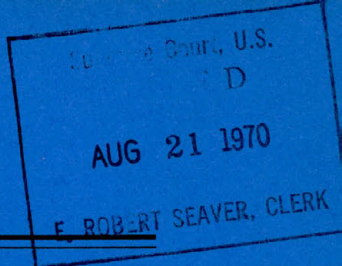


No. 41, ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
Columbus, Ohio 43215,
Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corpora-
tion existing under the laws of Michigan, located at 1609
Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED,
A corporation existing under the laws of the Dominion
of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation exist-
ing under the laws of Delaware, located at Midland,
Michigan,

Defendants.

BRIEF AMICUS CURIAE
IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT

FRANK J. KELLEY
Attorney General of Michigan
Lansing, Michigan 48913

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Defendants.

**BRIEF OF THE STATE OF MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT**

This is a brief amicus curiae by the State of Michigan
by its Attorney General, Frank J. Kelley, in favor of a

Motion for Leave to File a Complaint by the State of Ohio against a Michigan corporation, a Delaware corporation and a Canadian corporation. This brief amicus curiae is brought pursuant to Supreme Court Rule 42(4) without the express consent of the parties. The State of Michigan concedes that this brief amicus curiae supporting the State of Ohio comes late. The State of Michigan presents this brief amicus curiae upon the information and belief that the Defendants have been given an extended time for reply to the State of Ohio's Motion and, thus, also to this brief. The State of Michigan notified Defendants to this effect by letters dated July 15, 1970. Advanced typewritten copies of this brief amicus curiae were mailed to the Defendants on July 16, 1970.

STATEMENT OF INTEREST IN THE MOTION

The State of Michigan urges this Court to grant the State of Ohio's Motion for Leave to File a Complaint. The State of Michigan is firmly convinced that this Court's jurisdiction in the case rests on a sound, fundamental basis. Additionally, the State of Michigan believes that only this Court can render the quality of judgment which best serves the needs of the Great Lakes community as a whole. Acceptance of jurisdiction will wisely respond to that need.

Particularly, the State of Michigan is increasingly concerned with the ecological balance and well-being of all the natural resources which comprise the Great Lakes. Michigan's concern is easily understood. It is the only state whose entire population and territory lie within the Great Lakes Basin. Not surprisingly, Michigan holds in trust the largest portion of the Great Lakes waters, fish, vege-

tation and bottomlands. This trusteeship extends to Lakes Superior, Michigan, Huron, St. Clair and Erie.

JURISDICTION

This is an action brought by a state against citizens of other states. Judicial power and original jurisdiction in this case are vested in this Court by virtue of Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U.S.C., Section 1251.

THE SUBJECT MATTER IS APPROPRIATE FOR THE EXERCISE OF JURISDICTION

Nuisance abatement has long been a subject matter which this Court has accepted under original jurisdiction. *Missouri v. Illinois* (1901), 180 U.S. 208 (sewage pollution of the Mississippi River Basin). *New York v. New Jersey* (1921), 256 U.S. 296 (sewage pollution of New York harbor area). *North Dakota v. Minnesota* (1923), 263 U.S. 365 (hazardous drainage into interstate waters).

Furthermore, original jurisdiction has been allowed to states seeking to abate nuisances caused by citizens of other states. In the case of *Pennsylvania v. Wheeling and Belmont Bridge Co.* (1851), 54 U.S. (13 How.) 556, this Court took cognizance of Pennsylvania's claim that a bridge built by a Virginia bridge company was a public nuisance because it obstructed navigation on the Ohio River. In the case of *Georgia v. Tennessee Copper Co.* (1907), 206 U.S. 230, the Court again took cognizance of an action to abate a nuisance causing air pollution. Mr. Justice Holmes speaking for the Court in that case said:

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U.S. 429, 420, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisance impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U.S. 208, 241. (at 237)

In the case of *New Jersey v. City of New York* (1931), 283 U.S. 473, this Court heard New Jersey's claim that New York City's practice of deep sea garbage disposal constituted a public nuisance.

In addition, this Court has exercised original jurisdiction over a number of water diversion and water boundary disputes. *Wisconsin v. Illinois* (1929), 278 U.S. 426 and (1930), 281 U.S. 179, and *Michigan v. Wisconsin* (1926), 270 U.S. 295 and (1926), 272 U.S. 398 are but two examples relating to the Great Lakes. The State of Michigan realizes that the State of Ohio is making no such claims. However, Ohio's complaint has boundary and water law implications which, according to our federal system, should be tried in a federal forum.

LACK OF AN APPROPRIATE, ALTERNATIVE FORUM

Central to this Court's cognizance of claims under original jurisdiction is the lack of an appropriate, adequate

alternative forum. *Georgia v. Pennsylvania R.R.* (1945), 324 U.S. 439, 464.

The appropriateness and the need for federal judicial guidance is as apparent as the vastness of the Great Lakes Basin and its attendant problems. The Basin itself stretches the length of America's industrial heartland. Nearly one fourth of the nation's manufactured goods are produced in this region. Over thirty million Americans make their homes and livelihoods within this region. These citizens reside in eight states. All but one of the Great Lakes forms a major boundary between the United States of America and the Dominion of Canada.

The inherent interstate, indeed international, character of the Great Lakes cannot be minimized. Legal developments—especially of a precedent setting nature—are of interest to all who live within the Basin. This interest on the part of states is augmented by the frank admission that the neglect of the Great Lakes is due in large part to the neglect of states to advocate and formulate a solid body of common law which fits experiences unique to great lakes (as opposed to rivers).

Only a federal forum can appropriately and impartially consider the interstate and international implications of this litigation. But this Court in *Postal Telegraph Cable Co. v. Alabama* (1894), 155 U.S. 482, 487 stated:

A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court [now district court] of the United States has no jurisdiction of it, unless it arises

under the Constitution, laws or treaties of the United States. *Ames v. Kansas*, 111 U.S. 449; *Stone v. South Carolina*, 117 U.S. 430; *Germania Ins. Co. v. Wisconsin*, 119 U.S. 473.

Thus, without a 'federal question' Ohio cannot bring its suit under normal federal district jurisdiction. There is a considerable doubt that Ohio's complaint arises under the Constitution, laws or treaties of the United States.

CONCLUSION

Original jurisdiction is necessary and proper for the efficient, speedy and just resolution of the issues raised by Ohio's Complaint. Therefore, the State of Ohio's Motion for Leave to File a Complaint should be granted.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

M. Robert Carr
Assistant Attorney General

July, 1970

CERTIFICATE

I, Robert A. Derengoski, Solicitor General of the State of Michigan and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 16, 1970, I served typewritten copies of the foregoing Brief Amicus

Curiae on the defendants by mailing typewritten copies in a duly addressed envelope with proper postage pre-paid to: J. Donald McLeod, DAHLBERG, MALLENDER and GAWNE, 1022 Ford Building, Detroit, Michigan 48226, attorney for defendant Wyandotte Chemical Corporation; Milton Kunen, KAYE, SCHOLER, FIERMAN, HAYS and HANDLER, 425 Park Avenue, New York, New York 10022; Harley J. McNeal, MCNEAL and SCHICK, 520 Williamson Building, Cleveland, Ohio 44114, attorneys for defendant Dow Chemical; and Paul W. Brown, Attorney General, State of Ohio, Columbus, Ohio 43215.

Robert A. Derengoski /s/
Solicitor General
State of Michigan
Lansing, Michigan 48913

