The decisions turning on adequacy of other remedies as a bar to declaratory relief seem grounded in a hesitancy to employ a strange device, especially where its use appears unnecessary.[73] But a consideration of such factors as preservation of evidence and elimination of expensive suits leads to the conclusion that what is legally adequate may not always be expedient. For it hardly seems likely that a plaintiff with a seemingly satisfactory remedy will run the risk of having his suit dismissed by asking a declaratory judgment, unless there are considerations making what appears adequate, inadequate, especially where there is no reason of policy to confine the uses of the declaratory judgment, or to cause a plaintiff expense by dismissing an action merely because another remedy might have been sought. The English and Dominion courts appear to view the declaration with favor, and grant declaratory relief as of course even though other remedies exist.[74] Another reason perhaps for the occasional application of an "inadequacy of other remedy" requirement is a desire to avoid a multiplicity of suits, since a declaratory judgment is not accompanied by execution, although it may be set up in a subsequent suit as res judicata.[75] A declaratory judgment against an insurance company is equivalent to execution, however, since insurance companies are generally responsible. And a declaration is sufficient for an insurer since he usually does not seek a money recovery.

In view of the suspicion with which the declaration is sometimes regarded,[76] it is possible that by a dual process of refusing to issue declarations in unfamiliar situations, because it is said that no controversy exists, and in familiar situations, because traditional remedies are available, the courts may steadily curtail the use of the declaration. Although an opposing trend of substantial vigor is discernible, it is yet too early to predict with assurance what scope the courts will ultimately give the declaratory judgment.

THE COMMODITIES CLAUSE AND THE REGULATION OF INDUSTRIAL RAILROADS

INDUSTRIAL ownership of railroads creates serious problems when those railroads are common carriers or connect with common carriers. Typically, an industrial plant finds it convenient and economical to build a private track to connect with a common carrier. Its own locomotive receives from the common carrier inbound cars loaded with raw materials and distributes them among its various buildings according to the requirements of the manu-

73. Nesbitt v. Manufacturers' Casualty Ins. Co., 310 Pa. 374, 165 Atl. 403 (1933).

74. See cases cited note 28 *supra;* as to American courts see (1932) 32 Col. L. Rev. 536.

75. Borchard, Declaratory Judgments (1934) 9 *et. seq.*

76. *E.g.,* Columbian Nat. Life Ins. Co. v. Foulke, 13 F. Supp. 350 (W.D. Mo. 1936).

facturing process, and delivers finished products to the common carrier in full trainload lots. Thereupon an allowance from the published freight rate will be demanded for the performance of duties which it is claimed the railroad is otherwise bound to perform.[1] The next step will be the extension of the private track to nearby shippers and, perhaps, to other common carriers, whereupon the parent company will incorporate the railway and claim that it is a common carrier. Tariffs will be filed with the Interstate Commerce Commission and through routes and joint rates[2] will be arranged with connecting common carriers for traffic moving over the new railway.[3] When the industrial road[4] connects with several trunk lines, it may secure large divisions of the joint rates by the threat of diverting the parent company's traffic to other lines.[5] Because the railroad industry is subject to heavy fixed charges[6] and because it is impossible to estimate the cost of carrying any particular item of freight,[7] railroads are willing to carry marginal freight at rates that will produce any residue, over and above out-

1. See *e.g.*, Manufacturers Railway Co. v. St. Louis, I. M. & S. Ry. Co., 28 I. C. C. 93, 113 (1913).

2. A through route is an arrangement between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. The through rate may be the sum of the local rates or a joint rate which is less than the sum of local rates. At common law the carriers could not be compelled to establish through routes and joint rates. Atchison, T. & S. R. R. Co., v. Denver & N. O. R. R. Co., 110 U. S. 667 (1884). But the Hepburn Act [34 STAT. 590 (1906), 49 U. S. C. 15(3) (1934)] empowered the Commission to require the establishment of through routes and joint rates.

3. See *e.g.*, Industrial Railways Case, 29 I. C. C. 212, 242-3 (1914).

4. "An industrial railway may be defined as an incorporated or unincorporated railway controlled by some manufacturing or mining industry, the major portion of whose traffic is furnished by the controlling company. Such a road is distinguished from a commercial road in that it is not primarily for the sale of transportation; it is distinguished from a purely private track or siding in that the operation of its property gives rise to a service to which some payment or allowance may be assigned." Annual Report of Interstate Commerce Commission (1910) 33.

5. The shipper's privilege to choose the railroad by which his property shall be transported is expressly recognized by statute. 36 STAT. 553 (1910), 49 U. S. C. § 15(8) (1934).

6. It has been variously estimated that from one-tenth to two-thirds of railway expenditures are independent of the volume of traffic. ACWORTH, ELEMENTS OF RAILWAY ECONOMICS (1905) 55; RIPLEY, RAILROADS, RATES AND REGULATION (1927) 55; Lorenz, *Cost and Value of Service in Railroad Rate-Making* (1915) 30 QUART. J. ECON. 205, 219.

7. Most standard treatises on railroads have emphasized the influence of these factors on rate structures. DAGGETT, PRINCIPLES OF INLAND TRANSPORTATION (1928) ch. xx; FENELON, RAILWAY ECONOMICS (1932) ch. x; JONES, PRINCIPLES OF RAILWAY TRANSPORTATION (1927) ch. iv-v; LOCKLIN, ECONOMICS OF TRANSPORTATION (1935) ch. vii; 3 B. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 313-329; 2 TAUSSIG, PRINCIPLES OF ECONOMICS (1911) ch. 60; VANDERBLUE & BURGESS, RAILROADS (1923) ch. vii.

of-pocket costs, which may be applied to fixed charges,[8] and consequently are under pressure to grant large allowances and divisions to industrial roads in order to secure the traffic moving over them. This pressure makes for considerable increases in allowances and divisions to industrial roads and shippers. What is involved is an irregular reduction of a high fixed price in response to competition; while the reduction is economically desirable from the point of view of carrier and shipper, and perhaps of the public, it inevitably results in a freight rate preference in favor of the industry commanding the high division and against its competitors, a discrimination inconsistent with the policy of the Interstate Commerce Act. A spread of these practices, moreover, may threaten the general rate levels of entire regions. Furthermore, unless losses occasioned by the extreme forms of this practice are recouped by raising rates on other articles,[9] the trunk lines may be seriously weakened,[10] with consequences of weakened credit standing, and perhaps impaired service, depending on the road's general strength.[11] Secondly, such a combination endangers the advantages accruing from the workings of the competitive system; for, when the same business unit is financially interested in both transportation and production, the usual tests of success in either of the functions become indecisive.[12] Furthermore, industrial control of railroads facilitates violations of the distance principle of rate-making, under which geographical advantages should find expression in freight charges.[13] Finally, since rate reductions on the type of freight shipped by the parent company tend to remove its competitive advantage, industrial common carriers may often exert pressure to maintain excessive general rates, to the injury of competitors who lack such control over railroad service.[14] However, these practices are not without economic justifica-

---

8. FENELON, *op. cit. supra* note 7, at 125; LOCKLIN, *op. cit. supra* note 7, at 144-6; 2 TAUSSIG, *op. cit. supra* note 7, at 378.

9. See Industrial Railways Case, 29 I. C. C. 212, 217 (1914).

10. That these practices result in huge depletion of railroad revenue is shown by the fact that the Pennsylvania Railroad paid in one year $1,019,910.41 to only ten industrial railroads. See Industrial Railways Case, 29 I. C. C. 212, 214 (1914). The depression has made this depletion of revenue a serious problem. One of the stated purposes of the Emergency Transportation Act was to "control allowances . . . to the end that undue impairment of net earnings may be prevented." 48 STAT. 212 (1933), 49 U. S. C. § 254 (1934).

11. See FENELON, *op. cit. supra* note 7, at 120; SHARFMAN, THE AMERICAN RAILROAD PROBLEM (1921) 286.

12. JONES, *op. cit. supra* note 7, at 118; LOCKLIN, *op. cit. supra* note 7, at 481; SHARFMAN, RAILWAY REGULATION (1918) 23-5.

13. 2 TAUSSIG, *op. cit. supra* note 7, at 363-6.

14. An officer of one industrial common carrier wrote that the parent company should not initiate "rates for its own constituent companies that serve to reduce the rates of other Railroads on shipments made by its patrons and competitors of the Steel Company." United States v. Elgin, J. & E. Ry. Co., 56 Sup. Ct. 841 (1936), Record on Appeal, p. 145.

tion. Price reduction by rebate and discrimination may be the only alternative to monopolistically high freight rates.[15] By performing its own transportation, moreover, the owning industry may reduce its costs of production, and to the extent that these are reflected in lower prices, the consumer will gain correspondingly. Furthermore, since privately owned industrial sidings provide extra storage tracks and relieve trunk lines of the necessity of increasing their terminal facilities, the owners might well be compensated for the service they perform.[16]

Congress has given the Interstate Commerce Commission jurisdiction to regulate the problem of allowances and divisions to industrial roads. By the Hepburn Act the Commission was given authority to set reasonable allowances to shippers who perform transportation services[17] and reasonable divisions between common carriers, but this latter power became operative only when the carriers could not agree between themselves and appealed to the Commission.[18] But, where the divisions amounted to rebates, the Supreme Court announced that the Commission had power to regulate them under its general authority to prevent discriminations.[19] The Transportation Act of 1920, however, clarified the Commission's uncertain jurisdiction over divisions of joint rates by giving it authority to instigate proceedings and set divisions in the public interest.[20]

Both as to allowances to shippers and as to divisions to industrial roads, the Commission is first confronted with the preliminary problem of determining the dividing point between transportation, which the carrier must perform, and industrial service, which is private in character. Carload freight is ordinarily delivered in one of two ways: the car may be placed upon a public team track where the consignee may come and call for his freight; or it may be placed upon a private siding beside the consignee's plant.[21] In the latter situation the carrier's common law duty is fulfilled when the car is switched onto the siding clear of the main track;[22] in practice, however,

15. See Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions* (1936) 45 YALE L. J. 1339, 1346.

16. See Associated Jobbers of Los Angeles v. Atchison, T. & S. Ry. Co., 18 I. C. C. 310, 317 (1910); Railroad Commissioners v. Florida E. C. Ry. Co., 42 I. C. C. 616, 622 (1917); 1 BARNES, INTERSTATE TRANSPORTATION (1910) § 341.

17. 34 STAT. 590 (1906), 49 U. S. C. § 15(13) (1934). An amendment [36 STAT. 553 (1910)] specifically recognizes the Commission's authority to institute proceedings under this section.

18. 34 STAT. 589 (1906).

19. O'Keefe v. United States, 240 U. S. 294 (1916); see Tap Line Cases, 234 U. S. 1, 28 (1914).

20. 41 STAT. 486 (1920), 49 U. S. C. § 15(6) (1934).

21. See Associated Jobbers of Los Angeles v. Atchison, T. & S. Ry. Co., 18 I. C. C. 310, 315 (1910); United States Cast Iron Pipe & Foundry Co. v. Director General, 57 I. C. C. 677, 682 (1920).

22. See Industrial Railways Case, 29 I. C. C. 212, 225-7 (1914).

the carriers "spot" the cars, that is, place them in position for loading or unloading at the plant, and this extra service is taken into consideration in fixing the general level of rates.[23] Under this system the carrier's duty to spot the cars is conditional upon the carrier's ability to operate conveniently over the shipper's facilities[24] and upon the shipper's willingness to allow the carrier to perform the service.[25] Furthermore, the carrier's service in this respect is limited to what is termed the "equivalent of team-track spotting:"[26] that is to say that, where an industrial concern owns a huge network of intra-plant tracks, and delivery by the trunk line carrier to the various buildings would entail more expense than delivery at the public team track, transportation ends with delivery to some reasonably convenient point of interchange and the movement of cars beyond that point is considered an industrial service.[27]

As many large industrial concerns must have an engine to do intra-plant switching and will prefer to utilize the engine's idle time in car spotting if they may receive an allowance, the trunk lines are under pressure to replace the spotting services with allowances. Since the carrier's privilege to employ an agent to perform its transportation duties seems settled,[28] it may arrange for shippers to do their own spotting and give them compensation in the form of allowances from the published rates, but only for the performance of that part of the spotting that is a service of transportation.[29] But there is no absolute duty to grant allowances. The shipper's right to secure them is conditioned upon proof that the shipper is willing to have the carrier perform the service[30] and that the carrier is able but refuses to spot the

23. See Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105 (1909); Associated Jobbers of Los Angeles v. Atchison, T. & S. Ry. Co., 18 I. C. C. 310, 314 (1910).

24. Roach Creek Coal Co. v. Ann Arbor R. R. Co., 142 I. C. C. 579 (1928); Mumby Lumber & Shingle Co. v. Chicago, M. & St. P. & P. R. R. Co., 200 I. C. C. 261 (1934); see Florence Pipe Foundry & Machine Co. v. Pa. R. R. Co., 188 I. C. C. 215, 216 (1932).

25. General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237 (1908); Allowances to Texas Gulf Sulphur Co., 96 I. C. C. 371 (1925).

26. The spotting service rendered should not be greater than that expended in placing cars on team tracks for consignees who call for their property. See United States Cast Iron Pipe & Foundry Co. v. Director General, 57 I. C. C. 677, 683 (1920). Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11 (1935).

27. General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237 (1908); Interlake Iron Corp. Terminal Allowances, 209 I. C. C. 51 (1935).

28. See Ellis v. Interstate Commerce Commission, 237 U. S. 434, 444 (1915); United States v. Fruit Growers Express Co., 279 U. S. 363, 368 (1929).

29. General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237 (1908); Ford Motor Co. Terminal Allowances, 209 I. C. C. 77 (1935).

30. General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237 (1908); Marting Iron & Steel Co. Case, 48 I. C. C. 620 (1918); Allowances to Texas Gulf

cars.[31] In New England and the Southeast the carriers have uniformly refrained from granting allowances.[32] But in other sections of the country where there is a general practice to grant allowances, they must be granted to each qualified shipper upon demand in order to avoid discrimination.[33] In the past the Commission has been more anxious to prevent such preferences than to determine whether or not any particular allowance was justified.[34] But with the advent of the depression the Commission, in order to preserve carrier revenue, has turned with renewed vigor to this problem of determining which part of the spotting service is transportation for which compensation may be granted if performed by the shipper.[35]

But this problem is further complicated by the fact that many shippers have incorporated so-called common carriers[36] to perform the spotting service and have filed tariffs for transferring cars from the trunk lines to their own plant doors. Since it has been the practice of each trunk line to place the shippers in a given rate district on a parity whether located on its own line or that of another carrier, the trunk lines have absorbed the transfer charge of the industrial road by paying the industrial road its switching charge out of the line haul tariff.[37] The through routes and joint rates established

Sulphur Co., 96 I. C. C. 371 (1925). The shipper may prefer to do his own spotting at his own expense because the common carrier would interfere with the operation of the plant engine if it uses the tracks when the latter is attempting to perform intra-plant switching.

31. United States Cast Iron Pipe & Foundry Co. v. Director General, 62 I. C. C. 339 (1921); Mumby Lumber & Shingle Co. v. Chicago, M., St. P. & P. R. R. Co., 200 I. C. C. 261 (1934).

32. See Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11, 33-4 (1935).

33. United States Cast Iron Pipe & Foundry Co. v. Director General, 57 I. C. C. 677 (1920); Allegheny Steel Co. v. Director General, 60 I. C. C. 575 (1921).

34. United States Cast Iron Pipe & Foundry Co. v. Director General, 57 I. C. C. 677 (1920); Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81 (1920); Allegheny Steel Co. v. Director General, 60 I. C. C. 575 (1921); Florence Pipe Foundry & Machine Co. v. Pa. R. R. Co., 188 I. C. C. 215 (1932).

35. The Commission has just recently investigated the delivery services at some 200 industrial plants. Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11 (1935). Forty-two orders finding the allowances unlawful were issued. Twenty-one of the orders have been attacked in the courts. See Annual Report of the Interstate Commerce Commission (1935) 27. Apparently only one case, refusing a preliminary injunction, has so far appeared in the reports. Koppers Gas & Coke Co. v. United States, 11 F. Supp. 467 (D. Minn. 1935).

36. Some industrial units have been forced to set up common-carriers in order to condemn a right of way to the trunk line tracks. See Industrial Railways Case, 29 I. C. C. 212, 234-5 (1914); Second Industrial Railways Case, 34 I. C. C. 596, 602 (1915).

37. See Second Industrial Railways Case, 34 I. C. C. 596, 605 (1915); National Tube Co. v. Lake Terminal Railroad Co., 55 I. C. C. 469, 479 (1919). But see Manufacturers Ry. Co. v. United States, 246 U. S. 457, 463 (1918).

by this device[38] shift to the common carrier the costs of that service which was formerly performed by the plant railroad at the expense of the industrial unit.[39]

In this situation the Commission's problem is to decide whether services that were formerly industrial may become an integral part of the national transportation system when the industrial road assumes all the outward appearances of a common carrier. The Commission's first answer to this query was in the affirmative,[40] but it was soon forced to look through legal forms to determine whether or not the holding out as a common carrier by the railroad subsidiary of an industrial corporation was genuine or a mere subterfuge to secure divisions of joint rates, which it is illegal to grant to private carriers.[41] When the Commission analyzed the relation of a large number of tap lines in the lumber district to their parent lumber companies, it ruled that as to freight shipped by the parent company the roads were plant facilities and not entitled to arrange and divide joint rates, but that as to freight shipped by others, they were common carriers and entitled to divisions.[42] The Supreme Court refused to uphold a result which would countenance such flexibility in the common carrier concept.[43] In this manner the Commission was relegated to a policy of regulation instead of one of prohibition.[44] But this decision did not force the Commission to return to its early attitude that compliance with legal forms transforms an industrial road into a common carrier. Instead it announced that only those industrial roads which were "bona fide" common carriers were entitled to arrange divisions[45] and that such divisions should be based on the length of the

38. For another device by means of which industrial common carriers secure preferential treatment for their parent companies, the per diem reclaim, see Industrial Railways Case, 29 I. C. C. 212, 231-3 (1914); Rules for Car-Hire Settlement, 160 I. C. C. 369, 401 (1930), supplemental report, 165 I. C. C. 495 (1930).

39. Of course, if the parent corporation was already receiving allowances as a shipper, for the performance of "transportation" service, the cost would have been previously shifted to the common carrier.

40. See Central Yellow Pine Ass'n v. Vicksburg, S. & P. R. R., 10 I. C. C. 193, 215 (1904).

41. Central Yellow Pine Ass'n v. Vicksburg, S. & P. R. R. Co., 10 I. C. C. 193 (1904).

42. Tap Line Case, 23 I. C. C. 277 (1912).

43. Tap Line Cases, 234 U. S. 1 (1914); United States v. Butler County R. R., 234 U. S. 29 (1914).

44. The Supreme Court's preference of regulation over prohibition has been shown in other situations. The Commission's rule that owners of grain elevators could not receive elevation allowances on grain which they owned was also annulled. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 (1911). See 2 SHARFMAN, *op. cit. supra* note 7, at 142-175.

45. Industrial Railways Case, 32 I. C. C. 129 (1914). The difficulty of determining whether or not an industrial road is a "bona fide" common-carrier may be illustrated from two cases. In the first the Commission found the road to be a plant facility; in

haul, the most definite measure of cost of service.[46]

At best, regulation of divisions to industrial roads would seem a poor and costly substitute for outright prohibition. Since there are some two thousand industrial railroads in the United States,[47] and since the reasonableness of each division to each road must be separately investigated, enormous administrative difficulties and expenses are involved,[48] for numerous complex factors impinge upon the problem of investigating general rate levels and considering the justification of specific deviations from them.[49] Upon occasion, preferences other than unduly large divisions have been uncovered.[50] Although the carriers may appeal to the Commission to set divisions, such a possibility is unlikely; for when the industrial roads attempt to obtain by bargaining more than the reasonable division that the Commission will

the second a common carrier. The Lake Terminal Case, 50 I. C. C. 489 (1918); National Tube Co. v. Lake Terminal R. R. Co., 55 I. C. C. 469 (1919), dissenting opinion, 56 I. C. C. 272 (1920).

46. Tap Line Case, 31 I. C. C. 490 (1914). This order tended to produce inefficient utilization of transportation facilities. Since divisions varied with the length of the haul, industrial roads were encouraged to use that trunk line whose connection was furthest from the plant even though it was farther from the intended destination than the connection of some other trunk line. O'Keefe v. United States, 240 U. S. 294 (1916); Divisions Received by Brimstone R. R. & Canal Co., 68 I. C. C. 375 (1922). The Commission has attempted to end this evil by ordering that divisions be measured by the distance to that junction with a trunk line which is over the direct route of movement toward final destination. Wasteful Services by Tap Lines, 53 I. C. C. 656 (1919), Supplemental Reports, 58 I. C. C. 450 (1920), 89 I. C. C. 327 (1924).

47. Of 2,410 industrial railroads investigated by the Commission, 364 derived revenue from local rates and 449 from divisions of through rates or allowances from common carriers. Annual Report of Interstate Commerce Commission (1910) 33. Counsel in one case was able to list approximately 250 terminal railroads controlled through stock ownership by the principal shipper over their roads. United States v. Elgin, J. & E. Ry. Co., 56 Sup. Ct. 841 (1936), Record on Appeal, p. 417-25.

48. The Lake Terminal R. R. Co. within six years appeared in five proceedings before the Commission. Industrial Railways Case, 29 I. C. C. 212 (1914); *ibid.*, 32 I. C. C. 129 (1914); Second Industrial Railways Case, 34 I. C. C. 596 (1915); Lake Terminal Case, 50 I. C. C. 489 (1918); National Tube Co. v. Lake Terminal R. R. Co., 55 I. C. C. 469 (1919), dissenting opinion 56 I. C. C. 272 (1920).

49. The following are a few of the cases in which the Commission has investigated the reasonableness of divisions to industrial roads. Lum v. Great Northern Ry. Co., 33 I. C. C. 541 (1915); Northampton & Bath R. R. Co. Case, 41 I. C. C. 68 (1916); American Steel & Wire Co. v. Newburgh & S. S. Ry. Co., 55 I. C. C. 353 (1919); Pittsburgh, A. & M. R. R. R. Co. v. Director General, 57 I. C. C. 1 (1920); Chicago Short Line Ry. Case, 58 I. C. C. 561 (1920); Manufacturers' Junction Ry. Co. Case, 58 I. C. C. 666 (1920); Jones & Laughlin Steel Co. v. Director General, 60 I. C. C. 325 (1921).

50. For example at one time the Chicago, Lake Shore & Eastern, a U. S. Steel Co. industrial road, maintained without expense to the Illinois Steel Co., another U. S. Steel Co. subsidiary, the miles of track within its private plant and tried to charge these to operating costs. See *In re* Divisions of Joint Rates, 10 I. C. C. 385, 397 (1904).

allow, the trunk lines are reluctant to appeal to the Commission lest they antagonize the industrial owner and lose its freight.

A new method of prohibiting divisions to industrially controlled roads recently attempted is the application of the commodities clause of the Interstate Commerce Act, which prohibits railroads to transport in interstate commerce articles in which they have an interest, direct or indirect.[51] Added as an amendment to the Hepburn Act to wipe out monopoly[52] and to remove the danger to the rate structure[53] caused by railroad control of the anthracite coal mines, the clause seems to have been aimed at railroad ownership of industrial units rather than at industrial control of transportation facilities. Its treatment by the courts has been far from consistent. The Supreme Court upheld its constitutional validity[54] in the first test case, but at the same time emasculated it by holding that it does not prohibit a railroad from transporting products produced (1) by the railroad but sold before carriage or (2) by a bona fide corporation whose capital stock is owned by the railroad.[55] This decision led to the reorganization of many corporate structures so that the benefits of common ownership might be retained through stock ownership. Although the separation of the coal and transportation industries into two distinct corporations removed one of the worst abuses by necessitating two bookkeeping systems which made it possible to determine whether the discrimination came from rebates or from loss as a producer, the basic problem in coal competition still remained.[56] By charging its wholly owned coal company the standard freight rate, the railroad would appear to avoid discrimination; yet the coal company might

51. 34 STAT. 585 (1906), 49 U. S. C. § 1(8) (1934).

52. For an outline of this development see BOGEN, THE ANTHRACITE ROADS (1927); JONES, THE ANTHRACITE COAL COMBINATION IN THE UNITED STATES (1914); KIBLER, THE COMMODITIES Clause (1916) Ch. II; Comment (1932) 41 YALE L. J. 439.

53. New York, N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361 (1906).

54. It was said that the power to regulate interstate commerce does not include the power to exclude from such commerce an article not inherently dangerous or harmful. United States v. Delaware & H. Co., 164 Fed. 215 (C. C. E. D. Pa. 1908). It was also suggested that the commodities clause might violate due process of law. Since the railroad-owned coal properties were mortgaged, the railroads might be deprived of all revenue from the coal lands if the bondholders refused to consent to a sale. Lewis, *Constitutional Questions Involved in the Commodity Clause of the Hepburn Act* (1908) 21 HARV. L. REV. 595. But see Hand, *The Commodities Clause and the Fifth Amendment* (1909) 22 HARV. L. REV. 250.

55. United States v. Coal Roads, 213 U. S. 366 (1909); Anonymous, *The Commodities Clause Decision* (1909) 9 COL. L. REV. 523; Marshall, *The Commodities Clause* (1909) 17 J. POL. ECON. 448; (1909) 9 COL. L. REV. 534; (1909) 13 LAW NOTES 41.

56. See *In re* Relation of Common Carriers Subject to the Act to Regulate Commerce to Coal and Oil and the Transportation Thereof, 31 I. C. C. 193, 213 (1914); *In re* Rates for Transportation of Anthracite Coal, 35 I. C. C. 220, 254 (1915).

sell coal below cost and undercut competitors with no loss to the system as a whole, for the loss on coal sales would be recouped from profits on transportation. Furthermore, railroads were still under the incentive to prefer the railroad controlled coal company as a shipper with better service and more cars in times of shortage.[57] In later cases, however, the Supreme Court adopted a more realistic approach, holding that administrative control of the subsidiary by the parent and the mingling of the affairs of the two corporations brought the clause into operation.[58] The policy adopted seems to have been that it is not power but the abuse of power that is forbidden and, therefore, that each case must be decided on its own facts. Such an interpretation would seem contrary to the wording of the clause, but gives the court a large measure of discretion in applying it. Although this policy may seem unsatisfactory, it has gone far to accomplish the desired result since railroad control of industries has largely ceased to exist.[59]

Industrial ownership of railways would seem governed by the commodities clause, which prohibits a railroad company to transport in interstate commerce "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, . . . or in which it may have any interest direct or indirect."[60] Whether the producing company is owned by the railroad, or the railroad by the producing company, the railroad may be said to have an "indirect" interest in the article transported. But, since the clause prohibits only carriage in

57. For examples of abuses see Coxe Bros. & Co. v. Lehigh Valley R. R. Co., 4 I. C. C. 535 (1891) (railroad sells coal in competition with complainant at less than cost plus published freight rate); Red Rock Fuel Co. v. Baltimore & O. R. R. Co., 11 I. C. C. 438 (1905) (refusal to permit side track connection with complainant's mine); Powhatan Coal & Coke Co. v. Norfolk & Western Ry. Co., 13 I. C. C. 69 (1908) (system of car distribution that discriminates in favor of railroad owned mines); Hillsdale Coal & Coke Co. v. Pa. Ry. Co., 19 I. C. C. 356 (1910) (railroad spiked down complainant's siding and refused to deliver any cars).

58. United States v. Lehigh Valley R. R. Co., 220 U. S. 257 (1911); United States v. Delaware, L. & W. R. R. Co., 238 U. S. 516 (1915), (1916) 81 CENT. L. J. 39, (1915) 14 MICH. L. REV. 49; United States v. Reading Co., 253 U. S. 26 (1920), (1920) 69 U. OF PA. L. REV. 66; United States v. Lehigh Valley R. R. Co., 254 U. S. 255 (1920), (1921) 19 MICH. L. REV. 553.

59. Most of the large coal roads have sold their coal properties to corporations whose stock is held by the general public. A few still retain their coal mines but the distribution has been turned over to outside corporations. However, some community of interest still remains because of common control by banking firms. BOGEN, *op. cit. supra* note 52, at 226–40. Likewise railroad owned oil properties have been sold to independent corporations. Venner v. Southern Pacific Co., 279 Fed. 832 (C. C. A. 2d, 1922).

60. 34 STAT. 585 (1906), 49 U. S. C. § 1(8) (1934). Congress intended to draw no distinction between industrially owned and other common carriers. An amendment designed to limit the clause to carriers whose principal business was that of a common carrier was rejected. 40 CONG. REC. 7015–7 (1906).

interstate commerce,[61] it would seem that before the clause may be applied the industrial road's services must be services of transportation connected with that commerce and not merely part of the industrial process.

In the first case in which an attempt was made to prohibit industrial control over railroads under the commodities clause the carrier was clearly engaged in interstate commerce, but the Supreme Court, with three justices dissenting, refused to hold the practices at issue within the ban of that clause. Suit was brought by the United States to restrain the defendant railroad, all of whose capital stock was owned by the United States Steel Corporation, a holding company, from carrying articles mined, manufactured, or owned by other subsidiaries of the Steel Company, alleging that such transportation constituted a violation of the commodities clause.[62]

The suit appears to be a test case to determine whether or not the commodities clause applies to industrial railroads.[63] Undertaken at the instigation of the Interstate Commerce Commission,[64] it does not represent a radical departure from its former policy with respect to the regulation of divisions of joint rates. Balked in its earlier attempts to prohibit divisions to industrial common carriers, the Commission has not abandoned its preference of prohibition for detailed regulation. Although the enforcement of the commodities clause was left exclusively to the Department of Justice,[65] the Commission has indicated its belief that industrially controlled railroads fall within the prohibition of the commodities clause,[66] and has refused industrial companies permission to build short railroads connecting a plant or mine with trunk lines on the ground that transportation of the owners' products would be a violation of the commodities clause.[67] Furthermore, the Elgin,

61. Sisters of Providence v. Lower Vein Coal Co., 198 Ind. 645, 154 N. E. 659 (1926); Central Trust Co. v. Pittsburg, S. & N. R. R. Co., 52 Misc. 195, 101 N. Y. Supp. 837 (1906).

62. United States v. Elgin, Joliet & Eastern Ry. Co., 56 Sup. Ct. 841 (1936), (1936) 36 Col. L. Rev. 1175.

63. (1930) 88 Railway Age 1600. A similar suit under the commodities clause was instituted against the Montour R. R. Co. on Oct. 31, 1933. Annual Report of Interstate Commerce Commission (1933) 44. At the last report it was still pending. *Ibid.* (1935) 53.

64. Annual Report of Interstate Commerce Commission (1931) 15; *ibid* (1933) 44.

65. Ketchum v. Denver & R. G. R. R. Co., 248 Fed. 106 (C. C. A. 8th, 1917). The Commission has refused to entertain complaints alleging a violation of the commodities clause. St. Louis, T. & E. R. R. Co. Case, 57 I. C. C. 371 (1920); American Salt & Coal Co. v. Chicago, R. I. & P. Ry. Co., 126 I. C. C. 7 (1927); see International Harvester Co. v. New York C. R. R. Co., 101 I. C. C. 89, 90 (1925). But see Valley & S. R. R. Co. v. Southern Pacific Co., 53 I. C. C. 397, 399 (1919).

66. See Industrial Railways Case, 32 I. C. C. 129, 132 (1914); Second Industrial Railways Case, 34 I. C. C. 596, 605 (1915). But see Adriatic Mining Co. v. Chicago & N. W. R. R. Co., 78 I. C. C. 611, 619 (1923).

67. Construction of Line by Jefferson Southwestern, 76 I. C. C. 778 (1923), rehearing, 86 I. C. C. 796 (1924); Lake Decatur & E. R. R. Co. Proposed Acquisition,

Joliet & Eastern Railroad was probably chosen as a defendant because it is not completely a one industry road.[68] It operates what is essentially a transfer route around Chicago connecting with every railroad entering the city. It also connects with all the subsidiaries of the United States Steel Company in the Chicago area, and sixty percent of its tonnage is carried to and from these subsidiaries. Since its route does not extend beyond the Chicago area,[69] its principal function with regard to Steel Company freight is to carry it to connecting trunk lines and receive divisions of joint rates. Although most of the road's freight comes from subsidiaries of the Steel Company, the government was able to argue that the Elgin is not what is commonly called an industrial road,[70] and in this manner attempted to conceal the new application of the commodities clause.

The majority of the Court, however, assumed, and the minority expressly declared, that the clause applies to industrial railroads. Facing the relationship of the railroad to the parent industrial corporation, all the justices agreed that mere stock ownership is not the test by which the legality of the carriage is to be determined. Whether or not the railroad has an illegal interest in the goods transported is a question of fact to be decided by examining the degree of control exercised by the parent company over the railroad in addition to the control normally permissible through stock ownership. Six justices upheld the finding of the District Court that "no single piece of evidence taken alone, nor all taken together and considered as a whole, warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation in the sense that the defendant and

175 I. C. C. 405 (1931); Tittabawassee R. R. Co. Proposed Construction, 189 I. C. C. 563 (1933). *Contra:* Upper Merion & P. R. R. Co. Acquisition, 166 I. C. C. 351 (1930).

68. Another factor that may account for the suit is the fact that Elgin, Joliet & Eastern since 1920 has been granting allowances on an increasingly large scale and has forced the other carriers in the Chicago area to follow suit. See Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11, 37 (1935).

69. The Elgin has a trackage agreement with the Chicago & Eastern Illinois Railroad Co. whereby the former is granted the privilege of operating over the latter's right of way to and from the Steel Company's mines in Southern Illinois. To be sure the subsidiaries of the Steel Company pay the Elgin the same rates that other shippers pay the Chicago & Eastern for a similar haul. But, as the Steel Company receives the profits in dividends, it acquires an advantage over competitors to the extent that the divisions, which the Chicago & Eastern would otherwise receive, exceed the amount of the rental plus the cost of operating the trains over the Chicago & Eastern's tracks. See *In re* Relation of Common Carriers to Coal & Oil and the Transportation Thereof, 31 I. C. C. 193, 210 (1914). But see *In re* Divisions of Joint Rates and Other Allowances to Terminal Railroads, 10 I. C. C. 385, 404 (1904), where it was said concerning this lease, "If the Steel Trust can build and operate a railroad cheaper than it can hire transportation from some other railroad, that is its privilege . . ."

70. Brief for appellant, p. 105–14; (1936) 57 TRAFFIC WORLD 685.

the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation."[71] The dissent, however, believed that enough domination and control had been shown to bring the transportation within the prohibition of the commodities clause.

The majority declared that the commodities clause is applicable only when some measure of control more direct than stockholding accompanies stock ownership, and seemed to be requiring a quantum of control sufficient to charge the parent for the debts or torts of the subsidiary; but this view seems highly insensitive to the underlying policy of the statute that common carriers should have no interest that conflicts with their duty to treat all shippers alike.[72] Because the carrier has an incentive to discriminate in such a situation and because such discriminations are difficult to uncover, it might well have been held that to apply the language and fulfill the policy of the act required the conclusion that stock ownership, at least when considerable enough to support an inference that controlling power exists, creates the forbidden "interest." But however much such a view of the commodities clause might simplify administration of the Act, the Supreme Court was already committed to the view that stock ownership was not enough to make it applicable. In no previous case in which it considered the issue, however, had the court determined that the measure of control needed to bring the clause into operation was lacking.

Courts have been reluctant to disregard the corporate entity when the formalities of separate existence have been complied with in private litigation where attempts have been made to hold parent companies for torts[73] and on contracts[74] of subsidiaries, or to obtain jurisdiction over the parent by service on the subsidiary,[75] or to prove a parent's claim in the bankruptcy or receivership of its subsidiary.[76] But, when two corporations have been so assimilated in administration that they may be considered one, or when the

71. United States v. Elgin, Joliet & Eastern Ry. Co., 11 F. Supp. 435, 444 (N. D. Ill. 1935).

72. See United States v. Delaware, Lackawanna & W. R. R. Co., 238 U. S. 516, 525 (1915); United States v. Reading Co., 253 U. S. 26, 60 (1920).

73. Friedman v. Vandalia R. R. Co., 254 Fed. 292 (C. C. A. 8th, 1918); Berkey v. Third Avenue Ry. Co., 244 N. Y. 84, 155 N. E. 58 (1926); Bergenthal v. State Garage & Trucking Co., 179 Wis. 42, 190 N. W. 901 (1922); see Douglas & Shanks, *Insulation From Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193, 195-210.

74. Majestic Co. v. Orpheum Circuit, Inc., 21 F. (2d) 720 (C. C. A. 8th, 1927); Marsh v. Southern New Eng. R. R. Co., 230 Mass. 483, 120 N. E. 120 (1918); *cf.* First Nat'l Bank of Seattle v. Walton, 146 Wash. 367, 262 Pac. 984 (1928); see Douglas & Shanks, *loc. cit. supra* note 73, at 210.

75. Cannon Mfg. Co. v. Cudahy Pkg. Co., 267 U. S. 333 (1925); Selbert v. Lancaster Chocolate & Caramel Co., 23 F. (2d) 233 (C. C. A. 6th, 1928); see H. R. REP. No. 2789, 71st Cong., 3rd Sess. (1931) 13.

76. Duffy v. Treide, 75 F. (2d) 17 (C. C. A. 4th, 1935); *cf.* Wheeler v. Smith, 30 F. (2d) 59 (C. C. A. 9th; 1929); see Comment (1936) 45 YALE L. J. 1471.

parent has exercised such control over its subsidiary that the former may be said to operate the latter, claimants against the subsidiary have reached the parent despite the separate identity of the two corporations.[77] There is no reason, however, why the large measure of control necessary to break down the corporate entity in suits involving private interests should be required in the *Elgin* case, where separate incorporation is part of a scheme to reach an end prohibited by statute.[78] In practice the courts have recognized the validity of such a distinction between the public and the private law contexts in which the parent-subsidiary problem appears, and have often disregarded the corporate entity with little or no evidence of control when necessary to enforce the policy of the law.[79]

But even if the strict test of control is applied to this situation, as the Supreme Court indicated, it would seem to have been satisfied in the *Elgin* case. Although there were no interlocking directorates nor common officers, although the accounts of the two corporations were strictly separated, and although the Elgin had an adequate capital structure, there was a large measure of community of interest evidenced by constant requests by the Elgin's officers for advice from the Steel Company's officers, and consequent participation by the parent in the executive and policy-making activities of the subsidiary. There was considerable evidence of direct control. Dividends were declared only with the consent of the Steel Company's officers; surplus funds were deposited with the Steel Company; and the Elgin, like all other subsidiaries of the Steel Corporation, was required to obtain the approval of the Steel Company's finance committee before making any capital expenditures over $5,000.[80] There was, moreover, some evidence of commingling of corporate affairs and of representation that the separate corporate

77. Luckenback S. S. Co. v. Grace & Co., 267 Fed. 676 (C. C. A. 4th, 1920); Costan v. Manila Electric Co., 24 F. (2d) 383 (C. C. A. 2d, 1928); Centmont Corp. v. Marsch, 68 F. (2d) 460 (C. C. A. 1st, 1933); Gordon v. Baton Rouge Stores Co., 168 La. 247, 121 So. 759 (1929); Ross v. Pa. R. R. Co., 106 N. J. Law 536, 148 Atl. 741 (1930).

78. LATTY, SUBSIDIARIES & AFFILIATED CORPORATIONS (1936) c. 2; Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1925) 14 CALIF. L. REV. 12, 14. Incorporation was not resorted to with any intent to avoid the operation of the commodities clause since the Steel Company acquired control of the Elgin in 1901, five years before the clause was enacted. However, intent would seem to be immaterial since the clause was applied in United States v. Reading Co., 253 U. S. 26 (1920), where a similar corporate organization was formed in 1896.

79. Linn & Lane Timber Co. v. United States, 236 U. S. 574 (1915); Chicago, M. & St. P. Ry. Co. v. Minneapolis C. & C. Ass'n, 247 U. S. 490 (1918); United States v. Walter, 263 U. S. 15 (1923); United States v. Milwaukee Ref. Transit Co., 142 Fed. 247 (C. C. E. D. Wis. 1905); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169 (1892); *cf.* Northern Securities Co. v. United States, 193 U. S. 197 (1904); see H. R. REP. No. 2789, 71st Cong., 3rd. Sess. (1931) 21-28; Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 COL. L. REV. 496, 517.

80. From 1920 to 1932 the limit was $10,000.

entities were one. The railroad's employees participated in the same manner as all employees of the Steel Company and of its other subsidiaries in profit sharing, bonus, and stock purchase plans.

Although the instant case settles the application of the commodities clause to industrial common carriers, the government has won an illusory victory; for the difficulty of showing enough control to satisfy the court that the industrial road would be considered a mere "instrumentality" of the parent company for other purposes is almost insuperable. Two possible methods of removing the carriers' incentive to grant excessive divisions to industrial roads, both requiring legislation, remain; one is to amend the commodities clause so that stock ownership by or of a railroad would create an illegal interest in the article transported; the other, altogether to forbid divisions on tonnage shipped by the proprietary industry.