ARGUMENTS AGAINST THE REFERENDUM

(Continued from page one).

Malarkey's Contention.

Mr. Malarkey cited a Nebraska decision that upheld a law declaring that petitioners must give their age when signing the petition. It referred to proof of bona fide signatures, the genuineness of which it attacked in this case.

He argued that because the legislature required certain forms to be complied with, that requirement was material, and must be complied with. Legislative requirements were mandatory, not merely directory. He charged that signers were secured for selfish purposes or for pay. People signed then for self-defense. He also charged that people would sign almost any petition. Only 5 per cent had to be secured to sign the referendum petition. The 95 per cent also had a right to be heard. The legislature wanted to preserve the purity of the ballot. Mr. Malarkey contended that no one could be prosecuted for signing the petitions illegally, when the warning was omitted from the head of each sheet. He said to escape harrassment he had signed all petitions presented to him. He had probably signed some twice. Prominent men had signed some of the petitions twice. If the contention is sustained by the court that it is mandatory to print the warning against signing a petition illegally, all referendum petitions prepared this year will be nullified. Tis great argument for his contention was that statutory requirements to prevent frauds in elections, petitions and all political proceedings were held by the courts to be mandatory.

Judge Webster's Review.

Judge Webster said he would not offer himself as a witness, as Mr. Malarkey had done in this case. He could present a far different state of facts if he went upon the witness stand. He contended that it was not necessary to prove the last legislature guilty of any absurdity. It had convicted itself. The warning clause was not required by the law to be printed on the petition. People who signed petitions indiscriminately would not be deterred by forty warning clauses. **"THE FORMS HEREIN GIVEN ARE NOT MANDATORY"** was the language of the statute itself That made them merely directory. The law went further and said no merely clerical and technical defect should defeat a petition for the referendum. The law did say it was a felony to sign these petitions twice or illegally, but it was not the petition or part of the petition itself. By the very terms of the law the warning was not a part of the petition. The power of the referendum was exercised by the people of the state, and signing it made th esigners' individual petition, the individual responsive action of each signer. The absurdity of the petitioner holding out a red flag of warning to himself, warning himself against committing a felony against himself. Every American citizen was presumed to know the law. Why did they attack this technical weakness alone, when there was half a dozen such technical loopholes, and it was almost impossible to get up one of these petitions that was technically correct. The legislature could tie up all the constitutional rights of the people with absurd technicalities. With its power to attach an emergency clause the legislature could nullify the right of the people to annul the constitution itself. If sent by a man, instead of "brought by a man," it was clearly illegal. The law itself did not specify that the warning must be part of the petition. There was a general presumption that these petitions were genuine and honestly and fairly obtained. If the substantial right thing has been done, if the spirit of the law and constitution have been complied with, this should stand. They were attacking a defect, not a single signature was called in question. There was no lack of compliance with the spirit and general purpose of the law. Whether one bill or the other stood or fell was not material, as a far deeper question was involved. It was here contended that on a merely technical defect, in a special act of the legislature could defeat the solemnly enacted amendment to the constitution. Could the fundamental rights of the people be nibbled away by constant encroachment. This referendum amendment was a solemn declaration by the people that they stand above the legislature. The unlimited and unbroken power of the legislature to make laws ended when the direct legislation amendment was added to the constitution. The people were placed above the legislature and and above the government, and Judge Webster contended th· legislature had no right to define the form of petition or the style of same. It manifestly and intentionally attempted to limit and embarrass the constitution in the law of the recent legislature. All that was required was that five per cent of the voters sign a petition for the referendum, and file it with the secretary of state, and whether it was rolled on a corncob and tied with a tow string, or on pink paper scented with some delicate perfume, as the legislature might declare, as was contended by counsel against the referendum. There was no legislation permitted as to the forms of the petition. The legislature could provide for submitting the questions referred to the people after the petitions are got up and filed. The enactment of the last legislature, hedging about the right to submit petitions with all kinds of technical details and red tape, was in derogation of the rights guaranteed to the people by the constitution, was clearly unconstitutional.

More Technicality.

Mr. Malarkey in reply attacked the position of Judge Webster, that the warning was not part of the petition. He argued that every word of the law must be considered in the construction of the law.

"Why didn't the legislature say the warning should precede and be a part of the petition?" asked the attorney-general.

"It meant that it should precede the petition if it did not say so," said Malarkey. Mr. Malarkey then made some extended general remarks intended to illuminate the mind of the court, but in which the reporter could not trace the slightest relation to the subject in controversy. He still hinged all his contention on the warning clause being omitted as a fatal defect of the petitions.

More by Webster.

He offered as rejoinder that the direct legislation clause of the constitution was self-acting. It required no hand-out information from a set of men calling themselves legislators whose aggregate wisdom was no greater than of any other equal number of men.

A Word by Crawford.

The attorney-general said the warning was not in any sense a necessary part of the procedure of submitting a matter to a vote of the people. It stated no fact necessary to the determination of anything, and hence was not material.

Objected to Bingham.

Upon Geo. G. Bingham being announced as associate counsel, attorneys for the Linn county counsel objected to his appearing in a general manner. Unless he showed his authority or stated who employed him, he could not appear. He then stated that he appeared for the University.

Mr. Pogue said the University had said in the press that they would not appear in the case. They had no right to interplead. The University was not a party to the case, and had no right to appear. They were not parties to the record, and he filed a writ ten motion of protest at their appearing in a case in which th·y had thus far failed to show their hand. Mr. Bingham said he appeared for the secretary of state. But that did not satisfy the counsel for the farmers. Mr. Crawford said he was perfectly willing Mr. Bingham should appear with him as associate counsel for the secretary of state. He did not employ him, and had no authority to do so. The court ruled that if Mr. Bingham said he appeared for the secretary of state that ended it.

The University Case.

In opening Attorney-General Crawford said there was no question involved in this case, but the defect of the title of the bill on the petition. No exact copy of the bill was attached to the petition. He waived the alleged defect as to the warning clause not being at the heads of the petitions, or the size of the paper, or legality of signatures.

Mr. Pogue's Argument.

He contended that many of the precedents from other states had no bearing on this case, as this state was acting under a new system, that in the constitution itself was self-enacting. Direct legislation was a new departure in which the people sought to protect themselves against outrageous laws. The people reserve dto themselves the primary right to vote on all laws imposing new taxes, and all laws guaranteeing the right to a vote on any matter were construed liberally in favor of the citizen and against the officials attempting to limit that right. Such rights could not be abridged by an unreasonable act of the legislautre.

It appeared from the record that the plaintiff sent a reliable agent to the secretary of state for a copy of the bill sought to be referred. He did not ask for a certified copy, and was given a copy of the bill as introduced in the legislature. Afterwards the title to the bill was amended, not so as to change the title, but to make it read in addition that it repealed a certain section of the code. The initiative petition requires a full and correct copy of the "title and text of the measure," and the referendum petition shall contain a full and correct copy of the "measure." The "measure" was the law sought to be referred to the people, and the title of the statute was not a part of the bill. The title was a legitimate aid in ascertaining the meaning and intention of the legislature. The title was part of an act, but not a part of the measure or the law.

Was the petition good without the title in full? The law was defined and specified by the title. This petition did set out a full and correct copy of the measure itself. He showed the court several titles of bills enacted by this very legislature with titles so long that no room would remain for a single signature, to say nothing of a copy of the measure itself.

It was absurd and unreasonable to say that this was a mandatory provision of a complicated enactment by a careless legislature. The people had a right to vote on this matter, and they asked that the statute be followed in its plain terms and the right the people had must be construed in a reasonable manner as a strict construction would make this law impossiblo to be followed.

What Crawford Said.

The attorney-general argued that the law of June 7, 1902, required legislation to carry it into effect. He denied that the direct legislation amendments were not self-enacting General laws were enacted as to the manner of exercising initiative and referendum He did advise the secretary of state to reject the petition for the University referendum for the reason that it did not set forth a correct copy of the bill including the title. Technical and clerical errors did not permit complete omissions of a part of the whole of the title. No man's opinion could decide what was substantially the act in question.

"Could any man who read that petition fail to understand what he was signing?" asked Ford.

"I will admit that no one was deceived," said Crawford. "But the people must have some rule to go by. If the legislature passed a bill as defective as this one is, the courts would not sustain it. By direct legislation we must proceed as carefully as the legislature itself. It would not do to depart from the forms laid down, and the only safe rule was to follow the law. To follow the law substantially would not do in enacting laws, and was not safe in repealing them. No omissions could be tolerated. He cited many learned authorities to sustain his contention that there can be no omission of any one thing contained in the original. This bill attached to the petition did contain a complete omission of the words from the title to the section of the code repealed. The repealing clause omitted from the title was embodied in the measure itself that was attached to the people. "A full and true copy of the measure" meant title and all, and that could not be figured out.

"How do you harmonize the difference between the requirements for the initiative petition of a full copy of 'the title and the measure,' and in the requirement for the referendum petition of the 'measure' only?" asked M. Pogue.

Mr. Crawford did not "harmonize," but he did a stunt of well-trimmed and clearly-defined trimming and word-spelling, and most admirably dodged the question. He reiterated his statement that he did not hold the warning required by the statute to be material, but he thought the title was material.

Mr. Bingham Talks.

He said he did not wish to get at cross-purposes with the attorney-general, and said the court might reverse the counsel for state as to the notice of warnnig.

Mr. Ford objected to Mr. Bingham attacking the defective warning clause. The mandamus proceedings were under stipulation, that nothing was attacked in this proceeding but the question of title. The University had been publishing that the regents of the University were not taking a part in this proceeding. The gentleman was butting in where he did not belong.

Mr. Bingham said he felt flattered at the objections of opposing counsel. Counsel had erred in not securing a certified copy of the bill. They had taken an incorrect copy, and now excused themselves for their blundering. The cold question to be determined here was a question of fact. Was this referendum petition prepared and filed in compliance with law? He claimed it was not. He then went on to show the technical defect in the petition, and why it was rejected. Mr. Bingham closed the afternoon's forensic display with an able review of the contentions of the University regents, in the guise of appearing for Secretary Benson.

Hon Til Ford's Argument.

The cases cited in support of opposing counsel are not applicable, for those petitions were drawn under a mandatory law, commanding that certain things be complied with. The referendum law of Oregon is not mandatory, but directory, and so distinctly states. The referendum, as far as the form of petition is concerned is simply directory, and is, in fact, but a suggestion as to the form of the petition, a guide as it were, which the law says shall be substantially complied with. The word "substantially," and its meaning, has much to do in the case. It means that if all the essentials are stated, the form of their statement is immaterial. The statutes says they shall "substantially be as follows." It does not say this form of petition should be followed. Mr. Ford then analyzed the statute, showing the mandatory parts thereof and its directory. The size of the paper is mandatory, seven inches wide and ten inches long, and that only 20 names shall be on each page thereof. It would have been, and is impossible to print in full the title, etc., on the paper of the size made mandatory, and leave room for 20 names, but the substance of the act can be put thereon, leaving such room, and it is fair to presume that the legislature would not have enacted a law impossible to have been complied with, and this inference is emphasized by the language of the act itself, that the substance of the matter necessary to be put upon such petitions would be sufficient.

Mr. Ford took up the title of the act, and showed that the title of the amendatory act was fuller than necessary, stating much that could have been left out. The old title, the title used in the referendum petitions covers the whole matter, and is certainly all that is required to give notice to any man of common intelligence what the intention and the object of the petition was, and when that is done all that the law requires is done. An abstract of the law, or an abstract of the title, so it substantially complies with and states the facts is sufficient, and the people of the state should not be cut off from their rights by some technicality, the non-compliance with which mislead no one, and injures no one.

Old Law in Effect.

The initiative law is different and is mandatory, and states that "a true copy of the title and text of the measure shall be attached to the petition." The referendum does not require this.

The title is part of a bill, but it is not part of the law. Therein lies the necessity of putting the title in the initiative, because the constitution requires it, it being part of the act.

Judge Ford thought it remarkable that all the lawyers who drew a referendum petition overlooked the warning clause, if it was necessary, but it was not remarkable when it was taken into account that they each construed the law the same way, that is that the warning clause had nothing to do with the petition.

"Judge Bingham came up to represent the University of Oregon, which is taking no part in this case," said Mr. Ford, "and finally wormed into the case through the courtesy of the attorney-general, though he had no business in the case as the University of Oregon is not a party to the case." The University of Oregon appropriation is the bone of contention between the petitioners on one side and the secretary of state on the other, and it shows the remarkable spectacle of the bone taking part in the fight." Mr. Ford then explained the little joker in the bill, the nigger in the woodpile, being the clause in the bill, which made no provision for returning any surplus to the state, should the entire appropriation be unexpended. It was for this reason the governor vetoed it.

The point was made that the law did not go into effect until May 25, because the emergency clause provided it should go into effect on the approval of the governor, but as the governor did not approve it, it had to take its course of 90 days before it could go into effect, and so the old law was in effect at the time the petitions were filed, and this law the petitions in the case complied with.

Tenement Collapsed.

New York, June 25.—Seven children, all members of an Italian family, were crushed to death this morning by the collapse of a tenement. Firemen dug scores of injured from the ruins.