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IN THE

Supreme Court of the United States

October Term, 1927

No. ~~12~~ ORIGINAL

STATE OF NEW YORK,
Complainant,

against

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,
Defendants.

Brief on Behalf of the ~~Applicant~~, State of New York in Support of Its Exceptions Taken to the Conclusions of Law Contained in the Report of Hon. Charles E. Hughes, Special Master.

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HISTORY OF THE CASE

By motion dated September 17, 1926, the State of New York and State of Michigan jointly moved in the Supreme Court of the United States to amend the complaint of the State of Michigan against the State of Illinois and the Sanitary District of Chicago, theretofore filed and answered by such defendants, so as to bring in the State of New York as an additional party complainant in such Michigan action. Opposed by the defendants, this motion was denied by the United States Supreme Court, but the State of New York was permitted, however, to file a separate bill of complaint similar to the proposed joint Michigan and New York complaint. This action was therefore commenced in October, 1926, by the State of New York serving its separate complaint upon the defendants State of Illinois and Sanitary District of Chicago.

Subsequently, upon the petition of the State of New York, the Supreme Court permitted it to participate in the trial of the related suit of No. 7 Original, the *States of Wisconsin, Ohio, Pennsylvania and Minnesota against the*

State of Illinois and the Sanitary District of Chicago "in like manner as if those suits had been consolidated." The Wisconsin action by order of June 7, 1926, had been referred to the Hon. Charles E. Hughes as Special Master to take the evidence and report the same to the Court with his findings of fact, conclusions of law and recommendations for a decree subject to the examination, consideration, approval, modification, or other disposition by the Court. The order permitting New York to participate in the trial of the Wisconsin case stated "this order is made without prejudice to the authority of the Court hereafter to make any order which it may deem proper, respecting the matters set forth in the third paragraph of the bill of complaint in the case of the *State of New York* v. *the State of Illinois and Sanitary District of Chicago,* and respecting the issues that may arise from the presence of that paragraph in that bill of complaint."

Referring to this order, the Special Master ruled as follows:

> "I shall receive the evidence which may be offered by the State of New York, in like manner as if its suit had been consolidated with the suit of the *State of Wisconsin* v. *The State of Illinois and Sanitary District of Chicago.*
>
> "It will be noted, however, that the order of the Supreme Court to that effect reserves the matters set forth in the third paragraph of the bill of complaint in the case of the *State of New York* v. *the State of Illinois and Sanitary District of Chicago.*
>
> "Accordingly, I shall not receive evidence with respect to any matter set forth in the third paragraph of the bill of complaint in that suit, until the further order of the Supreme Court." (Transcript, p. 1311.)

This third paragraph of New York's complaint set forth the allegations of injury caused to the water power inter-

ests of the State and its citizens on the Niagara and St. Lawrence rivers by the Chicago abstraction of waters from the Great Lakes-St. Lawrence Waterway.

The defendants failed to voluntarily answer the complaint of the State of New York. A motion for an order compelling such answer therefore was made. The Supreme Court on April 18, 1927, ordered that

> "the answer heretofore filed by defendants in this case to bill of complaint in related case of *Michigan* v. *Illinois and Sanitary District of Chicago* may and shall be accepted and treated as their answer to bill of complaint in this case, other than paragraph III thereof."

Subsequently, the motion of the defendants to strike out paragraph III, and New York's related motion to compel the defendants to answer its allegations were argued. On May 31, 1927, on an opinion of Mr. Justice Van Devanter, the Court struck out paragraph III from New York's bill of complaint, without prejudice. The Court's action was upon the theory that no injury would result from Chicago's diversion to the present water power developments on the Niagara and St. Lawrence rivers or to any definitely established projects.

In accordance with the Court's permission, the New York action was tried before the Special Master simultaneously with the Wisconsin and Michigan cases. Evidence was offered by New York in support of the allegations contained in its complaint with the exception of those relating to the damage to its water power rights and interests.

NEW YORK'S VITAL INTEREST IN THE GREAT LAKES ST. LAWRENCE WATERWAY

The Court's Special Master, Honorable Charles E. Hughes, concludes his discussion of the damage to the complainants, caused by the Chicago diversion, with the finding, "that the complainants have established that the diversion through the Chicago Drainage Canal has caused substantial damage to their navigation, commerce and other interests." (Report, p. 118.) The Master made no attempt to find the degree in which the complainant states had suffered from Chicago's abstraction, nor was this necessary. It should be pointed out, however, that the State of New York, both in its proprietary and sovereign capacities, has suffered tremendous injury as a result of Chicago's interference with the Great Lakes-St. Lawrence Waterway.

It might be erroneously thought, from the motions presented to the Court relating to the water power injuries set forth in paragraph III of New York's bill of complaint, that the State was solely interested in that particular class of damage. It is true that the water power injury to the State and its citizens was estimated by Colonel Hugh L. Cooper at over $100,000,000.00. (Transcript, pp. 1312–1348.) It is also true that no regulating, compensating or other kinds of works can be constructed which would recover on the Niagara-St. Lawrence rivers, the power lost by the diversion of the Great Lakes-St. Lawrence watershed. Such was the finding of the Joint Board of Engineers on St. Lawrence Waterway, appointed by the governments of United States and Canada, in paragraph 244 in their report of November 16, 1926, (Exhibit No. 147), although it is obvious that water permanently extracted from the upper reaches of this waterway cannot be used for power purposes down-stream. The Court, however, has deferred the presentation of this issue, and

it is only referred to here to emphasize the fact that despite the magnitude of this water power injury, New York State has navigational and commercial interest in the Great Lakes-St. Lawrence Waterway which is second to none.

An examination of the report of the War Department and the United States Shipping Board entitled "Transportation on the Great Lakes" (Exhibit No. 95), to which the report of the Special Master makes frequent reference, gives the statistics of the volume of commerce entering and leaving New York ports on Lake Erie and Lake Ontario and on the St. Lawrence and Niagara rivers. It appears from the undisputed evidence that this is largely a bulk-commodity movement, passing between the upper lakes and Lake Erie with Buffalo as the easterly terminus. The fact that practically all of this through commerce is carried in large lake vessels drawing from 21 to 23 feet of water when fully loaded, vessels which cannot pass through the Welland Canal as it is presently constructed, have caused Buffalo, New York, to became one of the great ports of the United States, and, for that matter, of the entire world.

At the trial before the Special Master, a picture of the varied nature and extent of New York's interest in the navigation and commerce of the Great Lakes was given by detailed proof of the commerce of Buffalo and the improvements made at private and public expense to facilitate its movement and handling. It was shown that while the Federal government constructed the outer breakwater and entrance channels, the State, city and private concerns had united to construct and maintain the inner harbor. Two extensive portions with well-equipped terminals and piers, known as Erie and Ohio Basins, cost the State approximately $4,000,000.00. (Transcript, p. 1803.) The city of Buffalo, up to 1926, had expended approximately $5,000,000.00 in the construction of the City Ship Canal,

Buffalo Creek and other portions of the harbor. (Transcript, p. 1803.) The extensive and varied nature of the harbor improvements and terminal facilities, including grain elevators, iron ore and coal docks, sand, stone, and gravel yards, freight houses of the seven different connecting railroads were all described by competent witnesses.

In view of its situation, it is not surprising to learn that Buffalo is the chief port on the entire Great Lakes-St. Lawrence Waterway in the value of the total commerce handled. (Exhibit No. 95, 1913–1923, inclusive, pp. 52, 53.) In gross tonnage, its commerce has been exceeded on the Great Lakes only by the combined ports of Duluth-Superior Lakes, and in the States of Minnesota and Wisconsin. (Exhibit No. 95, pp. 44–45.) Some idea of the importance of the commerce of the port of Buffalo may be gained by comparing its gross tonnage with that of all of the ports of the United States, and its insular possessions.

In the year 1925, according to reports of the United States Shipping Board (Exhibit No. 144) the gross tonnage of Buffalo was exceeded only by New York City, Duluth-Superior, San Francisco, and Los Angeles. In foreign commerce, Buffalo, in the same year, took a higher position. Though not a seaboard, its trade with foreign nations was greater than any United States port other than New York, New Orleans and Philadelphia.

Of all the large commerce movements on the Great Lakes, the one in which the State of New York is chiefly interested is the grain movement. Entirely apart from the large sums which the State, municipalities and citizens have spent in providing terminal facilities, grain elevators and even a Barge Canal to facilitate transportation of this commodity, the State has a greater interest in seeing that the cost of flour to its citizens is not increased because of the enhanced transportation charges resulting from the Chicago diversion.

Grain which is used by the eastern states, as well as New York, for the food supply of their vast and congested population centers, and also the grain which is exported to European countries, is chiefly carried by Great Lakes vessels to the port of Buffalo. Eighty-four per cent of the total grain shipments to the United States ports on the Great Lakes, in the year 1923, was received at Buffalo. There, it is trans-shipped into canal barges and railroad cars. Portions of it go to the flour mills of eastern New York. Other portions are consumed in the State of New York, and vast quantities are distributed to eastern states and foreign countries. There are great businesses owned and operated by citizens of the State of New York which are dependent upon the shipment, receipt, milling and distribution of this vast grain movement.

Grain, however, is only one of the great commodities of lake-borne commerce in which New York is vitally interested. From the Lake Superior ports there annually is shipped to the ports on the lower lakes great quantities of iron ore. The absence of coal deposits in the Mid-West necessitate the location of the steel mills in the eastern States. New York has extensive iron and steel mills and receives great quantities of this lake-borne iron ore through the Port of Buffalo. Additional amounts are trans-shipped there for distribution to other points in eastern states. Over five and one-half million tons of iron ore were unloaded from Great Lakes vessels in Buffalo in the year 1923. (Exhibit No. 95, p. 267 and map opposite p. 268.)

The iron and steel mills of New York also consume great quantities of fluxing stone which is imported from the upper peninsula of Michigan via lake vessels and unloaded at Buffalo. (Exhibit No. 95, p. 366, map opposite p. 366.)

The commerce at Buffalo is not one-sided, however. Practically all of the lake-borne anthracite coal used in the Mid-Western States is shipped from her docks. Ves-

sels bringing iron ore and grain to Buffalo returned to the west with 97 per cent of such lake-borne western coal movement. (Exhibit No. 95, pp. 309–310; second map opposite p. 310.)

In package freight, Buffalo again leads the ports of the Great Lakes in the volume of commerce received and shipped. This classification includes chiefly flour, automobiles, copper, feeds, cement, lime, articles manufactured from iron and steel, sugar, salt, fruits and vegetables and other miscellaneous merchandise. (Exhibit No. 95, pp. 371–375.)

The freight carried over the Great Lakes-St. Lawrence Waterway is of far greater consequence to the welfare of New York, the other complainant states, and the nation as a whole, than is the passenger traffic, but consideration must also be given that the waterway is extensively used as a highway for such traffic. From 1910 to 1923, inclusive, in each year, approximately 5,000,000 passengers have been transported in lake vessels. In 1923, about one-half of the entire number was to or from New York ports, Buffalo leading with a traffic of 2,712,179 persons. (Exhibit No. 95, pp. 56–57.)

The commerce of Buffalo is so varied and of such great magnitude that it overshadows the other ports of New York on Lake Ontario and on the Niagara and St. Lawrence rivers. They, nevertheless, are engaged in the lake trade on a large scale. Alexandria Bay receives more wood pulp, pulpwood and other forest products than any other port on the Great Lakes. (Exhibit No. 95, pp. 368, 369.) The car ferry traffic of Ogdensburg and of Charlotte (Rochester, N. Y.), in 1923, amounted to approximately 1,000,000 tons each. Oswego receives large quantities of grain, Charlotte and Sodus Point ship quantities of bituminous and anthracite coal to Canadian ports on Lake Ontario and to American ports on the St. Lawrence river. (Exhibit No. 95, p. 415, pp. 300–365, maps opposite p. 310.)

It is a matter of historical knowledge that New York's commercial position followed its opening highway of trade between the Atlantic seaboard and the Great Lakes-St. Lawrence Waterway, thus making itself the channel of trade between the vast interior sections of the country, rich in agricultural and natural produce, and the manufacturing states along the Atlantic coast and foreign countries. The opinions of this court have recognized this fact. In the case of *The Robert W. Parsons,* 191 U. S. 17 (1903), the court said:

> "The Erie Canal, though wholly within the State of New York, is a great highway of commerce between ports in different states and foreign countries." * * * "The canal was amply sufficient, and for twenty years was the principal means of communication with the northwest, and was not only the highway over which all the merchandise was carried between the Hudson River and the Great Lakes, but was largely used for the transportation of passengers in the great western immigration which immediately followed its construction."

The new Barge Canal, which has replaced the old Erie Canal, is open to such commerce as cares to use it and is free from all tolls. It is equipped with terminals, grain elevators and other modern facilities and affords a twelve foot depth of water between the Niagara at Tonawanda and the Hudson at Waterford. At Tonawanda, access to Lake Erie is had by the Niagara River. In the interior of the State, the Canal is connected with Lake Ontario by the Oswego Canal. To the north, the eastern end of the Canal is again united with the Great Lakes-St. Lawrence Waterway by means of the Champlain Canal, Lake Champlain, Richelieu River and Chamblay Canal. The Seneca

and Cayuga Canal connects the Finger Lakes region in the heart of the State. This great artificial waterway makes a very large proportion of the entire State, and particularly its commercial and populated sections, a natural tributary to the Great Lakes-St. Lawrence Waterway. This court has recently recognized the importance of the Barge Canal as a part of a great interstate highway of trade in the case of *The United States of America and Interstate Commerce Commission* v. *The New York Central Railroad Company,* 71 U. S. (L. ed.) 350; 272 U. S. 457, wherein the railroad company was compelled to furnish switching connections with the Erie Basin terminal of the Canal in Buffalo harbor. The court pointed out that "about 75 per cent of the traffic passing over" the canal "is interstate" and held that "where as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute."

It is apparent from a study of these undisputed facts that the State of New York as the quasi-sovereign of its great population, dependent upon the commerce of the Great Lakes for a portion of its food supply; of its citizens engaged in the manufacture, transportation and distribution of the commerce between it and other states and nations adjacent to the Great Lakes-St. Lawrence Waterway; as the proprietor of a great canal system costing about $174,000,000.00, solely designed to connect this waterway with the interior of the State and to facilitate the movement of commerce between the waterway and points in eastern states and foreign countries, has a great and vital interest in the commerce and navigation of the Great Lakes-St. Lawrence Waterway. When the city of Chicago, as the Special Master found, in aid of its sewage disposal problems and for the development of water power, reaches out through the operation of natural laws and lowers the

levels of the Great Lakes, an injury is done which so strikes at the welfare of the State and its citizens that this court should not permit its continuance.

THE QUESTION RAISED BY THE STATE OF NEW YORK

The main question which underlies this entire controversy—the answer to which is so vital to the welfare of New York and its citizens and affects the structure of state and national government—may be simply expressed.

> *Can Congress, acting through the Secretary of War, lawfully permit a municipality such as the Sanitary District of Chicago, to divert water from a natural waterway for sewage disposal and water power purposes, upon the sole ground that, through the resulting injury, commerce is affected?*

In view of the importance of this question, the State of New York lays aside its exceptions to the Special Master's findings of fact, and accepts his report on the facts as though wholly correct. Exceptions to conclusions of law, save as they relate to this one central question, are likewise disregarded.

STATEMENT OF FACTS WHICH RELATE TO THE LEGAL QUESTION RAISED IN THIS BRIEF

(a) The Diversion and Its Effect.

The Special Master finds that a diversion of 8,500 c. f. s. through the drainage canal of the Sanitary District of Chicago "lowers the levels of Lakes Michigan and Huron approximately six inches at mean lake levels; the levels of Lakes Erie and Ontario, approximately five inches at mean lake levels; and the levels of the connecting rivers, bays and harbors, so far as they have the same mean levels as the above mentioned lakes, to the same extent, respectively." (Report p. 104.)

It is further found that the diversion of about 8,500 c.f.s. has continued for a sufficient period of time to cause and has caused such lowering of the mean levels of the lakes. If the diversion at Chicago were ended the mean level of the lakes and rivers would be raised to the same extent that they had been lowered respectively by the diversion. (Report p. 105.)

(b) The Resulting Injury.

The Special Master finds that the lowering of the levels of the lakes and connecting waters occasioned by the Chicago diversion "has caused substantial damage to" the "navigation, commercial and other interests" of New York and the other complainant states . (Report p. 118.)

Among the other injuries the Master finds that "there is sufficient evidence to require the finding that a lowering of six inches has been a substantial contribution to the injury caused by the total reduction, in connection with fishing and hunting grounds, the availability and conveniences of beaches at summer resorts, and public parks." (Report p. 117). This general finding is based on specific proof, among other things, with reference to the injuries caused property owners in the Thousand Island section of the St. Lawrence River on New York's northern boundary by the diversion.

While the Master could not clearly determine the extent which the Chicago diversion had contributed to the decay of pile foundations of docks and other structures resulting from the lowering of lake levels occasioned both by natural causes and the Chicago abstraction, he nevertheless recognizes damages of this character. (Report p. 117). The complainants in their proof on this point selected the harbor and city of Milwaukee as a typical example. That a similar injury would be sustained at the port of Buffalo, New York, many of whose docks, piers, terminals, trestles, etc., rest on pile foundations is evident. (Exhibit 95).

These and other injuries resulting from the Chicago abstraction are small, however, compared to the damage done to the commerce of the Great Lakes-St. Lawrence Waterway in which the State of New York has such an outstanding interest. As to this the Master says "I am satisfied that the evidence requires the finding that the lowering of lake levels of approximately six inches has had a substantial and injurious effect upon the carrying capacity of vessels, and has deprived navigation and commercial interests of the facilities which otherwise they would have enjoyed in commerce on the Great Lakes." (Report p. 116).

(c) The Purposes of the Chicago Abstraction.

An examination of the entire history of the Chicago diversion including all the permits, governmental reports and documents indicates that the main purpose of constructing the sanitary canal was to obtain a cheap method of disposing of Chicago's sewage and the trade waste of the manufacturing plants and stockyards. To quote from the Special Master's Report "there is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District." (Report p. 165). That such is the fact cannot be seriously questioned before this court, for on two occasions, in the decisions of *Missouri* v. *Illinois,* 200 U. S. 496 and *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 424, the court recognized that the Sanitary District's channel was constructed "primarily as a means to dispose of the sewage of Chicago".

The Master further finds that the development of water power is an incidental object of the diversion. "The purpose of utilizing the flow through the drainage canal to develop power is also undoubtedly present, although subordinated to the exigency of sanitation. So far as the diverted water is used for the development of power, the use is merely incidental." (Report p. 165).

An examination of the testimony that particularly refers to the existing water power plants of the Sanitary Districts and the contemplated plants on the Illinois and Desplaines rivers, might raise some question as to whether or not the water power projects did not stand on a parity with the needs of sanitation among the purposes of the diversion. In fact the Master finds that up until the time when the District made a contract for the sale of all the power that it could produce, it manipulated the flow through the drainage canal in accordance with the demands for power produced at its Lockport, Illinois plant. This he points out resulted in a larger flow in the evening and during the night when the power load was heaviest. (Report p. 26).

The purposes of the diversion have not been construed through the medium of any Congressional approval. Despite the defendants' attempt, through reference to a century of reports of secretaries of war, acts of Congress and other documents, there is no evidence that Congress has directly approved the diversion. The Master says "I am unable to find that Congress, apart from the authority conferred upon the Secretary of War by Section 10 of the Act of March 3, 1899, and his action thereunder, * * * has authorized the diversion in question." (Report p. 173). In fact Congress has been exceedingly careful to prevent being placed, even indirectly, in the position of approving the diversion. In the Rivers and Harbors Act of January 21, 1927 (44 Stat. Pt. 2, 1010, 1013) which involved an improvement of a small stretch of the Illinois

River, Congress was careful to add a proviso "that nothing in this act shall be construed as authorizing any diversion of water from Lake Michigan." (Report p. 85.)

The only authoritative expression of Federal approval is to be found in the permit of the Secretary of War of March 3, 1925. As will be remembered that permit followed the decision in the government case, *Sanitary District of Chicago* v. *United States.* Yet there is nothing in the permit of the Secretary of War or in the application of the Sanitary District to show that it was issued for anything other than for the sanitary needs of the city of Chicago. The terms of the permit require a program of constructing sewage disposal works to be carried out and a like project for metering the water service in the city of Chicago, under both of which the necessities of diversion for sanitary purposes would be decreased. Controlling works were ordered to be placed in the drainage canal in order to prevent in times of storm the reversal of flow and the pollution of the waters of Lake Michigan, which are used as Chicago's drinking supply. (Report, p. 77.)

The only provisions relating to navigation are two clauses used in permits of this character forbidding an "unreasonable interference with navigation by the work herein authorized" and stating "that no attempt shall be made by the permittee to forbid the full and free use by the public of any navigable waters of the United States"—both of which provisions are obviously violated when the Special Master finds that the diversion has lowered the levels of the Great Lakes to the substantial injury of the commerce which passes over them. As a matter of fact the Secretary of War on March 3, 1925, in transmitting the permit to the Sanitary District clearly construed the purpose of its issuance when he wrote "this department has always held and continues to hold that *the taking of an excessive amount of water for sanitation* at Chicago does affect navigation on the Great Lakes adversely, and

that this diversion of water from Lake Michigan should be reduced to reasonable limits with utmost dispatch." (Report p. 80.)

There is an inference contained in the Special Master's Report that the Secretary of War might have considered that the diversion might be of some aid to navigation on the Mississippi River. Thus the Master says "upon all the facts, it was *permissible* for the Secretary of War to reach the conclusion that the diversion from Lake Michigan of 8,500 c. f. s., was to some extent, an aid to the navigation of the Mississippi River in time of low water." (Report p. 124.) While the Secretary of War might have so speculated, there is no evidence to show that in fact he gave any consideration to such a possible fact of the diversion. The testimony produced before the Special Master indicates that through the peculiar hydraulics of that river and its shifting sand bar bottom, that the addition of Lake Michigan water to it would have no appreciable affect upon its navigation. Even with all the government reports and the best witnesses obtainable who were conversant with the Mississippi phenomena, the Special Master was forced to conclude that although the diversion might increase the navigable depths over bars on the Mississippi River during low water "that the extent of this increase is not the subject of sufficiently accurate determination to warrant a finding." (Report p. 124.)

As a matter of fact it is not necessary to give much time to the discussion of this point, for impliedly at least, it was passed upon by this court in the decision in the government case. At that time representatives of the Mississippi Valley states appeared before the court to object that the action of Secretary of War Stimson on January 6, 1913, in refusing to permit increased diversion, had not given consideration to its effect upon the navigation of the Mississippi. The court overruled this objection and indicated that it was no part of his duty to con-

sider such a claim, stating "it is doubtful at least whether the Secretary was authorized to consider the remote interests of the Mississippi states * * *."

It is clear from the Master's report and the representations of the Sanitary District of Chicago that the amount of the diversion is governed by the sanitary needs of Chicago. The volume of flow which is necessary to dilute safely the sewage of the city is the measure of diversion sought for by the defendants. (Report, pp. 73, 132–139.)

It is obvious from a consideration of the facts that the action of the Secretary of War on March 3, 1925, had as its sole purpose the prevention of an epidemic or catastrophe which it was felt might result from the sudden reduction of the illegal diversion by Chicago to the amount then allowed under the old permit of the Secretary of War. It is further apparent that the major purpose of this diversion from the time of the original inception of the scheme down to the present, was to provide a cheap method of disposing of Chicago's sewage and also to provide hydro-electric power. It makes little difference which was the major and which the minor purpose. Both are essentially local in character. Neither of them in any way that can be measured has any beneficial effect upon navigation. On the contrary, all evidence shows, and the Special Master finds, that the diversion affects navigation to its serious and substantial detriment and to the injury of the great commerce of the Great Lakes-St. Lawrence Waterway.

ARGUMENT ON THE LAW

I

The State of New York has the right for itself and in behalf of its citizens to insist that the waters of the Great Lakes–St. Lawrence Waterway flow down to it without diminution by the defendants, the State of Illinois and Sanitary District of Chicago.

(*a*) *Position of the Special Master.*

The Master gives as his legal conclusion that—

> "The States have sovereign and proprietary rights over the navigable waters, and the lands underlying them, within their boundaries subject to the powers surrendered to the national government. * * * The States have authority to determine for themselves such rules of property as they may deem expedient with respect to the waters within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks. *United States* v. *Cress,* 243 U. S. 316, 319; *Barney* v. *Keokuk,* 94 U. S. 324."

The State of New York is in accord with that position, which is amply supported by the following authorities:

(*b*) *Under the Common Law.*

It is the rule of the English Common Law that a person owning land adjoining a natural waterway is entitled to receive the waters without pollution or substantial diminution. "Water," said Blackstone, "is a movable, wandering thing and must of necessity continue coming by the law of nature; so that I can have only a temporary, transient, usufructary property thereon." (*Blackstone's Commentaries,* Book II, pp. 14 and 18.)

The riparian proprietor may not make such an extraordinary or artificial use that navigation will be interfered with.

Farnham, Waters and Water Rights, § 64b.

"It is the well settled general rule that a riparian proprietor has a right to have the water of a stream flow down to his land as it was wont to run, in its natural mode and course, undiminished in quantity and unimpaired in quality"

Ruling Case Law, Waters, § 30.

There is no need to make extensive citation of authorities as to what the rule of common law is, for the Court itself in *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690 (1899) has rendered such a discussion unnecessary.

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Co., § 439:

> " 'Every proprietor of lands on the banks of a river has naturally an equal right of the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqu currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.'

"This is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law * * *."

In the later case of *Kansas* v. *Colorado,* 206 U. S. 46, p. 85, the Court again says:

> "The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed."

(*c*) *Under the Law of Riparian Rights as it Exists in the State of Illinois and in the State of New York.*

While the United State Supreme Court has declared its right to apply any law, international, state, or otherwise, which it deems appropriate to the exigencies of a particular case, it is noteworthy that in interstate conflicts it has attempted as far as possible to base its decision upon the local law which obtains in the states involved in the controversy. An examination of the two great interstate river disputes, *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado,** shows the great weight accorded by the Court to this consideration. In the first case the Court was obviously troubled in its decision by the fact that in Colorado the rule of appropriation had been adopted while Kansas, with certain modifications, was a riparian law State. Neither State could enforce its rule upon the other, and there was no Federal statute or other superior law governing both parties. "The actual decision reached was in the nature of a compromise, as is often the case in International arbitrations," says Herbert A. Smith in *The American Supreme Court as an International Tribunal* (1920), p. 88. In the latter case, however, the Court's problem was comparatively simple. Both were Simon-pure appropriation states. Neither could complain if the Court applied the same rule of law as between citizens along the interstate river in both States as each State had adopted within its own limits.

The problem, therefore, presented to the Court by the complaint in the New York action likewise is comparatively

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* 259 U. S. 419.

simple for both Illinois and New York have adopted the same common law rule,—that a lower riparian proprietor is entitled to have a stream come down to him substantially undiminished.

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respects to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks."
>
> *United States* v. *Cress,* 243 U. S. 316 (1916).

In the case of *Smith* v. *City of Rochester,* 92 N. Y. 472 (1883), Chief Judge Ruger referred to the temporary enjoyment or usufructuary right of a riparian proprietor under the common law, and said:

> "The rule of the common law of England has been uniformly deemed to apply in this country to the effluents of all navigable waters as well as to all those which are non-navigable, * * .* These rules were made the fundamental law of this State by its original Constitution and have been readopted upon every subsequent revision of that instrument.
>
> "* * * the sovereign right grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people.
>
> "* * * This right, being founded upon the public benefit supposed to be derived from their use as a highway, cannot be extended to a different purpose inconsistent with its original use. The diversion of these waters for the purposes of furnishing the inhabitants of a large city with that element for domestic uses, * * * is an object totally inconsistent with

> their use as a public highway or the common right of all the people to their benefits."

The common law rules of waters generally, as well as with reference to the riparian right to the undiminished flow of streams, has been adopted in New York, the only important change being the extension of the State's ownership of lands under water of tidal streams to the boundary lakes and rivers and to certain other important streams.

Fulton Light, Heat & Power Co. v. *State of New York,* 200 N. Y. 400 (1911).

The Canal Appraisers v. *People, ex rel. Tibbits,* 17 Wend. 371.

People v. *Canal Appraisers,* 33 N. Y. 461.

Danes v. *State of New York,* 219 N. Y. 67.

Matter of Commrs. of State Reservation at Niagara, 37 Hun 537, aff'd 102 N. Y. 734 (1885).

In *Revell* v. *People,* 177 Ill. 479, 52 N. E. 1055, the Supreme Court of Illinois said:

> "The State of Illinois has adopted the common law as it existed prior to March 24, 1606—the fourth year of James I, and in the absence of any statute of the state changing the common law in regard to rights of riparian owners the common law as it then existed must control."

In the same case the court said:

> "We are aware of no statute of this state changing the common law, nor has there been established any custom or usage which modifies the common law." (P. 484.)

Not only have the Illinois courts held that the common law was adopted as the law of that State, but the Supreme Court of the United States has declared that the common law rule as to rights of riparian owners is the settled law of Illinois.

In *Hardin* v. *Jordan,* 140 U. S. 371 (1891), this Court held that it was absolutely settled in Illinois that the rule of the common law was the law of that State in regard to the rights of riparian owners. Mr. Justice Bradley, at page 385, said:

> "It is our judgment that the law of Illinois, in this regard (the rights of riparian owners) is the common law, and nothing else; * * *."

In *Beidler* v. *Sanitary District of Chicago,* 211 Ill. 628, 71 N. E. 1118, the Supreme Court said:

> "A riparian owner has the right to use the water in the stream.* * * The limitation and extent of the use of the water is that it shall not * * * impair the right of use of water by other riparian owners."

Washington Ice Co. v. *Shortall,* 101 Ill. 46.
Mount Greenwood Cemetery Assn., 159 Ill. 385, 42 N. E. 891.
Bliss et al. v. *Kennedy,* 43 Ill. 67, 75.

It has been consistently held that the diversion of water from a stream by the upstream owner, which water is not returned to the stream, constitutes an impairment of the right of use of the water by the downstream riparian owner.

It therefore follows that under the law of the State of New York or under the law of Illinois, the citizens and State of New York, owners of property abutting upon

Lakes Erie and Ontario and upon the Niagara and St. Lawrence rivers, as riparian owners, have the right to the full flow of the stream as nature provided it, undiminished by any diversion.

The acts of the defendants State of Illinois and Sanitary District of Chicago, in the abstraction of 8,500 c.f.s. of water from Lake Michigan and in its diversion into the Mississippi watershed for the purpose of sewage disposal and hydro-electric power development, constitute an illegal use of the waters of a natural watercourse, actionable under the law of Illinois or the law of New York. The complaint of the State of New York asks the Court to apply the same rule that the Illinois courts would apply in a similar matter properly before them.

(*d*) *Under International Law.*

The Supreme Court has said that in controversies between quasi-sovereign States it applies "international law" as the exigencies of the particular case may demand.

Kansas v. *Colorado,* 185 U. S. 125 (1902).
The Paquette Habana, 175 U. S. 677, 700.

The Great Lakes-St. Lawrence Waterway being, in fact, the boundary between the Dominion of Canada and the United States of America, the principles of international law are particularly appropriate.

The treaties recognize the importance of unobstructed navigation over the waterway. By the treaty of Washington of May 8, 1871, Article XXVI, it was agreed that the portion of the St. Lawrence river wholly within the Dominion of Canada "shall forever remain free and open for the purposes of commerce to the citizens of the United States." By Article I of the present treaty between Great Britain and the United States, concluded January 11, 1909, and dealing with boundary waters between the United

States and Canada, it was declared that all of such navigable boundary waters should "forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally." Article III further provides that "no further or other uses or abstractions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdiction and with the approval as hereinafter provided, or a joint commission, to be known as the International Joint Commission." According to Hyde (*International Law, Chiefly as Interpreted and Applied by the United States,* § 183) such a duty imposed upon a riparian State either by international law or treaty to maintain the navigability of an international waterway "implies an obligation also to check within places subject to the control of such State commission of any acts which, unless restricted, would prove injurious to navigation generally. This obligation would seem to render improper the tolerance of any diversion productive of such an effect even though it should occur at a point where the river ceased to be navigable and lay wholly within the domain of the acquiescent territorial sovereign.

Hyde also lays down the rule that an international stream must be considered as a unity rather than from the viewpoint of the selfish needs of a particular State seeking to divert its waters. "Where a river traverses or serves as the boundary of territories of several States," says he in § 183, "the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare."

This last principle seems peculiarly appropriate to the controversy before the court in the three related cases. On the one hand we have a single State, with a very lim-

ited shore line and which in a state of nature contributed but a trifling fraction of the total water supply of the Great Lakes-St. Lawrence Waterway, permanently withdrawing from such waterway for sewage disposal purposes the equivalent of a sizable river,—a river which the Chicago engineers themselves claim to be one-quarter of the extreme low water flow of the Mississippi river itself. On the other hand are the six complainant States with their vast populations struggling to preserve unobstructed the navigation of this waterway for the use of their citizens and for the mutual benefit of their peoples and those countless others in all the States of the Union who are affected by any obstruction to the navigable capacity or any increase in freight rates of the Great Lakes-St. Lawrence Waterway.

An excellent statement of the rights of States and nations in an interstate or international stream is given by Farnham (*Waters and Water Rights,* Vol. 1, § 6).

> "A river which flows through the territory of several states or nations is their common property. Each is entitled to its navigation throughout its whole extent, so far as it can be exercised without injury to the rights of others. It is a great natural highway conferring, besides the facilities of navigation, certain incidental advantages, such as fishery and the right to use the power for water and irrigation. Neither nation can do any act which will deprive the other of the benefits of those rights and advantages. The inherent right of a nation to protect itself and its territory would justify the one lower down the stream in preventing by force the one further up from turning the river out of its course, or in consuming so much of the water for purposes of its own as to deprive the former of its benefit. Conversely, the upper owner would have a right to prevent an obstruction of the stream

which would prevent fish from ascending to its shores, or interfere with its rights of navigation. To prevent resort to force, courts of arbitration would protect these rights, and the courts of the respective nations will prevent acts on the part of their own subjects which interfere with the rights of subjects of other states. And courts having a supervisory jurisdiction over the acts of the political department of government will prevent acts by that department which will injure the rights of neighboring states. The gifts of nature are for the benefit of mankind, and no aggregation of men can assert and exercise such rights and ownership of them as will deprive others having equal rights, and means of enjoying them, of such enjoyment. The acts of nations must be governed by principles of right and justice. The days of force and self-aggrandizement at the expense of neighboring nations are past, and the common right to enjoy the bountiful provisions of Providence must be preserved. * * * One state cannot authorize changes in the river which will injure property in another state. And the upper state cannot divert the water to the injury of property or the destruction of navigation lower down, and attempts to do so will be restrained by courts having jurisdiction of the parties."

This principle has the support of the decisions in *Holyoke Water Power Co.* v. *Lyman,* 15 Wall. 500, 21 L. ed. 133; *Holyoke Water Power Co.* v. *Connecticut River Co.,* 52 Conn. 570, 20 Fed. 71; *Pine* v. *New York,* 112 Fed. 98; *Kansas* v. *Colorado,* 185 U. S. 125; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690; *Conant* v. *Deep Creek & C. Valley Irrigation Co.,* 23 Utah 627, 66 Pac. 188.

The Northwest Ordinance of July 13, 1787 (Art. IV) for the Government of the territory northwest of the river

Ohio has an important bearing on the present case. In a dispute in a case between States the Ordinance is in fact equivalent to an interstate treaty or compact. It declared "The navigable waters leading into the Mississippi or the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." This ordinance is still in force today and while it does not prevent the improvement of navigation it does assure to all the States interested in the waters covered by it that no one state may obstruct their navigable capacity.

Huse v. *Glover,* 119 U. S. 544 (1886).

Referring to the Northwest Ordinance in the action of the *Economy Light and Power Co.* v. *United States,* 256 U. S. 113, the United States Supreme Court stated that "so far as it established public rights of highway in navigable waters capable of bearing commerce from State to State [as it did in the case of the Great Lakes-St. Lawrence Waterway], it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by Congress."

The Sanitary District of Chicago in constructing its Sewage Canal and the State of Illinois in authorizing and directing the abstraction of lake waters have obstructed the Great Lakes-St. Lawrence Waterway and burdened the interstate commerce thereon, in violation of this interstate compact. New York in behalf of its citizens has the right to protest and by its complaint in this action it seeks the injunction of the court against the further continuance of the violation of the implied covenant of the Northwest Ordinance.

The residuum of sovereignty which the State of Illinois possesses as a member of the Union is less than that of the completely independent Nation. Yet even the territorial supremacy of such a nation "does not give a boundless liberty of action. * * * The State is, in spite of its territorial supremacy not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring State —for instance, to stop or to divert the flow of a river which runs from its own into neighboring territory. (Oppenheim on International Law, 3d ed., vol. 1, p. 211, (920).)

(e) *Under the Decisions of the United States Supreme Court.*

1. GENERALLY.

This court has recognized and applied in many cases the rule of the common law as to the right of a lower riparian owner to receive a stream without substantial diminution as laid down by Chancellor Kent. Only in the arid states of the west where physical necessities have required the application of a different rule has the court deviated from this ancient and well established doctrine.

In the case of the *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899), the United States objected to the defendant's diversion on the ground that although made on a non-navigable portion of the Rio Grande River it impaired the navigable capacity of the river further down-stream. The defendant pointed out that Congress itself had passed certain statutes, particularly the Act of 1866, which recognized the applicability of the rule of appropriation as to government property located in these states of the arid West which had definitely adopted such principle of law. The Court, however, decided that even such statutes could not be construed "to hold that Congress, by these acts meant to confer upon any State right

to appropriate all the waters of tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States." (P. 706.) The basis of this decision, although not the language, was absolute priority of navigation over any other use of a waterway. No matter what Congress had said in the Act of 1866, the Court refused to permit any interpretation that would allow an injury to the navigable capacity of the lower river.

2. Interstate Decisions.

The rule that a State may not divert the waters of a natural watercourse to the injury of a downstream state or its citizens has been applied by the United States Supreme Court in interstate controversies where even the great consideration of navigation was lacking.

The position of the defendants in this case is substantially the same as that of defendant, Colorado in the cases of *Kansas* v. *Colorado, supra,* and *Wyoming* v. *Colorado, supra.* In those two cases the State of Colorado or its citizens were diverting water for the irrigation of arid regions. In the present case the Special Master has held that the diversion from the Great Lakes–St. Lawrence Waterway to the Mississippi watershed by the defendants is to provide a cheap method of sewage disposal and for the development of hydro-electric power. (An examination of the documentary history of this abstraction shows that the idea of providing navigation between the Great Lakes and the Mississippi apparently was never thought of by the defendants until the tremendous havoc which the abstraction had wrought upon the navigation of the Great Lakes–St. Lawrence Waterway had raised a storm of protest from all the States littoral to the Great Lakes and from the United States Government itself.) In *Kansas* v. *Colorado,* the Court refused the injunction on the ground that the evidence failed to show there had been such a material depletion of the waters of

the Arkansas River by Colorado or its citizens as to occasion substantial injury to the interests of Kansas, by destroying the equitable proportion of benefits between the two States resulting from the flow of the river. Considerations arising out of the extent of the applicability of the appropriation doctrine also appear to have largely influenced the Court in its decision. No claim, it should be noted, was made in this case that the diversion tended to diminish the navigability of the river. The decision in the case of *Wyoming* v. *Colorado,* turned upon the application of the appropriation doctrine. The Court in granting an injunction against the State of Colorado held that between two appropriation States an interstate stream should be treated as a unity and the appropriation doctrine applied without respect to States lines.

> "The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas* v. *Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258; *Bean* v. *Morris,* 221 U. S. 485; *Missouri* v. *Illinois,* 180 U. S. 208, and 200 U. S. 496; and *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, are examples." (P. 466.)

In *Pine* v. *The State of New York,* two private citizens of the State of Connecticut objected to the diversion of a small *unnavigable* stream which arose in New York State,

crossed into Connecticut and emptied into Long Island Sound within the latter's territory. The diversion was pursuant to a statute of the New York Legislature and used for New York City's water supply. Compensation for injuries occasioned to lower riparian proprietors in both States was required by the act. The Circuit Court of Appeals in the Second Circuit (112 Fed. 98 [1901]) enjoined the defendant from continuing the diversion. The rule was laid down as settled that the State of New York in the exercise of its power of eminent domain could not authorize one of its municipalities to divert the waters of a nonnavigable interstate stream to the injury of riparian owners on such stream in another State. The acts of the city of New York complained of were held to amount to a taking of the property of the riparian proprietors in the State of Connecticut without authority of law and in violation of their constitutional rights. "The State of New York," said the Court, "cannot authorize the taking of property in Connecticut." When this case was appealed to the United States Supreme Court (*New York City* v. *Pine,* 185 U. S. 93 [1902]) the injunction was vacated upon the sole ground, however, that the plaintiffs had not themselves done equity, that they had sat by without protest while the city of New York had built the dams and other structures necessary to divert this new water supply and that they had been dilatory in commencing their action. The Court assumed without deciding their correctness, the various rules of law governing interstate diversions as laid down by the Circuit Court of Appeals. It did state, however, that "We start in this with the assumption that there was no power in the city of New York, by any proceedings in the States of New York or Connecticut to acquire the right of appropriating this water and thus depriving the plaintiffs of its continued flow."

In the case of *Hudson Water Co.* v. *McCarter, Attorney General of New Jersey,* 209 U. S. 349, (1907)

the question involved was the constitutionality of an act of the New Jersey Legislature prohibiting the diversion by artificial means of the streams of that State to points in neighboring States. The case arose through a contract made by the Hudson Water Company to supply, by means of a pipe, a portion of New York City through the diversion of a New Jersey stream. In sustaining the constitutionality of the New Jersey statute and in granting an injunction against the proposed diversion, the Court recognized as settled that a State may protect its property in interstate streams from diversion without its limits. Said the Court, "*What a State may protect by suit in this Court from interference in the name of property outside the State's jurisdiction,* one would think it could protect by statute from interference in the same name within." The Court of Errors and Appeals of the State of New Jersey in the decision below had "pointed out that the riparian proprietor has no right to divert waters for more than a reasonable distance from the body of a stream or for other than the well known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continuing and that there is a residuum of public ownership in the State." The Supreme Court preferred to rest its affirmance of the decree below upon the broader grounds of the police powers of the State, but in so doing it quoted the above statement without disapproval.

At common law, a corollary of the right of a riparian proprietor to have the waters of a stream come to him without substantial diminution, was the equal right to receive them free from pollution by upper proprietors. In the case of *Missouri* v. *Illinois, supra,* this question was raised between States and on interstate rivers. The Court over the protest of the State of Illinois and Sanitary Dis-

trict of Chicago, entertained jurisdiction, but upon examining the proof held that it had not been proved to its satisfaction that any substantial injury had as yet been occasioned to the inhabitants of Missouri through the defendant's acts in turning the Illinois River into Chicago's sewer. The complaint was therefore dismissed without prejudice to its later renewal.

Again, in *New York* v. *New Jersey,* 256 U. S. 296 (1921) the Supreme Court entertained jurisdiction of a controversy between New York and New Jersey as to a method of sewage disposal which was proposed and which the State of New York claimed would grossly pollute the waters of the Hudson and East Rivers in the vicinity of New York City. While the Court again determined that the evidence was not sufficiently clear to conclusively establish that the pollution would be of serious magnitude to cause injury to the health, comfort and prosperity of the people of New York, there is, however, no suggestions in the decision that the rule of law upon which the New York complaint was based was unsound or that it was inappropriate to an interstate dispute.

In *Georgia* v. *Tennessee Copper Co., supra,* an injunction was granted against the defendant discharging over the complainant's territory noxious fumes which caused and threatened damage on a considerable scale to the forests and vegetable life, if not the health, within the State of Georgia. While the pollution was carried by the air rather than borne by the waters of an interstate stream, the underlying principle is the same. If, as the Court said in that case, a State, as a quasi sovereign, "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain" and "it has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air," so has the State of New York a far greater right to enjoin the acts of the State of Illinois and the Sanitary District of

Chicago which have obstructed the navigable capacity of the waterways navigated by the citizens of New York, interfered with the interstate commerce in which they are engaged, damaged their property and injured the property of the State itself.

3. The Right of the State of New York.

It is the right of the State of New York to insist that the Great Lakes-St. Lawrence Waterway—whose shores it built upon, whose harbors it improved, whose waters its commerce navigated, while Illinois was still a wilderness—be unobstructed by the acts of the defendants and to insist that the waters flow to it without diminution.

The writers on the English common law, compared the waters of a running stream to wild animals in whom no one had absolute ownership. A riparian proprietor, they said, has only the usufructary right of using, to a reasonable and limited extent, the waters flowing past his property, returning them without substantial diminution to the stream.

The Supreme Court, it would seem, in controversies between American States, has extended rather than modified this strict doctrine and has recognized in a downstream riparian State a greater title in the flowing waters of an interstate river. In the footnote to the dissenting opinion of Mr. Justice Brandeis in the case of *Pennsylvania and Ohio* v. *State of West Virginia,* 262 U. S. 553, at page 608–9 (1923) and presumably written by the learned Justice, it is said *"The State has a property interest in running water naturally flowing into it* and in the public waters and air within its boundaries. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230–237. *If the running water is withheld its property is taken."*

In the majority opinion written by the same Justice in the case of *Port of Seattle* v. *Oregon and Washington Railroad Co., et al.,* 255 U. S. 56 (1920), the Court held;

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, *the owner of the navigable waters within its boundaries* and the land under the same. *Weber* v. *Board of Harbor Commissioners,* 18 Wall. 57."

Speaking of the great interest a State has in the preservation of its rivers, even though the reference was to a mere intrastate stream, the court in *Hudson Water Co.* v. *McCarter, Attorney-General of New Jersey, supra,* said:

"It is recognized that the State as quasi-sovereign representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. * * * It appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. Thus public interest is omnipresent wherever there is a state, and grows more pressing as population grows. We are of the opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river

that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The State of New York is the owner of the lands under the waters of Lakes Erie and Ontario and the Niagara and St. Lawrence Rivers within its lmiits.

Illinois Central Railroad v. *State of Illinois,* 146 U. S. 387 (1892);
Matter of Long Sault Development Company, 212 N. Y. 1 (1914); 242 U. S. 272 (1916);
Matter of Commissioners of the State Reservation at Niagara, 37 Hun 537, aff'd 102 N. Y. 734 (1885);
Fulton Light, Heat & Power Co. v. *State of New York,* 200 N. Y. 400 (1911).

It has a property interest in the running water naturally flowing to such lands and its shores on the lakes and rivers of the Great Lakes-St. Lawrence Waterway. When such running water is withheld and permanently diverted into the Mississippi watershed, the property of the State of New York is taken, and it is entitled to an injunction sought in its bill of complaint. Such a withholding of the running water as the acts of the defendants have caused violates the rights of the State and its citizens guaranteed by the Constitution.

4. The Justice of New York's Complaint.

The Supreme Court has said that through the succession of interstate decisions the "court is practically building up what may not improperly be called interstate common law." *Kansas* v. *Colorado,* 206 U. S. 346 (1906).

"One cardinal rule" of the decision of interstate disputes by the United States Supreme Court and "underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas* v. *Colorado, supra.*

Another cardinal principle which might be adduced from the decisions of interstate controversies by the court is its insistence that the strict rule of law will not be applied unless the threatened invasion by one State of the rights of another be of serious magnitude and established by clear and convincing evidence. *New York* v. *New Jersey, supra,* at page 309. Sitting, by virtue of the Constitution, to settle and compose interstate conflicts, it is more than a mere court of law. It never does, nor never should, exact the legal pound of flesh. Before the injunctive power of the court is exercised at the request of any State that State should not only found its complaint upon sound principles of law, but it should also prove that it, or its people, have been substantially injured and that justice warrants the granting of the relief sought.

This New York has done.

The tremendous damage that its citizens have sustained from the defendants' acts has been convincingly shown. The unreasonableness of the Chicago abstraction—to give one community cheap sewage disposal and hydro-electric power at the expense of burdening the interstate and foreign commerce of a large part of the nation—is obvious.

When the Special Master holds that the Chicago diversion has lowered the levels of the Great Lakes and substantially impaired the movement of commerce to the serious injury of the complainants, the right of the State of New York to come to this court and demand that the diversion be terminated, is clearly established. In order to approve the Chicago abstraction, it would be necessary to

totally disregard the rights of riparian ownership which have been recognized by this and other courts for many years. To reverse this settled law, would be in effect to decide that any community in the furtherance of any purely local purpose, such as sewage disposal or the development of hydro-electricity, may upset the natural flow of the waterways of the Nation to the injury of the private and public rights and uses which have sprung up through the years—in this case, to the substantial damage of the greatest inland water-borne commerce of the world.

II

Neither the Congress of the United States nor the Secretary of War have been delegated power by the States to permit this diversion for sewage and hydro-electric power development purposes to the detriment of the State of New York and its citizens and to the substantial injury of interstate commerce.

(*a*) *The position of the Special Master.*

It is found by the Special Master that the diversion lowers the levels of the Great Lakes-St. Lawrence Waterway, and causes substantial injury to the commerce passing over it and to the Great Lakes States and their citizens. The purpose of the diversion, he finds to be primarily for the disposal of Chicago's sewage and incidentally, for the development of hydro-electric energy — purely local purposes.

The argument contained in his third conclusion of law is that Congress has jurisdiction if the diversion merely *affects navigation.* As Congress could prevent this injury, the Special Master contends it could permit it.

Reference is made to the possible impairment of navigation should Chicago be permitted to discharge its sewage into Lake Michigan. No testimony was given on this point by either side. Furthermore, any injury which might result from such a cause to the free movement of commerce

would be caused to a greater degree by the discharge of the sewage into the restricted Des Plaines and Illinois rivers. Also mention is made of the possible benefit the diversion might have upon navigation of the Mississippi River during periods of low water, but on this point the testimony was so unsatisfactory and indefinite that the Master stated it could not support a finding. These two possible benefits to commerce and navigation through the diversion are so utterly trivial in comparison with the tremendous injury which has been done by the diversion to the commerce passing over the Great Lakes-St. Lawrence Waterway, that they must be disregarded. The mere supposition that if Congress had acted, it might have considered these details when Congress has refused to act; or the belief that the Secretary of War might have given them consideration, when his permit of March 3, 1925, and his letter accompanying it showed plainly that the purpose of the diversion was to aid in solving Chicago's sewage disposal problem; are too speculative to permit any serious comparison between them and the proved damage to the commerce of the Great Lakes-St. Lawrence Waterway.

The controversy therefore resolves itself into a determination whether or not the Special Master's proposition is sound, that if navigation is affected, although injuriously, the Secretary of War may permit a diversion for the benefit of Chicago's sewage disposal and water power development. It is respectfully submitted to the Court that the States have not surrendered to the Federal government the right to permit a diversion from a natural watercourse for the local purposes of a municipality and to the serious injury of a great commerce merely because, through that injury, navigation is affected. The control over the rights of riparian owners has not been vested in the Federal government to the extent that navigation may be injured to aid in solving the local problems of an upper riparian community.

(*b*) *The nature of the powers of the Federal Government over Navigable Waters.*

The sole power of Congress or of its agent, the Secretary of War, over the Great Lakes-St. Lawrence Waterway is the constitutional authority "to regulate Commerce with Foreign Nations and among the several States." (U. S. Constitution, Article I, section 8, clause 3.)

The clause originally was designed to prevent trade wars among the States.

> "It is very probable that all that was in the minds of the framers of the Constitution when they drafted the Commerce Clause was to give the National Government power to prevent the States from interfering with the freedom of interstate and foreign commerce." *The Law of the American Constitution,* (1922) section 85.

The Federalist papers of both Hamilton and Madison show that such an interpretation was placed by them upon the Commerce Clause.

The Federalist, Nos. VII, XLII.

But under the decisions of this court, the Federal power under this clause has been vastly extended. The authority to regulate commerce was interpreted to include the power to regulate navigation. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824). This in turn was enlarged to comprehend

> "control * * * of all of the navigable waters of the United States, which are accessible from a State other than those in which they lie. * * * This necessarily includes the power to keep them open and free from any obstruction to their navigation, imposed by the States or otherwise; to remove such obstructions when they exist; and to provide by such

sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders.'' *Gilman* v. *Pennsylvania,* 3 Wall. 713 (1865).

Other decisions have extended Congressional jurisdiction over waterways bearing interstate and foreign commerce from tide-water to the Great Lakes and then to all navigable waters, artificial as well as natural.

Thomas Jefferson, 10 Wheat. 428 (1825).
Steamboat Orleans v. *Phoebus,* 11 Peters 175 (1837);
The Genesee Chief, 12 How. 443 (1851);
Jackson v. *Steamboat Magnolia,* 20 How. 296 1857);
The Robert W. Parsons (*Erie Canal*), 191 U. S. 17 (1903);
The Daniel Ball, 10 Wall. 557 (1870);
Economy Light & Power Co. v. *United States,* 256 U. S. 113 (1921).

There can be no doubt but that Congress has control in aid of navigation over all the navigable waters of the United States which are accessible from a State other than those in which they lie.

Gilman v. *Philadelphia,* 3 Wall. Rep. 713 (1865);
Philadelphia Co. v. *Stimson,* 223 U. S. 605 (1911).

This necessarily includes the power to keep them open and free from obstructions to navigation imposed by the States or otherwise; to remove such obstructions when they exist and to improve the waterway by artificial means.

Miller v. *New York*, 109 U. S. 385 (1883);
Transportation Co. v. *Chicago*, 99 U. S. 635;
Union Bridge Co. v. *United States*, 204 U. S. 364 (1906);
Gibson v. *United States*, 166 U. S. 269 (1896);
United States v. *Chandler-Dunbar Company*, 229 U. S. 53 (1912).

(*a*) *The discretion vested in the Congress and its exercise.*

Great discretion and authority unquestionably is vested in Congress to determine what is an obstruction of a navigable river.

Gilman v. *Philadelphia*, 3 Wall. Repts. 713 (1865);
Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 421;
Philadelphia Co. v. *Stimson*, 223 U. S. 605 (1911);
Economy Light, Heat & Power Co. v. *United States*, 256 U. S. 113 (1921);
Miller v. *New York*, 109 U. S. 385 (1883);
Union Bridge Co. v. *United States*, 204 U. S. 364 (1906);
Gibson v. *United States*, 166 U. S. 269 (1896);
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1912).

It is to be presumed, however, that Congress in the exercise of the discretion vested in it will act in good faith and weigh carefully the facts presented in every case. The Supreme Court was careful to follow the broad statement of congressional discretion contained in its Chandler-Dunbar opinion with the definite conclusion drawn from a review of the facts that "Congress did not act arbitrarily."

There must be some limit to the power to exercise discretion. Congress, in the present situation, has studiously avoided granting any approval of the Chicago abstraction. It is not conceivable that Congress in the sound exercise of discretion could ever seriously weigh the trifling commerce which has existed between Lake Michigan and the Mississippi River in the past, or in such future commerce as the most inspired partisan could prophesy, against the tremendous interstate and foreign trade carried today over the Great Lakes-St. Lawrence Waterway.

The cases in which the Supreme Court deals with the discretion vested in Congress to determine what constitutes an obstruction of a navigable waterway relate to what might be described as the normal intendment of the term "obstruction." All of them to some extent involves the question of whether or not a bridge, or a pier, or a dam was so constructed as to impair or restrict the free navigation of a natural waterway. Thus in *Chicago Transportation Co.* v. *Pennsylvania Co.*, 246 Fed. 190 (1917), the owners of a dock complained that the construction of a bridge across the river prevented sailing vessels with high masts reaching the dock as formerly. The cases with reference to dams arose on the power to inconvenience or obstruct certain commerce on a particular river by the erection of a dam across the same. In these the court held that the navigation of the river as a whole might be considered and if deeper water were generally afforded by the dam and a lock was constructed for the passage of vessels around it, a proper exercise might be said to have taken place of the governmental discretion. (*Escanaba Co.* v. *Chicago*, 107 U. S. 678 (1882); *Huse* v. *Glover*, 119 U. S. 543 (1886).

In the *Chandler-Dunbar Case*, the question was raised incidentally as to whether the dam and regulating works constructed at the outlet of Lake Superior was an unlawful obstruction of navigation. The Court in deciding that it

was not, tested the exercise of the discretion vested in Congress by the importance and volume of the commerce passing between Lake Superior and the lower Great Lakes. In view of this extensive navigation the Court held that the large control which Congress had assumed and the property it had appropriated was in a reasonable exercise of its discretion. It should always be remembered, in view of the broad language of the opinion in this particular case, that it arose primarily on the objection that the Federal Government in appropriating the plaintiff's property for the purposes of improving navigation had taken more than was necessary for the public use to the detriment of the private riparian owner.

All of these cases dealt with an obstruction of the navigable capacity of a natural water course within the limits of the stream itself and the language of the Court as to the broad discretion vested in Congress was with direct reference to this type of obstruction. In all of them there were conflicting commercial interests. Thus, in the two decisions in *Pennsylvania* v. *Wheeling Bridge Company,* the Court established the power of Congress to weigh the comparative benefits and disadvantages resulting from a bridge which would carry mail and other interstate commerce over a river which would, to some extent, hinder its navigation.

In none of these cases was there involved the question of a permanent diversion, or, as more appropriately expressed herein, an abstraction of waters from a natural navigable waterway into an entirely different and separate watershed in such substantial amounts as to indirectly result in an actual obstruction of the navigable capacity of the first waterway. In these cases the attention of the Court was always directed to the effect of "structures placed in the river," "tunnels under or bridges over the river" and similar "obstructions" to the navigable capacity. The question before the Court for decision was

whether the commerce and navigation of the stream as a whole was benefited by what might amount to a temporary impediment to the navigation and commerce within a particular locality.

This power of the Federal government is a trust power for the benefit of navigation. Certainly when all authority is derived from the State Congress cannot exercise a higher degree of control than they had. For example, both New York and Illinois own the lands under the Great Lakes-St. Lawrence Waterway. Yet the courts have determined that neither State may part with such lands under water to such an extent that the right of present, or the opportunity to improve future, navigation is impaired. Grants may be made of lands for the construction of docks and wharves in aid of navigation. The State of Illinois, however, the United States Supreme Court held in *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387 (1892), could not abdicate its control over the land under the waters of Lake Michigan adjacent to Chicago Harbor. "Such abdication is not consistent with the exercise of that trust which requires the Government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * * The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them * * * than it can abdicate its police powers in the administration of government and the preservation of the peace. * * * The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole peo-

ple of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The same question arose with reference to a grant of the Legislature of New York to a corporation to use certain portions of the State's lands under the St. Lawrence River. In this case there was a proviso that the grantee should not impair or obstruct navigation but maintain it in as good condition as at the time of the grant. The highest Court of the State of New York in the *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), declared the grant void as surrendering the sovereign power and control of the State to a private corporation. The Court held the State was bound to retain the control over the public waters of the State in the public interest of navigation. The United States Supreme Court in dismissing the appeal of the company spoke with obvious approval of the decision in the New York Court. (*Long Sault Development Co.* v. *Call*, 242 U. S. 272 (1916.)

If the trust in which the State holds the lands under water "is governmental and cannot be alienated" surely the powers of the Federal Government which has no property right in the beds or waters of navigable streams must also and far more clearly be governmental and inalienable, The trust vested in the Federal Government by the Commerce Clause for the preservation of navigation and commerce is of the same essence as that which developed upon the States through their retained ownership of the beds of navigable waters.

No question of discretion, however, is really involved in the transfer of waters of the Great Lakes-St. Lawrence Waterway to the Mississippi watershed. If Congress should authorize this, or if the permit of the Secretary of

War of March 3, 1925, should be held to lawfully permit such a transfer, it would amount to a complete abdication of the governmental control and the trust vested in the Federal Government to preserve, and, if it sees fit, to improve the navigation of the Great Lakes-St. Lawrence Waterway in the interest of the interstate and foreign commerce thereon. When the abstraction takes place the water is for all times lost to the natural waterway and with it the Federal Government abdicates its governmental trust. Grants of land under navigable waters may only be made in aid of navigation and commerce, say the Courts,—by the States which own the lands. Can it be said that the Federal Government, owning no property and possessing only a sovereign governmental trust, may obstruct a great waterway for the benefit of the domestic needs of one community? The abdication of the control over a portion of the waters of the Great Lakes-St. Lawrence Waterway by permitting their diversion to the detriment of navigation into another watershed is not an exercise of discretion, but an unlawful surrender of a sovereign trust.

(*d*) *Federal Government has no Power to Authorize the Chicago Abstraction for Sewage Disposal and Hydroelectric Power Development Purposes.*

The question involved in this case is more than a mere abuse of the discretion vested in Congress. The authority delegated it by the States was for the furtherance of interstate or foreign commerce—not for any local municipal purposes such as sewage disposal. Congressional jurisdiction over waterways is

> "for the protection or advancement of either interstate or foreign commerce." The Daniel Ball, 10 Wall. 557, (1870).
>
> "Congress is the constitutional protector of foreign and interstate commerce." *Bridge Company* v. *U. S.*,

105 U. S. 470, 480. Congress "has the control of all navigable waters between the States, or connected with the ocean, *so as to protect and serve their free navigation.* * * * The power is vested in Congress * * * *so far as may be necessary to insure their free navigation. Miller* v. *Mayor of New York,* 109 U. S. 385 (1883). Even in as recent a case as *Appleby* v. *City of New York,* 271 U. S. 364 (1926), this Court, in dismissing the contention that the Secretary of War's order establishing pier and bulkhead lines had revested title to the land under water in the original grantee, i. e., city of New York, states "it does not attempt to vest it in the city. *It could not do so if it would.*"

Just as "every structure in the water of a navigable river is subordinate to the right of navigation," *United States* v. *Chandler-Dunbar Co., supra,* so, too, must every act of Congress be in the interest of navigation and interstate commerce, to constitute a constitutional exercise of the power surrendered by the States. If the Federal action is not in the interest of commerce or the improvement of navigable waters, as, for example, the case before the Court where the permit of the Secretary of War of March 3, 1925, deals exclusively with the use of the Great Lakes-St. Lawrence waters for the local sewage disposal purposes of the city of Chicago, then such action is unlawful.

"Congress is authorized to '*regulate,*' but not to *destroy* 'commerce among the states.' It may, undoubtedly, in its wisdom, obstruct, or, perhaps, destroy navigation, to a limited extent, at particular points, for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad or post-road bridge across a navigable stream; but it cannot de-

stroy, or authorize the destruction, entire or partial, of the whole system of navigable waters of a state for purposes wholly foreign to commerce or post-roads, or to their regulation. If congress could so authorize, or, as it is claimed, has so authorized, the acts complained of as to make them lawful, then it can authorize, and it has authorized, the filling up and utter destruction of all the navigable rivers, streams, and bays of the state, for there is no limit fixed to the amount of *debris* that may be sent down; and upon the hypothesis claimed, if such waters are not filled up and destroyed, it is for want of physical capacity to do it, and not because it is unlawful.

"But the injury to navigation is not the only element of a public nuisance in the case. The injuries already accomplished, and those still accruing, as well as those threatened to the cities and riparian proprietors of a large extent of country, if unlawful, constitute a public nuisance of themselves, irrespective of the injuries to navigation; and there can be no possible ground for maintaining that congress has authority to legalize such injuries, and take away their character of a public nuisance. There is, then, no plausible ground for holding that congress has ever attempted to make the acts complained of unlawful or, if it had, that there is any power vested in congress to effect that purpose. These acts, therefore, have not been legalized by reason of any congressional action." *Woodruff* v. *North Bloomfield Mining Co.*, 18 Fed. 753, 778.

The title of New York and its citizens in the waters, shores and bed of the Great Lakes-St. Lawrence Waterway admittedly is subject to the servitude that the waterway may be improved by Congress for the benefit of navigation. In some situations, improvements might cause

some local or consequential injury to particular property. Beyond this servitude, the State and its citizens have the right to expect and demand the natural and undiminished flow of the watercourse.

There is no greater power in Congress, arising from the Commerce Clause, to dispose of the waters of the Great Lakes for the real or fancied benefit of some single section of the nation, than to dispose of the lands under their navigable waters. Yet the Supreme Court has held that

> "To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty and deprive the States of the power to exercise a numerous and important class of police powers." *Pollards' Lessee* v. *Hagan et al.*, 44 U. S. 212 (3 How. 212, 1845).

In *Hardin* v. *Jordan*, 140 U. S. 371 (1891), the Court again laid down the rule in even stronger terms.

> "such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be granted out to individuals by the United States."

The value of lands under water, however, is dependent upon the flow of water over them and the uses to which such water may be put. To a State, the primary value of the beds of lakes came from the extent to which the waters over them could be navigated. Today, the use of the waters for the generation of hydro-electricity at places where a fall occurs, is also of great importance. It is the supply of water that gives the submerged lands their value to

State or citizen. Without the water the lands are of little consequence.

All property rights and ownership in the shores, beds and waters of navigable lakes and rivers are vested in the State and its citizens. The Federal Government has only a sovereign power to act in furtherance of interstate or foreign commerce and for improvement of the waters over which such commerce moves. It possesses no property right in navigable waters or the land beneath them. To quote from a recent opinion written by Mr. Justice Brandeis:

> "The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right, Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same." *Port of Seattle* v. *Oregon & Washington Railroad Co., et al.,* 255 U. S. 56 (1920).

Except as Congress has been granted power by the Constitution, none can be exercised.

> "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all the navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general Government." *Martin* v. *Waddell,* 16 Peters, 367 (1842).

This is true even though the Federal Government may correctly determine that the exercise of some new power would be beneficial to the nation at large. In the case of *Kansas* v. *Colorado,* 206 U. S. 46 (1906), the United States

Government intervened, claiming the right to control the waters for the reclamation of arid lands. It was argued that Congress had full control over navigable streams; that only by National control could the arid lands of the West be brought to tillable condition and that the United States was itself the owner of extensive lands on the particular river in question. The Court, however, dismissed its petition to intervene, even though it conceded the desirability of Federal action. No power had been granted the United States by the Constitution to deal with irrigation or the reclamation of arid lands. It is just as evident that no power has been lawfully granted in the present situation to the United States to permit Chicago to abstract a substantial portion of the flow of the Great Lakes-St. Lawrence Waterway for its sewage disposal and water power development purposes.

Entirely apart from the injury to the navigable waters over which commerce moves, there is the separate consideration of the damage to the commerce itself. It has ever been the evident desire of Congress and of this Court to prevent anything which might impair the free movement of interstate and foreign trade. Through its injunctive power, the Court has forbidden the commission of acts which might hinder the free movement of commerce among the States. Particularly striking, however, and of great force in the decision of the present controversy, is the case of the *State of Pennsylvania and the State of Ohio* v. *State of West Virginia,* 262 U. S. 553 (1923). In that case the commerce in question was the transportation of natural gas from West Virginia to Pennsylvania and Ohio by means of pipes. Viewing with alarm the approaching exhaustion of this natural resource and acting to preserve it for its own citizens, the Legislature of West Virginia passed a statute which, if executed, probably would have diminished, and perhaps eventually entirely prevented the export of this commodity. Citizens and State institutions of Penn-

sylvania and Ohio had for years used natural gas for light and heat and enjoyed the low rates at which it could be sold, as compared with artificially made gas. The Supreme Court of the United States by a divided court granted the request of the complainant states, declared void the act of the West Virginia Legislature and enjoined the officers and officials of that State from executing the statute.

As Mr. Justice Brandeis pointed out in his dissenting opinion, there is "a fundamental difference" between the "alleged right to acquire by purchase and to bring into a State natural gas produced elsewhere" and "to have the water of an interstate stream continue to flow into a state" as in *Kansas* v. *Colorado, supra,* "or the right recognized in *Missouri* v. *Illinois,* 180 U. S. 208, *New York* v. *New Jersey,* 256 U. S. 296 and *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, to have the waters and the air within one State kept reasonably free from pollution originating in another."

Despite the fundamental difference pointed out by Mr. Justice Brandeis the Court declared that "the purpose of the commerce clause was to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means, that, in the matter of interstate commerce we are a single nation—one and the same people."

If the Court thought the importation of a single commodity—one that could be easily and economically replaced —into two states for the use of a portion of their citizens, warranted the drastic relief granted, surely the Court here must grant the injunction sought by the State of New York and the other five complainant states who seek to protect the commercial intercourse of their vast populations carried on among themselves and with other states and nations over the Great Lakes-St. Lawrence Waterway from the far more invidious restraints, from the greater damage

and from the more serious burdens, which result from the acts of the defendants in saving the citizens of a single municipality of the State of Illinois the expense of proper sewage disposal plants.

It is therefore respectfully submitted to this Court that neither Congress nor its agent, the Secretary of War, has been delegated by the States through the Commerce Clause any authority to permit substantial injury to be done to the commerce and the riparian rights of the State of New York and its citizens through the Chicago diversion for sewage disposal and hydro-electric power development purposes.

III

Even if Congress had the power under the Commerce Clause to deprive the States of their sovereign and proprietary rights in aid of a Sanitation and Water Power Project, no such power has been delegated by it to the Secretary of War, and the permit of March 3rd, 1925, cannot be construed as having that effect.

The permit of March 3, 1925, purports to be issued pursuant to section 10 of the Rivers and Harbors Act (Act of March 3, 1899, 30 Stat. 1151, U. S. C. Tit. 33, § 403). Despite the language of the statute, that any obstruction to the navigable capacity of waters of the United States is prohibited unless "affirmatively authorized by Congress," the Master finds that by it Congress delegated sufficient authority to the Secretary of War to allow the issuance of the permit of March 3, 1925 (Report, pp 176–191).

It seems doubtful that the statute is susceptible of such a construction.

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

Even assuming, however, only for the purposes of argument, that said section 10 is authority generally for the Secretary of War to issue permits in aid of sanitation and water power projects, the necessary effect of which will be detrimental to navigation, the question still remains

whether the permit of March 3, 1925, can have the effect of depriving the states of their sovereign and proprietary rights.

The obvious purpose of Section 10 is to protect the navigable waters of the United States. The creation of obstructions not affirmatively authorized by Congress is prohibited, and it is made unlawful to do certain specified acts except in accordance with plans recommended by the Chief of Engineers and authorized by the Secretary of War.

Congress recognized the fact that certain local needs might require the placing of obstructions in and above navigable waters. In order to protect the navigation of such waters it has delegated to the Secretary of War the power of approval conferred by Section 10, and made it unlawful to create such obstructions without such approval.

We may assume for purposes of argument that the power is thus delegated to the Secretary of War to decide whether a given obstruction will injuriously affect navigation, and we may even assume that the courts will not review his decision. The effect, however, of his decision, is limited. The permit merely has the effect of a consent in so far only as the Government of the United States is concerned. To that extent it may be assumed that the Government of the United States has withdrawn its right to object. Having the power to prohibit any obstruction whatever, the Government, through the action of the Secretary of War under his delegated authority, merely says that it will not exercise that power. Such a consent cannot operate in such fashion as to take away rights of the states, and it is plain that the statute was not intended to have that effect, even assuming that it was within the constitutional power of Congress to take away such rights.

The distinction between such a case as this and one where the power of Congress is exercised in aid of naviga-

tion is obvious. To take the case supposed by the Master, if Congress had decided that it was in the interest of the country as a whole to open a waterway connecting Lake Michigan with the Gulf, it may be assumed but only for purposes of argument, that under its paramount power over navigation, Congress could authorize a diversion of water from one water shed to another, and that the resulting injury to the states, would be *damnum absque injuria.* We are dealing, however, with a project not in aid of navigation but in aid primarily, as the Master has found, of sanitation, and, incidentally, water power. The power of Congress under the Commerce Clause to consent to such a project, and thus to withhold the objection which it otherwise might interpose, plainly does not extend to a deprivation of the sovereign and proprietary rights of the states in aid of such a project, and even if Congress had the power, the act delegating the authority to the Secretary of War should not be construed so broadly unless such a construction be required by its plain terms. Such an extreme power must be granted in clear and express terms. Yet, the Master finds that Section 10 is so "ambiguous" that he has to go to departmental practice to determine even that the Secretary of War has delegated power to issue such a permit at all without express congressional approval. (Report, p. 184.) In short, the states' rights may be taken by Congress or pursuant to its authority in aid of navigation but not in aid of a local purpose over which Congress has no jurisdiction whatever, except perforce of its power to prevent obstructions to navigable waters. The permit, therefore, even assuming that it was granted perforce of congressional authority, must be limited in its effect to the plain purpose expressed in the act delegating the authority which is to prevent interference with navigation.

As a matter of fact, the Secretary of War so construed

his authority. The permit of March 3, 1925, is prefaced with the following note:

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

That construction by the Secretary of War of his own authority is amply supported by the case cited by him.

IV

The Facts alleged in the Bill of Complaint of the State of New York, supported by the proof in the trial of the case and by the Special Master's Report and the law applicable to this interstate dispute requires the issuance of an injunction restraining the defendant State of Illinois and its agent the Sanitary District of Chicago and each of them and each of their officers, agents and servants from reversing the flow of the Chicago River or in any manner obstructing its natural flow so as to prevent it from flowing in the course of Nature into the Great Lakes and restraining them from diverting any water whatever from Lake Michigan and its natural tributaries in such a manner as to permanently divert the same from the said Lake and the Great Lakes–St. Lawrence Watershed.

Respectfully submitted,

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