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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970 — 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.

SUPPLEMENTAL BRIEF OF RACINE AND KENOSHA

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SUPPLEMENTAL BRIEF OF RACINE AND KENOSHA

This Brief is submitted on behalf of defendants, City of Racine and City of Kenosha, as a joint venture. Counsel for the two cities have collaborated on this Brief and concur in its contents.

ISSUE

What law governs the substantive issues sought to be presented for decision in original actions such as this one ?

FACTS

This litigation involves the creation of an alleged common law nuisance based upon defendants polluting Lake Michigan at locations in Wisconsin and which effluent is carried to the shores of Illinois.

In 1967 plaintiff, Illinois, invoked procedures under Title 33, Sec. 466, U.S.C. (now Sec. 1151-1175) known as the "Federal Water Pollution Control Act." In January, 1968, the first Conference was called and in attendance were representatives of Illinois, Wisconsin, Indiana and Michigan. In July, 1968, pursuant to authority granted by each state legislature, the representatives of the four states signed a Statement of Agreement directed at the development of a common policy for the protection of Lake Michigan. Since such agreement, various water quality standards have been adopted by the Conference, submitted to Federal authorities for approval, and then returned to the individual states for implementation. At annual conferences status reports of progress of each state have been made and additional standards have been proposed, adopted and implemented.

(Cfr: Official Proceedings. "Conference, Pollution of Lake Michigan and Its Tributary Basin. Illinois-Indiana-Michigan-Wisconsin." U.S. Dept. of Interior, Federal Water Control Administration)

ARGUMENTS (INTRODUCTION)

Only for the purpose of this brief does the writer concede that this action is one of State vs. State for in Louisiana vs. Texas, 176 U.S. 1, 44 L. Ed. 347, 20 S. Ct. 251, it is noted:

> " . . . in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. . . . A controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse of or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

The State of Wisconsin is not a party to these proceedings, although plaintiff in its Reply Brief, pp. 3 and 4 contends that the complaint is in effect against the State of Wisconsin. However, it should be remembered that we are concerned with the alleged pollution by several cities of the sixth largest fresh-water lake on earth, that borders on four states and which is used by thousands of municipalities as their water resource for all purposes. Also, the lake does not have currents in the same connotation as a river, yet there is constant movement of the waters with a <u>northward</u> flow on the west shore about 75 percent of the time and a complete mixing of all the waters of the lake over a period of time.

> (Cfr: Vol. 2, pp. 563-570. Official Proceedings, 2nd Session, Feb. 25, 1969, Conference. Supra)

I.

ABSENT THE IMPLEMENTATION OF AGREEMENTS CONSUMMATED PURSUANT TO TITLE 33, SEC. 466, U.S.C. (FWPCA), FEDERAL, STATE AND INTERNATIONAL LAW WILL APPLY AS THE EXIGENCIES OF THE CASE MAY REQUIRE.

Assuming for the moment the absence of a compact or agreement between the states as authorized by Art. I, Sec. 10, U.S. Constitution, and assuming further the existence of a direct issue between the States of Illinois and Wisconsin being raised by the pleadings and a subject matter that is susceptible of solution by the court, we have a situation similar to the one confronting the court in Missouri vs. Illinois (1901), 180 U.S. 208, 45 L.Ed. 497, 21 S.Ct. 331. After discussing the history of Art. III, Sec. 2, and resolving that the court's original jurisdiction encompassed disputes and controversies between states other than those respecting territory and jurisdiction, the court at p. 512 (L.Ed.) stated:

> "But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter (the general government) would be devolved the duty of providing a

> remedy, and that remedy, we think, is found in the constitutional provisions we are considering."

Thus each state, with the adoption of the U.S. Constitution, surrendered a portion of its sovereign powers in favor of the Union. In lieu thereof, the people of the United States provided the mechanics under Art. I, Sec. 10, and Art. III, Sec. 2, by which controversies between sovereign states could be resolved. Automatically disputes between states become questions affecting national interests that are to be resolved without war, and if possible by negotiations between the states, and if this is not possible then by decision of the only neutral forum available, the U.S. Supreme Court. To this extent the peace, prosperity and the very existence of the Union has become vested in the Supreme Court. And when the two parties to the litigation are sovereign states a strong political motive is added, and the peace and harmony of the whole Union is involved. Such controversies extend well beyond the boundaries and jurisdiction of any single state and are matters of national interest.

In Missouri vs. Illinois (supra) it was not necessary to determine which law (state or federal) would govern the substantive issues, although there are strong indications which would control. However, in Connecticut vs. Massachusetts (1930), 282 U.S. 660, 75 L.Ed. 602, 51 S.Ct. 286, such determination was made. At p. 607, (L.Ed.) it is stated:

> "For the decision of suits between states, federal, state and international law is

considered and applied by this court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations 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. Kansas v. Colorado, 185, U.S. 125, 146, 46 L.ed. 838, 846, 22 S. Ct. 552. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in Kansas v. Colorado, 206 U.S. 46, 100, 51 L.ed. 956, 975, 27 S. Ct. 655, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means 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 a consideration of the pertiment 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. Wyoming v. Colorado, 259 U.S. 419, 465, 470, 66 L.ed. 999, 1013, 1015, 42 S. Ct. 552.

The development of what Mr. Justice Brewer speaking for the Court in Kansas v. Colorado, 206 U.S. 46, 98, 51 L.ed. 956, 975, 27 S. Ct. 655, refers to as interstate common law, is

indicated and its application for the ascertainment of the relative rights of States in respect of interstate waters is illustrated by Missouri v. Illinois, 200 U.S. 496, 50 L.ed 572, 26 S. Ct. 268; Kansas v. Colorado, supra; Wyoming v. Colorado, 259 U.S. 419, 465, 470, 66 L.ed. 999, 1013, 1015, 42 S. Ct. 552, supra, and Wisconsin v. Illinois, 278 U.S. 367, 73 L.ed. 426, 49 S. Ct. 163, 281 U.S. 179, 74 L.ed. 799, 50 S. Ct. 266."

II.

AGREEMENTS BETWEEN LITIGATING STATES ENTERED INTO UNDER ART. I, SEC. 10, WILL MODIFY THE APPLICATION OF "INTERSTATE COMMON LAW" AS SET FORTH IN CONNECTICUT VS. MASSACHUSETTS (SUPRA)

This court has, in situation such as are present in this case, repeatedly suggested that on matters of dispute between states, they are best resolved by means of negotiations:

"We cannot withhold the suggestion, inspired by consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York bay is one more wisely solved by cooperative study and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted."

New York vs. New Jersey (1921)
256 U.S. 296, 65 L.Ed. 937, 41 S.Ct. 492
Colorado vs. Kansas
320 U.S. 383, 88 L.Ed. 117.

And in the event a compact or agreement on a subject matter has been made between states pursuant to Art. I, Sec. 10, judicial remedies are not necessary unless there has been a breach of the agreement or compact, or the item disputed is not included within the terms of the agreement.

> "The assumption that a judicial or quasi-judicial decision of the controverted claims is essential to the validity of a compact adjusting them rests upon misconception. It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact - the legislative means - adapts to our Union of sovereign states the age-old treaty-making power of independent sovereign nations. . . ."

> "But resort to the judicial remedy is never essential to the adjustment of interstate controversies unless the states are unable to agree upon the terms of the compact, or Congress refuses to consent. . . ."
>
> Hinderlider vs. LaPlata River and C. Creek Ditch Co. (1938)
> 304 U.S. 92, 82 L.Ed. 1202, 58 S.Ct.803 (rehr. den.)

In the present action the States of Illinois, Wisconsin, Michigan and Indiana in July of 1968, through their duly authorized agencies, formally signed a Statement of Agreement directed at the development of a common policy for the protection of Lake Michigan. The agreement was the result of the State of Illinois invoking the procedures

under the FWPCA, Title 33, Sec. 466 U.S.C. Following the agreement the parties, and Federal approval as authroized by Congress, numerous water quality standards were adopted and implemented. Actually, Federal participation has gone well beyond the mere approval of standards because in conjunction with state enforcement of agreed upon standards, the Federal Government has made available millions of dollars of aid for pollution control.

> "An agreement solemnly entered into between states by those who alone have political authority to speak for the states cannot be unilaterally nullified; nor is it to be given its final meaning by an organ of only one of the contracting states."
>
> West Virginia ex rel Dyer vs. Sims, 341 U.S. 22, 95 L.Ed. 713, 71 S.Ct. 557

An examination of plaintiff's pleadings and briefs does not allege any breach of agreement between the parties. Nor does it allege pollution to exist as a result of conduct not already subject to regulation and outstanding orders made for the purpose of compelling municipalities to meet water quality standards agreed upon between the parties.

> Title 33, Sec. 1160 (FWPCA) U.S.C. provides in part:
>
> "(a) The pollution of interstate or navigable waters in or adjacent to any state or states . . . shall be subject to abatement as provided in this act."
>
> "(b) . . . 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) be displaced by federal enforcement action."

"(c)(1) If the Governor of a state or a state water pollution control agency files . . . a letter of intent that such state . . . will adopt (A) water quality criteria applicable to interstate waters . . . and (B) a plan for the implementation and enforcement of the water quality criteria adopted . . . if the secretary determines that such state criteria and plan are consistent with paragraph (3) of this subsection, such state criteria and plan shall thereafter be the water quality standards and applicable to such interstate waters or portion thereof."

"(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection . . . is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) . . . "

* * *

"(h) The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have

jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require."

* * *

"'Compacts or agreements' are words of like meaning, except that the former is generally used with reference to more formal and serious engagements than is usually implied by the latter, and covers all stipulations affecting the conduct or claims of the parties."
Virginia vs. Tennessee
148 U.S. 503, 37 L.Ed. 537, 13 S. Ct. 728

Once an agreement has been entered into between states and such agreement has received Congressional approval - and such agreement has been implemented by the parties as in the present case - to such extent the agreement becomes the standards governing the conduct of the parties.

"Historically the consent of Congress as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown. But the Constitution plainly had two very practical objectives in view in conditioning agreements by States upon consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance or Confederation' and what arrangements come within the permissive class of 'Agreement or Compact.' But even the

permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interests."

Frankfurter and Landis, The Compact Clause of the Constitution - A Study in Interstate Adjustments, 34 Yale L.J. 685, 694-695

CONCLUSION

It is therefore submitted that in this action the "Interstate Common Law" as expressed in Connecticut vs. Massachusetts (supra), and as modified by the water quality standards established and implemented pursuant to the Statement of Agreement made by the states under the provisions of the Federal Water Pollution Control Act, will govern the issue presented.

Respectfully submitted,

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