IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATES OF WISCONSIN, MINNESOTA, OHIO, and PENNSYLVANIA, Complainants, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, Defendants. STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI, and ARKANSAS, Intervening Defendants.	No. 5, Original.
STATE OF MICHIGAN, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	No. 8, Original.
STATE OF NEW YORK, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	No. 9, Original.

BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION OF OCTOBER 3, 1932.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

SUBJECT INDEX.

TABLE OF CASES.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

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BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION OF OCTOBER 3, 1932.

STATEMENT OF THE CASE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This cause comes before the court upon an application filed October 3, 1932, by the States of Wisconsin, Minne-

sota, Ohio and Michigan (hereinafter for convenience referred to as the "application"), for a rule

> "directed to the Governor and Attorney General of the State of Illinois, and to the Sanitary District of Chicago, directing the State of Illinois and the Sanitary District of Chicago to show cause, if any either has, why this Court should not appoint a Master, Commissioner, Receiver and/or United States Marshal to perform" the decree of this Court entered herein on April 21, 1930, "on behalf and at the expense of the State of Illinois and the Sanitary District of Chicago, with full power to exercise and bind the credit of the State of Illinois and the Sanitary District of Chicago, and to make the expenditures necessary to effectuate the decree a lien upon all of the property in the State of Illinois and upon all the revenues of that State and of the Sanitary District of Chicago, to issue bonds secured by the full faith and credit, the complete taxing power and all of the revenues of the Sanitary District of Chicago and the State of Illinois, to make such bonds a lien upon all of the property in the State of Illinois and upon all of the revenues of the State of Illinois and of the Sanitary District of Chicago, to levy and collect such taxes as may be necessary to provide for payment of the interest upon such bonds as it accrues and to provide a sinking fund to pay the principal of such bonds as said bonds fall due, to refinance outstanding bonds and obligations of the Sanitary District of Chicago as they may severally fall due, and to do everything which may be necessary, convenient or proper to bring about the speedy enforcement of the decree of this Court and the speedy restoration of your applicants' rights, such officer or officers to continue to exercise such powers until the decree has been fully performed and all obligations created on behalf of the State of Illinois and the Sanitary District of Chicago shall have been fully discharged, or until the State of Illinois and the Sanitary District of Chicago shall have made adequate provision for the performance of the decree and the satisfaction of any obligations created on their behalf by such officer of this Court, and for such other and further relief in the premises as shall seem just and meet."

On October 10, 1932, a rule was entered in which it was ordered by this court

> "that the Sanitary District of Chicago show cause, by printed return, on or before Monday, November 7, 1932, why it has not taken appropriate steps to effect compliance with the requirements of the decree of this Court in these causes dated April 21, 1930 (281 U. S. 696)."

A similar rule was directed to the State of Illinois.

The return of the Sanitary District of Chicago and the State of Illinois (hereinafter at times referred to collectively as "respondents") was duly filed on November 7, 1932.

Pursuant to a further direction in the order of this court entered on October 10, 1932, the respondents submit this brief in opposition to the relief sought in the prayer of the application.

The issues to be determined are presented by (1) the decree entered herein on April 21, 1930, which is to be construed, if such construction is necessary, in the light of the opinions of this court announced on January 14, 1929, 278 U. S. 367, and on April 14, 1930, 281 U. S. 179, and the "Report of the Special Master on Re-reference" filed December 17, 1929; (2) the semi-annual reports of the Sanitary District of Chicago (hereinafter for convenience at times referred to as the "Sanitary District") filed pursuant to the terms of the decree; (3) the application of the complainants filed herein on October 3, 1932; and (4) the return of the respondents. The provisions of the decree, the substance of the reports of the Sanitary District, the substance of the application of the complainants named, and of the return thereto of the respondents in so far as they are regarded material, are set forth at this point for the convenience of the court.

The Decree.

The decree, 281 U. S. 696, provides as follows:

"These causes came on to be heard upon the pleadings, evidence, and the exceptions filed by the parties to the Report of the Special Master, as well as on the exceptions filed to the Report of the Special Master on Re-reference, and were argued by counsel. The Court now being fully advised in the premises, and for the purpose of carrying into effect the conclusions set forth in the opinions of this Court announced January 14, 1929, 278 U. S. 367, and April 14, 1930 [*ante,* p. 179],

"It is now here ordered, adjudged, and decreed as follows:

"1. On and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 cubic feet per second in addition to domestic pumpage.

"2. That on and after December 31, 1935, *unless good cause be shown to the contrary,* the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 5,000 cubic feet per second in addition to domestic pumpage.

"3. That on and after December 31, 1938, *unless good cause be shown to the contrary,* the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any

of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of the annual average of 1,500 cubic feet per second in addition to domestic pumpage.

"4. That the provisions of this decree as to the diverting of the waters of the Great Lakes-St. Lawrence system of watershed relate to the flow diverted by the defendants exclusive of the water drawn by the City of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage. The amount so diverted is to be determined by deducting from the total flow at Lockport the amount of water pumped by the City of Chicago into its water mains and as so computed will include the run-off of the Chicago and Calumet drainage area.

"5. That the defendant the Sanitary District of Chicago shall file with the clerk of this Court semiannually on July first and January first of each year, beginning July first, 1930, a report to this Court adequately setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also setting forth the extent and effects of the operation of the sewage treatment plants, respectively, that shall have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of this decree down to the date of such report.

"6. That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate.

"7. That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-

described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

"And it is further ordered that the costs in these cases shall be taxable against the defendants." (Italics ours.)

Recommendations of the Special Master (Report of the Special Master on Re-reference, pages 144-149), that the decree should include directions with respect to the time to be given to the Sanitary District to complete the proposed construction program, so as ultimately to dispense with diversion beyond 1,500 cubic feet a second, were not adopted, and the decree contains no coercive or mandatory provision with respect to the time of completion of the various projects and their appurtenances. The dates specified in the decree relating to the amounts of reductions in the diversion of water from Lake Michigan, however, are based upon the time deemed necessary at the date of the decree for the completion of the several projects. (*Wisconsin, et al.* v. *Illinois, et al.*, 281 U. S. 179, 198-199.) The dates suggested by the Special Master (Report of the Special Master on Re-reference, pages 142, 146) for the completion of the various Treatment Works may be summarized as follows:

	To be completed
North Side Treatment Works and Batteries A and B of Imhoff Tanks at West Side Treatment Works	July 1, 1930
Calumet Treatment Works	December 31, 1933
West Side Treatment Works	December 31, 1935
Southwest Side Treatment Works	December 31, 1938

The Special Master further recommended (Report of Special Master on Re-reference, pages 143, 147) that Controlling Works should be constructed near the mouth of the Chicago River by the Sanitary District, within two years after receiving authorization from the Secretary of War, for the purpose of preventing reversals of the Chicago River at times of storm. Such authorization has not been received. (Return of Respondents, pages 26-27.)

The Special Master qualified his recommendations concerning the times of completion for the various projects by stating (Report of Special Master on Re-reference, pages 142, 146)

> "that in the foregoing estimate allowance is made for ordinary contingencies, but not for strikes *or other occurrences beyond the control of the Sanitary District* or its contractors,"

and by stating further (page 144) that

> "it must be assumed that out of respect to the Court the State of Illinois and the Sanitary District will perform what the findings conclude they should do, *unless obstacles arise which make such compliance impossible.*" (Italics ours.)

The decree of this court, in adopting the recommendations of the Special Master regarding the dates for reductions in diversion of water from Lake Michigan, also made provision for unforeseen contingencies as suggested by the Special Master, by expressly providing that the reduction in diversion to 5,000 c. f. s. on December 31, 1935, and to 1,500 c. f. s. on or before December 31, 1938, should be made "unless good cause be shown to the contrary."

It is stated in the opinion of the court, upon which the decree is based (*Wisconsin* v. *Illinois,* 281 U. S. 179, 197) that the plans of the Sanitary District for disposal of the sewage "are material only as bearing on the amount of

diminution to be required from time to time and the times to be fixed for each step," and that (page 198) "all action of the parties and the Court in this case will be subject, of course, to * * * any modification that necessity may show should be made by this Court." In speaking of the Controlling Works this court stated further (page 198) "on this point we deal only with the amount [of the diversion] and the time."

The Reports of the Sanitary District Filed Pursuant to the Decree.

In compliance with the requirements of the decree, the Sanitary District has filed with the clerk of this court semi-annually on July first and January first of each year, beginning July 1, 1930, a report setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also setting forth the extent and effects of the operation of the sewage treatment plants respectively that have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of the decree down to the date of the respective reports.

These reports show that the Sanitary District has complied with the decree by reducing the amount of annual average diversion from Lake Michigan to less than 6,500 cubic feet a second since July 1, 1930. The reports show further that on April 21, 1930, the sewage treatment amounted to 16.7 per cent of the total sewage of the District. On June 24, 1930, there was treatment of 24.8 per cent of the total sewage (semi-annual report of July 1, 1930, page 13). The semi-annual report filed on July 1, 1932, page 9, indicates that on June 25, 1932, 31.6 per cent

of the total sewage within the Sanitary District was being treated.

The reports contain an analysis of the amounts expended by the Sanitary District for construction and explain in detail the amount of work done and remaining to be done. Reasons are therein given for a temporary delay in construction work due to occurrences beyond the control of the respondents, which have not as yet prevented compliance with the decree. These matters are summarized and treated more fully in the return that has been filed to the rule to show cause, and will be discussed in greater detail in our comments upon the return of the respondents.

The Application of Complainants.

The application of the complainants complains of lack of progress by the Sanitary District in its construction program which was adopted upon the entry of the decree. The greater part of the application is devoted to charges of negligence, incompetence and bad faith on the part of the respondents, and kindred allegations made chiefly on information and belief; exaggerated deductions based upon the present temporary financial plight of the Sanitary District are made concerning the possible time within which the construction work can be completed.

In the prayer for relief the complainants ask that a rule be issued directing the respondents to show cause why this court should not appoint a Master, Commissioner, Receiver or United States Marshal "to perform this decree" with power to exercise and bind the credit of the respondents and

> "to make the expenditures necessary to effectuate the decree a lien upon all of the property in the State of Illinois and upon all the revenues of that State and

of the Sanitary District of Chicago, to issue bonds secured by the full faith and credit, the complete taxing power and all of the revenues of the Sanitary District of Chicago and the State of Illinois, to make such bonds a lien upon all of the property in the State of Illinois and upon all of the revenues of the State of Illinois and of the Sanitary District of Chicago, to levy and collect such taxes as may be necessary to provide for the payment of the interest upon such bonds," etc.

The prayer of the application obviously is based upon the assumption that such measures are essential or necessary to effect compliance with the decree.

The decree relates merely to progressive diminution of the diversion and does not attempt to prescribe the precise program to be followed in the construction of the sewage treatment works and appurtenances, nor does it allocate any particular work to any particular period. Failure to comply with any proposed plan of construction does not violate a decree which is solely concerned with the amount of water diverted. In our argument we shall contend that under this view of the decree it is wholly unnecessary for this court to resort in any particular to the means applied for by the complainants for the enforcement of the decree, in the event that compliance is not made with the decree without good cause.

The Return of the Respondents.

The return of the respondents denies all charges relating to a lack of diligence in the performance of the construction program of the Sanitary District, and denies each and all averments charging the respondents with negligence, incompetence, bad faith, lack of effort in performance, obstruction, avoidance and circumvention of the decree, and all similar allegations. The economic depression

and financial difficulties of Cook County affecting the Sanitary District, over which the Sanitary District has no control, resulting in a lack of funds, are set up as "occurrences beyond the control of the Sanitary District" operating to delay performance of the original program of construction. (Return of Respondents, page 16.) Accomplishments under the original construction program and reasons justifying the expectation that the construction program can be completed within the time allotted for reductions in diversion of water from Lake Michigan, in spite of the unforeseen delays, are also stated. (Return of Respondents, pages 10, 49.)

The Rule to Show Cause.

The rule of the court entered on the present application does not order the Sanitary District to show cause why the court should not appoint a Master, Commissioner, Receiver or United States Marshal to execute the decree.

The respondents are directed merely to show cause why they have not "taken appropriate steps to effect compliance with the requirements of the decree of the Court in these causes."

Under this rule, the question whether the court has the authority to appoint an officer with the power specified in the prayer of the application does not arise. It is assumed, however, that the court desires a brief upon the facts and legal questions presented by the application, and the argument of the respondents proceeds upon this assumption.

The respondents submit that compliance has been made with the decree of this court, and that continued and ultimate compliance can be effected without the adoption of any part of the relief prayed for in the application of the

complainants; that nothing can be accomplished or gained by granting the relief sought; and that in any event this court is without power to grant the relief which the complainants now seek.

SUMMARY OF ARGUMENT.

I.

The Sanitary District has complied with the decree. The nature of the decree is such that it may be enforced without the appointment of a Master, Commissioner, Receiver or United States Marshal to complete the construction program of the Sanitary District.

II.

The facts disclosed by the reports of the Sanitary District and the return of the respondents show that the granting of the relief sought by the complainants would be ineffectual.

III.

The court is without power or jurisdiction to grant the relief sought in the application.

(a) *Under the Constitution of the State of Illinois the court would be precluded from appointing an officer to assess and to collect taxes; and as the power to issue bonds and to bind the credit of the Sanitary District is dependent upon the power to tax, the court lawfully could not appoint an officer to issue bonds and to bind the credit of the Sanitary District.*

Section 9 of Article IX of the Constitution of the State of Illinois which, as construed by the Supreme Court of Illinois, prohibits the Legislature from granting the power to assess and to collect the taxes of a municipality to any other persons than the municipal officers who have been elected by the people or who have been appointed in some mode to which the people have given their assent, would operate as a complete bar to the appointment by the court of any officers with power to assess or to collect taxes.

Since the exercise of the power to issue bonds and the power to bind the credit of the state and of the Sanitary District are dependent upon the power to collect taxes, and since the Sanitary District, being a municipal corporation, can raise money to pay the principal and interest on bonds and to pay other indebtedness only by taxation, it follows that the power to issue bonds and the power to bind the credit of the state and of the Sanitary District lawfully could not be exercised by any of the officers mentioned in the application.

The Supreme Court of the United States will follow the construction which the highest state court gives to the state constitution.

(b) *Under fundamental principles of constitutional law the court is inhibited from exercising any of the powers specifically stated in the prayer of the application.*

The general prayer in the application asking that the officer be directed "to do everything which may be necessary, convenient or proper to bring about the speedy enforcement of the decree of this court" does not, of course, enlarge his power so as to authorize him to perform any of the functions of the *legislative* or *executive* branches of the government.

The Sanitary District is a municipal corporation, a political subdivision of the state, vested by the statutes of the state with power to levy and to collect taxes, to borrow money for corporate purposes, to issue bonds, to incur indebtedness and generally to exercise all powers necessary to carry out the purpose for which the District was organized.

The only method by which municipal corporations can pay the principal and the interest of their bonds is with money raised by taxation; taxation is the principal means by which municipal corporations defray their general corporate expenses.

The power to tax is not a judicial function. It is an inherent power of sovereignty exclusively vested in the legislative department of the government. Courts lawfully cannot be transformed into tax collectors. These principles are of universal application in the Federal and in the state governments.

Each step in the process of taxation from beginning to end can be taken only as the legislature may prescribe. This is true of the levy of the tax, of the assessment of the property subject to the tax, of the collection of the tax, and of the disbursement of the tax after it is collected.

If the court should appoint any of the officers designated in the application to levy, to assess or to collect taxes and to perform the other acts prayed for in the application, the court would be invading the legislative and executive departments of the state and of the Sanitary District, a municipal corporation.

The Sanitary District, being a municipal corporation, is the representative of the state and one of the instrumentalities of the state government.

The court has no power to grant the prayer of the application and to usurp the sovereignty of the state as represented in the Sanitary District, one of the state's political subdivisions, and to erect a super-government over the state and the Sanitary District to bind the credit of the state and the Sanitary District, to issue bonds, to levy and to collect taxes, to decree a lien upon all the property of the state and upon all the revenues of the state and the district, to provide a sinking fund for the bonds, and to refinance outstanding bonds and obligations of the Sanitary District as they may fall due.

The court cannot appoint officers to levy or to collect taxes, because the levy and the collection would fall upon people who are not parties to this suit, and who are entitled to be heard by some procedure which would come within the principle of due process of law.

Taxes are not debts of a municipal corporation. Taxes are in a sense assets of a municipal corporation which are held in trust by the municipal corporation for the people. The court lawfully could not assume custody and control of such trust funds; yet, this is what the court would be doing, if the court directed any officer to levy, collect and disburse taxes. The court would be seizing the trust funds of the Sanitary District, a municipal corporation.

The court has no power to subject the property of the Sanitary District to a lien for taxes. Such liens are not created for the benefit of claimants against a municipal corporation. The liens are created for the benefit of the public authorities to enable them to collect the taxes with greater certainty.

(c) *If the Sanitary District should fail to comply with the decree, the proper method to enforce the decree would be by mandamus.*

The decree can be enforced by mandamus. If the remedy by mandamus is adequate in theory, that is sufficient, even though in a particular case it may be inadequate to produce the desired results. Inadequacy, as a practical question, does not justify the invention of an extrajudicial method by a court to enforce a decree.

The prayer of the present application is premature since there is no showing that a writ of mandamus was issued and was not obeyed.

If the writ of mandamus were issued and proved to be ineffective, the court could not supply the remedy proposed in the prayer of the application because such a remedy is contrary to established procedure and to the fundamental law of the land.

Furthermore, the writ of mandamus will not issue to compel the doing of an act which the person sought to be coerced admits on the record that he is willing to do without coercion.

If the remedy by mandamus were not successful such a situation would not be a case of a wrong without a remedy. It would be a case *without a judicial remedy.* The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct and should not be confused.

The decree of the court can be enforced only to the extent and in the method established by law. If there is no lawful manner in which the decree may be enforced it must remain unexecuted.

The court cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law or without authority of law. The court acts only according to established principles and through established channels.

The doctrine that a want of a remedy to enforce a decree is an impairment or want of jurisdiction, does not imply the right to enforce the decree by extrajudicial methods. The doctrine simply means that a court has the power to use every lawful method to enforce a decree, but not the power to enforce a decree at all hazards.

However urgent the necessity may be, and however hopeless the position of the applicants may be, the court cannot seize the powers which belong to the legislative and executive departments and exercise such powers to enforce the decree.

It is not the province of the court to make laws in order to enforce a decree.

The hardships of a case and the failure of the mode of procedure established by law are not sufficient to justify a court to depart from all precedent and to assume an unregulated power of administering justice at the expense of well settled principles.

If the court were of the opinion that the trustees of the Sanitary District were incompetent or recalcitrant, the court lawfully could not remove them or suspend them and substitute even temporarily officers of the court in their place.

The court could not subvert the governmental structure of a state to enforce a decree.

The judicial department is the weakest of all of the departments. Its commands must be executed through the marshals who are officers of the executive department.

If force should become necessary to enforce a decree, a court could use only the marshal and his deputies for that purpose.

If that force proved to be insufficient the court might call on the President, as Commander in Chief of the Army, to enforce the decree. But the court would have no inherent power directly to control the Army.

If the court should apply to the President for assistance in enforcing a decree, the question then would become a political question for the chief executive, and would no longer be a judicial question.

IV.

No cases are cited by counsel for the applicants that can be accepted as authorities in support of the prayer of the application.

ARGUMENT.

I.

The Sanitary District has complied with the decree. The nature of the decree is such that it may be enforced without the appointment of a Master, Commissioner, Receiver or United States Marshal to complete the construction program of the Sanitary District.

As shown by the semi-annual reports of the Sanitary District and the return of the respondents to the rule to show cause, pages 6 and 7 (hereinafter for convenience referred to as the "return"), the Sanitary District has at all times complied with the terms of the decree by limiting the diversion of water from Lake Michigan to the amount prescribed by the decree, to-wit, 6,500 cubic feet a second in addition to domestic pumpage, since July 1, 1930.

It is stated in the decree that "unless good cause be shown to the contrary," the diversion must be reduced after December 31, 1935, to 5,000 cubic feet a second in addition to domestic pumpage, and to 1,500 cubic feet a second in addition to domestic pumpage on and after December 31, 1938. Respecting these requirements, the return of the respondents (pages 49-57) shows that it reasonably may be expected that reductions in diversion will be made in the future as specified, subject to any subsequent order that this court may make or that Congress may make in pursuance of its constitutional powers. (See *Wisconsin* v. *Illinois,* 281 U. S. 179, pages 198-199.)

If the Sanitary District should fail to limit the diversion as required by the decree, without good cause, this court, if necessary, could proceed directly to enforce its decree by causing the diversion to be reduced. Obviously, this court is not bound perforce to see that the *construction program* of the Sanitary District is carried out. The purpose of the decree can be accomplished by an order directing a negative act, that is, an order to be executed by an officer of the court, if necessary, prohibiting diversion beyond the prescribed amount, rather than by an order directing the performance of positive acts such as building of sewage treatment works and necessary appurtenances.

Moreover, the building of sewage treatment works is primarily the concern of the Sanitary District, and if, in response to the prayer of the application, the Sanitary District indicates its intention and willingness to carry out the contemplated construction program as soon as possible, with a showing of its ability to meet the requirements of the decree, the appointment of an officer of the court or a receiver to execute this function would be futile and useless.

II.

The facts disclosed by the reports of the Sanitary District and the return of the respondents show that the granting of the relief sought by the complainants would be ineffectual.

The semi-annual reports of the Sanitary District and the return of the respondents set forth the causes operating to delay and obstruct the performance of the construction program of the Sanitary District adopted upon the entry of the decree. As previously stated, the principal cause is a lack of funds due to the business depression and the refusal or inability of the taxpayers to pay their taxes which have been levied and assessed, rendering bonds of the Sanitary District unsaleable. It is pointed out in the return (pages 16-18) that the Sanitary District has power to levy taxes but it is not a collecting body. The levies of the Sanitary District for 1928, 1929 and 1930 aggregate $66,944,402.50. Of these levies, $22,228,908.32 remained unpaid up to October 26, 1932. The 1931 taxes, aggregating $18,875,953.75, which under ordinary circumstances would have been collected by May 1, 1932, have not as yet been extended for collection by the county clerk of Cook County. (Return, page 21.) The non-payment of taxes as shown by the return (pages 18-21) may be attributed to the business depression and the so-called "taxpayers' strike." The consensus of opinion is that business conditions are improving, and indications point to an early improvement in the local tax situation in Cook County. (Return, pages 49-51.) The major factors causing delay in the construction program of the Sanitary District are thus being removed.

It is manifest that if business conditions do not improve, and if the taxpayers persist in refusing to pay their taxes, any officer or receiver that this court might appoint will be as helpless as the Sanitary District in obtaining funds for the completion of the sewage treatment works. If financial conditions improve as anticipated, with a consequent removal of the reasons for delay, the appointment of an officer of this court to carry out the construction program would be wholly unnecessary, assuming this court had power to make such appointment, which the respondents deny.

The semi-annual reports filed with this court contain an adequate explanation of the unavoidable financial condition which has operated to impede the progress of the construction program, yet the complainants in their application ascribe the delay to neglect, incompetence, bad faith and circumvention.

The respondents, however, cannot be charged with neglect, incompetence or bad faith because of their failure to foresee and anticipate the business depression.

In *Gold* v. *United States* (C. C. A. 8th Circuit), 36 Fed. (2nd) 16, the court said (32):

> "Business adversity, especially in times of abnormal business conditions, does not necessarily spell fraud."

In *Corliss* v. *United States* (C. C. A. 8th Circuit), 7 Fed. (2nd) 455, the court, in speaking of the deflation following the World War, said (457):

> "The record shows conclusively that the disaster which overtook defendants' business was common throughout the entire industry. A business failure induced by such causes does not convert the enterprise into a scheme to defraud."

The respondents cannot be criticized for failure to foresee the depression and its extent.

In *McRoberts* v. *Spaulding* (Dist. Ct. S. D. Iowa), 32 Fed. (2nd) 315, in a suit brought against certain bank directors seeking recovery for losses sustained by the Merchants National Bank of Grinnell, Iowa, on account of negligent loans, the court said (317):

> "We are not here considering an ordinary bank failure caused by the mismanagement of the directors, but a situation that was caused by extraneous circumstances and conditions that could not be foreseen and the extent of which reasonable men could not at the time anticipate. And where bank officers, as in this case, made every reasonable effort to prevent the failure of their bank, they should not be criticized."

In the case at bar, the causes of delay will not be obviated by the appointment of an officer or a receiver to raise money and construct sewage treatment works, when it is impossible for the immediate present to raise money for this purpose. Under well established principles this court will not grant the relief prayed for in the application which, for the reasons stated, is not only unnecessary but will be wholly ineffective.

III.

The court is without power or jurisdiction to grant the relief sought in the application.

(a) *Under the Constitution of the State of Illinois the court would be precluded from appointing an officer to assess and to collect taxes; and as the power to issue bonds and to bind the credit of the Sanitary District is dependent upon the power to tax, the court lawfully could not appoint an officer to issue bonds and to bind the credit of the Sanitary District.*

Section 9 of Article IX of the Constitution of the State of Illinois provides as follows (Cahill's Ill. Rev. Stat. 1931, p. 22):

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same."

The Supreme Court of Illinois has held that the provision is self-executing and that its directions are mandatory.

The People v. *Louisville and Nashville R. R. Co.*, 300 Ill. 312, 316.

This provision has been construed by the Supreme Court of Illinois to be a limitation upon the power of the Legislature to grant the right of corporate or local taxation of a municipal corporation to any other persons than the corporate or local authorities who have been elected by the people of the municipality or whose appointment has been assented to by the people.

The People v. *Block*, 276 Ill. 286, 289, 290.
Booth v. *Opel*, 244 Ill. 317, 328.
Morgan v. *Schusselle*, 228 Ill. 106, 112.
Cornell v. *The People*, 107 Ill. 372, 380.
Dunham v. *The People*, 96 Ill. 331, 334.
The People v. *Morgan*, 90 Ill. 558, 566.
Updike v. *Wright*, 81 Ill. 49, 53.

In other words, the people of a municipal corporation in Illinois have the constitutional right to select the agency that may levy and collect taxes for the corporate purposes of the municipal corporation.

It has been held explicitly by the Supreme Court of Illinois that the Sanitary District is a municipal corporation.

Judge v. *Bergman,* 258 Ill. 246, 251.
The People v. *Nelson,* 133 Ill. 565, 582, 583.

The Supreme Court of the United States has declared a municipal corporation to be the representative of the state creating it, and to be one of the instrumentalities of the state government.

Pollock v. *Farmers Loan & Trust Company,* 157 U. S. 429, 584.

The phrase "corporate authorities" within the purview of Section 9 of Article IX has been defined to be such municipal officers as have been elected by the people, or appointed in some mode to which the people have given their assent.

Givins v. *City of Chicago,* 188 Ill. 348, 351.
Morgan v. *Schusselle,* 228 Ill. 106, 112.
Wetherell v. *Devine,* 116 Ill. 631, 636.
Cornell v. *The People,* 107 Ill. 372, 380.
Hessler v. *Drainage Commissioners,* 53 Ill. 105, 113.

It also has been held by the Supreme Court of Illinois by express decision that the phrase "municipal corporations" as used in Section 9 of Article IX includes all "public local corporations exercising some governmental function."

Wilson v. *Board of The Sanitary District of Chicago,* 133 Ill. 443, 464.

The Trustees of the Sanitary District are required to be elected by Section 3 of the Act under which the Sanitary District of Chicago was created.

Cahill's Ill. Rev. Stat. 1931, Chap. 42, Par. 339, p. 1201.

By Sections 9 and 10 of the same Act the Trustees are vested with the governmental functions, among others, of the issuance of bonds and of taxation.

Cahill's Ill. Rev. Stat. 1931, Chap. 42, Pars. 345, 346, pp. 1206, 1207.

The construction uniformly given to the Constitution of a state by the highest court of the state is binding on the courts of the United States as a rule of decision.

Barrington v. *Missouri,* 205 U. S. 483, 485.
Post v. *Supervisors,* 105 U. S. 667, 669.

This is the rule although the United States Supreme Court may be of the opinion that a state court has misconstrued its Constitution.

Forsyth v. *Hammond,* 166 U. S. 506, 518, 519.

The powers specified in the prayer of the application with respect to binding the credit of the Sanitary District and the issuance of bonds are powers dependent upon the power of taxation.

Section 12 of Article IX of the Constitution of the State of Illinois provides that municipal corporations shall not incur any indebtedness without providing for the collection of a direct annual tax sufficient to pay and discharge the principal and interest of the indebtedness.

Cahill's Ill. Rev. Stat. 1931, p. 22.

The Supreme Court of Illinois has held that this provision is self-executing and mandatory.

Gates v. *Sweitzer,* 347 Ill. 353, 359.

The Supreme Court of the United States has held that the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, is underived from that instrument,

and may be exercised except so far as it has been surrendered to the Federal Government.

Union Pacific Railroad Company v. *Peniston,* 18 Wall. (85 U. S.) 5, 29.

Nathan v. *The State of Louisiana,* 8 How. (49 U. S.) 73, 82.

The Supreme Court of Illinois has held that the power to impose burdens and to raise money is the highest attribute of sovereignty and can be exercised only by or under the authority of the Legislature.

County of Cook v. *Columbia Ins. Co.,* 329 Ill. 189, 193.

The People v. *Sweitzer,* 339 Ill. 28, 43.

The Supreme Court of the United States has held that debts contracted by a municipal corporation, including bonds, must be paid, if paid at all, out of taxes which the municipal corporations lawfully may levy, and that all contracts creating debts to be paid in future not limited to payment from some other source, imply an obligation to pay by taxation; that it follows that the right to contract must be limited by the right to tax; and that when the legislature authorizes a municipal corporation to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt.

Loan Association v. *Topeka,* 20 Wall (87 U. S.) 655, 659, 660.

We submit that since the court would be precluded by the Constitution of Illinois from appointing an officer to assess and to collect taxes, and since the power to issue bonds and to bind the credit of the state and of the Sanitary District by an officer appointed by the court could not be exercised without the power to assess and to collect taxes, it necessarily follows that the court does not possess

the power to authorize such officer to issue bonds and to bind the credit of the state and of the Sanitary District.

(b) *Under fundamental principles of constitutional law the court is inhibited from exercising any of the powers specifically stated in the prayer of the application.*

All of those powers that are specifically stated in the prayer of the application are powers of the executive and legislative branches of government and lawfully cannot be exercised by the court.

The power of taxation is legislative.

The power to issue bonds and to create indebtednesses of any kind is dependent upon the power of taxation and cannot be exercised without the power of taxation.

The prayer that the decree be made a lien upon all of the property of the state and of the Sanitary District, and upon all of the revenues of the state and of the Sanitary District, if granted by the court, would be an unlawful invasion of the executive department of the state, and of its political subdivision and representative, the Sanitary District, in that the court would be imposing a burden on property and revenues that are held in trust by the state and by the Sanitary District for the people to be used for public purposes.

The general prayer in the application asking that the court empower the officer "to do everything which may be necessary, convenient, or proper to bring about the speedy enforcement of the decree of this court," obviously would not authorize him to exercise any of the functions of the legislative or executive branches of government.

The case of *Depew et al.* v. *Venice Drainage District,* 158 La. 1099, 105 So. 78, is a closely analogous case in which a receiver for a municipal corporation was requested. The

court disposed of the questions involved in a summary way, and expressed the view, with which we agree, that such procedure was "a monstrosity." This was a suit brought by the holders of $43,000 of a series of public improvement bonds issued by the Venice drainage district, and listed by the supervisor of public accounts of the state. The purpose of the suit was to have the Venice drainage district placed in the hands of a receiver. The District Court overruled an exception to the jurisdiction of the court and an exception of vagueness. The defendants answered the petition, and judgment was rendered on the merits in favor of the plaintiffs, appointing a receiver for the Venice drainage district, with full power to hold, administer, manage, and dispose of the property and income of the corporation, to take charge of and manage the affairs of the corporation, to receive from the sheriff the taxes that are annually levied by it, and to distribute the same under the orders, directions and supervision of the court, to the persons entitled to receive them.

In holding that the suit should be dismissed the court said (pp. 1099, 1101, 1102):

> "We know of no authority, and counsel has cited none, in which a receiver was ever appointed, in a contested case by a court of this state, to take over and administer the affairs of a public political corporation.
>
> (2) A public corporation is one that is created for political purposes, with political powers, to be exercised for the public good in the administration of civil government. It is an instrument of government, subject to the control of the Legislature, and its officers are officers of the government for the administration and discharge of public duties.
>
> The sins of commission and omission, which plaintiffs impute to the commissioners of the Venice drainage district, may be urged, in a proper proceeding, as cause for their removal from office, but in this case we

are concerned only in ascertaining if the courts of this state have jurisdiction to appoint receivers to corporations declared by law to be political subdivisions of the state. If this court should hold that the judiciary may take over and control the agencies of government and substitute its judgment for the discretion vested in the legally constituted authorities, the legislative and executive branches of government might as well cease to function. The contemplation of such a monstrosity is repugnant to common sense.

We are of the opinion that the exception to the jurisdiction of the court should have been sustained, and that the district judge erred in overruling it. The judgment appointing a receiver of the Venice drainage district is therefore reversed, and this suit is dismissed, at plaintiffs' cost."

The question whether the collection of taxes by a receiver appointed by a court would be an invasion of the legislative department was not specifically discussed by the court in the case of *Depew et al.* v. *Venice Drainage District, supra,* but there are numerous authorities in which that question is thoroughly discussed.

The leading case in which the question whether the court has the power to appoint an officer to levy and to collect a tax is the case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107. The plaintiff Rees, a citizen of Illinois, being owner of certain bonds issued under authority of an act of the legislature of the State of Wisconsin, by the City of Watertown, brought suit in the United States Circuit Court in Wisconsin and recovered judgments of $10,000. Executions were issued which were returned unsatisfied. Thereupon, Rees procured from the Circuit Court a peremptory writ of mandamus directing the City of Watertown to levy and collect a tax upon the taxable property of the city to pay the said judgments. Before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal and pro-

ceedings upon the mandamus thereupon ceased. A second and a third writ of mandamus were issued which likewise were fruitless.

Thereupon Rees filed a bill in equity, praying for a decree subjecting the taxable property of the citizens to the payment of his judgments and that the marshal might be empowered to seize and sell so much of it as might be necessary and to pay over to him the proceeds of such sale.

The two judges before whom the case was tried were divided in opinion and the bill was dismissed.

The case was brought to the Supreme Court on a certificate of division and appeal. In affirming the judgment the court said (p. 116):

> "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court."

The court further said (pp. 121, 122):

> "The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdic-

tion when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations."

* * * * * *

"A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."

The court dismissed the bill saying (p. 125):

"Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing and we acquiesce in the conclusion of the court below that the bill must be dismissed."

The rule of decision in the case of *Rees* v. *City of Watertown, supra,* is well established. It has been adopted in the following cases:

Heine v. *Levee Commissioners,* 19 Wall. (86 U. S.) 655, 658.

Barkley v. *Levee Commissioners,* 93 U. S. 258, 265.

Meriwether v. *Garrett,* 102 U. S. 472, 519, 520.

Thompson v. *Allen County,* 115 U. S. 550, 556.

South Dakota v. *North Carolina,* 192 U. S. 286, 319.

Yost v. *Dallas County,* 236 U. S. 50, 57.

O'Brien v. *Wheelock* (C. C. S. D. Ill.), 78 Fed. 673, 679.

Safe-Deposit & Trust Co. v. *City of Anniston* (C. C. N. D. Ala., S. D.), 96 Fed. 661, 663.

Washington County v. *Williams* (C. C. A., 8th Cir.), 111 Fed. 801, 812.

Preston v. *Chicago St. L. & N. O. R. Co.* (C. C. W. D. Ky.), 175 Fed. 487, 490.

Preston v. *Sturgis Milling Co.* (C. C. A., 6th Cir.), 183 Fed. 1, 4.

Street District No. 60 v. *Hagadorn* (C. C. A., 8th Cir.), 186 Fed. 451, 453.

Road Improvement Dist. v. *Guardian Savings & Trust Co.* (C. C. A., 8th Cir.), 298 Fed. 272, 274.

In the case of *Barkley* v. *Levee Commissioners et al.*, 93 U. S. 258 (*supra*), the nature of the proceeding was as follows: Barkley applied to the court below for a writ of mandamus, to be directed to the Board of Levee Commissioners of the parishes of Madison and Carroll, in the State of Louisiana, to compel such of said board as then survived to proceed to assess and collect a tax for the payment of a certain judgment alleged to have been recovered by the petitioner against the board on the nineteenth day of June, 1872; or, if the court should be of opinion that the survivors did not have such power, and could not fill vacancies in their body, then that the police juries of the parishes of Madison and Carroll should be ordered to perform that duty, and assess and collect sufficient tax to pay the judgment; or, if the court should be of opinion that it had not power to make either of said orders, then that it should order the United States Marshal of the district to assess at once, or by installments, from year to year, and collect sufficient taxes upon the property subject to taxation for levee purposes in the parishes, to pay the judgment, interest and costs; the petition also contained a prayer for general relief.

The petition further stated that a writ of *fieri facias* had been issued on the judgment and returned unsatisfied,

after demand made on the secretary and treasurer of the board; that they, as well as the police juries of the parishes, pretended that the board was dissolved and failed to point out any property belonging thereto; that the two parishes were the really interested parties, and that, if the old Board of Levee Commissioners did not act, it was the duty of the police juries to assess and collect sufficient taxes on taxable property of the two parishes to pay the judgment. A rule was taken on the surviving members of the Board of Levee Commissioners and on the police juries of the parishes of Madison and Carroll, to show cause why a mandamus should not issue as prayed. The former, by exception and answer, set up various grounds of defense, the most important to note being that the corporation of levee commissioners was defunct by resignation and death, only three (who were not a quorum) remaining alive; also, that the judgment was void because no service of process had ever been made on the corporation. The police juries answered that they were distinct corporations from that of the Board of Levee Commissioners, and were not vested with power to assess and collect the taxes in question.

After receiving evidence and hearing the parties, the court below refused the mandamus. Barkley sued out a writ of error.

In deciding that the court did not have power to appoint a marshal to assess a tax the court said (pp. 264, 265):

> "The remaining prayer, for an order directing the marshal to assess the tax, is equally inadmissible. It is true, that, in the case of *The Supervisors of Lee County* v. *Rogers*, 7 Wall, 175, we held that the Circuit Court acting in that case, after having issued a *mandamus* to the supervisors of the county, commanding them to levy a tax, and they having refused to obey the writ, was authorized, under the Code of Iowa, which provided for such a proceeding, to issue a writ

> to the marshal commanding him to levy and collect the taxes required. But we have never gone beyond this case, which depended on the special law referred to. The marshal is the executive officer of the court, and can only execute its process; * * *. In the recent case of *Rees* v. *The City of Watertown,* 19 Wall. 107, we decided that the court has no general power to commission the marshal to levy taxes for the purpose of satisfying a judgment, and we refer to that case for a more full explanation of our views on this subject."

In the case of *Meriwether* v. *Garrett,* 102 U. S. 472 (*supra*), Garrett and others filed their bill in the court below against the City of Memphis, Tennessee, setting forth that they were the owners and holders of overdue and unpaid bonds and coupons and other evidences of its indebtedness to the amount of more than $100,000, upon much of which indebtedness they had secured judgments and writs of mandamus to compel the collection thereof; that, owing to *malfeasance, misfeasance,* and *incompetency* of its officers charged with the collection of taxes, a large proportion of taxes levied and assessed for many years past, and amounting to at least $2,500,000, were uncollected and unpaid, by reason of which it was insolvent; that its persistent failure to collect the taxes was a fraud upon its creditors; that during each of the years 1875, 1876, 1877 and 1878 a large levy of taxes was made in obedience to writs of mandamus, but that by reason of its failure during each of those years to collect more than three-fifths of the amounts thereof, and also of the taxes assessed and levied for general purposes, a large amount represented by the judgments remained unpaid; that the special levies so made, in which the complainants had a large interest, constituted a trust fund for the payment of their judgments which could only be used for that purpose, and that the city's neglect and failure to press the collection thereof was

a fraud upon them, against which a court of equity would relieve.

In holding that the power of taxation is legislative and that courts have not the power, in the absence of statutory authority, to appoint an officer to levy and to collect taxes the court said (p. 501):

> "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.
>
> "Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legisture."

In a concurring opinion, in which the reasons for the judgment were stated, it was said (pp. 513-514, 515-516):

> "* * * we say that the taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County,* reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum.* Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta* v. *North,* 57 Me. 392;

City of Camden v. *Allen,* 2 Dutch. (N. J.) 398; *Perry* v. *Washburn,* 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. * * * So long as the law authorizing the tax continues in force, the courts may by *mandamus,* compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

"It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the gov-

ernment; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

"This doctrine is not new in this court. It has been repeatedly asserted, after the most mature consideration. It was asserted in *Rees* v. *City of Watertown.*"

The case of *Yost* v. *Dallas County,* 236 U. S. 50 (*supra*), was a suit in equity, and the bill was dismissed by the District Court. The facts alleged were in substance as follows: A statute of Missouri incorporated the Laclede and Fort Scott Railroad and authorized counties to invest in its stock and bonds and to issue county bonds in order to pay for them. The appellee did so, afterwards defaulted upon its bonds, and the appellant recovered judgment upon the bonds in the same District Court for over a million dollars. Under the laws in force when the bonds were issued it was the duty of the county officers to levy and collect annually a tax of thirty per cent of the amount of the bonds issued, but this duty never had been performed and the county officers evaded service of writs of mandamus or if served refused to obey the writs. There was no other mode of obtaining satisfaction, and the duties of levying and assessing the tax were only those of apportioning the tax among the taxable inhabitants on the basis of the last previous assessment which has been made, and of collecting it. The prayer was for the appointment of a commissioner to levy, collect and pay over the tax according to the Missouri law. The questions which were presented by a certificate from the Circuit Court of Appeals were certified as follows (p. 55):

"1. Has the District Court of the United States, sitting as a court of equity, jurisdiction of such a cause?

"2. When a judgment has been recovered on the law side of a District Court of the United States of

competent jurisdiction, against a county of the State of Missouri, on its bonds issued by authority of law, and the laws of that State in force at the time the bonds were issued authorized such county to levy and collect taxes to pay such bonds, and the county has no funds in its treasury, which can be applied to the payment of the judgment, and its property is, under the laws of the State, exempt from seizure and sale under execution; when the officers charged by the laws of the State with the duty to levy and collect taxes to pay such judgment refuse so to do, when the court in which such judgment was rendered has a number of times issued writs of mandamus commanding such officials to levy the taxes which they are authorized and which it was their duty to levy to pay such judgment, but these officials have, when possible, evaded service of these writs, and when served have wilfully and definitely refused to obey the writs of mandamus, and the fact has been conclusively demonstrated by the proceedings at law that the plaintiff is utterly remediless at law by mandamus or otherwise for the failure of the county to pay, and the refusal of the officers of the county to discharge their duty to levy and collect taxes and therewith to pay his judgment; and when the last previous assessment was made, which, by the statute in force at the time the contract was made, was authorized and made the basis of the levy of the amount to which the plaintiff is now entitled under his judgment and writs of mandamus so that no act of discretion is required to levy and collect it, but only the clerical or ministerial acts of apportioning the amount among the assessed values of the taxables specified in the last previous assessment, placing it on the tax books and collecting it of the persons and property liable therefor, has the Federal Court of the District in which the judgment was rendered, and the futile writs of mandamus issued and, when possible, served, the jurisdiction and authority in equity to appoint a commissioner, receiver or other officer to make the apportionment and to collect the amounts which the owner of the judgment is entitled to have collected from the parties and properties liable therefor."

In answering the questions in the negative, the court said (pp. 56, 57):

> "The fundamental consideration for answering these questions is that the obligation upon which the judgment was recovered was an obligation under, not paramount to, the authority of the State. It is true that the District Court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligation imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the contract should not be impaired by subsequent state law. The plaintiff by bringing suit in the United States court acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the State and therefore limited in whatever way the State saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that 'taxes of the nature now in question can only be levied and collected in the manner provided' by the statute, and therefore that it is impossible for the courts to substitute their own appointee in place of the one contemplated by the act. * * * as the tax depended for its creation upon a sovereign act of the State and was confided for its enforcement to officers of the State it is decided that it cannot be enforced by others."

In *Preston* v. *Chicago, St. L. & N. O. R. Co.* (Cir. Ct. W. D. Ky.), 175 Fed. 487, it appeared that the Caseyville and Lindle Mills districts of Union County Ky., under the provisions of an act to incorporate the Madisonville & Shawneetown Straight Line Railroad Company, each subscribed for and took stock in that company and in payment therefor each district issued its bonds, due 20 years afterwards, with interest thereon payable semi-annually. Coupons for the installments of interest were attached to the bonds. Soon after the issue of the bonds of these dis-

tricts, the complainant and his wife, for a valuable consideration, purchased a large proportion of the bonds. From time to time, on the interest coupons and later on the bonds themselves, the complainant and his wife jointly obtained judgments for the amounts due thereon. Executions were issued, which were returned *nulla bona,* and the complainant in all other respects seemed to have found utterly ineffectual all the remedies provided by the statute, although the appropriate taxation had been fully levied and assessed upon the property in the districts. The districts had succeeded, by the devices stated in the bill, in repudiating the obligations incurred by them in such apparent good faith as to induce purchasers to invest in their securities. The complainant, a citizen of the State of Iowa, brought this suit in equity against an individual taxpayer, wherein he claimed that there was levied and assessed taxes of the amount of $22,887.65 on the property of the defendant situated in the Caseyville district and taxes to the amount of $4,356.35 on the property of the defendant located in the Lindle Mills district, and sought to compel the defendant to pay its part of the amount due to complainant on his judgments against said districts. It is claimed that by virtue of these facts liens were created in complainant's favor upon the defendant's property described in the bill, and which liens the complainant seeks to foreclose and enforce by this suit. The defendant, by its demurrer to the bill, questioned first, the jurisdiction of the court; and, second, the sufficiency of the bill as not showing any equity or right in complainant to the relief sought.

In dismissing the bill the court said (pp. 489, 490):

> "From a most attentive consideration of the principles upon which three of the cases, *supra,* appear to have been decided (namely, *Rees* v. *Watertown, Heine*

v. *Levee Commissioners, and Thompson* v. *Allen County*) we have concluded that they foreclose the questions involved in the demurrer to the bill, inasmuch as they seem definitely to hold that, unless a remedy by a suit in equity for the collection of taxes is expressly authorized by legislation, it cannot be maintained. * * *

"The equity jurisdiction of the courts of the United States is fixed by the Constitution and laws of the United States, and while those laws, as construed by the courts, will open up to the recognition and enforcement of certain rights, equitable in character, when given by the state laws, that jurisdiction is otherwise limited by the laws of the United States and the recognized principles of equitable jurisprudence as established in England before the adoption of the Constitution. * * *

"It is not contended that any express statutory authority exists for the institution of an action like this. The contention which has been strongly and ably presented is that the right to come into equity arises out of the justice and necessity of the case, since otherwise the complainant is without adequate remedy, and that equity will never permit a wrong to exist without providing a remedy for its correction. The courts dealt with this very question in the cases of *Rees* v. *Watertown,* 19 Wall., at pages 121 and 122, 22 L. Ed. 72, *Heine* v. *Levee Commissioners,* 19 Wall., at page 658, 22 L. Ed. 223, and in *Grand Rapids Furniture Co.* v. *Trustees, etc.,* 102 Ky. 558, 44 S. W. 98. In each of those cases the contention was overruled. In each of them it was held that equity cannot supply a remedy which the Legislature has not given for the collection of taxes assessed upon property, and that the Legislature alone can do so."

In the case of *Street Dist. No.* 60 v. *Hagadorn* (C. C. A. Eighth Cir.), 186 Fed. 451, *supra,* a bill in equity was filed in which it was sought to have a receiver appointed to collect the annual installments of an assessment which had been duly made and pledged by the defendant as security for the payment of the complainant's bonds. In dismissing the bill the court said (p. 453):

"The only relief sought by the bill or granted by the decree appealed from was the appointment of a receiver to collect the annual installments of an assessment which had been duly made and pledged by the defendant Grading District as security for the payment of complainants' bonds.

"Is jurisdiction for that purpose vested in a court of equity? In other words, was there an adequate remedy at law?

"We think this question has been conclusively answered by the Supreme Court of the United States in several cases.

"In *Rees* v. *City of Watertown,* 19 Wall. 107, 22 L. Ed. 72, a court of equity was asked to appoint its marshall to levy and collect a tax to pay judgments recovered against a city. Peremptory writs of mandamus had been issued against the officers of the city to compel the levy and collection of the tax; but, before the writ could be served, a majority of the defendants resigned their offices. In other ways the officers of the city had succeeded in preventing the levy and collection of taxes to pay the judgment. The Supreme Court, speaking by Mr. Justice Hunt, in denying the power of the court to grant relief, said: 'We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only. * * * It is a power that has not been extended to the judiciary.'"

The case of *Road Improvement Dist. No. 7 of Poinsett County, Ark.* v. *Guardian Savings & Trust Co.* (C. C. A. Eighth Cir.), 298 Fed. 272, *supra,* was brought by a trustee, for bondholders under a so-called mortgage, to obtain the appointment of a receiver and the payment of past due bonds and interest coupons issued by a road improvement district. The defendant was a road district organized under a special act of the Arkansas Legislature for the purpose of building a road to be paid for from special

benefit assessments upon land in the district. Various owners of such land intervened in opposition to the bill. The decree established the validity of the mortgage, the amount and ownership of the bonds outstanding and the delinquency of the district as to interest and adjudged that a receiver should be appointed to collect the assessments theretofore levied on the land in the district. From that decree an appeal was brought.

The jurisdiction of the trial court was challenged on the ground that the contract between the bondholders and the district provided, in case of default in payment, for the appointment of a receiver by the state chancery court for the purpose of collecting assessments to pay the obligations due the bondholders and that such contract made that remedy and that forum the exclusive resort for such relief. The statute, authorizing organization of the districts and the issuance of bonds, provided that the chancery court of Poinsett County might, in case of default on the bonds, appoint a receiver to collect assessments and pay the bonds. The argument was that the remedy became part of the contract with the bondholders. Appellee answered this contention by contending that the statute creating the district provided for the appointment of such receiver by the state chancery court and that "it is elementary law that no jurisdiction can be conferred upon a state court without conferring a similar jurisdiction upon the federal courts." Thus, this contention presented for determination the jurisdiction of the trial court to appoint a receiver.

In denying relief the court said (p. 274):

> "A remedial right to proceed in a federal court cannot be enlarged or diminished by a state statute. * * *
>
> "We are, therefore, remitted to the inquiry as to whether a federal court of equity has jurisdiction to

appoint a receiver such as here sought. Of course, the general power to appoint receivers, in proper cases and under proper circumstances, inheres in federal equity jurisdiction. Therefore, the question here is whether federal courts can appoint receivers for the purposes set forth in this bill. Those purposes are to collect and enforce payment of such portion of the benefits assessed against the land in this district as may be necessary to pay the claims of the bondholders. A district such as this is a public corporation or quasi public corporation. * * * This principle has been applied to benefit assessments. *Heine* v. *Levee Com'rs,* 19 Wall. 655, where it was said at page 661 (22 L. Ed. 223): 'It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government.'

"This principle has, also, been applied where a part of the relief sought was a receiver (*Thompson* v. *Allen County,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472), and even where the state statute authorized a receiver (*Meriwether* v. *Garrett,* 102 U. S. 472, 26 L. Ed. 197)."

After reviewing numerous authorities, including the case of *Rees* v. *City of Watertown* (*supra*), the court concluded (p. 275):

"The above citations rule the point before us. The trial court had no jurisdiction to appoint the receiver herein."

The Supreme Court of Illinois has held explicitly that the power of the State to tax implies the power of the State to enforce the collection of the tax and to prescribe the mode by which it should be accomplished.

Elmhurst State Bank v. *Stone,* 346 Ill. 157, 162.
The People v. *Sears,* 344 Ill. 189, 191.

Another ground on which it has been held that courts have not the power to appoint an officer to levy or to collect taxes is that the levy and collection would fall upon

people who are not parties to the suit and who are entitled to be heard by some procedure which would come within the principle of due process of law.

In the case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107, *supra,* the court said (p. 122):

> "Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence. * * *
>
> "Whether, in fact, the individual has a defence, * * * is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

In *Barkley* v. *Levee Commissioners, et al.,* 93 U. S. 258, *supra,* the court said (p. 265):

> "* * * the court * * * cannot enforce its judgments for the recovery of a debt in any other way than by seizing and selling the property of the judgment debtor, or (where imprisonment for debt is authorized) by seizing and detaining his person. Where the debtor is a corporation, it cannot seize the property of its members. This it would do if it should issue

> a writ to the marshal commanding him to levy a tax upon the inhabitants of a municipal corporation, or upon their private property. The court has no more authority, in point of law, to seize the property of citizens for the debt of the corporation in which they reside (except in some of the Eastern States, where a different system prevails) than it has to seize the property of another corporation."

In *Yost* v. *Dallas County*, 236 U. S. 50, *supra,* the court said (p. 57):

> "But as the tax depended for its creation upon a sovereign act of the State and was confided for its enforcement to officers of the State it is decided that it cannot be enforced by others. The fact that it falls upon people who are not parties to the contract or the suit is an additional consideration in favor of the result."

In the case of *The People* v. *Sweitzer*, 339 Ill. 28, a writ of mandamus was sought to compel, among other things, the board of assessors and the board of review to complete the assessment for the year 1928 by using for that purpose the real estate valuations fixed in 1927 without change or revision and to certify the assessment so made to the county clerk. In denying the writ the court said (p. 41):

> "By the exercise of the taxing power private property is appropriated. Every person has the right to be heard before he can be justly deprived of his property. He has the right to be informed of the value placed upon it by the assessor, in order that he may, if aggrieved, appeal to the board which has the power to revise and correct the assessment. (*City of Nashville* v. *Weiser,* 54 Ill. 245.) To levy taxes upon the general assessment throughout the quadrennium without giving the taxpayer an opportunity to be heard concerning substantial changes in the condition and consequently in the value of his property would not only result in a disproportionate assessment but would also deprive him of his property without due process of law."

It is equally well settled that the court has not the authority to grant the prayer of the application to decree a lien upon all of the property of the State and of the Sanitary District, and upon all of the revenues of the Sanitary District.

The real property and the revenues held by the State and by the Sanitary District are not owned in a private capacity as assets of the State and of the Sanitary District. They merely are held in trust by the State and the Sanitary District for the people to be used for public purposes.

South Dakota v. *North Carolina,* 192 U. S. 286, 318, 319.

Meriwether v. *Garrett,* 102 U. S. 472, 513.

Barkley v. *Levee Commissioners, et al.,* 93 U. S. 258, 264, 265, 266.

In the case of *South Dakota* v. *North Carolina,* 192 U. S. 286, the State of South Dakota filed a bill, making the State of North Carolina and others defendants, to recover the amount due on certain bonds issued by the State of North Carolina. In discussing the question whether a money judgment could be entered against the State of North Carolina, the court said (pp. 318-319):

> "But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State is exempt from seizure upon execution because it is held by such corporation, not as a part of its public assets, but as a trustee for public purposes. *Meriwether* v. *Garrett,* 102 U. S. 472, 513. As a rule no such municipality has any private property subject to be taken upon execution."

In *Meriwether* v. *Garrett,* 102 U. S. 472, *supra,* in a concurring opinion it was said (pp. 518-519):

> "On another ground, also, the decree is equally untenable. It adjudges that 'all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts' for which the suits are brought, and that 'such liability shall be enforced thereafter, from time to time, in such manner' as the court may direct.
>
> "In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial."

In the case of *Barkley* v. *Levee Commissioners, et al.,* 93 U. S. 258, *supra,* the court said (p. 265):

> "Much reliance is placed by the counsel of the petitioner on the fact that the taxes directed to be imposed by the acts of 1858 and 1859 were made a first lien and privilege upon the property liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout the country; but it is never supposed that

> the public creditors, to whom the money raised by tax is to be paid, have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed."

(c) *If the Sanitary District should fail to comply with the decree, the proper method to enforce the decree would be by mandamus.*

If the Sanitary District should fail, without reasonable justification, to continue to comply with the decree, the proper method to enforce the decree would be by mandamus.

In the case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107, *supra,* the court said (pp. 124-125):

> "The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs, have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented.

> It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution."

In the case at bar, the return filed by the respondents to the application (page 21) avers that tax levy ordinances have been duly filed by the Sanitary District, but that the County Collector of Cook County has been unable to collect a sufficient amount of taxes to turn over to the Sanitary District to enable it to proceed with its building program. A tax levy is therefore not required. All that remains to be done is the collection of the tax. Manifestly, mandamus would be a proper remedy if the assistance of a court were needed.

In *Meriwether* v. *Garrett,* 102 U. S. 472, *supra,* the court said (515):

> "So long as the law authorizing the tax continues in force, the courts may, by *mandamus,* compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; * * *."

To the same effect are the following cases:

Barkley v. *Levee Commissioners,* 93 U. S. 264, 265, 266.

Thompson v. *Allen County,* 115 U. S. 550, 554, 555.

O'Brien v. *Wheelock* (C. C. S. D. Ill.), 78 Fed. 673, 679.

Safe-Deposit & Trust Co. v. *City of Anniston* (C. C. N. D. Ala., S. D.), 96 Fed. 661, 662.

Washington County v. *Williams* (C. C. A. 8th Cir.), 111 Fed. 801, 812.

Preston v. *Sturgis Milling Co.* (C. C. A. 6th Cir.), 183 Fed. 1, 2, 3.

As stated by the court in *Rees* v. *Watertown,* 19 Wall. (86 U. S.), 107, *supra,* even if the legal remedy by mandamus has been exhausted, the court lawfully could not appoint an officer to levy and to collect taxes in order to enforce the decree.

In the case of *Yost* v. *Dallas County,* 236 U. S. 50, *supra,* there is the following statement (p. 57):

> "Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place."

In *Safe-Deposit & Trust Co.* v. *City of Anniston* (C. C. N. D. Ala., S. D.), 96 Fed. 661, *supra,* the court said (pp. 662-663):

> "In a case where the legal remedy by mandamus had been exhausted, proving ineffectual by reason of the refusal of citizens of the municipality to accept office, through which alone the taxes could be collected, it is held by the court of last resort that equity can afford no remedy. *Rees* v. *City of Watertown,* 19 Wall. 107. This being settled, it must follow, for stronger reasons, that equity has no jurisdiction when the usual proceedings at law have not been tried, and when facts are not alleged showing that the judgments cannot be collected by such proceedings. In cases of judgments against municipal corporations, the writ of mandamus is looked on as the final process of the court; it performs, in substance and effect, the office of a writ of execution. 2 Dill. Mun. Corp. (4th Ed.), § 861. Both by statute and by the general principles of law and of equity jurisprudence the federal courts are prohibited from exercising jurisdiction in equity when there is a plain, adequate, and complete remedy at law. Rev.

> St. U. S. § 723. If the remedy at law is adequate in theory, it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection of the claim sued on. 'By inadequacy of the remedy at law is here meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that, in its nature or character, it is not fitted or adapted to the end in view.'"

It is not the province of the courts to make laws.

The Chinese Exclusion Case, 130 U. S. 581, 603.

The power of the United States Supreme Court is exclusively judicial. It has no extrajudicial powers.

United States v. *Old Settlers,* 148 U. S. 427, 466.

In the case at bar, the prayer of the application is premature, since there is no showing that a writ of mandamus was issued and was not obeyed.

Furthermore, the writ of mandamus will not issue to compel the doing of an act which the person sought to be coerced admits on the record that he is willing to do without coercion. The return of the respondents (pp. 58-59) admits a willingness to comply with the decree at all times in so far as it is posible to do so.

In *The People* v. *Dunne,* 258 Ill. 441, the court said (pp. 446-447):

> "The purpose of the extraordinary writ of *mandamus* is to compel the performance of a ministerial duty which one charged with the duty has refused to perform. The writ can only be issued to compel a party to act when it was his duty to act without it. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. * * * If it is the duty of the defendants to do the acts sought to be coerced by the writ, such acts would not be any more valid or legal if done under the command of the court. The office of the writ is to compel action by the unwilling. There must be a

refusal to perform the act, and if a personal right is involved a refusal must follow a demand. The writ will not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion."

IV.

No cases are cited by counsel for the applicants that can be accepted as authorities in support of the prayer of the application.

Counsel for the applicants have not cited a single case that could be accepted as an authority in support of the prayer of their application.

The cases of *Welch* v. *Ste. Genevieve,* 29 Fed. Cas. p. 608, No. 17372; *Post, et al.* v. *Taylor County,* 19 Fed. Cas. p. 1092, No. 11302; *United States* v. *Treasurer of Muscatine County,* 28 Fed. Cas. p. 213, No. 16538, cited by counsel, in which receivers were appointed by the court to levy and to collect taxes, were decided by intermediate federal courts. Counsel impliedly concede (applicants' brief, p. 36) that these cases are opposed to the rule of decision of the Supreme Court of the United States.

One of the cases (*Welch* v. *Ste. Genevieve*) was called to the attention of the Supreme Court of the United States in the case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107, *supra,* and the court said (p. 118):

> "We are not able to recognize the authority of the case. No counsel appeared for the city * * *; no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph * * *."

This criticism of the case of *Welch* v. *Ste. Genevieve* is directly applicable to the other two cases.

The case of *Virginia* v. *West Virginia,* 246 U. S. 565, which seems to be the principal case on which counsel rely has no analogy whatever to the case at bar. An entirely different question was presented. The question related to the *issuance of a writ of mandamus.* In this respect the court said (p. 589):

> "A rule allowed at the instance of Virginia against West Virginia to show cause why, in default of payment of the judgment of this court in favor of the former State against the latter, an order should not be entered directing the levy of a tax by the legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule is the matter before us."

The court reserved judgment on the specific question presented, upon the assumption that the Congress having the power to act, would exercise its power. Obviously, however, the question whether a writ of mandamus should be issued to compel the legislature of West Virginia to levy a tax, is radically different from the question in the case at bar as to whether the court can appoint an *officer of the court* to levy a tax.

The case of *Virginia* v. *West Virginia, supra,* was one involving the original jurisdiction of this court in controversies between states, and the court went no further than to say that *judicial remedies* may be applied against governmental powers to enforce its judgment; the opinion does not warrant the conclusion that this court may transcend the usual remedial processes of the judiciary and encroach upon legislative or executive branches of the government.

The case of *Garrett* v. *City of Memphis* (C. C. W. D. Tenn.), 5 Fed. 860, 870, cited by counsel, recognized the general rule that a court cannot levy taxes and cited the

case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107. There are, however, expressions in the opinion which are contrary to the established rule.

The case of *Stansell* v. *Levee Board of Miss. Dist. No.* 1 (D. C. N. D. Miss.), 13 Fed. 846, cited by counsel, is not analogous. The court did not levy a tax (p. 851). The levy was made by the legislature which provided the remedy adopted by the court for the collection of the tax (p. 851).

The case of *Supervisors* v. *Rogers,* 7 Wall. (74 U. S.) 175, cited by counsel, was distinguished in the case of *Rees* v. *City of Watertown,* 19 Wall. (86 U. S.) 107, 117, on the ground that the procedure taken was by the express authority of the statute of Iowa. The court said (p. 117): "The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us."

The other cases cited by counsel are not analogous. They do not involve questions of the power of the court to appoint an officer to levy or to collect taxes or to issue bonds or to exercise any of the governmental functions specified in the prayer of the application in the case at bar. The judgments in those cases were executed by methods which do not constitute an invasion of the legislative or executive branches of government.

Illustrative of those cases is the case of *Montezuma Canal Co.* v. *Smithville,* 218 U. S. 371, cited by counsel. There a commisioner was appointed to supervise the common use of water flowing in a stream. The court held such action did not transcend judicial authority, saying (p. 385) that

> "* * * in view of the absence of legislative action on the subject and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with

> the decree, which undoubtedly to that extent, the court was authorized to render, we think the action taken by the court did not transcend the bounds of judicial authority * * *."

It is apparent that in that case the court was not exercising the functions of any public official and that there was no invasion of the legislative or of the executive department of government.

Counsel for the applicants impliedly concede that the general rule is that a court lawfully cannot levy or collect taxes. Counsel, however, attempt to distinguish the case at bar from the general rule by contending that the cases in which the courts refused to appoint an officer to levy and to collect taxes were cases brought by bondholders of municipal bonds to enforce the collection of the bonds; that in those cases the extent of the obligation was determined by the state statutes and not by the Constitution of the United States; that the federal courts acquired no greater powers than were given by the state statutes; but that in the case at bar "the Supreme Court of the United States is given jurisdiction and power by the Federal Constitution to determine all controversies between States"; and that "the jurisdiction to render judgments necessarily comprehends the power to enforce the judgments by any appropriate means and this includes the appointment of a receiver, commissioner, or other functionary to carry out the judgments to the extent of issuing bonds and levying taxes, if that should be necessary." (Applicants' Brief, pp. 36, 37.) Because of this contention we have discussed the decisions at length in order to demonstrate that the reasoning of the court not only fails to support counsel's theory but, on the contrary, refutes it.

Since the authorities hold that the power of taxation is legislative and not judicial, it clearly follows that the exer-

cise by courts of the power to levy, to collect or to disburse taxes would be an invasion of the legislative department whether the power was exercised in a suit by a bondholder brought primarily to collect money by taxes to pay his bonds, or whether the power was exercised by the courts as an ancillary power to enforce decrees of the courts. The exercise of such power by the courts would be unlawful regardless of the purpose for which the courts intended to exercise it.

Counsel for the applicants have quoted from the case of *Wisconsin* v. *Illinois,* 281 U. S. 179, the following statement, where the court with reference to the State of Illinois said (p. 197):

> "If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State."

As no attempt has been made by counsel for the applicants to interpret this language which is not wholly clear, we do not know precisely why it was cited. At most it must be construed to mean that this court may, by mandamus, cause the diversion to be diminished to comply with its order in case such action should ever become necessary, which is inconceivable.

The Supreme Court of the United States certainly would not have the power to compel the repeal of any part of the Constitution of the State of Illinois. Nor would that court be the paramount power to which the State of Illinois would have to yield.

Those questions would be purely political questions to be determined by the legislative and the executive branches of the United States government.

The court could not subvert the governmental structure of the State in order to enforce the decree.

There is no such thing as unlimited power in any branch of government. Each branch is of limited and of defined powers.

Loan Association v. *Topeka,* 20 Wall. (87 U. S.) 655, 663.

The judicial department is the weakest of all of the branches. The officers through whom its commands must be executed are Marshals of the United States who belong to the executive department.

United States v. *Lee,* 106 U. S. 196, 223.

If force should become necessary to compel the performance of a decree, the court could use only the marshal and his deputies; and if that force proved insufficient, then if the court were of the opinion that the exigencies of the case required that the decree should be enforced at all hazards, the court might apply to the President for additional force.

The President is the Commander in Chief of the army and the navy.

In re Neagle, 135 U. S. 1, 63.
Kurtz v. *Moffitt,* 115 U. S. 487, 503.
United States v. *Sweeny,* 157 U. S. 281, 284.

Military power may be used to enforce in any part of the land full and free exercise of all national powers.

In re Debs, 158 U. S. 564, 582.

The enforcement of a decree in such circumstances would no longer belong to the judicial department. The question of enforcement would be determined by other branches of government.

With respect to the relationship existing between the Federal and State government, the Supreme Court of the United States has announced general propositions which

have become fundamental in our constitutional jurisprudence.

The two governments are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This doctrine was affirmed at an early day in the case of:

McCulloch v. *Maryland,* 4 Wheat. (17 U. S.) 316.

The distinguishing feature of our form of government is the right of the people to choose their own officers for governmental administration.

In re Duncan, 139 U. S. 449, 461.

The public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interest and dignity of those who created them, require the exercise of power indispensable to the attainment of the ends of their creation.

Anderson v. *Dunn,* 6 Wheat. (19 U. S.) 204, 226.

In concluding the present discussion we may say that although opposing counsel prematurely have forced us to discuss the question of the compulsory power of the court with respect to the decree, we view the question at this time really as a moot question which never will arise for practical consideration, as the Trustees of the Sanitary District have not refused, and have no intention of refusing to comply with the decree.

The present situation was not caused by the respondents. It was created by circumstances entirely beyond their control.

We submit that the return of the respondents clearly indicates that the Sanitary District has used its utmost efforts to comply with the decree and that it will continue

to exhaust all reasonable means to accomplish that purpose (Return, pp. 58-59). In the circumstances, therefore, compulsion will not be necessary.

Respectfully submitted,

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