IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 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~~ 6 Original.

State of Michigan, Complainant,
vs.
State of Illinois and Sanitary District of Chicago, Defendants.

No. ~~11~~ 10 Original.

State of New York, Complainant,
vs.
State of Illinois and Sanitary District of Chicago, Defendants.

No. ~~12~~ 11 Original.

Brief for Defendants, Illinois and the Sanitary District of Chicago.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

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Brief for Defendants, Illinois and the Sanitary District of Chicago.

PRELIMINARY STATEMENT.

In support of their exceptions, the complainants have filed one brief in each of these three cases. The principal criticisms, appearing in each brief are common to all of them.

For convenience in replying, the arrangement of the brief filed by Wisconsin, *et al.*, will be followed so far as possible, referring at appropriate places to additional criticisms or arguments, appearing in the briefs of Michigan and New York.

Some of the exceptions are not urged. A joint abstract of those portions of the record pertinent to a consideration of the exceptions relied upon has been prepared. Therefore, it is assumed that all exceptions to findings of fact, which are not supported by the joint abstract, are waived. New York has expressly laid aside all of "its exceptions to the Special Master's findings of fact, and accepts his report on the facts as though wholly correct" (N. Y. Brief 11).

The findings of fact, to which exceptions are now pressed, are:

(1) "It appears from the evidence that, up to the time of the taking of the testimony herein, the Sanitary District had substantially complied with the conditions of the permit (March 3, 1925)" (Master's Report 81).

(2) "Before the diversion began in 1900, the official reference datum for Federal improvements and for obtaining and maintaining the established project depth in the Illinois River was the low water of 1879. Since then, this reference datum has been officially changed from time to time, so as to conform to existing low water as affected by the diversion" (Master's Report 71).

(3) "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 the needs of navigation. I am unable so to find. The needs of navigation on that waterway will depend upon the carrying out of plans already adopted and upon the ultimate decision of Congress with respect to water communication between Lake Michigan and the Mississippi River, the extent to which locks and dams are to be used or installed, that is, the character of the improvements and the amount which it is determined to expend" (Master's Report 122).

(4) "With present diversion, the depth will be about nine feet. If the diversion were reduced materially below 4,167 c.f.s., it would necessitate radical changes in the design and location of the locks, three of which are already either constructed or under construction, and increased outlays" (Master's Report 119).

(5) "The profile map accompanying the plans" (for Illinois Waterway, approved by Chief of Engineers and Secretary of War) "contains a notation that the water services shown were 'based on an assumed flow of 4,167 c.f.s., already approved, as a diversion from Lake Michigan, plus the normal flow from other sources in various pools'; that is, the assumption was of 6,000 c.f.s. flow, made up of 500 c.f.s. as an actual low water flow, 4,167 c.f.s. from Lake Michigan, and 1,395 c.f.s., as averaging the amount of Chicago's pumpage" (Master's Report 120).

(6) "My conclusion is that the diversion from Lake Michigan through the drainage canal increases to some extent during low water the navigable depths over the bars on 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 Secre-

tary of War to reach the conclusion that the diversion from Lake Michigan of 8,500 c.f.s., was to some extent, an aid to the navigation of the Mississippi River in time of low water" (Master's Report 124).

(7) "This evidence simply serves to show the national interest in the navigation of the Mississippi River, and this may well be taken for granted; but the question here is considered to be one with respect to the effect of the Chicago diversion in giving an improved depth of channel. 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" (Master's Report 125).

(8) "So far as the diverted water is used for the development of power, the use is merely incidental" (Master's Report 165 and 25).

(9) "In the present instance there seems to be no opportunity for dispute as to the long continued and uniform construction of Section 10 of the Act of 1899 by the War Department. It has been its view that in the cases for which provision is made in the last two clauses of Section 10 of the Act of 1899 a specific authorization by congressional act is not required and that the action of the Secretary of War upon the recommendation of the Chief of Engineers is sufficient" (Master's Report 185).

The Master's Report is a complete and succinct statement of the facts. It requires no embellishments or additions. Yet counsel have chosen to re-state in their own language many of the findings of fact, to which no exceptions are now pressed. In many instances their exposition of the facts is wholly improper and misleading.

As to findings of fact to which exceptions are now pressed, we believe that the joint abstract of record clearly shows that if the Master had not found as he did, but had found as complainants contend, he would have found contrary to the manifest weight of the evidence.

At the outset it should be borne in mind that:

> "As the case was referred by the court to a Master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court."
>
> *Davis* v. *Schwartz,* 155 U. S. 631, at 637.

See, also,

Hutchins v. *Munn,* 209 U. S. 246, 250.

BRIEF ON FACTS.

I.

Between the finding of the Master that defendants' diversion is one of a combination of causes contributing to injury in a substantial but undetermined amount and complainants' predication thereon of "destruction of their navigation" and of "immense and incalculable loss," there is a wide difference which must be emphasized in any consideration of law, fact, equity and remedy in this suit.

The Master limited his consideration of the question of injury sustained to a determination of a sufficient showing of interest of complainant states and injury thereto to sustain their status as complainants under the principles of this court governing suits between states. Since his final conclusion was that the suits should be dismissed, he found it unnecessary to appraise injuries even to the extent necessary to balance equities in the event that the prayer of the bills should be considered. We understand that the full extent of his finding was that there is damage at least sufficient to take the case out of the rule *de minimus*—"substantial" damage.

The evidence showed that in the year this suit was filed, Lake Michigan was at its lowest level in sixty-five years, and 32 inches below its fifty-year norm (Master's Report 88). The witnesses generally testified to damages sustained by reason of this lowering of nearly a yard (Master's Report 116). The Master found that the lowering effect of defendants' diversion is 6 inches; that it is one of a combination of causes contributing to certain of the injuries in a substantial but undetermined amount. Apart from

the technical findings, it must be obvious that while in such a situation a lowering of 6 inches might make a substantial contribution to a combined effect, there is no tenable conclusion that such a small proportion of the total lowering is a matter of vast concern.

Complainants, however, seize upon the Master's finding, magnify it beyond reason and end by making an argument that could be no more frantic if their lives, their fortunes and their sacred honor were at hazard. The witness Markham (Master's Report 114) estimated that if, in 1923 (an extreme low-water year), there had been six inches more draft, the Lake Superior traffic could have been carried on the larger freighters with the elimination of about thirty freighters of the smaller class from traffic. The loss here then was the difference *in cost* between carrying a small proportion of the lake cargo on large rather than on small craft.

Observe how complainants utilize this testimony (Wis. Brief 9). They multiply the difference in displacement due to six inches lost draft—not by the *increase in cost*—but by a freight rate (which is not *the* freight rate) and leave the implication that the result applies to every trip of every vessel.

The testimony as to damage applied to the lowest-water years in sixty-five years' experience and in view of the present rapidly mounting levels of the lakes is even now inapplicable. Of course, all vessels are not loaded to capacity on every trip. The up-lake movement is largely in ballast. Ships carry coal up-lake practically as ballast and at stop-loss freight rates and no hindrance to the up-lake movement is shown. There was no evidence of loss to anyone on the coal movement. The iron-ore movement is shown (Master's Report 112) to be two-thirds of the remainder of lake-borne traffic.

Lake commerce is said to be 44 per cent of the total water-borne commerce of the United States (Wis. Brief 10). These are impressive figures, but they lose some of their impressiveness when we reflect that 58 per cent of the ton mileage is about the heaviest and lowest grade freight in the category—iron ore, that grain enters into the ton-mile computation to the extent of 11 per cent of all and about 50 per cent of it is Canadian (Master's Report 110-112).

We do not wish to be understood as minimizing the importance of lake-borne traffic or to argue against the Master's finding of substantial damage, but we do wish to refute the implication of impending national tragedy in complainants' briefs. The fact that the lakes are an important highway of commerce bearing a vast tonnage, leads to no such conclusion as that the coal supply and the mining industry of the up-lake states and the steel-making industry and food supply of the down-lake states is threatened or even consciously impaired by anything defendants have done (Wis. Brief 11-12).

Complainants imply that the Master's Report finds a proved damage to docks due to complainants' diversion. We do not understand that the Master made such a finding. A vertical pile must be kept moist to its top or it will decay. Since many piles along the lakes have been installed, the lakes have fallen some 32 inches. The piles have decayed. They would have decayed had there been no diversion. Had the diversion stood alone they would not have decayed because capillarity keeps them moist for 11 inches from the waterline. The Master found specifically (Master's Report 117),

> "Instances of such decay have been given, and the damaging effect at Milwaukee of the lowering of the level of the adjacent waters has been shown. But the

extent to which the six-inch reduction in that level has contributed to this injury does not clearly appear."

The Master's finding with reference to property damage of a non-navigational character, merely was that much of the testimony permits of no satisfactory conclusion "that can be attributed exclusively to the Chicago diversion" (Master's Report 116, 117). He concludes with reference to fishing and hunting grounds, availability and convenience of beaches at summer resorts and public parks, that the lowering of six inches has been "a substantial contribution to the injury caused by the total reduction" in lake levels due to all causes (Master's Report 117). So that this damage is most remote and inconsequential and not possible to be measured. On the claimed damage to agricultural and horitcultural interests, the Master concludes that the "injury alleged" has not been "sufficiently shown to warrant its consideration" (Master's Report 117).

These are the plain findings of the so-called "property damages of a non-navigational character" (Wis. Brief 13-15). Yet counsel refer to these damages as "immense." What the cost of reconstructing dock walls in Montreal Harbor has to do with damage to docks, wharves and piers in harbors and landings along the shore lines of the complainant states, we are unable to conjecture.

As to the elaborate, but tenuous and bucolic evidence offered of injury to agricultural and horticultural interests, the Master has found (Master's Report 117) that it failed of proof. His words are "not sufficiently shown to warrant its consideration."

Of course, one measure of damage is proof of the means and amount by which it can be compensated and this matter is amply covered in the Master's Report, pages 125-131, where it is shown by a singular unanimity of the re-

ports of every engineering body (and there are many) who ever examined the subject that the effect of every injury considered in this suit could readily, and relatively cheaply, be offset by simple and certainly effective remedial works in the outlets of the lakes, and further that such works would remedy not only the effects of our diversions but the far greater effect of the whole congeries of artificial causes which have affected these waters adversely and do so with concomitant benefits to be derived in no other way. All complainants have to say to this is to raise such technical objections as that they ought not to be considered because they depend on the action of Congress and the consent of Canada—this is too serious a matter to be caromed off in that light fashion. If complainants are sincere in seeking to have navigation restored, they should welcome such a solution for it is by all odds the best available.

II.

The War Department—and not defendants—is now in control of this diversion. Its policy of control has been succinctly stated. Under that policy and under the facts in this case, there is and can be no threat of increase in damage to complainant states.

Complainants assert (Wis. Brief 6) that since the domestic pumpage shows a steady and rapid increase, there is no definite limitation of the claim of right to divert waters, and refer to the table on pages 22 and 23 of the Master's Report, wherein by years from the time of the opening of the Drainage Canal in 1900, when the population of the Sanitary District was about a million and a half, to and including the year 1926, when the population was approximately 3,300,000, the sewage flow or pumpage is

shown. This sewage flow was 449 c.f.s. in 1900, and in 1926, 1,395 c.f.s., indicating simply the normal increase of pumpage due to increase in population. This pumpage is small in comparison with the total diversion and is to be limited, if not reduced, by the condition of the permit requiring the metering of the water supply (Master's Report 76).

Conditions 7 and 9 of the permit of March 3, 1925, are, viz.:

> "7. That the execution of the sewage treatment program and the diversion of water from Lake Michigan *shall be under the supervision of the U. S. District Engineer at Chicago, and the diversion of water from Lake Michigan shall be under his direct control in times of flood on the Illinois and Des Plaines Rivers.*
>
> 9. That if, in the judgment of the Chief of Engineers and the Secretary of War, sufficient progress has not been made by the end of each calendar year in the program of sewage treatment prescribed herein so as to insure full compliance with the provisions of condition 4, this permit may be revoked without notice."

It is further to be remembered that this diversion, beyond 4,167 c.f.s., now stands enjoined by a decree of this court "without prejudice to any permit that may be issued by the Secretary of War according to law." The conditions quoted above are part of the permit so issued by the Secretary of War. On February 2, 1922, the Secretary of War succinctly states the policy of the War Department, viz. (Master's Report 71):

> "It is clear that, under the condition of affairs created by the Chicago Sanitary District, the diversion of a certain quantity of water is necessary at present for the proper protection of the health of the citizens of Chicago. It is by no means established, however, that the quantity required for that purpose, either now or

> in the future, is 10,000 cubic feet per second. I regard it as inadvisable to permit the diversions in that amount, or in any amount exceeding the amount now fixed by the Department, without full and complete information concerning the necessity therefor. It is my view that the quantity authorized should be limited to the lowest possible for sanitation, after the sewage has been purified to the utmost extent practicable before it is discharged into the sanitary canal. I regard it as extremely inadvisable to grant the city of Chicago, or any other agency, the right in perpetuity to take from the lake a definite quantity of water. It is not improbable that within a generation a method may be found to separate the valuable fertilizing elements from sewage, as a consequence of which the withdrawal of water from the lake to dilute the sewage will no longer be necessary."

Under such circumstances the argument (Wis. Brief 15, 53, 58) that the defendants threaten to increase the damage and will do so if complainants' prayer is not granted becomes untenable. Their apprehension, if any, must be in respect of the power and willingness of the United States justly and sincerely to govern this matter which has thus been so entirely absorbed within its control.

III.

The history of this canal and of Federal, Congressional and Administrative action in respect thereof, while found by the Master not to constitute direct Congressional authorization of this diversion, yet establishes:

(a) That, in its relation to the national system of internal navigation, it is and ever has been a navigation project.

Complainants contend that none of defendants' acts have any relation to navigation, that the navigation element is

an afterthought dragged in, after complainants began to complain, for the purpose of concealing what they say is the true and sole purpose of defendants' works—sanitation (Wis. Brief 16). They say that Congress never contemplated defendants' acts save with disapprobation, that it never contemplated any authorization of them by the Secretary of War and that all that defendants have done has been in contumacious defiance of the Federal Government and of the rights of sister states.

On this subject, the Master has clearly stated the situation:

> "There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District. The purpose of utilizing the flow through the drainage canal to develop power is also actually present, although subordinated to the exigencies of sanitation. So far as the diverted water is used for the development of power, the use is merely incidental" (Master's Report 165).

Again the Master states in his report (26):

> "It does not appear that the mean monthly or the mean daily flow at any time during the operation of the drainage canal exceeded the amount required by the State of Illinois, under the Act of 1889 as amended, for dilution purposes, that is, 20,000 cubic feet per minute for each 100,000 of population."

The Master's final conclusion requires no additional support by citing the following history, but a proper refutation of some portions of complainants' briefs and a

proper understanding of the bearing of the historical record, set forth in the Master's Report on these assertions of complainants does require some comment.

Complainants contend that all defendants have done has no relation to navigation, and that the navigation element is speciously dragged in to mask the use of the canal for sanitation (Wisconsin Brief 16-52; Michigan Brief 34-50; New York Brief 13-18).

Congress secured the site of the canal by Indian treaties of 1795 and 1816, and by Act of 1818 amended the act delineating the boundaries of Illinois to make them include this site for the purpose of inducing the state to open water communication between Lake Michigan and the Illinois River (page 1677, 32 Annals of 15 Congress).

The report of the Master discloses (11) that the site of the canal was an ancient waterway of exploration, colonization and trade; that the feasibility and military and commercial importance of a continuous water connection was early emphasized and that by the Acts of 1822 (3 Stat. 659) and 1827 (March 2, 1827) Congress authorized and aided the construction of a canal along this site. It will be recalled that in the first quarter of the last century, the power of Congress itself directly to undertake internal improvements was seriously questioned and the means usually employed was to aid the states by land grants. The authorization and intention of the early canal contemplated a water level route drawing water from Lake Michigan and discharging it into the Mississippi system (Master's Report 12). This canal was built, developed, used and proved so inadequate that President Lincoln in 1861 recommended its improvement to Congress as a military and commercial measure. In 1861 the Illinois Legislature undertook studies to improve the through waterway as a navigation project pure and simple. By 1865 a new

element (Chicago sewage) began to impose itself into the canal problem which, up to that time, had related solely to navigation. By 1872 (13) this element had assumed large proportions. In the meantime, beginning, as we have seen, in 1861, the Federal Government became active in this field. By Acts of 1866 and 1867 surveys were called for which, when rendered, emphasized the importance of the waterway from Lake Michigan to the Mississippi. By Act of 1888 (25 Stat. 419) Congress called on the Secretary of War for surveys, plans and estimates for a waterway here having capacity and facilities adequate for the largest Mississippi steamboats and naval vessels suitable for defense in time of war, to be not less than 160 feet wide and 40 feet deep. The year before this act of Congress a board of eminent sanitary engineers had recommended the bold and then unprecedented project of the great rock cut of the Sanitary and Ship Canal, calling attention, as an additional incentive to the city, to the magnificent waterway which would thereby be provided between Chicago and the Mississippi. The year afterward (1889) the Illinois Legislature passed a joint resolution (Master's Report 17) announcing its policy to create a great waterway along this route, requesting the United States to co-operate and to cease the work of canalization of the Illinois River and to apply all available funds to a new plan making use of water from Lake Michigan. The next day the Illinois Legislature passed the Act of May 29, 1889, creating the Sanitary District and authorizing the Sanitary and Ship Canal. The dimensions of the canal should be compared with the dimensions of the waterway which Congress had directed surveyed and estimated for the year before—160 feet wide at the bottom with a depth of water not less than 18 feet.

Section 23 of the Sanitary District Act (Master's Report 14) which specifies the dimensions of the future Sanitary

and Ship Canal to be constructed under that Act, clearly demonstrates that the canal was to be so constructed that it would not only serve to divert the drainage and sewage and water from Lake Michigan to oxidize same, but would also serve as a waterway. That section provides that the channel to be built by which any of the waters of Lake Michigan shall be caused to pass into the DesPlaines or Illinois Rivers shall be of sufficient size and capacity to produce and maintain a continuous flow of not less than 300,000 cubic feet of water per minute of a depth not less than 14 feet and a current not to exceed 3 miles per hour. If cut through a rocky stratum, then it was to have twice the flowage capacity and to be not less than 18 feet deep and not less than 160 feet bottom width. Thus the depth and the maximum velocity specified was important for navigation. If the channel was to be constructed only for the purpose of diverting the sewage, and drainage, of sufficient lake water to oxidize same, then the depth and velocity would have been unimportant. Section 24 of the Act (Master's Report 16) specifically provides that when the channel is completed and water turned in to the amount of 300,000 cubic feet per minute, it is declared to be a navigable stream. Again, in Section 12, Cahill's Revised Statutes of Illinois, 1927, Chap. 42, Paragraph 349, it is provided

> "That all bridges built across such channel shall not necessarily interfere with or obstruct the navigation of such channel, when the same becomes a navigable stream, as provided in Section 24 of this Act, but such bridges shall be so constructed that they can be raised, swung or moved out of the way of vessels, tugs, boats, or other water craft navigating such channel."

Section 3 of the Act of May 14, 1903, amending and supplementing the original Sanitary District Act passed May 29, 1889, Cahill's Revised Statutes of Illinois, Chap. 42, Paragraph 382, provided:

"Said sanitary district shall permit all water craft navigating or purposing to navigate said Illinois and Michigan Canal to navigate the water of all said channels of said sanitary district promptly, without delay and without payment of any tolls or lockage charges for so navigating in said channels."

While authority was granted by the General Assembly of Illinois to organize Sanitary Districts under the Act of May 29, 1889, for the purpose of building and maintaining outlets for the drainage and sewage as a primary object, yet there was an express condition upon the grant of such powers that the main channel to be constructed should be so built and maintained that it could be useful for navigation and should be and become a navigable waterway. The general assembly further, with reference to adjuncts to this channel authorized to be built under the Act of May 14, 1903, provided that they should be constructed and maintained so that boats navigating the Illinois-Michigan Canal might pass along such adjuncts.

The report of Captain Marshall of August 9, 1893, made pursuant to the Congressional Act of 1892 (Master's Report 29), when Chicago's population was slightly over a million, clearly shows the conditions which existed in the Chicago River and Chicago Harbor, navigable waters of the United States. That it was necessary to remove, this report states (Master's Report 29).

"'The insufficient discharge of the pumps into the canal' (referring to the Illinois and Michigan Canal) 'results in rainless weather, in a very feeble current from the lake toward the pumps at Bridgeport, and in an indescribable state of putridity and offensiveness in the Chicago River, due to domestic sewage and a discharge from manufacturing establishments through the sewers into the river. At ordinary rains, upon freshets in the DesPlaines or Chicago rivers drainage areas, great volumes of putrescent matter are disgorged into

> the lake through the mouth of the Chicago River, threatening the water supply of the city, which, in the main is taken through tunnels under the bed of the lake from two inlet cribs, situate, one north of and the other south of, and a few miles distant from the mouth of the river. To remedy the, at times, insupportable and disgusting condition of the river and its branches; to purify the river and to preserve the city water, relief is now sought under the State laws by constructing a drainage canal from the South Branch of Chicago River to the DesPlaines River above Joliet, capable of discharging into the Illinois River Valley from 300,000 to 600,000 cubic feet of water per minute.' ''

But complainants say that all these utterances and acts of defendants were a subterfuge and that the third paragraph of the Memorial Resolution of May 28, 1889, of the Illinois Legislature, "lets the cat out of the bag." They construe that resolution as requesting the United States to pay for the canal from the Chicago River to Lake Joliet, when, as a matter of fact, the only request was that the United States aid in such construction. They also wonder how this channel from Chicago to Joliet is to be of any value when it was to connect with a channel of only seven feet in depth, but they apparently forget that the resolution also asked that the United States project a channel from Joliet to La Salle of similar capacity to the one to be built above, and not less than fourteen feet, and capable of future development (Master's Report 17).

The only value of this resolution in this controversy is to show the purpose that Illinois had at that time in promoting a deep waterway to the Mississippi River and the Gulf. The Master finds (Master's Report 26, 27) and there is no exception taken to this finding, that from the time of President Lincoln, the commercial importance of enlarging the Illinois and Michigan Canal and improving the Illinois River, was before Congress and reported upon by engi-

neers, pursuant to congressional acts, the first Government Engineer's Report being made March 2, 1867. "Reports under these and later acts emphasized the value of a waterway from Lake Michigan to the Gulf of Mexico" (Master's Report 26, 27).

It must be remembered that up to this time no one suggested that defendants would lower the level of the Great Lakes. On August 16, 1895, a War Department board suggested this result to the Secretary of War. It is also obvious that in 1889 both State and Federal Governments were eager to open a Great Lakes to the Gulf Waterway, and for both these reasons there was no occasion or object for subterfuge on the part of the State of Illinois. There was no hidden motive back of these solemn and deliberate acts taken by our State and the people of Chicago to take advantage of the complainants or any of their people. The method adopted by Chicago to divert and oxidize its sewage was "at that time the method commonly used" (Master's Report 132). Chicago undertook to build the most expensive link in the waterway to the Gulf of Mexico by cutting a canal through the Continental Divide. The Illinois Legislature gave Chicago the authority, with the condition that the canal should be so constructed that it would serve as a navigation canal. The United States encouraged the enterprise because the canal would provide an important part of the inland waterways system of the United States connecting the Great Lakes with the Gulf of Mexico, and would also relieve the Chicago River and Chicago Harbor of obstruction to its navigable capacity due to the great sewage pollution therein, and at that time the method adopted to take care of Chicago's sewage was the practical and best method, and is still lawful (Joint Abst. 155, 161).

Of course, the primary object of the Sanitary District in deepening and widening the channels of the Chicago River

and its branches, was to enlarge them sufficiently to permit the diversion through them of water from Lake Michigan, so that a current would not be created injurious to navigation. But the physical acts of deepening and widening these channels, was in keeping with the purpose of the Federal Government of the United States, for Congress had under the Act of March 3, 1899 (Master's Report 36), fixed the project depths of the channels of those rivers at 21 feet, and provided for the replacement of bridges and the removal of piers and for the lowering of tunnels and the widening and straightening of the river for these purposes has, of course, greatly increased its navigable capacity.

The above history is important; first, because it refutes complainants' claim that sanitation and that alone was the sole object and motive for defendants' acts, and that the State of Illinois memorialized Congress in 1889 about the intention of Illinois to create a Great Lakes-to-Mississippi Waterway to deceive Congress and the public; second, because consistently since 1822 it indicates at least willingness and, as we believe, invitation and encouragement on the part of Congress for defendants to do what they did do; third, because it shows that, far from proceeding (as complainants charge) in an equivocal, lawless, and insincere fashion, to create this great engineering work, defendants were moving with honesty of purpose, declaring their plans to the world, and hoping by these plans to turn their necessity into a national benefit with no thought of harm to any interest.

Although the Master has found that this record of Federal action may not be construed as direct Congressional authority, yet he has found that this and subsequent history has a bearing on the construction of the Act of March 3, 1899 (Master's Report 174).

Specifically as to complainants' contention that the canal and diversion never was a navigation project, this record shows that from the beginning and continuously it has been a navigation project. Presently, sanitation became a co-ordinate motive. The overwhelming requirements of the Chicago situation required attention, but there is scarcely one of the Government surveys attending the inception of the project which does not commend its utility and purpose for navigation. The fact governing the construction of this particular canal is well stated in the report of the Joint Board of Engineers required by the Act of June 13, 1902 (32 Stat. 364) (Master's Report 44). "Although the primary object of the Chicago Drainage Canal was the discharge of Chicago sewage, its function as a channel for navigation was kept in view from the beginning." We understand this to be the Master's own conclusion (Master's Report 26, 165). It was also the conclusion of this court in *Sanitary District* v. *U. S.*, 266 U. S. 405.

This waterway, early, became an object of national concern. The political atmosphere attending and remaining with this project until several years after the turn of the century must not be forgotten. There can be no question that at its inception, no one ever questioned the benefit to be derived from defendants' acts. From about 1910 a new note begins to creep into official communications with reference to the navigation aspect of this canal. Lake commerce increased by leaps and bounds, chiefly due to the growth of our steel industry. The Mississippi waterway project languished. But what defendants had undertaken *had already been accomplished.* It is no temporary makeshift. The great rock-cut joining the two water systems is one of the notable engineering feats of the world. This court has well said that a hundred years is a short time in the life of the nation. The matter of internal waterways begins, as is common knowledge, to move again into economic prominence

(Master's Report 118). The abatement of the great works here provided should not be lightly considered.

Taking advantage of a nadir point in the life cycle of this waterway, complainants have stressed with strident iteration every circumstance of its temporary languishment to persuade the court that there is no element of navigation here involved. It is true that at completion of the canal and for some time thereafter there was no adequate connection with the waters below and toward the Mississippi. But it must be remembered that defendants believed, and had reason to believe, from the projects then considered in Congress, that the Federal Government would provide practically navigable channels below. It is true that there has not been a great commerce on this waterway, but that was not due to the inadequacy of what defendants had done. It was due to the desuetude into which fell the Federal projects for adequate channels in connecting waters. We shall not here detail all of complainants' railing against the navigation features of this canal. The answer to all is the same. The canal was conceived as a connecting link, without which a Lakes-to-Gulf waterway would be impossible. It was credited with great value as such when it was conceived. Its value as such remains, and if there is anywhere any circumstance to change the terse appraisal of this court (*Sanitary District* v. *U. S.*, 266 U. S. 405) on this subject we are not aware of it.

> "While its interest to defendant is primarily to dispose of the sewage of Chicago * * * it has been an object of attention of the United States as opening water transportation between the Great Lakes and the Mississippi and Gulf. * * * It will be well to bear in mind * * * that this suit is not for the purpose of doing away with the channel which the United States we have no doubt would be most unwilling to see closed. * * * We repeat that we assume that the United States desires to see the canal maintained * * *"

(b) Congress has fostered, aided and encouraged the creation of defendants' canal and diversion and has used the result of it.

September 19, 1890, Congress passed the first broadly restrictive legislation assuming full control of navigable waters. Defendants' canal was commenced in 1892. There can be no question that, under this act, the Secretary of War had been delegated authority to authorize structures of the kind contemplated (p. 79, Point I. *infra*).

The Master's Report (27-41) sets forth very briefly a few of the principal acts of the Federal Government up to the time the water was turned into the canal. It is shown (27) that the local U. S. Engineer attached to his report to Congress on a Lakes-to-Mississippi waterway 160 feet wide, 14 feet deep, made pursuant to the Rivers and Harbors Act of 1888, the Memorial of Illinois stating its intention and also the full text of the Illinois act authorizing the canal. In 1892 Congress asked for a report from the U. S. District Engineer on what the Government ought to do in the Chicago River. In 1893 this report was made. This report outlined defendants' plan to reverse the Chicago River to carry the drainage into the Des Plaines. It showed that the Chicago River could not accommodate this flow from the Lake without very sweeping changes. It stated that to accommodate the prospective flow the river would have to be deepened to 18 feet, many bridges remodeled and the tunnels under the river deepened. It recommended that Congress decide whether it intended to use the river as a slip for traffic or as a link in the Lakes-to-the-Mississippi Waterway. It stated changes in the river that would be "in the interest of commerce and navigation." It estimated costs for these changes, but suggested that *maintenance*—not original cost—should be paid by Chicago as long as sewage was

dumped in the river. Complainants assert that by this report and the action thereon Congress abandoned the Chicago River as a navigation project. By Act of June 3, 1896, Congress authorized the improvements recommended by the District Engineer. Thereafter the Sanitary District, acting under War Department permits and the War Department acting under specific acts of Congress, worked side by side in the Chicago River. In the meantime Congress by Acts of 1896, '97, '98 and '99 continued to direct surveys and reports of projects of various size and capacity to hook-up the Sanitary and Ship Canal with a waterway to the Mississippi (Master's Report 35-36) and continued appropriations for improvement of the Chicago River. These surveys invariably recommended such a waterway. Under the very Act of March 3, 1899 (30 Stat. 1146), Congress, in outlining the detail of its work side by side with the Sanitary District in the Chicago River in accordance with the local express recommendation in 1893, provided that the cost of removing tunnels and changing bridges should be done by the City of Chicago without expense to the United States.

Now whatever the *legal* effect of this joint endeavor may have been, there is no question that its practical effect was a co-operative effort on the part of the United States and the Sanitary District to prepare the Chicago River segment of defendants' diversion works to receive and accommodate the diversion. Complainants contend that this Federal work was no more than would have been done in the normal course of harbor improvement (Wisconsin Brief 131). There can be no doubt in any practical mind upon referring to Major Marshall's report (Master's Report 29-33) and to the excerpt from the Act of March 3, 1899 (Master's Report 36) that no such wholesale reconstruction of the Chicago River would ever have been undertaken

except for the conscious purpose of creating a practical segment of defendants' works for diversion. Indeed, Major Marshall specifically states (Master's Report 32) what is necessary for commerce and navigation alone and what in addition is necessary to accommodate diversion, and reference to what was done by Congress shows that it was operating on the latter plan. It shows Federal encouragement and invitation, it refutes complainants' oft-repeated contention that defendants have moved contumaciously in respect of Federal authority.

Especially considering the Act of March 3, 1899, under which complainants so vigorously contend that this diversion is inhibited, it is incredible, to say the least, that Congress would, in one section of that act, consciously authorize works to accommodate a diversion and, in another section, deny the use of these works.

During all this time, as related in the Master's Report (14-17), Congress was taking measures to utilize the effect of the prospective diversion in the Illinois River and the War Department plans for formal work in the Illinois River were drawn and executed on the basis of the use of the water diverted by defendants from Lake Michigan and practical navigation of the Government barge line in the Mississippi would be much impaired if not prevented without the addition of the deviated water at low stages of the river.

Other permits were issued by the Secretary of War, such as on May 8, 1899, authorizing the permittee to open the Sanitary and Ship Canal "and cause the waters of the Chicago River to flow into the same" and on July 11, 1900, for further deepening and widening the Chicago River, thereby completing the Government projects, provided for in the Act of March 3, 1899 (Master's Report 38-39).

On November 17, 1900, the Board of Engineers, appointed under the Act of Congress of March 3, 1899, to make "a survey and estimate * * * with a view to extension of navigation from the Illinois River to Lake Michigan," reported "the most economic route" to be "through the Sanitary Canal and the Chicago River, * * * thus complying with the terms of the Act of March 3, 1899," the construction of Section 10 of which is one of the questions here under consideration (Master's Report 40-41).

On June 6, 1900, Congress authorized the same Board of Engineers to report on "the proposed route from Illinois River to Lake Michigan," including "a proper connection * * * with the Sanitary and Ship Canal * * *," which the Board reported was "sufficient * * * for all of the requirements of navigation" (Master's Report 41).

(c) At every critical point in its history Congress has protected defendants' canal and diversion from interference.

In the Rivers and Harbors Act of 1902, Congress requested the President to join in the formation of an International Joint Commission to investigate the subject of Boundary Waters. The Commission was formed and reported on March 15, 1906. Its report (Master's Report 45) recommended that the Secretary of War be authorized to grant permits for diversion and, as to this canal, up to 10,000 c.s.f. The Canadian members reported likewise to their government (Master's Report 45) and explained their recommendation by saying that while they would receive 36,000 c.s.f. and American power companies 18,500 c.s.f., *their* allotment was counterbalanced by the 10,000 c.s.f. to be diverted at Chicago. The Joint Commission reported the same year to both governments and again recommended 10,000 c.s.f. at Chicago. As an interim measure, Congress in 1906 passed the Niagara Falls Act prohibiting diversions,

except as authorized by the Secretary of War and especially providing that the prohibition should not be interpreted as prohibiting diversions for "*sanitary* or domestic *purposes* or for navigation, the amount of which may be fixed from time to time by the Congress of the United States *or by the Secretary of War under its direction.*" Complainants contend this may be construed to imply Congressional disapprobation of defendants' diversion. The Master thinks (188) that whatever inference may be drawn is to the contrary.

In view of the significant circumstances of the times—the imminence of the Boundary Water Treaty, the international negotiations so clearly outlined in the Master's Report, pages 44-48 and 187-188, and the Niagara Falls controversy—we contend that the Niagara Falls Act presupposes full knowledge on the part of Congress of all that defendants had done and anticipated, that it evinced a Congressional purpose to protect it, that it confirmed the Secretary's power to authorize it, and that it is eloquent of the Congressional interpretation of Section 10 of the Act of March 3, 1899, to the effect that the Secretary of War then had all the authority that was needed to authorize defendants' diversion even as against the claims of Canada (Master's Report 188).

That the Niagara Falls Act should be construed as we contend and as the Master found, is further supported by the fact that this very Act of Congress was based upon a report of the International Waterways Commission of March 19, 1906, made pursuant to Joint Resolution of Congress of March 15, 1906, directing such report to be made. Such International Waterways Commission Report set forth the diversions on the United States side to be protected, as follows (Master's Report 45):

	Cubic Feet
"Niagara Falls Hydraulic Power & Manufacturing Co.	9,500
"Niagara Falls Power Company	8,600
"Erie Canal, or its tenants (in addition to lock service)	400
"Chicago drainage canal	10,000."

The purpose of the Niagara Falls Act was the protection of said diversions.

Complainants are very apprehensive of the rights of Canada which they contend are threatened. The facts are set forth at pages 52 to 58 and 188 of the Master's Report. The Master does not discuss the treaty or its reservations further than to say that it does not operate to deprive the Secretary of War of his power under Section 10 of the Act of March 3, 1899.

Congress was astute to protect defendants' diversion and, although the Master has not interpreted the treaty and its reservations, he *has* included in his report the interpretation of his distinguished predecessors in the office of Secretary of State who negotiated the treaty. It is found at pages 56 to 58 of his report. It shows that our Government followed the recommendation of the Commission as set forth above and "traded" to the Canadians a right to divert 36,000 c.s.f. with the understanding that 10,000 c.s.f. were to be taken by defendants, and that it carefully safeguarded the question of diversions from Lake Michigan from the inhibition of the treaty.

Congress has had full knowledge of all that defendants have done and the effect of it. Congress has aided and cooperated in the doing of it. Congress has adopted and used the result of it. When it has been threatened Congress has protected it. Some of this Congressional action was taken in a statute now said to inhibit it. Upon such a record, a

theory that Congress has forbidden or intends to forbid it seems untenable.

(d) No legislative or executive instrumentality of the Federal Government charged with responsibility for the regulation of navigation and commerce has ever recommended or even considered the cessation of defendants' diversion, or its radical reduction. The sole purpose of such instrumentalities has been to restrain increase of diversion and to avoid ultimate commitment to any permanently increased amount of diversion pending resolution of the present period of uncertainty and development of the sanitary and navigation problems involved.

The first official consideration of the possible effect of defendants' diversion on lake levels was that of a board of engineers constituted by Congress, which reported August 16, 1895 (Master's Report 33). After calling attention to the fact that no Federal control of such projects had been assumed by Congress until 1890, the report discussed the possible prospective effect of the diversion on lake levels, but it did not suggest that the diversion be not permitted. It merely suggested that regulation of the diversion must eventually be under the control of the Federal Government.

The next capital consideration of the diversion occurred when the channel of the Chicago River and the canal were ready to receive their initial increment af lake water. Their then capacity was only 5,000 cubic feet per second. The district engineer at Chicago reported that the question of the effect on lake levels was being considered by the Board of Engineers on Deep Waterways, that the effect of the proposed diversion on current in the Chicago River was a serious consideration, that the subject should eventually be controlled by Congress and that, in the meantime, a permit should be given for the then capacity of the channel

subject only to the condition of regulation by the Secretary if currents should prove destructive. This recommendation was approved by the Chief of Engineers and diversion *up to the then capacity of the channel* was authorized by the Secretary of War (Master's Report 38). There was no suggestion that, due to its effect on lake levels, the diversion should not be permitted.

For several years after opening the canal, the only conditions imposed in modifying permits arose from the difficulty experienced in the Chicago River by reason of its narrow, shallow and tortuous channels. Both the Federal Government and defendant Sanitary District expended large sums and did a great deal of work to improve the Chicago River so that *it might accommodate its then flow and receive a greater flow* and the contemporary correspondence discloses no conflict between the Federal Government and the local authorities, but only an earnest cooperative attempt to produce conditions under which the diversion might continue with safety to navigation in the Chicago River.

About 1907, defendant Sanitary District began to request from the War Department authority for increased diversion (Master's Report 49). The Department took the position that the project of such *increase* should be submitted to Congress. But it did not suggest *decrease*. On the contrary, all of the engineering boards which, in the period 1905 to date, have considered the problem, including the International Waterways Commission, have specifically disclaimed an intention to condemn the Chicago diversion.

The Chief of Engineers forwarded to Congress the report of the Deep Waterways Board on December 18, 1905 (Master's Report 43), epitomizing a part of it, viz:

> "In this connection the Board states that it does not condemn the present plan of taking 10,000 cubic feet

per second, believing as it does that some such amount will be needed to protect the lives and health of the people of a great city and of a populous valley; but it invites attention to the fact that *if a much larger amount be taken it will be necessary to construct remedial works elsewhere,* and that these are, or should be, of an international character. It is led to make this remark by the attitude of the Illinois legislature and of the other principal advocates of this enterprise, which is that the 14-foot waterway is only a beginning, and that a much deeper channel ultimately should be constructed, which means that a much larger volume of water must be taken from Lake Michigan. It is the opinion of the Board that the sanitary reasons for the abstraction of water so far exceed and over-shadow the commercial reasons that the amount should be strictly limited by the sanitary necessities of the case. It is impossible to fix a limit to the future growth of Chicago. In a future not remote larger amounts of water may be needed for sanitary purposes, and channels deeper than 14 feet will then become practicable in the open alluvial portion of the Illinois River."

Even the Canadian section of the International Waterways Commission in reporting to their government (Master's Report 46) the draft for the Boundary Waters Treaty recommended by them, stated as to defendants' diversion:

"Permanent or complete diversion of such waters are wrong in principle and should *hereafter* be absolutely prohibited. The diversion by the Chicago Drainage Canal *should be limited to the use of not more than* 10,000 *cubic feet* per second."

The joint report of that commission (Master's Report 46) all Canadian and American members) recommended:

"The commission, therefore, recommends that such diversions, exclusive of water required for domestic use and the service of locks in navigation canals, be limited on the Canadian side to 36,000 cubic feet per

second, and on the United States side to 18,500 cubic feet per second (*and in addition thereto, a diversion for sanitary purposes not to exceed* 10,000 *cubic feet per second, be authorized* for the Chicago drainage canal), and that a treaty or legislation be had limiting these diversions to the quantities mentioned."

and also,

"The diversion of large bodies of water from Lake Michigan for supplying the drainage canal has not been authorized by Congress, but there appears to be a tacit general agreement that no objection will be made to the diversion of 10,000 cubic feet per second as originally planned."

The full Commission specifically and finally recommended,

"A careful consideration of all the circumstances leads us to the conclusion that the diversion of 10,000 cubic feet per second through the Chicago River will, with proper treatment of the sewage from areas now sparsely occupied, provide for all the population which will ever be tributary to that river, and that the amount named will therefore suffice for the sanitary purposes of the city for all time. Incidentally it will provide for the largest navigable waterway from Lake Michigan to the Mississippi River, which has been considered by Congress.

We therefore recommend that the Government *of the United States prohibit the diversion of more than* 10,000 *cubic feet per second* for the Chicago Drainage Canal."

The Boundary Waters Treaty of 1909, negotiated in accordance with these recommendations, contains no suggestion of any reduction of defendant's diversion. On the contrary it is clearly shown by the proceedings before the Foreign Relations Committee of the Senate and the interpretation of the then Secretary of State who negotiated the treaty, that the treaty was understood to preserve the right of diversion up to 10,000 c.s.f.

On March 23, 1908 (Master's Report 52), litigation by the Federal Government against defendant Sanitary District was instituted, the purpose being to determine whether the Sanitary District could be controlled by the Secretary of War in diverting water through a new channel and reversing the Calumet and Little Calumet Rivers as well as the Chicago River. In its inception this litigation was not directed toward diversion through the original intake from Lake Michigan, but solely to prevent the extension of existing drainage facilities to include the Calumet River. In its inception this was "friendly" litigation intended to secure judicial interpretation of certain disputed legal principles. On October 6, 1913, a new suit intended to prevent diversion of water *in any amount in excess of War Department permits* was instituted. It is clear, however, that the purpose of this suit was not to *reduce* the diversion which, under pressing necessity, had increased far beyond the War Department permit authorizing 4,167 c.s.f. The object of the suit was to vindicate the principle that the War Department has a legal right to regulate the diversion and not to enforce any wish of the Government to enjoin or even reduce the diversion. With this the Wisconsin brief seems to agree (Wis. Brief 78, 79). Two circumstances demonstrate this conclusion. Immediately after the decree the War Department issued a permit authorizing diversions of 8,500 c.s.f. annual average and 11,000 c.s.f. instantaneous maximum. Also, in the Government's brief before the court, the conclusion stated:

> "Yet the government's position must not be misunderstood. Nothing that has been urged before the Court is intended to belittle or ignore the welfare of the great and progressive community growing within appellants' district. Whether the emergency is as great as certain of appellants' witnesses have intimated or not, Chicago's problem in the matter is a

serious and perplexing one in which the entire nation should have a sympathetic interest and to the solution of which the nation by its duly constituted authorities should address itself without delay. * * *

"Throughout the litigation the government of the United States have not been unmindful of the welfare of the people of Chicago * * * It is a condition and not a legal theory that confronts the government. The question is not judicial and *this Court will presume that the legislative and executive branches of the government will not be unmindful of the equities of the situation.* As this serious problem will require time for its careful consideration, the government cannot object if the Secretary of War, acting on the recommendation of the Chief of Engineers sees fit, pending action of Congress and as a *modus vivendi* to modify the existing permit and temporarily permit a greater diversion of water."

Pending and after the decision in the Federal case, four important engineering reports have been submitted to Congress on the perplexing subject of lake levels, the Warren, Markham and Putnam reports and the report of the International Joint Board on the St. Lawrence Waterway (Master's Report 66, 96). The general tenor of all these reports is, that this diversion affects lake levels, that due to the powerful combination of causes operating in that direction the lake level problem is serious and the lowering of levels due to all causes must be compensated, that no natural return to Nineteenth Century normality may be expected, that compensation works are relatively cheap and entirely practicable, that all causes affecting lake levels must be vigorously supervised and restricted by the Federal Government, that everything possible must be done to give impetus to auxiliary sewage disposal works to prevent the increase and gradually to reduce the amount of defendants' diversion. But in not

one of these technical reports is there the slightest suggestion that defendants' diversion should be enjoined or that any means should be taken looking toward its radical reduction. All recognize the necessities and the complexity of the situation and the recommendation of all is the only sound and common sense conclusion that any review of these circumstances leaves as inevitable that the matter is one for engineering and administrative supervision and regulation (Master's Report 193). It is not capable of solution by fiat. It involves hundreds of undetermined forces and can be resolved only by a wise process of administration, over a long period of time.

The most elaborate of these reports is the so-called Warren report compiled pursuant to Public Resolution No. 8, 67th Congress, and submitted November 9, 1920. The net recommendation of the report was that a diversion of 10,000 c.s.f. be permitted and the Sanitary District provide sewage disposal and water purification works to take care of the increased demand of the growing population. Also, that it agree to 10,000 c.s.f. as an ultimate limit and pay for compensating works to remedy the effect of the diversion. The Board of Engineers for Rivers and Harbors concurred but recommended a diversion of 6,800 c.s.f. instead of 10,000 c.s.f. The Chief of Engineers recommended deferment of decision on the increased amount of diversion until the Sanitary District had worked out and presented detailed plans of proposed sewage disposal works to reduce to a minimum the quantity of water necessary for sewage dilution and transportation (Master's Report 68).

The so-called Putnam report approved by the Secretary of War April 19, 1924. was a memorandum report which was not intended to be comprehensive and did not change the War Department policy. It recommended a necessary diversion of 8,500 c.s.f. and held forth the possibility of a

reduction as the sewage disposal plants progressed to 4,167 c.s.f. *within a period of about twenty years.* This conclusion is, of course, tentative and was based on preliminary engineering studies. It was specifically approved by the Secretary of War as "not modifying or reviewing" the Warren report just discussed. In an approved statement regarding it is included a statement of the present policy of the War Department as follows:

> "It is clear that under the condition of affairs created by the Chicago Sanitary District, the diversion of a certain quantity of water is necessary at present for the proper protection of the health of the citizens of Chicago. It is by no means established, however, that the quantity required for that purpose, either now or in the future, is 10,000 cubic feet per second. I regard it as inadvisable to permit the diversion in that amount, or in any amount exceeding the amount now fixed by the department, without full and complete information concerning the necessity therefor. It is my view that the quantity authorized should be limited to the lowest possible for sanitation, after the sewage has been purified to the utmost extent practicable before its discharge into the sanitary canal. I regard it as extremely inadvisable to grant the city of Chicago, or any other agency, the right in perpetuity to take from the lake a definite quantity of water."

It must be borne in mind that when, in these statements by the Secretary of War and War Department Engineers they mention the necessity of a certain amount of diversion for "sanitation," they must necessarily have had in mind that the word "sanitation" embraced not only the freeing of the water supply of Chicago from pollution, but also the elimination of pestilential and unsanitary conditions in the Chicago Harbor, Chicago River and its branches for the improvement of navigation.

These are typical and controlling instances of statements of the view and policy of the Federal Government. No-

where in the evidence will there be found an expression of any view or any policy subscribing to the advisability, the expediency, the practicability, or the justice of any of the action urged upon the court by complainants in this suit. The bill seeks to cut square across the whole course and policy of Federal legislation, adjudication, and administration in this matter and to seek by injunctive decree action sought and not heretofore found at the hands of Congress and the War Department.

IV.

While a compelling motive of defendant, Sanitary District in making the very great outlay necessary to construct the canal was disposal of sewage, said defendant was also persuaded to the method adopted by the hope of opening a great waterway to the gulf. Defendant State of Illinois had and has had no other motive than the latter.

On this subject, the Master has clearly stated the situation (Master's Report 165):

> "There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District."

The foremost engineers of that day were called into conference by the City of Chicago in 1887. After careful study they unanimously recommended as the only feasible solution of the problem, an enlargement of the ancient

spillway of Lake Michigan. They recommended such dimensions for this canal as would insure an amount of water sufficient to dilute the sewage in the Chicago River and, at the same time, protect the Lake. To do this it was necessary to reverse the flow of the Chicago River even in time of storm. Their purpose was also to provide ample dilution against future needs. But they advanced as a principal support of their recommendations that such a canal would make possible the long cherished project of a waterway from the lakes to the Mississippi by providing a channel from Lake Michigan to the Illinois River of sufficient size to accommodate the largest Mississippi River craft, and to provide a never-failing supply of water in sufficient quantity to offset all seasonal deficiencies in the Illinois and Mississippi Rivers.

The cost of the proposed Sanitary and Ship Canal was certain to impose an unusual financial burden on Chicago. Her motive in assuming it was two-fold; no other means were available to her to secure the stark municipal necessities of sewage disposal and safe water; the project offered her commercial access by water to the Mississippi Basin. As for the State of Illinois outside of Chicago, however, the first-named motive was a deterrent. It involved some pollution in two of her principal rivers and the release of a certain amount of initiative and control of her waterway policy. Thus, so far as Illinois is concerned, her sole incentive and purpose was and ever had been the improvement of navigation from Lake Michigan to the Mississippi. As for the City of Chicago, she had no alternative save the one adopted. Her physical condition forcing this decision was in part the direction of flow of the Chicago River, and that flow was turned westward by virtue of the laws of the State of Illinois and of the early laws of the United States, for it must be remembered that, while there

may not be direct Congressional authorization of the present diversion, the Acts of 1822 and 1827 did contemplate an Illinois-Michigan Canal on a water level and hence at least a partial reversal of the Chicago River.

Illinois welcomed the opportunity thus presented to secure an engineering work, the advisability of which had been universally recommended by Federal and state engineers and the cost of which was so great that it probably never would have been assumed by either the Federal or state governments. That cost of over $40,000,000 for the canal alone imposed a per capita burden on the people of Chicago many times that of the Panama Canal. It equals the amount the Federal Government has expended on the principal Great Lake improvements—the channels between Lakes Superior and Erie, including the locks and regulating works at Sault Ste. Marie.

It is not averred in the bill nor is it shown in the evidence that at any time prior to the last ten years there was any means of disposing of her sewage available to Chicago other than the one adopted.

V.

Defendants' canal and diversion and other works aid navigation in each of the following respects:

(a) It makes possible an adequate water-outlet of the Mississippi basin to the Great Lakes.

First of all it must be obvious from the history of the Illinois and Michigan Canal and the early history of the Sanitary and Ship Canal, that the rocky backbone of the continental divide between Lake Michigan and the Mississippi system, is not an easy obstacle to overcome. What defendants have done at tremendous expense

is to provide there a great artificial water-gap through which traffic to any reasonably anticipated extent *can* be accommodated, whenever, in the development of economic necessity (now rapidly approaching), the lower and far less difficult works connecting the canal with the Mississippi shall have been provided. Complainants contend that there is no important navigation there now, and in the absence of such navigation, consideration of the facilities provided in advance is unwarranted. The great traffic on the lakes would have been impossible without Federal foresight and provision because in their natural state their connecting waters were not navigable in the modern sense. There traffic followed improvement. Here, complainants contend improvement must follow traffic. Of course, this is impossible, for without provision of adequate waterways there can be no traffic. On this point, the Master remarks (122):

> "The needs of navigation on that waterway will depend upon the carrying out of plans already adopted and upon the ultimate decision of Congress with respect to water communication between Lake Michigar and the Mississippi River."

(b) Defendants' canal and diversion improve present navigation on the Illinois and Mississippi Rivers and it is the only reasonably practicable method of making early and adequate navigation thereon possible.

The Panama Canal has proved a serious economic handicap to the industrial development of the Mississippi Valley. By opening a short all-water route and forcing down rail rates, it has provided cheap transportation from our eastern seaboard to the west coast of both continents and to the orient. This benefit is not enjoyed by states of the Mississippi Basin, which, though much closer to the west coast, pay a higher freight rate to that region. The

economic prostration of agriculture in the Mississippi Valley is largely traceable to the excessive cost of transportation of farm products to European markets (Master's Report 118). Both problems are serious and the only sound solution yet advanced for either is the provision of adequate and practicable water-routes from the interior to the Gulf.

The "Lakes-to-Gulf Waterway" project, first proposed by Pere Joliet in 1674, and constantly advocated since, is two and one-half centuries old. It has never been rendered practicable. It requires provision against low water and sand bars in the Mississippi and against low water in the Illinois River and a practicable channel from the Illinois River to Lake Michigan.

The Mississippi is a capricious stream. From the mouth of the Missouri it bears great quantities of silt and when the streams are in a falling stage this silt deposits in bars which obstruct navigation. The rise and fall of the river are seasonal and hence the river is annually obstructed by these bars. At low water there is less than 30,000 c.s.f. of flow in the river above St. Louis and nearly one-fourth of this now comes from Lake Michigan. When the bars form, dredges are sent out to provide a channel through them while navigation waits in the river to get through the gaps thus opened (Joint Abst. 97).

The only effective provision of a channel in the Mississippi offered before defendants' diversion was this desultory dredging at critical points over sand bars after the bars occur. This makeshift method ill comports with the vast provision of artificial channels on the Great Lakes. Decrease of diversion would increase reliance on dredging.

Complainants' only testimony against the benefit of diversion to the Mississippi was that of General Bixby, formerly Chief of Engineers, and now retired. He strangely con-

cluded that six inches depth over bars at low water added by defendants' diversion is of no value to navigation; that better methods are not worth their cost for this river; and that practical rivermen do not know what they are talking about when they claim benefit from the diversion.

There was other evidence in the form of reports of the War Department that it was planning or could maintain project depths in the Mississippi without diversion but nothing impairs these controlling facts:

(1) Present low water depths are not great enough to serve navigation requirements.
(2) Present low water depths have not been available without defendants' diversion.
(3) There is no assurance that present depths can be or will be maintained without defendants' diversion.

The Mississippi needs every possible inch of increased available depth and the water added from Lake Michigan is clear gain of from six inches to one foot of depth over bars at its critical low-water. Every practical river man was certain and emphatic that defendants' diversion is indispensable to the maintenance of practicable navigation on the Mississippi (Joint Abst. 84-88).

There was conflict between General Bixby and several witnesses who testified for the defendants, including Major Gotwals, United States Engineer stationed at St. Louis (Joint Abst. 88-97). His conclusion was that an increment of 8,000 c.s.f. will raise the low water plane at St. Louis about one foot, and increase the navigable depth about one-half foot. If a six-inch lowering of lake levels is an *injury to navigation* in the 21-foot channels of the Great Lakes, surely a six-inch increase of navigable depths should be *an aid to navigation* in the 6, 8 and 9-foot channels of the Mississippi.

General Bixby seemed to be of the opinion that the less water there was in the river, the greater would be the depths for navigation (Joint Abst. 101-108). In any event, the Master saw and heard the witnesses testify. His finding ought not to be disturbed.

The lower Illinois River from Utica to the Mississippi is a shallow, sluggish, but clear-water stream carrying only 500 to 1,000 c.s.f. of natural low water flow. In its natural state it is inadequate to modern river navigation. The Federal project depth has been seven feet but at no time with no more work than it has received would it have been maintained without at least 8,500 c.s.f. from Lake Michigan water, which is responsible for over four feet of the low water depth of seven feet. The project depths are maintained from an improvement plane which includes defendants' diversion and even with this the depths were not secured by the Federal Government until 1925. This stretch of the river is adaptable to improvement best as an open channel and, if there were no diversion, a very great amount of improvement in the channel, requiring years to complete, and at least five and possibly more locks and dams would have to be provided to permit any navigation at all. Without at least 1,500 c.s.f. from Lake Michigan, the Illinois Waterway could not be operated at all. With the existing diversion, this stretch of the river can remain open and, with a very slight amount of improvement already provided by Congress, will afford a splendid nine-foot navigable channel.

It appears that the Federal project for the Illinois River below Utica was adopted in 1880, and provided for seven feet depth below low water of 1879, which was before the diversion began, and that low water of 1879 was the reference datum for such improvement.

The Master found that since the diversion in 1900, the reference plane had been officially changed from time to time to conform to existing low water as affected by the diversion (Master's Report 71). He also found that a diversion of 1,000 c.f.s. *is not* sufficient to supply all the needs of navigation on the Illinois River (Master's Report 122).

James R. Fuller, who was Assistant Engineer in the United States Engineer Corps and stationed at Peoria, Illinois, and who had been in the Government service since 1889, testified that when he began work on the Illinois River in 1889, the reference plane or datum for the improvement in the Illinois River was the low water of 1879, and that the project provided for a navigable channel of seven feet at such low water; that after 1893, when it became certain that the Sanitary and Ship Canal was going to be completed, the old reference datum was abandoned, and a reference plane was used based upon the proposed diversion (Joint Abst. 14); that at no time during the low water years from 1900 to the present time, was the diversion required to provide seven feet at low water at the critical points of navigation, less than 8,500 c.s.f. That 8,500 c.s.f. would raise the low water about 9 feet; that the actual diversions raised the water in the Illinois River at LaSalle, in 1901, 5.5 feet; in 1910, 7.5 feet; in 1914, 8 feet; in 1919, 9.3 feet; in 1925, 9.6 feet; at Peoria, in 1901, about 2.8 feet; in 1910, 5.4 feet; in 1914, 6 feet; in 1919, 6.5 feet; in 1925, about 6.7 feet; and below Kampsville Dam, in 1901, 2.5 feet; in 1910, 4 feet; in 1914, 3.7 feet; in 1919, 4.3 feet; that on the 3d of March, 1925, as conditions then existed in ordinary practice it would have taken about five years to have dredged or otherwise improved the Illinois River so as to have made available the project depth of 7 feet and the project width of 200 feet with a diversion of only

3,000 c.s.f.; that it would take about five years from the present time to accomplish the same result with the same diversion; and that without any diversion, it would take two to two and a half times as long (Joint Abst. 16). To the same effect, see Woermann's testimony (Joint Abst. 11-12).

The Putnam Report, Exhibit 1, November 1, 1923, entitled "Diversion of Water from Lake Michigan," in referring to the time required to obtain 7 feet depth with a diversion of 4,167 c. s.f. in the Illinois River, stated that it would take approximately five years from that date, and that "a reduction in diversion to 4,167 cubic feet per second could not be made without detriment to navigation before that time." The conditions on March 3, 1925, so far as obtaining project depths were concerned, were the same as they were when the above report was made.

There was offered in evidence correspondence between the District Engineer and Division Engineer and the Chief of Engineers, concerning the reference datum used and employed in the improvements of the Illinois River. This correspondence covered a period from 1900 to 1920 (Joint Abst. 18-28), and shows that continuously during the period of this diversion, the maintenance of navigation upon the Illinois River at all times depended and still depends upon the diversion from Lake Michigan in substantially the amount authorized. When the Chief of Engineers came to recommend and the Secretary of War to grant the permit of March 3, 1925, they were confronted with these conditions. In order to maintain navigation on the Illinois River, it was necessary to have the diversion he then authorized. At that time to have obtained the depths necessary for navigation, would have required ten years for the construction work, assuming that the necessary funds and equipment were made available.

The findings of the Master clearly establish that the diversion is not only a *direct and substantial benefit,* but an *absolute necessity,* to *navigation,* in *four separate* and *important* aspects, viz:

(1) By removing the impairment by pollution ("injurious to navigation" and to "the allied interests of interstate commerce, a matter of national concern") to the navigable capacity of Lake Michigan and the Port and Harbor of Chicago, because "navigation * * * requires something more than fluid and a boat" * * * and "there must be water conditions which make navigation practicable * * *" (Master's Report 167, 170).

(2) By furnishing "water * * * sufficient to supply the needs of navigation" on the Illinois Waterway and the quantity of flow upon which the plans and structures thereof are based, any material reduction of which "would necessitate radical changes in the design and location of the locks * * *" (Master's Report 119, 120, 122).

(3) By providing "about 4 feet of the low water depth of 7 feet" in the Illinois River, without which the Federal project therein would not have been, and *within the next ten or twelve years* could not be, obtained (Master's Report 120; Joint Abst. 17).

(4) By establishing project depths and furnishing "an aid to the navigation of the Mississippi River * * *" (Master's Report 124).

"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" (Master's Report 125).

If the diversion were not permitted in substantially the amount authorized, so as "to keep the Chicago River reversed at all times," there would be created "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 property 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" (Master's Report 193-194).

The Secretary of War was "called upon to consider the effect upon navigation of the stoppage, or reduction of an actual, existing diversion"—an effect "injurious to navigation" and to "the allied interests of interstate commerce, a matter of national concern" (Master's Report 167, 170, 194).

A diversion was absolutely necessary to navigation upon the Illinois Waterway, for which "there is no adequate water supply for lockage, except by diversion from Lake Michigan. * * * If the diversion were reduced materially below 4,167 c.f.s., it would necessitate radical changes in the design and location of the locks, three of which are already either constructed or under construction" and upon "which between $5,000,000 and $6,000,000 has been expended, or is payable under contracts" (Master's Report 119-120).

Without a diversion of substantially the amount authorized, the navigable depths in the Illinois River between Utica and its mouth would be only about 3 feet instead of 7 feet, required by the Federal project, which, without this diversion, could never have been obtained and could not now be obtained inside of *ten or twelve years*. The diversion is also "an aid to the navigation of the Mississippi * * *" (Master's Report 124).

Complainants urge that the diversion is "solely for sanitation and power," because they say that such a purpose was indicated by the Secretary of War in a letter transmitting the permit. This letter is not subject to that con-

struction. The language is, "that the taking of an excessive amount of water for sanitation * * * does affect navigation on the Great Lakes adversely, * * *" (Master's Report 80). The Secretary of War does not state that the amount authorized is "excessive," nor that the purpose of the diversion is "solely for sanitation." Neither does he say that it is for "power." If the Secretary's supposed "declaration of purpose" is to control, then complainants are in error when they say that "the diversion is also for power." Their argument is that the "purpose" determines the "effect" of the diversion. "The purpose of the diversion is not to be considered without regard to its effect. * * * It is the consequence, not the purpose, that is important in the national aspect" (Master's Report 165-166).

For example, the *"purpose"* of levees may be solely that of *flood control,* but their *"effect"* may be either to *aid* or *obstruct navigation.* In such a case, it is the *"effect"* not the *"purpose"* that determines the power of Congress. And the converse is true, for it is held that, "* * * levees built * * * in aid of navigation at the same time afford protection from overflow, and thus served a two-fold purpose * * *." *Jackson* v. *United States,* 230 U. S. 1, 18.

The foregoing specific findings (showing that the diversion is a direct and essential benefit to navigation in the four important aspects, above mentioned) completely destroys the contention of the complainants that "the diversion is solely for sanitation and power," which constitute the fact-basis for their propositions of law. Since these are built one upon the other, they both must fall together.

These findings conclusively establish that this case *does present* (if that be necessary) *"conflicting claims of navi-*

gation and commere," within the construction of the cases contended for by complainants and upon which they rely.

Complainants are emphatic that neither the great artificial watergap of the Canal, nor the obviously vastly increased navigable capacity of the Illinois by reason of diversion, nor the certainly improved depths over the Mississippi sand bars has any relation whatever to navigation. Here again common sense would seem to us to obviate the necessity for argument for if complainants are right, there would be better navigation in the Mississippi with no water at all.

This sort of urging trifles with a subject too serious for such frivolity, for let there be no misapprehension on the practical effect of injunction or substantial reduction of the diversion. Either would indefinitely postpone, if it did not completely frustrate, any practicable provision of navigation from the Great Lakes to the Gulf of Mexico—a project which, if it retains the benefit of the existing diversion, is very close to practical consummation.

In such circumstances the averment that the present diversion is not necessary to or bears no reasonable relation to interstate commerce and navigation is without merit. Determination of the amount of diversion necessary to commerce is a highly technical and difficult engineering choice between two methods of navigation improvement. It has far-reaching political bearings. *It is an administrative and legislative question which the Court should not undertake to decide.*

(c) Diversion improves, and does not injure, navigable capacity Chicago River.

Complainants make great point of *early* engineers' reports to the effect that the diversion impaired the navigability of the Chicago River by introducing a swift current therein.

This happened. Practically the whole joint effort of both the United States and the Sanitary District between 1900 and 1910 was devoted to the task of overcoming this. It was overcome. There is an important traffic there now. It does not now suffer from the current and there is neither evidence nor finding to that effect. A considerable portion of the shipping has gone elsewhere but for other reasons. But the actual result of these improvements was to straighten the river, remove conditions of unspeakable filth therefrom, broaden it to a uniform width of 200 feet, provide a uniform depth of 21 feet and within any reasonable intendment of the English language vastly improve its navigable capacity.

(d) The diversion is the only presently practicable means of preventing conditions at the greatest internal center of interstate commerce of the United States, which, through pestilence on land, an unspeakably noisome condition in the Chicago River and Harbor and the lake offshore, and a lethal pollution of the waters of the whole southern end of Lake Michigan, would stand as such an obstruction to commerce and navigation as would require the immediate intervention of Federal power.

It is stated that the disposal of sewage of Chicago is not a navigation purpose, and that the Master found that the prevention of the pollution of the Chicago River and adjacent lake by the sewage of the Sanitary District, was the only navigation purpose for the diversion (Wis. Brief 52).

It is difficult to understand how counsel can say that the Master found that the prevention of the pollution of the Chicago River and adjacent lake was the only navigation purpose of the diversion in view of the several findings of the Master on the subject of the value of this diversion for navigation on the Illinois Waterway and on

the Illinois and Mississippi Rivers, to which the complainants apparently take strenuous exception. However, complainants do not take issue with the proposition that the prevention of the pollution of the Chicago River and adjacent lake, was a navigation purpose and directly connected with navigation. Their only quarrel is that the Secretary of War had no right to take that situation into consideration, because, as they say, the condition was illegal. It is not unlawful to discharge into navigable waters, sewage "in a liquid state flowing from streets and sewers" (Master's Report 167). But the Secretary was confronted with no theory but with the condition as it existed on March 3, 1925. If he refused a permit for approximately the 8,500 c.s.f. diversion, pestilential and unwholesome conditions would immediately exist in those navigable waters, "injurious to navigation" and to "the allied interests of interstate commerce, a matter of national concern" (Master's Report 167, 170). Had the diversion never existed, and it was proposed, he might properly have granted a diversion to remove this condition. In any event, what the Secretary was called upon to do, in granting or refusing the permit, was clearly within the administrative power delegated to him.

New York makes the statement that no testimony was given on the subject of the obstruction and impairment by pollution to the navigable capacity of Lake Michigan and the Port and Harbor of Chicago and of the Chicago River which would result, if no diversion were permitted or if the diversion was not sufficient to keep the Chicago River reversed at all times (N. Y. Brief 39). This is a strange assertion, in view of the statement of New York (N. Y. Brief 11) to the effect that "the State of New York lays aside its exceptions to the Special Master's findings of fact and accepts his report on the facts, as though wholly correct".

On this subject, the Master's findings are specific and direct, as follows:

> "the Secretary of War had to consider the effect of an immediate stoppage of any diversion in excess of 4,167 c.f.s. There could be no question as to the consequences of such action" (Master's Report 193).
>
> "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. * * * 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" (Master's Report 138).
>
> "These questions would concern not simply the health of the citizens of Chicago and the adjacent territory, but also the interest of navigation, questions of the sort which were appropriately before the Secretary of War. It appeared that a diversion of 4,167 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" (Master's Report 193).

It goes without saying that the Master would not have made these vital and important findings of fact without evidence to support them. However, no exceptions whatever are filed by any of complainants to any of these findings. Not only that, but no evidence to the contrary appears in the Joint Abstract, filed pursuant to the order of this Court of January 4, 1928, which required the complainants to submit "in narrative form * * *, such parts of the record as they deem necessary to support their exceptions * * *". The record is replete with evidence fully supporting these findings, but it was not necessary for the defendants to incorporate this evidence in the Joint Abstract for the obvious reason that no evidence to the con-

trary was incorporated therein by the complainants. These findings of the Master must, therefore, stand as conclusive, both because no exceptions thereto have been filed by complainants and because no evidence to the contrary has been incorporated in the Joint Abstract. Furthermore, so far as New York is concerned it expressly accepts the Master's "report on the facts as * * * wholly correct" (N. Y. Brief 11).

Thus, it is not only established beyond all controversy by the findings, but it is both expressly (and by failure to file exceptions thereto) conceded by complainants, that the diversion, in the amount authorized by the permit of March 3, 1925, is a direct and substantial benefit to navigation, by preventing and removing the obstruction and impairment, by pollution, to the navigable capacity of Lake Michigan, the Port and Harbor of Chicago and the Chicago River, which would have been "injurious to navigation" and to "the allied interests of interstate commerce, a matter of national concern" (Master's Report 167, 170).

This is covered by the further specific finding of the Master, as follows:

> "The continuous introduction of such a pestilential mass into the harbor and the lake would * * * affect navigation and the allied interests of interstate commerce, a matter of national concern" (Master's Report 169-170).

As is well said by the Special Master,

> "Navigation is not an abstract conception. It requires something more than fluid and a boat. There must be water conditions which make navigation practicable, and Congress is concerned with these conditions" (Master's Report 167).

It is, of course, wholly unnecessary to point out the position of Chicago as the metropolis of the middle west, the

greatest railroad center in the world, and the central clearing house of internal commerce in both people and things. To contend that consideration by the Secretary of the protection of the off-shore waters, the harbor, the drinking water of persons passing through the great *entrepot,* and indeed the purity of waters in the southern end of Lake Michigan was not in the interests of interstate navigation and commerce because it happened also to invade the field of sanitation is nothing short of folly.

VI.

Use of the diversion for water power is an incidental and harmless afterthought which does not influence the diversion or the amount of it.

Nothing will be found in the initial acts of defendant Illinois on the subject of water power in connection with the canal and diversion. They were authorized in 1889 but it was not until 1907 (Wis. Brief 24) that there was any use of the diversion for the production of power. It was an afterthought and not an incentive for action. Not to have utilized the flow would have been an economic crime. Surely the use of it can have no bearing on the merits of the diversion.

Much is made by complainants of the so-called manipulation or change of flow to take care of peak load conditions. This meant merely the storing of water for a time during the day and building up a head at the lower end of the channel, which was used at peak load times. It did not have any effect upon the use of the water for navigation or for sanitation (Joint Abst. 126).

Counsel's zeal to find some sinister motive for this diversion different from that disclosed by the evidence and by the Master's Report, causes them to assert the most ex-

traordinary proposition (Wis. Brief 24-31), namely, that the amendment to the constitution of Illinois authorizing the construction of the Illinois Waterway, was solely for the purpose of power. The Sanitary and Ship Canal had been built with a capacity of 10,000 cubic feet per second, which was the amount required to keep the Chicago River reversed. The channels of the Chicago River and its branches have been deepened and widened at an expenditure of many millions of dollars, for the purpose of effectively caring for this diversion without creating a current unreasonably obstructive to navigation. This work was done pursuant to the approval of the Chief of Engineers and Secretary of War (Master's Report 39, 43). Congress had required and reports had been made by the Engineer Corps with reference to the use of the Sanitary and Ship Canal and the diversion through it for the improvement of the Illinois River. Likewise, from the opening of the canal, the diversion has been depended upon by the United States in its maintenance of project depths for navigation in the Illinois River. The engineers, in reporting upon the amount of diversion, had stated that 10,000 second feet diversion would undoubtedly be permitted by the Secretary of War when the Chicago River had been improved (Master's Report 44). The International Waterways Commission had recommended that a diversion of that amount be allowed (Master's Report 45, 46). The water in passing from the channel to the DesPlaines River at Lockport dropped about 34 feet. This water was going and would continue to go to waste (Master's Report 24, 26), unless works were installed to develop it. All this was merely incidental to the main operations of the Sanitary and Ship Canal, and was for the purpose of conserving this waste energy. Governor Deneen in his message in regard to the Illinois Waterway, mentioned the fact that the water power could be developed incidentally to the operation of the

Illinois Waterway, but emphasized the value and importance of the canal as a connecting link in the Lakes to the Gulf Waterway of national concern (Joint Abst. 113, 115).

VII.

The present inadequacy of Federal and other navigation works in waters connecting defendants' works with the Gulf of Mexico, does not detract from the advisability of Congress preserving the former, nor does it warrant complainants' insistence on impracticable methods of lockage and other novel provisions for navigation on the Lakes-to-Gulf Waterway suggested by them.

Complainants contend that all the commerce to be anticipated could be accommodated with less than 1,000 c.f.s. of diversion and that they have a right to insist that the court base its judgment on the worth of what defendants have done and the future of the whole project on a plan for a Lakes-to-Gulf Waterway sponsored by themselves which substitutes a canalization of the Illinois, complete reliance on dredging in the Illinois and the Mississippi, and a diversion of only 1,000 c.f.s. for the larger and more practicable possibilities inherent in the present situation. The argument is in effect:

(*a*) There is now no such volume of commerce on the Sanitary and Ship Canal, the DesPlaines, Illinois and Mississippi Rivers as warrants such a waterway. The method of dredging sandbars after they occur is good enough for the present commerce on the Mississippi and there is little commerce on the Illinois.

(*b*) The Illinois could be accommodated to any such navigation as is now practiced or, under present conditions, promised, by complete canalization, and under such canalization a diversion of from 1000 to 1500 cubic feet per second would be sufficient.

It is a principal averment and prayer of the bill that no diversion is necessary for navigation anywhere or that the Court should determine the amount of such diversion as the Court thinks necessary and enjoin the rest. The decision thereby presented to the Court, is

Which is a better solution of the Lakes-to-Gulf waterway problem:

(*a*) Destruction of the present electrical, sewage, drainage, and water system of Chicago; operation of the Sanitary and Ship Canal by locks and dams; relocating and rebuilding the structures of the Illinois Waterway; complete canalization of the Illinois River by an elaborate series of locks and dams; dredging at prohibitive expense a new and deeper channel in the lower Illinois; increase of dredging activity on Mississippi sand bars to increase the five-foot depths encountered before diversion to the nine-foot depths necessary to modern craft; possibly building locks in the Mississippi; and pestilential, noisome, unsanitary and unhealthful conditions, "injurious to navigation" and to "the allied interests of interstate commerce * * *", in Chicago River and Harbor and surrounding waters? or—

(*b*) Open water navigation in the Sanitary and Ship Canal as at present; use of the nearly completed locks Illinois has constructed in the Illinois Waterway; open water navigation with slight further dredging in the lower Illinois; open water navigation and project depths in the Mississippi; and Chicago River and Harbor and surrounding waters free from unsanitary and noisome sewage pollution, "injurious to navigation" and to "the allied interests of interstate commerce * * *"?

The plan for the waterway based on the latter decision is now nearing consummation and effectiveness. The former is an untried theory involving wholesale abandonment of vast and costly existing municipal and navigation facilities in favor of proposed projects of tremendous and unknown cost and hotly disputed practical utility. If the latter plan were practicable (which is uncertain) it could be effected only after a complete revision of the entire legislative and financial basis on which the present project is constructed. Determination in favor of the second plan by the Court would be a mere academic judicial opinion on a highly technical and probably moot engineering problem. *The Court could destroy what exists. It could create nothing to take its place.*

The diversity of opinion, testimony, purpose, and interest on this subject is extreme.

There is involved a conflict between economic areas, as well as between economic uses of water diverted. Congress has as yet not expressly committed itself either to confirmation or denial of the diversion practiced, apparently preferring to defer a final commitment as to the quantity of diversion until the many and complex technical aspects of the problem have resolved themselves into something concrete and tangible and in the meantime to leave the matter in the hands of the Secretary of War.

At its last session, Congress provided for a nine-foot channel from Utica, Illinois, to the mouth of the Illinois River and provided that the act should not be so construed as in itself an authorization of diversion of water from Lake Michigan. This provision was inserted to avoid prejudicing either party to the present suit. It of course contemplates and does not disturb the existing authorization. Whether it be construed to authorize diversion or not, low water datum planes for the Illinois River are de-

termined by the Chief of Engineers; the low water datum for construction on that river assumes a diversion of 10,000 cubic feet per second; preliminary Federal surveys for the newly authorized improvement proceeded from that assumption; cessation of diversion would extend that period of improvement indefinitely and frustrate any practicable Lakes-to-Gulf Waterway in the meantime. No one has even estimated what time and effort would be necessary to increase the Mississippi project to nine feet and at the same time compensate for the one or more feet now provided at low water by the diversion. The caution of Congress in making a final commitment as to the quantity of diversion pending solution of the factors which should control that commitment can certainly never be construed as a commitment of Congress either to reduction or destruction of a project and policy to which it has adhered for over a century.

Some point is made in evidence that the vast commerce on the Great Lakes followed close on the heels of improvement of their channels and harbors. This is obviously true because, before improvement, they were in a less navigable condition and promised less commerce than the projected Lakes-to-Gulf Waterway in its present state. Where "improvement" practically means "creation" there could be no water-borne commerce until water capable of bearing it is provided.

As to the Lakes-to-Gulf Waterway, however, complainants' witnesses are of opinion that commerce should precede improvement, and that the fact that there is no commerce where commerce could not be, militates against any practicable project for river improvement. Considering the pressing necessity and growing discontent in the Mississippi Valley, this view will seem cynical in those regions. There has been no commerce because there has been no

practicable flotation. The latter now seems attainable and attainment ought not to be discharged for a theory.

The waterway on the present plan has been the policy of the Federal Government for a century. That policy induced the existing facilities. Opposition from complainant states appeared later. If such opposition has created some misgivings in one Secretary of War as to the quantity of diversion that ought finally to be permitted, none ever suggested that that quantity ought to be reduced below 4,167 cubic feet per second, much less that it must be so reduced. Such misgivings have produced no ultimate change in the legislative or administrative status of the diversion. It is being practiced under permit and statute. Congress, aware of every aspect of it, has permitted it. Existing navigation facilities and projects are based upon it. The sole practicable present hope for adequate facilities rests upon it. *It is certainly no proper function of the Court to relieve the authorities, charged by the constitution and laws of the United States with responsibility for this policy and its administration, from the duty of deciding it and certainly it is no function of the Court to determine the engineering questions involved in that decision.*

Benefits to the Mississippi Basin from the Lakes-to-Gulf Waterway project, now approaching attainment, are assumed to be vast. Proof in detail of potential commerce was offered and declined because it might raise issues not capable of precise determination. But there is proof and there is no question that the freight rate structure throughout the Mississippi Valley will be benefited by it; that a portion of the handicap to that region created by the Panama Canal will be relieved by it, and that a vast commerce will move upon any practicable consummation of it.

It is asserted that the Illinois Waterway, when completed, will not require any diversion in excess of 1,000 c.f.s. for the benefit of navigation (Wis. Brief 32-35).

The Master says:

> "I am unable to so find. The needs of navigation on that waterway will depend upon the carrying out of plans already adopted * * *." (Master's Report 122).

On this issue, counsel for complainants urge in effect (Wis. Brief 32-35) that the Master should have believed the witness Bixby and not the witness Barnes. The Master saw and heard these witnesses and his judgment, therefore, will not be disturbed. The Master was not dealing with an imaginary Illinois Waterway or such an Illinois Waterway as complainants might design. He was dealing with the Illinois Waterway, as approved by the Secretary of War in March, 1920, and under actual construction more than two years before any of these suits were commenced (Master's Report 120).

With reference to the amount of diversion required for the Illinois Waterway, the Master's further findings are:

> "Plans for what is called the Illinois Waterway * * * are based on a diversion from Lake Michigan of at least 4,167 c.f.s. * * *
>
> If the diversion were reduced materially below 4,167 c.f.s., it would necessitate radical changes in the design and location of the locks, three of which are already either constructed or under construction, and increased outlays. Illinois has authorized the expenditure of $20,000,000 for the completion of the waterway, of which between $5,000,000 and $6,000,000 has been expended, or is payable under contracts" (Master's Report 119-120).

Complainants seek to overturn these findings because of what they call "a legal quibble" developed by them in the cross-examination of the witness Barnes. Such a "legal quibble," however, does not change the actual "design and location of the locks" of the Illinois Waterway, in which

"it would necessitate radical changes * * * if the diversion were reduced materially below 4,167 c.f.s. * * *" as found by the Master (Master's Report 119).

Concerning the plans of the Illinois Waterway, which were approved by the Secretary of War, the Master further finds:

> "The profile map accompanying the plans contains a notation that the water services shown were 'based on an assumed flow of 4,167 c.f.s., already approved, as a diversion from Lake Michigan, plus the normal flow from other sources in various pools'; that is, the assumption was of 6,000 c.f.s. flow, made up of 500 c.f.s. as an actual low water flow, 4,167 c.f.s. from Lake Michigan, and 1,395 c.f.s., as averaging the amount of Chicago's pumpage" (Master's Report, 120).

Complainants quarrel with the portion of this finding which states that the total assumed flow of 6,000 c.f.s., upon which the plans of the Illinois Waterway were based, was made up in part by "1,395 c.f.s., as averaging the amount of Chicago's pumpage," because they say that in 1919 when the Illinois Waterway plans were presented the amount of the Chicago pumpage was not 1,395 c.f.s., but 1,176 c.f.s. This difference is of no importance. Counsel for complainants themselves say, "We think it wholly immaterial" (Wis. Brief 35). Nevertheless, it was proper for the engineers to take into consideration the growth of the population of Chicago and a corresponding increase of the domestic pumpage.

Further quibbling about how the figure of 6,000 c.f.s. is made up, complainants say that the Master erred in finding that it was in part "made up of 500 c.f.s., as the actual low water flow * * *". They say that the evidence is that the low water flow is nil, but the testimony is that in the Starved Rock pool, which is the place of the "6,000 c.f.s. flow" entry on the plans, the low water flow is about 500

c.f.s. (Joint Abst. 123). As complainants themselves say, it is "wholly immaterial" how the balance of the 6,000 c.f.s. is made up. The controlling findings of the Master are that the plans of the Illinois Waterway "are based on a diversion from Lake Michigan of at least 4,167 c.f.s.," and "if the diversion were reduced materially below 4,167 c.f.s. it would necessitate radical changes in the design and location of the locks, three of which are either constructed or under construction, and increased outlays". The notation on the plans expressly states that the water surfaces shown thereon are "based on an assumed flow of 4,167 c.f.s., already approved, as the diversion from Lake Michigan * * *" (Master's Report 120).

Therefore, as to the contention of complainants that any diversion in excess of 1,000 c.f.s. is not required for the Illinois Waterway, the Master was not only justified in concluding, but was bound to conclude, "I am unable to so find. The needs of navigation on that waterway will depend upon the carrying out of *plans already adopted* * * *" (Master's Report 122).

Complainants put great store in the fact that in the Illinois Waterway Act of June 17, 1919, there was an improved stretch of seven miles in the Illinois River between La Salle and Utica (Wis. Brief 28, 29). Naturally, the Illinois Waterway should necessarily extend through the shoal sections of the DesPlaines and Illinois Rivers, where the expense of the improvement was greater than the Federal Government was willing to bear. The improvement of the navigation in the lower river where the shoals were not so great, the Government section, would be easy and inexpensive. It was already understood that the Government development would be extended to the vicinity of the Utica bridge, where the Illinois Waterway ended, as was finally done in the Rivers and Harbors Act of 1927.

Of course, the inadequacy of federal and other works below the areas here in question justifies neither condemnation of the latter nor insistence by complainants that the court accept some special scheme of theirs which Congress has not in its wisdom adopted and the only purpose of which is to support the prayer in a highly adversary and hotly contested lawsuit. These are matters for legislative and administrative action and not for the determination of complainants nor—with all respect—of the court.

VIII.

Defendant Sanitary District has not violated the conditions of all the various permits issued to it since 1903, and even if it had, violation of earlier permits has no effect on the validity of the existing permit, and whether violation of conditions of the latter should cause its revocation is matter of concern to the Secretary who imposed such conditions and not to complainants.

Obviously, the validity of only one permit is here being considered, the one in effect—allegations of violations of previous permits are only asserted to discredit the adversary, but the assertion has no place in the controversy.

As to violations of the latter permit, since both the granting and revocation of it were within the discretion of the Secretary of War and since he conditioned his revocation on certain conditions which he imposed (and could have omitted had he chosen to do so) the violation thereof is no concern of complainants and has no place in this controversy.

As a matter of fact, however, the permit has not been violated. The Master has found that it has been substantially complied with.

> "It appears from the evidence that, up to the time of the taking of the testimony herein, the Sanitary

District had substantially complied with the conditions of the permit" (Master's Report 81).

The permit "authorizes the Sanitary District of Chicago to divert from Lake Michigan through its main drainage canal and auxiliary channels, an amount of water not to exceed an annual average of 8,500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second * * *" (Master's Report 78).

Complainants say that the terms of the permit have been violated, because *for a few minutes* at 5:00 p. m. on November 16, 1925, the "instantaneous maximum" was 13,415 c.f.s. and *for a few minutes* at 4:30 p. m. on September 13, 1926, the "instantaneous maximum" was 12,796 c.f.s., as measured at Lockport. The item of 13,415 c.f.s. includes a domestic pumpage of 1,338 c.f.s., leaving a balance of 12,077 c.f.s. or 1,077 c.f.s. in excess of the maximum limit, while the item of 12,796 c.f.s. includes a domestic pumpage of 1,395 c.f.s., leaving a balance of 11,401 c.f.s. or 401 c.f.s. in excess of the maximum limit. The amount of the domestic pumpage should be deducted, because the domestic pumpage is not diverted by the Sanitary District. Neither is the domestic pumpage diverted "from Lake Michigan * * * through its main drainage canal and auxiliary channels" (Master's Report 75).

The "instantaneous maximums" complained of were measured at Lockport. The permit does not provide that the "instantaneous maximum" *at Lockport* shall not exceed 11,000 c.f.s. The reading of the permit is that "the instantaneous maximum * * * from Lake Michigan * * * through its main drainage canal and auxiliary channels" shall not exceed 11,000 c.f.s. In other words, the plain meaning and intention are that "the instantaneous maximum" *withdrawn from Lake Michigan* shall not exceed 11,000 c.f.s. The flow is measured at Lockport,

but the diversion "from Lake Michigan" takes place at the mouth of the Chicago River and at other intakes, situated 36 miles away. There is no violation of this provision of the permit unless "the instantaneous maximum" of the amount withdrawn "from Lake Michigan" at the mouth of the Chicago River and at the other intakes exceeds 11,000 cubic feet per second. There is no evidence in the record that "the instantaneous maximum" of the amount withdrawn "from Lake Michigan" exceeded the 11,000 c.f.s. limit.

Above the Lockport Lock, where the flow was measured, is a large pool. Between the Lockport Lock and the mouth of the Chicago River and the other intakes is an immense body of water from 36 to 47 miles long, from 22 to 26 feet deep and from 160 to 260 feet wide. When the flow is increased at Lockport, it takes many hours before *there is any increased flow,* and nearly 24 hours before *the full effect is felt,* at the mouth of the Chicago River or at the other intakes, 36 miles away. It is obvious, therefore, that evidence of *two instances* of "instantaneous maximums" from 401 c.f.s. to 1,077 c.f.s. in excess of the limit, occurring *for a few minutes* and measured at Lockport, is no proof of an "instantaneous maximum" in excess of the limit of diversion *"from Lake Michigan"* at the mouth of the Chicago River and at the other intakes, located from 36 to 47 miles away.

When the head is raised at the Lockport Lock due to a storage at that end of the channel, a sudden lowering of the gates (in order to increase the flow through the channel) might cause an extraordinarily large "instantaneous maximum" *for a few minutes,* when the measurement is being taken, but that would not be the amount of the "instantaneous maximum" *throughout the channels,* nor would it represent the "instantaneous maximum," being diverted

"from Lake Michigan" at the mouth of the Chicago River and at the other intakes. This is made clear by the testimony of the witness, Ramey, as follows:

> "The half hourly readings at Lockport, the lower end of the channel, merely represents a discharge there at the instant at which the reading is taken. In order to determine what the flow is throughout the channel, it is necessary to have the average discharge at the end of the channel for a long period of hours" (Joint Abst. 125).

Further speaking of the two "instantaneous maximums" complained of, this witness said:

> "I know that that much flow has not passed through the channel. It is true that the flow is measured at Lockport, but the discharge from the end of the channel is not the same for any given half hour that the flow through the channel might be, and as I recall the wording the permit is 'instantaneous flow through the channel' " (Joint Abst. 184).

Because of low lake levels during the years 1925 and 1926, it was physically impossible to produce an instantaneous maximum of diversion in excess of 11,000 c.f.s. "from Lake Michigan" at the mouth of the Chicago River and at the other intakes and throughout "the main drainage canal and auxiliary channels." This is also established by the Report of the Chief of Engineers of March 29, 1926, in which he stated at, page 17:

> "Due to low lake levels, however, it is physically impracticable with existing works to withdraw more than about 8,250 cubic feet per second * * * so that the figure of 8,250 cubic feet per second represents the instantaneous maximum that can be withdrawn at the moment * * *" (Joint Abst. 185).

Complainants concede this in their briefs where they say:

> "The lesser flow in 1925 and 1926 was occasioned by the fact that lake levels had fallen so low that the Sanitary District found it physically impossible to draw a greater quantity of water through its existing channels in their then condition through those years" (Wis. Brief 5-6).

Under these circumstances and in view of the specific finding of the Master that all of the conditions of the present have been "*substantially complied with,*" the claim that these two instances of slightly excessive "instantaneous maximums" occurring for a few minutes each, over a period of several years, representing the *flow at Lockport,* but not representing the diversion "*from Lake Michigan,*" amount to such a violation of the permit as to destroy its validity, is little less than childish. It furnishes, however, some measure of their other contentions.

Complainants next claim (Wis. Brief 54) that the 6-inch lowering of lake levels is a violation of condition (1) of the permit, to the effect that

> "there shall be no unreasonable interference with navigation by the work herein authorized."

At the time the permit was issued, it was understood by the Secretary of War that the diversion authorized would lower lake levels, substantially to the extent found by the Master. Complainants' argument, therefore, is that the diversion is both *authorized and prohibited,* so that the permit is to be interpreted like the leave granted by the old woman in Mother Goose, who, when asked,

> "Mother, may I go out to swim?"

replied:

> "Yes, my darling daughter,
> Go, hang your clothes on a hickory limb,
> But don't go near the water."

Such a contention scarcely needs a reply. It is plain that this condition relates not to the *diversion,* expressly permitted, nor to the lowering of lake levels occasioned thereby, but to the "*work* * * * authorized" and necessary to be done, in order to effect the diversion and in order to comply with the other conditions of the permit, such as the construction of the controlling works at the mouth of the Chicago River, provided for in condition (6) thereof, and to the manner of effecting the diversion, so as to avoid excessive currents and other obstructions in the Chicago River and in the Sanitary and Ship Canal. The Special Master well disposes of this contention with the following statement:

> "But this condition must be construed not as withdrawing or rendering nugatory the permission expressly granted but as providing that, in the manner of doing it, all that is done under that permission, and in performing the conditions of the permit, shall be done with reasonable regard for the interests of navigation" (Master's Report 196).

Complainants also say (Wis. Brief 56) "that since the close of the hearing, * * * the City of Chicago" has violated condition (8) of the permit, requiring the metering of its water supply. They admit that there is in the record no evidence of such violation. If this charge is true, it would be an easy matter for complainants to obtain leave to offer additional proof and undertake to sustain this claim by additional testimony. This they have not, and we believe they will not, attempt to do, for the very good reason that it would result only in failure. All of the conditions of the permit have been, and still are being, substantially complied with. That this is true was admitted in the oral argument before this Court on the motions to dismiss by all complainants then appearing, as is indicated

by certain portions of the transcript of such oral argument, as follows:

> "Mr. Justice Sutherland (interposing): Is the City of Chicago or the Sanitary District doing anything now that they are not permitted to do by the order of the Secretary of War?
>
> Mr. Baker: So far as I know, they are not, sir" (Joint Abst. 186).

In this connection, it may not be out of place here to suggest that if the permit is invalid, as complainants contend, why do they find it necessary or advisable to make these desperate and futile efforts in attempting to show that its conditions have been violated?

IX.

It is shown that compensating works would cure all the ills complained of more effectively than cessation of diversion. Their consideration is therefore involved in this case, first, because relief from these ills and nothing more is the sole supportable prayer of complainants; second, because in such circumstances the cost of them is one measure of damages, and third, because the fact of their practicability should have a persuasive if not a compelling bearing on the question of remedy.

This case stands stripped of any consideration except the damage due to lowered lake levels. As to compensating works, the Master found on the unanimous opinion of all of the numerous engineering boards that had ever examined the question.

(1) That the Secretary of War had required a bond of the Sanitary District to insure payment by it of its share of the cost of such works (125 *et seq.*).

(2) That the Special Board appointed pursuant to the Act of June 25, 1910, the Board of Engineers for Rivers

and Harbors (reporting December 16, 1913), the so-called Warren Report and the Joint Board of Engineers (United States and Canada) reporting November 16, 1926, had all reported to the general effect that all the results of artificial lowering causes and some of the results of natural causes could be offset by restrictions of lake outlets, not difficult to install and relatively inexpensive.

Complainants are particularly vociferous against any such consideration, although it is obvious that an engineering expedient which, without dredging anywhere, simply increases available navigable depth by raising the water level, relieves all concerned of the expense of excavation in all waters to offset not only the relatively small effect of defendants' diversion but all the complex of causes which have lowered Lake Michigan levels 32 inches below their 50 year norm, is a method much to be preferred over any other than has been suggested.

But complainants (Wis. Brief 57) vigorously protest this solution and advance such purely technical and legalistic arguments as that there can be no such works without Congressional authorization and Canadian acquiescence, and that complainants are not required to construct such works to offset damages occasioned by defendants. Of course nobody even suggested that complainants should construct such works.

Considering the last objection first, if the Federal Government in its wisdom and at expense of defendants elects to afford relief in this fashion, complainants should not be heard to complain. Considering the fact that both Federal and Canadian engineers are recommending these works to their governments, and that Canadian dredging in the outlets of Huron is responsible (Master's Report 97) for a greater lowering of Lake Michigan than is defendants' diversion, it is no great argument that Canada must agree.

This is not a suit between individuals. It is as Wisconsin alleges a great arbitral proceeding between quasi-sovereign states on the sole question of lake levels. If they can be restored as against the effect of *all* causes by the expenditure of $3,000,000 to $4,000,000; and at the same time cure all complainants' ills and not impose an unconscionable burden on defendants, complainants should be the last to protest.

Furthermore, when no direct assessment of technical damages is possible, the cost of a complete obviation of all damage is a compelling measure of the extent to which complainants are really hurt. Finally in a case like this when a Special Master of such distinction reports that the injunction prayed by complaints is virtually impossible (and is so recognized by complainants themselves, Master's Report 139), such an effective alternative remedy to that sought by the bill ought to be welcomed by all concerned.

X.

Continuation of the diversion will create no new damage and afford no new precedent.

As was clearly demonstrated at p. 10, *supra,* defendants no longer control the diversion. The War Department has assumed control and responsibility. The only occasion for future apprehension of damage is a doubt of the integrity and determination of purpose in a great federal administrative department.

The court could do nothing more here than to substitute its own unequipped administration for an exactly similar course of surveillance and administration by the far better equipped War Department. At page 139 of the Master's Report it will be seen that this is precisely what complainant asks the court to do. But if complainant mistrusts the

Federal Government as represented in this matter by the War Department, then it is conceivable that they might not be satisfied with the court. Considering technical equipment, it seems certain that the court would prefer the War Department (rather than itself) for the execution of a task so difficult. (See Point VIII, p. 179, *infra.*)

XI.

The injunction sought would cause untold damage to defendants and to navigation and subject the lives and health of the inhabitants of the Sanitary District to serious danger. Complainants themselves recognized its impracticability in oral argument before the Master.

The Master found:

> "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 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 complainants have recognized the impracticability of ordering an immediate cessation of the diversion, and the suggestion made in the closing argument on their behalf before the Special Master was that the

Court should determine the rights of the parties, and direct a discontinuance of the diversion, but should suspend the operation of the decree and hold it in the Court with requirements from time to time as to the action, and the time, that should be taken to bring about a condition which would permit of the decree becoming effective" (Master's Report 138-139).

With reference to the same subject, the Master concluded (193):

"So clearly do these consequences appear, that the complainants, pressing for a decree to prevent the diversion, at the same time suggest that the Court if it enters the decree should suspend its operation and direct the defendants to meet specified requirements, with a provision that the parties may come before the Court from time to time to show the difficulties encountered, the speed made, whether the delay was too great, asking in short that the Court should direct and supervise the steps necessary to be taken to make it possible ultimately to give effect to such a decree, which, it is recognized could not reasonably be made operative forthwith. And it is plain that this supervision would have to continue for a number of years. The Court would thus be compelled to deal with questions essentially of an administrative character. These questions would concern not simply the health of the citizens of Chicago and the adjacent territory, but also the interests of navigation, questions of the sort which were appropriately before the Secretary of War."

THE LAW.

Preliminary Statement.

This case and the issues of law and fact involved, may be well characterized in the language of this court with reference to the same subject-matter in *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 425:

> "It concerns the expenditures of great sums and the welfare of millions of men. But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that with less mighty interests no one would venture to dispute. The law is clear, and when it is known, the material facts are few."

When all the facts, as arranged by complainants in their briefs to suit their legal contentions, are considered, one and only one essential proposition stands forth, namely,

> "The United States is asserting its sovereign power to regulate commerce and control the navigable waters within its jurisdiction."
>
> *Sanitary District* v. *United States, supra.*

The defendants have filed no exceptions. We shall undertake only to sustain the Master's Report, which we adopt as a statement of the facts of the case and a brief on the law, sustaining the contentions of defendants. The record here consists of the Master's Report and the joint abstract of record.

Unfortunately for an unconfused consideration of the real questions involved, complainants have sought to restate many findings of fact, to which exceptions are not now pressed and in doing so have made them appear to

have a different and unwarranted meaning. These statements, we have heretofore considered.

There also appears in the Wisconsin brief, under the heading of "The Law," what is called "A Condensed Statement of the Facts Which Present the Problem" (Wis. Brief 60). In such statement, the enterprise of the Sanitary and Ship Canal is presented, without regard to the many surrounding facts having to do with navigation and the interests and concern of the United States and of the State of Illinois. The diversion as authorized by the permit of March 3, 1925, is pictured as a mere obstruction to navigation, having no relation to navigation or the use of navigable waters of the United States in interstate commerce. It becomes a diversion only for the purpose of sanitation and water power and there is no "national concern."

Upon the facts so presented and thus distorted, complainants seek to base their propositions of law. We believe that a fair consideration and correct understanding of the case cannot be had, without brushing aside these misinterpretations and considering the facts as they are disclosed and clearly stated in the Master's Report.

The complainants have filed three separate briefs, aggregating approximately 500 pages of printed matter. Their contentions are necessarily expressed in different form, but in the main, the contentions of each brief with reference to what we deem to be the main questions involved, are substantially similar. The fifteen days allotted to us to prepare our briefs does not permit, without unduly prolonging our brief, a specific and direct answer to each and every contention. Complainants have sought to comment on each of the Master's conclusions of law, some of which we do not believe are now open to serious question. We believe that these contentions of the complainants

will be best met by our presentation of what we believe to be the controlling questions in this case.

The Question of Justiciable Controversy.

On the motion to dismiss and before the Master, defendants contended; that the subject-matter of this suit is the navigable capacity of navigable waters of the United States; that complainants have neither domain nor property therein; that Congress has assumed exclusive sovereignty and domain thereof. It was therefore urged that the States have no right to sue, and the court has no jurisdiction to entertain their suit; because the rights sought to be vindicated are merely the rights of the people of these States to navigate national waters, and that, since these rights derive from their citizenship in the United States, and not from citizenship in these states, complainants could not bring suit on the rights of their citizens without violating the Eleventh Amendment.

(*New Hampshire* v. *Louisiana,* 108 U. S. 76;
Wisconsin v. *Pelican Insurance Co.,* 127 U. S. 265, 286;
Louisiana v. *Texas,* 176 U. S. 1, 16;
Massachusetts v. *Mellon,* 262 U. S. 447.)

It was further contended that the complaint was bad because the suit was in effect one to vindicate the freedom of interstate commerce, and no state has the right to sue for such purpose.

(*Louisiana* v. *Texas,* 176 U. S. 1;
Oklahoma v. *Atchison Ry.,* 222 U. S., at 289;
Oklahoma v. *Gulf, etc., Ry.,* 220 U. S. 290, at 301.)

and especially here, when the statute confines its vindication to suit by the Attorney General of the United States.

(*Minnesota* v. *Northern Securities Co.*, 194 U. S. 46.)

It was further contended that complainants, showing no special injury different from that of the public at large, could not, under traditional principles of equity, sue themselves, but must rely on suits by the Attorney General.

(*Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91;
Irwin v. *Dixon*, 9 How. 10;
Mississippi, etc., Ry. Co. v. *Ward*, 2 Black. 485, 499;
Gilman v. *Philadelphia*, 3 Wall. 713, 744.)

and especially here, where a statute of the United States expressly provides for its vindication solely at suit by the Attorney General.

(Sec. 17, Act of March 3, 1899.)
(*Minnesota* v. *Northern Securities Co.*, 194 U. S. 46.)

Finally, we contended, that the suit was in effect one to coerce by decree of this court the legislative discretion of Congress and the administrative discretion of the War Department, taking the court into the province of both of the two great co-ordinate branches of Government—in a word, that what is here sought is decretal regulation of commerce and a review of a valid administrative determination.

(*Marbury* v. *Madison*, 1 Cranch. 137, 170;
Georgia v. *Stanton*, 6 Wall. 50, 75;
New Orleans v. *Payne*, 147 U. S. 261;
So. Pacific Co. v. *Olympian Dredging Co.*, 260 U. S. 205;
Passaic Bridge Cases, 3 Wall., Appendix 782;
Missouri v. *Illinois*, 200 U. S. 496.)

The Master concluded, however (140-146), that the court has frequently taken jurisdiction of controversies between states involving questions of dominion over physical domain and that the question as to whether previous administrative action in this case is valid (146) is appropriately presented for the decision of the court.

We have not excepted to this conclusion, but we do not understand that it goes further than to determine that states complainant have demonstrated a sufficient interest to have their suit entertained. We think that, on the facts as found by the Master, every one of the above contentions is valid and available as against the prayer of the complaint, and that this question is properly before the court on the motion to dismiss, the disposition of which motion was reserved by the court for final hearing. We refer to our briefs filed in support of said motion to dismiss.

I.

Congress has delegated to the Secretary of War power to authorize this diversion. When so authorized the diversion is lawful and the Secretary's act is immune from judicial review.

(a) This Court has interpreted the statute in consonance with defendants' contention.

For convenience in considering the interpretation of Section 10 of the Act of March 3, 1899, upon which this whole controversy hinges, we set forth below, in parallel columns, Sections 7 and 10 of the Rivers and Harbors Act of September 19, 1890, and, beside it, Sections 9, 10 and 12 of the Rivers and Harbors Act of March 3, 1899:

Sections 7 and 10, Rivers and Harbors Act of Septem-	Sections 9, 10 and 12, Rivers and Harbors Act of

ber 19, 1890 (Laws, Improvement of Rivers and Harbors, Vol. I, p. 582)—

"Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridgedraw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any man-

March 3, 1899 (Laws, Improvement of Rivers and Harbors, Vol. 2, p. 886)—

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States 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: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. *And provided further,* that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be

ner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War; *Provided,* that this section shall not apply to any bridge, bridge-draw, bridge piers and abutments and construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

"*Sec.* 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

"*Sec.* 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States,

of any such obstruction shall be deemed a separate offense.

Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

"*Sec.* 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not exceeding twenty-five hundred dollars nor less than five hundred

or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States."

dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the *removal* of any *structures* or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States."

Construing Section 10 of the Act of 1899, the Master concluded (196):

> "That Congress has conferred authority upon the Secretary of War to regulate the diversion, provided he acts in reasonable relation to the purpose of his delegated authority and not arbitrarily."

As a basis for the above final conclusion, the Master said (Master's Report 182):

> "In the cases described in the second and third clauses of Section 10, Congress has given its affirmative authorization provided the requirements as to the recommendation of the Chief of Engineers and the authorization of the Secretary of War are met."

In discussing the question as to whether a justiciable controversy was presented, the Master stated (146):

> "The fact that the problem as now presented would seem to be one appropriate for administrative consid-

> eration and solution, if such could lawfully be had, does not defeat the jurisdiction to determine whether the administrative action hitherto taken has been valid."

Having concluded that the Secretary was authorized to grant a permit under Section 10 of the 1899 Act, the only question remaining was whether his act had *reasonable relation* to the *granted power* and whether his action was *arbitrary* or *capricious,* and so the Master states (190):

> "The Secretary of War's authority under Section 10 of the Act of March 3, 1899, is not to be regarded as unlimited. Such power could not be conferred. His action must have reasonable relation to the exercise of the power granted to Congress by the Constitution and to the purpose of the delegated authority, and must not be arbitrary or capricious."

If the Secretary has granted a permit which some person aggrieved by his action desires legally to question, it would be necessary for such person to institute a suit to enjoin action under the permit. In order that such a litigant should prevail in such a case, assuming that the permit had reasonable relation to the exercise of the power granted, it would be necessary to show that the Secretary's action was arbitrary or capricious. To establish that his action was arbitrary or capricious would require certainly a showing that the permit would result in unreasonable obstruction to navigation. Whereupon the Master concluded that *the legal result* and therefore (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."

The Master further concluded that the Secretary's (191)

> "determination as to what is or is not an unreasonable obstruction to navigation or navigable capacity in the circumstances of the particular case has the same effect and is as immune from judicial review as if Congress had acted directly" (Master's Report 190, 191).

The foregoing language of the Special Master is amply supported by his reasoning (176-191) and therefore we shall here confine ourselves to refutation of the argument in the Wisconsin brief.

Complainants' contention may be summarized, viz.: that, by the Rivers and Harbors Act of March 3, 1899, Congress never intended to delegate any authority to the Secretary of War to authorize obstructions to navigable capacity; that any such obstructions are inhibited by the statute; that the only purpose of the power delegated to the Secretary is to permit him to prohibit structures even though they are not obstructions to the end that the question of obstruction or no obstruction *may never be reviewed by courts or juries* (Wis. Brief 143). It is pertinent to observe that if such were the intentions of Congress, it either failed signally of its purpose or else Wisconsin and sister states complainant ought not to be here seeking to review the Secretary's permit.

These states have heretofore made the same contention here and have, as we think, failed to prevail with it.

There ought not to be any question as to the authority of the Secretary of War to issue the permit here involved under the March 3, 1899, Act, since the decision of this court in

> *Sanitary District of Chicago* v. *United States*, 266 U. S. 405.

It seems that every contention here presented by the complainants as to the construction of the March 3, 1899, Act, the power of the Secretary of War thereunder and the effect of his permit, was before the court, and the court's opinion does not leave open to argument any of these points here raised by complainants. In the case of *Sanitary District* v. *United States, supra,* all the complainants here appeared as *amici curiae* and filed a document entitled

> "Brief and Argument for the States of Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, as *Amici Curiae.*"

In support of this brief, the states also appeared in oral argument. At page 34 of the brief of the complainants in said case as *amici curiae,* begins their argument with reference to the construction of the March 3, 1899, Act, and the power of the Secretary of War thereunder, under the heading

> *"The Secretary of War was without power to authorize any abstraction of such waters."*

Again, at page 36 in this argument, the *amici curiae* brief states:

> "It seems clear from an examination of the provisions of Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, * * * that affirmative congressional action must be taken with regard to any construction or work which will obstruct the navigable capacity of any of the waters of the United States."

In the brief of the United States in that case, there is an argument under the heading (page 184):

> "Congress has committed to the Secretary of War and the Chief of Engineers the administrative duty of determining whether a modification of the condition, etc., of navigable waters is such that they can approve, or whether it amounts to an obstruction requiring af-

firmative authorization from Congress. The determination of those questions by the Secretary of War and the Chief of Engineers is conclusive."

It would seem, therefore, that these contentions were determined by this court in the case of *Sanitary District* v. *United States, supra,* by the following language (page 429):

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

(b) Administrative interpretation of the statute has consistently been in consonance with defendants' contention.

Complainants assert (154) that there has been no administrative interpretation supporting the Master's conclusions. We shall refer hereafter (p. 96) to their reference to Judge Koonce's lecture in this regard. Judge Koonce is described as a "law officer" of the Corps of Engineers. We assume that the court will take judicial notice of the organization of the War Department and of the functions of the Judge Advocate General of the Army and the Chief of Engineers. Judge Koonce says (Wis. Brief 165) that the Chief of Engineers "maintained" the same construction for which complainants now contend. What became of this maintenance is disclosed (50) by the Master's Report, as follows:

Referring to the fact that a certain application for one of defendant's permits was made under Section 10 of the Act of March 3, 1899, the Secretary of War stated that the Chief of Engineers was at first of opinion that such a change in the flow of the Calumet River was not within the power of the Chief of Engineers to recommend, or within the power of the Secretary of War to permit. The Judge Advocate

General, however, to whom the question was submitted, held that Section 10 applied to the case, and that it was one in which the work could be allowed under the recommendation of the Chief of Engineers and the permission of the Secretary of War. Upon this construction of the statute, the Secretary of War requested the Chief of Engineers to make his recommendation. After quoting the adverse decision of the Chief of Engineers on the matter of advisability, Secretary Taft concluded as follows (Master's Report 50):

> "It is quite evident from the reading of the statute that Congress intended in this statute, as in many others, to give the Chief of Engineers authority, independent of the Secretary of War, in reaching a conclusion as to the wisdom and propriety of granting a permit under the section, and that unless the Chief of Engineers shall recommend the granting of the permit, the Secretary of War is without power to give the requisite authority. It follows, therefore, that the application must be denied, whatever my view of the case. * * *
>
> *While I agree in the construction of the Judge Advocate General that the issue is left by statute to the recommendation of the Chief of Engineers and the concurrent decision of the Secretary of War,* it may be fortunate that circumstances now require submission of this question of capital and national importance to the Congress of the United States."

The construction placed upon the act by this one of a succession of Chiefs of Engineers was thus not concurred in by the Judge Advocate General of the Army, whose opinion (interpreting the statute in consonance with the Master's finding) was approved by the then Secretary of War as has just been shown.

It is difficult to see how in the face of this crystalized administrative interpretation of the War Department, Wisconsin can contend, as she does (154-160) that there

has been no interpretation by the War Department in accordance with the Master's finding. In addition to these departmental findings, the court is aware of the concurring interpretation of the statute by the Attorney General of the United States (Master's Report 185), set forth in full as an appendix to brief of Sanitary District on the motion to dismiss. The evidence is thus overwhelming against complainants' contention that there is no long established departmental interpretation of the Statute of 1899, in consonance with the Master's interpretation, and it is also worthy of remark that such departmental interpretation is not simply a generalized conclusion—it pertains to the facts and circumstances of this particular case. It should also be remarked that the opinion of Attorney General Wickersham (27 Op. Atty. Gen., 327, 331) cited at page 165 of the Wisconsin brief, as supporting their view of the interpretation of Section 10, is not even on the point here in controversy. It considers only whether the Secretary must consider damage to a bathing beach in granting a permit authorizing a dolphin.

The Master has set forth the various reasons for his interpretation of this statute so clearly that it would serve no purpose to review them, and we desire merely to call attention to this part of the Master's Report as a complete answer to all the contentions of the complainants to the contrary. He finds, specifically (Master's Report 185):

> "In the present instance there seems to be no opportunity for dispute as to the long continued and uniform construction of Section 10 of the Act of 1899 by the War Department. It has been its view that in the cases for which provision is made in the last two clauses of Section 10 of the Act of 1899 a specific authorization by congressional act is not required and that the action of the Secretary of War upon the recommendation of the Chief of Engineers is sufficient."

Attempting to refute this finding of the Master, counsel refer (Wis. Brief 154-160) to the conditions of the various permits that have been issued to the Sanitary District with reference to the diversion, and to the opinion of Secretary of War Stimson of January 8, 1913, when he refused the permit. But Secretary of War Stimson's opinion rested

> "his decision denying the application not upon the question of his legal authority, but on the appropriate exercise of his official discretion" (Master's Report 64, 186).

Counsel refer to the first condition of the various early permits, which provided, among other things, that it was the intention of the Secretary of War to submit the entire question to Congress, and if such were done, then the permit should be subject to any action that Congress might take (May 8, 1899, Permit, Master's Report 39). In

> *Sanitary District* v. *United States,* 266 U. S. 405, 429,

the court held that that condition was superfluous, because in any event the permit would be subject to the action of Congress.

Counsel refer to the permit of July 3, 1896 (Wis. Brief 156) and to the recommendation and application in respect thereof (Joint Abstract 133). The report of June 24, 1896, of the United States District Engineer at Chicago concerning the application for the July 3, 1896, permit, is merely a speculation by the District Engineer as to whether the question ought to be finally settled or decided by executive officers, or whether it is an international question. Then, with reference to the condition of the permit of July 3, 1896, counsel make (Wis. Brief 156) this surprising statement:

> "The Secretary of War, in his permit of July 3, 1896, stated that it was not to be interpreted as approval of

the plans to divert water (Master's Report 34-35)."

Upon reference to pages 34-35 of the Master's Report, which quotes the permit of July 3, 1896, we find that the real true words of the condition referred to by counsel, are as follows:

> "That this authority should not be interpreted as approval of the plans of the Sanitary District of Chicago *to introduce a current into the Chicago River.*"

In other words, there was no question in the Secretary's mind as to the power and authority to grant the diversion contemplated, but the only condition was, that there should be no current created in the Chicago River, thus making it incumbent upon the Sanitary District to enlarge the cross-section of the channels of the river to accommodate the diversion. And, strangely, in the very next sentence, counsel proceed:

> "A similar condition was incorporated in the permit of November 16, 1896" (Joint Abst. 133).

But the Joint Abstract shows that the particular permit

> "was conditioned that it should not be interpreted as approval of the plans of the Sanitary District of Chicago to introduce *a current into the Chicago River.*"

Counsel refer then (Wis. Brief 156) to the recommendation of the United States District Engineer of April 4, 1899, that the permit of May 8, 1899 (incorrectly referred to as May 3, 1899, in Wisconsin Brief) be granted and to the observations of the District Engineer that a matter of such magnitude should, in his belief, be settled by other authority than executive officers. However, the District Engineer assumed that the War Department had the authority to issue the permit, and recommended that *it should issue.*

It thus appears that in the whole gamut of argument and alleged instance advanced in the Wisconsin brief to overthrow the Master's interpretation of this statute, there is not one with substance or significance. As to the Michigan assertions on page 116 of her brief that the meaning of the language of the act is unmistakable, and on page 143, that it exhibits no *ambiguity* we have only to turn the latter page to find an equally emphatic assertion that the true interpretation of the statute has long been a matter of departmental doubt.

(c) The language and history of the statute support defendants' contention.

The Wisconsin Brief (138) quotes the first clause of the single sentence which constitutes Section 10 ("The creation of any obstruction to * * * navigable capacity * * * not affirmatively authorized by Congress is hereby prohibited; * * *") and then remarks that, if this sentence stood alone, there could be no doubt that any obstructions not authorized by Act of Congress would be unlawful. But this clause does not stand alone. It stands with Section 9 and with the two subsequent clauses of Section 10. Section 9 names a class of obstruction such as bridges, dams, dikes and causeways, and states a rule concerning them. They are unlawful until the consent of Congress to them has been obtained. Thus (by the use of the word "until") the *consent of Congress* is made an absolute condition precedent to their legality. The Secretary of War *"authorizes"* nothing under Section 9. His only function is to approve plans. Section 10 also names two classes of obstruction and states a rule to determine when they are lawful. But the rule governing the classes of obstructions in Section 9 is *not* the rule governing the class in Section 10. The latter are unlawful, *unless* the *work* has been *authorized* by the Secretary of War.

It can hardly be presumed that the marked difference in these rules signifies nothing and especially so if Wisconsin is correct in saying that the statute is the "fruit of the best efforts of men who had years of experience in Congressional legislation" aided by "the most expert legal and engineering minds of the War Department." Why would such experts (in Section 9) unequivocally inhibit the first class of obstructions "*until* the consent of Congress" and confine the Secretary of War's function to approval of the *plans*, and then proceed to say (in Sec. 10) of the class of obstructions in which defendant's diversion falls that it "'shall not be lawful' to * * * alter or modify the * * * capacity of any port * * * *harbor* * * * *canal* * * * *lake* * * * or channel * * * UNLESS the WORK * * * has been AUTHORIZED by the Secretary of War prior to beginning the same?" Why is the consent of Congress specifically required as a condition precedent as to one class and not as to the other? Why is the lifting of the statutory inhibition predicated on a precedent event (the consent of Congress) by the word "*until*" in Section 9 and on words of exception—"*unless* (authorized by the Secretary of War)"—in Section 10? Why is the Secretary of War commissioned only to "*approve*" *plans* for the work in Section 9 while he is to "*authorize*" the work itself in Section 10?

Truly the fact that the inhibition of the first clause of Section 10 does not "stand alone" limits the sweeping intendment complainant gave to it. The answer to the questions in the preceding paragraph is that Congress intended to reserve to itself the authorization of those structures named in Section 9 and it committed to the Secretary of War the authorization of those named in Section 10.

Complainants do not accept the challenge of these questions which have been put to them in arguments and briefs

and in the report of the Special Master (181). They seek to ignore the reasoning underlying the traditional official construction of this act and to build a new construction on a *tour-de-force* of syntactical ingenuity.

Thus, they remark (Wis. Brief 139) that the words of inhibition in the first clause of Section 10 are followed by the conjunctive "and," from which they conclude that nothing thereafter contained in the sentence can be construed as an exception to that inhibition.

Of course, the contention that the conjunctive "and" following an inhibition in a statutory sentence precludes the interpretation of subsequent clauses as exceptions is too slight to consider. It is only necessary in this section to substitute various *disjunctives* for the word "and" in this paragraph to see that the change would at most render the sentence meaningless and at least leave interpretation exactly where it now is with the conjunctive "and." For example:

> "The creation of * * * obstructions etc., * * * is prohibited, etc.,"
> (but)
> (except that)
> (provided that)
> (save that)
> (although)
> It shall not be lawful * * * to alter the * * * capacity of, any port, etc., * * * unless the work has been * * * authorized by the Secretary of War."

The truth is, of course, that the word creating the exception is the word "unless" and the fact that it appears later in the same sentence than the conjunctive "and" is utterly without significance.

There would be no room for complainant's argument on the meaning of Section 10, had the words of the first clause

remained as they were in the earlier Act of 1890. For example:

> "The creation of any obstruction not affirmatively authorized *by law* etc., * * * is hereby prohibited * * * and it shall not be *lawful* * * * to alter the capacity etc., * * * unless the work has been * * * authorized by the Secretary of War."

Here we should have an inhibition of a general category of things except when they are "affirmatively *authorized* by law," i. e. "*lawful,*" followed immediately by a precise definition of the circumstances in which a certain class within that category shall be unlawful. This definition says that such class shall be unlawful "*unless* * * * the work * * * has been authorized by the Secretary of War." If (as we suppose) no one, in such circumstances, would have sufficient temerity to contend that the authorization of the Secretary would not legalize structures of the latter class, we are left to the question whether Congress, by substituting in the Act of 1899, the words "affirmatively authorized by Congress" for the words "affirmatively authorized by law" in the Act of 1890, intended to change this intendment. Did Congress intend to have the former words interpreted to mean "affirmatively authorized by Congress *by statute*" and, incidentally to burden itself thereby with the rapidly growing mass and complexity of technical questions arising in the administration of Rivers and Harbors and to remove such questions from the War Department where Congress had set up the only technical mechanism in the Government adequate to administer them? Or was there some other intent in the change of the word "law" to the word "Congress"?

The Special Master's Report (179) finds and describes another intent. This court has done likewise (*Sanitary District* v. *U. S.*, 266 U. S. 405, 429). The real intent was

to obviate the danger that "authorized by law" might be taken to mean authorized by State law.

It has been the understanding of everyone that the change was made on account of the contentions and decision in the *Bellingham Bay Boom* case (Master's Report 179 and cases there cited) to obviate interpretation of the word "law" to include "state law." But Ohio says (152) that an old retainer of the Engineer Corps—its law officer in fact—once delivered a lecture in which he claimed to have drafted the Act of 1899 as early as February 10, 1896, whereas, the *Bellingham Bay Boom* case was not decided until June 28, 1897, and so Ohio concludes that the wish to preclude the words "affirmatively authorized by law" in the 1890 Act from being construed as "affirmatively authorized by State law" was *not* the motive for the change.

Pausing only to remark, that this old soldier's story is not in the record, was not produced at the trial and we had no opportunity to test it, that the draft as submitted was not in all respects the draft as enacted, and that a law officer of the Engineer Corps—if any such functionary there be, which we strongly doubt—would be well aware of the contentions in the *Bellingham* case long prior to its decision, it is pertinent to ask if the motive of the change was not to preclude State authorization, then what was the motive? Ohio says it was to "provide an amplification and revision of the old law, etc. (153)." But we are for the moment addressing only this change in a single word. This change did not "*amplify*" anything. Nobody questioned that an obstruction authorized by *Federal law* was good. To change the words to "authorized by Congress" did not advance by one iota the authority of the United States. All it did in fact was *to preclude authorization by State law,* and we challenge complainants to show any other purpose or effect of it.

But suppose the history of this change had been lacking; is this the sort of language "experienced legislators * * * the most expert legal * * * minds of the War Department * * *" would use to take a vast body of administration away from the Secretary of War and lodge it in Congress? It must be remembered that, in making this Act of 1899, these "experts" were not drafting a new law, they were making "a compilation of all general laws" on the subject and submitting "recommendations as to revision, emendation or enlargement." They were not limiting or restricting the old laws. They were addressing a well crystallized system of administration. It is inconceivable that they would have attempted to revolutionize it and change the very essence of the responsibility and authority of the War Department by any such verbal legerdemain as this, and then for the next twenty-nine years closely guard the secret magic of the changed word in the archives of the office of the Chief of Engineers, disclosing it, so far as we are told (Wis. Brief 143-152), only to young students in the cloisters of the Engineers' School at Fort Humphreys—reserving it even from the record in this case—to be revealed and used as a *coup de grace* by counsel for the State of Ohio at the eleventh hour and the fifty-ninth minute in this highly adversary proceeding. At the very moment of this amendment of the Act of 1890, the Secretary had, for several years, been granting permits for defendants' works under the earlier Act. Had he intended this sweeping change and restriction in his authority to grant such permits, we can at least assume that he would have recommended clear and unmistakable language and not such subtlety as this. Certainly, the Secretary did not conduct himself as though he had intended his draft of the new Act to impose any such restrictions on his power, for we find him granting

permits for defendants' works under the 1890 Act right up to the enactment of the Act of 1899 and within a few months after such enactment continuing to grant similar permits without any change whatever of language, practice or conditions.

If such a change were intended it has never been effectuated. The Act of 1899 is one of an annual succession of Rivers and Harbors Acts. There is a new one every year. As the Special Master found (174), Congress has been intimately informed and acutely conscious of the interpretation placed on this act by succeeding Secretaries of War in this and many other matters for over a quarter of a century. Except for the opinion of one Chief of Engineers (whose function was not to interpret statutes for the War Department, and who was promptly overruled by the Judge Advocate General, Attorney General and Secretary of War, no question was ever raised of the Secretary's *authority* to grant permits for defendants' diversion or of the validity of such permits when granted. The only questions disclosed by the record pertain to the *advisability* of granting them.

Had Congress meant what complainants say it meant, and had it expressed that meaning by saying: "The creation of any obstruction * * * not affirmatively authorized by *Act of* Congress, etc., is hereby prohibited," then Congress would have delegated no discretion to the Secretary of War and *would* have kept to itself and withdrawn from the Secretary the determination in every case of the reasonableness or existence of every obstruction mentioned in the Section and of every conceivable obstruction not so mentioned. That Congress did not by such explicit language do this, that it is inconceivable that Congress intended to draw to itself and exclude from the Secretary every detail of administration of rivers and harbors,

that the certain effect of the change it did make in this word was to preclude State authorization which theretofore had *not* been precluded, seems to us persuasive if not conclusive confirmation of the conclusion of the Special Master.

But this change of the word "law" to the word Congress was by no means the only change made in the Act of 1890. Section 7 of that Act of 1890 described in somewhat less detail all of the classes of structures now described in both Sections 9 and 10 of the Act of 1899. Section 7 did not begin (as does Section 10 of the 1899 Act) with a general inhibition of obstructions "not authorized by Congress." Before each of the classes named in Section 7, by inclusion or by reference, were the words "it shall not be lawful." Wharves, piers, dolphins, booms, etc., were not to be lawful "without the permission of the Secretary of War," *if* they obstructed navigation. And, by the way, here is proof positive that, in that act at least the Secretary *could* authorize obstructions. This is certain because if they were *not* obstructions they did not require a permit. It was only if they were obstructions that the Secretary's permit was necessary. Bridges, causeways, etc. (if over navigable waters wholly within a State and authorized by the State legislature), were not to be lawful until the location and plans had been approved by the Secretary of War. If such bridges were over waters not wholly within a state, they could not be authorized by a state legislature. Altering or modifying the capacity of the channel of navigable waters was not to be lawful unless "approved and authorized by the Secretary of War." Such was Section 7. Section 10 of the same Act (1890) provided that "the construction of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has juris-

diction is hereby prohibited." Then followed certain penal clauses. No one could well contend that, under this Act of 1890, Congress had inhibited *any of the named obstructions which the Secretary should authorize,* except bridges over interstate navigable waters.

For our present purposes it is fair to say that there is not one shadow of circumstance to indicate any reason for Congress wishing to *restrict* the authority of the Secretary by the changes introduced by the Act of 1899. On the contrary, Wisconsin's brief is eloquent with the argument that the intention was to *enlarge* it (143, 148, 149, 152). What were those changes? Broadly, the penal clauses were removed from Section 10 to a later section. Bridges, dikes, and causeways were grouped in Section 9 which was made unequivocal as to the necessity for *statutory* Congressional approval unless the navigable portions of the waterway lay entirely within the limits of a single state. The word "law" was changed to the word "Congress" and the class of structures comprised within the description "wharves, piers, dolphins, etc.," and alterations in navigable capacity, were moved from Section 7 of the Act of 1890 down into Section 10 of the new act *carrying with them the statement that they should not be lawful unless authorized by the Secretary of War.*

If in this shifting, there was a change in the prior rule under which the Secretary of War could legalize the structures of old Section 7 (new Section 10) by *"authorizing"* them, it must have been inadvertent because there is not one circumstance in the history or the language of the change to indicate any such intention.

Undismayed by these circumstances, Wisconsin's brief takes up alternative arguments (140). It considers first the structure mentioned in the second clause of Section 10, states them as "wharves, piers, dolphins, etc.," says that

such structures are not necessarily *obstructions to navigable capacity* and in fact are usually not so, and therefore concludes that, if the class was not mentioned at all in Section 10, those structures which are not *in fact* obstructions would not violate the inhibition of the section. From this it is argued that the purpose of *including* them must have been *solely* to provide that all such structures—obstructive or not—are unlawful unless permitted by the Secretary, thus giving the Secretary complete arbitrary and conclusive control and discretion over all such structures. If it were otherwise, says the brief (i. e., if this clause were deleted), the structures would be in each case lawful until a *jury* found them tc be obstructions. As it is they are unlawful if the Secretary refuses to permit them, and the ultimate purpose of this clause is therefore said to be *to remove from juries and repose in the Secretary the decision as to whether these structures be obstructions in fact* (Wisconsin Brief 143). So runs the argument and the result seems to be highly commended by complainants but they confine their commendation to the facility with which *non-permitted* structures may be abated by this provision that the Secretary's determination is independent of courts and juries (143). But how about the facility with which *permitted* structures may be *continued* without a finding of court or jury and solely on the Secretary's permit? If this rule works both ways, then Wisconsin and her associates ought not to be here for, if the Secretary's discretion in *denying* a permit is good and not reviewable by courts and juries then his discretion in *granting* one is also immune from review.

The dexterity of complainants' effort to extricate themselves from this position strips the late and great Houdini of his laurels.

The general prohibition says the brief (144) is not against obstruction to *navigation.* It is against obstruc-

tion to *navigable capacity*. The inference is—in fact, the assertion is—that the Secretary may authorize an obstruction to *navigation* but if he finds that a structure obstructs *navigable capacity* he reaches the dead-line of his authority and has no choice but to refuse the permit.

Of course this distinction is one without a difference. *Navigation* is defined in the Standard Dictionary as "the act of navigating or the state of being navigable"—capacity as "the ability to receive or contain." A cause which, acting in respect of a body of water, obstructs its "state of being navigable" also obstructs its "ability to receive or contain" navigation and vice versa. Also it is worthy of note that the third clause of Section 10 specifically includes modifications or alterations or excavations or fillings of the "capacity"—not the "navigability"—of various waters within that *class* of obstructions which the Secretary may authorize.

Wisconsin's brief seems not concerned with the dictionary. "Hence," it proceeds, "a pier, dolphin (or other aid to navigation which might be argued to constitute a technical obstruction to *navigation* at the precise point of the location) would nevertheless improve the *navigable capacity* of the waterway and would not be within the general prohibition. * * *" (We interpolate here the remark that this interpretation does not accord with *Hubbard* v. *Fort*, on which complainants so strongly rely. In that case the court said: "What is navigable capacity? Does it not mean the capability of being navigated over *any* part of the waters when in their normal condition?" and the court proceeds to find that it does mean just that. The Wisconsin quotation continues:) "If on the other hand we adopt the construction of the Special Master, then if the Secretary of War were to authorize the construction of a pier reaching entirely across the navigable channel of the Ohio

River so as to cut off all navigation, it would be a valid act within the power of the Secretary of War" (145). Of course it would *not* be a valid act because such a monstrosity would be obviously a mad caprice and under the Master's conclusion would be invalid. The foregoing quotation from the Wisconsin brief is included merely to emphasize how Wisconsin's distinction applies in practice. In other words, a pier—albeit it is a stark barrier to navigation—may be projected athwart a stream to the precise point where, in addition to obstructing *"navigation,"* it also obstructs *"navigable capacity."* Up to *that* point the Secretary's permit for it is immune from judicial review, but beyond that point, Wisconsin can sue to enjoin the permittee, and courts and juries will immediately begin to function to determine whether the Secretary rightly decided the point in the stream where an obstruction to *"navigation"* became an obstruction to *"navigable capacity."* What a frustration of the purpose advanced as the reason for the present wording of the statute—i. e., to prevent judicial review of administrative action! What administrative officer would choose to have his immunity from judicial review depend on such a hair-line distinction as that between navigability and navigable capacity, when by a more usual and obvious interpretation of the statute such as that of the Master, his discretion would be to determine the *reasonableness* of an obstruction and a review of it would depend on the presence or absence of fraud or the question whether he had acted arbitrarily or capriciously in the exercise of the power delegated to him by the statute?

We wonder why a pier was chosen for this illustration and its concomitant statement that such structures are not usually obstructions to navigation. Why not a boom? Why not a weir? They are both in the same statutory category as piers and dolphins. But according to all lexicographers a boom, in lumbering parlance, is "a chain or

barrier of floating logs to retain timbers or saw logs behind it," and in maritime parlance it is "a chain of logs to intercept or detain the advance of a vessel" and "to boom" a river is to "obstruct it by means of a boom" while the word weir derives from a Saxon word meaning "obstruct" and is defined as an "obstruction placed in a stream to raise the water, divert it into a mill race or irrigation ditch or form a pond, etc." We cite these definitions because the logic of the Wisconsin theory rests on the assertion (140) that "wharves, piers, dolphins, etc." (the "etc." being booms, weirs, bulkheads, jetties or other structures) "do not necessarily or even ordinarily create an obstruction to the navigable capacity of a waterway." From this, as we have seen, Wisconsin concludes that when they are *obstructions,* the Secretary may not authorize them. Applying this rule to booms and weirs (which not only ordinarily but necessarily *are* obstructions both to navigation and navigable capacity), we see that, under the Wisconsin rule, the Secretary could never authorize them. But if this is so, why did Congress include them?

Of course Wisconsin's rule is impracticable. It is advanced as one which removes the Secretary's decision as to obstruction from the scrutiny of courts—and yet Wisconsin is here seeking to review such a decision. It becomes absurd unless there be such a thing as a distinction between "obstruction to navigation" and "obstruction to navigable capacity." There is no such distinction and, even if there were, the rule requires the Secretary to make it in each case and defeats its own purpose because, under the Wisconsin theory, the Secretary's decision on the distinction would always be subject to review if it were wrong.

The interpretation of Section 10 followed by the Master has for twenty-nine years been the interpretation followed by the War Department, approved by the Judge Advocate

General (which approval was concurred in by Secretary Taft), approved also by the Attorney General and acceded to by Congress (see p. 87, *supra*). But the Wisconsin brief seeks (148) to reduce it to an absurdity by saying that thereunder a permit would be necessary *only* where one of the structures mentioned in the second clause of Section 10 (wharves, piers, etc.) would in fact be an obstruction to navigable capacity. The theory of this distortion of the Master's interpretation is that the Master says that the first clause of Section 10 is an inhibition of obstructions and that the second clause makes exception of such obstructions as are authorized by the Secretary. From this the inference is drawn by Wisconsin that if structures in this class are *not* obstructions they are not inhibited and therefore need not be permitted. Of course the answer to this casuistry is that the structures in the second clause are therein specifically inhibited *by name* and would be unlawful unless permitted by the Secretary, if there were no general inhibition at all. The words are "*it shall not be lawful* to build or commence the building of any wharf, pier, dolphin, etc."

On page 150 Wisconsin challenges "anyone" to name any obstructive structures which would not be comprehended within the enumerated structures in the second and third clauses of Section 10, and therefore concludes that under the Master's interpretation of the statute, the Secretary could authorize anything except perhaps *bridges,* and asks with fine sarcasm why Section 9 is included at all: Why not simply say "no obstruction shall be lawful unless it has been authorized by the Secretary of War"? The answer to the "challenge" is that bridges, dams, dikes and causeways are not "comprehended within the enumerated structures of Section 10," because their enumeration in Section 9 excludes them from Section 10 and Congress

included Section 9 for the purpose of preventing the structures therein named from being erected without federal statutory sanction in each case—a purpose which has been effectively pursued for the past twenty-nine years without any known exception.

Next, page 150, comes Old Faithful among complainants' arguments: Why would Congress retain to itself exclusive jurisdiction over interstate bridges some of which may be of no consequence, yet delegate to the Secretary the right to determine whether the "Great Lakes shall be drained into the Mississippi * * * immense and unmeasurable damage * * * 8300 miles of shore line * * * states embracing nearly one-half the population of the nation * * * who is to say he cannot authorize an obstruction of one foot or two feet or of ten * * * etcet., etcet., etcet."

We have noticed elsewhere (*supra*, pp. 5-37) the extent of harm done by what the Secretary has authorized, the attitude of Congress in that regard, and the practice indulged in by complainants of magnifying the withdrawal of six inches of water from Lake Michigan to make it appear to threaten a draining of the Great Lakes into the Mississippi Basin and many similar exaggerations. Of course, Congress has not delegated power to the Secretary to do arbitrary and capricious acts which have no relation to the purpose of the delegation and the Master has so concluded. When Congress authorizes a bridge there is some finality thereto. When the Secretary issues a revocable license for a diversion and then steps in under the sanction of this court and assumes active control thereof there is little likelihood of any ensuing cataclysm. One is a matter of more or less ultimate decision; the other is a question of day-to-day administrative control in a matter where, as this case amply demonstrates, nothing less than a highly

organized technical control could cope with the situation which happens to be one of the most complex and difficult problems in our interior economy. (See Point VIII, p. 179.)

The question at all events is of interpretation of this statute and not of the wisdom of what Congress has done. The former is a question for judicial decision; the latter is not. It may be that Congress reserved authorization of bridges from the War Department because they are instrumentalities of land transportation—a field which has not been placed under the jurisdiction of the Secretary—and that it did not reserve alterations of navigable capacity because for a century it has committed to the War Department, under its direction, a very wide measure of authority over all that pertains to water transportation in the United States. Whatever the reason, the fact remains. Surely Honorable Newton D. Baker, who represents the State of Ohio, who for four of the most difficult years in the history of that Department administered its affairs with an ability that has never been adequately acknowledged, will be the last to say as a matter of cold practice—beyond the reach of questions suggested in fervid advocacy—that he could wish that fact otherwise than it is.

(d) The determination of the Secretary of War that the diversion is not unlawful is not reviewable.

The Master found (190, 191):

> The Secretary of War's authority under Section 10 of the Act of March 3, 1899, is not to be regarded as unlimited. Such power could not be conferred. His action must have reasonable relation to the exercise of the power granted to Congress by the Constitution and to the purpose of the delegated authority, and must not be arbitrary or capricious. 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. The power of Congress to make such a delegation of authority is deemed to be sustained by repeated decisions of this Court. *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U. S. 205, 208; *Sanitary District* v. *United States*, 266 U. S. 405, 428; *Field* v. *Clark*, 143 U. S. 649; *Butterfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 192; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 424, 425. And when the Secretary of War acts under the authority conferred by Congress, his determination as to what is or is not an unreasonable obstruction to navigation or navigable capacity in the circumstances of the particular case has the same effect and is as immune from judicial review as if Congress had acted directly. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 195; *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U. S. 205, 210.

The only question we wish here to discuss is that of the unreviewable nature of the determination of the Secretary of War that defendants' diversion does not constitute such an obstruction to navigation as to bring it within the inhibition of the statute.

It is complainants' own contention (143) that the very purpose of Section 10 is to do this very thing: i. e., place the Secretary's finding beyond judicial review. It is the Master's finding (191) that such purpose has been effected.

Two great and, so far as we have been able to learn, uncontested legal principles are involved here.

(1) This court will in no event *interfere with the process* of determination by an executive department of a matter entrusted to it by statute.

(2) This court will not review an administrative finding of fact by an executive department.

As is amply demonstrated in the Master's findings, the whole question of diversion, waterways, power, flood control, lake levels, pollution and international relations in boundary waters is in a process of administrative determination. The existing permit under which defendants' diversion is being practiced is "temporary." The policy of the War Department has been explicitly stated (*supra*, p. 36). Briefly it is not to commit itself to any final decision until the controlling facts are further developed. The question of power and navigation in the Great Lakes waterway is shown to be under international consideration in a very broad way. Recent disastrous developments on the Mississippi indicate something of the problem of the War Department as to that stream. The whole record is eloquent of the difficult administrative situation presented by these circumstances.

No final stability of determination has yet been reached. It is perfectly apparent that the Federal Government has the canal, the present diversion and the problems presented thereby, the Lakes-to-Gulf Waterway and the whole subject of lake levels still under observation, experiment, and control. When we use the words "Federal Government" we mean its entire machinery. Congress, constantly and intimately cognizant of all that has happened and is likely to happen, has passed statutes requiring surveys and work on this project, and has now under consideration bills affecting the diversion. The War Department has been constantly in observation and supervision, is now in much more direct control, and is concerning itself actively with all possible

expedients to administer the situation. The State Department is actively negotiating with Canada on the very subject-matter—lake levels—to which this complaint is addressed.

It has consistently been the doctrine of this court that it should not intervene, under any such circumstances, at any suit. The principle was first expressed in one of the early classics of the court, in the following language:

> "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction (mandamus to the President) * * * the province of the court is solely to decide on the rights of individuals, not to inquire how the executive officers perform their duties in which they have a discretion * * *" (*Marbury* v. *Madison*, 1 Cranch 137, 170.)

The effect, if not the intention, of the present suit is to restrict, influence, control, and coerce the action and final determination of each and every of these Federal instrumentalities in dealing with this problem. The effect on the international negotiations must necessarily be stultifying. The effect on other departments is equally obvious. A decree by this court would produce the result desired by the complainants, but such a result would be contrary to every legal principle which should govern this case.

Said Mr. Justice Miller in *Gaines* v. *Thompson*, 7 Wall, 347, 352, amplifying the principle deduced in *Marbury* v. *Madison* above:

> "* * * an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their

> acts, after the matter has once passed beyond their control, *there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action.*"

The doctrine of the only admissible basis of such a suit is defined in *U. S.* v. *Calif. Land Co.,* 148 U. S. 31, 43, where it is said:

> "The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are *power in the officer or fraud in the party.* All other questions are settled by the decision made or the acts done by the tribunal or officer, whether Executive (1 Cranch, 170); Legislative (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563); Judicial (11 Mass. 227; 11 S. and R. 429; adopted in 2 Pet. 167, 168), or Special (20 Johns. 739, 740; 2 Dow P. C. 521 etc.) * * *."
>
> "* * * Until the legal title passes from the government, enquiry as to equitable rights comes within the cognizance of the Land Department. *Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States.*" (*Oregon* v. *Hitchcock,* 202 U. S. 60, 70.)

The question as to what ought finally to be done about defendants' diversion is in process of determination. But the existing permit of the Secretary of War is an accomplished fact. It authorizes the diversion and by necessary intendment determines that it is in the interests of navigation and not unreasonably obstructive thereto. The bill prays the court to review this determination and specifically asks the *court* to find what quantity of diversion would be in the interest of navigation in the Illinois and Mississippi Rivers and also what kind of water and drainage system should be adopted by Chicago. Complainants in oral argument asked that the court suspend its decree,

impose certain conditions upon diversion, and then supervise the performance of those conditions.

Under settled principles of law this action of the Secretary of War is not subject to review. It is clearly the law that courts are without power to interfere with or revise the action of a public officer in the exercise of that discretion imposed upon him by law as a part of his official function. (*U. S.* v. *Fisher,* 223 U. S. 683, 692; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 109; *U. S.* v. *Hitchcock,* 190 U. S. 316, 324; *Kirwan* v. *Murphy,* 189 U. S. 35, 55; *Secretary* v. *McGarrahan,* 9 Wall. 298, 312; *Litchfield* v. *Register,* 9 Wall. 575, 577; *New Orleans* v. *Payne,* 147 U. S. 261, 266; *Marquez* v. *Frisbie,* 101 U. S. 473, 475; *Craig* v. *Leitensdorfer,* 123 U. S. 189, 210; *McCormick* v. *Hayes,* 159 U. S. 332, 342; *French* v. *Ryan,* 93 U. S. 169, 172.

The court has recognized a distinction between acts in exercise of discretionary powers and acts in respect of purely ministerial duties. The rule as enunciated in *Marbury* v. *Madison* is that courts may adjudicate in matters relative to the latter, but never in matters pertaining strictly to the former, and particularly is this true when the discretionary function is in process of being exercised. (*Kendall* v. *U. S.,* 12 Pet., 524, 610; *Decatur* v. *Paulding,* 14 Pet. 497, 509; *U. S.* v. *Lamont,* 155 U. S. 303, 308; *U. S.* v. *Black,* 128 U. S. 40, 44; *Noble* v. *Union River L. R. Co.,* 147 U. S. 165, 171; *U. S.* v. *Schurz,* 102 U. S. 378, 395; *Mississippi* v. *Johnson,* 4 Wall. 475, 498; *U. S.* v. *Windom,* 137 U. S. 636, 643; *Cunningham* v. *Macon R. R. Co.,* 109 U. S. 446, 453.

The power granted the Secretary of War is valid. (*Sanitary District* v. *U. S.,* 266 U. S. 405; *Butterfield* v. *Stranahan,* 192 U. S. 470, 496; *West* v. *Hitchcock,* 205 U. S. 80, 83; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 338; *Zakoniate* v. *Wolfe,* 226 U. S. 272, 275; *Louisville*

Bridge Co. v. *U. S.*, 242 U. S. 409, 424; *Inter Mountain Rate Cases*, 234 U. S. 476; *First National Bank* v. *Union Trust Co.*, 224 U. S. 416.)

Many of the above mentioned cases are cited in the Selective Draft Law Cases, 245 U. S. 366, 389, where determinations by executive boards on a wide variety of vital matters were upheld.

A court of equity will intervene in a matter pertaining to the exercise of a discretionary power only to determine whether there was power in the officer or fraud in the party, or whether there was clear, unreasonable, and arbitrary abuse of discretionary power exercised. (*Ekiu* v. *U. S.*, 142 U. S. 651, 660; *Chae Chan Ping* v. *U. S.*, 130 U. S. 581, 609; *U. S.* v. *Ju Toy*, 198 U. S. 253, 261; *Fok Yung Yo* v. *U. S.*, 185 U. S. 296, 302; *Silberschein* v. *U. S.*, 266 U. S. 221, 225; *U. S.* v. *California Land Co.*, 148 U. S. 31; *Foley* v. *Harrison*, 15 How. 433, 448; *Johnson* v. *Towsley*, 13 Wall. 72, 83; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 535; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Steel* v. *Smelting Co.*, 106 U. S. 447, 450; *Lee* v. *Johnson*, 116 U. S. 48, 51; *Wright* v. *Roseberry*, 121 U. S. 488, 509.)

Particularly, where the courts are asked to interfere with lawful administrative determinations regulating commerce the courts have refused to interfere because such regulation requires uniformity of decision in order that there may be strict uniformity of rule, and it is obvious that, if the courts interfere with the determination of a single, controlling administrative unit, chaos will ensue. Strongly persuasive of the intent of Congress that the Secretary's determination is not subject to review is the fact that this statute confines its consideration to suits by the Attorney General of the United States. (See p. 162, *infra*.)

In *Texas and P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, the complaint was that an exorbitant rate had been exacted and the defense that the Interstate Commerce Commission had passed the rate. The court after remarking that, at common law, an action would lie said (440, 441):

> "* * *, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, *in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.* * * * If, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission. * * * Indeed, no reason can be perceived for the enactment of the provision * * * if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the

Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

There is a particular indication in this case that Congress intended to make the decision of the Secretary of War final and to provide against any revision. The Act of 1890 provided:

"*Sec.* 7.

It shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind, outside established harbor-lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, *in such manner as shall obstruct or impair navigation.*"

The 1899 revision of the language was as follows:

"*Sec.* 10.

It shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States outside established harbor lines or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War."

The purpose of the omission of the words "in such manner as shall obstruct or impair navigation" is clearly intended to remove any doubt that the Secretary's determination is final.

By Act of March 3, 1869 (15 Stat. 336) Congress provided that the construction of a bridge between New York

and Brooklyn should be such as not to *"obstruct, impair, or injuriously modify the navigation of the river"*; but the question as to what form and location of construction would conform with these conditions, was to be submitted to the Secretary of War. The Secretary of War determined that a bridge, 135 feet in height, would satisfy the conditions. Miller brought his suit for an injunction to restrain the building of such a bridge, averring that the masts of a large proportion of vessels navigating the stream at this location exceeded 135 feet in height above mean high water, and that this obstruction to navigation would destroy the value of his warehouses above the bridge. Miller contended that the act of Congress imposed the absolute condition that the bridge should not "obstruct, impair or injuriously modify the navigation of the river." He contended that the known height of masts and the exact definition of height of span together constituted obstruction within arithmetical certainty, that it was still open to him to show that if constructed as proposed, it would be an obstruction to navigation as fully as though the Secretary's approval had not been had. He contended that since Congress could not give any such effect to the action of the Secretary, it being judicial in character, it was not to be assumed that it intended by the wording of such act to do so. This court said in *Miller* v. *Mayor,* 109 U. S. 385, at page 393:

> "There is in this position a misapprehension of the purport of the Act. By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared *that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact.* Having power to regulate com-

merce with foreign Nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States. * * * Its power, therefore, to determine *what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive.* * * * The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the *ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.* * * *

The bridge being constructed in accordance with the legislation of both the State and Federal Governments *must be deemed a lawful structure. It cannot after such legislation be treated as a public nuisance, and however much it may interfere* with the public right of navigation in the East River, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. * * * *Every public improvement, whilst adding to the convenience of the people at large, affects, more or less injuriously, the interests of some. A new channel of commerce opened, turning trade into it from other courses, may affect the business and interests of persons who live on the old routes.*"

In *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S. 205, the Secretary had, under the preceding Act of 1890, determined that a row of sawed-off piling standing across a navigable stream like an *abatis* against the main road to a beleaguered city was not an obstruction. The dredging company sued for an injury due to the obstruction. The railroad company pleaded the Secretary's determination that it was no obstruction. This court said:

"In the light of this general assumption by Congress of control over the subject and of the *large powers* delegated *to the Secretary,* the condition imposed by that officer cannot be considered otherwise than *as an authoritative determination of what was reasonably*

*necessary to be done to insure free and safe navigation. * * * The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order.* Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of navigation, or upon the fact that to leave the stumps in the bed of the river would be of some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. *It was not for the petitioners, however, to question either his reasons or his conclusions. They were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction.* The language which this Court employed in *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 195, is pertinent:

'* * * Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, *to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined.* Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers perform their action to the mode prescribed by Congress.' "

See, also *Union Bridge Co.* v. *United States,* 204 U. S. 364, 385; *The Douglas,* 7 Probate Division (1882) 157; *Frost* v. *Railroad Co.,* 97 Me. 76; *Maine Water Co.* v. *Knickerbocker*

Steam Towage Co., 99 Me. 473; *The Plymouth*, 225 Fed. 483.

In *Louisville Bridge Co.* v. *U. S.*, 242 U. S. 409, a bridge across the Ohio had been constructed under the specific authority of the Acts of Congress of 1862 and 1865. Under Section 18 of the Rivers and Harbors Act of 1899, the Secretary determined that the bridge constituted an obstruction to navigation and the Bridge Company brought the case here, contending that what Congress had authorized as no obstruction the Secretary could not forbid as constituting an obstruction, and thus under his delegated authority virtually *work a repeal of a prior act of Congress.*

On this subject the court said:

> "* * * the declaration of Congress in the Act of 1865 that the bridge was a lawful structure was conclusive upon the question until Congress passed some inconsistent enactment. * * * *Although it may have been an obstruction in fact, it was not such in contemplation of law.* But Section 18 of the 1899 Act wrought a change in the law. * * * Congress thereby declared that *whenever the Secretary of War should find any bridge theretofore or thereafter* constructed over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters * * * it should be the duty of the Secretary, after hearing all the parties concerned, to take action looking to the removal or alteration of the bridge. * * * As this Court repeatedly has held, this is not an unconstitutional delegation of legislative or judicial power * * *."

And, although the court was here dealing with a bridge declared by Congress (prior to the Secretary's decision under the later act) to be no obstruction, and although the effect of the Secretary's decision was to repeal the prior act, this court denied the appeal to review the decree which

issued upon the request of the Secrtary of War and his administrative determination of fact.

Cases of this intendment could be multiplied. Only a few of those in which the facts and language seemed most appropriate to the circumstances of this case have been selected. More were not cited because it is believed that the principle in the subhead is so clearly established and so generally acknowledged that nothing more is necessary. If under Section 10 of the Act of 1899, *the Secretary of War had, as we have contended, authority to determine whether the acts here complained of were not such an obstruction of navigation as to invoke the inhibition of the statute, then there can be no doubt that his determination as recorded in these permits is beyond the reach of the bill and the jurisdiction of the court.* **The bill should be dismissed on this consideration alone.**

(e) The Secretary's action in granting the permits was neither capricious nor arbitrary. It bore a reasonable relation to the purpose of his delegated authority and was a sound and reasonable exercise of his statutory discretion.

Complainants advanced evidence to show that there is a conceivable plan of construction of a Lakes-to-Gulf waterway whereby navigation could be secured with a smaller diversion than that permitted. They also called some younger sanitary engineers to say that there is conceivable a sewerage and water supply system of Chicago which could be operated without diversion. Finally they produced letters written by Secretaries of War, one expressing doubt as to whether, under the statute, he could consider the sanitary needs of Chicago in granting a permit and the other expressing doubt as to whether he could consider navigation in the Lakes-to-Gulf waterway in granting the permit. Averring then that the diversion is for sanitation

and was never conceived of or used for power, the contention is one of *abuse* of power and action not authorized by statute.

While we maintain that action of the Secretary cannot be *reviewed,* we concede that it can be *examined* to determine whether there has been abuse of power or excess of authority. (*Philadelphia Co.* v. *Stimson,* 14 Pet. 448.)

The data that was before the Secretary of War tending to show the necessity of diversion for navigation is set forth in the Master's Report and is analyzed at pages 39-54, *supra.* The facts refuting complainants' charge that defendants' canal is solely a sanitary expedient will be found at pages 12-23, *supra.*

There has long been a fierce contest as to the requirements of navigation on the Lakes-to-Gulf waterway. This record is burdened with facts on both sides of that contest. Exactly the same contest and the same facts were before the Secretary. The mere circumstance that there was a contest before the Secretary proves that there was *something to decide.* The fact that there is a contest here proves that complainants were dissatisfied with the decision and seek to review it here. That, as we have just shown, they may not do.

The Master's Report shows that for years before defendants' diversion was authorized exactly such a diversion through similar works was a prime project of Congress and the War Department. It shows that if diversion were enjoined there would be no navigation in the upper reaches of the Lakes-to-Gulf waterway and none could be restored without years of construction and the expenditure of millions of dollars. It shows that if diversion were enjoined the Chicago harbor would become a cesspool, Lake Michigan would be seriously polluted, and the great center of

interstate commerce at Chicago would be gravely impaired. It shows that this situation could be relieved only after years of construction and the loss and direct expenditure of a vast treasure and incidental losses far greater still.

Such very briefly are the facts, the consideration of which by the Secretary in deciding that diversion is in the interest of navigation is claimed by complainants to be *abuse of power.* Refutation of this contention seems to need no argument.

But complainants urge that because one object of the diversion is sanitation, the permit should have been denied and that to grant it on any such consideration exceeds the statutory authority of the Secretary.

The Master's Report shows that pollution of the lakes is a serious and growing menace to navigation thereon. It shows that the cessation of diversion would render navigation on the Des Plaines and Illinois impossible by reason of pollution and would pollute Lake Michigan in amount almost as much as all the other pollution in all the other Great Lakes combined.

Regulation of navigation comprises something more than provision for the flotation of ships. Diversion is necessary and desirable for the flotation of commerce. It is also necessary and desirable for the sanitation of commerce. For whatever reason it was necessary or desirable for navigation the Secretary had a right under the statute to consider the reason and decide upon it. This he did and *if his action is subject to scrutiny against his authority, his decision is not subject to review against its expediency.*

But complainants say that even if his decision benefited commerce anywhere it was bad if it bore adversely on commerce anywhere.

The court has variously described what the Secretary does, viz.: He determines

"What was reasonably necessary to be done to insure free and safe navigation * * *. The Secretary in the exercise of his lawful powers declared to be no obstruction to navigation what was in fact an obstruction." (*Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U. S. 205.)

In *Sanitary District* v. *U. S.*, 266 U. S. 405, the court said:

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

In *Corrigan Transportation Co.* v. *Sanitary District*, 137 Fed. 85, Mr. Justice Baker said:

"Congress said to Illinois * * * 'You are not to change the course of the river unless you first obtain the Secretary's approval of your plan.' "

See also the language quoted from *Miller* v. *Mayor* at page 116, *supra*, holding that the Secretary decides what obstructions are unlawful, and on page 119 the language quoted from the *Louisville Bridge* case holding that, after the Secretary has acted, what may have been an obstruction in fact is not thereafter an obstruction in law. Such was the effect of the conclusion of the court in the second *Wheeling Bridge* case.

Citation on all sides of this refinement could be multiplied. But whether it be held that the Secretary of War authorizes an "obstruction" which he finds not to be such as to invoke the inhibition of the statute, or finds to be *no* obstruction in intendment of law that which may be to some extent an obstruction in fact, the result is the same. If the structures mentioned in the statute were not obstructions there would have been no need for the statute. In common sense the Secretary of War, who is entrusted with the maintenance of all navigable channels in the whole complex system of the United States, considers various

proposed artificial works affecting navigation and determines whether in all their aspects they can be permitted with due regard for the interests of navigation. Each case is decided in view of all of its circumstances.

A case can hardly be imagined where the proposed works do not injure some aspect of navigation while benefitting some other aspect. In *Miller* v. *Mayor of New York,* 109 U. S. 385, 393, in speaking of a claim of injury to a wharf due to the construction of a bridge in East River below it, the court said:

> *"Every public improvement, whilst adding to the convenience of the people at large, affects, more or less injuriously, the interests of some. A new channel of commerce opened, turning trade into it from other courses, may affect the business and interests of persons who live on the old routes."*

A more meticulous and painstaking effort to reach a just solution of a difficult problem it would be hard to find. The efforts of the Secretary of War to compose the conflicting necessities of the various ports and waters under his administration, by securing restoration of lake levels by compensation, by restriction of the Chicago diversion through additional facilities for sewage disposal, and by engineering surveys looking toward the solution of navigation problems in both great waterways *certainly does not indicate any abuse of his function or warrant any interposition of the court to control his determination or coerce his discretion.*

II.

Congress has power to authorize the diversion.

(1) The diversion does not constitute a taking of private property.

(a) Complainants have no property in the steamship lanes along the international boundary.

The findings of the Master seem to us amply to support the power of Congress in this regard and we adopt as our brief in chief the Master's Report 149-152. To this, in refutation of complainants' arguments, we add the following:

The main subject-matter and most of the evidence in this suit relates to navigable capacity of navigable waters of the United States, and particularly to the great steamship lanes from the head of Superior to the foot of Erie. For example, Wisconsin claims as injury the hindrance to bulk freighters in the principal traffic lanes. Yet this hindrance does not occur in Wisconsin, Pennsylvania, Minnesota, Ohio or New York. There is not a word in the Master's Report to show that it occurred in any of the states complainant and, as a matter of fact, the evidence showed that a substantial part of the area of hindrance was in Canadian waters. There was no showing of any hindrance not occurring within waters which are described in the Act of March 3, 1899, as navigable waters of the United States. Confining present consideration to this principal claim of injury—interference with bulk shipping—what private property of any complainant is taken by any effect of this diversion on the navigable capacity of the navigable waters of the United States? Could California maintain a suit against Florida on the basis of the causeway connecting the mainland with Key West on the basis of her property rights? Complainant states them-

selves do not navigate these waters, and, save for the State of Michigan, there is no hindrance to shipment by bulk freighters occurring in the waters of any of the complainant states. Stripped of the element of injury to navigation of bulk freighters, the rest of the showing of injury in complainants' case is insignificant.

What we are really addressing on this principal segment of the proof, is only the right of citizens of complainant states to navigate the navigable waters of the United States. In the first place, this right does not derive from their citizenship in these states. It derives from citizenship in the United States.

> "* * * He (a citizen of the United States) has the right to come to the seat of government * * * to free access to its seaports. * * * The right of the state to impede * * * the right which its citizens hold under it (the United States) has been universally denied. * * * If the right of passing through a State is one guaranteed to him by the Constitution * * * it must be sacred from State taxation * * *." (*Crandall* v. *Nevada*, 6 Wall., 44, 45.)
>
> "* * * The right to use the navigable waters of the United States * * * is dependent upon citizenship of the United States and not citizenship of a State * * *." (*Slaughter House Cases*, 16 Wall. 36, 79.)

In the second place, this right is not a *property* right, it is a personal privilege. It has been well described in *Frost* v. *Washington Ry.*, 97 Me. 76:

> "This right of plaintiff was not his private property nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it, or acquire it. He did not own it against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public and not for any

particular individual. * * * The sovereign cannot take private property without * * * compensation * * * but the constitutional provision does not limit the power of the sovereign over public rights."

Whatever may be their rights as to other aspects of waters, neither these states nor their citizens have any property in the navigable capacity of those which constitute navigable waters of the United States and *a fortiori* they have no property in waters outside their physical domain.

The rights of the states were never more than *quasi*-sovereign and not property rights in the sense in which the word "property" is used in the Constitution. Whenever the court has had to pass upon this question it has decided against any suggestion of such a "property" right.

In

Gilman v. *Philadelphia*, 3 Wall. 713,

referring to the absolute power of Congress over the matter of navigable rivers, the court said:

> "For this purpose *they are the public property of the nation*, and subject to all the requisite legislation of Congress. * * * *For these purposes Congress possesses all the powers which existed in the states before the adoption* of the national Constitution." * * *
>
> "Although the title to the shores and submerged soil is in the various states and individual owners under them, *it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.* * * * *The primary use of waters* * * * *is for the purpose of navigation.* * * *".

Gibson v. *U. S.*, 166 U. S. 269, 272.

In so far as we are addressing the principal complaint in this case—the interference by defendants' diversion with

navigable depths at critical points in the steamship lanes of the great bulk freighters—there is not even a debatable ground for complainants' argument that we are taking private property for public use without compensation, and this would be so regardless of whether we are authorized to divert by Section 10 of the Act of 1899 or not. If our acts be unlawful we may be committing a nominal tort in the event of some stranding or misadventure, but certainly we are taking the property of none of them or their citizens in the navigable capacity of such waters by reason of such hindrance.

(b) The doctrine of international law as applied by this court to the relations between states, and not the common law doctrine of riparian rights, is the governing law of this case and under those doctrines complainants have no property right to have all the water in the lakes flow to them without the slightest impairment in quantity.

The rules of private property are inapplicable to controversies between states. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; *Kansas* v. *Colorado*, 206 U. S. 46, 51, 99; *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 354, 357; *Rickey Co.* v. *Miller & Sax*, 218 U. S. 208, 260, 261; *Bean* v. *Morris*, 221 U. S. 485, 486, 488.

The doctrines governing suits between states are those of international law as modified by the decisions of this court which adapt them to the relations of the quasi-sovereign states of the Union under the Constitution.

In *Missouri* v. *Illinois*, 200 U. S. 496, Mr. Justice Holmes said:

> "But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between

individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States."

In *North Dakota* v. *Minnesota,* 263 U. S. 365, Chief Justice Taft said:

> "The jurisdiction and procedure of this court in controversies between states of the Union differ from those which it pursues in suits between private parties. * * * The jurisdiction is * * * limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. * * * In such action by one state against another, the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties."

In delivering the opinion on the demurrer in the case of *Kansas* v. *Colorado,* 185 U. S. 125, Mr. Justice Fuller after discussing the claim of Colorado to her full rights as an independent state under the doctrine of international law, said:

> "But when one of our states complains of the infliction of such wrong or the deprivation of such rights by another state, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? * * * *Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty;* but if a state of this Union deprives another state of its rights in a navigable stream, and Congress has not regulated the sub-

> ject, as no treaty can be made between them, how is the matter to be adjusted? * * * Sitting, as it were, as an international, as well as a domestic, tribunal, we apply *Federal law, state law, and international law*, as the exigencies of the particular case may demand."

In the opinion on the merits of the bill itself in *Kansas* v. *Colorado*, 206 U. S. 46, Mr. Justice Brewer said:

> "Controversies between the states are becoming frequent, and, in the rapidly changing conditions of life and business, are likely to become still more so. Involving, as they do, the rights of political communities which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty. * * * '*International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.*' * * * One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. *Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.*"

At international law an upper riparian state is under no servitude to a lower state to permit the water to flow down unimpaired in quantity.

Beginning about 1878, the Republic of Mexico commenced to advance a claim that diversions within the United States were obstructing practically all the waters of the Rio Grande, thereby impairing the rights of Mexico in the international section of the river, both as to navigation and agricultural uses.

In 1895 Attorney General Harmon addressing the following question (21 Opin. Atty. Gen. 274):

> "By the principles of international law, independent of any special treaty or convention, may Mexico right-

fully claim that the obstruction and diversion of the waters of the Rio Grande * * * are violations of its rights which should not continue for the future and on account of which, so far as the past is concerned, Mexico should be awarded adequate indemnity?"

advised the State Department as follows:

"It is stated by some authors that an obligation rests upon every country to receive streams which naturally flow into it from other countries; and they refer to this as a natural international servitude. (Heffter Droit Int., Sec. 43; 1 Phillemore Int. Law, p. 303.) Others deny the existence of all international servitudes, apart from agreement in some form. (Letters of Grotius quoted, 2 Hert., p. 106; Kluber Droit des Gens Moderne, Sec. 139; Bluntschli Droit Int. Code; Woolsey's Int. Law, Sec. 58; 1 Calvo Droit Int., Sec. 556.)

"Such a servitude, however, if its existence be conceded, would not cover the present case or afford any real analogy to it. *The servient country may not obstruct the stream so as to cause the water to back up and overflow the territories of the other.* The dominant country may not divert the course of the stream so as to throw it upon the territory of the other at a *different place.* (See authorities, *supra.*) In either of such cases there would be a *direct invasion and injury* by one of the nations of the territory of the other. But when the *use of water by the inhabitants of the upper country results in reducing the volume of which enters the other, it is a diminution of the servitude.* The injury now complained of is *a remote and indirect consequence* of acts which operate as a deprivation by prior enjoyment. So it is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying its inhabitants the use of a provision which nature has supplied entirely within its own territory.

"Such a consequence of the doctrine of international servitude is not within the language used by any writer with whose works I am familiar, and could not have been within the range of his thought without finding expression. * * *"

"The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain. Apart from the sum demanded by way of indemnity for the past, the claim involved not only the arrest of further settlement and development of large regions of country, but the abandonment, in great measure at least, of what has already been accomplished.

"It is well known that the clearing and settlement of a wooded country affects the flow of streams, making it not only generally less, but also subjects it to more sudden fluctuations between greater extremes, thereby exposing inhabitants on their banks to increase of the double danger of drought and flood. The principle now asserted might lead to consequences in other cases which need only be suggested. * * *

"The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from *considerations of comity is a question which does not pertain to this department;* but that question should be decided as one of policy only, because, in my opinion, the *rules, principles, and precedents of international law impose no liability or obligation upon the United States.*"

The Mexican Government cited against the opinion Farnham's Law of Waters. The State Department learned from Mr. Farnham that his statements, contrary to the opinion of the Attorney General, were private opinions not based on authority. (See relation of above circumstances in 101 Minnesota 197, at 230.)

Thereafter the treaty of May 21, 1906, was negotiated between the United States and Mexico, Articles IV and V of which are as follows:

Article IV.

"The delivery of water as herein provided *is not to be construed as a recognition by the United States of any claim on the part of Mexico to said waters;* and it is agreed that in consideration of such delivery of water Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican canal and Fort Quitman, Texas, and also declares fully settled and disposed of and hereby *waives all claims heretofore asserted or existing, or that may hereafter arise or be asserted against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico by reason of the diversion by citizens of the United States* of waters of the Rio Grande."

Article V.

"The *United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters* of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. * * *"

This Federal doctrine is also the doctrine of the Supreme Court of Minnesota. Judge Elliott in *Minnesota Canal and Power Co.* v. *Pratt* (1907), 101 Minn. 197, at 228, says:

"The respondents claim that, as the Birch Lake drainage area is tributary to the Rainy river and the various lakes which form the international boundary between the United States and Canada, the diversion of the waters to Lake Superior would be a violation

of international comity. The contention cannot be sustained on principle or authority. Birch Lake and its tributary waters are entirely within the United States, and *under the generally accepted rules of international law are subject to its exclusive control without responsibility to any foreign government or its citizens.* Modern international law rests upon the conception of territorial sovereignty. The territory of a nation consists of the land and waters within its geographical boundaries and the waters which wash its shores to the extent of a marine league or other distance determined by custom or treaty, from the shore. See *Mortensen* v. *Peters* (1906), 14 Scots' Law Times, 227, 1 Am. Jour. Int. Law, 626 and article by A. H. Charterio in 16 Yale Law Review 471. Over this territory the jurisdiction of the nation is exclusive and absolute. *Schooner Exchange* v. *McFadden,* 7 Cranch. 116, 3 L. Ed. 287."

There seems to be no question of the position of the United States that a sovereign state has full rights of diversion of water within its borders as an attribute of its sovereignty.

"Under the treaties with Mexico each republic reserves all rights within its own territorial limits. This would have been so on principles of international law without such reservation. States lying wholly within the United States belong exclusively to it, *and the soil within the United States is not burdened with a servitude in favor of Mexico in respect to any duty to so discharge the water as to promote or preserve the navigability of the Rio Grande."* (Sen. Doc. 104, 56th Cong., 2d session; *United States* v. *Rio Grande Dam and Irrigation Co.,* 9 N. M. 292; Sen. Doc. 154, 57th Cong., 2d session.)

As between States of the Union the court will enforce the doctrine of Comity (see quotation from *Kansas* v. *Colorado,* pp. 129, 130, *supra*), as to the waters of an interstate

stream. Comity means an equitable division of burdens and benefits in the water and not a right in the lower state to all the water. Thus in *Kansas* v. *Colorado,* although Colorado was taking practically the entire low-water flow of the Arkansas River the court did not enjoin.

In *Corrigan Transportation Co.* v. *Sanitary District,* 137 Fed. 851, Mr. Justice Baker was speaking of Section 10 of the Act of March 3, 1899, and of this canal and diversion in a suit by an individual for an injury due to that diversion:

> "If Section 10 stands, libelants' attack fails, because defendant obtained the permit and complied with its conditions. If Section 10 falls, what is the result? If a matter affecting commerce is of national scope and susceptible of uniform regulation, the failure of Congress to speak to the subject is deemed equivalent to a declaration that the states shall let the matter alone; but if the matter is local, and concerns the public policy of a state, though it may incidentally affect interstate and foreign commerce, congressional inaction is a recognition that the subject is fitter for local regulation, and is an invitation that the state continue in the unimpeded exercise of its police powers. * * * The bridging, dredging, purification of a navigable waterway wholly within a state are matters of the latter class. *Escanaba Transportation Co.* v. *Chicago,* 107 U. S. 678; *Lake Shore, etc., Ry. Co.* v. *Ohio,* 165 U. S. 365. With the commerce clause in abeyance, Illinois, as to every being in the whole world except future Congresses, was absolute sovereign in the premises. The absolute sovereign may change the grade of *highways or may vacate them, may alter the courses and currents of rivers or may dam or fill them up, and neither alien nor subject traveler and navigator may complain.* **No one can claim a vested right to have the United States interfere with Illinois, nor can a cause of action arise from want of interference.**"

Upon the above authority it is clear that complainants have no *property* right to all the water in the Lakes without diminution by defendants and, as was clearly shown in the Mexican incident, neither they nor their citizens are entitled to damages by reason of such a diversion.

(c) The slight incidental injury to incorporeal rights disclosed by the findings does not constitute a taking of property.

Counsel have referred to various state authorities decided under state constitutions, the provisions of which are entirely different from the Federal Constitution to support their contention that similar injuries have been held to constitute a taking. An instance of this is their reliance on the *Beidler* case, discussed below at pp. 150-153. But complainants omit to state that the State Constitution in the *Beidler* case provides for compensation for *damage* to property as well as for *taking* of property.

In the case at bar there is no question of taking. The damages, if any suffered, are of the most consequential and remote character. There is no question involved here as to whether actions for damages could be sustained by complainants, or any of their citizens. If by the greatest stretch of the imagination it could be said that there was property or a taking, no injunction could be granted, because there is such *laches* and acquiescence that a court of equity would not be moved to act, and the claimants should be relegated to their suits for damages, if there are any

New York v. *Pine,* 185 U. S. 93.

U. S. v. *Lynah,* 188 U. S. 445.

Northern Pacific R. Co. v. *Smith,* 171 U. S. 260.

Los Angeles v. *Los Angeles City Water Co.,* 177 U. S. 558.

Sullivan v. *Portland and Kennebec R. Co.*, 94 U. S. 806.

Bowman, et al. v. *Wathen, et al.*, 1 How. 189.

Piatt v. *Vattier*, 9 Pet. 405.

In *Osborne & Company* v. *Missouri Pacific R. Co.*, 147 U. S. 155, a bill in equity was filed to enjoin the railroad company from constructing a track in the public street opposite the lands of the plaintiff. In affirming a decree dismissing the bill, the court said (259):

> "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court, will decline to interfere.
>
> In *McElroy* v. *Kansas City*, 21 Fed. Rep. 257, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice Brewer, then circuit judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer great inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages."

In the case of *Manigault* v. *Springs*, 199 U. S. 473, a bill was filed by a riparian owner to enjoin another riparian owner from constructing in a navigable stream a dam authorized by the State of South Carolina, under a statute,

which expressly provided for the payment of such damages as might be sustained by reason of the erection of the dam. It was conceded that the easement of the plaintiff had been taken and that the plaintiff was entitled to damages. However, the court said:

> "But it does not necessarily follow that an injunction should issue. * * * a court of equity is not bound to enjoin a public work authorized by statute, until compensation is paid, where no property is directly appropriated. This is particularly true where the damage is difficult of ascertainment at the time, and a reasonable provision is made by the law for compensation."

The case of *Northern Pacific R. Co.* v. *Smith,* 171 U. S. 260, was a suit to recover from the railroad company the possession of lands which had been taken without the payment of compensation and which had been in the possession of the railroad company for many years. In denying recovery, the court said (271):

> "There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

Quoting from *McAuday* v. *Western Vermont R. R. Co.,* 33 Vt. 311, the court continues (272):

> "In these great public works, the shortest period of clear acquiescence, * * * will conclude the right

> * * * to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire an important interest in its continuance. * * * It is certain according to the English decisions, that he cannot stop the work, and especially the trains upon the road if he has in any sense, for the shortest period clearly given to the company * * * by his silence, to understand that he did not intend to object to their proceeding with their construction and operation."

These holdings are referred to in the case of *United States* v. *Lynah,* 188 U. S. 445, in which the court said, at page 467:

> "It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. *Roberts* v. *Northern P. R. Co.,* 158 U. S. 1, 11; *Northern P. R. Co.* v. *Smith,* 171 U. S. 260, and cases cited in the opinion."

It seems to us almost absurd to say that hindrance to the progress of steamships in the lakes constitutes appropriation of any property in connection with the claim of injury to shipping. The only other finding of injury that is in this case is the one relating to the contribution of defendants' diversion to the claimed injury in connection with fishing and hunting grounds, the availability and convenience of beaches at summer resorts and public parks.

Complainants have filed no exception to the Master's findings in this respect. The one relating to damage to shipping is

> "I am satisfied that the evidence requires the finding that the lowering of lake levels of approximately 6 inches, has had a substantial and injurious effect upon the carrying capacity of vessels, and has deprived navigation and commercial interests of the facilities which otherwise they would have enjoyed in commerce on the Great Lakes" (Master's Report 116).

On the other question of injury, the finding is:

> "But there is sufficient evidence to require the finding that a lowering of 6 inches has been a substantial contribution to the injury caused by the total reduction in connection with fishing and hunting grounds, the availability and convenience of beaches at summer resorts and public parks" (Master's Report 117).

As to the claimed injury to agriculture and horticulture, the Master says that injury has not been sufficiently shown (Master's Report 117). As to pile foundations of structures, the supposed injury due to the contribution of 6 inches reduction of the lake levels, does not clearly appear (Master's Report 117).

No exceptions were filed to these findings, which characterize the effects of the diversion as an "injury" only, without even a suggestion that there is any appropriation or taking. The cases cited by the Master (Master's Report 149-152) seem to settle any and all contentions of the complainants as set forth in their briefs.

In

Sanguinetti v. *United States,* 264 U. S. 146, 149,

the court said:

> "Under these decisions and those hereafter cited, in order to create an enforceable liability against the Gov-

> ernment, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of, and *not merely an injury to, the property.*"

Counsel cite (Wis. Brief 95-99) a number of cases as to the right and jurisdiction of a State in the waters and submerged lands of navigable waterways within their borders, and conclude that such dominion over the waters and submerged lands is in the nature of a trust for the public. With this conclusion we agree, but the dominion of the state in such waters and submerged lands, including the interest or rights of riparian owners in such waters and submerged lands, is subject to the exercise of Congress over navigable waters under the Commerce Clause.

Judge Koonce of the War Department in a lecture of April 23, 1926, not included in the evidence but cited at numerous places in the Wisconsin brief, states the rule as follows:

> "The property rights of a riparian owner in these areas as between himself and the state, or between himself and other persons, are subject to state authority and may be such as the legislature may prescribe. It must be said, however, that all state and private rights in the subject are more speculative than substantial."

The injury mentioned in the above cited findings of the Master as to fishing and hunting grounds and availability and convenience of beaches and summer resorts and public parks, can relate only to lands which are subject to the servitude of navigation under the Commerce Clause; but complainants say that in view of the fact that the diversion is from one watershed to another and cannot be said to benefit or improve navigation in the St. Lawrence system of waterways from which the water is taken, that

the servitude under the Commerce Clause does not exist. In other words, they would limit the exercise of the power of Congress under the Commerce Clause of the Constitution to a particular system of waterways; that is, the constitutional power would thus be limited by the division between watersheds. They disregard the expressions in many opinions of this court heretofore cited, to the effect that the powers delegated to Congress by the Constitution know no limitations such as state lines or regions, but may be exercised wherever the authority of the United States extends.

The Master found against the contention about watersheds at pages 152-158 of his report, and we have added certain authorities to those he cited (p. 154, *infra*).

In

> *Stockton, Attorney General,* v. *Baltimore and New York Railroad Company,* 32 Fed. 9, Circuit Court Division, New Jersey,

Mr. Justice Bradley, then one of the justices of this court, delivered the opinion. The case was commenced by information to restrain the defendants (railroad companies) from erecting a bridge across Arthur Kill, between New Jersey and Staten Island, in the State of New York, upon the land of the State situated on the shore and under the waters of said kill. The Staten Island Rapid Transit Company, one of the defendants, claimed the right to build the bridge and to occupy lands under water necessary for the support of its piers, under an act of Congress which provided that "it shall be lawful" for the Staten Island Railroad Company and the Baltimore and New York Railroad Company, or either of them, "to build and maintain a bridge across * * * Arthur Kill * * * for the passage of railroad trains." It was further provided that the plan of said bridge should be approved by the Secretary of War, which approval was obtained. The State raised

the same contention here considered as to the taking of private property. But the court said:

"The information states the ordinary doctrine that the state is owner of the shore and land under water of all navigable streams and arms of the sea within its borders; that this ownership was a part of the *jura regalia* of the king of Great Britain, by virtue of which he was seized and possessed of an estate in fee-simple absolute in said lands; and that, at the Revolution, this state, in its sovereign capacity, succeeded to the rights of the crown, and that this right of supreme dominion had never been ceded or surrendered to the United States; and that, without such cession or surrender, the United States could not take possession of said lands, or authorize other parties to do so, except by making compensation therefor, as provided in the fifth amendment to the constitution; and that, at the place of location of the proposed bridge, their ownership of the soil, on the part of the state, extended from ordinary high-water mark to the center line of the sound, being the boundary line between New Jersey and New York, as settled by agreement in 1833, and confirmed by act of congress, June 28, 1834. * * *"

"*First,* it is denied that the land of the state can be taken at all without voluntary cession, or consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the state in almost every case of an interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a state will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum.* It interposes an effectual barrier to the execution of a constitutional power vested in congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a state is necessary, such state may always, in pursuit of its own interests,

refuse its consent, and thus thwart the plain objects and purposes of the constitution.

* * * * * *

"But, *secondly,* it is contended that if the United States can constitutionally take the land of the state, as well as that of the citizen, for public purposes, without consent, it can only do so in the same manner, and subject to the same conditions, namely, that of making just compensation. It is urged that the language of the fifth amendment of the constitution is applicable to the case, and is imperative. This language is 'nor shall private property be taken for public use without just compensation.' It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state-house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state-house is quite different from that by which it holds the land under the navigable waters in and around its territory."

The court then agreed with the statement in the information as to the character of the state's jurisdiction over navigable waters and submerged lands, and said (20):

"Such being the character of the state's ownership of the land under water,—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce,—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that *private property* shall not be taken without compensation; making no reference to public property. But, if

the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water-way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care.

The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of

> erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necesary or expedient."

Complainants here say (Wis. Brief 96) that each state has sovereign and proprietary rights in all the waters within its borders and in the lands under them and that by withholding waters that would otherwise flow to them and cover the submerged lands to a higher level and, quite apart from the question of navigable capacity, our diversion takes property within the meaning of the 5th Amendment to the Constitution of the United States.

We think we have shown (pp. 128-136) that purely as between us and complainants, we were under no servitude to let all lake water flow to them without diminution. As a state of the Union we are under an obligation to do equity and justice—to observe comity toward our neighbors. We are under an obligation to obey the laws of the United States. If we do not do so, our act may be unlawful either because this court should declare that our exercise of sovereignty is unreasonable in respect of our duty of comity toward our sister states or that we are violating a law of the United States. But our failure in this regard would not constitute a *taking* of property.

Complainants quote the Master (Master's Report 149) as saying that they have sovereign and proprietary rights in these waters, but that was merely introductory to his finding that in the sense of the 5th Amendment no property of theirs is taken.

To base a suit upon this kind of a property right is a doctrine which has been rejected by this court.

In *Hudson Co.* v. *McCarter,* 209 U. S. 349, where the suit was brought by a state against a private trespasser, seeking to abstract and sell water needed in the state, Mr. Justice Holmes said:

> "We prefer to put the authority which cannot be denied in the *state upon a broader ground* * * * since in our opinion, *it is independent of the more or less attenuated* residuum of title that the state may be said to possess. * * *"

Indeed, it is a doctrine as old as the common law, that running water is not subject to ownership.

In *Geer* v. *Connecticut,* 161 U. S. 519, referring to a similar doctrine in respect of wild animals, the court said:

> "We take it to be correct doctrine that ownership of wild animals, so far as they are capable of *ownership,* is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common."

In most aspects waters are in the exclusive dominion of the state. But that dominion *is not proprietary.* It is simply *jus regium*—a right to regulate. From this *jus regium* flow riparian and all other water rights. They do not flow from *property* in the state. So far as the *jus regium* applies to the public right of navigation it is gone from the State to the United States, as elsewhere shown. The general subject was thoroughly expounded in

Illinois Central Ry. v. *Chicago,* 146 U. S. 387,

holding that a state has no such "property" as can be conveyed.

> "* * * the ownership and dominion over lands covered by tide waters * * * belong to the respective states * * * *subject to the paramount right of Congress to control their navigation.* * * * *The same doctrine is* * * * *held to be applicable to* * * * *the Great Lakes. These lakes possess all the general characteristics of open seas,* except in the freshness of their waters and in the absence of the ebb and flow of tide. In other respects they are inland seas. * * * *the same doctrine as to the dominion and sovereignty* * * * *of lands under*

the navigable waters of the Great Lakes applies which obtains at common law * * * of lands under tide waters * * *.

"* * * the state holds the title to the lands under the navigable waters of Lake Michigan * * *. *But it is a title different in character from that which the state holds in lands intended for sale.* * * * It is a title held in trust * * * abdication is not consistent with the exercise of that trust * * *. The control of the state for the purpose of the trust can never be lost. * * * General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases.

"* * * THE POWER EXERCISED BY THE STATE OVER THE LANDS AND WATERS IS NOTHING MORE THAN WHAT IS CALLED 'JUS REGIUM,' THE RIGHT OF REGULATING, IMPROVING AND SECURING THEM FOR THE BENEFIT OF EVERY INDIVIDUAL CITIZEN. * * * (Referring with approval to the case of *Stockton* v. *Railroad Co.*, 32 Fed. Rep. 9.) *'The character of the title of ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory.* * * * prior to the Revolution' the shore and lands under water of navigable streams and waters of the province of New Jersey belonged to the King. * * * *after the conquest the said lands were held by the state as they were by the King, in trust* * * * *subject* * * * *to the rights of navigation and commerce.*"

In

United States v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69, 70, 72,

the court said:

"But whether this private right to the *use of the flow of the water* * * * be based upon the qualified

title which the company had (from the state) to the bed of the river over which it flows, or of the ownership of land bordering upon the river, is of no prime importance. *In neither event can there be said to arise any ownership of the river.* * * * That the running water in a great navigable stream is capable of private ownership is inconceivable. * * * That riparian owners upon public navigable rivers have, in addition to the rights common to the public, certain rights to the use and enjoyment of the stream * * * must be conceded. * * * *These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank.* * * * It is for Congress to decide what is and is not an obstruction to navigation. * * * *Title is absolutely subordinate to the rights of navigation.* * * *"

So far as these states themselves are concerned then, their property is not taken by our diversion; first, because in withholding what would otherwise flow to them, we are taking nothing, and, second, because neither the corpus of the water nor the alleged right to have it flow to them is, of itself, property within the meaning of the 5th Amendment. Our action in any aspect we have yet discussed may be imagined for the sake of argument to be wrongful, but it is not a taking of private property within the meaning of the 5th Amendment.

But complainants go a step further and allege that our acts impair the enjoyment of themselves as corporate proprietors of public parks and of their citizens as individual riparian proprietors on the lakes.

Of course, if *as between us and them* (see pp. 128-136) (with no reference to our duty to the United States and solely in our relation as equal sovereigns) we are under no duty to let this water flow to them, our failure to let it flow is not a taking so far as the states are concerned, and

we think, also, so far as their citizens are concerned. If there is a duty to let it flow, not conceding that our failure to do so is a taking, then, as between us and them, there is no constitutional requirement in the 5th Amendment to compensate them, because the 5th Amendment is not addressed to the states and is no restriction on our sovereign powers.

It is only if what we have done be regarded (as the Master has found) as an act under the authority of the Federal Government, that the 5th Amendment may be considered at all and here complainants are between the horns of a dilemma. If our act is *not* under such authority, the argument about the 5th Amendment vanishes. If our act *is* under Federal authority, their whole case falls and the incidental argument about taking of property is covered by the occasion in *Sanguinetti* v. *U. S.*, 264 U. S. 146, and there is no taking involved.

Great reliance is placed by complainants on the case of *Beidler* v. *Sanitary District*, 211 U. S. 628. There Beidler, the owner of water front lots facing a tributary of the Chicago River and slips communicating with such tributaries, sued the Sanitary District for damages done to his loading facilities, by reason of a drop of six feet in water levels opposite his docks due to the reversal of the Chicago River when lake water was turned into it in 1900. The suit was predicated on Section 13, Article 2 of the Constitution of the State of Illinois, which provides:

> "Private property shall not be taken *or damaged* for public use without just compensation."

This case has no bearing here. We are now considering solely the meaning of the 5th Amendment to the Constitution of the United States which says nothing about *damage* to private property by public enterprise.

Complainants, however, say that on the principles of the *Beidler* case it results that the Sanitary District is thus made responsible in damages to anyone injured within the State of Illinois, but that one similarly injured outside the state is denied relief. This sounds well, but of course it is a *non sequitur*. This discussion is as to whether the effects of this diversion constitute a taking—it is not as to whether persons anywhere are entitled to damages therefrom. The Sanitary District is not the State of Illinois. It is subject to suit. If any individual in any complainant state can show an unlawful or negligent act and a resulting damage, he has exactly the same right of action as any citizen of Illinois. The fact that there has never been any such suit during the twenty-eight years of this diversion ought to be fairly persuasive evidence on the substance behind complainants' argument on this whole subject of taking of property and injury to property rights.

Complainants also use the *Beidler* case to support their contention that defendants' diversion is a sanitary and not a navigation project. The Illinois Supreme Court in that case simply said that the principal purpose of the Sanitary District was sanitation and that the fact that a navigable waterway may be created is incidental. In a later case (*Mortell* v. *Clark,* 272 Ill. 201), squarely addressing the effect of defendants' works and of the Illinois Acts authorizing what defendants have done and the relation of both to Federal Statute, the court said (p. 213):

> "The (Illinois and Michigan) Canal was built under the authority of the act of Congress of March 2, 1827, the act of 1822 having been mutually abandoned by the State and Federal governments. (*Werling* v. *Ingersoll,* 181 U. S. 131; *Wells* v. *Wells,* 262 Ill. 320.) This Federal act did not provide just where the canal should enter Lake Michigan, simply stating that the land was granted for the purpose of opening 'a canal to unite

the waters of the Illinois river with those of Lake Michigan,' etc. (Hurd's Stat. 1913, p. LXXXVIII.) The Sanitary District's main channel as now constructed practically complies with this act and furnishes a canal more suitable for navigation than the Illinois and Michigan canal. Furthermore, the Sag channel or cut-off is required to be navigable by said act of 1903, and the proof shows that the Calumet river is navigable to the point where it is intersected by the Sag channel. This cut-off would therefore also practically comply with both of said Federal acts as to furnishing part of the canal for connection of the Illinois river with Lake Michigan."

The Master found that the diversion was validly authorized under Federal law and that the damage shown is incidental and is, in no case, a taking within the meaning of the rule laid down in *Sanguinetti* v. *United States,* 264 U. S. 146, 149, and, therefore, that whatever damage there was amounted only to *damnum absque injuria.* Wisconsin now offers a novel suggestion that if the state improves the *natural* condition of a particular stream for navigation, the resulting incidental damage need not be compensated for, but if it replaces the natural course by an artificial by-path or improves it for any purpose save navigation—by which Wisconsin means only the flotation of ships—then incidental damage must be compensated for.

There is no such distinction. In the series of cases *U. S.* v. *Lynah,* 188 U. S. 445, and *U. S.* v. *Cress,* 243 U. S. 316, the law in favor of compensation for effects of river and harbor improvement was carried as far as it could be carried without making further progress in the perfection of our inland waterways impracticable. In the first case, backwater from a dam flooded the property in question, totally destroying its value. In the second case, backwater from the dam periodically flooded the property. In *Sanguinetti* v. *United States,* 264 U. S. 146,

the floods were exceptional and were a mere indeterminate addition to periodical floods which occurred prior to the intervention of the Federal dam. This court held as to the first two cases that they constituted an actual permanent invasion of the land amounting to an appropriation of it, and as to the third, that it constituted merely an injury to the property, and that this did not amount to a taking in the Constitutional sense. This is the doctrine of *Gibson* v. *the United States*, 166 U. S. 269, and the cases cited on page 151 of the Master's Report.

More apt words could not be found to describe the effect of this diversion than Wisconsin used at page 102 of her brief in describing the *Sanguinetti* case—a damage constituting "a mere indeterminate addition to the periodical floods which occurred prior to the government's intervention." Our diversion creates a lowering of exactly the same nature. The lakes fluctuate secularly over little understood periods of perhaps thirty years. They fluctuate sporadically in intermediate cycles of five to seven years. They fluctuate annually with the ebb and flow of water run off and seasonal rains. It is only at periods of extreme low water that our diversion is injurious and then, as the Master found in nearly every branch of this case, our contribution to whatever injury there may be results from one factor in such a complex of causes that precise determination of its particular effect is impossible. The only circumstance where this was not so was in the hindrance to bulk freighters, but this was only an injury to the navigable capacity of national navigable waters.

We find nothing in any of the briefs to disturb the terse logic of the Master's conclusions (150-152), and we believe we have answered the new suggestion of complainants' briefs that as between the states themselves, independent of Federal authority or the lack of it, the diversion

constitutes a taking of the property of either the states or their citizens.

(2) There is no restriction on the power of Congress to divert water from one watershed to another.

The Master disposed of this contention at pages 152-158. To this we add only the following observations:

This would be a quaint restriction which in principle, at least, would deny to our Government the power to undertake such great engineering works as the Panama and Suez Canals, the works on the upper Nile and such marvelous internal canal systems as that of the Republic of France and even the complainant State of New York itself.

Furthermore, this court has already said in *Missouri* v. *Illinois,* 200 U. S. 496, 526:

> "The natural features relied upon are of the smallest. And if, under any circumstances, they could affect the case it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance, not only of its own statutes, but also of the Acts of Congress of March 30, 1822, and March 2, 1827, the validity of which is not disputed."

The same argument was advanced in the case of *Wyoming* v. *Colorado* (259 U. S. 419), when the court said (466):

> "The fact that the diversion is to such a watershed has a bearing in another connection, but does not in itself constitute a ground for condemning it."

Complainants bring no support to their proposition in this regard beyond its bare assertion.

(3) Article I, Section 9, Clause 6 of the Constitution does not inhibit this diversion because this diversion does not give preference to the ports of any state.

On this point, we adopt as our brief the Master's Report, pages 158-160.

(4) There is no restriction on the power of Congress to regulate navigation inherent in the fact that a particular regulation may destroy navigable capacity and, if there were, it has no application here because this diversion does not destroy navigation anywhere.

To the Master's findings on this point, pages 160-165, we have little to add.

The contention, as presented by the Wisconsin brief (116-120) reduces to the assertion that Congress cannot improve navigation anywhere if the improvement would obstruct it anywhere. Of course, this is obviously untenable.

But the controlling vice in this argument is here (as elsewhere in the brief), the exaggeration of a six-inch contribution to a 32-inch lowering into such a description as a "destruction of commerce."

Some of the extreme cases imagined in Wisconsin brief of such ruthless, unreasonable, and grotesquely absurd action as a wharf extending entirely across the Ohio River or a syphoning of the Great Lakes into the Gulf of Mexico, might be beyond the power of Congress, but it would be because Congress had gone mad and the exercise of power would fall outside the rule of "reasonable relation to the end to be attained" in regulating commerce. Another fallacy of complainants' attempted *reductio ad absurdum* is that the third clause of Section 10 does not authorize *destruction* of navigation upon, or navigable capacity, of a navigable water, but merely contemplates permission to alter or modify "the course, location, condition or capacity."

There is no circumstance of destruction in this case and all argument here that goes to denial of a Constitutional

power because its exercise *might* be abused is beside the point because, as is demonstrated elsewhere, there is no abuse of power in this case.

(5) The diversion is not for the purpose of sanitation only. It is also for the purposes of navigation and, even if we examine its purpose of sanitation alone, we shall find that authorization thereof for that purpose was and is a regulation necessary and reasonably related to the protection of both navigation and interstate commerce on land.

The Master supports this contention (165-171). We have shown that the contention that this canal and diversion have no relation to navigation is without any substantial basis of fact.

The rapidly increasing pollution of the navigable waters of the United States has been considered here with no small apprehension in *Missouri* v. *Illinois,* 180 U. S. 208; 200 U. S. 496; *New York* v. *New Jersey,* 256 U. S. 296; *Sanitary District* v. *U. S.,* 266 U. S. 405. The magnitude of the danger of pollution of Lake Michigan by the discharge therein of Chicago sewage is shown by the Master (193) to be so great that complainants themselves in pressing for a decree recommended its immediate suspension (193) while alternative measures may be devised and put into effect—a process which the Master has found would involve a number of years.

If Congress can act to prevent the choking up of streams with sawdust, the impairment of streams by the dumping of acids, the obstruction of streams by bridges, dikes and causeways, it is a curious contention that, when it acts by any means at its disposal—positive or negative—to prevent the poisoning of the navigable waters of the United States, their conversion into noisome cesspools, or the avoidance of pestilence at the greatest internal center of

interstate commerce, it is not acting with reasonable relation to the regulation, fostering and protection of commerce.

(a) The Secretary of War was justified under the authority delegated to him, in considering the beneficial effect upon interstate commerce of preventing the pollution of the drinking water supply of Chicago.

The Master finds (Master's Report 138):

> "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 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."

Again the Master finds (Master's Report 169-170):

> "The continuous introduction of such a pestilential mass in the harbor and the lake would not only affect the health of the citizens of Chicago viewed as a question of local police, through the contamination of its only water supply, but would also affect navigation and the allied interests of interstate commerce, a matter of national concern."

Lake Michigan, a navigable water of the United States, is used not only for the floatation of ships, but the waters

are used otherwise in interstate commerce in furnishing a public water supply for a great center of interstate commerce, the place where substantially all the great transcontinental railroads converge. A vast number of people, perhaps upwards of 200,000 continuously (in addition to the regular residents of the city), hailing from different parts of the United States and the world, sojourn there. They represent Chicago's floating population. In addition, many people pass through the City, changing from one transcontinental train to another. Others travel through the city in interstate commerce by automobile. Trains engaged in interstate transportation of passengers depend upon Chicago's public water supply for drinking water to be used upon such trains. Likewise, boats passing to and from the Chicago River and Chicago Harbor depend upon the Chicago water supply for drinking water for their passengers. Boats and yachts plying in the Chicago Harbor carry people in interstate commerce who may become infected by polluted water. These considerations were set forth in Bulletin No. 83 of the Treasury Department, entitled "Sewage Pollution of Interstate and International Waters With Special Reference to the Spread of Typhoid Fever" (183):

> "The growth of the City of Chicago finds no parallel in history. From a population of 7,500 in 1843 it has grown to be the second city of the United States with a population in 1910 of more than 2,000,000. No argument is necessary to show the importance to the whole country of sanitary conditions in Chicago. Its vast commerce and giant industries make it the metropolis of an enormous territory and bring thousands of visitors daily from nearly every State in the Union. These visitors drink Chicago's milk and water and eat Chicago's food. Contamination of these articles of food or drink by typhoid fever germs means infection of the transients as well as citizens—transients who go to

their homes in other states to establish new foci of typhoid fever. These transients and interstate travelers are less able to protect themselves against contaminated food or drink than the citizen who heeds the warnings of Chicago's excellent department of health. Thousands of interstate travelers drink water on trains which is taken aboard cars in this great railway center, and the character of Chicago's water supply is of vital importance to these travelers and to the States to which they are destined."

These considerations alone would have justified the Secretary of War in granting the permit, because of "the allied interest of interstate commerce, a matter of national concern" (Master's Report 169).

Bartlett v. *Lockwood,* 160 U. S. 357, 361:

> "While, under its power to regulate foreign and interstate commerce, the authority of Congress to establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases, has never in recent years been questioned."

Hoke v. *United States,* 227 U. S. 308, 322, 323:

> "Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.
>
> * * * * * *
>
> The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its

exercise, and the means may have *the quality of police regulations.*"

New England Dredging Company v. *United States,* Circuit Court of Appeals, First Circuit, 144 Fed. 932, 934:

> "The power of the federal government over the navigable waters of its ocean harbors is absolute, general, and without limitations, except such as are prescribed by the Constitution; and, in the exercise of such power in the interest of and for the protection of commerce, it may well prescribe the manner in which the harbors shall be used; and, in the interest of sanitation and health, and of the general welfare, it may well protect its public waters from pollution."

We have shown (p. 54, *supra*) that the use of the diversion to generate power was a late and harmless afterthought having no bearing whatever as an incentive or purpose for our acts. It seems hardly to require argument that if there be no room to consider complainants' allegations in this regard on the question of incentive, there is certainly no room to consider them on the effect of this use of the water on the legal validity of the permit. If the diversion is lawful the use of the water is of no relevancy. Such in effect was the conclusion of the court in *Wyoming* v. *Colorado,* 259 U. S. 419. In *United States* v. *Chandler-Dunbar,* 229 U. S. 53, the court said:

> "If the primary purpose is legitimate, we can see no sound objection to leasing the excess of power over the needs of the Government."

To a similar effect is *Kaukauna Power Co.* v. *Green Bay,* 142 U. S. 254.

(6) The Ordinance of 1787 does not restrict the power of Congress to authorize this diversion.

Complainants say that defendants' diversion is in violation of the Ordinance of 1787. It has been repeatedly held that the provision of organic acts (such as the act admitting the State of Oregon into the Union, the Ordinance of the Northwest Territory and the Wisconsin State Constitution), providing that "all navigable waters shall be common highways and forever free," do not refer to *physical obstructions* but to *political regulations.*

Concerning these provisions this court said, in *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1, on page 10:

> "What regulation of commerce does it affect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of navigation, and any discrimination denying to citizens of other states the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction."

It was also held in *Withers* v. *Buckley,* 20 Howard 84, that such a provision did not prevent the legislature of a state "from improving by a canal the navigation of one of" its "navigable rivers and thereby diverting without compensation the flow of water * * *."

The *Withers* case is cited with approval by this court in the later case of *Shively* v. *Bowlby,* 152 U. S. 1, on 33.

See also *Economy Light and Power Co.* v. *U. S.,* 256 U. S. 120.

Moreover, the Supreme Court of Wisconsin, referring to this provision in the Wisconsin State Constitution, announced the same rule, and stated in the case of *In re Southern Wisconsin Power Co.,* 122 N. W. 801, 807:

> "The clause in the Constitution, providing that the navigable waters therein referred to 'shall be common highways and forever free,' etc., does not refer to phys-

ical obstructions of these waters, but refers to political regulations which would hamper the freedom of commerce."

III.

Congress has confined vindication of the Act of March 3, 1899, to suit by the Attorney General of the United States at the instance of the Secretary of War and certain of his subordinates.

The Act of 1899 is a comprehensive statute whereby Congress has assumed complete and exclusive control over navigable waters of the United States. (*So. Pac. Co.* v. *Olympian Dredging Co.*, 260 U. S. 205; *Sanitary District* v. *U. S.*, 266 U. S. 405.) In addition to setting up the mechanism for this control, the statute also declares the manner in which the aid of the courts may be invoked to enforce its provisions and in Section 17 it is provided:

> "that *the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of Section 9 to* 16, *inclusive,* of this act, and it shall be the *duty of District Attorneys of the United States* to vigorously prosecute all offenders against the same whenever *requested to do so by the Secretary of War* or by any of the officials hereinafter designated."

Section 12 of the act provides:

> "that every person and every corporation that shall violate any of the provisions of Section 9, 10 and 11, * * * shall be deemed guilty of a misdemeanor * * * and, further, *the removal of any structures or parts of structures erected in violation of the provisions of said section, may be enforced by the injunction of any Circuit Court * * * and proper proceedings to*

this end may be instituted under the direction of the Attorney of the United States."

Here, under both the civil and the criminal sections of the act, Congress has specifically designated the Federal Government as the sole party complainant. The words are mandatory and exclusive "The Department of Justice shall conduct the legal proceedings necessary to enforce * * * Section 10."

Exactly this question was addressed and conclusively decided in

Minnesota v. *Northern Securities Co.*, 194 U. S. 46.

There, as here, the state sought to sue on proprietary and other interests as a body corporate. There, as here, there were provisions in the statute for criminal and injunctive procedure and both the setting of the context of similar provisions and the essential language of the statute were almost precisely what they are here. The court, squarely addressing the question of whether a state can maintain such a suit on such a statute, said:

> "Does the present suit really and substantially involve a dispute, or controversy properly *within the jurisdiction of the circuit court?* * * *
>
> By the 1st section of the anti-trust act every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal." (In the instant case the language of the statute is "and it shall not be lawful") * * *
>
> "A violation of the provisions of each section is made a misdemeanor, punishable by a fine not exceeding $5,000 or imprisonment not exceeding one year, or by both said punishments in the discretion of the court." (The punitive section here is almost identical.) "Of course, a criminal prosecution under the

act must be in the name of the United States and in a court of the United States—the district attorney who conducts the prosecution being subject to the direction of the Attorney General as to the manner in which his duties shall be discharged. Rev. Stat. 362 (U. S. Comp. Stat. 1901, p. 208).

The 4th * * * Section of the Act is as follows:

'Sec. 4. *The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.* * * *

The act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. *It is not a criminal proceeding* (Secs. 1, 2, 3), *nor a suit in equity in the name of the United States to restrain violations of the anti-trust act.* * * *

But it is said that as the Act of Congress was for the benefit of all the states and all the people, this case is to be deemed one arising under the laws of the United States, and, therefore, cognizable by the circuit court, because one of the objects of the State of Minnesota by its suit is to protect certain of its proprietary interests, which, it is alleged, would be injured by violations, on the part of the defendants, of the act of Congress. Let us see what, in that view, is the case as presented by the complaint.

The complaint alleged that the state is the owner of more than three million acres of land, of the value of more than fifteen millions of dollars, obtained by donation from the United States, and that *'the value of said lands, the the salability thereof depends, in very large measure upon having free, uninterrupted, and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway Companies.'*

It was further alleged that the state is the owner of, and has maintained at large expense, a state university, hospitals for the insane, normal schools for teachers, a training school for boys and girls, schools for deaf, dumb, blind, and feeble-minded persons, a state school for indigent and homeless children, and a state penitentiary; *that a great portion of the supplies of every kind for such institutions must, of necessity, be shipped* over the different lines of railway owned and operated by the Northern Pacific and Great Northern Railway Companies; that the amount of taxes which the state must collect, and *the successful maintenance of its public institutions, as well as the performance of its governmental functions and affairs,* depend largely upon the value of the real estate and personal property situated within the state, *and the general prosperity and business success of its citizens; and that such prosperity and business depend very largely upon maintaining in the state free, open, and unrestricted competition between the railway lines of those two companies.*" (In the instant case it was said that the price of coal for public buildings was increased by increased freight rates due to decreased levels. The evidence showed that the tendency of an injunction would be to increase freight rates and that present freight rates have nothing to do with levels.)

"The injury on account of which the present suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such states; not such a direct, actual injury as that provided for in the 7th section of the Statute. If Minnesota may, by an original suit in its name, invoke the jurisdiction of the circuit court, because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by interstate carriers within

its limits, then every state upon like grounds, may maintain in its name, in the circuit court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a state may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke the original jurisdiction of a circuit court of the United States, to restrain and prevent violations of the Anti-Trust Act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the Anti-Trust Act. We cannot suppose it was intended that enforcement of the Act should depend, in any degree, upon original suits in equity instituted by the states or by individuals to prevent violations of its provisions. On the contrary, taking all the sections of that Act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States, under 45th Section of the Act, by district attorneys of the United States, acting under the direction of the Attorney-General; thus securing the enforcement of the Act, so far as direct proceedings in equity are concerned, according to some uniform plan, operating throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the Act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce, and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides, and in every direction, to accomplish improper or speculative purposes. *At any rate, the interpretation we have given of the Act is a more rea-*

sonable one. **It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and international commerce as of the fact that, so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it—namely, suits in equity under the direction of the Attorney-General.** Of the present suit, the Attorney-General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the 4th Section of the Anti-Trust Act."

It would be hard to find two cases more clearly alike on the question discussed in this portion of the decision in the above case of *Minnesota* v. *Northern Securities Co.* Wisconsin cannot be permitted to maintain this suit in the absence of the Attorney General without overruling the decision in that case.

Wilder Manufacturing Company v. *Corn Products Refining Company,* 236 U. S. 165, addressed the same question as that discussed in the *Northern Securities* case just cited. The manufacturing company sought to avoid suit by the refining company by a plea asking the court to determine that the refining company was a monopoly and had no legal existence because of violation of the Anti-Trust Act. The Anti-Trust Act provided (as we have just seen) for certain remedies, but only at suit of the Attorney General. The court said (174, 175):

"The Anti-Trust Act was intended in the most comprehensive way to provide against combinations and conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. * * * In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent *not the*

mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the *official unity of initiative* which was thus created to give effect to the statute *required a like unity of judicial authority,* the statute in express terms vested the Circuit Court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. * * *

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' *Farmers & M. Nat. Bank* v. *Dearing,* 91 U. S. 20, 35; *Barnet* v. *Muncie Nat. Bank,* 98 U. S. 555; *Oates* v. *First Nat. Bank,* 100 U. S. 239; *Stephens* v. *Monongahela Nat. Bank,* 111 U. S. 197; *Tennessee Coal, I. & R. Co.* v. *George,* 233 U. S. 354, 359."

In *Geddes* v. *Anaconda Copper Mining Company,* 254 U. S. 590, the court said (593):

"* * * *It is now the settled law that the remedies provided by the Anti-trust Act of July* 2, 1890, (26 Stat. at L. 209, chap. 647, Comp. Stat., Sec. 8820, 9 Fed. Stat. Anno., 2d ed., p. 644), *for enforcing the rights created by it, are exclusive;* and therefore, looking only to the act, a suit, such as we have here, would not now be entertained. *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *United States* v. *Babcock,* 250 U. S. 328, 331."

In *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.,* 260 U. S. 261, the court said (286):

"As respects the Sherman Anti-trust Act as it stood before it was supplemented by the Clayton Act, *this court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive, and that those remedies consisted only of* (*a*) *suits for injunctions brought by the United States* in the public interest under sec. 4, and (b) *private actions to recover damages, brought under sec.* 7. *Minnesota* v. *Northern Securities Co.,* 194 U. S. 46, 71; *D. R. Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *Geddes* v. *Anaconda Copper Min. Co.,* 254 U. S. 590, 593."

Said Waite, C. J., in

Haycraft v. *United States,* 22 Wall. 81, 98:

"Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others."

IV.

While the Master has found that Congress has not directly authorized the diversion, the evidence shows that for over a century Congress has invited the construction of a water connection here, that it has co-operated with defendants in creating it, and with full and immediate knowledge of defendants' diversion through it, has constantly acted to protect and foster it and has unmistakably registered its intention that it shall not be interfered with by any authority save its own.

The facts relied upon for the above statement are fully set forth in Point III, p. 12, *supra*. The Master has found (174):

> "Consideration by Congress of the advisability of the proposed waterway from Lake Michigan to the Illinois and Mississippi Rivers, demands by Congress for surveys, plans and estimates, the establishment of project depths, and appropriations for specified purposes, did not in my opinion constitute direct authority for the diversion in question, however that diversion, or the diversion of some quantity of water from Lake Michigan, might fit into an ultimate plan. The appropriations for widening and deepening the Chicago River, and the co-operation with the Sanitary District for several years in that improvement, committed Congress to the work as thus actually prescribed or authorized, but did not go further, whatever the advantage of that work in connection with the purposes of the Sanitary District's Canal. The action which has been taken by Congress may, indeed, be deemed to have an important bearing on the construction of the act of Congress under which, as Congress well knew, the Secretary of War granted permits for the diversion of specified quantities of water from Lake Michigan. But the point now is as to direct authorization by Congress of the diversion as distinguished from

action by the Secretary of War under the general authority Congress has conferred upon him.

The defendants invoke the doctrine of *Wisconsin* v. *Duluth,* 96 U. S. 379. There it was found that Congress had developed and was carrying out a system of corporate improvements at Duluth and had made appropriations for that purpose. The Court regarded the suit as an effort to have the Court forbid the execution of the work authorized and dismissed the bill. This decision may be regarded as applicable to the present case, if it be found that the Secretary of War's permit is valid and that the Federal Government under lawful authority has assumed charge of the diversion, its extent, and the conditions on which it is permitted. But the *Duluth* case is not considered to be an authority for the conclusion here that Congress has directly authorized the diversion, apart from the action of the Secretary of War."

Again, on page 188, referring to the Niagara Falls Act of 1906:

"I find nothing in the Niagara Falls Act which can be deemed to indicate disapprobation by the Secretary of War of his authority under the Act of 1899; whatever inference may be drawn seems to me to be to the contrary."

And, on page 186:

"This administrative construction of Section 10 does not lose, but rather gains, in strength from a consideration of the attitude of Congress. From the outset, Congress was promptly and fully advised of the construction of the drainage canal, the plans for the diversion of water from Lake Michigan, the amount of the diversion, and the permits granted by the Secretary of War. Action was taken by Congress in the light of these facts (*supra,* pp. 36, 41, 43). Congress provided for the widening and deepening of the Chicago River which was an essential part of the plans of the Sanitary District for the diversion through the drain-

age canal (*supra,* p. 58). The use of that canal as a part of a waterway from Lake Michigan to the Mississippi was under consideration by Congress and Congress called for surveys and estimates with this in view (*supra,* p. 41). While, as I have said, Congress did not directly authorize the diversion, it was fully conversant with what had been done by the Sanitary District and with what had been permitted by the Secretary of War purporting to act under the general authority conferred by Congress in Section 10 of the Act of March 3, 1899, and it may be regarded *as significant that Congress having complete control, all the permits of the Secretary of War being subject to its action, did not at any time adopt measures either to prevent the diversion or to manifest disapproval of the construction which the Secretary of War had placed upon the statute."*

We can no longer contend that these acts of the Federal Government constituted direct authorization for our diversion, in circumstance and amount as it existed, but we do contend that there was *initial* authority for our canal and for *some* diversion through it, and that the legislative and administrative history of this case is of great importance to the interpretation placed by Congress on the Act of March 3, 1899, the understanding by Congress that it had delegated power to the Secretary of War to authorize this diversion, and the desire of Congress that this executive administration of defendants' acts should not be interfered with by any authority other than its own.

The question here addressed is not whether Illinois has diminished the flow to her lower riparian sisters, but whether what she has done is in the

> "reasonable exercise of its sovereignty not unreasonably trespassing on any rights of Kansas * * * the scope of inquiry * * * is not limited to simple matter of whether any water of the Arkansas is withheld. * * * We must consider the effect of what

> has been done upon the condition in the respective states and so adjust the dispute upon the basis of equality of rights * * * equality of right and equity * * *." (*Kansas* v. *Colorado, supra.*)

To the extent of establishing their right to sue and the jurisdiction of the Court the Special Master has determined that there is "substantial" injury. So also did the Court in *Kansas* v. *Colorado.* But for the purpose of balancing equities here, the Master made no finding. Complainants seek to supply this by vastly exaggerated statement. The benefit to defendants of this diversion is not a question (as it was with Colorado) of something gained. It is not a gain; it is the sole protection they have to health and sanitation. The Master has found (193) not only that this diversion could not be presently enjoined but also that the time when it *could* be enjoined and the rate at which it could be reduced is impossible of predetermination. It is a problem of stark necessity. It can be solved only by the day-to-day inspection of unremitting administrative control (194). It is receiving that control (see permit of March 3, 1925, and Master's comments thereon, pages 73-85). In such circumstances it can hardly be said to be "comity" for complainants to insist on the prayers in their bills before this Court. On this reasoning we think the whole contention that there is a *property* right in complainants in the uninterrupted flow of these waters fails. Certainly the right a state has to expect comity from its neighbor is not a property right in the sense of the 5th Amendment.

V.

The United States (or the Secretary of War) and the City of Chicago are necessary and indispensable parties to this suit and the case cannot properly proceed without them.

All persons materially interested in the subject-matter of a suit in equity must be made parties to it. This rule applies to cases in the original jurisdiction of this court. *State of California* v. *Southern Pacific Co.*, 157 U. S. 229; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

As to the material and adverse interest of the United States, this is the identical subject-matter which was involved in the suit instituted by the United States against the Sanitary District of Chicago. *Sanitary District* v. *United States*, 266 U. S. 405. In that case, this court held that the United States had, not only an interest, but the *paramount and controlling interest*—an interest *"imminent and direct"*—in that subject-matter, and that the Sanitary and Ship Canal "has been * * * an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf * * * which the United States, we have no doubt, would be most unwilling to see closed."

The amended bill asks that the taking of *"any water whatever* from Lake Michigan" be enjoined, that the amount of diversion "reasonably required for the purpose of navigation" be determined and that the determination of the Secretary of War, acting for Congress, of the amount of diversion proper in the regulation of navigation, be declared invalid and that the determination of this court be substituted therefor by a decree. Such a decree would injuriously affect the right of the United States, not only

in its *exclusive* power to regulate interstate commerce in the Great Lakes, in the Sanitary and Ship Canal, and the Des Plaines, Illinois, and Missisippi Rivers, but also in all that has been done in creating the great national and international waterway of which the works here involved are a pivotal part. It would thus adversely affect the rights and interests of the United States in matters where, as this court said in the Sanitary District case, *supra, "the national importance is imminent and direct * * *."* The United States is thus a necessary and an indispensable party.

Whenever it appears "that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit," the court will dismiss the cause, even where the point is "not raised by the pleadings or suggested by * * * counsel." (*Minnesota* v. *Northern Securities Co.*, 184 U. S. 199), and this, even though such other parties "cannot be joined without ousting jurisdiction." (*State of California* v. *Southern Pacific,* 157 U. S. 229.)

As to the interest of the City of Chicago the record is eloquent of the fact that either the original or alternative decree prayed for in this case would practically ruin her. Though the Sanitary District initiates taxes, the City of Chicago suffers from them. She diverts water over which diversion the Sanitary District has no control. Hers is the duty of installing meters under the conditions of the 1925 permit. It is her streets that will be torn up if either decree prayed for is granted. It is her electrical system that is to be destroyed by the injunction requested. She must pay for that and suffer otherwise as perhaps no city was ever made to suffer by acts of its national government.

It is her water system which complainants demand shall be altered by super-tunnels, pollution and saturation with

chlorine at a cost running into hundreds of millions of dollars. It is her beautiful water front that is sought to be ruined and her Chicago River that is to be turned into a privy vault in the heart of the city. It is her great buildings and docks which are to be destroyed. The Sanitary District has nothing to do with these things.

Why the City of Chicago was omitted to be joined is beyond comprehension. As to whether the case fails if she is not joined the case of the *State of California* v. *Southern Pacific Co.*, 157 U. S. 229, is exactly in point. This suit cannot proceed without Chicago.

VI.

Complainants have so frequently changed front as to the nature and extent of the remedy sought that defendants are now at a loss to know exactly what, if anything, they do ask.

(1) The original Wisconsin bill sought to enjoin only that portion of the diversion which was in excess of the amount which should be authorized by the Secretary of War.

(2) Complainants, as friends of the court in *Sanitary District* v. *U. S.*, 266 U. S. 405, sought only to enjoin diversion in excess of the amount authorized by the Secretary of War.

(3) In the amended bill of Wisconsin and in the bills of Michigan and New York, complainants seek to enjoin all diversion.

(4) In the oral argument on the motion to dismiss complainants asserted that 1,000 c.f.s. was sufficient for navigation and that the court should so find and enjoin diversion in excess of 1,000 c.f.s.

(5) In presenting their proofs before the Special Master complainants offered evidence to show that while some diversion was necessary for navigation this was limited to 1,000 c.f.s.

(6) In the oral argument before the Master complainants suggested that the court, if it enters a decree, should suspend its operation (Master's Report 139 and 193).

(7) In the briefs of complainants in support of their exceptions they ask the court to enjoin all diversion.

VII.

Defendants do not abandon, and understand that they do not lose the opportunity, if the occasion arises, later to press, certain defenses which are not argued here because they are not now material to support the findings and conclusions of the Special Master.

The Master has rested the determination of this case on his interpretation of Section 10 of the Act of March 3, 1899, that this statute reposes in the Secretary of War the absolute discretion to authorize defendants' acts as not constituting such an obstruction to the navigable waters of the United States as is inhibited by the statute, and has therefore found it unnecessary to consider the contentions made before him by complainants and now repeated in their briefs:

(a) That the permit of the Secretary of War was permissive merely, and that, therefore, the court should consider the mutual obligations and duties as between complainants and defendants, and, on a sort of modified doctrine of the case of *Cummings* v. *Chicago,* 188 U. S. 410, should conclude that whatever may be the authorization defendants hold from the *United States,*

yet as *against complainants* the diversion would be unlawful if the effect of it in any way impairs any rights of complainant states.

(b) That the governing law of this case is the doctrine of riparian rights at common law, and, therefore, if defendants, in any degree diminish the flow of waters to complainants, as lower riparian owners, a cause of action accrues to complainants regardless of the permit of the Secretary of War.

(c) That in this view, whatever authorization may be found in the permit of March 3, 1925, it has no effect on rights and duties as between complainants and defendants, and that, therefore, regardless of the permit, the court is put to the determination of the relative rights of quasi-sovereign states as between each other.

On this aspect of the case, defendants contended—

(a) That the governing rule in international law as between sovereign states is that there is no servitude in an upper riparian state in favor of a lower state, and that the various treaties creating limited servitude in this regard represent concessions as matters of comity.

(b) That under the doctrine of *Kansas* v. *Colorado*, this court will require such comity as between the quasi-sovereign states of the Union.

(c) That what will thus be required is not, however, an application of the common law of riparian rights, but a fair division of benefits and burdens and as an example that, in *Kansas* v. *Colorado* although Colorado was taking practically the entire low water flow of the river, and this taking seriously impaired agriculture in the western tier of Kansas counties, yet

the court, considering the great benefit to Colorado and the *relatively* small burden to the Arkansas Valley in the State of Kansas, balanced the equities and denied the relief.

(d) That similar consideration should govern here and, regarding the relatively small damage to complainants, and the economic catastrophe to defendants certain to result from injunction, the court should here also deny relief.

Defendants also showed and urged that the acquiescence of complainants for over a quarter of a century while the great complex sewage, water and electrical system of Chicago was created around and in reliance on this diversion was a bar to the relief sought. Many cases in American and English law were cited in support of this contention.

Defendants also showed the impairment of these waters for navigation by complainants and the Dominion of Canada chiefly by pollution, but also by diversions. Defendants also demonstrated that economic requirements of a rapidly expanding population in all states littoral of the lakes had resulted in many artificial changes in terrain and surface covering that had greatly and adversely affected the levels of the lake. On this basis, defendants advanced the defense of unclean hands.

VIII.

The questions raised by the complaint are administrative, legislative and political and are for this reason beyond decretal regulation. Injunction is an inappropriate remedy.

The Master (138-139, 170) has found that the questions presented are "peculiarly appropriate for legislative consideration or administrative action under legislative

authority". He has shown that the situation presents a complex and difficult problem requiring constant and expert executive administration, and (139 and 192) that even complainants recognize this to the extent of asking the Court to suspend the operation of any decree and itself undertake this task of determination and administration. He remarks (170) that the concomitant consideration of compensating works is within the power of Congress. He calls attention (181) to the expert equipment of the War Department to deal with such problems and to the fact (65) that in granting complainants' request the court would be "*compelled to deal with questions essentially of an administrative character.*" Indeed, the Master's thorough discussion of the subject on the above cited pages demonstrate that the only decree conceivable here is one whereby the court would undertake to proportion diversion to necessity periodically if not yearly; to supervise the construction of works to diminish it over a course of years. If this be doubted it is only necessary to look to see what the War Department *is doing.* By a method of trial and error which the Master says will take years, it is cooperating with Chicago to control the necessity for increase in diversion. The record in this case is eloquent of the engineering perplexities which will haunt every year of this endeavor. There is inevitably involved a course of complicated continuing administration which the court will not undertake.

Only the administrative and legislative branches of the Federal Government can undertake such problems.

The power of Congress over these waters is paramount, supreme and exclusive. There is no room in our system of government for the exercise of two sovereignties over the same subject matter. " * * * the elementary and long-settled doctrine is that there can be no divided

authority over interstate commerce * * *". *Chicago, Rock Island and Pacific Railway Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426. Complainant states have not *plenary power* to act as guardians of lake levels. At best, if they were permitted to prevail in such suits as these, they could prevent only diversions *within the United States.* They could not sue, or negotiate with, the British Empire or prevent diversions *within the Dominion of Canada.* Only the United States can protect lake levels from *both domestic and foreign diversions.* The power of the United States over lake levels must, of necessity, be paramount, supreme and exclusive. It is as much to the interests of complainants as it is to the interests of the other states of the Union that Congress should have paramount, supreme and exclusive jurisdiction over these national and international navigable waters.

The states sacrificed their dominion over waters to create a nation. It is hardly to be supposed that they did not do so on the understanding that what they gave up would be administered by the constructive, positive and political power of Congress and not by the negative and purely judicial power of a court.

Only Congress can dredge lakes, construct dams, dig canals and build breakwaters. This court cannot.

Only Congress can compose differences between economic areas, by mutual concession, compromise, composition and adjustment. This court cannot.

There is scarcely any aspect of this case which does not broaden and emphasize this view.

This is a controversy between economic areas and not between states in any fair sense of the term.

Its solution depends on engineers and officers of the Government and not on lawyers and courts.

A decree in this case could do no one any good. It could only hamper and embarrass the great constructive solution contemplated by the Federal Government. It might even prevent it entirely.

It would be a rash and unprecedented action to impose against this uniform decision and administration of over a quarter of a century a judicial decree cutting squarely across the whole course and policy of Federal legislation, adjudication and administration and by injunction to coerce, frustrate and stultify the judgment and determination of the rightful arbiters of the important questions entrusted to their care.

The suit of a state cannot import into the judicial power matters allocated by the Constitution to either of the other two great branches of the Federal Government. (*Georgia* v. *Stanton,* 6 Wall. 50, 75; *New Orleans* v. *Payne,* 147 U. S. 261, 266; *So. Pac. Co.* v. *Olympian Dredging Co.,* 260 U. S. 205; *Monongahela Bridge Co.* v. *U. S.,* 216 U. S. 177; *U. S.* v. *California Land Co.,* 148 U. S. 31, 43, and cases there cited; *Passaic Bridge Cases,* 3 Wall. Appendix 782; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 29-30; *Mass.* v. *Mellon,* 262 U. S. 447.)

The court cannot undertake such regulation as is here requested.

> "This power of regulation (fixing rates of speed on a railroad) * * * is a power legislative in character * * * the legislation may delegate to an administrative body the execution in detail of the legislative power of regulation * * * The courts have no right to intrude upon this function * * * In our opinion the injunction which was issued in this case constituted, in substance, the operation of a railway * * * was, in the first place, not within the limits of judicial power, and in the second place totally inconsistent with the power of regulation vested unmistakably by the

legislature in the executive authorities." (*Honolulu Co.* v. *Hawaii,* 211 U. S. 282, 291-293; see also *Plymouth Coal Co.* v. *Pa.,* 232 U. S. 531, on 543.)

It is one thing to inquire whether rates which have been charged and collected are reasonable—that is a judicial act; but entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." (*I. C. C.* v. *Cincinnati, etc. Ry.,* 167 U. S. 479, 499; *C. M., etc., Ry.* v. *Minnesota,* 134 U. S. 418, 458; *Reagan* v. *Farmers Loan and Trust Co.,* 154 U. S. 362, 397.)

Said Mr. Justice Holmes in a very similar case, *Missouri* v. *Illinois,* 200 U. S. 496:

"But the fact that this court can decide does not mean, of course, that it takes the place of a legislature."

That, in one sentence, is the whole of our contention under this point.

The problem here requires positive and constructive measures. The power invoked must of necessity be wholly negative and, in these circumstances, tremendously destructive. Complainants seek to invoke that power to coerce the legislative and executive departments to a particular plan of their own choosing.

The court has consistently declined to undertake such regulation of commerce. Some of the expressions of the court on these principles are excerpted below.

"The proposed bridges will, in some measure, cause an obstruction of navigation. * * * Bridges are highways as necessary to the commerce and intercourse of the public as rivers. If every bridge over a navigable river be not necessarily a nuisance * * * *who is to judge of this necessity?* Who shall say what shall be the height of a pier, the width of a draw and how it shall be directed, managed and controlled? Is this a matter of

judicial discretion or of legislative enactment? Can there be a nuisance which is authorized by law? In the course of seventy years of practical construction of the Constitution no act of Congress is to be found regulating such erections. * * * Where do we find any authority in the Constitution or acts of Congress for assuming it ourselves? These are questions which must be solved before this court can constitute itself *arbiter pontium* and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient to draw or how much inconvenience to navigation will constitute a nuisance. The United States has no common law offenses and has passed no statute declaring such an erection be a nuisance. If so, *a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion.* (*Passaic Bridge Cases*, 3 Wall. 782.) (Bridge case.)

"It cannot be necessary to say that where a public work of this character has been inaugurated or adopted by Congress and its management placed under control of its officers (referring to the whole system of lake harbors), *there exists no right in any other branch of the government to forbid the work or to prescribe the manner in which it shall be executed* * * * While the Engineering officers of the government are, under the authority of Congress, doing all they can to make the canal useful to commerce and keep it in good condition, this court can owe no duty to a state which requires it to order the City of Duluth to destroy it." (*Wisconsin* v. *Duluth*, 96 U. S. 379.)

"* * * It does not appear that the Secretary disregarded the fact or that he acted in any arbitrary manner or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to their judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That

was immaterial, for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. *It is for Congress, under the Constitution, to regulate the rights of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe the way in which the question of obstruction shall be determined.* Its action in the premises cannot be revised or ignored by courts or *by juries.*" (*Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 177.)

"So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. *Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.* * * * The conclusion to be drawn is that the question of whether the proper regulation and legislation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners and whether the whole flow of the stream should be conceded for the use and safety of navigation, *are questions legislative in character,* and when Congress determined, as it did by the Act of March 3, 1909, that the whole river * * * was necessary for the purposes of navigation of said waters * * * that determination was conclusive." (*U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53.)

"*It is Congress and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several states.*" (*Transportation Co.* v. *Parkersburg,* 107 U. S. 691.)

There is another consideration which we do not advance on technical grounds, but solely for the sake of the light it may throw on the political nature of this controversy.

Is this a controversy between *states* in any sense of the word? We have here *thirteen* political sovereigns, grouped seven on one side and six on the other, and a foreign sovereignty whose interests are stressed in complainants' brief. The considerations which brought here Missouri, Tennessee, Louisiana, Kentucky, Arkansas, and Mississippi, are equally potent to bring Oklahoma, Kansas, Nebraska, Iowa and South Dakota. We understand that the southern and western four-fifths of Minnesota is ranged against the rest of that state as to which side her representation here should take.

Is this not rather a contest between economic areas than a contest between states? And if such be the case, is this court the tribunal to *compose* their differences? *And if it is, have any such arbitrary and absolute rights as are advanced as the basis of this suit any place in the consideration of it?*

We think that the Congress was devised and intended by the Constitution for such purposes as these. One state is not the nation—but 48 states are. When a controversy assumes such proportions and takes such directions as this one has assumed and taken, we believe the question *ipso facto* becomes political, and whether it does or not, the principles which should govern it were well laid down by Mr. Justice Clark, in *New York* v. *New Jersey,* 256 U. S. 296, where he said:

> "* * * We cannot withhold the suggestion inspired by a consideration of this case that the grave problems of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted."

We think this bill should be dismissed because it asks the court to invade the constitutional functions of the legislative and executive departments.

IX.

The special acts cited sustain defendants' not complainants' construction of Section 10.

Complainants say (Michigan Brief 160-165) that *general authority* was not intended to be delegated to the Chief of Engineers and Secretary of War by the Act of March 3, 1899, and support their contention by citing certain later *special* acts, giving *specific authority* to the Secretary of War—the argument being, that, if the general act was intended as sufficient, why should the special acts have been necessary?

These special acts, cited by complainants and relied upon by them to sustain this contention are: (1) Section 2 of the Act of May 9, 1900, to "regulate the floating of loose timber and logs, etc.," which for convenience will be called the "Floating Logs" Act; (2) Section 4 of the Act of March 3, 1905, "to prescribe regulations to govern the transporting and dumping into any navigable water * * * of dredgings * * * and other refuse material," which for convenience will be called the "Dumping Regulations" Act; (3) Section 4 of the Act of March 26, 1908, "to fix * * * pierhead and bulkhead lines * * * in the *inner* harbor of San Pedro," which for convenience will be called the "San Pedro Harbor" Act; (4) Section 5 of the Act of March 3, 1909, to make "regulations for * * * navigation of the south and southwest passes of the Mississippi * * * as * * * shall seem necessary * * * for the purpose of preventing any obstruction by the works therein constructed," which for convenience will be called

the "Mississippi Passes" Act; (5) Section 5 of the Act of August 26, 1912, "to modify * * * harbor lines in front of the City of Chicago * * * so as to permit park extension work * * *," which for convenience will be called the "Chicago Park Extension" Act; (6) Section 1, Chapter 436 of the Act of June 25, 1910, to approve "plans * * * of the City of New York * * * to obstruct navigation of any * * * waterway, which does not form a connecting link between other navigable waters * * *, *by closing all or any portion of the same* or by building structures in or over the same * * *," which for convenience will be called the "New York City" Act; (7) Section 1 of the Act of March 4, 1913, "to make * * * regulations for the navigation of Ambrose Channel," which for convenience will be called the "Ambrose Channel" Act; (8) Act of July 27, 1916, "to fix * * * pierhead and bulkhead lines * * * *in* Newport Harbor, California * * *," which for convenience will be called the "Newport Harbor" Act, and (9) Seven "pending bills before the 70th Session of Congress," for the construction of bridges "across Little Calumet River" at Chicago, which for convenience will be called the "Little Calumet Bridges" Bills.

An examination of the special acts, relied upon by complainants to sustain this contention, clearly discloses that the powers specifically delegated by these later acts are not at all the same powers nor are they within the same powers as those "generally delegated" by the Act of 1899.

Complainants have quoted (Michigan Brief 164) only those portions of the "Floating Logs" Act which *suit* their contention, but omit other important portions thereof which *completely destroy*, their contention, as to the Act of 1899. Section 15 of the latter act provides "that it shall not be lawful * * * to float loose timber and logs * * * in * * * channels actually navigated." The "Floating

Logs'' Act provides: ''That the prohibition contained in Section fifteen of * * * the * * * Act, approved March third, Eighteen Hundred Ninety-nine, against floating loose timbers and logs * * * in * * * channels actually navigated * * * shall not apply to any navigable * * * waterway * * * whereon the floating of loose timber and logs * * * is the principal method of navigation.'' Complainants have failed to quote this portion of the act and their reason for failing to do so is obvious. The portions which they have omitted clearly show that the ''Floating Logs'' Act is not inconsistent with the Master's and defendants' construction of the Act of 1899, but, on the contrary, it confirms Section 15 thereof and repeals it in part, by authorizing the Secretary of War to make regulations, permitting ''the floating of loose timber and logs * * * in any navigable * * * waterway, whereon the floating of loose timber and logs * * * is the principal method of navigation''. It clearly appears, therefore, that the ''Floating Logs'' Act is not *inconsistent,* but is in *complete harmony,* with the Act of 1899, and the Master's construction thereof.

Section 15 of the earlier act *prohibits* ''the floating of loose timber and logs * * * in channels actually navigated,'' whereas the ''Floating Logs'' Act *allows* ''the floating of loose timber and logs * * * in any navigable * * * waterway, whereon'' *that* ''is the principal method of navigation, * * * subject to the rules and regulations prescribed by the Secretary of War * * *''.

The ''Dumping Regulations'' Act refers to *''any navigable water''* regardless of injuries to ''anchorage and navigation,'' whereas those portions of the Act of March 3, 1899, quoted by complainants (Mich. Brief 162), authorizes the Secretary of War to ''permit the deposit of any material,'' *only* ''whenever in'' his ''judgment * * *

anchorage and navigation will not be injured thereby * * *."

The "Dumping Regulations" Act authorizes the Secretary of War *"to prescribe regulations to govern,"* whereas by those portions of the Act of March 3, 1899, quoted by complainants, the Secretary of War is authorized to *"permit,"* the deposit of materials. The distinction is that in the earlier act the Secretary only *"may permit,"* while in the later one the Secretary may *"prescribe regulations,"* any violation of which "shall be subject to the penalties prescribed in Section 16 of the * * * Act of March third, Eighteen Hundred Ninety-nine, for the violation of the provisions of Section 13 of said Act." It will be seen, therefore, that the provisions of the "Dumping Regulations" Act are not only entirely consistent with the quoted portions of the Act of March 3, 1899, but that these provisions of the two acts are *mutual and inter-dependent,* in that the violation of "the regulations" authorized by the *later act* are "subject to the penalties" prescribed by the *earlier one.*

In the "San Pedro Harbor" Act the Secretary of War is "authorized to fix * * * pierhead and bulkhead lines" (complainants say) (Mich. Brief 163), "in the harbor of San Pedro." Here, again, there is a misquotation. The language is not "* * * in the harbor of San Pedro," but the language is "in the *inner* harbor of San Pedro". Complainants argue that the "San Pedro Harbor" Act would have been unnecessary if the Secretary of War had *general authority* under Section 11 of the Act of March 3, 1899, which authorizes "the Secretary of War" to establish "harbor lines." That does not follow. The "San Pedro Harbor" Act authorizes the establishment, not of "harbor lines" but of "pierhead and bulkhead lines," inside the *harbor lines,* that is, "in the *inner* harbor of San

Pedro". But there is another distinction. Section 11 authorizes the Secretary of War to establish "harbor lines" only "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors * * *". The "San Pedro Harbor" Act permits the establishment of "pierhead and bulkhead lines" (not "harbor lines") even though it is *not* "made manifest * * * that the establishment of" such "lines is essential to the preservation and protection * * * of the *inner* harbor of San Pedro * * *".

The "Mississippi Passes" Act, authorizing the Secretary of War "to make * * * rules and regulations for * * * navigation," is not inconsistent with any of the provisions of the earlier Act of March 3, 1899, which nowhere authorizes "rules and regulations for * * * navigation" to be made by the Secretary of War. Power to make rules and regulations cannot be ordered from a power to permit something. It must be specifically and explicitly granted. These later acts are, however, forceful illustrations of the growing tendency of Congress to delegate to the Secretary of War, whenever it sees fit, the full measure of the inherent powers of Congress over navigation and interstate commerce. They, therefore, strengthen rather than weaken the Master's construction of the Act of 1899.

The work authorized by the "Chicago Park Extension" Act could not have been permitted by the Secretary of War under the provisions of Section 11 of the Act of 1899, relating to "the establishment of harbor lines" for the reason that this "park extension work" was not "essential to the preservation and protection of harbors".

This is borne out by the opinion of the Judge Advocate General of December 9, 1913, concerning this case and

addressed to the Secretary of War, in which the Judge Advocate General says:

> "Your authority for the establishment of harbor lines is found in section 11 of the Act of March 3, 1899, and appears to be limited by express language to cases where it is 'manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors'."
>
> (Judge Advocate General's Opinion, "Chicago Lake Front 4," December 9, 1913.)

Consequently, a special act was necessary.

Complainants omit from their quotation of the "New York City" Act the vital and controlling portions thereof as follows: "by closing all or any portion of the same or by building structures in or over the same * * *". Of course, under the Act of 1899, the Secretary of War could not have authorized the City of New York "to obstruct navigation of any * * * waterway * * * by closing all * * * of the same or by building structures in or over the same * * *," thereby, not merely *obstructing,* but *completely destroying, all navigable capacity.* Consequently, a special act was necessary. Furthermore, the Chief of Engineers had, no doubt, refused his recommendation.

The "Ambrose Channel" Act authorizes the Secretary of War to "make * * * rules and regulations for * * * navigation." This *special authorization* is not inconsistent with any *general authorization,* conferred by the Act of 1899, which nowhere authorizes "rules and regulations for * * * navigation," to be made by the Secretary of War.

The "Newport Harbor" Act authorizes the Secretary of War to establish, not "harbor lines," but "pierhead and bulkhead lines * * * in Newport Harbor * * *" (Mich.

Brief 163)—that is, *within* the harbor. This could not have been done by the Secretary of War under the general authority, delegated to him by Section 11 of the Act of 1899, because Section 11 relates to "harbor lines" and not to "pierhead and bulkhead lines," and because the special circumstances of the "Newport Harbor" case were such that it was *not* "made manifest * * * that the establishment of" such "lines" was "essential to the preservation and protection of harbors," which is a condition precedent to the exercise of his authority in such a case. Furthermore, the Newport Harbor application did not have the approval of the Chief of Engineers. He held "that there was no harbor in the commercial sense of the word at the place in question and that such harbor as in any sense might be there, required no harbor lines for its protection and preservation. He suggested that the underlying purpose must be the furtherance of a real estate proposition of some kind" (Judge Advocate General's Opinion 62-400, January 27, 1915).

In the "Newport Harbor" case the Secretary of War was advised by the written opinion of the Judge Advocate General that the Secretary of War was without power, under Section 11 of Act of 1899, to establish the lines in question for the reason that the Chief of Engineers had found that the establishment of such lines was not "essential to the preservation and protection of harbors."

This opinion is, in part, as follows:

> "The sole authority for the establishment of harbor lines is found in section 11 of the River and Harbor Act of March 3, 1899, * * *
>
> * * * * * *
>
> "Thus it is that before harbor lines can be established it must be manifest that they are essential to the preservation and protection of a harbor". (Judge

Advocate General's Opinion, 62-400, January 27, 1915.)

Under these circumstances, of course, it was necessary for those interested in the "Newport Harbor" case to have a special act authorizing the Secretary of War to establish the lines in question, because he was not authorized to do so under Section 11 of the Act of 1899, inasmuch as it was not "made manifest to" him "that the establishment of" these lines was "essential to the preservation and protection of harbors * * *".

The pendency of the "Little Calumet Bridges" bills has no bearing whatever upon the construction of Section 10 of the Act of 1899. These bills are apposite to Section 9, and not to Section 10, of that Act. But "the navigable portions" of Little Calumet River do not "lie wholly within the limits of a single state * * *," and, therefore, the bridges across the Little Calumet River do not come within the first proviso of Section 9, which permits the building of a bridge with the "authority of the legislature of a state across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and Secretary of War * * *".

Therefore, express authority of Congress is necessary for the authorization of these bridges.

Of these special acts, relied upon by complainants, only the "New York City" Act is apposite to Section 10, but what was there sought to be done is not within its provisions. In the "New York City" case it was not desired merely to "alter or modify the * * * capacity" of navigable waters. In that Act, the authority granted was "to obstruct navigation" of the waterways in question, "by clos-

ing all * * * of the same or by building structures in or over the same * * *". This amounted to a *complete destruction of all navigable capacity* and was not merely an *"alteration or modification"* of the navigable capacity.

The "Dumping Regulations" Act is apposite to Section 13 of the Act of 1899. It does not require, as does Section 13, any finding that "anchorage and navigation will not be injured". It also authorizes the Secretary of War to make "regulations," a power not delegated in Section 13.

The "San Pedro Harbor," the "Chicago Park Extension," and the "Newport Harbor" acts are apposite, not to Section 10, but to Section 11, which authorizes the "establishment of harbor lines" only "where it is manifest that" such lines are "essential to the preservation and protection of harbors".

The "Ambrose Channel" and the "Mississippi Passes" acts, which authorize the making "of regulations" are apposite to no part of the Act of 1899, which nowhere authorizes "the making of regulations".

The "Little Calumet Bridges" bills are apposite, not to Section 10, but to Section 9, and they do not come within the provisions of Section 9, because "the navigable portions" of the Little Calumet River do not "lie wholly within the limits of a single state".

These special acts, therefore, being neither apposite to, nor within, the provisions of Section 10, certainly can have no bearing upon its construction. They do, however, emphasize the growing tendency of Congress to delegate to the Secretary of War, whenever it sees fit, the full measure of its inherent powers over navigation and interstate commerce.

Consequently these special acts strengthen, rather than weaken, the interpretation and construction placed upon Section 10 in the Master's Report.

X.

Complainants must show a clear legal right to the relief prayed. There can be no pretense that they have in any manner brought themselves within the test established by the court for suits between states.

Missouri v. *Illinois,* 200 U. S. 496.

> "But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. * * * Before this Court ought to intervene, the case should be of serious magnitude, clearly and fully proved and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

See also,

New York v. *New Jersey,* 256 U. S. 296.
North Dakota v. *Minnesota,* 263 U. S. 365.
Kansas v. *Colorado,* 185 U. S. 125.

CONCLUSION.

This bill should be dismissed because:

1. It is a suit in the name of states and navigation but in the interest of individuals in violation of the eleventh amendment.

2. It is no just sense a suit between states. It is a controversy between economic areas, one of which crosses an international boundary. Its bearings are all political and its determination is peculiarly a function of Congress and not of this court.

3. It addresses a fundamental and intricate national problem, capable of many solutions which would be beneficial to the general good and seeks to restrict its determination to a single solution, inimical to the general good and beneficial to a single economic area and particular private interests.

4. It is an attempt to coerce the discretion of the legislative and executive departments of government in a matter committed exclusively to their care, and to embarrass and control the negotiations of government with a foreign state.

5. Solution of the problem presented involves continuous administration and relations with a foreign nation. As between states, it requires co-operation, composition and adjustment. Such solution is impossible in the

judicial field of absolute rights, instant determination and irrevocable decree—in a word, this is a problem which is political, legislative and administrative and not judicial in its nature.

6. The bill fails in every juridical requirement. It shows no right, no wrongful act, no injury. It is brought by the wrong parties complainant. It fails to join indispensable parties. The controversy is not presented in a manner appropriate to judicial cognizance. The complaint properly lies in the Constitutional field of other branches of the Federal Government. The relief prayed for is inappropriate to the functions and facilities of the court, outside its jurisdiction, and has incidental bearings repugnant to its purpose.

7. The decree of the court in Sanitary District v. United States and the permit of the Secretary of War issued in compliance therewith (both patent on the face of the bill), are a complete and conclusive answer to the complaint.

8. The bill is inappropriate to the subject-matter of the suit, to the jurisdiction of the court and to the nature of the questions involved.

9. The proof of injury is derivative, remote, indefinite and insufficient.

10. The injunction prayed would wreak a vast calamity with no correlative benefit to anybody.

11. The action has failed in every aspect—procedural, factual and equitable.

The bills of complaint in the three cases here involved should be dismissed at the cost of the complainants.

Respectfully submitted,

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