In the Supreme Court of the United States

States of Wisconsin, Minnesota, Ohio, and Pennsylvania, *Complainants,* vs. State of Illinois and the Sanitary District of Chicago, *Defendants.*	No. 5, Original.
State of Michigan, *Complainant,* vs. State of Illinois and the Sanitary District of Chicago, *Defendants.*	No. 8, Original.
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BRIEF OF WISCONSIN, MINNESOTA, OHIO AND MICHIGAN UPON THE HEARING ON THE REPORT OF HONORABLE EDWARD F. McCLENNEN, ON THE RE-REFERENCE OF DECEMBER 19, 1932.

(Names of Solicitors for the Complainants on inside of front cover)

Dated April 10, 1933.

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HISTORY AND STATEMENT OF THE CASE.

Since the long history of this litigation is well known to this Court, we deem it unnecessary to restate it. The pending phase of this litigation is concerned solely with what should now be done to enforce the decree of April 21, 1930 (281 U. S. 696) and secure to the complainants the rights heretofore adjudged to them by this Court; and our

statement of the case will, therefore, be confined to those matters deemed material for its consideration in that aspect.

On October 3, 1932, the States of Wisconsin, Minnesota, Ohio and Michigan, in a Joint Application, invited the attention of this Court to the circumstance that the facts then before this Court, through the Report of the Special Master on the 1929 Re-reference and the Semi-annual Reports filed by the defendants, disclosed that the general over-all or ratable performance by the defendants under the decree had been and was grossly inadequate; that there are certain projects in the program, for the construction of which the defendants sought and obtained the indulgence of this Court, which constitute "controlling factors" in relation to the intermediate reduction in diversion fixed for December 31, 1935 and the ultimate termination of the illegal diversion fixed for December 31, 1938; that, as to some of such projects or controlling factors, there had been a complete failure of performance; that, as to others of such controlling factors, there had been and was a gross inadequacy of performance; and that these facts justified and required a conclusion that without the further intervention and aid of this Court to secure to the complainants the rights heretofore adjudged to them, the arrival of the dates fixed by the decree for the intermediate and ultimate restoration of complainants' rights would inevitably be coincident with a default by the defendants.

These complainants in their Application and supporting brief urged that the facts therein recited from the records of this Court established that unless these complainants secure the Court's aid in removing the obstacles which had already modified as to time the relief to which they are entitled, these complainants will be in exactly the same situation in 1935 and in 1938 that they were when the decree was entered in 1930.

Specifically, the complainants' Application pointed out that the records of this Court disclosed a failure or inadequacy of performance in the following respects among others:

1. Whereas the average annual over-all expenditure required for the performance of the decree under the findings of the Special Master in 1929 was in excess of $20,000,000, the average annual performance since the entry of the decree had been less than $5,000,000, and that, during the preceding six months, performance had practically ceased. (Application, Sec. V, pp. 7-9.)

2. Whereas the intermediate reduction fixed by the decree for December 31, 1935 was predicated upon the completion of the Calumet, North Side and West Side Sewage Treatment Works, the Semi-annual Reports filed by the defendants with this Court indicated that the Calumet and West Side Sewage Treatment Works would not be completed by that date at the rate of progress theretofore had and then being made. (Application, Sec. VI, p. 10.)

3. Whereas the intermediate reduction fixed by the decree for December 31, 1935, was predicated upon the installation of controlling works in the Chicago River or at the head of the Drainage Canal, the Semi-annual Reports filed by the defendants did not disclose any steps whatsoever on the part of the defendants to secure a permit for such works or to proceed with their construction. (Application, Sec. VI, p. 10.)

4. Whereas the Southwest Side Sewage Treatment Works is admittedly the controlling factor in the over-all time required for the construction of the program for the treatment of the sewage of the Sanitary District of Chicago, the Semi-annual Reports disclosed that no site had yet been acquired for such works and that the negotiations for the acquisition of a site were then at a standstill. (Application, Sec. VII, pp. 10-11.)

5. Whereas the primary obligation for the performance of the decree rests squarely upon the State

of Illinois, the State of Illinois has neither properly cooperated with the Sanitary District nor taken any steps to finance or otherwise discharge its obligation under the decree. (Application, Sec. XIII, p. 16; Sec. XII, pp. 14-15.)

6. The State of Illinois and the Sanitary District had failed, neglected or refused adequately and reasonably to provide for financing the performance of the decree. (Application, Sec. XI, pp. 13-15.)

7. The non-salability of Sanitary District bonds and the other financial difficulties of the Sanitary District, to the extent, if at all, that they existed, rested squarely upon the neglect, failure or refusal of the defendants to levy and collect normal taxes and constituted a self-created obstacle. (Application, Sec. XII, pp. 14-16.)

The Application also pointed out that the Semi-annual Reports filed with this Court had consistently reported for over two years the pendency of alleged studies of stockyards wastes notwithstanding the fact that Mr. Chief Justice Hughes as Special Master on the 1929 Re-reference had found that in this matter "the Sanitary District should be able to obtain *within a few months, at the most,* whatever information is essential to proceed with the designing of this Plant (the Southwest Side Treatment Works)"; that such Semi-annual Reports had consistently reported the pendency of a suit filed in 1924 by the Sanitary District against certain packing companies, although that suit sought no relief essential to the performance of this Court's decree; and that such Semi-annual Reports disclosed that the personnel of the Sanitary District Engineering Organization had been so reduced as no longer to be adequate to perform the decree. The Application prayed for the issuance of a Rule to the Defendants to Show Cause why the Court should not appoint a Mandatory to carry out the decree at the expense of the defendants.

Upon consideration of complainants' motion and the Reports filed by the defendants, this Court, on October 10, 1932, directed to the defendants, the State of Illinois and the Sanitary District of Chicago, a Rule to Show Cause "why they have not taken appropriate steps to effect compliance with the requirements of the decree of this Court."

In compliance with this Rule, the defendants filed a Joint Return on November 7, 1932.

The Return admitted that the average annual expenditures had been, as set forth in the Application, less than 25% of the average annual expenditure required for the performance of the decree. The allegations advanced to minimize or excuse this general failure or inadequacy of performance were all without substance and largely so specious as to challenge their sincerity. Thus, in this connection the Return made irrelevant reference to expenditures for sewers and sewage treatment works which were made by the Sanitary District prior to the entry of the decree and which in no way represented performance under the decree. It pointed out that the diversion had been and then was restricted as required by the decree when the only issue then was and now is not the amount of the present diversion, but whether the failure and inadequacy of performance by the defendants threatens the intermediate reduction in the diversion fixed for December 31, 1935, and the ultimate termination of the illegal diversion fixed for December 31, 1938. The Return, in support of the claim of general performance, cited the increase in the percentage of sewage treatment when that increase arose merely from placing in operation works largely, if not wholly, constructed before the entry of the decree and not by reason of performance under the decree. The Return referred to the construction of intercepting sewers when it had been admitted before and found by Mr. Chief Justice Hughes as Special Master in 1929 that such sewers, though necessary,

were not controlling factors in determining the time within which the various sewage treatment works embraced in the program could be constructed and placed in operation. The Return, however, did disclose that the defendants had, after the entry of the decree, adopted a program of construction which amounted to a planned default under the decree. (See Brief of these Complainants Filed December 5, 1932, pp. 13-15.)

The Return admitted that the West Side Sewage Treatment Works, which Mr. Chief Justice Hughes as Special Master had found in 1929 should be completed with appurtenances and in operation by December 31, 1935 and prior to the reduction of that date, would not be completed before the end of 1936. The Return also disclosed that shortly after the entry of the decree, the defendants had adopted a plan which deliberately postponed the completion of the West Side Sewage Treatment Works until the end of 1936 and of some of the intercepting sewers until 1938. This planned default represented the difference between providing a treatment of 33⅓% for something less than all of the sewage of the West Side area by December 31, 1935 and a treatment of 85% to 90% for all the sewage of that area as required by the finding of the Special Master in 1929.

The Return admitted that the defendants had taken no steps whatsoever since the entry of the decree to secure a permit for and much less to construct controlling works. The Return sought to excuse this complete failure to do anything about controlling works on the ground that in 1926, more than four years before the entry of this decree, the defendants, in compliance with the requirement of Condition 6 of the Permit of the Secretary of War dated March 3, 1925, the defendants had submitted a preliminary and immature plan without application for a permit for a flood gate at the mouth of the Chicago River. The Return also stated, apparently as a further excuse, that in view of the

River & Harbor Act of July 3, 1930, "it is quite possible that the War Department does not wish" controlling works in the Chicago River.

The Return admitted the complete failure of the Defendants to acquire a site for the Southwest Side Sewage Treatment Works. It cited no excuse for this delinquency except that certain property owners had objected to the acquisition of a proposed site on the ground that the West Side area already owned by the Sanitary District was sufficient for both the West Side and Southwest Side Plants. The Return did state that tentative lay-outs had been made which indicated that the Southwest Side Treatment Plant *might* be constructed on a portion of the land heretofore acquired for the extension of the West Side Works if certain processes of disposal should prove practical, but the Return did not state that any decision had been reached upon that point.

The Return necessarily admitted the limited expenditures theretofore made and the inadequacy of the financing theretofore provided for the performance of the decree. It sought generally to excuse non-performance on the ground of financial difficulties. The Return confirmed the fact that such financial difficulties, to the extent that they existed, are applicable only to the Sanitary District and not to the State of Illinois and that as to the Sanitary District they rest solely upon an inexcusable failure to levy and collect usual and normal taxes. The Return in the view of the complainants confirms the conclusion that the financial difficulties of the Sanitary District, to the extent that they exist, are self-created obstacles in that they rest upon the incompetence, negligence or maladministration of officers for whom at least the State of Illinois is responsible.

These matters were heard by this Court on brief and oral argument on December 5th and 6th, 1932. "Upon consideration of the Return of the Defendants in the above

entitled Causes to the Rule issued October 10, 1932 * * * and of the argument had thereon," this Court under date of December 19, 1932, referred this cause to Honorable Edward F. McClennen, as Special Master, with directions and authority to make summary inquiry on three particular subjects therein described and to report to the Court on or before April 1, 1933.

With the exception of the subjects of inquiry referred to Special Master McClennen, the complainants take the other matters of failure and inadequacy of performance set forth in their Application as established and therefore will not reargue them in this brief. So far, if at all, as any issue may be raised with respect to them, these complainants will rely upon their brief filed with this Court on December 5, 1932.

THE QUESTIONS SUBMITTED FOR DETERMINATION ON THE RE-REFERENCE OF DECEMBER 19, 1932.

The nature and extent of the inquiry to be made on the Re-reference now under review was defined by the Order of this Court dated December 19, 1932, in the following language:

> "(1) as to the causes of the delay in obtaining approval of the construction of controlling works in the Chicago River and the steps which should now be taken to secure such approval and prompt construction;
>
> (2) as to the causes of the delay in providing for the construction of the Southwest Side Treatment Works and the steps which should now be taken for such construction or, in case of a change in site, for the construction of an adequate substitute;
>
> (3) as to the financial measures on the part of the Sanitary District or the State of Illinois which are reasonable and necessary in order to carry out the decree of this Court."

By this Order of Reference there was, therefore, submitted to the Special Master for determination the following questions:

First. What are the causes of the delay in obtaining approval of the construction of controlling works in the Chicago River?

Second. What steps should now be taken to secure such approval and prompt construction?

Third. What are the causes of the delay in providing for the construction of the Southwest Side Treatment Works?

Fourth. What steps should now be taken for the construction of the Southwest Side Treatment Works either on the site originally indicated or a new site?

Fifth. What financial measures on the part of the Sanitary District are reasonable and necessary in order to carry out the decree of this Court?

Sixth. What financial measures on the part of the State of Illinois are reasonable and necessary in order to carry out the decree of this Court?

THE FINDINGS OF THE SPECIAL MASTER.

After extended hearings, the Master made and filed his Report (hereinafter called Report of Special Master McClennen in contra-distinction to the Report of the Special Master on the 1929 Re-reference), answering the foregoing questions as follows:

In answer to the *First* Question, the Master found:

"The causes of the delay in obtaining approval of the construction of Controlling Works in the Chicago River are a total and inexcusable failure of the defendants to make an application to the Secretary of War for such approval." (Report of Special Master McClennen, p. 125, 5.)

In answer to the *Second* Question, the Master found:

"The step which should now be taken to secure approval of Controlling Works is in an enlargement

of the decree of April 21, 1930 by the addition of a paragraph enjoining the State of Illinois to provide forthwith the necessary money for, and through the Sanitary District of Chicago or through other instrumentality chosen by the State to submit plans forthwith to the Chief of Engineers of the War Department, for Controlling Works for the purpose of preventing reversals of the Chicago River at time of storm and the introduction of storm flow into Lake Michigan and to make application forthwith to the Secretary of War for authorization of such Works and diligently to pursue such application with all necessary modifications to secure within four months if possible the recommendation of the Chief of Engineers and the authorization of such Works by the Secretary of War, and immediately thereafter to begin and to continue to construct such Works to completion within two years." (Report of Special Master McClennen, p. 126, 36.)

In answer to the *Third* Question, the Master found:

"The causes of the delay in providing for the construction of the Southwest Side Treatment Works are (1) an inexcusable and planned postponement of the beginning of construction of these Works to January 1, 1935 which left an inadequate time for their completion before December 31, 1938, at the rate of progress expected or to be expected under the methods pursued by the Sanitary District, and (2) the failure to proceed to a definite decision as to a site and to the acquisition of the site so chosen, and (3) the failure to proceed with reasonable diligence to prepare designs, plans, and specifications for the Works at this site or on the site of the West Side Works." (Report of Special Master McClennen, pp. 125-6, 50.)

In answer to the *Fourth* Question, the Master found:

"The step which should now be taken for the construction of the Southwest Side Treatment Works or in case of a change in site for the construction of an adequate substitute, is in an enlargement of the decree of April 21, 1930 by the addition of a paragraph en-

joining the State of Illinois to provide forthwith the necessary money for, and through the Sanitary District of Chicago or through other instrumentality chosen by the State, forthwith to determine upon and secure the site for the Southwest Side Treatment Works, if the site is not owned already by the Sanitary District and forthwith to design and to construct said Southwest Side Treatment Works of the kind proposed to the Special Master of this Court in 1929 or of a kind no less efficient for the purification of the effluent to be discharged to the Sanitary Canal and at a rate of progress forthwith that except for casualties not now foreseeable will result in the completion of said Works and the beginning of their operation in ordinary course before December 31, 1938.

The omission of reference at this point to the Calumet, West Side and North Side Treatment Works is because they are not within the Order appointing me." (Report of Special Master McClennen, pp. 126-7, 60.)

In answer to the *Fifth* Question, the Master found:

"The Sanitary District is not failing now to pursue the reasonable financial measures now within its control, which are necessary in order to carry out the decree of this Court." (Report of Special Master McClennen, p. 126, 61.)

In answer to the *Sixth* Question, the Master found:

"The financial measures on the part of the State of Illinois which are reasonable and necessary in order to carry out the decree of this Court are in the enlargement of the decree by adding to it a paragraph providing that the State of Illinois be enjoined to appropriate through its General Assembly, before July 1, 1933, the sum of thirty-five million dollars to be expended before the end of the first fiscal quarter after the adjournment of the next regular session or in any event before October 1, 1934 and the same amount per year for each year ending on September thirtieth thereafter for the designing and the securing of authoriza-

tion from the War Department and for construction of Controlling Works for the purpose of preventing reversals of the Chicago River at times of storm and the introduction of storm flow into Lake Michigan and for sites for, and for the engineering expenses of designing, and for the construction, enlargement, alteration and completion of the intercepting sewer tunnels, conduits, sewage treatment plants and pumping stations commonly known as the Calumet Treatment Works, North Side Treatment Works, West Side Treatment Works and Southwest Side Treatment Works and all things appertaining thereto within the Sanitary District of Chicago, until all the same shall have been fully completed; and to incur indebtedness therefor and for the purposes aforesaid and no other to issue and to sell bonds of the State of Illinois for the amounts so appropriated and on such terms of payment and maturity and at such rates of interest as the General Assembly shall determine and without the law authorizing the same being submitted to the people of Illinois and the said laws shall be valid and the bonds so issued if in other respects conforming to the Constitution and laws of the State of Illinois shall be valid obligations of the State of Illinois notwithstanding the fact that said laws have not been submitted to the people of Illinois either theretofore or thereafter and any sums expended for said Works by the Sanitary District of Chicago, hereafter, from its own funds in any year ending September thirtieth shall reduce by so much the amount of the appropriation for said year which the State of Illinois is hereby required to expend." (Report of Special Master McClennen, pp. 127-8, 105-6.)

COMPLAINANTS' STATEMENT IN LIEU OF EXCEPTIONS.

The Order of Reference of this Court, dated December 19, 1932, provided that these causes should come on for hearing on the report of the Special Master without the filing of exceptions by either party. Complainants believe, however, that it may be helpful to the Court to state, in lieu

of exceptions, their position with respect to the answers made by the Special Master to the six questions submitted to him for determination.

First. Complainants take no exception to the findings and conclusion of the Special Master in answer to the first question.

Second. Complainants take no exception to the correctness of the findings and conclusions of the Special Master in answer to the second question, so far as they go but contend that the Special Master should also have found that, in addition to the steps recommended in the Special Master's Report, the decree should be further enlarged to provide for the appointment of a Mandatory of this Court, without further hearing or notice, to do the things therein described for, on behalf of and at the expense of the defendants, in the event that such things should not be done by the defendants at the times fixed in the decree.

Third. Complainants take no exception to the findings and conclusions of the Special Master in answer to the third question.

Fourth. Complainants take no exception to the correctness of the findings and conclusions made by the Special Master in answer to the fourth question, so far as such findings and conclusions go, but complainants contend that the Special Master should further have found that the decree should be enlarged to provide for the appointment of a Mandatory, without further hearing or notice, to take the steps therein indicated as necessary and proper for the construction of the Southwest Side Treatment Works at the expense of the defendants in the event of future default.

Fifth. The complainants take exception to the finding of the Special Master, if material, in answer to the Fifth Question, to-wit, as to the financial measures on the part of the Sanitary District which are reasonable and neces-

sary in order to carry out the decree of this Court, on the ground that such finding is merely that the District "is not failing *now* to pursue the reasonable financial measures *now* within its control." Whereas the question, if material, would be what financial measures on the part of the District should reasonably be required. However in the view of the complainants the finding is immaterial to a proper disposition of the matters before the Court, but, were the issue material, there are additional financial measures which should be required of the Sanitary District.

Sixth. The complainants take no exception to the correctness of the findings and conclusions of the Special Master in answer to the Sixth Question, so far as such findings and conclusions go, but complainants contend that the Special Master should also have found that the decree should be further enlarged to provide for the appointment of a Mandatory of this Court, without further hearing or notice, in the event of a failure by the State of Illinois to take the financial measures enjoined upon it at the times and in the manner prescribed by the enlarged decree.

ARGUMENT.

THE FACTS.

I.

THE INSTANT RECORD CONCLUSIVELY ESTABLISHES THE CORRECTNESS OF THE FINDING AND CONCLUSION OF THE SPECIAL MASTER THAT "THE CAUSES OF THE DELAY IN OBTAINING APPROVAL OF THE CONSTRUCTION OF CONTROLLING WORKS IN THE CHICAGO RIVER ARE A TOTAL AND INEXCUSABLE FAILURE OF THE DEFENDANTS TO MAKE AN APPLICATION TO THE SECRETARY OF WAR FOR SUCH APPROVAL."

The analysis of the evidence on this point by the Special Master (Report of Special Master McClennen, 5-36) so overwhelmingly sustains this finding that argument seems unwarranted, and is only indulged because the Special Master indicates in his report that the defendants challenge this finding.

A.

It is uncontroverted on the record that the defendants have taken no steps since the entry of the decree either to apply to the Secretary of War for a permit for the construction of controlling works or to finance or otherwise provide for the construction of such Works.

The records of the War Department, which were placed in evidence on the instant Reference by the Special Master, conclusively establish that between the date of the decree of April 21, 1930 and the present time, the defendants never filed any application with the Chief of Engineers or the Secretary of War, never submitted any plans for controlling works which the defendants proposed or desired to construct in the Chicago River or at the head of the Drainage Canal, and never addressed any communication whatsoever to the Chief of Engineers or the Secretary of

War or any subordinate officer of the War Department urging or seeking authorization for the construction of controlling works at the mouth of the Chicago River or at the head of the Drainage Canal. (Records of War Department, R. 32-120.) The State of Illinois has made no pretense of action of any kind in this matter. The Sanitary District admits that from the entry of the decree to date, it has never addressed any communication to the Secretary of War or to the Chief of Engineers urging or seeking authorization for the construction of controlling works as contemplated by the decree. (Ramey, R. 660.) No application for a permit to construct such controlling works was ever presented to the District Engineer at Chicago. (Weeks, R. 779, 802.)

Nor has either of the defendants at any time since the entry of the decree made or sought to make any provision for financing the construction of controlling works. When the Sanitary District in 1929 sought and obtained from the General Assembly of Illinois authorization for the issuance of bonds not to exceed in the aggregate twenty-seven million dollars without referendum for the prosecution of Sewage Treatment Works at Chicago, this authorization contained no provision for, and by appropriation to other purposes precluded, the use of any of this money for controlling works. On May 15, 1930, the Sanitary District passed a resolution petitioning the State Legislature to exempt it from the requirement of a referendum on bonds issued for the construction of the North Side, Calumet, West Side and South Side Treatment Works. This memorial sought no authority to issue bonds for the construction of controlling works. (Report of Special Master McClennen 79, 80.) On February 24, 1931, the Sanitary District submitted a bond issue of thirty-six million dollars for Sewage Treatment construction to public referendum. This bond issue made no provision for the construction of controlling

works. (R. 283-5.) Although this Court on December 19, 1932, had ordered a reference in these causes to make summary inquiry, among other things, as to the causes of delay in obtaining approval of the construction of controlling works and the steps which should now be taken to secure such approval and prompt construction, the Board of Trustees of the Sanitary District on January 12, 1933 adopted the 1933 budget without making any provision for financing the construction of controlling works. (Exhibit 50; Woodhull R. 1333-4.)

It is thus conclusively established that the State of Illinois and the Sanitary District have taken no action whatsoever to perform this requirement of the decree of April 21, 1930. We now turn to a consideration of the excuses advanced by the defendants for this total failure of performance.

B.

The defendants attempt to justify their failure to make application to the Secretary of War for controlling works in the Chicago River by advancing four excuses; but these supposed excuses not only leave their flagrant default wholly unexcused, but involve so many changes in position and are so utterly without substance as to challenge their sincerity.

On this Reference the defendants have advanced four inconsistent excuses for their default in the matter of controlling works. We proceed to discuss them *seriatim.*

1.

The defendants' contention that they thought the submission of certain plans (without any application for permit) for a pontoon gate at the mouth of the Chicago River in 1926 and 1927 in compliance with the requirement of the permit of March 3, 1925, constituted a performance of the decree of April 21, 1930, in this particular is wholly unsupported by the record and so specious as to lead inevitably to the conclusion that the contention cannot be seriously made.

The excuse advanced by the defendants for their failure to proceed with the construction of controlling works in their Return to the Order to Show Cause, filed in the Supreme Court on November 7, 1932, was that *"in compliance with"* the *Permit of March 3, 1925,* the District had submitted plans for controlling works in the Chicago River to the United States District Engineer at Chicago in *November, 1926.* (Return of the Sanitary District of Chicago and the State of Illinois to the Rule to Show Cause entered herein on October 10, 1932, pp. 26-27; Report of Special Master McClennen, p. 6).

This was the first of the four excuses which the defendants sought to put forward on this Re-reference as the lack of substance and factual basis for such alleged excuses became progressively transparent. In November 1926, the defendants submitted a mere sketch of a pontoon gate to be installed at the mouth of the Chicago River. (Ramey, R. 664-5.) It was submitted solely in compliance with the requirement of Condition 6 of the Permit of March 3, 1925 (Report of Special Master McClennen, p. 6), which expired December 31, 1929, before the instant decree was entered. In or before July 1927, the defendants submitted more detailed plans for this pontoon gate on the request of the District Engineer (Report of Special Master McClennen,

p. 7). No application for a permit accompanied either the sketch or plans. No further plans and no applications were ever submitted by the defendants even in connection with the Permit of March 3, 1925, and much less pursuant to the decree of April 21, 1930.

In December 1928, the Chief of Engineers directed the District Engineer to make a comprehensive study of all feasible methods of preventing reversal of flow in the Chicago River "for the purpose of determining what plan should be adopted to meet the Permit Condition," to wit, Condition 6 of the Permit of March 3, 1925. (Report of Special Master McClennen, pp. 7, 8.) The District Engineer, knowing that the Sanitary District had made studies of the subject, requested that such studies be made available to him. In response to this request, the Sanitary District supplied him with twelve plans of controlling works, many of them sub-divisions of others. The plans were not submitted as parts of any application or any anticipation of an application to be made, but merely as the voluntary assistance given by one engineering force to another. (Master's 1933 Report, p. 8; Weeks, R. 774.) The basis of the defendants' contention on this point necessarily rests upon the claim that the foregoing constituted a compliance on the part of the defendants with this requirement of the decree and that the defendants believed that they were merely awaiting the action of the War Department. The factitious character of this contention is overwhelmingly manifest from an examination of the facts.

The first decision of this Court (278 U. S. 367) was rendered on January 14, 1929. The evidence on the Re-reference to settle the terms of the decree was taken in March, April and September of 1929. On this Re-reference General Jadwin, Chief of Engineers in April 1929 stated the position of the War Department as follows:

"It is the present attitude of the Chief of Engineers, therefore, that the United States should not *require* the construction of controlling works, but that the Department will *consider any application for the approval of plans of controlling works, to be constructed by the Sanitary District or other agency,* and may be expected to approve these plans if the works are shown to be necessary, to be effective, and to be the minimum detriment to navigation.

The question of control works is therefore a sanitary matter for solution by the Chicago Sanitary District or the City of Chicago." (Italics ours.) (Report of the Special Master on 1929 Re-reference, p. 109.)

It is manifest that the position of the War Department was that, since controlling works were not required as an aid to navigation and since the interests of navigation were the only ones with which the Department was officially concerned, the Department would impose no mandatory requirement for the construction of controlling works but that the Department stood ready to consider and approve plans for controlling works if properly designed, as a sanitary measure, the responsibility for which rested upon the defendants. The Department, therefore, made plain that the initiative properly rested not with the War Department, but with the defendants.

After the War Department had thus clearly placed the initiative in this matter squarely upon the defendants, the defendants proposed in their findings submitted to Chief Justice Hughes, as Special Master, in September 1929 that they should immediately prepare plans, file an application and press for its approval for the construction of proper controlling works either at the mouth of the Chicago River or at the head of the Drainage Canal. (Report of Special Master on 1929 Re-reference, pp. 81, 106, 117; Report of Special Master McClennen, p. 11.) Thereafter Chief Justice Hughes, as Special Master, after having heard ex-

haustive testimony, found that controlling works properly designed would constitute no unreasonable interference with navigation (Report of Special Master on 1929 Rereference, p. 117), and provided both in his Conclusion and his recommendations for a decree that "the Sanitary District of Chicago shall forthwith submit plans for such Works to the Chief of Engineers of the War Department." (Report of Special Master on 1929 Re-reference, pp. 143, 147.) The defendants did not except to this finding or proposed form of decree, but on the contrary, in their brief before the Supreme Court on the hearing pursuant to which the decree of April 21, 1930 was entered, vigorously asserted that any exception or criticism by the complainants on the ground that these defendants would not file a proper application and press for its approval, in view of the finding of the Chief Justice that such controlling works would constitute no interference with navigation, and in view of the clearly stated attitude of the War Department that it would consider and approve plans presented for controlling works provided they were designed to cause the minimum interference with navigation, was captious and inadmissible and that the objections of the plaintiffs in that respect should be disregarded as without substance. (Report of Special Master McClennen, pp. 14-16.)

In passing it may be noted that the instant record discloses that there has been no change in the position of the War Department since the foregoing statement of General Jadwin and the foregoing conclusion of the Chief Justice. The present Chief of Engineers, Major General Lytle Brown, advised Special Master McClennen in January 1933 as follows:

> "The Department is prepared to approve plans for any controlling works presented by the Sanitary District, provided these works do not constitute unreasonable obstruction to navigation." (R. 33.)

The official position of the War Department, stated by General Jadwin before the Chief Justice in April 1929, and restated by General Brown in the instant Reference, was never changed during the interim. (Weeks, R. 488, 493, 494, 709.)

On this record it is unbelievable that the defendants could have thought that the things hereinbefore recited constitute a compliance with this requirement of the decree or that *they were awaiting the approval by the War Department of an application never filed.* The defendants knew that in the opinion of the War Department the plan for a pontoon gate, submitted in response to a requirement of the Permit of March 3, 1925, was not a satisfactory plan. (Ramey, R. 651.) On their own admission they knew that these immature plans submitted in 1926 and 1927 for a purpose wholly unrelated to the performance of the instant decree and not accompanied by any application were "practically dead." (Ramey, R. 658; Report of Special Master McClennen, p. 7.) All of these things now sought to be relied upon had been done prior to July 1927. The testimony before Chief Justice Hughes, as Special Master, in 1929 was, as shown by his Report, that controlling works should take the form of a lock with appropriate gates and that probably such controlling works should be placed at the head of the Drainage Canal. From what has been recited of the evidence, it is of course clear that the defendants never submitted any plan and application for authorization of controlling works containing a lock or for controlling works of any character at the head of the Drainage Canal. (Ramey, R. 660; Exs. 25, 26, 27.)

The defendants knew that Colonel Weeks, the District Engineer, acting under instructions from the Chief of Engineers, had prepared and filed a report upon suitable kinds of controlling works on April 11, 1929. The defendants never even examined that report until it was placed

in this record by Special Master McClennen on January 12, 1933. (Ramey, R. 398.) The defendants, represented by intelligent and experienced men, knew that on application to the proper authority in the War Department in Washington, they could secure permission to examine the report which Colonel Weeks, as District Engineer, would, of course, have no authority to release. The defendants never prepared any plans or submitted any application for authority to construct the type of controlling works which Colonel Weeks reported to be most desirable. (Ramey, R. 407.) Yet in the face of this record, the defendants now contend that this immature plan submitted in 1926 and 1927, *unaccompanied by any application* and for a purpose wholly unrelated to the performance of the instant decree, with knowledge that the form of proposal so submitted was considered unsatisfactory by the Chief of Engineers, with knowledge that there was no pending application upon which the War Department could act, with knowledge that they had assured the Chief Justice and the Supreme Court that they would forthwith prepare plans and press an application for authority to construct suitable controlling works, with knowledge that the Chief of Engineers had stated that henceforth the initiative on this matter rested squarely with the defendants, constituted a compliance with the decree of April 21, 1930.

The defendants were and are represented by intelligent and experienced men. These men have had wide experience in filing and pressing applications with the War Department for those things which they wanted. We respectfully submit that an attempt to excuse this flagrant default upon this flimsy basis cannot be sincere. The obligation imposed by the decree of this Court is a solemn obligation. We submit that it will not do to permit intelligent defendants to discard or treat their obligations under such a decree in any such fashion. It is inconceivable

that the defendants believed either that this old submission of plans without application for an entirely different purpose, long antedating the decree and known to have been found unsatisfactory by the War Department, constituted a compliance with the decree or an excuse for non-compliance.

2.

The alleged excuse that the absence of any specific provision for controlling works in the decree of April 21, 1930 (281 U. S. 696) created a doubt whether the defendants were required to construct such works and that such doubt justified the defendants both in refraining from taking any action whatsoever in the premises and from bringing the alleged doubt to the attention of this Court, not only affords no excuse but exhibits a highly culpable course of conduct.

It is a startling thing that a party under obligation to perform a judgment of this Court should assign, as an excuse for a three-years' failure to perform an important requirement of such a judgment, a claim that the party was in doubt whether the particular matter of performance was encompassed by the decree and therefore sat complacently inactive for three years (until the particular matter should have been actually performed) without even bringing to the attention of this Court such alleged doubt of the scope of the litigants' obligation. A mere statement of the position is sufficient to establish that the contention is not only without merit, but a proper subject for the most severe criticism. It can hardly be tolerated that litigants under the compulsion of a judgment of this Court may sit by until performance should have been accomplished and then for the first time advise the Court that they were in a state of uncertainty whether they should in fact perform.

Let us examine the facts advanced in support of this specious excuse. It is unnecessary to repeat, but it is necessary to bear in mind, the representations of the defendants on the Re-reference for formulating the decree, the findings of Chief Justice Hughes, as Special Master, and the action of this Court upon those findings, which were more particularly set forth in the preceding section. In the face of that record, the defendants assert that the absence of a specific provision for controlling works in the decree of April 21, 1930, created uncertainty in their minds whether they were required to construct such works. (Ramey, R. 399, 661-674.) The decree made no specific provision for *particular* or *any* sewage disposal works. Could these defendants be heard to say that they therefore doubted whether they were to proceed any further with construction of sewage disposal works? (Ramey, R. 662.) If not, how can they be heard to say that they were in doubt whether they were required to proceed with the construction of controlling works which occupied exactly the same status under the findings and conclusions of Mr. Chief Justice Hughes, then Special Master, as the sewage disposal works, and occupied exactly the same status in reference to the terms of this Court's decree? If the defendants could have had an honest doubt, which is inconceivable on the record, could they be heard to say that they refrained from taking any action on the basis of such a doubt without even reporting their alleged uncertainty to this Court? And this in the face of the fact that their Semi-annual Reports consistently listed controlling works as part of their program.

If the defendants had entertained an honest doubt, it would have been their duty to apply to this Court for instructions or a construction of the decree. These controlling works were part of the program submitted by the defendants as the one which they desired the Court to

give them time to construct before the restoration of complainants' rights, which the court in its first decision (278 U. S. 367) had held should otherwise be restored immediately. (Report of Special Master on 1929 Re-reference, pp. 81, 106, 117; Report of Special Master, McClennen, p. 11.) Can these defendants, after seeking the favor of the Court for postponement of the termination of their wrongdoing, excuse the failure to go forward with one of the elements of the program submitted by them as a basis for the Court's compassion on the ground of an *undisclosed* doubt? While it seems difficult to fix responsibility for anything among the defendants, the defendants and some of their officers were responsible for adopting the program to comply with the Court's decree. In the face of this pretended doubt, no responsible official of the Sanitary District even requested an opinion of its legal department as to the meaning of the decree in this respect. (Ramey, R. 669; Report of Special Master McClennen, p. 19.) In the face of its pretended doubt, the Sanitary District of Chicago filed its Semi-annual Reports with this Court which not only failed to disclose this pretended doubt, but which consistently included the construction of control works as part of defendants' program; and this Court had every reason to believe, as it doubtless did believe, that the defendants fully understood that they were required to proceed with the construction of controlling works just as they were required to proceed with all of the other features of the program submitted by them for the construction of which this Court had granted an indulgence of nine years.

No responsible official of the defendants ever took any action subsequent to the entry of this decree, either to resolve this pretended doubt or to go forward with this item of the program. That is true of the whole program of the Sanitary District. (Woodhull, R. 1281-1282.) In fact it is apparent from the whole record that no responsible official

of the Sanitary District or the State of Illinois ever made any real or substantial effort to investigate and determine whether the Sanitary District had laid down a program, and much less whether it was carrying out a program, which would accomplish the performance of the court decree. It is submitted that the indifference, to say the least, with which the responsible officials of the Sanitary District and the State of Illinois treated the question whether a program had been adopted and was being carried out conformable with the decree is inexcusable and intolerable. If this pretended doubt had in fact existed, it would be inconceivable that a defendant could be permitted to take advantage of such supposed doubt after it had delayed performance for three years without any disclosure to this Court. We submit that this excuse deserves the most severe condemnation.

3.

The alleged excuse that the Rivers and Harbors Act of July 3, 1930 created a doubt in the minds of the defendants whether they should proceed with the construction of controlling works, though required by the decree, has no substantial basis; but, if such alleged doubt had in fact arisen, the defendants could not be heard to excuse their non-performance on the ground of such a doubt, undisclosed to this Court for nearly three years.

The suggestion that the Rivers and Harbors Act of July 3, 1930 might affect the obligation of the defendants to go forward with the construction of controlling works, was made in the Return of the Sanitary District of Chicago and the State of Illinois to the Rule to Show Cause entered herein on October 10, 1932, which was filed in this Court on November 7, 1932. (See pages 27-31.) This suggestion was again urged by both defendants before the Special

Master on this Reference either as an excuse for, or in extenuation of, their default in the matter of controlling works. The Master's Report overwhelmingly refutes this contention of the defendants and clearly demonstrates that it is wholly without substance. (Report of Special Master McClennen, pp. 19-35.) In our brief before this Court upon Defendants' Return to the Rule to Show Cause, we pointed out that the Congress had not attempted to take any action since the date of the decree, if it has any power so to do, inconsistent with the decree, and that by the Great Lakes-St. Lawrence Deep Waterway Treaty, the Federal Government had adopted the decree of this Court as a Federal policy. All official Federal action was cited and discussed in our brief. (Brief of Wisconsin, Minnesota, Ohio and Michigan after Return of the Sanitary District of Chicago and the State of Illinois to the Rule to Show Cause, pp. 39-47.)

The inquiries thereafter ordered by this Court under the Re-reference of December 19, 1932 were, First, "the causes of the delay in obtaining the approval of the construction of the Controlling Works," and Second, "the steps which should now be taken to secure such approval and prompt construction." On January 12, 1933, the so-called Mississippi Valley States filed in this Court an Application for a Modification of the Decree of April 21, 1930, and an enlargement of the pending reference on the ground that the Rivers & Harbors Act of July 3, 1930 had created a changed situation. This Court denied the Application of the Mississippi Valley States on January 16, 1933. Under these circumstances a further extended discussion of this unsubstantial contention seems unwarranted.

Moreover, it is inconceivable on this record that the Rivers & Harbors Act of July 3, 1930 could have created or did create any honest doubt in the minds of the defendants as to their obligation under this requirement of the

decree. Indeed the most defendants claim is not that they had such a belief, but that they speculated about it.

The Federal project for the Illinois River from Utica or LaSalle to its mouth is the identical Federal project which was in effect when the hearings were had before Chief Justice Hughes, as Special Master, in 1929, before the formulation of the decree. The Rivers and Harbors Act of July 3, 1930, so far as it relates to any waters between Lake Michigan and the Mississippi River, relates only to the Illinois Waterway. The State of Illinois retained title to the Illinois Waterway. The project was based not upon Senate Document 126, 71st Congress, Second Session, but solely upon the Report of the Chief of Engineers as set forth in that document. (R. 129-130; Ex. 11, pp. 1-6.) That report disclosed that the utility of the project would not be affected by reduction in the flow at Lockport as low as a thousand second feet in comparison with the thirty-three or thirty-four hundred second feet which will flow at Lockport when the decree of this Court is fully in effect after December 1, 1938.

General Deakyne, Assistant Chief of Engineers, testified before the Rivers and Harbors Committee that an appropriation of $7,500,000 would construct the project channel so as to provide the full channel depths and widths, even though the flow at Lockport should be reduced to a thousand second feet as compared with the minimum of thirty-three hundred second feet under the decree. (R. 1844.) Contrary to the usual practice, an appropriation of $7,500,000 was made concurrently with the adoption of the project, so as to make it clear beyond debate that the adoption of the project could not be construed, even by implication, as any attempt, if Congress had the power, to appropriate any water in excess of the amount fixed by this Court.

The Congress required the project to be constructed in such a way as to require the smallest flow of water with which said project could be practically accomplished. It had before it the opinion of the Chief of Engineers that this could be at least as low as a thousand second feet. The provision for a survey was not with the view of increasing the flow, but with the view of seeing how small a flow would be adequate, for, with further developments in the art of sewage disposal, a lower flow than that provided at Lockport for sanitation under the court decree may become sufficient.

Of course in any event the most that could be said of the provision for a future survey would be that it is in the realm of speculation and possibility that the Congress, if it has the power, might at some future date, attempt to take some action which would provide a diversion different than that fixed by the Supreme Court. That alleged possibility had been consistently urged by these defendants throughout this litigation. That such an alleged possibility had any legal significance had been expressly repudiated by this Court in both decisions. (*Wisconsin v. Illinois,* 281 U. S. 179 at 197-8; Same, 278 U. S. 367 at 420.) It is submitted that the defendants cannot in good faith seek to excuse their default on the basis of an alleged possibility of congressional action twice before urged before this Court and twice repudiated by this Court.

Hence it is clear on this record that there could have been no real doubt created in the minds of the defendants by the Rivers and Harbors Act of July 3, 1930. The defendants did not even claim that they had decided or believed that it *would* be unnecessary to build controlling works because of the Rivers and Harbors Act of July 3, 1930, but at the most merely claimed that they thought it *might* be unnecessary ever to build controlling works. (Ramey, R. 405.) In short the defendants seek to ex-

cuse non-performance on the basis of an *undisclosed speculation.*

However, conceding for the sake of argument that an actual doubt, however unwarranted, arose in the minds of defendants, it would have been the imperative duty of the defendants, had they really had such an alleged doubt, to have brought it to the attention of this Court and asked this Court to determine whether such Federal action affected defendants' obligation under the decree. Assuming such alleged doubt to have existed, the action of the defendants in utterly disregarding this requirement of the decree for nearly three years on the basis of an undisclosed doubt, would not excuse, but condemn, the course of action followed.

4.

The alleged excuse that the defendants performed or were excused from performing their obligation under the decree immediately to make application to the War Department for approval of controlling works by casual and off-hand conversations with the United States District Engineer at Chicago, during visits to his office for other purposes, is without merit; and it is inconceivable that such an excuse can be seriously advanced by responsible and intelligent officials of a great State and an important municipality.

We have hereinbefore reviewed the record on this Reference and shown that no application whatsoever for a permit for the construction of controlling works was ever made even prior to the date of the entry of the decree of April 21, 1930 and much less since. (See Sects. I, A and B1, pp. 15-24 *supra.*) The only action of the defendants either before or after the decree may be briefly summarized. In 1926 and 1927, the Sanitary District submitted, without ap-

plication, tentative plans for a pontoon gate at the mouth of the Chicago River. These plans were submitted solely in compliance with the mandatory requirement of Paragraph 6 of the Permit of March 3, 1925. (Report of Special Master McClennen, p. 6.) Late in 1928 or early in 1929, the District Engineer, who had been directed by the Chief of Engineers to make a study and report of the possible kinds of controlling works other than those which would constitute a complete bar to navigation (as was the case with the pontoon gate submitted by the Sanitary District) requested of and received from the Sanitary District Engineers copies of such plans and studies of controlling works as had theretofore been made in the Sanitary District offices. These plans and studies were not submitted by the Sanitary District as parts of any application or in anticipation of any application to be made, but merely as the voluntary assistance given by one engineering force to another. (Report of Special Master McClennen, p. 8; Weeks, R. 774, 779, 802.)

In this state of the record the defendants offered testimony that certain Engineers in the employ of the Sanitary District, while conferring with Colonel Weeks, the District Engineer, from time to time in relation to other features of the work of the Sanitary District which required these meetings, had engaged in casual and off-hand conversations about controlling works with that officer. The defendants now apparently put forward these casual and off-hand conversations either as a performance of their obligation under the decree forthwith to make application to the War Department for a permit authorizing controlling works or as an excuse for non-performance in that regard. The utter lack of substance in the contention is thoroughly established by the Master's analysis of the evidence (Report of Special Master McClennen, pp. 16-18.) A detailed review of that evidence by the complain-

ants would be unwarranted. The specious character of the excuse is too manifest. All of Colonel Weeks' statements were mere expressions of his personal opinion and were made to the defendants in the form of mere statements of his personal opinions. (Weeks, R. 488.) The position of the War Department had been authoritatively stated by General Jadwin and was well known to the defendants. It is amazing that the defendants should claim that these casual and off-hand conversations constituted an honest and *bona fide* attempt to make an application for a permit for the construction of controlling works or an excuse for not doing so.

These gentlemen were not in ignorance of how to apply to the Secretary of War for a permit. The Sanitary District has applied for many permits, when it suited its purpose, during the course of its existence. No case was brought to the attention of the Master where the Sanitary District had failed to file a proper official application when it sought sanction for a further diversion. It was admitted by Mr. Ramey, Principal Assistant Chief Engineer of the Sanitary District, that were he seriously trying to obtain a permit he would file an official application, and if it were disapproved by the District Engineer he would press it with the Chief of Engineers and the Secretary of War. (R. 834.) Here we have these defendants faced with the solemn obligation of this Court's decree requiring them forthwith to proceed to prepare plans and file an application for proper controlling works with the War Department. How can it be sincerely contended that these defendants believed that an honest, wholehearted effort to comply with this decree was satisfied by casual, off-hand conversations with a District Engineer?

II.

THE FINDINGS AND CONCLUSIONS OF THE SPECIAL MASTER AS TO THE STEPS WHICH SHOULD NOW BE TAKEN TO SECURE APPROVAL OF CONTROLLING WORKS AND THEIR PROMPT CONSTRUCTION ARE CORRECT AND ABUNDANTLY SUPPORTED BY THE RECORD; BUT THE SPECIAL MASTER SHOULD ALSO HAVE FOUND THAT THE DECREE SHOULD BE FURTHER ENLARGED TO PROVIDE FOR THE APPOINTMENT OF A MANDATORY OF THIS COURT, WITHOUT FURTHER NOTICE OR HEARING, TO TAKE SUCH STEPS FOR, ON BEHALF AND AT THE EXPENSE OF THE STATE OF ILLINOIS IN THE EVENT OF DEFAULT.

After reviewing the evidence and the various contentions of the parties, the Special Master concluded on this branch of the case as follows:

> "The step which should now be taken to secure approval of Controlling Works is in an enlargement of the decree of April 21, 1930 by the addition of a paragraph enjoining the State of Illinois to provide forthwith the necessary money for, and through the Sanitary District of Chicago or through other instrumentality chosen by the State to submit plans forthwith to the Chief of Engineers of the War Department, for Controlling Works for the purpose of preventing reversals of the Chicago River at time of storm and the introduction of storm flow into Lake Michigan and to make application forthwith to the Secretary of War for authorization of such Works and diligently to pursue such application with all necessary modifications to secure within four months if possible the recommendation of the Chief of Engineers and the authorization of such Works by the Secretary of War, and immediately thereafter to begin and to continue to construct such Works to completion within two years." (Report of Special Master McClennen 126.)

The soundness of the foregoing conclusion as far as it goes is abundantly supported by the record. Neither the

Sanitary District nor the State of Illinois has, during the three years which have elapsed since the entry of the decree, made any application whatsoever for a permit of the Secretary of War authorizing construction of controlling works. Neither the Sanitary District nor the State of Illinois from the entry of the decree to date has ever made or sought to make any provision for financing such an application or for financing the construction of such works. Even after this Court by its order of Reference dated December 19, 1932 directed a summary inquiry as to what steps should now be taken to secure approval of controlling works and their prompt construction, the Sanitary District, when adopting its 1933 budget on January 12, 1933, made no provision whatsoever for financing the making of an application to the Secretary of War or for financing the construction of controlling works. Thereafter during this Reference, the defendants stated to Special Master McClennen that they do not intend to do anything about controlling works unless this Court should specifically order them so to do. Throughout the pending Reference the defendants persistently urged, as hereinbefore shown, specious claims of doubt as to whether they were under any obligation under the decree to go forward in the matter of controlling works. (See Facts, Section I, B, 2, 3, 4, pp. 24-33, *supra.*) It is therefore manifest that it is both reasonable and necessary that the decree should be enlarged in accordance with the finding of the Special Master.

The reasons why this duty should be specifically imposed upon the State of Illinois are overwhelming. They are ably stated by Special Master McClennen (Report of Special Master McClennen, pp. 36-50.) While the Sanitary District and the State of Illinois are both obligated to perform this Court's decree and restore complainants' rights, the primary obligation necessarily rests upon the State of Illinois of which the Sanitary District is a mere arm or

agency. In the past the State of Illinois has made no pretense of assuming or performing this obligation. It has sought to excuse its own default and the default of the Sanitary District upon the ground of lack of capacity and power in the Sanitary District when such lack of capacity and power, if they existed at all, rested upon restrictions imposed upon the Sanitary District by the State of Illinois, arose from a lack of powers which had not been but could have been conferred upon the District by the State of Illinois, or arose from the negligence, incompetence or maladministration of officers of other political subdivisions and agencies of the State over which the Sanitary District had no power or control, but over which the State of Illinois had and has power and control and for the discharge of whose duties the State of Illinois has the responsibility. As will appear more clearly hereafter from a discussion of the financial measures which should be taken now, the Sanitary District, not through lack of financial capacity or resources but through the negligence, incompetence or maladministration of tax collecting officers of the State of Illinois in Cook County, has been placed temporarily in a condition where the abundant financial capacity of the District to perform the decree cannot for the time be made available. That the State of Illinois is abundantly able to finance performance and to perform this decree cannot be questioned upon the instant record. (See Facts, Section VI, C, pp. 58-9, *infra.*) Under these conditions it is clear that the decree should be enlarged to impose a specific duty upon the State of Illinois to assume and discharge its obligation to perform the decree. This conclusion is based not only upon the present inadequacy of the *immediately available* financial capacity of the Sanitary District, in the existing state of its affairs as affected by collateral matters such as negligent failure of tax collections, under the jurisdiction and control of the

State of Illinois, but upon the fact that the measures which might properly be taken to increase and make immediately available the financial capacity of the Sanitary District are all things which might properly be authorized or properly be imposed upon the Sanitary District by the State and are dependent upon State action. The extent, if at all, to which the State of Illinois will require the Sanitary District currently or eventually to reimburse the State of Illinois for the cost of performance of the decree is a question of internal policy with which the complainants, and we assume this Court, is not concerned. Certainly the defendants must not be permitted longer to juggle the responsibility between them. The State of Illinois should not be permitted to delegate, as it has attempted to do in the past, its responsibility for the financing and the performance of this Court's decree.

The State of Illinois has sought to raise technical legal obstacles, allegedly based upon its Constitution, to the discharge of its obligation under the decree. The Special Master has fully demonstrated the unsoundness of such technical legal contentions in his Report. (Report of Special Master McClennen, pp. 36-50.) We shall reserve our discussion of those questions for the Section of our brief devoted to the law. (See Law, Section II, pp. 93-97, *infra.*)

However complainants submit that the Special Master should also have found that the decree should be further enlarged to provide for the appointment of a Mandatory of this Court, without further notice or hearing, to take the steps set forth by the Special Master, for, on behalf and at the expense of the State of Illinois in the event the State does not proceed promptly with the duties specifically to be imposed upon it by the recommendation of the Special Master. The Special Master erred in holding that such a procedure would be inexpedient if not futile.

We agree that if Illinois proceeds promptly with the discharge of its duty, it would be neither reasonable nor necessary to substitute a Mandatory of this Court. The past record of the defendants, however, furnishes just ground for apprehension whether the State of Illinois will go forward promptly and expeditiously with the performance of its duties so declared. The decision of this Court on this hearing should not be such as to require another hearing in such an eventuality. It should provide for the appointment of a Mandatory without notice in case of such a default; for under such circumstances the appointment of a Mandatory would be reasonable, necessary and practicable. No difficulty is perceived in authorizing such a Mandatory to levy taxes upon the last available assessment roll in the State of Illinois and to collect such taxes through United States Marshals. No extensive machinery would be required. If such last available assessment roll were not satisfactory to Illinois, the responsibility would rest upon the State. Hence, the Mandatory would need no army of subordinates to make valuations or assessments. Nothing in the record supports a conclusion that such a Mandatory would be received as a "carpetbagger," and on the contrary, speaking off the record, we have reason to believe that he would be welcomed by the thinking citizens of Illinois. Such a Mandatory could proceed to supervise the carrying out of the program by the Engineering Organization of the Sanitary District as well as the non-technical offices of that District. We reserve further consideration of this matter for our discussion of the financial measures.

III.

THE SPECIAL MASTER'S FINDINGS AND CONCLUSIONS "AS TO THE CAUSES OF THE DELAY IN PROVIDING FOR CONSTRUCTION OF THE SOUTHWEST SIDE TREATMENT WORKS" ARE OVERWHELMINGLY SUSTAINED BY THE EVIDENCE IN THIS CASE.

After reviewing the evidence and the contentions of the parties, the Master concluded on this branch of the case as follows:

> "The causes of the delay in providing for the construction of the Southwest Side Treatment Works are (1) an inexcusable and planned postponement of the beginning of construction of these Works to January 1, 1935, which left an inadequate time for their completion before December 31, 1938, at the rate of progress expected, or to be expected under the methods pursued by the Sanitary District, and (2) the failure to proceed to a definite decision as to a site and to the acquisition of the site so chosen, and (3) the failure to proceed with reasonable diligence to prepare designs, plans and specifications for the Works at this site or on the site of the West Side Works." (Rep. of Special Master McClennen 125-126.)

The Special Master's conclusion is abundantly supported by the evidence set forth in his Report (Rep. of Special Master McClennen 50-60). However, in view of the fact that the defendants claim this finding to be erroneous we discuss the evidence briefly.

A.

The Record Establishes that "The Cause of the Delay in Providing for the Construction of the Southwest Side Treatment Works" Was the Deliberate Adoption by the Defendants of a Program, in Utter Disregard of the Findings of Chief Justice Hughes, as Special Master, as to the Steps Which, With Reasonable Expedition, Should be Taken for the Construction of This Controlling Factor Within the Time Fixed by the Decree, Which Program Allowed Such Inadequate Time for the Construction of the Plant as to Constitute a Planned Default Under the Decree.

After hearing exhaustive testimony, Chief Justice Hughes, as Special Master, found, on filing his report in December 1929, that two and one-half years would be a reasonable time to allow for selection and acquisition of a site, necessary preliminary steps, preparation of plans and specifications and advertising and passing upon bids for the construction of the Southwest Side Treatment plant (Report of the Special Master on 1929 Re-reference, page 58), and that five and one-half years thereafter would be a reasonable allowance of time for the physical construction of the Southwest Side Treatment plant. (Report of the Special Master on 1929 Re-reference, page 70.) The program adopted by the defendants in 1930 utterly disregarded these findings and conclusions. Under the defendants' program construction was not to begin upon any part of this controlling factor until 1935. (Ex. 22. Ramey, R. 563, 565-566; Pearse, R. 994.) The defendants thereby deliberately and with knowledge, and without any intention of complying with the findings and conclusions of Chief Justice Hughes as Special Master, adopted a program under which they proposed to take five years, (1930 to 1934, inclusive,) for the things which Chief Justice Hughes as

Special Master had found, with reasonable expedition, should be accomplished in two and one-half years. (Ramey, R. 564, 566.) This program also postponed commencement of construction on this controlling factor until 1935 and allowed only four years or less for physical construction and tuning up the Southwest Side Plant. (Ex. 22. Ramey, R. 384, 563, 565-566, 568.)

In determining the sincerity of this program we must not only compare the period of *four years* thus allowed for the *construction and tuning* up of the Southwest Side Plant with the finding of Chief Justice Hughes, as Special Master, that *five and one-half years* would be required for *physical construction* of the plant, but also with the claims advanced by the defendants before Chief Justice Hughes, as Special Master, to the effect that the *physical construction* of this plant would require *nearly eight years.* (Report of the Special Master on 1929 Re-reference, p. 66.) Indeed, it is significant that the program adopted by the District (Ex. 22) was adopted both in relation to the works to be accomplished by December 31, 1935 and in relation to the provision made for the construction of the controlling factor, the Southwest Side Treatment Plant, with knowledge that such program did not comply with the findings of Chief Justice Hughes, as Special Master, as to what should be done by the District with reasonable expedition and without any intention to adopt a program that would comply with such findings. (Ramey, R. 557-562, 566; Woodhull, R. 1374-1376.)

From a consideration of the foregoing facts, it is incontrovertible that the prime cause of delay in providing for the construction of the Southwest Side Treatment Works is the deliberate adoption of a program which, without any adequate cause, provided for substantial, and in many cases very great, delay in the program for the construction of the Southwest Side Treatment Works that had been found to be reasonable and proper by Chief Justice

Hughes, as Special Master, on the 1929 Re-reference. This program utterly disregarded the findings of Chief Justice Hughes as Special Master as to what would be reasonable and proper performance. It deliberately postponed the commencement of construction of the Southwest Side Plant until so late a date as to amount to a planned default.

The adoption of this program by the defendants in 1930 establishes a lack, from the very date of the entry of this decree, of any real, substantial and *bona fide* effort and intent to perform the decree according to its terms. The only excuse offered was, that it was desired to average the annual expenditures in such a way as to equalize them as nearly as possible from year to year. But, as Special Master McClennen points out, the program adopted by the Sanitary District, with knowledge that if their professions and estimates of cost were even approximately correct an annual expenditure of over $20,000,000 would be required, failed to provide for anywhere near ratable expenditures on construction progress in the earlier years of the period (Report of Special Master McClennen, page 55), and accumulated excessive expenditures and construction progress for the last years of the period, so that the slightest derangement in finances or construction progress would inevitably lead to default, even if it were assumed that, contrary to the claims of defendants before Chief Justice Hughes as Special Master, and contrary to his findings, the construction work left for the last four years of the period under the defendants' program, could be physically performed within that time, should unlimited finances be available.

In passing we invite the Court's attention to the fact that the defendants' program likewise planned a postponement of the completion of the West Side Plant until the end of 1936, and indeed of some of the intercepting sewers, until 1938. This was incontrovertibly a planned default as to

that part of the decree which required the defendants to complete and place in operation the West Side Plant before the interim reduction of the diversion on Dec. 31, 1935. It is further to be noted that the work which under the decree should be done on the West Side, Calumet and Des Plaines projects before December 1, 1935, the date of the interim reduction in diversion, is only 16% completed, and far behind what Chief Justice Hughes, as Special Master, found in 1929 should be accomplished on these projects with reasonable expedition. (Report of Special Master McClennen, page 59.)

B.

The Defendants Have Neither Acquired Nor Definitely Selected a Site for the Southwest Side Treatment Works; They Stand Today in the Same State of Indecision as to Where the Southwest Side Treatment Works Will be Finally Located as They Stood Before Chief Justice Hughes, as Special Master, in 1929; and on This Reference the Matter of the Selection and Acquisition of a Site for the Southwest Side Treatment Works by the Defendants, as a Matter of Determination and Accomplishment, Stands Exactly Where It Stood on the 1929 Re-reference When the Defendants Presented Their Evidence on the Subject to Chief Justice Hughes, as Special Master.

After the defendants, at the close of the 1929 hearings, had professed an uncertainty whether they should acquire the site previously selected for the Southwest Side Plant or some other site, Chief Justice Hughes, as Special Master, in his report on Re-reference, at page 51, said:

> "The question must be determined promptly, and there seems to be no reason why proceedings for purchase or condemnation should not go speedily forward."

Since that evidence was taken before Chief Justice Hughes, as Special Master, in September 1929, approximately *three and one-half years* have passed and the performance of the decree is still threatened by the indecision and inability of the defendants to select and acquire a site. It is manifest from the evidence on this Reference that there is the same lack of a definite decision and the same absence of a definite official action for the selection and acquisition of a site which characterized the position of the defendants on the Re-reference in 1929. (Ramey, R. 582-5, 591-2, 597, 598; Woodhull, R. 1319-1320; Pearse, R. 971-2.) The Sanitary District had studied this problem with a large and highly competent corps of engineers for many years. It is unbelievable that the Sanitary District was either unable or incompetent to select a site for this plant.

In September 1929 the Sanitary District had funds with which to go forward immediately with the acquisition of a site. (Woodhull, R. 1303.) An ordinance for the acquisition of a site was not adopted until December 26, 1929. (Woodhull, 1305, 1308, 1314.) No offers were ever made to property owners and no condemnation suits were ever filed. (McCarthy, R. 1412, 1413.)

The defendants offered evidence that thereafter some adjoining property owners protested against the acquisition of the site selected and, at a public hearing, offered evidence that the acquisition of the proposed site was unnecessary for the reason that the West Side area, already owned by the Sanitary District, was adequate for the construction of both the West Side and Southwest Side Treatment Works. Thereupon the Sanitary District repealed its ordinance for the acquisition of the proposed site and remained in the same state of uncertainty as to the location of the Southwest Side Treatment Works as before. If the Sanitary District, after studying both the West Side and proposed Southwest Side sites for many years, with a large

and highly trained corps of engineers, could not reach a decision as to the proper location of these sewage treatment works or whether the West Side area was large enough for both plants, that circumstance furnishes an abundant reason why the performance of this decree must be taken out of such uncertain and incompetent hands and placed under the strict jurisdiction of this Court.

Finally, in 1932, the Sanitary District reached a state of mind where they thought that if a new process for disposing of the sludge proved successful, the Southwest Side Treatment Works could be built on the West Side area now owned by the District. No definite or final decision has been made. No official action has been taken. (Woodhull, R. 1319-20; Pearse, R. 971-2; Ramey, R. 582-5, 591-2, 597, 598.) The District stands in exactly the same state of indecision and uncertainty as to where, if at all, the Southwest Side Sewage Treatment Works will be built as it stood on the Re-reference in 1929. It requires no argument to show that three and one-half years of continued indecision as to where this plant shall be built has been and is a prime and inexcusable cause of the delay.

C.

A Further Cause of the Delay in Providing for the Construction of the Southwest Side Treatment Works is the Complete Failure of the Defendants to go Forward With the Preparation of Designs, Specifications, and Plans With Reasonable Expedition in Accordance With the Requirements of the Findings of Chief Justice Hughes, as Special Master.

No contract plans have been prepared for any of the structures involved in the Southwest Side Treatment Works. (Ramey, R. 637-643; Pearse, R. 1069.) Chief Justice Hughes, as Special Master, found that complete con-

tract plans should, with reasonable expedition, be prepared in two and one-half years. (Report of Special Master on 1929 Re-reference 58.) It is now approximately three and one-half years since that finding was made. The 1933 budget includes no substantial, if indeed it includes any, appropriation for the preparation of contract plans and the completion of designs for any of the large structures of the Southwest Side Treatment Works. (Ex. 50. Pearse, R. 1042-43.) The complete failure of the defendants to proceed with reasonable diligence to prepare designs, plans and specifications for the Southwest Side Treatment Works is manifest from the fact that the total expenditures on that project to date have been $87,306.65. (Report of Special Master McClennen, 56.) Even these meagre expenditures were made in efforts at acquisition of the site, in reinvestigation of the Stockyards and Packing Town wastes, and in other purely preliminary and unfruitful studies. (Report of Special Master McClennen, 56.) As stated by Special Master McClennen, no new reason for extended reinvestigation of the Packing Town wastes has arisen since the Re-reference in 1929 when Chief Justice Hughes, as Special Master, found that a few months at most were enough for any necessary reinvestigation. (Report of Special Master on 1929 Re-reference 55.) It is thus manifest that an important cause of delay has been the complete failure of the defendants to go forward with the preparation of plans for the Southwest Side Treatment Works.

IV.

THE FINDINGS AND CONCLUSIONS OF THE SPECIAL MASTER AS TO THE STEPS WHICH SHOULD NOW BE TAKEN FOR THE CONSTRUCTION OF THE SOUTHWEST SIDE TREATMENT WORKS ARE NOT ONLY FULLY SUSTAINED BUT IMPERATIVELY REQUIRED BY THE EVIDENCE. AS INDICATED BY THE SPECIAL MASTER, THE ENLARGEMENT OF THE DECREE SHOULD ALSO INCLUDE THE OTHER SEWAGE TREATMENT WORKS IN THE PROGRAM. HOWEVER, THE SPECIAL MASTER SHOULD ALSO HAVE FOUND THAT THE DECREE SHOULD BE FURTHER ENLARGED TO PROVIDE FOR THE APPOINTMENT OF A MANDATORY OF THIS COURT, WITHOUT FURTHER NOTICE OR HEARING, TO CARRY OUT THE DESIGNATED STEPS, FOR, ON BEHALF AND AT THE EXPENSE OF THE STATE OF ILLINOIS IN THE EVENT OF A DEFAULT.

On this branch of the case the Special Master concluded as follows:

> "The step which should now be taken for the construction of the Southwest Side Treatment Works or in case of a change in site for the construction of an adequate substitute, is in an enlargement of the decree of April 21, 1930 by the addition of a paragraph enjoining the State of Illinois to provide forthwith the necessary money for, and through the Sanitary District of Chicago or through other instrumentality chosen by the State, forthwith to determine upon and secure the site for the Southwest Side Treatment Works, if the site is not owned already by the Sanitary District and forthwith to design and to construct said Southwest Side Treatment Works of the kind proposed to the Special Master of this Court in 1929 or of a kind no less efficient for the purification of the effluent to be discharged to the Sanitary Canal and at a rate of progress forthwith that except for casualties not now foreseeable will result in the completion of said Works and the beginning of their operation in ordinary course before December 31, 1938.

> The omission of reference at this point to the Calumet, West Side and North Side Treatment Works is because they are not within the Order appointing me." (Report of Special Master McClennen, pp. 126-7.)

Special Master McClennen points out in his Report that this conclusion is sustained by the same reasons which require the enlargement of the decree to enjoin the State of Illinois to take the necessary steps to secure approval for the construction of controlling works and their prompt construction. (Report Special Master McClennen, pp. 60-61; 36-59.) While we should regard it self-evident in any event, this Court has already decided that the primary obligation for the performance of this decree rests upon the State of Illinois of which the Sanitary District is a mere political agency. (See Law, Section II, p. 93, *infra.*) Up to date the State of Illinois has utterly disregarded its obligation under the decree. We have already set forth the reasons why it is essential that the decree should be enlarged to impose a specific duty upon the State of Illinois to take the steps necessary for obtaining approval of the construction of controlling works and for their prompt construction. (See Facts, Section II, p. 34, *supra.*) Those reasons apply with equal force to the performance of this vital requirement of the decree. The abundant financial capacity of the State of Illinois to perform the decree must be admitted. (See Facts, Section VI, C, p. 58, *infra.*) The State of Illinois has complete control over the Sanitary District and therefore is in a position to require currently or ultimately such reimbursement of the cost from that District as the State desires. If the State of Illinois with complete control over the Sanitary District is unwilling to rely upon the Sanitary District to perform so as to exonerate Illinois, the State of Illinois can not fairly ask the Complainant States, which exercise no power or control over the Sanitary District, to disregard

the obligation of Illinois to them and rely solely upon that District to right their wrongs and perform this decree. The restrictions upon the Sanitary District are imposed by the State. (Report of Special Master McClennen, pp. 62-64.) As will hereafter appear, there are many powers which could be conferred upon the Sanitary District to make more immediately available its great financial capacity and there are other requirements which could be imposed upon the Sanitary District for the purpose of financing this decree. (See Facts, Section VI, G, p. 66, *infra.*) These matters are all within the control of the State. The State should be specifically required to assume and discharge its obligation to perform this decree, and it can then do as it sees fit in relation to the Sanitary District.

The finding of the Special Master on this point hereinbefore quoted indicates that the only reason he does not find that the decree should be enlarged to impose a specific duty upon the State of Illinois with reference to the completion of the Calumet, West Side and North Side Treatment Works is because they are not within the Order of Reference. Complainants submit that this Court should include the imposition of that duty on the State in respect to those projects in this enlargement of the decree. This conclusion is supported by the same compelling reasons which require this enlargement of the decree in relation to the Southwest Side Treatment Works.

Complainants also submit that the Special Master should have found that this enlargement of the decree should provide for the appointment of a Mandatory of this Court, without further notice or hearing, to perform the things to be enjoined upon the State of Illinois, at its expense in the event that the State fails to proceed to discharge the duty so enjoined with reasonable expedition.

The defendants have neither acquired nor selected a site for the construction of the Southwest Side Treatment Plant as originally planned, or an adequate substitute. (Woodhull, R. 1319-1320; Ramey, R. 582-585, 597-598.) The program adopted by the defendants (Ex. 22) for the construction of the Southwest Side Treatment Works not only flagrantly departed from what Chief Justice Hughes, as Special Master, found reasonable expedition would require, but was such as inevitably to produce a default by the defendants in the performance of the decree. The program amounted to a planned default. No contract plans have been prepared for any of the structures involved in the Southwest Side Treatment Works. (Ramey, R. 637-643; Pearse, R. 1069.) The 1933 budget includes no appropriation for the preparation of contract plans and the completion of designs for any of the large structures of the Southwest Side Treatment Works. (Ex. 50; Pearse R. 1042-43.)

Under these circumstances it is not only clear that there has been a flagrant default in the performance which reasonable expedition required, but that the defendants did not even plan to conform to that course. With this record of default, which involves not only a failure to proceed "with all reasonable expedition" but even a failure to *plan* so to proceed, there can be little confidence that these defendants, if left to their own initiative and devices, will proceed with that real, substantial and *bona fide* effort to comply with the terms of this Court's decree "with all reasonable expedition" which this Court found to be the measure of the diligence required of the defendants. (278 U. S. 367, 420-421.) Practically all, if not all, of the contract plans which have been prepared in relation to *any* of the plants in the program and which are ready to let when funds are available, relate to sewers. (Ramey, R. 631-633.) While the sewers are essential, Chief Justice Hughes, as Special Master, found that they are not a con-

trolling factor in the time required for the construction of these works. (Report of Special Master on 1929 Re-reference, 37, 142 (f).) Hence to the extent that any work has been carried on in the matter of design and contract plans in relation to *any* of the plants in the program, it has not been for the material structures from the standpoint of performance of the decree.

The past default of the defendants has greatly prejudiced the complainants and threatened the prompt restoration of their rights as declared by this Court. Hence, complainants submit that the decree should be enlarged to provide for the appointment of a Mandatory without further notice or hearing in the event of further default.

V.

THE FINDING OF THE SPECIAL MASTER AS TO THE FINANCIAL MEASURES ON THE PART OF THE SANITARY DISTRICT WHICH ARE REASONABLE AND NECESSARY IN ORDER TO CARRY OUT THE DECREE OF THIS COURT IS NOT RESPONSIVE TO THE ORDER OF REFERENCE. HOWEVER, IN THE VIEW OF THE COMPLAINANTS THE FINDING IS NOT MATERIAL TO A PROPER DISPOSITION OF THE MATTERS BEFORE THE COURT, BUT, WERE THE ISSUE MATERIAL, THERE ARE ADDITIONAL FINANCIAL MEASURES WHICH SHOULD BE REQUIRED OF THE SANITARY DISTRICT.

On this branch of the case the Special Master found:

> "The Sanitary District is not failing *now* to pursue the reasonable financial measures *now* within its control, which are necessary in order to carry out the decree of this Court." (Italics ours.) (Report Special Master McClennen, p. 126.)

In his discussion of this question, the Special Master conditions this finding as follows:

> "*If the financial measures hereinafter set out are required of the State of Illinois,* it is not reasonable

to require the Sanitary District to take any financial measures now, in addition to those which it is taking." (Italics ours.) (Report Special Master McClennen, p. 61.)

When the finding is so conditioned, the complainants take no exception. In our view the responsibility for financing the performance of this decree should be imposed directly and specifically upon the State of Illinois. The State of Illinois has full control over the Sanitary District. The State defines the District's powers. It can *confer any powers* upon the District essential or appropriate to make the large financial capacity of the District immediately available. The State may impose requirements upon the District. It can *impose all requirements* upon the District deemed necessary or appropriate for that purpose. This Court, in order to take similar measures to make immediately available the financial capacity of the District, would necessarily have to act through compulsion upon the State of Illinois which is the source of the Sanitary District's powers.

Moreover, the record discloses that the financial difficulties of the District, to the extent that they exist, rest upon the negligence, incompetence or misconduct of other agencies, subdivisions or officers of the State over which the State has control and for which it is responsible. The State does not confer the power to collect taxes on the Sanitary District but provides for the collection of Sanitary District taxes through other officers. The State does not empower the Sanitary District to assess property for purposes of taxation but provides for the assessment of the property upon which the Sanitary District's tax levies are operative by other officers. All of the financial difficulties of the Sanitary District flow from the negligence, incompetence or misconduct of the agencies provided by the State for the assessment of property and the collection

of taxes and from restrictions imposed upon the Sanitary District by the State. The correction of these conditions rests in actions by the State. In our view of the proper disposition of this litigation, these matters have no relevancy except as an added reason why the State of Illinois must be required to assume and discharge its primary responsibility to finance performance of the decree and may not be permitted to delegate, as it has attempted to do in the past, its responsibility for such financing and performance to the Sanitary District. For all of these reasons the complainants submit that it should be left to the State to determine to what extent, if at all, the State will require the Sanitary District currently or eventually to exonerate the State from the cost of financing this decree and to determine what machinery the State will provide to make the large financial capacity of the Sanitary District available for that purpose.

Otherwise, however, it would be both reasonable and necessary to require the Sanitary District to take additional financial measures to carry out this Court's decree. That conclusion would not be affected by the fact that the adoption of these measures would require either the grant of power to or the imposition of requirements upon the Sanitary District. The circumstance, however, that such measures necessarily depend upon State action makes it difficult, if not impossible, to discuss financial measures on the part of the Sanitary District separately from the measures which should be required of the State of Illinois.

We will, therefore, discuss those measures in our consideration of the financial measures which are reasonable and necessary on the part of the State of Illinois. (See Facts, Section VI, E, F, G, pp. 60-68, *infra.*) We merely point out that, were the issue material, the finding of the Special Master would not be responsive, for it merely says that the District is not failing *now* to pursue the reasonable

financial measures *now* within its control. The question, if material, would be what financial measures *should reasonably be required.*

At and after the date of the entry of the decree of April 21, 1930 and before its present financial difficulties flowing from obstacles created by other agencies of the State of Illinois arose, the Sanitary District did not pursue the reasonable financial measures within its control which were necessary in order to carry out the decree of this Court. The finding of the Special Master on this point clearly so implies. However, complainants are interested not in condemnation for past delinquencies but in future performance and therefore refrain from discussion of the evidence on that subject.

VI.

THE FINDINGS OF THE SPECIAL MASTER AS TO THE FINANCIAL MEASURES ON THE PART OF THE STATE OF ILLINOIS WHICH ARE REASONABLE AND NECESSARY IN ORDER TO CARRY OUT THE DECREE OF THIS COURT ARE CORRECT AND SHOULD BE AFFIRMED; BUT THE MASTER SHOULD ALSO HAVE FOUND THAT THE DECREE SHOULD BE FURTHER ENLARGED TO PROVIDE FOR THE APPOINTMENT OF A MANDATORY OF THIS COURT, WITHOUT FURTHER HEARING OR NOTICE, WITH FULL POWER TO CARRY OUT THESE FINANCIAL MEASURES AT THE EXPENSE AND ON THE CREDIT OF THE STATE OF ILLINOIS IN THE EVENT OF A DEFAULT.

As to the financial measures on the part of the State of Illinois which are reasonable and necessary in order to carry out the decree of this Court, the Special Master found:

> "The financial measures on the part of the State of Illinois which are reasonable and necessary in order to carry out the decree of this Court are in the enlargement of the decree by adding to it a paragraph pro-

viding that the State of Illinois be enjoined to appropriate through its General Assembly, before July 1, 1933, the sum of thirty-five million dollars to be expended before the end of the first fiscal quarter after the adjournment of the next regular session or in any event before October 1, 1934 and the same amount per year for each year ending on September thirtieth thereafter for the designing and the securing of authorization from the War Department and for construction of Controlling Works for the purpose of preventing reversals of the Chicago River at times of storm and the introduction of storm flow into Lake Michigan and for sites for, and for the engineering expenses of designing, and for the construction, enlargement, alteration and completion of the intercepting sewer tunnels, conduits, sewage treatment plants and pumping stations commonly known as the Calumet Treatment Works, North Side Treatment Works, West Side Treatment Works and Southwest Side Treatment Works and all things appertaining thereto within the Sanitary District of Chicago, until all the same shall have been fully completed; and to incur indebtedness therefor and for the purposes aforesaid and no other to issue and to sell bonds of the State of Illinois for the amounts so appropriated and on such terms of payment and maturity and at such rates of interest as the General Assembly shall determine and without the laws authorizing the same being submitted to the people of Illinois and the said laws shall be valid and the bonds so issued if in other respects conforming to the Constitution and laws of the State of Illinois shall be valid obligations of the State of Illinois notwithstanding the fact that said laws have not been submitted to the people of Illinois either theretofore or thereafter and any sums expended for said Works by the Sanitary District of Chicago, hereafter, from its own funds in any year ending September thirtieth shall reduce by so much the amount of the appropriation for said year which the State of Illinois is hereby required to expend.'' (Report of Special Master McClennen, pp. 127, 128.)

That the financial measures on the part of the State of Illinois, which the Special Master finds should be enjoined by an enlargement of the decree, are reasonable and necessary to carry out the decree of this Court, is fully established by the considerations set forth by the Special Master in his Report. (Report of Special Master McClennen, pp. 105-121.) However, since the defendants challenge the correctness of this finding, we proceed to discuss it.

The considerations which establish the reasonableness and necessity of this recommendation of the Special Master are numerous and conclusive. *First,* the primary obligation for the performance of this decree rests upon the State of Illinois which commanded and directed the wrong and caused the still continuing damage to the complainant States. *Second,* the State of Illinois has completely failed to take any steps to finance the performance of the decree and to discharge its obligation under the decree, but on the contrary denies its obligation. *Third,* the past and present financial resources of the State of Illinois have been at all times and now are more than adequate to finance performance of this decree. *Fourth,* the State of Illinois has failed to cooperate and has in fact impeded the financing of the performance of the decree by the Sanitary District to which agency the State apparently sought to delegate, if it did not entirely disregard, the performance of its obligation under the decree. *Fifth,* the financial difficulties of the Sanitary District, to the extent that they exist or have existed, rest upon obstacles created by the State or political subdivisions, agencies or officers of the State for which the State is responsible. The State has thus caused the default of the Sanitary District, and the remedy lies within its control. *Sixth,* the restrictions upon the present availability of the large financial capacity of the Sanitary District are imposed by the State and their removal

lies within the control of the State. *Seventh,* the powers which might properly be conferred upon the Sanitary District and the requirements which might properly be imposed upon the Sanitary District to increase and make available the large financial capacity of the Sanitary District are wholly within the control of the State of Illinois and dependent upon its action.

A.

The primary obligation for the performance of this decree rests upon the State of Illinois which commanded and directed the wrong and caused the now continuing damage to the Complainant States.

This Court in this litigation has already determined that the State of Illinois is directly and primarily responsible for the illegal diversion and for undoing the wrong. *Wisconsin v. Illinois,* 281 U. S. 179, 196, 197; Same, 278 U. S. 367, 409, 419. That question is *res judicata,* but were the question open, as it is not, the same decision would necessarily be reached on fact and law. (Report of Special Master McClennen, pp. 44-46.) Since the question is one more largely of law than fact, it will be discussed in the Section of this brief devoted to the law. (See Law, Section II, p. 93, *infra.*)

B.

The State of Illinois has completely failed to take any steps to finance the performance of the decree and to discharge its obligation under the decree, but on the contrary denies liability.

It is uncontroverted on this record that the State of Illinois has wholly neglected to make any provision, financial or otherwise, for the discharge of its obligation under the decree, unless it be to attempt to delegate the per-

formance of its duty to the Sanitary District. The State cannot thus shed its obligation either to this Court or to these complainants.

C.

The past and present financial resources of the State of Illinois have been and are more than adequate to finance performance of this decree.

It is uncontradicted on this record that the bonds of the State of Illinois have been at all times since the entry of the decree and now are readily marketable as Triple A investments. (Gordon, R. 746-8, 752-3; Report of Special Master McClennen, 114-115.) The market will readily absorb all bonds of the State of Illinois which can be validly issued. (Gordon, R. 747-748.) It is a matter of common knowledge that the State of Illinois is one of the richest States in the Union. The great wealth of the State is eloquently but fairly set forth in "The Blue Book of the State of Illinois, 1931-1932." (Report of Special Master McClennen, pp. 113-114.) This official publication of the State of Illinois fixes the value of the property in the State at $24,356,000,000. The assessed value of property in the State of Illinois for 1930 was $8,249,429,161. The assessed value of the real estate alone in 1930 was $6,149,251,816. (Exhibit 14, p. 1.) This assessment represented only 37% of the true value of the real estate. (Christie, R. 206-207; Bell, R. 1619; Petterson, 1669.) The true value of the real estate alone in 1930 thus exceeded $16,600,000,000. (Report of Special Master McClennen, p. 112.) It is, therefore, clear that at no time since the entry of this decree, or now, has there been, or is there, any adequacy of financial resources and financial ability on the part of the State of Illinois to discharge every obligation imposed upon that State by the instant decree. As said by this Court (*Wisconsin v. Illinois*, 281 U. S. 179, 197):

Typographical error in the principal Brief of the States of Wisconsin, Minnesota, Ohio and Michigan, dated April 10, 1933, filed in Wisconsin et al. v. Illinois et al., Nos. 5, 6, and 9 Original.

Page 58, at the beginning of the fourth line from the bottom of the page, -- change "adequacy" to "inadequacy".

"We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency *to the magnitude of which it seems not yet to have fully awaked.*" (Italics ours.)

D.

The State of Illinois has failed to cooperate and in fact impeded the financing of the performance of the decree by the Sanitary District to which agency the State apparently sought to delegate, if it did not entirely disregard, the performance of its obligation under the decree.

When this decree was entered on April 21, 1930, this Court had already decided that the defendants were doing wrong and that they must stop it. *Wisconsin v. Illinois,* 281 U. S. 179, 197. The Trustees of the Sanitary District correctly took the view that no question of policy was thereafter involved in the matter of the construction of the program required to carry out the decree, and that the obligation had been placed squarely upon the defendants to proceed expeditiously in the performance of the decree with adequate and proper financing. The Board of Trustees recognized that this required (if the State expected to delegate performance of this duty to the District), unencumbered control by the District over the issuance of the necessary bonds to the end that dependable financial resources might be provided. (Woodhull, R. 1133-5; 1236-1237.) The Sanitary District on three separate occasions pressed the State of Illinois for a grant of authority to issue without referendum such bonds as might be found necessary for the performance of the decree of this Court. (Woodhull, R. 1112, 1130-1133, 1253, 1254.) Nevertheless the State of Illinois in each instance refused to grant that authority. (Woodhull, R. 1236-7, 1252, 1253, 1254.) The State refused to give the Sanitary District a Civil Service

Law in the interests of more efficient operation. (Woodhull, R. 1344.) It is certain that the lack of authority to issue bonds without referendum impeded construction work in 1929. (Report of the Special Master on 1929 Re-reference, p. 45.) Other delays incident to the referendum requirement appear in the record. (R. 1140-1141, 1276.) Delay is inherent in the issuance of bonds depending upon referenda. (Woodhull, R. 1276.) Of course, no attempt to delegate performance to the District could excuse non-performance by Illinois, if the obligation were not in fact, for any reason, fully and effectively discharged by the District.

E.

The financial difficulties of the Sanitary District, to the extent that they exist or have existed, rest upon obstacles created by the State or political subdivisions, agencies or officers of the State for which the State is responsible. The State has thus caused the default of the Sanitary District, and the remedy lies within its control.

It is not only admitted but asserted by the defendants that the financial difficulties of the Sanitary District arise from a failure to collect normal and ordinary taxes in Cook County, as were collected in the rest of the State of Illinois, from 1929 to date. This condition arose from the following circumstances:

A re-assessment of all of the property in Cook County was ordered by the State Tax Commission in 1928. It was planned to take six months, and should not have occasioned any delay in the levying and collection of taxes. The re-assessment was actually accomplished within the six months' period. (Bell, R. 1609.) The subsequent delay in certifying the assessment was occasioned by the misconduct of the Board of Review of Cook County. (Bell, 1609-1610.)

It thus appears that the much-talked-of two years' delay was due entirely to maladministration in the State of Illinois. Thereafter it appears that there was an inexcusable delay both in sending out the tax statements and in pressing tax collections. An aggressive campaign to collect taxes was not begun in Cook County until October, 1932. (Christie, R. 240-241.)

While it would be clear from these facts that the failure to collect normal and proper taxes in Cook County and the Sanitary District was due solely to maladministration or misconduct, there is other evidence which conclusively establishes that fact, and which shows that any claim that such failure to collect normal taxes in Cook County was a mere incident of the depression is without substance and untrue. The record establishes normal collection of taxes in the whole of the State of Illinois outside of Cook County. (Christie, R. 233.) There are no delinquent taxes in the State of Illinois outside of Cook County. (Christie, 1768.) That the tax delinquencies in Cook County are not due to the depression is further emphasized by the fact that less than 3 per cent of the delinquent taxes are owed by taxpayers whose taxes were $500.00 or less. (Bell, 1628-9.) In other words, the delinquent taxes are owed by persons of large property and means. It appears that there are no adequate laws to enforce payment of taxes in Illinois (Bell, R. 1642-1645), and nothing appears to have been done to strengthen these laws during this period of alleged inability to function for lack of tax collection. From the foregoing it is clear that the State has caused the default of the Sanitary District. The remedy lies within its control. It can not be that a State under the obligation of a decree of the Supreme Court can excuse failure to perform upon the ground that it has permitted government to break down in the locality to which the State has sought to delegate its duty of performance. If government is broken

down in Cook County then it is the more essential that the State be required directly to assume its primary obligation to perform the decree.

It is uncontradicted on the record that bonds of the Sanitary District have been Triple A securities, commanding ready sale upon the bond market. (Gordon, 746.) It is not only admitted but asserted by the defendants that the only reason why there has been any default in principal or interest on Sanitary District bonds is the failure to collect normal taxes. It is uncontradicted on the record that if normal taxes had been collected the Sanitary District bonds would have been at all times during the past three years Triple A securities commanding a ready market, and that if this default in the collection of taxes, which arises from the foregoing maladministration, be corrected, the only limit to the amount of Sanitary District bonds which could be absorbed yearly by the market would be the amount which could be legally issued—and it is specifically stated that the market could readily absorb $25,000,000 of Sanitary District bonds per year. (Gordon, R. 752, 726-728.) There was a good and extensive municipal bond market in 1930, 1931, and 1932. (Gordon, R. 727, 728.) Exhibits 78, 79, and 80 disclose that there was a wide market for municipal bonds for 1930, 1931, and 1932 in which states and municipalities with resources far below those of Illinois and the Sanitary District found a ready market at reasonable interest rates. Under these circumstances we submit that it is incontrovertibly true that any difficulty which has existed, or now exists, in the salability of Sanitary District bonds rests upon maladministration and self-created difficulties of the State of Illinois or its political subdivisions over which the State of Illinois has jurisdiction, and for which the State of Illinois has responsibility. In the words of this Court in 281 U. S. 179, at 197, "It, (the State of

Illinois) can base no defense upon difficulties that it has itself created." Of course the wide sale of bonds of states and municipalities, much less wealthy than Illinois or the Sanitary District, which appears from Exhibits 78, 79, and 80 during 1930 to 1932 inclusive, conclusively establishes that the difficulty at Chicago did not, and does not, rest upon the general depression, but upon self-created local difficulties.

One of the difficulties in making available the vast financial capacity of the Sanitary District is the constitutional limitation upon its debt incurring or bonding capacity. This has been discussed at length by the Special Master. (Report of Special Master McClennen, pp. 65-69.) A brief examination of the facts demonstrates that this difficulty is a self-created obstacle, an obstacle created by the State of Illinois. The bonding limit of a municipal corporation is fixed by the Constitution of Illinois at 5% "on the value of the taxable property therein, to be ascertained by the last assessment for State and County taxes." (Art. IX, Sec. 12, Ill. Constitution; R. 262-3.) In 1930 the assessed value of the real estate alone in the Sanitary District was $3,373,275,520. It is uncontroverted on the record that real estate in the Sanitary District was in 1930 and now is assessed at only 37% of its true value. (Christie, R. 206; Petterson, R. 1669; Bell, R. 1619.) Hence, in 1930 the true value of the real estate alone in the Sanitary District was $8,995,401,386. A debt limit of 5% on the true value of the real estate alone would give a bonding power for the Sanitary District of approximately $450,000,000. With the inclusion of personal property, its debt limit would equal or exceed $500,000,000. The legal requirement in Illinois is that property shall be assessed at full value. (Exhibit 64; Art. IX, Sec. 12, Illinois Constitution; Cahill's Illinois Revised Statutes (1931), Chap. 120, Para. 1-4, Secs. 1-4,

Para. 329, Sec. 18; Report of Special Master McClennen, pp. 83-84; Christie, R. 207; Bell, R. 1619.) Allowing for some reduction in 1930 values, it is obvious that if the property in the Sanitary District were assessed at its true value, as required by law, the bonding capacity of the District would so far exceed any requirement for financing the instant decree as not to be a subject for discussion. The present policy pursued is one solely within the control of the State. It is contrary to the law of the State. It requires no constitutional amendment to conform to that law; and, with conformance, there could be no question of the adequacy of the bonding capacity of the Sanitary District. The State has apparently sought to delegate its duty to perform this decree to the Sanitary District. Yet in violation of its own laws, the State has restricted the ability of the District to perform. We submit that it cannot be tolerated that the performance of the decree of this Court can be delayed because a State, having an obligation under that decree, in defiance of its own law, persists in assessing property in such a way as to limit the bonding capacity of the agency to which the State has sought to delegate its duty of performance while, at the same time, the State seeks to avoid performing its obligation directly. Of course, accurately speaking, the State has no right, as against this Court or these complainants, to delegate its duty of performance, and what is here said is solely for the purpose of emphasizing the reasonableness and necessity of requiring the State directly to assume and discharge its own obligation.

F.

Other restrictions upon the availability of the financial capacity of the Sanitary District are imposed by the State; and their removal lies wholly within the control of the State.

The State has in many ways restricted the powers of the Sanitary District in such a way as to prevent the Sanitary District from making available for the performance of this decree its large financial resources and credit. Some of these restrictions are set forth in the Report of the Special Master. (Report of Special Master McClennen, pp. 63, 64, 65, 84, 105.) They include, among many other things, very rigid limitations upon the District's power of taxation. However, it is unnecessary to enumerate these restrictions. The point is that they are imposed by the State. Their removal lies within the control of the State. If the State is required, as it should be, to assume its primary obligation to finance the performance of and to perform this decree, the State may exercise its own discretion in removing such restrictions. It may take such steps as it sees fit to make available the large financial capacity of the Sanitary District for the reimbursement of the cost to the State. It should not be permitted, however, to avoid its own obligation by delegation to the Sanitary District and then to restrict the power of the Sanitary District to perform.

G.

There are many powers which might properly be conferred upon the Sanitary District and many requirements which might properly be imposed upon the Sanitary District to increase and make available the large financial capacity of the District. These measures are wholly within the control of the State of Illinois and depend upon its action.

The supposed excuses and difficulties advanced on behalf of the Sanitary District relate largely, if not wholly, to a lack of powers which might properly be conferred upon the Sanitary District by the State, a lack of performance of duty by other officers for whom the State is responsible and a failure to take steps which the State might properly authorize and impose upon the Sanitary District. The record discloses among others the following powers which might properly be conferred upon the District by the State, the following requirements which might be imposed by the State upon the District and the following duties which might properly be imposed upon, or the performance of enforced by, officers of the State or its sub-divisions to whom the State has entrusted the performance of functions essential to the realization of the large financial capacity and credit of the Sanitary District. Thus the State might among other things:

(1) Authorize the Sanitary District to issue without a referendum such bonds as are required, and it can sell, for financing the construction program.

(2) Cause the property in the Sanitary District to be placed upon the assessment roll at its true value so that there can be no question of the sufficiency of its bonding power.

(3) Require the Sanitary District to levy the full amount of taxes which it is permitted to levy under existing or subsequent State law to finance reimbursement of the State so far as possible on the "pay as you go" plan.

(4) Repeal or enlarge the limitations upon the taxing power of the Sanitary District.

(5) Authorize the Sanitary District to collect taxes levied by it.

(6) Authorize and require the Sanitary District to establish a utility system of sewage disposal for financing a part, either of the operations of the District, or of the cost of the construction program.

(7) Require the Sanitary District to levy special assessments for the purpose of financing in part the construction program.

(8) Make adequate provision for utilizing resources of the Reconstruction Finance Corporation under existing or future Federal legislation.

(9) Provide adequate laws for the collection of taxes, to the end that a breakdown in government in Cook County shall no longer exist or be tolerated by the State.

(10) Pass suitable legislation to correct the present tax muddle which the State has caused, or permitted to develop in Cook County.

The foregoing and similar considerations constitute compelling reasons why the State should be specifically required to assume and discharge its primary obligation to perform this decree. All of these matters and many others lie within the exclusive control of the State. If the State assumes its primary obligation, it can take such measures

and establish such machinery as it thinks wise or proper to make available the large financial resources and credit of the Sanitary District for the purpose of exonerating the State from the cost of performance. The State should not be heard to say to this Court or to these complainants that it should be excused from direct performance of its obligation under the decree and permitted to delegate that performance to the Sanitary District because it fears that the Sanitary District, over which the State has complete control, will not perform so as wholly to exonerate the State from the burden of performance. If the State is unwilling to rely upon performance by the District, it cannot fairly ask this Court or these complainants to rely upon such performance. The State of Illinois has full control over the Sanitary District; the complainants have no control over it. If the State contends that performance by the District will be adequate, then the State will suffer no hardship from assuming its obligation for it can confidently rely upon exoneration by the District.

H.

The decree should be further enlarged to provide for the appointment of a Mandatory of this Court, without further hearing or notice, with full power to carry out these financial measures at the expense and on the credit of the State of Illinois in the event of a default.

While it seems unbelievable that a great State will fail voluntarily to comply with an adjudged duty and obligation found to rest upon it by this Court, the past record of failure and inadequacy of performance is such as to require a conclusion that the decree should be so enlarged as to preclude the further prejudice of complainants' rights by any voluntary failure of performance.

We, therefore, submit that the decree should be further enlarged to provide for the appointment of a Mandatory of this Court, without further hearing or notice, in the event that the State of Illinois defaults in the performance of the duties enjoined upon it. The Mandatory should be vested with full power to carry out the construction program and, in the event of inaction by the State of Illinois, to levy taxes upon the current assessment roll of the State of Illinois; with full power to collect such taxes through United States Marshals, and in the event the State should elect to use bonds for financing, to issue such bonds upon the full faith and credit of the State of Illinois when and as needed to finance the performance of the decree; with full power to levy taxes to pay interest and maturities of such bonds upon the current assessment roll in the State of Illinois; with full power to collect such taxes through United States Marshals and with full power, in the event of a default by the State of Illinois to make provision for interest or maturities of such bonds, thereafter to levy and collect such taxes as would be required to meet such bond interest and maturities. Such a provision would not only protect complainants' rights, but would be beneficial to the State of Illinois in financing the performance of the decree. Such bonds would be immune from the uncertain action of local authorities in the levying and collection of taxes which has produced the present muddle so costly to the taxpayers of Illinois and to the complainant States. Such bonds would carry the confidence which would flow from the assurance that they would be paid in full and that the levying and collection of the necessary taxes for that purpose would be assured by the prestige and authority of this Court over which local officials would have no control. The carrying out of the program under a Mandatory would assure the efficient expenditure of the funds and economical construc-

tion of the project. This would not only aid in financing the decree but would be of great benefit to the citizens of Illinois.

Further reasons why the inclusion of a provision in the enlargement of the decree for the appointment of a Mandatory of this Court, without further notice or hearing, to perform the decree at the expense of the defendants in the event of a further default, is reasonable, necessary and practicable, have already been stated at pages 37 and 38, *supra,* and therefore are not repeated. The decision of this Court on this hearing should not be such as to require another hearing in the event of a further default by the defendants but should provide for the performance of the decree at their expense in such an eventuality.

THE LAW.

I.

THE ADMITTED JUDICIAL POWER OF THE SUPREME COURT TO ENTER THE JUDGMENT IN THESE CAUSES NECESSARILY EMBRACES FULL, PLENARY, ADEQUATE AND COMPLETE POWER AND AUTHORITY TO ENFORCE THAT JUDGMENT AND MAKE IT EFFECTIVE; AND SUCH POWER COMPREHENDS NOT ONLY THE POWER TO COERCE ALL INSTRUMENTALITIES OR AGENCIES OF STATE POWER BUT IT INCLUDES THE POWER DIRECTLY TO ENFORCE AND MAKE EFFECTIVE ITS JUDGMENT THROUGH THE APPOINTMENT FOR THAT PURPOSE, WITH ALL NECESSARY OR CONVENIENT POWERS, OF SUCH MANDATORY OR MANDATORIES AS MAY BE NECESSARY, CONVENIENT OR APPROPRIATE TO ACCOMPLISH THAT PURPOSE. THE JURISDICTION TO ENTER THIS JUDGMENT AND THE POWER TO ENFORCE IT IS CONFERRED BY AND RESTS DIRECTLY UPON THE FEDERAL CONSTITUTION; AND NEITHER THE JURISDICTION TO ENTER THE JUDGMENT NOR THE POWER TO ENFORCE IT CAN BE SUBORDINATED TO STATE CONSTITUTIONS OR STATE STATUTES WHICH, IF THEY STAND IN THE WAY, MUST YIELD TO A PARAMOUNT AUTHORITY.

A.

This Court has full, complete and plenary power to enforce and make effective any judgment rendered by it in the exercise of its original jurisdiction in controversies between States.

The history of the jurisdictional clause in the Federal Constitution which vests in the Supreme Court jurisdiction over controversies between two or more States amply sustains the view that this Court has full, complete and plenary power to enforce its judgment against a State, and that it may take such measures to attain that end as it may deem expedient in order to coerce the State to comply with a judgment rendered against it.

Precedent for such power is found in the practice which antedates the American Revolution. Long before this nation attained its independence, the King of England in Privy Council decided disputes between colonies both at the instance of a colony and at the instance of an individual. In touching upon this subject, Chief Justice White, in delivering the opinion of this Court in *Virginia v. West Virginia* (246 U. S. 565, 597-598) said:

> "Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse, more or less frequent, the contiguity of their boundaries, their conflicting claims, in many instances, of authority over undefined and outlying territory, of necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent, if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him, is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by the Privy Council was stated in *Rhode Island v. Massachusetts,* 12 Pet. 657, 739, *et seq.,* and will be found reviewed in the authorities referred to in the margin."

At the close of the Revolution, when the relations of the American Colonies with England were severed, the Ninth Article of the Articles of Confederation made an attempt to provide for the amicable settlement of disputes between States. This Article conferred upon Congress the power to act as arbiter of controversies between States. However, the weakness of this scheme was in its failure to make adequate provision for the enforcement of the decrees made and entered by Congress in controversies between States.

In discussing this phase of the subject, Chief Justice White (in *Virginia v. West Virginia,* 246 U. S. 565, 598) noted:

> "When the Revolution came and the relations with the mother country were severed, indisputably controversies between some of the colonies of the greatest moment to them, had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the Ninth of the Articles of Confederation, an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the States and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the States of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic because resulting from the limited authority over the States conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the States for the pur-

pose of enforcing findings concerning disputes between them, gave rise to the most serious consequences and brought the States to the very verge of physical struggle, and resulted in the shedding of blood and would, if it had not been for the adoption of the Constitution of the United States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known of all and will be found stated in the authoritative works on the history of the time."

With the break-up of the Confederacy the Constitutional Convention was called upon, among other things, to provide a substitute or new scheme of settling controversies between States. It was realized that the machinery set up in the Articles of Confederation was wholly inadequate. The result was the provision in the Federal Constitution giving to the Supreme Court of the United States original jurisdiction to entertain suits involving controversies between two or more States. The condition of affairs at that time which led to the creation of the Federal Constitution may be ascertained from the views expressed in the debates on the adoption of the Federal Constitution. Thus James Wilson of Pennsylvania, in 1787, in the Convention of the State of Pennsylvania on the adoption of a Federal Constitution, in referring to the extension of the judicial power in the Constitution to controversies between two or more States, said:

"This power is vested in the present Congress; but they are unable, as I have already shown, to enforce their decisions. The additional power of carrying their decree into execution, we find, is therefore necessary, and I presume no exception will be taken to it."

(*Elliot, Debates on the Federal Constitution,* Vol. 2, p. 490.)

And again Mr. Wilson said:

"Do we wish a return of those insurrections and tumults to which a sister state was lately exposed, or a government of such insufficiency as the present is found to be? Let me, sir, mention one circumstance in the recollection of every honorable gentleman who hears me. To the determination of Congress are submitted all disputes between states concerning boundary, jurisdiction or right of soil. In consequence of this power, after much altercation, expense of time, and considerable expense of money, this state was successful enough to obtain a decree in her favor, in a difference then subsisting between her and Connecticut; but what was the consequence? The Congress had no power to carry the decree into execution. Hence the distraction and animosity, which have ever since prevailed, and still continue in that part of the country. Ought the government, then, to remain any longer incomplete? I hope not. No person can be so insensible to the lessons of experience as to desire it."

(*Elliot, Debates on the Federal Constitution,* Vol. 2, p. 462.)

The security and stability of government which would follow the adoption of the Constitution was pointed out by Mr. Wilson in the following language:

"If we adopt this system of government, I think we may promise security, stability, and tranquillity to the governments of the different states. They would not be exposed to the danger of competition on questions of territory, or any other that have heretofore disturbed them. A tribunal is here found to decide, justly and quietly, any interfering claim; and now is accomplished what the great mind of Henry IV of France had in contemplation—a system of government for large and respectable dominions, united and bound together, in peace, under a superintending head, by which all their differences may be accommodated, without the destruction of the human race. We are told by

Sully that this was the favorite pursuit of that good king during the last years of his life; and he would probably have carried it into execution, had not the dagger of an assassin deprived the world of his valuable life. I have, with pleasing emotion, seen the wisdom and beneficence of a less efficient power under the Articles of Confederation, in the determination of the controversy between the states of Pennsylvania and Connecticut; but I have lamented that the authority of Congress did not extend to extinguish, entirely, the spark which has kindled a dangerous flame in the district of Wyoming.

"Let gentlemen turn their attention to the amazing consequences which this principle will have in this extended country. The several states cannot war with each other; the general government is the great arbiter in contentions between them; the whole force of the Union can be called forth to reduce an aggressor to reason. What a happy exchange for the disjointed, contentious state sovereignties!"

(*Elliot's Debates,* Vol. 2, 527.)

Chief Justice White summarized the situation in his opinion in the case of *Virginia v. West Virginia,* (246 U. S. 565, 599-600) as follows:

"Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that, not a want of authority in Congress to decide controversies between States, but the absence of power in Congress to enforce as against the governments of the States its decisions on such subjects, was the evil that cried aloud for cure,

since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to States created, joined with the prohibitions placed upon the States, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed during the colonial period in the Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between States but between private individuals and a State—a power which, following its recognition in *Chisholm v. Georgia,* 2 Dall. 419, was withdrawn by the adoption of the Eleventh Amendment."

In the proceedings of the Virginia Convention for the ratification of the Federal Constitution, Edmund Randolph, in 1788, in speaking of the Federal judiciary as an agency in promoting harmony between states and between foreign states and the United States, said:

"Harmony between the states is no less necessary than harmony between foreign states and the United states. Disputes between them ought, therefore, to be decided by the federal judiciary. Give me leave to state some instances which have actually happened, which prove to me the necessity of the power of deciding controversies between two or more states. The disputes between Connecticut and Pennsylvania, and Rhode Island and Connecticut, have been mentioned. I need not particularize these. Instances have happened in Virginia. There have been disputes respecting boundaries. Under the old government, as well as this, reprisals have been made by Pennsylvania and

Virginia on one another. Reprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia. Their differences concerning their boundaries are not yet perhaps ultimately determined. The legislature of Virginia, in one instance, thought this power right. In the case of Mr. Nathan, they thought the determination of the dispute ought to be out of the state, for fear of partiality.

"It is with respect to the rights of territory that the state judiciaries are not competent. If the claimants have a right to the territories claimed, it is the duty of a good government to provide means to put them in possession of them. If there be no remedy, it is the duty of the general government to furnish one."

(*Elliot's Debates,* Vol. 3, p. 571.)

And again, Mr. Randolph still speaking of the judiciary, alluded to the necessity of vesting power in that body to enforce its judgments. Mr. Randolph, in answer to a question, said:

"An honorable gentlemen has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred? Suppose justice was refused to be done by a particular state to another; I am not of the same opinion with the honorable gentleman. I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party.* But it is objected that this is retrospective in its nature. If thoroughly considered, this objection will vanish. It is only to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government."

(*Elliot's Debates,* Vol. 3, p. 573.)

It is apparent that, viewed in the light of history, as indicated by the foregoing quotations, the framers of the Federal Constitution sought to remedy the weakness of the Ninth Article of the Articles of Confederation by conferring upon the Supreme Court of the United States both a power to hear and adjudicate controversies between states, and also the power to enforce any judgment which might be entered against a State.

The fundamental theory of the Federal Constitution and of the powers of the Supreme Court of the United States, as advanced by James Wilson and others, is amply sustained by decisions of this Court.

It has been said that no principle of Constitutional Law has been more firmly established or constantly adhered to than that wherever this Court has jurisdiction to render a judgment, it has power to enforce the judgment and make it effective. *Gordon v. United States,* 117 U. S. 697, 704. This rule applies with full force and effect to the exercise of the original jurisdiction of this Court in controversies between States. In *Virginia v. West Virginia,* 246 U. S. 565, Chief Justice White, in rendering the unanimous opinion of the Court, said at page 591:

> "That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman v. Southard,* 10 Wheat. 1, 23; *Bank of the United States v. Halstead,* 10 Wheat. 57; *Gordon v. United States,* 117 U. S. 697, 702. And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this Court by the Constitution is therefore certain."

When this Court acts in the exercise of its original jurisdiction under the Constitution, it exercises an authority paramount to the States and overrides provisions of State Constitutions and State laws just as effectively as do

the direct provisions of the Federal Constitution and of lawful Federal statutes. In *Wisconsin v. Illinois,* 281 U. S. 179, Justice Holmes, in rendering the unanimous opinion of this Court, said at page 197:

> * * * "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. 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."

It is well settled that where a duty rests upon any officer of a State, or its political sub-divisions, to perform any acts necessary to the performance of a judgment of a Federal Court, that court has and will exercise the power to compel performance of the judgment by mandamus. Thus where there is a duty to levy or collect a tax to pay a debt which has been merged in a judgment of a Federal Court, the court will mandamus the State or municipal officer to enforce the judgment. *Supervisors v. United States ex rel.,* 71 U. S. (4 Wall.) 435; *Von Hoffman v. City of Quincy,* 71 U. S. (4 Wall.) 535; *City of Galena v. Amy,* 72 U. S. (5 Wall.) 705; *Riggs v. Johnson County,* 73 U. S. (6 Wall.) 166; *Walkley v. City of Muscatine,* 73 U. S. (6 Wall.) 481; *Labette County Commissioners v. Moulton,* 112 U. S. 217.

This power extends to the coercion of officers of a State in aid of the performance of a judgment rendered by this Court in the exercise of its original jurisdiction over controversies between States. *Virginia v. West Virginia,* 246 U. S. 565. The distinction between such a case and *Kentucky v. Dennison,* 65 U. S. (24 How.) 66, is mani-

fest. In the *Dennison* case the Congress sought to impose a duty by statute which it had no power to impose upon a State official as such. On the other hand, every State official owes a duty by virtue of the provisions of the Federal Constitution to perform every act essential or proper to enable his State to perform a judgment of this Court entered in the exercise of its original jurisdiction over controversies between States. In relation to such a judgment every State officer has a Federal duty. This distinction was well pointed out in *Ex Parte Siebold,* 100 U. S. 371 at 391.

However, courts also have the power directly to enforce their judgments through officers appointed by the court to carry out such judgments. Thus this Court may appoint a Commissioner or Commission to establish a boundary line between States in conformity with its decree. *Arkansas v. Tennessee,* 246 U. S. 158. The judicial power to render a decree for the apportionment of the waters of a river among different appropriators includes the power, without statutory authority, to appoint a River Master or Commissioner to carry out the decree, although the decree requires a variation in the apportionment from time to time under changing conditions, and although it would have been appropriate for the legislature to have provided administrative machinery to supervise the apportionment of the waters of the stream. *Montezuma Canal Co. v. Smithville Canal Co.,* 218 U. S. 371. That this Court, acting without benefit of statute, might appropriately appoint such an officer of the court to carry out a decree apportioning the waters of a river in a suit between States was recognized in *New Jersey v. New York,* 283 U. S. 805. A court, without authority of statute, may appoint a receiver in order to make possible or more convenient the performance or enforcement of a judgment or decree. *Stockton v. Central R. Co. of New Jersey,* 50 N. J. Eq. 489, 25 Atl. 942; *Mabon v.*

Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805. See 53 *C. J.,* 47, Sec. 34.

While the procedure is generally the subject of statute, a court may appoint a Commissioner to execute a deed pursuant to a decree of specific performance. *Langdon v. Sherwood,* 124 U. S. 74, 81. Where a state statute authorizes a court to appoint "a person" to discharge a duty enjoined by a writ of mandamus, which the defendant has refused to perform, a Federal Court may appoint a United States Marshal to levy and collect taxes for the payment of a judgment rendered against a municipal corporation of such State. *Supervisors v. Rogers,* 74 U. S. (7 Wall.) 175.

While it has been held that where there is no effective remedy under State law to collect a money judgment against a municipal corporation the Federal Courts will empower a Marshal to levy and collect a tax to discharge the judgment (*Welch v. Ste. Genevieve,* 29 Fed. Cas. 608, No. 17,372; *Garrett v. City of Memphis,* 5 Fed. 860; *Post et al. v. Taylor County,* Fed. Cas. No. 11,302 (19 Fed. Cas. p. 1092); *United States v. Treasurer of Muscatine County,* Fed. Cases No. 16,583 (28 Fed. Cas. p. 213); *Stansell v. Levee Board of Miss. Dist. No. 1* (D. C. N. D. Miss. 1881), 13 Fed. 846), the Federal Courts have generally held that they could only compel the exercise of such machinery as State law had provided for the levy and collection of taxes to pay a money judgment against a municipal corporation and that if such measures fail, no relief could be had. *Rees v. City of Watertown,* 86 U. S. (19 Wall.) 107 (1873); *Meriwether v. Garrett,* 102 U. S. 472; *South Dakota v. North Carolina,* 192 U. S. 286 (1903); *O'Brien v. Wheelock,* 78 Fed. 673 (C. C. S. D. Ill. 1897, Allen *D.J.*); *Yost v. Dallas County,* 236 U. S. 50.

However, these cases in no way militate against the power of this Court to enforce the instant judgment directly

through the appointment of a Master or Receiver with the full powers prayed for by the petitioners. The distinction between those cases and the one at bar is obvious. Suits to enforce bonds of municipal corporations are brought upon obligations issued under and not paramount to the authority of the State. The extent of such an obligation is determined by State statutes and law and not by the Constitution of the United States. A plaintiff by bringing suit in the Federal Courts upon the contract obligation of a municipal corporation acquires no greater rights than are given by the State statutes which measure the extent of the obligation created. Ordinarily, the right given in the bonds issued by municipal corporations, pursuant to State statutes, to have a tax levied, collected and applied to their payment is to have such tax levied and collected in the manner provided by the State statute, and the court in the guise of enforcing the judgment cannot extend the scope of such obligations.

On the other hand, the Supreme Court of the United States is given jurisdiction and power by the Federal Constitution to determine all controversies between States. The authorities establish that the jurisdiction to render judgments necessarily comprehends the power to enforce the judgment. Where the power to enforce does not exist, there is no jurisdiction. Accordingly, whenever a judgment is rendered by the Supreme Court of the United States in the exercise of its original jurisdiction in a controversy between States, that judgment is based upon the Federal Constitution and the extent of its obligation is measured by the Federal Constitution. From this it necessarily follows that unlike the other class of cases, the Supreme Court does have power and authority to enforce such judgments by any appropriate means and this includes the appointment of a receiver, commissioner or other functionary to carry out the judgment even to the extent of

issuing bonds and levying taxes, if that should be necessary.

Obviously, the exercise of this original jurisdiction could not be conditioned upon the provision by the State of some machinery to carry out the decree of this Court; for, if that were so, the original jurisdiction of this Court over controversies between States—perhaps the most important power of this Court, since it is designed to settle those controversies which would ordinarily be settled by diplomatic representations or war among independent nations—would be nullified and set at naught. That the power of this Court in the exercise of its original jurisdiction is no such feeble, impotent and futile thing has long since been set at rest by this Court. In *Virginia v. West Virginia,* 246 U. S. 565, the syllabus reads in part:

> "The original jurisdiction conferred upon this court by the Constitution over controversies between States includes the power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of a State.
>
> "The authority to enforce its judgments is of the essence of judicial power. That this elementary principle applies to the original jurisdiction in controversies between States has been universally recognized as beyond dispute, as is manifested by the numerous cases of the kind which have been decided, in not one of which hitherto, since the foundation of the Government, has a State done otherwise than voluntarily respect and accede to the judgment." (p. 565)

In that case, Chief Justice White, rendering the unanimous opinion of this Court, said, at p. 591:

> "That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman v. Southard,* 10 Wheat. 1, 23; *Bank of the United States v. Halstead,* 10 Wheat. 57; *Gordon v.*

United States, 117 U. S. 697, 702. And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary because, in all the cases cited, the States against which judgments were rendered conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute."

That the enforcement of such a decree cannot be defeated by restrictions in a State Constitution or other State obstruction was forcefully stated by Justice Holmes in *Wisconsin v. Illinois,* 281 U. S. 179, at 197, as follows:

> * * * "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. 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."

Obviously, if a State cannot defeat the enforcement of such a decree by positive action or self-imposed restrictions, it cannot do so by inaction or refusal to act. Under the Constitution of the United States such a decree becomes part of the supreme law of the land, in effect a part of the Federal Constitution, and overrides every attribute of State sovereignty. When the States of the United States agreed

to join together to form a more perfect union under the Federal Constitution, they respectively agreed that the Supreme Court should have jurisdiction to decide controversies among them, that such decisions should be final and that this Court should have full power to enforce them. The obligation of such a judgment is thus measured by the Federal Constitution; and the jurisdiction of this Court to render it carries the power to enforce it through any convenient and appropriate means without aid of statute. This power includes the power to create such binding obligations on the States as may be necessary to effectuate such a decree and the power to levy and collect such taxes as may be required until the State voluntarily performs her duty.

The fact that the Congress might properly provide suitable administrative machinery for the enforcement of such a decree (*Virginia v. West Virginia,* 246 U. S. 565) in no wise prevents the court in the absence of such administrative machinery from creating such machinery as may be necessary and appropriate to the enforcement of the decree without aid of statute. *Montezuma Canal Co. v. Smithville Canal Co.,* 218 U. S. 371. The Congress could not take such power away from this Court; and no legislation is necessary to make it effective; for otherwise the Congress by failure to pass laws could effectively nullify the jurisdiction of this Court. It is submitted that the power of this Court to give the relief prayed for by these petitioners is too clear for debate.

B.

The Raising of Funds by the State of Illinois to Discharge Its Liability and Duty Under the Decree of April 21, 1930, is not the Contracting of a Debt Within the Meaning of Section 18, Article IV of the Illinois Constitution nor is it the Assumption of a Debt of a Municipality Within the Purview of Section 20, Article IV of the Illinois Constitution. Assuming for Purposes of Argument that either Section 18 or Section 20 of Article IV of the Illinois Constitution is Applicable, Any Such Provision would be Void as Applied to a Judgment Rendered by This Court in the Exercise of its Jurisdiction in Controversies between States, for the Federal Constitution is the Supreme Law of the Land Upon Any Subject Upon Which it Speaks.

The defendants assert that the State of Illinois is disabled from performing its obligations under this decree by Sections 18 and 20 of Article IV of the Illinois Constitution. We think it manifest that no self-imposed restriction in the Constitution of the State of Illinois could be valid to affect either the duty of the State under a judgment of the Supreme Court in the exercise of its original jurisdiction in controversies between States or the power of the State to perform the judgment. However, we deem it clear that Article IV, Section 18 of the Illinois Constitution is not applicable to a case where the State raises funds to discharge its liability and duty under a judgment rendered by the Supreme Court of the United States in the exercise of its original jurisdiction in controversies between States.

The pertinent provision of Section 18, Article IV of the Illinois Constitution is as follows:

> * * * "Provided, the state may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate $250,000; and moneys thus borrowed shall be applied to the purpose for which they

were obtained or to pay the debt thus created, and to no other purpose; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, (for payment of which the faith of the state shall be pledged) shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the general assembly at such election." (Report of Special Master McClennen, 42-43.)

As is shown hereinafter in this brief (Law Section II, pp. 93-97, *infra*), the actions of the State of Illinois in commanding and directing the illegal diversion of water from Lake Michigan have rendered the State of Illinois liable to the complainant states for the wrong caused by this tortious conduct. Since the decree and decision of the United States Supreme Court is a mandatory order upon the State of Illinois specifically to remedy this continuing tort by constructing disposal plants and controlling works, the legal obligation thus imposed is valid and binding upon the State irrespective of constitutional limitations. Obviously, however, Section 18 which prohibits the contracting of indebtedness has no application to a liability arising involuntarily on account of tortious conduct. *Bloomington v. Perdue,* 99 Ill. 329; 5 *McQuillin, Municipal Corporations,* Section 2217:

> "Provisions as to debt limits, apply only to indebtedness which arises *ex contractu* and do not apply to involuntary liability arising *ex delicto*. Hence, the fact that a municipality has exceeded its debt limit is no defense to an action based on a tort. * * *"

and cases cited.

The State of Illinois faced with this obligation has alternative ways and means of satisfying the same. It may with undoubted propriety levy sufficient taxes to carry out the decree on a "pay as you go" basis. Under that policy

it need contract no debts. The annual amounts required for such a policy are not so large when compared with the financial capacity of Illinois, as to render such a policy overly burdensome. However, we here consider the validity, assuming the Illinois Constitution to be applicable, of funding the obligation by means of the issuance of state bonds or other evidences of indebtedness. This alternative, it is contended by the defendants, runs afoul of Section 18 of Article IV of the Illinois Constitution.

Since the primary obligation to construct the plants and works is valid and uncontestable, it is submitted that the funding of the obligation, which in effect merely extends its ultimate payment over a period of years, is not in itself the contracting of indebtedness within the meaning of the constitutional limitation. The liability of Illinois for its tortious conduct is already adjudicated and existing; and hence, no question of "contracting" the liability, already validly existing without contract, is involved in the issuance of bonds to satisfy such liability. Whether the issuance of bonds to fund or refund a valid liability existing outside of the constitutional limitation constitutes the creation of indebtedness within the meaning of the Constitution has not been passed upon by the Illinois courts so far as we can discover, although the question was presented but not passed upon by the court in *Stone v. Chicago,* 207 Ill. 492, 69 N. E. 970. However, it has been universally held in other jurisdictions that the issuance of such evidences of indebtedness for the purpose of funding or refunding valid obligations already existing does not fall within the constitutional prohibition, even though the underlying obligation, had it not already been in existence, would have been void as in excess of the debt power if it had been voluntarily contracted at the time the funding or refunding was contemplated.

The principle that the issuance of bonds to satisfy a previously existing debt or liability is not "the contracting of a debt," within the meaning of such constitutional restrictions, is fully established both by the Federal and State decisions. *Maish v. Arizona,* 164 U. S. 599, 609; *Board of Commissioners of Lake County v. Platt,* (C. C. A. 8), 79 Fed. 567 at 569; *Board of Commissioners v. Keene Five Cents Savings Bank,* 108 Fed. 505, 514; *Independent School District v. Rew,* 111 Fed. 1, 7; *Fairfield v. Rural Independent School District,* 116 Fed. 838, 844; *In Re Menefee,* 22 Okla. 365, 97 Pac. 1014 at 1017; *State ex rel. Board of Education v. West,* 29 Okla. 503, 118 Pac. 146, 149; *Veatch v. City of Moscow,* 18 Idaho 313, 109 Pac. 722 at 723, 724; *City of Cedar Rapids v. Bechtel,* 110 Ia. 196, 81 N. W. 468, 469; *City of Los Angeles v. Teed,* 112 Cal. 319, 44 Pac. 580, 582; *Farson, Leach & Co. v. Board of Commissioners,* 97 Ky. 119, 30 S. W. 17; *Palmer v. City of Helena,* 19 Mont. 61, 47 Pac. 209; *Powell v. City of Madison,* 107 Ind. 106, 8 N. E. 31, 35; *Nat. Life Ins. Co. v. Mead,* 13 S. D. 37, 82 N. W. 78, 81; *Hyde v. Ewert,* 16 S. D. 133, 91 N. W. 474, 479; *Schuldice v. City of Pittsburgh,* 234 Pa. 90, 82 Atl. 1125, 1128. This principle is peculiarly applicable to the issuance of bonds to satisfy a non-contractual liability for tortious wrongs, such as are involved in the case at bar, for otherwise debt limitations might free states and municipal corporations from all liability for torts, which is obviously not the purpose or intention of such constitutional provisions.

It is manifest that the citizens and taxpayers of Illinois are privies to and bound by the judgment rendered against the State as their governmental agency. They are bound by a judgment against their governmental agency. *Freeman on Judgments,* Vol. 1, at 1090; *Pear v. City of East St. Louis,* 273 Ill. 501, 113 N. E. 60 at 62; *Healy v. Deering,* 231 Ill. 423, 83 N. E. 226, at 228.

The debt limitations of the Illinois Constitution were imposed by the people upon the state and municipal legislators solely in order to protect the taxpayers from wanton expansion of the public debt by unbridled legislators. *Law v. The People,* 87 Ill. 385. If the broader purpose, as urged by the defendants, is imputed to the people of Illinois in drafting and passing this provision of the constitution, it would follow that the people intended to place restrictions upon the power of the Legislature to meet obligations of the people themselves. It would be unreasonable to infer such a proposition and it is submitted that such a construction would invalidate the section or at least render it inoperative so far as the financing of an obligation to a sister State is concerned. Since the judgment of the United States Supreme Court runs against and is binding upon the people of the State themselves, they cannot by purporting to require a plebiscite to pass on the question of whether or not they will honor that judgment, prevent the governmental authorities of their State, in effect their trustees, from raising sufficient funds to carry out that judgment. If it were otherwise, it would follow that the Supreme Court is helpless to enforce its orders against a State or its citizens in any case in which the people of a State have rendered their Legislature powerless to raise money without a popular vote. To permit the people of a State so to shield themselves or raise the barrier of such a self-made limitation upon the enforceability of judgments against them would completely defeat the jurisdiction of the Supreme Court in controversies between States.

It necessarily follows therefore that Section 18 of Article IV must be so construed or so disregarded as to permit the State Legislature to provide by any reasonable means, including the issuance of bonds, for the satisfaction of all liabilities or obligations which are binding upon the people themselves.

It is also clear that, since the State of Illinois directed and commanded the diversion of the waters of Lake Michigan and since the State is therefore primarily responsible for the damage caused, the discharge of the judgment of the Supreme Court by the State will not be assuming the debt of any municipal corporation within the provisions of Section 20, Article IV of the Illinois Constitution, but will merely be a discharge of the State's primary obligation. The State will only be assuming its own individual liability, and hence, it is clear that Section 20, Article IV of the Illinois Constitution has no application. (See Report of Special Master McClennen, 43-44.)

However, it is immaterial whether Sections 18 and 20 of Article IV of the Illinois Constitution are or are not in terms applicable. We have already seen that the obligation of a judgment rendered by the Supreme Court of United States in the exercise of its original jurisdiction in controversies between States is measured by and rests upon the Federal Constitution. It is, of course, axiomatic that the Federal Constitution is the supreme law of the land upon any subject upon which it speaks. It is manifest, therefore, that were either Section 18 or Section 20 of Article IV of the Illinois Constitution in terms applicable, such State constitutional provisions, when put forward and sought to be applied to nullify or prevent the enforcement of a judgment of the Supreme Court of the United States in its original jurisdiction of controversies between States, would be null and void as though they had never been. (See Report of Special Master McClennen, 40-50.) When the States of the Union gave up the right to settle controversies among them by diplomacy and resort to war, it was not the intent of such States nor of the framers of the Constitution that these rights should be surrendered in return for a mere mockery or pretense.

When the States became members of the Union, they agreed that the Supreme Court of the United States should adjudicate their controversies between themselves and their obligations to each other, and that this Court should have the power to enforce their just obligations to each other. This is the paramount power to which Justice Holmes refers in *Wisconsin v. Illinois,* 281 U. S. 179 at 197.

II.

THE PRIMARY LIABILITY AND DUTY OF THE STATE OF ILLINOIS HEREIN IS INCONTROVERTIBLE.

The primary liability of the State of Illinois for this illegal diversion of the waters of Lake Michigan and the consequential lowering of the levels of the Great Lakes has been adjudicated by this Court and is therefore *res judicata.* The Special Master, in his report of March 13, 1933, discusses this phase of the case very fully and clearly demonstrates both that the State of Illinois is doing the wrong herein and that it has been so decided by this Court and is therefore *res judicata.* (See Report of Special Master McClennen, pp. 42-46.) Thus it is the law of this case that the State of Illinois is itself directly liable, irrespective of any duty or liability on the part of the Sanitary District. (*Wisconsin v. Illinois,* 278 U. S. 367, 409, 419; The Same, 281 U. S. 179, 196, 197, 696.)

However, were the question of responsibility for the wrong an open one, the primary liability of the State of Illinois is incontrovertible.

It may be of interest to the Court to cite again the pertinent statutes and actions of the State of Illinois which establish that the diversion instituted and maintained by the Sanitary District of Chicago was directed and required by the State of Illinois.

Section 23 of the Act of May 29, 1889, (Ill. Laws 1889, p. 125) directed and required the Sanitary District to in-

stitute and maintain a diversion in an amount which today would be in excess of the capacity of the main drainage canal. (See Report of Special Master on Original Reference, 1927, pp. 14-15; Report of Special Master McClennen 44-45.) The Illinois Act of June 10, 1895 (Ill. Laws 1895, p. 168) expressly required that the Sanitary District should, on the opening of the channel, turn into said channel "not less than 20,000 cubic feet of water per minute for every 100,000 inhabitants of said District, and shall thereafter maintain the flow of such quantity of water." (See Report of Special Master on Original Reference, 1927, p. 17.) The Act of the Illinois Legislature of May 14, 1903 authorized the construction of works by the Sanitary District for the development of water power. In 1908 the State of Illinois adopted separate Section III of the Illinois Constitution (see Joint Abstract of Record filed on January 24, 1928, p. 115) appropriating the diversion in part for an artificial waterway and in part for the development of water power for the profit of the State. On June 17, 1919 the State of Illinois enacted the so-called Illinois Waterway Act which authorizes the construction of power plants along the so-called Illinois Waterway to utilize the abstracted water for the development of power for profit. The Governor of Illinois, in his message of May 10, 1907, stated that the use of this abstracted water for power by the State of Illinois would afford a minimum annual income of $3,000,000.00. (See Joint Abstract of Record filed on January 24, 1928, pp. 113-115.) That the State so directed the diversion also appears from the decision in *Sanitary District vs. United States,* 266 U. S. 405, at page 424.

As we have indicated heretofore, it is the law of this case that the State of Illinois is itself directly liable. However, irrespective of any such adjudication the primary liability of the State is well established. It follows from the legal relationship between the State and its municipal

agencies. As was stated in the case of *Ward vs. Field Museum of Natural History,* 241 Ill. 496, 89 N. E. 731, 736:

> "* * * The city and the South Park Commissioners are creatures of the Legislature for the purposes of administering certain functions of local government within specified territory. *People v. Walsh,* 96 Ill. 232, 36 Am. Rep. 135; *West Chicago Park Com'rs v. City of Chicago,* 152 Ill. 392, 38 N. E. 697. 'The city of Chicago, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Illinois, governs for Illinois, and its authorized legislation and local administration of law are legislation and local administration by Illinois through the agency of that municipality.' *Byrne v. Chicago General Railway Co.,* 169 Ill. 75, 85, 48 N. E. 703, 705. * * * The Legislature may create, annul, and change municipal corporations and control and dispose of their property, subject only to the constitutional provision relating to local or special legislation. Subject to that condition they may be changed, modified, enlarged, restrained, or abolished to suit the exigencies of the case, and the powers and duties with which they are invested may be imposed upon others. *Wilson v. Board of Trustees,* 133 Ill. 443, 27 N. E. 203; *Town of Cicero v. City of Chicago,* 182 Ill. 301, 55 N. E. 351; *City of Chicago v. Town of Cicero,* 210 Ill. 290, 71 Ill. 356; *People v. Walsh, supra.* * * *"

It is seen from the foregoing that the relationship of privity and agency between the state and its municipal subdivisions, within the limits of authorized action on the part of such subdivisions, is recognized and applied by the Supreme Court of Illinois. Such relationship is indeed the basis of original jurisdiction on the part of the Supreme Court in this case. If the Sanitary District were a purely private corporation not purporting to act as an agency of the state, or if the Sanitary District in the operation of its properties were acting wholly without legislative or state approval and authority, under the rule of

Louisiana v. Texas, 176 U. S. 1, 16, the original bill in this case would have been dismissed. This subject was considered by the Supreme Court in *Missouri v. Illinois,* 180 U. S. 208, 242, in which the State of Illinois sought to have the bill dismissed on the ground that the complaint related to acts by the Sanitary District of Chicago and that the controversy involved was accordingly not a controversy between states. This contention was disposed of by Justice Shiras at page 242 of the opinion:

> "It can scarcely be supposed, in view of the express provisions of the Constitution and of the cited cases, that it is claimed that the State of Illinois is exempt from suit because she is a sovereign State which has not consented to be sued. The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the State of Illinois, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.
>
> "We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana v. Texas,* where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.
>
> "The object of the bill is to subject this public work to judicial supervision, upon the allegation that

> the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and having such a right, might properly be made a party defendant."

For the purpose of the question here involved it is immaterial whether the building of the Sanitary Canal and the diversion of water from Lake Michigan had been accomplished by the direct action of the State of Illinois and by means of funds supplied by the State itself or, as the facts stand, by means of a municipal agency created by the State for the express purposes shown to have been accomplished. The elementary and applicable rule of agency, if any authority need be cited, is stated in *Mechem on Agency,* Vol. 2, Section 1873:

> "For injuries which occur to third persons as the natural, direct and proximate result of an act which the principal has expressly directed or authorized his agent to do, the principal is clearly and unquestionably liable. Such results are the direct outgrowth of the deliberate intention of the principal, and he is as much to be charged with the responsibility as if he had performed the act in person."

CONCLUSION.

We submit that upon the entire record in these causes the findings and conclusions of the Special Master must be confirmed. We urge, however, that in addition to the recommendations of the Special Master the decree of April 21, 1930 be further enlarged to impose a specific duty upon the State of Illinois in relation to the other Sewage Treatment Works embraced in the program of the defendants but not included in the present Order of Reference and to provide for the appointment of a Mandatory of this Court to do the things therein described, for, on behalf of, and

at the expense of the defendants, in the event that such things should not be done by the defendants at the times and in the manner fixed in the decree.

This Reference has been occasioned by the non-performance of the defendants. In accordance with the well-settled rule costs should, therefore, be taxed against the defendants, including the fees of the Special Master. *Wisconsin et al. v. Illinois et al.*, 281 U. S. 179, 200. *North Dakota v. Minnesota*, 263 U. S. 583. *South Dakota v. North Carolina*, 192 U. S. 286, 321.

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