ON PETITION FOR APPEAL TO THE

Supreme Court of Appeals of Virginia

JOHN H. HEALD COMPANY,
PIEDMONT MILLS, INCORPORATED,
G. BRUNING TOBACCO EXTRACT COMPANY,
and
LYNCHBURG MILLING COMPANY

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Reply to Petition for Appeal

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By DAVID H. LEAKE,
SAMUEL H. WILLIAMS,
T. JUSTIN MOORE,
JOHN L. ABBOT,
GEORGE D. GIBSON,
Its Counsel.

HUNTON, WILLIAMS, ANDERSON,
GAY AND MOORE,
BARKSDALE AND ABBOT,
Of Counsel.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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To the Honourable The Justices of the Supreme Court of Appeals of Virginia:

It is a familiar rule in this Honourable Court that appeals should not be allowed unless they present novel points of law or questions which are substantially doubtful (*Watts* v. *Commonwealth,* 1921, 129 Va. 781, 785). It seems especially desirable that the calendar of this

Honourable Court should not be occupied by cases which present no substantial issue except one which has been specifically and clearly concluded by a previous decision of this Court.

It is believed that the Court will desire, in this Reply, not a full argument of the respondent's legal position but a statement, as succinct as possible, of the issues presented by the petition and the reasons why the decision of the trial court is right. Such statement will be made in the following pages, and on the basis thereof, the respondent respectfully submits that the petition for appeal should be rejected, under Section 6348 of the Code, on the ground that the decree complained of is plainly right.

On the day when this Reply was filed in the Clerk's Office at Richmond, a copy was mailed to counsel for the petitioners.

The Issues Presented

The case arises on bill and demurrer. A statement of facts, therefore, can be nothing but a summary of the allegations in the bill. For present purposes, the statement of facts made in the petition may be accepted as sufficient subject to the two following comments: In numerous places (pp. 5, 8, 12, 13, 16 and 18) the bill asserts that—

(1) The respondent has acquiesced in a construction of the Act of 1879 by which its obligations thereunder are perpetual; and

(2) The respondent has invited the petitioners to locate their factories near the canal and to buy water from the canal.

Of course these are mere conclusions of the pleader which will be given no weight. The only facts alleged in the bill in support of those conclusions are that: (1) the respondent's predecessor reconstructed the dam at Lynchburg in 1881-2 (Bill, p. 8); the respondent has (2) supplied water to industries; (3) spent money for the maintenance of the canal, and (4) taken no steps to close the canal until the proceedings before the State Corporation Commission which culminated in an order authorizing the abandonment (Bill, pp. 21-2). In other words, the only allegation of the bill is that the respondent Railway Company performed its duty to maintain the Lynchburg level of the canal until the abandonment of that duty was authorized by the State Corporation Commission.

The facts alleged in the bill involve no question of any continuing *public* obligation to maintain the Lynchburg level of the canal. No such question can be presented. Every such obligation has been terminated by the unambiguous order of the State Corporation Commission, which was affirmed by this Honourable Court on the appeal of these petitioners, *inter alia* (*City of Lynchburg* v. *Commonwealth,* 1935, 164 Va. 57, 178 S. E. 769). No issue can exist in the present case except the question of purely *private* rights, if any, on the part of the petitioners.

It is likewise clear that no issue is, or can be, presented as to the rights of the petitioners under their respective

leases of water power. Those leases are filed with the bill, and the notices of termination likewise are. It is obvious that the latter strictly follow the provisions of the former. The petitioners admit this (Bill, p. 20, and Opinion of the Trial Court, p. 19, *infra*).

In the third place, the respondent has made no effort or threat to terminate or affect in any way the rights of Piedmont Mills, Incorporated, with respect to its so-called perpetual lease for its corn mill; and petitioners have asserted no cause of action with respect to that lease (Bill, pp. 22-25), and that lease accordingly has no standing in this case.

It is plain, therefore, that the only issue presented by the petition is whether the petitioners have any purely private right to a continued supply of water for plants other than the Piedmont Corn Mill, derived from sources other than their respective leases. The bill and the petition for appeal make it perfectly plain that the petitioners claim such a right on the two following grounds:

(1) Because of the provisions of the sixth clause of Section 1 of the Act of 1879; and

(2) Because of an alleged estoppel arising out of the action of the respondent in hitherto supplying water.

The respondent denies that the petitioners have any right on either of these two grounds. As to the first, the respondent submits that the issue of statutory construction has been concluded by a clear decision of this Court. As to the second, the respondent submits that the issue of estoppel is without basis in fact and insubstantial.

The Issue of Statutory Construction

The Sixth Clause of the First Section of the Act of 1879 (Acts of 1878-9, ch. 139, p. 318) contains two provisions which are of interest here. The first of them is:

> ". . . all existing contracts for water privileges along the entire line shall be respected and maintained at rates not exceeding the present rates, except in those cases in which they may be cancelled or altered by agreement, or extinguished by condemnation."

That is the only provision which purports to deal with the individual lessees of water power. The normal presumption would be that this provision includes *all the rights* which were intended to be conferred upon those lessees and that other provisions of a general character which do not mention the lessees were not intended to confer any rights upon them. The language of this provision does no more than say that such contract rights as existed before the transfer shall continue after the transfer. From the fact that this set of rights only was specified, it is obvious that the statute did not intend to create any other or additional set of rights, for *expressio unius est exclusio alterius.*

The other provision is as follows:

> "It shall be the duty of the . . . railroad company to maintain the present water supply . . . of the canal . . . along the Lynchburg level . . . "

This provision does not mention any lessee of water power. It does not say that the railroad company shall make any lease of water power. It merely says that the water supply shall be maintained. *The railroad company could comply with this provision by maintaining the water supply of the canal without letting any person whatever have the use of any of that water for the purposes of power or for any other purpose.* It is apparent, therefore, that the statute does not intend to give any right to any private person by which he could compel the continued maintenance of the canal. It was intended to take effect only by creating a general public duty which could be enforced at the instance of the State.

From the words in which this command is put, therefore, and also from the fact that the rights of individual lessees are dealt with in a separate provision which limits them to the rights which had been acquired under contracts then existing, it is submitted to be plain that the Act did not purport to create any duty to, or right in, any person over and above what was already held by contract, but only a general public duty enforceable by the State. This duty was not a duty to furnish water to the public, or to carry on the business of furnishing water to the public, but only to maintain the water supply of the canal.

This understanding of the statute has been clearly confirmed by the decision of this Honourable Court in the case of *Hurt & Son* v. *Myers & Axtell* (1887), 83 Va. 167.

The Richmond & Alleghany Railroad Company had passed into receivership, and the cited case arose on the petition of the Receivers filed in the receivership pro-

ceeding before the Circuit Court of the City of Richmond. This petition (Record on Appeal, p. 16) states that certain leases of water power to various persons in the City of Lynchburg had been in effect and had recently expired; the Receivers then sought to increase the rent and *modify the leases in other particulars,* but the lessees resisted, claiming an indefinite extension of their leases by virtue of the Act of 1879; the petition accordingly prayed a rule to show cause why the lessees should not either cease using water or execute new contracts.

The various lessees appeared and filed their answers to this rule. S. C. Hurt & Son, a predecessor of one of the petitioners here, set up in their answer very nearly the same contentions which are made in the bill of complaint here. They asserted that their plant had been in existence for a long time, that a large investment had been made in it, that this investment had been made "upon the faith of a continuous supply of water power," and that they were entitled to the water upon reasonable terms regardless of the wishes of the Receivers (Record, pp. 34-5 and 35-9). After argument the Court entered its decree (Record, 34-5) in which it held that the several lessees:

> "... *are not entitled by reason of the act* of assembly of 27th February, 1879 ... *or by any provision of the deed* of conveyance from the James River and Kanawha Company to the Richmond and Alleghany Railroad Company, dated the 4th day of March, 1880, *to a continuance or renewal of their respective leases* beyond the term prescribed and contracted for in said leases respectively." (Italics added.)

The order then proceeds:

> ". . . It is adjudged, ordered and decreed that *no one of said lessees has the right to further use of said water privileges* under his lease, *without a new contract therefor,* and that such new contract, if one be made, is to be subject to the approval and confirmation of this Court. And it is further ordered that the *receivers have the right* in the exercise of their discretion and the discreet management of the property confided to their charge, *to shut off the water* from each of the premises now supplied therewith, if no contract be made for the continued use thereof." (Italics added.)

No language could be plainer that the only rights which any individual may have are those which he has secured by private contract, that over and above those he has no rights whatever, and that the statute does not purport to confer any. On an appeal taken by S. C. Hurt & Son, this Honourable Court said that *"The decree is clearly right"* (p. 192). Turning then to the Act of 1879 the Court pointed out its meaning, so far as any lessees were concerned, in the following words (83 Va. at p. 192):

> "The language in question is plain and unambiguous, and we have neither power to change it, nor a doubt as to its construction. It is not enacted that all existing water privileges shall be continued as they are; but that 'all existing contracts for water privileges . . . shall be respected and maintained at rates not exceeding the present rates,' which means contracts executed and binding on both sides, not future contracts, and still less contracts to be in-

> definitely continued at the option of the lessees. The evident purpose of the legislature was, by special enactment, to protect existing contracts for water privileges which had been entered into with the canal company, but not, in doing so, to impose upon the railroad company, as its successor, greater obligations in respect thereto than the canal company had assumed."

The effort on the part of the complainants to restrict this case to a mere holding in regard to the rate of the rental is impossible. The Circuit Court expressly stated that the Receivers were under no obligation to continue selling water but could shut off the water if they so desired. *The appellants in the Hurt Case recognized the effect of this language and made it one of the issues of the appeal.* Thus in their petition for appeal they urged (Record, p. 12), as one of the grounds for reversing the decree below, that under that decree,

> "*While confessedly, the water supply must be kept up,* and the said company is forbidden to obstruct or lessen it, under the said construction, *the company may refuse to allow petitioners a pound of power at any price,* or what is the same thing in its effect, may charge any rate they please." (Italics added.)

In the face of this contention this Honourable Court affirmed the decree below and said that that decree was clearly right.

There can be no real question as to the meaning of this decision. In particular, the petitioners can not obscure or vary its meaning by any statement of counsel for a prede-

cessor in title of one of these same petitioners made in that case, which was not commented on by opposing counsel or by the Court. The rights of this respondent are not to be determined by what other counsel have said, for another client, in another case, in another century. Even if such statement of counsel were correct, it is now irrelevant, because that "perpetual" duty has now been terminated by an order of the State Corporation Commission affirmed by this Honourable Court.

The meaning of the Hurt decision was perfectly clear to the State Corporation Commission, which said *arguendo,* in a unanimous opinion, that (Exhibit A to the Bill, pp. 347-8)—

> "The holding of that case is that no rights were given under the Act to individuals other than what they had acquired through their leases . . .
>
> "Under the holding in the *Hurt Case,* the railroad company did not have to maintain the water supply of the canal for the benefit of the lessee of water rights or water power."

After analyzing the Act of 1879, the Commission said (Exhibit A, pp. 348-9):

> "Since no rights were reserved in the last sentence of the sixth clause to individuals, it seems to follow that the requirement for the maintenance of the water level was a general requirement for the benefit of the public. Any other view would make that language meaningless, and of no purpose.
>
> "On this phase of the case we, therefore, conclude that the effect of the Act of 1879 was to create a public duty to maintain the water supply . . ."

The trial court in the present case had the same understanding as to the meaning of the Hurt decision and said that such meaning was "inescapable." The trial court further pointed out:

> "The same questions were put in issue there as are in issue here. The exhaustive brief, extensive extracts from which appear in the report, filed for Hurt & Son, predecessors of one of the complainants, contained the same contentions elaborately urged as are put forward here."

For the convenience of the Court, the opinion of the trial court is printed at the end of this brief as Exhibit A.

It is believed, therefore, that the language of the Act of 1879 is perfectly clear and the meaning of the decision of this Honourable Court in *Hurt & Son* v. *Myers & Axtell* is perfectly clear, and the three members of the State Corporation Commission and the one judge of the trial court have unanimously concurred in that view. It is not in the public interest that litigants should be permitted to present to this Honourable Court the same contentions which have been previously urged before it and which have been determined by a decision whose meaning and effect are "inescapable."

The Issue of Estoppel is Insubstantial

It has been pointed out above that the general claims of the petitioners to the effect that the respondent has acquiesced in the view that its obligations under the Act of

1879 were perpetual and has invited the petitioners to locate their plants near the canal and take water therefrom, are mere conclusions of the pleader and are not entitled to any weight. The only allegations that are entitled to consideration are the allegations of fact in the bill.

In substance the only thing that these allegations say is that the respondent company and its predecessors performed their duty in maintaining the canal during the period in question and continued in effect during that period certain leases of water. All the leases now in effect are set out in Exhibit A and all of them (with the exception of the Piedmont Corn Mills lease above mentioned) make express provision for their termination, either at the end of a specified term or at the option of the respondent company. It is obvious, therefore, that these leases do not support any possible inference that the respondent would "perpetually" continue to supply the water in question; on the contrary they plainly show that the respondent expressly provided for the complete termination of the leases.

Nor is the conduct of the respondent company in performing its duty to maintain the Lynchburg level of the canal capable of supporting any inference in the mind of any reasonable man that it would "perpetually" continue to do so. The only inference which any reasonable man could have drawn from this conduct was that maintenance of the canal would be continued *indefinitely,* or until the State should have duly authorized its termination. This is of course exactly the same inference that can be made from the conduct of any public service corporation in per-

forming any public service, and the same question is presented in every case authorizing the abandonment of any public service. No estoppel on the basis of previous performance of such public service is recognized. Thus in *Portsmouth* v. *Virginia Electric & Power Co.* (1925), 141 Va. 44, this Honourable Court affirmed an order of the Commission permitting a public service corporation to abandon certain public service (the maintenance of particular street railroad tracks in the City of Portsmouth) which service the company was obligated to perform by its franchise from the City and had in fact performed for a large number of years. This decision squarely covers the present contention, and was specifically approved and followed by this Honourable Court in *Hampton* v. *Newport News & Hampton Rwy., Etc. Co.,* 144 Va. 29. This is of course familiar law, and other instances can be found in *Commonwealth* v. *Shenandoah River Light, Heat & Power Corp.,* 135 Va. 47, *City of Richmond* v. *Chesapeake & Potomac Telephone Co.,* 127 Va. 612, and *Richmond* v. *Virginia Railway & Power Co.,* 141 Va. 69. In all of these cases the public utility had performed for a substantial time the public service which it was then seeking to abandon; in none of them did this Honourable Court consider that such performance created any estoppel which would prevent the abandonment or require any exception in favor of private rights in the order of the Commission permitting the abandonment. It must therefore be considered that the complainants' suggestion of an estoppel arising on these grounds is frivolous and presents no substantial issue.

The case principally relied on by petitioners (*Millers* v. *The City Council of Augusta,* 1879, 63 Ga. 772), has no relevancy to the issues here presented. In that case a canal proprietor, engaged in public service, "capriciously" refused to serve a customer, without having been authorized by public authority to abandon its business.

This discussion of estoppel resolves itself into the simple fact that if the petitioners actually believed that the obligations of the Act of 1879 were perpetual, they were mistaken in their opinion as to the law, and the respondent can not be estopped by the petitioners' mistake of law. The matter was aptly summarized by the trial court as follows:

> "If complainants through an erroneous conception of the import of the Act of 1879 enlarged their undertakings, such mistake of law may not be visited upon respondent, nor does the record disclose any acts by respondent that estop it from cancelling the outstanding leases in accordance with their express terms and proceeding to close the canal to the extent indicated in the proceedings before the State Corporation Commission."

Summary

Counsel have not undertaken in this brief reply to discuss any of the miscellaneous issues raised by the petition which are not believed to be essential to the controversy. The two essential issues which are presented have been identified and discussed. It is respectfully submitted that

neither one raises any substantial issue for consideration by this Honourable Court, the one having been concluded by a previous decision of this Court, and the other having no substantial basis in fact, and that accordingly the petition for appeal should be rejected on the ground that the decision of the trial court was plainly right.

Respectfully submitted,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By DAVID H. LEAKE,
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T. JUSTIN MOORE,
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EXHIBIT A

Opinion of the Trial Court

[Opinion of the Trial Court]

Lynchburg, Virginia,
November 26, 1935.

Messrs. S. H. Williams,
Kemp, Hobbs, Daniel & Davidson,
Caskie and Frost,
Barksdale and Abbott,
Lynchburg, Virginia.
David H. Leake, C. & O. Ry. Co.,
Hunton, Williams, Anderson, Gay and Moore,
Richmond, Virginia.

John H. Heald Company
Piedmont Mills, Incorporated,
G. Bruning Tobacco Extract Co.
and
Lynchburg Milling Company,
Complainants,
vs.
Chesapeake and Ohio Railway
Company, *Respondent.*

Gentlemen:

The Demurrer now to be passed on challenges the right of the complainants to the perpetual injunction prayed for by them "enjoining the said Railway Company from closing the said canal at the Lynchburg level or diminishing the flow of water therein below that in the canal at the time of the passage of the said act of 1879, and requiring the said Railway Company to furnish them water for their respective industries at reasonable rates" etc.

The "canal" is what remains at Lynchburg of the James River and Kanawha Canal in which the State owned a controlling stock interest and which canal passed first to the Richmond and Alleghany Railroad Company and subsequently to the respondent company pursuant to the provisions of the Act of February 27, 1879, containing the following clause upon which complainants rely:

> "Sixth. It is hereby provided that the rate of dockage at Richmond shall not exceed the rate at present established by the James River and Kanawha Company, and all existing contracts for water privileges along the entire line shall be respected and maintained at rates not exceeding the present rates, except in those cases in which they may be cancelled or altered by agreement, or extinguished by condemnation. It shall be the duty of the Richmond and Alleghany Railroad Company to maintain the present water supply of the docks, and of the canal, along its line, between Bosher's dam and tide-water, and along the Lynchburg level between the water-works dam (which shall be preserved) above Lynchburg; and in the construction of its railroad it shall not so destroy or obstruct the present canal between Bosher's dam and tide-water, or between the water-works dam above Lynchburg and the first lock below Lynchburg, as to lessen the present supply of water."

At the time of the passage of the Act of 1879, at least one of the predecessors in title of complainants had an outstanding lease of water or water power and there

were then other "existing" leases of such power at Lynchburg from the canal company.

Complainants all now claim, insofar as leases go, under leases made long subsequent to 1879.

Typical of the cancellation clause found in all of these last indicated leases is the following, save as to time limit:

> "It is expressly covenanted and agreed that either party hereto may terminate this agreement at any time by giving the other party hereto ten (10) days notice in writing of its intention so to do."

It is admitted that the necessary notices have been given to terminate all of these leases.

What other rights, if any, have the complainants to require the respondent company to continue the maintenance at Lynchburg of the canal for their benefit is, in substance, the precise question now to be decided upon the allegations of their bill taken to be true as to the facts therein alleged.

Any rights in the premises that the complainant may have has as members of the general public have been adjudged at an end, in proceedings to which all of the parties here were parties, by the order of the State Corporation Commission of November 28, 1935, affirmed by the Court of Appeals March 14, 1935.

Lynchburg v. *Commonwealth,* 178 S. E. 769.

For a fuller statement of the facts in the present case, and of the extent of the jurisdiction of the Commission, reference may be had to the opinions of the Commission, by Commissioner Ozlin, and of the Court of Appeals.

Conceding that the duties of the respondent in respect of the maintenance of the canal at Lynchburg, at least insofar as any public rights that the complainants may have had, have been fully discharged and ended, the complainants assert that they have certain private rights that remain to be respected and enforced, in the main because of the aforesaid sixth clause of the Act of 1879, and by reason of alleged acts of estoppal. Unless one or the other of these two contentions or both together can be upheld, and regardless of other considerations urged, it is entirely clear that the present prayer of complainants must be denied.

The said sixth clause in respect of the rights of lessees to the maintenance of the canal at Lynchburg was before the courts in 1885 for construction in the case of *Hurt & Son vs. Myers and Axtell, Receivers of the Richmond and Alleghany R. R. Company,* first in the Circuit Court of the City of Richmond and afterwards in the Court of Appeals. 83 Va. 167.

The Receivers applied to the Court for instruction in respect of the rights of the Railroad Company in connection with the lease to Hurt & Son existing at the time of the passage of the Act of 1879 which Hurt & Son claimed the Railroad Company was obligated under the said Act to renew and at the same rates. The same questions were put in issue there as are in issue here. The exhaustive brief, extensive extracts from which appear in the report, filed for Hurt & Son, predecessors of one of the complainants, contained the same contentions elaborately urged as are put forward here.

The Circuit Court decreed that Hurt and Son had no such right as is now claimed by complainants and that unless a new agreement was made, in their discretion by the Receivers, subject to the approval of the Court, "the receivers have the right in the exercise of their discretion * * * to shut off the water from each of the premises now supplied therewith, if no contract be made for the continued use thereof."

The Court of Appeals said,

> "The decree is clearly right."

It is true it was also then said:

> "The provision was undoubtedly inserted in the interest of the manufacturing establishments in and near those cities, which were dependent for their water supply on the canal company; but this requirement is a very different thing from requiring the company to furnish water for all time to come, if the lessees choose to continue to take it, at rates not exceeding those charged at the time the act took effect."

Complainants would have it that the use of this language imports that the Court was dealing only with the matter of rates.

That this contention is not well founded is clear from the other language used by the Court already quoted as well as this also:

> "The evident purpose of the legislature was, by special enactment, to protect existing contracts for

> water privileges which had been entered into with the canal company, but not, in doing so, to impose upon the railroad company, as its successor, greater obligations in respect thereto than the canal company had assumed. Therefore, such contracts, which by their terms were not renewable as against the canal company, became none the more so as against the railroad company. In other words, they were not affected by the transfer of the property and franchises of the canal company to the railroad company. It is true that such contracts were already protected against the impairment by both State and federal law, but that cannot change the language of the statute, or extend its operation to matters not embraced within its terms."

The opinion read as a whole in connection with the decree of the Circuit Court which it affirms reflects the inescapable conclusion, more than persuasively binding upon this Court, that the Act of 1879 gave lessees in the situation of complainants here no private rights beyond those set out in their respective leases.

It remains then only to determine what rights, if any, the complainants have by reason of acts of estoppel alleged in the bill when considered alone or in connection with acts of the General Assembly and the transactions of the parties appearing in the record.

It is alleged that in reliance upon the Act of 1879, and further encouraged thereto by the extension of the dam by respondent's predecessor in title pursuant to the provisions of the Act of Assembly approved March 6, 1882, authorizing the railroad company to "extend the waterworks dam at Lynchburg," complainants have made ex-

tensive investments and improvements, amounting to hundreds of thousands of dollars, the benefits of which will be largely lost both to complainants and to the community at Lynchburg if respondent be not enjoined as prayed for.

To begin with, the canal company was under no charter obligation to supply water power though it had the privilege to do so if it found it profitable or otherwise desirable as a private enterprise.

The railroad companies, successors to the canal company, in assuming the obligations and succeeding to the rights of the canal company came under no obligation to supply water power save as to the leases existing at the time of their succession.

The obligation to maintain the canal at Lynchburg, continued by the Act of 1879, had thus a two-fold aspect. That Act carried the reassurance of the sovereign to the holders of existing leases that their rights thereunder should be preserved. To this extent, "The provision was undoubtedly inserted in the interest of the manufacturing establishments in and near those cities, which were dependent for their water supply on the canal company."

Beyond that it may well be that the General Assembly in authorizing the far reaching change in an existing system sought to preserve at the two principal cities served by the canal other and public benefits inhering in the maintenance of the canal, for local transportation or perchance for the further development of water power and other uses, as a public benefit. It may even have contemplated that this maintenance might be perpetual. Albeit however such obligation to maintain would be but in

the discharge of a duty to the public not beyond the reach of the police power of the State to determine, and this as we have seen the Commonwealth has done in orderly process through the duly appointed agencies of the State for such purpose.

Being under the duty imposed by statute to maintain the Lynchburg level, the railroad company was but discharging that duty in extending and making more secure the dam.

Non constat the railroad company may even have thought thereby to enlarge its private patronage in water and water power to be duly contracted for. If that expectation was disappointed and changed conditions also make it no longer in the interest either of the public or of the company to continue the service, the State on the one hand and the Company on the other are free under the law to discontinue the maintenance of the canal, provided only that compliance is made with such contracts as the lessees were content to make.

If complainants through an erroneous conception of the import of the Act of 1879 enlarged their undertakings, such mistake of law may not be visited upon respondent, nor does the record disclose any acts by respondent that estop it from cancelling the outstanding leases in accordance with their express terms and proceeding to close the canal to the extent indicated in the proceedings before the State Corporation Commission.

It follows from what has been said, that the demurrer will be sustained and complainants' bill dismissed.

Counsel may concert and present a note for a decree accordingly.

Acknowledgment is made of the indebtedness of the Court to counsel for the able and helpful arguments and briefs that have been submitted. After careful consideration of all of these it is believed that both the better reason and the weight of the authorities cited, which it is not practicable to review here, sustain the conclusion indicated above.

Very truly yours,

(Signed) AUBREY E. STRODE,
Judge.