Office Supreme Court, U. S.
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FEB 27 1928
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, AND STATE OF PENNSYLVANIA, *Complainants,* *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, *Defendants,* STATE OF MISSOURI, STATE OF KENTUCKY, STATE OF TENNESSEE, STATE OF LOUISIANA, STATE OF MISSISSIPPI, AND STATE OF ARKANSAS, *Intervening Defendants.*	No. 7, Original.
STATE OF MICHIGAN, *Complainant,* *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 11, Original.
STATE OF NEW YORK, *Complainant,* *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 12, Original.

BRIEF ON BEHALF OF INTERVENING DEFENDANTS, MISSISSIPPI RIVER STATES.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

List of Cases.

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INTRODUCTION.

The comprehensive report of the distinguished Special Master contains such a clear and convincing analysis of the law in support of his conclusions which we here ask the court to adopt, that it is unnecessary for us to burden the court with a complete answer to all the assertions of fact and arguments of law contained in the voluminous briefs filed by the complainant states.

We therefore propose in this brief, to present the con-

tentions of the intervening Mississippi River States (hereinafter called the "River States"), and the peculiar importance of their interest and contentions in this controversy. We shall then discuss certain fundamental assertions of fact as contained in complainants' briefs, upon which their entire case rests, but which on consideration of the Special Master's report and the record, will appear to be without foundation. We shall also, by way of supplement only to the legal conclusions of the Special Master, present certain arguments on the law in answer to some of the complainants' contentions.

Effect of the Special Master's Report.

In asking the court to accept the findings of fact and conclusions of law of the Special Master, it is not necessary to point to the many considerations which give his report peculiar weight and authority. As to conclusions of fact, the decisions of this court lay down a clear and simple rule by which to determine whether any exception to his findings should be sustained. In the language of this court, in *Davis* v. *Schwartz,* 155 U. S. 636; 39 Law. Ed. 293, his finding is not "absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the findings, it must be treated as unassailable."

The following decisions are cited in the opinion in *Davis* v. *Schwartz,* in support of this rule:

Wiscart v. *Dauchy,* 3 U. S. 3 Dall. 321; *Bond* v. *Brown,* 53 U. S. 12 Howe, 254; *Graham* v. *Bayne,* 59 U. S. 18 Howe, 16, 62; *Norris* v. *Jackson,* 76 U. S. 9 Wall 125; *Mercantile Mut. Ins. Co.* v. *Folsom,* 85 U. S. 18 Wall 237, 249; *The Abbottsford* v. *Johnson,* 98 U. S. 440; see also *Hutchins* v. *Minnesota,* 209 U. S. 250, 52 Law. Ed. 777.

STATEMENT.

The Case of the River States.

The original bill in this case was filed by the State of Wisconsin several years prior to the decision of this court in *United States* v. *Sanitary District*, 266 U. S. 405.

Before the argument in the Sanitary District case, all of the complainants in the instant case, appeared as *amici curiae* on the side of the Federal Government, which was seeking, as the court will remember, to enjoin a diversion from Lake Michigan *to the extent that it exceeded* the amount authorized by the then permit of the Secretary of War.

At the same time, four of the River States,—Missouri, Kentucky, Tennessee and Louisiana,—obtained leave as *amici curiae* to appear and support the defense of the Sanitary District.

After the decision of the Sanitary District case, the complainant states, which had supported the contentions of the Government, apparently not satisfied with the decision in the Sanitary District case, filed an amended bill in the Wisconsin case, in which, in addition to the original complainant, the States of Ohio, Minnesota and Pennsylvania joined; and subsequently, Michigan and New York each filed an original bill, all three cases being then referred to the Honorable Charles Evans Hughes, as Special Master, by an order "with the same effect as if consolidated."

After the filing of this amended bill in the Wisconsin case (No. 7, Original), the same four River States above named, obtained leave and intervened as co-defendants in No. 7 Original, and subsequently were joined by the

States of Arkansas and Mississippi. While this intervention occurred in the Wisconsin case, this controversy has been submitted to the Special Master on the faith of the court's order of reference, just as though the intervening River States had been made co-defendants in all three cases.

It should be noted with emphasis at the outset, and should be kept prominently in mind throughout the consideration of this case, that the Lake States, in seeking to enjoin the diversion that has been expressly permitted by Congress through the Secretary of War as its agent, *are attempting through judicial proceedings, to interfere with and prevent the functioning of the political branch of the government.*

They are asking the *Judicial* Department of the Government *to grant a remedy,* the *necessary effect of which* would be *to interfere with* the exercise by the Secretary of War, of a discretionary power and duty imposed upon him *by Congress* in *its legislative and administrative control* over interstate commerce, and to substitute the judicial determination by this court, for the conclusions of the Chief of Engineers and of the Secretary of War, in their administrative control over the navigable waters of the United States.

The conclusion of the Special Master that no such relief should be granted, is manifestly correct.

Water is being diverted from Lake Michigan through the Sanitary Canal into the Illinois River and thence into the Mississippi, under the authority of a permit of the Secretary of War, issued by him as the agent of Congress, under Section 10 of the Act of 1899. The contention of the River States is that this water is essential to the maintenance of navigation on the Mississippi under present conditions; and that the benefit to naviga-

tion on the Mississippi, produced by the diversion, was before the Secretary of War for consideration by him when he issued the said permit of March 3, 1925, and was sufficient in law to justify the exercise of the power delegated to him by Section 10 of the Act of 1899, an Act of Congress passed under the commerce clause of the Constitution.

The Special Master has so held.

In addition to the reasons assigned by the Special Master in reaching this conclusion, we point out that the moving effect, as a matter of law, of the fact of benefit produced upon Mississippi River navigation is strengthened and, we submit, rendered conclusive, by later acts of Congress imposing specific duties on the Secretary of War in connection with the conduct of commerce on this river.

The legal sufficiency of this benefit to Mississippi River navigation, to justify the action of the Secretary of War in issuing the permit, rests, first, upon the actual contribution to channel depth and width thereby produced, and, second, upon a proper conception of the relative economic importance of this waterway.

Concerning the benefit to Mississippi River navigation produced by the diversion, the Special Master reached the following conclusions:

> "My conclusion is that the diversion from Lake Michigan, through the Drainage Canal, increases to some extent, during low water, the navigable depths over bars of the Mississippi River, but that the extent of this increase is not the subject of sufficiently accurate determination to warrant a finding. Upon all the facts it was permissible for the Secretary of War to reach the conclusion that the diversion from Lake Michigan of 8500 c. f. s. was, to some extent, an aid to navigation on the Mississippi River in time of low water. * * * It is not controverted that the

> Secretary of War had these considerations before him on the application and hearing which resulted in the permit of March 3, 1925."

The fact that the Special Master did not appraise definitely, the extent of the benefit to the Mississippi River resulting from the Chicago diversion, does not, we submit, tend in any degree to lessen the legal effect of his above conclusions.

The complainants seek a drastic injunction based upon a claim of injury resulting from the diversion to navigation on the Great Lakes. It is quite clear that the Special Master was compelled, by reason of the nature of the relief sought, to find the extent and nature of this injury, as closely as the evidence would permit. The effect of the benefit to navigation on the Mississippi, however, is pertinent, merely to show legal justification for this exercise of power delegated to the Secretary of War.

It was clearly, as the Special Master held, within the authority of the Secretary of War to decide on the information available to him, first, whether such benefit to navigation on the Mississippi results, and second, whether the extent of such benefit was sufficient to call into action his authority to permit the diversion. It was therefore merely necessary for the Special Master to find that a material benefit did in fact result, sufficient in law for the Secretary of War to consider. As an inducement to the exercise of an administrative discretion, otherwise not judicially reviewable; and, as shown above, this was the conclusion of the Special Master.

It is significant that this very important conclusion of the Special Master, sustaining the contentions for the River States, is either belittled or brushed aside as unworthy of notice in the briefs for the complainants, a

method of treatment indicating that no adequate attack upon this conclusion of the Special Master was found. The complainants throughout their briefs, assert that no benefit to navigation on the Mississippi or elsewhere, has resulted from the diversion.

In the Michigan brief, the entire case of the River States is brushed aside. (Michigan brief, pp. 50-53.)

New York, though claiming to accept the Special Master's findings, likewise attempts to belittle the evidence proving benefits to navigation on the Mississippi and the necessary legal effect of such findings. (New York brief, p. 16.)

The Wisconsin brief discusses the evidence, and claims that there was conflicting evidence. Applying the rule above quoted from *Davis* v. *Schwartz,* 155 U. S. 636, as to the conclusive effect of the master's findings upon conflicting evidence, it necessarily follows in respect of this discussion in the Wisconsin brief (pp. 43-52) that their exceptions to the findings of the Special Master on this point cannot be sustained.

As a matter of fact, the analysis of evidence which follows, not only demonstrates the correctness of the Special Master's findings, but clearly shows that he could have found, had it been necessary for him to make a more definite finding, that the Chicago diversion contributes at least six inches of depth at the critical points of navigation on the Mississippi, at all stages of the river up to mean stage, that is during approximately one-half of each navigation season. And the evidence offered by complainants to meet our contentions, entirely supports this conclusion.

Analysis of Testimony as to Beneficial Effect of Diversion, in Mississippi River Navigation.

Referring to pages 114 and 115 of the Special Master's report, it will be seen that navigation is conducted on the Great Lakes at vessel drafts of 18 feet or more, and the Special Master finds that a lowering of six inches out of an average draft of 20 feet is a material lowering and capable of producing damage to navigation. The project depth, established by Congress, for the Mississippi River from St. Louis to Cairo is eight feet, and from Cairo south nine feet, with channel widths of, respectively, 200 and 250 feet. If six inches of these depths, during all stages of water from low water to mean stage, is contributed as a result of the diversion from Lake Michigan, the complainants can hardly contend that this amount of contribution is not material in view of their position as to the effect of the lowering of the Great Lakes' levels, which, they contend, is not more than six inches.

To support their contentions, the River States rely upon the testimony of three engineers, and of three navigators of long experience on the river antedating the diversion from Lake Michigan, and the principal operating officials of the Mississippi-Warrior Barge Line, conducted by the Inland Waterways Corporation pursuant to Act of Congress, under the direction and authority of the Secretary of War, all of the stock of which is owned by the United States.

To meet this testimony, the complainants offered only the testimony of General W. H. Bixby, formerly chief of engineers, and a number of official engineer's reports, the more important of which were prepared by General Bixby in his several official capacities.

If, on analysis, it appears that General Bixby himself admits a benefit of six inches or more resulting from the diversion, there remains no basis for exception to these conclusions of the Special Master.

General Bixby's testimony in narrative form is found at pages 97-107 of the joint abstract. He begins by giving a detailed description of the Mississippi River, pointing out that from a navigation standpoint, it is composed of a series of deep pools separated every three or four miles by bars, with an average depth considerably deeper than the Government project depths, but the limiting depths being the amount of water found over the bars. Due to the fact that the volume of the stream varies greatly and carries a large burden of silt from bank erosion and from contributions of tributaries, particularly the Missouri, bars move and rise and fall, with different stages in the stream. General Bixby described these phenomena in detail, finally arriving at the conclusion (page 101 of the joint abstract), that the contribution of 10,000 second feet from Lake Michigan has no appreciable effect upon navigation of the Mississippi.

On cross-examination, however, he admitted (Joint Abst., 102) that at low water the addition of 10,000 second feet was sufficient to raise the stage one foot, *i. e.* raises the surface plane of the water, one foot. He stated that bars begin to form at stages between 15 and 23 feet on the gauge at St. Louis, and low water at St. Louis is at one foot on the gauge. When referred to certain charts in H. D. No. 50, 61st Congress, 1st Session, a report rendered in 1909 by a board of which General Bixby was the chairman, he admitted that up to 15 feet on the gauge, the effect of an addition of 10,000 second feet would be to raise the stage one foot. He stated (p. 103, Joint Abstract):

"due to the rise of bars at low water because of

> the diversion of 10,000 second feet, there is only an increase of half of the one foot and a half, that is, seven-tenths of a foot so far as navigable depth is concerned. *When the water is rising, the bars form only half as fast as the water surface rises. The bars rise about two feet for every five feet in water stage as the water goes up. As the river falls, the bars go down only half the decrease in stage.*" (Italics ours.)

It follows necessarily, therefore, that up to 15 feet on the St. Louis gauge, on General Bixby's own testimony and assuming that the bars rise and fall exactly as described by him, there is an increase of navigable depth of six inches or more over the bars caused by the diversion, since, as General Bixby testified, the addition of this water raises the stage one foot or more.

At page 102, joint abstract, General Bixby interpreted Exhibit 507 which showed the average stages of the Mississippi for each day, based upon determinations made by the Government engineers over a period of 60 years, and stated that from this exhibit, the river exceeded 20 feet on the gauge at St. Louis an average each year of only ten days; that about the first of July, the 20-foot stage was left and the river began to fall uniformly until about the 10th of September when it was 9 feet, then declining uniformly to 8 feet in November and down to about 5 feet on the 19th of December. It is quite apparent, therefore, that at all stages below 15 feet, which means, on the statements above referred to, most of the period from the first of July to the end of the navigation season in December, on General Bixby's own testimony, a diversion of water from Lake Michigan contributes at least six inches to the navigable depth of the Mississippi.

At page 105, joint abstract, General Bixby made a statement clearly defining the conclusion stated on his direct examination, that the addition of 10,000 second

feet from Lake Michigan "has no appreciable effect on the navigation on the Mississippi River", when he says, "I would regard a change of from three to six inches as insignificant under those circumstances." We respectfully submit that it is not open to question, that in conducting navigation in eight or nine feet of water, the addition of six inches in depth would be substantial. Certainly the complainants, who contend that six inches is substantial in conducting 20 foot navigation, are in no position to agree with General Bixby's conclusion that it is not substantial.

In considering General Bixby's testimony, the Court should bear in mind that in his official capacity while in the service of the Government, he was the author of two important reports upon the Mississippi River, from which voluminous quotations are to be found in the joint abstract. These reports are known as Complainants' Exhibit 177, H. D. No. 4, 69th Congress, 1st Session, Report on the Illinois Waterway (a quotation from this is found at page 108 of the Abstract) and H. D. No. 50, 61st Congress, 1st Session. The latter report made in 1909, is the most comprehensive report available upon the Mississippi River and long quotations therefrom are found in the abstract. This same report, however, contains in addition to the engineers' conclusions, a vast amount of basic data in the shape of measured discharges, tables of depths, curves of relation between stage and discharge and similar matters. This data is not an expression of opinion, but is the scientific determination of fact as made by the engineer corps throughout many years of service on the river. The most important item of this kind in this report, is the curve of relation between river stage and bar heights. This chart was introduced as Defendants' Exhibit 526 by the wit-

ness, Colonel Robert Isham Randolph, and was entitled as follows (Joint Abst., 77):

> "Curves showing Relations between River Stage to Bar Heights and Depths Limiting Navigation in the Mississippi River between St. Louis and Cairo compiled for the Board of Examination and Survey of Mississippi River from the records of the United States Engineer Office, St. Louis, Missouri, for the years 1896 to 1908. The curve of mean depths shows for each foot of stage the average of the best depths found in the channel crossings of all bars between St. Louis and Cairo, and indicates the relation between mean bar height and stage: the total number of soundings represented by each reference mark being stated opposite thereto."

General Bixby, himself, on cross-examination, referred to this chart and described it as follows:

> "I refer to the chart in Doc. No. 50, 61st Congress, 1st Session, the report of the 1909 Board, showing the correlation between bars and water stage for 12 years between 1896 and 1908, and there were some 30,000 soundings taken in getting up that chart. The chart shows not only the location of the soundings with reference to stage, but also the depth of the controlling bar on each trip, that is, the least depth on the trip. And these controlling depths are plotted on a curve. The chart is Plat 2 of H. D. 50. * * *"
> (Joint Abst., 102; Trans., 8290.)

The witness' last statement in reference to the chart is not very clear. There were in fact two curves, one showing the mean depths over bars and the consequent ratio of increase in such depths to increases of stage, and the other curve, as the witness states, shows a similar relation for the least depths over bars. The chart itself describes the latter curve as follows:

> "The average of the line channel depths, one for each through trip between St. Louis and Cairo, found by boats operated by the U. S. Engineering Office, indicates the relation between the controlling depth and the stage, the least depth of each trip

being shown as a small dot, and the mean of all trips within a half foot of each foot of stage being shown as a large circle." (Joint Abst., 80; Trans., 4894.)

The information given by this curve, in other words the actual specific result of 30,000 soundings taken during an eight-year period is accurately described by the witness Randolph as follows:

> "The curve indicates in general that as the river rises the bars rise with the river so that at gauge 10, for instance, an increase of stage of one foot indicates an increase of depth over bars of approximately seven-tenths of a foot." (Joint Abst., 77; Trans., 4540.)

His attention having been directed to this curve, on cross-examination General Bixby says:

> "Due to the rise of bars at low water, because of the diversion of 10,000 second feet, there is only an increase of half of the one foot and a half, that is, seven-tenths of a foot so far as navigable depth is concerned. When the water is rising, the bars form only half as fast as the water surface rises. The bars rise about two feet for every five feet in water stage as the river goes up. As the river falls, the bars go down only half the decrease in stage."

We emphasize these statements and the specific record of soundings embodied in this chart, because these statements clearly define what was in the mind of General Bixby and his associated engineers in the various reports to be found in the joint abstract, when they say that the effect of the Chicago diversion upon navigation in the Mississippi is "small" or that it is doubtful if there is "material increase" in navigability, or similar expressions. The whole question, of course, is what is meant by the purely relative terms used. When the matter is referred to the express record of actual results of soundings extending over a period of eight years, the

conclusion is irresistible that there is at least an increase of one-half as much in depth over bars as there is an increase in stage. And as previously pointed out in General Bixby's own testimony, there is an increase in stage as shown by the Government discharge records of one and four-tenths feet at St. Louis by an increment of 10,000 second feet at low water and up to mean stages an increase of at least a foot. From this it follows necessarily, that if the diversion from Lake Michigan were cut off, there would be a decrease in navigable depths over the bars—the critical points of navigation on the Mississippi—of at least six inches. A decrease of this amount may or may not be "small" or "material," as the individual may happen to regard it, but for the purposes of this case, in view of the insistence of the complainants that a decrease of six inches is material on the Great Lakes where navigation is normally conducted at available depths of approximately 20 feet, or more, six inches must be taken as material (substantial); and therefore we respectfully submit, that on the testimony of the complainants' sole witness, there was shown to be a substantial beneficial effect on the navigation of the Mississippi, by the diversion from Lake Michigan.

To support our contention on this point, we introduced the testimony of Colonel Robert Isham Randolph, a qualified engineer, who had prepared detailed charts to approximate and define the extent of the benefit due to the diversion, based, as he stated, upon a careful scientific appraisal of all available Government data. He took the records as found in all of the engineering reports and prepared a comprehensive study. His conclusion was in accordance with that above stated. In addition, we offered the testimony of Mr. Woermann, a civil assistant government engineer of many years ex-

perience on both the Illinois and Mississippi Rivers, whose conclusion was based upon his long service and familiarity with these problems, and is identical with that of Colonel Randolph; and finally we introduced the testimony of Major Gotwals, at present United States district engineer at St. Louis, who had made a careful and comprehensive study as a part of the preparation of data for submission to Congress, accepted by it as the basis for the recently changed project for the improvement of the Mississippi between the mouths of the Missouri and the Ohio. Major Gotwals' testimony, obviously unprejudiced, was summed up by him in his Exhibit No. 1186 (Joint Abst., 91), a table prepared by him to show the effect of 10,000 second feet diversion from Lake Michigan, on the Mississippi River at Grafton, St. Louis, Columbus, Helena, Vicksburg and New Orleans. He testified that this was prepared from official reports and from the latest discharge and rating curves. Summing the matter up, he said that above the Missouri, since the Illinois and Upper Mississippi are streams with fixed beds, rise of stage would be reflected by a corresponding increase in navigable depth, and below the mouth of the Missouri, "the effect of a rise in stage on navigable depths would be about one-half the rise in stage." (Joint Abst., 92.)

In addition, we offered the testimony of Captain William L. Berry, Captain Oscar F. Barrett and Captain H. W. Neyhe, all of whom had been engaged in the navigation of the Mississippi as pilots, vessel captains and in other capacities for periods long antedating the beginning of the diversion from Lake Michigan in 1900. (Joint Abst., 84, 85, 87.) Their testimony was to the effect that the diversion had increased navigable depths and widths of channel, and they pointed out that after the

diversion had become established there was a marked difference in the Mississippi channel below Grafton (which is at the mouth of the Illinois River), but no difference above Grafton. In other words, the conclusion is irresistible that rainfall, climatic conditions, etc., did not product this change, as any such causes would have operated just as much above the juncture of the Illinois and Mississippi Rivers as below.

General Bixby himself admitted on cross-examination, that he had never been able to find a practical navigator on the river who did not think that the diversion benefited navigation. And we respectfully submit that the testimony of men engaged from day to day in the navigation of this river and thus familiar with all of its peculiarities and difficulties, is after all as conclusive as any engineer's theories, particularly when it is apparent that such engineering conclusions are inconsistent with the actual measurements upon which they are based.

To prove the importance of this improvement in the navigability of the Mississippi, we introduced the testimony of Major-General T. Q. Ashburn, executive of the Inland Waterways Corporation, which operates pursuant to the mandate of Congress, the Mississippi-Warrior Barge Line. By the Inland Waterways Corporation Act to which we will refer later, the Secretary of War is made the incorporator of this corporation, of which the United States owns all the stock, and General Ashburn was delegated by the Secretary of War as his subordinate to conduct this operation. We also produced the testimony of Theodore Brent, who had formerly been federal manager of the line in the period preceding the existence of the corporation, and since that period traffic manager, and who was personally familiar through eight years of official experience, with the difficulties of conducting this transportation facility in the

insufficient and constantly changing channels of the Mississippi River.

It is implied in the Inland Waterways Corporation Act and we understand is generally understood, that the Government is in one sense thus conducting a demonstration of the practicability of navigation and common carrier service on the Mississippi. Mr. Brent's testimony was to the effect that proper and essential operating profits can only be obtained by what may be called wholesale operation, the transporting in one tow by a towboat and a number of barges, of very large amounts of freight, thus reducing labor cost and making available the true economies of water transport; and throughout his testimony he emphasized the absolute dependence of this line upon sufficient navigable depths and widths of channel. We respectfully submit that his testimony compels the conclusion that a six-inch addition to the depth of the Mississippi River constitutes a substantial and valuable improvement to the navigability of the river.

Consequently, as the Special Master concluded, it was proper for the Secretary of War,—officially advised of these facts as he must be presumed to have been, and shown by the evidence to have been in fact so advised,—to take into consideration this benefit to navigation resulting from the diversion, in determining whether or not to grant the permit of March 3, 1925.

The joint abstract shows a portion of the transcript containing the offer of Defendants' Exhibit 1158 (Joint Abst., 173-177), and a condensation of an excerpt from that exhibit. (Joint Abst., 177-178.)

This exhibit was a transcript of the hearing held by the Secretary of War in Washington, February 21, 1925, on the application of the Sanitary District for the permit subsequently granted March 3, 1925. The Special Master at first considered this offer inadmissible as not compe-

tent to prove the truth of the statements made by the various parties appearing before the Secretary of War and set forth verbatim in the transcript, but when it was pointed out that the offer was simply to show what were the claims made to the Secretary of War, he ruled that this offer was competent and the evidence was received. Counsel for the River States joined in said offer for the express purpose of showing that there had been presented to the Secretary of War a claim that the navigation on the Illinois River and the Mississippi would be benefited by continuing the diversion; and that this claim was made, is clearly shown by the excerpt from the transcript set forth in the joint abstract at pages 177-178.

But that a claim of benefit to navigation on the Illinois and Mississippi was before the Secretary of War is proved by other uncontradicted evidence. The formal application of the Sanitary District for the permit, appears in part at page 158 (joint abstract), and shows that there was submitted with the formal application a statement of facts, which shows (Joint Abst., 160), that the Sanitary District in October, 1924, engaged twenty-eight consulting sanitary and hydraulic engineers, leaders of the profession, to make an exhaustive and complete review of the works of the district, including this diversion, and the unanimous report of this board, together with the basic data, is shown by the statement of facts to have been also submitted to the Secretary of War with the application of the district. Excerpts from this engineering report contained, in the following words, the conclusions of these engineers (Joint Abst., 162):

> "Diversion of water at Chicago * * * improves navigation in the waterways from the Great Lakes down the Illinois and Mississippi Valleys;"

and again (Joint Abst., 167) as follows:

> "An average annual diversion of 10,000 cubic feet per second at Chicago would reduce the cost of com-

pleting and operating the 9-foot waterway from the lakes to the Gulf of Mexico, would improve navigation conditions down to and below Memphis, and would dispense with four of the nine locks which would be required with a diversion of 1,000 or 2,000 cubic feet per second. This would make feasible a 9-foot channel without locks from the Gulf of Mexico to within 100 miles of Chicago."

"The improved Illinois waterway will adequately connect the Mississippi Valley with the Great Lakes. Such a connection will encourage navigation, and will give the Middle West and Gulf States a better opportunity to share in the benefits to be derived from ample and desirable facilities for water-borne commerce between the Gulf and the Lakes. Such a waterway is of international importance, and with the completion of the improvements in the Illinois River is a possibility within three or four years."

On the record before the court, therefore, the exceptions taken by the complainants to the Master's conclusion that the Secretary of War did have before him for consideration the benefits to navigation resulting from the diversion on the Mississippi River, should be denied. Complainants cite no evidence to sustain these exceptions, and by the written documents actually submitted to him as a part of the application of the Sanitary District, these claims were clearly and definitely presented.

We therefore respectfully submit that the complainants' exceptions to the findings and conclusions of the Special Master as to a substantial benefit to Mississippi River navigation caused by the diversion should be denied, first, because they rest upon evidence as to which there was a conflict, and under the doctrine of *Davis* v. *Schwartz, supra,* his conclusions are final in such case; second, because not only his conclusion as made was fully sustained by the weight of the evidence, but, if the legal issue had so required, the evidence would have compelled a finding

that the navigable depth of the Mississippi River was increased at least six inches; and, third, because the record shows that the above facts and contentions, constituting a sufficient legal basis on which to grant a permit in the interest of navigability, were before the Secretary of War when he granted the permit of March 3, 1925.

DUE TO THE ECONOMIC SITUATION OF THE MISSISSIPPI VALLEY, A DIVERSION TENDING TO IMPROVE AND MAINTAIN THIS RIVER NAVIGATION, IS A MATTER OF RECOGNIZED NATIONAL IMPORTANCE.

As the court will take judicial notice, the states in the Mississippi Valley, and particularly those states on whose behalf this brief is filed, are primarily dependent for their prosperity and economic progress upon agriculture; the southern states upon cotton; the northern states upon the production of grain and corn.

The situation in the Middle West, and particularly in the states here represented, is best described in the language of Secretary Hoover in a report filed by him on Great Lakes-to-Ocean Waterways, in 1927 (in evidence, Defendant's Exhibit 1209), where he says:

> "In the mid-west, the territory tributary to any of these projects, the economic situation is considerably distorted; there is much agricultural distress and incessant demands for remedial legislation. This situation to a large extent has been brought about by transportation changes. Increases in railway rates since the war force the mid-west farmer to pay from 6 to 12 cents more per bushel to reach world markets than before the war. Foreign farmers produce close to ocean ports and pay but little, if any, more than prewar costs, because shipping rates are substantially at prewar levels. While it is true that these rate increases apply only on the exports of grain, nevertheless the price which the farmer receives in foreign markets is the principal factor in determining his return upon the whole crop, not

alone the export balance. It is this transportation differential that is, unquestionably, one of the most important causes for our present agricultural depression.

Coincident with these increased rail rates the mid-west has also been affected adversely by the operation of the Panama Canal. Cheapened water transportation has brought the coasts relatively closer together at the same time that increased rail rates, figuratively speaking, have moved the mid-west farther from seaboard. This situation has been expressed graphically by setting up a new measuring unit in the shape of the number of cents that it takes to move a ton of freight. By using this measuring rod, it can be stated, that for a certain manufacturer, these postwar influences have moved Chicago 336 cents away from the Pacific coast, while New York has been moved 224 cents closer to the Pacific coast.

These factors operate reciprocally and not only place a handicap on the outbound products of the mid-west, but also add to the costs of inbound supplies.

All of these influences have had a very far-reaching effect; certain classes of industry have migrated to the seaboard; agriculture has been greatly depressed, and, through the increasing separation of agriculture and manufacture, both have been affected adversely. The net result has been to accentuate one of our present-day evils—the concentration of industry and population in urban communities.

The waterway projects under consideration offer a measure of relief for these conditions. Transportation has brought about economic distortion; in the proposed waterways we have an instrument which will have a beneficial effect and tend largely to restore the former satisfactory economic situation. The Panama Canal cannot be closed; the railroad rates cannot be reduced without impairing disastrously the usefulness of our carriers, but a Great Lakes-to-the-Ocean waterway offers the mid-west a substantial rate advantage which will enable it to compete successfully once more in the world markets.'' (p. 4.)

He also says:

> "In the interest of national transportation this country should make the best possible use of the water transportation facilities which nature has provided. We are rapidly improving our inland waterways. The Ohio River development from Pittsburgh to Louisville is now completed and is carrying an increasing traffic. Development of that portion from Cincinnati to St. Louis and of other segments of the Mississippi trunk system is contemplated. This development will link up the entire south, central, and southern commercial sections with a barge waterway. There is a barge canal connecting the Great Lakes with the Hudson River which makes possible traffic between the Great Lakes and New York City.
>
> While we are making rapid strides in rail, river, and canal transportation it is all the more necessary where it is practicable and feasible from an engineering viewpoint, that, if it be economically advisable, we improve our waterway possibilites where transportation costs are the cheapest and where the benefits derived will be the greatest." (p. 11.)

(Department of Commerce, Great Lakes-to-Ocean Waterways. Economic Survey, Domestic Commerce Series, No. 4, Washington, 1927, pages 4 and 11.)

These statements are amply supported by the testimony of Mr. Brent, traffic manager of the Inland Waterways Corporation. (Joint Abst., 72-73.)

COMPLAINANTS' ARGUMENTS ARE PREDICATED UPON ASSERTIONS OF FACT DIRECTLY CONTRARY TO THE FINDINGS OF THE SPECIAL MASTER.

The brief on behalf of Wisconsin (pages 32-43), contains arguments in support of the following statement:

> "Past and present diversions have not been, and are not now, in aid of navigation on the Illinois waterway, and if and when the Illinois waterway is ever completed, all diversion in excess of 1,000 second feet will not be for the benefit of navigation on that waterway."

The Michigan brief (pages 43-50), discusses the following:

> "The greatest amount of water required to be abstracted from Lake Michigan for the need of navigation from Lake Michigan to the mouth of the Illinois River would be 1,000 c. f. s. * * *"

In reference to the effect of the diversion upon the Illinois waterway and the above contentions of complainants, the Special Master found (Report, p. 122) as follows:

> "The complainants contend that if the water for lockage and navigation purposes of this waterway from Lake Michigan to the mouth of the Illinois River is or should be taken from the Great Lakes-St. Lawrence watershed, a diversion of less than 1,000 c. f. s. of water is sufficient to supply all needs of navigation. *I am unable so to find.*" (Italics ours.)

He further found (Report, p. 120) as follows:

> "The Federal project depth (on the Illinois River) has been seven feet; but this could not have been maintained without at least 8500 c. f. s. from Lake Michigan, which gives, in the lower Illinois, about four feet of the low water depth of seven feet. The Chicago diversion has increased the navigable capacity of the river. This stretch of the river is adaptable to improvement as an open channel, but if there were no diversion at Chicago, a large amount of improvements and several locks and dams would have to be provided. The question appears to be largely one of cost."

We shall not discuss the evidence which supports the above findings of the Special Master as this will be presented in detail in the brief on behalf of Illinois and the Sanitary District, but under the rule applicable to the effect of the Special Master's findings above pointed out, in view of the fact that no claim is made that these findings are not supported by competent testimony even though there be contradicting testimony, the finding of the Special Master is conclusive.

The brief of Wisconsin states (p. 52):

> "The disposal of the sewage of Chicago is not a navigation purpose."

And the discussion on this point claims that no benefit results to navigation from the prevention of serious polution of the Chicago harbor bound to follow from a shutting off of the diversion.

The Special Master found otherwise (Report, p. 193), as follows:

> "It appeared that a diversion of 4167 c. f. s. was not sufficient to keep the Chicago River reversed at all times, and when not kept reversed, the enormous volume of Chicago's sewage would pour into the lake and under present conditions could not fail to create a pestilential condition in the lake, and in the port and harbor of Chicago. The nature of the injury which would be sustained by the interests of navigation and commerce, and the propriety of the intervention of the United States, in such a case were pointed out by the Court in *New York* v. *New Jersey*, 256 U. S. 296. * * * Called upon to consider the effect upon navigation of the stoppage, or reduction, of an actual, existing diversion, he had to determine what he would permit in the face of a definite and inescapable exigency. What was necessary to prevent intolerable conditions in the waters of the lake, and in the port and harbor of Chicago? Within what time could steps be taken which would permit a reduction of the quantity diverted with safety to navigation? What should be the nature of the steps to be taken? What supervision should there be of the work necessary to be done? These questions none the less related to navigation because they involved questions of sanitation."

In addition to the foregoing references to complainants' briefs, the Court will find a number of places throughout their arguments, in which the fact of benefit to navigation through the prevention of serious damage to the Chicago harbor as above found by the Master, is

denied. It should be noted that the complainants did not even file exceptions to these findings, consequently their assertions, contrary to the Master's findings, should not be considered by the Court.

The Master also found (Report, p. 138) as follows:

> "It is plain that the present flow from Lake Michigan through the drainage canal could not be immediately cut off or reduced to 1,000 c. f. s., and in consequence the sewage of the Sanitary District in its present condition turned into Lake Michigan without exposing the inhabitants of the District to the grave risk of water borne diseases, by contamination of the water supply taken from the lake. The Chicago River and the waters of the lake about the city would be filthy and noisome, with serious injury to the commerce of Chicago harbor. It appears from the testimony that it would take several years, not less than five years and perhaps ten years, or even more, before the sewage of the district, with such treatment as is practicable, could be turned into the lake and the diversion from the lake stopped or greatly reduced, without serious risk to the health of the people of Chicago."

The Special Master thus finds additional benefits to the conduct of interstate commerce in that the continuance of the diversion will prevent disaster to the City of Chicago and to the capacity of its inhabitants to engage in interstate commerce, which, in and of itself constitutes adequate ground for the issuanec of the permit as clearly within the scope of the congressional power to regulate commerce. The community of Chicago is so large, and conducts such an important part of the interstate commerce of the country, that the prevention of disease epidemics such as is found by the Special Master would result from shutting off the diversion, is in itself a proper exercise under these circumstances, of the power to regulate commerce, for it is clearly competent under this grant of power not only to

affirmatively create channels for the movement of interstate commerce, but to protect those already existing, and prevent interruptions thereto.

THROUGHOUT THEIR BRIEFS COMPLAINANTS OVERSTATE AND GROSSLY EXAGGERATE THE DAMAGE CLAIMED BY THEM TO RESULT FROM THE DIVERSION.

The principal damage claimed is the six inch lowering of the levels of the water in the channels of the Great Lakes, with the consequent injury to the conduct of commerce through these channels.

By figuring the additional cargo that could be carried with additional depths, complainants have sought to appraise this damage, but it is to be noted that throughout their briefs and throughout the findings of the Special Master in reference to this damage, there is no statement anywhere, nor any suggestion of claim that any tonnage moving in interstate commerce was in fact prevented from being transported over the Great Lakes by reason of the lowering resulting from the diversion.

As suggested in Col. Markham's report, quoted at page 114 of the Special Master's Report, the sole effect of additional depth would be to render unnecessary the use of a small number of the smaller water carriers in conducting the Great Lakes commerce. The only possible effect of the lowering has been to slightly increase the cost of operation by requiring more voyages to carry the tonnage offered; and in view of the Special Master's failure to find any specific amount of increase of cost and the failure of the complainants to make any specific claim in this particular, the court may assume that the complainants did not offer evidence tending to show the actual increase in cost.

As suggested in their briefs, complainants' proof consisted in attempting to show the amount of freight which could have moved if vessels had been loaded six inches deeper, and in applying to that imaginary volume of freight, the revenue to be derived from such movement, without, however, any proof tending to show that any such freight was actually in existence and seeking carriage over and above the tonnage actually handled by the Great Lakes vessels.

Complainants also lay great stress upon damage to their riparian rights, and in their briefs invariably misstate the Special Master's conclusions as to these contentions.

In his description of the Great Lakes, the Special Master finds that the levels of these lakes are constantly fluctuating, due to natural causes without regard to the effect of the diversion.

The report says (page 86):

> "Computations show that the average supply received from the land areas about equals that received as rainfall on the lakes, but that roughly 40 per cent of this total gross supply is lost by evaporation. The net suply varies widely. The records show rates of net supply to the whole lake system exceeding 800,000 c. f. s. for a month, and they also show months during which the evaporation from the lakes exceeded the water received from all sources, with a consequent negative net supply. The average monthly net supply for the months of April and May is at a rate exceeding 500,000 c. f. s., and the average net supply for the month of November is at a rate of less than 20,000 c. f. s. The lakes absorb the great variations in supply, because of the rise and fall of their levels. When the supply is high they rise and store water; when it is low they fall and deliver the stored water. The average annual rise and fall of the various lakes due to the seasonal variations in supply is from 1¼ to 2 feet, but extreme variations

> in seasonal supply have caused fluctuations in lake levels ranging from 2.67 feet on Lake Superior to over 4 feet on Lake Ontario. Extreme high and low lake levels are reached at the ends of periods of excessive or deficient supply extending over several years. The period of low rainfall occurring during the past few years has brought down the levels of the lakes, and with other factors has produced record low levels on Lakes Michigan, Huron and Erie."

The Special Master's Report further finds that various artificial causes other than the Chicago diversion, have tended to produce effects upon the levels of the Great Lakes. These are listed in the table shown at page 97.

In reference to damage to riparian interests, the Special Master's conclusion is as follows (page 117):

> "But 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. * * * My conclusion on this branch of the case is that, while the damage proved to have been sustained by the complainants has been due to the combination of causes which have brought about the total lowering of the levels of the lakes and connecting waters, the contribution made by the diversion of the water of Lake Michigan through the Chicago drainage canal must be regarded as substantial, although the proportion of the damage caused by the reduction of approximately six inches is not susceptible of exact computation."

The report of the Special Master in giving figures of mean lake levels shows that in the years mentioned, from 1913 to 1920 (*i. e.* 1913, 1916, 1918 and 1920), the mean levels of the lakes were higher than in the five year period from 1895 to 1899 (Special Master's Report, pp. 88-89); and the table on page 88, shows that the mean

levels have widely fluctuated, and, further, that the mean levels were higher during the earlier periods. These earlier higher mean levels obviously obtained prior to the present Federal improved channels through the Great Lakes. It is quite clear that when outlet channels are deepened outflows increase, and although the complainants, on their theory, have a right to complain against the Federal Government for uncovering large stretches of beach below the high water marks that obtained in the period beginning in 1860, no such complaint has ever been made because complainants have received the benefit, through increased navigation facilities, of these deepened outlet channels.

But the fluctuation which is constantly going on in the levels of the lakes, changing not only from year to year but from day to day, demonstrates that it is impossible,—and the Special Master so found,—to appraise the exact extent of damage to riparian rights resulting from the Chicago diversion. The briefs of complainants discuss this claim of damage throughout as if it were an appreciable and measured factor. They, therefore, totally disregard the Special Master's conclusions above quoted, and in all consideration of their arguments it should be remembered, that all that the Special Master has found the defendants to be responsible for, is an increase of the total reduction from original high-water mark, the amount of which, though found to be substantial, he finds cannot be determined from the evidence. And in considering the legal effect of this finding, the fact should be noted that natural causes at times bring back the levels to those existing before the diversion began, and so far as riparian damage is concerned, it is quite clear from the levels given in the report (joint abstract and table, p. 88), that there are many periods during which

the diversion has continued, when there has been no riparian damage from this source, because the original levels had been restored by natural causes.

This absence of certainty of any riparian damage, both as to extent and duration, are highly important to consider, in view of complainants' contentions upon the 5th Amendment.

Complainants' briefs also discuss their claim for damage to agricultural and horticultural interests, from a theoretical change in water tables alleged to fluctuate with the lake levels and consequently to be lowered by the diversion.

This claim of damage was not sustained by the Special Master and complainants have not seen fit to include, in the Joint Abstract, the conflicting testimony upon which his conclusion was reached.

The Effect of the master's Findings as to Remedial or Compensatory Works.

Complainants seek in their briefs to build a monumental case of damage to the navigability of the Great Lakes and to complainants' riparian rights, in support of their prayer for a drastic injunction looking to the future.

The Special Master found as a fact (Report, pp. 125-131), that compensating works in the outlet channels of the Great Lakes could, without interfering with navigation, be constructed at relatively slight expense, in such a way as to restore the original lake levels and thus entirely prevent any damage resulting from continued diversion,—thereby eliminating all substance from the alleged equities of this, the sole complaint of the Lake States.

COMPLAINANTS' PRESENT CONTENTION THAT THE CONDITIONS OF THE PERMIT HAVE BEEN VIOLATED.

The Special Master found (Report, p. 81):

> "It appears from the evidence that up to the time of the taking of testimony herein, the Sanitary District had substantially complied with the conditions of the permit" (of March 3, 1925).

Notwithstanding this finding, complainants in their briefs insist that the Sanitary District has violated the conditions of this permit. We shall not discuss the evidence referred to by them to support this contention, because the brief of Illinois and the Sanitary District will do so, but we submit that such portions of complainants' briefs as refer to matters entirely outside the record, should not be taken into consideration.

ARGUMENT.

Introduction.

The report of the Special Master contains a clear analysis of the legal issues, and a comprehensive and, we submit, conclusive discussion of each point of law involved, supported by ample citations of authority. Aside from our duty not to burden the court with repetition, it would be folly for us to attempt to improve upon the Special Master's statement of the law. We therefore beg leave to adopt his report as our brief upon the law of this controversy, and we shall here submit only a few points intended to answer certain arguments now presented in complainants' briefs, and thereby to supplement the reasoning of the Special Master as stated in his report.

The Motion to Dismiss the Wisconsin Bill.

Before discussing the legal issues, we respectfully invite attention to the state of the record. A motion to dismiss the amended bill of Wisconsin, Ohio, Minnesota and Pennsylvania (in No. 7, Original), was filed, presented and argued. The Court disposed of this motion, in effect, by reserving it for decision until the Master's report came in, so it is still to be disposed of by the Court.

The basis of our motion to dismiss was, that this amended bill of said Lake States failed to disclose a sufficient interest either proprietary or quasi sovereign to invoke the exercise of the extraordinary original jurisdiction of this Court. For a discussion of the reasons in support of the motion and an analysis of previous de-

cisions of this Court, we beg leave to refer to the briefs heretofore filed on behalf of the River States in support of said motion to dismiss, and we now respectfully ask that the motion heretofore made be sustained.

I.

THE PERMIT OF MARCH 3, 1925, WAS BASED ON ADEQUATE CONSTITUTIONAL GROUNDS SHOWING DIRECT AND SUBSTANTIAL BENEFITS TO NAVIGABILITY.

The urgent contentions for complainants, that the permit of March 3, 1925, was issued solely for the benefit of sanitation and water power and had no substantial relation to navigability, cannot avail to overcome the findings of the Special Master that the permit does benefit navigability in several substantial respects, and that the permit therefore rests on an adequate constitutional basis under the commerce clause.

There is, however, an additional and important basis having a direct relation to navigation, not mentioned by the Special Master but shown by the record, upon which the action of the Secretary of War in issuing the permit may also rest, viz. the duties to navigate the Mississippi that are expressly imposed on the Secretary of War by Sections 201 and 500, of the Transportation Act of 1920, and by the Inland Waterways Corporation Act of June 3, 1924. (43 Stat. L. 360.)

By these statutes Congress imposed a mandate on the Secretary of War, to conduct a common carrier transportation service on the Mississippi River, a duty necessarily predicated on the decision by Congress that its performance by the Secretary of War will be in the national interest for the benefit of navigation.

The extent to which the Middle West, and particularly the River States, have been suffering from what Secretary Hoover terms "economic distortions" due to maladjustment of transportation facilities and costs resulting from the World War, is a matter of common knowledge of which this Court can take judicial notice; and is also shown by the evidence heretofore mentioned and now before the Court.

That these economic evils are in process of relief by the increasing use of the Mississippi in interstate commerce, has also been shown.

So the Secretary of War, having authority under Section 10, to permit a diversion of water from Lake Michigan into the Mississippi and thereby to improve its navigability, is at the same time, though by later statutes, charged by Congress with the mandatory duty of navigating the Mississippi by operating a common carrier barge line.

And we respectfully submit, that in considering and deciding whether it would be for the benefit of navigation as a whole, to substantially improve the navigability of the Mississippi by exercising his authority under Section 10 and granting a permit to authorize this diversion, the Secretary of War was not only at liberty, but was in duty bound, to rest his conclusion that the diversion should be permitted, upon the direct aid that the diversion would give to him in the performance of his duty to conduct the barge line navigation on the Mississippi. This benefit constituted an additional constitutional basis for his action under Section 10. It broadened and strengthened the grounds for his action, and constituted an additional reason and purpose, resting squarely on navigability, for the permit that he issued.

This is particularly true, since the evidence shows that this added reason was expressly called to his attention at the hearing held by him prior to his decision that the permit should issue.

II.

THE CONFLICT BETWEEN THE CONTENTIONS OF THE COMPLAINANTS AS TO THE CONSTRUCTION TO BE GIVEN TO SECTION 10 OF THE ACT OF 1899.

In the New York brief (No. 12 Original), counsel merely doubt the master's construction and cite *Hubbard* v. *Fort,* 188 Fed. 987, without discussion. They refer to the prohibition of obstructions to navigation not affirmatively authorized by Congress, but admit (Brief, p. 56) that "Congress recognized the fact that certain local needs might require the placing of obstructions in and above (sic) navigable waters." This, as counsel recognize though attempting to qualify their admission, necessarily delegates to the Secretary of War legal authority to determine whether the particular obstruction for which his permit is sought, falls within the class which the statute authorizes him to permit. Counsel then argue that the permit of the Secretary of War is merely negative, a "withdrawal" of the broad power of the United States to forbid any obstruction.

In the Michigan case (No. 11, Original), counsel take the extreme, though entirely conflicting position, that the first clause in Section 10 forbids any obstruction at all except upon affirmative action by Congress. This position is argued at great length. Counsel suggest (Brief, p. 116) that only alterations of navigable capacity that do not in fact amount to obstructions, can

be lawfully authorized by the Secretary of War's permit. If this be the construction of the statute, the Secretary is clearly given authority to determine whether a given project in fact amounts to an obstruction, and his permit amounts to his administrative finding that the work authorized is not a legal obstruction. Under well settled principles, such an administrative determination is not to be judicially set aside unless found to be entirely arbitrary or clearly beyond the statutory power.

At page 132 of this brief, counsel say:

> "Section 10 of the Act of March 3, 1899, definitely and positively prohibits *'obstructions to navigable capacity'*. IT DOES NOT PROHIBIT THOSE WORKS WHICH ARE IN AID OF NAVIGATION." (Italics ours.)

By this admission alone, counsel have disposed of their entire case. For, in the first place, on this construction of the statute the Secretary of War must have authority as a precedent to the grant of any permit, to determine whether in fact a particular alteration of navigable capacity benefits navigation as a whole. And such administrative determination is not to be set aside by a court except because of a clear and indisputable abuse of official discretion. And, on the facts in the case at bar, as we have shown above, the alteration of navigable capacity authorized by the permit of March 3, 1925, must have been found by the Secretary of War, to materially benefit navigation in important particulars.

In the Wisconsin brief (No. 7, Original) counsel say that the structures referred to in the second clause of Section 10, wharves, piers, dolphins, etc., "do not necessarily, or even ordinarily, create an obstruction to the navigable capacity" (Brief, p. 140). This very statement again implies that a question of fact arises in

each instance upon the request for a permit. Counsel say, at pages 144-5:

> "Hence, a pier, dolphin, or other aid to navigation, which might be argued to constitute a technical obstruction to navigation at the precise point of its location on a navigable waterway, would nevertheless improve the navigable capacity of the waterway and would not be within the general prohibition of the first part of this section."

In the case at bar, the mere awarding of the Sanitary District permit by the Secretary of War raises a presumption, not to be lightly overcome, that the work authorized "improves the navigable capacity of the waterway." As counsel in these statements suggest, any such work, large or small, must almost inevitably to greater or less extent, obstruct navigation. On their own theory, the Secretary of War has delegated authority when application for a permit is made, to determine on all the facts, whether the amount of obstruction inevitably present is sufficiently overcome by the amount of resulting increase in navigable capacity.

In the case at bar, we have shown above, the nature, importance, and great extent of increase to the navigability of important waterways resulting from this diversion, and the further fact—usually not present—that at small expense all resultant temporary obstruction may, by the creation of compensation works, be entirely eliminated. We submit that these facts demonstrate there is no ground here for any claim of abuse of administrative authority.

If these several arguments really conflict with and contradict each other, this fact is persuasive that this court should accept the well founded, carefully reasoned conclusion of the Special Master. He said (Report, p. 190):

> "The true intent of the Act of Congress was that

> unreasonable obstructions to navigation, and navigable capacity, were prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction."

But it will be seen that each of these four constructions admits the delegation to the Secretary of War of some kind of discretion. New York admits an authority, not defined, to be delegated; Michigan, we contend, admits authority to authorize those structures which will benefit navigation; Wisconsin, goes further and admits authority to authorize an obstruction if it increases navigable capacity. The essential difference between these several interpretations of the statute is very slight. The Special Master's construction is merely broader than complainants in that he uses a general phrase obviously capable of meeting every question that could arise. Complainants' counsel, arguing more narrowly, do not, we submit, differ in essentials from the Special Master's conclusion.

The only question before this court, on any of these interpretations of Section 10, urged by complainants' counsel, is whether there has, in this case, been shown to be such an abuse of administrative authority as to require this court to set it aside. Complainants do not clearly meet this question. Their labored and lengthy arguments as to the interpretation of Section 10, are only designed to avoid the necessity of attempting to show a clear abuse of administrative discretion. They either deny any benefits to navigation resulting from the diversion, or ignore the existence of these benefits. But the Special Master found that such benefits—specific and substantial increases of navigable capacity—do in fact result from the Secretary of War's permit.

The familiar rule defining the extent of this court's jurisdiction to review administrative findings, is well stated in the language of Mr. Chief Justice White in the decision of this court in *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. at page 470, in the following expression:

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

Complainants here, make no attempt whatever to bring their case within this rule. They merely urge a construction of Section 10, which avoids the necessity of asking this court to review the action of the Secretary of War in issuing the permit. The validity of the Secretary of War's permit tested by this rule, is indisputable.

III.

CERTAIN ADDITIONAL SUGGESTIONS IN SUPPORT OF THE SPECIAL MASTER'S CONSTRUCTION OF SECTION 10.

An analysis of the reasoning of the Special Master on the correct construction to be given to Section 10, as compared with the reasons urged in complainants' briefs in their attempt to attack his conclusions, shows that complainants' attempts are fully met and overcome by

the reasoning and authorities in the Special Master's report.

There are, however, two points upon which additional suggestions seem justified:

(1) Any study of Sections 7 and 9 of the Act of 1899, as compared with Sections 9 and 10 of the Act of 1890, will show by the rearrangement in the Act of 1899, of the several classes of obstructions and by the method prescribed for obtaining Congressional consent as to each class, that when there was *an intent to require dual consent* (of Congress and of the Secretary of War, *such intent was clearly expressed.*

Thus it is indisputable, that in respect of the particular obstructions (bridges, etc.) named in Section 9 (Act of 1899), Congress considered their nature to be such as to merit the consideration and consent of Congress itself, supplemented or accompanied by the approval of the chief of engineers and of the Secretary of War. Consequently, in said Section 9, we find a prohibition of the commencement of construction of certain specified obstructions until the consent of Congress to the building of such structures, shall have been obtained, *and* until the plans for the same shall have been submitted to and approved by the chief of engineers and by the Secretary of War.

Two conclusions are necessary from the above provision requiring dual consent: (a) that Congress intended that as to certain enumerated obstructions, it would require dual consent; and (b) that the intent in drafting said Section 9, was to gather into Section 9, the particular kinds of obstructions as to which Congress intended to require dual consent.

Having thus by Section 9 singled out and included

within it, those particular obstructions as to which Congress intended to require dual consent, and having as to said obstructions clearly expressed its requirement of such dual consent, Congress then proceeded in Section 10 to deal with all other kinds of obstructions and work affecting navigability; and it did so by again grouping into classes certain kinds of obstructions, and as to each class prescribed what form of Congressional consent should be necessary in order to render them lawful, but as to neither of these classes, did Congress use any language similar to that used in Section 9 by which it had expressed its requirement of dual consent.

We therefore respectfully submit that it is clear that Congress did not intend any of these particular kinds of obstruction enumerated in the separate classes described in Section 10, to require dual consent, and that consequently the only consent expressed in Section 10, namely, that of the Secretary of War upon the recommendation of the chief of engineers, can be considered as intended by Congress.

(2) As an additional consideration supplementing the reasoning of the Special Master, and particularly concerning the contention strongly pressed in one of complainants' briefs,—that the first clause of Section 10 forbids all obstructions to navigation and that, therefore, all of the subjects of the later two clauses of the section must be first affirmatively authorized by Congress,—we suggest the following answer to this construction of the statute.

The last two clauses of the statute would require, under complainants' construction, first an affirmative act of Congress and second a permit authorized by the Secretary of War upon the recommendation of the chief of engineers. But, any subsequent Congress might decide

to grant its permission by specific statute without also requiring any administrative action by the Secretary of War. This would clearly be within the power of Congress, and in earlier years was its usual practice. Complainants' construction necessarily implies that the requirement as to permit from the Secretary of War in the last two clauses, either is an attempt to impose a restriction upon the actions of future Congresses by prohibiting them from directly granting Congressional permission for a particular obstruction without the added action of the Secretary of War,—a construction that would be clearly void; or else the specific language requiring administrative permits must be entirely disregarded. Under well-settled rules of statutory interpretation such a nullifying construction of this section, whose ambiguity is emphasized by the inability of complainants to agree upon its meaning, must be avoided if any other reasonable construction can be found.

IV.

THE DECISION OF THIS COURT IN SANITARY DISTRICT VS. UNITED STATES, 266 U. S. 405, HAS DETERMINED THE CONTROLLING ISSUES OF LAW INVOLVED IN THE MERITS OF THIS CONTROVERSY.

We present this point because of the efforts in the briefs for complainants, to limit the effect of the decision in the Sanitary District case within much narrower scope than is justified by the decision itself, and so to minimize its effect in the instant case.

Thus in the brief for Wisconsin (page 162), counsel say (italics ours):

> "*All that is involved* in the decision in *Sanitary District* v. *U. S.* 266 U. S. 405, 426-429, which is in

part quoted by the Special Master, is *that the obstruction of the navigable capacity of the Great Lakes* is clearly *prohibited by the first part of Section* 10. The question *whether the Secretary of War had the authority to authorize an obstruction to the navigable capacity* of the waters of the United States *was not before the Court, nor involved in the decision.*"

And in the brief for Michigan (page 148), counsel say (italics ours):

> "The decision of this Court in *Sanitary District* v. *United States, does not construe or interpret Section* 10 as *delegating power to the Secretary of War to affirmatively authorize an obstruction to the navigable capacity of the Great Lakes.*"

And on page 149, same brief, counsel also say (italics ours):

> "The use made of Section 10 in that case was *confined to its first clause.* The second and third clauses and the extent of the power under them, *was not discussed because not involved.* It is respectfully urged that this Court *is not committed to any construction of the second or third clauses of Section* 10 by anything said or any principle involved in that case."

We respectfully submit, that even a casual reading of the opinion of this Court in the Sanitary District case, discloses that the above quoted statements are incorrect and incomplete, and that the following points were there decided in relation to this very diversion of water from Lake Michigan, and in a case, in the briefing and argument of which all of these same Lake States participated on the side of the Government in seeking to sustain the very powers of the Secretary of War that the Lake States now attack, and in which several of these same River States participated on the side of the Sanitary District, in seeking to question the extent of the

power of the Secretary of War under all portions of Section 10. So the construction of Section 10, was involved and discussed and the court decided:

1. That this diversion of water from Lake Michigan is of such "national importance," that it "cannot be done without the consent of the United States" (266 U. S. at page 426).

2. That Section 10 of the Rivers and Harbors Appropriation Act of March 3, 1899,

> "Repeatedly has been held to be constitutional in respect of the power given by the Secretary of War," (266 U. S. at p. 428).

3. That the same Section 10 was quoted, discussed and construed by the court in its opinion:

(a) As "covering," *i. e.,* applicable to and determinative of, the Sanitary District case, in which the Government successfully contended that the diversion then being made was unlawful, because and to the extent that, the quantity of water being diverted *exceeded that expressly authorized by the permit* then in effect.

(b) As so applicable and determinative, *even though the diversion authorized by the Secretary of War* under Section 10, *might "change the condition* of the Lakes and the Chicago River, admitted to be navigable," *even to the extent of creating "an obstruction to their navigable capacity";* and

(c) As applicable "prospectively to the water henceforth to be withdrawn"; and

(d) As holding that the withdrawal then being made, *"is prohibited* by Congress *except so far* as it *may be authorized by the Secretary of War,"*—meaning, of course, by a permit.

These conclusions, (a) to (d) inclusive, seem unavoid-

able, from the following part of the opinion (italics ours):

Referring to Section 10, as applicable to the Sanitary District case, the court said (266 U. S. at p. 429):

> "There is *neither reason nor opportunity* for *a construction that would not cover the present case. As now applied* it *concerns a change in the condition* of the Lakes and the Chicago River, admitted to be navigable, and, *if that were necessary, an obstruction to their navigable capacity, U. S.* v. *Rio Grande Dam & Irrig. Co.* 174 U. S. 690, without regard to remote questions of policy. It *is applied prospectively to the water henceforth to be withdrawn. This withdrawal* is *prohibited by Congress, except so far as it may be authorized by the Secretary of War.*"

We respectfully submit that this last sentence means, and it can only mean, that *so far as authorized* by the Secretary of War under Section 10 of the act, this withdrawal of water *is not prohibited* by Congress, *and is therefore valid.*

Further, in speaking of the contentions of the River States, the opinion says (266 U. S. at 431, italics ours):

> "The interest that the river states have in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to Congress, if they see fit, to induce *a modification* of *the law that now forbids that increase unless approved as prescribed.*"

The words "unless approved as prescribed" necessarily mean, in the connection in which they were used, that the authorization of the Secretary of War and the approval of the chief of engineers under the later parts of Section 10, would *render lawful* a diversion *that without them* would be *forbidden by the first part of Section* 10.

In saying that "the interest that the River States have

in increasing the *artificial flow* from Lake Michigan is not a right, etc.," we understand the court to mean that if the River States seek (as they did in the Sanitary District case) *a larger diversion than is authorized by a permit of the Secretary of War under Section* 10, they would have to obtain Congressional action *modifying Section* 10, *"the law* that *now forbids that increase unless approved as prescribed."*

But the River States, conforming to the above decision, respectfully contend in the instant case, that by obtaining the permit of March 3, 1925, the Sanitary District did obtain from Congress through the Secretary of War as agent of Congress, authority to make the diversion now under attack, and that the increase in the amount being diverted is not forbidden by Section 10, because it has thus been "approved, as prescribed" by Section 10.

Consequently, no question of title in the River States is here involved.

But the Court says that the "interest" of the River States "in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to Congress * * *"; so it follows, necessarily, that the River States may present their interests to the agent of Congress if, as we have shown, Congress has delegated to an agent authority in the premises. Clearly the court here decided that the interest of the RiverStates, if supported by the facts, constitutes a consideration, which the Secretary of War must take into account.

Even the direction in the opinion concerning the decree to be entered, shows that the decision was predicated on the conclusion by the court that a permit for the full amount being taken, *would have been a valid de-*

fense. Thus the court said (266 U. S. at 432; italics ours):

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

It should be noted that the attitude of the Government in the Sanitary District case was, that the diversion of water then being made, was unlawful because and to the extent that the quantity then being taken, *exceeded* that *expressly authorized* by the permit then in effect. And the whole theory of the Government's case was predicated on the contention that the diversion was lawful under the permit to the extent of the quantity allowed by the permit to be taken, but *was unlawful as to any quantity in excess of that allowed by the permit.*

The conclusion is therefore inevitable, that the decision in the Sanitary District case not only upheld the constitutional validity of Section 10, but it also construed all parts of the Act of March 3, 1899, as meaning, that the Secretary of War had power upon the recommendation of the chief of engineers, *to authorize* the Sanitary District *by his permit, to divert* from Lake Michigan *such quantity of water and under such conditions to be observed by the permittee,* as the Secretary of War might in the reasonable exercise of his power, find appropriate in the interests of navigation and navigability.

If the contentions being made in complainants' briefs, as to the scope and meaning of Section 10, had any merit, it would have been wholly unnecessary for the Court in the Sanitary District case, to do more than hold that *direct* authorization by Congress was necessary under Section 10. Such a ruling would have ended the entire controversy. And the fact that the Court did not so hold, but did hold in effect, that even though the direct consent

of Congress had not been obtained, nevertheless a diversion to the extent authorized by permit of the Secretary was valid, argues conclusively that the later parts of Section 10, were not only construed, but were upheld as giving the Secretary of War power *by his permit to authorize this very diversion.* And this, even though the diversion did *create "an obstruction* to the navigable capacity" of the Great Lakes.

V.

THE NATURE AND EXTENT OF THE DAMAGE TO THE COMPLAINANTS' RIPARIAN RIGHTS DOES NOT CONSTITUTE A TAKING OF THEIR PROPERTY WITHIN THE MEANING OF THE FIFTH AMENDMENT.

As we understand complainants' position, they admit that their rights in navigation on the Great Lakes are subject to the exercise of the paramount power of Congress to control navigation; but, they insist, that they have such a title to the lands within their respective borders beneath the waters of the Lakes, as to make the damage to their riparian rights constitute a taking of property within the meaning of the 5th Amendment.

Assuming for argument only, but not admitting, that this Amendment applies to the case at bar, we respectfully submit that the character of damage as found by the Special Master to have been suffered by complainants from the diversion, falls far short of a "taking" of property within the meaning of the 5th Amendment.

The Special Master found (Report, p. 117):

> "But 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."

And again (Report, p. 118):

> "My conclusion on this branch of the case is that, while the damage proved to have been sustained by the complainants, has been due to the combination of causes which have brought about the total lowering of the levels of the lakes, the contribution made by the diversion of the water of Lake Michigan through the Chicago Drainage Canal must be regarded as substantial, although the proportion of the damage caused by the reduction of approximately six inches is not susceptible of exact computation."

We submit that the Special Master's conclusion therefore is, that due to both natural and artificial causes, other than this diversion, there would in any event have been a lowering of the levels of the Great Lakes, which would have caused this identical damage but to an indeterminately lesser degree. The Special Master's finding, therefore, is that there is no proof of damage to riparian rights which can be found to be exclusively due to the acts of these defendants.

The Special Master has reviewed the decisions of this court at length in his report, and has cited all of the pertinent cases. The sum and substance of these decisions as applicable here, is, that to constitute "a taking" of property within the meaning of the 5th Amendment, there must be a certain, inevitable deprivation of the right or opportunity to use specific property over at least a materially definite period of each year, which interruption of use amounts to a complete denial of a user otherwise existing. No case can be found, and the complainants do not cite any, where a taking of property has been legally found to result from a mere increase of damage or interruption to user, which would otherwise, due to other causes for which the defendant is in no wise responsible, inevitably have existed.

The 5th Amendment has been held to be a limitation upon the power of eminent domain where a taking has occurred in fact within the meaning of this limitation; in most instances it has been held by this Court that as the result of the exercise of the power of eminent domain, actual title to the property taken has been transferred by the mere act of taking. It is undoubtedly due to this view of the effect of the amendment, that this Court is always careful to point out that a constitutional taking requires a permanent and continuous damage.

In the case at bar, the Special Master has found that the levels of the Great Lakes may be restored to what they would have been had the diversion not taken place, or even to higher levels, by the construction of compensating or regulating works in the outlet channels. (Report, pp. 125-131.)

The report of the Special Master at page 54, quotes Article 4, of the Treaty of 1909, between the United States and Canada. This article provides, that except in cases provided for by special agreement between them, the High Contracting Parties will not permit the construction of remedial or protective works, the effect of which is to raise the natural level of waters on either side of the boundary, unless the construction or maintenance thereof is approved by the International Joint Commission. In other words, the Treaty itself contemplates the construction of such remedial works, and in view of the fact that the United States Government has authorized through the permit of the Secretary of War this diversion, which has caused the damage above referred to, and is well advised that this damage can be entirely eliminated by the construction of these works, we respectfully submit that this court should indulge a presumption that the continuance of this damage will be

relatively brief—so brief that aside from other considerations, its relatively slight duration alone, would prevent it from being construed to be a taking of property within the meaning of the 5th Amendment.

Article IV of the Treaty of 1909 with Canada (Report, p. 54) contemplates the construction of such remedial works. One of the conditions of the Secretary of War's permit of March 3, 1925, required the Sanitary District to deposit $1,000,000 toward the payment of its share of the cost of such remedial works, and this deposit has been made.

Can a partial temporary damage, which can be entirely eliminated, and toward the elimination of which Illinois and the Sanitary District have already done everything required by the United States, be regarded—whatever be its present character or extent—as a taking of property within the meaning of the 5th Amendment?

VI.

THE ADMITTED ECONOMIC RIVALRY AT THE BOTTOM OF THIS CONTROVERSY IS ITSELF, SUFFICIENT TO JUSTIFY THE PRESENT EXERCISE OF THE CONGRESSIONAL POWER TO REGULATE COMMERCE.

In the brief filed in No. 7, Original, the Wisconsin case, at page 110, the following statements are made:

> "It is not too much to say that the whole industrial and commercial structure of the United States has been built about the existence of two great waterways separated by the *Continental Divide,* opening interstate and international communication by the St. Lawrence on the one hand and the Mississippi on the other. Each has its natural advantages. In the basin of each of these waterways, vast populations have built up their social and industrial institutions and use to the maximum these natural

advantages. An intense but constitutionally restrained rivalry exists between the two sections and the dominant character of their respective civilizations, has been determined, throughout the past one hundred years, as much by their respective advantages as by their common advantages.

That the natural advantages of the Great Lakes region should now be sacrificed to the drainage of Chicago or to the improvement in the navigable depths of the Mississippi would be at variance with the just expectations of the states and their peoples, who have settled the Great Lakes region and built it into an efficient industrial empire."

The foregoing statement suggests the self-evident fact that the commercial structure of the United States exists solely by virtue of the constant interplay of interstate commerce between all of the various regions and localities of this country. As commerce is, in the main, directed by self interest, rivalries between localities necessarily exist as well as between individuals, and the complainants admit that sectional rivalry is at the bottom of this controversy. It is submitted that the unequal results of such sectional rivalry and the evils following its uncontrolled exercise, were the actuating causes for giving to the Federal Government the power to regulate interstate commerce, including, of course, the power to create channels of communication usable by such commerce.

We submit that in the foregoing statement of complainants the real gist of the complaint presented by the Lake States is very clearly indicated. By the gift of nature they possess an unequalled channel for water communication stretching from their shores to the Atlantic Ocean. The Middle West, chiefly dependent upon agriculture, in order to compete in world markets on an equality with other regions not only in this country

but abroad, is seeking a practicable channel for water communication, which alone, by the economies of such carriage, will relieve this vast section of our country from economic burdens now weighing heavily upon it.

Can there be any question that in the exercise of its power to regulate commerce, Congress is authorized to create such a channel when it is apparent that this will tend to remove discriminations seriously retarding the growth and prosperity of the entire Mississippi Valley? Is it not apparent that this sectional rivalry, thus admitted by the complainants, will tend to disappear when this water channel of communication extending from the Gulf, up the Mississippi Valley, is perfected and made available not only for the Mississippi Valley but by the connection of the Illinois River, through the Drainage Canal into Lake Michigan, to all of the complainant states? Substantial benefits from this new instrument for the conduct of interstate commerce are necessarily bound to inure to the complainants as well as to the defendants. Can there be any question but that the power of Congress is sufficient to reach out of its own accord, without regard to state action, to create such a channel of communication which would tend to minimize existing inequitable economic burdens and eliminate a sectional rivalry which through recent years, due to increasing competition, has become more and more acute and if permitted to exist uncontrolled, certain in the future to prove of serious detriment to the national welfare?

If the power is broad enough for this purpose, as we submit its description above demonstrates, still more has Congress the authority to permit a state, by its unaided efforts, to bring about such beneficial results. No state

could be expected to assume the expense and burden of this construction if it did not receive very direct and demonstrable individual benefit. The fact that Illinois is able to solve an acute sanitary problem and relieve itself of some of the expense through the incidental development of power, certainly is no argument against the wisdow of the executive branch of the Government, exercising the authority conferred upon it by the legislative branch, to authorize the defendant Illinois to bring into being such essential benefits to the nation at large.

We also submit that the selfish desire of the complainant states to maintain an advantage, the mere existence of which imposes a serious burden upon many sister states, is certainly no consideration to address to the conscience of a chancellor.

Conclusion.

We again respectfully call attention to the fact that in its essence this suit is an attack on *an administrative act* of the Federal Government. The judicial department is being asked to interfere with the political department. This Court is being asked to enjoin an administrative act of the Secretary of War (as the agent of Congress), done by him in the exercise of a power that this Court has already held was validly delegated to him by Congress, in respect of this same diversion.

We therefore respectfully submit that this Court should enter a decree adopting the Special Master's report in all particulars, sustaining defendants' motions to dismiss the bill in the Wisconsin case (No. 7, Original) for the reason that the bill fails to disclose sufficient interest in the complainants to justify an exercise of this

court's original jurisdiction, and dismissing the bills in the other two cases for want of equity.

Respectfully submitted,

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