

[44] Our sources further show wide differences in the attitude of the several circuit courts, and therefore in the district courts subject to each, ranging in 1948-54 from 37% of patents upheld in the 4th and 5th Circuit Courts, to only 2.6% in the 2d, the New York circuit.<sup>29</sup> In consequence, complainants naturally try to bring suit in the favorable circuits.

[45] Whether the courts are too severe is a question, in view of the admitted low quality of patents. We shall take up later (§ 292-300) why the Patent Office is unable to impose higher standards of patentability.

[46] With only about 1% of our patents ever getting a contested court decision, we have to guess from this special sample as to the strength of all patents, and the impact of court decisions upon all. The 1% litigated are all doubtful cases, since a patent that was either clearly valid or clearly bogus or inapplicable would ordinarily not be fought over, and least of all appealed. And they represent inventions of value, either intrinsically or because useful to attack a weak rival firm or inventor. From this selected 1%, of inventions valuable for some reason and of doubtful validity, we have to judge the viability of the other 99%, since there is no other index. Perhaps the best guess is that these patents are rather typical of the rest that matter.

[47] One other lesson of importance is clearly to be read from table 2. The amount of patent litigation has latterly been falling off, notably as counted by patents contested to an appeals court finish.<sup>30</sup> These were 649 in 1925-59, rose to 803 in 1935-59, or 0.4% of the patents granted in those years, and fell to 336 or 0.16% in 1950-54. The *reasons* for less legal fighting are not hard to imagine. The decline in number of patents granted since 1925-29 would account for 6% of it. The probability, which has risen 3:1, that the patentee starting and pushing through a suit will lose it, would inevitably be a factor. The progress of patent pooling, and informal comity between competitors, and compulsory licensing to the Government and others, indeed all the basic factors making for decay of the patent system, would probably cower to reduce the amount of litigation, which will be discussed again in § 263ff. An exception might be the probably rising share of suits which are brought by alleged infringers under the Declaratory Judgments Act.