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I.

THE CONSTITUTIONAL AND LEGAL ASPECTS OF REPUDIATION.

REPUDIATION OF STATE DEBTS.

CHAPTER I.

THE CONSTITUTIONAL AND LEGAL ASPECTS OF REPUDIATION.

THE study of the chapter of financial history which constitutes the subject of this book, properly begins with an investigation into the rights and privileges of the States of the American Union relative to the payment or non-payment of their debts. We naturally ask at the very outset whether repudiation is in any way connected with the defects in our constitutional and legal system, or whether it has happened in spite of the best possible laws.

The Federal Constitution and the laws of the States themselves are the sources whence an answer to these questions must be derived. We will begin with the former.

As originally adopted, the Constitution of the United States contained two provisions which have

a bearing on this subject. One, in Section 10 of Article I., prohibits a State from passing any law "impairing the obligation of contracts," and the other, in Section 2, Article III., provides that the judicial power of the United States shall extend "to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects."

The meaning of these two clauses in the present connection at first sight seems clear. The casual reader, uninitiated in the technicalities of the law, would affirm unhesitatingly that the first one made it unlawful for a State to repudiate her just debts, and that the second one provided that in case she did thus incriminate herself, she could be brought to justice before the federal courts. However, a more careful examination of the precise language used in the "contract clause," as the first one is called, reveals several difficulties. In the first place, it does not expressly state whether the contracts referred to are those of private individuals, of States, or of both. The natural inference is that it refers to all contracts by whomsoever made; but the "natural inference" is not always the one which interested parties draw. The next query concerns the meaning of the expression the "obli-

gation of contracts." What is the obligation of a contract? This being explained, we ask in the third place, in what ways can the obligation of a contract be violated? These difficulties must be removed before we can be sure of the precise bearing of the clause in question on the subject under discussion.

Regarding the kinds of contracts referred to, — whether State or individual, or both, — the decisions of the Supreme Court leave no room for doubt. They are unanimous in the declaration that the clause includes cases to which a State is a party. The following are examples of these decisions: In the case of the State of New Jersey *v.* Wilson [1] the statement is made that the contract clause of the Constitution "extends to contracts to which a State is a party as well as to contracts between individuals." In Providence Bank *v.* Billings [2] these words are used: It has "been settled that a contract entered into between a State and an individual is as fully protected by the tenth section of the first article of the Constitution as a contract between two individuals." The decision in the case of Green *v.* Biddle [3] states that "the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obli-

[1] 7 Cranch. 164, 166. [2] 4 Pet. 514, 560. [3] 8 Wheat. 1, 84.

gation into which she herself has entered than she can the contracts of individuals." These and other decisions[1] which might be quoted leave no doubt concerning the constitutional limitation of the right of States to impair contracts into which they have entered.

The meaning of the phrase "obligation of contracts" is settled by the following declarations of the Supreme Court: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."[2] Again it says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it."[3]

These decisions clearly indicate that the value of the contract clause depends upon other laws; namely, those which provide for the enforcement of contracts. If a State owes a debt, her obligation seems to depend entirely upon the laws in existence for the enforcement of contracts against States. If there are no such laws, the contract,

[1] Woodruff v. Trapnall, 10 How. 190, 207; and Wolf v. New Orleans, 103 U. S. 358, 367.

[2] McCracken v. Hayward, 2 How. 608, 612.

[3] Louisiana v. New Orleans, 102 U. S. 203, 206.