No. 15, Original

In The

Supreme Court of the United States

October Term, 1958

STATE OF ILLINOIS,
Complainant,

v.

STATES OF MICHIGAN, OHIO, PENNSYLVANIA, MINNESOTA, NEW YORK AND WISCONSIN,
Defendants.

BRIEF IN OPPOSITION TO MOTION OF ILLINOIS FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR DECLARATORY JUDGMENT AND INJUNCTION

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BRIEF IN OPPOSITION TO MOTION OF ILLINOIS FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR DECLARATORY JUDGMENT AND INJUNCTION

By a motion for leave and proposed complaint filed herein supported by brief, the State of Illinois apparently in its capacity of parens patriae for its subordinate instrumentality, the Elmhurst Villa Park Lombard Water Commission, seeks to invoke the original jurisdiction of this Honorable Court in an action against the State of Wisconsin and others. This brief is tendered in opposition to the motion of Illinois for leave to file a complaint.

JURISDICTION

The named parties to this proceeding are all sovereign states of the United States of America. Jurisdiction to hear this case as an original proceeding in the Supreme Court of the United States is conferred upon this Honorable Court by the provisions of Article III, section 2, clause 1, of the United States Constitution.

Exclusive jurisdiction to hear this proceeding is vested in this Honorable Court by the provisions of Title 28, § 1251 (a) (1) of the United States Code. Complainant also quotes with some reliance the Declaratory Judgment Act, 62 Stat. 964 as amended, 28 U. S. C. § 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, sec. 2, clause 1, of the United States Constitution reads:

> "The judicial power shall extend to * * * controversies between two or more states. * * *"

Title 28, para. 1251 (a) (1), U. S. C., 62 Stat. 927:

> "(a) The supreme court shall have original and exclusive jurisdiction of:
>
> "(1) All controversies between two or more states;"

Title 28, § 2201, 62 Stat. 964, as amended (the Declaratory Judgment Act):

> "Creation of remedy
>
> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Art. XI:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

QUESTIONS INVOLVED

1. When the only real issue herein, the right to divert water from the Great Lakes Basin to the Mississippi River watershed, is involved in another action pending between the identical parties and before the identical court, may the State of Illinois maintain this second action?

2. Can the State of Illinois maintain this action either as principal or in its capacity of parens patriae for the Elmhurst-Villa Park-Lombard Water Commission, a quasi-municipal corporation created by the State of Illinois without funds, solely because its quasi-municipal corporation is unable to borrow money because of conditions within the control of the State of Illinois?

3. Does the Federal Declaratory Judgment Act apply to the United States Supreme Court?

4. When the State of Wisconsin has said nothing about a proposed project of an instrumentality of the State of Illinois, can Illinois now maintain an original action to obtain an advisory opinion as to the outcome of an action which may never be brought?

5. Does the proposal of an instrumentality of the State of Illinois to divert some 30 cubic feet per second of water from the Great Lakes Basin to the Mississippi watershed pose an issue of sufficient magnitude to invoke the jurisdiction of this court or to create a controversy within the meaning of Art. III, section 2?

6. Is the proposed complaint which names six states as defendants multifarious?

A STATEMENT OF THE CASE

The State of Illinois with one of its instrumentalities, the Metropolitan Sanitary District of Greater Chicago, has been engaged in litigation with the other Great Lakes states, which are named as defendants herein, since 1922 because of Illinois' insistence on diverting water from the Great Lakes Basin to the Mississippi River watershed in the course of purifying and disposing of its sewage.

The original decree in the case in which Wisconsin and the other Great Lakes states were plaintiffs and the state of Illinois and the Chicago Sanitary District were defendants was entered on April 21, 1930, and was an open end decree. By an application filed in 1957 and an amended application filed in 1958 the Great Lakes states, plaintiffs in the original action, have asked the court to reopen the original decree and amend that decree to direct that Illinois, after using water from the Great Lakes Basin for domestic purposes and for carrying away its sewage, return the purified effluent to the Great Lakes Basin. Illinois is resisting that application.

When the Great Lakes states learned late in 1958 that a quasi-municipal corporation known as the Elmhurst-Villa Park-Lombard Water Commission, created under Illinois statutes by the joint action of the city of Elmhurst and the villages of Villa Park and Lombard, intended to construct a waterworks plant for the purpose of withdrawing water from Lake Michigan for the use of the three incorporating municipalities and other customers who, after using the water, would dispose of the sewage effluent into the Mississippi watershed and thereby effectuate a *diversion* of water from the Great Lakes Basin, Michigan took the lead

in notifying the Water Commission that it considered its proposed activity unlawful and subject to the same objection which was being currently litigated in the amended application of all the Great Lakes states in the case of *Wisconsin et al. v. Illinois and the Metropolitan Sanitary District of Greater Chicago.*

Ohio and Pennsylvania joined in the objections by the state of Michigan to the Elmhurst-Villa Park-Lombard Water Commission.

The state of Wisconsin said nothing about the proposed project and has never authorized anyone to make any statement on its behalf. As far as the pleadings herein show, the states of Minnesota and New York, likewise, have made no comment upon the proposals of the Water Commission.

As stated in the complaint the Water Commission proposed to finance its project by the issuance of revenue bonds. The state of Illinois was not providing any of the financing for the project, and did not even offer to guarantee the bonds of the Water Commission which it described in the complaint as its instrumentality. Neither, as far as the complaint shows, did the municipalities who will be served by the Water Commission propose to aid in financing the project, nor do they guarantee the payment of its revenue bonds.

When the Water Commission was ready to sell its bonds, it was unable to do so because of the statement of Michigan joined in by Ohio and Pennsylvania, that it would challenge the legality of the project if it involved a diversion of water from the Great Lakes Basin to another watershed.

The present action is brought solely because the Elmhurst-Villa Park-Lombard Water Commission, a quasi-municipal corporation created under the laws of the state of Illinois by the named municipalities and described in the complaint by the state of Illinois as "its instrumentality," is unable to sell its revenue bonds for the purpose of financing the proposed waterworks.

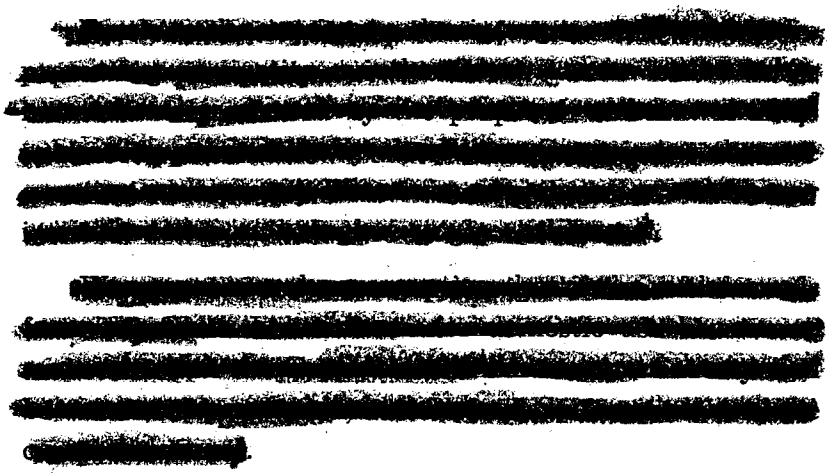
Illinois is proceeding in this case apparently in its capacity of parens patriae. It has made no allegation that it has no funds of its own to finance the proposed project, and there is no allegation that the municipalities concerned and who need the water cannot raise the necessary funds by general obligation bonds.

There is no allegation that the states named as defendants have ever claimed that Illinois or its instrumentalities may not withdraw water from the Great Lakes Basin for domestic purposes. On the other hand the allegation is made that in the principal action the states had conceded that such a withdrawal may be made.

The gravamen of the action arises because of the announced intention of the municipalities concerned to divert the water, once used, from the Great Lakes Basin to the Mississippi watershed. Three of the Great Lakes states concerned have regarded this threat as a sufficient injury to their interests and a violation of the principle being asserted in the principal case, *Wisconsin et al. v. Illinois and the Metropolitan Sanitary District of Greater Chicago,* to warrant their statement that if such a project is undertaken they will seek to enjoin it.

We reiterate that Wisconsin has made no such statement. By the time the Water Commission has completed

its waterworks it is entirely possible that all of the Great Lakes states will have entered into a compact for the protection of the Great Lakes-St. Lawrence Seaway, which will outlaw all of these pin prick withdrawals from the Great Lakes Basin. While they may be individually small, if they become too numerous they could seriously affect the navigable capacity of the Great Lakes and the development of hydroelectric power in the Niagara River and in the International Rapids section of the St. Lawrence River.



Under the circumstances, we respectfully submit that Wisconsin has committed no act and threatens no act which gives rise to a justiciable controversy between the states of Illinois and Wisconsin.

ARGUMENT

I. THERE IS ANOTHER ACTION PENDING BETWEEN THE IDENTICAL PARTIES TO THIS LITIGATION AND BEFORE THE SAME COURT WHICH INVOLVES THE ONLY REAL ISSUE BETWEEN THE GREAT LAKES STATES AND THE STATE OF ILLINOIS.

While Illinois apparently has sought to exclude the issue of the diversion of water from the Great Lakes Basin to the Mississippi River watershed from consideration in the instant case by its statement in paragraph 13 of its proposed complaint, subparagraph (5) "the right of the Commission to withdraw water from the lake for domestic purposes as proposed by it should be declared without consideration of any demand by the defendants that the sewage effluent resulting therefrom be returned to the lake," it seems apparent to us that this is the only real issue involved. The letters from the states of Michigan, Ohio and Pennsylvania in nowise challenge the right or privilege of Illinois or any other instrumentalities such as the Water Commission to withdraw water from Lake Michigan for domestic purposes. The challenge on behalf of Michigan is to "its apparent intention of *diverting* water from the Great Lakes Basin, * * *"

If Illinois is correct in its contention that it does not desire to litigate that issue in this case then the case should be dismissed since there is no controversy whatsoever between the parties. On the other hand if this is the real issue which Illinois seeks to have determined then leave to file the proposed complaint should be denied since this is the identical issue now pending before the court on the

amended application of the Great Lakes States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York in its amended application to amend the decree of April 21, 1930, filed in November of 1958 and presently pending. The defense of another action pending which was originally raised in common law pleadings by a plea in abatement still appears to be available to the parties and to be recognized in our Federal Court. In the case of *Shelby v. Bacon,* (1850) 10 How. 56, 51 U. S. *67, it is stated that when two tribunals have concurrent jurisdiction the one which first obtains possession of the subject must adjudicate.

In the case of *Insurance Company v. Brune's Assignee,* (1877) 96 U. S. 58, it is stated that the rule at law that the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, provided the action be in the courts of the same state, holds in equity.

In the case of *Stephens v. Monongahela Bank,* (1884) 111 U. S. 197, it is recognized that the defense of another action pending is a plea in abatement.

In 1 Am. Jur. § 14, p. 27, it is stated:

> "There is no principle better settled than the general rule of law that the pendency of a former action in a court of competent jurisdiction within the same state or jurisdiction, between the same parties, and involving the same subject-matter and cause of action, wherein all the rights of the parties thereto may be fully and finally determined and adjudicated, may be asserted as a ground for the abatement of the second action."

In support of the foregoing statement the text cites among others the cases above referred to.

While formal pleas in abatement have been abolished, at least in the district courts, by the Federal rules of Civil Procedure, Rule 7 (c), it does not appear that the adoption of the new rules was intended to abolish any legitimate defense that a defendant might have but merely to change the form in which it was stated and to reduce drastically the number of pleadings permitted. 1 Barron and Holtzoff, General Practice and Procedure, Rules Edition, page 395, paragraph 241. Accordingly, since the only real issue between the state of Illinois and the states named defendant herein is the issue of the right to divert water out of the Great Lakes Basin into the Mississippi watershed, and that issue is now being contested by the identical parties and before this same Court, it would appear that Illinois' motion for leave to file this complaint should be denied.

II. ILLINOIS CANNOT MAINTAIN THIS ACTION IN ITS CAPACITY AS PARENS PATRIAE BECAUSE OF AN ALLEGED INABILITY OF ITS INSTRUMENTALITY TO BORROW MONEY ARISING OUT OF THE FAULT OR NEGLECT OF THE STATE OF ILLINOIS.

While the capacity of Illinois to maintain the instant action for the benefit either of its claimed instrumentality, the Elmhurst-Villa Park-Lombard Water Commission, or in behalf of the constituent municipalities, or in behalf of their inhabitants is not discussed in the brief, it seems clear that Illinois is proceeding in its capacity as parens patriae, and the action must be considered accordingly.

It is clear that under the Eleventh Amendment to the Constitution of the United States neither the Water Commission, the constituent municipalities, or the people who desire the water, could not maintain any action against the state of Wisconsin.

While we concede that a state may proceed in its capacity as parens patriae for the benefit of a substantial segment of its population, *Georgia v. Pennsylvania Railway Company,* (1945) 324 U. S. 439 and *Pennsylvania v. West Virginia,* (1923) 262 U. S. 553, and many other cases, the conditions under which it may do so are severely limited. *Massachusetts v. Missouri,* (1939) 308 U. S. 1; *Oklahoma v. Atchison Topeka & Sante Fe Railroad Company,* (1911) 220 U. S. 277; *Oklahoma ex rel. Johnson v. Cook,* (1938) 304 U. S. 387.

The leading case of *Massachusetts v. Missouri* clearly indicates that it is not proper to call upon the original jurisdiction of this court to enforce the private rights of a limited number of citizens and that an action, if it is to be cognizable in this court, must involve an injury to the state itself.

The case of *Massachusetts v. Missouri* arose out of a contest over inheritance taxes on a private estate and there was no showing that either of the party states would be injured if both states should chose to levy an inheritance tax. The case was distinguished on these grounds in *Texas v. Florida,* (1939) 306 U. S. 398, where it was shown that if all states attempted to levy inheritance taxes, one or more of the states might be injured. In *Great Lakes Dredge & Dock Co. et al. v. Hoffman,* (1943) 319 U. S. 293, the court stated that it was the duty of the district court under the Federal Declaratory Judgment Act to dismiss an action for

declaratory judgment in its own discretion when the suit involved a proceeding to enjoin the collection of a state tax and the taxpayer had an adequate remedy elsewhere. In *Altvater v. Freeman,* (1943) 319 U. S. 359, the court stated, "The requirements of 'case' or 'controversy,' * * * are no less strict under the Declaratory Judgment Act * * * than in case of other suits."

United States v. West Virginia, 295 U. S. 463, 475, 79 L ed. 1546, 1553, 55 S. Ct. 789;

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325, 80 L ed. 688, 699, 56 S. Ct. 466;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 81 L ed. 617, 57 S. Ct. 461, 108 A. L. R. 1000;

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U. S. 270, 85 L ed. 826, 61 S. Ct. 510.

In the *Altvater* case the court held that there was a justiciable claim and that there was an actual controversy between the parties.

In *Alabama State Federation of Labor v. McAdory,* (1945) 325 U. S. 450, which was an appeal from a state court in which a declaratory judgment proceeding had been conducted, the Supreme Court appeared to believe that it was being called upon to render a declaratory judgment upon the state statute. The holding of the case is that the court will not review on certiorari the decision of a state court in a declaratory judgment proceeding which upholds the constitutionality of a state statute. *Asbury Hospital v. Cass County,* (1945) 326 U. S. 207, 90 L ed. 6, holds definitely that the United States Supreme Court is without power to give advisory opinions and the lawyer's edition contains an annotation. It cites in support the *McAdory*

case, supra, and states that it is being asked to pass upon the constitutionality of a possible application of state statute in advance of its application to appellant.

In the present case there is no allegation that the state of Illinois itself is injured because of the inability of its creature, the quasi-municipal corporation known as the Elmhurst-Villa Park-Lombard Water Commission, to borrow money. There is no allegation that the state of Illinois itself could not raise funds either by general taxation or by borrowing on the credit of the state of Illinois to construct the proposed waterworks. There is no allegation that the communities benefited, that is, the city of Elmhurst, the villages of Villa Park and Lombard, and other customers, could not issue general obligation bonds which would pay for the cost of the waterworks.

If the Water Commission is unable to borrow money, it is the fault of the state of Illinois alone, which has created the Commission as a penniless orphan without assets other than its general revenues to be derived from a plant to be constructed with borrowed funds. Further, it is the state of Illinois which is the sole authority for the proposed activity of which some of the Great Lakes have complained, and that is the diversion of Great Lakes Basin water out of the watershed and into the Mississippi watershed. If Illinois were to direct its instrumentality to follow the practices of every other city or municipality on the Great Lakes which uses the lakes as a source of water for domestic purposes, and return its purified sewage effluent to the Great Lakes Basin, there would not even be the threat of litigation. Accordingly, the obstacle to the construction of the proposed waterworks, which has arisen because of the inability of the Water Commission to sell its bonds, is the

fault of Illinois, and Illinois alone; and Illinois alone should bear the consequences.

III. THE FEDERAL DECLARATORY JUDGMENT ACT DOES NOT AFFECT THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

In the instant case three of the states named as defendants have not even made a threat of litigation against the Elmhurst-Villa Park-Lombard Water Commission, and hence under the accepted rule Illinois would have no case whatsoever for an injunction against such an act. Recognizing this deficiency in its position, Illinois perforce is compelled to ask for a declaratory judgment. The reference in the brief filed on behalf of Illinois to the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201, would at least infer that the complainant believes that this act may have affected and augmented the jurisdiction of the United States Supreme Court.

While there are repeated statements that the Supreme Court of the United States may not be called on to give advisory opinions or to pronounce declaratory judgments, *Alabama v. Arizona,* (1933) 291 U. S. 286; *Arizona v. California,* (1931) 283 U. S. 423; *Interstate Commerce Commission v. Brimson,* (1894) 154 U. S. 447; there are other cases such as *Massachusetts v. Missouri,* (1939) 308 U. S. 1 and *Nebraska v. Wyoming,* (1945) 325 U. S. 589, which appear to infer that in an appropriate case arising in its original jurisdiction the United States Supreme Court will enter a judgment which would appear to be declaratory in nature.

In the case of *Massachusetts v. Missouri*, supra, it is stated at page 17:

> "Nor does the nature of a suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense (*Aetna L. Ins. Co. v. Haworth*, 300 U S 227, 240, 241, 81 L ed 617, 621, 622, 57 S Ct 461, 108 A L R 1000) and as between the two States there is no such controversy here."

Accordingly, we would respectfully suggest that if the United States Supreme Court does have power to enter a declaratory judgment, it is an inherent power arising out of its original jurisdiction and out of the nature of the particular controversy which is presented to it for decision, and that properly speaking the original jurisdiction of the United States Supreme Court can neither be enlarged nor diminished by any act of the Congress. Hence, the issue to be determined in this case is whether or not there is a justiciable controversy in the light of the decisions reached in the many cases affecting the original jurisdiction of this court.

IV. SINCE THE STATE OF WISCONSIN HAS NEVER EVEN THREATENED LITIGATION OVER THE PROPOSED ACTIVITIES OF THE ELMHURST-VILLA PARK-LOMBARD WATER COMMISSION, THE JUDGMENT SOUGHT BY ILLINOIS WOULD ONLY BE AN ADVISORY OPINION, WHICH IS BEYOND THE JURISDICTION OF THIS COURT.

There is no rule of law affecting the jurisdiction of the United States Supreme Court more firmly declared than the rule that the court may not be called upon to give advisory opinions.

Alabama v. Arizona, (1933) 291 U. S. 286;

Federal Radio Commission v. General Electric Company, (1930) 281 U. S. 464;

Alabama State Federation of Labor, Local Union v. McAdory, (1945) 325 U. S. 450;

Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 447;

Trailmobile Co. v. Whirls, (1947) 331 U. S. 40.

It has been stated that the Supreme Court will not give advisory opinions even when asked by the chief executive, *Chicago and S. A. Lines v. Waterman S. S. Corporation,* (1948) 333 U. S. 103.

In the instant case Wisconsin at no time has challenged the right of Illinois or its Water Commission to withdraw water from Lake Michigan for domestic purposes. Neither has it claimed that it would be damaged by the proposed diversion from the Great Lakes Basin, nor threatened litigation to protect itself against any possible damages. Under the circumstances it would appear clear that there is no

"controversy" between Illinois and Wisconsin in the sense in which that term is used in Art. III, Sec. 2 of the United States Constitution, and hence there is no warrant for making the state of Wisconsin a defendant in the instant action.

The proposal of the state of Illinois and its instrumentality to divert some 30 cubic feet per second of water from the Great Lakes Basin to the Mississippi watershed does not pose an issue of sufficient magnitude to invoke the attention and jurisdiction of the United States Supreme Court.

It has been repeatedly stated that not every matter which would warrant the resort to equity by one citizen against another would justify the Supreme Court in interfering with the action of a state of which another state complains. *Colorado v. Kansas,* (1943) 320 U. S. 383; *Alabama v. Arizona,* (1933) 291 U. S. 286.

And in another form it has been stated that the United States Supreme Court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York v. New Jersey,* (1921) 256 U. S. 296; *Connecticut v. Massachusetts,* (1930) 282 U. S. 660; *Washington v. Oregon,* (1936) 297 U. S. 517.

In the present case the injury complained of by Illinois, even if there were any warrant for holding Wisconsin responsible, is the inability of a small, subordinate quasi-municipal corporation to borrow money and the resulting inability of three small communities in Illinois to obtain water. Under the rule of the foregoing cases this issue would clearly be insufficient to invoke the attention or original jurisdiction of this court.

V. THE PROPOSED COMPLAINT IS MULTIFARIOUS.

In the case of *Alabama v. Arizona,* (1933) 291 U. S. 286, 291, Alabama sought to invoke the original jurisdiction of this court to enjoin the enforcement of the statutes of some 19 other states which regulated or prohibited the sale of articles produced by convict labor. After the objection that the complaint was multifarious was raised, counsel for Alabama obtained leave and did file an amendment eliminating some 14 states and leaving only 5 states which had similar statutes as parties defendant. In this case the Court stated at p. 291 as follows:

> "* * * It is not shown that the joiner of five States is necessary to avoid a multiplicity of suits or that it will substantially serve the convenience of Alabama or of the court. Alabama does not claim concert of action on the part of the defendants or that they are jointly liable in respect of any matter referred to in the bill. . . . Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of such joinders have no bearing in a case such as this. * * *"

The Court held that the amended bill naming only five states as defendants was multifarious.

In the present case there is more warrant for holding that the complaint proposed by Illinois is multifarious. Three of the states named as parties defendant have not even threatened litigation, and on that point at least are not on the same footing as the other three states.

On this point alone we respectfully suggest that leave to file the proposed complaint should be denied.

CONCLUSION

The difficulties which have arisen in Illinois because of the inability of the Elmhurst-Villa Park-Lombard Water Commission to borrow money to construct a waterworks arise solely because Illinois has not taken the proper steps to insure the credit of its subordinate instrumentality. The fault is that of Illinois, and Illinois alone.

We respectfully urge that leave to file the proposed complaint should be denied.

Respectfully submitted,

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Dated March 17, 1959.