The debates referred to clearly show that the words "the effect thereof" meant the effect of the acts, records and proceedings, and not the effect of the proof, and the decisions of the courts to this effect have been uniform.

The full faith and credit provided for means the same to which they are entitled in the State whose they are. When, therefore, suit is brought in one State upon a judgment entered by the court of another State, and it appears that the law of the State in which it was entered made it conclusive on the defendant, it will be held equally conclusive in the court where suit is brought upon it. No plea will be good against such judgment which would not be good in the court where it was pronounced; but in the State where the suit is brought upon the judgment, as in the State where the judgment is pronounced, it may be shown that the court of the latter had no jurisdiction to enter it. So a release may be pleaded, and the statute of limitations will be available according to the law of the forum where the suit upon it is brought. But the latter State must allow reasonable opportunity to enforce the demand, and not by its act of limitation substantially deny all remedy. The cases on this subject are numerous.[1]

But while constructive service of process by publication will suffice to subject property within the jurisdiction of the court, such service cannot be the foundation of a personal judgment. A personal judgment can only arise from process against the defendant served in the State where the judgment is pronounced; and, *a fortiori*, is not binding in any other State. The latter gives full faith and credit to such judgment in the former by denying it the effect of a personal judgment which it cannot have in the former. Later cases are in accord with those already cited.[2]

[1] Mills v. Duryee, 7 Cr. 481; Nations v. Johnson, 24 How. 195; Hampton v. McConnel, 3 Wheat. 234; Green v. Van Buskirk, 7 Wall. 139; Harris v. Hardeman, 14 How. 334; Cheever v. Wilson, 9 Wall. 108; Galpin v. Page, 18 id. 350; Thompson v. Whitman, id. 457; Christmas v. Russell, 5 id. 290.

[2] Renaud v. Abbott, 116 U. S. 277; Chicago, etc. Ry. Co. v. Wiggins Ferry Co., 119 id. 615; Blount v. Walker, 134 id. 607; Texas Pacific Ry. Co. v. Southern Pacific Ry. Co., 137 id. 48; Carpenter v. Strange, 141 id. 87; Laing v. Rigney, 160 id. 531.

The court may inquire into the jurisdiction of the court rendering the original judgment, and into the facts necessary to give such jurisdiction. Congress has passed a law carrying out the provisions of this clause, and it has been decided that the States may make other regulations not in conflict with these, and allow proof of records in common-law modes.[1]

Privileges and Immunities of Citizens.

§ 307. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[2] This important clause has already been largely considered. It has been seen that the provisions of the thirty-third Article of the Confederation have been embraced in the condensed terms of this article. Construing it in the light of the authoritative exposition of Mr. Madison in the *Federalist*, *supra*, sanctioned by the decision of the Supreme Court in the *Slaughter-House Cases*, this clause may be regarded as a mutual guaranty by the States of intercommunication of privileges and immunities of citizenship in each of them, and is a constitutional guaranty independent of any power of Congress to pass laws to execute or regulate it. The prior section just considered is based upon interstate compact, with a power in Congress to pass laws to aid in giving it effect; but this is stripped of all power, Federal or State, to impair the right given thereby. A brief analysis of the clause will now be attempted.

In *Corfield v. Coryell*[3] Justice Washington gives an exposition of this clause, which has been adopted as sound in a number of cases to be referred to, and especially in the *Slaughter-House Cases*, *supra*. He says the privileges and immunities of citizens may be comprehended under the following general heads: "Protection by the government; the

[1] Gaines v. Relf, 12 How. 472; White v. Burnley, 20 id. 235.

[2] Const. U. S., Art. IV, sec. 2.

[3] 4 Wash. C. C. 371.

enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

"According to the express words and clear meaning of the clause, no privileges are secured by it but those which pertain to citizenship."[1]

"These are civil rights, not political franchises. Hence, voting, holding office, serving on juries, and the like, are political, not civil, privileges."[2]

A corporation of one State is not a citizen of another within the meaning of this clause. A State may deny to the corporation the privileges accorded to a like corporation of its own.[3] No lawyer admitted to practice in one State has the right under this clause to practice in every other. That is not a privilege of citizenship, but belongs to the internal polity of a State.[4] Louisiana gave certain rights of property by virtue of marriage to its own resident citizens. This did not entitle the citizen of Mississippi to the same privileges.[5]

A State may give exclusive privileges to its people to take

[1] Conner v. Elliott, 18 How. 591; Blake et al. v. McClung et al., 172 U. S. 239.

[2] Slaughter-House Cases, 16 Wall. 36.

[3] Paul v. Virginia, 8 Wall. 165.

[4] Ward v. Maryland, 12 Wall. 418; Chemung Canal Bank v. Lowery, 93 U. S. 72; Hooper v. California, 155 U. S. 648.

[5] Conner v. Elliott, 18 How. 594.

fish in its own waters, and exclude citizens of other States. Its fisheries are its own property; it may give them to its own children and exclude others.[1] We have seen that taxation of a citizen of another State at a higher rate than its own citizen is a violation of this clause.[2]

§ 308. Two other clauses in this connection may be considered. It is well known as a principle of international law that extradition for crime is dependent on contractual obligation. It is not *de jure*, but contractual, or a matter of comity. This was more distinctly so a century ago than now, and was more so then than now as to the extradition of persons held to service or labor, their extradition being merely a matter of comity.

In the fourth Article of Confederation the extradition of criminals was provided for, and the provision of the present Constitution is in almost the same terms; but no provision for the extradition of slaves was incorporated in the Articles of Confederation. The language of the provision was as follows: "If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from Justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[3]

We may note that the person to be surrendered must be charged in the demandant State with treason, felony or other crime, and must flee from justice and be found in another State. In such case the interstate compact declares he shall,

[1] McCready v. Virginia, 94 U. S. 391; Manchester v. Massachusetts, 139 id. 241.

[2] Ward v. Maryland, 12 Wall. 418; Guy v. Baltimore, 100 U. S. 434.

[3] Const. U. S., Art. IV, sec. 2 clause 3.

on the demand of the executive of the demandant State, be delivered up by the asylum State to be removed to the demandant State, having jurisdiction of the crime.

In the case of *Kentucky v. Dennison*,[1] the Governor of Ohio refused to surrender a fugitive from Kentucky who was charged in Kentucky with kidnaping a slave. The point was made by the Governor of Ohio that that was not a crime according to the law of Ohio. The same point was made by Governor Seward in 1841, and the extradition of the kidnaper of a slave was distinctly denied. The Supreme Court in the Kentucky and Ohio case held it to be a case over which the court had no jurisdiction, and with which Congress had nothing to do. It depended upon interstate faith, and the claim of Kentucky was dismissed by that court, as the claim of Virginia had been denied by Governor Seward.[2] The act of 1793 was held to be only declaratory, and that the United States had no power to compel the extradition. Congress has passed a later law on the subject.[3] It has been held that the charge against the accused must be in such judicial form as would justify an arrest were it committed in the demandant State.[4]

When the demand is made in due form, it is the duty of the executive of the asylum State to surrender the accused, and he has no moral right to refuse.[5] If he does refuse, the Federal courts have no power to compel obedience.[6] The person surrendered should be held privileged from prosecution on any new charge, until he has had opportunity to return to the State which has surrendered him. It was so decided in *Commonwealth v. Hawes*,[7] with which *United States v. Rauscher*[8] is in accord. But the Supreme Court, in *Lascelles v. Georgia*,[9] held that the accused was entitled to no

[1] 24 How. 66.
[2] See also Holmes v. Jennison, 14 Pet. 540; Taylor v. Taintor, 16 Wall. 366; Ex parte Reggel, 114 U. S. 642; Roberts v. Reilley, 116 id. 80.
[3] R. S. U. S., §§ 5278–79.
[4] People v. Brady, 56 N. Y. 182; Kingsbury's Case, 106 Mass. 223.
[5] Kentucky v. Dennison, *supra*.
[6] Taylor v. Taintor, 16 Wall. 366.
[7] 13 Bush, 697.
[8] 119 U. S. 407.
[9] 148 U. S. 537.

such exemption; that the terms of the Constitution did not confine the jurisdiction of the demandant State over the fugitive to trial for the specific crime for which he was surrendered. But if the asylum State has an unsatisfied demand upon the fugitive, it has a right to satisfy the demand of its own law before surrendering him.[1]

In the case of *Pierce v. Fries*,[2] Pierce, on a requisition of the Governor of Alabama, was arrested in Texas, and sought discharge upon the writ of *habeas corpus*, on the ground of the invalidity of the indictment under the laws of Alabama. The Supreme Court affirmed the decision of the court of Texas, that, the other prerequisites for extradition having been complied with, he should be extradited, leaving to the courts of Alabama to decide upon the sufficiency of the indictment. This not only conformed to the clause of the Constitution in reference to extradition, but gave full faith and credit to the action of the courts of Alabama according to the previous clause already considered.

§ 309. The next clause[3] concerns the surrender of fugitives held to service or labor in one State and escaping into another. This was inserted in the Constitution, no similar clause having been in the Articles of Confederation, as a part of that general compromise to which reference has been made *ante*, involving the commerce power and the ratio of representation in the two Houses, the slave trade, and the exemption of exports from taxation or duty. The terms descriptive of the character of the fugitives are broad enough to include the main class of fugitive slaves as well as persons bound as apprentices, etc., under the laws of a State. It will be perceived that the extradition of fugitives from justice is on demand of the executive authority of the demanding State. The claim for the surrender of the fugitive from service or labor is made by the party to whom it may be due. The clause does not state on whom the demand or claim shall be made. In this demand of executive upon executive the Supreme Court has held, as we have seen, that

[1] Taylor v. Taintor, 16 Wall. 366.
[2] 155 U. S. 311.
[3] Art. IV, sec. 2, clause 2.

the judicial power is not competent to coerce the asylum State to comply with the demand of the demandant State; but in the case of the fugitive from service it is a private claim of the owner for the delivery of his property, who is also a person who may assert his freedom in consequence of any law or regulation of the asylum State. It is obvious, therefore, that this claim and the resistance thereto would generate a suit of some kind before some judicial tribunal. This being so, and the case arising under the Constitution of the United States, would give to the judicial power of the United States jurisdiction of such case, to be regulated by necessary and proper laws to be passed by Congress for making the proceeding effectual.[1] With this view of the Constitution, Congress in 1793 passed the fugitive slave law, which was in operation until it was superseded by the fugitive slave act of 1850.

Both of these acts prescribed the judicial procedure for trying the title of the claimant to the fugitive in a United States forum. The validity of both of these acts was stoutly contested. That of 1793 was considered in the case of *Prigg v. Pennsylvania.*[2] The decision of the court was delivered by Mr. Justice Story. The case was briefly this: Prigg, as the agent of a Maryland owner of a fugitive slave, caused the slave to be arrested, to be removed to the State of Maryland and delivered into the custody of her master. A special verdict found the facts. The court adjudged the accused guilty of the offense; he appealed to the Supreme Court of Pennsylvania, where the judgment was *pro forma* affirmed. From this latter judgment writ of error was brought to the Supreme Court of the United States. The Supreme Court reversed the judgment as unconstitutional and void. Judge Story held that the Constitution vested in the United States government exclusive power to legislate concerning the extradition of fugitive slaves; that the owner of a fugitive slave was clothed with complete power in every State to seize and recapture him whenever he could do so

[1] Const. U. S., Art. III, sec. 2, and Art. I, sec. 8, clause 18.

[2] 16 Pet. 539.

without a breach of the peace. The statute of Pennsylvania of March, 1826, made it a crime to take or carry away any negro with the intent of selling or keeping him as a slave, and punished such act by fine and imprisonment. The decision of the unconstitutionality of the Pennsylvania law was the question involved. The exclusiveness of the power in Congress in respect to the extradition of such fugitives was not involved, and therefore was *dictum*. Chief Justice Taney, and Justices Thompson, Baldwin and Daniel, concurred with the opinion of Story on the unconstitutionality of the law under which conviction was had, but dissented from the opinion expressed that the power of the Federal government was exclusive. Justice McLean concurred with the judgment of the court, and agreed with Justice Story that the power was exclusive in the Federal government to act in respect to such cases; but held that there was a police power in the State to guard and protect its own jurisdiction and the peace of its citizens. The court was unanimous in declaring the act of 1793 constitutional, and the act of Pennsylvania punishing the claimant of the fugitive slave unconstitutional and void.

In the case of *Ableman v. Booth*[1] the question arose thus: Booth was charged with aiding and abetting in Wisconsin the escape of a fugitive slave from the United States marshal who had him in custody under warrant issued by a district judge of the United States under the act of Congress of September, 1850. A collateral question was involved, which, upon the clause we are now considering, it is not necessary to advert to. The court decided that the fugitive slave law of 1850 was, in its provisions, fully authorized by the Constitution of the United States; that the conviction of Booth under one of its provisions for aiding the escape of a fugitive slave was legal and constitutional; and that the judgment of the Supreme Court of Wisconsin discharging Booth from the imprisonment inflicted by the United States court was utterly void and should be reversed. The

[1] 21 How. 506.

court was unanimous in its decision, including Justices McLean, Nelson, Grier and Clifford, who were citizens of Northern States.

The conclusion, however, is not justified that all legislation by the States in aid of the owner of a fugitive slave or punishing the obstruction of a right was unconstitutional. In *Moore v. Illinois*,[1] Moore was indicted under the code of Illinois for harboring a negro slave and preventing the lawful owner from retaking him, etc.; and the court, with one dissentient, affirmed the constitutionality of the Illinois law, and as *dicta* intimated that any legislation of the State to aid and assist the claimant would be valid. It may be added that it is probable from the language of Judge Story in *Prigg v. Pennsylvania* that the power of Congress to pass laws in aid of the extradition of fugitives from justice would be sustained upon like grounds as the laws of 1793 and 1850 were held to be constitutional in respect to fugitive slaves.[2]

Guarantee of Republican Form of Government.

§ 310. This is an important provision which carries into effect the purposes expressed in the original Articles of Confederation, and the objects mentioned in the preamble to the Constitution in these words: "To insure domestic tranquillity, provide for the common defense, . . . and secure the blessings of liberty to ourselves and our posterity." The language of the present clause is as follows: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."[3]

The first provision is the guarantee of a republican form of government by the United States to each State. Everywhere in the *Federalist*, and notably in the twenty-first, quoting from Montesquieu, as well as in the forty-third, number,

[1] 14 How. 13.
[2] 16 Pet. 620.
[3] Const. U. S., Art. IV, sec. 4.

the idea is prominently enforced that a union of States, in which the form of government of each is dissimilar from that of each of the others, resulting in a union of dissimilar democracies, would be in its very nature so uncongenial as to present no hope of permanency or harmony in its relations. The whole structure of the Federal system is based on the idea of the popular form of government of each of the members of the Union. The popular suffrage, which is the constituency of the House of Representatives, is derived from it as the constituency of its own legislature. It is very natural then for Mr. Madison to say: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."[1]

He thus argues that the Union is a compact between distinct republics, and that the basis of that Union is the identity of type of each of these republics, and a guarantee assured that this type shall be permanent. And he adds: "Governments of dissimilar principles and forms have been found less adapted to a Federal coalition of any sort than those of a kindred nature." And Montesquieu says:[2] "A confederacy is not agreeable to the nature of petty monarchies. . . . The spirit of monarchy is war and enlargement of dominion; the spirit of republics is peace and moderation. These two kinds of government cannot naturally consist in a confederated republic."[3]

This idea was originally proposed in Randolph's plan.[4] At last Mr. Wilson suggested the form that a "republican form of government shall be guaranteed to each State."[5] At one time there was a suggestion that each State should have a re-

[1] Federalist, No. XLIII.
[2] Spirit of Laws, Book 9, chs. 1, 2.
[3] Id.
[4] Madison Papers, 734, 844, 861, 913.
[5] Id. 1141.

publican Constitution. The form adopted was the guarantee of a republican form of government. This left great variety in the Constitution as to suffrage and the like to be protected under a republican form of government. Thus many States had very restricted suffrage, as the freehold suffrage in Virginia. Some of them had universal suffrage. All the slave States excluded slaves from suffrage, and most of them free negroes. Other States, having no slaves, admitted what was substantially universal suffrage. Still the form was popular; though substantially there was great variety. Mr. Madison discusses this clause with condensed force in the *Federalist*,[1] as follows:

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers. To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the States, they are guarantied by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

[1] No. XLIII.

§ **311.** We start with the assumption, then, that all the forms of government then obtaining in the several States of the Union were republican. The above citation from Mr. Madison shows this. But the fact is patent. Would the States have adopted a Constitution which invited a disturbance of their forms of government upon the instant that the Constitution went into effect? The existence of slavery, where one-third or one-half of the population were slaves, was not inconsistent with a republican *form* of government. Men might say it was inconsistent with the substantial idea of a republic, but still by the internal polity of each State it was republican in form, only those being excluded from the suffrage whom the State deemed unworthy. Nor is a very restricted suffrage inconsistent with a republican form of government. Every form of suffrage involves the idea that only those are excluded who are unfit for it, and a republican form of government does not require the admission of unfit persons to suffrage, in order to its being republican. Hence slaves without votes were admitted as a basis of representation, three-fifths being counted, and this by the Constitution of the United States. That Constitution which recognized all this in the State Constitutions could not deem the status of slavery and the disfranchisement of slaves inconsistent with a republican form of government.

The clause reads: "The United States shall guarantee." What authority then must be the guarantor? By article I, section 8, clause 18, Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States," etc. The law, therefore, necessary and proper to guarantee a republican form of government must be passed by Congress to carry into execution this duty reposed in the United States. The words "to guarantee to every State in this Union a republican form of government," obviously discriminate the State as a Body-politic from its government, whose form must be republican. A delicate question here arises. If Congress must

guarantee, must it not determine when the occasion arises for its exercise? The word "guarantee" does not mean to form, to establish, to create; it means to warrant, to secure, to protect the State, that is, the Body-politic, in its right to have a republican form of government. It defends the people against the interference of any foreign power, or of any intestine conspiracy against its right as a Body-politic to establish for itself republican forms of government. To allow the guarantor to take the initiative, and, under the pretext of its duty as guarantor, to impose a form of government upon the people of a State, would make this clause, intended for protection, an excuse for destructive invasion. No occasion for the exercise of this important yet dangerous power has ever arisen, except as the result of civil war.

It was assumed as a postulate in *Texas v. White*[1] that this guaranty clause, by the act of secession of the State of Texas, was not applicable, as that State had lost its government and could not be recognized by the court as capable of instituting a suit in the name of the State. It was necessary that the government and the people of the State should be restored to peaceful relations to the United States under the Constitution before such a suit could be prosecuted. The authority to provide for the restoration of the State government was derived from this guarantee clause in the Constitution. When slavery was abolished the new freedmen became part of the people, and it was the State thus constituted which was now entitled to the benefit of the constitutional guarantee. Congress had the choice of means for re-establishing a republican form of government, but these means must be sanctioned by the Constitution.

In accord with this reasoning the reconstruction acts were passed, by which it was declared that no legal State governments existed in the seceded States; and that in order to preserve peace and good order in the States until legal State governments republican in form could be established, they were to be divided into military districts, each of which

[1] 7 Wall. 700.

was assigned to an officer of the army, with a military force to enable him to perform his duties and enforce authority. The officer was authorized to protect persons in their rights, to punish criminals, either through the local civil tribunals or through military commissions which the act authorized. These acts provided that when the people of any of these States had framed a Constitution in conformity with that of the United States, and framed it in a way specified by the statute, and when the State had adopted a certain article of amendment to the Constitution, which article was to become a part of the Constitution, then the State should be admitted to representation in Congress. The court in that case did not pass upon the constitutionality of any provision of the reconstruction laws. The case was decided with three judges dissenting; nor have these laws ever been sanctioned by judicial decision. It is therefore pertinent to observe in respect to them, that they overthrew existing republican forms of government in every State of the Confederacy, and that government in Virginia which Congress and the President had recognized in the act dividing the State of Virginia which had resulted in the admission of West Virginia to the Union; and the government of Virginia thus recognized was put in possession of power at the city of Richmond after the war as the lawful government of Virginia. The reconstruction laws overthrew that government which Congress itself had set up, and substituted a military government with the judicial power subject to its control. Military commissions were inaugurated for the trial of citizens in other States,[1] and conventions were called under regulations for suffrage prescribed by Congress, and new Constitutions were adopted and new forms of government established. It is hardly a question that these laws, which overthrew the form of government established by the State, and refused to restore it as the legitimate form of government, and set up a military despotism in its place, were not a guarantee of a republican form of government to the States, but guaranteed the over-

[1] McCardle's Case, 6 Wall. 318, and 7 id. 506.