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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NAEGELE OUTDOOR ADVERTISING CO., INC., SAM E. NEWEY, LES LOGGINS ADVERTISING & PUBLIC RELATIONS, INC., et al.,

Petitioners,

v.

CASE NO.: 83,734

CITY OF JACKSONVILLE, FLORIDA and CAPSIGNS, INC.,

Respondents.

PETITIONERS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case involves the issue of whether a municipality can lawfully use economic coercion to deprive its citizens of their constitutionally-protected rights to equal protection, due process and access to the courts.

Petitioners' suit challenged the constitutionality and procedural validity of certain city charter provisions and ordinances (hereinafter, sign ban regulations) which were designed to force property owners and outdoor advertising companies to abandon their property rights by threatening to impose massive fines which would bankrupt petitioners. Under these regulations, fines are accruing against Petitioners at a rate of $250,000 per day. As of the date of the temporary injunction hearing, the accrued fines already exceeded the value of Petitioner's individual businesses, in some cases by five to six-fold. Those fines now exceed $180,000,000. The City is using its power to fine to confiscate Petitioners' property without payment of compensation and the District Court has, by quashing a temporary injunction, effectively deprived Petitioners of their rights to challenge confiscatory regulations.

Following a lengthy evidentiary hearing, the trial court entered a temporary injunction prohibiting the city from imposing $500 per day per sign fines pending adjudication of the validity of said penalty and otherwise preserving the status quo until after a full hearing on the merits.

On appeal, the District Court quashed the injunction and refused to follow the principle of "constitutional tolling" of accrual of fines during the pendency of litigation, a principle which has been the law of Florida since at least 1920. The District Court stated that it was premature to adjudicate whether Petitioners were liable for fines imposed during the pendency of the litigation. The District Court noted but refused to pass upon Petitioners' contention that the fines involved were so excessive as to intimidate Petitioners' exercise of the right to litigate the validity of the enactment authorizing the fines.

The opinion of the District Court also has the effect of impermissibly amending Rule 1.610, Florida Rules of Civil Procedure. Petitioners have timely filed their notice invoking this Court's discretionary jurisdiction. Unless this Court grants relief, Petitioners' constitutional rights will be taken from them by economic coercion.

SUMMARY OF ARGUMENT

In Florida East Coast Ry. Co. v. State, 79 Fla. 66, 83 So.708 (1920), this Court held that a state agency could not penalize a litigant for bringing a good faith challenge to the validity of regulations by imposing fines for non-compliance with the regulations during the pendency of the litigation. Until there had been a judicial determination of whether the regulations were valid, this Court pointed out, the state could not constitutionally impose fines so onerous as to intimidate its opponent by making the

risk so great that it was better to yield to orders of uncertain legality than to ask the law's protection.

In the present case, the First District has permitted the City to penalize Petitioners for bringing a good faith challenge to the sign ban regulations by accruing multi-million dollar fines for non-compliance during the pendency of the litigation. Because there had been no judicial determination of the regulations' validity, the First District held that the City could continue to accrue $500 per day, per sign, fines even if the effect was to intimidate Petitioners into yielding to orders of uncertain legality rather than seeking the protection of the law.

Because the First District's decision is in express and direct conflict with this Court's decision in Florida East Coast, this Court has discretionary jurisdiction under Article V, Section 3(b)(3), Florida Constitution. This Court should exercise that jurisdiction in order to reaffirm that the state will not be permitted to create a "chilling effect" through economic coercion, and to reaffirm that the constitutionally-protected rights to equal protection, due process and access to the courts will not be restricted to only those wealthy enough to risk enormous sums in order to protect their rights.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN THE INSTANT CAUSE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS COURT IN FLORIDA EAST COAST RY. CO. v. STATE, 79 FLA. 66, 83 SO. 708 (1920), THEREBY GIVING THIS COURT JURISDICTION TO REVIEW THIS CAUSE PURSUANT TO ARTICLE V, SECTION 3(B)(3), FLORIDA CONSTITUTION.

Under Article V, Section 3(b)(3), Florida Constitution, this Court has jurisdiction to review decisions of District Courts of Appeal which are in express and direct conflict with decisions of this Court. In the instant case, the decision of the First District Court of Appeal is in express and direct conflict with this Court's decision in Florida East Coast Ry. Co. v. State, 79 Fla. 66, 83 So. 708 (1920), thereby giving this Court jurisdiction to review this cause. In light of the serious constitutional issues involved, this Court should exercise its discretionary jurisdiction in this cause and resolve the conflict.

In Florida East Coast, the Railroad Commissioners had promulgated certain rules requiring a percentage discount on joint line rates and requiring prior submission to, and approval by, the Railroad Commissioners of any increase in any rate by any railroad doing business in Florida. Believing that these rules were unconstitutionally confiscatory of its property, the railroad promulgated supplementary rate schedules which, by eliminating the joint line discount, had the effect of increasing its rates. It did not submit these changes to the Railroad Commission for prior approval. The Railroad Commission imposed two fines of $2,500 each, with interest. While the railroad was preparing to challenge the regulations in court, the Railroad Commissioners brought a mandamus action in the Supreme Court. Desiring to contest the validity of the regulations in court, the railroad elected to litigate the issue in that proceeding.

Among the defenses raised by the railroad was a contention that, for constitutional reasons, the railroad could not be subjected to a penalty while litigating the validity of the administrative regulations. This Court agreed, and held that this was a valid affirmative defense. This Court, relying on Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915), stated (83 So. at 715) that:

> . . . pending a judicial determination of the validity of the administrative rates, rules, orders, etc., which are only prima facie valid, the state may not impose such excessive penalties for non-compliance with the challenged rates, etc., as will intimidate the parties complaining from contesting the validity of the rates, etc., in due course of judicial proceedings, since that would in effect be a denial of organic rights to equal protection of the laws, and to resort to the courts to finally establish the validity or invalidity of the rates, etc., whose legality are challenged.

An affected party, this Court said, was entitled to a safe and adequate judicial review of the legality of the enactment, and it would be a denial of due process of law if such review could be effected by appeal to the courts "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law." 83 So. at 715. Other courts also apply this "constitutional tolling principle." U.S. v. Pacific Coast European Conference, 451 F.2d 712, 717 (9th Cir. 1971) (defendants should not have to pay a penalty for non-compliance during the time they were judicially testing the validity of a statute).

This Court observed in Florida East Coast that (83 So. at 715-716):

> . . . if the defendant reasonably and in good faith regarded the rule, for the violation of which the fines here sought to be enforced were imposed, as an unconstitutional violation of its property rights, it had the privilege of testing the validity of the rule in the courts. And, if the defendant proceeded in good faith and with due diligence to make the test in actions brought by the Railroad Commissioners for the enforcement of such contested rule, heavy fines cannot lawfully be imposed for violations pending such test, where the fines are so onerous as to intimidate the defendant in exercising its right to contest the validity of the administrative rule not having the characteristics of a final judgment, since such action would be a denial to the defendant of the equal protection of the laws, in violation of the federal Constitution, if not also a deprivation of property without due process of law in violation of the state and United States Constitutions.

In the instant case, the District Court reached precisely the opposite result. Apparently failing to recognize that Florida East Coast required a different analysis than the traditional four-prong test for temporary injunctions under Florida Rule of Civil Procedure 1.610(a), the District Court held that the City could continue to accrue fines of $250,000 per day during the pendency of this litigation. Moreover, the District Court did so on the express basis that it would be premature to enjoin accrual of the fines because a "full hearing" on the merits of Petitioners' challenge to the sign ban regulations had not yet occurred. The District Court ruled that whether Petitioners were liable for penalties under the sign ban regulations depended on who ultimately prevailed on the merits of the lawsuit. The District Court noted Petitioners' contention that the fines were so excessive as to intimidate their exercise of the right to litigate the validity of the enactments authorizing the fines, but nonetheless ignored the

principle of constitutional tolling and quashed the temporary injunction, although claiming (slip opinion at 11) not to "prejudge this question."

In Florida East Coast, this Court held that the government could not constitutionally subject a litigant to economic coercion as the price of litigating regulations whose validity had never been passed upon by a court of competent jurisdiction. To hold otherwise, this Court said, would deprive the litigant of its property without due process of law, as well as raising significant equal protection and access to the courts issues. In the instant case, the First District has held that the City may engage in precisely that type of economic coercion by continuing to accrue these enormous fines during the pendency of this litigation, regardless of the chilling effect that such huge and ever-increasing fines might have on a litigant's willingness to continue the litigation.

In Florida East Coast, this Court stated that it was a denial of due process if judicial review could only be effected by appeal to the courts at the risk of having to pay penalties so great that it was better to yield to orders of uncertain legality than to ask the protection of the law. In the instant case, the District Court held that judicial review of the validity of the sign ban regulations could only be had at the risk of having to pay precisely such penalties.

In Florida East Coast, this Court held that a state agency could not attempt to impose fines for disobedience to regulations

which were the subject of a good faith court challenge, because there had been no judicial resolution of the validity of the regulations. In the instant case, the First District held that the City could continue to accrue enormous fines until there had been a judicial resolution of the validity of the regulations.

For all these reasons, the decision of the District Court in the instant cause is in express and direct conflict with the decision of this Court in Florida East Coast Ry. Co. v. State, supra. This Court thus has jurisdiction, pursuant to Article V, Section 3(b)(3), Florida Constitution, to review the decision of the District Court in the instant case.

This Court should exercise its discretion in favor of reviewing the District Court's decision. In Hoffman v. Jones, 280 So.2d 431, 433-434 (Fla. 1973), this Court held that a District Court of Appeal is not empowered to overrule a decision of this Court; if a District Court disagrees with this Court's prior decision, its proper function is to rule in accordance with this Court's decision and certify the issue to this Court.

Additionally, this Court should exercise its discretion to review this cause because of the "chilling effect" the decision of the District Court of Appeal would have on the rights of litigants who, in good faith, contest the validity of a regulation, but who are subjected to economic coercion by a state agency as a consequence of making that challenge. This state has long been committed to ensuring access to the courts --indeed, that policy is a part of the Declaration of Rights, where it is found as

Article I, Section 21, Florida Constitution. If agencies of the state are permitted to make the exercise of the constitutional right to access to the courts subject to the risk of huge and ever-increasing fines, a necessary and healthy check on potential abuses of governmental power will be removed, to the great detriment of our constitutional system of checks and balances. Those who cannot afford to incur that risk will be effectively denied access to the judicial system, and only those wealthy enough to take that risk will truly be protected by the laws. The majority of the citizens of this state would have to accept whatever government chooses to do to them, without hope of protection by the judiciary.

Such is not the system of government our forefathers intended, nor is it the structure of government which our constitution protects. Not only is the decision of the District Court of Appeal in the instant cause in conflict with the prior decision of this Court in Florida East Coast, but the public policy it establishes is anathema to our constitutional system.

The District Court also impermissibly amended the Florida Rules of Civil Procedure by holding that the temporary injunction, issued after a lengthy and hotly-contested evidentiary hearing conducted after due notice, was deficient because it did not contain "clear, definite and unequivocally sufficient factual findings [to] support each of the four conclusions necessary to justify entry of a preliminary injunction" (slip opinion at 8). The District Court misapprehended the distinction in Florida Rule of Civil Procedure 1.610 between injunctions issued without notice

(Rule 1.610(a)(2)) and injunctions issued after notice and hearing (Rule 1.610(c)).

CONCLUSION

For all the reasons set forth above, this Court has jurisdiction to review this case under the provisions of Article V, Section 3(b)(3), Florida Constitution, and should exercise that discretion and review this cause on the merits.

Respectfully submitted,

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Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Tracey I. Arpen, Esquire**, Assistant General Counsel, 1300 City Hall, 220 East Bay Street, Jacksonville, FL 32202; **Linda C. Ingham, Esquire**, 1200 Gulf Life Drive, Suite 800, Jacksonville, FL 32207; and **William D. Brinton, Esquire**, 3200 Independent Square, Jacksonville, FL 32202, this 31st day of May, 1994.

Attorney

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CITY OF JACKSONVILLE, FLORIDA, and CAPSIGNS, INC.,

Appellants,

v.

NAEGELE OUTDOOR ADVERTISING CO., SAM E. NEWEY, LES LOGGINS ADVERTISING & PUBLIC RELATIONS, INC., JUNIOR POSTERS OF NORTH FLORIDA, INC., UNIVERSAL OUTDOOR, INC. d/b/a ATLANTIC OUTDOOR ADVERTISING, INC. a Florida corporation, L. I. GEFEN d/b/a SLG INVESTMENTS, ANASTASIA ADVERTISING ART, INC., WALTER BRAZIL d/b/a B & B OUTDOOR ADVERTISING, ED YATES d/b/a BILLBOARD CONSULTANTS, WIL WES RAPPAPORT, TRACY RAPPAPORT and DARE HAWKINS d/b/a CLASSIC OUTDOOR ADVERTISING, FIRST COAST OUTDOOR ADVERTISING, INC., a Florida corporation, WHITECO METROCOM, a division of WHITECO INDUSTRIES, INC., a foreign corporation, JAMES M. WYNN, and TRI-STATE SYSTEMS, INC., a foreign corporation, LOIS I. GEFEN, and NATIONAL ADVERTISING CO.,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 93-381

Opinion filed March 30, 1994.

An Appeal from the Circuit Court for Duval County. Henry E. Davis, Judge.

Charles W. Arnold, Jr., General Counsel; Steven E. Rohan, Chief Trial Counsel; Stephen M. Durden, Loree L. French, and Tracey I. Arpen, Jr., Assistant General Counsel, Jacksonville, for Appellant City of Jacksonville.

Linda C. Ingham of Marks, Gray, Conroy & Gibbs, P.A.; William D. Brinton of Allen, Brinton & Simmons, P.A., Jacksonville, for Appellant Capsigns, Inc.

Raymond Ehrlich, George E. Schulz, Jr., and Scott D. Makar of Holland & Knight, Tallahassee; Richard E. Davis, Holland & Knight, Tampa; Richard D. Norton of Berger & Norton, Santa Monica, California, for Appellees Lois I. Gefen and National Advertising Co.

John M. McNatt, Jr., Susan S. Oosting, and Jack W. Shaw, Jr., of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Jacksonville; Eric M. Rubin, Jeffrey Harris, Walter E. Diercks, and Steven J. Stone, Washington, D.C., for Appellees Naegele Outdoor Advertising Co., Sam E. Newey, and Les Loggins Advertising & Public Relations, Inc.

John M. McNatt, Jr., Susan S. Oosting, and Jack W. Shaw, Jr. of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Jacksonville, for Appellees Junior Poster of North Florida, Inc., Universal Outdoor, Inc. d/b/a Atlantic Outdoor Advertising, Inc., L. I. Gefen d/b/a SLG Investments, Anastasia Advertising Art, Inc., Walter Brazil d/b/a B & B Outdoor Advertising, Ed Yates d/b/a Billboard Consultants, Wil Wes Rappaport, Tracy Rappaport, and Dare Hawkins d/b/a Classic Outdoor Advertising, First Coast Outdoor Advertising, Inc., Whiteco Metrocom, James M. Wynn, and Tri-State Systems, Inc.

BENTON, J.

In conformity with Florida Rule of Appellate Procedure 9.130(a)(3)(B), the City of Jacksonville (City) appeals a non-final order granting plaintiffs' motions for temporary injunctive relief. The trial court entered the temporary injunction under Florida Rule of Civil Procedure 1.610(a), after notice and an evidentiary hearing, in the course of litigation initiated by appellees in the court below. We reverse the order granting plaintiffs' motions for temporary injunctive relief, and quash the temporary injunction.

In dispute is the fate of certain outdoor advertising signs owned or leased by appellees within the City. Capsigns, Inc., a

nonprofit corporation, helped organize a petition drive to place on the ballot an amendment to the City's charter restricting outdoor advertising. In 1987, the charter was in fact amended as a result of the referendum, although plaintiffs below (appellees here) have called into question the legality of the amendment, citing Holzendorf v. Bell, 606 So. 2d 645 (Fla. 1st DCA 1992), and other cases.

The original charter amendment authorized a five-year "amortization period" ending June 1, 1992, during which targeted outdoor advertising signs were allowed to stand, before removal. Only as the fourth year came to a close did the first of the plaintiffs below file in circuit court to block action by the City. Most of the plaintiffs filed still later, once the City began "tagging" signs. Claiming irreparable harm if the signs should be removed, the plaintiffs sought broad injunctive relief pending the outcome of the litigation. They asked the trial judge, before whom all four lawsuits were consolidated, to enjoin enforcement against them of pertinent City ordinances and charter provisions.

In a series of some ten ordinances since 1987, the City has made repeated efforts to accomplish the charter amendment's objectives. Effective June 30, 1992, moreover, the Legislature enacted a superseding City charter containing the very language voted on in the 1987 amendment. Ch. 92-341, § 1, at 130, Laws of Fla. Like the original charter amendment, these measures contain provisions requiring the removal of certain signs and authorize

substantial fines ($500 per day) for failure to comply. As appellees' counsel conceded at oral argument, appellees must demonstrate a vitiating infirmity in each of these provisions in order to prevail on the merits.

In the order under review, entered on December 29, 1992, the court below granted all injunctive relief requested by any plaintiff. The court enjoined the City from removing any of the plaintiffs' signs, enforcing the challenged ordinances or charter provisions against plaintiffs or their lessors,[1] threatening to enforce the challenged provisions against them, "[e]nforcing those provisions . . . that the City contends permit the . . . impositions of fines, penalties or sanctions for failure to remove signs . . . [and a]ccruing the penalties provided for in . . . the Charter . . . from June 1, 1992 . . . against the Plaintiffs or the owners of the real property upon which Plaintiffs' signs are located during the pendency of this action."

Procedural Requirements Not Met

[1]The City complains that the temporary injunction is overbroad because it inures to the benefit, not only of the plaintiffs, but also of land owners not party to the lawsuit. Some of the advertising signs in controversy stand on land owned by strangers to the litigation and leased to plaintiffs. While an injunction should rarely, if ever, run against a non-party, it is no objection that a non-party is incidentally benefitted by an injunction. The City has not complained about the amount of the bonds plaintiffs have been required to post.

Even after hearing and notice, a temporary injunction[2] is properly entered only in certain well-defined circumstances. As we said in Thompson v. Planning Commission, 464 So. 2d 1231 (Fla. 1st DCA 1985):

> [T]he issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest. See Islandia Condominium Association, Inc. v. Vermut, 438 So. 2d 89 (Fla. 4th DCA 1983); Playpen South, Inc. v. City of Oakland Park, 396 So. 2d 830 (Fla. 4th DCA 1981).

Here the trial court perceived "sufficient testimony and other evidence of" irreparable harm and the unavailability of an adequate remedy at law, and concluded that unspecified "public interest considerations favor the issuance of an injunction."

The order under review acknowledges that entry of a temporary injunction "generally requires" a showing of a "substantial likelihood of success on the merits." But the order also cites Bailey v. Christo, 453 So. 2d 1134 (Fla. 1st DCA 1984), for the proposition that a temporary injunction need not

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[2]As amended in 1980, Florida Rule of Civil Procedure "1.610(a) use[d] 'Preliminary Injunction,' and distinguishe[d] it from 'Temporary Restraining Order,' Fla. R. Civ. P: 1.610(b)." Ladner v. Del Prado Condominium Ass'n, 423 So. 2d 927, 929 n.1 (Fla. 3d DCA 1982). In appropriate emergency circumstances, the latter was available even without an evidentiary hearing. In 1984, the temporary restraining order and procedure were abolished. Since then, any injunction entered before decision on the merits is denominated temporary.

be supported by a finding of a substantial likelihood of success, and states:

> Whether the remaining requirement that Plaintiffs demonstrate a substantial likelihood of success on the merits has been met will not be decided at this time. The controversy that is the subject matter of this litigation dates back at least to 1986. The issues involved are extremely important to parties and the community. The Plaintiffs have presented substantial facts and law in support of their position. The Defendants likewise have presented substantial facts and law in defense to the Plaintiffs' claims. The merits of these positions should be decided after trial.

The preliminary injunction in Bailey required Bailey to operate a night club and disburse a fraction of gross revenues to Christo during the pendency of a lawsuit Christo brought against Bailey. Since Bailey's answer had admitted Christo's co-ownership of the enterprise, the substantial likelihood that Christo would obtain some relief on the merits must have been clear to all. Entered to prevent waste of an asset, the preliminary injunction was upheld on appeal on that basis, without reference to the likelihood of success on the merits.

In the course of the Bailey opinion, we said that a temporary injunction pending final hearing "may be granted if the totality of circumstances warrant," at 1137 (citation omitted), see also Cordis Corp. v. Prooslin, 482 So. 2d 486, 491 (Fla. 3d DCA 1986); Davis v. Joyner, 409 So. 2d 1193, 1195 (Fla. 4th DCA 1982), but we in no way meant to suggest that traditional equitable rules could be selectively jettisoned, or that a

temporary injunction should ever be entered in the absence of a substantial likelihood that the party seeking the injunction is entitled to relief on the merits. Such a likelihood is required under Florida law. Our decision in Bailey v. Christo, supra, antedated our decision in Thompson v. Planning Commission, supra.

A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated. It is not enough that a merely colorable claim is advanced.

> Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested. See, e.g., Oxford International Bank and Trust, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54 (Fla. 3rd DCA 1979), cert. dismissed, 383 So. 2d 1199 (Fla. 1980). It must appear that the petition has a substantial likelihood of success, on the merits. Heavener, Ogier Services, Inc. v. R.W. Florida Region, Inc., 418 So. 2d 1074 (Fla. 5th DCA 1982); Russell v. Florida Ranch Lands, Inc., 414 So. 2d 1178 (Fla. 5th DCA 1982). The establishment of a clear legal right to the relief requested is an essential requirement prior to the issuance of a temporary injunction. Reinhold Construction, Inc. v. City Council for City of Vero Beach, 429 So. 2d 699 (Fla. 4th DCA 1983); Heavener.

Mid-Florida at Eustis, Inc. v. Griffin, 521 So. 2d 357 (1988). Not without force, the City argues that the trial court's conclusion that it has "presented substantial facts and law in defense" precludes a temporary injunction.[3]

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[3]We do not reach this contention because the order lacks the requisite specific reasons and findings of fact. Among the matters as to which the trial court made no findings are those bearing on the City's defenses that some of plaintiffs' claims are time barred, and that others are moot.

If it is to be subject to meaningful review, an order granting a temporary injunction must contain more than conclusory legal aphorisms. Appellate review of temporary injunctions is a matter of right. Fla. R. App. P. 9.130(a)(3)(B). Florida Rule of Civil Procedure 1.610(c) provides simply that "[e]very injunction shall specify the reasons for entry." Court commentary to the 1984 rule amendment makes clear, however, that the rule retains the "requirement of findings and reasons." The cases also establish the necessity to do more than parrot each tine of the four-prong test. Facts must be found. Seashore Club of Atlantic City, Inc. v. Tessler, 405 So. 2d 767, 768 (Fla. 4th DCA 1981). An "application for temporary injunction is insufficient . . . [if] it fails to set forth clearly, definitely and unequivocally sufficient factual allegations to support . . . [the] conclusion of 'irreparable damage' necessary to warrant intervention of a court of equity." Swensen v. Lofton, 457 So. 2d 1069, 1070 (Fla. 2d DCA 1984) (citations omitted). Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction.

Premature Adjudication Improper

Whether the plaintiffs are liable for penalties for failure to remove outdoor advertising signs is a question lying at the heart of the main litigation. To the extent the order granting plaintiffs' motions for temporary injunctive relief may be read to apply retroactively to relieve the plaintiffs of

responsibility for fines already incurred, it prematurely adjudicates "material points in controversy," City of Miami Beach v. State ex rel. Taylor, 49 So. 2d 538 (Fla. 1950), that are not properly decided until the parties can be heard on the merits. "A decree cannot be violated in advance of its entry and it cannot be made retroactive so as to establish a violation by the acts of parties committed before the decree was entered." South Dade Farms v. Peters, 88 So. 2d 891, 900 (Fla. 1956).

Whether prohibitory or mandatory, an injunction is prospective. "[A]n injunction does not lie to prohibit an act which has already been committed." Quadomain Condominium Ass'n, Inc. v. Pomerantz, 341 So. 2d 1041, 1042 (Fla. 4th DCA 1977). "It is well settled that injunction will not lie to enjoin that which has already been done." Wilkinson v. Woodward, 105 Fla. 376, 141 So. 313 (1932). "[A]n injunction will lie only to restrain . . . future injury, since it is impossible to prevent what has already occurred." City of Coral Springs v. Florida Nat'l Properties, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976). The trial court's stated objective of preserving the status quo is not served by a decree invalidating penalties already imposed.

Pending the outcome of litigation, the trial court's order enjoins not only enforcement, but also accrual, of the fines called for by ordinances and charter alike. Enjoining accrual, as opposed to enforcement pendente lite, adjudicates material points in controversy in much the same way that enjoining collection of past fines does.

> The purpose of a temporary injunction is to preserve the status quo until a final hearing when full relief may be granted. Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc., 212 So. 2d 365 (Fla. 4th DCA 1968). A preliminary injunction does not decide the merits of the case unless (1) the hearing is specially set for that purpose, (2) the parties have had a full opportunity to present their cases, University of Texas v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981), and a denial of a preliminary injunction or reversal of an order granting same does not preclude the granting of a permanent injunction at the conclusion of a full hearing. Hialeah, Inc. v. B & G Horse Transportation, Inc., 368 So. 2d 930 (Fla. 3d DCA 1979).

Ladner v. Plaza Del Prado Condominium Ass'n, 423 So. 2d 927, 929 (Fla. 3d DCA 1982). There has not yet been a "full hearing" in the present case. Whether appellees or any of them are liable for penalties under one or more ordinances or charter provisions depends on who prevails on the questions that comprise the merits of the lawsuit.

"Because a party is not required to prove his case in full at a preliminary injunction hearing, the findings of fact and conclusions of law made by the court at that hearing are not binding at the trial on the merits. University of Texas v. Camenisch, 451 U.S. at 395, 101 S. Ct. at 1833." Ladner v. Plaza Del Prado Condominium Ass'n, 423 So. 2d 927, 929 (Fla. 3d DCA 1982). Among appellees' contentions is that the fines are so excessive as to intimidate their exercise of the right to litigate the validity of the enactments authorizing the fines. See Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915) and

Florida East Coast Ry. v. State, 79 Fla. 66, 83 So. 708 (1920). In reversing the temporary injunction, we do not prejudge this question, the lawfulness of the fines, or any other aspect of the merits of the controversy.

The temporary injunction is quashed, and the order granting plaintiffs' motions for temporary relief is

REVERSED.

BARFIELD and ALLEN, JJ., CONCUR.

PER CURIAM. The following is the entry of appeal herein:

"Josiah S. Richardson v. W. C. Gaither et al.

"Now comes Swann & Holtsinger Company, a corporation, and C. M. Knott, as receiver of the said Swann & Holtsinger Company, defendants and counterclaimants in the above-stated cause, and hereby take and enter their appeal, on this the 15th day of July, A. D. 1919, to the Supreme Court of the State of Florida, from the final decree made and entered in the above-stated cause, the said appeal being hereby taken and made returnable to the 9th day of October, A. D. 1919.

"Dated this the 15th day of July, A. D. 1919."

The proceeding is a mortgage foreclosure brought by Richardson against the mortgagors and others in which the interests of various parties in the mortgage rights were adjudicated. The appellants were among the defendants against whose claims to the mortgage rights the decree was rendered. The mortgagors and owners of the legal title, whether they be the original mortgagors or their grantees, are not made parties to the appeal, and mainly for this reason a motion is made to dismiss the appeal. A large amount is involved, and a reversal of the decree may affect the rights of the mortgagors, in the expense and delay of further litigation, if not also in the matters of consequence involved in the unusual matters and controversies disclosed by the transcript; therefore, the court will not adjudicate this appeal in the absence of the mortgagors. See Henry Vogt Machine Co. v. Milton Land & Inv. Co., 74 Fla. 116, 76 South. 695; Nichols & Johnson v. Frank, 59 Fla. 588, 52 South. 146.

A material defect in parties may be noticed at any time upon motion of counsel, or by the court of its own motion.

The appeal is dismissed.

All concur.

On Petition for Rehearing.

PER CURIAM. In an application for rehearing, it is urged that the mortgagors and holders of the legal title are not necessary parties to this appeal. The answer avers that the original mortgagors, Henderson and Gaither, had conveyed the property to the Tampa Kissingen Wells Company "subject to the privity of lien of the said mortgage." But this merely places the named grantee in the place of the original mortgagors, and such grantee is not a party to the appeal.

Among the assignments of error is one that—

"The court erred in its findings and final decree and entry of final decree of foreclosure in said cause."

This covers matters of vital interest to the original mortgagors and to their grantee of the legal title to the property subject to the mortgage, against all of whom the decree is rendered; but they are not made parties to this appeal. A deficiency decree was rendered against the original mortgagors. The authorities cited by the petitioner are not controlling under these circumstances.

The mortgagors or holders of the legal title have not appeared here or asked to be made parties to this appeal.

Rehearing denied.

All concur.

FLORIDA EAST COAST RY. CO. v. STATE.

(Supreme Court of Florida. Jan. 26, 1920.)

(Syllabus by the Court.)

1. PUBLIC SERVICE COMMISSIONS ⟸21—STATE MAY IMPOSE PENALTIES TO SECURE OBEDIENCE TO LAWFUL ORDERS OF PUBLIC UTILITY COMMISSIONS AFTER THE PARTIES AFFECTED HAVE FAILED TO TEST THEIR VALIDITY.

A state has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful, or after the parties affected have had ample opportunity to test the validity of administrative orders and failed to do so.

2. CONSTITUTIONAL LAW ⟸303—IT IS A DENIAL OF DUE PROCESS OF LAW IF REVIEW OF LEGALITY OF STATUTE MAY BE HAD ONLY AT RISK OF PENALTIES SO GREAT THAT IT IS BETTER TO YIELD TO ORDERS OF UNCERTAIN LEGALITY.

A party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law.

3. CONSTITUTIONAL LAW ⟸298(1)—PUBLIC SERVICE COMMISSIONS ⟸19(1)—RATES OR ORDERS OF RAILROAD COMMISSIONERS DO NOT HAVE ATTRIBUTES OF FINAL JUDGMENT OR DECREE OF JUDICIAL TRIBUNAL; DUE PROCESS CLAUSE ENTITLES PERSONS AFFECTED TO JUDICIAL REVIEW.

Rates, rules, orders, and regulations made by the Railroad Commissioners, who are administrative officers, acting under statutory authority, are generally legislative in their nature, and have not the attributes of a final judgment or decree of a judicial tribunal; and those who are directly affected by such administrative rates, etc., are, under the due process of law clauses of the state and federal Constitutions, entitled to a judicial review of questions in good faith duly presented, challenging the validity of the administrative action taken as it affects private property rights.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. CONSTITUTIONAL LAW ⊜247, 328—EXCESSIVE PENALTIES FOR NONCOMPLIANCE WITH CHALLENGED ADMINISTRATIVE RATES IS DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

Pending a judicial determination of the validity of the administrative rates, rules, orders, etc., which are only prima facie valid, the state may not impose such excessive penalties for noncompliance with the challenged rates, etc., as will intimidate the parties complaining from contesting the validity of the rates, etc., in due course of judicial proceedings, since that would, in effect, be a denial of organic rights to equal protection of the laws, and to resort to the courts to finally establish the validity or invalidity of the rates, etc., whose legality are challenged.

5. FLORIDA CONSTITUTION FORBIDS THE IMPOSITION OF EXCESSIVE FINES, AND PROVIDES THAT FOR ANY INJURY THERE SHALL BE A REMEDY IN DUE COURSE OF LAW.

The state Constitution forbids the imposition of excessive fines; and also provides that the courts of the state shall be open so that for any injury there shall be a remedy by due course of law.

6. CONSTITUTIONAL LAW ⊜48—CONSTRUCTION SHOULD MAKE STATUTE COMPLY WITH ORGANIC LAW; LAWMAKING POWER IS ASSUMED TO HAVE INTENDED A VALID ENACTMENT; SO THAT A CONSTRUCTION RAISING DOUBTS AS TO CONSTITUTIONALITY SHOULD BE AVOIDED.

A statute should be construed and applied so as to make it accord with organic law, and the lawmaking power is held to have intended a valid enactment, and that a construction that avoids raising doubts as to the constitutionality of the statute should be applied.

7. PLEADING ⊜354(2)—IN ACTION FOR FINES IMPOSED BY RAILROAD COMMISSIONERS A PLEA THAT ALLEGED VIOLATIONS NECESSARILY OCCURRED WHILE DEFENDANT WAS CONTESTING THE CONSTITUTIONAL VALIDITY OF ANOTHER RULE SHOULD NOT BE STRICKEN.

In an action to recover fines imposed by the Railroad Commissioners, a plea that in effect avers that the alleged violation of rules of the Railroad Commissioners, for which large fines were imposed, were committed while the defendant was with due diligence contesting in the courts of the state the constitutional validity of one of the rules, and that in taking appropriate action to test the validity of such rule the alleged violations of another rule necessarily occurred, should not be stricken.

Error to Circuit Court, Dade County; H. Pierre Branning, Judge.

Action by the State of Florida against the Florida East Coast Railway Company. Demurrer to original third and fourth counts sustained, and demurrer to amended third and fourth counts overruled, demurrers to pleas sustained, and final judgment rendered for plaintiff, and defendant brings error. Reversed.

See, also, 82 South. 136, 139.

Brown, Twyman & Scott, of Miami, and Scott M. Loftin, of Jacksonville, for plaintiff in error.

Dozier A. DeVane, of Tallahassee, for the State.

WHITFIELD, J. In this action brought under section 2908, General Statutes of 1906, as amended by section 12, c. 6527, Acts of 1913 (Comp. Laws 1914, § 2908), to recover fines imposed by the Railroad Commissioners for violations of the Commissioners' rates, rules, and regulations by the defendant, the first and second counts of the declaration were abandoned.

The first count sought a recovery of a fine of $3,000 imposed by the Railroad Commissioners July 16, 1915, for violations of rule 19 in September and November, 1914; and the second count related to a fine of $1,000 for a violation of rule 19 on October 15, 1914, imposed October 30, 1916. Other counts as amended are:

"Third Count.

"The plaintiff aforesaid further sues the defendant aforesaid for that the defendant is and has been from a date prior to September 18, 1914, a railroad company and common carrier operating its line of railroad within the state of Florida, for the transportation of goods and passengers for hire, and running into and doing business in the county of Dade aforesaid; that prior to the 18th day of September, 1914, the Railroad Commissioners of the State of Florida had, pursuant to statute, adopted, promulgated, and prescribed certain rules and regulations for the government of the transportation of persons and property by the railroad companies and common carriers doing business wholly or in part within the state of Florida, and among other rules and regulations so adopted, promulgated, and prescribed was rule 7, of the 'General Rules,' which is as follows:

" 'Increased Rates.

" '7. In no case shall any railroad or common carrier doing business wholly or in part within the state of Florida advance or increase any special rate, or other rates, demurrage charges, storage or wharfage charges, without first submitting the proposed increased rate or rates, demurrage, storage, or wharfage charges, to the Railroad Commissioners and receiving their approval.'

"That said rule 7 was in full force and effect on the 18th day of September, 1914, and has continued in full force and effect from thence hitherto.

"That on the 21st day of October, 1914, the Railroad Commissioners of the state of Florida charged the aforesaid defendant that the defendant did, in and by its Supplement No. 6 to Rate Issue 1135, issued September 18, 1914, effective September 18, 1914, advance and increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advance and increased rates

to the said Railroad Commissioners, and without receiving their approval thereof; and the said Railroad Commissioners gave the said defendant more than ten days' notice that the said charge of violating or disregarding said rule No. 7 would be heard at their office in the city of Tallahassee, Fla., on the 12th day of November, 1914.

"That on, to wit, the 12th day of November, 1914, the Railroad Commissioners of the state of Florida did hold in their office in the city of Tallahassee, Fla., a meeting for the purpose of hearing and considering whether or not the said defendant, to wit, the Florida East Coast Railway Company, had violated said rule 7 by issuing on the 18th day of September, 1914, effective the 18th day of September, 1914, its Supplement No. 6 to Rate Issue 1135, in which supplement it did advance or increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said advance or increase to the said Railroad Commissioners, and without receiving their approval thereof.

"That afterwards, to wit, on the 16th day of July, 1915, the said Railroad Commissioners having, in accordance with law, duly tried the defendant, and the defendant, by its sworn answer, having admitted that it did advance or increase its joint rates on business destined to, or originating at, points on other lines in Florida destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advance or increase to the said Railroad Commissioners, and without receiving their approval, as required by rule 7 of the General Rules, by their order duly entered adjudged the said defendant guilty of violating said rule 7, and, in accordance with law, the said Railroad Commissioners duly fixed and imposed upon the said defendant a penalty for such offense in the sum of twenty-five hundred dollars ($2,500), a copy of which order and judgment is hereto attached, and marked Exhibit C, and made a part hereof. And the said plaintiff alleges that by reason of the premises, and according to the form of the statute in such cases made and provided, the said defendant became liable to pay to the State Treasurer of Florida, the sum of $2,500, with interest thereon from the 16th day of July, 1915. Yet the defendant has not paid the same nor any part thereof, but neglects and refuses so to do, to the damage of the plaintiff, and the plaintiff claims fifteen thousand dollars ($15,000).

"C.

"Order No. 492, File No. 3726.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Violation of Rule 7 by the Florida East Coast Railway Company.

"Pursuant to Notice No. 61, dated October 21, 1914, this matter came on for consideration before the Railroad Commissioners of the State of Florida at their office in Tallahassee on November 12, 1914, and then and there appeared the Florida East Coast Railway Company, by Alexander St. Clair Abrams, its counsel. The said company filed its sworn answer in the said matter, admitting that it did issue Supplement No. 6 to Rate Issue 1135, issued September 18, 1914, effective September 18, 1914, as charged in said Notice No. 61, but setting forth its reasons for so doing and why it should not be penalized therefor. And after a full hearing the Commissioners took the matter under advisement.

"And now, on this day, the said matter coming on for further and final consideration, the Railroad Commissioners, being fully advised in the premises, do find that the Florida East Coast Railway did, in and by its Supplement No. 6 to Rate Issue 1135, issued September 18, 1914, effective September 18, 1914, advance and increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advance and increased rate to the Railroad Commissioners and without receiving their approval.

"Wherefore, it is considered, ordered, and adjudged by the Railroad Commissioners of the State of Florida that the Florida East Coast Railway Company has been guilty, as charged, of violating rule 7 of the General Rules adopted by the Railroad Commissioners of the State of Florida for the government of the transportation of persons and property by common carriers in Florida, and then and now of full force and effect, and has thereby incurred a penalty for such violation, which is hereby fixed and imposed in the sum of twenty-five hundred ($2,500) dollars, which said sum the Florida East Coast Railway Company is required to pay promptly to the State Treasurer as provided by law.

"Done and ordered by the Railroad Commissioners of the State of Florida in session at their office in the city of Tallahassee, the capital, this 16th day of July, A. D. 1915.

"Fourth Count.

"The plaintiff aforesaid further sues the defendant aforesaid for that the defendant is and has been from a date prior to September 18, 1914, a railroad company and common carrier operating its line of railroad within the state of Florida for the transportation of goods and passengers for hire, and running into and doing business in the county of Dade aforesaid; that prior to the 18th day of September, 1914, the Railroad Commissioners of the state of Florida has pursuant to statute adopted, promulgated, and prescribed certain rules and regulations for the government of the transportation of persons and property by the railroad companies and common carriers doing business wholly or in part within the state of Florida; and among other rules and regulations so adopted, promulgated, and prescribed was rule 7 of the 'General Rules,' which is as follows:

" 'Increased Rates.

" '7. In no case shall any railroad or common carrier doing business wholly or in part within the state of Florida advance or increase any special rate, or other rates, demurrage charges, storage, or wharfage charges, without first submitting the proposed increased rate or rates, demurrage, storage, or wharfage charges, to the Railroad Commissioners and receiving their approval.'

"That said rule 7 was in full force and effect on the 18th day of September, 1914, and has continued in full force and effect from thence hitherto.

"That on the 7th day of October, 1914, the Railroad Commissioners of the State of Florida charged the aforesaid defendant that the defendant did, in and by its Supplement No. 7 to Rate Issue 1142m, issued September 18, 1914, effective September 18, 1914, advance and increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advanced and increased rates to the said Railroad Commissioners and without receiving their approval thereof; and the said Railroad Commissioners gave the said defendant more than ten days' notice that the said charge of violating or disregarding said rule No. 7 would be heard at their office in the city of Tallahassee, Florida, on the 20th day of October, 1914; and at the request of said defendant consideration thereof was postponed until the 12th day of November, 1914.

"That on, to wit, the 12th day of November, 1914, the Railroad Commissioners of the State of Florida did hold in their office in the city of Tallahassee, Fla., a meeting for the purpose of hearing and considering whether or not the said defendant, to wit, the Florida East Coast Railway Company, had violated said rule 7 by issuing on the 18th day of September, 1914, effective the 18th day of September, 1914, its Supplement No. 7 to Rate Issue 1142, in which supplement it did advance or increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said advance or increase to the said Railroad Commissioners and without receiving their approval thereof.

"That afterwards, to wit, on the 16th day of July, 1915, the said Railroad Commissioners having, in accordance with law, duly tried the defendant, and the defendant by its sworn answer having submitted that it did advance or increase its joint rates on business destined to, or originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advance or increase to the said Railroad Commissioners, and without receiving their approval, as required by rule 7 of the General Rules, by their order duly entered adjudged the said defendant guilty of violating said rule 7, and in accordance with law the said Railroad Commissioners duly fixed and imposed upon the said defendant a penalty for such offense in the sum of twenty-five hundred dollars ($2,500), a copy of which order and judgment is hereto attached, and marked Exhibit D and made a part hereof. And the said plaintiff alleges that by reason of the premises, and according to the form of the statute in such cases made and provided, the said defendant became liable to pay to the Treasurer of the State of Florida the said sum of $2,500, with interest thereon from the 16th day of July, 1915, yet the defendant has not paid the same nor any part thereof, but neglects and refuses so to do, to the damage of the plaintiff, and the plaintiff claims fifteen thousand dollars ($15,000).

"D.

"Order No. 491, File No. 3726.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Violation of Rule 7 by the Florida East Coast Railway Company.

"Pursuant to Notice No. 60, dated October 7, 1914, this matter came on for hearing before the Railroad Commissioners of the State of Florida, at their office in Tallahassee, Florida, on the 20th day of October, 1914; and thereupon, at the request of the Florida East Coast Railway Company, the consideration thereof was postponed until November 12, 1914. Pursuant to such postponement the said matter came on for consideration on said date, and then and there appeared the Florida East Coast Railway Company, by Alex. St. Clair Abrams, counsel, who was fully heard, and the said Florida East Coast Railway Company having filed its sworn answer in the said matter, which said answer admitted that the said company did issue its Supplement No. 7 to Rate Issue 1142, issued September 18, 1914, effective September 18, 1914, as charged in said Notice No. 60, the Commissioners thereupon took the matter under advisement.

"And now, on this day, the said matter coming on for further and final consideration, the Railroad Commissioners, being fully advised in the premises, do find that the said Florida East Coast Railway Company, in and by its Supplement No. 7 to Rate Issue 1142, issued September 18, 1914, effective September 18, 1914, did advance or increase its joint rates on business destined to, and originating at, points on other lines in Florida, destined to, or originating at, Florida East Coast Railway stations, without first submitting the said proposed advance or increase to the said Railroad Commissioners and without receiving their approval.

"Wherefore it is considered, ordered, and adjudged that the Florida East Coast Railway Company has been guilty as charged of violating rule 7 of the General Rules adopted and promulgated by the Railroad Commissioners of the State of Florida for the government of the transportation of persons and property by common carriers in Florida, as above set out, and has thereby incurred a penalty for such violation, which is hereby fixed and imposed in the sum of twenty-five hundred ($2,500) dollars, which said sum the said Florida East Coast Railway Company is required to pay promptly to the State Treasurer, as provided by law.

"Done and ordered by the Railroad Commissioners of the State of Florida in session at their office in the city of Tallahassee, this 16th day of July, A. D. 1915."

A demurrer to the original third and fourth counts was sustained, and a demurrer to the amended third and fourth counts was overruled.

Among the pleas were the following:

"The defendant, for plea to the third and fourth counts of the declaration, severally and separately says:

"(1) That the defendant, Florida East Coast Railway Company, denies that at the time mentioned in the declaration it had advanced or increased any joint rate on business destined to, or originating at, points on any other line or lines of railroad in Florida, and says that it had never made, and never had, any joint rate with any railroad on business destined to, or originating at, Florida East Coast Railway Company's stations.

"(2) And for a further and second plea to said third and fourth counts separately defendant says that it has not in any way violated rule 7 of the General Rules promulgated by the Railroad Commissioners of Florida; that it did not by its Supplement No. 6 of Rate Issue 1135, nor by its Supplement No. 7, Rate Issue 1142, mentioned in said counts, advance or increase any rate fixed by said Commissioners, but thereby changed only the regular rate authorized by said Commissioners, without, however, making the reductions of ten per cent. and twenty per cent. below the rates so fixed by the Commissioners, as required by rule 19 promulgated by said Commissioners, and set forth in full in the first and second counts of the declaration.

"(3) And for a further and third plea defendant says that the matters complained of in the said third and fourth counts of the declaration are identical with the matters complained of in the first and second counts thereof, and are not other or additional matters; that the said first and second counts allege the substantial violation of the orders of the Railroad Commissioners, and the said third and fourth counts deal solely with the evidence of such violation."

The fourth and fifth pleas were apparently abandoned.

"(6) As amended, and for a further and sixth plea to the third and fourth counts, defendant says that upon the making and promulgation by the Railroad Commission of Florida of said rule 19 the defendant, believing, upon the facts as known to it, that the said rule was unreasonable, arbitrary, and unjust, and confiscatory of the property of the defendant, prepared to test by a bill in equity in a competent court in the state of Florida the question as to whether its order as applied to the defendant was unreasonable, arbitrary, unjust, or confiscatory as aforesaid, and to enjoin the said Railroad Commission from the enforcement of said order as against defendant.

"That while the defendant was proceeding, with all due and reasonable speed, to collate the facts required to be set forth in said bill in equity, and prepare the said bill, the said Railroad Commission brought in the Supreme Court of Florida a relation for mandamus directed to the defendant to compel it to put in force, obey, and abide by said rule 19, and to apply it to all shipments on its line of railway coming within the scope of said rule.

"That the defendant, with the desire that its rights should be adjudicated by the court, filed a return to the alternative writ, which return is substantially set forth in 65th volume of the Reports of the Supreme Court of Florida, at page 425 and following, and what was therein set forth is hereby made a part of these pleas.

"That a replication was filed by said relators and testimony taken; that the determination of the question at issue as aforesaid required the introduction in evidence in said mandamus proceedings of the testimony of a great many witnesses and of many voluminous calculations and papers.

"That none of the said matters, and no evidence as to them, were before the said Railroad Commission at or before its actions, by which it fines the defendant as set forth in said count, but that it based its fine, as appears in the declaration, on the answer of the defendant admitting that it had issued its said Supplements No. 6 and No. 7.

"That the said mandamus proceedings was prosecuted with all reasonable speed by said relators, and that up to the time of the decree therein rendered the said defendant believed said rule to be invalid and unenforceable.

"That the issue of defendant's Supplement No. 6 to Rate Issue No. 1135 on the 18th day of September, 1914, effective the 18th day of September, A. D. 1914, and of its Supplement No. 7 to Rate Issue 1142 on the 18th day of September, 1914, effective on said 18th day of September, 1914, by which defendant refused to put in operation said rule 19, as charged in said counts, were made after the filing of said mandamus proceedings, and before the said decree of the said Supreme Court of Florida, and that, as shown by the said count, the said fines were imposed by the said Florida Railroad Commission after the decree of the said Supreme Court.

"That it was necessary for the defendant to make and promulgate its Supplement No. 6 and its Supplement No. 7, above mentioned, in order that it might test the right of the Railroad Commission to make said rule 19, and that, without such making and promulgation, it would have been obliged to submit to the deprivation of its rights and the confiscation of its property, as it believed, by yielding without contest to the demands of said rule 19.

"As under the law of the state of Florida the defendant was liable to a fine by the said Railroad Commission for each and every violation of the said rule 19, if the same was valid as applied to the defendant, and in the course of business of the defendant, both prior to and in the year 1914 and thereafter, there were very numerous shipments made over its line made over more than one line of railway in Florida, and to and over its lines from one or more railways in Florida, and coming in the scope of said rule 19, and it was its duty to receive and transport said shipments; and defendant avers that it was either compelled to obey said rule and charge rates accordingly, to its great loss of earnings, or to resist by due resort to the courts the enforcement of said rule, and procure a determination by said courts of its validity and enforceability or invalidity and unenforceability, and that the imposition and collection of a fine or fines upon defendant by the said Florida Railroad Commission, and thus reduce its earnings during the pendency of the said suit to secure such determination, are without due process of law, and in violation of the rights of the defendant under the Constitution of the United States."

Demurrers to all the pleas were sustained. The sixth plea above, having been amend-

ed, was stricken on motion. The amendment to plea No. 6 is covered by the next to the last paragraph of such plea as set out above.

The defendant declined to further plead, and final judgment for the plaintiff was rendered, to which the defendant took writ of error.

The statutes of the state contain the following provisions:

The Railroad Commissioners shall have power "to make reasonable and just joint rates for all connecting carriers doing business in this state as to all traffic passing from the line of one common carrier to another, and to apportion such joint rates between said carriers participating therein." "To prescribe all rules and regulations appropriate for the execution of any of the powers conferred upon them by law either in express terms or by implication." "All rules and regulations made * * * by the Commissioners shall be deemed to be prima facie * * * reasonable and just." "If any railroad, railroad company, or other common carrier doing business in this state shall by any officer, agent or employé be guilty of a violation or disregard of any rate, schedule, rule or regulation provided or prescribed by said Commission, or shall fail to make any report required to be made under the provisions of this chapter, or shall otherwise violate any provision of this chapter, such company or common carrier shall thereby incur a penalty for each such offense of not more than five thousand dollars, to be fixed and imposed by said Commissioners after not less than ten days' notice of the charge of such violation or disregard of rate, schedule, rule or regulation or failure to make report or other violation or disregard of the provisions of this chapter, and upon which charge such company or common carrier shall have had an opportunity to be heard by said Commissioners.

"The common carrier charged shall file its defense or defenses in writing under oath, specifically setting forth each particular defense. The Commissioners may permit amendments to charges and defenses upon such terms and conditions, and with such postponements of hearing, if any, as in their opinion the ends of justice may require. They may also adopt rules to regulate the proceedings before them.

"The said penalty in the amount so imposed, if not promptly paid to the State Treasurer, shall be recovered with interest thereon from the date of the order, in a civil action brought by the said Commissioners in the name of the state of Florida in any county in the state where such violation has occurred, or in any other country through or in which such common carrier runs or does business.

"The declaration shall be deemed sufficient if it recites fully or sets forth the said order in which suit is brought, with an averment that the defendant is indebted to the plaintiff thereon in the amount of the penalty imposed with interest as aforesaid. In such cases there shall be no general issues, but the plea or pleas shall specifically set forth the particular defense or defenses to the action; and no defense which existed prior to the day of hearing before the Commissioners, and which was not made before them, shall be permitted in the action. The fact of the fixing and imposing of such fine by the Commissioners shall constitute prima facie evidence of everything necessary to create the liability or require the payment of the fine or penalty as fixed and imposed, and to authorize a recovery thereon in any actions or proceedings brought by the Commissioners, and a copy of the entry in the minute book of the Commissioners of the order fixing and imposing such fine or penalty, certified by the chairman of the Board of Railroad Commissioners, shall constitute prima facie evidence of the fact that such fine or penalty was fixed and imposed by the Commission.

"Every fine when imposed by the Commissioners shall be a lien upon the railroad, equipment, boats and real property of the common carrier on which it is imposed except such real property as is not used in the business of transportation."

"The writ of injunction shall lie and obtain in all cases of the violation of any freight or passenger rates, or of any schedule of either, or of any failure or refusal to conform to or enforce or put and keep the same, or any or either, in operation, by any railroad company or other common carrier, to prevent the violation of any such rate or schedule, and to compel any such railroad or common carrier to observe and put and keep in operation the same." Chapter 6527, Acts of 1913; sections 2893, 2908, 2924, Compiled Laws 1914.

"Said Commissioners may, at their discretion, cause to be instituted in any court of competent jurisdiction in this state, by the Attorney General, State Attorney or special counsel, designated by them, in the name of the state, proceedings by or for mandamus, injunction, mandatory injunction, prohibition or procedendo, against any such company or common carrier subject to the provisions of this chapter, or against any office or officer, agent or agents thereof, to compel the observance of the provisions of this chapter, or any rule, rate or regulation of the Commissioners made thereunder, or to compel the accounting for and refunding of any moneys exacted in violation of any one of the provisions of this chapter. In all cases where any common carrier shall have become indebted or liable for damages to a large number of persons by reason of its failure to abide by or comply with the provisions of any rule, rate or regulation of the Commissioners, or by its violation of any provisions of this chapter, it shall be the duty of the Railroad Commissioners to demand of such common carrier by written notice served upon it, a discovery of the names of all such persons and an accounting and payment to all such persons of all such indebtedness or damages, and if such common carrier shall refuse or shall fail to make such accountings and payments within sixty days after such notice shall have been served upon it, it shall be the duty of the Railroad Commissioners to institute a proceeding or proceedings by or for mandamus or mandatory injunction against such common carrier to compel the making of such accountings and payments, and in any such proceeding upon an adjudication against common carrier there shall be taxed as costs and paid over to the Railroad Commissioners to be paid out by them all such costs, attorneys' fees and expenses of

such proceedings as shall appear to the court reasonable under all the circumstances and necessary to effect such accounting and settlement without cost or expense to the state or to the claimants, and the courts shall make all such orders as may be necessary or advisable to secure an accounting and payment of costs and damages as full and complete as may appear to be practicable, and any money not paid over to the persons to whom it shall be due within thirty days after such payment shall have been ordered made, shall be paid into the registry of the court to be disbursed to the proper persons upon orders of the court. And said Commissioners are hereby given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of this chapter." Chapter 5616, Acts 1907; section 2921, Comp. Laws 1914.

Rule 19, contained in the first and second counts and in the fourth plea, is as follows:

"'Joint Rates.

"'19. On intrastate shipments of freight passing over two or more lines, and not governed by rule 1, no railroad which is a party to the haul shall charge or receive for its services in connection with such equipment more than its maximum rate for the distance hauled by it, less ten per cent., when the entire haul is over two lines, nor more than its maximum rate, less twenty per cent., when the entire haul is over three or more lines, nor in any instance more than the published rate applicable for the same movement when handled as a one-line haul; but any such rate collected, or received by any such roads as above prescribed, may be divided among themselves by the parties to any such rate in such proportion as may be agreed upon by them.'"

Rule 19, mentioned in the amended sixth plea, is contained in the first and second counts, but it is not referred to in the third and fourth counts of the declaration; and Supplement No. 6 to Rate Issue No. 1135, and Supplement No. 7 to Rate Issue No. 1142, referred to in those counts, are not found in the pleadings.

Assuming that the demurrers to the original pleas were properly sustained, the main contention with reference to striking the amended sixth plea will be considered.

[7] The statute provides that, if a pleading be so framed as to prejudice or embarrass or delay the fair trial of the action, it may be stricken. Section 1433, Gen. Stats. 1906 (Compiled Laws 1914); State ex rel. Ellis v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 South. 230.

To authorize the striking of a plea on motion, it must not only be informal and bad, but it must be wholly irrelevant or for some reason improper. Russ v. Mitchell, 11 Fla. 80; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922.

The grounds of the motion to strike the amended sixth plea are, in effect, that it appears from the plea that the defense set up existed prior to the hearing before the Railroad Commissioners when the fine sought to be recovered was imposed, and it is not averred that such defense was made before the Railroad Commissioners, as is required by the statute, and that the plea is duplicitous. The latter ground of the motion to strike the amended sixth plea is not argued here by counsel for the defendant in error. If it be conceded that the first ground of the motion to strike the plea would otherwise be proper, it is not available if the statute does not require the plea to make the suggested averment.

Section 2908, General Statutes of 1906, as amended by section 12, chapter 6527, Acts of 1913, provides that, in the actions authorized to be brought to recover the penalties imposed by the Railroad Commissioners, "there shall be no general issues, but the plea or pleas shall specifically set forth the particular defense or defenses to the action, and no defense which existed prior to the day of hearing before the Commissioners, and which was not made before them, shall be permitted in the action." Section 2908, Compiled Laws 1914.

The quoted enactment does not require a plea to aver that the defense tendered did not exist prior to the hearing before the Commissioners when the fine was imposed, or that if they so existed they were presented at such hearing. The statute apparently does no more than to enable the plaintiff to reply that the defense was not presented at the hearing when the fines were imposed, or to make such defenses inadmissible if objected to at the trial. The statement in the order of the Railroad Commissioners (Exhibit C), imposing the fines mentioned in the third count of the declaration, that the defendant company in its answer set forth its reasons why it should not be penalized for the infractions charged, indicates that the company may have presented at the hearing when the fines were imposed the defense tendered by the amended sixth plea, and this comports with the averments of the amended sixth plea.

The matters of defense referred to in the sixth plea, as not having been "before the said Railroad Commissioners at or before its actions, by which it fines the defendant as set forth in said count," do not relate to the right to test the validity of the rule without being intimidated by onerous fines in violation of organic rights, but to the validity of rule 19 as an administrative regulation.

However, if the plea tenders no defense, it may be immaterial whether the proper procedure was had in eliminating it.

The defense tendered by the sixth plea is, in effect, that the fines were imposed for violations of rule 19 of the rules adopted by the Railroad Commissioners, which the defendant regarded as violative of its consti-

tutional rights, the validity of which rule the defendant with due diligence was contesting in the courts of the state when the rate charges were made in violation of the rule for which the fines were imposed.

[1] A state has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and failed to do so.

[2] A party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be affected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Wadley Southern R. Co. v. State of Georgia, 235 U. S. 651, 35 Sup. Ct. 214, 59 L. Ed. 405; Attorney Gen. of N. Y. v. Con. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Missouri Pac. R. Co. v. Tucker, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507.

[3, 4] Rates, rules, orders, and regulations made by the Railroad Commissioners, who are administrative officers, acting under statutory authority, are generally legislative in their nature, and have not the attributes of a final judgment or decree of a judicial tribunal; and those who are directly affected by such administrative rates, etc., are, under the due process of law clauses of the state and federal Constitutions, entitled to a judicial review of questions in good faith duly presented, challenging the validity of the administrative action taken as it affects private property rights. The statutes of this state also contemplate a judicial review of such administrative orders at the suit of the Railroad Commissioners to enforce their rules and orders that are not obeyed in due course. And pending a judicial determination of the validity of the administrative rates, rules, orders, etc., which are only prima facie valid, the state may not impose such excessive penalties for noncompliance with the challenged rates, etc., as will intimidate the parties complaining from contesting the validity of the rates, etc., in due course of judicial proceedings, since that would in effect be a denial of organic rights to equal protection of the laws, and to resort to the courts to finally establish the validity or invalidity of the rates, etc., whose legality are challenged. See Wadley Southern R. Co. v. State of Georgia, supra; Attorney General of State of New York v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

The statutes of this state expressly make only "prima facie reasonable and just" any action taken by the Railroad Commissioners within their statutory authority, and specifically provide that the rates, rules, orders, and regulations made by such Commissioners shall by them be enforced in the proper courts of the state; thus providing a prompt method for determining the validity of the administrative orders, etc. No express provision is made in the statutes for those affected by the rates, rules, etc., of the Railroad Commissioners to test their validity in the courts.

It has been held by this court that where the Railroad Commissioners exceed or abuse the authority and discretion conferred upon them, by making an order that illegally invades the property rights of a railroad company, the illegality of the order is available as a defense in proceedings at law to compel the company to obey the invalid order, or in an action for a statutory penalty for a violation of the order; therefore the remedy at law is adequate, and an injunction will not be granted in the absence of some ground for equitable relief. Louisville & N. R. Co. v. Railroad Com'rs, 63 Fla. 491, 58 South. 543, 44 L. R. A. (N. S.) 189.

In view of the statutes and of the decisions of this court, it must be assumed that the statutes contemplate that if those who are to observe the administrative rates, rules, and orders of the Railroad Commissioners, duly and reasonably assert the invalidity of the rates, etc., as they affect private property rights, and decline to observe the rates, etc., the Railroad Commissioners shall, in due course and without needless delay, test the validity of their action by invoking appropriate judicial proceedings to enforce the questioned rate, etc. When this is done, those who assert a violation of their organic property rights may contest the enforcement of the challenged rates, rules, or regulations.

Rules and orders of the Railroad Commission are administrative, not judicial, and are not conclusive. They are subject to review by the courts in any appropriate proceeding; and if the defendant reasonably and in good faith regarded the rule, for the violation of which the fines here sought to be enforced were imposed, as an unconstitutional violation of its property rights, it had the privilege of testing the validity of the rule in the courts. And, if the defendant proceeded in good faith and with due diligence to make the test in actions brought by the Railroad Commissioners for the enforcement of such contested rule, heavy fines cannot lawfully be imposed for violations pending such test, where the fines are so onerous as to intimidate the defendant in exercising its

right to contest the validity of the administrative rule not having the characteristics of a final judgment, since such action would be a denial to the defendant of the equal protection of the laws, in violation of the federal Constitution, if not also a deprivation of property without due process of law in violation of the state and United States Constitutions. Wadley Southern R. Co. v. State of Georgia, supra; Ex parte Young, supra; Southwestern Telegraph & Telephone Co. v. Danaher, 238 U. S. 482, 35 Sup. Ct. 886, 59 L. Ed. 1419, L. R. A. 1916A, 1208; State Public Utilities Commission ex rel. v. Chicago & W. T. R. Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Missouri Pac. R. Co. v. State of Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; Missouri Pac. R. Co. v. Tucker, supra.

[5] The state Constitution forbids the imposition of excessive fines. Section 8, Declaration of Rights. And also provides that all courts in the state shall be open so that for any injury there shall be a remedy by due course of law, and right and justice administered without sale, denial, or delay. Section 4, Declaration of Rights.

[6] Section 2908, General Statutes of 1906, as amended by chapter 6527, Acts of 1913, provides that if a railroad company shall be guilty of a violation or disregard of any rate, schedule, rule, or regulation prescribed by the Railroad Commissioners, such company "shall thereby incur a penalty for each such offense of not more than five thousand dollars, to be fixed and imposed by said Commissioners," etc. In view of the express provision of the statute making such rates, schedules, rules, or regulations only prima facie reasonable and just, and of the organic right of the companies to have the validity of such administrative rates, schedules, rules, and regulations tested in appropriate judicial proceedings, before such rates, etc., may be regarded as conclusively established and binding on the companies, the statutory provision that for a violation or disregard of any rate, etc., the company "shall thereby incur a penalty for each such offense," apparently has reference to rates, schedules, rules, and regulations whose validity is not contested or has been duly established in appropriate judicial proceedings. This construction of the quoted statutory provision seems appropriate under the rule of interpretation that statutes must be construed with reference to constitutional requirements, that the Legislature must be held to have intended a valid enactment, and that a construction that avoids raising doubts as to the constitutionality of the statute should be applied. These rules are particularly applicable to penalty statutes. See Burr v. Florida East Coast Ry. Co., 81 South. 464; Langford v. Odom, 81 South. 469; United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; U. S. v. Brewery (Jan. 5, 1920) 251 U. S. 210, 40 Sup. Ct. 139, 64 L. Ed. ——.

These principles of the interpretation may have a bearing upon the provisions of the statute relative to the presentation of defenses in actions to recover fines imposed for violations of such administrative rules, etc., while they are of only prima facie validity.

The validity of rule 19 having been established by a judgment of this court (State ex rel. Railroad Com'rs v. Florida East Coast R. Co., 69 Fla. 480, 68 South. 729, L. R. A. 1918F, 272, it may be enforced by direct judicial proceedings or by fines recoverable as provided by the statute; and the statute also provides for enforcing, at the suit of the Railroad Commissioners, an accounting and payment of overcharges made in violating the rules of the Commissioners fixing rates. Chapter 5616, Acts 1907; Florida East Coast Ry. Co. v. State, 82 South. 136.

Amended sixth plea states a defense. Among other statements, it in effect avers that the alleged infractions of rule 7, for which the fines here sought to be recovered were imposed, occurred while rule 19 was only prima facie valid, and while its validity was being tested in the courts, and before its validity was established by a final judgment of a competent tribunal; and that the making of supplements 6 and 7 to defendant's rate issues, in alleged violation of rule 7, was necessary to test the validity of rule 19; and that the defendant carrier duly contested the legality of rule 19 when the Railroad Commissioners sought to enforce it against the defendant company. In view of the statutory provisions for the enforcement of the rules of the Railroad Commissioners and the absence of specific provision for testing such rules at the suit of the carriers, and in consideration of the rules of procedure in the courts of this state with reference to injunctions against the Railroad Commissioners where there is an adequate remedy at law by defenses in action brought by them, and in view of the averments as to diligence on the part of the defendant carrier in contesting the validity of the rule, a lack of diligence on the part of the defendant in contesting the validity of the rule does not appear. This holding accords with St. Louis, I. M. & S. Ry. v. Williams, 251 U. S. 63, 40 Sup. Ct. 71, 64 L. Ed. ——, decided December 8, 1919; Gulf, Colorado & Santa Fé Railroad Co. v. State of Texas, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574.

There was error in striking amended sixth plea, for which the judgment will be reversed.

BROWNE, C. J., and TAYLOR, ELLIS, and WEST, JJ., concur.