

judge of Jackson county, Ala., whereby complainant acquired a lien upon the defendant's property.

On March 18, 1893, a bill was filed in the state chancery court of Jackson county by the Bridgeport Land & Improvement Company against the defendant, the Bridgeport Electric & Ice Company, praying the appointment of a receiver, and a receiver was accordingly appointed by that court. Subsequently, Meader obtained leave of the state court to enforce his judgment at law by execution, notwithstanding the existence of the receivership. An execution sale was accordingly had, but, on application to the supreme court of Alabama for a writ of mandamus, that court ordered the sale to be vacated and annulled. Such further proceedings were had in the present cause that on December 18, 1894, a final decree was entered, by which it was declared, among other things, "that the complainant is entitled to a lien for the balance that is due him, as shown by the judgment, copy of which is made an exhibit to the supplemental bill in the case, upon the property, real and personal, hereinafter particularly described. Said liens relate back to and commence from the date when the original contract was made, on May 7, 1891." The decree ordered that, in case the amount of the indebtedness, as shown by the judgment, with interests and costs, was not paid within 30 days from enrollment of the decree, the property should be sold. From this decree the present appeal was taken by the Bridgeport Electric & Ice Company, with the following assignment of errors: "(1) The court erred in deciding and decreeing that the said complainant has a lien on the said property described in the said decree. (2) In holding that the contract signed by Soulard was an equitable mortgage on the property described in the decree. (3) In holding and decreeing that the complainant was entitled to relief, and in not dismissing the bill. (4) In not holding and deciding that the complainant had abandoned the contract sought to be enforced in this suit. (5) In not deciding that the complainant had waived his right, if he had any, to enforce said contract. (6) In not holding that the said bill was one for the specific performance of a contract, or that the said contract was so uncertain that it could not be enforced. (7) In not decreeing that the defendant have leave instead of giving a lien or mortgage to give 'satisfactory security.' (8) In holding that an agreement to give a mortgage made by the alleged agent of an intended corporation was binding on the corporation when formed, before its stockholders had authorized it or ratified it at a meeting called for that purpose. (9) In holding that the contract sued on was a contract that bound the defendant as a valid mortgage."

D. D. Shelby and W. L. Martin, for appellant.

Milton Humes, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

BRUCE, District Judge, sat on the argument, but finding that in the course of the case in the circuit court he had from time to time made important orders, recused himself. The other judges divided in opinion. The decree appealed from is affirmed.

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INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND  
RY. CO. et al.

(Circuit Court, M. D. Alabama. July 9, 1895.)

No. 158.

1. REGULATION OF INTERSTATE COMMERCE—LONG AND SHORT HAUL.

The prohibition against charging a greater compensation, in the aggregate, for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance, does not apply, ex-

cept where the charge for transportation is made under substantially similar circumstances and conditions for the shorter as for the longer distance.

2. **SAME.**

The courts are left to decide what are "substantially similar circumstances and conditions." Neither the congress, in making the law, nor the courts, in construing it, can fail to note the element of competition as it enters into the industrial life of the people, and perhaps in no department is it more important than in the carrying trade of the country. It could not have been the purpose of congress to ignore or to regard with disfavor the competing forces and interests, which, in many cases, result in so much benefit to so many classes of people.

3. **SAME.**

In the presence of competing lines of transportation from and to distant points, the circumstances and conditions are not the same as in cases where there are no questions of competing lines, and no questions of reduced rates of transportation between different and distant points, to be considered.

4. **SAME—"BASING POINTS" OR "TRADE CENTERS."**

While there may be cases where "basing points" or "trade centers" are fixed and determined arbitrarily, for the purpose of building up one locality at the expense of another, in violation of the spirit and provisions of the act of congress, it is common knowledge that Montgomery, Ala., was a distributing point before the railroad system was known, and when there were no trunk lines of railroad such as are now competing for a share of her business.

5. **SAME.**

Such basing points or trade centers as Montgomery, Ala., and Columbus, Ga., are necessarily determined by competition between lines engaged in, and seeking a share in, the carrying trade of the country. Water transportation is doubtless a large factor in the determination of such basing points. Other considerations may enter into the matter, but the real source of it must chiefly be found in the competition between the great lines of transportation, reaching out, as they do, for a share in the commerce of the country, and, as a general rule, cheapening the necessaries of life brought to every man's door.

6. **SAME—"COMBINATION RATES."**

A "combination rate" (made by adding to a competitive through rate, charged between a point of shipment and a basing point, a noncompetitive local rate charged between such basing point and a local station beyond) is not violative of the act to regulate commerce. In this case, to compel a reduction of the local rate to the same rate per ton per mile as the through rate would not pay operating expenses, and would be ruinous to the Alabama Midland Railway Company.

7. **SAME—"UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE."**

The words "undue or unreasonable preference or advantage," contained in the third section of the act to regulate commerce, plainly imply that every preference or advantage is not condemned, but such, only, as are undue or unreasonable.

W. C. Oates, L. A. Shaver, and H. D. Clayton, U. S. Dist. Atty., for complainants.

Roquemore & White, for Central Railroad & Banking Co. of Georgia and others.

A. A. Wiley, for Alabama Midland Ry. Co. and others.

Ed. Baxter, for Louisville & N. R. Co.

BRUCE, District Judge. The complaint of the Board of Trade of Troy, Ala., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, is that there is in the rates charged for transportation of property

by the railroad companies mentioned, and their connecting railroads, a discrimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of congress of 1887. It is specified that the Alabama Midland and the Georgia Central and their connecting roads discriminate against Troy, and in favor of Montgomery, in charging and collecting \$3.22 per ton on phosphate rock shipped from the South Carolina and Florida fields to Troy, and only \$3 per ton on such shipments to Montgomery, the longer distance point; and that the rock carried from such fields to Montgomery is hauled through Troy, so that the shorter distance is included in the longer distance. To the same purport is the next specification, which is as to cotton, viz.: That the rates on cotton established by said two roads and their connections on shipments to the Atlantic seaports, Brunswick, Savannah, and Charleston unjustly discriminate against Troy, and in favor of Montgomery, in that the rate per hundred pounds from Troy to points east is 47 cents; that the rate from Montgomery to same points east, the longer distance point, is only 40 cents; and that such shipments from Montgomery, over the road of the Alabama Midland, pass through Troy. Specification 4 is that the Alabama Midland and the defendant carriers connecting and forming lines with it from Baltimore, New York, and the East, to Troy and Montgomery, charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery; the latter being the longer distance point by 52 miles. Again, that the rates on class goods from western and north-western points, established by the defendants forming lines from those points to Troy (stating it as the complainants do), are relatively unjust and discriminating, as against Troy, when compared with the rates on such lines to Montgomery and Columbus; that Troy is unjustly discriminated against in being charged on shipments of cotton, via Montgomery, to New Orleans, the full local rate to Montgomery, by both the Alabama Midland and the Georgia Central. There are other specifications, but these are deemed sufficient for the consideration of the questions in the cause.

These specifications bring under consideration what is known as the "long and short haul clause," as well as other clauses of the act; and the claim and argument is that the difference in the charge for the transportation of property from points east or west to Montgomery and Troy is discrimination against Troy, and in violation of section 4 of the act, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance."

It may be conceded that the defendant railroad companies, the Midland and the Georgia Central, in cases of the transportation of property from eastern points, through Troy, to Montgomery, or from Montgomery to points east, as claimed, fall within the specifi-

cation of the complaint, and bring the case within the inhibition of the fourth section just quoted, if the charge for transportation is made "under substantially similar circumstances and conditions" for the shorter as for the longer distance. In the case of transportation of property from eastern or northeastern points (New York, Philadelphia, Baltimore, etc.), whether it is all rail, or by water to Savannah, and then by rail to Montgomery, through Troy, on the Midland, or from northwestern points (such as Cincinnati, Louisville, St. Louis, etc.), through Montgomery, to Troy, there is what may be called a "long haul"; and for this haul there are competing lines, all rail or all water, in some cases, or part by rail and part by water, and this gives rise to through rates, and through rates give rise to "basing points" or "trade centers," which, in the very nature of things, are determined by questions of competition between lines engaged in, and seeking a share in, the carrying trade of the country. Water transportation is, doubtless, a large factor in the determination of these basing points. Other considerations may enter into the matter, but the real source of it must chiefly be found in the competition between our great lines of transportation, reaching out, as they do, for a share in the commerce of the country, and, as a general rule, cheapening the necessities of life brought to every man's door. Doubtless, there may be cases where these basing points or trade centers are fixed and determined arbitrarily, and where the motive for it may be a purpose to build up one locality at the expense of another, in violation of the spirit and provisions of the act of congress; but is that the case we are dealing with here? It is common knowledge—it is history—that Montgomery was a distributing point before the railroad system was known, and when there were no trunk lines of railroad, such as we now have, competing for a share of her business. Troy is a city of about 4,000 or 5,000 population, with two railroads, one of which has been but recently constructed. It is not a large distributing point; and it is not on any navigable water course. The complaint would almost seem to be that the railroad companies had not made her a basing point; and that Montgomery, west of her, on the Alabama river, and Columbus, east of her, on the Chattahoochee river, being basing points, this operated to her prejudice as a business point, which it no doubt does; and this is, perhaps, her real cause of complaint.

But the question is, has the act of congress been violated, and what is meant by the words "under similar circumstances and conditions"? These words are first used in the statute in section 2, which provides:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

This section of the statute is directed against special rates, rebates, drawbacks, or other devices, and has no application, directly at least, to the case at bar; but it shows the care and caution of the congress when it was dealing with such objectionable devices, calculated to favor particular persons or localities, and which might put almost every merchant or business locality at the mercy of corrupt management of the transportation lines. It may be that the caution used in framing the statute is on account of the inherent difficulty there is in the establishment of rules to govern all cases; and the courts are left to say what are "substantially similar circumstances and conditions" in any given case.

Neither the congress, in making the law, nor the courts, in construing the law, can fail to note the element of competition as it enters into the industrial life of the people; and, perhaps, in no department is it more important and controlling than in the carrying trade of the country. It could not have been the purpose of congress to ignore, or even to regard with disfavor, the competing forces and interests, which, in many cases, result in so much benefit to so many classes of the people. It has long since passed into a trite saying that "competition is the life of trade"; and, in the presence of competing lines of transportation from and to different points, the courts must see that the circumstances and conditions are not the same, as in cases where there are no questions of competing lines and reduced rates of transportation between different and distant points to be considered. In the case at bar there are questions of competing lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same; and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet these other matters may be, and often are, more controlling than even distance itself. The long haul rate, as a rule, is favorable to shippers, and for an obvious reason: It involves less handling of the property transported, and rates per ton per mile for long hauls may be, and often are, inadequate for the shorter hauls. The purpose of congress could not have been to disregard this distinction, which is well understood and accepted, in questions of transportation.

It may be observed that the third section of the act does not contain the words "under substantially similar circumstances and conditions," and declares it to be unlawful "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The words "any undue or unreasonable preference or advantage" plainly imply that every preference or advantage is not condemned, but such, only, as

are undue or unreasonable. In cases where there are no questions of through rates to basing points or trade centers, it might not be difficult to apply the law to what might clearly appear to be unjust and unreasonable preference and advantage, and so leave a wide field for the operation of the statute.

The evidence shows that in cases of transportation of property from northwestern points (such as St. Louis, Cincinnati, or Louisville) to Troy, Ala., the shipments come to Montgomery, and from there to Troy; that the rate is so much from such shipping points to Montgomery; that the Alabama Midland Railroad charges what is called the "local rate" from Montgomery to Troy; and this is complained of. The Troy parties claim that they shall not only have the advantage of the reduced rates between the shipping points and Montgomery, but that they are entitled to such reduced rates from Montgomery to Troy. The same thing is claimed on cotton shipped from Troy to New Orleans, via Montgomery, which is a combination of a through rate to New Orleans from Montgomery, plus the local rate from Troy to Montgomery. The evidence shows that such a rate would be absolutely ruinous to the Midland; that it would not pay operating expenses; and, besides, there is no section of the law under which such contention can be maintained.

Again, in this connection, and by way of illustration, it may be asked, by what right or by what rule shall a common carrier, whose duty it is to serve the public impartially, be required to carry the goods shipped by a Cincinnati merchant, via Montgomery, to his customer at Troy, Ala., for a less rate than is charged upon goods of the same class shipped by a Montgomery merchant to his customer at Troy, Ala.? And does not the contention here that Troy parties are entitled to the same rates per ton per mile from Montgomery to Troy that they get from the shipping points in the Northwest to Montgomery invoke a violation of the spirit, if not the letter, of the law itself, and show that such contention cannot be sustained? There is a suggestion, however, that because the transportation is under a common control or arrangement for a continuous carriage or shipment, and under a through bill of lading, this operates, under the act, upon the rates that the roads participating in the carriage shall charge. Such a view as that cannot be maintained under any section of the act. By the first section of the act, it (the act) is made applicable to cases where the transportation is under a common control or management,—a point which has not and could not be questioned. But that such clause eliminates from the fourth section the words "under substantially similar circumstances and conditions" cannot be and is not contended.

In any aspect of the case, it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charge upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the interstate commerce act. The conditions are not substantially the

same, and the circumstances are dissimilar, so that the case is not within the statute.

The case made here is not the case as it was made before the commission. New testimony has been taken; and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered.

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In re MINOR.

(Circuit Court, D. West Virginia. July 10, 1895.)

**CIGARETTES—LICENSE TO SELL—INTERSTATE COMMERCE—POLICE REGULATION.**  
 Act W. Va. Feb. 21, 1895, amending and re-enacting Code, c. 32, § 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes imported from another state and sold by the importer in West Virginia in the original package, and to cigarettes manufactured in another state and by the manufacturer sent into West Virginia in the original package, for sale by the agent of the manufacturer, and so sold in such package by such agent, is not an exercise of the police power of the state, but a regulation of interstate commerce, and therefore void.

Petition by Frank A. Minor for writ of habeas corpus.

W. W. Fuller, for petitioner.

U. S. G. Pitzer, for the State.

GOFF, Circuit Judge. The petitioner, Frank A. Minor, claims that he is illegally deprived of his liberty, and prays that he may be discharged from custody. The facts, as agreed by counsel, are as follows: The petitioner, a citizen of the United States, residing at Martinsburg, in the state of West Virginia, has been for some years past engaged in the business of selling, in said city, cigarettes at retail. On the 21st day of February, 1895, the legislature of the state of West Virginia passed an act entitled "An act to amend and re-enact sections one, two, sixty-six and eighty-four of chapter thirty-two of the Code," which act requires license fees or taxes to be paid for carrying on the different trades, acts, and occupations mentioned therein. Section 66 of said act, so amended, is as follows: "On every license to sell at retail, domestic wines, ale, beer, or drinks of like nature, one hundred dollars, or to sell at retail cigarettes or cigarette paper, five hundred dollars." On the 23d day of May, 1895, petitioner purchased in the state of New York, from the American Tobacco Company, a corporation organized under the laws of the state of New Jersey, and doing business in the city and state of New York, 50 packages, each containing 10 cigarettes, and directed that the same be shipped to him at Martinsburg, in the state of West Virginia. The cigarettes so purchased were manufactured by said company at its factory in New York, and packed by it, in said factory, in pasteboard boxes, each box containing 10 cigarettes. Upon each of said packages was printed the name of the manufacturer, the brand of the cigarettes contained therein, the number of the internal revenue collection district, and the name of the state where the factory was located, the number of

cigarettes contained in the box, the caution notice required by the laws of the United States, and all the other requirements of the laws and regulations of the United States relating thereto, and, also, to each box was attached the internal revenue stamp required for 10 cigarettes. The said company shipped said cigarettes to the petitioner at Martinsburg, from its factory in New York, in the original packages, without case or covering of any kind about any of the packages, each being loose and separate from every other, and petitioner so received them, and offered them for sale at his place of business in Martinsburg, from which he on the 23d day of May, 1895, sold one of such packages to L. D. Gearhardt. The said American Tobacco Company, also, on the 23d day of May, 1895, shipped from its factory in New York to the petitioner in Martinsburg, at his request, on consignment to be sold at retail by him, as the agent of said company, 50 boxes or packages, each containing 10 cigarettes, which had been manufactured at such factory in New York, and so packed therein as before mentioned. The cigarettes so shipped on consignment were received by petitioner at Martinsburg, exposed to sale by him in said city, and one package sold by him as such agent, on said 23d day of May, to said customer Gearhardt. The cigarettes so sold by petitioner—those owned by him and those held by him as the agent of said company—were sold in the original packages as received from the factory in New York. The petitioner had no state license to sell cigarettes at retail, nor had he paid or tendered any fee or tax for such license. On the 23d day of May, 1895, petitioner was, upon complaint of said Gearhardt, on a warrant issued thereon by P. R. Harrison, a justice, arrested by one William M. Hollis, the officer to whom said warrant was directed, and by him taken before said justice, by whose direction said petitioner is held in custody, charged with the violation of said section 66, in so making sale of said two packages of cigarettes. On due application the writ of habeas corpus was issued, to which proper return has been made, the body of the petitioner produced in court, and full argument submitted on the questions involved.

It is insisted that Minor is unlawfully detained in custody by said officers, because that the said act of the legislature of the state of West Virginia under which he was arrested and is now held is, so far as it applies to the sales of the cigarettes so made by him, in violation of clause 3 of section 8 of article 1 of the constitution of the United States; and that it, so far as said sales are concerned, is in contravention of clause 2 of section 10 of article 1 of said constitution; and that said legislation, so far as it concerns the business of selling and dealing in cigarettes in the original packages as imported by him into the state of West Virginia from another state, is unconstitutional and void. The questions raised by the petition and return thereto, so fully and ably discussed by counsel, and now to be disposed of by the court, while of great interest and importance, are not new, and their disposition has been plainly indicated by the decisions of the supreme court of the United States, in cases involving transactions similar in character to those now presented.

From the earliest cases on this subject to those recently decided it has been held that legislation by the states of the Union, relating to the regulation of commerce, is not allowable, and that where a uniform system is necessary between the states the congress of the United States has the exclusive power to regulate it. Interstate commerce, being the purchase, exchange, transportation, and sale of commodities in and between the different states, is national in character, and can only be carried on successfully when conducted by and under a uniform system of laws and regulations. The power of the congress over such commerce is as complete as it is over foreign commerce. Where congress has not legislated concerning a particular subject-matter of interstate commerce, or has not authorized the states to do so, it thereby indicates that its intention is that such commerce shall be free, untrammelled by either federal or state laws. This subject was again fully discussed and explained in the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, in which the case of *Peirce v. New Hampshire*, 5 How. 504, theretofore cited to the contrary of the opinion then announced, was expressly overruled. The rule now well established is clearly stated by Mr. Justice Field in *Bowman v. Railway Co.*, 125 U. S. 465, 507, 8 Sup. Ct. 689, 1062, in these words: "Where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supercedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it and provide the needed regulations." It follows that if congress has not legislated on any special subject relating to commerce, and the enactments of a state regarding the same are questioned, the only matter to be determined by the courts is, does the state legislation complained of amount to a regulation of commerce? If so, it is unconstitutional and void. This result is clearly demonstrated by the following cases: *Cooley v. Board*, 12 How. 299; *State Freight Tax Case*, 15 Wall. 232; *Welton v. Missouri*, 91 U. S. 275; *Henderson v. Mayor*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Cook v. Pennsylvania*, 97 U. S. 566; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725. That the power of congress over the entire subject of interstate commerce is supreme and exclusive is now without question, and, so far as that matter is concerned, state lines are obliterated and state laws inoperative. The reason for this is evident, and its imperative necessity was shown by the condition of affairs relating to commerce, existing when the convention that framed the constitution of the United States assembled, as all familiar with our history well know.