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Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

Number 16, Original in Equity.

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STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,
Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,
Defendants.

Statement and Brief of Defendant, The Sanitary District of Chicago, in Support of Motion to Dismiss the Amended Bill of Complaint.

HECTOR A. BROUILLET,
Attorney, The Sanitary District of Chicago.

GEORGE F. BARRETT,
EDMUND D. ADCOCK,
LOUIS J. BEHAN,
MORTON S. CRESSY,
Solicitors for Defendant, The Sanitary District of Chicago.

BARNARD & MILLER PRINT, CHICAGO

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STATEMENT AND BRIEF OF DEFENDANT, THE SANITARY DISTRICT OF CHICAGO, IN SUPPORT OF MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT.

STATEMENT OF FACTS.

This case comes on for hearing upon two motions to dismiss. One is contained in the answer of defendant, The Sanitary District of Chicago, filed January 4, 1926. The other is a separate motion, in the form of a demurrer filed by the defendant, State of Illinois, on the same day.

The original bill of complaint was filed in June, 1922, by one of the present complainants, the State of Wisconsin, returnable to the October term, 1922, of this court, and upon the return day, the defendants, Illinois and Sanitary District, filed joint and several answer to said bill, which contained motion to dismiss.

The original bill, in effect, *conceded the validity of the then existing permits authorizing the diversion from Lake Michigan* and prayed principally (p. 35):

> "And in the event that this court shall hold and determine that it is within the lawful power of the Secretary of War to permit the taking of water from the said Lake Michigan for the operation of the said canal, and to determine the amount and conditions of such taking, then and in that case your orator prays that upon the final hearing of this cause an injunction be issued, under the seal of this court, perpetually restraining the defendants and each of them, and each of their officers, agents and servants, from taking or causing to be taken any water from Lake Michigan, in such manner as to permanently divert the same from the said lake, for the purpose of operating the said canal, *in excess of two hundred fifty thousand* (250,000) *cubic feet per minute, or four thousand one hundred sixty-seven* (4,167) *cubic feet per second, until such time as the Congress of the United States, or the Secretary of War acting upon the recommendation of the Chief of Engineers of the United States Army, shall give valid permission for the taking and diversion of a larger amount of water.*"

After the filing of said bill, on June 18, 1923, the District Court of the United States, for the Northern District of Illinois, Eastern Division, in the case of *United States* v. *The Sanitary District of Chicago,* entered its decree enjoining the defendant district from abstracting or withdrawing from Lake Michigan any amount of water in excess of said 4,167 cubic feet per second. Said decree was affirmed by this court by its order entered January 5, 1925, the said order providing:

> "The decree for an injunction, as prayed, is affirmed, to go into effect in 60 days—without prejudice to any permit that may be issued by the Secretary of War according to law." (*Sanitary District of Chicago* v. *U. S.,* 266 U. S. 405.)

Thereafter, on March 3, 1925, prior to the expiration of said 60-day period, the Secretary of War, pursuant to recommendations of the Chief of Engineers, issued a permit to the defendant Sanitary District—

> "to divert from Lake Michigan through its Main Drainage Canal and auxiliary channels, an amount of water not to exceed an annual average of 8,500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second * * *",

upon certain conditions stated in said permit. (Amended bill of complaint, pp. 30-32.)

Prior to the issuance of said permit, the Secretary of War requested of and obtained from the Attorney General of the United States, an opinion as to his authority to issue a permit for the diversion of water from Lake Michigan at Chicago in an amount greater than the 4,167 seconds feet, the maximum amount theretofore authorized by the Secretary of War, pursuant to the recommendations of the Chief of Engineers. On February 13, 1925, acting Attorney General James M. Beck, advised the Secretary of War that he had such authority upon the recommendation of the Chief of Engineers. A full copy of said opinion appears as an appendix hereto (p. 59).

On October 5, 1925, an order was entered herein, permitting the States of Minnesota, Ohio and Pennsylvania to join as complainants, and with the original complainant to file an amended bill of complaint. The amended bill *for the first time questioned seriously the validity of permits of such nature,* and prayed (Amended Bill, p. 36):

(1) That the defendants be restrained

> "from taking or causing to be taken, any water from Lake Michigan in such manner as to permanently divert the same from said lake."

(2) That in the event that the Sanitary and Ship Canal constructed by the defendant Sanitary District shall be used as a navigable waterway of the United States and subject to the same control on the part of the United States as the other navigable waterways thereof, then that the defendants be

> "restrained from taking or causing to be taken any water from Lake Michigan in such manner as to permanently divert the same from said lake for any purpose, in excess of the amount which the court shall determine to be reasonably required for the purpose of navigation in and through said canal and the connecting waters, to the Illinois and Mississippi Rivers, without injury to the navigable capacity of the Great Lakes and the connecting waters thereof."

(3) That the defendants be restrained

> "from dumping and draining into the said Sanitary District Canal, any sewerage or waste in such quantity and manner as to excessively pollute and render the Sanitary District Drainage Canal, the Chicago, Desplaines and the Illinois Rivers, unsanitary, pestilential and dangerous to the health, safety and comfort of the complainant states navigating said rivers, or to injure or destroy the property of the people of this complainant states navigating the said rivers and waterways."

(*The said canal and rivers mentioned are entirely within the State of Illinois.*)

Motions to Dismiss.

Special grounds for dismissal urged:

(1) The case is not one justiciable in this court.

(2) The subject-matter is within the exclusive jurisdiction of the United States assumed and being exercised.

(3) The permit of March 3, 1925, is valid, and constitutes complete authorization for the diversion com-

plained of, and the permit regulates and controls the amount and conditions of such diversion; and no state has the right to complain.

(4) Complainants are not entitled to equitable relief, because—

(a) In so far as the amended bill seeks to have this court determine the amount of diversion "reasonably required" for navigation, it calls for a usurpation by this court of powers and functions vested in Congress and by Congress delegated to the Secretary of War;

(b) So far as said amended bill seeks relief against an alleged impairment through pollution of navigable waters of the United States, neither of the complainant states nor any of their respective citizens, suffer or can suffer any direct or special injury, because such waters lie wholly without and below the complaining states. None of the complainants have any direct or proprietary interest in the navigable condition of such waters.

(5) Complainants cannot complain of breach of any of the conditions of the permit of March 3, 1925, as the power to enforce such conditions is vested exclusively in the United States, because the permit is revocable by the Secretary of War for breach of any of the conditions, and because said Rivers and Harbors Act of 1899 provides adequate available, special and exclusive remedies for violations of said act.

(6) The United States is a necessary and indispensable party to this suit.

(7) The original bill of complaint admitted the right of defendants to divert 4,167 cubic feet per second, and to a diversion in excess of said amount if and when Congress or the Secretary of War, according to law, permitted it. But the amended bill denies such rights and upon such denial of such rights, the relief of the amended bill is based. Therefore, complainants are es-

topped from seeking the relief prayed for in said amended bill.

While the principal facts as to this controversy are likely fresh in the court's mind, due to its consideration of the case of *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, yet for the convenience of the court we will in some detail state the facts alleged in the amended bill and also those appearing *aliunde* and within the court's judicial notice.

Amended Bill of Complaint.

(As the sections of the amended bill are numbered, the numbered paragraph will be indicated where the facts here stated may be found in said bill.)

The complainant states bring their action as states of the Union (1), against Illinois and the defendant Sanitary District, a public corporation organized and existing under the laws of Illinois, and a citizen of that state (2), and the action is instituted in the exercise of the original jurisdiction of this court in equity relating to a controversy between two or more states of the United States, and also between states of the United States and a citizen of another state (3).

The shore line of Wisconsin along Lake Michigan is approximately 350 miles, and thereon are located some thirteen harbors, the amount of freight received at and shipped from said harbors during the year 1923, exclusive of that carried by car ferry, being in excess of 9,000,000 tons. The shore line of Wisconsin along Lake Superior is approximately 150 miles, and located thereon are three harbors, traffic of which in 1923 was in excess of 67,000,000 tons (4).

The shore line of Minnesota along Lake Superior is approximately 75 miles, and located thereon are six

harbors, the traffic of which during the year 1923 was about 60,000,000 tons (5).

The shore line of Ohio along Lake Erie is 230 miles, and located thereon are some thirteen harbors, traffic of which during the year 1923, exclusive of car ferry shipments, was more than 76,000,000 tons (6).

The shore line of Pennslyvania along Lake Erie contains Erie harbor, traffic of which during the year 1923 was 3,766,389 tons (7).

The shore line of Illinois along Lake Michigan is approximately 60 miles, comprising the eastern boundaries of the Counties of Lake and Cook. Prior to the year 1900, the Chicago River flowed through said Lake and Cook Counties, one branch in a northern direction and the other in a southerly direction, and emptied into Lake Michigan in the City of Chicago (8).

On May 29, 1889, the General Assembly of Illinois passed an act under which the defendant Sanitary District was organized, the said act granting power to construct, maintain and operate drainage canals or channels for the disposal of drainage and sewage. Sections 23 and 24 of said act are set out in said amended bill.

Section 23 of said act of Illinois provides that if a channel were constructed by which any of the waters of Lake Michigan should be caused to pass into the Desplaines or Illinois Rivers, it should be constructed of sufficient size and capacity to produce and maintain at all times a continuous flow of *not less than* 300,000 *cubic feet of water per minute* and to be of a depth of *not less than* 14 *feet,* and *a current not exceeding three miles per hour;* that if the channel should be cut through a territory with a rocky stratum where such rock is above a grade sufficient to produce a depth of water from Lake Michigan of *not less than* 18 *feet,* such portion of said

channel shall have *double flowing capacity above provided for,* and a width of *not less than* 160 *feet at the bottom,* (the channel was cut through the rocky stratum and has a capacity of not less than 600,000 cubic feet per minute, and is more than 18 feet deep and is of the width provided); that if the population of the district drained into said channel shall exceed 1,500,000 inhabitants, that the flow through the channels shall be at all times equal to 20,000 cubic feet per minute for each 100,000 of the population; that *the current in said channel shall not be more than three miles per hour;* that the district constructing a channel to carry water from Lake Michigan of any amount authorized by the act, may correct, modify and *remove obstructions in the Desplaines and Illinois Rivers, and shall remove the dams at Henry and Copperas Creeks in the Illinois River before any water shall be turned into said channel.*

Section 24 of said act provides that, when the channel described shall be completed and the water turned therein, to the amount of 300,000 cubic feet per minute, *the same is declared a navigable stream* and whenever the General Government shall improve the Desplaines and Illinois Rivers for navigation to connect with this channel, it shall have full control over the same for navigation purposes, but not to interfere with its use for sanitary and drainage purposes (9).

Cognate sections of said Act of May 29, 1889, and acts amendatory and supplementary thereto, while not set forth in the amended bill, should be here called to the attention of the court. Section 12 of said act provides that *all bridges* built *over the channel* described in Section 23, shall *not* necessarily *interfere with* or *obstruct* navigation, and that when the same shall become a navigable stream, as provided in Section 24 of

said act, *they shall be so constructed* that they can be *raised, swung or moved out of the way of vessels navigating the said channel.* (Callaghan's Revised Statutes of Illinois (1925), Chap. 42, Sec. 349.)

Section 27 of said act (Callaghan's Revised Statutes of Ill. (1925), Chap. 42, Sec. 367) provides that before the channel shall be opened, *the Governor* shall *certify* that it has been *completed* in all respects *in accordance with the provisions of Section* 23 *of said act.*

The act of Illinois supplementary to and amendatory of the original Sanitary District Act passed May 14, 1903, provides (Sec. 3 thereof) that said defendant District shall *permit all water-craft navigating or purposing to navigate said Illinois and Michigan Canal, to navigate the water of all said channels, free of any tolls, lockage charges, etc.,* and that the rules of the United States Government regulating navigation on the Chicago River shall govern navigation on the channels of said defendant District. Section 2 of said Act of May 14, 1903, provides that *a lock shall be constructed* (and it was so built) at the *southern terminus* of said canal for the *purpose of connecting it with the Desplaines River and the Illinois and Michigan Canal.* (Callaghan's Revised Statutes of Ill. (1925), Chap. 42, Sec. 381.)

June 17, 1919, *the General Assembly of Illinois* passed what is known as the "Illinois Waterway" Act, for the construction of the "Illinois Waterway" from the southern terminus of the said Main Channel of defendant District, through the Desplaines and Illinois Rivers, to a point on the Illinois River at or near Utica. The depth of the said waterway was to be not less than 8 feet and in the rock sections not less than 10 feet, minimum depth over-mitre sills of locks not less than 14 feet; minimum width of locks not less than 110 feet; minimum usable

length not less than 600 feet. The waterway is to be connected with the said canal of defendant Sanitary District by means of a lock of said size and connections. (See Callaghan's Illinois Stat. Ann., Vol. 1, p. 753.) The first act with reference to the Illinois Waterway was passed in the year 1913, and the above act, June 17, 1919, replaced it.

The amended bill further alleges:

In November and December of the year 1889, the defendant, Sanitary District, was organized and has since continued in existence, the territorial limits of which originally were 185 square miles. Its area is now approximately 395, due to additions pursuant to Acts of Illinois, and extends along Lake Michigan for approximately 33 miles and comprises the City of Chicago, together with large areas of land to the South, West and North (10).

The construction of the Canal of defendant, The Sanitary District, was commenced on the 3d of September, 1892, and said Canal extends from the West Fork of the South Branch of the Chicago River, about six miles above its mouth, in a general westerly direction for a distance of approximately 32 miles to a point near Joliet, connecting there with the Desplaines River, that stream flowing in a westerly and southwesterly direction and forming a tributary of the Illinois River, the latter river flowing westerly and southwesterly to the Mississippi River (11).

In the construction of the Canal, it was the plan of the defendant that it should be a passageway for the sewage of defendant District, carried down the Canal into the Desplaines and Illinois Rivers; also, it was the intention to divert from Lake Michigan, through the Canal, such amounts of water as should be deemed to be necessary for the dilution of sewage. The original

Act of 1889 was amended in 1895 requiring 20,000 cubic feet of water per minute for every 100,000 inhabitants of the District (12).

The Governor of Illinois, pursuant to Section 27 of the Act, approved the construction of the Canal and authorized its opening, which was done about January 2, 1900, and thereafter defendant District diverted water from Lake Michigan into the Chicago River, and thence into and through the Canal, *"in such amounts and in such velocity as to reverse the flow of the Chicago River and create a steady and uninterrupted flow of water from said day down to the present time,"* from Lake Michigan, through the Chicago River, thence to the Desplaines, Illinois and Mississippi Rivers (13).

The primary purpose of the Act of 1889 as construed by the highest courts of Illinois is to provide a method of disposing of the sewage of the City of Chicago and contiguous territory, and so the Canal has been used in providing for diversion of water through the Canal at the rate of 20,000 cubic feet per minute for each 100,000 inhabitants. It was known to the defendants, and each of them, that the only source from which water in such quantities could be obtained was by diverting it from Lake Michigan. The census of 1920 shows the population of the defendant District to be 2,963,090, requiring, according to the ratio of diversion to inhabitants, 9,876 cubic feet of water per second (14).

Said Act of May 14, 1903, of Illinois authorized the construction and operation of a hypdro-electric plant for the generation of electrical energy from water passing through the Canal (15).

In November, 1907, the defendant District put in operation its hydro-electric plant, having a capacity of 36,000 horsepower of electrical energy, and there has been developed in excess of 20,000 horsepower contin-

uously throughout the year. The energy produced is mainly transmitted to the City of Chicago for municipal and commercial purposes, and since 1907 many million dollars of profits have been realized from its operation (16). The object and purpose of the defendants in the operation of said Canal has been, since the completion of the hydro-electric plant, twofold, viz.: The disposition of the sewage of the defendant District and the generation of electrical energy (17).

The diversion of water from Lake Michigan from 1900 to 1917 has ranged from 2,900 cubic seconds feet in 1900 to 8,800 cubic seconds feet in 1917, and since 1918 the mean diversion each year has exceeded 8,800 cubic feet per second (18). All the water thus diverted is permanently abstracted from the Great Lakes system, resulting in the lowering of the surface elevations of all the great lakes (except Lake Superior) and their connecting channels, not less than 6 inches (19).

At no time during the last ten years has it been necessary for the protection of the health of the defendant District's people, or for any other purpose, that said sewage be disposed of by means of the Sanitary District Canal. On the contrary, it has been entirely feasible, and is now feasible, for defendant District to dispose of its sewage by the use of artificial sewage treatment works, which would require no permanent diversion of water from Lake Michigan and no pollution of the waters of the Lake (20).

The lowering of the level of Lake Michigan has seriously diminished the utility of the ports of Wisconsin and has reduced by at least 6 inches in each of the Lake Michigan ports in Wisconsin the draft of vessels which can be accommodated therein. Over 80% of the tonnage received at said Lake Michigan ports consists of coal shipped from Eastern States. This coal, except the

amount consumed at the ports, is thence carried by rail to a large number of cities, villages and towns in Wisconsin and in other States to the West, and constitutes the principal source of supply for the State of Wisconsin in its proprietary capacity, as owner of many public buildings and institutions, and for many thousands of individuals and industrial plants located in the State. The type of vessels in which the coal is carried is known as "bulk freighters," having enormous capacity and capable of being operated at very low freight rates when loaded to their maximum. For every inch of draft unable to be utilized, the cargo-carrying capacity is reduced by many tons, resulting in increase in freight rate cost per ton, which is a burden upon the State of Wisconsin in its proprietary capacity and upon many thousands of the people of the State. The only method within the power of Wisconsin to relieve itself of the burden is by dredging its harbors. This dredging would necessitate the expenditure of large sums of money each year (21).

The utility of the ports of the complainant States located along the shores of Lake Michigan and Lake Huron, along the shores of Lake Erie, and along the shores of Lake Ontario, are lessened in the same way as the Wisconsin ports on Lake Michigan. The lowering of the surface elevations also affects traffic to and from ports located on Lake Superior. The traffic between the various ports mentioned amounts to many millions of tons each year, the principal commodities being iron ore, coal and grain. The annual loss in tonnage due to the diversion amounts to many millions of dollars, a large part of which falls upon the people of complainants (22).

Current is introduced into the Chicago River impairing its navigability. Prior to the commencement of the diversion, the Chicago River constituted an inner harbor

of great importance, handling between six and eight millions of tons of inbound and outbound freight each year, a large portion of which constituted commerce between the citizens of Wisconsin and Illinois. Since the commencement of the diversion, the commerce of the Chicago harbor has become reduced to less than one-third of the said tonnage, because of the difficulty of navigation resulting from said diversion, and portions of the Chicago River have become closed up by reason of said diversion and are not accessible to commerce of the people of Wisconsin (23).

Prior to the construction of defendant District's Canal, the Chicago, Desplaines and Illinois Rivers constituted a navigable waterway of the United States, extending from Lake Michigan to the Mississippi River. The construction of the Canal modified and altered said navigable waterway by diverting portions of the Desplaines River from its original bed, and has modified and rendered said natural waterway practically inaccessible from Lake Michigan by causing the West Fork of the South Branch of the Chicago River, West of the commencement of the Canal, to become filled up and useless. *"As a result of said acts of said defendant, the said canal has become in fact a substitute for the old navigable waterway hereinbefore referred to, and is now the only practicable means of navigation by water from Lake Michigan to the Mississippi River."* Defendants have refused to concede said Canal to be a navigable waterway of the United States, and have undertaken to bar the United States from all control or authority over it until such time as the Government shall comply with the conditions of said Section 24 of the Act of 1889 (24).

The amount of water required to operate the Canal for navigation purposes only does not at the present

time exceed 500 cubic feet per second, and the amount which may in the future be required for its operation for said purposes only will not exceed 1,000 cubic feet per second, even if said Canal should be utilized to its fullest extent (25).

On May 8, 1889, the Secretary of War, as recommended by the Chief of Engineers, issued a permit authorizing the opening of the Canal and the diversion of water from Lake Michigan for the canal's operation limited by the following principal condition:

> "2. That if at any time it becomes apparent that the current created by such drainage works in the South and Main Branches of Chicago River be unreasonably obstructive to navigation or injurious to property, the Secretary of War reserves the right to close said discharge through said channel or to modify it to such an extent as may be demanded by navigation and property interests along said Chicago River and its South Branch."

The amended bill sets forth various permits issued by the Secretary of War limiting the diversion from Lake Michigan due to current in the Chicago River, and pursuant to condition 2 of said May 8, 1899, permit, viz.:

April 9, 1901, 200,000 cubic feet per minute,

July 23, 1901, 300,000 cubic feet per minute,

December 5, 1901, 250,000 cubic feet per minute,

Jan. 17, 1903, 350,000 cubic feet per minute,

until March 31, 1903, and thereafter, to be limited to the amount fixed by the December 5, 1901, permit. There is also set forth the permit of June 30, 1910, authorizing the construction of the Calumet Sag Channel, an adjunct to the main Canal described in Section 23 of the original Act of 1889, extending from the said main channel at Sag Illinois, to the little Calumet River at or near Blue Island, Illinois, which said permit was subject

to the condition that the total amount which should be diverted through the Calumet Sag Channel and the Calumet River, and through the main channel and the Chicago River, should not exceed 250,000 cubic feet per minute (4,167 cubic feet per second). One of the recitals of said permit of June 30, 1910, is:

> *"So long as the water flow remains unchanged there seems to be no special objection to its extension to both rivers instead of confining it to a single one, especially since if the new (Calumet) route be developed later to a navigable state the double route will be advantageous to navigation interests."*

It is then alleged that all of said permits, beginning with the one of May 8, 1899, have no force or effect to authorize defendants to withdraw water from Lake Michigan in such quantities as to obstruct its navigable capacity, or to obstruct the navigable capacity of the Chicago River by introducing a dangerously swift current into said river; that all of said documents purport to be issued solely under and pursuant to the authority conferred by Section 10 of the Rivers and Harbors Act of March 3, 1899, which authority is limited by said Act to the approving of alterations and modifications, of channels and waterways therein referred to, but by the terms of said Act the power to authorize obstructions to navigable capacity of navigable waters is exclusively reserved to, and retained by, Congress. If the permits are construed to be within the power of the Secretary of War under the March 3, 1899, Act, then complainants assert that at no time since March 31, 1903, have defendants been authorized by the Secretary to divert from Lake Michigan more than 4,167 cubic feet of water per second. Defendant, The Sanitary District, has violated said permits, continuously by withdrawing water largely in excess of said permits. The institution of the suit of the United States against

The Sanitary District in the District Court of the United States, for the Northern District of Illinois, Eastern Division, is alleged and said decree of June 18, 1923, is set forth, as well as the order of this court entered affirming said decree on January 5, 1925 (27).

The amended bill sets forth the permit of March 3, 1925, issued by the Secretary of War pursuant to the recommendation of the Chief of Engineers, which said permit, (omitting the recitals), is in words and figures as follows, to-wit:

> "Now, THEREFORE, This is to certify that, upon the recommendation of the Chief of Engineers, the Secretary of War, under the provision of the aforesaid statute, hereby authorizes the said Sanitary District of Chicago to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8,500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second, upon the following conditions:
>
> "1. That there shall be no unreasonable interference with navigation by the work herein authorized.
>
> "2. That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.
>
> "3. That no attempt shall be made by the permittee, or the owner, to forbid the full and free use by the public of any navigable waters of the United States.
>
> "4. That the Sanitary District of Chicago shall carry out a program of sewage treatment by artificial processes which will provide the equivalent of the complete (100%) treatment of the sewage of a human population of at least 1,200,000 before the expiration of the permit.
>
> "5. That the Sanitary District shall pay its share of the cost of regulating or compensating works to restore the levels or compensate for the lowering of the Great Lakes system, if and when constructed and post a guarantee in the way of a bond or cer-

tified check in the amount of $1,000,000 as an evidence of its good faith in this matter.

"6. That the Sanitary District shall submit for the approval of the Chief of Engineers and the Secretary of War plans for controlling works to prevent the discharge of the Chicago River into Lake Michigan in times of heavy storms. These works shall be constructed in accordance with the approval plans and shall be completed and ready for operation by July 1, 1929.

"7. That the execution of the sewage treatment program and the diversion of water from Lake Michigan shall be under the supervision of the United States District Engineer at Chicago, and the diversion of water from Lake Michigan shall be under his direct control in times of flood on the Illinois and Desplaines Rivers.

"8. That if, within six months after the issuance of this permit, the city of Chicago does not adopt a program for metering at least ninety per cent of its water service and provide for the execution of said program at the average rate of ten per cent per annum, thereafter this permit may be revoked without notice.

"9. That if, in the judgment of the Chief of Engineers and the Secretary of War, sufficient progress has not been made by the end of each calendar year in the program of sewage treatment prescribed herein so as to insure full compliance with the provisions of condition 4, this permit may be revoked without notice.

"10. That this permit is revocable at the will of the Secretary of War, and is subject to such action as may be taken by Congress.

"11. That this permit, if not previously revoked or specifically extended, shall cease and be null and void on December 31, 1929."

The complainants allege that the conditions of said permit have not been complied with in that (1) there has been unreasonable interference with navigation, (2) full free use of navigable waters have been prevented by defendant District, (3) no guaranty has been provided by the defendant for payment of costs of regulating or

compensating works, (4) no plans have been submitted for controlling works to prevent the discharge from the Chicago River into Lake Michigan in times of heavy storms, (5) defendant District has not, and is not, carrying out a program of sewage treatment as required, and (6) the City of Chicago is not making provision for compliance with the order for termination of said diversion (28).

The acts of the defendant in diverting water from Lake Michigan have never been authorized by Congress and are in violation of the rights of complainant states in the following respects:

(a) Interference with the common law rights of complainant States and their people to have free and unobstructed use of Lake Michigan and the harbors located thereon for the purpose of navigation, trade and commerce, free from any interference with the natural navigable capacity of said waters.

(b) It is alleged that the same rights are interfered with as to navigation on Lakes Huron, Erie and Ontario and their connecting channels.

(c) The acts of defendant violate said March 3, 1899 Act of Congress, particularly Section 10 thereof (29).

Defendants have continuously since the opening of said Canal authorized and directed the City of Chicago and other municipalities within defendant District and large industries to drain their sewage and waste into said Canal, which sewage and waste includes the sewage from a population of more than 3,000,000 inhabitants and the waste from industrial plants equivalent to the sewage of a population of 1,800,000 inhabitants. The said sewage and wastes pollute the waters of the Chicago, Desplaines, Illinois and Mississippi Rivers, creating a wholly offensive, unsanitary, disease-breeding

and pestilential condition in, upon and along the waterways from Lake Michigan through the Sanitary District Drainage Canal and the Chicago, Desplaines and Illinois Rivers into the Mississippi. This condition has made undesirable and largely impossible the use of said waterways, whether for business, recreation or pleasure, and navigation thereon has been made offensive and dangerous to the health and lives of the persons engaged in the conveyance of freight and passengers thereon. There is a large amount of passenger traffic and a large amount of interchange of commodities and business between the territory adjacent to and served by said waterways, and the complainant States and their people, all of which constitutes a public nuisance, violating the rights of complainants (30).

Said violations of said legal rights have caused, and are now causing, and will continue to cause so long as they are permitted to continue, serious interference with the trade and commerce of the people of the complainant States and of the said States in their proprietary capacities, resulting in pecuniary losses to the people and to said States for which there is no adequate remedy at law. The complainant States bring the action in behalf of themselves in their proprietary capacity and also on behalf of the people of the several States (31).

The permit of March 3, 1925, has a direct and positive relation and connection with the regulation of interstate and foreign commerce as appears from facts shown by the amended bill and by those within the courts knowledge.

(1) Illinois provided by its laws for the construction of a canal (The Sanitary District Canal in controversy here) as a link in the waterway from Lake Michigan to the Mississippi River, to be operated with a diversion

from Lake Michigan of an amount of water up to 10,000 cubic feet per second.

Section 23 of the original Act of 1889, provides that the canal shall be not less than 18 feet deep, 162 feet wide at the bottom, capable of passing through it 600,000 cubic feet of water per minute (10,000 per second) and the velocity to be not greater than three miles per hour. These were requirements for navigation on the canal itself. Furthermore, Section 24 provides that it shall be a navigable waterway, and Section 3 of the Act of May 14, 1903, provides that all watercraft navigating the Illinois and Michigan Canal, a navigable water of the United States, shall be permitted to navigate all the channels of defendant District free of all tolls, charges, etc.

Section 12 provided that bridges over the Main Channel should not interfere with navigation, and that they should be so constructed that they might be moved, to leave the channel free when navigation required. The March 3, 1925 permit authorizing the diversion of 8,500 cubic seconds feet (mean yearly) provides the water for the operation of the Canal for navigation purposes *in the interest of navigation.* Likewise, in the interest of navigation, were all the other permits theretofore issued.

(2) The water so diverted pursuant to War Department permits, furnishes additional depths for navigation in the Desplaines and Illinois Rivers, in the interest of navigation; also this diverted water permits the removal of the dams and locks in the Illinois River for free river navigation. Section 23 of the Act authorizes the removal of the dams in view of the operation of the Sanitary Canal with the diversion.

The General Assembly of Illinois passed an act, approved June 4, 1889, in force July 1, 1889, in contempla-

tion of the construction of the said Canal of defendant Sanitary District, providing that the state works, including dams at Henry and Copperas Creeks, which dams are mentioned in Section 23 of said act and the entire Illinois River slack-watered by said works, are ceded to the United States, on condition that the dams should be removed whenever the depth then available for navigation could be secured and maintained by channel improvement without the aid of said dams.

Section 4 of said Act provides (Session Laws of Illinois 1889, p. 227-8),

> "that the State of Illinois bases this act of session upon the condition that the plan of improving the Illinois River below La Salle by slack water, maintained by dams and locks, *be changed to a plan of improvement by means of an open channel, in conjunction with a water supply from Lake Michigan.*"

The water supply above mentioned is provided by the United States for the maintenance of navigation in the Illinois River, in the manner provided by Illinois, and thus approved by the United States.

(3) The Secretary of War, in the interest of navigation, has provided for this additional water specified in the permit of March 3, 1925, for the purpose of providing means by which the sewage and wastes discharged from various cities and towns into the Desplaines and Illinois Rivers, may be oxidized, the oxygen content of the fresh water of Lake Michigan causing the oxidation, it being well known that unless there is a certain percentage of oxygen at all times in water where wastes and sewage are present, it becomes noisome, malodorous and dangerous to the health of the people passing over such waters in boats or watercraft and/or living upon them; and, unless there is some oxygen content under such circumstances, fish life will be destroyed.

(4) The permit by the amount of its diversion including the instantaneous maximum provided, will keep the Chicago River reversed and flowing away from Lake Michigan, so that the wastes and sewage in it will not reach Lake Michigan, a navigable water of the United States, causing its pollution and interference with navigation thereon and other injury to the public, all having to do with the regulation of interstate commerce. The amended bill (p. 10) alleges that the defendant District has caused the waters of Lake Michigan to flow through its Canal in such manner as to reverse the flow of the Chicago River at all times. The amended bill (p. 13) alleges that that amount has been, in order to accomplish such reversal, approximately 8,800 cubic feet per second, being aproximately the amount of the mean yearly flow provided by the March 3, 1925, permit. The instantaneous maximum of 11,000 cubic feet per second allowed by the permit (amended bill, p. 31) was for the purpose of increasing the flow of the Chicago River to that amount in case of an extraordinary storm, which experience has shown to be necessary to keep the river from flowing into Lake Michigan at such time or times. This is necessary until the dam or controlling works provided to be constructed by July 1, 1929, at the mouth of Chicago River, according to condition 6 of said permit (amended bill, p. 31) is put in operation.

(5) Every condition of the permit shows its connection with the maintenance and interest of navigation.

Condition—

1. Requires that the work authorized shall not unreasonably interfere with navigation.
2. The United States may make inspections "in the interests of navigation" for which defendant Sanitary District shall pay.
3. Interference with the full free use by the public of "any navigable waters of the United States" is forbidden.

4. A program of sewage treatment by artificial processes shall be carried out so that the condition of the water in the Sanitary and Ship Canal of defendant District and in the Desplaines and Illinois Rivers will be better and navigation will thereby be convenienced and danger to the health of persons navigating these waterways will be removed.

5. The cost of regulating or compensating works to offset the lowering effect of the diversion shall be borne and guaranteed by the defendant in order that the program which has received the attention of the United States for a great many years of controlling within narrow limits the natural fluctuations of the lake surfaces may be provided. It is common knowledge that the outlet of Lake Erie (the Niagara River) would have to be enlarged in order that the plan of regulating the surface elevations of Lakes Erie, Huron and Michigan might be best carried out. The additional outlet maintained at Chicago through the diversion will make unnecessary this work for the enlargement of the Niagara River and thereby the Great Lakes surfaces may be controlled within narrower limits, all of which will benefit navigation, providing much greater depths of water in Lakes Erie, Huron, Michigan and their connecting channels at extreme low water.

6. The construction of controlling works at the mouth of the Chicago River to keep the Chicago River from flowing into Lake Michigan "in times of heavy storms" will prevent pollution of Lake Michigan, a navigable water of the United States thus benefitting navigation.

7. The control of the execution of the sewage treatment program and the diversion of water shall be under the control of the District Engineer at Chicago, a subordinate of the Chief of Engineers and the Secretary of War, in order that the sewage treatment program to remove noisome conditions in the navigable waterways below, such as the Sanitary and Ship Canal, Desplaines and Illinois Rivers, shall be properly carried out and the diversion of water from Lake Michigan shall be controlled at all times in the interest of navigation.

8. The metering of the water supply is provided to be adopted and carried out by Chicago in order

that there will be a lesser consumption of water by the vast population within its limits, thus making the sewage treatment program more effective.

9. If sufficient progress is not made by the end of each calendar year to insure compliance with condition 4, the permit may be revoked without notice.

10. And finally, the permit is revocable at will and it is subject to action by Congress.

Congress has occupied the entire field of navigation upon all of the Great Lakes, their connecting channels and the harbors along their respective shores as shown by Congressional acts and reports by law provided to be made to Congress.

(1) THE IMPROVEMENT AND MAINTENANCE OF NAVIGATION UPON THE GREAT LAKES SYSTEM OF WATERWAYS, NATIONAL WATERS, MAY BE PROPERLY DIVIDED INTO TWO ASPECTS.

The waterways from Lake Superior to Michigan-Huron, from Huron to Erie, through the St. Clair River, Lake St. Clair and the Detroit River, and from Erie to Ontario, of course in a state of nature were restricted, and the navigable connection between Superior and Michigan-Huron and between Erie and Ontario, due to the rapids and falls, was practically impassable.

It was necessary, therefore, in order that boats and watercraft engaged in commerce could pass from one lake to the other, that these connections be vastly improved.

The other aspect of the improvement of the Great Lakes system of navigation, constituted dredging of harbors, building breakwaters and piers to accommodate boats that could pass to and from the different lakes through their connecting waterways as they were from time to time improved. Upon this whole project, the United States has expended many millions of dollars.

(2) Between Lake Superior and Michigan-Huron.

The low water depths in the original condition of the St. Mary's River, were from 5 to 17 feet. "Navigation past the Falls was entirely impracticable, except for down-bound canoes and log crafts." Previous projects for the improvement of navigation at the St. Mary's River were provided by Acts of Congress of July 8, 1856 (11 Stat. L. 25), August 2, 1882 (22 Stat. L. 191), August 5, 1886 (24 Stat. L. 310). The existing project adopted in 1892, provides for 21 feet depth, low water. The navigable connection was provided by locks and canal and dredging various channels of the St. Mary's River below the Rapids. (Chief of Engineers Reports, 1924, p. 1457.)

Section 11 of the Rivers & Harbors Act of March 3, 1909, (35 Stat. L. 815, 820), provided for the freeing of the St. Mary's River of power plants to carry out fully the project of controlling the outflow of Lake Superior in order to prevent the surface elevation of Superior from being reduced as low or raised as high as would exist under natural conditions. This act and the project of the United States with reference to the St. Mary's River and the control of the outflow of Superior for the purposes mentioned, were considered by this court in

United States v. *Chandler-Dunbar Water Power Company,* 229 U. S. 51, 57 L. ed. 1063.

By the improvement of the United States at St. Mary's River and the control of the out-flow of Lake Superior, the relation of the surface elevation of Lake Superior to that of Michigan and Huron, has been entirely changed by the impounding at various times of water in Superior, and the releasing of such water at other times. By this means, the surface elevation of Lake Superior with reference to that of Michigan-Huron,

has been at times higher and at other times lower than it would have been under natural conditions. This has affected the relation, likewise, of the surface elevation of Michigan-Huron to that of Lake Erie. Various improvements at and in the St. Mary's River are further shown by the Chief of Engineers Reports for the year 1924 (p. 1459).

(3) Connection Between Huron and Erie.

(a) *The St. Clair River.*

In its original condition, the St. Clair River was obstructed by shoals at the foot of Lake Huron. The least depths varied from 16 to 18 feet. The present depths provided by existing projects are from 19 to 21 feet, as authorized by Congressional Acts of July 13, 1892 (27 Stat. L. 88), and by the Act of July 27, 1916. (Chief of Engineers Reports 1924, p. 1466.)

(b) *Lake St. Clair.*

The entrance to this lake was obstructed by bars, over which the least depth of water was from 2 to 6 feet. The original projects were authorized by Acts of Congress of March 2, 1867 (14 Stat. L. 418), and by the Act of March 3, 1873 (17 Stat. L. 560), whereby depths were provided of approximately 16 feet by dredging channels through the lake. The present projects provide for deepening of the channels 20 to 21 feet, as authorized by Acts of Congress of August 5, 1886 (24 Stat. L. 310), July 13, 1892 (27 Stat. L. 88), June 13, 1902 (32 Stat. L. 331), March 2, 1919. (United States Engineers Reports 1924, p. 1469.)

(c) *Detroit River.*

The low water depth in its original condition, was 12½ to 15 feet. Previous projects for the improvement of navigation in the Detroit River were authorized by the Acts of Congress of June 23, 1874 (18 Ph. 3 Stat. L. 237), July 5, 1884 (23 Stat. L. 133), August 5, 1886 (24 Stat. L. 310), August 11, 1888 (25 Stat. L. 400), July 13, 1892 (27 Stat. L. 88), March 3, 1899 (30 Stat. L. 1121), by which depths were provided of at least 20 feet. The existing project provides for approximately 22 feet in depth, according to Acts of Congress of June 13, 1902 (32 Stat. L. 331), March 3, 1905 (33 Stat. L. 1117), June 25, 1910 (36 Stat. L. 630), March 4, 1913 (37 Stat. L. 801), March 2, 1907 (34 Stat. L. 1073), June 25, 1910 (36 Stat. L. 630), March 2, 1919. (Chief of Engineers Reports, 1924, p. 1473.)

(d) *Connection between Erie and Ontario.*

The impossibility of passing from one lake to the other under natural conditions, and the necessity of providing such communication solely by canal, is so well known that it is unnecessary to call the court's attention to the various projects authorized by Congress for the construction of canals and for other improvements of navigation here.

(4) Harbor Improvements by the United States.

All the harbors on the shores of these Great Lakes and their connecting channels, have been improved so as to provide depths from time to time as the navigable connections between the Great Lakes were improved, all pursuant to acts of Congress. Time and space will not permit our referring to all the different harbors show-

ing the various improvements authorized by Congress. It will suffice to mention some of them, and the improvement of all of the various harbors on the shores of the Great Lakes are described in the various annual reports of the Chief of Engineers.

(a) *Marinette Harbor, Wisconsin.*

Thirteen feet depth was provided by Act of Congress of March 3, 1871 (16 Stat. L. 538), 15 feet by the Act of September 15, 1890 (26 Stat. L. 426), 18 feet by the Act of March 3, 1899 (30 Stat. L. 1121). Other improvements of the harbor were provided by Acts of July 13, 1892 (27 Stat. L. 88), June 13, 1896 (29 Stat. L. 202), June 13, 1902 (32 Stat. L. 331), March 4, 1913 (37 Stat. L. 801). (Chief of Engineers Reports, 1924, p. 1327.)

(b) *Green Bay.*

The original depth of this harbor was 10 feet. Congress has by its acts provided a depth of 18 feet. The Acts of Congress for the various improvements are June 23, 1866 (14 Stat. L. 70), June 23, 1874 (18 Pt. 3 Stat. L. 237), Sept. 19, 1890 (26 Stat. L. 426), June 3, 1896 (29 Stat. L. 202), June 13, 1902 (32 Stat. L. 331), June 25, 1910 (36 Stat. L. 630). (Chief of Enginers Reports, 1924, p. 1330.)

(c) *Sturgeon Bay Harbor.*

Depth of 19 feet has been provided by Acts of Congress of July 13, 1892 (27 Stat. L. 88), July 13, 1892 (27 Stat. L. 88), June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1343.)

(d) *Algoma Harbor.*

From the original 3 feet depth, Congress by its acts has provided for 14 feet, March 3, 1871 (16 Stat. L. 538), March 3, 1875 (18 Pt. 3 Stat. L. 456), July 5, 1884 (23 Stat. L. 133), March 3, 1899 (30 Stat. L. 1121), and March 2, 1907 (34 Stat. L. 1073). (Chief of Engineers Reports, 1924, p. 1347.)

(e) *Kewaunee Harbor.*

From an original depth of 13 feet, Congress has by its acts provided a depth of 18 feet. See Acts of Congress of March 3, 1881 (21 Stat. L. 468), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1350.)

(f) *Manitowoc Harbor.*

From an original depth of 4 feet, Congress has provided a depth of 18 feet by its Acts of August 30, 1852 (10 Stat. L. 56), March 3, 1881 (21 Stat. L. 468), September 19, 1890 (126 Stat. L. 426), June 3, 1896 (29 Stat. L. 202), and June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1357.)

(g) *Sheboygan Harbor.*

From an original depth of 4 feet, Congress has provided a depth of approximately 19 feet by its acts of June 23, 1866 (14 Stat. L. 70), March 3, 1873 (17 Stat. L. 560), March 3, 1881 (21 Stat. L. 468), August 18, 1894 (28 Stat. L. 338), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331). (Chief of Engineers Reports, 1924, p. 1360.)

(h) *Port Washington Harbor.*

From an original depth of but a few feet, Congress has provided a depth in this harbor of 16 feet by its Acts of July 11, 1870 (16 Stat. L. 223), August 14, 1876 (19 Stat. L. 132), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1364.)

(i) *Milwaukee Harbor.*

From an original depth of 4½ feet, Congress has provided 19 feet depth and has made various other improvements by its Acts of March 3, 1843 (5 Stat. L. 619), August 30, 1852 (10 Stat. L. 56), April 10, 1869 (16 Stat. L. 44), March 3, 1881 (21 Stat. L. 468), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331), March 2, 1907 (34 Stat. L. 1073), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1367.)

(j) *Racine Harbor.*

From an original depth of 2 to 3 feet, Congress has provided a depth of 19 feet by its Acts of June 23, 1866 (14 Stat. L. 70), March 3, 1899 (30 Stat. L. 1121), June 13, 1902 (32 Stat. L. 331), March 2, 1907 (34 Stat. L. 1058), June 25, 1910 (36 Stat. L. 630). (Chief of Engineers Reports, 1924, p. 1372.)

(k) *Kenosha Harbor.*

From an original depth of 2 feet, Congress has provided approximately 19 feet by its Acts of August 30, 1852 (10 Stat. L. 56), June 23, 1866 (14 Stat. L. 70), September 19, 1890 (26 Stat. L. 426), March 3, 1899 (30 Stat. L. 1121), March 2, 1907 (34 Stat. L. 1073). (Chief of Engineers Reports, 1924, p. 1376.)

(l) *Superior Harbor or Bay.*

From an original depth of 8 to 9 feet, Congress has provided depths of approximately 20 feet by its Acts of March 3, 1873 (17 Stat. L. 560), March 2, 1867 (14 Stat. L. 418), and June 3, 1896 (29 Stat. L. 202). Under the latter act the improvement of the Harbors of Duluth and Superior were included as one project. All the conditions here were considered by this court, and it was held that the United States had and had assumed exclusive jurisdiction over Duluth and this harbor. (See *Wisconsin* v. *Duluth,* 96 U. S., p. 379.) (Chief of Engineers Reports, 1924, p. 1282.)

(m) *Ashland Harbor.*

Congress has provided for improvement of this harbor by its Acts of August 5, 1886 (24 Stat. L. 310). The original depth was 19 feet and 20 feet is provided by the United States. (Chief of Engineers Reports, 1924, p. 1292.)

The harbors above mentioned, constitute all the harbors along the Wisconsin shores mentioned in the amended bill. It would seem unnecessary to pursue the subject further as to other harbors of other states mentioned in said amended bill. As to such other harbors, Congress authorized improvements apace with the navigable facilities it provided generally upon the Great Lakes to the same extent and in the same manner it did as to said Wisconsin Harbors, as is shown by the annual reports of the Chief of Engineers of United States Army.

(5) THE UNITED STATES CONSENTED TO THE CONSTRUCTION BY THE DOMINION OF CANADA OF A DAM ACROSS A CHANNEL OF THE GALOPS RAPIDS AND AUTHORIZED THE DIVERSION OF WATER FROM LAKE ERIE FOR NAVIGATION AND WATER POWER PURPOSES HAVING THE EFFECT OF LOWERING ITS NATURAL SURFACE ELEVATION 4.2 INCHES.

The outlet of Lake Ontario known as the "Gut Dam," which had the effect of permanently raising the surface elevation of Lake Ontario over its natural condition about 5 inches, as is shown by report entitled "Diversion of Water from the Great Lakes and Niagara River," made pursuant to Resolution Number 8, 65th Congress, the letter of the Chief of Engineers transmitting said report to the Speaker of the House of Representatives being dated December 7, 1920, to which is attached letter of the Chief of Engineers of November 9, 1920, and report of the Board of Engineers August 24, 1920, and to which is also attached the report of Col. J. G. Warren of August 30, 1919. (See page 378 of said "Report on diversion of water from the Great Lakes and Niagara River." Also see H. R. 762, 63d Congress, Second session.)

The diversion through the Welland Canal in Canada, Black Rock Ship Canal, New York State Barge Canal at Niagara Falls for water power purposes, from Lake Erie, has the effect of lowering the surface elevation of the water of Lake Erie .35 foot, or 4.20 inches, (See said "Report on Diversion of Water of the Great Lakes and Niagara River," p. 23.)

ARGUMENT ON THE LAW.

Preliminary to discussing the points of law and the facts of this case to which the various propositions of law apply, we wish to call the attention of the court to certain facts of which it may take judicial notice.

This court will take judicial notice of all waterways making up the various navigation systems and connecting those systems one with the other, the condition of same, facts set forth in public documents of the United States, of the State of Illinois and of its agents, and will as to such knowledge disregard any allegations of the bill of complaint contrary to such facts.

Jones v. *United States,* 137 U. S. 202, 212, 215, 34 L. ed. 691, 695, 696 and cases there cited.

South Ottawa v. *Perkins,* 94 U. S. 260, 24 L. ed. 154.

Brown v. *Piper,* 91 U. S. 37, 23 L. Ed. 200.

Jenkins v. *Collard,* 145 U. S. 546, 36 L. ed. 812.

Armstrong v. *U. S.,* 3 Wallace 154, 20 L. ed. 614.

The original condition of the various waterways connecting the Great Lakes, the harbors along their shores, the improvement of the Great Lakes system of waterways from time to time by Congress, the acts of Congress relating to same, the acts of the General Assembly of Illinois, constituting the statute laws, are set forth in the statement of facts (herein, p. 25). The court will take judicial notice, notwithstanding the allegations of the amended bill, on information and belief, to the contrary, of the compliance by the defendant District with

the conditions of the permit of March 3, 1925, if the facts of such compliance are deemed to be material, or in the event the court should consider that the allegations of the amended bill of complaint, (on information and belief and the merest conclusions) are such as to overcome the presumption that each and every of the conditions have been complied with. (The Secretary of War has not at any time revoked the permit, and it is now in full force and effect.) The facts of which the court may take judicial notice showing compliance with the conditions of the permit are:

Under condition 2, the cost of inspections made by the Engineers Corps United States Army from March 3, 1925, to September 30, 1925, amounting to $614.28, was paid by defendant Sanitary District October 14, 1925; the cost of such inspection and supervisory work from October 1, 1925, to November 30, 1925, amounting to $2,224.24, was paid by defendant Sanitary District December 17, 1925. (The bill for the said last items appears in appendix hereto, page 70).

Under condition 4, schedule of design and construction of sewage treatment plants for period from 1925 to 1929, was submitted by Sanitary District to and approved by the District Engineer at Chicago on July 28, 1925, and in pursuance of said program for sewage treatment works so approved, the following contracts were let by defendant Sanitary District for sewage treatment works on the dates shown below. (See proceedings of the Board of Trustees of Sanitary District for the respective dates.)

August 6, 1925—95th Street Sewer Connection	$ 44,720.00
August 20, 1925 — Operating Galleries, North Side Treatment Plant	316,090.00
Sept. 17, 1925—Preliminary Tanks and Grit Chambers, North Side Treatment Plant	801,665.80
Sept. 17, 1925—Dredging Calumet and Little Calumet Rivers	1,080,000.00
Oct. 1, 1925—Motors and Pumps, North Side Treatment Plant	35,475.00
Oct. 1, 1925—Miscellaneous Electrical Equipment, North Side Treatment Plant	22,900.00
Oct. 8, 1925—Contract No. 7, North Side Sewer	384,560.00
Oct. 8, 1925—Contract No. 8, North Side Sewer	354,200.00
October 15, 1925—Elevators, North Side Treatment Plant	13,734.00
Oct. 22, 1925—Air Conditioning Equipment, North Side Treatment Plant	29,900.00
Nov. 19, 1925—Pump and Blower House, North Side Treatment Plant	3,791,320.00
Total	$6,874,564.80

NOTE—Total expended for sewage treatment plants, pumping stations and the like (not including maintenance and operation), to January 1, 1926—$42,563,300—as shown by defendant Sanitary District's public records and documents.

Under condition 5, the million dollar bond provided to guarantee the payment of the cost of regulating or compensating works was approved by the Board of Trustees of defendant Sanitary District at its meeting of September 17, 1925 (see proceedings for said date), and was thereafter filed with and approved by and is in the possession of the War Department.

Under condition 7, the supervision of the work has been and is under the United States District Engineer at

Chicago, as shown by the bills for cost of inspections. (Appendix, page 70.)

Under condition 8, on September 1, 1925, the City Council of the City of Chicago passed an ordinance (see proceedings of City Council for that date), adopted a program for metering at least 90 per cent of its water service, and for the execution of said program at the average rate of 10 per cent per annum.

Condition 1 provides that the work provided to be done under the permit shall not unreasonably interfere with navigation, and condition 3 that the defendant Sanitary District shall not forbid full free use by the public of any of the navigable waters. It must be presumed that these two conditions have been observed, for there is no showing that there has been any complaint by the War Department.

Condition 6 provides for the submission of plans for and the completion (by July 1, 1929), of the controlling works at the mouth of the Chicago River to prevent the Chicago River from flowing into Lake Michigan at times of heavy storms. It must be presumed that these plans are being prepared and will be submitted and the work will be done as provided. There is no allegation that any complaint on this score has been made by the War Department.

Conditions 9 and 10 relate to revocation by the Secretary of War for cause or at will.

Condition 11 provides for the permit's termination December 31, 1929.

I.

THE PERMIT OF MARCH 3, 1925, ISSUED BY THE SECRETARY OF WAR UPON THE RECOMMENDATION OF THE CHIEF OF ENGINEERS, IS WITHIN THE AUTHORITY GRANTED TO SAID OFFICERS BY SECTION 10 OF THE RIVERS & HARBORS ACT OF MARCH 3, 1899. THE DIVERSION OF 8,500 CUBIC SECONDS FEET IS LAWFUL, AND SUCH DIVERSION IS IN LAW NO OBSTRUCTION TO NAVIGATION.

(a) Complainants contend that the Chief of Engineers was not authorized to recommend, and the Secretary of War was not empowered to approve, a permit allowing and affirmatively authorizing this diversion of water from Lake Michigan, because it is, in fact, as they allege, an obstruction to navigation, in that it lowers Lake Michigan, Huron, Erie, Ontario and their connecting channels and harbors, at least six inches, and thereby affects the carrying capacity of boats that might pass over these waters.

There ought not to be any question as to the authority of the Secretary of War to issue a permit under the March 3, 1899, Act, since the decision of this court in *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 69 L. Ed. 200. Speaking of this very diversion, the court said:

> "This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War."

The very question was submitted to the acting Attorney General, Honorable James M. Beck, and his opinion was given February 13, 1925. (See appendix hereto, page 59). The opinion concluded that the secretary had the authority to grant a permit authorizing a diversion greater than the amount that had theretofore been allowed by his permits, and that Congress intended by the Act of March 3, 1899, to delegate complete, full and ex-

clusive authority to the Secretary of War and the Chief of Engineers to determine what should or should not be done in connection with navigable waters, and that when the Secretary approved the doing of anything in connection with those waters, the act permitted was not in law an obstruction.

In support of his opinion, the acting Attorney General cites and quotes from the case of *Miller* v. *Mayor,* 109 U. S. 385, 27 L. ed. 971; see, also, *U. S.* v. *Rio Grande Dam & Irrigation Company,* 174 U. S. 690, 43 L. ed. 1136.

In

Maine Water Company v. *Knickerbocker,* 99 Maine 473, (decided February 17, 1905),

the power of the Secretary of War under Section 10 of the Rivers and Harbors Act is analyzed. The water company brought suit against the Towage Company for damages sustained to the Water Company's pipe line across the Kennebec River at Bath, a tidal, navigable water wholly within the state. The pipe line was properly authorized by the state, and the Secretary of War had issued a permit, as recommended by the Chief of Engineers, for the placing of the pipe line in the river. It was claimed by the defendant that the pipe line was an obstruction and unlawfully occupied the river, and that the Secretary of War was not empowered to grant the permit for placing it in the river, and that the authority could only come from Congress direct. The court held (p. 481):

> "that such structures if built according to plans recommended and authorized, as provided in the section (10), are authorized by Congress—that they are affirmatively authorized,—though the affirmative authority arises by implication,—and that they are lawful without any further action by Congress".

The *Maine Water Company* case was cited with approval by this court in

Southern Pacific Company v. *Olmypian Dredging Company,* 260 U. S. 205, 210, 67 L. ed. 213,

and by the Circuit Court of Appeals, 4th Circuit, in

Ganison v. *Greenleaf Johnson Lumber Company,* 215 Fed. 578, 580.

In

Southern Pacific Company v. *Olympian Dredging Company,* 260 U. S. 205, 207, 67 L. ed. 213, 215,

in referring to the similar act of September 19, 1890, this court said:

> "By the Act of September, 1890, (26 Stat. L. 453, 454, Chap. 907), Congress inaugurated a new policy of general, direct control over the navigable waters of the United States. * * * By this legislation Congress assumed jurisdiction of the subject of obstructions to navigtaion, and committed to the Secretary of War administrative power in so far as administration was necessary."

In

Monongahela Bridge Company v. *U. S.,* 216 U. S. 177, 195, 54 L. ed. 435, 443,

this court, in construing the Act of March 3, 1899, said:

> "* * * Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject."

The Act of March 3, 1869, which was before the court in the case of

Miller v. *Mayor,* 109 U. S. 385, 386, 387, 394, 27 L. ed. 971, 973, 974,

authorizing the construction of a bridge between New York and Brooklyn, so

> "as not to obstruct, impair or injuriously modify the navigation of the river",

provided that the plans of the bridge should be subject to the approval of the Secretary, upon the Secretary's being satisfied

> "that the bridge built on such plan"

will not

> "obstruct, impair or injuriously modify the navigation of said river".

This court, in holding the act and the action of the Secretary of War in approving the plans to be lawful, said:

> "Its (Congress') power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive * * *. The efficiency of an act as a declaration of legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

(b) The diversion authorized by the permit of March 3, 1925, is lawful, and it is not an obstruction to navigation. The determination of the amount of the diversion was and is delegated by the Act of 1899 to the Chief of Engineers and the Secretary of War and the action of the Secretary on the recommendation of the Chief of Engineers has the same force and effect as if such action had been taken directly by Congress. The power to act being exclusive in the United States (control of navigable waters), its action cannot be questioned.

The case of

> *Pennsylvania* v. *W. & B. Bridge Company,* 18 Howard 421, 430, 15 L. ed. 435, 437,

would seem to be conclusive of almost every question involved in this controversy. In that case suit had been instituted by the State of Pennsylvania in this court to

enjoin the construction or maintenance of the bridge because, as it was proposed to be, or was built, it prevented boats passing up the river and into Pennsylvania, and caused an undue burden upon the State of Pennsylvania in its proprietary capacity, by preventing the full operation of various canals and works built by Pennsylvania to connect with the Ohio River and thereby the tolls and revenue of the state were and would be diminished, and the public improvements thus made would be rendered useless. This court entered a decree as set forth in its opinion in

13 Howard, 518, 14 L. ed. 249,

finding the bridge to be an obstruction and enjoining the maintenance of the bridge as it had been built. Later, August 31, 1852, Congress passed an act declaring the bridge to be a lawful structure in its then condition. When the matter came before this court upon motions of the complainant for attachment and sequestration of the property of the bridge company for contempt, the court said (p. 130):

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress they are to be regarded and modified in this subsequent legislation, and although it still may be an obstruction in fact, **is not so in the contemplation of law.** We have already said, and the principle is undoubted, that the Act of the Legislature of Virginia conferred full authority to erect and maintain a bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation, consistent with its preservation and continuation, **the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government.** * * *
>
> The regulation of commerce includes intercourse

and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction of navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge."

The diversion authorized by the March 3, 1925, permit is lawful as to the maintenance of which during its existence no state can complain. It stands in exactly the same position as the bridge from New York to Brooklyn, considered by this court in

Miller v. *Mayor of New York,* 109 U. S. 385, 396, 27 L. ed. 971, 975,

as to which bridge, built with the approval of the Secretary of War, this court said:

"For its interference with the public use of the stream no individual could complain, as **the power which could control and regulate that use had made the structure creating the interference a lawful one."**

(c) **This court said in**

Martin v. *Mott,* 12 Wheaton, 19, 31, 6 L. ed. 537, 541,

"Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." See, also, *Mullan* v. *U. S.,* 140 U. S. 240, 35 L. ed., 489.

In

Interstate Commerce Commission v. *Chicago, Rock Island & Pacific Railroad Company,* 218 U. S. 88, 110, 67 L. ed. 946, 958,

in speaking of the presumption indulged as to a decision of the Interstate Commerce Commission, this court said:

" * * * its findings are fortified by presumptions of truth 'due to the judgments of a tribunal appointed by law and informed by experience.'"

The discretion of determining whether or not the diversion is or is not an obstruction to navigation and of con-

trolling the amount of the diversion, was committed to the Secretary of War. His finding is conclusive. There is not the slightest suggestion that his action in granting the permit of March 3, 1925, was taken capriciously, nor was the authority unreasonably exercised. In fact, there are no allegations properly setting up facts upon which relief can be based. They are the merest conclusions of the pleader. Paragraph 25 of the amended bill merely states that 500 or a thousand cubic feet per second is the only amount necessary for the operation of the canal for navigation purposes. From what facts that conclusion may be obtained is not shown. More water may be required for the operation of the waterway on some other plan than the one the pleader had in mind when he stated that there was not required more than 500 to a thousand cubic feet per second. Whether he assumed this water was required for slack water navigation or for a free river plan of navigation for the Desplaines and Illinois Rivers, is not shown.

In

Pierce Oil Corporation v. *Hope,* 248 U. S. 498, 500, 63 L. ed., 381, 383,

this court said:

> "The averment that the ordinance is unnecessary and unreasonable if it be regarded as a conclusion of law upon the point which this court must decide is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the court would not inform itself, as in many cases it would, * * * an averment in this general form is not enough. * * * Only facts well pleaded are confessed."

The same principle applies to the allegations of the bill of complaint as to the supposed injury to complainants. (Paragraph 21, amended bill). There is the statement that coal and other commodities are carried in what are

called bulk freighters of "enormous carrying capacity," and then the statement is made that "for every inch of their normal draft which said vessels are unable to utilize, their cargo carrying capacity is reduced by many tons." There is no allegation that any boats carrying coal or commodities used by the complainants, have been or will be prevented from carrying their full cargo. There is not even an allegation of conclusion as to injury or damage.

II.

THE MARCH 3, 1925, PERMIT RELATES DIRECTLY TO AND HAS DIRECT, POSITIVE AND SUBSTANTIAL CONNECTION WITH THE REGULATION OF INTERSTATE COMMERCE, AS SUCH PERMIT OPERATES DIRECTLY, AND PROVIDES FOR THE MAINTENANCE AND IMPROVEMENT, AND THE CONVENIENCE AND FACILITY, OF NAVIGATION UPON UNITED STATES NAVIGABLE WATERWAYS.

Treating, for the purpose of argument only, the conclusions of the pleader as properly presenting to the court facts which can be confessed by the motion to dismiss, the nub of complainant's case, as set forth by their amended bill, seems to be—first, the diversion lowers the surfaces of the Great Lakes approximately 6 inches, as well as their connecting channels and the harbors along their respective shores, resulting in the loss of draft, and consequent carrying capacity of boats engaged in interstate commerce and carrying coal, iron ore and other commodities; second, that portion of the diversion authorized by the permit of March 3, 1925, exceeding 500 or a thousand cubic seconds feet, admitted by the amended bill to be necessary for navigation, is unlawful; third, the only purpose of the Secretary of War in granting the permit was to take care of certain conditions relating to the health of approximately three million people

residing within the territorial limits of defendant Sanitary District.

However, the various allegations of the amended bill and facts appearing *aliunde* within the court's judicial notice demonstrate, that the permit providing for the diversion in the amount named, really and substantially serves the interests of navigation, in that; (see statement of facts herein, p. 20 *et seq.*).

(a) The permit provides the water from Lake Michigan required under the laws of Illinois for the operation of defendant District's canal, a link in the waterway from Lake Michigan to the Gulf of Mexico, which waterway has received the attention of the government and Illinois from the very time Illinois became a state of the union, and which waterway and the diversion of water from Lake Michigan for its operation, was authorized by Congress under the Acts of March 30, 1822, and March 2, 1827. Said acts are entitled, respectively:

> "An Act to authorize the State of Illinois to open a canal through the public lands to connect the Illinois River with Lake Michigan,"

and

> "An Act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan"; (4 Stat. L., 234.)

The force and effect of these two acts were considered as consent by the United States that the drainage of Chicago should pass in to the Desplaines, Illinois, and Mississippi Rivers. (*Missouri* v. *Illinois,* 200 U. S. 496.) So, when Illinois built its canal and provided for its operation with a diversion up to 10,000 cubic seconds feet, the amount that could be diverted for such purposes was subject only to the recommendation of the Chief of Engineers and approval of the Secretary of War. (*Sanitary District of Chicago* v. *U. S.,* 266 U. S. 405, 69 L. ed. 200.)

(b) The water diverted serves the interests of navigation in providing oxygen for the oxidation of sewage and drainage in the Des Plaines and Illinois Rivers, preventing a nuisance and inconvenience to navigation thereon; likewise the diversion to the amount mentioned keeps out of Lake Michigan the sewage polluted Chicago River, thus preventing a condition in the water of Lake Michigan injurious to navigation;

(c) The diversion, in addition to providing navigation facilities upon the defendant Sanitary District's canal, makes for the maintenance of free river navigation in the Illinois River, and increases and insures navigable depths on said river.

So, the issuance of the permit is within the scope of the power not only delegated to Congress, but also that power and authority as we have seen properly committed to the Secretary of War under the Act of March 3, 1899. The exercise of the power to fix the amount of the diversion in the interests of navigation having been committed to the Secretary of War, the amount, manner and conditions of such diversion is therefore within his exclusive control. No court in the land has power to review or question the exercise by the Secretary of War of this authority.

In

Gilman v. *Philadelphia,* 3 Wallace 713, 724, 18 L. ed. 96, 99,

this court said:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. * * * **For these purposes Congress possesses all the powers which existed in**

the states before the adoption of the national constitution, and which have always existed in the Parliament in England."

In

United States v. *Chandler Dunbar Water Power Co.*, 229 U. S. 51, 62, 64, 65, 57 L. ed. 1063, 1075, 1076,

this court, in speaking of the power of Congress over navigable waters, said:

"That power of use and control comes from the power to regulate commerce between the states and with foreign nations. * * *

So unfettered is this control of Congress over navigable streams of the country, that its judgment as to whether a construction in or over such river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of **a subject wholly within its control.**

"* * * And when Congress determined, as it did by the Act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present Ship Canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was conclusive."

Economy Light & Power Co. v. *U. S.*, 256 U. S. 113, 121, 65 L. ed. 847, 854:

"Congress may exercise its authority through general as well as through special laws, its power in either case being supreme. The Act of 1899 * * * upon which the present bill is founded, is a due assertion of the authority of Congress over all navigable waters within its jurisdiction; and it must be accorded due weight as such."

Wisconsin v. *Duluth*, 96 U. S. 379, 24 L. ed. 668, 672:

"While the engineering officers of the government are under the authority of Congress doing all they can to make this canal useful to commerce, and to

keep it in good condition, this court can have no duty to a state which requires it to order the City of Duluth to destroy it."

In

Southern Pacific Co. v. *Olympian Dredging Co.*, 260 U. S. 205, 209, 67 L. ed. 213, 216,

in speaking of the authority of the Secretary of War under the Act of March 3, 1899, this court said:

> "Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of navigation, or upon the fact that to leave the stumps in the bed of the river would be of **some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. It was not for the petitioners, however, to question either his reasons or his conclusions.**"

So, in this case, whether the Secretary of War merely concluded that the diversion in the amount fixed by his permit secured "the safety of navigation," or whether he issued it for the purpose of improving and benefiting navigation, are not questions about which the complainants here may inquire.

The control of navigation being within the regulation of commerce, whatever the Secretary of War may do in connection with the control of navigable waters for the public good (for the protection of the water supply of three million inhabitants) is within his power, exclusive and conclusive, which no one can question.

In

Pensacola Telegraph Company v. *Western Union Telegraph Company*, 96 U. S. 1, 24 L. ed. 708, 711,

this court said:

> "The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for

the whole nation, and is not embarrassed by state lines."

Mondou v. *N. Y. H. & H. R. Co.*, 223 U. S. 1, 47, 56 L. ed. 327, 345 (2d Employers' Liability cases):

"3. 'To regulate' in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. * * *

4. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act."

III.

THE ENTIRE GREAT LAKES SYSTEM OF WATERWAYS, INCLUDING THE GREAT LAKES THEMSELVES, CONNECTING CHANNELS AND HARBORS, ARE UNDER THE EXCLUSIVE JURISDICTION OF THE UNITED STATES. IT HAS EXERCISED AND IS EXERCISING SUCH JURISDICTION AND HAS OCCUPIED THE ENTIRE FIELD. IT IS NOT WITHIN THE RIGHT OF COMPLAINANTS TO QUESTION SUCH REGULATION OF SAID WATERWAY SYSTEM IN ANY COURT, OR FOR THE COURT, AT THE SUIT OF COMPLAINANT STATES, TO CONTROL THE ACTION OF CONGRESS WITH RESPECT TO THEM.

In our statement of the facts herein (page 25) we have called the court's attention to the fact that Congress, through its various acts, beginning a century ago, commenced and has continued to exercise jurisdiction over the Great Lakes system by enlarging and improving the connecting waterways, and each and every of the harbors. Thereby Congress has provided within its exclusive jurisdiction the conditions of navigation upon

such waterways. The improvement of these waterways has taken the form of expenditures under the direction of the Secretary of War and Engineer Corps, of large sums of money, pursuant to the various Rivers and Harbors Appropriation bills, as well as by other acts of Congress. The connecting channels which originally formed no waterway connection between certain lakes, have been completely changed or enlarged by dredging and widening, or by the construction of canals. The relation of the levels of the different lakes to one another have been entirely changed, as has resulted from the impounding and releasing of the waters of Lake Superior through the complete control of the out-flow of Lake Superior through the St. Mary's River and by the diversions of water from Lake Erie for navigation and water power purposes, including the raising of the surface elevation of Lake Ontario by building the Gut Dam in the Galops Rapids. The harbors likewise have been deepened and otherwise improved by the United States, so that whatever navigation facilities are maintained for interstate commerce upon the Great Lakes, has been provided entirely by the United States, as in fact it and it alone had the power to do under the Constitution.

The case of

Wisconsin v. *Duluth,* 96 U. S. 379, 24 L. ed. 668, 670, 671,

is conclusive, as Congress has taken upon itself the entire burden of the improvement of the Great Lakes system of waterways. Congress by these various acts with reference to the Great Lakes system of waterways and every harbor mentioned in the amended bill, has said, as this court stated that it said as to the Duluth harbor, in *Wisconsin* v. *Duulth, supra*:

> "It cannot be necessary to say that when a public work of this character has been inaugurated or

adopted by Congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted.

* * * * *

We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

If the merest recital of these acts of Congress, and the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument."

IV.

THE AMENDED BILL DOES NOT MAKE A CASE JUSTICIABLE IN THIS COURT.

It is of national waters that complaint is made (*Sanitary District of Chicago* v. *U. S.*, 266 U. S. 405, 69 L. ed. 200), over which waters there is required the exercise of the exclusive jurisdiction of the Federal Government. *U. S.* v. *Chandler-Dunbar Water Co.*, 229 U. S. 53-67, 57 Law ed. 1063. The power of the United States as to such navigable waters is complete and exclusive, being all the power formerly in the several States. *Gilman* v. *Philadelphia*, 3 Wal. 713-724, 18 L. ed. 96; *Pensacola Telegraph Co.* v. *Western Union*, 96 U. S. 1, 24 L. ed. 701.

"* * * The vindication of the freedom of interstate commerce is not committed to the State of Louisiana. * * *" *Louisiana* v. *Texas*, 176 U. S. 1, 44 L. ed. 347.

"But in matters where the national importance is imminent and direct, even where Congress has been silent, the States may not act at all." *Sanitary District* v. *U. S.*, 266 U. S. 405, 69 L. ed. 200. See also *Kansas City & Southern* v. *Kaw Valley Drainage District*, 233 U. S. 75-79, 58 L. ed. 857; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1029.

V.

THE UNITED STATES IS A NECESSARY AND INDISPENSABLE PARTY, AND THE CASE CANNOT PROCEED WITHOUT IT.

No decree can be entered in this case without affecting the rights of the United States as provided by acts of Congress and by the action of its executive officers taken under congressional acts. The bill seeks either the absolute abatement of all diversion from the Great Lakes to the Desplaines and Illinois Rivers, or such portion of the diversion as the court should determine to be unnecessary for navigation. The acts of Congress of March 30, 1822, and March 2, 1827, directly provided for the construction and maintenance of the canal connecting Lake Michigan with the Illinois River and the consequent diversion of water from Lake Michigan to operate same. Under the latter act, the United States granted to the State of Illinois for the construction of this canal, and it was provided that it should be maintained by Illinois as a canal for the use of the United States, a vast quantity of land, equal to one-half of five sections in width, on each side of the canal. Therefore, the United States is interested in the operation of the defendant Sanitary District's canal, the condition of pollution of the waters of the Desplaines and Illinois Rivers, the depths for navigation in the Illinois River and the condition of pollution of Lake Michigan at and near Chicago.

The interest of the United States in the diversion was apparent to this court in

> *Sanitary District* v. *United States,* 266 U. S. 405, 69 L. ed. 200,

when it said:

> "This suit is not for the purpose of doing away with the channel which the United States, we have no doubt, would be most unwilling to see closed. * * *".

Hence a decree as to whether there should be any diversion, or as to the amount of diversion, would directly and positively affect the rights and interests of the United States. Under such circumstances the United States is a necessary party.

State of California v. *Southern Pacific Co.,* 157 U. S. 229, 39 L. ed. 683.

Minnesota v. *Northern Securities Company,* 184 U. S. 199, 46 L. ed. 499.

Sanitary District v. *United States,* 266 U. S. 405, 69 L. ed. 200.

VI.

COMPLAINANTS CAN BASE NO RIGHT IN THIS COURT UPON THE ALLEGED FAILURE OF DEFENDANT SANITARY DISTRICT TO CARRY OUT ANY OF THE CONDITIONS OF THE SAID PERMIT OF MARCH 3, 1925. THE PERMIT IS IN FULL FORCE AND EFFECT, HAS NOT BEEN REVOKED. NON-COMPLIANCE WITH THE CONDITIONS DOES NOT IPSO FACTO REVOKE IT. IF CONDITIONS SHOULD NOT BE COMPLIED WITH, ONLY THE SECRETARY OF WAR MAY REVOKE, AND THE BREACH OF ANY OF THE CONDITIONS DOES NOT AFFECT THE NAVIGABLE CONDITIONS OF THE GREAT LAKES AS TO WHICH COMPLAINANTS MAKE CLAIM OF INJURY.

Whether any conditions or what conditions should be imposed, was entirely within the discretion of the Secretary of War.

> "The power to approve implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to condition an approval." *Southern Pacific* v. *Olympian Dredging Co.,* 260 U. S. 205, 208, 67 L. ed. 213, 216.

In the case of

Kuhne v. *Sanitary District,* 294 Ill. 430, 437,

Kuhne attempted to base a right of action upon the alleged wrongful act, as he claimed, of the Sanitary Dis-

trict in diverting from Lake Michigan water in excess of 4,167 cubic seconds feet, as provided by the permit of December 5, 1901, which was the subject of the case of

Sanitary District of Chicago v. *United States*, 266 U. S. 405, 69 L. ed. 200.

There the Illinois Supreme Court held that enforcement by the Secretary of War of the limitation of his permit, was entirely and exclusively within his jurisdiction, and that the plaintiff, even though injured by failure of the Sanitary District to observe the limitation, could not complain

It being within the power of the Secretary of War in the first instance to impose such conditions as he chose or to impose no conditions, it is likewise within his power and discretion to revoke or not revoke the permit in the event the conditions, or any of them, are not observed by the defendant District.

According to the allegations of the amended bill, the permit now is in full force and effect, which is the only fact material in this controversy.

In any event, as heretofore shown, the court may take judicial notice from public documents and ordinances of the Board of Trustees of the Sanitary District and City Council of the City of Chicago, that all conditions of the permit have been complied with by defendant District. When the facts within the court's judicial knowledge are contrary to the allegations of the bill, the court should disregard such untruthful statements of the pleadings. (*Infra*, 34).

VII.

COMPLAINANTS ARE NOT CONCERNED WITH THE CONDITION OF POLLUTION OF THE DESPLAINES AND ILLINOIS RIVERS, OR WHETHER THERE IS A CURRENT IN THE CHICAGO RIVER. FURTHERMORE, THEY SHOW NO SPECIAL INJURY, AND THE INJURY CLAIMED IS COMMON AS MUCH TO OTHER STATES AND THEIR CITIZENS AS TO THE COMPLAINANT STATES AND THEIR CITIZENS.

The waters mentioned as polluted or in which there is a current created by the diversion are Chicago River, Chicago Sanitary and Ship Canal, Desplaines and Illinois Rivers, which waters are navigable waters wholly within the confines of the State of Illinois. The alleged condition as to current and the alleged condition as to pollution, have been authorized by the State of Illinois and approved by the United States, acting through its constituted authorities.

These two governmental bodies have regulated navigation on the waterways mentioned, consistent with their preservation and continuation and

> "that authority combines the concurrent powers of both governments, state and federal, which if not sufficient, certainly none can be found in our system of government."
>
> 2d Wheeling Bridge Case, 18 Howard 421, 430, 15 L. ed. 435, 436.

In order that a complainant may be entitled to relief against a public nuisance, it must appear that he suffers some direct and special injury.

Northern Pacific Railroad Company v. *Whalen,* 149 U. S. 157, 37 L. ed. 686.

Mississippi, etc., v. *Ward,* 2 Black 485, 17 L. ed. 311.

Georgetown v. *Alexandria,* 12 Peters 91, 9 L. ed. 1012.

VIII.

THE COMPLAINANTS' POSITION TAKEN BY THEIR AMENDED BILL IS INCONSISTENT WITH THAT TAKEN IN THE ORIGINAL BILL OF COMPLAINT, AND THEY ARE THUS PRECLUDED FROM OBTAINING THE RELIEF PRAYED BY THE AMENDED BILL.

The original bill (Statement herein 2.) recognized the authority of the Secretary of War to authorize a diversion of 4,167 seconds feet provided by the December 5, 1901, permit, and also to later authorize a diversion in excess of that amount.

We respectfully submit that the amended bill of complaint should be dismissed.

HECTOR A. BROUILLET,
Attorney, The Sanitary District of Chicago.

GEORGE F. BARRETT,
EDMUND D. ADCOCK,
LOUIS J. BEHAN,
MORTON S. CRESSY,
Solicitors for Defendant, The Sanitary District of Chicago.

APPENDIX.

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

February 13, 1925.

My dear Mr. Secretary:

I acknowledge receipt of your letter of the 27th ultimo, in which you enclose a memorandum prepared for you by the Chief of Engineers of the War Department, with reference to your authority to grant the Sanitary District of Chicago a permit for a diversion from Lake Michigan of a greater quantity of water than 4,167 cubic feet per second. You ask my opinion as to whether you have authority to grant such a permit.

The applicable law is Section 10, of the River and Harbor Act of March 3, 1899 (30 Stat. 1151), which provides as follows:

> "Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge,

> or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

As your memorandum indicates, the language of this statute permits two constructions.

The first would authorize you, pending specific direction by Congress and always subject thereto, to determine the circumstances, under which the construction of works can be undertaken which may affect the navigability of interstate waters.

The other construction, which your memorandum also submits for my consideration, is that any obstruction to the navigable capacity of such waters is unlawful *per se,* and that the only purpose of the latter part of the quoted statute is to require the submission of every project, which might affect such navigability, to the Chief of Engineers and the Secretary of War, and that no construction shall be begun until the assent of the War Department has been secured in the manner provided by the statute.

In reply to your inquiry, I am of opinion that the different sentences of this statute must be read together, and construed in such a reasonable way as to attain the objective which Congress had in mind. It is obvious that Congress, which is not always in session, could not assume the duty of determining in each specific case whether or not a construction or use of navigable waters so impaired navigable capacity as to be forbidden by the paramount authority of the Federal Government. If this were not so, no construction which might affect the navigable capacity, could be undertaken when Congress is not in session; and it seems to me unreasonable to assume that Congress meant that, not only should all

public works be stopped when Congress was not in session, but that, even when it was in session, such construction or use of navigable waters should await the slow processes of Congressional action.

In my judgment, Congress intended, by the first section of the quoted statute, to assert its paramount authority over navigable waters,—and thus to serve notice that they could not be undertaken without Federal assent. I imagine that the section in question was due to the construction by the Supreme Court, of the prior statute of 1890, in the case of *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211. That Act provided that the "creation of any obstruction not affirmatively authorized *by law* to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited," and it was held, in the decision above referred to, that such an obstruction could be authorized by the law of a State, in the first instance.

Congress evidently intended that works should not be begun, which might affect the navigable capacity of the waters of the United States, solely on the authority of any State law. Congress, by the Act of 1899, therefore assumed full governmental power over the subject by a comprehensive and definitive prohibition of "any obstruction not affirmatively authorized by Congress."

For the reasons that I have already given, it does not seem to me reasonable to suppose that this contemplated that no work should be undertaken until Congress had first passed a specific statute to authorize it. The interest of the United States in the waters of the country under the Commerce Clause of the Constitution is confined to their navigability, and any construction, which may be erected, or any use of the waters, may be said, in a remote, but not very practical, sense, to affect these waters. The Constitution gave to the United

States paramount authority over the general subject of navigability, in order that the Federal Government, and not the States, might determine under what circumstances the use of navigable waters for the purposes of the citizen or of the States so prejudicially affected the great consideration of navigability as to require a prohibition. Navigable waters may be used for many purposes other than those of navigation, and thus there are many considerations that must be weighed to determine whether such use unduly impairs navigation, and the relative advantages and disadvantages of any such use, as compared with the interests of navigation, must be taken into consideration.

Congress did not intend that such a question should be primarily decided by either the States or the citizen. In view of prior decisions, which, as to navigable waters which were wholly intrastate in character, held that, in respect to purely local facilities, the States might act, in the absence of Federal legislation. Congress evidently intended, by the Act of 1899, to remove this implication by asserting that, with respect to the navigable capacity of the waters of the United States, its failure to legislate should not be regarded as an implied authority to the States or to the citizens thereof to proceed to use the waters; but that the Federal Government should determine to what exent, if any, the navigable capacity of the water highways of the country might be affected.

This seems to me obvious, when the vagueness of the phrase: "navigable capacity" is taken into consideration; for the phrase is a relative one. Navigable capacity could be impaired for vessels of large draft, without impairing it for vessels of small draft. This requires a certain balancing of the economic equities of the situation, and the Federal Government preferred itself to weigh these equities, and not permit the States or the

citizens thereof to determine the advantages or disadvantages of any interference with navigable waters.

It was therefore necessary that, in some way, the question as to what interference would be permitted and what should be forbidden in any specific case should be determined by some one, and, as I have said, it was impossible for Congress to do so in all cases and at all times, as it would not be continuously in session.

I therefore interpret the latter part of the quoted statute as meaning that, within reasonable limits, Congress would delegate its power in the premises to the Chief of Engineers and the Secretary of War to determine—at least in the first instance—what interference with navigable waters could be permitted, until Congress should specifically act, and always subject thereto.

This policy of Congress was not a new policy, for it had found expression in much prior legislation. Thus, by the Act of March 3, 1869 (15 Stat. 336), Congress had provided, with respect to the proposed construction of a bridge between New York and Brooklyn—

> "That the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and in order to secure a compliance with these conditions the company, previous to commencing the construction of the bridge, shall submit to the secretary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act, not to obstruct, impair, or injuriously modify the navigation of the river.
>
> Sec. 2. And be it further enacted, That the secretary of war is hereby authorized and directed,

> upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification, the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary

Under this statute, the Secretary of War, upon the recommendation of the Chief of Engineers, approved the plan for the bridge, and it was subsequently contended that, as the bridge in fact impaired navigation of the river, the Secretary of War was without authority to permit it.

The Supreme Court, however, thus construed the Act of 1869:

(*Miller* v. *Mayor,* 109 U. S. 385.)

> "It is contended by the plaintiff with much earnestness that the approval of the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river.

It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necesarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

In my opinion, Congress had the same purpose in view in the Act of 1899. Having assumed paramount jurisdiction over all navigable waters and excluded the idea that any action of a State could legitimate an impairment thereof, and that any Federal assent thereto could be implied from Federal inaction, Congress proceeded to forbid the commencement of any such work, "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War, prior to beginning the same."

In my opinion, Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact, and if they were of opinion that the use of navigable waters, in a certain case, was not such an impairment of their navigability as to require the prohibition of Congress, then the construction was "affirmatively authorized by Congress," because the administrative agency, to which Congress had delegated the ascertainment of the facts, had found the fact to be that such use was not, for the time being, an impairment of navigable capacity, such as Congress intended to prohibit.

I am informed that, for a long period of years, it has been the practice of the War Department to issue permits under Section 10 of the Act of March 3, 1899, without requiring that the particular project be first authorized by special act of Congress, and that was the policy of the War Department in the specific case of the Sanitary District of Chicago.

The history of that prolonged controversy recognized an authority on the part of the Chief of Engineers and the Secretary of War to determine the facts of undue impairment in behalf of the Federal Government. The permits, which were given from time to time by the War Department, (the last of which permitted Chicago to divert water from Lake Michigan to the extent of 4,167 cubic feet per second), can only be explained on this theory; for, theoretically, the diversion of so great a volume of water affected the navigable capacity of the Great Lakes; but the legal question still remained whether, taking into consideration all of the economic factors—as, for example, the navigability of the Chicago and Calumet Rivers, to the south, and the navigability of the Great Lakes, to the east—and having in mind the depth of the various channels and the natural use of wa-

ters for sanitary and other purposes, there was such an undue impairment of navigability as to require that one use of these waters be restricted to a given amount, in order to make another use more effective. Your predecessors, having in mind the various elements of an extremely complicated economic and sanitary problem, reach the conclusion that there could be—at least until Congress provided otherwise—a permit to use the amount indicated, but no more; and this could only proceed upon the theory that, while Congress had made a general prohibition of all impairment of navigable waters, it had delegated to the War Department the duty of deciding the degree of impairment which would bring a specific case within the general prohibition.

Certainly the suit which the United States brought against the Sanitary District of Chicago proceeded on this theory; for the Government sought to restrain the Sanitary District from taking any waters in excess of 4,167 cubic feet per second. The suit was thus based upon the permits of the War Department and assumed its authority to grant them. The lower court granted an injunction which forbade a greater diversion of the waters than the amount permitted by the War Department, and the Supreme Court, on January 5, 1925, affirmed this decree, and expressly added that its affirmance was "without prejudice to any permit that may be issued by the Secretary of War, according to law."

If it be suggested that the words "according to law" destroy the force of the proviso, it can be answered that such a proviso, deliberately written by the Supreme Court in its decree of affirmance, cannot be disregarded as meaningless. The Supreme Court apparently contemplated the possibility that it might be necessary, pending the final action of Congress and in order to prevent irreparable injury to life and property, to make some

temporary provision, and its decree of affirmance sustaining a permit previously granted by the Secretary of War enforced an administrative decision of the Chief of Engineers and the Secretary of War, previously given under the authority of an Act of Congress, and as its instrument.

Unquestionably the War Department must take into account, in exercising its administrative discretion, the policy of Congress, as disclosed by the statute. The function of your department is to determine the facts, and not policies. In doing so, you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters.

The present diversion by the City of Chicago of more than the amount permitted is, under the general prohibition, not authorized by Congress, because it has not been authorized by the administrative agency to which Congress delegated the power of determination; but it would be authorized by Congress—subject, of course, to any change in the law at any time by that body—if and when the Chief of Engineers and the Secretary of War determine that the interests of navigation—having in mind all the complicated circumstances—would not be unfairly prejudiced by a temporary use of the waters to the extent that the War Department, in its sound discretion and having in mind the general policy of Congress, sees fit to permit.

In exercising this political discretion, it seems to me that the War Department should do what it believes Congress would wish it to do under the circumstances. As a President of the United States once said: "It is a condition, and not a theory, that confronts" the Federal Government. The condition is that a great city, with

over three millions of inhabitants and with mighty industries situated within its boundaries, has built important works for the diversion of water from Lake Michigan, and is in fact diverting such waters, to an amount in excess of the amount permitted by your precedessor.

You may conclude, in the exercise of your discretion, that such a situation, which has developed in a period of thirty-five years, during which the City of Chicago has greatly added to its population, cannot be changed in a day.

In the exercise of such discretion, you may conclude that, under present circumstances, the Sanitary District of Chicago should be permitted to take a greater quantity of water than that authorized by previous permits, or required to take less. The previous permits given by your predecessors in this matter were expressly revocable in terms, and, even if this were not the case, their revocability would, in my judgment, be implied from the continuing duty of the United States to preserve the navigability of its water highways.

You are therefore at liberty, as the administrative agency of Congress, to determine, under the circumstances which now exist, to what extent, if any, Chicago may continue to divert the waters of Lake Michigan, and, if you reach the conclusion that a greater diversion of such waters by the city of Chicago may be temporarily permitted, to enable that city to comply with the law, you are authorized not only to make such permit revocable, in your discretion, but also to grant it upon such terms and conditions as, in your judgment will effectively protect the interests of navigation in these great interstate highways.

You may also conclude, in the exercise of the same discretion, that any permit that you may grant may be expressly made subject, at all times, to the action of

Congress, whose representative you are in the matter and whose judgment, with or without such express reservation, is final as to the policy of the nation in the premises.

This view as to the nature of your powers seems to me a reasonable construction of the pertinent Acts of Congress. It is, in any event, the only construction that would prevent irreparable harm, and, therefore, presumably, it is a construction which Congress itself would favor; and I therefore so advise you.

Very respectfully,
JAMES M. BECK,
Acting Attorney General.

Assistant and Chief Clerk,
Feb. 14, 1925.
War Dept.
P. S.
The Honorable,
The Secretary of War.

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
537 South Dearborn Street
Chicago, Ill.

Address reply to
THE DISTRICT ENGINEER.
Refer to File No. M. A. 25.
(Chi. R. 140/688).

December 8, 1925. HLP.

The Sanitary District of Chicago,
910 S. Michigan Ave.
Chicago, Ill.

Dr.

To United States Engineer Office, Chicago, Ill. . $2,224.24
Oct. 1 to
Nov. 30, 1925.
Incl.

To reimburse federal appropriations for the cost of supervising work done under permit signed by the Chief of Engineers, U. S. Army, and the Secretary of War on March 3, 1925, authorizing "The Sanitary District of Chi-

cago to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8500 cubic feet per second, the instantaneous maximum not to exceed 11000 cubic feet per second."

Services:		
The District Engineer, Major Rufus W. Putnam, 2 days at $15.55	$ 31.10	
Asst. Engr. J. W. Woermann, 8 days at $10.555	84.44	
Asst. Engr. F. H. Doddridge, 1⅓ months at $250.00	333.33	
Junior Engr. A. T. Grohmann, 1 month	200.00	
Inspector Harry Lallo, 1 month.	153.33	
Survey party, 6 men, 1 month...	774.99	
Crew, Motor Launch, "Whistler," 6 days at $9.466	56.80	
		$1,633.99
Plant Rental:		
Survey Boat, "Calumet," 25 days at $7.47	$186.75	
Motor Launch, "Whistler," 6 days at $8.40	50.40	
		237.15
Subsistence, survey party, 25 days at $4.80		120.00
Travel and per diem allowances:		
Lallo	$ 99.76	
Doddridge	99.76	
Grohmann	33.58	
		233.10
Total		$2,224.24

Certified correct:

RUFUS W. PUTNAM,
Major, Corps of Engineers,
District Engineer.

Please draw check payable to order of "Rufus W. Putnam, Major, Corps of Engineers, U. S. A."—and mail same to "U. S. Engineer Office, Room 1201, #537 S. Dearborn St., Chicago, Ill."