SANITARY DISTRICT OF CHICAGO *v.* UNITED STATES

No. 161

SUPREME COURT OF THE UNITED STATES

266 U.S. 405; 45 S. Ct. 176; 69 L. Ed. 352; 1925 U.S. LEXIS 753

December 8, 9, 1924, Argued
January 5, 1925

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

Mr. Harvey D. Goulder for the Lake Carriers' Association as *amicus curiae,* by special leave of Court.

Mr. Francis X. Busch and *Mr. Leon Hornstein,* by leave of Court, filed a brief on behalf of the City of Chicago, as *amicus curiae.*

Taft, McKenna, Holmes, Van De Vanter, McReynolds, Brandeis, Sutherland, Butler, Sanford

[*423] [**177] [***361] MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the United States to enjoin the Sanitary District of Chicago, a corporation of Illinois, from diverting water from [***362] Lake Michigan in excess of 250,000 cubic feet per minute [4166 cfs]; the withdrawal of that amount having been authorized by the Secretary of War. It is alleged that the withdrawal of more, viz., from 400,000 to 600,000 cubic feet per minute, has lowered and will lower the level of the water of Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario, Sault Ste. Marie, St. Mary's River, St. Clair River, Detroit River, Niagara River, St. Lawrence River, and all the harbors, &c., connected therewith, all of which are alleged to be navigable waters of the United States, and will thus create an obstruction to the navigable capacity of said waters; and that it will alter and modify the condition and capacity of the above named and their ports, &c., connected with them. The prohibition of such [**178] alterations and obstructions in the Act of March 3, [*424] 1899, c. 425, § 10; 30 Stat. 1121, 1151, is set out at length and relied upon but the frame of the bill does not exclude a reliance upon more general principles if they were needed in order to maintain it.

The withdrawal practised and threatened is through an artificial channel that takes the place of the Chicago River, formerly a little stream flowing into Lake Michigan, and of a part of its branches. The channel instead of adding water to the Lake has been given an opposite incline, takes its waters from the Lake, flows into the Desplaines River, which empties into the Illinois River, which in its turn empties into the Mississippi. The channel is at least twenty-five feet deep and at least one hundred and sixty-two feet wide; and while its interest to the defendant is primarily as a means to dispose of the sewage of Chicago, *Missouri* v. *Illinois*, 200 U.S. 496, it has been an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf.

The answer shows that the defendant is proceeding under a state act of May 29, 1889, by which it was provided that a channel should be made of size sufficient to take care of the sewage and drainage of Chicago as the increase of population might require, with a capacity to maintain an ultimate flow of not less than 600,000 cubic feet of water per minute, and a continuous flow of not less than 20,000 cubic feet [333 cfs] for each 100,000 of the population within the sanitary district. It denies that the defendant has abstracted from 400,000 to 600,000 [6,666 – 10,000 cfs] feet per minute, but as it alleges the great evils that would ensue if the flow were limited to the amount fixed by the Secretary of War or to any amount materially less than that required by the state act of May 29, 1889, and as it admits present conditions to be good, the denial cannot be taken very seriously. The act sufficiently indicates what the State threatens and intends to do unless [*425] stopped. The answer also denies that the abstraction of water substantially in excess of 250,000 cubic feet per minute [4,166 cfs] will lower the levels of the Lakes and Rivers concerned or create an obstruction to the navigable capacity of those waters. It goes into the details of the construction of the channel; the expenses incurred; and the importance of it to the health of the inhabitants of Chicago, both for the removal of their sewage and avoiding the infection of their source of drinking water in Lake Michigan which had been a serious evil before. It shows the value of the channel for the great scheme of navigation that we have mentioned; recites acts of Congress and of officers of the United States alleged to authorize what has been done, and to estop the United States from its present course, and finally takes the bull by the horns and denies the right of the United States to determine the amount of water that should flow through the channel or the manner of the flow.

This brief summary of the pleadings is enough to show the gravity and importance of the case. It concerns the expenditure of great sums and the welfare of millions of men. But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that with less mighty interests no one would venture to dispute. The law is clear, and when it is known the material facts are few.

This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the

footing of an ultimate sovereign interest [***363] in the Lakes. [*426] The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273. With regard to the second ground, the Treaty of January 11, 1909, with Great Britain, expressly provides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein. As to its ultimate interest in the Lakes the reasons seem to be stronger than those that have established a similar standing for a State, as the interests of the nation are more important than those of any State. *In re Debs*, 158 U.S. 564, 584, 585, 599. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230. *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355. *Marshall Dental Manufacturing Co.* v. *Iowa*, 226 U.S. 460, 462.

The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants. In matters where the States may act the action of Congress overrides what they have done. *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177. [**179] *Second Employers' Liability Cases*, 223 U.S. 1, 53. But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all. *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75, 79. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.

[*427] But the defendant says that the United States has given its assent to all that has been done and that it is estopped to take the position that it now takes. A State cannot estop itself by grant or contract from the exercise of the police power. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U.S. 408, 414. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U.S. 548, 558. *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U.S. 241, 244. It would seem a strong thing to say that United States is subject to narrower restrictions in matters of national and international concern. At least it is true that no such result would be reached if a strict construction of the Government's act would avoid it. This statement was made and illustrated in a case where it was held that an order of the Secretary of War under the Act of March 3, 1899, c. 425, the same act in question here, directing an alteration in a bridge must be obeyed, and obeyed without compensation, although the bridge had been built in strict accord with an act of Congress declaring that if so built it should be a lawful structure. *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 417. *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251. It only remains to consider what the United States has done. And it will be as well to bear in mind when considering it that this suit is not for the purpose of doing away with the channel, which the United States, we have no doubt, would be most unwilling to see closed, but solely for the purpose of limiting the amount of water to be taken through it from Lake Michigan.

The defendant in the first place refers to two acts of Congress: one of March 30, 1822, 3 Stat. 659, which became ineffectual because its conditions were not complied with, and another of March 2, 1827, c. 51, 4 Stat. 234, referred to, whether hastily or not, in *Missouri* v. *Illinois*, 200 U.S. 496, 526, as an act in pursuance of which Illinois brought Chicago into the Mississippi watershed. The [*428] act granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no [***364] irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain.

In an appropriation Act of March 3, 1899, c. 425, § 10; 30 Stat. 1121, 1151; Congress provided "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; ... and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." By § 12 violation of the law is made a misdemeanor and punished, and the removal of prohibited structures may be enforced by injunction of the proper Court of the United States in a suit under the direction of the Attorney General. This statute repeatedly has been held to be constitutional in respect of the power given to the Secretary of War. *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 424. [*429] It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, c. 907, § 10; 26 Stat. 426, 454, which forbade obstruction to navigable capacity "not affirmatively authorized by law," and which had been held satisfied with regard to a boom across a river by authority from a State. *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211. There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, [**180] without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.

After this statute was passed the Secretary of War granted various permits, which are relied on by the appellant although in their nature they all were revocable licenses. On May 8, 1899, the Secretary, on application of the appellant, granted permission to open the channel, assumed in the recitals to have a flowage capacity of 300,000 cubic feet per minute with a

velocity of one and one-quarter miles an hour, on the conditions that the permit should be subject to the action of Congress (which was superfluous except as a warning); that if at any time the current created proved to be unreasonably obstructive to navigation or injurious to property he reserved the right to close or modify the discharge; and that the Sanitary District must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in Chicago River. On July 11, 1900, improvements of the Chicago River were permitted with the statement that the permission did not affect the [*430] right of the Secretary to revoke the permit of May 8, 1899. On April 9, 1901, the Secretary, Mr. Root, directed the Sanitary District to cut down the discharge to 200,000 cubic feet per minute. On July 23, 1901, at the appellant's request, he amended the order to permit a flow of 300,000 feet between 4 p.m. and twelve, midnight, subject to revocation. On December 5, 1901, again on the application of the appellant, leave was given to discharge not exceeding 250,000 feet per minute during the whole twenty-four hours, but subject to such modification as the Secretary might think that the public interests required. On January 17, 1903, the allowance was increased to 350,000 feet until March 31, 1903, after which date it was to be reduced again to 250,000 feet all subject to modification as before. On September 11, 1907, and on June 30, 1910, permissions were granted to make another connection [***365] with Lake Michigan and to open a channel through Calumet River (this last refused by Mr. Secretary Taft on March 14, 1907) on the understanding that the total quantity of water withdrawn from the Lake should not exceed that already authorized by the Secretary of War. Finally on February 5, 1912, the appellant, setting forth that the population of the Sanitary District exceeded 2,500,000 and was increasing rapidly, and that the only method then available for disposing of the sewage of this population was by diluting it with water flowing from Lake Michigan through the canal, asked permission to withdraw not exceeding 10,000 cubic feet per second, subject to such restrictions and supervision as might seem proper to the Secretary and to revocation by him. On January 8, 1913, Mr. Secretary Stimson carefully reviewed the situation, including the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation, and held that he was not warranted in excepting the appellant from the prohibition of [*431] Congress on the ground of even pressing sanitary needs. It appears to us that the attempt to found a defence upon the foregoing licenses is too futile to need reply.

States bordering on the Mississippi allowed to file briefs as *amici curiae* suggest that they were not heard and that rights have not been represented before the Secretary of War. The City of Chicago makes a similar complaint and argues that it is threatened with the loss of a hundred million dollars. The interest that the River States have in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to Congress, if they see fit, to induce a modification of the law that now forbids that increase unless approved as prescribed. The investment of property in the canal and the accompanying works took the risk that Congress might render it valueless by the exercise of paramount powers. It took the risk without even taking the precaution of making it as sure as possible what Congress might do. But we repeat that the Secretary by his action took no

rights of any kind. He simply refused an application of the Sanitary Board to remove a prohibition that Congress imposed. It is doubtful at least whether the Secretary was authorized to consider the remote interests of the Mississippi States or the sanitary needs of Chicago. All interests seem in fact to have been copiously represented but he certainly was not bound to give them a hearing upon the application upon which he was requested to pass.

After the refusal, in January, 1913, to allow an increase of flow, the appellant was notified by direction of the War Department that it was drawing more water than was allowed and was violating § 10 of the Act of March 3, 1899. In reply it intimated that it was bound by the state law to which we have referred and in obedience to it had been flowing 20,000 cubic feet per minute for each [*432] 100,000 of population and could not reduce that flow. It suggested that its rights should be determined by a suit, and accordingly this bill was filed on October 6, 1913. An earlier suit had been brought on March 23, 1908, to prevent the construction of a second channel from Lake Michigan through the Calumet River to the appellant's main channel, leave to do which had been refused as we have seen by Mr. Secretary Taft. (The permit subsequently granted on June 30, 1910, was [**181] with the understanding that it should not affect or be used in the 'friendly suit' then pending to determine rights.) The earlier suit was consolidated with the later present one, and it was agreed that the evidence taken in that should be used in this, so far as applicable. There was some delay in concluding the case, which the defendant naturally would desire, but after it was submitted to the Judge according to his own statement he kept it about six years before delivering an oral opinion in favor of the Government on June 19, 1920. No valid excuse was offered for the delay. There was a motion for reconsideration, but the Judge took no further action of any kind until he resigned in 1922. On June 18, 1923, another Judge entered a decree for an injunction as prayed, with a stay of six months to enable the defendant to present the record to this Court.

The parties have come to this Court for the law, and we have no doubt that as the law stands the injunction prayed for must be granted. As we have indicated, a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the City of Chicago will be subjected if the decree is carried out are exaggerated, but in any event we are not at liberty to consider them here as against the edict of a paramount [***366] power. The decree for an injunction as prayed is affirmed, to go into effect in sixty days -- without prejudice to any permit that may be issued by the Secretary of War according to law.

Affirmed.