

**IN CHANCERY OF NEW JERSEY, BETWEEN THE
DOMESTIC TELEGRAPH AND TELEPHONE
COMPANY, OF NEWARK, NEW JERSEY,
COMPLAINANT, AND THE METROPOLITAN
TELEPHONE AND TELEGRAPH COMPANY, AND
THE NEW YORK AND NEW JERSEY TELEPHONE
COMPANY, DEFENDANTS, PP. 1-195**

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In Chancery of New Jersey, Between the Domestic Telegraph and Telephone Company, of Newark, New Jersey, Complainant, and the Metropolitan Telephone and Telegraph Company, and the New York and New Jersey Telephone Company, Defendants, pp. 1-195 by James McC. Morrow

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JAMES MCC. MORROW

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114
Transcript
5-21-83

In Chancery of New Jersey.

BETWEEN

THE DOMESTIC TELEGRAPH & TELEPHONE COMPANY OF NEWARK, NEW JERSEY,
Complainant,

AND

THE METROPOLITAN TELEPHONE AND TELEGRAPH COMPANY AND THE NEW YORK & NEW JERSEY TELEPHONE COMPANY,
Defendants.

} *On Bill, &c.*

Argument of JAMES McC. MORROW, Counsel for Defendants, before HON. JOHN T. BIRD, Vice Chancellor, 6th Dec. 21 and 22, 1885, and January 8, 1886.

It has been said that "our profession leads us to explore the mazes of falsehood; to detect its artifices; to pierce its thickest veils; to follow and expose its sophistries; to compare the statements of different witnesses with severity; to discover truth and separate it from error."

And if my effort shall accomplish any of these purposes, and aid the Court to a proper understanding of the issues involved, it will not have been made in vain.

And I shall ask the indulgence of the Court only so long as may be necessary to a proper discussion of the facts in this controversy.

The issues of this case are few, but their solution is of vast importance not only to the litigants represented here, but also to the business interests of this community.

They involve not only the right *exclusively* to use the telephone in this district of Newark, Harrison, and Kearney, with all the profit and emolument attending such exclusiveness, but they involve likewise the question whether this necessity to every business man's operations shall be freed from, or hampered by, the annoyances which must inevitably result from intercommunication attempted to be conducted between this

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territory and the city of New York and surrounding country, by antagonistic companies.

Railroads may build their rival lines and the public is sure to derive a benefit. Stage and express lines, the telegraph, the competing boats and steamers—in fact, any rivalry between corporations free to act anywhere and everywhere and independently of each other, brings relief to manufacturing, mercantile, or business life.

But the time has not yet arrived for rivalry in telephone lines. Whatever we may think of the monopoly, we must recognize the fact that the business man who must have this assistance in the transaction of his business, or get left, is bereft of his usual option of "looking around" to see where he can do the best; but he is compelled to use the Bell Telephone, or do as well as he can without any.

etc.

And your Honor will see how important it is, living as we do in such close proximity with the metropolis of the land, our manufactories here and our salesrooms in New York, that this means of communication should reach its most perfect possibilities, and be relieved of the embarrassments and failures which must of necessity spring from any attempt to carry on the business through a company at one place having no sympathy with, but on the contrary, an antagonism towards, that in the other.

The telephone first began to attract the attention of the business world in 1878 or 1879. Its theory, of course, was known prior to that time, but it was but a toy, awaiting development and perfection. Several patents had been issued, the Edison, the Gray, the Phelps, the Bell, and others not necessary to mention.

Organizations and companies had been formed, and these various instruments had been introduced, or were seeking introduction everywhere. Rivalry was promised, and all appearances indicated the benefit to the commercial world which had sprung from the inventions of the telegraph, the railroad, the express, and the steamer.

The Western Union Telegraph Company, that alert and powerful corporation which needs no introduction anywhere, was quick to foresee the advantages of this new invention, the practical operation of which would be conducted similarly to, and be closely allied with, its own business.

It secured control of the Edison and Gray patents and established its exchanges everywhere. It was early in the field in the city of Newark.

Mr. Hubbell, the president of the Domestic Company, and the principal witness for the complainants in this suit, says (p. 132, l. 16): "On August 6, 1879, they had established themselves here, and had 250 subscribers secured and 150 tele-phones in operation. Their lines were run upon the various lines which the Western Union owned in this city and on the lines of other companies which they assumed control of, and that, together with house fixtures here and there, made it comparatively easy for them to establish their lines, which they did *with amazing rapidity and success.*"

Could language more graphically describe the ease with which this powerful corporation, with lines already constructed, and with means without stint at its disposal, pushed itself to the front in the telephone business here and everywhere?

What was the position of the complainant's company at that time?

They were incorporated November 20, 1875, with a capital of \$10,000, as the Domestic Telegraph Company. Under their primary organization, they conducted (p. 124) what is termed a Signal Alarm business. It consisted of calling for messengers to do errands of various kinds around the city—calls for policemen, fire department, the doctor, or any other call which might be understood by a preconcerted code.

Mr. Hubbell says it was a profitable business. Undoubtedly it was, and undoubtedly it would have continued profitable if something better had not arrested the public gaze. The stage business was a profitable business until the dawn of the railroad; but the stage business and the signal alarm business dropped naturally into their graves when the railroad and the telephone were born.

How ready was the Domestic Company to recognize the changed condition of things. Mr. Hubbell says (p. 127) their attention was called in 1879 to this telephone business because their signal alarm business could be much better and more efficiently conducted by the telephone.

They "were depending on preconcerted signals" (p. 127, l. 23)—which signals must, of course, be limited ("they had only six," p. 204, l. 20) and unsatisfactory in a great measure; whereas, "the telephone would permit a person to talk to their central office" (p. 127, l. 25), and he might have added to any person connected with their central office, or the central office of any neighboring exchange, practically "face to face as a man speaks to his friend."

This company took prompt action. In September, 1879, they

changed their name to the "Domestic Telegraph and Telephone Company" (p. 125, l. 14), being determined to have the name and form as well as the substance; and, on July 31, 1880, "they filed articles by which they had an authorized capital of "\$100,000" (p. 126, l. 5) instead of \$10,000, as at the beginning of their existence, which capital, Mr. Hubbell says (p. 126, l. 7), "was full paid up in cash"; but one-half of which appears to have been paid up by a stock dividend, declared May 23, 1882. Possibly this is a distinction without much difference.

It is no criticism against them that they made money; but for some mysterious reason they did not want to admit it.

Now to retrace a step or two.

The Domestic Company seeing that their signal alarm had seen its day, and viewing with "signal alarm" "the amazing rapidity and success" with which the Western Union was preparing to bury them out of sight with the telephone—for Mr. Hubbell says (p. 204, l. 17): "The fact of introducing tele-phones here in Newark was to substitute a complete means of communication between houses or customers and the tele-
"phone exchange in place of our boxes, which only allowed six "signals"—they put their heads together, consulted John D. Harrison (p. 129, l. 14), looked over the field, and concluded that inasmuch as the breeching was about to break, something had got to be done; and by some favor of the gods, determined that the Bell telephone gave them the brightest promise of successful competition with the Western Union.

They ascertained (p. 127, l. 34) that the Bell Telephone Company of New York had a license from the Bell of Boston, then the parent company, for the exclusive use of the Bell telephone in New York city and thirty-three miles of the surrounding territory, including Newark, Harrison, and Kearney, and on August 5, 1879, the Domestic Company resolved that (p. 128, l. 27):

"George W. Hubbell and F. T. Fearey are authorized to arrange with the Bell Telephone Company of New York for the use of their latest improved instruments for the term of five years, with the privilege of renewal, and also to arrange about the necessary switches and indicators."

On the next day, August 6, 1879 (p. 128, l. 32), Messrs. Hubbell and Fearey met the representatives of the Bell Telephone Company of New York in New York city.

This, however, was not the famous Gilsey House interview.

It will be perceived that by the action of the Domestic Company, constituting them a committee, Messrs. Hubbell and Fearey were distinctly authorized to make a contract.

In what plight was the committee of the Bell Company in that respect on that day?

The Board of Trustees of that company also held a meeting on August 5, 1879, and resolved (p. 702, l. 2):

"That Mr. Harrison be authorized to notify the Domestic Telegraph Company of Newark that the Bell Telephone Company of New York will enter into an arrangement with it for a limited term of years to operate a distinct telephone system in Newark, by paying not less than the gross rental of telephones, such right to be confined to the limits of the cities of Newark and East Newark; the Bell Telephone of New York reserving the exclusive right of establishing communication between such exchange and the outside territory, and also having the option of purchasing all the plant in these for exchange purposes at the termination of the contract."

So it would seem that by comparison of the action of the two companies, that that of the Domestic was a result of that taken by the Bell.

Particular mention is made of these actions to impress upon the Court the *care and caution* with which *both* these companies proceeded, so that nothing should be done *under cover of doubtful authority*.

The next day, August 6, 1879, the Directors or Trustees of the Bell Telephone Company met again on this business and resolved (p. 103, l. 10):

"On motion duly seconded, the President was authorized to sign a memorandum basis of contract with the Domestic Telegraph Company of Newark, and the drawing of a formal contract referred to the Executive Committee. The above motion unanimously adopted."

Did this leave anything in doubt? Could there be any question as to the authority of these Committees? And I repeat with what *care and caution both these companies proceeded*, so that nothing should be done under a doubtful authority.

Now these Committees met. They indulged in a long discussion, and, as a result of it all, they brought forth the preliminary contract of August 6, 1879, found on page 44.

And just here I desire to call the attention of the Court to the strenuous manner in which Mr. Young warned the Court against relying upon Mr. Theo. N. Vail's testimony in this case, not because Mr. Young had found any *untruth* in Mr. Vail's testimony, but because, as he alleges, that Mr. Vail disregarded the preferential clause contained in the protocol; and in the same breath with which he criticised Mr. Vail he apologized for

Mr. Hubbell's loose statements respecting the execution and handwriting of this protocol, but declared that it was of very little importance.

Let us see if it was of very little importance.

Standing by itself, perhaps it was of little importance.

When Mr. Hubbell gave his direct testimony, he said positively, and without possibility of mistake, that his copy was in Vail's handwriting, and he gave the whole circumstances (p. 130, l. 5) of Vail's writing it in his presence, "and under his eye"—and he said all this advisedly; and he maintained his positiveness until on the cross-examination he was about to be confronted with the copy written by Vail, when he hedged out of it, in the way shown by the cross-examination read by Mr. Young.

I say, standing alone it would not amount to much, but it is a most perfect index of the general looseness of Mr. Hubbell's statements.

Whose testimony shall we scan so narrowly in this case?

And whose loose swearing—as Mr. Young terms it—shall we remember?

Shall we condemn the man, who, in Mr. Young's opinion merely, disregarded the preferential clause, as the courts have said he might? Or shall we look with some suspicion upon the testimony of the man who swears to one thing one day, and another thing the next?

They apparently have got to learn that the streets of Jerusalem were kept clean by each man keeping his own door-stone clean, and there is an immense pile of rubbish before this Domestic door.

It will be noticed that this protocol gave the exclusive right to use Bell Telephone *only* (no other), in Newark, Harrison, and Kearney, for exchange and private line purpose.

The rentals were fixed—iron-clad—at \$10, though Mr. Young tells us in his argument that at that time they could be had for the asking, and, practically, that you could buy them up cheap at any corner grocery—but our Domestic friends evidently didn't know that, or they wouldn't have agreed to pay \$10 rental for them—and nobody else knew it, because it wasn't true, and so the rentals were fixed at \$10—iron-clad, without a suggestion of a possibility of reduction; the Domestic Company to use none but Bell telephones, and the Bell Company reserved the exclusive right of connecting the Newark exchange with other exchanges. The agreement to continue five years, and

the Domestic Company to have first preference in making any contract at the termination of the agreement.

Mr. Young says if the business proved *profitable* they wanted a renewal. But didn't they want a renewal if it *didn't* prove profitable? Oh, no! They were very fair, but they wanted a bargain like the handle of the jug, and the courts have said that bargains which allow one party to put the handle on whichever side of the jug suits the fancy, are not good for much.

The Domestic Company to prosecute the business diligently under penalty of forfeiture, and to deliver to the Bell Company messages for hire for points outside. And a final declaration that "This is the memorandum of a contract which we hereby agree to execute as soon as drawn."

Mr. Young says that Mr. Vail's statement (p. 524, l. 15) that these words "were written at the time" the preliminary was drawn is probably incorrect, but Mr. Vail was not contradicted and there is no word of testimony upon which Mr. Young based his *probability*.

Some time later, the full contract between these companies, bearing the same date, August 6, 1879, was prepared and executed under the seals of the two companies by their proper officers. It embraces the provisions of the preliminary contract, amplified with all the "ponderosity of particularity." It omitted the private line grant to the Domestic Company, whether by accident or design has been much controverted in this case.

Mr. Hubbell says he didn't notice the omission when it came to them for signature, and as will be seen further on, it was of very little, if any, consequence to them. But it was omitted, both parties signed and accepted it, and that was the end of it.

The terms of this amplified contract merit discussion, particularly and at length.

It will be noted:

1st. That the iron-clad terms of rental of instruments at \$10 per annum during the continuance of the contract were preserved without even a hint or thought of any reduction under any circumstances (p. 47, l. 1).

2d. That by the 9th clause, the contract was to terminate on the last day of August, 1884 (p. 49, l. 16).

3d. That by the 10th clause, it was made optional to, *but not obligatory upon*, the Bell Company, its successors and assigns, to purchase the Domestic Company's plant at the termination of the contract, at a price to be agreed upon or fixed by arbitration, but such purchase to have no regard to valuation for good will (p. 49, l. 24).