Dowman's entry and settlement, though made in good faith, were not available to him upon the relinquishment of Doran's entry, such ruling would have been contrary to that established by the later decisions of the department; and certainly it cannot be said that, in following the later rulings, the secretary violated any recognized rule of law; and it is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled that a court of equity is justified in setting aside the action of the department. Moore v. Robbins, 96 U. S. 530; Marquez v. Frisbie, 101 U. S. 473; Quinby v. Conlan, 104 U. S. 420.

Being of the opinion that the facts set forth in the bill herein filed do not make a case for the intervention of a court of equity, within the rule laid down in the cases cited, it follows that the trial court did not err in dismissing the bill on the merits, and the decree to that effect is affirmed.

INTERSTATE COMMERCE COMMISSION v. WESTERN & A. R. CO. et al.

(Circuit Court, N. D. Georgia. June 15, 1898.)

No. 524.

1. THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE.

If a greater charge be made for a shorter than for a longer distance over the same line, etc., and the circumstances and conditions at the longer distance point are substantially similar to those at the shorter distance points, it is a violation of the fourth section; but if the circumstances and conditions at the longer distance point are substantially dissimilar, within the meaning of the act, to those at the shorter distance point, the fourth section is not violated.

2. SAME.

If the circumstances and conditions at the longer distance point are substantially dissimilar from those at the shorter distance point, then the fourth section of the act is inapplicable. Cases cited and followed: In re Louisville & N. R. Co., 1 Interst. Commerce Com. R. 57; 1 Interst. Commerce Com. R. 278; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 300; Behlmer v. Railroad Co., 71 Fed. 839; Interstate Commerce Commission v. Alabama M. Ry. Co., 18 Sup. Ct. 45, 168 U. S. 144. Case cited and disapproved: Interstate Commerce Commission v. East Tennessee, V. & G. Ry. Co., 85 Fed. 107.

3. SAME—SIMILARITY OF CIRCUMSTANCES AND CONDITIONS—COMPETITION.

Competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce. Case cited: Interstate Commerce Commission v. Alabama M. Ry. Co., 18 Sup. Ct. 45, 168 U. S. 144.

4. SAME—COMPETITION BETWEEN RAILWAYS.

Railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. The fourth section declares that the carrier shall not make the higher charge to the nearer point under substantially similar circumstances and conditions. If the circumstances and conditions are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs. If railway competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the

intermediate point, and the higher rate is not prohibited by the fourth section. Cases cited: Savannah Bureau of Freight & Transportation v. Charleston & S. Ry. Co., 7 Interst. Commerce Com. R. 479; 11 Ann. Rep. Interst. Commerce Com. pp. 37–43.

5. SAME—POWER OF COURTS AND COMMISSION IN REGARD TO RATES.
Where the circumstances and conditions at the longer distance point are substantially dissimilar, the carrier may judge of this for itself, in the first instance, and fix the rates for the longer distance point without violating the fourth section of the act; but this does not preclude the courts or the commission from inquiring as to whether the rates to the shorter distance points are unjust or unreasonable, or whether they constitute undue preference for, or unjust prejudice against, any locality. Case cited: Interstate Commerce Commission v. Alabama M. Ry. Co., 21 C. C. A. 51, 74 Fed. 723; Id., 18 Sup. Ct. 45, 168 U. S. 173.

6. SAME.
In order to constitute dissimilarity under the fourth section of the act, the competition must be real, and not imaginary or trifling.

7. THE THIRD SECTION OF THE ACT TO REGULATE COMMERCE—UNDUE PREFERENCE.
Railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. Case cited: Interstate Commerce Commission v. Baltimore & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 283.

8. SAME—COMPETITION.
If the lesser charge to the longer distance point results from dissimilar circumstances and conditions brought about by competition, it cannot be said to be a preference which is undue or unreasonable.

9. SAME.
All the evidence shows is that the rate to Atlanta, the longer distance point in this case, is forced on the railroad officials by competition. There is no evidence of any improper desire on the part of these officials to give Atlanta a lower rate or the local shorter distance points a higher rate. The matter is controlled by existing competitive conditions. Unless the rates complained of, as compared with each other, violate the fourth section of the act, there seems to be very little ground for claiming that they violate the undue-preference provision of the third section. Case cited: Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 947, 948.

10. SAME.
Government should not undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another. It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The act to regulate commerce has no such purpose. Case cited: Brewer v. Railway Co., 84 Fed. 258.

11. THE FIRST SECTION OF THE ACT TO REGULATE COMMERCE—REASONABLENESS OF RATES IN AND OF THEMSELVES.
The first section provides that all charges for the transportation of property, etc., shall be reasonable and just. There is no evidence to justify a finding that the rates charged to the shorter distance points in this case are unjust and unreasonable in and of themselves. The mere fact that lower rates which are charged to a longer distance competitive point pay something above the cost of the service of carriage does not show that the shorter distance rates are unreasonable.

12. SAME—COMBINATION RATES.
The rates to the shorter distance points in this case are made up of a highly competitive rate from point of shipment to Chattanooga, added to a local rate to destination fixed by the Georgia Railroad Commission. The rates in question, when separately considered, are not unreasonable or

unjust. On the contrary, the testimony is that each is reasonable of itself. Case cited: Interstate Commerce Commission v. Alabama M. Ry. Co., 21 C. C. A. 51, 74 Fed. 723.

18. THE SECOND SECTION OF THE ACT TO REGULATE COMMERCE.
The second section deals with preferences as between shippers, and not as between localities, and it is conceded to be wholly inapplicable to this case.

Geo. L. Bell, Asst. U. S. Atty. (L. A. Shaver, of counsel), for complainant.

Ed. Baxter and Payne & Tye, for defendants.

NEWMAN, District Judge. On the 16th day of October, 1891, L. N. Trammell, Allen Fort, and Virgil Powers, constituting the railroad commission of Georgia, filed with the interstate commerce commission a petition setting up a violation on the part of the above-named defendants of section 4 of the act of congress, entitled "An act to regulate commerce" (24 Stat. 379). The petition, after setting out that the defendants are common carriers engaged in transporting goods from Cincinnati, Ohio, to points in Georgia, and therefore subject to the act to regulate commerce, complains that the rates charged on freight from Cincinnati and other Ohio river points to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, local stations on the line of the Western & Atlantic Railroad in Georgia, are greater than the rates charged to Atlanta, the eastern terminus of the Western & Atlantic Railroad, and a longer distance point. It was alleged that the transportation to Atlanta and to the local stations named was under substantially similar circumstances and conditions. The petition further stated that Marietta is 20 miles west of Atlanta and 118 miles east of Chattanooga, that Acworth is 35 miles west of Atlanta and 103 miles east of Chattanooga, that Cartersville is 48 miles west of Atlanta and 90 miles east of Chattanooga, that Kingston is 59 miles west of Atlanta and 79 miles east of Chattanooga, that Adairsville is 69 miles west of Atlanta and 69 miles east of Chattanooga, and that Calhoun is 78 miles west of Atlanta and 60 miles east of Chattanooga; that the rates of freight charged, collected, and received by the defendants for freight transportation by continuous carriage from the city of Cincinnati and other Ohio river points to the towns and stations above named were more and greater on each class than the amount charged and received for freight to the city of Atlanta, which is a greater distance from the city of Cincinnati; that, therefore, the rates were unreasonable and discriminating in their nature; that they have called the attention of the officials of the Western & Atlantic Railroad Company to the fact, and that they have refused and declined to change the same. The prayer of the petition is as follows:

"Whereupon petitioners, as the railroad commission of the state of Georgia, come and present the facts as aforesaid, and appeal to the interstate commerce commission for relief, and aver and charge that the aforesaid through rate of freight into the state of Georgia and to the different towns and stations on the Western & Atlantic Railroad, so made, charged, and collected by the carriers as aforesaid, is unreasonable and discriminating in its nature, and is in direct violation of section 4 of the act of congress entitled 'An act to regulate commerce.'"

Answers were filed by the defendants, in which substantially they denied that the transportation to Atlanta and the other points named was under substantially similar circumstances and conditions, or that the rates were unjust and discriminating. After hearing the parties, the interstate commerce commission, on November 11, 1892, filed its report and opinion, and made an order in which it required the railroad companies to desist from the acts complained of in the petition of the Georgia railroad commission. On the 27th day of May, 1893, the interstate commerce commission filed its bill in this court, alleging that the defendant railroad companies had refused, and still refuse, to comply with the order so made by it, asking that said order be enforced, and that the defendant railroad companies be enjoined in accordance with its decision and order. The particular act, therefore, which it is claimed constitutes a violation of section 4 of the act to regulate commerce, is the charging and receiving greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati and other points, called and known as "Ohio river points," for a shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, in the state of Georgia, than for a longer distance over the same line in the same direction to Atlanta, also in the state of Georgia; the shorter being included within the longer distance. The claim, of course, is, and the conclusion of the commission was, that freight carried from Cincinnati, etc., to Atlanta, is carried under substantially similar circumstances and conditions as freight carried to the shorter distance points named. And this violation of section 4 has been the only question raised prior to this hearing, as shown by the record. If the circumstances and conditions at Atlanta are substantially similar to those at Marietta and the other shorter distance points named, it is conceded to be a violation of section 4 of the act to regulate commerce; if the circumstances and conditions at Atlanta are substantially dissimilar, within the meaning of the act, to those at the shorter distance points, then it is conceded that the fourth section is not violated. As bearing upon this question, and, indeed, as determining it, the question discussed in this case, as in several other cases, has been whether or not competition with other carriers subject to the act to regulate commerce at longer distance points is sufficient to make the carriage to such points under dissimilar circumstances and conditions. The record in this case shows that the rates on first-class goods per 100 pounds, in 1892, and at present, are as follows: From Cincinnati to Chattanooga, 76 cents; to Calhoun, $1.09; to Adairsville, $1.12; to Kingston, $1.15; to Cartersville, $1.18; to Acworth, $1.24; to Marietta, $1.27; and to Atlanta, $1.07. The rate to the six local points named is made up of the through competitive rate to Chattanooga, Tenn., with the local rate authorized by the Georgia railroad commission from Chattanooga to the points named added. The plan of rate-making in Georgia to local noncompetitive stations is to add to the through competitive rate the local rate authorized by the Georgia railroad commission; and when made in this way the above rates are the result.

After the case was at issue in this court, evidence was taken both for the commission and the railway companies. The evidence for the commission was that of merchants at the local stations on the

Western & Atlantic Railroad. Their evidence tended to show that they were put at a disadvantage at their respective places of business by reason of the lower rate to Atlanta, and that injury had resulted to business at these points by reason of the Atlanta rate. The evidence for the railway companies was taken for the purpose of showing, and tends to show, that the rate to Atlanta is the result of active competition; also that the rate to the local stations named on the Western & Atlantic Railroad were just and reasonable rates in and of themselves; also that a lower rate to the local stations would not materially affect the amount of goods carried to those stations, or the volume of business transacted. The testimony is of considerable length, and no attempt will be made to quote from the evidence for either side except from the testimony of one witness out of a number, as to competition existing at Atlanta. Mr. J. M. Culp, the general traffic manager of the Southern Railway, was a witness for the defendants, and the following extract is taken from his testimony, by questions and answers:

"Q. State whether the rates of freight from Ohio river points to Atlanta are controlled by any, and, if so, to what, extent, by competition. A. They are entirely controlled by competition. They are controlled by competition between the railroads themselves, the railroads leading from the Ohio river themselves, and controlled by competition from the Eastern seaboard. The adjustment of rates on certain of the classes is based upon the same rates from Cincinnati to Atlanta as from Baltimore to Atlanta. This is not true of all classes, but it is true of a number of classes. Q. State whether there is any such competition at Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta as exists at Atlanta, Georgia. A. There is not the same competition. There is competition existing up to Chattanooga,—strong competition; and the rates fixed by that competition are used in making rates to these local stations. As I have before testified, to these competitive rates up to Chattanooga are added the rates which are the same for the same distance as the rates of the Georgia commission."

While the testimony varies somewhat, the above is in line with the testimony of all the witnesses for the defendants who testified on the subject. The present case was heard and decided by the interstate commerce commission in 1892. At that time there had been no authoritative determination of the question as to whether or not competition at a longer distance point would render the carriage of freight to such point under substantially dissimilar circumstances and conditions from those existing at a shorter distance point within the meaning of the fourth section of the act to regulate commerce. Since that time several cases have been before the supreme court, and the question thoroughly discussed. It appears to be now finally settled by the decision of the supreme court in the case of Interstate Commerce Commission v. Alabama M. Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45. In that case the substance of the decision by the supreme court may be gathered from a headnote as follows:

"Competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce. This is no longer an open question in this court."

In the case of Savannah Bureau of Freight & Transportation v. Charleston & S. Ry. Co., 7 Interst. Commerce Com. R. 479, the in-