

NORTH DAKOTA DECISION DOES NOT AFFECT STATEMENT NO. 1

Frederick W. Mulkey, former United States senator from Oregon, head of the Oregon tax commission, which drafted some of the most important laws now on the statute books, and prominent attorney of Portland, takes the stand that the Oregon direct primary law and Statement No. 1 is not parallel to the law of North Dakota. He contends that the decision of the supreme court of North Dakota declaring the primary law of the state, that pledges exacted of members of the legislature are unconstitutional, does not apply to the Oregon law in any way.

The two laws are entirely different, Mr. Mulkey contends, and in support of his argument he has written a clear and forceful statement regarding the matter. In his letter, Mr. Mulkey says:

Holds Decision Is Sound.
Portland, Or., Nov. 14.—To the Editor of The Journal—In compliance with your request that I give you my opinion upon the application of the recent decision of the supreme court of North Dakota upon the question of the primary law of that state, in as far as its primary law deals with the election of United States senators and the pledging of members of the legislature to support the choice of the party for United States senator, to the primary election law of the state of Oregon upon the same subject, I desire to state as an introduction to my opinion that, in my judgment:

First—The decision of the supreme court of North Dakota is sound in every particular.

Second—That those parts of the primary law of North Dakota which are held to be unconstitutional and void by the supreme court of that state are not contained in the Oregon primary law upon the same subject, either by expressed language, by implication or analogy.

Third—That the obiter dicta of the supreme court of North Dakota in that part of its opinion which holds the pledge of members of the legislature to vote for a party for United States senator to be void and unconstitutional is not unfavorable to the constitutionality of the Oregon law upon the subject.

Fourth—That the opinion of the supreme court of North Dakota upon those portions of the primary law of that state that are analogous to the Oregon primary law upholds the constitutionality of the law in so far as it is within judicial power to pronounce upon the subject.

As to the Pledge.

The part of the primary law of North Dakota which the supreme court of that state held to be unconstitutional and void was as follows: Section 4, chapter 109 of the laws of 1907, which required a candidate for legislative nomination to take the following pledge before his name could be placed upon the primary nomination ballot:

"I, the undersigned, a candidate for the office of member of the legislative assembly of the state of North Dakota, do pledge myself to the people of the state of North Dakota and the people of my legislative district during my term of office, I will support and vote for that candidate for United States senator in congress of the party of which I am a member who has received a majority of such votes for that position at the primary election next preceding the session of the United States senate in congress; provided, that in case no candidate of my party receives 40 per cent of all the votes cast for the office of United States senator of my party, then and in that case I pledge myself to vote for the candidate of my party who receives the highest number of votes at my party at the general election succeeding such primary election."

The court very properly held this pledge to be unconstitutional, because the constitution of the state contained all the qualifications for holding office, and to require the candidate to take an additional statutory qualification, that his name could be placed upon the ballot, was unconstitutional.

lot contravened the organic law upon the subject and was, therefore, void. In this respect the opinion says: "If the provisions of the act (section 4), requiring said oath and pledge, conflict with section 211 of the constitution of this state, then of course, those portions of the act are null and void. We think it plain that they do thus conflict, as they add another oath, declaration and test as a qualification for the office."

No Effect on Statement No. 1.

But this cannot be considered a decision from which it can be concluded that the pledge contained in the Oregon primary law (Statement No. 1) is unconstitutional, because the statute providing for the Statement No. 1 pledge does not make the pledge a qualification for office. A legislative candidate is not required to take the pledge to vote for the choice of the people before his name can be placed upon the primary ballot. He may, however, within his own discretion, take either Statement No. 1 or Statement No. 2, or he may regard the choice of the people merely as a recommendation, or he may take no pledge at all. The law being the point in that it leaves it all to his discretion.

As to the obiter dicta of the North Dakota opinion that declares the pledge under the law of that state to be unconstitutional and its application to the Oregon primary law, which, as I have said, does not contain the pledge as a qualification to hold office, the court says:

"We shall assume for the purpose of this case that if these contentions are sound, the writ should issue, although we confess our inability to understand just how the writ prayed for, can, if issued, operate to cancel what has already been done by defendant pursuant to this law. The candidates for the legislature have long since taken oath, and made as given, the pledge exacted of them by sections 3 and 4 of the act. Such a pledge at most merely created a moral obligation, to fulfill the same. If the law under which the pledge was exacted is held void the moral obligation will still continue, and no judgment of a court can obliterate it. It would seem that the court do not and cannot deal with mere moral obligations."

Moral Obligation Recognized.

Had the court used the term "political obligation" or "political responsibility" in place of "moral obligation" the language would have been more appropriate in any event, whether the term moral obligation or political obligation be employed, it imports the laying upon the one that takes the obligation the performance of duty; which duty, however, is not enforceable by a court of justice. In other words, a duty the performance of which cannot be compelled or the breach of which cannot be redressed by the judicial power, but which can, however, be redressed but not enforced by the political power.

I have referred to the fact that in the North Dakota case the provisions of the law analogous to the Oregon law were held to be constitutional. Those provisions are the ones that permit the names of candidates for the United States senatorship to be placed upon the ballot in order to submit to the determination of the voters their choice in the election, which I am both the North Dakota primary law and the Oregon primary law contain such provisions to ascertain the party choice, while the Oregon law goes a step further and under its general election law seeks to ascertain the people's choice as between the candidates of each party previously selected under the primary law. In legal contemplation, however, there can be no difference as the reasoning in the North Dakota primary law case is fully applicable to the provision found in the Oregon general election law. The analogy in this respect is complete.

What Is Constitutional.

The supreme court of North Dakota says on this point: "We conclude that the requirements of such a pledge violate section 211 of our constitution in

that it exacts an additional test in contravention thereof. But does it necessarily follow from this that all other portions of chapter 109 relating to the election of United States senators and giving the electors of each party an opportunity to express their choice for the candidates for such office are also void? We think not. The pledge requirement is but one step to effectuate the main object sought to be accomplished, to-wit, the selection of a United States senator in accordance with the choice of a majority of the members of the political party with which he affiliates. In other words, the provision of this law permitting the expression of the party will as to United States senators, if constitutional, (held in this case to be constitutional), must stand even though the provisions requiring a pledge from the legislative candidate that he will abide by such expressed will cannot stand because unconstitutional.

"This logically brings us to a consideration which is that the entire act, so far as it relates to candidates for United States senators is void under the constitution of the United States. Much of the argument advanced in support upon this branch of the case is based upon the assumption that the pledge feature of the law when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates is effectuated as an election of United States senators by popular vote instead of by the legislature as the federal constitution requires. Therefore, the pledge feature of the statute is eliminated because unconstitutional much of counsel's argument ceases to have any force. It certainly cannot be contended that the provisions permitting the voters of each political party merely to designate their choice for senator amounts to an election of such senator, as it amounts to nothing more than the right of petition, a right which is guaranteed and not deprived. The legislative member is in no manner obligated or required, except perhaps morally by reason of party support and fealty to vote and support a candidate of his party's choice thus expressed."

Names on Ballot Upheld.

From this it must be concluded that under this decision the names of the party's candidates for the nomination of United States senator under the Oregon law can be constitutionally placed upon the primary ballot to ascertain the candidate who is entitled to party support and this as a basis for the moral obligation to support the candidate, the right being guaranteed under the right of petition. If this be true can it not be said if there be not legal interference with party integrity that the same can be done by placing the name of the party nominee for United States senator upon the general election ballot to ascertain the person who is entitled to the support of those members of the legislature who have placed themselves under a moral obligation? If the right under petition is given to the members of a political party can not the same right be given to the entire electorate of the state?

In the North Dakota case the moral obligation existed because certain candidates for the legislature bound themselves under an unconstitutional law. Under the Oregon primary law the candidate is left free to take a moral obligation or not as he may see fit; if he does take it, all the primary law of Oregon does and all the general election law upon the subject does, is, first, to furnish evidence of the moral obligation by the filing with a proper state officer the pledge (Statement No. 1) and then by ascertaining the party's nominee at a primary election and thereafter the people's choice between the different party nominees at the general election furnished a basis by which the electorate of the state may determine whether those who voluntarily placed the moral obligation upon themselves have or have not performed that moral obligation at the time the legislature votes for United States senator.

FREDERICK W. MULKEY.



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GROWING INTEREST IN WOLF CREEK MINING RECALLS EARLY DAY TIES

(Special Dispatch to The Journal.)
Wolf Creek, Or., Nov. 14.—Great interest is being taken in mining on Wolf and Coyote creeks, which were the scenes of great activity in the early sixties, and the stories of those days are being reviewed. Four miles of Wolf creek runs through what is commonly known as the "Wolf Creek" property, on which Oregon's ideal colony is now forming. One of the parties to the property continues their course for another mile on the same property. Reports that lumbermen in mining wells years ago went through dirt from which 10 and 15-cent nuggets were washed have been confirmed by actual tests in the last few days, and there are many places where a man with pick and shovel can make from \$2 to \$4 per day. At one time, between 1861 and 1865, over 400

men were at work on Coyote creek and a \$200,000 nugget was found. It was quite common to find nuggets of from \$25 to \$75, and \$10 to \$17 to the pan. Water was scarce and little cars carrying 1,200 pounds of gravel were hauled to water and these carloads ran as high as \$75. The Ruble mine, four miles up the creek, has been worked for years and now yields from \$200 to \$6,000 per year, at an annual expense of about \$1,500. There is much virgin ground along the creek which is being explored for large returns, and the workings of the past few days have renewed the interest in mining as well as increased the satisfaction of those who have already purchased tracts for fruit purposes, as the best pay streaks are along the creek and little land will be spoiled for fruit. A nugget was exhibited yesterday from Coyote creek worth about \$50.

QUICK SERVICE ON SALEM LINE

New and Faster Trains Begin Today on Oregon Electric System.

Beginning with today's service the Oregon Electric railroad will operate eight through trains daily each way between Portland and Salem. The first train leaves Portland for Salem at 6:25 a. m. and the last at 8:40 p. m.

No train will take longer than two hours to make the trip of 59 miles, and the limited Capital City Flyer will make it in one hour and 35 minutes at an average speed of 51 1/2 miles an hour. Train No. 3 is to be known as the "Lawyer's Special" and will leave Portland at 8 in the morning, arriving in Salem at 10:02. With the consent of the Chief Justice of the supreme court whenever cases from Multnomah county are called court will not open until 15 minutes after the arrival of this train. This will enable supreme court lawyers to leave Portland at a comfortable hour in the morning and reach the capital in time to be present at the opening of court.

The limited train, No. 5, will leave Portland at 9:15 a. m. and reach Salem at 10:50 a. m. going, and returning, the Rose City limited will leave Salem at 3:05 p. m. and arrive in Portland at 4:45 p. m. Other trains will leave Portland for Salem at 6:25 a. m., 8 a. m., leaving Salem for Portland the following trains will be put in service, 6:40 a. m., 8:55 a. m., 11:15 a. m., 1:40 p. m., 3:05 p. m., 6:20 p. m., and 8:40 p. m.

Train No. 6 which leaves Portland at 9:15 a. m. will connect with the Southern Pacific from McMinnville and Dalles at Tualatin at 9:45 a. m. and with the Forest Grove train at Garden Home at 9:25 a. m. Thus giving residents along these two lines much quicker service into Salem than they have had in the past.

WAREHOUSE SITES.

Exceptionally Fine Properties Up for Sale.

A single corner, 50x100, fronting on the railroad track on Fifteenth street, just across from where a new four-story brick warehouse is to be erected, above high-water mark of the city, the best lot in the city for the purpose at the price. Quarter block, Choice quarter block on Fifteenth street, on the east side, immediately across from the new six-story brick to be erected covering whole block, entirely above 1894 high-water mark. The best quarter block in the city for warehouse or factory, needing railroad facilities, to be had at the price. Half block, Full half block, fronting on railroad track on Fifteenth street, suitable for large warehouse or factory site, with frontage on the railroad on one side and streetcar line on the other. See us if you want good warehouse or factory sites at low prices. CHARLES K. HENRY & SON, 250 Stark Street, Portland, Or.

ANNUAL BAPTIST RALLY TOMORROW

The fourth annual rally of the Baptist churches of the city will be held in the White Temple tomorrow. It is expected that fully 1,500 pastors and members of the Baptist church will be in attendance. The attendance at this rally has increased 300 each year for the past three years and should be fully as much this year.

\$24,000 DEPOT FOR PENDLETON

(Special Dispatch to The Journal.)
Pendleton, Or., Nov. 14.—Pendleton gets a new \$24,000 depot, according to the statement of General Manager J. P. O'Brien of the Harriman lines in Oregon made this morning to a committee of representative business men. In addition, changes will be made in the location of the roundhouse, etc., which will make a total of improvements worth \$45,000 in the local yards. The station will be similar to that erected at Albany. Work will be commenced as soon as arrangements can be made.

CONSOLIDATION OF ST. LOUIS BANKS

St. Louis, Mo., Nov. 14.—A deal was consummated today by which the National Bank of Commerce took over the commercial and savings accounts of the Commonwealth Trust company. The bank of Commerce receives \$9,000,000 additional deposits, making it the largest depository in the country outside of Chicago and New York.

Garage Property on Chapman Sold

E. J. Daly reports the sale of a lot 45x100 feet on the east side of Chapman, between Yamhill and Taylor, for \$10,500. The property was owned by C. Aarne Jr. There is a concrete and corrugated iron garage on the lot.

SIDELINE STORIES OF GREAT NORTHWEST

ELECTION PROMISES BOTTLED

Two Factions Will Fight for Control at Marshfield.

(Special Dispatch to The Journal.)
Marshfield, Or., Nov. 14.—The city election in Marshfield next month promises stirring developments. The mayor holds over for another year, but there will be a fight on the alderman candidates, who represent the present administration. Recently there was formed an organization which is known as the Civic League. This body has a membership numbering in the hundreds. Frequent meetings have been held and resolutions passed demanding that a good business administration be carried out in the city. To bring about this ideal of city government the members of the Civic League will put up independent candidates for aldermen. The city is divided into two factions.

THEATRES ARE DANGEROUS

Near Panics Cause Marshfield Council to Act.

(Special Dispatch to The Journal.)
Marshfield, Or., Nov. 14.—Threatened fire in a theatre in Marshfield and a recent blaze in one of the shows at Coquille, when a panic was barely averted, has aroused the city council to take steps to prevent the better protection of the patrons of these places of amusement. At the last meeting of the council the city attorney was instructed to draft an ordinance covering the protection desired. The measure will require that the machines be enclosed in a metal box, that doors be closed, and that other similar precautions be taken.

FARM DWELLING BURNS

Residence of Grant Dodge Is Destroyed by Fire.

DIRT SOON TO FLY

Work to Commence on Fill Over Government Canal.

(Special Dispatch to The Journal.)
Klamath Falls, Or., Nov. 14.—Dump cars and engines have arrived in Klamath Falls and are being taken to the railroad camp on the Hot Springs road, where they are to be used in making the fill over the government canal, and at the station grounds. A force of men will be employed all winter on the cut and fill, as several acres of yards and switching grounds are to be filled and made ready for track laying. Two large shovels are now working within sight of this city.

\$50,000 FOR RIGHT OF WAY

Union Pacific Pays Out Big Sum in Washington.

NEW FORCE APPOINTED

Instructed to Enforce Laws Without Fear or Favor.

(Special Dispatch to The Journal.)
Klamath Falls, Or., Nov. 14.—The new police force appointed in Klamath Falls is instructed to enforce the law without fear or favor. After the council discharged the old force an account of the alleged failure to discharge its duties, the new force with Oscar L. Carter, as chief, was appointed and is now on duty.



Gift Furniture

No gift is so sure of welcome as a piece of furniture. Christmas stocks now on show. Extraordinary selection includes CHAIRS, SETTEES, ROCKERS, SEWING TABLES, TEA TABLES AND TEA WAGON, MUFFIN STANDS, MUSIC AND CURIO CABINETS, CONSOL TABLES, BOOK BLOCKS, CANDLE STICKS, HALL CLOCKS.

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The Latest New York Novelty
Pompeian Willow Furniture
New, Beautiful and Not Expensive.
See Window Display
Late arrivals in the Carpet Department include new Axminster in tan grounds; new Brussels in blues, grays and greens; new Ingrains and new Wilton, Brussels and Scotch Caledon Rugs.
For the Hall, Parlor, Dining-Room, Library and Bedroom.
Magnificent Assortment of Rugs and Carpets.
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