IN THE

Supreme Court of the United States

No. 49 Original

STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

PLAINTIFF'S REPLY BRIEF

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PLAINTIFF'S REPLY BRIEF

Exercise of Original Jurisdiction Is Imperative.

Defendants' briefs in opposition to plaintiff's motion for leave to file the bill of complaint assert, in the main, that the administrative proceedings available under the Water Quality Act of 1965 (33 U.S.C.A. §1160) are adequate to deal with the pollution nuisance charged in the complaint, hence that this Court refrain from exercising original jurisdiction, especially in view of the fact that these administrative proceedings were originally commenced upon the urgings of the then Governor of the State of Illinois.

It should be pointed out at the outset that the mere recital of defendants' own statements carries with it the strongest refutation of their contention of the alleged adequacy of the administrative proceedings in question. Defendants relate that these proceedings were initiated as early as 1967, and that defendants are presently engaged in remedying the situation. In doing so, they tacitly acknowledge that nothing has been accomplished during the last four years in curbing the rampant pollution of Lake Michigan, caused by defendants' contaminated effluents. They discreetly fail to mention any definite deadlines, knowing full well that such deadlines were never kept in the past, and were extended over and over again by the State of Wisconsin. They do not even vaguely drop a hint if and when the pollution charged in the complaint will ever be totally eliminated.

This is not a small matter. **Two hundred million gallons** of raw or inadequately treated sewage and waste materials are discharged **daily** into Lake Michigan in the Milwaukee area alone. (See U.S. Department of the Interior, Federal Water Quality Administration: Transcript

of Proceedings of the Third Session of the Conference in the Matter of Pollution of Lake Michigan and Its Tributary Basin, held in Milwaukee, Wisconsin, March 31-April 1, 1970, p. 235). The following questions then arise: Must the State of Illinois helplessly stand by and watch the polluted waters flow into its territory, contaminating the vital water supply of millions of its people and threatening the life and health of its inhabitants? Must it engage in interminable conferences which during the last four years have been proved totally ineffective and, as far as the defendant municipalities are concerned, entirely devoid of any productive result? The answer to these questions is obvious. The State of Illinois has not only the right but the duty to have that life-threatening nuisance abated in the quickest possible way; and the only way in which that can be accomplished is by invoking the jurisdiction of the highest court in the land which alone can conclusively act in this matter, without the possibility of prolonged appeals and all sorts of procedural delays inherent in all other types of proceedings, whether administrative or judicial. Time is of the essence. Thus exercise of original jurisdiction by this Court is imperative and of the utmost urgency.

The Complaint Is in Effect Directed Against the State of Wisconsin.

The bill of complaint for which leave to file is asked in these proceedings is brought by the State of Illinois in its sovereign capacity against a number of Wisconsin municipalities which are entrusted by their State with the carrying out of important functions in the field of public health and welfare. Thus the complaint is in effect directed against the State of Wisconsin which, even un-

der the pertinent provisions of the Water Quality Act of 1965, exercises, through its Department of Natural Resources, vital and decisive control over the type of water pollution problems caused by its municipalities. It is respectfully submitted that, under these circumstances, exercise of original jurisdiction by this Court is required and founded upon a constitutional mandate.

Plaintiff's Only Adequate and Effective Remedy Lies with This Court.

Defendants' assertions that the administrative proceedings under the Water Quality Act of 1965 (33 U.S.C.A. §1160) are adequate and sufficient to deal with the existing and continuing grave threat to the health and welfare of the people of the State of Illinois are legally and factually incorrect. The constant and recurring theme of the Water Quality Act is the emphasis placed by the statute upon the primary responsibility of the states to abate and prevent water pollution. The policy declaration of the Act stresses that guiding principle in clear and unmistakable language; it reads, in part, as follows (33 U.S.C.A. Sec. 1151(b)):

> In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution . . .

In order to make certain that this right and responsibility of the States encompasses the entire gamut of remedies available to them, Congress again stressed the principle in those provisions of the Act (33 U.S.C.A. §

1160) which deal expressly with the administrative proceedings concerning interstate waters, referred to by defendants in their briefs—the very same administrative proceedings that, according to defendants' contentions, are adequate, and bar the plaintiff from invoking the jurisdictional power of this Court. The provisions in question read as follows (33 U.S.C.A. §1160(b)):

> Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

Thus it is obvious that none of the traditional remedies of a state in battling water pollution nuisances, including those rooted in the Constitution of the United States and springing from a state's sovereignty, are displaced by the provisions of the federal statute. Hence, contrary to defendants' contentions, the cases cited by plaintiff in its motion as direct precedents for the exercise of original jurisdiction by this Court are as applicable and valid today as they were at the time when they were decided.

An even cursory reading of the pertinent statutory provisions cited by defendants will demonstrate that these provisions were designed to spur the states to the adoption of programs aimed at the attainment of improved water quality standards. The authority to carry out and enforce those programs was and is, in the main, vested in the individual states. It needs not any elaboration that the success of such a program is totally dependent upon the energetic action of the particular state and its agencies which have adopted the program. It also follows from the very nature of these programs that the

mutual consent of neighboring states to the establishment of these programs in their respective territorial realms does not constitute an approval of the continuation. and particularly the prolonged continuation, of a pollution nuisance which severely endangers the life and health of the inhabitants of a neighboring state. In short, as applied to the present case, participation of the State of Illinois in the four-state conference on Lake Michigan did not amount to the granting of a *carte blanche* to Wisconsin or its municipalities to tolerate and to continue with the maintenance of a pollution nuisance for a prolonged time period; nor did it constitute an approval given to the Wisconsin municipalities to dump millions of gallons of contaminated sewage into the waters of Lake Michigan to the life-endangering detriment of hundreds of thousands of people in Illinois. It also did not mean that Illinois had thereby irrevocably waived its right to protect the health of its people against a continuing severe danger and detriment. This is particularly so in view of the cumbersome and slow-moving nature of the procedures in question—procedures which had started more than three years ago but still, during all that time, had not produced any tangible results and had not eliminated the dangerous discharges of the contaminated effluents emanating from the defendant municipalities. As previously mentioned, broken deadlines, fruitless efforts, and inconclusive conferences characterized, as far as the defendant municipalities are concerned, the utter futility of these administrative proceedings hailed by defendants as the most effective means of putting an end to the water pollution problem involved. The absurdity of that notion was officially recognized by none else than the director of the United States Environmental Protection Agency, Mr. William R. Ruckelshaus, who in

a recent letter to Rep. Carl Albert, Speaker of the House, declared that the procedures under the Water Quality Act relating to the pollution of interstate waters "have not proved sufficiently strong and effective." (Report in the Chicago Daily News of Friday, Feb. 12, 1971). These are the words of the man who is in charge of supervising these procedures. Any further comment regarding their adequacy and effectiveness seems superfluous.

It should be mentioned in this connection that administrative tolerance or approval of the deplorable pollution conditions does not detract from the illegality of the situation and cloak the conduct of the parties responsible for the existence of the nuisance with the mantle of legality and immunity. Thus, in the case of *New Jersey* v. *City of New York,* 283 U.S. 473, 51 S. Ct. 519, 75 L. ed. 1176 (1931), in which the State of New Jersey had complained in this Court that the City of New York was dumping garbage into the ocean and that the garbage was carried by the waves to the New Jersey coastline, the City of New York based part of its defense upon the ground that the supervisor of the harbor of New York had issued federal permits for the dumping of the garbage in accordance with the applicable federal statute. This Court refuted that defense and said (75 L.ed. 1176 at 1179, 1180, 283 U.S. 473 at 482, 483):

> There is no merit in defendant's contention, suggested in its amended answer, that compliance with the supervisor's permits in respect of places designated for dumping of its garbage leaves the court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the act that purports to give to one dumping at places permitted by the supervisor immunity from liability

> for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect.

In the present case, too, there is no merit in defendants' contention that the administrative provisions of the Federal Water Quality Act bar the plaintiff from invoking this Court's jurisdiction.

It should, furthermore, be emphasized that the statements of the Metropolitan Sewerage Commission of the County of Milwaukee and the Sewerage Commission of the City of Milwaukee that they are not municipalities and, therefore, not citizens of Wisconsin, are incorrect. Apart from the fact that those statements have nothing to do with the question whether or not this Court should exercise original jurisdiction in the case, the decisive point is that these commissions are legal governmental entities under the laws of the State of Wisconsin, as appears clearly from the statutory provisions and cases cited by them. Whether they exercise these governmental powers as agents for any other public agency or independently or whether they engage only in limited functions is, at this posture of the case, totally immaterial. Important is only for present purposes that they are legal entities entrusted with the performing of governmental functions; they are, therefore, municipalities and citizens of the State of Wisconsin.

CONCLUSION

Plaintiff's statements contained in its motion and reply brief have amply demonstrated the necessity and urgency for the exercise of original jurisdiction by this Court. Only this Court possesses the power to act conclusively and speedily in the premises. Time is pressing, for the health of millions of people is at stake. It is, therefore, respectfully asked that this Court grant leave to plaintiff to file its bill of complaint and refer the case to a special master for further proceedings.

Respectfully submitted,

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