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Ernest Bruncken

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THE CHICAGO WATER DIVERSION

By ERNEST BRUNCKEN*

THE litigation growing out of the attempt of the city of Chicago, its Sanitary District, and the State of Illinois, to divert an unreasonably large amount of water from Lake Michigan into the Mississippi, without regard to the injury done thereby, whenever the water level happens to be periodically low, to the navigation interests, the riparian owners, and even the agricultural fertility of the Great Lakes country and the people living in the surrounding region would attract considerable attention simply by reason of the magnitude of the interests involved. To the lawyer, the political scientist, the sociologist and the statesman, however, they are of even greater interest, not so much on account of the legal questions decided by the Supreme Court of the United States in the two cases adjudicated by that tribunal, but rather by the questions more or less definitely raised in the pleadings and arguments which were left undecided by the Court and therefore constitute a sinister legacy that may possibly come to plague future generations.

The facts in these cases, although voluminous in their statement, are not very complicated; nor are the points of law decided of a particularly novel or difficult character. A brief statement of the most important facts will show this to be the case.

In 1881, an Illinois statute authorized the City of Chicago to pump water out of Lake Michigan, through the South Branch of the Chicago River, into an old canal connecting the Lake with the Illinois River. This canal was a project begun under two acts of Congress passed in 1822 and 1828, giving a grant of public lands for that purpose. The canal was completed in 1848, improved in 1872, but had not become a very important channel of navigation. By the latter year, both the Chicago River and the canal were become very much polluted by the sewage allowed to flow into it. In 1883, the pumps installed under the act mentioned above began adding a thousand cubic feet of water a second, which at that time seemed to be sufficient to

* Member of the Milwaukee Bar. Sec. Milwaukee Harbor Commission.

dilute and purify the sewage in the canal. In 1886, the highest level of water known since 1835 was reached in the Lake, and a steady moderate current of water flowed out of the Lake into the old canal and on into the Illinois and Mississippi. Everybody was happy.

During the following years, however, the Lake level steadily receded, and by 1889 was two feet lower. It has oscillated somewhat since then, but even with the high water of 1929 it has not yet reached again the maximum of 1886. The pumps were able to pump little more than 600 second feet, and the pollution became worse than ever.

In 1891 the State Drainage and Water Supply Commission recommended the building of a canal from the Chicago to the Desplaines River, through the low height of land which divides the hydrographic basin of the Great Lakes (or St. Lawrence) from that of the Mississippi. This canal was to have a capacity of approximately 12,000 second feet, and be capable of carrying boats up to 2,000 tons burden. It was to be both a great commercial highway and an inexpensive method of disposing of the sewage. The fact that the comparatively small amount of sewage flowing through the pumps had been purified satisfactorily before it reached the Illinois, as long as 1,000 second feet of Lake Michigan was added, made everybody sanguine to hope that a large amount, in a larger canal, would also be purified before it got into the lower river.

In 1890, under an Illinois act of 1889, the Sanitary District was organized. It has since been enlarged and now embraces the metropolitan area, west of the Indiana line, with a total of 438 square miles, containing fifty-four cities, villages, and country towns. This municipal organization, with ample taxing and borrowing powers, proceeded to build the now famous Drainage Canal.

In 1896, the first permit in connection with this matter was granted by the Secretary of War. It was for the enlargement of the cross section of the Chicago River, but expressly guarded against any interpretation that the government thereby authorized a current in the river opposite to its natural flow. The application had become necessary, because Congress by the River and Harbor Act of 1890 had prohibited the changing of the channel of a navigable river without such a permit. This law was amplified by sections 9 and 10 of the River and Harbor Act of 1899. On December 5, 1901, the Secretary of War granted a permit to pump 4,167 second feet (or 250,000 cubic feet a minute) into the new drainage canal. Thereafter a number of similar permits were granted, lowering or increasing the flow from time to time, for various reasons. In 1907, an application for additional flow through the Calumet Sag channel, to the south of the Chicago River, was denied. The Sanitary District found some sort of excuse to prepare

for taking the water anyhow; and the Government tried to prevent this by an injunction. This injunction was appealed. The District then began to exceed its limit of water through the regular drainage canal, and was again enjoined. On appeal the two injunctions were combined and constitute the record in the case of *U. S.* v. *Sanitary District.*[1]

In the meantime, the State of Illinois, by an amendment to its constitution, had provided for a deepwater way from the Drainage Canal at Lockport, to a point on the Illinois River at Utica, and thereby created the navigation excuse for the Drainage Canal. The Sanitary Distrct, at the place where a limestone ridge is crossed, near Lockport, established a power house, by which it is receiving considerable revenue, both from the City of Chicago and from private parties.

There is still another group of facts, which does not figure in the cases decided by the Supreme Court but throws considerable light on the character of the enterprise. The amount of sewage flowing into the Drainage Canal from the rapidly growing population centers of Chicago and its suburbs soon became so great that there was no longer a thought of its oxydization, as had been the case at the beginning. As a consequence, the entire Desplaines River below the canal, and a portion of the Illinois, have become so polluted that all the fish have died and the banks can no longer be used for recreation purposes. The polluted stretch is gradually lengthening and now is but a few miles above Peoria. The hundreds of persons owning the land along the banks of the two rivers were compelled to bring action, each for himself, against the Sanitary District. Naturally, they are at a disadvantage, on account of the cost of litigation; and many of the plaintiffs have consented to accept trifling amounts in lieu of the substantial amounts they are justly entitled to for damages. The injuries to the fisheries and to the beauty of the stream are lost without compensation to the public.

The injunction suits, commenced in 1908 and 1913, respectively, although brought in the name of the United States, had a curious history. They were begun by the Attorney-General, by virtue of his implied powers to protect the rights of the federal government, on two principal grounds. The first was that the withdrawal of more than 250,000 cubic feet per minute would lower the level of the Lakes below Lake Superior, and of the St. Lawrence River, by six inches, and thereby alter and modify the navigable channels, which by the Rivers and Harbors Act of 1899, cited above, was prohibited and made a misdemeanor. The second ground was that the Treaty with

[1] 266 U.S. 405; 69 L.Ed. 352.

Great Britain of January 11, 1909, expressly prohibited any act affecting the natural level or flow of boundary waters without the approval of the Joint Commission provided for in that treaty. It was charged that instead of the 250,000 cubic feet per minute the District had been taking from 400,000 to 600,000 cubic feet, and in addition threatened to construct a second canal through the Calumet Sag, necessarily adding to the quantity of water diverted.

The District, in its answer, relied on the Act of Congress of March 30, 1828, cited above (3 St. at L. 659), the conditions of which were never complied with; and the Act of March 2, 1827, authorizing a land grant for the building of a canal to connect Lake Michigan with the Illinois River. The defendant also maintained that it was obliged to obey an Illinois statute, of May 29, 1899, by which it was directed, among other things, to maintain a continuous flow through the canal of not less than 20,000 cubic feet per minute for each 100,000 inhabitants in the Sanitary District.

Evidence—much of which was directed towards the feasibility and desirability of a Lake to Gulf canal and afterwards disregarded by the Supreme Court as irrelevant—was received and the result taken under advisement by the federal judge. This was the learned gentleman who in 1922 resigned to accept the more congenial and lucrative duties of "boss" of a commercialized sport. Two years before his resignation, he had rendered an oral decision in favor of the government, after taking six years to consider. Naturally, the defendants had no objection to the delay; but they made a motion for a rehearing, which the court again took under advisement. After Judge Landis' resignation, another judge entered a decree for an injunction, with a stay of six months for an appeal. In the Supreme Court, a number of states bordering on the Mississippi were allowed to file briefs as *amici curiae*, on the side of the Sanitary District. The attorneys for Michigan and the Lake Carriers' Association addressed the Court orally in the same capacity on behalf of the Government.

The Supreme Court affirmed the decree, and in doing so decided a number of important questions, or at least reaffirmed certain important doctrines.

Perhaps the most fundamental point made by the Court was directed to the argument of the defendant that the United States, by assenting, through the Secretary of War, to the change in the condition of a body of navigable water, had estopped itself from afterwards withdrawing that assent. This proposition the court vigorously denied by asserting that a "state cannot estop itself by grant or contract from the exercise of the police power." Expressed more concretely, that means: No person has a right to claim damages because the government today pro-

hibits some act which yesterday it permitted. Still less can anybody claim the right to continue a prohibited action, because at one time it was not prohibited. When put in that form, it is easy to see that the contrary doctrine would destroy the very foundations of government. The law would have to remain forever what it had always been. Yet there need be no doubt that the argument of the defendant was put forward in good faith. The outward similarity between the permission of the government to divert the water, and the act of a private landowner who permits me to put the foundations of my building partly on his land and is estopped from afterwards driving me off, must have blinded him. Yet, the Court shows the difference by the simple statement that "this is not a controversy between equals. The United States is asserting its sovereign power."

See the numerous cases cited in support of this doctrine.[2]

However, the decree in the injunction cases interfered little with the plans of the Sanitary District. It went to the Secretary of War for permission to tap 10,000 second feet, the equivalent of 600,000 cubic feet per minute, which had always been its maximum demand, although it has been claimed that at times even this was exceeded. The permit actually issued allowed an annual average of 8,500 second feet, on condition that before expiration of the permit, on December 31, 1929, proper sewage reduction plants should be built, enough to take care of one-third of the population. It was also stipulated that the City of Chicago should, within three years, install a system of metering its water supply. The federal engineering department was to supervise the execution of this permit.

It was clear that under these provisions the interests that were injured by the extraordinary acts of the Sanitary District, the City of Chicago, and the State of Illinois had no sort of guarantee that the tortious proceedings would not continue. The injunctions covered only a part of the cause of action; and nobody could tell but what some future Secretary of War might modify the permit so as to release the Chicago people from the duty of taking the steps prescribed in order to make the diversion unnecessary from the sanitary point of view. While the appeal from the injunction decree was still pending, the states of Wisconsin, Minnesota, Ohio, and Pennsylvania brought an original action in the Supreme Court of the United States against the State of Illinois and the Sanitary District of Chicago; soon after, similar suits were separately brought by the State of Michigan and the State of New York against the same defendants, with the primary purpose of determining that the rights of the people of these states to

[2] *Sanitary District* v. *U.S.* 266 U.S. 405; 69 L.Ed. 353.

free and unobstructed navigation on the Great Lakes were dependent, not on the discretion of some executive officer like the Secretary of War, but on the fundamental laws of this country. The states of Missouri, Kentucky, Tennessee, Louisiana, Mississippi, and Arkansas intervened as defendants, apparently because they had conceived the notion, sedulously fostered by Chicago propaganda, that somehow the navigability of the Mississippi was bound up with the diversion of water from the Great Lakes.

The bills of the complainants substantially showed that the diversion of water through the Drainage Canal had lowered the water of the Lakes not less than six inches, thereby causing great injury in various forms to the plaintiff states and their people; that none of the acts complained of had been authorized by Congress; that the withdrawal of water was for the purpose, not of promoting navigation or interstate commerce, but of sanitation, for which Congress could exercise no power; that the acts complained of were not done for the purpose of promoting navigation and interstate commerce; and that the diversion was in conflict with the Act of Congress of March 3, 1899.

After a demurrer by the defendant state of Illinois and motions to dismiss by the intervening states had been over-ruled, the defendants made their several answers. In them they pressed the point that the diversion was for the improvement of navigation on the Illinois and Mississippi Rivers; that the plaintiffs were guilty of laches in not bringing their suits earlier, and were estopped because they had well known for what purpose the Drainage Canal was being built, and had not objected at that time; and that, if damage had been caused to anybody, it was *damnum absque injuriâ*, having been caused by measures taken by Congress, the executive of the United States, the State of Illinois, and its subdivisions, in the legitimate endeavor to promote commerce and navigation.

The Court appointed as special master to take evidence no less a person than former Justice Charles Evans Hughes, thereby recognizing the importance of the questions of fact involved in the matter.

The plaintiffs, in their briefs and arguments, raised a number of questions of a profound constitutional nature but the Court did not decide these. It issued an interlocutory decree, based substantially on these three propositions:

1. The various acts of Congress authorizing surveys and other measures looking toward the construction of a "Lakes-to-Gulf" waterway, and especially the Rivers and Harbors Act of 1927, which contained an express proviso that nothing therein should authorize any diversion from Lake Michigan, do not constitute an authorization by Congress of any substantial diversion from the Lake.

2. The primary purpose of the Drainage Canal and the diversion is sanitation, not the promotion of commerce and navigation; but Congress has no power to provide for the health of the inhabitants of a state; that is within the constitutional authority of the local government.

3. The Secretary of War, in issuing permits, acted for the purpose of preventing unlawful interference with the navigability of the Great Lakes. In doing so, he was within his authority, conferred by the Rivers and Harbors Act of 1899 and other acts of Congress. These acts do not in any sense constitute an unconstitutional delegation of legislative power; the Sanitary District had failed to do its duty of providing for proper sewage disposal; therefore an emergency existed which was recognized in the prior injunction suit[3] and in the temporary and conditional permit of March 3, 1925. So far, the Sanitary District and the City of Chicago have complied with the conditions of this permit.

The Court declares that on the basis of these propositions the plaintiffs "are entitled to a decree which will be effective in bringing that violation of the complainants' rights, and the unwarranted part of the diversion, i.e. the diversion not designed to promote navigation, to an end. But in keeping with the principles on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section, our decree should be so framed as to accord to the sanitary district a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanently operative, and effective injunction."

In accordance with this declaration, the case was again referred to the master to take such evidence as may be needed to frame a further decree on the basis of the principles stated. The Court adds:

"Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project."[4]

It is probable that this litigation has by no means reached its end. While the taking of testimony by the master is under way, it has become known that the Sanitary District, by reason of what appears to be official corruption and mismanagement of almost incredible gross-

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[3] *U.S.* vs. *Sanitary District supra.*

[4] *Wisconsin et. al.* v. *Illinois* et. al 73 L.Ed. U.S.S. 195.

ness, is bankrupt and will have the utmost difficulty in constructing the sewage disposal plants, and the modern sewer system, which are necessary and which it has for all these years, with unheard of recklessness, neglected to supply. There is evidence, from the attitude of officials, hired "experts," and some of the newspapers, to warrant a suspicion that even now there is no real intention to comply with the law and the decree of the Court.

If in addition thereto, Congress should, in a perfectly legitimate and laudable desire to aid in the construction of a waterway to the Mississippi, allow itself to be misled into granting a greater diversion than is needed for the navigation of such a canal, experts say that 1,000 feet per second would be ample, the constitutional principles which the Court did not need to consider for the present will have to be relied upon for vindicating the rights of the people of the Great Lakes country.

The fundamental question that would be raised by such a law of Congress is a novel one in the constitutional theory of the United States. It is this: Can the federal government deprive one section of the country of the benefit of natural conditions and confer the advantages derived therefrom upon another? This is a problem of the most far-reaching character. It has been latent in a variety of forms during the recent economic development of this country, and upon its final solution the whole future of the country may depend. It is by no means simple, because the same section may be benefitted by some and injured by others of the applications of whichever solution may finally be adopted.

If the federal government may, by the withdrawal of large amounts of water from the Great Lakes, build up commerce and navigation on the Mississippi, all natural advantages of every city or state, of every community whatsoever, will, in principle, become dependent on the will of a majority in Congress, insofar as these advantages can be affected by the arts of the engineer. To set limits to the expansion of those arts would be a very bold undertaking. With an economic incentive, and a sufficient financial support, the engineers are able, nowadays, literally to move mountains and dry up oceans. The history of settlement in this country furnishes a very serious precedent for the disregard of natural conditions. By building railroads into unsettled regions, and building up a rate structure for them by which new and flourishing communities in these undeveloped places were made possible in practical disregard of distance, we have conquered the continent and become the most powerful nation in the world. If we had not overcome by these artificial means the natural disadvantages of the interior, caused by remoteness from markets, the country between

the Mississippi and the Pacific Coast region would still be a wilderness. A new turn in the economic life has now made it necessary to make another artificial change, by bringing the ocean ships nearer to the interior, through an improved waterway up the St. Lawrence. So far, these measures have worked advantageously; but will they always do so?

If the waters of a natural hydrographic basin can be diverted to the benefit of another hydrographic basin, the sections now populous will have a tremendous advantage over the undeveloped portions of the country, for in their hands will be the decision whether these shall grow into prosperous commonwealths or not. Already this question has appeared in connection with the Colorado River, where populous California is reaching out for water naturally belonging to undeveloped Arizona. Evidently the highest kind of far-seeing statesmanship is needed to solve these problems.

In the case of the Chicago water diversion, it may be that a protection to the Great Lakes will be found in the historical conditions that made these waters the boundary between two countries. It is inconceivable that the United States will attempt to disregard the rights of Canada to the undiminished flow of the St. Lawrence waters. Moreover, the manner in which the states of the Great Lakes region arose suggests a legal protection that may become the basis for a satisfactory solution of the problem of the rights of localities to their natural conditions.

The Northwest Territory Ordinance of 1787 contains a clause, according to which the navigable waters of the Territory and the carrying places between the same, shall be forever free to the inhabitants of said Territory as well as other citizens of the United States. By another clause, the Ordinance is made a compact between the government and the inhabitants of the Territory. It may be that this should be construed so that any substantial change in the natural conditions would at least require the consent of the people of the states carved out of the Territory.

The question whether the "bill of rights" provisions of the Ordinance are still the law of the land has been decided affirmatively by the Supreme Court of Ohio. Yet the question may be asked whether, by being admitted to the United States, on an equality with other states, the states carved out of the Territory have not abrogated the "compact" of 1787, by common consent, as provided in the instrument itself.[5]

Economic and social questions in the public life of the United States

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[5] *State* v. *Poone*, 84 Ohio St. 346; 95 N.E. Rep. 924.

have from the beginning had a tendency to assume the form of constitutional, in other words of legal, questions. The highest statesmanship in our country has been the statesmanship of trained lawyers. It is evident that new problems are taking shape which can be solved only by the skill of legal minds. Therein lies an added incentive for the young men now preparing for the legal profession, to train themselves, profoundly and conscientiously, for these wider tasks as well as for the ordinary work of lawyers.