IN THE

Supreme Court of the United States.

ORIGINAL JURISDICTION.

OCTOBER TERM, ~~1925.~~ 1926

THE STATE OF WISCONSIN, THE STATE OF OHIO, THE STATE OF PENNSYLVANIA AND THE STATE OF MINNESOTA,
Complainants,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, Defendants.

STATE OF MISSOURI, STATE OF TENNESSEE, STATE OF KENTUCKY AND STATE OF LOUISIANA,
Intervening Defendants.

Bill in Equity.
Original Jurisdiction.
No. 16.

BRIEF IN SUPPORT OF MOTION TO DISMISS FILED ON BEHALF OF THE STATES OF MISSOURI, KENTUCKY, TENNESSEE, AND LOUISIANA, INTERVENING DEFENDANTS.

NORTH T. GENTRY,
Attorney General of Missouri;
FRANK M. THOMPSON,
Attorney General of Tennessee;
FRANK E. DAUGHERTY,
Attorney General of Kentucky;
PERCY SAINT,
Attorney General of Louisiana;
CORNELIUS LYNDE,
DANIEL N. KIRBY;
Solicitors.

J. W. Steele & Co., Printers, 101-103 S. Seventh St., St. Louis.

17

SUBJECT INDEX.

Table of Cases, etc., Cited.

PAGE

IN THE

Supreme Court of the United States.

ORIGINAL JURISDICTION.

OCTOBER TERM, 1925.

THE STATE OF WISCONSIN, THE STATE OF OHIO, THE STATE OF PENNSYLVANIA AND THE STATE OF MINNESOTA, Complainants, vs. STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, Defendants. STATE OF MISSOURI, STATE OF TENNESSEE, STATE OF KENTUCKY AND STATE OF LOUISIANA, Intervening Defendants.	Bill in Equity. Original Jurisdiction. No. 16.

BRIEF IN SUPPORT OF MOTION TO DISMISS FILED ON BEHALF OF THE STATES OF MISSOURI, KENTUCKY, TENNESSEE, AND LOUISIANA, INTERVENING DEFENDANTS.

STATEMENT.

In this brief, we shall refer to the complainant states as the "Lake" states, and to the intervening defendants as the "Valley" states.

General Nature of Case.

The subject matter of the amended bill herein, is the diversion of water from Lake Michigan into the Mississippi Valley water-shed, through the "Lakes-to-the-Gulf" waterway, a subject with which the Court is already familiar through its decision on January 5, 1925, in the case of *Sanitary District of Chicago vs. United States* (266 *U. S.* 405).

In the briefing and argument in this Honorable Court of said Sanitary District case, the Lake states, complainants in the instant case, participated as amici curiae on the side of the United States.

The United States, as complainant in the Sanitary District case, attacked this diversion of water, then as now being made by the Sanitary District of Chicago, as unlawful to the extent that the quantity of water diverted had not been authorized by the then permit of the Secretary of War upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (30 Stat. at Large 1151).

This Honorable Court upheld this contention of the United States, thereby conclusively determining (as we understand the decision) that a diversion of water from Lake Michigan into the Mississippi Valley water-shed, may lawfully be made by said Sanitary District, if the making, quantity and conditions of such diversion have been authorized by permit of the Secretary of War upon the recommendation of the Chief of Engineers.

The amended bill herein shows on its face, that on March 3, 1925, since said decision and within the time allowed therefor by said decision, the Secretary of War

upon the recommendation of the Chief of Engineers, issued a permit allowing the Sanitary District of Chicago, upon certain conditions, to divert specified quantities of water from Lake Michigan into the said "Lakes-to-the-Gulf" waterway.

It is this diversion that the Lake states seek in said amended bill, to attack as unlawful.

So that the effort of the Lake states in the instant case, is to have this Honorable Court reconsider and reverse its fundamental conclusions announced in the Sanitary District case, by enjoining any diversion whatever.

It is also an effort to have this Honorable Court usurp the powers and functions held by this Court in said Sanitary District case to be vested by the Constitution in the Congress, and by the Congress lawfully delegated to the Secretary of War upon the recommendation of the Chief of Engineers.

Against such effort of the Lake states, these Valley states, each of which is vitally interested in preserving the navigability of the entire "Lakes-to-the-Gulf" waterway, have moved to dismiss the amended bill on grounds which are chiefly jurisdictional in nature.

Since the grounds of this motion include the contentions (a) that the amended bill does not disclose the kind of case of which this Court will take original jurisdiction under the Constitution, and (b) that the entire subject matter of the amended bill, including the relief sought, involves the exercise of control and regulation of navigable waters of the United States, in respect of which the United States has already assumed complete jurisdiction (Sanitary District vs. United States, supra), it is important that this brief contain a sufficient anaylsis of the amended bill

and a sufficient statement of the earlier history of this controversy to explain these contentions.

The Sanitary District Case; Early History of Controversy.

We understand it to be the established doctrine of this Court (Butler v. Eaton, 141 U. S. 240, 244; Bienville Water Co. v. Mobile, 186 U. S. 212, 217; Craemer v. Washington, 168 U. S. 124, 129); that it will take judicial notice of its own prior records and decisions, either where there is a practical similarity of parties or a specific reference in the pleadings to a prior record.

In the instant case there is a substantial similarity of parties and a specific reference (in the amended bill) to the record and decision in the Sanitary District case both in the District Court and in this Court. Therefore, we shall make reference to these records in order to inform the Court of essential facts.

The original bill in the Sanitary District case was filed by the United States in the Circuit Court of the United States in 1908, to prevent any diversion from Lake Michigan through the Calumet-Sag channel, one of the lesser channels through which the Sanitary District was preparing to divert water from Lake Michigan. The effect of this diversion upon the levels of the Great Lakes was pleaded, as well as the absence of any authority from Congress or from the Secretary of War, under Section 10 of the Rivers and Harbors Act of March 3, 1899. The prayer of the bill was for an injunction restraining the Sanitary District from diverting any water from Lake Michigan through the Calumet-Sag channel, or otherwise,

"in any channel other than the Chicago River as authorized by the said Secretary of War, unless, prior to beginning any of said work, or doing or attempting to do any of said things, the Chief of Engineers of the said United States shall have recommended, and the Secretary of War of the said United States shall have authorized, the doing of said work. * * *" (Volume VIII, Transcript of Record No. 529, October Term, 1924, Supreme Court of the United States, Sanitary District Case, Page 6.)

In 1913, a separate bill was filed by the United States, with which the former bill was later consolidated, seeking to enjoin a diversion through the Chicago River, of water in excess of the amount theretofore permitted by the Secretary of War. It was similarly claimed that this excess diversion would tend to lower the levels of the Great Lakes, and would thus create an obstruction to the navigable capacity of all of said waters. It was alleged that these waters had been deepened under authorization of the Congress, and that this diversion would therefore tend to annul the orders of Congress expressed in the various Rivers and Harbors Acts. The prayer in this later bill was for an injunction restraining the defendants

"from diverting or abstracting any waters from Lake Michigan over and above and in excess of 250,000 cubic feet per minute, as already authorized by said Secretary of War. * * *" (Volume VIII, Sanitary District Record, Page 44.)

A decree in accordance with the prayer last above quoted, was entered, and on appeal was affirmed by this Court (266 U. S. 405), without prejudice to any permit

lawfully to be granted by the Secretary of War. The scope and effect of this decision upon the instant case, we shall discuss later.

The Interests of the Valley States.

The "Lakes-to-the-Gulf" waterway, frequently a subject of congressional action, now consists of the Chicago River, the Sanitary and Ship Canal of the Sanitary District, the DesPlaines, Illinois and Mississippi Rivers. All of these waters, are navigable waters of the United States, and all to some extent have been improved as the result of congressional action. These defendants, the States of Missouri, Kentucky, Tennessee and Louisiana, and, of course, the State of Illinois, border on this waterway, and are deeply interested in the preservation and improvement of its navigability.

The development and maintenance of this waterway has long been a subject of public consideration and of national importance, particularly to the Mississippi Valley States whose commerce is served by it.

By the Federal Control Act of Congress (40 Stat. at Large, 451), the President of the United States was authorized to spend such amounts as he deemed necessary for the utilization of waterways and the creation of water transportation agencies, and the policy of the Congress to encourage inland transportation services and facilities, was declared in Section 500 of the Transportation Act of 1920 (41 Stat. at Large, 499). By Section 201 of said Act (41 St. at L. p. 458), the Federal facilities for such transportation that had been previously acquired pursuant to the Federal Control Act, were transferred to the Secretary of

War who was authorized and directed to conduct them. As a result, the Secretary of War successfully inaugurated and operated a barge line freight service on the Mississippi River from St. Louis to New Orleans, and on the Black Warrior River in Alabama, known as the "Mississippi-Warrior Barge Line." This instrumentality of the government was subsequently taken over by the "Inland Waterways Corporation" organized pursuant to an Act of Congress entitled "An Act to create the Inland Waterways Corporation for the purpose of carrying out the mandate and purpose of Congress as expressed in Sections 201 and 500 of the Transportation Act, and for other purposes," approved June 3, 1924 (43 St. at L. p. 360). This corporation now carries a substantial volume of freight, and renders an important commercial service, particularly to the Mississippi Valley, and in many instances, forms a part of through transportation from points as far east as Western New York and Pennsylvania to and from points as far West as Western Texas and Arizona.

The President of the United States has recently recommended in a Message to Congress, the maintenance and development of this waterway.

The commerce of the Valley states has been built up, in reliance upon the continued existence of water transportation over this route. It is a well recognized fact that water transportation in the upper Mississippi, particularly at most points North of the City of Memphis, Tennessee, is dependent upon a sufficient volume of water, and in times of low water, navigation is interfered with, and frequently interrupted, due to insufficient depths at critical points in the channel. Similar conditions exist at several points in the Illinois and DesPlaines Rivers. The volume of water diverted from Lake Michigan through the Sani-

tary District Canal, forms a very substantial part of the low water flow, of both the Illinois and Mississippi Rivers at these critical points of navigation, and this water so diverted from the Great Lakes, is essential to the adequate navigability of the "Lakes-to-the-Gulf" waterway. The well-known natural conditions of this waterway make a determination of the proper amount of water to be diverted from Lake Michigan, the vital factor in its maintenance as well as in its development.

The amended bill herein shows as the main theory of the complainant states, that they are lower riparian owners along a waterway of which Lake Michigan is the upper stretch, and they claim injury as such lower riparian owners, from the diversion of water, which, in the course of nature would flow to them. The injury complained of, is an interference with interstate commerce conducted over this lake waterway.

If the relief sought in the amended bill be granted, and all diversion from Lake Michigan enjoined, the Valley States, each of whom is a riparian owner along the "Lakes-to-the-Gulf" waterway, will suffer injury identical in nature with that complained of in the amended bill.

The Valley states are interested in the instant case not only upon this question of the navigability of the "Lakes-to-the-Gulf" waterway, but also because the water supply of the river communities in several of the states, including the City of St. Louis, Missouri, would become dangerously polluted in case the diversion were substantially enjoined while the pollution of the Chicago River continued.

SUMMARY OF ARGUMENT;

POINTS AND AUTHORITIES.

The amended bill should be dismissed, because:

I.

The Supreme Court of the United States, in exercising its constitutional grant of original jurisdiction, has only entertained an original suit in which a State was complainant, (a) when such State sued on its own account to protect a direct property interest of such State in the subject matter of the suit, or to protect a sovereign right of the State, or (b) when such State sued in its representative or quasi-sovereign capacity, to protect or enforce rights of its citizens held because of their citizenship in such State.

Constitution of U. S., Article III, Sec. 2.
Amendment XI to Constitution of U. S.
Missouri v. Illinois, 180 U. S. 208, at 241, 239.
New Hampshire and New York v. Louisiana, 108 U. S. 76, 91.
Kansas v. Colorado, 185 U. S., 124, 142.
Georgia v. Tennessee Copper Co., 206 U. S. 230, 237.
North Dakota v. Minnesota, 263 U. S. 365, 372-374.
New York v. New Jersey, 256 U. S. 296, 301, 302.
Wyoming v. Colorado, 259 U. S. 419.
Louisiana v. Texas, 176 U. S. 1, 16, 19, 24-25.
Oklahoma v. A. T. & S. F. Ry., 220 U. S. 277, 286, 289.
Oklahoma v. G. C. & S. F. Ry. Co., 220 U. S. 290, 300-301.

(a) The amended bill seeks to prevent alleged interference with "interstate commerce" caused by alleged obstructions to the navigable capacity of the Great Lakes, a matter in which the states complaining have no direct proprietary or sovereign interest.

(b) The amended bill shows that the complainant states have no right in this case to sue in their representative capacity, because the subject matter of the bill consists of an attempt to control the navigability of navigable waters of the United States, in respect of which such rights as are possessed by the citizens of the complaining states, arise from their citizenship in the United States, and not from their state citizenship; and because the United States has the sole and exclusive power and responsibility to protect for the benefit of all citizens of the United States, the navigability of its navigable waters. To permit a state to sue for this purpose would constitute an interference with the sovereign power of the United States.

Louisiana v. Texas, 176 U. S. 1, 16, 19, 24-25.

Oklahoma v. A. T. & S. F. Ry., 220 U. S. 277, 286, 289.

Oklahoma v. G. C. & S. F. Ry., 220 U. S. 290, 300-301.

II.

The constitutional power of the Congress to regulate interstate commerce, whether exercised or not, as to all matters of national scope and importance, is exclusive of

all state action. And where, as in the instant case, the Congress has once assumed to regulate any particular instrumentality of interstate commerce, no state can act upon the same subject matter.

Sanitary District v. U. S., 266 U. S. 405, 426.

(a) It has been decided that the navigability of the Great Lakes is a matter of such national importance as to be within the exclusive power of Congress to regulate.

Sanitary District v. U. S., 266 U. S. 405 at 426.

(b) The effect of a decree in the instant case as sought by the complainant states, would be a regulation by these states of interstate commerce over the Great Lakes, a subject matter that this Court has held to be not within their constitutional powers or authority.

Sanitary Dist. v. U. S., 266 U. S. 405, 426.

III.

It appears upon the face of the amended bill, that the diversion complained of therein is being made pursuant to a written permit therefor, duly issued and "authorized by the Secretary of War" and "recommended by the Chief of Engineers" of the United States, acting pursuant to the authority and provisions of the Rivers and Harbors Act" of 1899, by which Act, the Congress of the United States, as this Court has held in respect of this same

diversion, in the case of Sanitary District v. United States, 266 U. S. 405, has validly conferred upon said officials the power, exclusive of any action by any state, to permit, regulate and control the amount and conditions of such diversion; and said permit constitutes a valid and legal authorization by the United States of said diversion.

Sanitary District v. U. S., 266 U. S. 405, 428-429.

IV.

The grant of power to the Secretary of War made by the Rivers and Harbors Act of March 3, 1899, "repeatedly has been held to be constitutional."

Sanitary District v. U. S., 266 U. S., 405 at 428.

V.

There is no "common law right" in respect of the waters of the Great Lakes, as claimed in the amended bill, which can supersede, or have the affect of limiting, the exclusive power of Congress to regulate the navigability of these waters, or to permit the diversion from Lake Michigan of which the amended bill complains. The wisdom or expediency of a permit issued by the Secretary of War pursuant to the power granted him by the Rivers and Harbors Act of March 3, 1899, is not subject to review by the Courts.

Sanitary District v. U. S., 266 U. S. 405.

U. S. v. Rio Grande Dam Co., 174 U. S. 690, 702.

I. C. C. v. Ill. Cent. Ry., 215 U. S. 452, 470.

U. S. v. Chandler-Dunbar Water P. Co., 229 U. S. 53, 64.

So. Pac. Co. v. Olympian Dredging Co., 260 U. S. 205, 210.

Monongahela Bridge Co. v. U. S., 216 U. S. 177, 195.

VI.

The nature of the alleged cause of action as shown by the amended bill, and reflected in its prayer for relief, is not such as to entitle complainants to any of the equitable relief sought, because:

(a) Insofar as said amended bill seeks an injunction to restrain the permanent diversion from Lake Michigan of any water whatever, it relates to a subject matter over which the Congress has exclusive jurisdiction, which jurisdiction has been assumed, and is being exercised.

Sanitary District v. U. S., 266 U. S. 405.

(b) In seeking to have this Court determine the amount of diversion "reasonably required" for navigation purposes, the amended bill attempts to impose upon this Court the exercise of a power not judicial in its nature, but essentially legislative and heretofore constitutionally delegated by Congress to the Secretary of War upon recommendation of the Chief of Engineers in the Rivers and Harbors Act of March 3, 1899.

Ill. Cent. Ry. Co. v. I. C. C., 215 U. S. 452, 470.

Simpson v. Shepard, 230 U. S. 352, 433.

Miller v. Mayor, etc., 109 U. S. 385, 393-394.

(c) In seeking an injunction against alleged damage to navigation on the Great Lakes claimed to result from alleged lowering of the levels thereof, and alleged damage to navigation on the "Lakes-To-The-Gulf" waterway claimed to result from the alleged pollution thereof, it appears from the amended bill that the complainant states sue as mere private litigants who seek to restrain an alleged public nuisance, and it further appears that none of the complainant states, nor any of their respective citizens, suffer or can suffer any direct, peculiar or special injury different in kind or degree from the alleged injury to the general public. The exclusive power to prevent this character of public nuisance, except only in the case of a complainant suffering special and irreparable damage, different in kind from that suffered by the general public, is vested in the United States. Such power is being exercised by the United States in respect of this waterway, and the relief sought, would conflict therewith.

Sanitary District v. U. S., 266 U. S. 405.
Georgetown v. Alexandria Canal Co., 12 Pet. 91, 99.
Penn. v. Wheeling Bridge Co., 13 How. 518, 566.
Arizona Copper Co. v. Gillespie, 230 U. S. 46, 57.

(d) In seeking relief from alleged pollution of the "Lakes-To-The-Gulf" waterway, it appears on the face of the amended bill, that the waterway alleged to be polluted, lies wholly below all of the complainant states, and that none of said states have any direct or proprietary interest in the navigable condition thereof, the exclusive power to protect such navigable condition being vested in the United States, which is now exercising the same.

VII.

The United States alone can complain of any alleged failure of the Sanitary District to comply with the conditions of the permit issued to said District by the Secretary of War, March 3, 1925. Other adequate remedies are provided to protect against breaches of such conditions, thus making relief in equity unnecessary and inappropriate.

Texas Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 437.

(a) The permit is expressly made revocable by the Secretary of War at any time, with or without cause; and by other express provisions of the permit, the diversion complained of is being made under the supervision, and at times under the control, of the United States Engineer at Chicago. So this complete remedy to prevent or protect breaches of the permit, is always available.

(b) The Rivers and Harbors Act of March 3, 1899 (Sections 12 and 17 thereof), creates new liabilities and provides special and adequate remedies for violations of the Act, including failures to comply with the conditions of permits issued under the Act. These special remedies provided by statute, to be exercised by Federal authorities, are exclusive of all other remedies, and preclude complainants from any relief in equity in this particular.

Rivers and Harbors Act of Cong., March 3, 1899, Secs. 12, 17.

Texas Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437.

Pollard v. Bailey, 20 Wall. 520.
Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 756.

(c) It must be presumed that in issuing and recommending said permit of March 3, 1925, the Secretary of War and the Chief of Engineers took full cognizance of the extent to which lake levels would be lowered, and navigability obstructed, if at all, by the diversion authorized in said permit. The Secretary of War being the agent of Congress in determining these matters, his conclusions are not subject to review by the Courts.

Monongahela Bridge Co. v. U. S., 216 U. S. 177, 195.
Pennsylvania v. Wheeling & B. B. Co., 59 U. S. 421.
U. S. v. Chandler-Dunbar Co., 229 U. S. 53, 64.
So. Pac. Ry. v. Olympian Dr. Co., 260 U. S. 205, 210.
I. C. C. v. Ill. Cent. R. R., 215 U. S. 452, 470.

VIII.

The rights asserted and the relief sought in and by the amended bill, are contrary to, and inconsistent with, the rights asserted and the relief sought in and by the original bill herein, in the respect that the original bill conceded and admitted the right of the defendants to a diversion not in excess of four thousand one hundred and sixty-seven (4,167) cubic feet per second, and also to a diversion in excess of said amount, if and when the Congress of the United States or the Secretary of War,

acting upon the recommendation of the Chief of Engineers, should so permit, whereas, the amended bill denies such right of the defendants; therefore, the complainants are now estopped from denying the said right of the defendants and from seeking the relief prayed for in the amended bill.

North. Pac. Ry. Co. v. Slaght, 205 U S. 122.

ARGUMENT.

THE MOTION TO DISMISS SHOULD BE SUSTAINED, BECAUSE:

I.

THE SUPREME COURT OF THE UNITED STATES, IN EXERCISING ITS CONSTITUTIONAL GRANT OF ORIGINAL JURISDICTION, HAS ONLY ENTERTAINED AN ORIGINAL SUIT IN WHICH A STATE WAS COMPLAINANT, (A) WHEN SUCH STATE SUED ON ITS OWN ACCOUNT TO PROTECT A DIRECT PROPERTY INTEREST OF SUCH STATE IN THE SUBJECT MATTER OF THE SUIT, OR TO PROTECT A SOVEREIGN RIGHT OF THE STATE, OR (B) WHEN SUCH STATE SUED IN A REPRESENTATIVE CAPACITY, TO PROTECT OR ENFORCE RIGHTS OF ITS CITIZENS HELD BECAUSE OF THEIR CITIZENSHIP IN SUCH STATE.

(a) The amended bill seeks to prevent alleged interference with "interstate commerce" caused by alleged obstructions to the navigable capacity of the Great Lakes, a matter in which the States complaining have no direct proprietary or sovereign interest.

(b) The amended bill shows that the complainant States have no right in this case to sue in their representative capacity, because the subject matter of the bill consists of an attempt to control the navigability of navigable waters of the United States, in respect of which such rights as are possessed by the citizens of the complaining States, arise from their citizenship in the United States, and not from their State citizenship; and because the United States has the sole and exclusive power and responsibility to protect for the benefit of all citizens of the United States, the navigability of its naviga-

ble waters. To permit a State to sue for this purpose would constitute an interference with the sovereign power of the United States.

Section 2, of Article III of the Constitution of the United States provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *; to controversies between two or more States; between a State and citizens of another State; * * *
>
> In all cases * * * in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The jurisdiction of this Court in original cases involving controversies between States rests entirely on the above provisions; and the sole power to recognize or, by definition, to limit, such jurisdiction rests in this Court.

In *Missouri vs. Illinois,* 180 U. S. 208, at page 241, it was said:

> "It would be objectionable, and, indeed, impossible, for the Court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this Court."

In attempting to discuss the nature of this original constitutional jurisdiction, counsel are aware that the

Court itself has hesitated to define it or to prescribe its limitations. The Court has, however, in taking or denying such jurisdiction in various cases, announced certain general principles, and has disclosed certain features treated as essential to the exercise of such jurisdiction and certain other features as precluding such jurisdiction. So the only aid possible to be given by counsel in discussing whether a particular case does or does not fall within this original jurisdiction, is to endeavor to point out the nature of the case under consideration, the extent to which general principles announced by this Court seem applicable, and the extent to which the particular case is analogous in principle to other cases in which the Court has taken or denied such jurisdiction.

Nature of Case at Bar.

In the case at bar, the entire subject matter of the controversy as disclosed by the amended bill, is the regulation and control of navigable waters of the United States, instrumentalities of interstate commerce.

None of the complainant States have any proprietary, sovereign or quasi-sovereign interest in this subject matter. The United States is exclusive sovereign over it, yet the wrong of which the amended bill complains, is an alleged obstruction to the navigability of these highways of interstate commerce.

The legal theory of the amended bill, as stated in its paragraph 29, pages 33-34, is that the complainant States are suing to protect the following alleged rights:

(a) A supposed "common law right" of each of the Lake States "*and its people,*" that the "natural navigable

capacity'' of the lakes for navigation, shall be maintained free from all interference by any one except the complainant states *''or the United States* Government.''

Since it is clear that no State has any such ''common law'' *property* or *sovereign* right in respect of protecting the navigability of the navigable waters of the United States,—all sovereign power over this subject matter being vested exclusively in the Congress,—a suit by a State to protect this alleged right, is necessarily representative in character,—a suit by a quasi-sovereign on behalf of its people.

(b) An alleged right *''of the people''* of the Lakes States ''to the free and unobstructed navigation'' of the Great Lakes waterways, and also of the ''Lakes-to-the-Gulf'' waterway.

A suit by the complainant States to protect such a right is also representative in character.

(c) A supposed right to sue to prevent or correct alleged violations of Section 10, of the ''Rivers and Harbors Act'' of Congress of March 3, 1899, i. e. to protect the navigability of navigable waters of the United States.

A suit to protect such a right, is representative in character.

It thus appears that as to all of the alleged rights claimed, and as to all of the alleged wrongs complained of, the complainant States are suing solely in a representative capacity, to redress alleged wrongs and injuries *to their citizens,* caused by alleged interference with the instrumentality of commerce in question, i. e. the use

for purposes of navigation of the waters of the Great Lakes, and of the "Lakes-to-the-Gulf" waterway.

Cases Illustrating Grounds of Original Jurisdiction.

Decisions of this Court in cases where jurisdiction was taken, or denied, in original controversies between States, indicate that limitations upon the jurisdiction have arisen in several ways: first, through the requirement that the Court give full and proper effect to other provisions of the Constitution, which would be denied if such original jurisdiction of the particular controversy were taken; second, from the nature of the power invoked, that is, limitations necessarily existing by reason of the fact that the controversy must present a justiceable issue (*Louisiana vs. Texas,* 176 *U. S.* 1, *at* 15, 18)—must call for such a remedy as a Court of law or equity is authorized to grant; and third, through the requirement that the controversy must in fact, in its essential nature, be one *directly* "between two or more States," or "between a State and citizens of another State." When it was sought to use a State by suing in its name to litigate a controversy in which the State had no real interest, jurisdiction was denied.

That cases might arise in which a repugnance between different provisions of the Constitution might impose limitations on the original jurisdiction of this Court, was foreseen by Chief Justice Marshall, in *Cohens vs. Virginia,* 6 *Wheat.* 264, *at* 393. In this opinion, he pointed out that the Constitution gave the Supreme Court original jurisdiction in certain cases and appellate jurisdiction in others, among which latter are cases arising under the Constitution and laws of the United States; that, of

course, a controversy between States might involve a case arising under the Constitution and laws of the United States; and that, therefore, there might be a conflict between these grants of jurisdiction.

This dictum was noted in *Missouri vs. Illinois,* 180 *U. S.* 208, *at* 239.

By Amendment XI to the Constitution of the United States the original jurisdiction was expressly limited, by excluding suits against a State, brought by citizens:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the States of the United States by citizens of another State, or by citizens and subjects of any foreign State."

In *New Hampshire and New York vs. Louisiana,* 108 *U. S.* 76, 91, citizens of the complainant States owning money claims against Louisiana, had lawfully assigned such claims in such a way as to vest the complainant States with full legal title to the claims, which they sought to enforce by an original suit in this Court. Jurisdiction was denied because the Eleventh Amendment denied such original jurisdiction to *the citizens* with whom the controversies had arisen, and because this Court held that notwithstanding the assignments, the complainant States "could not create a controversy with another State," and had no such genuine interest in the claim as would permit the Court to take jurisdiction.

It was the opinion in these cases that seems to have first pointed out the requirement, repeated in many later

cases, that a State must have *an interest of its own,* i. e. the controversy must be *directly* with the State, or the original jurisdiction will be denied.

The case at bar also presents an instance of repugnance between constitutional provisions, i. e. the original jurisdiction of this Court under the Constitution is sought to be invoked for the purpose of intruding upon the paramount and exclusive power of the Congress to regulate interstate commerce.

And we respectfully contend that this repugnance should cause a denial of jurisdiction in the case at bar.

Turning now to the question,—when a controversy is "direct" in respect of the State or States involved, we respectfully venture the assertion that so far as the decisions have disclosed, a State cannot qualify as a complainant unless it sues for its own account to protect a direct property interest of the State in the subject matter of the suit, or to protect a sovereign right of the State, or as a represenative or quasi-sovereign of its citizens to protect their rights held because of their citizenship in such State pursuant to its sovereignty.

We shall endeavor to support the above contention by a reference to decided cases, the reasoning and authority of which (as we respectfully contend) should cause a denial of jurisdiction in the case at bar.

In *Missouri vs. Illinois,* 180 *U. S.* 208, Missouri filed its original bill in this Court, to enjoin threatened pollution of the waters of the Mississippi River through the use of the defendant Sanitary District's canal as a means of disposing of sewage of the City of Chicago by emptying it into the Illinois River, which, it was

claimed, would convey it into the Mississippi, thereby poisoning the water supply of St. Louis and other river communities.

In this case the Court took jurisdiction upon a construction of its constitutional power, which (as we understand) is expressed in the following quotation from the opinion (180 U. S. at 241):

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this Court at the suit of the State of Missouri. It is true no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to defend them. If Missouri were an independent or sovereign State all must admit she could seek remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the Constitutional provisions we are considering.
>
> The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases may spread themselves throughout the territory of the State. Moreover, substantial impairment of the health and prosperity of the towns and cities of the State situated

on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State."

In other words, the jurisdiction was based upon *the sovereign interest* of *the State* of Missouri in the health and comfort of its citizens, a subject matter which the State alone could exercise sovereign power to regulate and protect, as a part of its retained police power. Its sovereignty over this subject matter was unimpaired by any constitutional grant of power to the United States. The State itself, therefore, had a direct and sovereign interest in the real subject matter of the litigation, and its only possible remedy against injury threatened by another State, lay in the original jurisdiction of this Court, which was allowed.

In *Kansas vs. Colorado,* 185 *U. S.* 124, 142, the State of Kansas filed its bill to enjoin the diversion of water from the Colorado River, being made under authority of the State of Colorado, at a point above that part of the river which runs through the State of Kansas.

The State sued in both a representative capacity on behalf of the citizens of Kansas, whose lands were claimed to have suffered from a diminished flow in the river, and also for its own benefit to protect direct property rights of the State itself in Kansas lands bordering upon the Colorado River. There was no averment that the United States had assumed jurisdiction over the waters as "navigable," so the question of State control as in conflict with the control of Congress over interstate commerce, did not arise.

The controversy was "direct."

To the extent that this case is an authority for such a suit being filed in a representative capacity, it is apparent that the alleged rights of the citizens of Kansas were rights which such citizens claimed to have *under the sovereign power* of the State of Kansas, and to protect which, the State therefore had a "direct interest and responsibility."

In *Georgia v. Tennessee Copper Company,* 206 *U. S.* 230, the State of Georgia sued to prevent pollution of the air over territory in Georgia, near the works of the Tennessee Copper Company in Tennessee, which works emitted obnoxious fumes dangerous to health and destructive to vegetation, in the State of Georgia. In discussing the question of jurisdiction the Court said (206 U. S. at 237):

> "The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. * * *
>
> The alleged damage to the State as a private owner is merely a make-weight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads. * * *
>
> The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496, 520, 521. But it is plain

that some such demands must be recognized, if the grounds alleged are proved.

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the grounds of their still remaining *quasi*-sovereign interests; and the alternate to force is a suit in this Court."

Jurisdiction was taken; and the above quotation seems to indicate that the substantial basis which the Court held sufficient in above case, was the *sovereign* power and responsibility of the State of Georgia to protect the health and comfort of its citizens. While to some extent the State sued in a representative capacity, the substantial reason for the taking of jurisdiction was the *quasi*-sovereign right of the State; and this ground of jurisdiction seems to be more clearly explained in the above case than in the others above cited.

The cases of *North Dakota v. Minnesota,* 263 *U. S.* 365, *at* 372, 374; *New York v. New Jersey,* 256 *U. S.* 296, *at* 301, 302, and *Wyoming v. Colorado,* 259 *U. S.* 419, were all suits brought by the respective complainant States to enjoin the commission of alleged wrongs by the defendant States, either by the diversion of water from interstate streams, or into such streams so as to flood lands in the complainant States, or by the pollution of waters on which the complainant State bordered. No question of interstate commerce seems to have been present in these cases.

In each of these cases, it is clear that the subject matter of the complaint was within the scope of the

sovereignty of the complaining State. While the property rights of citizens were alleged to have been impaired by the acts complained of, these rights were held pursuant to their citizenship in their respective States, and subject to the supervising protection of the police power of their respective States, so that in these cases, both property and quasi-sovereign rights were involved, and jurisdiction was taken.

In marked contrast to the grounds on which jurisdiction existed and has been taken, as illustrated by the above cases, the decision in *Louisiana v. Texas,* 176 *U. S.* 1, discloses a class of cases in which the jurisdiction does not exist and has been denied. This decision is of special importance in the case at bar, in support of our contention that jurisdiction should be denied to the complainant States, because they have no power, sovereign, quasi-sovereign or property, to regulate interstate commerce.

Louisiana filed its bill to prevent injuries alleged to result to its citizens engaged in interstate commerce with persons in Texas, which commerce was entirely shut off by an alleged unreasonable embargo imposed by officers of Texas, to preventing the spread of yellow fever. The bill was demurred to partly on the ground that the only issues presented were between Texas and certain persons in the City of New Orleans engaged in interstate commerce, which issues did not in any manner concern the State of Louisiana as a corporate body or state. Concerning the requisites to jurisdiction, Mr. Chief Justice Fuller, in the opinion of the Court (176 U. S. 1, at page 16), said (italics ours):

> "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined, is a

> controversy arising *directly* between *the State* of Louisiana and *the State* of Texas, and *not a controversy in vindication of the grievances of particular individuals.*"

After explaining as the reason for the constitutional grant of the original jurisdiction, that the States by their grants in the Constitution, gave to the nation all their sovereign powers to negotiate, and make treaties, and to make war with other States, the opinion refers to the Debs case (158 U. S. 564), in which the Court held that it was proper for the Government, concerned as it was with the preservation of the rights of all its citizens, to appeal to the Courts for relief even though it might not suffer any particular or special injury, and then says (176 U. S. at p. 19; italics ours):

> "but the State of Louisiana presents herself in the attitude of *parens patriae,* trustee, guardian, or representative of all her citizens.
>
> She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. *Inasmuch as the vindication of the freedom of interstate commerce* is *not committed to the State of Louisiana,* and that State is not engaged in such commerce, *the cause of action must be regarded not as involving any infringement of the powers of the State* of Louisiana, or *any special injury to her property,* but as asserting that the State is entitled to seek relief in this way, *because* the matters complained of *affect her citizens at large.* Nevertheless, if the case stated *is not one presenting a controversy between these States,* the exercise of original

jurisdiction by this Court as against the State of Texas, *cannot be maintained.*"

The opinion concluded that a "direct" controversy was not involved. In the concurring opinion of Mr. Justice Harlan he stated more completely the point on which we rely in the case at bar, thus (176 U. S. at pp. 24-25; italics ours):

> "But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this Court on account of the matters set forth in its bill. The case involves no property interest of that State, nor is Louisiana charged with any duty, *nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect.* When the Constitution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this Court for the purpose of testing the constitutionality of local statutes or regulations *that do not affect the property or the powers of the complaining state in its sovereign or corporate capacity,* but which at most affect *only the rights of individual citizens or corporations engaged in interstate commerce.* The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more states', and to controversies 'between a State and citizens of another State', and the word 'party' in the clause declaring that this Court shall have original jurisdiction of all cases 'of which the State shall be a party', refer to controversies or cases that are justiciable as between the parties thereto, and *not to controversies or cases*

that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State."

* * * * * * * * *

"I concur in the judgment dismissing the suit, solely upon the ground that the State of Louisiana in its sovereign or corporate capacity, cannot sue on account of matters set out in the bill."

A similar conclusion was reached in *Oklahoma vs. A. T. & S. F. Ry Co.*, 220 *U. S.* 277 *at* 286, in which the complainant filed its original bill for the purpose of enforcing a provision in its organic act, requiring the railroads in Oklahoma to charge rates not in excess of similar rates charged by them in the State of Kansas. The injury was to the citizens of the State of Oklahoma, no claim of proprietary interest being made. The bill was demurred to on the ground that it failed to set forth any controversy between the complainant State and the defendant, within the original jurisdiction of the Court. Upon this question the Court said (220 U. S. 227 at p. 286):

"But, plainly, the *state,* in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate or enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. The opposite view must necessarily rest upon the ground that the Constitution, when conferring *original* jurisdiction on this Court 'in all cases affecting am-

bassadors, other public ministers and consuls, and *those in which a State is a party'* (Art. III, Sec. 1) intended to include any and every judicial proceeding of whatever nature which the state may choose to institute in this court, for the purpose of enforcing its laws, although the state may have no direct interest in the particular property or rights immediately affected, or to be affected, by the alleged violation of such laws."

The opinion then discussed and quoted from the opinion in *Louisiana vs. Texas, supra,* and said (220 U. S. 227, at page 289):

"These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this Court as defined by the Constitution. * * *

"We are of the opinion that the words in the Constitution, conferring original jurisdiction on this Court, in a suit 'in which a State shall be a party', are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs done to some of its people or to enforce its own laws or public policy against wrong-doers generally."

At the same term, the Court decided the case of *Oklahoma vs. G. C. & S. F. Ry. Co.,* 220 *U. S.* 290, in which a bill was filed to enjoin defendant railroads from transporting liquor into the State of Oklahoma in violation of

its laws. The main ground of the decision was an application of the principle decided in *Wisconsin vs. Pelican Insurance Company,* 127 *U. S.* 265, in which it was held that the original jurisdiction of this Court did not include suits filed by a state to enforce penalties or judgments for violation of the penal laws of the complainant state. The Court said (220 U. S. 290, at 300-301):

> "But there is another ground which is equally fatal to the claim that this Court may give the relief asked by an original suit brought by the State. * * * In Oklahoma vs. Atchison, T. & S. F. R. Co. No. 13, Original, ante p. 277, it was held that a *State* could not invoke the original jurisdiction of the Court, by suit on its behalf, where the primary purpose of the suit was to protect its citizens *generally,* against the violation of its laws by the corporations or persons sued; that the above words, 'those in which a State shall be a party', were not to be so interpreted as to embrace suits of that kind."

We respectfully submit that the conclusion to be deduced from the cases above cited, is that (aside from the cases in which a complainant State has a proprietary interest in the subject matter), the right of a State to invoke this original jurisdiction exists only as to matters over which the State has actual sovereign or quasi-sovereign powers.

Without this element, a State cannot have such power or responsibility in respect of the subject matter as to give *a "direct" interest* or to render the controversy a "direct" controversy with another State over such subject matter.

If the States still possessed all their original sovereign

powers, every legal right of their citizens would come properly within the protection of the State when interfered with by another State. But by the Constitution many sovereign powers were surrendered to the Nation. As a result, many of the rights of citizens, now exist, not because of citizenship in their particular States, but because of citizenship in the United States. This was definitely decided in the *"Slaughter House Cases,"* 16 *Wall.* 36, where the precise point was involved in construing the Fourteenth Amendment to the Constitution. In instancing some of the rights derived from citizenship in the United States, the Court said (16 Wall. 36 at 79; Italics ours):

> *"The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, * * * are dependent upon citizenship of the United States, and not citizenship of a State."*

So in the case at bar, the right of the citizens of the complainant States to the unobstructed navigation of the waters of the Great Lakes and of the Lakes-to-the-Gulf Waterway, are derived from their citizenship in the United States and not at all from the sovereignty or authority of the complainant States. Over the exercise of this right to navigate these waters the complainant States have neither authority nor control. Their sovereignty does not cover the subject matter of this amended bill, and as a result they have no power or responsibility to redress alleged injuries suffered by citizens of the United States, who happen also to be citizens of the complainant States, in regard to alleged obstructions to these waterways. The complainant States, therefore, have no such

interest in the subject matter of the amended bill as to render this controversy a "direct" controversy between States, and no such relation to the subject matter as would justify this Court in taking jurisdiction. On this ground alone, the amended bill should be dismissed.

II.

THE CONSTITUTIONAL POWER OF THE CONGRESS TO REGULATE COMMERCE, WHETHER EXERCISED OR NOT, AS TO ALL MATTERS OF NATIONAL SCOPE AND IMPORTANCE, IS EXCLUSIVE OF ALL STATE ACTION, AND WHEN, AS IN THE INSTANT CASE, THE CONGRESS HAS ONCE ASSUMED CONTROL OF ANY PARTICULAR INSTRUMENTALITY OF INTERSTATE COMMERCE, NO STATE CAN ACT UPON THE SAME SUBJECT MATTER.

(A) It has been decided that the navigability of the Great Lakes is a matter of such national importance as to be within the exclusive power of Congress to regulate.

Since the above proposition was squarely presented and decided in *Sanitary District of Chicago vs. United States,* 266 *U. S.* 405, *at* 426, we deem it unnecessary to cite any other authority in its support. In the Sanitary District case, the Court said, concerning the lack of power in Illinois to authorize this diversion (p. 426; italics ours):

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants.*" Monongahela Bridge Co. vs. U. S., 216 U. S. 177; Second Employers Liability Cases, 223 U. S. 1, 53. But *in matters where the national importance is imminent and direct, even*

where Congress has been silent, the States may not act at all. Kansas City Southern Ry Co. v. Kaw Valley Drainage District, 233 U. S. 75, 79. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which could not be done without the consent of the United States, even were there no international covenant in the case."

Since it was settled by the above decision that the regulation of the navigability of the waters of the Great Lakes in respect of this diversion of water at Chicago, is a matter of national importance over which the States could not exercise authority even in the absence of congressional action, we respectfully submit that,

(B) **The effect of a decree in the instant case, as sought by the complainant States, would be a regulation by these States of interstate commerce over the Great Lakes, a subject matter that this Court has held to be not within their constitutional powers or authority.**

The prayer for relief in the amended bill, is three-fold: first, for a general injunction restraining defendants from permanently diverting any water whatever from Lake Michigan; second, in the event that the canal be used subject to Federal control as a navigable waterway, for an injunction against the permanent diversion from Lake Michigan of any water in excess of *the amount this Court may determine* to be *reasonably required for navigation* through the "Lakes-to-the-Gulf" waterway; and, third, for an injunction restraining the pollution of the Sanitary and Ship Canal of the defendant District, and of the Chicago, DesPlaines and Illinois Rivers, in such a way as to

affect the health of the people of the complainant States navigating said rivers, or to injure property of the complainant States, while so engaged. The amended bill also shows that the Congress has assumed control over this very subject matter, and that the Secretary of War has permitted this diversion at Chicago under a permit that leaves the diversion subject to his supervision. So it is clear, that complainant States are seeking by this suit to take part in the regulation of this waterway as an instrumentality of interstate commerce, and that the granting of such relief would be inconsistent with the maintenance of the paramount power of Congress over interstate commerce.

We respectfully submit that the amended bill should be dismissed for this reason also.

III.

IT APPEARS UPON THE FACE OF THE AMENDED BILL, THAT THE DIVERSION COMPLAINED OF IS BEING MADE PURSUANT TO A WRITTEN PERMIT THEREFOR DULY ISSUED AND "AUTHORIZED BY THE SECRETARY OF WAR" AND "RECOMMENDED BY THE CHIEF OF ENGINEERS" OF THE UNITED STATES, ACTING PURSUANT TO THE AUTHORITY AND PROVISIONS OF THE "RIVERS AND HARBORS ACT" OF 1899, BY WHICH ACT THE CONGRESS OF THE UNITED STATES, AS THIS COURT HAS HELD IN RESPECT OF THIS SAME DIVERSION IN THE CASE OF SANITARY DISTRICT VS. UNITED STATES, 266 U. S. 405, HAS VALIDLY CONFERRED UPON SAID OFFICIALS THE POWER EXCLUSIVE OF ANY ACTION BY ANY STATE, TO PERMIT, REGULATE AND CONTROL THE AMOUNT AND CONDITIONS OF SUCH DIVERSION; AND SAID PERMIT CONSTITUTES A VALID AND LEGAL AUTHORIZATION BY THE UNITED STATES OF SUCH DIVERSION.

In *Sanitary District vs. U. S.*, 266 *U. S.* 405, the Court said (p. 428; italics ours):

> "In an appropriation Act of March 3, 1899, Chapter 425, Section 10, 30 Stat. at L. 1121, 1151, * * * Congress provided '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 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 enclosure within the limits of any break-water, 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'. By Sec. 12, violation of the law is made a misdemeanor and punished, and the removal of prohibited structures may be enforced by injunction of the proper Court of the United States in a suit under the direction of the Attorney General. This statute repeatedly has been held to be constitutional in respect of the power given to the Secretary of War. Louisville Bridge Co. vs. U. S., 242 U. S. 409, 424. It is a broad expression of policy in unmistakable terms, advancing upon an earlier act of September 19, 1890, Chapter 907, Section 10, 26 Stat. at L. 426, 454, which forbade obstruction to navigable capacity 'not authorized by law,' and which had been held satisfied with regard to a boom across a river by authority from a state. United States vs. Bellingham Bay Boom Co., 176 U. S. 211. There is neither reason nor opportunity for a construction that would not cover the present case. As

now applied, it concerns a change in the condition of the lakes and the Chicago River admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity (United States vs. Rio Grande Dam & Irrigation Co., 174 U. S. 690), without regard to remote questions of policy. *It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.''*

The diversion from Lake Michigan of which the amended bill complains, was the subject matter before the Court in the Sanitary District Case. The issues were practically the same as in the instant case except that in the Sanitary District case, the United States, through the Attorney General, had filed its bill to enjoin diversion *in excess* of the amount specified in a permit theretofore issued by the Secretary of War under the authority of the Rivers and Harbors Act of 1899. The decision of the Court necessarily involved first, a decision as to the validity of the statute as a proper exercise by Congress of its power under the commerce clause; second, the applicability of the statute to the matter of this diversion; and third, the approval by this Court of the authority conferred by the statute upon the Secretary of War to issue permits authorizing diversion. These very complainants appeared before the Court in the Sanitary District case as friends of the Court, and argued in favor of an affirmance by the Court of the decree entered in the District Court at Chicago, enjoining the defendants from taking more than the amount authorized by the permit referred to.

This Court affirmed the decree below, and directed that

it go into effect in sixty days. But the Court recognized that the Act of Congress in question was prospective, that the authority of the Secretary of War to regulate this subject matter, was equally prospective and might well be exercised in different ways at different times, depending upon changed circumstances, and so the decree was affirmed *"without prejudice to any permit that may be issued by the Secretary of War according to law."*

The amended bill in this case, sets out (printed bill, page 30, paragraph 28), that on March 3, 1925, within sixty days from January 5, 1925, the date when this Court rendered its decision, the Secretary of War issued a new permit under the statute in question. The amended bill itself, therefore, sets forth the complete lawful authority for the acts of these defendants from which relief is sought. And the amended bill should be dismissed for this reason also.

IV.

THE GRANT OF POWER TO THE SECRETARY OF WAR MADE BY THE RIVERS AND HARBORS ACT OF MARCH 3, 1899, "REPEATEDLY HAS BEEN HELD TO BE CONSTITUTIONAL."

Sanitary District vs. U. S., 266 *U. S.* 405, 428.

This proposition seems so firmly established by this Court, as not to be open to debate.

V.

THERE IS NO "COMMON LAW RIGHT" IN RESPECT OF THE WATERS OF THE GREAT LAKES AS CLAIMED IN THE AMENDED BILL, WHICH CAN SUPERSEDE OR HAVE THE EFFECT OF LIMITING THE EXCLUSIVE POWER OF CONGRESS TO REGULATE THE NAVIGABILITY OF THESE WATERS, OR TO PERMIT THE DIVERSION FROM LAKE MICHIGAN OF WHICH THE AMENDED BILL COMPLAINS. THE WISDOM OR EXPEDIENCY OF A PERMIT ISSUED BY THE SECRETARY OF WAR, PURSUANT TO THE POWER GRANTED HIM BY THE RIVERS AND HARBORS ACT OF MARCH 3, 1899, IS NOT SUBJECT TO REVIEW BY THE COURTS.

In the Sanitary District case, supra, this Court decided as we understand: first, that the power of Congress to regulate the navigability of the Great Lakes is paramount, and not subject to interference by the States; and, second, that the method adopted by Congress, in which authority was given to the Secretary of War to maintain proper navigable conditions through the issuance of permits under the Act of March 3, 1899, was constitutional and adequate in the premises.

This decision would seem sufficient in itself to sustain the first proposition above stated. It may be well, however, to also call attention to the decision in *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 *U. S.* 690 *at* 702, where this point was dealt with in the following language (italics ours):

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * *

"While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion, a state may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * *

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a state cannot by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that *it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.* In other words, *the jurisdiction of the general government over interstate commerce, and its natural highways, vests in that government the right to take all needed measures to preserve the navigability of the navigable water-courses of the country, even against any state action.*"

And the second proposition, that the Courts will not review the wisdom or expediency of the permit, is also well established.

The Rivers & Harbors Act of 1899, has been held to be a valid exercise by Congress of its constitutional power to regulate commerce. When the Secretary of War issues

a permit under the Act, his status is merely that of an agent of Congress, acting within the authority prescribed by Congress. We understand that the Court has also decided (in the Sanitary District case, supra) that it is within this authority of the Secretary of War to grant a permit authorizing the diversion of water from Lake Michigan, as complained of in the amended bill. In its essence, therefore, the exercise of this power by the Secretary of War is *an administrative function* in aid of an exercise of the legislative power of Congress; *U. S. v. Chandler-Dunbar Water Power Co.*, 229 *U. S.* 53, *at* 64. It is similar in essence to the power exercised by the Interstate Commerce Commission in prescribing rates. The extent to which this Court will pass upon the legal sufficiency of such an administrative order, has been carefully defined and stated thus in the opinion in *Interstate Commerce Commission v. Illinois Central Railroad Company*, 215 *U. S.* 452, *at* 470 (italics ours):

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) the relevant question of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) the proposition which we state independently although in its essence, it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned, has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule

that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and those discharged may not be by us in a proper case avoided, *it is equally plain that such perennial powers lend no support* whatever *to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.*"

And in *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, at 210, the Court said (italics ours):

"It is for Congress, under the Constitution, to regulate the right of navigation, by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe the way in which the question of obstruction shall be determined. *Its action* in the premises *cannot be revised or ignored by courts* or by juries, except that *when it provides for an investigation of the facts* * * * the courts can see to it *that executive officers conform their action to the mode prescribed by Congress.*"

VI.

THE NATURE OF THE ALLEGED CAUSE OF ACTION, AS SHOWN BY THE AMENDED BILL AND REFLECTED IN ITS PRAYER FOR RELIEF, IS NOT SUCH AS TO ENTITLE COMPLAINANTS TO ANY OF THE EQUITABLE RELIEF SOUGHT, BECAUSE:

(A) Insofar as said amended bill seeks an injunction to restrain the permanent diversion from Lake Michigan of any water whatever, it relates to a subject-matter over which the Congress has exclusive jurisdiction, which jurisdiction has been assumed, and is being exercised.

The contention stated in this sub-head has been fully discussed heretofore.

(B) In seeking to have this Court determine the amount of diversion "reasonably required" for navigation purposes, the amended bill attempts to impose upon this Court the exercise of a power not judicial in its nature, but essentially legislative and heretofore constitutionally delegated by Congress to the Secretary of War upon recommendation of the Chief of Engineers in the Rivers and Harbors Act of March 3, 1899.

The legal nature of the power exercised by the Secretary of War, under the Act of March 3, 1899, in granting the permit of 1925, has already been discussed.

The amended bill asks the Court to determine the amount of water "reasonably required" for purposes of navigation on the "Lakes-to-the-Gulf" waterway. Such a determination would involve the decision of many complicated and important questions of fact relating to engineering and navigation, as for instance: what depth should be maintained in this waterway to meet the needs

of its effective navigability, especially in those parts of the Mississippi River where the low-water channel depth is difficult to maintain; what engineering methods of channel control and of flow control should be assumed by the Court in determining the quantity of diversion; what current speed could be expected in various parts of the channel as the result of given quantities of diversion and under the engineering methods and practices of controlling current speed. The mere statement of such questions is sufficient to demonstrate that they are essentially legislative in nature and to be decided solely by the Secretary of War under his delegated authority from the Congress.

We respectfully submit, that this prayer of the amended bill, in view of the existing permit issued by the Secretary of War under which diversion now takes place as appears on the face of the pleading, asks this Court, in the language of Mr. Justice White in the Illinois Central case, *supra,* to "usurp merely administrative functions by setting aside a lawful administrative order upon" the Court's conception "as to whether the administrative power has been wisely exercised."

(C) In seeking an injunction against alleged damage to navigation on the Great Lakes claimed to result from alleged lowering of the levels thereof, and alleged damage to navigation on the "Lakes-to-the-Gulf" waterway, claimed to result from the alleged pollution thereof, it appears from the amended bill that the complainant States sue as mere private litigants who seek to restrain an alleged public nuisance, and it further appears that none of the complainant States, nor any of their respective citizens, suffer or can suffer any direct, peculiar or special injury different in kind or degree from the alleged injury

to the general public. The exclusive power to prevent this character of public nuisance, except only in the case of a complainant suffering special, peculiar and irreparable damage different in kind from that suffered by the general public, is vested in the United States. Such power is being exercised by the United States in respect of this waterway, and the relief sought would conflict therewith.

The extent to which the National Government is exercising jurisdiction over the subject-matter of this controversy is fully set out in the amended bill, and in the decision of this Court in the Sanitary District case, *supra*. Our point here is, that the prayer for relief is an attempt by the complainant States to enjoin what is claimed to be a public nuisance, although their relation to the subject-matter is such that they neither can nor do suffer any special or peculiar injury different in kind, nature or degree, from the injury resulting to each member of the general public, from the alleged nuisance.

The rule requiring the showing of such special injury was established in this Court as early as the decision in *The Mayor, etc., of Georgetown v. Alexandria Canal Company*, 12 *Peters* 91. The City of Georgetown sought to enjoin the further construction of a canal because it was alleged that this resulted in making shallow and therefore unnavigable, parts of the harbor of Georgetown in the Potomac River. The bill showed no special damage to the city different in kind or in degree from that suffered by any member of the general public seeking to use this facility of navigation. The Court pointed out that the bill was, in substance, a bill to enjoin a public nuisance, and laid down the rule applicable, we submit, to the case at bar, in the following (p. 99; italics ours):

"The principle then is, that *in case of public*

> *nuisance* where a bill is filed *by a private person asking for relief by way of prevention,* the plaintiff *cannot maintain a stand in a court of equity, unless he avers and proves some special injury.* . . . The complainants then must, *as in the case of private persons,* to maintain their position in the court of equity for relief against a public nuisance, have averred and proved that they were the owners of property liable to be affected by the nuisance, and that, in point of fact, they were so affected so that *they thereby had suffered a special damage.* Now, there is no such averment in this bill."

And applying the rule, the bill was dismissed.

The rule thus announced has been followed in later cases: *Pennsylvania v. Wheeling Bridge Company,* 13 *How.* 518, 566; and *Arizona Copper Company v. Gillespie,* 230 *U. S.* 46, 57.

The amended bill seeks to prevent interferences with navigation on the Great Lakes resulting from alleged lowering of the levels thereof, due to diversion of water from Lake Michigan, and interference resulting from pollution of the "Lakes-to-the-Gulf" waterway, claimed to result from its use in disposing of Chicago sewage. There is no claim whatever that the damage to the complainant States is different in any way from the damage suffered by the public at large, nor is there even a claim that the citizens of the complainant States suffer peculiar or special damage. This point applies with equal force to both of the alleged nuisances set up in the bill, i. e. the lowering of the levels of the Great Lakes, and the pollution of the waterway.

(D) In seeking relief from alleged pollution of the

"Lakes-to-the-Gulf" waterway, it appears on the face of the amended bill, that the waterway alleged to be polluted lies wholly below all of the complainant States, and that none of said States have any direct or proprietary interest in the navigable condition thereof, the exclusive power to protect such navigable condition being vested in the United States, which is now exercising the same.

As to this waterway, complainants are upper riparian owners, and can only be affected by the alleged pollution and by the injury claimed to result therefrom, when, if ever, citizens of the complainant States desire to use this waterway in interstate commerce. The protection of this waterway from such pollution as would injure its navigability, is within the control being exercised by the Secretary of War, and is not subject to control in this suit.

VII.

THE UNITED STATES ALONE CAN COMPLAIN OF ANY ALLEGED FAILURE OF THE SANITARY DISTRICT TO COMPLY WITH THE CONDITIONS OF THE PERMIT ISSUED TO SAID DISTRICT BY THE SECRETARY OF WAR, MARCH 3, 1925. OTHER ADEQUATE REMEDIES ARE PROVIDED TO PROTECT AGAINST BREACHES OF SUCH CONDITIONS, THUS MAKING RELIEF IN EQUITY UNNECESSARY AND INAPPROPRIATE.

(A) The Permit is expressly made revocable by the Secretary of War at any time; and by other expressions of the permit, the diversion complained of is being made under the supervision, and at times under the control, of the United States Engineer at Chicago. So this complete remedy to prevent or protect breaches of the permit is always available.

(B) The Rivers and Harbors Act of March 3, 1899 (Sections 12 and 17), provides special and adequate reme-

dies for violations of the act, including failures to comply with the conditions of permits issued thereunder. These are designed to enforce compliance with the broad system of regulating navigation embodied in the act. These special remedies to be exercised by federal authority are exclusive of all other remedies and preclude complainants from any relief in equity in this particular.

The provisions of the Act of March 3, 1899, and this Court's construction of it, show that Congress intended by it to establish a comprehensive and complete system of regulation covering the entire subject matter of the control of the navigability of the navigable waters of the United States, including the creation of complete and adequate remedies to make it effective and to remedy violations of the Act and of permits issued under it. The Act created new statutory liabilities and provided special remedies for them.

We respectfully submit, that this system provided by Congress, and the special statutory remedies created as a part of it, are exclusive; that the granting of the remedy sought by the complainants in the case at bar, would be inconsistent therewith and in fact destructive of the very purpose of the statute; and that, by necessary implication from the statute itself, it was the intent of Congress by its enactment to deny the further use of remedies such as are sought in the amended bill, to prevent obstructions to navigation.

Analysis of Sections Seven to Twenty of the Rivers and Harbors Act of March 3, 1899.

Section 7. The Secretary of War shall submit in his annual report, a statement of the then condition of works

of River and Harbor improvement with estimates of cost of repair and recommendations.

Section 8. The Secretary of War is directed to report to Congress a list of all Government harbor works occupied by private persons, the terms of such occupancy, date of same together with recommendations.

Section 9. Forbids construction of any dams, dikes or bridges or causeway over or in any navigable water until the consent of Congress and the approval of plans by the Chief of Engineers and the Secretary of War provided when such waters are within the limits of a single State, State consent and approval by the Chief of Engineers and Secretary of War are sufficient, but when such plans have been approved strict compliance therewith is required.

Section 10. The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of waters of the United States is prohibited; and it shall not be lawful to build any wharf or pier in any port or river, or any other water outside established harbor lines, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; nor to excavate or fill or in any manner alter the navigable capacity of any navigable water unless similarly recommended and authorized.

Section 11. Power is given the Secretary of War when deemed essential, to designate harbor lines beyond which no piers, etc., may be extended except under his regulations.

Section 12. Violations of Sections 9, 10 and 11 is made a misdemeanor punishable by fine or imprisonment, or

both, and further, the removal of structures erected in violation thereof "may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Section 13. It is made unlawful to dump refuse, etc., into navigable waters or to deposit same on banks thereof, but the Secretary of War upon approval of the Chief of Engineers may permit such deposits in designated areas.

Section 14. It is made unlawful to injure or destroy, or obstruct by fastening vessels thereto, or otherwise, any wharf, pier, etc., under control of the United States, in whole or in part for the prevention of floods, etc., provided the Secretary of War and Chief of Engineers may grant temporary permission therefor when deemed not injurious.

Section 15. Anchoring in navigable channels so as to prevent passage is forbidden or to voluntarily sink vessels therein or to float rafts so as to impede such channels, duty to buoy sunken vessels, etc.

Section 16. Penalty imposed for misdemeanor, fine and imprisonment, for violation of Sections 13, 14 and 15. Vessels responsible for such damage subject to libel by the United States.

Section 17. The Department of Justice shall conduct the legal proceedings necessary to enforce Sections 9 to 16. It is the duty of United States district attorneys to vigorously prosecute offenders when requested by the Secretary of War or his subordinates, reports to be made to the Attorney General and copies to the Secretary of War by such District attorneys; and in aid of enforce-

ment of said laws, United States collectors of customs and other revenue officers are given power to swear out process and arrest, with or without process, persons committing any of the offenses prohibited.

Section 18. When the Secretary of War has good reason to believe any railroad or bridge is an obstruction to navigation he shall give notice to interested persons, conduct a hearing and recommend desirable changes, if any. If alterations are not made in time specified, criminal proceedings are required by the local United States District Attorney. Penalty of $5,000.00 a month fine is imposed.

Section 19. Power of the Secretary of War to break up and dispose of abandoned crafts in navigable waters. Publication of notice, etc.

Section 20. In the event of grounding of any craft in any navigable waters or canal lock in a way dangerous to navigation, the Secretary of War or his agents may take immediate possession of such craft so as to remove or destroy it and clear the channel, using judgment to prevent unnecessary injury. Expense of removal to fall upon the owners.

The Act of 1899, above briefly summarized, was a revision of a prior Act of similar purport contained in the Rivers and Harbors Act of September 19, 1890.

In *Southern Pacific Company vs. Olympian Dredging Company,* 260 *U. S.* 205, 208, 210, suit was brought against the railroad for damages resulting from the sinking of a barge which ran against certain piles in the Sacramento River, which were left by the railroad upon the removal of

one of its bridges. The removal and the manner of leaving the piles was in strict compliance with a permit of the Secretary of War issued under the provision of Section 7, of the Act of 1890, and the question presented for decision was whether the courts would inquire into reasonableness or propriety, of an obstruction that the Secretary of War had thus permitted. On this point the Court said, pages 208-210:

> "By this legislation Congress assumed jurisdiction of the subject of obstructions to navigation, and committed to the Secretary of War administrative power insofar as administration was necessary. * * * That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to condition an approval. In the light of this declared assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authorative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned. * * * It was not for the petitioners, however, to question either his reasons or his conclusions. They were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction."

The opinion then quoted from the opinion in *Mononga-*

hela Bridge Company vs. United States, 216 *U. S.* 177, 195; as follows:

> "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. It is for Congress, under the Constitution, to regulate the right of navigation by all purported means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe a way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the Courts or by the jury * * * ." (This case construed the Act of 1899).

It is clear from the foregoing, that by this statute Congress set up a system of regulation which covered the entire subject of navigable waters. It gave complete authority to the Secretary of War to carry out this system of regulation and to impose specified penalties for failure to comply with his requirements. It also placed in the Department of Justice, acting in strict co-operation with the Secretary of War, such judicial supervision over the subject matter as the policy of the regulation would require. If, at the suit of a private individual, injunctions should be granted inconsistent with the provisions of any permit issued by the Secretary of War, and power to issue such injunction were assumed by the Courts, the carrying out of this Congressional scheme would be impossible.

An analogous situation in support of this contention is shown in the opinion in *Texas and Pacific Railway Com-*

pany v. Abilene Cotton Oil Company, 204 *U. S.* 426, 437. In that case a shipper sued in the State Court to collect damages resulting from the collection from the shipper by the defendant railroad, of claimed excessive freight rates. At the common law this action would lie, the damages being the amount by which the rate in question exceeded what the Court and jury would find to be reasonable. The sole question before this Court was whether the necessary effect of the Interstate Commerce Act was to deprive a shipper of this common law remedy for overcharge. In the Interstate Commerce Act there is an express reservation of common law remedies theretofore existing.

In considering this question, the Court concluded that the common law remedy would not be construed to have been taken away unless imperatively demanded by the construction of the statute. The Court then summarized the Commerce Act, holding that it was intended as an effective means of redressing wrongs resulting from unjust discrimination and undue preference, that the principal means be employed to this end, was the requirement of uniformity of charges obtained by compelling freight rates to be filed with the Interstate Commerce Commission, and when filed to be collected from all shippers. The Court pointed out that if the common law remedy were allowed the uniformity required by the Act would be destroyed and said:

> "Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. * * * This must be, because,

> if the power existed in both Courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the position of the Court."

The Court therefore held that the common law right no longer existed having by necessary implication been repealed by the statute, which required primary recourse to the Interstate Commerce Commission in any matter involving an alleged excessive rate.

In the case at bar the Secretary of War has approved by the issuance of his permit, the obstruction to navigation of which complainants complain. Assuming that a Court might differ with the Secretary of War as to the wisdom or propriety of permitting this diversion, it is clear that if by granting injunctive relief, a Court should require a departure from the terms of the permit issued by the Secretary of War, the entire sytem of regulating of navigable waters established by the Act, would be interferred with and its effectiveness destroyed.

Moreover, it seems to be established doctrine that where a statute creates a right or *liability,* and *prescribes a remedy, the remedy prescribed is exclusive;* Pollard v. Bailey, 20 Wall. 520, 526, Fourth National Bank v. Franckly n, 120 U. S. 747, 756.

We therefore respectfully submit, that the necessary intent of the Act of March 3, 1899, is to make exclusive of all other remedies, the special statutory remedies that the Act itself provides as available through the Secretary of War and the Department of Justice.

And the fact that these remedies were not made directly available to private litigants, is in harmony with the decisions of this Court that neither individuals, nor States, have any justiceable interest in the control of the navigability of the navigable waters of the United States.

(C) It must be presumed that in issuing and recommending said permit of March 3, 1925, the Secretary of War and the Chief of Engineers took full cognizance of the extent to which Lake levels would be lowered, and navigability obstructed, if at all, by the diversion authorized in said permit. The Secretary of War, being the agent of Congress in determining these matters, his conclusions are not subject to review by the Courts.

We have already discussed the extent to which a court may review the discretion of the Secretary of War acting under the authority conferred upon him by Sec. 10, of the Act of March 3, 1899, under which the permit in question was issued.

Both from the averments in the amended bill and from the record in the Sanitary District case to which this Court may refer under its rule of judicial notice, this Court knows that for many years the subject-matter of this litigation—the diversion at Chicago, of water from Lake Michigan—has been under the supervision and inspection of the Secretary of War and his assistants. The record in this Court in the Sanitary District case contained testimony of many Government officers as to the character, extent and effects upon Lake levels, of this diversion. The Court must presume, therefore, that the Chief of Engineers, in recommending the permit of March 3, 1925, and the Secretary of War, in issuing the same, took full cognizance of any effect upon Lake levels which might result therefrom.

We submit that so far as concerns the effect upon Lake levels, of the diversion authorized by this permit, the legal situation is closely analogous to that before this Court on the original bill of the *State of Pennsylvania* concerning the *Wheeling and Belmont Bridge Company*, 59 *U. S.* 421.

The original bill was filed by Pennsylvania to redress special damage resulting to it in its proprietary capacity due to the fact that the bridge was alleged to interfere with navigation on the Ohio River. The Court, in the original case, took jurisdiction of the bill, and granted an injunction which required an abatement of the public nuisance Thereafter the Congress in the excerise of its authority to regulate commerce, passed a statute declaring that the bridge was a *lawful* structure. After this statute, contempt proceedings were begun before the Court to compel the bridge to abide by the original decree, but it was held that since the bridge had been declared a lawful structure, it should not be abated as being any longer a public nuisance.

It is respectfully submitted, that in so far as concerns the diversion of water from Lake Michigan within the amount permitted by the permit of March 3, 1925, all questions of legality have been removed by the issuance of said permit. The power of the Secretary of War to issue the permit has been confirmed by this Court in the Sanitary District case. A structure of any kind in the navigable waters of the United States is, to the extent that vessels might use in those waters, the same space occupied by such structure, an obstruction to navigation. It cannot be claimed that there is any inconsistency between permitting the Secretary of War to authorize obstructions to navigation, and the general prohibition contained in Section 10, of the Act of March 3, 1899. The entire Statute must be read together. It clearly involves a complete and comprehensive scheme of regulation, and particularly a scheme designed, through the creation of works of man, in and adjoining to the navigable waters of the country, to render feasible such use of

those waters as may best conserve the general public interest. No such scheme could possibly be carried out, unless it involved the creation of power to determine to what extent and in what particulars actual obstructions to navigation might be required, always, of course, conditioned upon the duty to make such permitted obstructions harmonize with the remedial purpose of the statute —to further and develop the navigable waters of the country.

VIII.

THE RIGHTS ASSERTED AND THE RELIEF SOUGHT IN AND BY THE AMENDED BILL ARE CONTRARY TO, AND INCONSISTENT WITH, THE RIGHTS ASSERTED AND THE RELIEF SOUGHT IN AND BY THE ORIGINAL BILL HEREIN, IN THE RESPECT THAT THE ORIGINAL BILL CONCEDED AND ADMITTED THE RIGHT OF THE DEFENDANTS TO A DIVERSION NOT IN EXCESS OF FOUR THOUSAND, ONE HUNDRED AND SIXTY-SEVEN (4,167) CUBIC FEET PER SECOND, AND ALSO TO A DIVERSION IN EXCESS OF SAID AMOUNT, IF AND WHEN THE CONGRESS OF THE UNITED STATES OR THE SECRETARY OF WAR ACTING UPON THE RECOMMENDATION OF THE CHIEF OF ENGINEERS, SHOULD SO PERMIT, WHEREAS, THE AMENDED BILL DENIES SUCH RIGHTS OF THE DEFENDANTS; THEREFORE, THE COMPLAINANTS ARE NOW ESTOPPED FROM DENYING THE SAID RIGHT OF THE DEFENDANTS, AND FROM SEEKING THE RELIEF PRAYED FOR IN THE AMENDED BILL.

The original bill herein was filed June 5, 1922, to the October Term, 1921, by the State of Wisconsin as sole complainant. The prayer of this bill was for a general injunction against any diversion until such time as the Congress should give its valid consent, and in the alternative, in the event the canal of the defendant District be

used as a navigable waterway, for an injunction against any diversion in excess of the amount which the Court should determine to be reasonably required for purposes of navigation through said canal, until such time as Congress should give its valid consent; and in the event that the Court should hold it within the power of the Secretary of War to permit diversions, then for an injunction against any diversion in excess of 4,167 cubic feet per second until such time as Congress or the Secretary of War acting upon the recommendation of the Chief of Engineers should permit a larger amount.

Thereafter, the complainant, Wisconsin, together with the additional complainants named in the amended bill, and also the Lake States of Indiana and Michigan, appeared with leave, as friends of the Court, in the Sanitary District case, and there argued in favor of the affirmance of the decree that had been entered in the District Court, enjoining the defendant Sanitary District from diverting water in excess of 4,167 cubic feet per second, the amount allowed by the then outstanding permit from the Secretary of War.

The question in that case, as well as the question presented by the original bill here, necessarily involved a determination by this Court of the legality of the authority exercised by the Secretary of War in issuing permits for this diversion.

But when the amended bill in the instant case is considered, which in effect denies the authority of the Secretary of War to issue such permit, it is clear that the complainants have materially changed their position. This, under well-established rules, they may not do.

In their original bill, it was the duty of the complainants to state their entire case, to set forth every ground upon which they could obtain relief. They could not thereafter enlarge the scope of the action. If a decree had been entered, for instance, in the original bill, it would be *res adjudicata* so far as the complainants are concerned of the matter presented in this bill, not because the issues of the two are identical, but because the complainants had the opportunity to present those issues on the original bill. As was said by this Court in *Northern Pacific Railway Company v. Slaght,* 205 *U. S.* 122, 130-131, the question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what *could* have been pleaded or litigated.

After the original bill herein was filed, in 1922, the Sanitary District and the State of Illinois filed a joint and several answer. No further steps were taken until October, 1925, except, as stated, that Wisconsin, together with other Lake States, voluntarily appeared in the Sanitary District case.

The relief prayed in the original bill herein, was identical with the relief sought by the Government in the Sanitary District case. The appearance of Wisconsin in that case to urge affirmance of the decree awarding the relief sought, gave to the Sanitary District and the State of Illinois the right to assume that Wisconsin would be satisfied with the decision of this Court in that matter. The permit granted by the Secretary of War, March 3, 1925, imposed many and substantial burdens upon the Sanitary District as conditions with which it must comply in order to continue to divert water from Lake Michigan.

In seeking this permit—and of course, this Court may assume the permit would not have been issued except on application of the Sanitary District—the District had a right to assume that it could proceed with the program of construction imposed upon it by the conditions of the permit without fear of any further threat of litigation from the State of Wisconsin. The mere pendency at that time of the original bill contained no such threat because, as above pointed out, the relief sought in that bill was identical with the relief sought in the Sanitary District suit.

Under these circumstances, therefore, we submit that complainants are estopped to set up a new theory denying the authority of the Secretary of War, afer the Sanitary District had obtained the permit in March, 1925, subject to the heavy burdens therein imposed.

For this reason also, the amended bill should be dismissed.

CONCLUSION.

Having endeavored above to show the various reasons why the amended bill should be dismissed as wholly insufficient to invoke the original jurisdiction of this Court, and as wholly lacking in equity, we shall close with a short explanation of the interests that the Mississippi Valley States have in the subject matter in controversy.

It is two-fold. The vast domain that comprises the Mississippi Valley and the freight territory tributary to the Mississippi, is deeply concerned in the carrying out by the Government of its plans for the development of these inland waterways.

The diversion at Chicago of an adequate and reasonable quantity of lake water, is essential to the development and operation of this very important "Lakes-to-the-Gulf" waterway.

This interest of the Valley States rests not only upon the direct benefit to be obtained by all their peoples through the very great tonnage of freight that moves and will move over these waterways, but also upon the indirect benefit to be obtained through the lowering and leveling effect that the existence of these all-water or part-water routes and their low freight rates have and will have upon competing rail rates.

If it be suggested that the Mississippi Valley States have no justiciable interest in these subjects of navigability and transportation, we respectfully answer that they have at least as much justiciable interest in them as the complaining Lake States.

But there is another interest, that was held in *Missouri v. Illinois, supra,* to be justiciable, and that is of direct and urgent importance to Missouri, perhaps also to Kentucky and Tennessee, viz.: the protection of the Illinois and Mississippi Rivers against dangerous pollution.

The great and urgent importance to the Valley States, of this water pollution feature of the present situation, does not seem to have been understood by the Court in the Sanitary District case, probably because the Court then had in mind the facts and situations disclosed by the record in *Missouri v. Illinois.* We therefore venture to stress the fact that the physical situation has changed in important respects.

If the prayer of the amended bill should be granted, and an adequate diversion of water from Lake Michigan should be enjoined, a much more serious and dangerous pollution of the Illinois and Mississippi Rivers would occur than was found to be the fact in *Missouri v. Illinois.*

This is so because: at the time the evidence was taken in *Missouri v. Illinois, only a part* of the sewage of Chicago passed into or through the Sanitary District's canal, and the City of Chicago was then much smaller in population than now. Since then the situation has changed, and the menace to the water supply of St. Louis and other River cities has greatly increased. Now *almost all* of *the sewage and waste, domestic and industrial,* of *the vastly greater* City of Chicago passes into the canal, and would seriously menace the water supply of the River cities, certainly in Illinois and Missouri, if an adequate diversion should be discontinued.

We respectfully submit that this interest is direct and substantial, and should entitle the Valley States to participate in the defense of this case.

Respectfully submitted,

NORTH T. GENTRY,
Attorney General of Missouri;
FRANK M. THOMPSON,
Attorney General of Tennessee;
FRANK E. DAUGHERTY,
Attorney General of Kentucky;
PERCY SAINT,
Attorney General of Louisiana;
CORNELIUS LYNDE,
DANIEL N. KIRBY;
Solicitors.