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Constitutional Law—Elections—Right of Congress to Regulate Primaries

By losing sight of the test for the scope of the employment, the Missouri Supreme Court in the *Phillips* case has caused the embarrassment of the court in the instant case in its application of the rules of *respondeat superior*. It is to be hoped that the Supreme Court of Missouri will, on a hearing of the instant case,[15] put an end forever to the doctrine of *Phillips v. Western Union Tel. Co.*[16] R. T. S.

CONSTITUTIONAL LAW—ELECTIONS—RIGHT OF CONGRESS TO REGULATE PRIMARIES—[United States].—The defendants, Commissioners of Elections, conducted a primary election under the laws of the state of Louisiana to nominate a Democratic party candidate for representative in Congress. They were indicted in the District Court for Eastern Louisiana for having wilfully altered and falsely counted the ballots of the voters. The charge was based upon section 19[1] of the U. S. Criminal Code which makes it a federal crime to conspire "to injure, oppress, threaten, or intimidate any citizens in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," in this case (1) the right of qualified voters to have their votes counted as cast in a Congressional party primary election and (2) the right of candidates in a Congressional party primary to have votes cast for them properly counted. A demurrer to the indictment was sustained by the district court on the ground that no right "secured by the Constitution and laws of the United States" had been infringed. On review before the Supreme Court, *held:* the rights of voters and candidates to have votes properly counted in a Congressional party primary are "secured by the Constitution and laws of the United States" in Article I, sections 2, 4[2] and so are within the purview of section 19 of the U. S. Criminal Code.—*United States v. Classic.*[3]

To sustain its view that the right to an honest count of votes in a Congressional party primary was secured by the Constitution, and so was within the purview of section 19 of the U. S. Criminal Code, the majority of the Court, speaking through Mr. Chief Justice Stone, found that Congressional power to regulate the election of its members under Art. I, sections 2 and 4, extended to the conduct of primary as well as general elections.

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15. The dissenting judge in the instant case has of his own motion certified the case to the Supreme Court of Missouri. Salmons v. Dun & Bradstreet (Mo. App. 1941) 153 S. W. (2d) 556, 566.

16. (1917) 270 Mo. 676, 195 S. W. 711, L. R. A. 1917F 489.

1. (1909) 35 Stat. 1092, c. 321, 18 U. S. C. A. 51.

2. U. S. Const. Art. I., §2: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." U. S. Const. Art. I., §4: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators."

3. (1941) 61 S. Ct. 1030.

Although from the outset, Congress had the express constitutional power to regulate the "times, places and manner of holding elections for * * * representatives,"[4] it did not exercise it until 1842.[5] In that year it provided that representatives were to be elected on a general ticket. There was no further legislation for 24 years, when Congress regulated the manner in which state legislatures were to choose United States Senators.[6] Not until 1870 did Congress enact a comprehensive system of regulations for the conduct of Congressional elections,[7] and this was repealed in 1894[8] with the exception of sections 19-26, chapter III of the U. S. Criminal Code. Since that time Congress has adhered to its earlier policy of legislating directly by piece-meal only and adopting in each state the regulations of that state. Congressional power to legislate with reference to Congressional general elections[9] or to adopt as its own the legislation of the several states has been undoubted.[10] But power to regulate Congressional party primaries has been questioned, although the existence of such power has not before been squarely affirmed or denied.[11]

The decision in the instant case would furnish the necessary constitutional support for further direct regulation of Congressional party primaries if Congress should see fit to legislate in that respect.[12] From the standpoint of the existence of constitutional power, as well as from the standpoint of governmental policy, the decision is unquestionably sound.[13]

But as Mr. Justice Douglas, speaking for the minority in dissent, points out, the narrow question in the instant case was the applicability of section 19 of the U. S. Criminal Code. The position of the minority may be thus paraphrased: (1) That before a right is "secured by the Constitution" within the purview of section 19, it must be as explicit as "equal protection of the laws" and Negro suffrage in the 14th and 15th Amendments;[14] and

4. U. S. Const. Art. I, §4.
5. 5 Stat. 491, c. 47.
6. (1866) 14 Stat. 243, c. 245.
7. 16 Stat. 144, c. 114, 16 Stat. 254, c. 254. These statutes were supplemented in (1872) 17 Stat. 347-349, c. 415.
8. (1894) 28 Stat. 36, c. 25.
9. Ex parte Yarbrough (1884) 110 U. S. 651; In re Coy (1888) 127 U. S. 731; Swafford v. Templeton (1902) 185 U. S. 487; United States v. Mosley (1915) 238 U. S. 383.
10. Ex parte Siebold (1879) 100 U. S. 371.
11. See Newberry v. U. S. (1921) 256 U. S. 232, which arose under the Corrupt Practices Act of 1910, setting a limit on the amount which could be expended by a candidate in any campaign for nomination or election to congressional office. This act specifically referred to primary elections and did not involve section 19 of the U. S. Criminal Code. On the question of whether Congress had power to control primary elections, four judges held in the affirmative and four in the negative, the fifth judge refusing to take part.
12. But see Grovey v. Townsend (1935) 295 U. S. 45 which held that the 14th and 15th amendments did not prevent a political party from determining who might vote in that party's primary.
13. For uncritical approval of the result of the instant case on these grounds, see Note (1941) 4 La. L. Rev. 133.
14. See Guinn v. U. S. (1915) 238 U. S. 347 involving amendment XV; Nixon v. Herndon (1927) 273 U. S. 536; Nixon v. Condon (1932) 286 U. S. 73, both involving amendment XIV.

(2) that a statute, especially a criminal statute, must have been directed toward acts within the contemplation of the legislature when enacted.[15] There is considerable force to the first branch of the dissent when it is remembered that Art. I, including section 2, deals with the organization and powers of Congress and not, as do some other provisions of the Constitution, with individual rights and privileges as such.[16] So too, the second branch of the dissent is in keeping with the desirable policy of narrowly construing criminal statutes rather than extending their text beyond their context at the time of enactment.[17] J. E.

COPYRIGHT—FAIR USE—FEDERAL RULES—[Federal].—Plaintiff, the New York Herald-Tribune, editorially defended Wendell L. Willkie, the Republican presidential candidate, against charges that he was closely associated with Wall Street. In a communication to the newspaper, defendant, Otis & Company, reprimanded it for assuming that any affiliation was to be disavowed. This letter was acknowledged but never referred to in the newspaper. Thereupon the defendant addressed a circular letter to a select list of public officials, bankers, educators, economists, and other persons, enclosing a photostatic copy of the editorial page, including the masthead, of plaintiff's copyrighted newspaper. Plaintiffs brought an action for alleged infringement of copyright and trademark. The defendant filed motions to dismiss and for judgment on the pleadings, supported by affidavits claiming "fair use" of the copyrighted material. *Held:* The determination of "fair use" is not to be decided on motion and affidavits, but is to be left to the trial judge on the merits of the case. *New York Tribune v. Otis & Company.*[1]

The Federal Rules of Civil Procedure, Rule 56(b),[2] permit some objections to the contentions of an opposing party to be raised by a motion for summary judgment supported by affidavits. The decision in the instant case, however, goes no further than to hold that "fair use" is a defense of such complexity, and so dependent upon particular facts, that it can be raised only by answer and proved only in a full trial before judge or jury.

The decision seems reasonable, when the vagueness of the conception

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15. See United States v. Gradwell (1917) 243 U. S. 476 in which the court held that conspiracies to defraud in a primary election are not within the purview of §19 of the Criminal Code, because when §19 was passed by Congress, primary elections were unknown in the law.

16. U. S. Const. Amend. XIV. See Nixon v. Herndon (1927) 273 U. S. 536; Nixon v. Condon (1932) 286 U. S. 73; note 12, supra; U. S. Const. Amend. XV. See Guinn v. U. S. (1915) 238 U. S. 347, note 12, supra. These cases were thus distinguished by Mr. Justice Douglas in dissent, 61 S. Ct. 1030, 1046.

17. McBoyle v. U. S. (1931) 283 U. S. 25.

1. (D. C. S. D. N. Y. 1941) 39 F. Supp. 67.

2. "FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."