IN 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.
STATE OF NEW YORK, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 9 Original.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Supreme Court of the United States:

The State of Illinois respectfully petitions that the Court grant a rehearing in the above entitled causes for the following reasons:

I.

Before the Court impose, by the addition of a paragraph to the decree, a requirement upon the State of Illinois separate and distinct from the provisions of the

decree applicable to the Sanitary District of Chicago, the State of Illinois asks the Court to give consideration to rights of the State which have always been asserted throughout this proceeding and defenses based thereon but which because of the course of the litigation, have not, as we understand the record, been given consideration.

The amended bills herein claimed that the diversion of water from Lake Michigan by the Sanitary District lowered the levels of the Great Lakes by not less than 6 inches, to the injury of the complainants; that this diversion had not been authorized by Congress, and was in violation of the Act of Congress of March 3, 1899. The defendants denied the injuries and averred the diversion was authorized by the laws of Illinois, the acts of Congress and permits of the Secretary of War, and pointed to specific benefits to navigation resulting from the diversion on the waterway from Lake Michigan by way of the Mississippi to the Gulf.

On reference to the Special Master the principal defense was reliance upon the validity of the permit of the Secretary of War issued March 3, 1925, with the condition of which, it was established, the Sanitary District had complied. *But the State of Illinois asserted other defenses.* It pointed to what we have termed the rule of equitable apportionment, as established by this Court in *Kansas* v. *Colorado,* 185 U. S. 125, and applied in other controversies between states involving diversions of water from interstate channels. Illinois asserted that standing on a plane of equality with the complainant states, it possessed a right to appropriate a reasonable portion of the waters of Lake Michigan. It was also contended that an equitable appraisement of the relative necessities and benefits to the State on the one side as

contrasted with the comparatively slight injury claimed by the complainants, would result in an allowance to Illinois of at least its reasonable requirements. Other defenses of laches, acquiescence, etc. were also pressed.

The Special Master sustained the first ground of defense and held that the permit of March 3, 1925 was valid and consequently that the acts of the defendant Sanitary District, performed in compliance therewith, were legal and hence that no legal damage resulted to the complainants. Having reached this conclusion, he found it unnecessary to consider the other defenses.

On the argument before the Court on the Master's report, the defendants naturally sought to sustain the Master's position, but in their brief, as pointed out in the present brief of the State of Illinois in the pending proceeding (Brief of Illinois on Report of Special Master McClennen, pp. 47-49), the defendants again asserted their right to the rule originally announced in *Kansas* v. *Colorado,* and alleged that a fair appraisal of the contrasted benefits and burdens resulting from the taking of water by the upper riparian defendants would justify the defendants.

We respectfully submit that the Court in its opinion on the merits in this case did not *and on the record before it could not,* deal with this defense. The necessary findings of fact were not made by the Special Master. Because of the way in which the Special Master had dealt with the facts and law, he deemed it unnecessary to attempt any apportionment of the waters of Lake Michigan as between the complainant and defendant states. No finding by him involved the application of the rule of *Kansas* v. *Colorado,* nor was any conclusion of facts on this matter set forth in his report.

The Court, at pages 409-410 of its opinion (278 U. S.

399), summarizes the issues in the case and, we submit, this summary shows that the defenses put forward by the State of Illinois—its rights under the rule of equitable apportionment as established by the previous decisions of this court in *Kansas* v. *Colorado*—were not considered in this case.

As to the conclusion of the Special Master, the Court found the permit of the Secretary of War had been lawfully issued within the authority vested in him by the Act of March 3, 1899, because required by an emergency which was created, as the Court decided, by the wrongful acts of the defendants, and that the complainants were entitled to an injunction to prevent the continuance of these wrongful acts.

We suggest that any application of the doctrine of equitable apportionment of the waters of Lake Michigan as between the complainant and defendant states, would necessarily allow to Illinois some portion of those waters and that as to such amount of diversion, the acts of the defendants were not "wrongful", but clearly within the right of Illinois. The Court's conclusion recognized no right whatever in so far as the acts in question are concerned.

This is further demonstrated, we submit, by the fact that the Court pointed to one of the findings of the Special Master—that diversion to some extent was needed to maintain navigable conditions within the harbor of Chicago—and in resubmitting the cause to the Special Master to recommend an appropriate decree, the Court said:

> "In increasing the diversion from 4167 cubic feet a second to 8500, the drainage district defied the authority of the national government resting in the Secretary of War. And in so far as the prior diversion was not for the purposes of maintaining navi-

> gation in the Chicago River, it was without any legal basis, because made for an inadmissible purpose. It is, therefore, the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis, and thus to restore the navigable capacity of Lake Michigan to its proper level. The *Sanitary District authorities,* relying on the argument with reference to the health of its people, had much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they cannot now complain if an immediately heavy burden is placed *upon the District* because of their attitude and course. The situation *requires the District* to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition, adequate plants for the disposition of the sewage through other means than the lake diversion." (Italics ours.)

In the Special Master's report on re-reference at page 4, the questions submitted to him by the Court are definitely stated. The only question submitting the amount of diversion was as follows:

> "What diversion, if any, of water from Lake Michigan will be necessary for the purpose of maintaining navigation in the Chicago River as a part of the Port of Chicago, after these sewage disposal works are in full operation?"

The harbor of Chicago as shown by the record and the original Special Master's report was a part of interstate navigable channels then under regulation and control by the federal government. Navigation necessities in this Port are not the necessities and requirements of the State of Illinois, but those of the United States.

We respectfully submit, therefore, the allowance of a diversion of 1500 c. f. s. for the purpose of maintaining navigable conditions in the Port of Chicago cannot be deemed an application of the rule of equitable appor-

tionment, and is in no sense a recognition of either the necessities of the State of Illinois or of its right to appropriate a fair and equitable portion, as between it and sister states, of the waters of Lake Michigan.

The defendants, as this Court can well believe, carefully studied this opinion, and finding in the language last quoted a recognition of the policy adopted by the defendants to have the sewage problem handled by the Sanitary District, as distinguished from the State, and in view of the fact which was proved before the Special Master on re-reference, that the District had already adopted a plan for the construction of plants designed to treat sewage artificially, the defendants felt their only concern as a practical problem under this decision was to obtain in the hearing before the Special Master a reasonable time, properly adjusted to practical necessities and particularly taxable income, in which to carry out the program they had already adopted.

On re-reference the Special Master fully met the suggestion in the above language of the Court and imposed by his recommendations a heavy and immediate burden upon the Sanitary District, but a burden, heavy as it was, which the Sanitary District within its normal capacity could safely assume.

The later phase of the case, occasioned by the unanticipated failure of the District to obtain the funds with which to carry out its program because of the depression, has involved, we respectfully submit, an entirely different procedure. The Court in its recent opinion and order has added a paragraph to the original decree defining a "requirement" that the State of Illinois as distinguished from the Sanitary District undertake financial measures by which the program may be completed.

Since the Court now seeks to impose upon the State of Illinois a specific requirement as distinguished from the obligations heretofore imposed by the Court's decree upon the Sanitary District, the decree having been determined upon a finding that the District possessed capacity to meet these requirements, the State of Illinois respectfully asserts its right now to have consideration given to defenses always urged by it in this proceeding and which are valid, as we understand the decisions of this Court. We rely upon the following cases:

Kansas v. *Colorado,* 185 U. S. 125.
New York v. *New Jersey,* 256 U. S. 296.
Wyoming v. *Colorado,* 259 U. S. 419.
Connecticut v. *Massachusetts,* 282 U. S. 660.
New Jersey v. *New York,* 283 U. S. 336.

In *Connecticut* v. *Massachusetts,* 282 U. S. 660, this Court said (p. 670):

> "The determination of the relative rights of contending states in respect to the use of streams flowing through them does not depend upon the same consideration and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right * * * It seems that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the states stand, in point of power and right, under our constitutional system,' and that upon consideration of the pertinent laws of the contending states and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters."

In *New Jersey* v. *New York,* 283 U. S. 336 (p. 343) the Court said:

> "The removal of water to a different watershed obviously must be allowed at times *unless states are to be deprived of the most beneficial use on formal grounds.* In fact it has been allowed repeatedly and has been practiced by the states concerned." (Italics ours.)

We respectfully urge that up to the present point this Court has determined the validity and effect of the permits of the Secretary of War and contentions based upon interpretation of acts of Congress. But the Court has not applied the rule of the cases referred to. The State of Illinois desires to appropriate the waters of Lake Michigan for the domestic uses of its citizens bordering upon the Great Lakes. In an indirect way this right has been sustained in the pending proceeding. But on the facts in this case the exercise of this particular right has clearly had no bearing upon the determination of any diversion to be made by the Sanitary District. The State of Illinois further desires to appropriate the waters of Lake Michigan for navigation on a waterway largely constructed by its funds and now by appropriate congressional action, a complete federal project regulated and controlled by the federal government and now open to navigation and used therefor. The State of Illinois desires to appropriate the waters of Lake Michigan not only to maintain navigable depths in this waterway but particularly to prevent nuisance from the sewage necessarily, under the conditions of present civilization, required to be emptied into this stream. The State requires the waters to be diverted from the Lake in order to maintain the purity of the waters of Lake Michigan.

The issue here involved is not a re-assertion of the right to divert 10,000 cubic feet per second, to produce a lowering of the lake levels to the extent of 6 inches, but involves a much less amount. There has never been any attempt to appraise the damage to the complainant states to be produced by a change in the levels of the Great Lakes, for instance, of 3 inches. The conditions under which navigation is conducted on the Great Lakes have changed materially since consideration of navigation necessities in the original hearing before the Special

Master occurred. Channels have been materially deepened.

The State of Illinois, therefore, respectfully asks the Court to reconsider its opinion and to take appropriate steps for the application of the rule applied by it in the determination of the relative rights and conflicts of interest between sovereign states who in all cases have been held to stand upon a plane of equality before the Court.

We urge this right because of our belief and confident conviction that a reappraisal of all of the circumstances involved, based upon a recognition of the right of the State of Illinois to appropriate an undetermined portion of the waters of Lake Michigan—a recognition which this Court, because of the peculiar course of the case, has heretofore denied us—will result in a substantial allowance to the State and may largely, if not entirely, eliminate the existence of such an emergency as to require the imposition by this Court of an immediate burden upon the State. This assertion must not be taken to suggest the existence of any intention to depart from the adopted program of the Sanitary District, which is required by the laws of the State of Illinois to be carried out, and which must be fulfilled at the earliest practicable moment for the protection of the citizens of the State.

II.

In concluding that the Court should appropriately add the paragraph to the decree adopted by the opinion and order herein defining the "requirement" of the State of Illinois, the Court says:

> "That responsibility the State should meet. Despite existing economic difficulties the State has adequate resources, and we find it impossible to con-

> clude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister states, as adjudged by this Court, shall be properly discharged."

We respectfully suggest that the evidence in the record will not sustain the foregoing finding of the Court if this finding be deemed to be the Court's conclusion that the "adequate financial measures" referred to may be undertaken by the State of Illinois in sufficient time to meet the Court's requirements as defined in the opinion for speedy and immediate going forward with the construction program of the Sanitary District.

As we understand the Court's opinion, the Court adopts the conclusion of the Master that if expenditures begin at once and the utmost diligence and energy, with no restriction on funds, be employed, it is yet possible to complete the construction program of the Sanitary District so as to permit the reduction in diversion required by the original decree at the end of 1938. This conclusion must be based upon the assumption that funds will be made available at once. We believe, however, the Court's conclusion as to the capacity of the State of Illinois is based upon a misconception by the Court that the credit of the State may now be made presently and immediately available for these purposes.

The responsible officers of the State of Illinois must proceed in accordance with the requirements of the Constitution of the State. Section 18 of Article IV of the Constitution of Illinois, adopted in 1870, forbids the creation of a debt, except upon approval of the vote of the people at a general election. This effectively denies the use of the credit of the State, except in accordance with these provisions. The next general election in Illinois,

a matter fixed not only by statute but by Constitution, will occur in November, 1934.

The Court must also bear in mind that under Section 1 of Article XIV of the Constitution of 1870, an amendment to that Constitution must be voted upon at a general election after submission by act of the General Assembly. No amendment to the Constitution of Illinois, therefore, can be adopted prior to November, 1934.

We, therefore, respectfully point out that under these constitutional provisions, in the first place no constitutional change can be made and, in the second place, the State's credit cannot be utilized, before November, 1934. The conclusion of the Court, therefore, in the finding first above quoted from its opinion, if applied to an existing emergency, must be based upon the Court's belief that the State possesses the capacity to raise by additional and extraordinary taxation, $35,000,000.00 in cash in the year 1933 and a like sum in the year 1934. Clearly such tax income must be in addition to existing taxes.

As we understand it the conclusion of the Court and finding as above expressed must be tantamount to a definite expression that the State may be some form of taxation, presently collectible, raise the necessary amounts. We suggest that this view of the requirements of the situation may have escaped the Cour's attention because, we submit, a review of the evidence in the record will not justify the conclusion that the State may, as a practical matter, now raise by taxation, collectible this year and next, the sum of $70,000,000.00 and take care of the other necessities of the State which must be assumed.

The Court will remember the Special Master recommended a mandatory decree requiring the immediate issue of bonds notwithstanding that such requirement

would, in the first place, seek to control an exercise of the legislative discretion of the General Assembly of Illinois and, in the second place, would direct a procedure expressly prohibited by the Constitution of the State. His analysis of the financial capacity of the State was clearly the basis for this recommendation. His conclusion of fact, therefore, was merely that the credit of Illinois was good for the required bond issue. To reach this conclusion he was not required to find, and made no finding, that without the use of the State's credit taxes could immediately be collected in the needed amount.

We ask the Court to refer particularly to the report of Special Master McClennen, pages 112-121, inclusive. We suggest there is no conclusion stated in that report to the effect that it is practical for the State by special or general tax levies now to raise the required sum in 1933 and 1934. His final conclusion on the point is in the following language (Report, p. 121):

> "Whether the thirty-five million dollars annually for these Works shall be raised annually by taxation in place of borrowings, is for the General Assembly to determine. It is not to be anticipated that the General Assembly will wish to cover so large an amount in so short a time, when it can be spread over a longer period."

The Master himself sets out the deficiencies in the State tax collection for the years 1929 to 1932, inclusive (Report, p. 116), which shows a total deficiency in collection in the sum of $66,360,000. Whatever may be said as to the natural and acquired advantages of the State of Illinois in the shape of ownership of property, fertile fields, large cities, manufacturing capacity, mines, etc., the ability to pay taxes depends upon income. The value of property owned has no bearing whatever (un-

less a capital levy be involved) and the record of the past four years showing a failure of tax collection in this vast amount, is the most conclusive evidence this Court could desire.

We respectfully suggest, therefore, that there is no evidence in the record from which can be deduced any accurate estimate or even a guess, as to the capacity of the people of Illinois to pay an increase of taxes in the required amount.

Leaving aside the obligation of the State to take care of its citizens out of employment and deprived of any chance to earn a livelihood because of the depression—a matter we had hoped would receive strong consideration at the hands of this court—we urge that an appraisal of the evidence in the record will entirely fail to justify a conclusion of fact that it is now within the financial capacity of the State of Illinois by additional taxation to raise $35,000,000.00 in 1933 and a like sum in 1934 and subsequent years.

The 3 per cent sales tax, adopted by the General Assembly to meet unemployment relief, has been held unconstitutional since this case was submitted.

In the light of the Court's requirement for immediate raising of funds, a matter clearly indicated by the opinion, and the constitutional incapacity of the State to borrow money before November, 1934, we respectfully submit the sole remedy available to the State is additional taxation. We ask the Court to reconsider the evidence in the record on this point which we believe will not support a definite conclusion that taxes in this amount can be successfully collected within the required time.

We believe Illinois can not from its legally available resources meet the "requirement" now added to the

decree. On this view of the facts, clearly supported by the record, we respectfully ask the Court to reconsider its order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Cornelius Lynde, Special Assistant Attorney General of the State of Illinois and of counsel in the above entitled cause, hereby certify that the Petition for Rehearing, to which this Certificate is attached, is presented in good faith and not for delay.

CORNELIUS LYNDE,
Special Assistant Attorney General.