IN THE

Supreme Court of the United States

Original Jurisdiction

October Term, 1925

The States of Wisconsin, Ohio, Pennsylvania and Minnesota, *Complainants,*

vs.

State of Illinois and Sanitary District of Chicago, *Defendants,*
States of Missouri, Tennessee, Kentucky and Louisiana, *Intervening Defendants.*

Bill in Equity

Original Jurisdiction

No. [illegible]

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

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SUBJECT INDEX.

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SUPPLEMENTARY STATEMENT

We find certain features of complainant's "Statement of Facts," that call for correction, and therefore we submit this supplemental statement:

(1) In their caption to subdivision II (complain-

ant's brief, page 5), and elsewhere, they say that "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."

This statement ignores substantial provisions of the Illinois Statutes and is incorrect in fact.

We assume there can be no impropriety in referring to the express provision of the Sanitary District Act of Illinois, of 1889, which is referred to, and partly quoted in paragraph 9, page 6, of complainant's amended bill. This statute created the Sanitary District, and, as amended, defined its powers. This statute shows conclusively and contrary to the above statement of complainants that the Canal is now and always has been a navigation as well as a sanitation project.

By Section 7, *inter alia,* the trustees are given power to "make and establish docks adjacent to *any navigable channel made under the provisions hereof* for drainage purposes, and *to lease, manage and control such docks.*" By Section 17, the trustees are empowered to enter upon, use, widen, deepen and improve any navigable or other waters, waterways, canal or lake. Section 23, which is in part quoted on pages 6 and 7 of the amended bill, specifically authorizes the use of the waters of Lake Michigan in the canal. Section 24 provides that the canal shall be *a navigable water of the United States, under the control of the Federal Government, for navigation purposes* but not for sanitary or drainage purposes.

Two years after the canal was opened, and, of course, long before the filing of this suit, an act of the Illinois

General Assembly, in force July 1, 1901, gave additional powers to the Sanitary District, among others the power to utilize the original Illinois and Michigan Canal theretofore built by the State of Illinois pursuant to the authority of the Act of Congress of March 2, 1827, subject, however, to the obligation to supply the facilities afforded by that canal. By Section 3, it was provided that the District "shall permit all water craft navigating or proposing to navigate said Illinois and Michigan Canal to navigate all of said channels of said sanitary district promptly, without delay, and without payment of any tolls or lockage charges for so navigating in said channels." And Section 8, specifically required the district to comply with all of the provisions of the Act of Congress of March 2, 1827, which provided for the uniting of the waters of Lake Michigan and the Illinois River.

These statutes of Illinois, which, as we shall hereafter show, have been held to be valid under the Constitution of Illinois, clearly empowered the defendant Sanitary District to construct, maintain and operate navigable channels, and this was an essential part of the purpose of the Legislature in the enactment of these statutes.

In addition to this conclusion, necessary to be drawn from the above provisions, the same purpose is also clearly shown by the requirements of Section 23, that the channel, when created, shall be of the depth of not less than fourteen feet, and, if cut through rock, of not less than eighteen feet deep, and "a current not exceeding three miles per hour." If the sole purpose of its construction had been to dispose of sewage, it would have been in the interest of the proper carrying out of such a purpose to require a rapid current rather

than to put in a prohibition of any such speedy flow. The only possible purpose in mind in this latter requirement was to demand at all times the maintenance in the canal of a current which would not be inconsistent with ordinary navigation requirements.

There is also a complete lack of harmony between the statement of the complainant's brief above referred to, as to the purpose of the Sanitary District's canal, and their statement (page 9), of the actual volume of commerce transported on the canal.

Moreover, for the purpose of this case, the purpose and usefulness of this canal for navigation, must also be regarded as conclusively established by the fact that the Secretary of War has, from the beginning, and in the interests of navigation, assumed jurisdiction over its construction and uses, and the amount of diversion through it.

(2) On page 10 of their brief, under division IV of their "Statement of Facts," complainants make the following statements: "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, DesPlaines and Illinois Rivers." And complainants support this statement by quotations from a number of engineering reports, none of which were referred to in the bill of complaint.

This statement, we presume, is based upon Paragraph 25 of the bill of complaint (pages 18 and 19), which alleges, "that the amount of water necessary to permit *the said canal* to be operated for navigation purposes only," as orators are informed and believe, does not at the present time exceed 500 cubic feet per second, and that the amount to be needed for future requirements for navigation only, will not, on in-

formation and belief, exceed 1,000 cubic feet per second, even "if the said canal should come to be utilized to the fullest extent to which it is physically capable of being used for the purposes of navigation."

This is the sole averment in the bill specifying the quantity of diversion claimed by the complainants to be necessary on any portion of the Lakes-to-the Gulf Waterway for navigation purposes.

It should be noted that the statement just quoted from the brief, states the amount of water alleged to be needed *not only* upon *the canal,* but also in *the Des-Plaines and Illinois Rivers,* whereas these two rivers were not included in the above averment in the bill.

This averment in the bill, limited as it is to *the canal only,* being technically admitted by the pending motions and demurrer, is sought to be used again and again throughout the complainant's brief as a binding admission as to the needs of navigation *throughout the entire Lakes-to-the Gulf Waterway.*

We call attention here to the fact that the admission as made by the demurrer and motions to dismiss, is much narrower than it is stated in complainant's brief, i. e., the admission is only that the *utmost amount of diversion needed for navigation purposes on the Canal,* is 1,000 cubic feet per second.

The contentions that complainants predicate on this admission of fact we shall reply to later in this brief, where we shall also endeavor to show that other portions of the bill more than overcome the effect of this omission, and permit the Court in its consideration of the pending motions and demurrer to take into account the much greater quantity of water that is in fact needed for navigation on the extensive system

of navigable waters of which the canal is only a very small part.

I. THE QUESTION OF JURISDICTION.

The Brief for the complainant states is predicated, as to this question, upon assumptions and contentions that are not pleaded in the bill, nor supported by the authorities cited.

The grounds upon which rest the contentions of the complainant states appear in points I and II of "Points and Authorities," pages 23 to 27, and in subdivisions I & II, pages 38 to 63, of the "Argument," complainants' brief.

Summarized they are:

(A) That the bill presents a case involving the *proprietary interests* of complainant states, as *absolute owners* of parts of the waters of the Great Lakes within their borders.

(B) That as quasi-sovereigns, they have the right wholly distinct from the injuries to their citizens, to protect their own quasi-sovereign rights.

(C) That they have a right to maintain this suit in their representative capacities to protect their citizens.

(D) That they have a right to maintain this suit in their private capacities as owners of public works and property.

(E) That they can maintain this suit not as "an academic vindication of the freedom of commerce, but as a redress" of special injuries to the complainants in the capacities above stated; and

(F) That the bill does not ask the Court to "regulate navigation or to supervise long continuing acts."

The weakness of complainants' case appears first from the fact that a comparison of the scope of the above contentions with the scope of the bill and its expressed legal theory shows that a substantial part of their present contentions is an after-thought not at all within the contemplation of the bill.

We assume that the Court will decide this question of jurisdiction within the limits of the averments of the bill, although we shall endeavor in this brief to meet all of the contentions of complainants on this question.

The sole subject matter of the bill is navigability in interstate commerce; its main theory is that the complainant states are lower riparian owners along a waterway of which Lake Michigan is the upper stretch, and they, as lower riparian owners, claim injury solely from interference by upper riparian owners, with the navigability of waterways for use in interstate commerce. The bill itself expressly states the nature of the legal rights sought to be protected, and the legal theories upon which relief is asked; see paragraph 29, pages 33-34.

The sole subject matter of each of these rights and wrongs, is the alleged interference with the navigability in interstate commerce, of the waters of the Great Lakes and of the "Lakes-To-The-Gulf" waterway. This case has to do only with the protection and control of the navigability of certain navigable waters of the United States, over which, as the bill itself shows, the Congress has assumed and is exercising, its exclusive jurisdiction.

This controlling fact—perhaps the most important fact in this case—*that Congress has taken and is exercising,* through its Agent the Secretary of War, *com-*

plete jurisdiction over the entire subject matter—even to the extent of *expressly authorizing the very diversion complained of—is ignored by complainants' brief on this question of jurisdiction.*

We refer to this fact as important and vital, because none of the cases cited by complainant disclose any instance in which this Court has taken jurisdiction and granted relief at the instance of a State, to protect any feature of interstate commerce over which the Congress had theretofore taken and was then exercising its paramount jurisdiction and control.

Proceeding now to a discussion of complainants' grounds of jurisdiction in the order above summarized, we respectfully contend:

(A) *That the complainant States have no such proprietary interest in or ownership of the waters of the Great Lakes within their borders, as to supersede or limit the paramount power of Congress to protect and control the navigability of these waters, and for such purposes to permit the diversion from Lake Michigan of which the amended bill complains.*

The Nature of Complainants' Proprietary Interest.

If, as seems to be the case, complainants claim absolute ownership, as individual proprietors of a part of the water of the Great Lakes, we need only quote from the opinion in *U. S. vs. Chandler-Dunbar W. P. Co.,* 229 U. S. 53, at 69:

> "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."

The extent to which the States have a proprietary interest *in the lands under* these waters, is not involved in this case. Although it is suggested in complainants' brief (page 53), that damage has resulted to riparian owners—to this extent seeking to involve the title of complainant States to the lands under the waters—no such claim is made in the bill.

The sole question presented by the bill, is the control of the navigability of these waters.

While it is true that the complainant States have some proprietary interest in, or title to, these waters while within their respective boundaries, the very authorities cited by them show that they are merely trustees of this title to protect this public right of navigation, *but subject always to the paramount power of Congress.*

This title is an incident of sovereignty, and is similar to the title held by the Crown to the navigable waters of Great Britain. The title thus derived is necessarily held subject to the provisions of the Constitution, and to the paramount power of Congress to control interstate commerce. The so-called "trust," insofar as interstate commerce is concerned, is therefore, merely a naked trust.

The fact that the complainant States have such a limited or qualified title to these waters, cannot of itself justify the claimed jurisdiction. The bill avers no attack on this title, and the interference with the rights claimed to be incident to such title, is shown by the bill to be authorized by Congress pursuant to its paramount power, subject to which the title is held.

In *Illinois Central R. Co. vs. Illinois,* 146 U. S. 387, at 452 (36 L. Ed. 1018-1042), the Court said (italics ours):

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, * * *. *It is a title held in trust* for the people of the State *that they may enjoy the navigation of the waters, carry on commerce over them,* and have liberty of fishing therein, free from the obstruction or interference *of private parties.* * * *
>
> (p. 453) General language sometimes found in opinions of the courts, expressive of absolute ownership and control of lands *by the state* under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

In *United States vs. Rio Grande Dam & I. Co.* 174 U. S. 690, 43 L. Ed. 1136, the Court held that the common law authority of the states to regulate, permit or deny diversions from streams flowing within their boundaries, is always subject to the paramount power of Congress to regulate interstate commerce.

So it is clear that the proprietary interest asserted by the complainant States, cannot constitute a ground for jurisdiction in the instant case, because the bill shows that jurisdiction is sought to be invoked notwithstanding the fact that Congress has taken and is exercising its paramount and exclusive jurisdiction over the subject matter of this suit.

The Claimed Common Law Right to An Undisputed Flow.

The bill (page 35) claims a "common law right" of the complainant States and their peoples, to have an

unobstructed use of Lake Michigan for purposes of navigation "free from any and all interference with the *natural* navigable capacity of said Lake." Upon this averment is based that substantial part of complainants' brief in which they claim that jurisdiction should be taken and relief granted in this case, because of the diversion of water from Lake Michigan, and because such diversion carries the water into a different water shed.

It is a complete answer to these contentions, that the bill shows: that the diversion of water from Lake Michigan,—the alleged wrongful act on which the entire bill rests,—has been authorized by Congress through its agent, the Secretary of War; that the diversion thus authorized, was for the expressed purpose of aiding navigation; and that, therefore, the argument of complainants is that their right to have the waters of Lake Michigan flow to them without interruption or diminution of their natural capacity, is superior to the power of Congress under the Constitution to permit a diversion of such waters for the benefit of navigability.

Moreover, this Court has firmly established the doctrine that the common law rules affecting the rights of riparian owners to appropriate the waters of flowing streams may be changed by the States through legislation, or by established custom, for purposes having no relation to navigation, such as the reclamation and irrigation of arid lands, and the conduct of mining opertions; and that such appropriations may be made even to the extent of permanently diverting waters used for such purposes from their natural water shed.

In *U. S. v. Rio Grande Dam Co.*, 174 U. S. 690, at 702-703, there was a diversion of water from the Rio

Grande River (flowing between the United States and Mexico), and a claim by the United States that such diversion of water from the Rio Grande River should be abated as a substantial obstruction to the navigability of interstate and international waters.

Concerning the power of a state to change the common law rule against the appropriation of the waters of a river, this Court said, at page 702-3 (italics ours):

> "* * * it is also true that as to every stream within its dominion *a state may change this common law rule* and *permit the appropriation of the flowing waters for such purposes as it deems wise.* * * *
>
> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized. * * * that *it (the state) is lmitied* by *the superior power of* the general government *to secure the uninterrupted navigability* of all navigable streams within the limits of the United States. In other words, *the jurisdiction of the general government over interstate commerce and its natural highways vests in that government* the right *to take all needed measures to preserve the navigability* of the navigable-water courses of the country even against any state action."

In *Kansas vs. Colorado,* 206 U. S. 46, at p. 86, this Court again recognizes the above doctrine, and also says concerning the powers of a State (p. 94):

> "It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."

And at page 95:

> "Neither State can legislate for, or impose its own policy upon the other."

It follows from the above decisions that there is no fixed or rigid rule of the common-law that Illinois could not change by legislation. And there can be no question that Illinois did legislate to authorize this diversion of water from Lake Michigan into the Mississippi Valley watershed, and that the constitutionality of this legislation has been sustained by the Supreme Court of Illinois: *Wilson vs. Board of Trustees*, 133 Ill. 443, *People vs. Nelson*, 133 Ill. 565 at 594.

Nor does the fact, so much stressed by complainants, that this diversion is *into a different watershed*, prove that such a diversion is unlawful.

In *Wyoming vs. Colorado*, 259 U. S. 419, there were diversions from a flowing stream into a different watershed, and upon this point this Court said (p. 466, italics ours):

> "The objection of Wyoming to the proposed diversion on the ground that it is *to another watershed*, from which she can receive no benefit, *is also untenable.* The fact that the diversion is to such a watershed has a bearing in another connection, but *does not in itself constitute a ground for condemning it.*"

Applying these rules to the instant case, it follows that there is no such common-law rule as the complainants claim to render unlawful this appropriation and diversion of water from Lake Michigan.

But even if there were such a rule applicable in a

controversy, as between the States, in which the appropriations and diversions complained of had not been expressly permitted under the authority of Congress—it could have no application here because the Secretary of War, as the agent of Congress, has expressly permitted this diversion.

So the complainants are invoking the original jurisdiction of this Court not in a controversy between States to apportion between them the use of the waters in question, but in a suit by certain States to prevent another State from doing in respect of navigable waters of the United States, what the Secretary of War has expressly permitted in the interests of navigability.

Consequently, the claimed "common-law right to an uninterrupted flow," cannot constitute adequate ground for the exercise of jurisdiction in this case.

(B) *The quasi-sovereignty of complainant States, apart from alleged injuries to their citizens, does not justify jurisdiction.*

The complainants' brief (pages 51 to 55), attempts to justify jurisdiction of this case through an alleged invasion of quasi-sovereign rights: first, the general right to protect forests, air and public waters within their respective domains; second, a right to prevent damage to the rights of riparian owners, citizens of the respective States; and, third, the right to prevent damage to citizens of the complaining States in their attempts to navigate these waters in interstate commerce.

In support of the first of these contentions, complainants cite the decisions of this Court in *Georgia vs. Tennessee Copper Company,* 206 U. S. 230, 51 L. Ed. 1038; *Hudson Water Company vs. McCarter,* 209 U. S.

349, 52 L. Ed. 828, and *North Dakota vs. Minnesota,* 263 U. S. 365, 68 L. Ed. 342.

None of these cases is applicable here, because no question was presented involving an effort by States to control any feature of interstate commerce over which Congress had taken jurisdiction and was exercising control.

In *Georgia vs. Tennessee Copper Co., supra,* the suit was to enjoin the defendant copper companies from discharging noxious gas from their works in Tennessee, into the State of Georgia. Damage to Georgia as a private owner was alleged, but was treated by the Court as a mere "make-weight." Jurisdiction was taken and relief granted, on the ground that it was a reasonable demand of Georgia in its capacity of quasi-sovereign (p. 238):

> "that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains * * * should not be further destroyed, * * * that the crops and orchards on its hills should not be endangered from the same source."

No question involving the control of any feature of interstate commerce was involved.

In the case at bar, this question constitutes the gist of the action.

In *Hudson Water Co. vs. McCarter, supra,* the State of New Jersey had passed a statute designed to forbid riparian owners in New Jersey from diverting outside the State, waters of a stream within the State. The Court held that this was a valid exercise of the police power of the State over waters within the State. The waters in question did not appear from the opinion to

be navigable, but without regard to this, it is clear that no question of the control of public waters for use in interstate commerce was presented.

In *North Dakota vs. Minnesota, supra,* suit was brought to prevent the further overflowing and injury to farm lands in North Dakota, produced by ditches constructed by Minnesota for drainage and sanitation. Apparently, these ditches were not navigable, nor is there any indication that the Secretary of War had authorized any of the acts complained of. The overflow of North Dakota farm lands,—the claimed injury,—clearly involved a subject-matter within the scope of State sovereignty, and the Court based its jurisdiction on this ground.

In each of these cases, the suits involved matters over which the respective States had a reserved quasi-sovereignty which they sought to protect, and which constituted the basis of jurisdiction. As shown in our original brief (pages 24-36), the existence of such sovereignty carries with it as a necessary incident. power to protect, by suit in this Court, its citizens who are damaged in respect of the subject matter of such sovereignty, by wrongful acts of other States or of citizens of other States.

In the case at bar, the complainant States possess no sovereignty whatsoever over the subject matter of this cause,—the control of the navigability of navigable waters of the United States for use in interstate commerce. Sovereignty over this subject is possessed exclusively by the Nation. Since the complainant States do not possess this sovereignty, they, therefore, have no incidental right to maintain this suit.

As to the second claim of quasi-sovereignty,—a right to prevent damage to riparian owners,—it is a com-

plete answer that there is no averment in the bill making any claim of damage to riparian owners, citizens of the complaining States, caused by the diversion.

But even assuming that such damage did in fact result, there is a further complete answer in that the bill itself shows that the diversion is authorized by the permit of the Secretary of War, in exercise of the paramount power of Congress over the navigable waters of the United States.

In *United States vs. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 57 L. Ed. 1063, this Court held that the United States in the exercise of this paramount power, may interfere with, limit, or even destroy riparian rights. On this subject the Court said (page 61, italics ours):

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. It is a title which inheres in the ownership of the shore; and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. *It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers.* That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. *All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible.* If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, *it is not*

> *thereby taking private property for public use, for the owners' title was in its very nature subject to that use in the interest of public navigation.* If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, *it may require their removal and forbid the use of the bed of the river by the owner in any way which, in its judgment, is injurious to the dominant right of navigation.* * * *"

And at page 64:

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

This case involved the condemnation by the United States of property adjoining the St. Mary's River, and it was claimed by the riparian owners that they should receive compensation for the taking of their riparian rights *in the stream* (including the impairment of water power), as distinguished from the land adjoining the stream. Concerning this claim, the Court said (page 66, italics ours):

> "So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. *But the flow of the stream was in no sense private property,* and *there is no room for a judicial review of the judgment of Congress that the flow of the river is not*

in excess of any possible need of navigation, or for a determination that, if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same."

This case well illustrates the paramount nature of the authority of Congress over the subject matter of the case at bar.

And as to the rights of riparian owners, for the protection of which against this diversion authorized by the Secretary of War as the agent of Congress, the complainant States invoke the original jurisdiction of this Court,—the case is conclusive that the complainants have no such rights. Therefore, this claimed ground of jurisdiction also falls.

As to the third claim of quasi-sovereignty,—the claimed right to prevent damage to citizens of the complainant States in their attempts to navigate these waters in interstate commerce, none of the authorities cited by complainants sustain their contention; on the contrary pertinent decisions of this Court are against it.

We respectfully submit that all the cases point to this conclusion: that the cases in which this Court has allowed its original jurisdiction at the suit of a State to redress injuries to its citizens have fallen into one or the other of two classes: first, cases in which the complainant States possessed quasi-sovereign authority over the subject-matter of the alleged injury; and second, cases in which the injury resulted in property damage to the State itself in its proprietary capacity, for the relief of which jurisdiction was taken, but as the result of such relief its citizens were also protected.

The case at bar is not among either of the two above

indicated classes of cases in which the Court has allowed jurisdiction, but is within the kind of cases in which it has been denied.

The complainant States have no quasi-sovereign power to vindicate the freedom of navigation, nor as we shall show, have they any proprietary interest requiring protection in this suit.

(C) *The claimed right of complainant states to maintain this suit in their representative capacity as parens patriae to protect their peoples.*

The complainant States contend (their brief, page 56), that they "have a standing to maintain this suit as *parens patriae* to protect their 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." At the same time they recognize that this claimed right must be distinguished from an attempt by a state to "collect" *individual* claims of its citizens against another state. In the latter connection, they quote from *North Dakota* vs. *Minnesota,* 263 U. S. 365, 375-376, the following:

> "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."

Since the complainant States thus concede that jurisdiction will not be granted to a State for the purpose of protecting the *individual* claims of its citizens, no matter how great in number, it necessarily follows

that no ground of jurisdiction is left to a complaining state to protect the rights of its people, except where the exercise of the rights involved is *under the protection of the quasi-sovereign powers of the State.* In no other way can full effect be given to the Eleventh Amendment, which removed from the judicial power of the United States, suits against one of the States *by citizens* of another State.

The extent to which this Court has applied the rule of the Eleventh Amendment is well illustrated by the decision in *New Hampshire and New York* vs. *Louisiana,* 108 U. S. 76-91, in which it was held that the Court would look through the formal transfer to a State of the legal title of claims held by certain of its citizens against another tSate, and when it was apparent that such transfer was only for the purpose of using the name of the State to enforce the individual claims of its citizens, the Court refused its original jurisdiction. Any other device by which a State permits itself to be merely an instrument to enforce or protect property rights, essentially those of its citizens, would be equally ineffective.

It must follow, therefore, that the rights of citizens as distinguished from those of the State, may be protected by original suit by the State in its representative capacity, only when the State is entitled to a remedy in vindication of its own rights, which remedy may also operate incidentally for the protection of the individual rights of its citizens. The fundamental fact, therefore, without which jurisdiction seems always to have been denied, and, within the doctrine of the Eleventh Amendment, must be denied, is the actual presence in the case of an interest of *the State* as distinguished from the individual interests of its citizens.

The cases cited by complainants (brief, page 56) in support of their above contention, are consistent with this view of the limits of jurisdiction.

The case of *New York* vs. *New Jersey,* 256 U. S. 296, 65 L. Ed. 937, involved threatened injury to New York, by pollution—through a proposed scheme of sewage disposal—of the waters of upper New York Bay. As to its jurisdiction, to entertain this proceeding the Court said (p. 301, italics ours):

> "But we need not inquire curiously as to the rights of the state of New York, derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the state to maintain such a suit as is stated in the bill is very clear. *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 the resort to the remedy of an original suit in this Court, under the provisions of the Constitution of the United States." Citing Missouri vs. Illinois, 180 U. S. 208, and Georgia vs. Tennessee Copper Co., 206 U. S. 230.

In this case, as in the two cases cited, the subject matter of the litigation was clearly within the scope of the police power of the complainant State. Its rights as quasi-sovereign were directly involved and threatened by the acts of the defendants. To the extent, therefore, that its quasi-sovereignty was thus threatened, the State had a direct interest in the controversy, and could with propriety bring suit to protect its sovereignty and thereby to prevent injuries to its citizens.

In *Pennsylvania* vs. *West Virginia,* 262 U. S. 553, two bills substantially alike, one by Pennsylvania, and the other by Ohio, were considered. Both were brought to prevent the enforcement of a West Virginia statute restricting the piping of natural gas from West Virginia into the complainant and other states into which for a number of years gas had been thus transported in large and continuous volume. With the long acquiescence and encouragement of West Virginia, Pennsylvania and Ohio had come to be largely dependent on the continued flow of such gas as a fuel for their state institutions, and otherwise, and for the use of their citizens. The challenged statute of West Virginia imposed on the pipe line carriers, a mandatory duty which, if obeyed, would largely prevent this supply of gas from moving into Pennsylvania and Ohio.

In describing the effect of the cutting off of this supply of gas, the Court said (page 592):

> "Each state uses large amounts of the gas in her several institutions and schools—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.
>
> The private consumers in each State not only include most of the inhabitants of many urban communities, but constitute a substantial portion of the state's population. 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 apart from the indi-

viduals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law."

The Court took jurisdiction and granted relief (to the extent only of declaring the statute of West Virginia invalid and enjoining its enforcement), primarily on the ground that the suit was to protect proprietary interests of the complainant States, (see the Court's reference to the case in *New Jersey* vs. *Sargent, Attorney General,* No. 20 Original, October Term, 1925, decided January 4, 1926).

The bills did not seek to obtain "decretal regulations," nor did the Court attempt to "regulate the interstate commerce involved."

To the extent that the decision gave recognition to the right of the complainant States in their representative capacity, to protect their peoples, the subject matters of such protection were expressed to be "their *health, comfort,* and *welfare,*" (page 592), which are recognized subjects for the exercise of the quasi-sovereign powers of the States.

Consequently, the decision is not to be regarded as enlarging the scope of this previously recognized right of a State to sue in its representative capacity to protect those quasi-sovereign powers for the benefit of its citizens.

Moreover, the decision in the Pennsylvania case is to be distinguished from the case at bar on several grounds:

First. In the Pennsylvania case, there was a clear and indisputable ground of jurisdiction,—threatened injury to the property and proprietary interests of Pennsylvania.

No such ground of jurisdiction exists in the case at bar.

Second. The bill in the Pennsylvania case was filed, in so far as representative capacity was concerned, to protect the *health, comfort,* and *welfare* of its citizens, —a purpose clearly within the valid exercise of the State's reserved sovereign police power.

In the case at bar, the bill seeks only to vindicate the freedom of interstate commerce,—a *subject expressly removed from the operation of the State's police power.*

Third. In the Pennsylvania case, the interstate commerce in question,—interstate pipe-line transportation of gas,—had by the express action of Congress (see Section 1, Act to Regulate Commerce, as amended, 34 Stat. at L. 544; Transportation Act, 41 St. at L. 474),—been left free from congressional regulation. Consequently, since Congress had not assumed control over it, the subject matter remained within the scope of the States' police power, when exercised within constitutional limits, for the protection of the "health, comfort and welfare" of their peoples, and not as a direct regulation of interstate commerce, and the complainant States were, therefore, free to sue to protect themselves and their peoples from inequitable treatment by West Virginia.

In the case at bar, however, *Congress has assumed and is exercising its constitutional power to regulate the entire subject matter of the bill.* Moreover, the Court has held (*Sanitary District case*) that even if Congress had not assumed such jurisdiction, the subject matter is of such "imminent and direct national importance," that the States could not act at all even if Congress had been silent.

Each of these reasons necessarily precludes the possibility of power in complainant States to maintain this suit as representatives of their peoples.

Fourth. The concluding paragraph of the opinion of the Court in the Pennsylvania case (262 U. S. at 600), shows clearly that the Court did not intend by its decree to grant to complainants any relief that would constitute a *regulation of interstate commerce.* Thus the Court said, page 600, (italics ours):

> "The *object of the suits* is not *to obtain decretal regulations,* * * *."

And,

> "If there be need for *regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides."*

These quotations support and strengthen our above contention that the Court did not regard or treat the regulation of interstate commerce, as within the subjects open to protection by a state suing as the representative of its people.

The Pennsylvania case, therefore, is an authority against the contention of complainants here under discussion.

In the case at bar, the sole purpose of the suit is to regulate the navigable capacity of these navigable waters, in interstate commerce. To allow the original jurisdiction for such a suit by a State against another State, would be contrary to all of the pertinent decisions of this Court, including that in the Pennsylvania case.

(D) *The claimed right of complainant States to*

maintain this suit in their private capacities as owners of public works and public property.

It should be noted first, that Wisconsin alone, claims any special injury to itself in its private proprietary capacity, as distinguished from its representative capacity.

The sole averments of this nature in the bill, are found in paragraph 21, pages 14 and 15. Insufficient as these are to show any actual damage suffered by Wisconsin as the result of the diversion of waters from Lake Michigan, the decision of this Court in the *Chandler-Dunbar Water Power Company case, supra,* as to the paramount nature of the power of Congress in its regulation of navigable waters, is a complete answer. The only way in which the acts of defendants are claimed to injure Wisconsin, is in the imposition of a burden upon interstate commerce, resulting from the diversion as a claimed obstruction to the navigable capacity of the Lakes. This diversion has been authorized by the Secretary of War with the approval of the Chief of Engineers exercising the delegated authority of Congress, and for the benefit of navigation. If there be an injury to the complainant, Wisconsin, in the particular alleged, it is not a legal injury for which legal redress may be allowed.

This conclusion is unavoidable upon the authority of *Southern Pacific Co. vs. Olympian Dredging Co.,* 260 U. S. 205, 67 L. Ed. 213.

In that case, the defendant railroad company had obtained a permit from the Secretary of War, to build a new bridge in place of an old one, across a navigable stream. One of the conditions of the permit required the railroad company to cut down the piles which had supported the old bridge to a certain number of feet

below the then low water level, but leaving, the stumps of the piles when so cut down, in the stream. The railroad company complied with this condition. Thereafter the plaintiff in the case claimed to have been damaged by the defendant as the result of a collision of its barge with these piles so remaining in the bed of the stream. The Court held: that compliance with the conditions of the permit of the Secretary of War, entirely relieved the railroad company of any liability.

In discussing the power of the Secretary of War under the Act, the Court said (page 208, italics ours):

> "That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove, and the power to disapprove necessarily includes the lesser power to condition an approval. *In the light of this general assumption by Congress of control over the subject,* and *of the large powers delegated to the Secretary, the condition imposed by that officer* cannot be considered otherwise than as *authoritaative determination of what was reasonably necessary to be done to insure free and safe navigation* so far as the obstruction in question was concerned. * * *

Page 209:

> "The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order. Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of navigation, or upon the fact that to leave the stumps in

the bed of the river would be of some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. *It was not for the petitioners, however, to question either his reasons or his conclusions.* They *were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction.* The language which this Court employed in Monongahela Bridge Co. vs. United States, 216 U. S. 177, 195, 56 L. Ed. 435, 442, is pertinent: * * * 'Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. *It is for Congress,* under the Constitution, *to regulate the right of navigation by all appropriate means,* to declare *what is necessary to be done* in order to free navigation from obstruction, and *to prescribe the way* in which the question of obstruction shall be determined. *Its action in the premises cannot be revised or ignored by the Courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the Courts can see to it that executive officers conform their action to the mode prescribed by Congress.'* See also Union Bridge Co. vs. United States, 204 U. S. 364, 385, 51 L. Ed. 523, 533; The Douglas (1182) L. R. 7, Prob. Div., 157, 47 L. T. N. S. 15; Frost vs. Washington County R. Co., 96 Me. 76, 59 L. R. A. 68; Maine Water Co. vs. Knickerbocker Steam Towage Co., 99 Me. 473; The Plymouth, 140 C. C. A. 1, 225 Fed. 483."

This case is on all fours with the case at bar, so far as concerns the existence of any claim for legal redress from special injuries alleged to result from this diversion of water from Lake Michigan. The defendants

are acting in accordance with the permit of the Secretary of War, issued in aid of navigation.

The Court may not revise or set aside the Secretary's order, even though the Court might differ with his conclusion as to the value of this diversion in aid of navigation. As shown in the above quotation, his order is to be treated as if it were an act of Congress itself.

In connection with this contention of complainants, it should be noted that the bill contains certain averments to the effect that the defendants have not complied with the conditions of the permit of the Secretary of War, issued March 3, 1925. But none of these averments include any claim that such non-compliance has resulted in a greater lowering of Lake levels than would result if all of the conditions of the permit were strictly complied with. So far as concerns the point here under discussion, even if these averments be taken as true, they can have no effect to justify a right of action by the complainants since they do not cause them the special damage relied on in the bill.

(E) *The claim that a state may enjoin a violation of the freedom of interstate commerce, not as an academic volunteer, but in redress of special injuries.*

Complainants attempt (brief, pp. 57-61), to distinguish *Louisiana vs. Texas,* 176 U. S. 1, 44 L. Ed. 347,—by suggesting a lack of interest in Louisiana; they admit that the states may not regulate interstate commerce,—contend that actions to enjoin violations of the freedom of interstate commerce are not in conflict with the power of Congress to regulate it,—and cite *Pennsylvania vs. West Virginia, supra,* in support of this contention. They also, somewhat surprisingly, cite on this point, *Pennsylvania vs. Wheeling Bridge Co.,* 13 How. 518, 14 L. Ed. 249.

In reply, we respectfully submit, that in *Louisiana vs. Texas, supra,* the quasi-sovereignty of Louisiana was as much involved in the wrongs suffered by some of its citizens in the interruption of their interstate commerce with Texas, as is that of the complainants, in the alleged obstruction to the interstate navigation of the complainants' citizens. If the number of citizens affected be greater in the present case, the damage to each individual was infinitely greater in the Louisiana case. The decree sought in the instant case would prevent compliance with a regulation of commerce lawfully issued under congressional authority, and, therefore, would be itself a regulation of that commerce. And the final result of the Wheeling Bridge litigation demonstrates, that neither complainants nor their citizens have suffered legal damage in the case at bar.

In that case, this Court granted an injunction to redress actual property damage to Pennsylvania. Thereafter, Congress declared the bridge, which was causing the damage by obstructing navigation, to be lawful, and Congress thereby issued its permit. Thereupon this Court held, *Pennsylvania vs. Wheeling Bridge Co.,* 18 How. 459, 15 L. Ed. 435, that these acts theretofore held to be actionable had *become lawful,* and that the actual resulting damage *could not be redressed.* The case holds in effect, that freedom of interstate commerce in law, means freedom within such limitations or restrictions as Congress may impose, and the permit of the Secretary of War in this case is such a limitation.

Although not on this point, complainants then contend, that if they suffer special damage from pollution of the Illinois waterways, they may sue to redress it, but they fail to point to any such special damage.

Complainants conclude their argument under this head, by contending that rights derived from citizenship in the Nation as distinguished from the States, may be protected at the suit of individuals. Our contention on this point is merely that the States, as *parens patriae,* possess no quasi-sovereignty to be exercised to protect navigable waters that are under the care of the national Government. And this contention, complainants do not answer.

(F) *The claim that the bill does not ask the Court "to regulate navigation or to supervise long continuing acts."*

Complainants contend (brief, p. 62), that the granting of a prayer for an injunction against a diversion exceeding the needs of navigation, does not involve "an administration of the regulation of commerce," nor ask the Court to "supervise long continuing acts," And this, notwithstanding the fact that the part of the bill here referred to (bill, p. 36), assumes that the Sanitary District's canal is a part of the navigable waters of the United States, and "subject to the same control on the part of the United States as the other navigable waterways thereof" and notwithstanding such assumption, seeks to enjoin the permanent diversion of any water from Lake Michigan "for any purpose, *in excess* of *the amount* which *the Court shall determine* to be *reasonably required for the purpose of navigation* in and through said canal and the connecting waters to the Illinois and Mississippi Rivers, without injury to the navigable capacity of the Great Lakes and the connecting waters thereof."

Complainants say (brief, p. 62), that such a prayer "involves only a finding of fact," and that "this Court has made such a determination at the instance of *a*

private citizen,'' but they cite no case in support of this latter contention, unless it be *United States vs. Rio Grande Dam & I. Co.,* 174 U. S. 690, 43 L. Ed. 1136. This case, however, is not in point, because it was a suit brought by the United States, not by a private citizen, to prevent acts of a state which would interfere with navigability. The purpose of the suit was to protect the navigable waters in question, for the benefit of interstate commerce. A state claimed the right to divert and appropriate a part of these flowing waters for other purposes, so the Court was compelled to find the essential fact, namely, the quantity of water that could be thus diverted without injuring navigability,—as the point of demarcation between state and national authority.

In the case at bar Congress has acted in exercise of its power to regulate navigability, and the prayer of the bill is a clear attempt to ask this Court to substitute in place of the regulatory supervision already being exercised by the Secretary of War, a different and a court-made regulation. In the case at bar, the diversion is being made pursuant to a permit of the Secretary of War, and, therefore, pursuant to the consent of Congress, and no occasion exists for the Court to apportion these waters between state and national authority, the entire appropriation being made pursuant to national authority.

The additional above contention of complainants, that by granting the relief prayed in the bill, this Court would not ''supervise long continuing acts'' is obviously without merit, because such a determination by the Court would involve the constant supervision of this diversion, and frequent re-considerations of a constantly changing state of facts due to the progres-

sive development by the Sanitary District of its other methods of sewage treatment, and due to other changes which from time to time will vary, because of changes in the quantity of lake water needed in aid of navigation, not only in the Illinois rivers, but also in the Mississippi River where a much greater quantity is needed at critical points than in the Illinois rivers.

Moreover, it is obvious that a determination by this Court of the quantity of water to be needed in aid of navigation, at various times in the future, would involve complicated and important questions of fact relating to engineering and navigation problems, as for instance: the depths to be maintained at various points in this long waterway to meet the needs of its effective navigability and its constantly increasing commerce, especially in those parts of the Mississippi River where the low water channel depth is difficult to maintain; the engineering methods of channel control, and of flow control that should be assumed by the Court in its determination of the quantity of diversion; the speed of current to be expected in various parts of the channel as the result of given quantities of diversion under the varying engineering practices that obtain in different portions of the watery way for controlling the current speed.

The mere statement of these problems indicates that the relief prayed would necessarily require the Court to "supervise long continuing acts," and it is not to be conceived that the Court will oust the supervising control over these very matters that the Secretary of War and the Chief of Engineers already have in hand, nor substitute its own supervision for the regulation and continuing of navigation.

We come now to a contention of the complainants,

made not only under this point, but frequently elsewhere in their brief, that this Court and the defendants, on the consideration of these motions to dismiss and demurrers are conclusively bound to admit what are claimed to be averments in the bill to the effect that not more than 1,000 cubic feet per second need be diverted from Lake Michigan for navigation purposes.

While the pending motions and demurrers do admit facts well pleaded, it may be said in passing that such technicalities have not received much consideration by the Court when it has exercised its original jurisdiction; but when all of the averments of the bill are taken into consideration, we respectfully submit that not only from a technical viewpoint, but as a matter of substance, there is no merit in this contention.

Reliance is placed by complainants upon the effect of the averments found in paragraph 25 (page 18) of the bill, which reads as follows:

> "The amount of water necessary to permit the said canal to be operated for navigation purposes only, as your orators are informed and verily believe and therefore aver, does not at the present time exceed 500 cubic feet per second, and the amount of water which may in the future be required for the operation of said canal for navigation purposes only, if permitted to be operated for such purposes, will not exceed one thousand cubic feet per second, as your orators are informed and verily believe and therefore aver, even if the said canal should come to be utilized to the fullest extent to which it is physically capable of being used for the purposes in navigation."

As already noted, the prayer of the bill asks the Court to determine the amount "reasonably required

for the purposes of navigation in and through said Canal and *the connecting waters of the Illinois and Mississippi Rivers* * * *." Even without such averment, the Court knows that the navigability question is not limited to the twenty-six mile stretch of the Sanitary District Canal, but also involves the rest of the Lakes-to-the-Gulf waterway, in the preservation, utilization and improvement of which, the intervening defendant states that we represent, are so much concerned.

It is apparent, therefore, that the sole allegation in the bill—made, it will be observed, only on information and belief—is confined to the needs of this twenty-six miles of canal. There is no averment whatsoever, upon which the motions and demurrer can operate as an admission, concerning the navigation needs of the great remaining stretch of the waterway which includes the DesPlaines, Illinois and Mississippi Rivers.

Moreover (and this rests upon merit not technicality), the bill also shows—by alleging the permit of 1925, as the successor of many earlier permits also pleaded in the bill—that Congress, through its agent, the Secretary of War, with the recommendation of the Chief of Engineers, having exclusive authority and jurisdiction to determine such fact, has *officially determined* that the needs of navigation for all purposes, require a diversion of "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;" and this official conclusion of fact by Congress is not subject to collateral attack in the Courts.

Therefore, we respectfully submit, that the legal dignity, weight and effect of this admission in the bill of an official determination by Congress that a greater

quantity than 1,000 cubic feet per second is needed, far outweights complainant's technical contention that these motions and demurrers conclusively admit that only 1,000 cubic feet is needed for a small part only of the waterway in question.

This Court has held (Sanitary District case) that the granting of this power to the Secretary of War is constitutional, and it has approved an exercise of such power in respect of this very diversion.

That this Court will not review such administrative determinations of fact, see *Interstate Commerce Commission vs. Illinois Central Railway Co.*, 215 U. S. 452, at 470.

In this connection, the decision in *Wisconsin vs. Duluth*, 96 U. S. 379, is in point. Wisconsin sued on the ground that the channel of the St. Louis River as it flowed in a state of nature, was a common boundary between Wisconsin and Minnesota, in continuation of an interstate waterway in which Wisconsin had an interest. A canal cut by Duluth across Minnesota Point, deeper than the natural outlet of the St. Louis River at its mouth, had diverted the current of the River from its natural course to a new course through the canal and Superior Bay, and Wisconsin averred that this diversion from the natural outlet would cause the latter to fill up, and would thus destroy the usefulness of the river and bay for navigation. Wisconsin in its original bill, challenged the authority of Minnesota thus to divert the waters, to the prejudice of Wisconsin and its citizens.

One of the affirmative defenses pleaded was that the United States by its legislative and executive departments, had approved the construction of the canal, and *had taken control of the work,* for the benefit of navigability.

Concerning this defense, the Court said (page 388, italics ours):

> "If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the Lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this Court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?
>
> "* * * *While the engineering officers of the Government are, under the authority of Congress, doing all they can to make this canal useful to commerce, and to keep it in good condition, this court can owe no duty to a state which requires it to order the City of Duluth to destroy it.*"

Having endeavored to show, subdivisions (A) to (F) above,—that each of the grounds upon which complainants' brief relies in support of their claim that the Court should take jurisdiction of the case at bar, is without merit, we shall proceed next to reply to the rest of complainants' contentions, which,—aside from certain technical questions which we shall not discuss in this reply,—may be considered together as involving the same general subject, and as governed in the main by the decision in the Sanitary District case.

II. THE NATURE AND EXTENT OF THE ALLEGED COMMON LAW RIGHTS OF THE COMPLAINANT STATES IN THE WATERS OF THE GREAT LAKES AND CONNECTING WATERS.

Complainants contend (brief, pages 68-81): That "the common law of waters has been generally adopted in the United States, and obtains in both the complainant and defendant states"; that *as owners* of the waters of the Great Lakes within their borders, the complainant 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 the natural level and condition for all other purposes"; that an upper state bordering on a navigable water course, cannot appropriate the waters thereof to the prejudice of a lower state; that the Courts will enjoin such appropriation, and in apportioning the respective quantities of such waters that may fairly be appropriated by various interested states, will take into account such common law or statutory rules or customs concerning such appropriations of waters, as may obtain between the states, or in the defendant state; that a state cannot divert interstate waters within its boundary from their natural watershed; and that various Illinois Statutes purporting to authorize the Sanitary District to divert water from Lake Michigan, were unconstitutional.

To a large extent, the above contentions have already been replied to, in that part of this reply brief which deals with the subject of jurisdiction. We there quoted the authorities, showing that the claimed rights of the complainants States in respect of the waters of the Great Lakes, both as to title and maintenance of flow

and appropriation or diversion, are subject in all respects to the paramount power of Congress to control and regulate such waters in the interests of navigability. We shall not repeat at this point the citations or discussion thus already made.

We shall, however, reply to those of the above contentions not already dealt with in this brief.

(A) As to the state of the common-law rule in Illinois concerning the appropriation of water from flowing streams, it is a sufficient reply, to say: that the cases already quoted from and discussed, establish the rule that a state may change its common-law rule; that Wisconsin may not impose on Illinois a rule of Wisconsin's making; that Illinois by its Sanitary District acts has changed her common law to expressly permit and legalize this diversion so far as State authority is required; and that the case at bar is not one in which the controversy is between States that seek under State authority only, to appropriate navigable waters, but is an effort by complainant States to prevent defendants from making a diversion of water that has been expressly authorized by the Secretary of War and that is being made under his supervision and control,—for the benefit of navigation.

(B) In reply to complainants' contention (brief, pp. 80, 81), that the various Illinois Statutes authorizing the Sanitary District to divert water from Lake Michigan, *were unconstitutional,* we respectfully submit:

(1) That viewing these Illinois Statutes as an expression by an owning or riparian state, of its change in the common-law rule affecting the appropriation of flowing waters, and as its express consent to such appropriation,—their constitutionality has been conclusively decided by the Supreme Court of Illinois, in

Wilson vs. Board of Trustees, 123 Ill. 443; *People vs. Nelson,* 133 Ill. 565, and *Pittsburg F. W. & C. Ry. Co. vs. Sanitary District,* 218 Ill. 286. And a citation of authorities should be unnecessary upon the proposition that within this view, the decision of the highest court in the state upon the constitutionality of its own statutes, will be followed by this Court.

(2) That these Illinois decisions are equally conclusive to establish the validity of these statutes as proper exercise of the police power of Illinois.

(3) That viewing the Illinois Statutes in relation to the paramount control of Congress over interstate commerce, there can be no doubt of, and we have not contended against, the existence or full scope of such paramount power. On the contrary, we contend that the Illinois Statutes, supplemented by the permit of the Secretary of War issued pursuant to the authority of Congress, constitutes complete lawful authority, both state and Federal, for the making of the diversion sought to be enjoined by the bill. And even though the alleged interference with interstate commerce, affects national or international waterways of such importance that a state may not act at all to authorize such interference, nevertheless, in such a case the permit of the Secretary of War alone constitutes complete lawful authority for the diversion in the case at bar.

III. THE DECISION IN THE SANITARY DISTRICT CASE CONCLUSIVELY ESTABLISHES THE LACK OF EQUITY IN COMPLAINANTS' BILL.

Since the decision in the Sanitary District case, as we understand it, answers all of the contentions of the

complainants and conclusively shows lack of equity in the bill, we shall attempt to state the scope and effect of this decision.

(1) *The power of Congress to authorize this diversion.*

In the Sanitary District case, the Court affirmed the decree below which enjoined the Sanitary District from diverting more than 4187 cubic feet per second, the amount authorized at that time by permit of the Secretary of War. This decree was affirmed, to go into effect within sixty days, *without prejudice to any permit lawfully to be issued by the Secretary of War.*

The effect of the affirmance thus qualified, necessarily involved the conclusion by the Court, that the Secretary of War could lawfully exercise the power under Section 10, of the Rivers and Harbors Act of March 3, 1899, *to authorize* this diversion. The opinion comments on the fact that the diversion is from the Great Lakes watershed into the Mississippi watershed, so the above mentioned conclusion of the Court was reached notwithstanding this fact.

As to the Rivers and Harbors Act of 1899, the opinion states that it "repeatedly has been held to be constitutional in respect of the power given to the Secretary of War."

The conclusion is unavoidable, that the decision of the Court in this case squarely sustained the power of Congress through its agent the Secretary of War, to authorize this diversion.

(2) *The legal effect of the permits.*

As stated in the opinion in the Sanitary District case, the prayer of the bill was for an injunction to prevent diversions in excess of the permit of the Secretary of War. This prayer was allowed with the

qualification above set forth. The several permits theretofore issued by the Secretary of War were discussed by the Court in the opinion, and in concluding such discussion, the Court says (italics ours):

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

The prohibition thus referred to, was that expressed in Section 10, of the Rivers and Harbors Act of 1899; and the "authorization" referred to, was a permit of the Secretary of War, under the same act.

(3) *The constitutionality of the Rivers and Harbors Act of March 3, 1899.*

The permits before the Court in the Sanitary District case were issued under the grant of power defined in Section 10 of this Act. The Act was necessarily before the Court for consideration, and as stated above, its constitutionality was squarely affirmed in the opinion.

The essence of the decision in the Sanitary District case was, that the power of Congress was paramount over the subject matter of this suit,—the diversion of water from Lake Michigan into a different watershed.

The defendant, Illinois, sought to justify its departures from the restrictions imposed upon it by the then permits of the Secretary of War, by reliance upon its police power, and upon these same alleged riparian rights which the complainants emphasize so much in the case at bar. All of these contentions were held unavailing, solely by reason of the paramount effect that the Court held must be given to the exclusive power of Congress to regulate commerce. There is no legal contention available to the complainants in the instant

case, which could not have been urged by Illinois, in opposition to the relief sought by the Government in the Sanitary District case.

CONCLUSION

Since the decision in the Sanitary District case constitutes a complete reply to all of the substantial legal contentions made by complainants in their brief, except on the question of jurisdiction, we have endeavored to limit this reply brief to that question. What we have said in our original brief and in this reply also answers the contentions made in the briefs filed by other Lake States as *amici curiae.*

Having thus endeavored to show that this case is not one properly cognizable by the Court under its original jurisdiction, and that complainants' case is without equity and does not entitle them to the relief sought, we respectfully submit that the motion to dismiss filed by the intervening defendants should be sustained.

Respectfully submitted,

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