

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

Order discharging writ affirmed.

CITY OF LOUISVILLE *v.* CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 761. Argued March 7, 8, 1912.—Decided June 7, 1912.

Quære, and not determined, whether an ordinance cutting the earnings of a telephone company down to six per cent per annum, would, under the circumstances of this case be confiscatory and unconstitutional under the Fourteenth Amendment.

This court requires clear evidence before it will declare legislation, otherwise valid, to be void as an unconstitutional taking of property by reason of establishing rates that are confiscatory.

In this case the evidence is not sufficient to justify enjoining enforcement of an ordinance fixing rates of a telephone company and the decree granting an injunction is reversed, but without prejudice.

THE facts, which involve the question of whether an ordinance of the City of Louisville fixing rates for telephone service in that city, was unconstitutional as confiscatory of the property of the companies, are stated in the opinion.

Mr. Clayton B. Blakey and Mr. Huston Quinn, with whom Mr. Joseph S. Lawton was on the brief, for appellant:

Questions referred to a master cannot in turn be referred to an accountant in such a manner that the report of the accountant will bind the parties, the master or the court. *Kimberly v. Arms*, 129 U. S. 512.

The court should assume that a telephone company will charge the same rates to all of its subscribers having the same class of service. *Knoxville v. Water Co.*, 212 U. S. 16.

A telephone company without a franchise or privilege to occupy the streets of a city is a trespasser and should not be permitted to question a rate regulating ordinance. *Rough River Tel. Co. v. Cumberland Tel. Co.*, 119 Kentucky, 470; *Rural Home Tel. Co. v. K. & I. Tel. Co.*, 32 Ky. Law Rep. 1072; *East Tenn. Tel. Co. v. Russellville*, 106 Kentucky, 669; *Bland v. Cumberland Tel. Co.*, 109 S. W. Rep. 1180; *Bridge Co. v. Prange*, 35 Michigan, 400; *Cincinnati Inclined Plane Railway Co. v. Cincinnati*, 44 N. E. Rep. 327.

A telephone company should not be granted relief against rates established by a city ordinance where such company refuses to make a frank disclosure of its books, and records and facts within its knowledge. *Knoxville v. Water Co.*, 212 U. S. 16.

A telephone company should not be permitted to earn a return on cables which it has installed and does not use

and will have no occasion to use for years to come. *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 697; *San Diego L. & T. Co. v. Jasper*, 189 U. S. 429; *Water District v. Water Co.*, 99 Maine, 376; *S. C.*, 59 Atl. Rep. 539.

In determining the value of a telephone plant when it charges that a rate ordinance confiscates its property the true method is to ascertain what it would cost to reproduce a plant, then deduct from the reproduction cost the amount the plant in question has depreciated. *Knoxville v. Water Co.*, 212 U. S. 1.

In determining the value of a telephone plant where it claims that a city rate ordinance confiscates its property the value of the franchise should not be considered. Beale and Wyman's Work on Railroad Rate Regulation, § 362; *Brunswick & T. Water District v. Maine Water Co.*, 99 Maine, 371.

Rates charged by telephone companies in other cities of substantially the same size and similarly located as the city in question are a fair criterion in determining the reasonableness of telephone rates. *Interstate Com. Comm. v. Southern Railway Co.*, 115 Fed. Rep. 741; *Interstate Com. Comm. v. East Tenn., Va. & Ga. Ry.*, 85 Fed. Rep. 107.

Mr. William L. Granbery and Mr. Alexander Pope Humphrey, with whom Mr. Alexander Pope Humphrey, Jr., was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the enforcement of an ordinance of the City of Louisville fixing telephone rates, passed in 1909, after the attempt of the city to deprive the appellee of its franchise, when that seemed likely to fail. See *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649. The question raised is the usual one of con-

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fiscation. In consequence of the conclusion to which we have come we shall make a much more summary statement of the facts than in other circumstances might be necessary. The case was referred to a Master and he reported in favor of the city. He was of opinion that in the first year after the ordinance should go into effect there would be a loss of \$30,000, but that in another year or so, in view of the probable increase of subscribers, the company would get back to its former net revenue with a probable continuous increase thereafter, and would earn a sufficient return. The judge was of a different opinion, and for the purposes of the present decision only we shall adopt his figures subject to the changes that we shall state which leave us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect.

The Judge's values were:

Plant, including toll lines	\$1575000.00
Real estate.	162000.00
Supplies on hand	18000.00
Working capital	33000.00

\$1788000.00

Gross earnings for 1908, including 15% of receipts from toll lines. This was undisputed. \$325838.30

The court added 10% more of the toll line receipts, making 330926.38

The Master was of opinion that the remaining 85% should be added, making the total gross earnings. 369087.00

For the purpose of such an estimate as this we think that the toll lines should be either in or out, and if they are to be counted in the property upon which the appellee is not to be prevented by

law from earning a fair return, as they are above, and the expenses charged to the appellee, the whole return from them should be added to the gross earnings of the appellee. So we take the total gross earnings as.....	\$369087.00
Expenses as found by the Master and accepted by the Judge	\$216363.07
But this includes amount charged to the Exchange for the use of real estate (less expenses for repairs), which, in view of the inclusion of real estate above, it should not	11707.52
	<hr/> \$204655.55
Deduct corrected expenses from gross earnings	204655.55
	<hr/>
Net earnings	\$164431.45
Even if we deduct from the net earnings a sum estimated by the Judge as necessary above actual expenditures of 1908 to make good average depreciation..	24095.02
	<hr/>
we have	\$140336.43
which is nearly eight per cent. on the estimated value. The Master prophesies a falling off for the first year of	30000.00
	<hr/>
which would leave	\$110336.43
or over six per cent. on the valuation assumed.	

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Suppose now that we leave out the toll lines.

Plant with real estate &c. as above. . . . \$1788000.00

Deduct toll lines estimated at 125000.00

\$1663000.00

Gross earnings. 325838.30

Less 15% from toll lines 7632.11

\$318206.19

Expenses \$216363.07

Less amount charged for use

of real estate as above.. 11707.52

\$204655.55

Less toll line expenses

which if estimated (in the

absence of satisfactory

proof as to their amount)

by dividing expenses in

proportion to receipts

would be approximately 30000.00

\$174655.55

Deduct corrected expenses from gross

earnings 174655.55

\$143550.64

Additional deduction for depreciation as

before 24095.02

\$119455.62

Which is nearly 7 per cent. or deducting

for loss of custom the first year. 30000.00

\$89455.62

which is just above five per cent. on the Judge's valuation.

We express no opinion whether to cut this telephone company down to six per cent. by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent. on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings $5^{10}/_{17}$ per cent. with a reduction by the ordinance to $3^6/_{17}$ per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand.

Decree reversed without prejudice.

MESSENGER v. ANDERSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

No. 150. Argued January 19, 22, 1912.—Decided June 2, 1912.

Where the Circuit Court of Appeals has before it in the second trial of the same case, a will previously construed by it, and meanwhile the highest court of the State in which the real estate affected is situated has construed the will differently, the Circuit Court of Appeals is not bound to adhere to its previous decision as being the law of the case. It may follow, and in such a case it should lean toward an agreement with, the state court.

In the absence of statute, the phrase "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts gen-