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, Original.

State of Michigan, Complainant,
vs.
State of Illinois and Sanitary District of Chicago, Defendants.
No. 11, Original.

State of New York, Complainant,
vs.
State of Illinois and Sanitary District of Chicago, Defendants.
No. 12, Original.

APPENDIX TO DEFENDANTS' BRIEF.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

NOTE.

Complainants' contention that the War Department interpretation of Section 10 of the 1899 Act of Congress has been in a state of uncertainty and has been and is contrary to the Special Master's interpretation, is further completely met by the Memorandum of the Judge Advocate General, February 12, 1907, to the Secretary of War, entitled, "In the Matter of the Application of The Sanitary District of Chicago to reduce the flow of the Calumet River," approved by the Secretary of War by Memorandum of March 14, 1907. (Master's Report, 49-51.) This Memorandum of the Judge Advocate General is set forth in haec verba in the following pages.

WAR DEPARTMENT,

OFFICE OF THE JUDGE-ADVOCATE GENERAL, D.

WASHINGTON.

February 12, 1907.

In the Matter of the Application of the Sanitary District of Chicago to Reduce the Flow of the Calumet River.

Memorandum by the Judge Advocate General.

To reach a reasonable interpretation of Section 10 of the River and Harbor Act of March 3, 1899, it will be necessary to mention some preceding legislation. The matters which were made the subject of statutory regulation in the Act of March 3, 1899, had been previously made the subject of legislative consideration in the Act of September 19, 1890, which provided, *inter alia*, that:

> "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, commerce, or anchorage of said waters.
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> "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 manner 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 * * *" Sec. 7, Act of September 19, 1890 (26 Stat. L., 454).

Section 10 of the Act provides:

"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 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, 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." Sec. 10, Act of September 19, 1890 (26 Stat. L., 454, 455).

Section 7 of the Act of 1890 was amended in 1892, so as to read as follows:

"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, bridge draw, 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 manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War * * *" Sec. 7, Act of July 13, 1892 (27 Stat. L., 110).

The Act of 1890 seems to have given rise to considerable difficulty in execution; this is indicated by the language used in an opinion rendered by Attorney-General Olney in 1894, in which he says:

"It may be admitted that the entire act is infelicitously, not to say clumsily, drawn, and that the proviso just cited is the most obscure and unfortunate portion of it. Nevertheless, when the general scope and tenor of the whole statute are considered in connection with its main purpose, and in view of the facts to which Congress must have meant it to apply, the difficulties attending its interpretation largely disappear and leave a tolerably intelligible and consistent piece of legislation." (XXI Opins. Atty. Gen. 42).

As a result the Act was made the subject of amendment in 1899, in which it was provided:

> "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 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. 9, Act of March 3, 1899 (30 Stat. L., 1151).

Section 10 contained the requirement:

> "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, outside established harbor lines, or where no harbor lines have been established, except on plans recom-

mended 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 of 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. 10, *Ibid.*

When the matter was undergoing consideration in the Senate, the sections of the Act of 1899 last above cited formed part of a series of amendments to the Act of 1890 which it was proposed to embody in the bill, and the Chairman of the Senate Committee on Commerce gave the following explanation of the contents and purpose of the amendments:

"There are not ten words changed in the entire thirteen sections. It is a compilation. The Senator understands that these laws have been passed in this way: A section in a river and harbor act fifty years ago, another one forty years ago, another one twenty years ago, another one later, and so on down. We put a provision in the last river and harbor act to codify those laws. The Department have codified them, and in their careful examination during the codification they found two or three of them, relating principally to impediments placed in harbors and things of that kind, which required to be changed, as to just a word or two, because the Attorneys-General had rendered different decisions in regard to the effect of the law.

"It seems to me there is no necessity of reading them. I will state further, as I said before, that I examined them myself. I then had them referred to a subcommittee of the Committee on Commerce to go over them carefully, and the subcommittee reported that they were all right." (Congl. Record, Vol. 32, part 3, page 2297).

With that explanation the amendments above cited were embodied in the Act of March 3, 1899.

It will be observed that Section 9 of the Act of 1899 relates to the construction of bridges, dams, dikes, or causeways over the navigable waters of the United States; that is to structures which completely cross a portion of the navigable waters, in most cases for the purpose of enabling commerce to be carried over or across the river, harbor or other navigable water in which the work is constructed. It will also be observed that Section 10 relates to the construction of works in the nature of wharves, piers, breakwaters, jetties, and the like, in the navigable waters, which project into, rather than cross the bodies of water in which they are located. Section 10 also contains some requirements in respect to excavations or fills, and to certain modifications of the course, location, or capacity of the navigable waters of the United States.

It is proper to observe also that Section 10 of the Act of 1890 is in substance a penal statute. The first three lines of Section 10 of the Act of 1890 are substantially the same as the first three lines of Section 10 in the Act of 1899. The remainder, however, of Section 10 of the Act of 1899 is a substantial reenactment of the requirements of the first clause of Section 7 of the Act of 1890.

The first clause of Section 7 of the Act of 1890 prescribed a method in which wharves, breakwaters, jetties, and other structures of similar character might be constructed in the navigable waters; that is, the Section provided that:

> "It shall not be lawful to build any wharf * * * without the permission of the Secretary of War."

That is, with the permission of the Secretary of War, it would be perfectly lawful to establish a structure of the classes described in Section 7 in such navigable waters;

and such, in fact, was the practice of the Department from 1890 to 1899, in granting permission for the establishment of obstructions in the navigable waters of the United States.

Section 10 of the Act of 1899 was constructed by taking the first clause of Section 10 of the Act of 1890, which was a penal clause pure and simple, and placing it at the head of the first paragraph of Section 7 of the Act of 1890, and the two clauses are so merged or combined as to form Section 10 of the Act of 1899; so that the question to be determined is, what change in interpretation or application has been imported into Section 10 of the Act of 1899 by this combination or merger of parts or clauses of Sections 7 and 10 of the Act of 1890? I think it will be conceded that, if the first clause of Section 10 of the Act of 1899 be removed, what remains will constitute a rule of action which will give no occasion for any difficulty in execution.

It is the view of the Chief of Engineers that the operation of the first clause of Section 10 is very important, and that it changes the character, meaning and application of the entire section. Reduced to its lowest terms that is the question which is referred to this office for opinion.

The first clause goes on to say—"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." So long as this clause constituted a part of Section 10 of the Act of 1890, its necessity was clear. It was a part of a penal statute and operated to create an unlawful status in respect to any obstruction theretofore or thereafter established in the navigable waters of the United States and a penalty for violation of its requirements was imposed in the statute. But what is prohibited in Section 10 of the Act of 1899?

The creation of any obstruction not *affirmatively* authorized by Congress.

For the purposes of this discussion the word "affirmatively" may be regarded as applying to a case in which positive permission in some form, for the establishment of a structure in the navigable waters has been given by Congress. The permission may be given in general terms, or it may apply to a particular case or class of cases. Congress might also have used the word "expressly" instead of "affirmatively." If that word had been used, I think the conclusion would have been inevitable that the consent of Congress would have to be given in each separate case, or, at the outside, in each class of cases which had been made the subject of explicit mention and description. It will thus appear that the word "affirmatively" is somewhat more general in its application than the word "expressly." A structure is "affirmatively" authorized if its authorization is positive and is not obtained from a statute by inference or implication. A structure is "expressly" authorized when a specific authority for that particular structure is given in an enactment of Congress.

If Section 7 of the Act of 1892, hereinbefore cited, be examined, a case of "affirmative" authorization will be disclosed. Section 7 goes on to say that it shall not be lawful to construct certain bridges, dams, etc., in the navigable waters, until the plans for the same have been submitted to and approved by the Chief of Engineers and by the Secretary of War. Here there is an express delegation of authority by Congress and it cannot be doubted that, if the plans have been submitted to those officers, and have been approved by them, the consent of Congress passes and the structure becomes lawful. In other words, the consent of Congress is given for the establishment of certain structures in the navigable waters of the United

States in cases where the plans have been submitted to and approved by the Secretary of War.

Omitting the first clause, Section 10 of the Act of 1899 contains an example of affirmative authorization. The Act goes on to say that it shall not be lawful to build any wharf, pier, etc., except on the plans recommended by the Chief of Engineers and authorized by the Secretary of War. From this it follows that, if the plans of the structure have been recommended by the Chief of Engineers and authorized by the Secretary of War, the work can be proceeded with as one coming within the affirmative authorization of Congress.

Section 9 of the Act of 1899 contains an example of "express" authorization, as the bridges and other structures which are provided for in that section are required to be authorized by Congress, if they are to be erected in the Navigable waters of the United States, and by the Legislature of the State if in waters lying wholly within the State. In both cases, however, the approval of the plans by the Secretary of War and Chief of Engineers is a necessary condition precedent to construction.

It will thus appear that Section 10 is composed of two clauses. The first of these clauses is general in its terms, and prohibits "the creation of any obstruction" which has not been "affirmatively authorized by Congress." The second clause is specific in character and prescribes an exact method of procedure; standing alone it conveys an ample delegation of power to the Secretary of War and Chief of Engineers to authorize the placing of certain obstructions in the navigable waters of the United States; indeed, the delegation of authority to allow refuse matter to be deposited in the navigable waters is accomplished in Section 13 of the same enactment by the use of identical language. A similar form of words was resorted to with

a view to delegate certain powers to the Secretary of War in Section 7 of the Acts of September 19, 1890 and July 13, 1892.

The two apparently conflicting clauses of Section 10 of the Act of 1899 would thus seem to present a case for the construction of general and special clauses of legislation.

In laying down the rule of interpretation which is applicable in such cases, Bishop, in his "Written Laws," a standard authority in interpretation, says:

> "Where there are words expressive of a general intention, and then of a particular intention incompatible with it, the particular must be taken as an exception to the general, and so all the parts of the act will stand. And, as a broad proposition, general words in one clause may be restrained by the particular words in a subsequent clause of the same statute. This doctrine applies even to statutes enacted at different dates, and it will be more fully illustrated in other connections." (Bishop, Written Laws, Sec. 64).

Elsewhere the same author says:

> "Out of the special matter of the statute grows also a doctrine, spoken of likewise in other connections, whereby apparently conflicting provisions are reconciled and made harmonious. It is applicable equally to the different clauses of the same enactment, to different statutes at whatever different times passed, and to the common and statutory laws when viewed in combination. It is, that the general and specific in legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general; so that general and specific provisions in the laws, both written and unwritten, may stand together, the latter qualifying and limiting the former." (*Ibid,* Sec. 112a). See also Endlich on Interpretation, Sec. 399; Sedgwick on Construction, p. 360; Black on Interpretation of Laws, p. 140.

In *State* v. *Inhabitants of City of Trenton* (38 N. J. Law, 64), it was said:

> "When a legislative act contains two sets of provisions, one giving specific and precise directions to do a particular thing, and the other in general terms prohibiting certain acts which would, in the general sense of the words used, include the particular act before authorized, the general clause does not control or affect the specific enactment."

Considerable light is thrown upon the question of interpretation which is here presented in the case of *Cummings* v. *Chicago* (188 U. S., 410). Cummings had applied to the Chief of Engineers for a permit to rebuild a dock on the Calumet River and, on May 12, 1900, and under the authority conferred by Section 10 of the Act of March 3, 1899, a permit had been issued by the Secretary of War and the Chief of Engineers for the reconstruction of the wharf. Cummings had omitted to obtain the permission of the Department of Public Works, which is required, by a municipal ordinance of the city of Chicago, as a condition precedent to such reconstruction. It was held by the court that neither the Act of September 19, 1890, nor that of March 3, 1899, vested the right in an individual to erect such an obstruction in the navigable waters of the United States without the consent of the local and Federal Governments.

Section 10 of the Act of 1899 is referred to in the decision, and it was not claimed by counsel that there was any express legislative authority for the rebuilding of the wharf. It was recognized by the court that the consent of Congress, as contemplated in the Acts of 1890 and 1899, had been given and was embodied in the permit issued by the Secretary of War and the Chief of Engineers for the reconstruction of the wharf, and this permit had been based

on Section 10 of the Act of March 3, 1899. As the court was passing upon the exclusive power of Congress to control the placing of obstructions in the navigable waters, it could hardly have escaped its attention that there had been no express consent given by Congress for the rebuilding of Cummings' wharf in the Calumet River, and that the only consent in the case was that embodied in the permit issued by the Secretary of War and the Chief of Engineers on May 12, 1900. If this form of expressing the consent of the Federal Government had been deficient, in that an express authorization of Congress was necessary to the work of reconstruction, it would seem that the attention of the court would have been directed to it by the able counsel who represented the plaintiff and defendant in error.

In a subsequent case, *Montgomery* v. *Portland* (190 U. S., 89), the decision in *Cummings* v. *Chicago* was followed by the Supreme Court, and Section 10 of the Act of March 3, 1899, is fully cited by the court in its decision. Here again the consent of Congress was embodied in a permit issued by the Secretary of War, and if Montgomery's authority to construct his pier had been defective, not having been expressly given by Congress, it would hardly seem that the defect could have escaped the attention and comment of the court. In the course of the decision the court says:

> "It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by

private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies." (*Montgomery* v. *Portland,* 190 U. S., 89-105).

In *Corrigan Transit Company et al.* v. *Sanitary District of Chicago* (137 Fed. Rep., 851), a permit was issued by the Secretary of War and Chief of Engineers on May 8, 1899, authorizing the Sanitary District of Chicago to divert the waters of the Chicago River into the drainage canal, under certain conditions which are expressed in the permit. It was claimed by the plaintiff that the current created in consequence of the diversion was so great as to materially interfere with the movement of barges in the opposite direction. It was also held that the delegation of power by Congress to the Secretary of War was unconstitutional. As to this the court said:

"Libelants have taken the further position here that the part of Section 10 (Act March 3, 1899, 30 Stat. 1151), which purports to authorize the Secretary of War to issue permits is unconstitutional as being a delegation of legislative power; * * *.

"A decision of the question whether legislative power was delegated to the secretary (see *Field* v. *Clark,* 143 U. S. 649); (*Buttfield* v. *Stranahan,* 192 U. S. 470), is unnecessary, for the reason that libelants are in error in assuming that section 10, thus emasculated, would remain in force. Congress, acting under the commerce clause, said to Illinois, which would otherwise be sovereign, 'You are not to change the course of the river unless you first obtain the secretary's approval of your plan.' The sentence in its entirety—the subjunctive clause as well as the indicative—expressed the will of Congress. The expressed intention was, not to exclude Illinois utterly from exercising her police powers over the river for the welfare

> of her citizens (and that suggests a nice and delicate question), but to permit the continuation of the exercise upon condition. Now, if the conditional clause is to be deleted, it is not for the courts to construct a new congressional policy out of the fragment. *Compare Montgomery* v. *Portland* (190 U. S. 105)." *Corrigan Transit Co.* v. *Sanitary District of Chicago,* (137 Fed. Rep., 851-857).

I am therefore of opinion that the true construction of Section 10 of the Act of March 3, 1899, does not require the explicit consent of Congress for the placing of an obstruction in the navigable waters, but that an obstruction of the classes named therein may be placed in such waters when the plan of the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning of the same, and that excavations and fills may be made with the same authority.

There is another point of view from which the inclosed communication of the Chief of Enginers should be regarded.

The Acts of 1890 and 1892 vest, by delegation, a limited power in the Secretary of War to authorize the placing of obstructions in the navigable waters of the United States. In the amendments which were incorporated in this legislation by the Act of March 3, 1899, the delegation is made, not to the Secretary of War alone, but to the Secretary of War and the Chief of Engineers, each of whom is charged in the statute with an independent exercise of discretion.

It is therefore necessary to the issue of a permit, in the operation of Section 10 of the Act of March 3, 1899, that the Secretary of War and the Chief of Engineers should separately approve or recommend the placing of obstructions in the navigable waters of the United States. If either disapproves, or fails to recommend or approve, the issue of the instrument is defeated.

In the case in reference application has been made by the Sanitary District of the City of Chicago to reduce the flow of the Calumet River. In the inclosed communication, the Chief of Engineers clearly fails to recommend the alteration, or modification of the course, capacity, or flow of the Calumet River. As his recommendation is required to be had, as a condition precedent to the issue of the permit, the project necessarily fails, and it is the opinion of this office that no permit can lawfully issue.

Very respectfully,

GEO. B. DAVIS,
Judge Advocate General.