not award a patent to one who was not the first to make an invention, we think that Bell's patent is void by the anticipation of Drawbaugh.

Mr. Justice Gray was not present at the argument, and took no part in the decision of these cases.

Mr. Justice Lamar, not being a member of the court when these cases were argued, took no part in their decision.

PETITION FOR REHEARING.

On behalf of the People's Telephone Company and the Overland Telephone Company, the following petition for rehearing was filed May 7, 1888:

"To the Honorable Justices of said Court:

"The appellants in the above-entitled cases hereby humbly pray that the court will rehear and reconsider the matters decided March 19, 1888, so far as the same involve the question of priority of invention of the electric speaking telephone between Alexander Graham Bell and Daniel Drawbaugh; and that an order or orders be entered reversing the decisions below and dismissing the appellees' bills, with costs to the appellants in said cases respectively.

"The grounds of this application are, first, that the court, in its said decision, as evidenced by its written opinion, filed on said 19th day of March, giving its reasons therefor, inadvertently erred in respect to certain matters of fact and of law material to, and decisive of, said question, and therefore of these cases; and, secondly, that in consequence of said errors, the decision of the court was against the weight of the evidence.

"The opinion of the court treats three portions of the evidence as controlling, viz.: (1) The evidence of a great cloud of witnesses as to what Drawbaugh, prior to the fall of 1876, had accomplished in the matter of an electric speaking telephone; (2) His conduct from that time to the year 1880, when the appellants became interested in his inventions; (3) The New York and Philadelphia tests.

I. *Proofs of Drawbaugh's Priority.*

"Mr. Storrow, complainant's counsel, admitted in his oral argument that 'forty-nine witnesses testified that they had heard speech in Drawbaugh's shop before the date of the Bell patent' (Oral Argument of Storrow, p. 149).

"Seventy witnesses heard talk through the Drawbaugh telephones, or were present when others successfully talked through them prior to Bell's alleged conception of the telephone June 2, 1875.

"One hundred and forty-nine witnesses actually saw the instruments, and two hundred and twenty testified to having heard of or seen them prior to that time.

"Many of the witnesses testified to such circumstances, facts, and records corroborative of their evidence as to make it impossible that they could have erred, and either their testimony is true or they committed wilful perjury. No attempt has been made to impeach them. The dates they positively aver are all prior to June, 1875, the year when Bell claimed to have first conceived the idea of the telephone. Of this class of witnesses are the following:

"*Wilson H. Strickler:* Never was at Milltown but once. Had made an invention for insulating telegraph wires. Visited Drawbaugh for information and advice concerning that invention. Had not then filed his application for a patent. He and Drawbaugh talked to each other through the telephone at that time, and Drawbaugh explained to him how electricity operated it. Subsequently filed his application and obtained a patent for his invention. Produced the specifications and drawings as filed, and the patent as issued. Date of filing, August 22, 1874; date of patent, April 20, 1875 (Additional Proofs, p. 233).

"*George W. Bowman:* Resides at Mechanicsburg. Drove to Eberly's Mills with his wife to attend a baptism. After the baptism drove to Drawbaugh's shop. This was during the lifetime of his wife's mother, who died in 1871. He then and there heard Drawbaugh talk through the telephone (Additional Proofs, p. 173).

"*Mrs. Maggie E. Bowman*, wife of the above, corroborates his testimony. Her mother died March 14, 1871. Knows the baptism was before her mother's death, because it was upon her mother's persuasion that they went to attend it (Additional Proofs, p. 177).

"*Emanuel K. Gregory:* Resided at Milltown from March to October, 1870. Then removed to Massachusetts. Has never been in Pennsylvania since until he testified. At Milltown worked at Drawbaugh's shop for faucet company. The company's books corroborate this. Assisted Drawbaugh in his experiments, and heard him talk through his telephone a number of times. Identifies B and F as the instruments (Additional Proofs, p. 185).

"*William H. Zearing:* Had a pair of steelyards relettered by Daniel Drawbaugh. Entered the date and charge therefor in a book, November 23, 1873, as shown by book produced. Never had any steelyards relettered at any other time. When he went for them Drawbaugh talked to him through a telephone, saying among other things, "The steelyards are finished." Zeering was the secretary of the school board of his township (Def. Sur. Reb. Testimony, p. 122).

"Other witnesses of the same class are: Goodyear (Def. Sur. Reb. Tes., p. 1011); David Stevenson, Jr. (Def. Add. Proofs, p. 141); his two daughters (Def. Add. Proofs, pp. 166, 169); William H. Martin (Def. Sur. Reb. Tes., p. 827); John Keefauver (Def. Sur. Reb. Tes., p. 837). See accompanying brief for many others.

"II. *Drawbaugh's Conduct.*

"Of the above proofs the court say: 'If they contained all the testimony in the case it would be more difficult to reach the conclusion that Drawbaugh's claim was not sustained. But in our opinion their effect has been completely overcome by the conduct of Drawbaugh, about which there is no dispute, from the time of his visit to the Centennial until he was put forward by the promoters of the People's Company, nearly four years afterwards, to contest the claims of Bell.' p. 565.

"This conduct, concerning which the court say there is no dispute, relates solely to his incapacity as a business man. It is true that there is no dispute as to his incapacity to use, to the best advantage, the opportunity his invention gave him; but the court has evidently overlooked much testimony to show the constant efforts he did make to secure capital from 1876 to 1880 to enter upon the contention which would be sure to follow an application for a patent. Among the witnesses on this point are: Moffitt (Def. Record, Vol. 1, p. 497); Chellis (Same, p. 526), and Shettel (Same, p. 214). The accompanying brief cites many other witnesses to Drawbaugh's constant and earnest seeking of assistance to push his telephone inventions.

"III. *Drawbaugh's Ignorance of the Date of Bell's Invention.*

"Drawbaugh swore that he did not know the alleged date of Bell's invention until 1880 (Def. Record, Vol. 2, p. 870). The court must have overlooked this testimony, for they say that he must have known of the approximate time of Bell's invention, because the subject of the invention itself was often referred to in the Harrisburgh and Mechanicsburgh papers. He did not know but Bell had been at work on it as he himself had been for many years. The date of the patent was no guide to the date of the invention.

"IV. *Drawbaugh's Visit to the Centennial.*

"The failure of Drawbaugh to ascertain, when visiting the Centennial Exhibition, whether the telephone instruments there exhibited by Bell were similar to his own, seems to have been regarded by the court as strong evidence against his claim. But the court, after citing questions and answers from 386 to 398, inclusive, overlook the answer to the very next question, in which Drawbaugh testifies that none of the instruments he saw at Philadelphia were the instruments represented in the cuts of Bell's instruments as given in the record in this case.

"The testimony of Prof. Barker (Add. Proofs, p. 7) says that the Bell instruments were not easily accessible in the

building at that time. They seem to have been merely exhibited to invited individuals at times of private tests. A fair inference from Drawbaugh's answers cited in the opinion of the court, and the one omitted is that he saw the instruments he supposed to be the subject of comment, and they were not telephones at all, but were harmonic telegraphic instruments, which his answers fairly describe.

"V. *Drawbaugh's Pursuit of his Invention.*

"The court say that he had apparently lost all interest in talking machines from 1876 to 1880. Such a conclusion could only be reached by overlooking the evidence of many witnesses. Among these are Stees and Johnson, who operated his carbon transmitter J at Harrisburg in May, 1878, months before the Blake transmitter was invented (Add. Proofs, pp. 209 and 198). He was constantly exhibiting his telephones during the whole of those four years to numerous witnesses, as will readily be seen by citations in the accompanying brief, but what is absolutely conclusive on this point is the fact that he made the most effective and finished telephones from 1876 to 1880.

"VI. *Drawbaugh's Neglect to Apply for a Patent.*

"The cost of an application for a patent being small, the failure of Drawbaugh to make such application is taken by the court as evidence that he had no invention. But this view leaves out of consideration the certainty of interference proceedings, the cost of which he was advised would be enormous, which advice has since been abundantly justified.

"VII. *The Tests at New York and Philadelphia.*

"Successful tests of Drawbaugh's instruments, both original and reproduced, were made in New York in 1882 and in Philadelphia in 1885.

"The court say that: 'It is substantially conceded that the test in New York was a failure'; that 'Occasionally sound was heard, and sometimes a word, but it would not transmit sentences.' That this was a very material error is shown by

the testimony of Mr. Benjamin, at page 1278 of Def. Vol. 2, and by other witnesses. So far from it being conceded that the test at New York was a failure, it was conceded by complainants' counsel, Mr. Storrow, that it was a success. Concerning the single instrument F, he said: 'There were one hundred and thirty-seven phrases uttered into it on the second day, seven of those were understood, and some words of seven more, and that is all. The third day they got better. They uttered one hundred and seventy-five phrases into the transmitter; thirty-five of those were heard.' (Oral argument in Circuit Court, p. 92, filed here.)

"The court was of the opinion that the instruments afterwards reproduced and tested at Philadelphia were 'not the same,' but 'differently constructed'; but the Bell Company's expert, Pope, swore that they differed only in being constructed more carefully, and with better workmanship (Complainant's Reply, p. 176).

"In the opinion of the court in this very case, it is said of Bell's original instrument: 'The particular instrument which he had, and which he used in his experiments did not under the circumstances in which it was tried reproduce the words spoken so that they could be clearly understood, but the proof is abundant and of the most convincing character that other instruments carefully constructed and made exactly in accordance with the specifications, without any additions whatever, have operated and will operate successfully.'"

"The court said the instruments were used in a different way at Philadelphia than at New York ; that is to say, that at New York they rested on a table, while at Philadelphia they were held in the hand. But Prof. Barker testified that he used them both ways at Philadelphia, and that they worked best when standing on the table as they did at New York. (Barker, Ans. 81 and 84 Def. Add. Proofs, p. 28). This evidence is more fully treated in the accompanying brief.

"VIII. *The Construction of the Instruments.*

"The court said that nobody knew the actual construction of the original machines except Drawbaugh himself. But

there is much evidence beside that of Drawbaugh as to their construction, as will be seen by reference to the testimony cited in the accompanying brief, for example, H. K. Drawbaugh could reproduce the machines from memory. (Def., Vol. 1, pp. 566–7, Ans. 129, 130). Steinberger described one from memory. (Def., Vol. 1, pp. 344–6), and so did Schrader (Def. Sur. Reb., pp. 470–1, and see ten others cited in brief).

"*Finally.*

"The court says, in its opinion: 'We do not doubt that Drawbaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity, and that he was experimenting upon that subject,' meaning, as is clear from the context, that he did this before Bell's invention.

"*The Drawbaugh story, then, is no afterthought growing out of Bell's discoveries*, but is based upon the admitted facts of a prior conception of the possibility of electric speech-transmission and prior experiments actually made to accomplish it. The same witnesses who satisfy the judgment of the court as to these facts, identify the machines and testify to their successful working, and are neither impeached nor contradicted as to these additional facts. At another point, referring to Drawbaugh, the court says: 'He was a skilful and ingenious mechanic. . . . He was also somewhat of an inventor, and had some knowledge of electricity. According to the testimony he was an enthusiast on the subject of his 'talking-machine,' and showed it freely to his neighbors and people from the country when they visited his shop.' p. 557 *supra.*

"Taking these admitted facts together, his prior conception of the possibility of electric speech transmission; his experiments to accomplish it; and, during his experiments his enthusiasm about the talking-machine—how can his *enthusiasm* be accounted for? Is it conceivable that enthusiasm resulted from constant failure? Can it be explained on any other reasonable theory than that his machines were producing the successful results about which the corroborating witnesses so abundantly testify? And why should he exhibit the invention so freely to the surrounding public, if it constantly

failed to work when thus exhibited? Did he exhibit it as a failure or as a success? Can his conduct at the time, especially when taken in connection with his contemporary declarations that he had achieved the result, and was going to patent the invention, and wanted financial aid to secure the patents, be reconciled with any other theory than that of success? And is it not clear that the court has erred as to the evidential force of the facts which it admits to have been established?

"On account of the errors above referred to, which will be made more apparent by reference to the accompanying brief, and to the end, therefore, that equity may be done, and that this court may, upon fuller consideration and with the advantage of oral argument, revise its former opinion (if revision be right and proper), your petitioners pray that the court may be pleased to take their suggestions under a careful consideration and grant a rehearing upon the points upon which said decision was based, and grant such other relief and order as in equity and good conscience may be proper.

"New York, May 1st, 1888.

"Lysander Hill,
"George F. Edmunds,
"Don M. Dickinson,
"Charles P. Crosby,
"Henry C. Andrews,
"Of Counsel with Appellants."

There was also filed with this petition a full brief, signed by the same counsel, with many references to the evidence.

Mr. Justice Miller, May 14, 1888, delivered the opinion of the court.

No Justice who united in the opinion of the court having asked for a rehearing, the application is denied.