

## The Commoner.

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## APPRECIATED IN KANSAS

B. A. Fletcher, Caldwell, Kan., Nov. 3, 1911.  
—Find enclosed bank draft for \$17.60 for which send The Commoner to the following named persons for the period set opposite their respective names.

## Direct Legislation Before Supreme Court

George Fred Williams of Massachusetts has filed an interesting and instructive brief in the direct legislation case now before the United States supreme court.

The first installment of this brief was printed in The Commoner of November 10. The second installment appears in this issue. Other installments will follow. The second installment of Mr. Williams' brief follows:

## II. The Guaranty

## A. THE DEMAND FOR THE GUARANTY

Quotations could be multiplied to show that the entire direction of the people's thought was toward the protection of national as well as state governments against the return of the tyrannies which they had just thrown off by rebellion.

"In truth," said Jefferson, "the abuses of monarchy had so much filled all the space of political contemplation that we imagined everything republican, which was not monarchy." Letter to Kerscheval, July 12, 1816.

The sole purpose of the guaranty clause was to protect the union and states against monarchical and aristocratic changes.

Cooley Constitutional Limitations (7th Ed.) p. 28.

"to defend the system against aristocratic or monarchical invasions," says Madison. Federalist, Letter 43.

Patrick Henry cried out against the constitution, "away with your president; we shall have a king; the army will salute him monarch!"

Franklin feared that the government would result in monarchy. Elliot's Debates.

From the Philadelphia convention not a word can be cited to show that the fear of an extension of popular sovereignty had any place in the minds of the delegates.

"At this rate," said Nathaniel Gorham of Massachusetts, "an enterprising citizen might erect the standard of monarchy in a particular state; might extend his views from state to state, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness to its own destruction." Elliot's Debates, Vol V., p. 333.

"The opposition to the constitution came not from any apprehension of danger from the extent of power reserved to the states, but on the other hand, entirely through fear of what might result from the exercise of the power granted to the central government."

South Carolina v. U. S., 199 U. S. 457.

## B. HISTORY OF THE GUARANTY CLAUSE

The act of the confederation congress, April 23d, 1784, contained the precedent for this provision.

Gerry of Massachusetts, Sherman of Connecticut, Spaight of North Carolina, later members of the constitutional convention of 1787 voted on the measure giving power to the people of the northwest territory to form governments, and providing "Sixth. That their respective governments shall be republican."

A later act of the confederation congress of July 13th, 1787, contained the same provision.

The history of the progress of Article 4, Section 4, in the constitutional convention of 1787 appears from Elliot's Debates, Volume 5, to be as follows:

The measure first appeared in what is known as the Virginia form introduced by Edmund Randolph in this shape,

Art. XI, "Resolved that a republican form of government and the territory of each state except in the instance of a voluntary function of government and territory ought to be guaranteed by the United States to each state." (Page 122).

Later an amended form of the article appeared as follows:

"That a republican constitution and its existing laws ought to be guaranteed to each state by the United States." (Page 182.)

James Madison, Jr., Virginia, moved to substitute, "That the constitutional authority of the states shall be guaranteed to them respectively against domestic as well as foreign violence."

William Churchill Houston of New Jersey objected to perpetuating the existing constitutions, instancing that of Georgia as a very bad one." (Page 333.)

Edmund Randolph moved to add as an amendment "And that no state be at liberty to form any other than a republican government." (Page 333.)

James Wilson (Pa.) moved as a better expression of the idea "that a republican form of government shall be guaranteed to each state and that each state shall be protected against foreign and domestic violence." (Page 333.)

Mr. Madison and Mr. Randolph thereupon withdrew their propositions.

The article emerged from the committee on detail as "The United States shall guaranty to each state a republican form of government" etc. (page 381) and the final form was the same excepting for the substitution of the word "every" for "each" and the addition of the words, "in this union."

## C. WHAT IS THE GUARANTY?

The word "guaranty" has, and at that time had, a well defined legal significance.

"A guaranty is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person, who in the first instance is liable."

Kent's Com. (12 Ed.) Vol. IV, p. 121.

"The contract of guaranty is a collateral undertaking. It can not exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person either express or implied, that is to say if there is no debt, default or miscarriage, present or prospective, there is nothing to guarantee and hence can be no contract of guaranty."

Brandt on Suretyship and Guaranty, Section I, n. 1, p. 5.

This word was not adopted carelessly or without meaning. It was clearly distinguished from the later promise of protection, and there is also significance in the fact that the guaranty was to "every state" while the promise of protection was to each. These men long skilled in the framing of their revolutionary documents understood the use of words.

Edmund Randolph, Alexander Hamilton, Gouverneur Morris, William C. Houston, John Rutledge, James Wilson, who debated this article were lawyers, and understood the exact legal meaning of the word "guaranty."

## D. WHO ARE THE PARTIES TO THE GUARANTY?

A guaranty involves three distinct parties:

1st the promisee, the beneficiary.

2d the promisor, the original obligor.

3d the guarantor, assuring the promisee for the benefit of the promisor.

A guaranty is an agreement not for the interest of the guarantor. The promisee is directly named to wit "every state in this union;" the original promisor is also included in this category. Each state becomes the original promisor to every state, that it will maintain a republican form for the benefit of each and every state.

The undertaking of the states themselves under the guaranty clause may be a repetition of the description of the social compact in the Massachusetts constitution—"the people covenants with each citizen and each citizen covenants with the whole people, &c," which being applied would read, "The states covenant with each state and each state covenants with all the states, &c," and the undertaking of the United States is to guarantee the performance of these covenants.

## E. WHO HAS THE POWER OF INITIATIVE

This question must be answered in contemplation of the powers described and reserved in the constitution of the United States. By Art. I, Sec. I, the legislative powers of congress are confined to the powers "herein granted." Therefore the congress takes away no powers from the people of the states, except those contained within the pages of the United States Constitution.

But the peoples of the states forced upon the constitution explicit additional declarations as to the reserved powers of the people of the states. Art. IX declares, "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and

Amend X. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively or to the people."

## 1. A State Must Make the Demand

Clearly only the promisee can demand enforcement and the only promisees under this guaranty are the states.

Judge Story ("Constitution," Vol. II, Sec. 1815) declares that this section of Art. 4 was