Number 16 Original in Equity.

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OCTOBER TERM, A.D. 1925.

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

vs.

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

STATES OF MISSOURI, TENNESSEE, KENTUCKY AND LOUISIANA, *Intervening Defendants.*

REPLY BRIEF OF DEFENDANT, THE SANITARY DISTRICT OF CHICAGO, UPON THE MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT.

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

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

JAMES M. BECK,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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We have anticipated, and, we believe, fully answered in our main brief the points and authorities in complainants' brief. In any event further discussion seems unnecessary in view of the very recent and conclusive decision of the Court (rendered last Monday, March 1, 1926) in

Oregon, Washington Railroad & Navigation Company v. State of Washington,

in which this Court again ruled that, where Congress has occupied a field of governmental activity under the Constitution, the states are powerless to interfere with the Federal Government. In that case it appeared that the State of Washington had provided for inspections and investigations to be made by certain of its officers for the purpose of fixing a quarantine to prevent the spread of dangerous plant disease or insect infestation. These officers in the performance of their duty under the state act had issued an order that alfalfa raised in certain territory outside the State of Washington should not be shipped into or through the state. Congress had passed an act providing for action by the Secretary of Agriculture for the purpose of preventing the spread of disease to plant life. The question arose as to whether the act of Washington was in conflict with that of Congress. The court after holding that the act of the Legislature of Washington was a real quarantine regulation, and valid as such in the absence of federal regulation, held it, however, to be invalid, in view of the Congressional regulation, and this notwithstanding that in that case the Secretary of Agriculture had not acted. The Court said:

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state can not interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating inter-

state commerce and so necessarily has excluded state action.

* * * * * * *

It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. *The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted.''*

That case was obviously much stronger for state power than the present. It dealt with a question of quarantine which is within state power in the absence of federal regulation and the federal administrative officer *had not acted.* In the instant case we are dealing with interstate navigation, as to which federal power is plenary, and the federal administrative officer *has acted.*

At no place in their brief do the complainants attempt to meet the proposition presented by us, that this whole controversy was settled by the decision and decree of this court in

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

nor have they even mentioned the opinion of the acting Attorney General of February 13, 1925, to the Secretary of War, holding that he was authorized to issue the very permit (March 3, 1925) here claimed to be invalid. (Appendix, our brief p. 59.)

All the states and parties here in this suit were before the court, either as parties or as *amici curiae* in the Sanitary District case. There the complainant states and *amici curiae* supporting them here, contended, as the United States contended, that the whole matter was within the power of the Secretary of War to regulate under Section 10 of the 1899 Act. Furthermore, in that case it was recognized by the United States that a serious condition affecting the health of the people of Chicago and its environs—upwards of three million people, half the population of the State of Illinois,—had to be considered; that if the diversion were immediately or within any short time decreased to 4,167 cubic seconds feet (not 500 or 1,000 as contended for here), serious results would follow to the health and lives of the people; that such curtailment of withdrawal would not only affect immediately the people of Chicago obtaining their drinking water supply from Lake Michigan, but also would extend along the Drainage Canal, Des Plaines and Illinois Rivers, impairing the health of people living along the waterway, and of those navigating same.

Consequently, the United States in its brief in the Sanitary District case, and the Solicitor General in his oral argument called attention to this condition, and suggested and indeed requested that this Court, if it affirmed the decree should recognize the power of the Secretary of War, acting on the recommendations of the Chief of Engineers, to grant a permit even for a

greater diversion than the 4,167 cubic seconds feet, if the equities of the case so required.

The Solicitor General said:

> "Throughout this litigation the Government of the United States and its legal representatives have not been unmindful of the welfare of the people of Chicago. Within the scope of its delegated power, the Federal Government (and not the Sanitary District) represents the people of Chicago; and, so representing them—whose truest welfare must be that of the whole people of the United States—the Federal Government has endeavored to act in this matter for the common welfare. Certainly it has not been lacking either in consideration or patience in this litigation. But in its deep concern for the welfare of Chicago, the Government must also have regard for the rights and interests of the great States and populous cities which have equal rights in the waters of Lake Michigan.
>
> It is a condition and not a legal theory that confronts the Government. The question is not judicial, and this Court will presume that theLegislative and Executive branches of the Government will not be unmindful of all the equities of the situation.
>
> As this serious problem will require time for its careful consideration, the Government can not object, if the Secretary of War, acting on the recommendation of the Chief of Engineers, sees fit, pending the action of Congress, and as a modus vivendi to modify the existing permit and temporarily permit a greater diversion of waters.
>
> If there be any doubt as to his power under the authority already delegated to him, the Government has no objection to a proviso in any decree that this Court may enter which will provide that the decree and the injunction, while immediately

> effective, shall be without prejudice to any temporary permit that the Secretary of War, acting upon the recommendation of the Chief of Engineers, may see fit to grant in the nature of a modus vivendi, pending the action of Congress in the premises.
>
> This would set at rest the authority to make some temporary arrangement in the event the present Congress could not dispose of the question before it adjourns sine die on March 4, and especially in the event that Congress might not be again in session until the first Monday of December next."

Presumably pursuant to this suggestion and request, this Court provided:

> "Decree for an injunction as prayed is affirmed to go into effect in sixty days—without prejudice to any permit that may be issued by the Secretary of War according to law."

In so doing this Court recognized that the United States in asking equity, should do equity, and the Secretary of War within the sixty days issued his permit to this great end. The effect of the order of affirmance, therefore, was that the decree of the lower court should become effective to limit the diversion only to the extent that the Secretary of War acting on the recommendations of the Chief of Engineers might fix within the period of sixty days. This court there recognized the validity of the regulations theretofore made by the Secretary of War, extending over a period of twenty-six years; and Congress has at all times had notice by the various annual reports of the Chief of Engineers to it of the regulation of the withdrawal made and by its silence has therefore indicated its

approval of the action of the administrative officers to whom it had delegated the power to find a practical solution of a very difficult problem.

In view of the specific provisions of the Sanitary District Act providing for the construction and maintenance of the channels to be built so that they would be navigable and could be used for navigation between the Great Lakes and the Mississippi River, the complainants' proposition, that the sole purpose of the construction of these works was sewage disposal, is very surprising. The various provisions of the Sanitary District Act in this respect were specifically mentioned in our brief. (pp. 8-9.)

The case of

Chicago v. Green, 238 Ill. 258,

is cited (Complainants' Brief, p. 6) and part of the opinion is quoted as supporting that proposition. Counsel, however, fail to quote the other language of the opinion specifically holding that one of the purposes of these works was to provide for navigation (p. 270):

> " * * * It is also manifest, not only from the Sanitary District Act but from the surrounding facts and circumstances, that as a part of the work of disposing of the sewage of the municipalities in the Sanitary District by an outlet through the Des Plaines and Illinois rivers, it was *intended at the same time to assist in building a great waterway from Lake Michigan to the Mississippi River* with the incidents of dockage and water power which would necessarily follow from

a *navigable channel of the proposed size and location.*"

Counsel quote from the opinion in

People v. Nelson, 133 Ill. 565,

but fail to take cognizance of the following language in that opinion (p. 594):

> "Sec. 24, however, recognizes the obvious fact that the contemplated channel, when completed in such way as to accomplish in a satisfactory manner the purpose for which it is designed, will constitute a waterway capable of being utilized for purposes of navigation and therefore declares what in the absence of such declaration would be the fact, viz., that when so completed it shall be a navigable stream."

In the same manner, in endeavoring to lay a basis for the claim that 500 to 1,000 cubic seconds feet is all the water that possibly could be required to be diverted from Lake Michigan for navigation purposes, counsel fail to observe the report and language of General William V. Judson, U. S. Engineer at Chicago (report dated March 23, 1921) concerning a 9 foot waterway from Chicago to the mouth of the Illinois River, as to the volume of water required for a waterway (H. R. Doc. No. 2, 67th Congress, 1st Session):

> "For a 9-foot channel with an increment of 4167 second feet, the cost, either with dams retained or removed, apears almost prohibitive, and the probability that Congress will limit the increment to 4167 second feet is, in my opinion, so remote that this hypothesis may be left out of

consideration. * * * In my opinion, to most reasonably conform to the probable conditions of the future, an 8-foot project should now be adopted, based on a 7500 second feet withdrawal for purposes of estimate, and with all dams removed. Then should Congress place the limit of the amount of water to be withdrawn from Lake Michigan at 10,000 second feet, which I deem probable, and under proper conditions advisable that increment would of itself increase the depth to 9 feet."

Counsel also cite the report of Gen. Wilson of 1868. This report also contained a discussion of the improvement of navigation on the Illinois River by withdrawal of a large quantity of water from Lake Michigan. (Chief of Engineers Reports, 3rd Session, 438, 449):

"* * * Those which have been most generally advocated are:

1. By dredging and wing-dams.

2. By drawing a sufficient supply of water from Lake Michigan to give the requisite depth in the Illinois River.

The navigation of the river may doubtless be much improved by the first method, but it is doubtful whether any amount of expenditure upon this plan would give an available depth for navigation of more than four feet at extreme low water in a channel of 160 feet wide.

* * * * * * *

The plan of supplying sufficient water from Lake Michigan to make navigation of the Illinois River suitable for the largest class of steamboats,

> without the intervention of dams and locks, has received considerable attention, but this plan is, for reasons which will be hereafter stated, impracticable at any reasonable cost."

The excessive cost referred to by Major Wilson was the building of a canal from the Chicago River across the Continental Divide to Lockport, such as the Sanitary and Ship Canal now operated by the Sanitary District. The construction of the Sanitary and Ship Canal later made possible and feasible the improvement and maintenance of navigation upon the Illinois River with the use of a large amount of water from Lake Michigan.

In quoting from the testimony of the Chief of Engineers, Major General Harry Taylor, before the Select Committee on 9 Foot Channel from the Great Lakes to the Gulf (U. S. Sen. 68th Con., 2nd Session, pursuant to Senate Resolution 411, 67th Congress, 4th Session, Vol. 2, p. 141), counsel failed to include the very pertinent testimony following their quotation:

> "Of course the amount of water depends entirely upon how the improvements shall be made. We could get 8 or 9 feet in the Illinois River with 1,000 second feet or with 10,000 second feet diversion, but by different methods of improvement and at different cost. * * * With 1,000 second feet you would have to have locks and with 10,000 second feet no locks would be required; that is, below Utica."

Major Putnam, in his report to the Chief of Engineers of November 1, 1923, referred to in complain-

ants' brief and mentioned in Major Putnam's letter to the Chief of Engineers dated March 2, 1925, recommending the issuance of the permit of March 3, 1925 (Appellant's Brief, Appendix 115) (the report recites the facts upon which his recommendation was made), discusses the value of the diversion for navigation purposes as follows:

> (P. 43): "There is no doubt but what navigation conditions have been improved by the diversion of water from Lake Michigan. Originally the low-water discharge at La Salle was in the neighborhood of 500 cubic feet per second, while at Grafton it was near 1,000 second-feet. The addition of over 8,000 cubic feet per second, while increasing the slope and the velocity slightly, produced a discharge of about 8,500 cubic feet per second at La Salle and about 9,000 at Grafton. Depths throughout the entire stream were increased substantially as may be seen from the following table and as indicated by comparing the profiles in Plate VII:

Miles above Grafton	Name of Place	Increased depth with 8,000 cubic feet per second diversion
223.2	LaSalle	5.0
88.6	Beardstown	2.2
0.0	Grafton	1.2"

The diversion of water from Lake Michigan has gone on for upwards of twenty-six years and consequently the United States in maintaining its project depth for navigation in the Illinois River below Utica or the southern end of the Illinois and Michigan Canal, has relied upon this diversion of water to produce the required depths, particularly at low water times when

navigation requires it. Consequently the river has not been dredged by the United States continuously in order to remove earth and other substances settling in the bottom of the navigation channel, which dredging would have been required had the diversion not existed or had it been materially less. To reduce the flow from Lake Michigan would therefore deprive the river in the stretches mentioned of the required project depths. Even the project that is being carried out by the Government at the present time would not permit the reduction to 4,167 seconds feet prior to 1928, and Major Putnam in his said report states the problem thus (p. 60):

> "On the improved portions of the Illinois River depths have been materially benefited by the introduction of Lake Michigan water. The present project contemplates the completion of a 200-foot channel 7 feet deep based on a diversion of 4,167 cubic feet per second. If the project were completed the flow could be reduced to 4,167 cubic feet per second and cause no injury to navigation. It is estimated that about 1,700,000 cubic yards of material would have to be dredged to complete the project. This would require from three to four years' time with a 15-inch suction dredge such as is contemplated for the river. With the expenditure of about $973,000, inclusive of funds available, the project will be completed by 1928. *A reduction in diversion to 4,167 cubic feet per second could not be made without detriment to navigation before that time.*"

The value of this water for navigation upon the Mississippi River below the mouth of the Illinois is further stated by Major Putnam (p. 47):

"The diversion of 8,000 second feet from the lake constitutes slightly over one-fourth of the low water flow in the Mississippi River. An inspection of the discharge curve of the river at St. Louis indicates that an increment of 8,000 cubic feet per second produces an increased depth of 1.4 feet."

The value of the water in the Illinois River to avoid conditions offensive to people living along or navigating it, is stated in this report (p. 48):

"While conditions along the upper river are not always pleasant, they are neither so bad as to endanger the health of any community or of individuals who travel on vessels navigating the stream nor so offensive as to depreciate seriously values of adjoining property. Further contamination by increase of sewage or reduction of fresh water probably would produce the latter difficulty."

Counsel for complainants cite at numerous places in their brief the cases of

Pennsylvania v. West Virginia, 262 U. S. 553, 67 L. ed. 1117.

Pennsylvania v. Wheeling Bridge Co. (1st case), 13 Howard 518, 14 L. ed. 249,

New York v. New Jersey, 256 U. S. 296, 65 L. ed. 937,

in support of the jurisdiction of the court over the matter in controversy. These cases have no application, for in the first *Wheeling Bridge* case and in *Penn-*

sylvania v. West Virginia there had been no regulation or attempt at regulation or control of the subject of interstate commerce before the court in those cases. The effect of regulation by Congress of the subject (in that case restraint or impairment of the freedom of commerce) was clearly shown in the second Wheeling Bridge case (18 Howard 421, 15 L. ed. 435) where the court upheld an act of Congress declaring lawful the bridge which was found to be in the first Wheeling Bridge case actually obstructive to navigation. If there had been regulation or control exercised by Congress of the subject of transportation of natural gas in interstate commerce, sanctioning such restraint as West Virginia attempted by the act of its legislature before the court in *Pennsylvania v. West Virginia, supra,* the decision would have been different, as is indicated by the very last sentence of the court's opinion, as follows:

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

Prior to the passage of the Wilson and Webb-Kenyon Act, the court held the laws of the states prohibiting the transportation of intoxicating liquors into the state under certain conditions of shipment, to be invalid, as an impairment or regulation of interstate commerce.

> *Bowman v. Chicago, Northwestern Railway Co.,* 125 U. S. 465, 31 L. ed. 700.

Similar laws, however, thus restraining and impairing the freedom of interstate commerce were held valid

and enforceable under certain conditions provided for by the Webb-Kenyon Act.

> *James Clark Distilling Co. v. Western Maryland Railway Company* and State of West Virginia, 242 U. S. 311, 61 L. ed. 326.

Chief Justice White, in discussing the practicability of the regulation of commerce provided for under the Webb-Kenyon Act, used language which applies forcefully to the very regulation of the Chicago diversion by the Secretary of War acting on the recommendation of the Chief of Engineers under the March 3, 1925, permit, as follows (p. 340):

> "* * * Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

In

> *New York v. New Jersey, supra,*

New York based its right to proceed upon the injury to the health and comfort of its citizens, due to the discharge of the sewage of the Passaic Valley into New York Bay. There was no right claimed due to impairment of navigation, a subject for the exclusive

control of Congress. It is true that the United States intervened and the State of New Jersey acquiesced in its demands by stipulation and the United States then withdrew as an intervenor long before this Court decided the case.

The only use to which the bed and waters of the Great Lakes within the confines of the different complainant states can be put, or it is claimed may be put, is for navigation. No other use is claimed for them by the amended bill of complaint, and none is suggested even in complainants' brief. Full, complete and exclusive control of this use is in the Federal Government and has been and is being exercised by Congress and by the officer or officers to whom has been delegated the authority. What vestige of dominion or control of the waters and bed of the lakes remains or is in the state, is unable to be observed, because whatever right they have is subject to the paramount power of Congress in control of navigation (and counsel so admit in their brief). Thus, the paramount power of Congress to control (a power exercised) envelopes and supersedes any right, authority or dominion of the states in such waters. So, what the states complainant complain about in the assumed capacity of lower riparian proprietors is nothing. In speaking of the right of a riparian proprietor in the waters and submerged land of navigable waters, this court said, in

> *Scranton v. Wheeling,* 179 U. S. 141, 45 L. ed. 126 at page 137:
>
> "It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be

held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

Some argument is attempted, to the effect that the power of Congress to regulate interstate commerce, including within such power the control of navigable waters, is limited to such extent that Congress in exercising control cannot divert or cause to be diverted or permit the diversion of waters from one watershed into another. We submit that the power of Congress in the regulation of interstate commerce is plenary, and such has been the holding of this court from *Gibbons v. Ogden,* down. Because of its peculiar pertinence here, we call attention to the so often quoted language of the opinion of the Chief Justice in that case, as follows (9 Wheaton 1, 6 L. ed. 23, at page 70):

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the

United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse."

In

Chicago, Rock Island & Pacific Railway Company v. Hardwick Farmers Elevator Company, 226 U. S. 426, 57 L. ed. 284, 287,

it is said:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme."

That Congress has lawfully committed to the Secretary of War, acting on the recommendation of the Chief of Engineers, full and complete power to control navigable waters, which includes fostering, improving or restraining facilities of navigation, cannot

now be questioned. In referring to the former act of Congress of September 19, 1890, the court in

United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 43 L. ed. 1136, 1143,

said:

"* * * Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the national government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government, enacted the statute in question."

In

Sanitary District of Chicago v. United States, 266 U. S. 405, 69 L. ed. 352, 364,

the court said:

"* * * This statute repeatedly has been held to be constitutional in respect of the power given to the Secretary of War. Louisville Bridge Co. v. U. S., 242 U. S. 409, 424, 61 L. ed. 395, 403, 37 Sup. Ct. Rep. 158. It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, chap. 907, sec. 10, 26 Stat. at L. 426, 454, Comp. Stat. Sec. 9910a, which forbade obstruction to navigable capacity 'not affirmatively authorized by law,' and which had been held satisfied with regard to a boom across a river by authority from a state. United States v. Bellingham Bay Boom Co., 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343. There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the lakes

and the Chicago river, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity (United States v. Rio Grande Dam and Irrig. Co., 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770), without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War."

That Article 1, Section 9, Clause 6, of the Constitution of the United States does not apply and can have no bearing upon the controversy here, is shown by counsels' own argument, (their brief 89, 90) and by the citation of

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

The subject of the control is navigable waters. Under the commerce clause of the constitution the power thus given can not be limited by Article 1, Section 9, Clause 6, of the Constitution. Otherwise, the intention of the Constitution to give to Congress complete and full power to regulate interstate commerce without any limitations whatever would be frustrated. Every facility for navigation to meet present demands of interstate commerce upon the Great Lakes has been provided by the United States in the improvement of the connecting channels of the Great Lakes, including all the harbors mentioned in the amended bill of complaint. So Congress by the 1899 Act has not only generally exercised control of and delegated to the Sec-

retary of War the power to regulate all navigable waters, but has actually and physically assumed and exercised control of the particular waters here involved by providing for deepening harbors and connecting channels and by otherwise improving them.

COMPLAINANTS' PRAYER FOR RELIEF.

We submit that the court can measure the futility of this litigation by the character of the relief prayed. These prayers in themselves demonstrate, without reference to the averments of the bill, that this suit should not be entertained but should be dismissed.

The first prayer asks, in substance, for a permanent injunction restraining the State of Illinois and the Sanitary District "from taking or causing to be taken any water whatever from Lake Michigan in such manner as to permanently divert the same from the said lake."

It is not clear what the pleader means by the word "permanently," but the most reasonable construction would apply it to a use of the waters which are not returned to the Lake. If by the word "permanently," the pleader means the duration of time, then the bill is both premature and futile, for the permit of the Secretary of War, which is the basis of this action, is limited in duration and is, in any event, revocable at any time in the discretion of the political department of the government.

We assume, however, as is reasonable, that "permanently" simply means that the complainants do not object to a temporary use of water which would be subsequently returned to Lake Michigan. If so, it is obvious that the prayer, if granted,would prevent the city of Chicago from making any use whatever of the waters of Lake Michigan, even for drinking purposes,

and, as Chicago has no other available water supply for its three millions of inhabitants than the waters of Lake Michigan, it is quite obvious that to grant such an injunction would be calculated to cause an immediate depopulation of the second city of the country. We cannot believe that this prayer is meant seriously and it can well be dismissed by this court as a mere futility, quite independent of the fact that it seeks to obstruct a use of the waters which the political department of the United States has expressly sanctioned.

The second prayer asks a permanent injunction to restrain defendants "from-taking or causing to be taken any water from Lake Michigan in such manner as to permanently divert the same from said Lake for any purposes in excess of the amount *which the court shall determine* to be reasonably required for the purposes 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."

This prayer cannot be characterized as a futility, but it can be justly characterized as a direct and necessary obstruction of the operations of the political department of the government in whose discretion the Constitution has vested the determination of the matter. It invites this court to usurp the functions both of the Secretary of War and his Chief of Engineers, and also of the Congress of the United States, and to determine for itself, without the adequate means of information which so complicated a problem of engineering would require, the question as to the respective navigable capacities of two great waterways, one to the Atlantic Ocean and the other to the Gulf of

Mexico. Possibly the court might be willing to assume such a responsibility if Congress had not acted, but the political department of the government has passed upon this question, not only with its affirmative prohibition of any state action, but by its very wise provision that this difficult question of engineering shall be determined, subject always to the final action of Congress, by the Secretary of War and the Chief of Engineers. By a long series of permits, they have determined this question. For over twenty-five years they have assumed the responsibility of determining to what extent the waters of Lake Michigan could be diverted into the Drainage Canal without undue prejudice either to the interests of the Great Lakes or to the interests of the Mississippi Valley. To grant this prayer for relief would mean that the Secretary of War would at once be *functus officio,* and even the Congress of the United States would thereafter be impotent to determine a great question of national policy, for if the court were itself to determine how these waters could be most wisely used for purposes of navigation in the common interests of the whole nation, it would, in effect, be discharging a function that is purely political in character and, in no respects, judicial.

All this was passed upon in the Sanitary District case, which this court has already decided, for it was the contention of the government in that case that while the unlawful diversion of the waters against the paramount authority of the government was a judicial question, that the method of apportioning the waters between respective national highways was not a judicial question, but was one that was peculiarly a question of political discretion and, as such, could only be

solved by the Congress of the United States or by such administrative officers as Congress, by reason of the inherent difficulty of the problem, might delegate the task.

This prayer for the relief becomes more significant when the interpretive contention in complainants' brief is read, for the main contention in that brief is Point VI, which is as follows:

> "It is not considered that Congress has power to authorize the abstraction of the waters of the Great Lakes from that water-shed 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 1000 cubic second feet.*"

In other words, the complainants ask this court to definitely determine, under this prayer for relief, that at the present time Chicago may not divert more than 500 cubic feet per second, or at any time, no matter what the growth of that great city may be, more than 1,000 cubic feet a second, as the measure of apportionment between the respective waterways. For this court to sustain this contention would be to nullify not only the present permit of the Secretary of War, which was given with the sanction of this court in the Sanitary District case, but it would nullify every permit that has ever been granted by the United States government in the twenty-six years that the Sanitary District has operated, and it would largely impair, if not destroy, vast works which have been constructed on the faith of these permits, the cost of which is in excess of $100,000,000.

This would be a judicial usurpation of the functions of the political branch of the government beyond any precedent, and it is a responsibility that this court would not willingly assume, even if it had the power under the Constitution, and yet it is the real prayer for relief in this bill. As such, its impropriety would seem to be too clear for argument.

This court said, in

Newport and Cincinnati Bridge Company vs. U. S. 105 U. S. 470, 26 L. ed. 1143, 1147,

> "* * * It is to be observed that the question now under consideration is not whether the Bridge Company has failed to comply with the requirements of the Joint Resolution, but whether those requirements are all that the due protection of free navigation demands. The first is, undoubtedly, a proper subject for judicial inquiry, but the last, as we think, belongs to the Legislature.
>
> * * * * * * * *
>
> No provision is made for instituting proceedings to have the question determined judicially; and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure.
>
> * * * * * * * *
>
> * * * It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the Legislature."

The attempt to claim the right in any state of the Union to come into this court to compel Illinois to maintain its waterways in a certain manner because

some citizen of the complaining state in his foreign travels might not like the odors arising therefrom is "too futile to need reply."

CONCLUSION.

We desire to submit very earnestly one final suggestion to the court. These bills should be dismissed because even the pendency of this litigation in the judicial branch of the government tends to embarrass the Secretary of War in the full exercise of his discretion in the matter and also the Congress in its determination of the policy of the nation. It is well known that the final solution of this great problem has been under consideration by Congress for many years. The problem is a difficult one and the political department of the government should be left free to determine it without a cloud upon its powers to do so, to which the pendency of even a frivolous suit gives rise.

As this court, in the Sanitary District case, clearly decided that the solution of the problem rested with the political department of the government, this bill should be dismissed.

Respectfully submitted,

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

GEORGE F. BARRETT,
EDMUND D. ADCOCK,
LOUIS J. BEHAN,
MORTON S. CRESSY,
Solicitors for Defendants.

JAMES M. BECK,
Of Counsel.