

claimed."²⁸⁹ For proving the extent of these faults we might merely refer back to our table 2, which shows that about three-fourths of the patents sued on to a judgment are destroyed by the courts, especially when appealed. The true percent of invalid or uninfringed patents is a mystery, and might be higher or lower, since only the doubtful, borderline cases, as a rule are sued on. Most who have taken a license under a bogus patent are content to share the monopoly, proper or not, or they are debarred from later denouncing the patent, by having signed a frequently inserted clause promising not to contest it. In the common case of "package licensing" they become thus estopped from impugning *any* of the licensor's patents, though they are the people best qualified to do so.²¹⁵ Such a license may be forced on a weaker firm by threat of an infringement suit, or during a trial the alleged infringer may be persuaded by good enough terms to capitulate and either lose the suit or end it by an agreement. We recall the statistics (§ 263)²⁵³ showing only 16% of patent cases are pushed through to a contested judgment by judge or jury. Such a case was very likely the great one of the Bell interests against Western Union.²⁹⁰ These won a 4-3 Supreme Court decision in 1888, despite many signs of fraud and error,²⁹¹ and in the end agreed to pay Western Union 20% of the receipts from all telephone licenses, and to keep out of the telegraph business.²⁹² A long string of patents, however weak some of them might be ascertained to be, used to be a great defense for an industrial monopoly against weaker competitors,²⁹⁷ who could find themselves sued no matter what they did in the monopoly's field. Such weak patents have been dubbed the "scarecrow" type, and have been likened by a chess-player to a serried line of pawns, individually weak but together an impregnable barrier. Recent antitrust decisions, forcing license of whole portfolios of patents, must have considerably

²⁸⁹ Even the otherwise immaculate Patent Office was perhaps involved, since it had pushed through Bell's patent in the extraordinary short time of 3 weeks despite the interference of Gray's caveat on the same invention, filed 5 hours later. (Bell knew something of Gray's work, and was later charged by the Government with adding to his own application elements improperly shown him from Gray's caveat.) What was most extraordinary was that the majority four Supreme Court justices brushed aside all the prior work of Bourseuil, Reis, Gray, and especially Danl, Drawbaugh, Leibtag, N 293, Meucci, N 294, Cammack, N 295, and McDonough²⁹³ have been reported as inventing telephones also. Drawbaugh had an electric telephone working as early as 1867, according to a whole village full of witnesses (126 U.S. 331ff., esp. 339); yet chiefly because (like Bell) he was a man of limited though some electrical learning, and because he had not pushed his invention till Bell did, 4 of the judges brushed aside the unanimous testimony of 70-200 witnesses, an extraordinary procedure, while Justices Field, Bradley, and Harlan would not. Drawbaugh was an ingenious, selfless, and hen-pecked man. His village witnesses had "regarded the matter as more one of curiosity than of public importance." So did Bell's wider public. For the first year after exhibiting his telephone at the Exposition of 1876 Bell received little but derision from it, he despaired of it, and the 2-vol. report of the Exposition made no mention of it. Elisha Gray "left this statement among the papers found after his death: 'The history of the telephone will never be fully written. It is partly hidden away in 20,000 or 30,000 words of testimony and partly lying on the hearts and consciences of a few whose lips are sealed—some in death and others by a golden clasp whose grip is even tighter.'" (Quoted by Petro, p. 367, 8. ftN 9 from MacMeal: *Story of Indep. Telephony*, 1934, p. 11.) Further skulduggery with Dolbear, another telephone inventor and historian, was charged by the Government in a later suit, which was finally dropped without conclusion when most of the patents had expired. Cf. Petro, *op. cit.*, p. 371, etc. Senate *Hearing*, N 329, p. 32; & Hamilton, N 207, his pp. 87-90.

²⁹⁰ C. D. Edwards says "Even conflict between the claims of different applicants need be no serious obstacle to the development of a patent monopoly", since the Pat. Office will grant a patent to either one if they compose their differences and one withdraws. Again, "Large and small competitors alike may be willing to recognize the validity of a patent as an instrument through which prices can be fixed and other monopoly restrictions can be imposed. In consequence, invalid patents may remain unchallenged. That this is so is attested upon occasion by a court decision that nullifies a patent after years of use. Current examples are the tetracycline case (Amer. Cyanamid), Senator Kefauver's proposal for filing interference settlement agreements, which with modifications has passed the House, the Precision Instrument case, Hazel-Atlas case, etc. Businessmen and lawyers habitually classify patents as strong and weak. Edwards, N 252, its pp. 220-2. Cf. also Senate *Hearings*, N 329.