

tions in 1913 and 1914; but the final decision on priority of invention was not awarded by the Supreme Court until 1934," reminding one of Dickens' *Bleak House* case. "By the time the De Forest patent was upheld, De Forest had sold it and gone through several bankruptcies and left the radio field, while Armstrong had also sold his patents because he said 'I was in danger of being litigated to death,'" ²⁷⁴ One patent, No. 1,423,956, figured in 72 suits. Edward Weston, the great inventor of electrical instruments, dynamos, and lamps, finding one of his creations being universally copied, his ruin threatened and his resources insufficient to tackle GE and Westinghouse, "smartly compromised by starting separate suits against his weaker opponents first, picking them off one by one and gradually establishing a body of evidence by which to confound the big fellows later on. . . . Finally he stood on top." ²⁷⁵ Costs in England in chemical suits were said to be the worst in the world in 1929, ²⁷⁶ amounting, for both parties, to £600-1,000 per day. "Counsel who could grasp chemical facts and present them to a judge effectively from a legal point of view were scarce." American patent suit costs have been estimated as usually \$25,000 per side or more, the Senate subcommittee reported. ²⁷⁷ "The ironic result is that we create a system that is peculiarly valuable in principle to small concerns and individuals, and then price these very people out of the market by putting the cost of obtaining and enforcing their patents beyond their reach."

[267] The competence of judges trained only in Law, to understand and determine questions of fact on the latest frontiers of chemistry and physics, with the aid only of partisan, mutually contradicting experts, is a principle often attacked, which is taken up in ¶ 510 and in Whinery's study No. 8 of the present series. ⁵⁰³

[268] The great costs, delays, and uncertainties of patent litigation lead inevitably to several consequences. Three we have mentioned: the declines of patenting and of litigation, and the strengthening of the strong vs. the weak firms. Add of the ruthless vs. the conscientious. The evidence of charts 1 and 4, showing how the ratio of patents to inventive effort and output has steeply declined in the past 80 years, leaves plenty of further room for this factor to operate, if the litigation situation becomes either worse, or more fully realized. We may cite an instance from Weston again, who really enjoyed litigation, ²⁷⁵ and once had 64 suits in court at the same time. He took out 309 patents in all, but mostly gave up patenting after 1886, when 36 years old, because he concluded it used up too much time and money. ²⁷⁸ He depended almost always thereafter on the year or more of head start which secret invention and development allowed him, and on the unrivaled prestige of his company.

[269] Other inevitable consequences of the burden of litigation must include some measure of turning away from invention altogether, or from its more serious fields needing patent protection, in favor of easy, minor improvements, or to inventing for the Government. And some freelance inventors will go to work for a corporation, or sell their patents to them, as Armstrong and De Forest did, or keep their inventions secret for a while, as can easily be done if they be kept unused and the patent delayed from issuance. In any case we can see that the evil of patent litigation is declining, both from the drastic decay of patenting (ch. 3), and from direct observation of litigation.