SENATOR FULTON DEFENDS SCHMITZ REVERSAL

Methods of Dunne and Heney Denounced as Manifestly Unfair and Courage of Appellate Tribunal Extolled.

In an address before the Oregon Bar Association, delivered on Tuesday last, ex-Senator Fulton severely arraigned the course of Judge Dunne and the methods used by Francis J. Heney to secure the conviction of ex-Mayor Schmitz.

After the trial and the verdict of guilty was secured, an appeal was taken and the case remanded for a new trial, pending which the former official is at liberty. Mr. Fulton strongly indorsed the action of the Court of Appeals and urged that an honest, courageous court could not have done otherwise.

The speaker condemned ill-advised newspaper criticism of judicial decisions, saying that the facts and the law were frequently misunderstood, and cited a noted Oregon case.

THE following is the full text of the address delivered by ex-Senator Charles W. Fulton before the Oregon Bar Association last Tuesday, and which attracted unusual attention. As the ex-Senator took his seat he was met with round after round of applause. Without mentioning any names the speaker made it plain that his remarks were directed in part toward the man who created interest in Oregon land filings and later became engaged in the graft prosecutions at San Francisco. Mr. Fulton said:

It is a popular saying that we are governed by laws and not by men. We assert that all men are equal before the law; that we have but one rule by which we measure and test alike the rights and the conduct of the rich and the poor, the strong and the weak, the sinner and the saint. We know that this should be so, and we hope, trust and try to believe that in the administration of our laws this fundamental, basic principle of justice is constantly kept in view and invariably applied. Whether it is must ever be a matter of deep public concern.

Government by law requires that general rules of conduct shall be prescribed by which every citizen and all citizens without distinction shall be judged and to which all shall be required to conform. Such a government, to be successful, must provide and maintain impartial tribunals charged with the duty of interpreting the law and applying it uniformly without regard to the character, station or standing of the individual whose life, liberty or property may be involved. We have established such tribunals and designated them courts of justice.

Courts Custodians of Peace.

It is quite evident that the peace and good order of society and the permanence of government depend very largely upon the extant to which the courts shall enjoy the respect nad confidence of the people, for on their construction and application of the laws, or, to speak in a larger way, upon their administration of justice, the security of life, liberty and property depends.

That the courage, wisdom and fidelity of the courts must ever be the principal factors in enlisting and retaining respect for and confidence in their decisions cannot be doubted. Yet, however courageous, wise and just courts may be, systematic and continuous misrepresentation will ultimately result in undermining their influence and in bringing them into so great a degree of disfavor that brave and honorable men will be retired from the bench and be succeeded by Judges who will study, not how to administer justice in accord with the spirit and purpose of the law, but how best to win the popular applause of the hour. I need not pause to picture how deplorable and disastrous such a condition would be. It would seem therefore that every thoughtful citizen, everey lover of good government should deem it one of his most important public duties to foster and inculcate not only a spirit of obedience to law, but, as well, respect for and confidence in the wisdom and integrity of the tribunals charged with its administration.

Fortunately this has been heretofore quite generally conceived to be the mental attitude requisite to good citizenship; and, happily, so far in our history there has seldom been evidenced any considerable disposition to indulge in wanton or ignorant attacks uopn the judiciary. Within the last few years, however, many of the otherwise best conducted and most intelligently edited newspapers of the country have fallen into the habit of indulging in what very largely seems to me to be ill-considered and unreasonable censure of our courts. The usual text for their objurgations is that the courts are wedded to technical rules which control their decisions and are observed at the expense of common sense and justice. They seldom take the pains to inform themselves of the facts or the law of the cases they criticise, hence they rarely have accurate information about them or an intelligent understanding of the reasons assigned by the court in support of the rulings they so unhesitatingly condemn and hold up to contumelious scorn.

Knowledge Should Precede.

They have previously determined that the defendant is guilty, or that the successful party in the cause should not have prevailed; and so, without knowledge of the facts disclosed by the record and with no disposition to ascertain them, they denounce the decision as either the result of corrupt influences or a narrow and fanatical devotion to technical rules and precedents which have, or should have, they assert, no place and are entitled to no consideration in these enlightened times. I do not contend that courts are or should be deemed to be above criticism. I do insist, however, that the importance to the public welfare of maintaining confidence in and respect for their decisions is so great that a true appreciation of the duties of good citizenship should restrain one from condemning as corrupt, unsound or unjust a decision of a high judicial tribunal without being first fully informed of and having carefully considered the facts and principles of law upon which it rests. That courts, even of last resort, are sometimes wrong in the conclusions they reach no one will deny. That they are frequently wrong I cannot concede, for such is not my belief. That they are, as a rule, presided over by men of acknowledged ability and sound learning, of high ideals, moral and mental integrity, will, I believe, be very generally admitted. Still, they are only men, liable to err, and not exempt from criticism. I urge only that criticism of their decisions should be preceded by and based upon accurate knowledge of the facts and the law involved.

This being essentially a government by law, and not by men, it follows that the law must be uniformly applied; that that which is the law for one man must, in like circumstances, be the law for all men; hence the importance of adhering to precedent. When the judge shall be at liberty to make the law conform to his personal convictions as to what should be done in each case, we will have ceased to be governed by law and will have become the subjects of men. When precedents shall count for naught; when uniformity of decision and universality in the application of the rules of law shall no longer be deemed important; when cases shall be determined, not by general rules or established precedents designed for the guidance of men in their conduct and relations in life, but eby giving heed to public clamor or by substituting for the law the personal convictions of a judge as to what the law of the particular case should be, then popular government will have ceased, anarchy will have supervened, revolution and possibly despotism will be near at hand.

"Legal technicalities" is the familiar weapon which the newspaper judicial decision reviewer, as a rule, employs in assailing court decisions. If the effect of a decision be not in accord with his pre-adjudication, he unhesitatingly brands it as the result of unreasonable veneration for time-worn precedents and slavish observance of obsolete or technical rules. As above stated, he rarely takes time to read the decision itself, but, relying upon an alleged report of its substance and effect, condemns it as a travesty on justice and solemnly admonishes the court that the people will not long tolerate such miserable perversions of the law. Without knowledge of the facts disclosed by the record, the authorities or source of the law which the court, after painstaking investigation, conscientiously believed applied thereto, he promptly condemns their conclusions as being unwarranted by either the facts or the law.

I do not mean to say or intimate that newspaper writers are incompetent to review and intelligently comment on judicial decisions; on the contrary, I readily concede that most of the editorial writers and many of the reporters on high-class papers and journals are men of exceptional mental force, vigor and analytical powers. My contention is that before entering upon such a task one should carefully inform himself of the exact facts on which the court passed, and the source, purpose, spirit and intent of the rule or rules announced or applied. This not simply in justice to the court, though that would be a sufficient reason, but because of the vital importance of fostering public respect for and confidence in our state and National judiciary.

It cannot be too often repeated that courts do not make the law; that their duty is to apply the law as it is written. A judge may, of course, ignore the law, or purposely misconstrue it, but in so doing he violates his official oath; disgraces and discredits his high position. Nor can a judge, conforming to his oath and to our theory and system of government, vary, warp or suspend the rules of the law in order to avert that which otherwise will be the result in a particular case. It may be quite apparent to a court that by declaring and applying the law as it is written, the effect in a given case will be to postpone, possibly prevent entirely, the punishment of one whom they may deem guilty of a serious offence against society. It is none the less the duty of the court to declare the law as it is. It is far better that a guilty person shall occasionally escape justice by reason of the rigidity of legal rules than that the power shall be admitted to be vested in any man or any number of men to suspend the observance of statutes or rules which the wisdom and experience of ages have demonstrated are necessary to the preservation of popular government and the untainted administration of justice.

Harmless Error Disregarded.

Ah, but mere technicalities! Has not the court the right, and is it not its duty to disregard them? That depends. It depends on what you mean by technicalities. If by a technicality you mean a merely abstract and purely harmless error, it should be, and if it plainly is such, always is disregarded. Errors at the trial, which do not affect the substantial rights of an appellant are supposed to be and generally are ignored. The Oregon reports and the reports of every state are full of decisions which verify this statement. The question to be determined in each case where error occurred at the trial is, "Was the error of such a character that the court can say with confidence that it was not prejudicial?" I am not objecting to a discussion and criticism of the decisions of courts based on an accurate knowledge and understanding of what the court really did decide. The misfortune is that such information or understanding is rarely the basis of newspaper criticism. If it were and the facts were fairly stated, the viciousness of such criticisms, now so frequently manifest, would largely disappear.

The fact is that a careful analysis of most decisions condemned by the newspapers as having been the result of undue devotion to so-called technical law will disclose that they are defensible on the broadest grounds of equity and simple justice. I know of no decision that has been more widely criticised and condemned by newspapers as altogether bad and vicious than that of the California Appellate Courts in People vs. Schmitz. Apparently the entire vocabulary of denunciation has been exhausted in heaping condemnation upon those courts because of their action in that case, and yet I seriously doubt if the author of a single one of these denunciatory articles ever carefully read either decision or has an intelligent understanding of the grounds on which either was placed.

Schmitz Trial Unfair.

I state without any reservation whatever, as a result of a careful reading and consideration of both decisions, that had either court failed to decide substantially as it did it would have discredited itself and the judiciary of this country. They could not have decided otherwise than they did without violating their official oaths and pleading guilty to a degree of cowardice and pusillanimity that would have justly earned for them the enduring contempt of the bench and bar of this nation. I do not contend that the record disclosed the innocence of Schmitz. He may have been guilty of the crime of extortion, for which he was tried, and of which he was convicted in the lower court. I do affirm, however, that he was entitled to a fair and impartial trial and that the record disclosed not only that he had been denied such, but that the character of trial to which he had been subjected in the court below, in its utter disregard of the most simple and elementary principles of justice and decency, was rarely, if ever, surpassed by Jeffrey in his most vigorous and vicious examples of judicial tyranny and depravity. Witness the following, being only a few of the numerous prejudicial errors shown by the record:

1. The California penal code provides that when a jury is being selected a challenge must be taken "when the juror appears and before he is sworn to try the cause; but the court may, for cause, permit it to be taken after the juror is sworn and before the jury is completed."

Three jurors had been accepted and sworn to try the case wnen the District Attorney asked permission of the court to challenge one of the three so accepted and sworn. The defense objected unless cause should be shown. The court overruled the objection and permitted the District Attorney, without assigning or submitting any cause, to excuse the juror. It was a plain violation of an express provision of the statute.

2. After the jury had been impaneled and sworn, the District Attorney asked the court to appoint an elisor to take charge of it and offered several affidavits in support of his request. Counsel for the defense objected to any action being taken until copies of the affidavit should be served on them and they had had an opportunity to file counter-affidavits, whereupon the court said:

"It is no concern of yours, Mr. Barrett; you have nothing to do with it.

EX-SENATOR FULTON, WHO ARRAIGNS LAWLOR AND HENEY.

You may object to the whole thing, but I want to make it plain to you that it is none of your business. . . . You can object. I believe you have objected, and I would like to have you take your seat." The court then made an order adjudging the Sheriff and Coroner each disqualified and appointed one Biggy to act as elisor and take charge of the jury. Counsel for the defense objected to the appointment of Biggy, contending that he was an enemy of defendant, and they asked permission to file affidavits in support of that contention, but the judge declined to permit the affidavits to be filed or to hear the objections of counsel for defendant to the selection of Biggy.

Defendant's Rights Denied.

This was assigned as an error, and the court of appeal, in passing on it, said in part:

Without analyzing the rulings of the court in detail, it is sufficient to say that it appears that the court refused to allow the defendant to file counter-affidavits as to the fact of the disqualification of the Sheriff and Coroner, and acted upon the ex parte affidavits of the prosecution, which had not been even served upon the defendant. The court further refused to hear the defendant as to the enmity and disqualification of the elisor, Biggy. It was held by the court that the prosecution might have the Sheriff and Coroner declared disqualified from taking charge of the jury because they would not act impartially. It was in the next breath held that the defendant had no right to show that the elisor was disqualified by reason of bias and prejudice against defendant. These matters were of the utmost importance to defendant. If it was necessary, in order to subserve the ends of justice, that the political friends of the defendant should not have charge of the jury, it was equally necessary, in order to protect the rights of the defendant, that the elisor should not be a personal enemy of the defendant or in the employ of the prosecution. Fair dealing and the rights of the defendant required that he should be heard upon both propositions. If, after giving the defendant the right to be heard by affidavits or otherwise, the court, upon a full investigation of the facts, concluded that the Sheriff and the Coroner were disqualified, that would be a matter resting in the sound discretion of the court, and if the court concluded to appoint an elisor, it was equally important that the elisor should not have any bias or prejudice either for or against the defendant. Defendant had the right to be heard as to the qualifications of the Sheriff and Coroner, and also as to whether or not Biggy was qualified. If the Sheriff, by reason of his friendship for defendant, might in some way have influenced the jury, if they had been placed in his charge, it is equally clear that the enmity of Biggy to the defendant, or his friendship for the prosecution, might in some way have influenced the jury. It was of the utmost importance to the defendant.

Will any lawyer question the justice or soundness of the reasoning of the court? Indeed, it does not require a legal mind to appreciate the force and fairness of the views there expressed. Had they held otherwise they would have merited the condemnation of all honest men.

3.—The theory of the prosecution was that Schmitz, the defendant, as Mayor of San Francisco, exercising his power over one Reagan, a Police Commissioner, had conspired with his co-defendant, Ruef, to refuse to issue a license to certain restaurant keepers, so that they would be compelled to employ Ruef and pay him a large sum of money, ostensibly as an attorney's fee, but in truth to be divided with Schmitz; this constituted the alleged extortion.

The prosecution did not call Ruef as a witness in chief and closed its case without making any attempt to prove by direct testimony that Ruef gave to defendant or that defendant ever received any of the money claimed to have been paid to Ruef or that he was ever paid any money by any person on account of such licenses. Reagan testified to certain conversations had with Schmitz as did also one Malfanti. The conversations testified to by Reagan were to the effect that the defendant had told him that certain restaurants were bad places; "to hold them up and if possible close them up." Malfanti testified that he asked the defendant "why the licenses of the French restaurants were being held up," and defendant answered that he would see what could be done; that he would call a special meeting of the police commission and be there himself. When the prosecution rested, the defendant took the stand as a witness in his own behalf. His testimony in chief was confined to explaining or refuting the alleged conversations, the name of Ruef not being mentioned; nothing whatever was said about any money having been paid to Ruef or any other person. On cross-examination he was asked if Ruef had paid him any part of the $5000 which it had been testified by witnesses for the prosecution had been paid to Ruef. To this question defendant's counsel objected that it was not proper cross-examination, the matter not having been mentioned or referred to in the direct. The court overruled the objection and compelled defendant to answer. He denied having received any part of the money. He was cross-examined on the subject at length and the same question put to him in many forms and he was required to answer.

The California Penal Code provides, as do the codes of most states, that "no person in a criminal action shall be compelled to be a witness against himself, but if a defendant offers himself as a witness he may be cross-examined as to all matters about which he was examined in chief." Of course, the cross-examination to which Schmitz was subjected was improper and in clear violation of the statute and his counsel earnestly objected. The trial judge told counsel to take his seat and said to the plaintiff, "put him in his seat and if he does not take it, put him out of the room." The utterly disgraceful, not to say infamous, conduct of the trial judge appears, however, only by contrasting his ruling on the cross-examination of Schmitz with his ruling on the cross-examination of Ruef, for, though not called in chief, when the defense rested, the prosecution called Ruef ostensibly in rebuttal, though his testimony was in truth part of their main case and should in all fairness have been introduced before the prosecution rested in chief. He testified that he at one time gave Schmitz $1500 and at another time $2500 and told him it was a part of the money he had received from the French restaurants as a fee. Ruef admitted, however, "that he had stated to the prosecution that if he should testify to the facts in all their details, as they were, the larger part of them would be favorable to the defendant"; thereupon counsel for defendant said: "Well, what were those facts? State them now in detail in relation to this case?" The prosecution objected and the court sustained the objections and excluded the evidence, on the ground that it was not proper cross-examination.

Defendant's counsel asked witness (Ruef) if prior to the giving of the money to Schmitz he had any conversation with him in relation to any division of his fee. The court refused to permit the witness to answer, on the ground that it was not proper cross-examination. Counsel asked Ruef if he was not testifying under expectation of complete immunity. The court directed witness not to answer for the same reason. Numerous other questions of like character were asked by defendant's attorneys and ruled out as being improper cross-examination, notwithstanding every question was clearly asked by defandant's attorneys pertinent to the matter brought out in the direct examination excepting the question relative to immunity and that was designed, of course, to disclose the interest he had in testifying favorably to the prosecution, and probably no court in this land ever before excluded such testimony.

Higher Court Courageous.

Is it surprising that the Appellate Court reversed the judgment? Could an honest, courageous court have done otherwise? The rulings I have pointed out are but a few of many equally as erroneous. It was not, for instance, charged in the indictment that the defendant Schmitz was the Mayor of San Francisco, yet the theory of the prosecution was that as Mayor he was to exert his influence to hold up the licenses, unless satisfactory payments should be made to Ruef. If he held no official position he could exert no control in the matter of issuing or withholding the licenses unless by reason of sustaining some special, peculiar or exceptional relation to the city administration, and no facts showing or indicating any such relation were alleged; the prosecution apparently relied solely on the fact that he was Mayor and hence in a position to extort money by withholding the licenses unless the money should be paid. It does not require a trained legal mind to understand the importance in such a case of averring in the indictment the fact that defendant was Mayor. Even those in charge of the prosecution, it would seem, should have known that.

Of the trial judge I hesitate to speak, lest, mistaking ignorance for infamy, I shall express myself in language too severe, or mistaking infamy for ignorance, I shall condemn his conduct not sufficiently. Macaulay, speaking of Bertrand Barere, said: "In almost every particular sort of wickedness he had had rivals. There may have been," he said, "men as cowardly as he, some as cruel, a few as mean, a few as impudent. There may also have been as great liars as he, though we have never met with them or read of them. But when we put everything together, sensuality, poltroonery, baseness, effrontery, mendacity, barbarity, the result is something which, in a novel, we should condemn as a caricature and to which we venture to say no parallel can be found in history."

It remains only to add that had it fallen to the lot of Macaulay to read the record in the case of People vs. Schmitz, he would have either modified or qualified in some respects his famous denunciation of Barere.

I have not, however, referred to the decision in Schmitz' case either to condemn the prosecution or to defend Schmitz. The latter was probably a weak and corrupt official, but whatever may have been his character he was entitled to be tried according to the laws of the land. It was not for the court to assume his guilt and then proceed with an eye single to his condemnation. It was the sworn duty of the Appellate Courts to see to it that the plain, simple rules of justice, recognized in every civilized community throughout the world, were not trampled upon and ignored as the record disclosed had been done at the trial. The Appellate Courts did their duty, no more, and by so doing preserved the judicial honor of their state. In their decisions there was neither discussion nor application of technicalities. There is not a bar association in this country which, were the record in that case submitted to it, as an appellate tribunal, would not promptly and with at least practical if not absolute unanimity vote to reverse it. And yet I constantly see newspaper references to the Judges who joined in the decisions reversing the case, framed in the most cruel and contemptuous language, holding them up to public scorn and derision for having enabled "Schmitz to escape on a technicality."

State vs. Hembree Reviewed.

The recent decision of our own Supreme Court in state vs. Hembree has been severely condemned by a number of the influential newspapers of this state. No statement of the facts upon which the decision was based or of the reasons assigned by the court in support of its action has, to my knowledge, ever been published in connection with such criticisms. It has been deemed sufficient to characterize the decision as predicated on technicalities and as being the result which must be expected so long as the courts shall blindly and without discrimination adhere to precedents and continue to indulge in legal quibbling and cavil. Nevertheless the decision was, as a matter of fact, based entirely upon a very clear and plain provision of the Oregon criminal code.

Hembree was convicted of the crime of murder in the first degree. The evidence showed that the defendant and his family, consisting of his wife, a daughter, aged 18, and two sons, aged 12 and 14, respectively, resided on a farm in Tillamook County. During the month of December, 1905, the boys were absent from home for some days, and one night, during such absence, the Hembree dwelling was destroyed by fire and the remains of the wife and daughter were subsequntly discovered in the embers. On the night of the fire, between 2 and 3 o'clock in the morning, the defendant appeared at the home of a neighbor, named Hoyt, and inquired if his wife and daughter were there. Being informed that they were not, he stated that his house had burned down, and that his wife and daughter were "out in the cold," and asked Hoyt's brother-in-law, a Mr. Thompson, to go and look for them. Hembree was clothed only in a suit of underwear, a pair of old shoes and a hat, with a hop sack over his shoulders. He complained and gave evidence of being ill. Thompson went to Hembree's farm and found the house burned, but, finding no trace of the wife or daughter, notified other neighbors, who joined in the search. The following morning there were found in the embers two human skeletons, undoubtedly the remains of Mrs. Hembree and her daughter. There was no direct evidence whatever tending to establish criminal agency on the part of the defendant. It was contended by the prosecution that the following circumstances established the defendant's guilt:

First—His sons were absent when the house was burned, presumably by his connivance.

Second—There was a considerable mass of embers where the remains were found, which, it was contended, was greater than would have been supplied from the materials of the building.

Third—When the remains were discovered, no small bones were seen.

Fourth—Where the skeletons were found no remains of either of the heads were to be seen, but some days thereafter bones alleged to have been those of a human skull were found in a stove that had been in the house when it burned.

Fifth—Defendant did not return to the scene of the burned house that night or join in the search for his wife and daughter, but remained at Hoyt's house, went to bed and slept until 7 o'clock in the morning.

Story of Defense Unshaken.

The defendant testified that his sons were absent on a visit to relatives, which seems to have been a fact; that on the night of the fire he was sleeping in his undershirt and drawers when he awoke and found his chamber filled with smoke; he called his wife, who was sleeping in an upper room of the house. Neither the wife nor daughter stopped to put on clothing, but, both in night robes, seized bed clothing and went with him downstairs. Arriving there and finding a fire under the stairway, they endeavored to extinguish it with water from the kitchen. The wife tried to bring into the house a tub of water which was standing outside, but either the handle broke or she fell, and the tub overturned, spilling the water. The fire made such headway in the cloth and paper lining of the walls that it was seen the house could not be saved, whereupon they turned their attention to removing furniture and some had been removed when the daughter exclaimed, "Mamma, my trunk; my fine clothes!" Looking up the stairway towards the room where his daughter's clothing was kept, the defendant said; "Don't go up there; it is dangerous." Going then into the kitchen, he removed some provisions and dishes. The heat soon compelled him to retire, when he tried to find his wife and daughter, but, failing, concluded they must have gone to the home of Mr. Hoyt, so he started on a run in that direction. He arrived at Hoyt's suffering severely, and, retiring to a room, fell asleep, unconscious of the death of his wife and daughter. Such was his story.

Furniture, provisions, dishes, clothing and the upset tub were found near where the walls of the house had stood, mute witnesses, corroborative of a portion at least of his testimony. Touching the alleged remains of cranium bones said to have been found in the stove, one of the sons testified that some days subsequent to the fire, at his father's request, he searched in the ashes where the skeletons had been discovered, and there found a handful of bones, which he threw in a heap near the stove. Thereafter he tried to put the stove into shape for use, but found it too badly warped to be reconstructed. This seems to have been prior to the discovery of the mysterious bones in the stove. It also appeared that the chimney had fallen on the skeletons before they were discovered, and that the mass of bricks had to be removed before the bones could be secured for interment.

Inference Not Supported.

Such were the facts in evidence against the defendant. No direct evidence whatever connecting him with the alleged crime; all purely circumstantial and not by any means inconsistent with his innocence, sufficient to give rise to a suspicion of his guilt, but little if any more. The prosecution realized the importance, —if not, in the circumstances, the necessity—of establishing a motive on the defendant's part to commit the crime and for that purpose sought to prove that he had sustained criminal relations with his daughter, of which his wife, it was to be inferred, had probably become cognizant, and hence it was to be inferred a motive existed on defendant's part to get her out of the way. The only evidence tending in the least to establish such theory was the testimony of one Larsen, a hotel proprietor. He testified that the daughter attended school for about three months at Tillamook City, and that nearly every week defendant came to town and brought the daughter to witness' hotel to remain over night. There was no direct evidence that the defendant ever visited his daughter's room at night, but witness testified to circumstances occurring on two occasions which tended to prove that he did, and therefore the jury was asked to infer that he had done so. He was neither seen nor heard in her room. The utmost that could be justly claimed for the testimony was that it might be inferred therefrom that he did visit her room, and if so, it was contended that the circumstances were such as to justify the further inference that he did so for a criminal purpose.

Considering the relation of father and child, there was really no evidence to justify such inference, but in any case, as stated, the utmost that could be claimed for the evidence was that it might be inferred therefrom that defendant and his daughter had committed the crime of incest. From that inference, the prosecution contended, the jury might infer that the wife had discovered this criminal intimacy and that the defendant, becoming aware of that fact, had a motive for the commission of the crime charged against him. In other words, the jury were required to infer first, that defendant had committed incest, and second, assuming that as a "fact, legally proven," which it was not, to infer therefrom that the wife had discovered such criminal relations, of which inferred fact defendant, it was to be inferred, had become informed, hence the motive. On this theory the evidence tending to prove the incestuous relations was submitted to the jury by the trial court. In view of the provisions of the Oregon statute, which I shall shortly quote, it would be a work of supererogation to undertake to show how entirely untenable was the theory of the prosecution and how clearly erroneous was the ruling of the trial court. It is sufficient to quote the statute: Section 783 of the Oregon Code thus defines an inference:

An inference is a deduction which the reason of the jury makes from facts proved, without an express direction of law to that effect.

Section 785 of the Code thus prescribes what an inference, such as the law permits, must be based upon:

An inference must be founded:

1. On a fact legally proved, and
2. On such deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature.

Facts Must Be Proved.

Thus it appears that an inference must be founded on a fact legally proven, not on an inference founded on some anterior fact or on an inference founded on an inference founded on a still more remote fact.

Now, the fact which the prosecution sought to prove was that criminal relations had existed between defendant and his daughter, from which it asked the jury to infer that either the wife had discovered the existence of such relations and defendant had become aware of such discovery and hence had a motive for the crime, or that the daughter had become pregnant, of which fact he had become cognizant and hence a motive. It was, however, only an inference from certain circumstances that defendant had visited his daughter's room at all at night time; assuming that inference justifiable, the further inference was demanded, founded on the first inference, that, being there, he was guilty of incest, and founded on the second inference the jury was required to infer either that the wife had discovered such criminality or that the daughter had become pregnant, and based on such third inference to infer that defendant had been made aware of the knowledge of the wife or the condition of the daughter, therefore his motive. The court held that under our statute an inference cannot be founded on an inference. How could they in reason have ruled otherwise?

It is not my purpose to cite authorities or attempt an argument in vindication of the court's rulings. My purpose is simply to show that the decision was based exclusively on a positive and plain provision of a statute of this state which the court could not ignore without doing violence to their oaths or discredit to their intelligence. Indeed, the trial court might well have declined to submit the case to a jury. The evidence, given its utmost weight, justified little more than a suspicion of the defendant's guilt. Circumstantial throughout, it completely failed to rise to that dignity of proof which all experience has taught is requisite to guard against injustice in such cases, namely: "to exclude to a moral certainty every reasonable hypothesis but that of the guilt of the defendant." Or, in other words, as most eminent authorities state the proposition, and as all agree the law is, "all the facts proved must not only be consistent with and point to his guilt, but they must be inconsistent with any other reasonable hypothesis."

No one can reasonably contend that the proofs in this case measured up to this most just and humane requirement. It may be that Hembree was guilty. It is almost, if not quite as probable that he was innocent. Be that as it may, I refer to the case only to show how far wide of the mark were the newspapers in asserting that the Supreme Court was controlled either by technical rules or precedent in reversing it. The decision was based, as I think I have shown, on a very plain and easily understood provision of the Oregon statutes. If the statutory rule is unwise, let it be repealed, but do not condemn the court for observing it when by so doing they do but observe their oaths.

Aside from an intelligent citizenry, devoted equally to justice and to liberty, the most important and essential element in our fabric of government is a fearless and honest judiciary. Courage is as essential as integrity, for cowardice oftentimes approximates and may easily become as hurtful and prove even more disastrous than corruption itself. The danger is not that our courts will evidence too great a devotion to precedent. Indeed, adherence to precedent and uniformity of decision are essential to a just and impartial administration of the law. The real danger, in a government such as ours, where the stability, peace and good order of society, depend so largely upon the integrity, courage and wisdom of courts, is that judges will too frequently bow to the popular clamor of the hour, and that optimism, rather than rules born of the wisdom of experience, will guide and control judicial decision.

SPOKANE ATTORNEY FLAYS DIRECT PRIMARY LAW—SAYS IT'S FAILURE

Frank T. Post, in Address Before Session of Oregon Bar Association, Scores Modern-Day System of Election, Mentioning Particularly Present Method of Selecting Judges of Various Courts in Oregon and Washington.

HAVING been so long delayed by interrupted train service that he was unable to reach the session of the Oregon Bar Association prior to its adjournment, Attorney Frank T. Post, of Spokane, arrived in Portland late Wednesday night, and at the banquet tendered the members of the bar, spoke of the present methods of selecting judges of various courts in Washington and Oregon.

Without any hesitation he declared the direct-primary nomination law a failure, deprecating its tendency to lower the standing of the judiciary, and contending that it is in contravention of the provisions of the constitution.

Mr. Post was well received by the members of the Oregon bar and his remarks created a most profound consideration of the subject. The full address is as follows:

At the present time the popular, or at least common, subjects for addresses or papers before conventions of lawyers, seem to be those relating to court procedure, and discussed under various heads, such as "The Law's Delay," "Defects in Criminal Procedure" and "Legal Technicalities." While these questions are of interest to the profession and of importance to the general public, it has seemed to me that there are other questions which the bar, particularly of the Northwest, should fully discuss and after careful consideration give the public the benefit of their views. And that the question of paramount importance might properly be given the title, "The Effect of the Direct Primary Law Upon the Character, Ability and Independence of the Judiciary." Perhaps a question of even greater importance to the whole people is the wisdom or folly of recent legislation in certain sections of the country, particularly the Northwest, tending towards material changes in our form of government as established by the Constitution of the United States and the constitutions of the 13 original states. I particularly refer to the legislation that is known generally as "initiative and referendum," "recall," "direct primary" and election of United States Senators by popular vote. In order to fully discuss the first subject stated, it is necessary to touch somewhat upon the second subject. The government established by the fathers and whose success and stability has been the marvel of the world, is a republic and not a democracy. In the series of letters published in the city of New York before the adoption of the Constitution and republished under the title "The Federalist," written by statesmen then of great renown and now of even greater renown, namely: Alexander Hamilton, James Madison and John Jay, the authors comment upon the dangers of democracy and the difference between a democracy and the government proposed to be established. In one of them Mr. Madison says:

"Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

Cure Is Promised.

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

"The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

"The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or practical considerations."

The great care taken by that remarkable body of men who framed the constitution of the United States to establish a republic instead of a democracy is shown by a study of its provisions.

Present System Questioned.

The chief executive is not elected by popular vote. The will of the majority of the people as to the personnel of the chief executive is not controlling, nor is he elected by the states, but "each state shall appoint in such manner as the Legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector." And these electors shall elect the President and Vice-President. The legislative department of the government is divided into two parts, the members of one coming directly from the people, or rather from Congressional districts, every two years, while the members of the other are selected by the states, two from each state, through their respective Legislatures, who are the representatives of the people of the state in the state's legislative department. The term of office of the Senators is six years. And one of the purposes of the provision making a different length of term of office, as well as a different method of selection of Senators, is to prevent legislation resulting from the temporary whims, passions or prejudices of the people. The other great department of the government is the judiciary department. Note the precautions taken to protect the people from the influences of the demagogue and the charlatan and petty politician in the selection of men who are to preside over this, in many respects the greatest and most influential department of the government. The Judges are not only not selected by popular vote, but they are not even selected by men who have been elected to their respective offices directly by popular vote. They are appointed by the president, who is elected by the electoral college, and confirmed by the Senate, who are elected by the Legislatures of the respective states. The result has been, throughout the entire history of this country, the selection of a body of men of the highest patriotism and the greatest ability. It is our just boast that in the truest and best sense, the wisest and ablest court known to history is the Supreme Court of the United States. To that court more than any other body of men is due the strength and stability of the nation, and the protection of the rights and liberties of all the people as guaranteed to them by the Magna Charta and our common law, and the Declaration of Independence, and the constitution of the United States.

Republic Change to Democracy.

It is not my purpose to enter upon a discussion of the merits of the statutes known as "initiative and referendum," "recall" and "direct primary," but to call your especial attention to the fact that the tendency of these statutes,

(Concluded on Page 9.)