or attempted execution of such scheme is guilty of the second offense defined in section 215. The venue of this offense is in the district where such matter was taken from the mail and the prosecution properly lies in that district. No change is proposed in respect to this offense, its venue or prosecution.

(c) The two offenses mentioned above are the only ones which were defined and penalized under section 5480 of the Revised Statutes, but when that section was brought forward as section 215, of the Penal Code, a third offense was added. The gravamen of the new offense is expressed in the words "who shall knowingly cause to be delivered by mail." "The fact of delivery," as distinguished from the act of mailing or the act of receiving through the mail, marks this new offense off from the two older offenses.

There are two different methods of delivery by mail each of which comes within the purview of this added provision. The second will be stated or illustrated first.

If a person who has devised such a scheme to defraud should in the execution or attempted execution of such scheme deposit 100 letters in the post office (in the District of Columbia), addressed to a confederate in San Francisco, to be delivered by such confederate to the hundred different persons to whom they were "directed to be delivered," this would constitute an offense and should constitute an offense under section 215 as it now stands. This offense would be, and should be, prosecuted in the district where the delivery was made. No change is proposed in regard to this offense, its venue, or prosecution.

The other or the first act which is constituted a crime under the added portion of section 215, as revised in the Penal Code may be stated as follows:

Any person who shall knowingly cause to be delivered by mail according to the direction thereon any letter, postal card, etc., shall be punished, etc.

The point in this offense is the causing of the forbidden mail matter to be delivered according to the direction thereon. To illustrate, if a person in executing or attempting to execute a scheme to defraud, mails a letter in the District of Columbia to a person in San Francisco, he is guilty of an offense in San Francisco and can be prosecuted in San Francisco, although he was never west of the Potomac River. The Government could prosecute such a person in the District of Columbia for the offense of mailing the letter, but the Government has the option under the law as it now stands to prosecute such person in San Francisco, for causing the letter to

be delivered there, "according to the direction thereon." This option is liable to abuse. The accused is entitled to the presumption of innocence; he ought not to be subjected to needless expense and hardship in making his defense. Innocent men are sometimes accused and they should not be liable where there is a practical alternative to be transported across the continent for trial in a contest so unequal as that between an individual with his limited resources and the Government of the United States with its unlimited resources.

When such a person, however, goes outside of the United States and mails such matter to a point within the United States or when he mails such matter on the train or at any other place which can not be ascertained, then and in that event and only in that event should he be subject to prosecution in the district and at the place where such delivery was made, according to the direction thereon.

This is the only change which the proposed bill makes in the existing law so far as the definition of this particular form of the offense is concerned. This change is embodied in the following amendment: "When mailed outside the United States or at a place to the grand jurors unknown." This language will be found in lines 22 and 23 on page 2 of the reported bill. The only effect of this amendment will be to require the Government to prosecute such an offender in the district where the matter was mailed instead of in the district where it was delivered, unless the place of mailing is outside of the United States or is unknown.

The only other change proposed in section 215 will be found in the proviso at the end of the reported bill, the only object of this proviso is to save the statute of limitations and to make it possible for the Government to proceed with prosecutions where indictments have already been returned for knowingly causing any such matter to be delivered by mail according to the directions thereon, in those cases where prosecutions for mailing or causing such matter to be placed in the mail could not now be instituted on account of the statute of limitations having run.

In view of the foregoing consideration it is believed that the enactment of the bill would clarify the law, would put an end to acknowledged abuses, and would serve alike the cause of economy and of public justice.