THE EFFICACY OF NONSTATUTORY REMEDIES FOR WATER POLLUTION IN SOUTHERN LAKE MICHIGAN

William Bowe
March 29, 1966

TABLE OF CONTENTS

I. INTRODUCTION: THE SETTING

Due to the peculiarities of the glacial ice mass which carved out the bed of Lake Michigan, the southern end of the lake is like a cul-de-sac. It takes the slow currents more than a hundred years to change completely Lake Michigan's water.[1] This fact was of little significance until the relatively recent past when attention began to be directed to the problems created by the large scale discharge into the lake of industrial and human pollutants. The largest population center boardering on this part of the lake is the city of Chicago and, not surprisingly, the first serious pollution of the lake resulted from that city's uncontrolled pouring of sewage into the Chicago River which flowed into Chicago's harbor. Typhoid deaths between 1860 and 1900 averaged 65 per 100,000 population per year,[2] and the disease

---

[1] Chicago Daily News, February 3, 1966, p.18.

[2] Metropolitan Sanitary District of Greater Chicago, The Lake We Drink (Chicago: August, 1964), p.2.

was responsible for thousands of deaths overall. Public pressure led engineers to propose reversing the flow of the river so that it would no longer empty into Lake Michigan. This was done at the turn of the century when the Sanitary and Ship Canal was excavated. Through the Canal the South Branch of the Chicago River was emptied into the Illinois Waterway which, in turn, flowed into the Mississippi. At once typhoid deaths ceased to be of major concern and the lake's first major pollution experienced passed from the public mind. Periodically since there has been occasional public attention turned to Chicago's sanitary system. That attention has centered on litigation initiated by other Great Lakes States. These states, ostensibly wishing to keep the lake levels high enough for shipping, hope to reduce the volume of water now diverted from Lake Michigan by Chicago.[3]

---

[3] 30 Marquette Law Review 149 (December, 1946) and 31 Marquette Law Review 28 (May, 1947), "Chicago's Water Diversion Controversy"; see also 51 Northwestern University Law Review 653 (January and February, 1957) "Legal Aspects of Lake Diversion" and Chicago Bar Record, "Great Lakes Water - Is There Enough?" (November, 1965), p.60.

Slowly however an entirely different pollution problem was coming to the fore. Steel mills began locating at the southern tip of Lake Michigan in order to take advantage of abundant fresh water and the convenient access to raw materials. Iron ore from Minesota's Messabi Range could be quickly and cheaply brought by ship to the new plants. Other industries settled on the shore to tap the skilled labor force and the growing midwest market. Today the industrial complex between Chicago and Burns Ditch, Indiana, includes ten steel mills, five oil refineries and other manufacturing operations from soap to paper. The new industries have not left the lake environment in its pristine state. Estimates are that billion gallons of water carrying industrial wastes enter the lake daily. This enormous discharge contains fifty tons of oil, eighteen tons of nitrogenous matter and other tons of phenols and cyanides.[4] Inaddition to pollutants flowing into Lake Michigan directly, wastes which are dumped

---

[4] Chicago Daily News, February 11, 1966.

into the Calumet River and the Calumet-Sag Channel reach the lake whenever an offshore wind drops the water level by as little as 0.3 foot. On the average this occurs about 8 percent of the time.[5] This means that industries which are situated far inland from the lake are still a potent source of effluent discharge. A five-year United States Public Health Service study found that thirty-one industries and twenty-one municipalities were dumping waste into the sluggish end of Lake Michigan and that this was endangering the health and welfare of eight million persons.[6]

Recreational use of the lake has been substantially disrupted. Six Illinois and Indiana beaches have been unusuable about one third of the time. There are possible secondary effects as well. Two of the beaches in Chicago draw many Negroes and there have been fears of unrest if the

---

[5]Vinton W. Bacon, General Superintendent the Metropolitan Sanitary District of Greater Chicago, Statement to the Conference in the Matter of Pollution Interstate Waters of the Grand Calumet River, Calumet River, Lake Michigan, Wolf Lake, and Their Tributaries (Indiana - Illinois) at Chicago, Illinois, March 5, 1965.

[6]New York Times, February 3, 1966, p.19.

beaches were to be closed during the hot summer months.[7] To the north in Wisconsin, 252 sewer outfalls discharge into rivers a short distance from Milwaukee's harbor and the accumulation of filth has frequently made that city's four beaches unusable.[8]

Besides creating a high bacterial content at beaches, phosphorus and nitrate pollutants act as fertilizers and accellerate the plant growth in the water far beyond the lake's capacity to support such growth. The over-abundant plant life dies, sinks to the bottom, and decays, using up the water's oxygen and in the process creating "dead" water in which fish and other aquatic life cannot live.[9] Excessive growths of algae become serious nuisances along the shores because they multiply in such quantity that they are washed up and cover the beaches often in twenty to fifty feet wide strips. When these algae die and rot they create

---

[7] Ibid.

[8] Chicago Daily News, February 11, 1966.

[9] Chicago Sun Times, January 13, 1966, editorial

slimy, odorous barrier to would-be swimmers. Commercial shipping and pleasure boating add to the pollution, since very few of these craft have facilities for treating sewage or storing it until they reach port.[10] Contamination of Chicago's water supply has also frequently occurred. On December 12, 1965, for example, following a sustained south wind, phenols expelled from coke plants on the southern shore were blown north to the water intakes at the Navy Pier filtration plant and gave a phenolic taste to the drinking water in certain parts of the city.[11]

How has this catalog of pollution been combatted? As long as thirty years ago Governor Henry Horner of Illinois complained to Governor McNutt of Indiana about pollution from Calumet Region.[12] Obviously however reform has not been brought about merely exchanging letters. To date the only effective tools have proved to be Federal statutory remedies. The Federal Water Pollution Control Act set up machinery

---

[10] George B. Langford, "Filth in the Great Lakes", U.S. News and World Report, December 13, 1965, p.58.

[11] Interview with Dr. Joel Kaplovsky of the Metropolitan Sanitary District, January, 1966.

[12] "No Place to Hide", Saturday Review, May 22, 1965, p.41.

which led to a February 1965 agreement to reduce effluent discharge into Southern Lake Michigan to tolerable levels set by the Secretary of Health, Education and Welfare. Congressional legislation has also been considered which would prevent ships from dumping garbage and raw waste into the lake.[13] It is now estimated that by the summer of 1966 beaches closed because of pollution will be reopened,[14] though it is admitted that some "persistent pollutants" will remain in the lake for 100 years.[15]

An important question remains to be answered. Why have traditional Common Law remedies not played a more substantial part in the attack on lake pollution? A few general observations might be in order. Over one third of the State of Indiana's income now originated in its northwest counties of Lake and Porter. This will increase to almost one-half with completion of the Burns Ditch steel

---

[13] New York Times, February 2, 1961, p.58.

[14] Chicago Daily News, February 4, 1966, editorial

[15] Chicago Daily News, February 3, 1966, p. 18.

mill expansion plans.[16] While this may help explain why Indiana's officials have been reluctant to press the industries involved, it does not explain why Illinois officials have not been more forceful. Is it that Common Law remedies themselves are inadequate to meet this problem, or have existing remedies simply have not been effectively used? If the latter is true, what courses of action are open to private citizens in order to force needed public action? Answers to these and other questions will be explored in this paper.

Mr. Murry Stein, chief federal enforcement officer at the Lake Michigan pollution conference, has already argued that private suits are by in large ineffective in meeting the problem and that federal action is obligatory.

> Privately initiated suits, although theoretically capable of abating water pollution, have not proved effective on a broad area-wide basis. From a public regulatory point of view, private suits often are brought fortuitously and without regard for a concerted planned abatement program. A private party may himself not be sufficiently damaged to secure abatement decrees, and a con-

---

[16] Interview with Dr. Joel Kaplovsky, op. cit.

> tinued, uninterrupted pollution over a period of years may give one a prescriptive right to pollute with consequent immunity from many private actions.[17]

Whether this need be the last and definitive word on the role Common Law litigation can play remains to be seen. This paper will focus heavily, though not exclusively, on the development of nuisance law in Illinois as it relates to water pollution.

---

[17] Murry Stein, Chief, Enforcement Branch, Division of Water Safety and Pollution Control, Public Health Service, U.S. Department of Health Education and Welfare, National Resources Journal, Vol. 2, December, 1962, p.404.

II. WATER POLLUTION AND THE COMMON LAW DOCTRINES OF NUISANCE

One recourse for a person damaged by water pollution is to bring Common Law action in nuisance. In addition to private actions in nuisance, the Illinois legislature, as long ago as 1871, declared it to be a lawful extention of the police power for a city ordinance to prescribe a nuisance and provide for its statement.[18] The resulting case by case development of nuisance law has not been without its critics. As one has said,

> (The present nuisance law) shows the characteristic paucity of projective thinking that is the great weakness of the Common Law ... No branch of our law more clearly shows the real nature of our legal philosophy than does the law of nuisance ... Typically, it is an amalgam of case decisions based on somewhat conservative social views, overlaying a piecemeal growth of limited legislation, on a base of feudal concepts of property rights.[19]

On the whole this seems a fairly accurate observation with regard to the specific Common Law response to pollution problems.

---

[18] Illinois Rev. Stat. 1965, Ch. 24, sec. 11-60-2

[19] 5 Cleveland Marshall Law Review 160, "Nuisance in a Nutshell" (1956).

A number of propositions should be made at the outset with regard to the law of nuisance. According to Blackstone, a nuisance was "anything that worketh hurt, inconvenience, or damage",[20] More recently a nuisance has been defined as: "anything that works or causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property, or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious, or unwarranted and which injures, endangers or damages one in an essential or material degree, or which materially interferes with his legitimate rights to the enjoyment of life, health, comfort, or property.[21]

Nuisance is to be distinguished from trespass. A trespass to land usually involves a non-continuous physical invasion. Nuisance includes this, plus continuity in most cases, plus effect of intangibles and of technically-physical

---

[20] 3 Blackstone's Commentaries 5,216

[21] Wood, Horace, Treatise on Nuisance, (1893).

invading mechanisms, such as fumes, noise and the like.[22] Nuisances may be divided into two classes, private and public. A private nuisance is one which effects a particular person, specifically and is an injury different in kind from any suffered by the community at large. A public nuisance is one which affects an indefinite number of people, or an entire area or community, though its effects on each individual therein may vary. Being an offense against the public, it is actionable only by governmental officials and not by an individual, unless it injures that individual directly. Then it also becomes a private nuisance as to him.[23] Although certain activities are nuisances per se, generally what is a nuisance is a question of fact left for the jury.[24] A continuing nuisance means one that continues unceasingly, or so often recurring as to have a substantially continuous

---

[22] 5 Cleveland Marshall Law Review 160, op.cit., p.150.

[23] Ibid. p. 148. see also Hoyt v. McLaughlin 250 Ill. 442, 95 N.E. 464 (911).

[24] R. v White & Ward 1 Burr. 333, 97 E.R. 338 (1757), Where"at the parish of Twickenham, etc. near the King's common highway there, and near the dwelling houses, of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking, and offensive liquors." Lord Mansfield stated, " the very existence of the nuisance depends upon the

harmful effect.[25] A permanent nuisance may be one that continues unceasingly[26] or is difficult or expensive to abate.[27]

In pollution cases the remedy at law, money damages, is usually of little help to the injured party. The person suffering must seek the aid of Equity if he is to obtain the only relief he cares about, namely cessation of the pollution. For equitable relief the pollution victim must allege and prove that the annoyance or loss is continuous or recurrent and that he has suffered irreparable harm. An injury may be irreparable where the party injured cannot be adequately compensated in damages, or where the damages cannot be measured by any pecuniary standard.[28] However, difficulty in computing damages alone is not grounds for interference

---

[24] con't
fact to be judged of by the jury."

[25] Kafka v. Bayio 191 Calif. 746, 218 p. 753 (1923)

[26] Norfolk & Western R.R. Co. v. Allen 118 Va. 428, 87 S.E. 558 (1916).

[27] Cumberland Torpedo Co. v. Gaines 201 Ky. 88, 255 S.W. 1046 (1923).

[28] Schewich v. Southwest Light Co. 109 Mo. App. 406, 84 S.W. 1003 (1905).

of Equity by injunction.[29] Also for a person to be entitled to permanent injunctive relief, one must establish actual and substantial injury and not merely technical inconsequential or speculative wrongs which, if they entitle him to any damages, entitle him to nominal damages only.[30] As might be expected all of these requirements give the plaintiff great difficulties of proof.

Since in the past the jurisdiction of Equity has been dependent in large part upon the protection of property rights, it is common to find the older cases expressing an unwillingness to enjoin a public nuisance in a situation which contravened public policy rather than threatening property rights.[31] With the development of social consciousness in many courts, Equity jurisdiction to protect the public or social welfare came to be exercised without regard

---

[29]Carlson v. Koerner 226 Ill. 15, 80 N.E. 562 (1907).

[30]Bour v. Ill. Cen. R.R. Co., 176 Ill. App. 185 (1912).

[31]Nichols v. City of Rock Island 3 Ill. 2nd 531, 121 N.E. 2nd 799 (1954).

to the question of property.[32] However, the water pollution cases which have arisen over the years have almost invariably brought equitable relief on the basis of injured property rights. Generally, the only persons found with a sufficient interest to protect have been riparian owners.[33]

Thus pollution by an upper riparian owner can give rise to a right of action by a lower riparian owner for injunctive relief.[34] Lessees of such an owner have the right to bring suit as well.[35] Most states hold that an upper riparian owner has the right to have reasonable use of the water only and any unreasonable use which interferes with another's proper use of the water may give rise to a nuisance action. To determine what is a reasonable use, the interests of the contending parties must be weighed. If the benefits derived from polluting water exceed the damage done thereby,

---

[32] Walsh, Treatise on Equity (1930), sec. 37.

[33] Although nuisances from seeping and percolating waters have led to a long line of cases including Rylands v. Fletcher L.R. 3 H.L. 330 (1868).

[34] International Water Co. v. American Strawboard Co. 57 Fed. 1000 (C.C.P. Ind. 1893).

[35] Cheat Mountain Club v. West Va. Pulp & Paper Co., 205 F. 195 affirmed 212 F. 373 (D.C., W. Va. 1913).

an injunctive remedy might not be available.[36] Although dicta in many cases often points the other way,[37] a polluter's defense, such as this "balancing of the equities", will usually allow him to continue defilling, though he may be liable for damages even if this use of the water is clearly unreasonable. Thus large industries which pollute have come to be protected.[38]

Not all states subscribe to the "reasonable use" doctrine. In Mississippi, for instance, recovery may be had for any pollution which results in injury regardless of negligence, or reasonableness of use. In essence it amounts to strict liability.[39] Illinois, however, is one of the majority states with regard to the doctrines of "reasonable use" and "balancing of equities". In Barrington Hills

---

[36]Chicago Forge & Bolt Co. v. Sanche 35 Ill. App. 174 (1889).

[37]People v. White Lead Works 82 Mich. 471, 46 N.W. 73 5 (1890), which stated for instance that where a nuisance exists it is of no consequence that the business is useful or necessary or that it contributes to the wealth & prosperity of the community.

[38]35 Va. Law Review 778, "Rights & Remedies in the Law of Stream Pollution."

[39]26 Mississippi Law Journal 107 (1954) "Stream Pollution Rights of Riparian Landowners, and cases cited therin.

Country Club v. Village of Barrington[40] it was said that individuals have the right to have the flow of a stream through their property unpolluted. This Barrington dictum was qualified later in the Haack case,[41] which held that the old common law right to pure water would not be enforced in the absence of real injury: "lawful and useful business may not be stopped on account of triffling or imaginary annoyances which do not constitute real injury". The Illinois doctrine was restated more clearly in the 1950 [redacted] case.[42] This was a suit by riparian owners to enjoin a chemical company from polluting a stream which flowed through a farm. It was held that deposits of whitish substances and the aesthetic fact that the stream had an unnatural color were not sufficiently harmful to establish a right to relief. The court expressly adopted the "balancing of conveniences" test.

---

[40]Barrington Hills Country Club v. Village of Barrington 357 Ill. 11, 191 N.E. 239 (1934).

[41]Haack v. Lindsay Light & Chemical Co. 393 Ill. 367, 66 N.E. 2nd 391 (1946).

[42]Clark v. Lindsay Light & Chemical Co. 341 Ill. App. 316, 93 N.E. 2nd 441, cause transferred 405 Ill. 139, 89 N.E. 2nd 900 (1950).

The fact that a city is the unlawful polluter has never made any difference to a court in weighing an injunction, since a city or village has no more right to pollute than an individual or industry.[43] Also, the fact that the pollution of a stream is due in part to other sources is no defense to a suit to enjoin a city from maintaining a nuisance if it is, in fact, unlawfully contributing to the pollution of the stream.[44]

Private suits to abate water pollution nuisances are often complicated by state statutory remedies. Illinois has a Sanitary Water Board empowered to determine if pollution exists in certain cases.[45] However, Ruth v. Aurora Sanitary District[46] established the proposition that the Sanitary Board did not have exclusive jurisdiction to correct

---

[43] Hayes v. Village of Dwight 49 Ill. App. 530, affirmed 150 Ill. 273, 37 N.E. 218 (1893); Peck v. City of Michigan City 149 Ind. 670, 49 N.E. 800 (1898); Phillips v. Armada 155 Mich. 260, 118 N.W. 941 (1908).

[44] City of Kewanee v. Otley 204 Ill. 402 (1903).

[45] Ill. Rev. Stat. 1957, Ch.19 see 145.6.

[46] Ruth v. Aurora Sanitary District 17 Ill. 2nd 11, 158 N.E. 2nd 601 (1959).

pollution of waters in the state. The builder of a subdivision has not been allowed by the Board to tie into existing and inadequate sewage disposal lines. The court held that an action would lie to compel the Board to cease the resultant pollution of the Fox River and to issue bonds to finance construction of the needed treatment facilities.[47] Thus, available statutory remedies do not necessarily interfere with Common Law remedies.

It is well to consider what the foregoing analysis of the existing law means to an analysis of the pollution problems peculiar to Lake Michigan. Private and public nuisances created by cities and industries may be enjoined only if the reasonable use and balancing of equity hurdles are overcome. Generally relief will be granted only to those injured having property rights which are interfered with.

---

[47] For an interesting English case holding the other way in a similar situation see Smeaton v. Ilford Corp. 2 W.L.R. 668 (1954).

For an injunction to issue, there are serious proof difficulties which have to be met in order to see whether or not damages are irreparable and sufficiently great. Finally, it should be remembered that these Common Law remedies were designed, not to prevent pollution in the first place, but only to afford relief to injured parties.[48] The handicaps of acting through private litigation to enjoin pollution in Lake Michigan should not be underestimated. As one commentator pessimistically said:

> The pollution problem ... cannot be safely left to private iniative. Pollution damages are often spread so thinly that human indifference makes it unlikely that anyone will sue. Suit by a private person is expensive and he may find several large companies with expert counsel opposing him. Surprisingly few suits have been brought by the local district attorneys or the attorney general to enjoin a public nuisance.[49] (Emphasis Added)

Perhaps therein lies an answer however.

---

[48] 35 Virginia Law Review 785, op.cit.

[49] 3 Stanford Law Review 649 (1951), "Californias Water Pollution Problem".

III. THE INJURED PARTIES IN THE SOUTHERN LAKE MICHIGAN AREA

It is important to akk who is harmed by Lake Michigan's pollution. First of all there are scattered homeowners along the Illinois, Indiana add Michigan shores. These property owners have riparian rights and may be injured sufficiently to bring suit alleging a private nuisance. Their recovery problems are immense, however, once they might be entitled only to money damages under the balancing of equities test discussed above. A number of cases have come up in which private beaches have been closed due to oil spillage or discharge from off-shore tankers. Invariably, only money damages have been allowed since the offending substance has been deposited by accident and is not a continuing nuisance.[50] Thus, while injury to beaches is worthy of recompense, Equity will not necessarily intervene. The damage to private beaches in southern Lake Michigan is likely to be intermittent and

---

[50] See Kirwin v. Mexican Petroleum Co., 267 F. 460 (D.C. R.I. 1920); Petition of New Jersey Barging Corp. 168 F. Supp. 925 (D.C. Dela. 1959); Southport Corp. v. Esso Petroleum Co., Ltd. 3 W.L.R. 773 (1953); New York Times, February 10, 1964, p.51.

in any event the offending corporation or municipality may have acquired the right to pollute by prescription.[51] Hence laches may afford a defense to an action for issuance of an injunction.[52]

Other categories of injured parties are the states which boarder on the lake whose waters are befouled, and the individual municipalities whose beaches may have been closed. These parties are damaged in greater degree than individuals. For instance, Chicago had twenty-one miles of shoreline and its beaches serve literally millions of people each summer. Thus closure of a beach constitutes a serious public nuisance. Even an intermittent disruption of a municipality's recreation facilities might cause irreparable damage where a similar injury to a private beach not. Furthermore, the chances for relief are somewhat better since there can be no prescriptive rights with regards to the nuisances effecting

---

[51] Commonwealth v. Upton 6 Gray (Mass.) 473.

[52] City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N.E. 992 (1913).

the public generally,[53] and just the threat of damage in certain circumstances may be sufficient to maintain an injunctive action.[54]

It is the right and obligation of responsible public officials to sue to enjoin such public nuisances. That they have been lax in pressing actions to restrain pollution should not obscure the fact they may have a clear duty to do so. The fact that pollution may cut across state lines is not a bar to such actions. There is ample precedent to support the right of one state to sue another in these matters. Missouri has sued Illinois to enjoin pollution and in 1921 New York sought to enjoin New Jersey from discharging sewage into Upper New York Bay.[55] Though both actions floundered on problems of proof, the courts have indicated they will act in proper cases.

---

[53] Parker v. People 111 Ill. 581 (1884).

[54] Villa Park v. Wanders Rest Cemetary Co. 316 Ill. 226, 147 N.E. 104 (1925).

[55] New York v. New Jersey 256 U.S. 296, 41 S. Ct. 492 (1921).

IV. ENFORCING PUBLIC DUTIES BY WRITS OF MANDAMUS

As has been seen, suits to enjoin private nuisances face serious obstacles to relief and, since private individuals are unable to sue to enjoin public nuisances unless they have been especially harmed, often it is only suits by public officials that can fill the void. Since public officials have not always acted when they should have, it is useful to explore to what extent the writ of mandamus might be available to ordinary citizens who are exasperated by the phenolic taste of their water or the closing of their city's beaches.

The writ of mandamus has been described by Ferris.

> Mandamus is a summary writ, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed. Its original purpose was to prevent disorder from a failure of justice ... Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive and ministerial duty ... upon officers and others who refuse or neglect to perform such duty and when there is no other adequate and specific legal remedy ... Mandamus will not

> lie where the duty is clearly discretionary and the party ... has exercised his discretion reasonable.[56]

There is some dispute as to whether a petitioner need allege and prove pecuniary loss or special damages to entitle him to relief by mandamus.[57] In Illinois it is enough that the relator in mandamus be interested in having his rights as a citizen enforced.[58]

Assuming a mandamus action to force officials to enjoin pollution will lie whom shall such action be brought against? This depends to some extent on which governmental body or official has jurisdiction over the place where the nuisance

---

[56] Ferris, F.G., The Law of Extraordinary Legal Remedies, (St. Louis, 1926), pp. 218, 222-23, 239.

[57] Ibid., p. 224; and McQuillin, Eugene, The Law of Municipal Corporations, (Chicago, 1943), p. 228, saying special damages are needed: contra see, McQuillin, Ibid. p. 1058, "Where a public right is involved and the object is to enforce a public duty, ... the relator in mandamus need not show any special interest in the result, if the performance of the general duty obviously affects his right as a citizen", and People ex. rel. Mark Cross Co. v. Ahearn, 124 App. Div. 840, 845, 109 N.Y. S. 249.

[58] People v. Suburban R.R. Co. 178 Ill. 594, 53 N.E. 349 (1899).

occurs. The northeastern boundary of Illinois extends down the middle of the lake from northern and southern points east of the Illinois borders on the lake with Wisconsin and Indiana.[59] The state has granted jurisdiction over waters without the confines of numicipal corporations to the counties immediately west of such waters.[60]

Generally, anything which is detrimental to health or which threatens danger to persons or property within a city may be dealt with by municipal authorities as a nuisance.[61] Thus mandamus may be invoked by a citizen to compel mayors and city councils to enforce a city ordinance.[62] The city of Chicago and other municipalities have specifically been granted the power to abate nuisances,[63] and the Municipal Code of Chicago now prohibits the discharge of forbidden

---

[59] Illinois Constitution 1870, Art. 1.

[60] Illinois Rev. Stat. 1965, Ch. 34, sec. 3.

[61] Rosehill Cemetary Co. v. Chicago 352 Ill. 11, 185 N.E. 170 (1933).

[62] McQuillin, op. cit., p. 1059.

[63] Ill. Rev. Stat. 1965, Ch. 24, sec. 20-20, and sec. 11-60-2.

substances anywhere in Lake Michigan within ten miles of the corporate limits.[64] State Attorney Generals may be joined in the action where they are under an obligation to represent state agencies with lake responsibilities.[65] The only person to whom a writ will not issue is the Governor.[66] It is thought better in such cases to keep strictly separate the judicial and executive branches of government and to allow the political process to rectify any improper laxness.[67]

To be successful however the responsible officials must have a clear duty to act. This duty may be created by the city ordinances, as Chicago has done, or it may be created by state statute.[68] In Illinois it has long been law that where a statutory duty exists to remove a nuisance that duty may be enforced by a writ of mandamas.[69] There are

[64] See Municipal Code of Chicago, Ch. 38, sec. 8,9.

[65] 7 American Jurisprudence 2nd 19, sec.9.

[66] People v. Bissil 19, Ill. 229 (1857).

[67] 55 C.J.S. 204, 6, sec. 122.

[68] State v. Baily 6 Wis. 291.

[69] On following page.

a number of Illinois statutes which would seem to give certain agencies and officials a clear, positive duty to prevent the befouling of the lake water. For instance, one statute states that,

> the Department of Public Works and Buildings shall ... have full and complete jurisdiction of every public body of water in the State of Illinois ... and the jurisdiction ... shall be deemed to be for the purpose of protecting the rights of the people of the state in the full and free enjoyment of all such bodies of water and for the purpose of preventing ... impairment of the rights of the people ... and every proper use which the people may make of the ... lakes of this State of Illinois shall be aided, assisted, encouraged and protected by the Department of Public Works and Buildings.[70]

---

[69] People v. City of Casey 241 Ill. App. 91 (1926), duty of Mayor and City Council to prevent encroachments on public streets; People v. Harris 203 Ill. 272, 67 N.E. 785 (1903), duty of mayor and alterman to keep sidewalks open; People v. Wayman 256 Ill. 151, 99 N.E. 941 (1912), duty of States Attorney to file a petition for foreiture of a corporate charter under certain conditions.

[70] Ill. Rev. Stat. 1965, Ch. 19, sec. 73.

This would seem to charge the Department with a mandatory duty to bring suits to enjoin pollution of the lake where such pollution acts to the great detriment of state citizens.

Even in the absence of any explicit, mandatory, obligation to act, there are many cases forcing action where official laxity would amount to an abuse of discretion. In an 1889 Illinois case, highway commissioners failed to remove a fence from across a public highway. The court held a writ of mandamus would issue in the case forcing the commissioners to act, even though the statute's language provided highway commissioners "may remove" obstructions and not "shall remove" them.[71] Thus statutes giving discretionary authority to act may in certain cases create enforcible duties. Illinois has declared it to be the public policy of the state to maintain reasonable standards of water purity for recreation and the propagation of fish and wildlife.[72] The Board of Trustees of Sanitary Districts

---

[71] Brokaw v. Commrs. of Highways 130 Ill. 482, 22 N.E. 596 (1889).

[72] Ill. Rev. Stat. 1965, Ch. 19, sec. 145.1.

specifically have the power to prevent the pollution of any waters from which a municipal water supply may be obtained.[73] Also, Sanitary Districts are specifically not authorized to flow sewage from their district into Lake Michigan.[74]

Lacking any statutory base under which a state had assumed a duty to protect the purity of its water, the state nevertheless still might have a duty to act. This could be so in spite of the fact that some commentators consider the preservation of the public's rights in state waters to be a nonmandatory governmental function.[75] The case law on the subject has generally followed the commentator's view,[76] though this trend may be reversing.[77] The proposition that the state must act to prevent pollution, absent any statutory

---

[73] Ibid., Ch. 42, sec. 296.

[74] Ibid., sec. 306.

[75] 1958 Wisconsin Law Review, 583 (1958), Waite, "The Dilemma of Water Recreation and a Suggested Solution."

[76] Love v. Glencoe Park District 270 Ill. App. 117 (1933), holding a municipal corporation acts in a governmental capacity, as relates to its liability for negligence in operating and maintaining a bathing beach.

[77] McQuillin, op. cit., p. 446.

duty arises from the so-called "trust theory".[78] The state considered to own the lake beds in trust for the public use. The leading Illinois case is Illinois Central Railroad Company v. Illinois.[79] In that case the State of Illinois sought to have declared invalid an act granting certain submerged lands in Lake Michigan to the Illinois Central Railroad. In upholding the right of the legislature to repeal such a statute the court stated,

> Title to the bed of navagable waters in the Northwest Territory visited in the general government temporarily upon the cession from Virginia. It passed to the several states as to waters within their borders upon admission of those states into the Union... It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, [redacted] the obstruction or interference of private parties... The state can no more abdicate its trust over property... like navigable waters... than it can abdicate its police powers in the administration of government and the preservation of the peace.[80]

---

[78] 2 Minnesota Law Review 429 (1918), Fraser, "Title to Soil Under Navigable Waters - the Trust Theory".

[79] Ill. Central R.R. Co. v. Illinois 146 U.S. 387, 13 S. Ct. 110 (1892).

[80] Ibid., pp. 387, 452.

Illinois courts have often upheld the state in the active management of this trust,[81] and the other states bordering Lake Michigan have followed a similar course.[82] If the state owns the lake beds in trust for the public use, it would seem that the state had [redacted] duties as trustee, such as the use of proper care to prevent damage to the subject matter of the trust.[83] Thus the state may have enforceable duties of active management. Supporting such a theory was a case sustaining a grant of submerged land by the State of Wisconsin to Milwaukee.

> The trust reposed in the state is not a pas[redacted] trust; it is governmental active and administrative... The trust... requires the law-making body to act in all cases where action is necessary, not only to preserve the trust but to promote it... A failure to act, in our opinion, would have amounted

---

[81] People v. Kirk 162 Ill. 138, 45 N.E. 830 (1896); Revill v. People 177 Ill. 468, 52 N.E. 1052 (1898).

[82] McLennan v. Prentice 85 Wis. 427, 55 N.W. 764 (1893); Lake Sand Co. v. State 68 Ind. App. 439, 120 N.E. 714 (1918). Ainsworth v. Munnesknong Hunting and Fishing Club 159 Mich. 61, 123 N.W. 802 (1909).

[83] 1958 [redacted]isconsin Law Review 352 (1958), Waite,"Public Rights to Use and Have Access to Navigable Waters".

> to gross negligence and a misconception of its proper duties and obligations.[84]

It would seem therefore, that based on this trust theory alone a writ of mandamus might issue compelling officials to enjoin a public nuisance caused by pollution. There is no case law directly in point, but given the general awareness today of the threat which water pollution poses, there is reason to suppose that courts might be willing to enforce the state's trusteeship obligations over its waters.

[redacted] [84] Milwaukee v. State 193 Wis. 423, 214 N.W. 820 (1927).

V. NON-RIPARIAN OWNERS AND THE REQUIREMENT OF SPECIAL DAMAGES IN PRIVATE SUITS TO ENJOIN PUBLIC NUISANCES

It is well to ask which private individuals might have a chance of successfully suing to enjoin a public nuisance. Besides the riparian owners previously considered, the rights of commercial and recreational fishermen might also be worthy of protection.

Generally, in Illinois the public has the right to pass over waters in boats, to hunt and kill wild fowl, and to take fish from all navigable lakes, irrespective of ownership of the underlying sail and any riparian rights.[85] Since the public has a clear right to fish, monetary damages to commercial fishermen in Lake Michigan would be sufficient to justify relief (assuming of course that problems of proof with respect to fish depletion could be met). It is a fact

---

[85] Schulte v. Warren 218 Ill. 108, 75 N.E. 783 (1905); Shepard Drainage District v. Eimerman 140 Wis. 327, 127 N.W. 775 (1909); but see Sanders v. De Rose 207 Ind. 90, 191 N.E. 331 (1934), giving owners of private lakes exclusive right of fishing.

that large scale introduction of human and industrial waste into Lake Erie has almost killed the fishing industry there.[86] The annual blue pike catch there was reduced from 20,000,000 pounds in 1937 to 7,000 pounds in 1960, because the oxygen supply necessary for fish has been consumed by algae which are fed by pollutants.[87] There is a firm case law according relief in such circumstances. In Maddox v. International Paper Company it was stated that no one has a legal right to use a public stream to dispose of a effluent which pollutes such stream and interferes with or damages fish-life there.[88]

Lake Michigan is different from a stream, however, and localized pollution at the southern end of the lake still leaves vast areas of untainted water. As a result, proof of damages might become extremely difficult and unless the petitioner can show special damages, he may not sue on a public nuisance. A hopeful case on this point is a 1943

---

[86] U.S. News & World Report, op. cit., p. 58.

[87] Chicago Sun Times, February 28, 1966, Editorial.

[88] Maddox v. International Paper Co. 105 F. Supp. 89 (D.C. Miss. 1951), affirmed 203 F. 2nd 88.

North Carolina decision.[89] A pulp company's pollution of the Roanoke River decreased an upstream riparian owner's fishery profits by interfering with the migration of fish up the river. The lower court held the plaintiff could not recover, since he owned neither the river, nor the fish, but had only a right to fish in common with the public. In reversing, the Court of Appeals stated, "It is true that he might obtain access to the fish by going to more distant points where the nuisance has not yet affected the fish... but, if a man's time and money are worth anything, he has received a substantial damage in being driven to this necessity." (emphasis added).[90] Thus the court held the plaintiff had standing to complain of a public nuisance due to his having to go farther than usual to exercise successfully his right of fishery. The holding is of great potential importance because of the possible extention of this theory to protect

---

[89] Hampton v. North Carolina Pulp Co. 223 N.C. 535, 27 S.E. 2nd 538 (1943).

[90] Ibid.

recreational as well as commercial users of water. If the holding could be extended to protect recreational users of water, then swimmers and boaters, as well as fisherman, might be compensated for having to go out of their way in their use of the lake.

One commentator, Waite, previously has raised this question of whether sportsmen or citizens generally, who own no riparian lands and may never have even used the waters, have the right to bring suit when they are interested in eliminating a condition such as pollution. If the North Carolina plaintiff's enforced detour gave him standing, it could be argued that a similar detour by a sport fisherman or vacationer might give rise to the needed depletion of his "time and money". Waite thinks that the spoiling of a "never-to-berecaptured vacation" might be sufficient harm to justify redress. For instance, if sewage polluted a recreational area of a lake so as to make it unusable,

> the court may be impressed with the desirability of protecting economic interests and the individual water sportsman may have a persuasive argument. Many persons will be able to show a substantial monetary investment in equipment, lodgings and transportation to and from the recreational spot. The size of the investment may well be sufficient

> to satisfy the court that the individual suffers special damages when he is deprived of enjoyment of a portion of the surface of the water... Having shown that special damages have been sustained, injunctive relief is available since a right to property is involved.[91]

Bringing the theory to a Lake Michigan setting, it might be that a Chicago resident, who had been used to swimming at a nearby beach, no longer could do so because of the high level of bacteria present. The question then would be whether his added time and expense in going elsewhere to swim would be sufficient to accord him standing to challenge the pollution as a public nuisance. His recovery in damages might be minimal but if he could bring a class suit he might have a chance of obtaining redress in Equity.

A leading case pointing toward enforcement of this kind of private right is a 1952 Wisconsin decision.[92] In the

---

[91] 1958 Wisconsin Law Review 335, Waite, p. 350.

[92] Muench v. Public Service Commission 261 Wis. 492, 53 N.W. 2nd 514 (1952).

Muench case a citizen, who was apparently neither a riparian owner nor a person who had ever swum in the stream in question, brought an action to require the public service commission to carry out its statutory duty to make findings as to the undesireable effect on natural scenic beauty which the construction of a proposed dam would have. The court held the citizen had standing to complain,

> The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right, that is entitled to all the protection of financial rights... Our holding... is in keeping with the trend... to extend the rights of the general public to the recreational use of the waters of this state, and to protect the public in the enjoyment of such rights.[93]

Although a statute was involved in the case, the import of the decision does not seem to rest solely on that point. Thus, in Muench, an interest in scenic beauty is set up as a right to be protected as much as a financial interest. It could be argued a fortiori that the closing of Lake Michigan

---

[93] Ibid. p.522

beaches to large numbers of citizens should give those citizens standing to complain.

In spite of these hopeful speculations as to where the law might, or should, grow, what little case law there is at present clearly does not give much hope of success to indignant citizens who hope to enjoin pollution of Lake Michigan. Yet, the trend in giving such citizens relief should not be overlooked. With the current level of awareness of pollution problems by the public and the courts, it is generally recognized that changes must occur. If official reaction is slow enough to provoke private citizens into attempting to enjoin such public nuisances, it seems likely that the courts will find a way to give some relief. At the very least, however, such suits might provoke politically responsive authorities into action on their own.

VI. CONCLUSION

As can be seen from the foregoing analysis, existing precedents would probably not allow pollution in southern Lake Michigan to be attacked successfully on a broad scale. Theoretically there is no reason for this to be true. Historically the Common Law has always developed over time to solve new problems and there is no reason why this could not be true with nuisance doctrines and the problem of water pollution. The intervention of state and federal statutes however, has served to remove the pressure on the courts to adjust the law to meet the new situation. For those with a preference for having local problems solved locally the federal influence in controlling Lake Michigan's pollution might be deplored were it not for the fact that the federal presence was due solely to the vacuum created by local inaction. For Lake Michigan the success of the federally inspired ant-pollution agreements may have made moot the question of whether the Common Law could have dealt with the problem equally well. Should federal efforts

ever flag, however, the role of private litigation may take on a new importance. In this light the use of the mandamus writs and a broadened conception of the special damages necessary to confer standing on private individuals may help stimulate appropriate action by the courts.

VII. BIBLIOGRAPHY

Public Documents

Illinois Constitution 1870

Illinois Revised Statutes 1965

Municipal Code of Chicago

Books

Ferris, F. G., The Law of Extraordinary Legal Remedies, (St. Louis, 1926).

McQuillin, Eugene, The Law of Municipal Corporations, (Chicago, 1943).

Walsh, Treatise on Equity (1930).

Wood, Treatise on Nuisance (1893).

Articles and Periodicals

Chicago Bar Record

Chicago Daily News

Chicago Sun Times

Cleveland-Marshall Law Review

Kentucky Law Journal

Articles and Periodicals

Langford, George B., "Filth in the Great Lakes," U.S. News and World Report.

Marquette Law Review

Minnesota Law Review

Mississippi Law Journal

National Resources Journal

New York Times

Northwestern University Law Review

Saturday Review

Stanford Law Review

Virginia Law Review

Wisconsin Law Review

Reports

Bacon, Vinton W., Statement to the Conference in the Matter of Pollution Interstate Waters of the Grand Calumet River, Calumet River, Lake Michigan, Wolf Lake, and Their Tributaries (Indiana - Illinois) at Chicago, Ill. March 5, 1965.

Metropolitan Sanitary District of Greater Chicago, The Lake We Drink (Chicago, 1964).

Other Sources

Metropolitan Sanitary District of Greater Chicago.
Personal interview with Dr. Joel Kaplovsky, January, 1966.