BEFORE THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATE OF WISCONSIN, ET AL, *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, ET AL.	No. 5 Original.
STATE OF MICHIGAN, ET AL., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, ET AL.	No. 8 Original.
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REPLY BRIEF ON BEHALF OF THE STATE OFF ILLINOIS IN OPPOSITION TO REPORT OF SPECIAL MASTER McCLENNEN.

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THE BRIEF OF COMPLAINANT STATES PROCEEDS UPON A MISCONCEPTION OF THE RECORD.

This proceeding is based upon paragraph 6 of the decree herein which reads as follows:

> "That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the program of construction, or the methods of

operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate."

Pursuant to this provision the complainant states made their "application" calling the attention of the Court to the fact as alleged that "the progress of construction" was insufficient. Their application seeks additional relief but incorrectly claims to seek orders enforcing the original decree.

The original decree has been completely performed up to date. Beginning with July 1, 1930, the diversion was reduced as required to 6500 c. f. s. in addition to domestic pumpage. As shown by the record, the defendant Sanitary District will be prepared to accept a reduction on December 31, 1935, to 5000 c.f.s. Since the original damage or lowering of lake levels has always been estimated by the Court as six inches to result from a diversion of 10,000 c.f.s., the reduction already accomplished has reduced the damage one third and the District is prepared to accomplish a reduction of the damage to three inches in 1935. Since there is allowed by the decree 1500 c.f.s. all that remains to be accomplished is the restoration of only two inches. *This entire proceeding therefore only concerns two inches to be added to the surface of the Great Lakes.*

THE DECREE HEREIN DID NOT CONTAIN MANDATORY PROVISIONS REQUIRING THE CARRYING OUT OF THE CONSTRUCTION PROGRAM.

This fact is of the utmost importance. The orders recommended by the Special Master as well as the pleas of the complainants suggest mandatory orders designed to compel the expenditure of money by the defendants for the purpose of carrying out the construction program. Literally, therefore, neither the recommendations of the Special Master nor the prayers of the complainants can be

regarded as seeking or recommending any order to enforce the terms of the original decree.

The argument submitted in complainant's brief as to the power of this court presents assertions only as to the extent to which the court may go in enforcing a judgment or decree. Since the orders now in question can not be regarded as orders enforcing the terms of an original decree or judgment, the legal contentions of complainants have little bearing upon the issue before the Court.

The report of the former Special Master on re-reference did recommend a mandatory decree commanding the Sanitary District to go forward with its previously adopted program for the construction of sewage disposal works, with specific detailed commands as to the various operations to be undertaken and the time of completion thereof. *These recommendations were not adopted by the court.*

The sole purpose of these recommendations was to accommodate the proposed reductions in the diversion in such a manner as to safeguard the water supply of the City of Chicago, and thus adequately preserve the essentials of safety for health and life of the inhabitants of the Sanitary District.

We submit this court could and did safely assume that the compelling motive of self-interest and self-protection was sufficient to insure the carrying out of this program. But if this court had held complainants legally entitled to a decree along the lines recommended by the former Special Master, that decree would have been entered. The mere fact that the complainants in their own interest had strong motives to induce the doing of those things, which would insure their own safety, to meet the effects of the injunction decided upon by the court, would of itself be no legal or equitable bar to including in the decree a requirement for the performance of these precautionary measures. The refusal of the court to adopt the recommendations of the former Special Master must have proceeded, we respect-

fully submit, upon established legal and equitable principles opposed to granting such relief.

Certain facts of record suggest most definitely the principles involved.

In the first place, it is an established principle of equitable procedure that relief shall generally be granted in accordance with the prayers of the bill of complaint. In both of the bills of complaint of the State of Michigan and the joint bill of the states of Wisconsin, Minnesota, Ohio and Pennsylvania, all that is sought is an injunction.

The court found, pursuant to the report of the former Special Master, that the damage to the complainants resulting from the diversion could be stopped and former conditions restored within a definite period after the diversion was cut off. This finding necessarily led to the conclusion that the relief sought by the complainants would be sufficiently and adequately procured if injunctive relief were accorded.

The necessity of adjusting the proposed relief so as to give necessary protection for the lives and health of the citizens of the Sanitary District was merely an incident to the form of relief found to be due the complainants. Whatever steps were to be taken to produce such protection were for the benefit of the defendants, not of the complainants.

We respectfully suggest that the power to carry out these precautions involves exclusively an exercise of the police power of the State of Illinois, or such part of that power as is lawfully and constitutionally delegated to the Sanitary District of Chicago.

The conclusion, therefore, is suggested that the refusal of this court to command by mandatory decree performance of precautionary measures was based first, upon the fact that these measures were not needed to accord complainants relief and, second, upon the fact that if so commanded, the Court would intrude upon the reserved powers of the State of Illinois.

This analysis of the record is, we submit, most pertinent for the primary consideration of the court in view of the nature of the contentions addressed to the court in complainant's brief as well as similar suggestions in the report of Special Master McClennen. Although the latter, at pages 38 and 39, analyses the record very much as we have set it forth above, his recommendations are based on the theory that this court should now enter orders for the purpose of enforcing a previously decreed obligation resting upon the State of Illinois under the constitution of the United States. In discussing his proposal that the General Assembly of Illinois be directed to issue bonds without submitting the bonds to the vote of the people as required by the constitution of Illinois, Special Master McClennen says (Rep. p. 41):

> " * * * Indeed, the decision quoted indicates that because the General Assembly can not delegate its power and duty to have the State perform its obligation under the constitution of the United States, such a vote of the people would be unconstitutional under the Constitution of Illinois."

There is, we submit, no obligation imposed upon the State of Illinois under the constitution of the United States to exercise its reserved police power in any way whatsoever or at all for the procurement of adequate sanitary conditions or a safe water supply for its citizens. That the Special Master is not referring to any such type of federal constitutional obligation upon Illinois in the foregoing statement is shown by his expressions immediately following the above quotation:

> "When the State of Illinois became a part of the United States and a party to its constitution, the people of the State retained no right to vote that the State should not use its necessary means to perform its duties to other states as the Supreme Court of the United States within its jurisdiction has adjudged those duties

to be and as it has enjoined the state to perform them.

"It has come to pass that the only way in which the State of Illinois can perform those duties is by becoming indebted. Construction contracts and bond issues are the necessary means.

"The State of Illinois is under a liability which it is within the jurisdiction of the Supreme Court of the United States to compel it to satisfy out of the resources of the State. The state has among its resources the inherent power to contract for construction and to borrow money. When the constitution of the United States by the judgment of its Supreme Court obliges the state to use that resource, any self-imposed prohibition to perform that obligation is repugnant to the supreme constitution and falls. A vote of howsoever large a number of people would be unconstitutional."

The foregoing expressions clearly indicate that Special Master McClennen understood this court by the decree herein had imposed an obligation upon the Sanitary District, or the State of Illinois, or both, to go forward with the construction program. We respectfully insist no such requirement is to be found in the decree in this case. As pointed out, the carrying out of this program is in no way whatsoever essential to the relief allowed the complainant states. There exists today, therefore, no federal constitutional obligation upon the State of Illinois or the Sanitary District in these matters. This is, we submit, the inescapable logic of the record.

The opinion of the court indicates beyond question the belief of the court that the construction program is essential. This is a fact with which we entirely and without qualification agree, but recognition of this fact in no sense required nor did it result in the creation by decree of court of any legal obligation resulting from this exercise of the jurisdiction of the court to settle the pending controversy between the complainant states and the State of Illinois.

The only way in which this proceeding can be regarded

as one to enforce a decree is for the court to read into the decree, what is not there expressed, a binding command to go forward with the construction program as it was outlined in the not adopted Special Master's recommendations.

THE SOLE QUESTION NOW BEFORE THE COURT IS WHETHER UNDER PARAGRAPH 6 OF ITS DECREE, THE COURT SHALL NOW ENTER ANCILLARY ORDERS FOR THE PURPOSE OF FURTHER ACCORDING TO THE COMPLAINANTS THE RELIEF FOR WHICH THEY BROUGHT THESE SUITS.

Complainants' relief will result, and has already resulted in large part, from the carrying out of the original injunction. The question now before the court is whether additional orders are to be entered. From the practical standpoint, due to the interruption of the construction program, the same compelling necessities for the preservation of life and health must now again receive consideration. The court therefore confronts the question as to whether in order to meet these human needs, the court will for the first time do what it has not yet done in this case, impose a mandatory obligation upon either the Sanitary District of Chicago or the State of Illinois. But it is of the utmost importance to note the fact that in contemplating such a proposal the court is not being called upon to enter an order to enforce a previously issued decree or judgment. We respectfully insist that all of the assertions so fully presented in complainants' brief as to the power of this court to enforce its judgments, have no bearing upon the issue now before the court. The proposal submitted by the Special Master involves the entry of a new decree entirely different in essence and effect from the nature of relief originally allowed by the court to the complainants.

The question merely is the extent to which the discretion of a court of equity shall be exercised under the peculiar and unique circumstances of this case. The power involved is primarily discretionary in its nature. Complainants have no lawful right to assert with mathematical precision based upon controlling legal principles the duty of the court to enter any additional form of order whatever. Assuming complainants have demonstrated, as found by the court, their right to relief, that relief can be accomplished by enforcing the injunction heretofore entered. This states the sole measure of the legal right of the complainants.

It may be suggested there exists a legal qualification upon the foregoing statement in view of the principle so often announced by this court in these controversies between states that plaintiff and defendant states stand upon an equality and the treatment accorded them by the court necessarily should involve the process of weighing the relative benefits sought by the plaintiff as against the detriments incurred by the defendant if those benefits be allowed. We submit the application of this principle can lead to but one conclusion. As pointed out, there is to result from all of the proposals, whether urged by the complainants or recommended by the Special Master, a change in the levels of the Great Lakes of no more than two inches, since the defendants will undoubtedly be prepared under existing circumstances to accept the reduction called for by the original decree to 5000 c.f.s. at the end of 1935. The final reduction of the diversion to 1500 c.f.s. in 1938 would then leave a one inch reduction of levels never to be restored by the court's decree. We believe any fair and impartial consideration of the facts will demonstrate that a two inch change in the levels of the Great Lakes, which are in a constant state of fluctuation, is not appreciable. As we have pointed out in our original brief, the navigation damage to the complainants is already in process of elimination by the

deepening of the channels to as low a depth as any vessels on the lakes are prepared to utilize, and all damage of every kind is also about to be entirely eliminated by the artificial restoration of levels which will produce more than the entire benefit allowed to the complainants in this case. The complainant states, therefore, stand before the court in the position of having half of the damage they complained of practically now eliminated and of having all of it in process of more speedy elimination than could be achieved by carrying out the original injunction without modification. All that can be accomplished by the proposals now before the court is an additional assurance in the remote event that the program of Congress (specifically required, however, by lawful enactment with proper appropriation for its accomplishment provided) should be delayed or not be carried out. This is the true and accurate measure of complainants needs which they now assert should impel this court to enter the extraordinary, unprecedented and harsh orders sought by the complainants and so surprisingly recommended by Special Master McClennen.

We submit that the Special Master gave no attention to the existence or not of any compelling emergency in fact calling for additional relief to complainants, but through an apparent misconception as to the effect of the order of reference, assumed the existence of such an emergency. He apparently deemed his duty was to advise the court as to *possible* measures to accomplish a result, but not at all to advise the court as to the wisdom, propriety or necessity for the adoption of such measures. If not apparent in other ways, his failure to give any consideration to the facts as to the restoration of lake levels and the deepening of channels demonstrates, we submit, that this must have been his reasoning. From a literal standpoint he has limited his consideration of the problem solely to the giving of answers to the questions submitted by the court, but in doing

so he has, as we view it, not sufficiently considered the obligation imposed by the requirement of the last of the three questions, that the measures to be recommended should be "reasonable". As we understand this question, a full consideration of the relative equities is required for an appropriate answer and his report does not present any such comparison.

Contrasted with the unimportant and the inappreciable benefit to result to the complainants from the proposed measures, the court must contemplate the results to the defendants. These may be very briefly summarized as follows:

1. The court must enter an order invading the reserved police power of the State of Illinois, and taking away from the State of Illinois or its agent the exercise of discretion as to the nature and extent to which this power shall be used.

2. The court must, if it comply with the constitution of the State of Illinois, command an exercise of legislative discretion by the general assembly of Illinois, by the governor of Illinois and by the people of Illinois in a vote to be held at the next general election in November, 1934.

3. If the court disregard the constitution of Illinois, it must seek to control, compel and command an exercise of the legislative discretion of the general assembly of Illinois and the governor of Illinois.

4. In decreeing these measures the court must, we submit, immediately decide the legal liability of the State without applying to this case the established rule of equitable apportionment of interstate waters.

5. The court must impose the requirement of an additional tax to be paid by every taxpayer in the State of Illinois, and the record shows inability to collect taxes under existing circumstances to the extent of 60 per cent of taxes now spread in Cook County with increasing difficulties in tax collection in the balance of the state.

6. The court must coerce the use of a portion of the limited financial capacity of the state, infinitely more needed from the standpoint of human requirement for unemployment relief than even for the requirements of sanitation.

Disregarding the many other difficulties, the carrying out of this program is more than likely to ultimately lead to the assumption by this court of the exercise of all of the important functions of government, legislative, executive and judicial, within the State of Illinois. All of these functions will be needed to compel the issuance of bonds and the collection of taxes if the proposed orders should unfortunately not be obeyed.

We respectfully suggest that an exercise of equitable discretion necessarily involved in choosing between the rights of complainants and the effects upon defendants as above briefly outlined, can lead to but one conclusion. The relative benefit to the complainants contrasted with these inevitable effects upon the defendants must, according to the established principles controlling the exercise of discretionary chancery power require the rejection of the Special Master's recommendations.

COMMENTS UPON COMPLAINANTS' DISCUSSION OF THE LAW.

Complainants Point I begins as follows:

> "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 * * *"

This statement demonstrates complainants misconception of the nature of the pending proceeding. There is no judgment in this case already imposing a legal obligation upon the defendant to be carried out by the proposed recommendation. The argument, therefore, under this point has no bearing upon the issue before the Court. If there were a judgment here imposing a legal duty upon the Sanitary District to go forward with its construction program, this proceeding should properly be a contempt proceeding involving a consideration by this court of the question of fact of whether its decree had been disobeyed and then the question of appropriate further proceedings.

The situation before the court is so unique that analogies are difficult, but we ask the court to contrast its decisions in *United States v. St. Louis Terminal*, 224 U. S. 383, and the subsequent contempt proceeding in *Terminal Railroad Association v. United States*, 266 U. S. 27. In the first case the court found an illegal combination in restraint of trade and entered a decree calling for an adjustment and accommodation of the existing combination, although in many ways permitting its continuance. In condemning the association a consideration of its practices was directly involved. Several of the matters considered and criticized by the court involved the adjustment of rates. The subsequent case presented a charge of contempt, a claim that the decree in the first case had not been complied with, and the principal basis of the charge seems in its essence to involve

the assertion that the rate practices criticized in the original decision were being continued. The court held that the question of contempt depended upon the specific provisions of the decree and reservations in the decree, notwithstanding expressions in the opinion, were held to defeat the validity of the charge. We submit a consideration of these two opinions demonstrates that the rights of the defendants are to be determined by the specific requirements of the judgment or decree, rather than by expressions in the opinion, definitely appropriate as they were in the first case as reasons for the judgment entered.

The position of the complainants here is that expressions in the opinion leading to the entry of the decree herein have legal binding force and effect and therefore, because of this claimed binding effect, that this court in entering the proposed orders will be merely exercising the power to enforce a judgment. We rely here, upon the definite and complete distinction between expressions in an opinion and the legal effect of the judgment or decree.

Complainants in sub-point B of Point I (Brief p. 87) state that:

> "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 Sec. 18, Art. 4 of the Illinois constitution, nor is it the assumption of a debt of a municipality within the purview of Sec. 20, Art. 4 of the Illinois constitution."

In the first place this proposition again involves the assumption that the proposed bond issue is to discharge a liability under the decree of April 21, 1930. As we have pointed out, this assumption is incorrect and has no foundation in the record.

Assuming the State of Illinois owed an obligation to the complainants under the decree of April 21, 1930, the pro-

posed order would compel the State of Illinois in order to raise funds with which to meet its obligation to the complainant states to create by a bond issue debts *not to the complainant states but to the purchasers or holders of such bonds.* The purpose of the bond issue we will assume is to raise funds to meet a pre-existing obligation, but that fact does not change the essence of the transaction. The issue of the bonds creates a debt not to the original obligee but to the holder of the bonds. On this ground alone complainants contention is without merit and clearly the Illinois constitutional provisions apply.

The same reasoning distinguishes the Illinois case of *Bloomington v. Purdue,* 99 Ill. 329, cited by complainants (brief p. 88) to the effect that provisions as to debt limits do not apply to involuntary liability arising *ex delicto.* The debt limit provisions may not apply to the creation of such a liability, and we have not contended heretofore that Illinois debt limits would apply to bar the creation of an obligation against the Sanitary District of Chicago. The question before the Court, however, is not as to the creation of the obligation but concerns the creation of a mechanism with which to provide funds with which to meet the claimed obligation.

The cases cited in complainants' brief, *Pear v. East St. Louis,* 273 Ill. 501, *Healey v. Deering,* 231 Ill. 423, do not lay down or support any general proposition that "citizens and tax-payers of Illinois are bound by the judgment rendered against the state as their governmental agency." The first case was a tax payers bill in which the tax payer asserted merely the general rights of all tax payers under statutes. The court held previous decisions construing such rights were binding upon the subsequent suitor. The second case involved the title of a municipality to streets and under the law of Illinois the title to streets is held by a municipality as trustee for the preservation of the right of passage for the benefit of all citizens.

Counsel, we submit, do not properly present the effect of the decision of the Supreme Court of Illinois in *Law v. The People,* 87 Ill. 385. At page 396 the court said:

> "The clear and unmistakable purpose of the framers of the organic law, by inserting this provision (limitations upon the power of the state to contract debts) was to effectually protect persons residing in municipalities from the abuse of their credit and the consequent oppression of burthensome if not ruinous taxation. There could, we think, have been no other purpose, and this is made manifest from the experiences of the past. Under the constitution of 1818, there was no limit on the power of the General Assembly to borrow money on the credit of the state, or to authorize municipal bodies to incur indebtedness. Under that constitution, the General Assembly entered upon a gigantic system of internal improvements, paid for by money borrowed by the state; but it ended in bankrupting the state, and almost in ruin of its citizens. Whilst laboring under the disastrous effects of that policy, the convention convened that framed the constitution of 1848 and they inserted, as a part of that instrument, the 37th section of Art. 4, by which the power of the state to incur indebtedness was limited to $50,000, except to repel invasion, suppress insurrection, or defend the state in war, or when the people should vote to create a debt."

These expressions illustrate the genesis of Sec. 18 of Art. 4 of the constitution of 1870 which is a mere re-enactment of the earlier provision of the constitution of 1848 above referred to.

We respectfully insist that the fundamental question before this court is whether this court shall take away from the people of Illinois the right to decide whether they will run the risk of bankrupting the state, a genuine, existing and not exaggerated risk if these recommendations be adopted, in order to carry out a sanitation program for the inhabitants of Cook County. And this when almost a

million of the citizens of the state are dependent upon the state's already strained financial capacity to provide them with the bare necessities of life. No power of this nature has ever heretofore been asserted by this court nor has its exercise ever been heretofore contemplated.

Again counsel for complainant illustrate the fallacy which permeates their entire legal discussion, at page 192 of their brief, where they say:

> "It is manifest therefore that were either Sec. 18 or Sec. 20 of Art. 4 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 * * *. 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 between each other and that this court should have the power to enforce their just obligations to each other. * * *"

The only obligation of Illinois or the Sanitary District in these proceedings owed to the complainant states is to cease the doing of those acts which wrongfully produce damage to the lake levels. This court has awarded an injunction against the continuance of those acts. The constitutional provisions of the fundamental law of Illinois are not advanced as a bar to this relief. They were not so advanced at the time of its award. They do apply, however, directly to the choice now confronting this court as to the form or nature of further orders which this court in its sole discretion in the exercise of chancery power may or may not now enter. The orders suggested are not required by any legal principle to enforce the injunction heretofore allowed. The fact that consideration of the life and health of the people in Cook County may demand a further postpone-

ment of the final step in carrying out the injunction awarded does not of itself as a matter of law compel this court to postpone the decree, unless this be regarded as an equity of controlling weight. Since it was found controlling in the original consideration of this case, we assume it must control now. But arriving at the conclusion that this equity should originally prevail, merely involved an exercise of the discretion vested in a chancellor. The same realm of discretion must now be entered by the court if the recommendations of the Special Master are to be adopted. Even though this Court might assert the power to set aside the constitution of Illinois under the circumstances here presented, this factor alone would also most strongly, we believe, require the gravest possible emergency. Only under circumstances the most moving, on the established principles always heretofore applied, could this court for a moment contemplate such an invasion of the sovereignty of one of the states of the United States. For the reasons set out in our original brief, even in such an emergency, we respectfully urge this court's power does not extend so far. *But, for the reasons we have pointed out no such emergency is here presented.*

We respectfully submit the report of the Special Master should be rejected and the suggestions submitted in our original brief be adopted. Carrying out of the final reduction of the diversion in 1938 should now be regarded as under suspense, a matter only to be ultimately determined when the court, in 1938 or at such appropriate time as it may require, be definitely advised first as to the progress which shall have then been made by the Sanitary District in carrying out its program of self-protection, and second, as to the nature of the final exercise of the paramount

power of Congress to determine the amount of diversion needed for navigation.

Respectfully submitted,

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