

The grant was of water to be taken from the river near the entrance to the canal. Appellee admits that of itself the grant imposed no obligation on the state to continue the canal in use. The only claim made by appellee under this grant is of the right to have the specified amount of water come to it through the canal so long as it is maintained as such. Consequently, appellee has no right under this grant, apart from the right claimed under its leases, to have the state maintain the canal, which latter we find to be non-existent, and we need not decide what effect in other respects, if any, the Act of 1927 had upon the grant.

The decree below will be reversed, but the decree to be entered will be without prejudice to the rights of appellee against the City of Toledo under the Ohio statute of January 22, 1920, and under the conveyance to the City of Toledo made pursuant to it, and without prejudice to the rights of appellee under the final decree of the District Court for Northern Ohio, entered on the mandate of the Court of Appeals for the Sixth Circuit in the suit entitled *Maumee Valley Electric Company v. The City of Toledo, et al.*

Reversed.

KIRK, SUPERINTENDENT OF PUBLIC WORKS,
ET AL. v. THE PROVIDENCE MILL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

No. 675. Argued April 26, 1929.—Decided June 3, 1929.

A grant of the right to use surplus water from a state canal, held subject to the right of the State to abandon the canal and devote it to other purposes—on the authority of *Kirk v. Maumee Valley Co.*, ante, p. 797. P. 809.

Reversed.

APPEAL from a final decree of the District Court of three judges enjoining the appellants from interfering with the flow of water in part of a canal in such manner as to infringe certain water rights claimed by the appellee.

Mr. Gilbert Bettman, Attorney General of Ohio, with whom *Messrs. L. F. Laylin, Joseph A. Godown, and Leroy W. Hunt* were on the brief, for appellants.

Mr. Karl E. Burr, with whom *Messrs. U. G. Denman and T. W. Christian* were on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a direct appeal, under § 266 of the Judicial Code, from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio, enjoining appellants, the state director of highways, the superintendent of public works of Ohio, and county commissioners, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal, in such manner as to interfere with the rights of appellee to take surplus water under a grant from the state to appellee's predecessor in interest. The questions presented are the same as those in No. 674, *Kirk v. Maumee Valley Electric Company*, ante, p. 797, decided this day, the only difference being in the nature of the grant under which appellee derives its rights to the water.

The grant here involved is embraced in an indenture of September 1, 1842, between the commissioner of the Board of Public Works and one Minor, as readjusted on February 23, 1846. By it Minor, a riparian owner, released and quit claimed to the state all claims against it arising out of the use and occupation by the state of water from the Maumee River and of lands used in the construction and operation of the Wabash & Erie canal,

now the Miami & Erie. This release was made in consideration of a perpetual grant by the state, made after the passage of the Act of March 23, 1840, 38 O. L. 87, discussed at length in our opinion in No. 674, *Kirk v. Maumee Valley Electric Company, supra*. By the grant the state sold and conveyed a specified quantity of water "except when otherwise necessary for the navigation of the canal" and the contract as readjusted was similarly restricted. The grant was subject to the limitations of the Statute of 1840, and the rights conferred under it did not, for present purposes, differ from those considered in No. 674. They were likewise subject to the reserved power of the state to abandon the canal and devote it to other purposes, which was exercised by the Act of the Ohio Legislature of May 11, 1927, 112 Ohio Laws 350, for the reasons discussed at length in No. 674, and equally applicable here, the judgment below is

Reversed.

