

Mr. Ker's Argument for Clay Commercial Telephone.

Mr. William W. Ker for the Clay Commercial Telephone.

It is alleged in the bill of complaint that the American Bell Telephone is "a corporation duly established under the laws of the Commonwealth of Massachusetts." This is a descriptive allegation. If a descriptive allegation is not proved as laid, it is a fatal variance. 1 Gr. Ev. 82, § 64. To prove the incorporation, the complainants offered in evidence a special Act of the Legislature of the Commonwealth of Massachusetts. It is entitled "An Act to Incorporate the American Bell Telephone Company." The name of the proposed corporation is not mentioned in the body of the act. When a corporation is erected, a name must be given to it, and by that name alone it must sue and be sued, and do all legal acts. Such name is the very being of its constitution. The name is the very knot of the combination, without which it could not perform its corporate functions. Bl. Com. Book I. ch. 18; Angell and Ames on Corporations (10 ed.), § 1; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636. The act is entitled, "An Act to Incorporate the American Bell Telephone Company." The title cannot confer the name American Bell Telephone Company upon the corporation. Potter's Dwarris Stat. 102; Sedgwick Construction of Statutes (2d ed.), pp. 39, 40; *Mills v. Wilkins*, 6 Mod. 62; *Hadden v. The Collector*, 5 Wall. 107; *Coal Company v. Slifer*, 53 Penn. St. 71; *Union Passenger Railway Company's Appeal*, 81 Penn. St. 94. The special act, offered in evidence, enacts that Bell and his associates may associate themselves, and "organize a corporation according to the provisions of chapter 224 of the act of the year 1870, and the acts in amendment thereof and in addition thereto." Chapter 224 of the act of 1870 and its amendments are now known as chapter 106 of the Public Statutes of Massachusetts, and so much thereof as relates to this question is as follows:

"Section 4. Any such number of persons as is hereinafter provided, who associate themselves together by such an agreement in writing as is hereinafter described, with the intention of forming a corporation for any purpose hereinafter specified, upon complying with the provisions of section twenty-one, shall be and remain a corporation.

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"Section 16. Such agreement shall set forth the fact that the subscribers thereto associate themselves together with the intention of forming a corporation, the corporate name assumed, the purpose for which it is formed, the town or city, which shall be in this Commonwealth, in which it is established or located, the amount of the capital stock, and the par value and number of its shares.

"Section 17. Any corporate name may be assumed which indicates that it is a corporation, and which is not in use by an existing corporation or company; and the name assumed shall be changed only by act of the General Court. If organized for the purposes mentioned in sections 9 or 10, the words 'co-operative' or 'fishing' respectively, shall form part of the name."

To further prove the act of incorporation, complainants offered in evidence a certificate, under the seal of the Secretary of the Commonwealth of Massachusetts, certifying that W. H. Forbes and ten other persons had associated themselves under the name American Bell Telephone Company, with a capital of seven million three hundred and fifty thousand dollars. The special act does not give the persons named in it power to assume a name. It gives them power to *organize* a corporation. The assumption of a name was not one of the incidents which attached, even by implication, to the powers, purposes, or objects stated in the act. We are to look at what the Legislature actually did, and not what it intended to do. The act was a grant from a sovereign power, and is to be taken most beneficially for the sovereign, and against the grantee. 2 Black. Com. 347; Potter's Dwarris on Statutes, etc., pp. 146, 215; *Dartmouth College v. Woodward*, *supra*; *Commonwealth v. Erie & Northeast Railroad Co.*, 27 Penn. St. 339; *S. C.* 67 Am. Dec. 471. The special act was a later one. It does not incorporate chapter 224 in its provisions. It refers to chapter 224, by enacting that Bell and his associates might "organize a corporation according to the provisions of chapter 224." The powers conferred by the special act are limited to the precise language used. The language confers no authority upon the Secretary of the Com-

Mr. Dickinson's Argument for People's and Overland Cos.

monwealth to issue such a certificate as has been offered in evidence. *Commonwealth v. Railway Co.*, 52 Penn. St. 52; *Bowling Green &c. Railroad Co. v. Warren County Court*, 10 Bush, 711; *Ellis v. Paige*, 1 Pick. 43; *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 613; Angell and Ames on Corporations, §§ 81, 111. The Bell Telephone Company of Philadelphia is one of the complainants mentioned in the bill of complaint. It is described as "a corporation duly established under the laws of the State of Pennsylvania." Although, under the pleadings, the complainants were bound to prove the existence of the corporation, yet there was no act, law, charter, or evidence offered to prove that such a corporation ever did exist.

Mr. Ker also contended that the evidence showed that the complainants were not entitled to maintain a suit alone against the respondents; that Bell was not the original inventor of the inventions described in the patents; that material parts of the invention had been described in printed publications prior to the granting of letters patent; that the claims in the patent were not warranted by the descriptions and specifications set forth in it, or by the proofs and evidence; and that the apparatus was inherently unfit for telephonic purposes in the transmission of articulate speech.

Mr. Don M. Dickinson for the People's Telephone Company (the Drawbaugh Case) and for the Overland Telephone Company.

Two leading judgments of this court settle the rules applying to the issue of priority of invention between Bell and Drawbaugh. These are *Gayler v. Wilder* (the Fire Proof Safe Case), 10 How. 477, and *Coffin v. Ogden* (the Reversible Lock Case), 18 Wall. 120.

The simple question is, did Mr. Bell or Mr. Drawbaugh first conceive and apply the principle of the telephone and "clothe the conception in substantial forms which demonstrated at once its practical efficacy and utility?"

The principle is, that of transmitting articulate speech upon