IN THE

# SUPREME COURT OF THE UNITED STATES

ORIGINAL JURISDICTION



**OCTOBER TERM, 1925**

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

*Complainants,*

v.

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.~~
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## BRIEF ON BEHALF OF COMPLAINANTS IN OPPOSITION TO MOTION TO DISMISS

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# INDEX

## SYNOPSIS

Page

Page

Page

## CASES CITED

Page

Page

Page

Page

Page

Page

Page

# STATUTES, CONSTITUTIONAL PROVISIONS, SESSION LAWS, ETC.

# TEXTS CITED

## PUBLIC DOCUMENTS

Page

# APPENDICES

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT

### STATEMENT OF FACTS

This case comes on for hearing on a motion by defendants to dismiss. This action was originally brought by the State of Wisconsin in 1922 against the State of Illinois and the Sanitary District of Chicago. In October, 1925, leave was granted by this court to file an amended complaint joining the states of Minnesota, Ohio and Pennsylvania as complainants. On January 4, 1926, the defendant State of Illinois filed its motion to dismiss and the defendant Sanitary District of Chicago filed its answer and motion to dismiss. On January 25, 1926, the States of Missouri, Tennessee, Kentucky and

Louisiana filed a motion to be admitted as intervening defendants and to dismiss.

The salient facts set up in the amended complaint and for present purposes admitted by the demurrer and motions to dismiss may be briefly summarized.

The complainants allege injuries to them in their proprietary capacities as *quasi*-sovereigns, and in their capacities as *parens patriae* of their people, resulting from unlawful acts of the defendant State of Illinois and defendant Sanitary District of Chicago.

These injuries consist of a long continued and permanent lowering of the levels of the Great Lakes and their connecting waters through the abstraction of the waters of Lake Michigan from the Great Lakes watershed and their permanent diversion through the Chicago, Des Plaines and Illinois rivers and the Sanitary Canal into the Mississippi watershed. This has obstructed the navigable capacity of the Great Lakes and connecting waters and caused large losses to these states and their people in reducing the carrying capacity of the large numbers of vessels navigating these waters and in damages done to their harbors, and in damages to the property rights of thousands of citizens of the complainant states and to the proprietary rights of the complainant states in the waters within their borders.

These injuries also consist of the excessive pollution of the navigable waters of the Chicago, Des Plaines and Illinois rivers and the Sanitary Canal, making navigation thereon dangerous to the health and lives of the people of the complainant states having the right to navigate said waters in carrying on a large commerce which is or could be served by such navigation.

The complainant states assert that neither the State of Illinois nor the United States could legally authorize any abstraction of the waters of the Great Lakes to be diverted into another watershed for any purpose, but bring this suit only to enjoin the defendants from so taking any water in excess of the amount needed for navigation without injury to the navigable capacity of the Great Lakes. The amount so needed is alleged not to exceed 500 cubic feet per second

for the present navigation and not to exceed 1,000 cubic feet per second for any possible future navigation over the Sanitary Canal, the Chicago, Des Plaines and Illinois rivers.

## I.

## THE PRINCIPAL ALLEGATIONS OF THE AMENDED BILL OF COMPLAINT MAY BE SUMMARIZED AS FOLLOWS:

That the complainants are states of the United States of America. The various acts of Congress define their boundaries as extending to the center of the lakes, between such states.

That the complainant states have extensive shore lines along said lakes with numerous harbors and a large commerce amounting to many millions of tons annually for each of said states.

That the Sanitary District Canal through which the waters of Lake Michigan are abstracted was constructed solely for sewage disposal purposes, pursuant to the legislative acts of the State of Illinois, beginning with the year 1889, which acts have been so construed by the highest court of the State of Illinois.

That in 1903, the Illinois Legislature authorized the construction and operation by the Sanitary District of an electric power plant which has been operating since 1907, producing more than 20,000 H. P., and many million dollars of profits to the Sanitary District.

That an underestimate by engineers of the Sanitary District shows an abstraction of water from Lake Michigan increasing from 2,900 cubic feet per second in 1900 to 7,786 cubic feet per second in 1917, and that in fact in 1917, and since, more than 8,800 cubic feet per second have been so abstracted.

That the Great Lakes, excepting Lake Superior and connecting waters and the St. Lawrence River have been lowered not less than six inches by such abstraction of water by defendants, and that such lowering has reduced the possible loading of vessels thereon by at

least six inches, and has reduced their cargo carrying capacity by many tons, with a resultant increase of freight costs to the people of complainant states and to the State of Wisconsin in its proprietary capacity. That the carriage of coal by such vessels constitutes the principal source of supply of coal for the State of Wisconsin and its people, that such lowering has lessened the utility of all of the ports of said lakes and connecting waters of said lakes, and that the total annual loss due to the lowered carrying capacity of lake vessels chargeable to the abstraction of such water amounts to many millions of dollars.

That navigation in the Chicago River has been made so difficult and dangerous by the swift current created by the abstraction of this water as to reduce the commerce handled in the Chicago harbor from between six and eight millions of tons of freight each year to less than one-third that amount, a large part of which commerce was between citizens of Wisconsin and citizens of Illinois.

That the State of Illinois asserts and seeks to bar the United States from control over said canal and to subordinate its use to sewage disposal and power purposes.

That for the purpose of present navigation over said canal and the Chicago, Des Plaines and Illinois Rivers, the diversion necessary does not exceed 500 cubic feet per second, and that the maximum amount of water so needed to be diverted for the greatest possible navigation upon said canal and river will never exceed 1,000 cubic feet per second.

That none of the permits issued by the various Secretaries of War are or ever have been of any force or effect to authorize a withdrawal of water from Lake Michigan in such quantities as to obstruct its navigability, and that the defendants have never been authorized by Congress to divert any water from Lake Michigan.

That the acts of the defendants have caused large pecuniary losses to the peoples of the complainant states and have violated the legal rights of the states themselves.

The situation out of which this controversy arises has been in the

courts so long and has been so recently before this court that the facts are already quite familiar to the court. We do not agree with the defendants as to the statements of facts in their briefs nor that matters set out therein are matters of which this court will take judicial notice or which are material at this time. Without conceding anything on these points or considering any statement of facts necessary for this present purpose other than as set out in the amended complaint, we add for such use as the court may find convenient the following supplementary matters which are based upon governmental reports, official documents and other public records.

## II.

## THE HISTORY OF THE SANITARY CANAL CONCLUSIVELY ESTABLISHES THAT THE CANAL IS NOT NOW AND NEVER HAS BEEN A NAVIGATION PROJECT, BUT THAT IT IS NOW AND ALWAYS HAS BEEN SIMPLY A SANITATION AND POWER PROJECT FOR THE BENEFIT OF THE SANITARY DISTRICT OF CHICAGO.

Prior to the decision of this court in the *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352, there had never been any serious claim on the part of the defendants Sanitary District and State of Illinois that the Sanitary Canal was anything other than a sanitation and power project. When this court in the foregoing case decided that the defendant had no right to appropriate and abstract the waters of the Great Lakes-St. Lawrence System for local sanitation and power purposes, the defendant, the Sanitary District of Chicago and the State of Illinois, took the position in the instant case, that such canal was not a sanitation and power project but was a navigation enterprise. This changed position upon facts which were well known to such

defendants at and prior to decision of the *Sanitary District* case has an important bearing upon the weight to be given the claims of the defendants in urging that proposition in a court of equity at this time.

The Sanitary Canal was opened in January of 1900. Separate Section 3, Constitution of Illinois 1870 and Starr and Curtis Statutes 1896, page 206, forbade the State of Illinois to loan its credit or make appropriations in aid of canals. The necessary effect of this constitutional provision was applied in *Burke* v. *Snively,* 208 Ill. 328, 348, 70 N. E. 327.

The defendant Sanitary District of Chicago was created by an Act of Illinois of May 29, 1889, entitled "An act to create sanitary districts, etc." In *Chicago* v. *Green,* 238 Ill. 258, 87 N. E. 417, the highest court of the State of Illinois in speaking of this act said:

> "The purpose of the act of 1889 was to furnish a common outlet for the sewage of the incorporated municipalities within the limits of the district."

In *People* v. *Nelson,* 133 Ill. 565, 27 N. E. 217, it was said:

> "A sanitary district is a municipal corporation organized to secure, preserve and promote the public health."

From these various acts, decisions and constitutional provisions it is apparent that the State of Illinois could act only through the medium of the defendant Sanitary District and that such district could build and operate a sanitary canal solely as a sanitation project and not as a canal for the purposes of navigation.

The true purposes of the Sanitary Canal are also shown in an official memorandum or report issued by the Trustees of the Sanitary District in December, 1923, which contains the following statement on page four:

> "The Sanitary Project was developed by the City of Chicago with the cooperation of the State Board of Health of Illinois and

a joint committee of the Illinois General Assembly in the years 1885-1889. To study and report upon the problem Chicago created the Drainage and Water Supply Commission consisting of eminent Civil Engineers. Three methods of the solution of the problem of disposal of the sewage of the Chicago District were considered by the Commission: First, the discharge of sewage into Lake Michigan at one end of the City and the taking of water supply from the Lake at the other extreme end of the city; Second, the disposal of sewage on land by intermittent filtration over a vast sewage farm (as large as 15,000 acres); Third, the discharge of sewage into the Des Plaines River by means of a ship canal, and the resultant disposal by dilution. The third method, recommended by the Commission, was chosen as the basis of the Sanitary District Act.

"Thereupon the Sanitary District of Chicago was created by act of the Illinois State Legislature May 29, 1889, and the validity of the act was affirmed by the State Supreme Court on June 12, 1890. Its purpose was to provide a Main Channel or outlet and necessary adjuncts to divert the sewage of Chicago and adjacent towns from Lake Michigan, thus protecting the municipal water supply from contamination by sewage. To dispose of sewage by dilution and provide an outlet into the Illinois River the act required that such channel should be made of such size and capacity as to provide a minimum dilution of 3.33 cubic feet per second for every 1,000 people."

While defendant Sanitary District and State of Illinois now attempt to argue that the principal object of the Act of Illinois of 1889 was to provide for the construction of a ship canal, the reason given by the Sanitary District in their requests to the War Department for permission to divert water from the Chicago River into the Des Plaines River were merely to aid in the disposition of the sewage of Chicago, and to prevent that sewage from entering Lake Michigan and polluting the water supply of Chicago. In 1911 the defendant Sanitary District applied to Secretary of War Stimson for permission to increase the withdrawal of water to ten thousand cubic second feet. In the opinion of Secretary Stimson containing his decision upon that application, he said:

"The demand for the diversion of this water at Chicago is based solely upon the needs of that city for sanitation. There is involved in this case no issue of conflicting claims of navigation."

And again in that opinion Secretary Stimson says,

"Having reached the conclusion that the proposed diversion of the waters of Lake Michigan would substantially injure the interests of navigation on the Great Lakes, which it is my legal duty to protect, it would clearly follow that the present application should be denied."

In 1907 the trustees of the defendant Sanitary District, after their application for a permit to reverse the current of the Calumet River had been denied, passed a resolution which reads in part as follows:

"Whereas, heretofore, to-wit: on November 28, 1906, this board instructed its president to transmit to the Secretary of War an application for a permit to reverse the flow of said Calumet River and thereafter, to-wit: On March 14, 1907, the Secretary of War communicated to the board his refusal to issue such permit;

"Whereas, this board is advised that it has the right and that is the duty under the laws of the State of Illinois to construct said channel, notwithstanding the refusal of the Secretary of War to issue a permit therefor, for the purpose of furnishing the proper sanitary method of disposing of the sewage of the territory and inhabitants contiguous to the said proposed channel and within the corporate limits of the Sanitary District of Chicago, and unless restrained by a court having jurisdiction of the subject matter at the instance of the United States Government."

The testimony of the engineering expert for the proponents of the Sanitary District before the Illinois Legislative Committee on April 7, 1887, shows that the main reason for adopting the dilution method instead of the purification method for the disposal of the sewage of Chicago was to save some expense. See pp. 1800-1820, Part 2, Rivers and Harbors Committee Hearing of April and May, 1924.

The foregoing documentary evidence conclusively establishes that the Sanitary Canal was not constructed for navigation purposes, but solely for the purpose of disposing of the sewage of the Sanitary District by dilution methods.

## III.

## A COMPARISON OF THE COMMERCE OF THE DES PLAINES AND ILLINOIS RIVERS WITH THE COMMERCE OF THE GREAT LAKES SYSTEM.

The commerce upon the Sanitary Canal, the Des Plaines River and the Illinois River is shown by the official publication of the U. S. Department of Commerce, 1923, Miscellaneous Series No. 119, entitled "Inland Water Transportation in the United States." From that report it appears that the total volume of freight on the Illinois River in 1921 was 157,536 tons. The volume of commerce on the Des Plaines River was much smaller. The volume of commerce on the Sanitary Canal was approximately 400,000 tons, consisting chiefly of the removal of rock and debris from along its banks by barges.

From page 67 of the same report it appears that in 1920 the total volume of freight carried on the Great Lakes was over one hundred and eleven million tons. The Statistical Report of the War Department for the year 1923 shows that of all the waterborne commerce into and out of and through the United States, approximately twenty-seven per cent was carried on the Great Lakes. From the government reports it appears that the freightage through the Soo Canal alone has reached a peak of ninety-two million tons and is nearly double that of the combined freightage of the Panama and Suez Canals in their twelve months' year against the lakes' eight months season. The Great Lakes perform a ton mile service equivalent to about twenty-five per cent of the tonnage of all the railroads of the United States, and carry bulky raw materials such as iron ore, stone,

coal, and grain at a cost not exceeding one-fifth and sometimes as low as one-tenth of the cost of railway transportation.

The present small commerce upon the Des Plaines and upper Illinois Rivers cannot be substantially increased until the completion of the locks and improvements on these rivers, which, according to present plans, will not be for two or three years. The engineering reports hereinafter cited show that an abstraction of less than one thousand cubic second feet will suffice for the commerce of one hundred million tons per year, which is immensely greater than any probable commerce upon the Des Plaines and Illinois Rivers.

## IV.

## ONE THOUSAND CUBIC SECOND FEET IS THE GREATEST AMOUNT OF WATER WHICH WILL EVER BE REQUIRED FOR THE NEEDS OF NAVIGATION UPON THE SANITARY CANAL, DES PLAINES AND ILLINOIS RIVERS.

Defendants assert that the allegation in the bill of complaint that the present needs of navigation upon the Des Plaines and Illinois Rivers do not exceed five hundred cubic second feet of abstraction and will not with any development of which those waters are capable exceed one thousand cubic second feet, should not be accepted by this court as a fact, although admitted by their motion to dismiss. The only argument advanced in support of this contention is that the complaint does not disclose whether such quantity of water is needed for slack water navigation or free water navigation. For the purpose of this motion it must be considered as a verity that such an amount is sufficient for any type of navigation of which these waters are capable. However, as bearing upon the truth and the good faith of the contention, we will state the facts.

With respect to the Des Plaines and upper Illinois Rivers no contention for free water navigation can be made in good faith. From

the end of the drainage canal at Lockport to the surface of the water at Utica there is a drop of about one hundred and thirty feet in a distance of sixty-six miles. As a physical fact, this drop demonstrates that no open river navigation is practical over this distance or even possible with any degree of safety. (In fact, the defendant State of Illinois is now constructing five locks averaging about twenty-six feet lift each to cover this section of the river.) At Lockport there is a fall of thirty-four feet. Obviously no possible quantity of water would render free navigation over such a drop possible. With reference to the lower Illinois from La Salle to its mouth at Grafton, there is a fall of only about thirty feet in two hundred and twenty-four miles. Upon that portion of the Illinois River open navigation is possible with very small water flow, as any desirable draft can be obtained in the boat channel by dredging without the addition of any water to the natural flow of the stream, and once secured will be practically permanent. Annual Report of the Chief of Engineers, 1868, House Executive Document No. 1, part 2, 40th Congress, 3d Session, p. 438. A further report August 30, 1878, provided for no diversion of waters, but specifically stated that "the slack-water system * * * has the advantage in every important feature." Annual Report, Chief of Engineers, 1879, House Executive Document, No. 81, 45th Congress, 3d Session, p. 8.

Since physical obstruction to the upper Illinois and Des Plaines Rivers demand locks under any system of improvement for navigation purposes, the only water needed from the Great Lakes System is a sufficient addition to the natural flow in the Des Plaines and Illinois Rivers to provide for efficient and proper operation of necessary locks. It is entirely feasible to provide any necessary capacity in the lower river by dredging. The expense of such dredging is nominal and when once incurred does not have to be incurred again. On the other hand, the *annual* damage to navigation on the Great Lakes by an excessive abstraction of waters probably equals or exceeds the total added cost to be incurred but once in the

improvement of the Des Plaines and Illinois Rivers without abstraction in excess of 1,000 cubic second feet.

The five hundred to one thousand cubic second feet stated to be the maximum required for navigation, approximates that required for the Soo and Welland Canals, where the traffic is greatly in excess of what could reasonably be expected for the Des Plaines-Illinois waterway. On the other hand, a diversion of ten thousand cubic second feet creates a current of such an excessive velocity as to make navigation difficult and even dangerous. The attempt now being made by Chicago to establish permanent bridges over the Chicago River indicates that the people of the Sanitary District are not chiefly interested in providing for navigation either on the Sanitary Canal or along the Illinois and Des Plaines Rivers. The alternative Calumet-Sag Channel is at present of shallow depth and the only existing proposal to deepen this channel does not contemplate the deepening of this channel for a number of years. The Chicago Sanitary District can, by installing sewage disposal works, as has been done elsewhere, dispose of all danger of pollution of the lake by returning only a safe effluent from such disposal works.

The amount of water necessary for navigation purposes upon the Des Plaines-Illinois waterway was passed upon by the Special Board on the Waterway from Lockport, Illinois, to the mouth of the Illinois River. This board was made up of government engineers under the chairmanship of General W. H. Bixby, Chief of Engineers. The report, dated January 23, 1911, was published in the House of Representatives Document 762, 63d Congress Second Session, pages 101 to 107. We quote from pages 105, 106, 107 as follows:

> "The Board considers a bottom width of 160 feet in canal and 200 feet in the open river above the mouth of the Illinois River sufficient for a channel of eight or nine feet available depth. For safety and ease of navigation the channel should be extended to 11 feet in rock cuts and canals, and the locks should be given 11 feet depth, 80 feet width and 600 feet useful length. With these lock dimensions three barges carrying about 9,000 tons of freight may be locked through with their tow-boat. A waterway of these

dimensions would have a capacity exceeding 100,000,000 tons per annum and would accommodate barge tows carrying about nine times the ordinary train-load of this vicinity. In addition the vessels using it would be capable of navigating the Ohio and Lower Mississippi Rivers. Such waterway will not require a diversion of more than 1,000 second feet from Lake Michigan, this amount would not injuriously lower lake levels nor cause excessive flooding of land in the Illinois Valley." (Page 105.)

(Page 106.) "For purposes of navigation a diversion from Lake Michigan of less than 1,000 second feet of water is all that will be necessary." (Page 107.) "* * * The claim that more than 1,000 cubic feet per second is required for purposes of navigation cannot be maintained."

The statement that 1,000 cubic second feet is all that could ever be needed for navigation purposes in this waterway has often been reinterated. Thus Secretary Stimson in his decision of January 8, 1913, denying permission to abstract 10,000 cubic second feet said:

"The Chief of Engineers reports that so far as the interests of navigation alone are concerned, even if we should eventually construct a *deep* waterway from the Great Lakes to the Mississippi over the route of the sanitary canal, the maximum amount of water to be diverted from Lake Michigan need actually be not over 1,000 feet per second, or less than a quarter of the amount already being used for sanitary purposes in the canal. This estimate is confirmed by the report of the special board of engineers on the deep waterway from Lockport, Ill., to the mouth of the Illinois River, dated January 23, 1911. It is also confirmed by the practical experience of the great Manchester Ship Canal in England. From the standpoint of navigation alone in such a waterway too great a diversion of water would be a distinct injury rather than a benefit. It would increase the velocity of the current and increase the danger of overflow and damage to adjacent lands."

Again, in the final report of the special board on the waterway from Lockport to the mouth of the Illinois River (House Document 762, 63d Congress, 2d Session, p. 14) dated December 16, 1913, it is said:

"But the Board reiterates that a diversion exceeding 1,000 second feet is not necessary for navigation purposes alone in the Illinois River, and that an added discharge will produce a slight and inadequate effect on the Mississippi River."

The report just quoted is the last official report of the War Department to Congress upon this subject, but General Taylor, the present Chief of Engineers, when called before a senate committee on January 20, 1925, and questioned as to the amount of diversion necessary for the navigation of a nine-foot channel down the Illinois River, referred to the various reports that we have quoted above, and said with reference to the original Bixby report:

"It has been investigated a number of times, and I think the conclusions reached by that board have always been concurred in." (Vol. 2, p. 741, Hearings on the Nine-Foot Channel from the Great Lakes to the Gulf, Pursuant to Senate Resolution 411, 67th Congress, 4th Session.)

The abstractions of the defendant Sanitary District in excess of 1,000 cubic second feet have introduced a current into the Chicago River which has made it practically impossible for large boats to navigate that river, and has virtually driven all commerce from the river. This is clearly brought out by the defendants' own engineer, Isham Randolph, in testimony given before the House Rivers and Harbors Committee. (See last paragraph of Document No. 6 of that Committee, 59th Congress, 1st Session.) Thus it is apparent that not only is 1,000 cubic second feet all that will ever be needed for navigation purposes, but that the excessive amount now being diverted is an actual injury to navigation.

The recently completed locks and dams, and the locks and dams under construction and those contemplated for the Des Plaines and Illinois Rivers, answer conclusively any argument that there can be any free water navigation with the abstraction of any possible amount of water from Lake Michigan.

## V.

## THAT THE ABSTRACTION OF THE WATERS OF THE LAKES IN THE QUANTITY CLAIMED BY THE DEFENDANTS CONSTITUTES A SUBSTANTIAL AND UNREASONABLE OBSTRUCTION TO THE NAVIGABLE CAPACITY OF THE GREAT LAKES IS AN ESTABLISHED FACT.

The levels of the lakes have been lowered approximately six inches by the Chicago abstraction. *Chicago Sanitary District* v. *United States,* 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352. This has resulted in a reduction of the carrying capacity of the Great Lake freighters and in a loss in that connection amounting to at least three million dollars per year. House Committee Hearings of 1924, page 105; Hearings Rivers and Harbors Committee, House of Representatives, 69th Congress, First Session Jan. 30, 1926, page 11. It has resulted in damages to docks, piers, and other property, and has required additional expense in dredging. Both the federal government and the Canadian government have expended large sums to improve the navigation of the Great Lakes. The loss in load for big lake freight carriers has been from eighty to eighty-eight short tons per inch of draft, Record Volume 3, 1245, *Sanitary District of Chicago* v. *United States.* These losses have increased as the commerce has grown. The increased extent of the damage appears from the testimony in the River and Harbors Committee hearings, 68th Congress, first Session, on Illinois and Mississippi Rivers and diversion of water from Lake Michigan, Part 2, pp. 348, 376 and 392-431. See also Senate Special Committee in 1925 Report on Hearings on Nine Foot Channel from Great Lakes to the Gulf, 68th Congress, Second Session, pursuant to Senate Resolution 411, 67th Congress, Fourth Session, in volume 2, pages 134, 230.

Assuming that there is a lowering of the levels of the Great Lakes from natural causes or any causes in addition to the lowering

caused by the abstraction of the defendant Sanitary District, that is no justification for its unlawful abstractions. If nature has caused a lowering of the levels of the lakes, then the abstraction of the defendant Sanitary District causing an additional lowering is so much the more serious.

The contribution to the lowering of the lakes by the deepening of the St. Clair River is practically nothing, as shown by the annual report of the Chief of Engineers for 1900. A contrary allegation appearing on page 92 of Answer of Sanitary District can only be based upon the Wisner Report of Oct. 12, 1911 to Board of Trustees of Sanitary District. Mr. Wisner in his report on the Deep Waterway on pages 280 and 297 stated that he had learned that the deepening of the St. Clair Channel had lowered Lake Huron about one foot, the basis of that report being the probability of such a lowering as stated in the report of the Chief of Engineers for 1899. However, Colonel Leydecker, in charge of the United States Lake Survey, stated in the annual report of the Chief of Engineers for 1900 that he much regretted that this incorrect statement had appeared in his previous year's report, and that a long and thorough investigation during the intervening year, of which the results were published on pages 5320 to 5401 of the Annual Report of the Chief of Engineers for 1900, showed conclusively that the lowering of Lake Huron could not have been produced by any changes in the St. Clair and Detroit Rivers.

However, it needs no argument to show that a lowering of the lake level by six inches constitutes an unreasonable and substantial obstruction to navigation.

## VI.

## THERE IS A WELL DEFINED DIVIDE BETWEEN THE GREAT LAKES AND MISSISSIPPI WATERSHEDS.

Some attempt has been made by the defendants to imply that there is not and never has been any well defined divide between the

Mississippi and Great Lakes watersheds and that the waters of the Great Lakes System at times run into and mingled with the waters of the Mississippi system. There is a well defined divide of at least eight feet in height between the two watersheds. For legal purposes, it can make no difference whether the divide is eight feet or eight thousand feet in height. General Wilson, in the Annual Report of Chief of Engineers of 1868, at page 440, says:

> "About thirteen miles southwest of the mouth of the Chicago River is a depression of a mile or more in width * * * through which a part of the waters of the Des Plaines River in times of flood flow into the lake."

General Wilson goes on to state that the surface of Lake Michigan is between eight and fourteen feet below the summit of this depression. Lake Michigan has never been known to rise to such a height. Consequently it is clear that in a state of nature all of the waters of the Chicago and Calumet Rivers always flowed into Lake Michigan, that the waters flowing into this depression in times of flood were a part of the Upper Des Plaines River waters flowing out of the Illinois or Mississippi basin into the Great Lakes basin, and that none of the waters of the Chicago River ever flowed into the Mississippi basin.

## VII.

## THE COMPLAINT AND FACTS PRESENT NOT ONLY THE ABSTRACTION BY AN UPPER RIPARIAN STATE OF ALL OF THE WATERS OF AN INTERSTATE WATERCOURSE ORIGINATING WITHIN ITS OWN BORDERS BUT THE CASE OF A STATE, BY REVERSING THE FLOW OF THAT PART OF THE WATERCOURSE WITHIN ITS BORDERS, THROUGH THE AGENCY OF NATURAL LAWS, ABSTRACTING WATERS OF SUCH WATERCOURSE WHICH ORIGINATED IN LOWER RIPARIAN STATES AND PERMANENTLY DIVERTING THEM FROM THE WATERSHED.

The defendant is claiming the right to abstract and appropriate the waters of the Chicago and Calumet plus eighty-five hundred cubic second feet from Lake Michigan, plus the domestic pumpage from Lake Michigan, which amounts to an additional 1,200 cubic second feet and which, instead of being returned to the lake, is diverted into the Sanitary Canal. (See Report of Major Putnam, Appendix I, to this brief.) Illinois has less than seven per cent of the total area of the lake, and it contributes hardly three per cent of the total rainfall in the Lake Michigan basin or of the outflow of water from Lake Michigan and Lake Huron. Report of Major Putnam, November 1, 1923, page 66, as distributed by the Secretary of War. Prior reports have estimated the low water flow of the Chicago River at from six hundred to eight hundred cubic second feet. The flow of the Des Plaines is little larger. There are no other streams of appreciable size flowing into the lake in Illinois.

It is obvious that the State of Illinois and the Chicago Sanitary District are asserting the right not only to appropriate all of the waters of an interstate watercourse originating within the borders of the State of Illinois, but through the agency of natural laws to appropriate and abstract the waters of that watercourse originating in the lower riparian states.

## VIII.

## THE IMMINENT NATIONAL CONCERN WHICH ATTACHED AND ATTACHES TO THE CHICAGO ABSTRACTION ARISES FROM THE LOWERING OF THE LEVELS OF THE GREAT LAKES AND NOT FROM THE INTERESTS OF CHICAGO AND ILLINOIS IN OBTAINING THESE WATERS FOR SANITATION OR POWER PURPOSES.

It is obvious that the matter of national concern in connection with this abstraction is the interference by a state with the natural levels of the Great Lakes-St. Lawrence Waterways. *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 46 Sup. Ct. 176, 69 L. Ed. 352. The United States generally has no interest in the sanitation needs, real or imaginary, or the power desires of Chicago or Illinois, so long as they do not interfere with the rights of others. The defendants attempt to give their acts the status of an imminent national concern because their acts through the operation of natural laws affect a wholly different matter which was and is an object of such national concern.

## IX.

## THE VARIOUS PERMITS GRANTED BY DIFFERENT SECRETARIES OF WAR WERE NOT IN AID OF NAVIGATION.

A casual reading of the applications for various permits requested by the Sanitary District of Chicago, the decisions of the various secretaries of war, and the various permits actually issued discloses conclusively that such permits were not only not granted in aid of navigation but were reluctantly given in any degree because of the fact that they were injurious to navigation. In the letter of Secre-

tary of War Weeks to the President of the Board of Trustees of the Sanitary District of Chicago accompanying the permit under which the defendants now claim, and bearing date March 3, 1925, it is said:

> "This department has always held and continues to hold that the taking of an excess amount of water for sanitation at Chicago does affect navigation on the Great Lakes adversely, and that this diversion of water from Lake Michigan should be reduced to reasonable limits with utmost dispatch." See Appendix I to this brief.

In the recommendation of General Taylor, Chief of Engineers, upon which the permit of March 3, 1925 is based, he states in commenting upon one of the conditions attached to that permit as follows:

> "And the proposed construction is the first stage in a programme which will permit the ultimate reduction of the water diverted to 4,167 cubic feet per second or lower if treatment plants are installed."

Again, General Taylor states in his recommendation as follows:

> "It is, of course, highly desirable that the excessive diversion of water from Lake Michigan be reduced to reasonable limits with the utmost dispatch. *For humanitarian reasons,* it is impractical to make the desired reductions instantaneously * * *."

In the Warren report of August 30, 1919 as concurred in November 9, 1920 by the Chief of Engineers in the Annual Report of the Chief of Engineers for 1920, at page 95, it is said:

> "If conditions could be restored to those existing in 1890, and the city of Chicago should ask permission to divert water for use in such a sewage disposal system as they now have, the request would and should be refused. It would undoubtedly appear that the benefits to be obtained would not be commensurate with the damage which would be caused. If the question were to be de-

cided solely on the basis of the most economical use of the waters of the Great Lakes the solution would involve restriction of the division to the amount required for purposes of navigation, and adoption of other methods of sewage disposal."

From all the documents relating to the various permits issued by the Secretary of War for different diversions by the defendants and particularly the present permit of March 3, 1925, it is obvious that such permits were not in aid of navigation but were given merely as a *modus vivendi* of handling a situation in which the defendant Sanitary District had wilfully placed the people of Chicago.

## X.

## THE EARLY ACTS OF CONGRESS WERE FOR A SUMMIT LEVEL CANAL.

The acts of Congress of 1822 and 1827 provided merely for a summit level canal, which of course did not contemplate or authorize any abstractions from Lake Michigan. Moreover, these acts had no relation to the present canal. The Boundary Waters Treaty of 1909 had and has no connection with the Sanitary Canal.

Claim is made that the Boundary Waters Treaty authorizes the Sanitary Canal abstraction. At the time this treaty was made the federal government was maintaining suit to enjoin the illegal acts of the defendant Sanitary District. *Chicago Sanitary District* v. *United States,* 266 U. S. 405, 46 Sup. Ct. 176, 69 L. Ed. 352. Defendants refer to preliminary reports which were not embodied in the treaty. The only diversions which were considered as the treaty was actually made were with reference to power developments already in existence or under completion around Niagra Falls. The figures show that the computations were based upon the capacities of these plants without reference to the Chicago abstraction. International Waterway Commission Public Reports 1905, 1906, 1907. Moreover only legal diversions could be recognized.

Under a construction of the facts most favorable to the defendant's contention no diversion in excess of 4,167 cubic second feet could have been authorized. The federal government has given a practical construction to the treaty to the effect that it did not authorize the claimed right of abstraction of these waters by the defendant Sanitary District. This is conclusively shown by the fact that the federal government successfully maintained a suit to prevent such abstraction as is now claimed as a matter of right under the treaty. *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 46 Sup. Ct. 176, 69 L. Ed. 352.

## XI.

## NATIONAL ECONOMIC LOSS IN POWER DEVELOPMENT.

It appears from the testimony in *Sanitary District Chicago* v. *United States,* 266 U. S. 405, 46 Sup. Ct. 176, 69 L. Ed. 352, that the diversion of ten thousand cubic second feet of water at Chicago is capable of producing about thirty thousand horsepower of electric energy at Lockport, although the average production has been about twenty thousand horse-power. The greatest possible development of power from this source, from Lake Michigan to the Mississippi River, will not exceed eighty thousand horsepower. As against this, engineers have computed that this ten thousand cubic second feet of water, if permitted to flow through its natural channels down the Niagara River and into the St. Lawrence would produce not less than five hundred thousand horsepower of electric energy. The mere statement of these facts is sufficient to disclose the immense economic loss caused by the Chicago abstraction to the people of the United States and Canada, in the way of development of electric power.

## POINTS AND AUTHORITIES.

### I.

### THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE ORIGINAL JURISTION OF THIS COURT.

Constitution of the United States, Article III, Section 2.

*Missouri* v. *Illinois,* 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497.

*Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038.

*North Dakota* v. *Minnesota,* 263 U. S. 365, 373, 44 Sup. Ct. 138, 68 L. Ed. 342.

*Kansas* v. *Colorado,* 206 U. S. 46, 97-98, 27 Sup. Ct. 655, 51 L. Ed. 956.

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

*Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 14 L. Ed. 249.

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.

*Missouri* v. *Illinois,* 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

*So. Carolinia* v. *Georgia,* 93 U. S., 4, 23 L. Ed. 782.

*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591, 43 Sup. Ct. 658, 67 L. Ed. 1117.

*Wisconsin* v. *Duluth,* 96 U. S. 379, 24 L. Ed. 668.

*Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

*Oklahoma* v. *A. T. & S. F. Co.,* 220 U. S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465.

*New Hampshire* v. *Lousiana,* 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656.
*Hans* v. *Louisiana,* 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842.
*Louisiana* v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

## II.

## THE COMPLAINING STATES HAVE SUBSTANTIAL LEGAL INTERESTS WITH CORRESPONDING INJURIES INVOLVED IN THIS CONTROVERSY WHICH ENTITLE THEM TO MAINTAIN THIS SUIT.

1. The complaining states have a proprietary interest in the waters of the Great Lakes and connecting waters within their respective borders, which they have the right and duty to protect.

*Martin* v. *Waddell,* 16 Peters 367, 410, 10 L. Ed. 997.
*Port of Seattle* v. *Oregon & Washington Rwy. Co.,* 255 U. S. 56, 41 Sup. Ct. 237, 65 L. Ed. 500.
*Barney* v. *Keokuk,* 94 U. S. 324, 338, 24 L. Ed. 224.
*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.
*McCready* v. *Virginia,* 94 U. S. 391, 394, 24 L. Ed. 248.
*Shively* v. *Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331.
*Pollard* v. *Hagan,* 3 How. 212, 11 L. Ed. 565.
*Manchester* v. *Mass.,* 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159.
*Ill. Cent. Rwy. Co.* v. *Illinois,* 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.
*Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828.
*Hoge* v. *Eaton,* 135 Fed. 411, 414.
Farnham on Waters, (1904) Vol. 1, pp. 29, 602.
*Holyoke Water Power Co.* v. *Conn. River Co.,* 20 Fed. 71.
*Pine* v. *New York,* 112 Fed. 98.

*U. S.* v. *Rio Grande Dam & Irrig. Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

Moore, History of The Foreshore (3d ed.) (1888), 370-413.

Hargrave's Law Tracts (1787) pp. 11-12, 25-36.

Hall, The Seashore, (2d ed.) (1875) pp. 1-9.

Hale, De Partibus Maris, 84-89.

*Hardin* v. *Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 159.

*Mumford* v. *Wardwell,* 6 Wall. 423, 18 L. Ed. 756.

*St. Anthony Falls Water Power Co.* v. *Commissioners,* 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497.

*Mobile Transp. Co.* v. *Mobile,* 187 U. S. 479, 23 Sup. Ct. 179, 47 L. Ed. 266.

*Gibson* v. *U. S.,* 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996.

*Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 342.

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.

*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

*Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

*Pennsylvania* v. *West Virginia,* note in 43 Sup. Ct. 658, 669.

2. The actions of the State of Illinois and its agents, of which the bill complains, constitute an injury to the complaining states in their quasi-sovereign capacity, wholly distinct from the injuries to their citizens; and they are entitled to maintain this suit in this court to vindicate quasi-sovereign rights.

*Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038.

*Hudson Water Company* v. *McCarter,* 209 U. S. 349, 355, 357, 28 Sup. Ct. 529, 52 L. Ed. 828.

*North Dakota* v. *Minnesota,* 263 U. S. 365, 44 Sup. Ct. 138, 139, 68 L. Ed. 342.

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592, 43 Sup. Ct. 658, 67 L. Ed. 1117.

*New York* v. *New Jersey,* 256 U. S. 296, 494, 41 Sup. Ct. 492, 65 L. Ed. 937.

*North Dakota* v. *Minnesota,* 263 U. S. 365, 374, 44 Sup. Ct. 138, 68 L. Ed. 342.

*Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.

*Pennsylvania* v. *Wheeling & B. Bridge Co.,* 9 How. 647, 13 L. Ed. 294, 11 How. 528, 13 L. Ed. 799, 13 How. 518, 14 L. Ed. 249, 18 How. 421, 15 L. Ed. 435.

*South Carolina* v. *Georgia,* 93 U. S. 4, 23 L. Ed. 782.

3. The complaining states have a right to maintain this suit in their private capacities as owners of public works and public property.

*Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 14 L. Ed. 249.

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

*Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038.

4. The complaining states have a standing to maintain this suit as parens patriae to protect their people.

*Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

*North Dakota* v. *Minnesota,* 263 U. S. 365, 375-376, 44 Sup. Ct. 138, 68 L. Ed. 342.

*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

5. While a state may not maintain an action solely to vindicate the freedom of commerce in the role of a mere volunteer, where the action of another state violating the freedom of commerce inflicts special injury on the state in its proprietary or quasi-sovereign capacity, or as parens patriae of its people, it can maintain an action to enjoin such act, not as an academic vindication of the freedom of commerce but as a redress of it injuries in the capacities stated.

*Louisiana* v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

*Western Union Telegraph Company* v. *Attorney General of Massachusetts,* 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790.

*Williams* v. *Talladega,* 226 U. S. 404, 415, 416, 33 Sup. Ct. 116, 57 L. Ed. 275.

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591, 43 Sup. Ct. 658, 67 L. Ed. 1117.

*Pennsylvania* v. *Wheeling Bridge Company,* 13 How. 518, 578, 14 L. Ed. 249.

*Missouri* v. *Illinois,* 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

6. The bill does not ask the court to regulate navigation or to supervise long continuing acts.

*United States* v. *Rio Grande Dam & Irrigation Company,* 174 U. S. 706, 19 Sup. Ct. 770, 43 L. Ed. 1136.

## III.

## THE UNITED STATES AND SISTER STATES ARE NOT INDISPENSABLE PARTIES.

*State of California* v. *Southern Pacific Company,* 157 U. S. 229, 249, 15 Sup. Ct. 591, 39 L. Ed. 683.

*Shields* v. *Barrow,* 17 How. 130, 139, 15 L. Ed. 158.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.
*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.
*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.
*Kawananakoa* v. *Poly Blank,* 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834.
*Kansas* v. *United States,* 204 U. S. 331, 341, 27 Sup. Ct. 388, 57 L. Ed. 510.
*Mechanics Bank* v. *Seton,* 1 Pet. 229, 306, 7 L. Ed. 152.
*Osborn* v. *United States Bank,* 9 Wheat. 738, 6 L. Ed. 204.
*Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 431, 45 Sup. Ct. 176, 69 L. Ed. 352.

## IV.

## THE BILL OF COMPLAINT IS NOT MULTIFARIOUS

*Heckman et al.* v. *United States,* 224 U. S. 413, 448, 32 Sup. Ct. 424, 56 L. Ed. 820.
*Risley* v. *Utica,* 173 Federal 502.
*Virginia-Carolina Chemical Co.* v. *Home Insurance Co.,* 113 Fed. 1.

## V.

## THE STATE OF ILLINOIS WAS AND IS WITHOUT POWER TO APPROPRIATE AND ABSTRACT THE WATERS OF THE GREAT LAKES AND CONNECTING WATERS IN DEFIANCE OF RIGHTS OF THE COMPLAINING STATES.

1. The common law of waters has been generally adopted in the United States and obtains in the defendant and complaining states.

*United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690,

702, 19 Sup. Ct. 770, 774, 43 L. Ed. 1136.

*Kimberly & Clark Co.* v. *Hewitt,* 79 Wis. 334, 337, 44 N. W. 303.

*Priewe* v. *Wisconsin State Land and Improvement Co.,* 93 Wis. 534, 67 N. W. 918.

*Cedar Lake Hotel Co.* v. *Cedar Lake Hydraulic Co.,* 79 Wis. 297, 48 N. W. 371.

*Williams* v. *Bass,* 179 Wis. 364, 191 N. W. 499.

*Evans* v. *Merriweather,* 4 Ill. (3 Scam.) 492, 38 Am. Decisions 106.

*Barrett* v. *Mt. Greenwood Cemetery Association,* 159 Ill. 385, 42 N. E. 891.

*Village of Dwight* v. *Hayes,* 150 Ill. 237, 37 N. E. 218.

*Plumleigh* v. *Dawson,* 6 Ill. (1 Gilman) 544.

*Dayton* v. *Commissioners,* 128 Ill. 271, 21 N. E. 198.

*Bliss* v. *Kennedy,* 43 Ill. 67.

*Minnesota Loan & Trust Co.* v. *St. Anthony Falls Water Power Co.,* 82 Minn. 505, 85 N. W. 520, 523.

*Miller* v. *Miller,* 9 Pa. 74, 49 American Decisions 545.

*Clark* v. *Pennsylvania R. R. Co.,* 145 Pa. St. 438, 77 Atl. 989.

*Columbus and H. Coal & Iron Co.* v. *Tucker,* 48 Ohio St. 41, 57, 26 N. E. 630.

*Mansfield* v. *Balliett,* 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, 633.

*Canton* v. *Schock,* 66 Ohio St. 19, 63 N. E. 600.

*Burke* v. *Simonson,* 104 Ind. 173, 2 N. E. 309.

*Stock* v. *Jefferson,* 114 Mich. 357, 72 N. W. 132.

*Amsterdam Knitting Co.* v. *Dean,* 43 N. Y. St. 21, affirmed 56 N. E. 757, 162 N. Y. 278.

*Strobel* v. *Kerr Salt Co.,* 164 N. Y. 303, 58 N. E. 142.

*Rossmiller* v. *State,* 114 Wis. 169, 186, 89 N. W. 839.

*Illinois Steel Co.* v. *Bilot,* 109 Wis. 418, 425, 426, 84 N. W. 855.

*Pewaukee* v. *Savoy,* 103 Wis. 271, 274, 79 N. W. 436.

2. As proprietors of the waters of the Great Lakes within their borders, the complaining states have a right to the natural flow of

the waters in such watershed and to all the waters coming naturally to them, to the end that the waters of the Great Lakes shall be preserved in their navigable capacity and at their natural level and condition for all uses and purposes.

*Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 356, 28 Sup. Ct. 529, 52 L. Ed. 828.
*McCarter* v. *The Hudson Water Co.,* 70 N. J. Equity 695, 718-719.
Farnham on Waters (1904) Vol. 1, p. 29.
*Hoge* v. *Eaton,* 135 Fed. 411, 414.
*Holyoke Water Power Co.* v. *Connecticut River Co.,* 52 Conn. 570, 22 Blatchf. 131, 20 Fed. 71.
*Pine* v. *New York,* 50 C. C. A. 145, 112 Fed. 98.
*Kansas* v. *Colo.,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.
*U. S.* v. *Rio Grande,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

3. An upper state through which flows or on which borders an interstate stream or watercourse, cannot appropriate the waters thereof in defiance of the rights of a lower state; such appropriation will be enjoined by the court; and in determining the fair use of such interstate waters, the upper state cannot complain if its rights are measured by its own law of waters. Applying that rule, as the most favorable to Illinois which she could possibly demand, her asserted right to abstract the waters of the Great Lakes fails.

*Kansas* v. *Colo.,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.
*Wyoming* v. *Colorado,* 259 U. S. 419, 466, 42 Sup. Ct. 552, 66 L. Ed. 660.
*Hudson County Water Company* v. *McCarter,* 209 U. S. 349, 356, 28 Sup. Ct. 529, 52 L. Ed. 828.
*Pine* v. *New York,* 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.
*Economy Light and Pr. Co.* v. *U. S.,* 256 U. S. 113, 41 Sup. Ct. 409, 65 L. Ed. 847.
Farnham on Waters, Vol. 1, page 59.
Hyde on International Law (1922) Vol. 1, pp. 315-316.
*Holyoke Water Power Co.* v. *Conn. River Co.,* 20 Fed. 71.

4. Since a state has no power to abstract all of the waters of an interstate watercourse in defiance of lower riparian states, clearly Illinois has no right to not only abstract all of the waters of such a watercourse within its own boundaries, but by reversing the flow of that part of the watercourse within its borders, to abstract waters of such watercourse which originate in lower riparian states and permanently divert them from the watershed.

*Kansas* v. *Colorado,* 206 U. S. 117, 27 Sup. Ct. 655, 46 L. Ed. 838.

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 660.

*Pine* v. *New York,* 185 U. S. 93, 22 Sup. Ct. 519, 46 L. Ed. 820.

*Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828.

*Holyoke Water Power Co.* v. *Connecticut River Co.,* 20 Fed. 71.

5. The various acts of the Illinois Legislature purporting to authorize the Sanitary District of Chicago to abstract waters from Lake Michigan were unconstitutional and void.

These acts assumed to control and appropriate the waters of a national and international waterway.

*Moore* v. *American Transportation Co.,* 24 Howard 1, 16 L. Ed. 674.

*The Propeller Genesee Chief,* 12 Howard 443, 13 L. Ed. 1058.

*U. S.* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063.

*Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 426, 45 Sup. Ct. 176, 69 L. Ed. 352.

*Burke* v. *Snively,* 208 Ill. 328, 70 N. E. 327.

Separate Section 3, Constitution of Illinois, 1870.

Ordinance of 1787.

*Economy L. & Power Co.* v. *U. S.,* 256 U. S. 113, 41 Sup. Ct. 409, 65 L. Ed. 847.

## VI.

IT IS NOT CONSIDERED THAT CONGRESS HAS POWER TO AUTHORIZE THE ABSTRACTION OF THE WATERS OF THE GREAT LAKES FROM THAT WATERSHED AS A FEDERAL ACT, FOR ANY PURPOSE. COMPLAINANTS, HOWEVER, IN THIS ACTION, DO NOT NOW ASK AN INJUNCTION AGAINST ANY ABSTRACTION REASONABLY NECESSARY FOR NAVIGATION PURPOSES WHICH WILL NOT BE IN EXCESS OF 500 CUBIC SECOND FEET AT PRESENT, OR EVER IN EXCESS OF 1,000 CUBIC SECOND FEET—THE ATTITUDE OF THE COMPLAINING STATES BEING EXPLAINED BY LEGISLATIVE RESOLUTIONS APPEARING AS APPENDICES TO THIS BRIEF.

1. The constitutional power over navigable waters construed in the light of history and the common law, does not extend to the abstraction of the waters of one watershed for the benefit of another.

*Kansas* v. *Colorado,* 206 U. S. 46, 94-95, 27 Sup. Ct. 655, 51 L. Ed. 956.

Odgers, Common Law of England, Vol. I, pp. 590-594.

2. In any event, the acts of Congress for improvement of navigation must be reasonably appropriate to that end. The acts of Congress in control and improvement of navigation under the commerce clause of the federal constitution must be reasonably appropriate to the ends of navigation and not arbitrary or capricious or for any other purpose, such as the sanitation needs, real or imaginary, or the power desires of another state or city. It cannot, under the guise of the power to regulate interstate Commerce, arbitrarily destroy the rights of riparian owners or the proprietary rights of littoral states without any object not really related to navigation.

*Woodruff* v. *North Bloomfield Gravel Mining Co.,* 18 Fed. 753, 778, 779.

*Barney* v. *Keokuk,* 94 U. S. 324, 342, 24 L. Ed. 224.

*Burlington Gas Light Co.* v. *Burlington, etc. Rwy. Co.,* 165 U. S. 370, 17 Sup. Ct. 359, 41 L. Ed. 749.

*Muhlker* v. *N. Y. & Harlem R. R. Co.,* 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872.

*Sauer* v. *City of New York,* 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

3. If Congress can appropriate these waters in any amount, it can do so only for the promotion of navigation, and then only to the extent reasonably necessary therefor; and the court will enjoin abstractions admittedly in excess thereof.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

*New York* v. *New Jersey,* 265 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

*U. S.* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

4. If such an appropriation of the waters of one or more of the states, to their injury, were otherwise valid, the act would still violate Article I, Section 9, Clause 6 of the federal constitution.

Art. I, Sec. 9, Clause 6, U. S. Constitution.

*Pennsylvania* v. *Wheeling Bridge Co.,* 18 How. 421, 15 L. Ed. 435.

*So. Carolina* v. *Georgia,* 93 U. S. 4, 13, 23 L. Ed. 782.

## VII.

## ASSUMING THAT CONGRESS COULD AUTHORIZE SUCH AN ABSTRACTION OF THE WATERS OF THE GREAT LAKES AS TO IMPAIR THEIR NAVIGABLE CAPACITY, IT HAS NEVER DONE SO.

1. The Act of Congress of March 2, 1827, does not authorize the abstraction of the waters of the lakes.

4 U. S. Stats. at L. 234.

*The Sanitary District of Chicago* v. *U. S.*, 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352.

2. The permit of the Secretary of War issued March 3, 1925, does not purport to authorize any abstraction of the waters of the Great Lakes which would injure their navigable capacity.

*Louisville Bridge Co.* v. *U. S.*, 242 U. S. 409, 37 Sup. Ct. 158, 61 L. Ed. 395.

*U. S.* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063.

3. The Rivers and Harbors Act does not empower the Secretary of War to authorize any obstruction of the navigable waters of the United States; and to the extent that the permit of the Secretary of War is claimed to authorize obstruction of the waters of the Great Lakes in excess of the amount needed for navigation, it would be clearly unauthorized by said act.

Section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stats. at L. 1151).

*Hubbard* v. *Fort*, 188 Fed. 987, 992, 993, 996-997, 998-999.

*Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 431, 69 L. Ed. 352.

VIII.

IF THE RIVERS AND HARBORS ACT ATTEMPTS TO AUTHORIZE ABSTRACTION OF WATERS OF THE GREAT LAKES WITHOUT REGARD TO THE INJURY TO THEIR NAVIGABLE CAPACITY AND NOT TO PROMOTE NAVIGATION, BUT FOR THE SANITATION AND POWER DESIRES OF ILLINOIS, IT IS UNCONSTITUTIONAL AND VOID.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

*Woodruff* v. *North Bloomfield Gravel Mining Co.,* 18 Fed. 753, 778.

*Sanitary District of Chicago* v. *United States,* 226 U. S. 405, 431, 45 Sup. Ct. 176, 69 L. Ed. 352.

*United States* v. *River Rouge Improvement Co.,* 46 Sup. Ct. 144, 70 L. Ed. 148.

*Illinois Central Rwy. Co.* v. *Illinois,* 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

*Port of Seattle* v. *Oregon Rwy. Co.,* 255 U. S. 56, 41 Sup Ct. 237, 65 L. Ed. 500.

*Alabama* v. *Gulf Power Co.,* 283 Fed. 606.

*New Jersey* v. *Sargent,* 46 Sup. Ct. 122, 70 L. Ed. 177 (Advance Sheets).

Art. I. Sec. 9, Clause 6, U. S. Constitution.

IX.

ASSUMING THE PERMITS OF THE SECRETARIES OF WAR TO BE VALID PURSUANT TO CONGRESSIONAL AUTHORITY FOR THE ABSTRACTION OF THESE WATERS SO FAR AS RELATES TO THE OBSTRUCTION OF NAVIGABLE CAPACITY (WHICH WE DO NOT CONCEDE), THESE PERMITS ARE NO DEFENSE TO THIS BILL.

30 U. S. Stats. at L. 1121.

*United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53,

33 Sup. Ct. 667, 57 L. Ed. 1063.

*Hubbard* v. *Fort,* 188 Fed. 987, 999.

*Cobb* v. *Commissioners of Lincoln Park,* 202 Ill. 427, 439-440, 67 N.E. 5.

*Wilson* v. *Hudson County Water Co.,* 76 N. J. Eq. 543, 558, 76 Atl. 560.

*Attorney General ex rel. Becker* v. *Bay Boom W. R. & F. Co.,* 172 Wis. 363, 376, 178 N.W. 569.

*Thlinket Packing Co.* v. *Harrison Co.,* 5 Alaska 471.

*Columbia Salmon Co.* v. *Berg,* 5 Alaska 538.

*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

*International Bridge Co.* v. *New York,* 254 U. S. 126, 132, 41 Sup. Ct. 56, 65 L. Ed. 176.

## X.

THE DOCTRINE, THAT IN MATTERS WHERE THE NATIONAL CONCERN IS IMMINENT AND DIRECT, THE STATES MAY NOT ACT AT ALL, EVEN WHEN CONGRESS HAS BEEN SILENT, IS NO DEFENSE TO THIS BILL.

*Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 426, 45 Sup. Ct. 176, 69 L. Ed. 352.

*Kansas City So. R. R. Co.* v. *Kaw Valley Drainage District Co.,* 233 U. S. 75, 79, 34 Sup. Ct. 564, 58 L. Ed. 857.

## XI.

THE BOUNDARY WATERS TREATY OF 1909 IS NO AUTHORITY FOR THE ACT OF THE DEFENDANTS: ON THE CONTRARY, IT FORBIDS THE ACT

*Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352.

## XII.

## THE COMPLAINANTS ARE NOT ESTOPPED BY THE FORMER PLEADING

*N. Pacific R. R. Co.* v. *Slaght,* 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738.

*Strathleven Steamship Co.* v. *Baulch,* 244 Fed. 412.

21 C. J. 1234.

## XIII.

## OTHER TECHNICAL OBJECTIONS TO THIS BILL ARE WITHOUT MERIT

*Supreme Sitting O. of I. H.* v. *Baker,* 134 Ind. 293, 33 N.E. 1128, 20 L. R. A. 210.

*Norfold, etc. R. Co.* v. *Sutherland,* 105 Va. 545, 55 S. E. 456.

31 Cyc. 463.

*Turner* v. *Roundtree,* 30 Ala. 706.

*Briscoe* v. *Bank of Kentucky,* 11 Peters, 257, 9 L. Ed. 709.

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

*Virginia* v. *West Virginia,* 220 U. S. 1, 31 Sup. Ct. 330, 55 L. Ed. 353, 357.

## ARGUMENT

### I.

### THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE ORIGINAL JURISDICTION OF THIS COURT.

The pertinent provision of the constitution is Section 2 of Article III of the Constitution of the United States, which, so far as being material, reads as follows:

> "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."

This court has laid down the rule generally with respect to original jurisdiction of actions between states of the Union that wherever a controversy between states is of such a nature that, if the states were independent, the controversy would become the subject of diplomatic representations with the right to resort to force in the event of a failure of diplomatic representations, the case is one which is justicable in this court in its original jurisdiction. The original jurisdiction of this court in such matters was intended to take the place of the right of one state of the Union to vindicate its wrongs at the hands of another state by negotiation and force, which rights were surrendered by the states upon the adoption of the federal constitution.

In *Missouri* v. *Illinois,* 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497, this court said:

> "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 that 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 represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a 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 introduced in the river communities 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.

"That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

In *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, this court said:

"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 ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."

In *North Dakota* v. *Minnesota*, 263 U. S. 365, 373, 44 Sup. Ct. 138, 68 L. Ed. 342, this court in discussing its orginal jurisdiction in controversies between states of the Union, said:

"The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject

of diplomatic adjustment. They must be suits '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 of its domain.' "

In *Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, this court passed upon a demurrer to the complainant charging the state of Colorado with appropriation of waters of an interstate river in violation of the rights of the state of Kansas and its citizens and praying for injunctive relief against such appropriation of waters of the interstate water course. In discussing the justicable character of that suit at page 140, the court said:

"Undoubtedly as remarked by Mr. Justice Bradley in *Hans* v. *Louisiana,* 134 U. S. 1, 15, the Constitution made some things justicable, 'which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution.' And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justicable by that instrument."

Again at page 145 it was said:

"Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

"We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that

were also essential. *Tayloe* v. *Merchants' Insurance Company*, 9 How. 390, 406; Daniell, Ch. Pr. (4th Am. ed.) 380."

The court then took the broad ground that the technicalities of the pleading which obtained in ordinary suits between private parties had no relation to controversies, practically international in character, stripped the controversy of all technicalities, brushed aside all defects in the bill and found that since there was a robust controversy between two states, the court would sit as an international tribunal and hear the controversy without even attempting a close analysis of the bill to discover whether or not it contained imperfections or inadequacies of statement.
At page 146, it was said:

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. *Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation.* We think proof should be made as to the * * * circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof."

The complaint relates to the equitable use of interstate waters lying partly in the complaining states and partly in the defendant State of Illinois. It relates to the alleged right of the State of Illinois to appropriate and abstract the waters of an interstate stream or watercourse to the injury of the complaining states, which are lower riparian states upon such interstate stream or watercourse. It requires no argument to demonstrate that such a claim of right upon the part of the State of Illinois and action on the part of that state in pursuance of such an asserted right to the injury of the various interests of the complaining states in the waters of the interstate stream or watercourse constituting the Great Lakes-St. Lawrence System creates a controversy between the complaining states and the

State of Illinois, which, if such states were independent, would give rise to diplomatic negotiation between such states with the right to resort to force in the event of the failure of amicable adjustment.

In *Kansas* v. *Colorado,* 206 U. S. 46, 97-98, 27 Sup. Ct. 655, 51 L. Ed. 956, this court said:

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."

In this connection we also invite the attention of the court to the following cases:

*Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 14 L. Ed. 249;
*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999;
*Missouri* v. *Illinois,* 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572;
*So. Carolina* v. *Georgia,* 93 U. S. 4, 23 L. Ed. 782;
*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937;
*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591, 43 Sup. Ct. 658, 67 L. Ed. 1117.

In all of these cases the right of a state to maintain an original suit in this court upon the grounds like or similar to those asserted by the complainants in this case was sustained by this court. With this statement of the general principles upon which this court has assumed jurisdiction of controversies between states, we proceed to

the question whether there are rights asserted by the complaining states with corresponding injuries which entitle them to maintain this suit as real parties in interest, rather than in the role of volunteers.

However, before passing from this general question of the scope of the jurisdiction of this court in original suits to which states are parties, we wish to notice briefly the cases relied upon by the defendants as establishing that the court is without jurisdiction of this controversy. The cases which are relied upon by the defendants in this connection are as follows:

*Wisconsin* v. *Duluth,* 96 U. S. 379, 24 L. Ed. 668;
*Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239;
*Oklahoma* v. *A. T. & S. F. Co.,* 220 U. S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465;
*New Hampshire* v. *Louisiana,* 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656;
*Hans* v. *Louisiana,* 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842;
*Lousiana* v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

The claim that these cases are authority for the denial of jurisdiction in this suit or even that they have any pertinent relation to the maintenance of the suit is perhaps best answered in the language of this court. In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592, 43 Sup. Ct. 658, 67 L. Ed. 1117, this court in respect to a similar subject, said:

"The defendant State relies on such cases as *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1; *Kansas* v. *United States,* 204 U. S. 331; *Oklahoma* v. *Atchison, Topeka & Santa Fe Rwy. Co.,* 220 U. S. 277, and *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162, but the facts on which they turned, as the opinions show, were so widely different from those here that they are not in point."

Nevertheless, we will briefly comment on the cases as follows:

In *Wisconsin* v. *Duluth,* 96 U. S. 379, 24 L. Ed. 668, this court assumed jurisdiction, but denied relief because the bill was without equity.

In *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, this court assumed jurisdiction but denied relief upon the merits because it was an attempt to enforce extraterritorially the penal laws of the plaintiff state. The same situation exists in *Oklahoma* v. *A. T. & S. F. Co.,* 220 U. S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465. That such was the effect of the decisions in those cases has been heretofore stated by this court. *Kansas* v. *Colorado,* 206 U. S. 46, 83, 27 Sup. Ct. 655, 51 L. Ed. 956. The cases of *New Hampshire* v. *Lousiana, supra,* and *Hans* v. *Lousiana, supra,* were cases which on the facts amounted to suits by private individuals against one of the states of the Union in contravention of the 11th Amendment to the Constitution of the United States, forbidding the institution of a suit by any private person against another state of the Union. The decision in *Louisiana* v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347, was clearly explained and its lack of application to a suit such a this definitely stated in the opinion of the court in *Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. However, it is a sufficient commentary upon the alleged application of the decision of that case to the instant suit, to state that under the construction of the pleadings and facts adopted by this court, Lousiana was attempting to maintain a suit merely as a volunteer for the vindication of the freedom of interstate commerce. It requires no argument to demonstrate that upon such a state of facts the complaining state would present no interest in the suit which would entitle it to maintain the same without any regard to the nature of the controversy, since this court will not sit for the purpose of determining a question which, as to the complainant, is merely academic, involving no right of such complainant.

## II.

## THE COMPLAINING STATES HAVE SUBSTANTIAL LEGAL INTERESTS WITH CORRESPONDING INJURIES INVOLVED IN THIS CONTROVERSY WHICH ENTITLE THEM TO MAINTAIN THIS SUIT.

1. *The complaining states have a proprietary interest in the waters of the Great Lakes and connecting waters within their respective borders, which they have the right and duty to protect.*

It is a well established principle of law that the states in their quasi-sovereign capacities are the owners of all the public waters and the submerged lands within their respective borders. The original states possessed these proprietary rights at the time of the adoption of the federal constitution and their rights were not surrendered to the federal government but were retained in full vigor and effect, subject only to the paramount right of congress to regulate the navigable waters for the promotion of navigation and interstate commerce. All subsequent states of the Union upon admission to statehood acquired the same rights in the waters and submerged lands within their domains as existed, and still exist in the original states of the Union.

In touching upon this right in the case of *Martin* v. *Waddell,* 16 Peters 367, 410, 10 L. Ed. 997, the court said:

> "* * *When the Revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

In the case of *Port of Seattle* v. *Oregon & Washington Rwy. Co.,* 255 U. S. 56, 41 Sup. Ct. 237, 65 L. Ed. 500, this court in discussing

the proprietary rights of a state in the waters and submerged lands within its borders, said:

"'The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right, Washington became, upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under the same. (*Weber* v. *Board of Harbor Com.*, 18 Wall. 57, 21 L. Ed. 798.) By section one of article 17 of its Constitution, the state asserted its ownership in the bed and shore 'up to and including the line of ordinary high tide in waters where the tide ebbs and flows.' The extent of the state's ownership of the land is more accurately defined by the decision of the highest court, as being the land below high-water mark, or the meander line, whichever of these lines is the lower. The character of the state's ownership in the land and in the waters is the full proprietary right. The state, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights."

Again, in *Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224, this court said:

"And since this court, in the case of *The Genesee Chief* v. *Fitzhugh* [12 How. 443, 13 L. Ed. 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignity, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

This citation was quoted with approval by this court in *Kansas* v. *Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

Again, in *McCready* v. *Virginia*, 94 U. S. 391, 394, 24 L. Ed. 248, this court said:

"The principle has long been settled in this court, that each

State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Smith* v. *Maryland,* 18 How. 74; *Mumford* v. *Wardwell,* 6 Wall. 436; *Weber* v. *Harbor Commissioners,* 18 Wall. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell,* 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States."

In that case it was further stated that any states upon admission to the Union acquired the same rights in the navigable waters and submerged lands as were and are held by the original states.

In *Snively* v. *Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, the court quoted *Martin* v. *Waddell, supra,* with approval to the effect that when the revolution took place, the people of each state became themselves sovereign, and in that connection held their absolute right to all navigable waters and the soils under them for their common use, subject only to the rights subsequently surrendered by the Constitution to the general government. The court further pointed out that by common law both the title and the dominion of the sea and of the rivers and arms thereof, where the tides ebbed and flowed, and all lands below the high wate. mark within the jurisdiction of the Crown of England, were in the King; that upon the American Revolution, all the rights of the Crown and Parliament in such waters and submerged lands vested in the several states. That such rights in the waters and submerged lands are not limited to tidal waters, but extend to all navigable waters of the United States, is pointed out in the opinion of this court in *Barney* v. *Keokuk, supra.*

Other cases and texts which establish and define the proprietary rights of the states of the Union in their quasi-sovereign capacities

in the public waters thereof, and the submerged lands within their domains, are as follows:

*Pollard* v. *Hagan,* 3 How. 212, 11 L. Ed. 565;
*Manchester* v. *Mass.,* 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159;
*Ill. Cent. Rwy. Co.* v. *Illinois,* 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018;
*Hudson County Water Co. v. McCarter,* 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828;
*Hoge* v. *Eaton,* 135 Fed. 411, 414;
Farnham on Waters, (1904) Vol. 1, pp. 29, 602;
*Holyoke Water Power Co.* v. *Conn. River Co.,* 20 Fed. 71;
*Pine* v. *New York,* 112 Fed. 98;
*U. S.* v. *Rio Grande Dam & Irrig. Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136;
Moore, History of the Foreshore (3d ed.) (1888), 370-413;
Hargrave's Law Tracts, (1787), pp. 11-12, 25-36;
Hall, The Seashore, (2d ed.) (1875) pp. 1-9;
Hale, De Partibus Maris, 84-89;
*Hardin* v. *Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 159;
*Mumford* v. *Wardwell,* 6 Wall. 423, 18 L. Ed. 756;
*St. Anthony Falls Water Power Co.* v. *Commissioners,* 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497;
*Mobile Transp. Co.* v. *Mobile,* 187 U. S. 479, 23 Sup. Ct. 179, 47 L. Ed. 266;
*Gibson* v. *U. S.,* 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996.

Since these complaining states under the authorities hereinbefore cited have the full proprietary right in the navigable waters within their boundaries and the lands under the same, it would seem to require no citation of authority to demonstrate that they have a standing in this court to protect those right as against any other

state which may attempt to appropriate such waters, in which they have the full proprietary interest, to their injury and in violation of their proprietary rights. However, there is abundant authority to sustain that right. That right stands upon an equal plane with the right to protect the forests of a state or any other great gift of nature within its borders. It stands on a parity with the right to protect air over its domains. In fact, it would seem to rise to a dignity higher than that of the right to protect its forests, since the title to the forests is in private citizens, whereas the title to the waters is in the states themselves. In *Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, the court held that the state of Georgia had a right to maintain an original suit in this court to protect its forests from destruction without regard to their economic value, and without regard to the fact that such forests were held in private ownership. In *Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, Kansas asserted its right to protect an interstate river because of its ownership of the bed of the same. The right to maintain the suit was sustained, as we understand it, on this as well as additional grounds. That a state may vindicate its rights in interstate waters as against the appropriation thereof, or pollution thereof by another state or agency thereof, has also been recognized by this court in *Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999, *New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937, *Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

The allegations of the bill disclose that a large part of this interstate stream or watercourse, together with connecting waters thereof, which is generally known and described as the Great Lakes-St. Lawrence Waterway, lies within the borders of the complaining states. If such allegations did not appear from the face of the bill, this court would take judicial notice thereof, since the court will necessarily take judicial notice of the extent of the boundaries of a state of the Union. From such judicial notice this court would

know that the borders of the complaining states extend to the center of such of the Great Lakes as border upon the respective complaining states and include within their boundaries many of the connecting waters thereof. The bill further discloses not only that the action of the State of Illinois, of which complaint is made, is interference with the natural flow of the waters of an interstate watercourse within the borders of the offending state, but also that the act of which complaint is made, by reversing the natural flow of a portion of that course, attempts to reach into the borders of the complaining states through the operation of natural laws and abstract from those states waters of an interstate stream or watercourse, which originated in such complaining states or some of them, and which were never within the boundaries of Illinois, except through the agency of the act of which complaint is made. That the abstraction and taking of waters of the complaining states in which they hold the full proprietary right constitutes an injury to those states, would follow without any express allegation to that effect.

Thus, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, the court said:

> "The state has a property interest in water naturally flowing into it and in the public waters and air within its boundaries."

And in a note to *Pennsylvania* v. *West Virginia*, 43 Sup. Ct. 658, 669:

> "If running water is withheld, its property is taken. If the public water or air is polluted, its territorial integrity is invaded."

However, the bill aptly states injury to the states and to large numbers of their citizens.

2. *The actions of the State of Illinois and its agents, of which the bill complains, constitute an injury to the complaining states in their quasi-sovereign capacity, wholly distinct from the injuries to their citizens; and they are entitled to maintain this suit in this court to vindicate quasi-sovereign rights.*

While the states of the Union have surrendered some of their sovereign rights to the federal government they still retain in their capacities of quasi-sovereign, many rights which they are entitled to maintain and vindicate. In *Georgia* v. *Tennessee Copper Company,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, where the State of Georgia instituted an original suit in this court to enjoin the discharge of noxious fumes over the territory of that state, this court disregarded any proprietary interest which Georgia might have in minute tracts of forest lands within its borders, but laid down the principle that in its capacity of quasi-sovereign it had a right to protect its forests from destruction, and the air over its domain from pollution. In this connection the court said:

"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. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads."

In that case the court further pointed out that no proof of special damage was requisite to the successful maintenance of the suit; that the injury to a state by the invasion of its quasi-sovereign rights was not susceptible of being compensated in money, and that the right to balance equities as against an invasion of such sovereign right does not exist. In this case the court said:

"Some peculiarities necessarily mark a suit of this kind. If the

state has a case at all, it is somewhat more certainly entitled to specific relief than a private party may be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power."

The court further pointed out that it was immaterial whether the action of Georgia would do more harm than good to her citizens, as that was a matter for a state alone to determine.

In *Hudson Water Company* v. *McCarter,* 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 828, this court said:

"It sometimes is difficult to fix boundary lines between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas* v. *Colorado,* 185 U. S. 125, 141; s.c., 206 U. S. 46, 99; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 238."

In *North Dakota* v. *Minnesota,* 263 U. S. 365, 373, 44 Sup. Ct. 138, 68 L. Ed. 342, this right was reaffirmed by this court.

The foregoing cases proceed upon the principle that a state in its quasi-sovereign capacity has the right to protect the forests, the air over its domain, and the public waters. An injury to any of these great gifts of nature constitutes an injury to the state in its quasi-sovereign capacity, which is not susceptible of being compensated in money, and as to which its decision with respect to the maintenance of its natural resources unimpaired by outside interference is con-

clusive, and which quasi-sovereign rights it may vindicate without assigning any reason therefor. As stated in *Hudson Water Company* v. *McCarter,* 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828:

> "It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The complaint, however, discloses another injury to the complaining states in their quasi-sovereign capacities which entitles them to maintain this suit. It appears affirmatively from the bill of complaint that the alleged wrongful act of the State of Illinois and its agents has lowered the waters of the Great Lakes to the extent of at least six inches. From this fact it necessarily follows that there has been great damage to the rights of riparian owners of these lands who are citizens of the complaining states. It further appears from the allegations of the bill that this lowering of the levels of the Great Lakes within the borders of these states and also connecting waters within the borders of these states has caused great damage to thousands of the citizens of the complaining states in their attempts to navigate these waters. It has been often held by this court that injury to the welfare, prosperity, and property of a large number of the citizens of a state constitutes an injury to such state in its quasi-sovereign capacity wholly distinct from injuries to its citizens and entitles the state to maintain an original action in this court against an offending state.

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592, 43 Sup. Ct. 658, 67 L. Ed. 1117, in considering the right of a state to maintain an action where a substantial portion of its population has been affected, the court said:

> "Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest affected. It is not merely a remote or ethical interest apart from that of the individuals but one which is immediate and recognized by law."

Again, in *New York* v. *New Jersey,* 256 U. S. 296, 494, 41 Sup. Ct. 492, 65 L. Ed. 937, the court said:

> "The health, comfort and prosperity of the people of the state and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States. *Missouri* v. *Illinois,* 180 U. S. 208, 241, 243, 21 Sup. Ct. 331, 45 L. Ed. 497; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488."

Again, in *North Dakota* v. *Minnesota,* 263 U. S. 365, 374, 44 Sup. Ct. 138, 68 L. Ed. 342, this court said:

> "It needs no argument, in the light of these authorities to reach the conclusion that, where one state by a change in its method of draining water from lands within its border increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another state, the latter state has such an interest as quasi sovereign in the comfort, health, and prosperity of her farm owners that resort may be had to this court for relief."

The converse of the foregoing proposition is obviously of equal truth; and therefore a change in the method of drainage which diminishes the flow of a stream or watercourse in another state with damage to that state and its citizens, must be equally actionable.

In this case we also invite the court's attention to the following cases:

*Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497;

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838;

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 522, 66 L. Ed. 999;

*Pennsylvania* v. *Wheeling & B. Bridge Co.*, 9 How. 647, 13 L. Ed. 294;
11 How. 528, 13 L. Ed. 799; 13 How. 518, 14 L. Ed. 249; 18 How. 429, 15 L. Ed. 435;
*South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. Ed. 782.

3. *The complaining states have a right to maintain this suit in their private capacities as owners of public works and public property.*

The right of a state to maintain an original action in this court to protect its rights where the unlawful act of another state, person, or corporation has caused injury to such state in its capacity of owner of public works and public property has always been recognized. *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117; *Kansas* v. *Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956; *Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038.

The bill avers in considerable detail special damage to the State of Wisconsin in its ownership of public works and public property by reason of the alleged wrongful acts of the State of Illinois and its agents. Some contention is made in the various briefs filed by and on behalf of the defendants that such injury is not real or substantial. For the purposes of a motion to dismiss or of demurrer, this allegation of fact in the complaint is admitted and stands as a verity in the case. The defendants can not both admit the fact and ask the court to disregard it. If they had seen fit to deny that fact and put the complainant to its proof, it would have been their right, but they cannot admit it and then ask the court to disregard it for the purpose of avoiding the force of their admission. The same situation applies to many other arguments of fact attempted to be made by or on behalf of the defendants.

4. *The complaining states have a standing to maintain this suit as parens patriae to protect their people.*

It has been recognized in this court by a large number of decisions that a state has a standing as parens patriae of its people where the illegal act of another state, person, or corporation has caused injury and damage to a large number of the citizens of that state. As has been pointed out by this court, obviously separate and independent actions by such injured citizens do not constitute an adequate remedy. In *Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497, this court said:

> "That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

This right must be distinguished from an attempt to collect individual claims of the citizens of the state as their trustee against a sister state. In *North Dakota* v. *Minnesota,* 263 U. S. 365, 375-376, 44 Sup. Ct. 138, 68 L. Ed. 342, this court said:

> "The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state by prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."

The right of a state to proceed as parens patriae is sustained in the following cases:

*New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937;

*Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.

The fact that the state has no pecuniary interest is immaterial. In *Kansas* v. *Colorado,* 185 U. S. 125, 142, 22 Sup. Ct. 552, 46 L. Ed. 838, the court said:*

> "As will be perceived, the court there ruled that the mere fact

that a state had no *pecuniary* interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the states as *parens patriae,* trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justicable under the Constitution.

"In the case before us the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is a state action, and not the action of state officers in abuse or in excess of their powers."

5. *While a state may not maintain an action solely to vindicate the freedom of commerce in the role of a mere volunteer, where the action of another state violating the freedom of commerce inflicts special injury on the state in its proprietary or quasi-sovereign capacity or as parens patriae of its people, it can maintain an action to enjoin such act, not as an academic vindication of the freedom of commerce but as a redress of its injuries in the capacities stated.*

Much is attempted to be made in the various briefs filed by and on behalf of the defendants of a statement in one of the opinions in *Louisiana* v. *Texas,* 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347, to the effect that the vindication of interstate commerce has not been entrusted to the State of Louisiana. From this statement it is argued that the complaining states have no right as propritors quasi-sovereign or *parens patriae* to assert any claim in this suit based

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*Italics, except in cited cases and Latin expressions, are ours.

upon an alleged unlawful interference by the State of Illinois with the freedom of commerce which causes special damage to the complaining states and their citizens. In view of the many discussions of the decision in *Louisiana* v. *Texas, supra,* by this court in subsequent opinions, and the obvious difference between the facts in that case and those set forth in the instant bill of complaint it is difficult to believe that this contention is seriously made. Obviously no state may maintain an action to vindicate the freedom of commerce as an academic proposition. However, a claim that a state may not maintain an action to redress wrongs arising from an unlawful interference with the freedom of interstate commerce on the part of another state is a very different matter. It is a matter that has no relation to the fact that the regulation of interstate commerce is entrusted to the federal government. A state may not lawfully interfere with the freedom of interstate commerce, either by direct and positive regulations or by an act which, although in itself not purporting to have any connection with interstate commerce, yet by its inevitable effect interferes with the freedom of that commerce. When a state has interfered with interstate commerce either directly or through an act which inevitably has that result, it is liable to suit by an injured party. The restriction on the state extends not only to a simple prohibition of laws impairing freedom of interstate commerce, but extends to interference by any ultimate organ. *Western Union Telegraph Company* v. *Attorney General of Massachusetts,* 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Williams* v. *Talladega,* 226 U. S. 404, 415, 416, 33 Sup. Ct. 116, 57 L. Ed. 275. Accordingly when a state has, by an unlawful act, interfered with the freedom of interstate commerce to the damage of another state or a private individual, it is no answer to a suit on behalf of those injured that the regulation of interstate commerce is entrusted to the federal government. It is not a suit to regulate interstate commerce but to redress wrongs growing out of an unlawful interference with interstate commerce. In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117, the

state of Pennsylvania maintained a suit on the basis that West Virginia, by an act of its legislature had attempted to interfere unlawfully with the freedom of interstate commerce to the damage of Pennsylvania in its proprietary capacity and to the damage of the state in its quasi-sovereign capacity through injury to a large number of its citizens. The right to maintain that suit was fully sustained by this court. At page 591 the contention of the defendants is discussed and fully disposed of. There this court said:

> "Each suit presents a direct issue between two States as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant State asserts and the defendant State denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. *It concededly is so in suits between private parties, and of course its character is not different in a suit between States.*
>
> "What it sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant State before set forth and is about to be carried into effect by her officers acting in her name and at her command. The State is the principal and the action of her officers rightly may be imputed to her, even thought a suit for an injunction might lie against them.
>
> "The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury."

The same question was involved in *Pennsylvania* v. *Wheeling Bridge Company,* 13 How. 518, 14 L. Ed. 249. In that case the

right to maintain action because of damage to the complaining state was also sustained.

In *Pennsylvania* v. *Wheeling Bridge Company, supra,* 578, the court said:

> "For the reason and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the state of Pennsylvania has been, and will be, injured in her public works in such manner as not only to authorize the bringing of this suit, but to entitle her to relief prayed."

Any number of cases might be cited of suits between private individuals involving the constitutionality of state regulations on the ground of interference with the freedom of interstate commerce. If the theory of the defendants were correct every such suit would have to be dismissed upon the ground that the regulation of interstate commerce was entrusted solely to the federal government.

Defendants advance the novel theory that complaining states suffering special damage in their proprietary capacities, as quasi-sovereign, and as *parens patriae* of their people, from an illegal obstruction to navigation upon the Des Plaines and Illinois Rivers by virtue of their pollution, have no right to complain thereof for the reason that such states are not lower riparian owners upon said river. Obviously the right of navigation free from unlawful obstructions is not dependent upon a location either above or below or at the point of unlawful obstruction of a navigable water of the United States. If the complaining states in any of their capacities sustained special injury from such unlawful obstruction their right to proceed against the same cannot be questioned, and it is, of course, ridiculous to talk of upper and lower riparian rights in connection therewith. The same situation was presented with respect to the location of the obstruction in *Pennsylvania* v. *Wheeling Bridge Company,* 13 How. 518, 14 L. Ed. 249. See also *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.

The point is attempted to be made that it has been finally determined by this court in *Missouri* v. *Illinois,* 200 U. S. 496, 26 Sup.

Ct. 268, 50 L. Ed. 582, that the pollution does not constitute an obstruction. As the point is relatively unimportant, it is only necessary to say that the controversy in that case related only to the condition of the waters in the Mississippi River at St. Louis, which is several hundred miles below the Des Plaines. The court did not decide that the Des Plaines River and upper Illinois were not polluted. In the second place this decision was rendered somewhat over twenty years ago, and the quantity of sewage polluting these waters has immensely increased since that time.

In the brief of the intervening defendant states it is asserted that the right to use the navigable waters of the United States is an incident of citizenship of the United States and not of citizenship of the state. The materiality of that question is not apparent. The right exists regardless of whether it is derived from the state or from the United States. Rights derived from the United States are certainly no less sacred than those derived from a state and no less capable of judicial vindication at the suit of a person suffering special injury from a deprivation of such right. The right to engage in interstate commerce is a natural right subjected by the constitution to federal regulation free from obstruction. Yet the state of Pennsylvania vindicated its right in its proprietary capacity and the rights of its citizens in a quasi-sovereign capacity to this freedom of interstate commerce in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117. Cases without number could be cited where private individuals or corporations have vindicated federal rights of this character before this court. Certainly it will not be contended that only the federal government could vindicate an injury to one of its citizens by reason of the denial or infringement of a right either natural or arising by virtue of federal citizenship. Many times such infringements give rise to a claim for damages, and obviously the United States could not sue to collect the damages for one of its citizens.

6. *The bill does not ask the court to regulate navigation or to supervise long continuing acts.*

A prayer for enjoining an abstraction of all waters beyond that needed for navigation does not involve an administration of the regulation of commerce. It involves only a finding of fact. This court has made such a determination at the instance of a private citizen and certainly the rights of these states are of a higher dignity than those of a private citizen. Moreover, the prayer for enjoining the abstraction of any water does not involve a regulation of navigation. In *United States* v. *Rio Grande Dam & Irrigation Company,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, this court required the lower court to make a determination of the amount of water which might be appropriated by the irrigation company without substantial damage to the navigable portions of the Rio Grande River and, upon such determination, to enjoin that company from abstracting a larger quantity of such waters. This, of course, was the determination of a question of fact. Such is the most that could be presented to the court in this case under any view of the relief demanded.

Moreover, it stands admitted by the demurrer or motion to dismiss in this case that abstraction of waters beyond one thousand cubic second feet is in excess of either the present or prospective needs of navigation. The attempt is made to admit this fact and then ask the court to disregard the same. For the purposes of this motion it must stand as a verity in the case, and there is no question that it could be successfully controverted. The consistent effort of the defendants to avoid the effect of their demurrer to the bill by asking this court to disregard allegations of fact contained therein is a substantial admission that the demurrer should be overruled. We will not further discuss the facts in connection with this allegation at this point since they are covered fully in the statement of facts in the beginning of this brief.

Under the state of the pleadings it stands admitted that any diversion in excess of one thousand cubic second feet would not

be for purposes of navigation, but would necessarily be solely for the real or imaginary sanitary needs of the defendant Sanitary District or to produce the power desired by that district or by the State of Illinois. The only interest, under any conceivable view of the controversy here presented, which the federal government could have would relate only to navigation. Since the bill does not seek to control waters so far as they are needed for navigation purposes the relief obviously would not constitute any regulation of navigation.

## III

## THE UNITED STATES AND SISTER STATES ARE NOT INDISPENSABLE PARTIES.

In the State of *California* v. *Southern Pacific Company,* 157 U. S. 229, 249, 15 Sup. Ct. D. 591, 39 L. Ed. 683, this court defined a necessary party as follows, quoting from *Shields* v. *Barrow,* 17 How. 130, 139, 15 L. Ed. 158:

> " 'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' "

Obviously neither the United States nor the sister states has or have any interest in the relief sought here. They could not be affected by the decree prayed for.

The fact that the controversy may involve the extent of the power of congress to regulate navigation under the interstate commerce clause does not make the United States an indispensable party. If such were not the case the United States would be an indispensable party in every suit involving a constitutional question under the federal constitution. It needs no argument or citation of authority to demonstrate that such is not the fact. The same reasoning applies to any constitutional question which may arise under the Rivers and Harbors Act.

The bill seeks to enjoin the abstraction of waters, in which the complaining states have a legal interest, to their damage to the extent which is admittedly in excess of the needs of navigation. The interest of the United States in any private controversy affecting navigable waters thereof is limited solely to navigation questions. Thus in *Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, the United States filed a petition for leave to intervene on the ground that it was interested in the disposition of the waters of the Arkansas River for reclaiming large areas of arid lands in the west. This court denied the petition of the United States for intervention in that case on the ground that under the constitution the United States had no interest in any of the waters of the United States except so far as that interest could relate to the navigation thereof, and that it had no standing upon any other grounds. No federal property was involved.

In *New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937, the United States intervened to protect its rights with reference to government property and with reference to the control of navigation in upper New York Bay. Subsequently by an agreement which was held to be lawful and within the authority of the federal officers making the same, the United States compromised with the State of New Jersey its claims with reference to injury to its own property and with reference to injury to the navigation of upper New York Bay. Notwithstanding such settlement on the part of the United States the suit between New York and New Jersey proceeded in this court for a period of approximately six years. Obviously, the federal government could not have been considered an indispensable party to that suit.

We also invite the attention of the court to *Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999.

Moreover, the United States cannot be sued without its consent. It has not given its consent to be sued in this behalf. The exemption of the United States from suit cannot be held to be a ground for denying relief to the complainant states. If the United States feels

that it has any substantial interest in the controversy, it can intervene if it sees fit. However, the court will not permit itself to be prevented from granting relief among the parties before it by the fact (which does not exist in this case) that another party which might be otherwise important, if not indispensable, cannot be sued because of sovereign exemption or for any other reason. The defendants cannot avoid responsibility for their own acts even though it was assumed that the United States would be an indispensable party but for the fact that it is exempt from suit.

In *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834, the territory of Hawaii was an indispensable party but could not be sued because of its exemption as a sovereign. The court, however, granted relief against the defendants, and on page 354 said:

> "However it might be in a different case, when the inability to join all parties ~~had~~ and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the Territory the court is not thereby deprived of ability to proceed."

We also invite attention of the court to the following cases:

> *Kansas* v. *United States,* 204 U. S. 331, 341, 27 Sup. Ct. 388, 51 L. Ed. 510;
> *Mechanics Bank* v. *Setoon,* 1 Pet. 299, 306, 7 L. Ed. 152;
> *Osborn* v. *United States Bank,* 9 Wheat. 738, 6 L. Ed. 204.

Cases such as *California* v. *Southern Pacific Co.,* 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683, have no application here. In that case the complaining state had a remedy by suit in its own courts against all of the parties concern~~ing~~ed and could, if it saw fit, take the case to this court by writ of error. The existence of such a remedy was pointed out in that case. However, if this court were to hold that the United States is a indispensable party it would amount to a denial of ~~that~~ any remedy to the complaining states, since the United States has not consented to be sued. This would violate the funda-

mental principle of equity that there is no wrong without a remedy.

This suit seeks to protect the proprietary and quasi-sovereign rights of the complaining states in the waters of the Great Lakes-St. Lawrence System. As a phase thereof the complaining states seek to protect the navigation of the Great Lakes System and to permit all needed abstraction from those waters for the needs of navigation upon the Des Plaines and Illinois Rivers. Clearly the sister states of the Union are not indispensable parties. The sister states which do not border upon the Great Lakes-St. Lawrence waterway can have no possible rights other than in navigation. The bill does not seek to affect navigation other than that it will incidentally protect and promote the navigation of the Great Lakes-St. Lawrence waterway without injury to the navigation of the Illinois and Des Plaines Rivers. In *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 431, 45 Sup. Ct. 176, 69 L. Ed. 352, this court in discussing the alleged interest in the Mississippi River states said:

> "The interest that the river states have in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to Congress if they see fit * * *. But we repeat that the Secretary, by his action, took no rights of any kind. He simply refused an application of the Sanitary Board to remove a prohibition that Congress imposed. It is doubtful, at least, whether the Secretary was authorized to consider the remote interests of the Mississippi states or the sanitary needs of Chicago."

Obviously, sister states cannot, at best, be more than proper parties to this bill. Indiana, Michigan, and New York, being the other littoral states of the Great Lakes-St. Lawrence waterway, have filed briefs in support of the complainants' bill as *amici curiae*.

## IV

## THE BILL OF COMPLAINT IS NOT MULTIFARIOUS.

In direct opposition to the preceding point the defendants assert that the bill of complaint is multifarious in that the complaining

states have no right to join in bringing and maintaining this suit. This assertion is obviously without merit. All of the complaining states have a common interest; all are seeking a common relief; and the rights of all of the complaining states depend upon the same transactions or state of facts.

In *Heckman et al.* v. *United States,* 224 U. S. 413, 448, 32 Sup. Ct. 424, 56 L. Ed. 820, in commenting upon a claim that the bill was multifarious, this court said:

> "A further objection is that the bill is multifarious. But in view of the numerous transfers which the Government attacks, it was manifestly in the interests of the convenient administration of justice that unnecessary suits should be avoided, and that transactions presenting the same questions for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit."

It is sufficient if complainants are all interested, although distinctly, in the subject matter, and in the object to be obtained. In any event, an objection to multifariousness always rests largely in the discretion of the court. Since one of the grounds of equity jurisdiction is the prevention of a multiplicity of suits the court of equity looks with favor upon the joining of complainants in a suit; and the avoidance of a multiplicity of suits is a good ground for joinder of complainants.

We also invite the attention of the court to *Risley* v. *Utica,* 173 Fed. 502; *Virginia-Carolina Chemical Co.* v. *Home Insurance Co. of New York,* 113 Fed. 1.

## V

## THE STATE OF ILLINOIS WAS AND IS WITHOUT POWER TO APPROPRIATE AND ABSTRACT THE WATERS OF THE GREAT LAKES AND CONNECTING WATERS IN DEFIANCE OF RIGHTS OF THE COMPLAINING STATES.

1. *The common law of waters has been generally adopted in the United States and obtains in the defendant and complaining states.*

It was the unquestioned rule of the common law that a riparian proprietor was entitled to the continued natural flow of a living stream by or through his land without appreciable diminution in quantity or impairment in quality. This rule was generally adopted in the United States and it is our purpose at this point to demonstrate that such rule obtains in the defendant State of Illinois and in all of the complaining states.

In *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136, this court said:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent, Comm. sec. 439;
>
> " 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere solebat,* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.' "

This court then stated that the rule as laid down by Chancellor Kent is undoubted and obtains in those states of the Union which have simply adopted the common law.

That rule obtains in full vigor in the complaining State of Wisconsin. In *Kimberly & Clark Co.* v. *Hewitt,* 79 Wis. 334, 44 N. W. 303, the Supreme Court of Wisconsin held that a riparian owner upon a river had no right to divert the water thereof or a material part of it through his own land and return it to the river below the land of a lower proprietor and thus deprive him of the use thereof. At page 337 the court said:

> "The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him, by throwing it back on the former or subtracting it from the latter. *Lawson* v. *Mowry,* 52 Wis. 219, and cases cited in the opinion by Mr. Justice Cassoday; Ang. Water-courses (7th ed.), ch. 4, p. 98, note 2; Burrill, Law Dict. tit. *'Ut Currere Solebat.'* "

Not even the state can take away or destroy the rights of a riparian owner on a navigable lake without compensation or for a private purpose. *Priewe* v. *Wisconsin State Land and Improvement* Co., 93 Wis. 534, 67 N. W. 918. We also invite the attention of the court to *Cedar Lake Hotel Co.* v. *Cedar Lake Hydraulic Co.,* 79 Wis. 297, 48 N. W. 371; *Williams* v. *Bass,* 179 Wis. 364, 191 N. W. 499.

The common law rule of waters obtains in the State of Illinois. *Evans* v. *Merriweather,* 4 Ill. (3 Scam) 492, 38 Am. Decisions 106; *Barrett* v. *Mt. Greenwood Cemetery Association,* 159 Ill. 385, 42 N. E. 891; *Village of Dwight* v. *Hayes,* 150 Ill. 237, 37 N. E. 218; *Plumleigh* v. *Dawson,* 6 Ill. (1 Gilman) 544; *Bliss* v. *Kennedy,* 43 Ill. 67; *Dayton* v. *Commissioners,* 128 Ill. 271, 21 N. E. 198.

To avoid burdening this brief unnecessarily we will simply cite the

decisions to show that a common law rule that a lower riparian owner is entitled to the natural flow of a stream through or by his property without material diminution of quantity or quality obtains in the other complaining states and in the other states littoral to the Great Lakes-St. Lawrence System. *Minnesota Loan & Trust Co.* v. *St. Anthony Falls Water Power Co.,* 82 Minn. 505, 85 N. W. 520, 523; *Miller* v. *Miller,* 9 Pa. 74, 49 American Decisions 545; *Clark* v. *Pennsylvania R. R. Co.,* 145 Pa. St. 438, 77 Atl. 989; *Columbus and H. Coal & Iron Co.* v. *Tucker,* 48 Ohio St. 41, 57, 26 N. E. 630; *Mansfield* v. *Balliett,* 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, 633; *Canton* v. *Shock,* 66 Ohio St. 19, 63 N. E. 600; *Burke* v. *Simonson,* 104 Ind. 173, 2 N. E. 309; *Stock* v. *Jefferson,* 114 Mich. 357, 72 N. W. 132; *Amsterdam Knitting Co.* v. *Dean,* 43 N. Y. St. 21, affirmed 56 N. E. 757, 162 N. Y. 278; *Strobel* v. *Kerr Salt Co.,* 164 N. Y. 303, 58 N. E. 142.

As was pointed out in *Mansfield* v. *Balliett,* 65 Ohio St. 451, the right of every proprietor over or past whose land a stream of water flows that it shall continue to flow to and from his premises in the quantity, quality, and manner in which it was accustomed to flow by nature, subject only to the reasonable uses of upper riparian proprietors, is a property right which cannot be taken except for public purposes and then only for compensation. It needs no argument to show that the state of Illinois could not take the property rights of the citizens of the complaining states, even for compensation, because such an act would be an invasion of and an injury to the quasi-sovereign rights of the complaining states.

The state holds the title to the waters in trust for its people, so that it not only has a right but it also has a duty to protect them. In *Rossmiller* v. *State,* 114 Wis. 169, 186, 80 N. W. 839, the Supreme Court of Wisconsin stated that it "has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the State by the Ordinance of 1787 and vested in it at the instant it was admitted into the Union to preserve the

public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust." To the same effect see *Illinois Steel Co.* v. *Bilot*, 109 Wis. 418, 425, 426, 84 N. W. 855; *Pewaukee* v. *Savoy*, 103 Wis. 271, 274, 79 N. W. 436.

2. *As proprietors of the waters of the Great Lakes within their borders, the complaining states have a right to the natural flow of the waters in such water-shed and to all the waters coming naturally to them, to the end that the waters of the Great Lakes shall be preserved in their navigable capacity and at their natural level and condition for all uses and purposes.*

The waters of the Great Lakes are owned by the respective states in a proprietary capacity. However, this title of the states is in trust for all of their citizens for the use of navigation, fishing and every other proper and legitimate use to which the waters can be put. The waters also have a beneficial effect upon the lands through which they flow or along which they border. Such waters benefit and render more easily accessible the water supply beneath the ground bordering upon them and contribute directly to the waters in and under the adjoining land which are necessary to the successful cultivation of that land. For all of these purposes it is not only the right but the duty of the state, as the guardian and trustee of its citizens, to protect those waters in their natural state from any injury not authorized by law. Since the lower riparian owner on a stream may claim as against the upper riparian owner, the right to a continued, uninterrupted and unpolluted flow of the stream passing his lands, why cannot the lower state claim the same right as against the upper state? The right of the state is superior in extent and in dignity to the right and property of the riparian owner, since the state has the full proprietary interest which the riparian owner has not, and since the state has the additional right and duty in its quasi-sovereign capacity as guardian of the right and property of its citizens.

In *Hudson County Water Company* v. *McCarter*, 209 U. S. 349,

356, 28 Sup. Ct. 529, 52 L. Ed. 828, this court, in speaking of the right of a state to protect and conserve its natural resources for the benefit of the people, and speaking with particular regard to the right of a state in its quasi-sovereign capacity to protect its waters, said:

> "We are of the opinion further that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. * * * It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

In discussing this case in the lower court, 70 New Jersey Equity 695, 718-719, Justice Pitney said:

> "It will, of course, be observed that the case before us is not at all parallel to the case that would be presented were the state of New Jersey or citizens thereof setting up a right to interfere with the flow of water that otherwise would, in its natural course, reach the territory of a neighboring state. Such a case was presented in *New York City* v. *Pine,* 185 U. S. 93. There the city of New York constructed a dam on the west branch of Byram River, within the State of New York, this being a non-navigable stream of fresh water arising in New York, flowing thence through the State of Connecticut, and emptying into Long Island sound. The plaintiffs were riparian owners of land in the State of Connecticut, and brought action in federal circuit court for an injunction to restrain the city from diverting the waters of the west branch from their natural flow through the plaintiffs' lands. *The supreme court assumed, without deciding, that although the west branch above the dam and all the sources of the supply of water to that branch are within the limits of the State of New York, that state has no power to appropriate such water or prevent its natural flow through its customary channel into the State of Connecticut.* The injunction was denied, however, and the right of the plaintiffs to pecuniary compensation established in its stead, on the ground of their acquiescence in the construction of the works by means of which the diversion was to be effected. In the great case of

*Kansas* v. *Colorado,* 185 U. S. 125 (decided on demurrer, but not yet determined on final hearing), the State of Kansas, party on the basis of its ownership of riparian land upon the Arkansas river and partly in the right of its citizens who are riparian owners thereon, is seeking to enjoin the State of Colorado from withdrawing from the river for irrigation of the arid lands of Colorado so much of the waters of the river as to materially injure the riparian lands in Kansas. A demurrer to the bill was overruled on the ground that in a case of so great importance a determination of the questions involved ought to be left until the facts were established by proofs. *Impliedly the right to prevent an undue interference with the natural flow of the river was recognized."*

This question is discussed in Farnham on Waters (1904) Vol. 1, p. 29, as follows:

"A river which flows through the territory of several states or nations is their common property. Each is entitled to its navigation throughout its whole extent, so far as it can be exercised without injury to the rights of others. It is a great natural highway conferring, besides the facilities of navigation certain incidental advantages, such as, fishery and the right to use the water for power. Neither nation can do any act which will deprive the other of the benefits of those rights and advantages. The inherent right of a nation to protect itself and its territory would justify the one lower down the stream in preventing by force the one further up from turning the river out of its course or in consuming so much of the water for purposes of its own as to deprive the former of its benefit. * * * Courts, having a supervisory jurisdiction over the acts of the political department of government, will prevent acts by that department which will injure the rights of the neighboring states. The gifts of nature are for the benefit of mankind, and no aggregation of men can assert and exercise such rights and ownership of them as will deprive others having equal rights, and means of enjoying them, of such enjoyment. The acts of nations must be governed by principles of right and justice. The days of force and self-aggrandizement at the expense of neighboring nations are passed, and the common right to enjoy the bountiful provisions of Providence must be preserved."

In *Hoge* v. *Eaton,* 135 Fed. 411, in a suit by settlers in Wyoming on a stream which arises in Colorado to restrain the diversion of water from such stream in Colorado, the court, p. 414, stated the following to be a general principle:

> *"The idea of an exclusive right in the people of a state to divert its running waters to the injury of riparian owners in another state must be equally unattainable. Indeed, the doctrine of riparian ownership and use of running water is not subject to political boundaries. Between hostile states the doctrine must be recognized, but any such repudiation would be simply vis major. Between states dwelling in peace and concord, as are the states of our Union, the equal rights of the inhabitants of each state to the waters of intersecting streams must always be recognized."*

In this connection we invite the attention of the court to the following cases:

*Holyoke Waterpower Co.* v. *Connecticut River Co.,* 52 Conn. 570, 22 Blatchf. 131, 20 Fed. 71;

*Pine* v. *New York,* 50 C. C. A. 145, 112 Fed. 98;

*Kansas* v. *Colo.,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838;

*U. S.* v. *Rio Grande,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

3. *An upper state through which flows or on which borders an interstate stream or watercourse cannot appropriate the waters thereof in defiance of the rights of a lower state; such appropriation will be enjoined by the court; and in determining the fair use of such interstate waters, the upper state cannot complain if its rights are measured by its own law of waters. Applying that rule, as the most favorable to Illinois which she could possibly demand, her asserted right to abstract the waters of the Great Lakes fails.*

The proposition that an upper riparian state upon an interstate stream or watercourse may not divert, appropriate or use the waters

of that stream within its borders to the injury of a lower riparian state and without regard to any prejudice which may be worked to the rights of the lower state and its citizens, has been definitely and finally settled. Such a right was asserted on behalf of the State of Colorado in the case of *Kansas* v. *Colo.*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, and was resolved adversely to Colorado. In the case of *Wyoming* v. *Colorado,* 259 U. S. 419, 466, 42 Sup. Ct. 552, 558, 66 L. Ed. 999, In reply to that contention, this court said:

> "The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas* v. *Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032; *Bean* v. *Morris,* 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821; *Missouri* v. *Illinois,* 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497, and 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572, and *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488 are examples."

The law is thus clearly established that an upper riparian state may not appropriate the waters of an interstate watercourse to the detriment of the lower riparian state and its citizens. The question is then presented: What rule shall be applied in determining the uses which may be made of such interstate watercourse by the respective states in conformity to and in recognition of their respective rights? In the case of *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado, supra,* this court laid down the rule that in determining the fair apportionment of the beneficial uses of an interstate stream by the upper and lower riparian states, it would take into

consideration the law of waters of the respective states, and that the lower riparian state could not complain if the upper riparian state were permitted to make such uses of the interstate waters as were permitted by the law of waters of the complaining state. Thus in *Kansas* v. *Colorado, supra,* this court found that the state of Colorado had adopted the appropriation doctrine of waters common in arid regions of the west, that the state of Kansas by its law of waters recognized the right of riparian owners to a reasonable appropriation of the waters of a stream for irrigation purposes within the basin of the stream, and that Kansas could not justly complain of a reasonable appropriation of waters of the Arkansas River by the state or citizens of Colorado for irrigation purposes within the basin of that river. This court, in deciding the facts in that case, held under the evidence that there was no appropriation of the waters of the Arkansas River by Colorado outside of its basin, and no unreasonable appropriation within the basin in relation to the rights of lower riparian owners as recognized by the laws of Kansas. It was therefore held that Kansas had no present ground for enjoining the use of the waters of the Arkansas River by the state of Colorado, and the case was dismissed, but without prejudice to another action in the event that the state of Colorado should later assume to use an unreasonable portion of the waters of the Arkansas River for irrigation purposes.

In *Wyoming* v. *Colorado, supra,* this court found that both of the states, being in the arid section of the west, had adopted the appropriation theory of the law of waters. It was accordingly held that the respective rights of the two states in the interstate stream in controversy should be determined by the application of the law of waters common to the two states just as though the property rights involved were embraced within a single state having such a law of waters. Applying this doctrine Colorado, as an upper riparian state, was compelled to recognize the prior appropriations in the state of Wyoming and was enjoined from appropriating any quantity of the waters of the interstate stream except that part which was in

excess of the reasonable requirements of the prior appropriation in the state of Wyoming. It should be noted that this case laid down the doctrine that the most favorable consideration which a state may ask in relation to its rights in an interstate stream or watercourse is the determination of its rights on the basis of its own law of waters. It does not follow, however, that where two states have an entirely different law of waters, either of them can prejudice the rights of the other by virtue of adopting a law of waters which is not recognized by the other state, and which would seriously injure such other state. Up to this time the decisions have gone merely to the extent of saying that the lower riparian state cannot complain if its rights are determined in accordance with its own law of waters.

As has been demonstrated in the preceding sections of this brief, the common law of waters obtains in all of the complaining states, and in the defendant state of Illinois. By that law of waters, every riparian owner is entitled to the natural flow of the stream or watercourse without substantial diminution in either quantity or quality. Under that law of waters, any right to divert water from a watercourse without returning it before it leaves the land of the one making the diversion is denied, and much less can any riparian owner abstract the waters of such watercourse and transport them away from the watershed so as to be wholly lost to the lower riparian owners. As was said by this court, in *Hudson County Water Company* v. *McCarter,* 209 U. S. 349, 356; 28 Sup. Ct. 529, 531, 52 L. Ed. 828:

> *"The problems of irrigation have no place here.* Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use."

It is thus apparent that under the recognized rules of law, the

right of the state of Illinois to appropriate and abstract this water wholly fails.

We also invite the attention of the court to

*Pine* v. *New York,* 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820;

*Economy Light & Pr. Co.* v. *U. S.,* 256 U. S. 113, 41 Sup. Ct. 409, 65 L. Ed. 847;

Farnham on Waters, Vol. 1, p. 59;

Hyde on International Law, (1922) Vol. 1, pp. 315-316;

*Holyoke Water Power Co.* v. *Conn. River Co.,* 20 Fed. 71.

4. *Since a state has no power to abstract all of the waters of an interstate water course in defiance of lower riparian states, clearly Illinois has no right to not only abstract all of the waters of such a water course within its own boundaries, but by reversing the flow of that part of the water course within its borders, to abstract waters of such water course which originates in lower riparian states and permanently divert them from the watershed.*

By the decisions in the cases cited and discussed in the preceding section, it is apparent that an upper riparian state has no right to appropriate all of the waters of an interstate watercourse originating within its bounds without regard to the rights of lower riparian states. However, the defendant state is asserting a right which goes much farther. It is not only appropriating all of the waters of the Chicago and Calumet Rivers, which originate and lie within the bounds of the state of Illinois but the waters of which in the course of nature naturally flow into and belong to the lower riparian complaining states, but it is also asserting the right to appropriate 8,500 cubic second feet additional out of the waters of Lake Michigan, plus 1,200 cubic second feet from the waters of the same lake by way of pumpage, which is not returned to the lake as is required in the ordinary and legal use of such waters for domestic purposes,

but is likewise permanently diverted from the watershed. The mean low water flow of the Chicago River is approximately 600 to 800 cubic second feet and that of the Calumet River is less than 1,000 cubic second feet. However, under the precedure adopted by Illinois, none of the waters of either of these rivers flow into the lake. There are no other streams of appreciable size flowing into the lake from Illinois. In addition to appropriating the waters of the Chicago and Calumet Rivers, the defendant state of Illinois is taking about 9,700 cubic second feet of water from the lake. It needs no argument to demonstrate that this 9,700 cubic second feet of water taken from Lake Michigan does not originate within the bounds of Illinois. This therefore must necessarily originate within the bounds of some of the lower riparian states. Accordingly it constitutes the taking of the waters of an interstate stream, by Illinois, which originate lower down upon such watercourse, and a direct appropriation of the waters of such lower riparian states. It would not be seriously contended that the state of Illinois could, by means of a pipe line or other mechanism, take the waters of Wisconsin inland lakes for its own purposes; yet there is no distinction between such an act and the one of which complaint is made.

Since the act of Illinois constitutes a much more flagrant violation of the law of waters than that complained of in the case of *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado, supra,* the illegality of the act and the right of the complaining states to enjoin the same, cannot be questioned.

*Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956;

*Wyoming* v. *Colorado,* 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999;

*Pine* v. *New York,* 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820;

*Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828;

*Holyoke Water Power Co.* v. *Connecticut River Co.*, 20 Fed. 71.

5. *The various acts of the Illinois legislature purporting to authorize the Sanitary District of Chicago to abstract waters from Lake Michigan were unconstitutional and void.*

*These acts assumed to control and appropriate the waters of a national and international waterway.*

The national and international character of the Great Lakes-St. Lawrence system has been recognized by this court.

*Moore* v. *American Transportation Co.*, 24 How. 1, 16 L. Ed. 674;

*The Propeller Genesee Chief*, 12 How. 443, 13 L. Ed. 1058;

*U. S.* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063.

The necessary consequences of carrying out the provisions of the acts of the Illinois Legislature was to lower the level of the Great Lakes and to interfere with interstate commerce upon the greatest inland waterway in the world. This was a matter upon which no state might lawfully act, even though Congress was silent. In *Sanitary District of Chicago* v. *United States*, 266 U. S. 405, 426, 45 Sup. Ct. 176, 69 L. Ed. 352, this court has said:

"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 cannot be done without the consent of the United States, even were there no international covenant in the case.*"

Moreover, the natural consequences of this act were to destroy property rights of citizens of lower riparian states without com-

pensation, in violation of the federal Constitution. It assumed through the agency of natural laws, to legislate *extra* territorially. The Illinois acts also violated act of Congress, the Constitution of Illinois, and the Ordinance of 1787.

We also invite the attention of the court to the following:

*Burke* v. *Snively,* 208 Ill. 328, 70 N. E. 327;
Separate Section 3, Constitution of Illinois, 1870;
Ordinance of 1787;
*Economy L. & Power Co.* v. *U. S.,* 256 U. S. 113, 41 Sup. Ct. 409, 65 L. Ed. 847.

## VI

## IT IS NOT CONSIDERED THAT CONGRESS HAS POWER TO AUTHORIZE THE ABSTRACTION OF THE WATERS OF THE GREAT LAKES FROM THAT WATERSHED AS A FEDERAL ACT, FOR ANY PURPOSE. COMPLAINANTS, HOWEVER, IN THIS ACTION, DO NOT NOW ASK AN INJUNCTION AGAINST ANY ABSTRACTION REASONABLY NECESSARY FOR NAVIGATION PURPOSES WHICH WILL NOT BE IN EXCESS OF 500 CUBIC SECOND FEET AT PRESENT, OR EVER IN EXCESS OF 1,000 CUBIC SECOND FEET—THE ATTITUDE OF THE COMPLAINING STATES BEING EXPLAINED BY LEGISLATIVE RESOLUTIONS APPEARING AS APPENDICES TO THIS BRIEF.

1. *The constitutional power over navigable waters construed in the light of history and the common law, does not extend to the abstraction of the waters of one watershed for the benefit of another.*

The waters of the Great Lakes and their connecting waters, together with the submerged lands thereunder, are the property of the

littoral states, and their title thereto, regardless of whether it be the full legal title, or in trust for their people, is subject only to the paramount right of Congress to regulate navigation as a power implied from the express power to regulate commerce. Since the rights of these states in such waters and submerged lands are proprietary rights, the control of these states thereover must be final and conclusive except in so far as that title is qualified by the legitimate scope of the federal power to regulate navigation.

When the United States was settled, the colonists brought to this country the common law of England. That common law prevailed in full force and effect at the time of the adoption of the constitution. The existence of that common law was taken for granted by the framers of the constitution, and the constitution was adopted and must be construed in relation to the rights, privileges and limitations which existed by virtue of the common law, and upon which common law rights the constitution, upon its adoption, was superimposed. This has many times been recognized by this court. In *Kansas* v. *Colorado,* 206 U. S. 46, 94-95, 27 Sup. Ct. 655, 51 L. Ed. 956, this court said:

> "It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and *scope* of the Constitution of the United States. and is also in many States expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Gray in *United States* v. *Wong Kim Ark.,* 169 U. S. 649, 654:
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> " 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett,* 21 Wall. 162; *Ex parte Wilson,* 114 U. S. 417, 422; *Boyd* v. *United States,* 116 U. S. 616, 624, 625; *Smith* v. *Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law, 1 Kent. Com., 336; Bradley, J., in *Moore* v. *United States,* 91 U. S. 270, 274.' "

When the constitution was adopted, and the express power given to Congress to regulate commerce, the right to abstract the waters of a watershed had never been claimed, and much less recognized. This fact is readily determined by any study of the common law in England as it existed at the time when the constitution was adopted, or since that time. Odgers, Common Law of England, Vol. 1, pp. 590-594. The paramount rights of congressional control to which the title of a state to the waters within its boundaries and the riparian titles of its citizens were subject was only the appropriation of all the waters of a navigable waterway for an avenue of commerce along such natural highway, including the natural extensions thereof, together with the right to improve that natural highway in its natural basin without regard to any incidental injury therefrom; but it never included within the grant of power, the right to take or seriously injure one of the great gifts of nature belonging to one or more states and hand it over to another state or states, even as an incident of interstate commerce. These complaining states were settled because of the existence of these resources, and the states themselves then enlarged and enhanced the gifts of nature within their boundaries. Citizens of these states settled and established themselves within their borders because the natural resources contained therein appealed to them. Was it ever contemplated by the framers of the constitution that such natural resources might at any time be taken away from those who had settled in proximity to them and developed and made use of them, for the benefit of people who had chosen to settle and locate in another watershed? This is a very different question from the right of the federal government to do incidental damage by improving a natural waterway substantially in its natural location. It is unthinkable that a power given to Congress only by implication was ever intended to permit a temporary majority of a political body to take or injure the gifts of nature in one state, for another. It is our contention that Congress has no more power to take the water which is the property of the complaining states to their injury, either to give it to Illinois for any purpose

or to create an artificial waterway in another watershed, than it would have to authorize the state of Illinois to appropriate the forests of Wisconsin to construct canals or locks on the Illinois River for the improvement of navigation. For the purpose of making the principle involved very clear, let us assume an extreme case. Assuming it were economically and mechanically possible to transport the waters of the Great Lakes system by syphon, pipe line or other mechanism, to the Sacramento River, would it be contended that Congress had the power of appropriating the waters of the Great Lakes-St. Lawrence system for the improvement of navigation on the Sacramento River? Yet there is no distinction in principle between such a case and the appropriation of the waters of the Great Lakes for the Illinois and Des Plaines Rivers.

In asserting this lack of constitutional power on the part of Congress, complainants do not consider that they are challenging any of the great decisions of this court with reference to the improvement of navigable waters by Congress. The facts present a novel question which, in the opinion of the complainants, has never been passed upon by this court.

2. *In any event, the acts of Congress for improvement of navigation must be reasonably appropriate to that end. The acts of Congress in control and improvement of navigation under the commerce clause of the federal constitution must be reasonably appropriate to the ends of navigation and not arbitrary or capricious or for any other purpose, such as the sanitation needs, real or imaginary, or the power desires of another state or city. It cannot, under the guise of the power to regulate interstate commerce, arbitrarily destroy the rights of riparian owners or the proprietary rights of littoral states without any object ~~not~~ really related to navigation.*

The power of Congress to regulate a navigable waterway even ~~when~~ in its natural channel and natural basin extends only to an improvement of navigation upon such waterway. That right does not

include the abstraction or destruction of the waters of such waterway.

In *Woodruff* v. *North Bloomfield Gravel Mining Co.,* 18 Fed. 753, the defendant mining company sought to justify the obstruction of a river with debris from its mining operations upon the ground of federal authority. On pp. 778, 779 the court, Sawyer, J. said:

> "Congress is authorized to *'regulate,'* but not to *destroy* 'commerce among the states.' It may, undoubtedly, in its wisdom, obstruct, or, perhaps, destroy navigation, to a limited extent, at particular points, for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad or post-road bridge across a navigable stream; but it cannot destroy, or authorize the destruction, entire or partial, of the whole system of navigable waters of a state for purposes wholly foreign to commerce or post-roads, or to their regulation. If congress could so authorize, or, as it is claimed, has so authorized, the acts complained of as to make them lawful, then it can authorize, and it has authorized, the filling up and utter destruction of all the navigable rivers, streams, and bays of the state, for there is no limit fixed to the amount of *debris* that may be sent down; and upon the hypothesis claimed, if such waters are not filled up and destroyed, it is for want of physical capacity to do it, and not because it is unlawful.
>
> "But the injury to navigation is not the only element of a public nuisance in the case. The injuries already accomplished, and those still accruing, as well as those threatened to the cities and riparian proprietors of a large extent of country, if unlawful, constitute a public nuisance of themselves, irrespective of the injuries to navigation; and there can be no possible ground for maintaining that congress has authority to legalize such injuries, and take away their character of a public nuisance. There is, then, no plausible ground for holding that congress has ever attempted to make the acts complained of unlawful, or, if it had, that there is any power vested in congress to effect that purpose. These acts, therefore, have not been legalized by reason of any congressional action."

While the power of Congress in the control of navigation under the interstate commerce clause is plenary within its field, it has always been recognized that its acts under that power could not

exceed what was reasonably necessary for the improvement of navigation.

Could it be reasonably claimed that Congress has the power to drain the Great Lakes? If Congress has that power, it may reduce the Great Lakes, and particularly Lake Michigan, to nothing more than a small river or canal following the lowest part of the bed of the lake, and leave the property and the great cities of the complainant states in effect stranded upon the edges of this dried up basin. It seems to us unthinkable that Congress could have that power. Certainly Congress could not exercise that power for the sanitation needs or power desires of the state of Illinois. It seems equally clear that they could not exercise that power without any reasonable relation to the ends of navigation. If these conclusions are correct, then there is a limit to the extent to which Congress can abstract the waters of the Great Lakes and lower their water levels and impair their navigable capacity. If there is a limit, the question is then present as to what is the proper definition of that limit. It seems clear that it could not in any event exceed the amount of abstraction which would be reasonably necessary for navigation upon the Des Plaines and Illinois Rivers.

The decisions of this court with respect to the use and obstruction of highways offer an instructive analogy. In *Barney* v. *Keokuk,* 94 U. S. 324, 342, 24 L. Ed. 224, it was held that the public authorities could not authorize permanent obstructions like a depot building, on the streets of a town. In this case the public authorities had attempted to authorize a railroad company to occupy a public street with a depot building. The owner of the adjoining lots brought ejectment. This court said:

> "The Circuit Court is clearly correct, however, in holding that the construction of a permanent freight depot in Water Street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created or allowed. It is subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public."

The court stated that it made no difference in its opinion whether the public owned the fee of the street or merely an easement for highway purposes. The rule was laid down that the public authorities could not authorize any obstruction in a public highway, and that the public authorities could not authorize any use of a public highway for any purpose other than that of a public avenue of communication. This doctrine is recognized in the following cases:

*Burlington Gas Light Co.* v. *Burlington, etc. Rwy. Co.,* 165 U. S. 370, 17 Sup. Ct. 359, 41 L. Ed. 749;

*Muhlker* v. *N. Y. & Harlem R. Co.,* 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872;

*Sauer* v. *City of New York,* 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

Is not the trust of the federal government in the navigable waters of the United States just as sacred and of as high a degree as that of a state in a public highway? If such is the fact, these cases sustain the proposition that the federal government has no authority to authorize any use of, or the creation of any obstruction in, any of the navigable waters of the United States, except for the promotion of navigation thereon as a public avenue of commerce.

3. *If Congress can appropriate these waters in any amount, it can do so only for the promotion of navigation, and then only to the extent reasonably necessary therefor; and the court will enjoin abstractions admittedly in excess thereof.*

In *Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, the federal government sought to intervene for the purpose of controlling the waters of the Arkansas River for the use in the irrigation of arid lands. This court in denying the petition of the federal government pointed out that the federal government was one of delegated and enumerated powers; that its sole concern with the waters of the United States under the constitution was for purposes of navigation, and that it had no interest in such waters which

it could assert for any other purpose. While the federal government did not seek to interfere, the same conclusion would be reached from *New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937.

In *U. S.* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, the federal government sought to enjoin the defendant corporation from impounding the waters of the Rio Grande at a point in the territory of New Mexico where such river was not navigable, as an interference with the navigable capacity of said river on its lower reaches where it had navigable capacity.

This court refused to enjoin all impounding of the waters of the Rio Grande River by the defendant company, but merely enjoined the impounding of any quantity which it should be determined would substantially interfere with the navigable capacity of the lower reaches of the Rio Grande River. It thereby impliedly denied the authority of the federal government to interfere with the exercise and control of the waters of the Rio Grande River beyond the point where navigation was affected. The court also undertook to determine the amount of waters which might so be impounded without substantial injury to navigation. This determination was made at the instance of a private corporation which was a defendant in that case. Surely the rights of these great states in their quasi-sovereign capacity and in their proprietary capacity as owners of these waters, rise to a higher dignity than the right of a private individual. Certainly the court, at their request, will determine what, if any, amount of water may be abstracted by Congress from the Great Lakes-St. Lawrence System for the improvement of navigation in another watershed. But here no determination is necessary, as it is admitted on the pleadings, and is conclusively established by the government reports that any abstraction in excess of 1,000 cubic second feet is not necessary for navigation in the Illinois and Des Plaines Rivers, and would in fact be detrimental to navigation in those rivers.

4. *If such an appropriation of the waters of one or more of the states, to their injury, were otherwise valid, the act would still violate Article I, Section 9, Clause 6 of the federal constitution.*

Article I, Section 9, Clause 6 of the Constitution of the United States reads as follows:

> "No preference shall be given by any Regulation of Commerce or Revenue, to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."

The effect of this provision of the constitution was raised in *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 15 L. Ed. 435. The effect of this provision was again raised in *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. Ed. 782. This court in commenting upon the construction placed upon this provision in the *Wheeling Bridge Company* case, *supra*, said, p. 13:

> "It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State, and only incidentally injuriously effect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce."

In the *Wheeling Bridge* case it was held that the fact that Congress had authorized the construction of a bridge over the Ohio River at Wheeling which incidentally might to some extent hurt navigation to the ports of Pittsburg in Pennsylvania did not violate this provision. In *South Carolina* v. *Georgia, supra,* it was held that the act of the federal government, in closing one of two channels in the Savannah River where that river was divided by an island, did not come within this prohibition. The reason for such a holding was that where Congress, in the exercise of a lawful power, made an improvement at a port in one state which might incidentally affect the ports of another state, such incidental effect

could not be construed to invalidate the exercise of a valid power. That is, Congress may, for instance, improve the harbors of the ports of one state. Such improvement may incidentally tend to give such harbors a preference over those of another state by reason of the fact that such improvements will make such harbors more attractive to commerce. However, such an incidental result cannot interfere with such a valid congressional act. It is analogous to the rule that although Congress cannot arbitrarily injure riparian rights, under the guise of improving navigation, any injury which is done to riparian rights in the lawful improvement of the navigation along the watercourse is *damnum absque injuria.* In short, the acts which do not come within this prohibition are those which are performed at the particular port or ports of a state, without any direct relation to the ports of other states, and where the results to the ports of other states can only be consequential and indirect. However, where the act of Congress directly gives a preference to the ports of one state over those of another, it is within the constitutional prohibition. In the instant case, were Congress to attempt to authorize the taking or attempt directly to take the waters of the Great Lakes away from the ports of the complaining states and give such waters to the ports of Illinois, it would be an act directly and positively giving a preference to the ports of Illinois over the ports of the complaining states. Certainly it can not be contended that if Congress attempted to take all of the water of the Great Lakes by draining them, and give such waters to the ports of the state of Illinois for navigation purposes in either natural or artificial channels, such act would not constitute a direct and positive preference of the ports of that state over the ports of the complaining states. If a lesser amount of water is taken away from the lakes, and consequently from the ports of the complaining states, to give to the ports of Illinois for an artificial waterway, the preference can be none the less a preference though less in degree. The constitutional provision recognizes no degrees, perhaps for the well-known reason that a very small commercial advantage is sufficient to enable one

port to ruin another. It does not say that Congress can give the ports of one state a little preference, or a medium preference, but that it can give them no preference. We submit that this constitutional prohibition would be an absolute bar to any attempt of Congress to take the waters of the Great Lakes away from the ports of the complaining states and give those waters to the ports of Illinois. We are not dealing with the extent of a constitutional power delegated to Congress which should be liberally construed to effectuate the purposes of the delegation, but we are dealing with the lack of such a power under the terms of the constitution, and that instrument should be construed just as liberally to prevent Congress from asserting a power which was denied to them under its terms.

## VII

## ASSUMING THAT CONGRESS COULD AUTHORIZE SUCH AN ABSTRACTION OF THE WATERS OF THE GREAT LAKES AS TO IMPAIR THEIR NAVIGABLE CAPACITY, IT HAS NEVER DONE SO.

### 1. *The Act of Congress of March 2, 1827, does not authorize the abstraction of the waters of the lakes.*

It can hardly be believed that the defendant seriously contends that the Act of Congress of March 2, 1827, 4 Stats. at Large 234, constitutes or constituted any authority for the abstraction of the waters of the lakes. Prior to the argument of the case of *The Sanitary District of Chicago* v. *U. S.*, 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352, the defendant state of Illinois and the Sanitary District of Chicago had never pretended that this act of Congress constituted any such authority. The idea that any such authority existed under any such act was clearly an after-thought. The canal authorized by that act had and has no relation to or connection with the Sanitary Canal. That act contemplated a summit level canal

with locks to be operated by the natural flow of the waters. It was a canal the location of which was fixed by law, and which location is not the location of the Sanitary Canal. It was a canal for navigation and not for sewage and power as is the Sanitary Canal. It would, furthermore, have been rendered inoperative by the subsequent Rivers and Harbors Act enacted prior to any abstraction of the waters of the lake by the defendant Sanitary District. Any contention, however, that such act constitutes congressional authority for the present abstraction was decided against the defendant in *Sanitary District of Chicago* v. *U. S.*, 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352.

2. *The permit of the Secretary of War issued March* 3, 1925, *does not purport to authorize any abstraction of the waters of the Great Lakes which would injure their navigable capacity.*

Such a grant would be in derogation of the public rights and should therefore be strictly construed against the grantee or permittee. *Louisville Bridge Co.* v. *U. S.*, 242 U. S. 409, 37 Sup. Ct. 158, 61 L. Ed. 395.

The permit is set forth in the Bill of Complaint, pp. 30-31-32. However, the preliminary recital to the permit is not set forth in the bill, and we quote it herewith:

> "It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago*, 188 U. S., 410.)"

The first condition of the permit provides "that there shall be no unreasonable interference with navigation by the work herein authorized." Construing the permit of the Secretary of War in the

light of the recognized rules of construction, it only purports to authorize the Sanitary District of Chicago to abstract so much of the waters of the Great Lakes as will not injure their navigable capacity, but not exceeding 8,500 cubic second feet in any event. Clearly the permit does not purport to authorize the Sanitary District of Chicago to abstract a quantity of water from the lakes which will injure their navigable capacity, and that district is limited to such quantity as will not injure the navigable capacity of the lakes no matter how small that quantity may be. Under the state of the pleadings in this case and facts which cannot be successfully controverted, that amount will not exceed 1,000 cubic second feet. For the purposes of the present motion to dismiss, however, it is only material that the present admitted abstraction does ~~not~~ injure the navigable capacity of the lakes.

It should be noted that this permit does not constitute any appropriation of the waters being abstracted by the defendant Sanitary District for the purposes of navigation, such as was the case in the congressional act under consideration in *U. S.* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063. The permit at most could constitute a mere permissive and revokable consent to the abstraction of navigable waters, creating no property rights in the permittee.

3. *The Rivers and Harbors Act does not empower the Secretary of War to authorize any obstruction of the navigable waters of the United States; and to the extent that the permit of the Secretary of War is claimed to authorize obstruction of the waters of the Great Lakes in excess of the amount needed for navigation, it would be clearly unauthorized by said act.*

Section 10 of the Rivers and Harbors Act of March 3, 1899, (30 Stats. at Large 1151) reads as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier,

dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

It is obvious that this section of the Rivers and Harbors Act prohibits any obstruction or injury to the navigable capacity of any of the waters of the United States which has not been *affirmatively* authorized by Congress. The Secretary of War, on recommendation of the Chief of Engineers, is then authorized to give a revocable consent or license for the construction of certain enumerated structures which may not constitute an obstruction to navigable capacity, if properly constructed and providently located. The act then proceeds to authorize the Secretary of War on recommendation of the Chief of Engineers to give a revocable license or consent for certain other works within the navigable waters of the United States, which may not constitute any obstruction to navigable capacity or constitute such an unappreciable obstruction as to be unimportant. However, the abstraction of the waters of a navigable watercourse of the United States, or the construction of an entirely new, artificial waterway, is not among the possible obstructions to navigation for which the Secretary of War is authorized to give even a revocable permit or consent. Obviously the building of a wall, pier or dolphin is not a question of national policy. Just as obviously, the project of turning the waters of the Great Lakes, constituting the greatest and most important inland waterway and avenue of commerce in the world, even if within the power of Congress, would be a momentous

question of national policy which Congress would be neither willing nor able to delegate to one man. The determination of whether a dolphin may be constructed without injury to the navigable capacity of waters is a question of fact which may readily be determined by the Secretary of War as a fact upon which the legislative will, as declared by statute, may be brought into operation.

In short, Section 10 of the Rivers and Harbors Act clearly means the following:

(1) The creation of any obstruction to the navigable capacity of a navigable water must be affirmatively authorized by Congress, e. g., there must be an act of Congress, general or special, authorizing the obstruction.

(2) A modification of the course, location, condition, or capacity of any navigable water of the United States when *not* amounting to an obstruction, must, to be lawful, be recommended by the Chief of Engineers, and authorized by the Secretary of War.

Under sec. 10 of the Rivers and Harbors Act of 1899, the secretary of war has delegated power only. The only power which is delegated to the secretary of war and the only power which constitutionally could be delegated to him under that act is to determine a question of fact as to whether a given construction or act will materially affect navigation.

By that act congress thus intended to delegate to the chief of engineers and the secretary of war administrative authority to determine the facts. If they were of the opinion that a contemplated use of navigable waters in a certain case, was not such an impairment of their navigable capacity as to require the prohibition of congress, then the construction, use or act was "affirmatively authorized by congress" because the administrative agent to which congress had delegated the ascertainment of the facts had found the facts to be that such use was not for the time being an impairment of navigable capacity such as congress intended to prohibit.

The function of the war department under the acts of congress is to determine these facts and not questions of policy. The in-

tention of congress that navigable waters of the United States shall not be diverted for local purposes so as to injure the just rights of the whole people in the navigability of such waters, is very clear. The decision to divert the waters of the Great Lakes to the Mississippi watershed, even if within the power of congress, would be clearly a question of policy and not the determination of a fact.

The present permit of March 3, 1925, under which abstractions are now being made, expressly negatives any implications that the secretary of war decided that the diversion of 8,500 cubic second feet does not obstruct navigation or impair the navigable capacity of the Great Lakes. This is made clear by the first condition in that permit. It is further shown by the reports of the engineers and the letter of the Secretary of War to the Sanitary District, which appear in Appendix I of this brief. Since this permit does not have, and does not profess to have, any relation to navigation or questions of navigation, but obviously assumes to deal with questions of sanitation, it is a nullity.

This act has not been construed by this court, but it has been construed by the circuit court in *Hubbard* v. *Fort,* 188 Fed. 987. On pages 992-993 the court said:

> "So far as applicable to the present question, such section may be summarized thus: First, the creation of any obstruction to the navigable capacity of any waters of the United States is prohibited unless affirmatively authorized by Congress; second, it shall not be lawful to build any structure in a navigable river or water of the United States, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and, third, it shall not be lawful to excavate or fill the channel of any navigable water of the United States unless such work is recommended by said Secretary of War prior to beginning the same."

It is interesting to note that by Section 9 of Chapter 429 of the Act of March 3, 1899, 30 Stats. at Large 1151, it was made unlawful to construct or commence to construct any bridge over any navigable water of the United States without the consent of Con-

gress, or with such consent until the plans shall have been submitted to and approved by the Chief of Engineers and the Secretary of War. Accordingly, before a bridge can be built over the navigable waters of the United States, the consent of Congress must be obtained by statute. Can it be reasonably contended that Congress, by the Rivers and Harbors Act of 1899, 30 Stats. at Large 1121, reserved to itself the exclusive right of determining whether a bridge should be built over any of the navigable waters of the United States, but delegated to the Secretary of War the right to determine whether the Great Lakes should be drained into the Mississippi Valley?

We quote further from the discussion of this act in *Hubbard* v. *Fort, supra,* pp. 996-997:

> "And how can it be said that the structures or the works subsequently referred to in this section may not amount to an obstruction to such navigable capacity? It is to be noted that 'excavate or fill' is associated with 'alter or modify the course, location, condition, or capacity of any' navigable water, all of which may be so performeed as to become serious obstructions to navigation. That such obstructions may be but slight, and that some will be of only temporary duration, would not make them any less obstructions, and within the prohibition. Any less comprehensive interpretation of the first part of section 10 would do violence to its language, and, as already said, be meaningless. If Congress intended that as to all other obstructions not prohibited by section 9, no affirmative action by Congress should be necessary, but that they might be constructed upon obtaining the permission of the Secretary of War it used singularly inapt and ambiguous language in expressing such intention.
>
> "The use of the word 'authorize' instead of 'approve' does not change the Secretary of War's act from permissory to plenary. Two of the definitions of the word 'authorize' are to aprove of; to formally sanction. Cent. Dict. & Cyc. What does the Secretary of War authorize? Not the building of the structures mentioned in the second part of this section, but the plans to which such construction is to conform. And what does he authorize as to excavating, filling, altering, etc., of the channel of navigable waters, but the commencement, the character, and the manner of doing

such work? While the language here employed is not as felicitous and clear as it might be, yet, when it is considered that Congress here revising and amending, any other interpretation than that such official action by the designated executive officer was to be had only after the initial power to do such works shall have been procured from Congress would be to unnecessarily limit the plain and unambiguous language used in the first part of this section by which full control over all the works in interstate waters was kept in Congress itself.

At pages 998-999, Id., is the following:

"Among the changes effected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state was permitted if authorized by state legislation and the locations and plans of such structure were approved by the chief of engineers and by the Secretary of War. Perhaps without the change from 'authorized by law' to 'authorized by Congress' no obstruction to the navigable capacity of interstate waters without affirmative congressional enactment would have been lawful, but a present reading of the law in the light of the history of its enactment clearly evinces to my mind a legislative purpose to require affirmative action on the part of Congress before such a crossing of interstate streams as contemplated by complainants in this suit shall be permitted, and that only when such congressional action shall have been taken can the powers delegated to the Secretary of War be put into operation."

That the acts of the defendant Sanitary District constitute obstructions of navigable capacity of the Great Lakes was decided in *Sanitary District* v. *U. S.*, 266 U. S. 405, 429, 45 Sup. Ct. 176, 69 L. Ed. 352, where this court said:

"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.*"

Moreover, the Secretary of War in any case has no power to grant a permit except before the work is begun. He is not author-

ized to validate a work unlawfully begun or constructed. When a state illegally creates an obstruction, the act gives the Secretary no power to sanction it or authorize its continuance.

## VIII.

## IF THE RIVERS AND HARBORS ACT ATTEMPTS TO AUTHORIZE ABSTRACTION OF WATERS OF THE GREAT LAKES WITHOUT REGARD TO THE INJURY TO THEIR NAVIGABLE CAPACITY AND NOT TO PROMOTE NAVIGATION, BUT FOR THE SANITATION AND POWER DESIRES OF ILLINOIS, IT IS UNCONSTITUTIONAL AND VOID.

The scope of the power of Congress over navigable waters under the interstate commerce clause is limited solely to regulation of their use and their improvement for navigation purposes. It is not a case of the extension of a valid power; it is the case of an absence of power. Thus, the United States has no jurisdiction over the waters of the United States for the purpose of reclaiming arid lands. *Kansas* v. *Colorado,* 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. The United States Congress has no power to authorize the filling in of a stream with the debris of mining operations. *Woodruff* v. *North Bloomfield Gravel Mining Co.,* 18 Fed. 753, 778. In *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 431, 45 Sup. Ct. 172, 69 L. Ed. 352, this court said:

> "It is doubtful at least whether the Secretary was authorized to consider the remote interests of the Mississippi States or the sanitary needs of Chicago."

While the federal government may lawfully dispose of surplus power which is incident to a valid improvement in navigation, it has no control over the power developments or navigable waters

except in so far as regulations of navigation incidentally affect such power development.

Valid regulatory acts must be appropriate to the ends of navigation. Otherwise they are beyond the power of Congress. *United States* v. *River Rouge Improvement Co.*, 46 Sup. Ct. 144, 70 L. Ed. 148 (advance sheets); *Illinois Central Rwy. Co.* v. *Illinois,* 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Port of Seattle* v. *Oregon Rwy. Co.,* 255 U. S. 56, 41 Sup. Ct. 237, 65 L. Ed. 500; *Alabama* v. *Gulf Power Co.,* 283 Fed. 606; *New Jersey* v. *Sargent,* 46 Sup. Ct. 122, 124, 70 L. Ed. 177, 181 (Advance Sheets).

To the extent that the Rivers and Harbors Act attempted to authorize such abstraction for such purposes it would violate Article I, Section 9, Clause 6 of the federal Constitution. The argument upon the effect of that provision is set out in a prior section of this brief.

## IX.

## ASSUMING THE PERMITS OF THE SECRETARIES OF WAR TO BE VALID PURSUANT TO CONGRESSIONAL AUTHORITY FOR THE ABSTRACTION OF THESE WATERS SO FAR AS RELATES TO OBSTRUCTION OF NAVIGABLE CAPACITY (WHICH WE DO NOT CONCEDE), THESE PERMITS ARE NO DEFENSE TO THIS BILL

The various permits of the Secretaries of War do not in any sense constitute an appropriation of the waters abstracted to the uses of navigation, but on their face, purport to be mere temporary consents to what would otherwise be an illegal and criminal obstruction in navigable waters under the Rivers and Harbors Act. The distinction between such a permit and a valid act of Congress appropriating all of the waters of a navigable stream for the use of navigation

in that stream is obvious. It was an act of the latter character which was under consideration of this court in *United States* v. *Chandler-Dunbar Water Power So.,* 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063. In fact, such permits do not constitute affirmative authorization of any character. They at most constitute a defense for the sanitary district on a charge of violation of the criminal provisions of the Rivers and Harbors Act. They constitute no authority to do the work or act in question. They do not authorize any invasion or injury to the rights of others and the secretary would be without power to give such authority if he desired. This is made clear by the heading of the permit which we quote as follows:

> "NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago,* 188 U. S., 410)"

The permits are at best mere permissive, revocable consents creating no property right in the permittee. While that question has not been presented to this court it has been passed upon by a number of other courts. In *Hubbard* v. *Fort,* 188 *Fed.* 987, the receivers of the Hudson County Water Company sought to maintain a right to lay two water mains across the Kill von Kull by virtue of a permit issued by the Secretary of War and against the protest of the State of New Jersey. A bill was brought to enjoin the officials of New Jersey from enforcing the provisions of a New Jersey statute. The complainant claimed such statute was an illegal interference with interstate commerce, and that the permit of the Secretary of War was complete authority. The court held that the permit of the Secretary of War consituted no authority to lay the water mains,

and dismissed the bill for want of equity. The distinction between an act of Congress in the furtherance of navigation and interstate commerce and a permit to an individual to engage in a private work was well pointed out by the court, which said, p. 999:

> "This is not a case of the United States government seeking to make a crossing of this interstate stream in the exercise of its governmental powers, but an attempt to override a sovereign state's opposition to the use of its submerged land by a corporation of its own creation, under the claim of being engaged in interstate commerce."

A labored attempt is made in the brief of the Sanitary District to show that the permit is an affirmative act of the government in furtherance of a scheme for the improvement of navigation. This is based first on the condition that it shall not unreasonably interfere with navigation. Instead of showing that the act licensed under the permit is in furtherance of navigation, it conclusively establishes that it is probably detrimental to navigation, and unreasonable interference therewith. The making of inspections by the United States is not in the interests of furthering navigation by virtue of the act of the defendants, but in the interests of safeguarding navigation from serious injury by the acts of the defendant. The same situation applies with reference to the prohibition of interference with the full, free use by the public of the navigable waters of the United States. The provision with reference to sewage treatment by artificial processes is not to the end that navigation shall be promoted by virtue of the abstraction of the defendants, but to the end that such abstraction may be reduced as speedily as possible in order to terminate the admitted injury to navigation from the defendants' act. It is indeed a bold position to assert that under the guise of improvement of navigation the defendants may claim the right to abstract waters to the injury of navigation for the purpose of counteracting their illegal pollution of navigable waters. The construction of controlling works, the question of compensating works, the execution of the sewage treatment program and the meter-

ing of the water supply are all to the end that the injury to navigation from the defendants' unlawful abstraction shall be terminated as speedily as possible and establish that such abstraction is not in promotion of navigation, but detrimental to it.

In *Cobb* v. *Commissioner of Lincoln Park*, 202 Ill. 427, the highest court of Illinois passed upon the effect of a permit issued by the Secretary of War and that court held that it was no defense to an action by private individuals who would be injured by the performance of the act specified in the consent. At pp. 439-440 the court said:

> "But such permission is not given to override the rights of the owners of the submerged lands. It is, as said above, a declaration by the guardian of the interests of the public at large that the proposed structure will not interfere with navigation. It is strictly permissive, and not an authorization by paramount authority to build the structure."

Such must necessarily be the effect of such a permissive consent by the Secretary of War. Otherwise, although Congress itself is without power to control the navigable waters for any purpose other than the promotion of navigation and without power to arbitrarily injure and destroy the riparian rights of private individuals for any purpose other than to promote navigation, the Secretary of War might, under the guise of such permissive consent, destroy any or all riparian rights without promoting the ends of navigation.

In *Wilson* v. *Hudson County Water Co.*, 76 N. J. Eq. 543, 76 Atl. 560, the court in discussing this statute and the facts presented in *Hubbard* v. *Fort*, said, p. 558:

> "The doctrine of *Cobb* v. *Lincoln Park*, as applicable to the case under consideration may be paraphrased as follows: The provisions of section 10 of the River and Harbor Act of March 3d, 1899, were designed to protect the navigable waters of the United States (including the Kill von Kull) from encroachment and from obstruction to navigation, and to commit the duty of their protection to an officer of the general government without whose per-

mission no such obstruction can be made; that the act is a mere regulation for the benefit of commerce and navigation and that the license or permission of the secretary of war is only a finding and declaration that a proposed structure or excavation would not interfere with or be detrimental to navigation, and is not equivalent to a positive declaration by the authority of congress that the licensee may make such obstruction or excavation without first obtaining the consent of the owner of the submerged land; that the Water Company, not having by the law of this state the right to excavate on the submerged lands without the state's consent, could not acquire that right by obtaining a license from the secretary of war; that the act is not a declaration touching the rights of the owner of the submerged lands in question, and, assuming that the permission of the general government to the excavation and laying of the proposed pipe line is necessary, such permission is not given to override the rights of the owner of the submerged lands, namely, the State of New Jersey, and it is, as said, the declaration by the guardian of the interests of the public at large that the proposed work will not interfere with navigation, and is strictly permissive, and not an authorization by paramount authority to do the work proposed."

In *Attorney General ex rel. Becker* v. *Bay Boom W. R. & F. Co.*, 172 Wis. 363, 376 178 N. W. 569, the effect of a permit of the secretary of war under the Rivers and Harbors Act was considered and discussed. That was an action brought by a citizen of Wisconsin on the relation of the Attorney General to prevent the construction of a dike within the waters of Lake Poygan, a meandered bod of water in Wisconsin. The court is commenting upon the claim of paramount authority under a federal permit said:

"The federal permit expressly declares that it grants no property rights or exclusive privileges and that the free use by the public of the area inclosed is not to be prevented. The application for the permit and the grant of it presupposes that there was a body of navigable waters; otherwise it was an idle ceremony. It is considered that the facts show that the construction of the dike was not sought by defendant for the improvement of navigation and that its location and construction is in fact an injury to the public

easement and that the federal permit, in the light of the conditions upon which it was granted, does not vest defendant with the right to continue the dike, since it is an encroachment and injury to the enjoyment of the public easements of navigation and the rights of fishing and hunting."

See also *Thlinket Packing Co.* v. *Harrison Co.,* 5 Alaska 471; *Columbia Salmon Co.* v. *Berg,* 5 Alaska 538.

In this conection it should be observed that, as we have shown above, the complaining states are appearing in this suit to enforce various rights different from and in addition to the right to be free from an unlawful interference with interstate commerce. They appear in the capacity of proprietors of the waters and submerged lands of the Great Lakes and connecting waters within their borders. They appear in their capacities of quasi-sovereign to protect from injury the property rights of thousands of their citizens from damage to piers, docks, buildings, wharves, and riparian lands from the illegal abstraction and the consequent lowering of the levels of the Great Lakes and connecting waters within their borders. They appear in the capacity of *parens patriae* to protect the rights of their people. Even if it were assumed that such permit would be a defense to an action for obstructing the navigable capacity of the waters (which complainants do not concede) the permit would be no defense to the injury to the proprietary rights of the states in these waters and submerged lands or to the injury to the states in their quasi-sovereign capacity. Clearly the permit does not purport to authorize the defendants to appropriate the property of the citizens of the complaining states or to injure the property of such citizens. Under the law of the complaining states the riparian rights are property which cannot be taken even for public use without compensation by the complaining states themselves. When riparian rights are destroyed or substantially impaired, property is taken within the law of these complaining states. For another state to take the property of their citizens is an invasion of their quasi-sovereign rights wholly independent of rights to be free from unlawful obstructions

to the freedom of navigation. The permit in any view wholly fails as a defense to the assertion of such rights. The permit itself recites that it shall not be construed as creating any property right or exclusive privilege or authorizing the injury or destruction of the property of others. This point is further illustrated by *New York* v. *New Jersey,* 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937. In that case, after the federal government had made a valid settlement of all its rights pertaining to navigation and government property, this court entertained a suit over a period of five or six years, involving the rights of the State of New York in the waters in controversy. In *International Bridge Co.* v. *New York,* 254 U. S. 126, 132, 41 Sup. Ct. 56, 65 L. Ed. 176, where it was asserted that a congressional act constituted paramount authority for the maintenance of the bridge as against the state of New York this court said:

> "There was no exercise of the power of iminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York."

The court further said that the Rivers and Harbors Act did not make Congress the source of right to build a bridge, but subjected the right to be obtained from the state to the condition of getting congressional consent to act upon the state permit.

Thus, cases relating to the sections of the Rivers and Harbors Act authorizing the Secretary of War to abate a bridge found to be an obstruction to navigation have no application.

## X.

## THE DOCTRINE THAT IN MATTERS WHERE THE NATIONAL CONCERN IS IMMINENT AND DIRECT THE STATES MAY NOT ACT AT ALL, EVEN WHEN CONGRESS HAS BEEN SILENT, IS NO DEFENSE TO THIS BILL.

By a specious process of reasoning, the defendants attempt to show

that the complainants are prevented from maintaining this suit on the ground that it involves a matter of imminent and direct national importance upon which a state may not act even in the absence of congressional action. The first fallacy in the defendants' proposition arises from the assumption that the abstraction of waters by the defendant Sanitary District for sanitation and power purposes is a matter in which the national interest is imminent, direct, and important. The abstraction of waters by that district for sanitation and power is strictly a local proposition in which the nation, as a whole, has no direct or imminent interest, considering only the nature of such act and purposes of such act without regard to the effects which flow therefrom through the necessary operation of natural laws. The national interest is no more imminent and direct in the matter of the local sanitation and power problems of Chicago than in the sanitation problems of every other city in the United States. Such problems have always been considered distinctly local in character. Defendants try to bottom this contention upon *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 426, 45 Sup. Ct. 176, 69 L. Ed. 352. In that case this court said:

> "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 cannot be done without the consent of the United States, even were there no international covenant in the case."

It is obvious that the matter which this court held to be of direct and imminent national concern was not the use of the waters by Chicago for sanitary and power purposes, but the effect of such use upon the level of the lakes through the operation of natural laws.

The second fallacy in the defendants' contention is the effort to twist this principle from its proper application of preventing any state action in a matter of direct and imminent national importance, even where Congress has been silent, to prevent anyone from challenging an unlawful and illegal state action in defiance of this principle. In

short, the defendant State of Illinois violates this principle of limitation upon state action, and then seeks to use the principle to prevent anyone from questioning its violation thereof. This certainly is a bold and unique position. Among cases which have laid down this principle and which is cited in *Sanitary District of Chicago* v. *United States, supra,* as authority for it, is the case of *Kansas City So. R. R. Co.* v. *Kaw Valley Drainage District Co.,* 233 U. S. 75, 79, 34 Sup. Ct. 564, 58 L. Ed. 857. In that case the drainage district secured a decree from the supreme court of Kansas requiring the railroad company, which was an important artery of interstate commerce, to remove certain bridges as obstructions to a river tending to cause the flooding of lands, of the drainage district, in times of high water. As against this decree the railroad company appealed to this court on the ground that such a destruction of their bridges would involve a serious injury to a great artery of interstate commerce. The court held that the state was without authority to order the destruction of such bridges even in the absence of congressional action, since it would amount to an interference with a matter of such imminent and direct national concern that the silence of Congress amounted to a prohibition that there should be any interference therewith. It is to be noted that the matter of imminent national concern was not the flooding of the lands of the drainage district, but the destruction of an important artery of interstate commerce. If the principle urged by the defendants were correct then this court should have dismissed the suit of the railroad company on the theory that it could not question the action, in effect of the State of Kansas, ordering the destruction of its bridges and the consequent injury to the nation in a matter of direct and imminent national concern, because it was such matter of imminent and direct national concern and could not be questioned by anyone except the federal government. In short, the situation would have been that, although the State of Kansas had unlawfully acted in a field forbidden to it because of its direct and imminent national concern, the person or corporation injured by such unlawful act on the part of the state

could not question the act in this court, because of the very principle which made the act illegal and unlawful. The fallacy of this position is self-evident.

## XI.

## THE BOUNDARY WATERS TREATY OF 1909 IS NO AUTHORITY FOR THE ACT OF THE DEFENDANTS: ON THE CONTRARY, IT FORBIDS THE ACT.

At the outset it may properly be observed that under the treaty power the federal government cannot extend its constitutional authority. Therefore if, as contended by the complaining states, Congress is without power under the constitution to authorize the acts of the defendants, then obviously Congress or the federal government could not authorize and sanction such acts by an exercise of the treaty power.

Some reference is made in the briefs of the defendants to hearings and reports of the International Waterways Commission in which reference was made to the Chicago abstraction and in which was contained a recommendation that the Chicago abstraction should never be permitted to exceed ten thousand cubic second feet. This discussion did not purport to recognize any right of Chicago to divert or abstract ten thousand cubic second feet of the waters of the lakes or any other amount. Moreover, many things were discussed in the reports of the International Waterways Commission which were never covered and many suggestions were made which were never adopted in the treaty as finally drawn. One of the things which was not included in the treaty was any authorization for Chicago to abstract any water whatsoever.

Clearly, under the most favorable view which could be taken on behalf of the defendants there could have been no recognition of a right to abstract in excess of four thousand one hundred sixty-seven cubic second feet. At the time when the treaty was ratified the federal government was proceeding with a suit to restrain the illegal

acts of the defendants. No illegal abstraction could have been referred to. All subsequent acts of the federal government in any way relating to matters touching the Boundary Waters Treaty must be assumed to have been in furtherance of that treaty in the absence of a direct declaration to the contrary. It must be assumed that Congress would either legislate in furtherance of the treaty or abrogate it. One of the interests of the federal government in *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352, was the enforcement of international covenant known as the Boundary Waters Treaty of 1909 with Great Britian. It was there recognized that that treaty at least prohibited any abstraction by Chicago in excess of four thousand one hundred sixty-seven cubic second feet. Can it be contended that Congress delegated to the Secretary of War, by means of the power to grant a permissive and revocable permit for certain purposes, the power to abrogate a treaty with a foreign nation?

It is a bold position for the defendants to attempt to assert that a restriction of the abstraction of the waters of the lakes might affect the levels thereof contrary to the provisions of the Boundary Waters Treaty, and one which smacks of bad faith when it is a matter of common knowledge that the archives of the State Department and the records of hearings before the various Secretaries of War upon the defendants' applications for permits are replete with the protests of Canadian authorities and Canadian interests against this abstraction of waters by Chicago as causing serious and substantial damage to Canada and Canadian interests in violation of the covenants of the Boundary Waters Treaty of 1909.

These states have an interest under the Boundary Waters Treaty. Bordering as they do upon the great nation of Canada and having as a result of geographical position a larger volume of trade and a greater amount of intercourse with that nation than other portions of the United States, they are peculiarly interested in the maintenance of friendly relations with t great and friendly nation.

## XII.

## THE COMPLAINANTS ARE NOT ESTOPPED BY THE FORMER PLEADING.

It is asserted in a brief on behalf of the intervening states that complaining states are estopped by their former pleading. The States of Minnesota, Ohio, and Pennsylvania were not parties to the former pleading. In support of this proposition, reliance is placed upon *N. Pacific R. R. Co.* v. *Slaght,* 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738. That was a case involving the title to land, and it was properly held that a final adjudication of the title was *res adjudicata,* although the plaintiff had not asserted all of the legal grounds of title which might have been asserted in the original suit. Surely no argument is needed to demonstrate the utter lack of application of that decision to the facts of this case. In the instant case there has never been any trial on the merits. There has never been any adjudication of rights of any kind. There can be no estoppel because a pleader mistakes a legal right, if such be the fact. It is an elementary principle that there is no estoppel from asserting a prior inconsistant legal position unless it has been sustained by final judgment. Much less can there be any estoppel from asserting a legal position in the pleading which has never been the subject of judicial determination on the merits.

*Strathleven Steamship Co.* v. *Baulch,* 244 Fed. 412; 21 C. J. 1234.

## XIII.

## OTHER TECHNICAL OBJECTIONS TO THE BILL ARE WITHOUT MERIT.

The amended bill is within the scope of the original bill. It relates to the same transaction and merely corrects the prayer for relief.

Some of the objections of the defendants go to the prayer for relief. The prayer for relief is not part of the pleading and is not reached by demurrer.

*Supreme Sitting O. of I. H.* v. *Baker,* 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210.

Where an amended bill is complete in itself without reference to the original bill, a demurrer raises the question only of the sufficiency of the amended bill. It does not challenge the right to file it.

*Norfold, etc. R. Co.* v. *Sutherland,* 105 Va. 545, 55 S. E. 465;

31 Cyc. 463;

*Turner* v. *Roundtree,* 30 Ala. 706.

The allegations of a plea to which a demurrer has been filed stand admitted.

*Briscoe* v. *Bank of Kentucky,* 11 Peters 257, 9 L. Ed. 709.

On a demurrer or motion to dismiss a plea its allegations will be liberally construed in favor of the pleader.

*Kansas* v. *Colorado,* 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

The rule that the allegations of a plea will be liberally construed on motion to dismiss is peculiarly applicable to a controversy between states which has been said to be of a quasi-international character. In such cases this court has laid down the rule that it will disregard all technicalities and consider the case solely upon its merits. In *Virginia* v. *West Virginia,* 220 U. S. 1, 31 Sup. Ct. 330, 55 L. Ed. 353, 357, 358, this court said:

"The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this court may becalled on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either

state alone. *Missouri* v. *Illinois,* 200 U. S. 496, 519, 520, 50 L. Ed. 572, 578, 579, 26 Sup. Ct. Rep. 268; *Kansas* v. *Colorado,* 206 U. S. 46, 82-84, 51 L. Ed. 956, 968, 969, 27 Sup. Ct. Rep. 655. Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts,* 14 Pet. 210, 257, 10 L. Ed. 423, 445; *United States* v. *Beebe,* 127 U. S. 338, 32 L. Ed. 121, 8 Sup. Ct. Rep. 1033."

See also Equity Rule 19.

## CONCLUSION.

In the foregoing brief the complainants have endeavored to demonstrate first, that in the absence of any federal question the right of the complaining states to relief against the defendant State of Illinois and the defendant Sanitary District cannot be questioned, and, second, that there is no federal question which is a bar to the maintenance of this suit.

This suit is simply a controversy between the complaining states and the defendant State of Illinois. All of the argument with reference to the so-called "lakes to the gulf" waterway and with reference to sanitation needs of Chicago, is, in the mind of these complainants, merely for the purpose of attempting to becloud the issues presented by this bill. Properly construed, the bill has no relation to that proposed waterway.

The statement is made in the brief of the intervening defendant that some of the harbors of the complaining states which are specified in the bill of complaint, are mere landings. The government reports of the Department of Commerce will disclose that nearly all of these harbors compare very favorably with the Port of Chicago in the amount of commerce. The issue presented is one of vital importance to the future welfare and prosperity of the citizens of the complaining states. That welfare is sought to be sacrificed merely to save the city of Chicago from expenditures for the sanitary disposal of its sewage which all cities in the United States have to make, and to

permit the city of Chicago to continue draining its sewage through a wide area of the United States in defiance of the present state of the art of sewage disposal.

Respectfully submitted,

HERMAN L. EKERN,
*Attorney General of Wisconsin,*

RAYMOND T. JACKSON,
*Special Assistant Attorney General of Wisconsin,*

RALPH M. HOYT,
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*Attorney General of Pennsylvania,*

PHILLIP WELLS,
*Deputy Attorney General of Pennsylvania.*

# APPENDIX I.

This appendix contains the report of Major Putnam to the Chief of Engineers on application of Sanitary District of Chicago for permit of March 3, 1925; the recommendation of General H. Taylor, Chief of Engineers, on said application; the letter of the Secretary of War Weeks to the Board of Trustees of the Sanitary District; and, the permit of March 3, 1925.

## 1.

## REPORT OF MAJOR PUTMAN TO CHIEF OF ENGINEERS.

U. S. Engineer's Office, Chicago, Ill., March 2, 1925. To the Chief of Engineers, Washington, D. C.

1. This is an application from the Sanitary District of Chicago, a municipality created under the laws of the state of Illinois, to divert 10,000 cubic feet per second of water from Lake Michigan, for the purpose of keeping the sewage of that locality from contaminating its water supply and for reducing the sewage by dilution.

2. This question of the diversion of water from Lake Michigan has been so thoroughly investigated by the Department and discussed at such great length in various reports that it is not believed advisable to enter into any descriptive or historical review before presenting the recommendations which are to follow. Detailed information of this character may be found in the report entitled "Diversion of Water from Lake Michigan," which was submitted by this office on November 1, 1923.

3. This application is prompted by the action of the United States Supreme Court on January 5, 1915, by which it sustained the position taken by the local United States Court, requiring adherence to the limitations placed by the Secretary of War on the amount of the diversion. The local authorities are faced with the alternative

of a reduction in the amount of diversion to 4,167 cubic feet per second by March 5, 1925, or relief from Congress or the War Department.

4. In the issuance of a permit, the exact meaning of the word "diversion" should be understood. In the recommendations which follow, by diversion is meant the amount of water which is actually withdrawn from Lake Michigan by the Sanitary District of Chicago through its main drainage canal and auxiliary channels, and is not inclusive of the amount flowing in the channels which come from the sewers of the locality. In other words, "diversion" is taken to be the gross flow at Lockport, less the amount of water used by the city of Chicago for domestic purposes.

5. It is recommended that a permit be issued to the Sanitary District of Chicago, covering a period of five years, to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8,500 cubic feet per second; the instantaneous maximum not to exceed 11,000 cubic feet per second. This permit should be made conditional upon the following:

(1) The Sanitary District of Chicago shall carry out a program of sewage treatment by artificial processes which will provide the equivalent of the complete (100%) treatment of the sewage of a human population of at least 1,200,000 before the expiration of the permit.

(2) The Sanitary District shall pay its share of the cost of regulating or compensating works to restore the levels or compensate for the lowering of the Great Lakes system, if and when constructed, and post a guarantee in the way of a bond or certified check in the amount of $1,000,000 as an evidence of its good faith in this matter.

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

(4) The execution of the sewage treatment program and the diversion of water from Lake Michigan shall be under the supervision of the United States District Engineer at Chicago, and the diversion of water from Lake Michigan shall be under his direct control in times of flood on the Illinois and Des Plaines Rivers.

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

6. The average diversion from Lake Michigan during 1924 by the Sanitary District has been approximately 8,500 cubic feet per second. This diversion, combined with the discharge from the sewers of the locality, produce a total flow at Lockport of about 9,700 cubic feet per second. This so closely approximates the *flow* necessary to safeguard against reversals of the river into the lake in times of storm (10,000 cubic feet per second) that a permit for *diversion* of 8,500 cubic feet per second will suffice in this regard. No obligation appears to rest with the Department to prevent any increase in pollution of the Illinois and Des Plaines Rivers; the maintenance of *status quo* as regards amount of diversion will place the burden of relieving the lower river situation upon the Sanitary District. Until the controlling works (condition 3) are completed, ample protection against the dangers of a reversal of the river is provided by the authority to divert an instantaneous maximum of 11,000 cubic feet per second.

7. Condition (1), as proposed, provides for the execution of a sewage treatment program which will relieve the load on the Drainage Canal by the equivalent of a population of 1,200,000. Compliance with this condition will make possible a reduction in amount of diversion to 7,250 cubic feet per second or lower by the end of 1929. This condition looks to a reduction to 4,167 cubic feet per second by 1935.

8. It might be considered preferable to substitute the following

condition for the one proposed so that definite yearly performance might be prescribed as closely as possible:

I. That the Sanitary District of Chicago carry out the following program of artificial sewage treatment of a degree sufficient to produce aggregate results equivalent to the complete (100%) treatment of the sewage of a human population of at least 1,200,000.

**Before December 31, 1925**

(1) Completion of 95th Street Pumping Station.

(2) Completion of Calumet Intercepting Sewer serving area south of 87th Street, east of South Chicago Avenue and north of Calumet River.

(3) Removal of levee at entrance of Calumet-Sag Channel.

(4) Completion of miscellaneous sewer connections to Calumet System (S. D. Budget item 65-56-A-1).

(5) Completion of Elmwood Park Interceptor to Des Plaines River.

(6) Placing of contracts for extension to Des Plaines Plant.

**Before December 31, 1926**

(1) Purchase of sewer easements for Des Plaines project as follows:

a. River Grove to Elmwood Park.
b. Bellwood-Broadview.
c. North Riverside.

(2) Purchase of easements for sewer extension to Calumet project:

a. West Blue Island.
b. Blue Island Branch.
c. Hegewisch.
d. Riverdale and Dolton.

(3) Dredging Little Calumet River.

(4) Purchase of site for West Side Plant, including land necessary for trickling filter addition.

(5) Purchase of site for Southwest Side Plant, including land necessary for trickling filter addition.

(6) Completion of following auxiliaries to North Side project:

a. Interceptors from treatment plant south to Fullerton Avenue.

b. Necessary syphons and controls.

(7) Placing of contracts for completion of North Side Plant.

(8) Purchase of sewer easements necessary for West Side project.

**Before December 31, 1927**

(1) Completion of following sewers of Des Plaines project.

a. River Grove to Elmwood Park.

b. Bellwood-Broadview.

c. North Riverside.

(2) Completion of extension to Des Plaines Plant—activated sludge—to give 1945 capacity for connected area.

(3) Placing of contracts for interceptors for West Side project.

(4) Completion of new pumping station to replace existing Lawrence Avenue Station.

(5) Placing of contracts for extension of Calumet Plant.

(6) Placing of contract for West Side Plant—Imhoff.

**Before December 31, 1928**

(1) Completion of sewer extensions to Calumet project as follows:

a. West Blue Island.
b. Blue Island Branch.
c. Hegewisch.
d. Riverdale and Dolton.

(2) Completion of extension to Calumet Plant—Imhoff—to give 1945 capacity for connected area.

(3) Completion of North Side Plant—activated sludge— to give 1930 capacity for connected area.

(4) Purchase of sewer easements necessary for Southwest Side project.

**Before December 31, 1929**

(1) Completion of Interceptors—West Side Plant.

(2) Completion of West Side Plant—Imhoff—to give 1945 capacity for connected area.

9. This condition is not recommended, however. It would be quite impractical to enforce; for there would be many changes to be made in the program during the course of its execution, and each change would require the approval of the Secretary of War and the Chief of Engineers, and perhaps, the rewriting of the permit. If condition (1) is couched in the more general terms recommended, it is proposed to inform the Sanitary District that the performance expected of them will be as outlined in detail in paragraph 8, and this would permit minor departures to be authorized promptly as they were necessary.

10. The estimated cost of the proposed program is approximately $54,192,000. The present bonding power of the Sanitary District (3% of the assessed valuation) is insufficient to finance this program; however, legislative authority may be obtained to increase this rate to 5%—the constitutional limitation. The estimated revenue from bonds on this basis (including reissues) to December 31, 1929, is $66,240,000.

11. Condition (2) merely obligates the Sanitary District to pay

its proper share of works to restore the levels or compensate for the lowering of the Great Lakes system should such works be constructed. It does not commit the Department to any particular plan nor to the general proposition of restoration of lake levels. The posting of the guarantee will not embarrass the Sanitary District financially nor interfere with the execution of the sewage treatment program.

12. Condition (3) is considered necessary to permit an ultimate reduction of the diversion to 4,167 cubic feet per second. Controlling works of some sort will be required to keep the Chicago River from discharging into Lake Michigan in times of flood, and at least two types have been suggested which are believed to be practical.

13. The provision with reference to metering of the water service of the city of Chicago is included for three reasons:

(a) There will be a substantial saving in the cost of construction and operation of sewage treatment plans due to the decreased amount of sewage to be treated.

(b) There will be substantial reduction in the amount of lake water used for domestic purposes.

(c) It will be possible for the city of Chicago to finance a filtration system for its water supply when its water consumption is reduced to a reasonable amount. When the water supply is filtered, the dangers incident to an occasional reversal of the Chicago River will be entirely eliminated.

14. A shorter time limit for the permit is not recommended, as results produced by the end of 1927, for instance, will not permit a reduction in the amount of the diversion, which it is believed should be required in any renewal, no matter when it is made. Furthermore, sufficient performance can not be prescribed for a shorter period to insure completion of a larger program looking to a reduction in diversion to 4,167 cubic feet per second by 1935.

(Signed) RUFUS W. PUTNAM,
Major, Corps of Engineers,
District Engineer.

2.

RECOMMENDATION OF CHIEF ENGINEERS.

March 3, 1925.

To the Secretary of War:

1. The Sanitary District of Chicago has made application for a permit to divert an annual average of 10,000 cubic feet per second from Lake Michigan through the channels of the Sanitary District.

2. The District Engineer recommends the issuance of a permit, covering a period of five years, to divert through the main drainage canal and auxiliary canals of the Sanitary District, an amount of water not to exceed an annual average of 8,500 cubic feet per second; the instantaneous maximum not to exceed 11,000 cubic feet per second, such permit to be subject to certain conditions set forth in the first indorsement hereon.

3. The first condition recommended by the District Engineer provides for the adoption and execution of a program of construction of modern sewage disposal plants at such a rate as to provide before the end of five years for treatment of the sewage of a human population of 1,200,000. This figure is believed to be the maximum practicable under existing conditions, and the proposed construction is the first step in a program which will permit the ultimate reduction of the amount of water diverted to 4,167 cubic feet per second, or lower, as treatment plants are installed.

4. The program of construction recommended is limited to five years, as it is not possible to predict what advances may be made in the science of sewage disposal during the next five years. It is entirely within the realms of possibility that during that period such advances may be made as to warrant the Department's insisting on an even more rapid rate of progress thereafter, should a renewal of this permit be sought. A shorter period for the permit is not believed advisable, as it would be difficult to prescribe sufficient progress in the way of construction of sewage treatment plants and require a

substantial reduction in the diversion upon the renewal of the permit.

5. It is estimated that the construction of sewage treatment plants for a population of 1,200,000 will permit a reduction in the necessary diversion from Lake Michigan of about 1,250 cubic feet per second. In other words, such construction would permit a reduction in the authorized diversion, by December 31, 1929, to about 7,250 cubic feet per second. As stated above (paragraph 4), it is probable that a still more rapid rate of reduction of diversion may be practicable thereafter.

6. It is, of course, highly desirable that the excessive diversion of water from Lake Michigan be reduced to reasonable limits with the utmost dispatch. For humanitarian reasons, it is impracticable to make the desired reduction instantaneously, and it is believed that the procedure proposed by the District Engineer is the most reasonable and just to all concerned that can be adopted.

7. As further means of relieving the present undesirable situation with respect to lake levels, the District Engineer recommends as conditions of the permit the prompt adoption and execution of a program for metering Chicago's water supply, the construction of controlling works to prevent the discharge of the Chicago River into Lake Michigan in times of heavy storms, and also that the Sanitary District be required to pay a share of the cost of such regulating or compensating works for restoring lake levels as may be constructed, posting a bond of $1,000,000 as a guarantee of their good faith in the matter.

8. I concur in the views of the District Engineer, and recommend the issuance of a permit in accordance with the draft herewith.

H. TAYLOR,

Major General,
Chief of Engineers.

3.

## LETTER OF SECRETARY OF WAR WEEKS TO SANITARY DISTRICT.

Mr. Lawrence F. King, March 3, 1925.
President, Board of Trustees,
Sanitary District of Chicago,
910 South Michigan Avenue,
Chicago, Illinois.

Dear Sir:

With reference to your application of January 31, 1925, for permission to divert an annual average of ten thousand cubic feet of water per second from Lake Michigan through the channels of the Sanitary District of Chicago, it is my pleasure to inform you that after careful consideration by the Chief of Engineers and myself, and acting upon his recommendation, I have issued a permit, effective this date, authorizing the temporary withdrawal of 8,500 cubic feet of water per second until December 31, 1929. One copy of this permit is transmitted herewith.

Your attention is invited to the conditions to which this authorization is subject, particularly those prescribing certain definite accomplishments on the part of your locality. This department has always held and continues to hold that the taking of an excessive amount of water for sanitation at Chicago does affect navigation on the Great Lakes adversely, and that this diversion of water from Lake Michigan should be reduced to reasonable limits with utmost dispatch. I appreciate that the desired reduction can not be made instantaneously, but with the view of making a substantial reduction by the time this permit expires, the conditions require, among other things, the artificial treatment of the sewage of a large population, the construction of controlling works to prevent the discharge of the Chicago River into the lake, and the metering of the water service of the city of Chicago.

I can not emphasize too strongly the importance of diligent and prompt execution of the conditions imposed. If it is necessary to increase the bonding power of the Sanitary District from three to five per cent of the assessed valuation of the taxable property, or if increased taxing power is imperative, the requisite legislative permission should be obtained promptly. While it is not in my province to dictate, I sincerely urge the reduction of your expenses to the lowest possible requirements, and, further, that arrangements be made with the packers and corn products interests to treat their waste before discharging it into the sewers.

I believe that steps should be taken which will enable Chicago to complete the entire work within ten years.

Sincerely yours,

JOHN W. WEEKS,
Secretary of War.

4.

## PERMIT OF MARCH 3, 1925.

## ORDER BY SECRETARY OF WAR

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of federal, state, or local laws or regulations, nor does it obviate the necessity of obtaining *state assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF FEDERAL GOVERNMENT SO FAR AS CONCERNS PUBLIC RIGHTS OF NAVIGATION. (See *Cummings* v. *Chicago,* 188 U. S., 410.)

### THE PERMIT

WHEREAS, By Section 10 of an Act of Congress, approved March 3, 1899, entitled "An Act making appropriations for the con-

struction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any part, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, barbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same;

AND WHEREAS, Application has been made to the Secretary of War by *The Sanitary District of Chicago, Illinois,* for authority to divert an annual average of 10,000 cubic feet of water per second from Lake Michigan through the channels of said Sanitary District;

AND WHEREAS, In the judgment of the Secretary of War, an annual average diversion of more than 8,500 cubic feet per second should not now be permitted;

NOW THEREFORE, This is to certify that, upon the recommendation of the Chief of Engineers, the Secretary of War, under the provisions of the aforesaid statute, hereby authorizes the said Sanitary District of Chicago to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8,500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second, upon the following conditions:

1. That there shall be no unreasonable interference with navigation by the work herein authorized.

2. That if inspections or any other operations by the United

States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

3. That no attempt shall be made by the permittee, or the owner, to forbid the full and free use by the public of any navigable waters of the United States.

4. That the Sanitary District of Chicago shall carry out a program of sewage treatment by artificial processes which will provide the equivalent of the complete (100%) treatment of the sewage of a human population of at least 1,200,000 before the expiration of the permit.

5. That the Sanitary District shall pay its share of the cost of regulating or compensating works to restore the levels or compensate for the lowering of the Great Lakes system, if and when constructed, and post a guarantee in the way of a bond or certified check in the amount of $1,000,000 as an evidence of its good faith in this matter.

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

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

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

9. That if, in the judgment of the Chief of Engineers and the Secretary of War, sufficient progress has not been made by the end of each calendar year in the program of sewage treatment prescribed

herein so as to insure full compliance with the provisions of condition 4, this permit may be revoked without notice.

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

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

WITNESS my hand this 3rd day of March, 1925.

(Signed) H. TAYLOR,
Major General, Chief of Engineers.

WITNESS my hand this 3rd day of March, 1925.

JOHN W. WEEKS, Secretary of War.

## APPENDIX II

This appendix contains the resolutions of protest of the lake states against the diversion of the waters of the Great Lakes by the Sanitary District of Chicago.

### WISCONSIN RESOLUTION

[Jt. Res. No. 9, A.]

No. 1, 1925

### JOINT RESOLUTION

Protesting to the congress and to the secretary of war of the United States against the continuation of the illegal taking of water from the Great Lakes through the Chicago Drainage Canal.

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WHEREAS, Actions were instituted by the United States in 1908 and 1913 against the Sanitary District of Chicago praying an injunction to restrain the diversion of water from the Great Lakes through the Chicago Drainage Canal in excess of four thousand one hundred sixty-seven cubic feet per second, and over the protest of the government a decision was delayed until, after the resignation of Judge Landis, on June 18, 1923, Judge Carpenter decided the case in favor of the government and ordered that the injunction be granted;

WHEREAS, The states of Wisconsin, Minnesota, Michigan, Indiana, Ohio, Pennsylvania and New York joined in appearing as amici curiae with the United States against the Sanitary District of Chicago in said action on appeal before the supreme court of the United States;

WHEREAS, The United States supreme court on January 5, 1925, affirmed the decision of Judge Carpenter, holding that the Sanitary District of Chicago has violated the laws of the United States, that

its action is in violation of our treaty with Great Britain and enjoining any abstraction of water in excess of four thousand one hundred sixty-seven cubic feet per second;

WHEREAS, The legislature of Wisconsin in 1921 ordered and directed the beginning of a suit in the supreme court of the United States by the state of Wisconsin against the state of Illinois and the Sanitary District of Chicago to restrain the taking of water from the Great Lakes by the Sanitary District of Chicago and such action has begun and is still pending, no proceedings therein having been had awaiting the final decision in the case just decided;

WHEREAS, The present illegal abstraction of water from the Great Lakes now, and for many years past, has reached the enormous amount of upwards of ten thousand cubic feet per second and has seriously lowered the levels of the Great Lakes and the St. Clair, Detroit, Niagara and St. Lawrence rivers, and has greatly restricted and interfered with navigation thereon;

WHEREAS, The Great Lakes constitutes the greatest waterway in the world, carrying at the present time a tonnage equal to one-fourth of all the railroad tonnage of the United States at a cost of less than one-fifth that of railroad freight rates, and the diversion by the Sanitary District of Chicago has already increased lake freight rates by not less than three million dollars annually and has damaged lake harbors and other works fully twelve million dollars;

The enormous diversion has created currents in the Chicago harbor which have destroyed Chicago as a lake port to its own great loss and to the great loss of all other ports thereby deprived of economical lake transportation to and from this great center of the middle west;

Incalculable damage has been done to farm and other property along the Illinois river and its fishing and pearl industry has been destroyed by the dumping of Chicago sewage into the stream;

The action of the Sanitary District in abstracting nearly ten thousand cubic second feet where less than one thousand cubic second feet is necessary or desirable for navigation has rendered futile all

projects for a lake to the gulf waterway by way of the drainage canal and the Desplaines, Illinois and Mississippi rivers, and if continued will forever prevent the development of such waterway;

The Chicago Sanitary District is deriving a revenue of more than one million dollars annually from electric power produced by the waters so taken, and by this diversion is preventing the United States from obtaining its fair share of water for power purposes at Niagara Falls and along the St. Lawrence river, where the same quantity of water will produce at least ten times the amount of power produced by the Sanitary District;

The controversy over the diversion by the Sanitary District stands in the way of the immediate undertaking of the St. Lawrence waterway to give to ocean going vessels access to the Great Lakes and to give to the middle and the northwestern part of the United States the advantages of ocean going ports and the enormous development of power possible through such improvement of the St. Lawrence river; and

WHEREAS, The Sanitary District of Chicago has repeatedly asked Congress to enact legislation permitting such diversion and Congress has refused to enact such legislation, and bills are now pending in Congress for such permission, and the Sanitary District has repeatedly petitioned Secretaries of War for permits authorizing such diversion, and Secretary of War Stimson, in 1913, refused any permission in excess of four thousand one hundred sixty-seven cubic feet per second, and the Sanitary District now gives out that it will make application for a permit to increase said amount and is carrying on a propaganda and gives out that it must continue to take not less than ten thousand cubic feet per second until the year 1945, with the implication that it intends to continue to abstract this amount of water or more during this period and all time thereafter and will not erect sewage disposal plants other than to take care of sewage from the growth of population and industries during this time, and the Sanitary District is not now making provisions for the immediate practical disposal of sewage by modern methods as is being done in other large lake cities; and,

WHEREAS, The states appearing with the government in the recent case take the position that the waters and the right to have these waters flow down the natural watershed of the Great Lakes is a property right of these states within their respective boundaries, and that there has been delegated to the government of the United States no power to divert these waters for any purpose except possibly so far as needed for the protection and improvement of navigation for which purpose there will at no time be needed more than one thousand cubic feet per second along the Chicago, Desplaines and Illinois rivers,

*Resolved, by the Assembly, the Senate concurring,* That the state of Wisconsin hereby respectfully protests to the Congress of the United States and to the Secretary of War against any action by either recognizing or continuing any permit to the Sanitary District of Chicago to divert water from the Great Lakes through the Chicago Drainage Canal for any purpose other than the protection and improvement of navigation;

*Resolved,* That a copy of this resolution, properly attested by the presiding officers and chief clerks of both houses, be sent to the President of the United States, the Secretary of War, the presiding officers of the senate and the house of representatives, and to each United States senator and member of Congress from Wisconsin;

*Resolved,* That a copy of this resolution so attested be sent to the governor and the presiding officers of both houses of the legislature in each of the states of the union, inviting the cooperation of the states in like protest to the Congress and to the Secretary of War.

HENRY A. HUBER,
President of the Senate.

H. W. SACHTJEN,
Speaker of the Assembly.

F. W. SCHOENFELD,
Chief Clerk of the Senate.

C. G. SHAFFER,
Chief Clerk of the Assembly.

## MINNESOTA RESOLUTION

### A CONCURRENT RESOLUTION PROTESTING TO THE CONGRESS AND SECRETARY OF WAR OF THE UNITED STATES AGAINST THE CONTINUATION OF THE ILLEGAL TAKING OF WATER FROM THE GREAT LAKES THROUGH THE CHICAGO DRAINAGE CANAL.

Whereas actions were instituted by the United States in 1908 and 1913 against the Sanitary District of Chicago, praying an injunction to restrain the diversion of water from the Great Lakes through the Chicago Drainage Canal in excess of four thousand one hundred sixty-seven cubic feet per second, and over the protest of the government a decision was delayed until, after the resignation of Judge Landis, on June 18, 1923 Judge Carpenter decided the case in favor of the government and ordered that the injunction be granted;

Whereas the states of Wisconsin, Minnesota, Michigan, Indiana, Ohio, Pennsylvania and New York joined in appearing as amici curiae with the United States against the Sanitary District of Chicago in said action on appeal before the supreme court of the United States;

Whereas the United States supreme court on January 5, 1925, affirmed the decision of Judge Carpenter, holding that the Sanitary District of Chicago has violated the laws of the United States, that its action is in violation of our treaty with Great Britain and enjoining any abstraction of water in excess of four thousand one hundred sixty-seven cubic feet per second;

Whereas the legislature of Wisconsin in 1921 ordered and directed the beginning of a suit in the supreme court of the United States by the State of Wisconsin against the state of Illinois and the Sanitary District of Chicago to restrain the taking of water from the Great Lakes by the Sanitary District of Chicago and such action has been begun and is still pending, no proceeding therein having been had awaiting the final decision in the case just decided;

Whereas the present illegal abstraction of water from the Great Lakes now, and for many years past, has reached the enormous amount of upwards of ten thousand cubic feet per second and has seriously lowered the levels of the Great Lakes and the St. Clair, Detroit, Niagara and St. Lawrence rivers, and has greatly restricted and interfered with navigation thereon;

Whereas the Great Lakes constitute the greatest waterway in the world, carrying at the present time a tonnage equal to one-fourth of all the railroad tonnage of the United States at a cost of less than one-fifth that of railroad freight rates, and the diversion by the Sanitary District of Chicago has already increased lake freight rates by not less than three million dollars annually and has damaged lake harbors and other works fully twelve million dollars;

Therefore, be it resolved by the Senate of the state of Minnesota, the House of Representatives concurring, that the state of Minnesota hereby respectfully protests to the Congress of the United States and to the Secretary of War, against any action by either, recognizing or countinuing any permit to the Sanitary District of Chicago, to divert water from the Great Lakes through the Chicago Drainage Canal for any purpose other than the protection and improvement of navigation.

Resolved, that a copy of this resolution, properly attested, by the proper officers of both houses, he sent to the President of the United States, the Secretary of War, the presiding officers of the Senate and the House of Representatives, and to each United States Senator and member of Congress from the state of Minnesota.

W. I. NOLAN,
President of the Senate.

JOHN A. JOHNSON,
Speaker of the House of Representatives.

Passed the Senate the Fourth day of February, nineteen hundred and twenty-five.

GEO. W. PEACHEY,
Secretary of the Senate.

Passed the House of Representatives the Fourth day of February, Nineteen Hundred and Twenty-five.

OSCAR ARNESON,
Chief Clerk of the House of Representatives.

Approved February 4th, 1925.

THEODORE CHRISTIANSON,
Governor of the State of Minnesota.

Filed February 5th, 1925.

MIKE HOLM,
Secretary of State.

## OHIO RESOLUTION

86th General Assembly,
Regular Session, 1925.

H. J. R. No. 5

MR. HUNT, of Lucas.

## JOINT RESOLUTION

Protesting against the taking of water from the great lakes for use of the Chicago drainage canal or for any other purpose.

WHEREAS, The city of Chicago has for many years taken from Lake Michigan many thousands of cubic feet of water per second for the use and purposes of the Chicago drainage canal; and

WHEREAS, The diversion of said water has resulted in the lower-

ing of the water level in the great lakes, and is a serious menace to navigation upon said great lakes; and

WHEREAS, A member of the Illinois delegation to the congress of the United States has introduced a bill and the same is now pending in congress to legalize the further diversion of a greater quantity of water into the Chicago drainage canal and thence into the Mississippi river and that said diverted water would be lost to the great lakes forever; and

WHEREAS, The water of the great lakes is an international possession and the taking of the same is likely to result in complications and difficulties with a friendly foreign neighbor; and

WHEREAS, The canalization of the great lakes and the St. Lawrence river will in all probability be begun and completed within the next ten years, thus making ocean ports of all of our great lake cities and bringing undreamed of benefit to a great proportion of the population of the United States; therefore

*Be it resolved by the General Assembly of the State of Ohio,* That we do hereby emphatically protest against the diversion of any water whatsoever by the city of Chicago or elsewhere from its normal flow through the chain of the great lakes and the St. Lawrence river to the sea or any other act which will in any way tend to interfere with or impair the normal flow of the usual level water in the said great lakes.

That we do hereby respectfully request our representatives in both houses of congress to use their vote and influence to prevent the taking of any further quantity of water from the great lakes and to compel the city of Chicago to discontinue its present diversion of said water.

That a copy of this resolution be sent to the president of the United States, to the secretary of war, to the Honorable Frank B. Willis and Honorable Simeon D. Fess, United States senators from Ohio, and to each and every member of the Ohio delegation to the House of Representatives of the congress of the United States.

## PENNSYLVANIA RESOLUTION

### COMMONWEALTH OF PENNSYLVANIA
### RESOLUTION NO. 4.

In the House of Representatives,
January 26, 1925.

WHEREAS, The city of Chicago is now diverting colossal quantities of water out of Lake Michigan into the Chicago Drainage Canal for sanitation and power purposes, which diversion has already caused great injury to commerce on the Great Lakes, and

WHEREAS, The said city of Chicago is now seeking permission through the provisions of a bill now pending in the Congress of the United States, to increase the diversion of water from said lake to ten thousand cubic feet per second for the alleged purpose of protecting its water supply and disposing of its sewage, and

WHEREAS, The diversion of water in the quantities intended would result in a considerable additional lowering of the mean levels of the Great Lakes to the great damage of the inner harbors and connecting channels and by reducing the carrying capacity of the lake fleet would make certain an enormous yearly loss to owners thereof, and

WHEREAS, The lowering of the levels of the Great Lakes and the changing conditions resulting therefrom would very seriously affect the fishing industries of the Commonwealth, and

WHEREAS, This excessive drainage would be of water to and in which the Dominion of Canada has rights equal to those of the United States, and any attempt to increase the same is in violation of the Treaty Relations with the Dominion of Canada, therefore

BE IT RESOLVED (if the Senate concur), That it is the opinion of the General Assembly of the Commonwealth of Pennsylvania that any increase in the amount of water permitted to be drained from the Great Lakes would be against the interests of the people of the United States, would seriously affect the fishing industries of this

Commonwealth, would be unnecessary, and might have an unwanted effect upon our friendly relations with the people of the Dominion of Canada, and be it further

RESOLVED, That a copy of these resolutions be transmitted by the Secretary of the Commonwealth to each Member of the Senate and each Member of the House of Representatives in the Congress of the United States, and that they be urged to use their vote and influence against the passage of any legislation intended to permit such further damage.

The foregoing resolution was adopted by the House of Representatives and concurred in by the Senate, January 26th, 1925.

THOMAS H. GARVIN,
Chief Clerk of the House of Representatives.

W. P. GALLAGHER,
Chief Clerk of the Senate.

Approved—The 3d day of February, A. D. 1925.

GIFFORD PINCHOT.

The foregoing is a true and correct copy of Resolution of the General Assembly No. 4.

CLYDE L. KING,
Secretary of the Commonwealth.

## NEW YORK RESOLUTION

### STATE OF NEW YORK
### IN SENATE

Albany, February 2, 1925.

By Mr. Gibbs:

Whereas, There is pending before Congress a bill known as Senate Bill No. 4428 (McCormick bill) which among other things author-

ized the withdrawal of 10,000 cubic feet per second of water from Lake Michigan by the Sanitary District of Chicago; and there is also pending in the Senate an amendment proposed by Mr. McKeller to H. R. Bill No. 3933, which bill provides for the purchase of the Cape Cod canal property, and which amendment authorizes among other things for some years the withdrawal of 10,000 cubic feet per second of water from Lake Michigan by the Sanitary District of Chicago and thereafter a withdrawal of 7,500 cubic feet per second;

Whereas, the withdrawal of 1,000 cubic feet per second of water from Lake Michigan is adequate for the needs of navigation in constructing a waterway from Lake Michigan to ultimately connect with the Mississippi River; and the withdrawal of 10,000 cubic feet per second of water from Lake Michigan at Chicago is damaging navigation interests on the Great Lakes to the extent of approximately $3,000,000 annually in addition to the damage done to other interests;

Resolved, (If the Assembly concurs), That the Legislature of the State of New York respectfully memorialize the Congress of the United States not to advance to passage the aforesaid bills nor any other measure which would authorize the withdrawal of any quantity of water from Lake Michigan through the Chicago sanitary canal in excess of 1,000 cubic feet per second.

Be it Further Resolved, That a copy of these resolutions be transmitted to the Secretary of War, the Clerk of the Senate and to the Clerk of the House of Representatives and to each Senator and Representative in Congress representing the State of New York, and that the latter be urged to do all in their power by voice and vote to prevent the passage of this proposed legislation, which by this memorial is brought to the attention of Congress.

By Order of The Senate
ERNEST A. FAY, Clerk.

IN ASSEMBLY
February 3, 1925
Concurred in without amendment,
By order of the Assembly,
Fred W. Hammond, Clerk.

House Concurrent Resolution No. 5.

## MICHIGAN RESOLUTION

## A CONCURRENT RESOLUTION PROTESTING AGAINST THE UNLAWFUL ABSTRACTION OF THE WATERS OF LAKE MICHIGAN BY THE SANITARY DISTRICT OF CHICAGO, OR ANY OTHER PERSON OR AGENCY.

Whereas, The State of Michigan has a full proprietary ownership in all the waters in the Great Lakes within the boundary lines of the State, and as such owner the State is entitled at all times to have an uninterrupted flow of all the waters coming naturally into the Great Lakes Basin, and is in duty bound to protect and preserve the right of the State to these waters; and

Whereas, The Sanitary District of Chicago has been for a long time unlawfully abstracting large quantities of the waters of Lake Michigan and diverting these waters from the Great Lakes Basin into the Mississippi River Basin; and

Whereas, There are now pending in the Congress of the United States bills purporting to be measures for the improvement of commerce and navigation which would authorize on the part of the Federal Government a diversion of ten thousand cubic feet per second of water from Lake Michigan for the alleged improvement of the navigation of waters lying outside the Great Lakes Basin, but which said bills are in fact for the purpose of an attempted legalization of the abstraction of these waters by the Sanitary District of Chicago for its own use and benefit; and

Whereas, An abstraction and diversion of the waters of Lake Michigan does and will so injure the navigability of the Great Lakes and the connecting waters that it makes navigation of the many harbors in Michigan difficult and dangerous and the maintenance of these harbors more costly; seriously affects the immense fruit interests in the State and jeoparizes their development through chemical changes due to the diversion of the natural flow of these waters; retards the building up of the Great Lakes navigation, both as to gross volume and the size and draft of the vessels employed; seriously affects privately owned docks, elevators, warehouses, railroad lines and many other constructions built to take and ship lake tonnage; therefore, be it

Resolved, By the House of Representatives of the State of Michigan, (the Senate concurring), That for and in behalf of the people of the State, we vigorously protest against and object to the continued unlawful diversion and abstraction of the waters of Lake Michigan by the Sanitary District of Chicago; and be it further

Resolved, That we oppose and object to any scheme or plan of improvement of the navigable waters of the United States at the expense of and to the detriment of the continued improvement and natural navigability of the Great Lakes; and be it further

Resolved, That we commend the Attorney General of this State for the very active and able service rendered the people in leading the opposition of the Lake Border States to any unlawful abstractions and diversions of these waters, and urge him to continue all necessary activities in protection of the States' rights in and to these waters; and be it further

Resolved, That a copy of these resolutions, duly prepared by the Secretary of the Senate and certified to by the said Secretary and the Clerk of the House of Representatives be transmitted by the said Secretary of the Senate to the Honorable, the Secretary of War of the United States; to each of the Michigan members of Congress; to the Secretary of the Senate and the Secretary of the

House of Representatives of Congress; and to the Attorney General of this State.

## ONTARIO RESOLUTION

### CANADA

*To All to Whom These Presents May Come or Concern.*

I, CHARLES FREDERICK BULMER, Assistant Clerk of the Legislative Assembly of the Province of Ontario, do hereby certify that the typewritten paper hereto annexed is a true copy of a Resolution made upon the fourth day of April, A. D. 1924, by the Legislative Assembly of the Province of Ontario.

(Signed) C. H. BULMER
Assistant Clerk of the Legislative Assembly,
ONTARIO

ON MOTION OF MR. KEEFER,
SECONDED BY MR. McCREA,

That whereas there is and has been for some time past, but without any legal authority for so doing, a diversion and abstraction at Chicago of 10,000 cubic feet per second flow of waters out of the boundary waters between Canada and the United States, commonly known as the Great Lakes System, and into another watershed into which said waters do not belong;

And whereas such diversion and abstraction is contrary to the international treaty respecting boundary waters entered into between Canada and the United States, and the Canadian Government has been protesting and is protesting against such diversion for some time past to the Government of the United States;

And whereas the Province of Ontario, which is bounded on the south by the Great Lakes System, is vitally affected by any diversion from the said Lakes of any body of water, both because of its effect

on navigation in the Great Lakes and the St. Lawrence River, and also because of the Hydro-electric energy that could be developed from such water viz., 500,000 horsepower, in the Niagara and the St. Lawrence Rivers; therefore,

Be it resolved, That the Legislature of the Province of Ontario in Session assembled respectfully urge upon the Government of the Dominion of Canada to use every means within its power with the United States of America to restrain the City of Chicago from such illegal and improper diversion of water from the international waters in which Canada and particularly the Province of Ontario are so vitally interested.

And this Legislature also recommends that the Government of Canada should request the Government of the United States to take and exercise control of the works which permit of any diversion at Chicago instead of allowing same to be under the jurisdiction of one interested party only.