

The following order will be entered: The brief in favor of appellants, signed by T. A. Green as solicitor, and filed July 31, 1897, and also the brief signed by T. A. Green and E. B. Green, as counsel, and filed September 10, 1897, will be stricken from the files in this case; the name of said T. A. Green will be stricken from the record as solicitor or counsel of appellants, and he will no longer be heard in this case, either orally or by brief; the appellants will be permitted to appear by some other solicitor or counsel, and file new briefs within 30 days, and the appellees will have 15 days thereafter to reply thereto, and the case will be continued and set down for hearing at the next term of this court. All the costs of the case up to date will be charged to appellants.

The same order will be entered in case No. 871, Michael Curran et al. v. John F. Campion et al., and in case No. 872, James H. Donovan v. John F. Campion et al.

CITY OF PHILADELPHIA V. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Pennsylvania. July 16, 1897.)

No. 69.

MUNICIPAL CORPORATIONS — TELEGRAPH POLE AND WIRE TAXES — INTERSTATE COMMERCE.

The city of Philadelphia has no power to impose pole and wire taxes upon a telegraph company doing interstate business, in excess of the reasonable expense to the city of the inspection and regulation thereof, and an ordinance imposing charges several times larger than this amount is invalid. 40 Fed. 615, followed.

John L. Kinsey and E. Spencer Miller, for plaintiff.

Reed & Pettit, for defendant.

DALLAS, Circuit Judge. This is an action for the recovery of certain charges imposed by two ordinances of the plaintiff, which the defendant contends are invalid. Upon the trial the counsel of both parties united in suggesting that the case was for decision by the court, but each of them claimed that a verdict should be directed for his client. Thereupon the jury was instructed to find for the defendant, and, a verdict having been rendered accordingly, the plaintiff now moves for a new trial.

One of these ordinances imposed a charge of \$1 per annum for each telegraph pole maintained in the city of Philadelphia by any telegraph company, including the defendant; and the other of them required, in addition to this pole charge, the annual payment of \$2.50 per mile on all wires suspended above ground. The defendant conceded that, if the amount of these charges was not unreasonably in excess of the amount needful to defray the expense to which the municipality was subjected for inspection and regulation of the appliances of the telegraph companies, the ordinances should be sustained; and to this question of reasonableness the evidence was directed. A witness, whose qualification as an expert plainly appeared and was not questioned, testified, without objection, that a liberal

estimate of all the cost to the city of issuing permits, inspecting, and exercising supervision, would not exceed 50 cents per pole, and that such a charge would, of itself, fully meet the expense of all that was actually done by the city; and hence it was argued that, to the extent of one-half of the pole charge and the whole of the charge per mile per wire, the sum imposed was excessive. The same witness presented the matter, also, in a more specific manner, by making a comparison, which is very striking and cogent. He stated that for maintenance of their poles and wires, including repairs and new material, when required, as well as office work, the defendant company has, for a number of years, expended only from \$2.60 to \$2.90 per mile per annum, whereas the charges imposed by these ordinances amount to about \$4.35 per mile per annum; and it is impossible to regard a charge of \$1.45 per mile more for inspection, etc., than is needed for maintenance and repair, as being reasonable. The witness to a part of whose testimony reference has been made is, it is true, in the employment of the defendant, but his veracity was not assailed, and he was not contradicted. The plaintiff called the chief of its electrical bureau, but he was not asked to gainsay the estimate which has been mentioned, and he did not do so, nor does his evidence appear to conflict with it. But the estimate of defendant's witness took into account only the expense incurred by the city's electrical bureau, and the plaintiff insists that it is therefore delusive, because, as it claims, additional duties and labors were devolved, not only on that particular bureau, but also upon its councils, and upon its police and fire departments, by reason of the presence and use of the plants of the telegraph companies. Accordingly, the plaintiff offered to prove the expense involved in the transaction of the entire business of councils, but, upon its being stated that it was not proposed to show what proportion or part of this expense was chargeable to business relating to telegraph companies, the offer was rejected, on the ground that the single fact proposed to be proved was, as respects the precise issue, too vague, indefinite, and uncertain to be of any practical materiality. There was evidence that the police were directed to report, with other entirely distinct things, "leaning telegraph poles, and detached, broken, or sagging wires," and that the firemen, in extinguishing fires, were compelled to do some additional work when they encountered electric wires; but there was no attempt to show to what extent the labors of either of these departments were augmented, or how much, if at all, the expense of maintaining them was increased, in consequence, and an assumption that to provide for any such increase a charge of 25 cents per pole would be requisite could rest only upon a most extreme conjecture. There can be no doubt that it is through its electrical bureau that the city's right of inspection and regulation is mainly—almost exclusively—exercised.

Upon the facts disclosed on the trial, it then seemed to me, as it still does, that, although the city should be fairly and even liberally treated, the ordinances in question could not be upheld. There is nothing to distinguish this case from the one between the same parties which was decided by this court in 1889, and which is reported in 40 Fed. 615. That decision was based upon the fact that a charge had

been imposed of five times the amount required. Here we have a pole charge which, to the extent of at least one-fourth of its amount, is plainly excessive; and there is required, in addition, the payment of \$2.50 per mile of wire, for which there is no legitimate need whatever, and the sum of the charges imposed is very considerably greater than the cost of actual maintenance. Therefore, I think that unreasonableness is as clearly apparent in this case as it was in that to which I have referred, and I remain of the opinion that the judgment in the latter was properly applied and followed upon this trial. The motion for a new trial is denied.

COMMERCIAL NAT. BANK et al. v. PIRIE et al.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1897.)

No. 791.

1. NATIONAL BANKS—GUARANTY.

The act of congress authorizing the organization of national banks confers upon them no authority, either in express terms or by implication, to guaranty the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature, whether executed by the cashier or the board of directors, are necessarily *ultra vires*.

2. SALE—FRAUDULENT REPRESENTATIONS—RESCISSION.

The presentation by a merchant seeking to purchase goods of a written guaranty, by a national bank, of payment for any goods he may purchase, even if it implies a representation that the bank is financially sound, is not of itself a fraudulent representation, such as will justify a rescission, since the seller is chargeable with knowledge that in law such a guaranty by a national bank is *ultra vires* and void.

3. SAME—FRAUDULENT INTENT.

Whether goods are bought with a preconceived fraudulent intent not to pay for them is a question for the jury if there is evidence tending to show such an intent, but not of so conclusive a character as to convince all reasonable minds that such must have been his purpose.

4. VENDOR AND PURCHASER—INNOCENT PURCHASERS.

To vest a mortgagee of chattels with the rights of an innocent purchaser, a pre-existing debt alone is not sufficient, but, if any considerable sum of money is paid at the time of the execution of the mortgage, and as part of its consideration, then the mortgagee may be an innocent purchaser as to the full amount of his loan.

6. CONVERSION—WHEN MAINTAINABLE.

An action for wrongful conversion against one who has sold goods in his possession is not maintainable where defendant had a valid lien upon the property, so that his refusal to surrender it upon demand was not a tort.

In Error to the Circuit Court of the United States for the District of Kansas.

N. T. Guernsey and W. C. Perry (John H. Crain was with them on the brief), for plaintiffs in error.

Charles Blood Smith (W. H. Rossington and Clifford Histed were with him on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit to recover the value of certain goods, which was brought by the defendants in error, com-