BEFORE THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

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. 7 Original
STATE OF NEW YORK, et al., *vs.* STATE OF ILLINOIS and SANITARY DISTRICT OF CHICAGO, et al.	No. 8 Original

BRIEF OF ILLINOIS SUBMITTED IN REPLY TO BRIEF OF WISCONSIN, MINNESOTA, OHIO and MICHIGAN PRESENTED IN OPPOSITION TO PETITION FOR REHEARING FILED BY ILLINOIS.

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CASES CITED.

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The State of Illinois filed a petition for rehearing in this case, now pending before the Court for consideration, in which the purpose and intent of the petition is stated as follows:

> "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."

Further on in the petition, the rule of law setting forth the defense upon which we relied is summarized in a statement in which the State of Illinois pointed to what we have termed the rule of equitable apportionment, as established by this Court in *Kansas* v. *Colorado,* 206 U. S. 46, 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.

By the addition of a paragraph to the decree, the Court has now sought to impose upon the State of Illinois a direct financial obligation. Up to that point the Court had determined that the diversion must be entirely eliminated except for 1500 c. f. s. required to maintain navigable conditions in the Harbor of Chicago, and that the Sanitary District must assume the burden of constructing plants for the artificial treatment of sewage, in accordance with the schedule of reductions of diversion set out in the original decree.

It is quite clear, from the facts set out in previous Master's reports and the Court's opinion, that the nature of construction required and the amount of purification of water that must be handled by the plants, as well as the time requirements for the completion of those plants, depend very largely upon the ultimate amount of diversion to be permited. If, as an example, it were deter-

mined by the application of the rule of *Kansas* v. *Colorado,* 206 U. S. 46, or as the result of the War Department appraisal of the navigation necessities of the United States, that either the State of Illinois had an equitable right to divert 5000 c. f. s. or that amount were demanded for navigation purposes on the Lakes to the Gulf waterway, the nature of the financial burden to be imposed upon the State of Illinois, if the Court seek to enforce the paragraph added to the decree, becomes entirely different. This is particularly true as to the extent of any present emergency. The burden imposed upon the Sanitary District under the requirements of the original decree required an adjustment of conditions to meet an ultimate diversion of 1500 c. f. s. If this amount be increased, the burden and emergency become less.

It is thus apparent that the contention of the State is a material one. The importance of this contention is also recognized in the unusual procedure adopted by the complainant States of filing a brief in opposition to our petition for rehearing.

Since this brief very definitely misstates the position of the State of Illinois and also completely misconceives the previous course of this litigation, we feel it necessary, on behalf of the State, to reply to this brief, and to present fully and in more detail the serious and important contention, which was, as above set out, the basis of our petition for rehearing.

At pages 4 and 5 of complainants' brief, statements are made suggesting that complainants' counsel understand the State of Illinois presents a claim to "appropriate the whole State's contribution to an interstate waterway in disregard of the rights of lower riparian States." And further that Illinois seeks to apply "the doctrine of unrestricted appropriation by an upper riparian State."

We desire to emphasize the complete difference between these descriptions and the real nature of the right we claim. Our position is that the State of Illinois stands before this Court in this controversy upon a plane of equality with the complainant States, and, therefore, possesses a clear and unchallenged right to a reasonable appropriation of the water of the interstate channel formed by the Great Lakes. We assert that, beginning with *Kansas* v. *Colorado,* 206 U. S. 46, and followed in later cases, particularly the very recent cases of *Connecticut* v. *Massachusetts,* 282 U. S. 660, and *New Jersey* v. *New York,* 283 U. S. 336 and 284 U. S. 585, this court has held that in determining what is reasonable as between the conflicting claims of upper and lower riparian States bordering upon an interstate channel, the question becomes one of fact for the determination of this Court upon a consideration of all of the relative necessities and benefits as well as injuries and damages of the contending parties.

It is important for the Court to note the complete and wide difference between the real position of the State of Illinois as stated above and the statement of that position in complainants' brief. Complainants' arguments in their brief are addressed to their definition of Illinois' assertion of a legal right. Necessarily, these arguments have little, if any, application to the real principle upon which we rely. This principle is too well established in the previous decisions of this Court to which we refer to need argument here, and we assume the Court will not desire us to waste time in replying to complainants' arguments which are in fact addressed to a contention and position we do not assert.

This claim of right and this established doctrine is here presented by a Sovereign State, and we, therefore, ask its appropriate consideration.

Complainants' brief also states that there is a "gratuitous assumption in the petition for rehearing that this Court in four careful hearings in this litigation did not give any consideration to these contentions, vigorously pressed in oral argument and voluminous briefs * * *."

This statement (complainants' brief, pages 2 and 3) is followed by the following assertion:

> "This Court in fact did carefully consider these bold assumptions of power on the part of the State of Illinois to inflict without restraint injuries upon the complainant States, and their peoples, and determined that such supposed rights do not exist."

The position of complainants, therefore, is that this right of the State of Illinois, which we now assert, has been heretofore decided in this litigation, and that the question is *res adjudicata.* We believe a fair consideration of the record, and of the way in which the issues arose and were adjudicated, demonstrates that this claim is not well founded.

We believe it can not be successfully denied that nothing in any opinion in this litigation deals with those contentions. There is no statement in the opinions heretofore filed which discusses the relative equities of the State of Illinois and those of the complaining states concerning the abstraction of water from the Great Lakes. There is ample and complete discussion of the right of the Sanitary District to divert water for sewage purification and of the propriety or impropriety of its action in the premises. We deal here, however, as pointed out above, of necessity with the separate and much broader rights of the State of Illinois.

This is not an attempt to make a technical distinction between the State and the District, nor is it an attempt to reargue the contentions addressed to the Court in

brief and argument, as to the distinction between the liability of the State and the liability of the District. We point out that the Court heretofore has imposed a burden only upon the Sanitary District. All of the affirmative requirements of its decree heretofore entered deal with acts to be performed by the District as distinguished from the State.

When the case was referred to the Special Master on the first reference, the State of Illinois and the Sanitary District both asserted that the existing permit of the Secretary of War of March 3, 1925, afforded complete legality for the diversion performed under that permit, which, the Court will remember, *was a permit running to the Sanitary District* and not to the State of Illinois. The State of Illinois asserted, however, that, disregarding the effect of the permit, the doctrine of *Kansas* v. *Colorado,* 206 U. S. 46, would apply and that the State was entitled to a reasonable use of the water of Lake Michigan. The Special Master sustained the first ground of defense. He held the permit was valid and legalized the diversion made by the Sanitary District under the permit which ran only to it, and, based upon this conclusion, he recommended that the complainants' bill be dismissed for want of equity.

When this report came before the Court, the Court differed with the conclusions of the Special Master. It held the permit was valid, as an exercise of properly delegated authority to deal with an emergency. The emergency, however, was held by the Court to be the product of the wrongful acts by the Sanitary District and the Court said:

> "This situation gave rise to an exigency which the Secretary, in the interest of navigation and its protection, met by issuing a temporary permit intended to sanction for the time being, sufficient diversion

> to avoid interference with navigation in the Port of Chicago. See *New York* v. *New Jersey*, 256 U. S. 293, 307, 308. The elimination and prevention of this interference was the sole justification for expanding the prior permit, the limitation of which had been disregarded by the Drainage District. Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. * * * It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River which really is part of the Port of Chicago, but that amount is negligible as compared with 8500 c. f. s. now being diverted. Hence, and beyond that negligible quantity the validity of the Secretary's permit derived its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights * * *."

In substance, we submit, the Court held the permit valid as to the entire diversion as dealing with a wrongfully created emergency, and permanently valid in so far as the permit allowed an amount needed for navigation in the Port. The Court sustained the power of the Secretary to allow this latter amount and in fixing this amount on the testimony of the Chief of Engineers the Court could not have considered this measure of Federal power to be determined in any degree by the legal rights or equities of the State of Illinois.

The Court thereupon sent the case back to the Special Master for a rereference to determine the nature of decree. The purpose of this rereference is clearly stated in the following language at the conclusion of the Court's opinion:

> "It, therefore, is 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 bases 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, have 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 immediate 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 to construct and put in operation with all reasonable expedition adequate plants for the disposal of sewage through other means than the Lake diversion."

The Court thereupon ordered the reference to accomplish these purposes.

We respectfully submit that no consideration of these expressions from the Court's opinion, or of the entire opinion, can justify any claim that the Court, in arriving at this basis of decision, gave any consideration to the equitable and legal right of the State of Illinois to a reasonable diversion from Lake Michigan. The Court in effect condemned the Sanitary District for using the latent oxygen in vast quantities of water to eliminate sewage impurities. The needs and necessities of Illinois under existing circumstances involve consideration of many other equities and purposes.

The record shows that this defense of the State was presented to the Special Master, was not overruled by him, but held, on the contrary, unnecessary to be considered by him because of his conclusion as to the validity of the permit. The defense was presented to the Court upon consideration of the Special Master's report. It appeared in that report and from brief and argument that the Sanitary District had, before the litigation began, adopted a program for the construction of artificial treatment plants which was actually written into the Secretary of War's permit, and furthermore that this program was authorized and in a legal sense di-

rected by Statute of the State of Illinois. The Court's requirement, therefore, in its essence, merely was to call for a speedier accomplishment of what the Sanitary District had previously decided upon and already commenced to bring about. The State of Illinois, notwithstanding the fact that it pressed upon the Court for consideration the propriety of applying the doctrine of *Kansas* v. *Colorado,* 206 U. S. 46, had by Statute adopted and approved this program of the Sanitary District. The remedy proposed by the Court applied, as a practical proposition, solely and exclusively to the Sanitary District. We submit the fair and reasonable interpretation of the Court's opinion and the way in which the case was disposed of leads to only one inference as to this defense of the State of Illinois, and that is that under the then circumstances, the Court did not deem it necessary to give consideration to this defense and probably, in effect, held that on this record the State was in no position to urge it, since by Statute it had authorized the accumplishment of the program of the Sanitary District, which the Court proposed upon the reference to require to be more speedily performed.

The only question refered to the Special Master on rereference involving the amount of diversion was to determine the amount required to maintain navigable conditions in the Harbor of Chicago. This requirement was not in answer to any assertion of any right by the State of Illinois. It was not a recognition of the exercise by the State of Illinois of any right or constitutional power, since the control of interstate navigation in and through the Port of Chicago had long before been exclusively taken over by Congress within its Constitutional authority and was, as the record fully showed, completely regulated by the Secretary of War, as the agent of Congress. We point to this fact simply to demonstrate that on the

rereference the Special Master in complying with the Court's direction, gave no consideration whatever to the relative rights as between Illinois and the complaining States and made no attempt to determine what would be a reasonable use of that water by the State of Illinois. The determination of the amount needed to maintain interstate navigation in the Harbor of Chicago was therefore not in recognition of any right sought for or asserted by the State of Illinois.

The question now before the Court is whether at this stage of the litigation, the State can again bring forward and present for consideration its right under the doctrine of *Kansas* v. *Colorado,* 206 U. S. 46.

What we have said above shows not only that the Court did not pass upon this issue in its decision herein, but also shows very clearly, we submit, that the nature of that decision did not involve any right of the State of Illinois, beyond the right of the State, as Constitutional parent, to assert and protect the powers and authority of its municipal corporation, the Sanitary District. Our contention here is that if it be clear that the case now involves what may be termed the personal right of the State of Illinois, as distinguished from the rights of the Sanitary District, on established precedent the rule of *Kansas* v. *Colorado,* 206 U. S. 46, must first be applied before any remedy be allowed by the Court involving those personal or distinctive rights.

That we are justified in the assertions here made that the Court maintained a complete distinction between the Sanitary District and the State of Illinois in the way in which it disposed of this litigation, is most clearly demonstrated by a consideration of the proposed form of decree recommended by the Special Master on rereference. This is set forth in detail at pages 146 to 149 of

his report. The Court will find that the first six paragraphs of this proposed mandatory form of decree set forth in detail a program of construction of various works for the artificial treatment of sewage to be constructed by the Sanitary District. Each of these paragraphs of the suggested mandatory decree begins in the following language:

> "That the defendant, Sanitary District of Chicago complete and place in full operation * * *"

The Court will also find that paragraphs 7, 9 and 10 set forth injunctive provisions regulating the diversion, and paragraph 7 reads as follows:

> "That on and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes, St. Lawrence system or watershed through the Chicago drainage canal and its auxiliary channels or otherwise in excess of an annual average of 6500 c.f.s. in addition to domestic pumpage."

Paragraph 9 contains similar language as to the State of Illinois, the Sanitary District, their employees, etc., reducing diversion to 5000 c. f. s. upon certain contingencies, and the ultimate diversion is similarly provided for in the same language in paragraph 10. This form of decree draws, we submit, a clear and definite distinction between the two defendants; one of them, the Sanitary District, is commanded and required to carry out the construction program; both of them, the Sanitary District and the State of Illinois, are enjoined from diverting water in excess of certain stated amounts at stated times on stated contingencies. *This proposed form of decree cannot be construed, therefore, as a suggestion that any financial burden or requirement be imposed upon the State of Illinois.*

This report was considered by the Court in its opinion delivered by Mr. Justice Holmes, 281 U. S. 179. The Court adopted the injunctive provisions of the decree recommended by the Special Master from which we have quoted above, but did not adopt the mandatory requirements running solely against the Sanitary District. The Court adopted the finding of fact by the Master that the District intended to carry out the program involved, and that its accomplishment was within the District's financial capacity and means. The Court required by its injunctive provisions the reduction of diversion at certain times at which the Special Master had found certain steps in the completion of the program of construction would be accomplished, and, at which times as the result of such accomplishment, he found it would be safe, from the standpoint of health, to cut down the diversion. The Court, therefore, instead of using the force of a mandatory decree, merely left it to the self-interest of the Sanitary District, as trustee for its people, to do those things that had to be done in order to protect their lives and health, by accomplishing the completion of the construction program within the time requirements as to these successive reductions in diversion.

This difference in the form of decree, is not, we submit, any change in the attitude of the Court in recognizing in this particular, as it had throughout the course of the litigation up to this point, the practical distinction between the positions of the two defendants, the Sanitary District and the State of Illinois. The injunction, with propriety, ran against the State, as well as the District, in order that there would be no basis for not carrying out its terms through failure to include every person associated in any way with the active defendant, the Sanitary District. Whether the mandatory requirement

of the Court be regarded as enforced by the effect of its order, or be enforced by the effect of the controlling self-interest required to be exercised in order to meet the results of the injunction the Court did enter, that effect, so far as it involved the acceptance and performance of the burden of construction, ran solely against the Sanitary District, and not against the State of Illinois.

We, therefore, respectfully submit that by its final decree, this Court made no attempt to impose any burden upon the State of Illinois, but merely enjoined it from acting in concert with the principal defendant, the Sanitary District, in violation of the Court's requirements.

The complainant States must themselves assume the responsibility for any delay that may result from the change in the litigation caused by their application of last December. They asked the Court to change and enlarge the decree. In this application they seek to shift the entire nature of the case—to impose upon the State of Illinois, as distinguished from the Sanitary District the financial burden of complying with the Court's requirements. This distinction is not a technical one. This financial burden must be met by taxation, and even though bonds of the State were to be issued for the purpose of raising necessary funds, State bonds are merely twenty-year extensions of taxation under our system of government. An entirely different and much broader group of taxpayers is, therefore, directly to be affected by the remedy the complainants themselves sought at the hands of this Court than were affected by the relief the Court allowed the complainants in the original proceeding.

We respectfully insist, therefore, that the distinction we point out is not only not technical, but involves

matters of fundamental right, which the people of the State of Illinois can and must assert in their own defense as distinguished, and completely distinguished, from any position taken by the Trustees of the Sanitary District on behalf of the taxpayers of the District.

We insist, and we believe the Court has failed to note the distinction here involved, that by reason of this change of approach, this entirely different remedy, new rights are necessarily presented for consideration, since new defendants, when the real parties in interest are considered, are brought before the Court.

We submit that without regard to the right of the State of Illinois as a Sovereign to expect to receive at the hands of this Court consideration of any assertion carefully and earnestly presented, when the State presents, as it now does, contentions involving *the rights of individuals who were in no way affected by the prior proceeding, or the relief allowed,* as a matter of fundamental equity, the necessity for a consideration, without regard to what has heretofore occurred, of these present contentions, should be admitted.

The position of the State of Illinois on behalf of some three millions of its population—the half of its people outside the Sanitary District—not heretofore directly affected by the decree of this Court, is that the State stands upon a plane of equality before this Court as to its right to a reasonable and equitable share of the water of the interstate channel of which Lake Michigan forms a part; that without regard to any determination which has been made in a controversy which has only heretofore involved the people of the Sanitary District, the State asserts that the exact nature of judicial process always heretofore applied by this Court in controversies of this nature, must, as a matter of justice and Consti-

tutional right, be applied now, to the controversy between the people of the State of Illinois and the complaining States. The application of this principle, established for the first time in *Kansas* v. *Colorado,* 206 U. S. 46, and followed in subsequent cases, requires a careful examination before a Master of all of the relevant facts; the benefit to the State of Illinois under existing abnormal conditions to result from a reasonable diversion; the damage to the complainant States to result from such diversion.

The Court will find on such a reference that the question of damage is entirely different. The original case proceeded on the theory that the Sanitary District was diverting approximately 10,000 c. f. s. Due to the progress of the sewage disposal program and other factors which would appear on such a reference, even under present conditions the necessities of Illinois would be met by the allowance of a diversion of 5,000 c. f. s.—one-half of the amount upon which the Court heretofore has estimated damages. On such a reference the Special Master would be informed that the limiting depths of the navigation channels of the Great Lakes have been materially deepened since the original hearing. The navigation necessities are, therefore, fundamentally different than they were at the time the Court considered the damage resulting from a diversion of 10,000 c. f. s. As has been heretofore pointed out in this proceeding, the navigation interests of the United States in this diversion are greater now and entirely different from what they were at the time of the original decision. The United States has taken over and is now operating a completed waterway connecting the Sanitary District canal with the Illinois and Mississippi Rivers. Commerce is proceeding on this channel. Its necessities are rapidly becoming apparent, so that they may be much more definitely appraised than at any time heretofore. The Court's

limitation in the prior proceeding in its consideration of National requirements to a determination of the navigation needs of the Harbor of Chicago is now clearly too narrow.

What we have said above is not for the purpose of re-arguing questions previously considered but only to show that a re-examination of the basic question in the light of changed circumstances might and, we believe, inevitably would result in an allowance to the State of Illinois as a matter of its legal right and equity of an amount of diversion different and greater than the 1500 c. f. s. heretofore fixed as the ultimate maximum diversion. It also follows necessarily that a different allowance might and, we believe, certainly would entirely alter, in the first place, the necessity for an immediate resumption of construction work, and, in the second place, might well involve changes in the entire construction program.

We believe there is one fact in this record whose effect on the contention now addressed to the Court is inescapable. The allowance of 1500 c. f. s. for the sole and only purpose of maintaining navigable conditions in the Harbor of Chicago was not arrived at by applying the nature of judicial reasoning and procedure which, under the established precedents referred to above, have always heretofore been applied. In each of these cases the Court will note that the defendant State which has permanently abstracted water has been allowed a diversion. This has not been allowed as a matter of grace or as the result of an equitable settlement of a controversy. The fact of diversion has been held to be within the State's right. Only the amount of the diversion has been required to be adjusted by equitable consideration not only of the State's necessities but also of the effect upon neighboring States. In the instant case, the reason for the allowance of 1500 c. f. s. cannot be construed to be a recognition of any right of the State of Illinois, but solely to

meet a requirement of the National Government in the exercise by it of the power of Congress to regulate interstate navigation. Examination of the record will demonstrate that the process by which this allowance was reached did not involve any attempt to balance the conflicting necessities and rights of the complainant and defendant States. We respectfully submit that under these circumstances, it is clear the rule applied to other States has not been applied to the State of Illinois. Although the State could, with propriety, as we have pointed out above, acquiesce in the way this case was handled as long as the burden of the remedy allowed rested where the State desired it to rest, upon the Sanitary District, now that burden by direct financial effect upon millions of individuals not heretofore involved, is sought to be spread in a manner in no wise contemplated by the original decree. We respectfully submit the State of Illinois has a right to present its original contention for reconsideration and to urge that the judicial process applied to all other States be now applied to it, in order that the extent of the burden to be imposed upon the State of Illinois shall be determined in this established manner rather than as a result of giving consideration solely to Federal necessities.

The State of Illinois, therefore, respectfully submits this brief in support of its petition for rehearing heretofore filed.

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