Hamilton County, 261 S. W. 990, decided today, but not yet [officially] reported.

We hold the justices of the Court of Civil Appeals are not disqualified.

Upon authority of Hubbard v. Hamilton County, supra, questions 1 and 2 are answered in the negative, and the third question in the affirmative.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS et al. v. STATE. (No. 3153.)

(Supreme Court of Texas. April 30, 1924.)

1. Constitutional law ⟸45—Not province of court to determine whether statute is abstractly valid.

It is not the province of courts to determine whether a statute is abstractly valid or invalid at instance of state or individual.

2. Carriers ⟸18(6)—Averments held insufficient to make case for relief against issuance of free passes.

A case for injunctive relief against carriers issuing free passes to certain classes of persons, under Anti-Pass Law (Acts 1907, c. 42, § 2, as amended by Acts 1911, c. 83 [Vernon's Ann. Pen. Code 1916, art. 1533]), is not made on mere averment that Legislature violated Constitution in authorizing free transportation to certain classes, nor by allegation that free transportation, issued under act, adds to carriers' operating expense.

3. Carriers ⟸12(1)—Not all discrimination in passenger fares prohibited by Constitution; "unjust."

Const. art. 10, § 2, providing that Legislature shall pass laws to regulate passenger tariffs, correct abuses, and prevent unjust discrimination, does not forbid all discrimination in fares, but only such as will operate unjustly; "unjust," in view of Rev. St. art. 6670, being probably used in sense of that which is opposed to a law which is the test of right or wrong.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unjust.]

4. Constitutional law ⟸70(1)—Power of Legislature to classify passengers as to rate of fare paid, stated.

Under Const. art. 10, § 2, Legislature is given discretion of classifying passengers for purpose of determining who shall pay full fare, reduced fare, or none, and classification so adopted is beyond judicial review unless without reasonable basis.

5. Constitutional law ⟸205(1)—Legislative classification of Anti-Pass Law held not arbitrary.

Anti-Pass Law (Acts 1907, c. 42, § 2, as amended by Acts 1911, c. 83 [Vernon's Ann. Pen. Code 1916, art. 1533]), enacted under authority of Const. art. 10, § 2, *held* not arbitrary in classification of persons entitled to free or reduced transportation because it grants free passes to certain public officials and reduced transportation charges to certain classes of non-office holders.

6. Evidence ⟸14—Common knowledge that public interest is subserved by meetings of religious workers and industrial fairs.

It is common knowledge that public interest is subserved by meetings of religious and charitable workers and by industrial fairs, and that many in need of service rendered by such meetings could not attend if payment was to be made of full passenger fares.

7. Constitutional law ⟸70(1) — Legislative classification not disturbed by courts if not beyond reason.

It is enough to forbid judicial destruction of any portion of legislative classification, in performing duty laid on Legislature by Constitution, if court is unable to declare that classification goes beyond bounds of reason.

8. Carriers ⟸12(1)—Constitutional law ⟸241—Anti-Pass Law, entitling certain classes to reduced fare and other classes to ride free, held not invalid.

There being reasonable grounds for legislative classification of persons with respect to rates of fare paid, under Anti-Pass Law (Acts 1907, c. 42, § 2, as amended by Acts 1911, c. 83 [Vernon's Ann. Pen. Code 1916, art. 1533]), and law affecting equally all persons similarly situated under similar circumstances, it is not invalid within Const. Tex. art. 1, nor Const. U. S. Amend. 14.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by the State of Texas against the St. Louis Southwestern Railway Company of Texas and others. Judgment for defendants was reversed by the Court of Civil Appeals (197 S. W. 1006), and defendants bring error. Judgment of Court of Civil Appeals reversed, and judgment of district court affirmed.

E. B. Perkins, George Thompson, and C. C. Huff, all of Dallas, H. M. Garwood, of Houston, J. W. Terry, of Galveston, and Hiram Glass and N. A. Stedman, both of Austin, for plaintiff in error.

B. F. Looney, Atty. Gen., and C. M. Cureton and Luther Nickels, Asst. Attys. Gen., for the State.

GREENWOOD, J. Defendant in error, the state of Texas, by the Attorney General, instituted this suit to enjoin plaintiffs in error, being numerous railroad corporations organized under the laws of Texas, from issuing or honoring free passes to any persons or classes of persons other than employees.

The averments of the state's petition may be briefly stated as follows:

First. Each plaintiff in error had for years granted, and would, unless restrained, continue to grant, free transportation to some members of the traveling public, while requiring others to pay passenger fares.

Second. Free mileage thus granted amount-

ed each year to an average of 12 per cent. of the total passenger mileage of each plaintiff in error.

Third. Plaintiffs in error claim the right to issue and honor passes for free transportation of passengers under section 2 of chapter 42, Acts of 1907, as amended by chapter 83, Acts of 1911 (Vernon's Ann. Pen. Code 1916, art. 1533), defining the classes of persons entitled to free transportation. All provisions of said amended section, authorizing transportation on free passes or for less than regular tariffs of all persons except employees are void; because in contravention of section 2 of article 10, and sections 3, 19, and 28 of article 1, of the Constitution of Texas; and because in violation of the Fourteenth Amendment to the Constitution of the United States.

Fifth. Plaintiffs in error are guaranteed by the Constitution and statutes the right to make such charges for transporting freight and passengers as may be necessary to yield a reasonable return on their investments over and above expenses of operation, interest on bonds, etc., and thousands of dollars are added annually to the operating expenses of each plaintiff in error by reason of free transportation of passengers.

By general and special exceptions and by special pleas, plaintiffs in error questioned the sufficiency of the averments of the petition to authorize the state to maintain the suit, and denied the grant of free transportation save in accordance with the terms of the statute, claimed to be valid.

On the trial, it was agreed that each plaintiff in error had transported, and would, unless restrained, continue to transport, passengers free of charge, when holding passes issued under the terms of the challenged statute; and it was proven that more than 95 per cent. of the free transportation granted by plaintiffs in error, measured by mileage, was on passes to officers, agents, and employees, and members of their families.

The district court rendered judgment against the state, both on general demurrer and on consideration of the evidence. On appeal, the Honorable Court of Civil Appeals at Austin reversed this judgment and enjoined plaintiffs in error from granting transportation in this state to any person without payment of the regular fare for passengers, except:

(1) To the necessary caretakers accompanying livestock, poultry, melons, or other perishable produce, while such caretakers are en route and while returning.

(2) Trip passes to indigent poor when application therefor is made by any religious or charitable institution.

(3) To Confederate veterans who are inmates of the Confederate Home, or who have been or may hereafter be admitted to such home.

(4) To persons injured in wrecks upon the road of any railway company immediately after such injury, and the physicians and nurses attending such injured persons during the transportation of such injured persons.

(5) To persons carried in cases of general epidemics, pestilence, or other calamitous visitations at the time thereof or immediately thereafter.

(6) To persons procuring special rates for special occasions and under special conditions when such rates shall have been authorized by the Railroad Commission of Texas.

(7) To publishers, editors, or proprietors of newspapers or magazines when transportation has been procured by contract of exchange of advertising space for such transportation; and when such contracts are in writing and have received the approval of the Railroad Commission of Texas and such exchanges made upon the same basis of charge as made to the public generally by the parties to the contract for like service; and when such contract is made on the basis of value received.

(8) To all persons actually employed and engaged in the service of any company, including its officers, bona fide ticket agents, passenger and freight agents, physicians, surgeons, general attorneys, and attorneys who appear in court to try cases and who receive a reasonable annual salary; furloughed, pensioned, and superannuated employees; persons who have become disabled or infirm in the service of a common carrier, and ex-employees traveling for the purpose of entering the service of a common carrier; the families of employees and of persons killed while in the service of a common carrier; persons actually engaged on sleeping cars and express cars; officers and employees of telegraph companies; newsboys employed on trains; railway mail service employees and their families; and chairmen and bona fide members of grievance committees of employees.

The judgment of the Court of Civil Appeals also permitted the exchange between one railway company and another, and between railway companies and certain other companies, of passes and franks for officers and employees and their families. Such decree also permitted the free transportation of articles being sent to any charitable institution or orphans' home.

We have concluded that the judgment of the district court was correct for two reasons: First, because the state failed to plead or prove facts entitling it to equitable relief, though invalidity of portions of the statute be assumed; and, second, because the Constitution did not forbid but instead expressly authorized the Legislature to enact the statute.

[1, 2] It is not the province of courts to determine whether a statute is abstractly valid or invalid at the instance of the state or an

individual. The mere averment that the Legislature violated the Constitution in authorizing free transportation to certain classes, if true, would not sustain the award of an injunction. Guadalupe County v. Wilson County, 58 Tex. 230; Cruickshank v. Bidwell, 176 U. S. 80, 20 Sup. Ct. 280, 44 L. Ed. 377; McCabe v. A., T. & S. F. Ry. Co., 235 U. S. 164, 35 Sup. Ct. 69, 59 L. Ed. 169. Nor does the additional allegation that free transportation, issued under the attacked provisions of the statute, adds to the carriers' operating expenses, suffice to make out a case entitling the state to relief in a court of equity. As stated by Mr. Pomeroy:

"When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors, that is, it must establish a case of equitable cognizance and a right to the particular relief demanded." 4 Pomeroy's Equity Jurisprudence (4th Ed.) § 1752.

No injunction sought by the state could directly diminish the charges of plaintiffs in error for transporting passengers. At most, the effect of the injunction must be indirect, uncertain, and conjectural. That the state will be denied injunctive relief, under such circumstances, is regarded as settled by the carefully considered opinion of this court through Chief Justice Stayton in State of Texas v. Farmers' Loan & Trust Co., 81 Tex. 530, 17 S. W. 60. There the state, by Attorney General Hogg, sought cancellation of mortgage bonds of the International & Great Northern Railroad Company on allegations to the effect that such bonds were invalid, and that since the bonded debts of railroad companies were considered in establishing railroad rates, cancellation of the bonds would result in lowering of rates for transportation of persons and property in Texas. In holding that neither section 22 of article 4, of the Constitution, nor any other provision of the Constitution nor any statute sustained the right of the state, through the Attorney General, to maintain such an action, the court said:

"If in this case the court had retained jurisdiction and on final trial had granted all the relief the state asked, what good could have been accomplished by it through which the public would have been benefited? It would not be contended that the court could legally have made and enforced an order that the railway company, after the cancellation of the bonds alleged to be invalid, should transport freight of passengers at rates lower than the maximums fixed by law.

"Courts cannot give equitable or other relief to the state as the representative of public interest upon the sole ground that this may place a railway company in a position in which without injury to itself or creditors it might serve the public at a lower rate with profit to itself than could it if such equitable relief was not given, when under positive legislation no legal obligation would rest on the corporation to make the burden on the public less than the law expressly authorizes. * * * To maintain such an action under the general rules governing equitable procedure it must be made to appear that the public interest will be subserved through direct effect of the decree itself; and it is not enough to enable the state to maintain the suit that the decree to be entered would show the ability of the railway company to serve the public with profit to itself under a rate lower than the maximum fixed by law."

The honorable Court of Civil Appeals determined that the portions of the statute which were void were those authorizing free or reduced transportation as follows:

(1) To federal officers—such as health officers, marshals, deputy marshals, post office and customs and immigration inspectors, and persons accompanying shipments of fish for free distribution in the waters of the state.

(2) To state, county and municipal officers—such as railroad commissioners, dairy and food commissioner, superintendent of public buildings and grounds, game, fish and oyster commissioner, live stock sanitary commissioners and inspectors, health officers, rangers, militiamen, sheriffs, constables, certain deputy sheriffs and deputy constables, city marshals, policemen, and firemen.

(3) To persons engaged in works of religion or charity—such as ministers, sisters of charity, or members of like religious organizations, managers of Young Men's Christian Associations or other eleemosynary institutions while engaged in charitable work.

(4) To delegates to certain conventions or gatherings—such as farmers attending institutes, congresses, etc., and firemen attending state and district meetings; and to a limited number of officers and employees of industrial fairs.

[3, 4] The view of the Court of Civil Appeals was that exemption of the classes just enumerated from payment of full passenger fares was forbidden by section 2 of article 10 of the Constitution in the following language:

"The Legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties."

The constitutional provision does not undertake to define or prohibit discrimination. It does command the Legislature to pass laws to prohibit extortion. It authorizes and directs the Legislature to enact laws defining "unjust discrimination" in freight and passenger tariffs by railroad and imposing penalties for "unjust discrimination" which will prove adequate for its prevention.

It is not improbable that the word "unjust" was used in this section in the sense ascribed to it by Bouvier as "that which is opposed to a law which is the test of right

and wrong." Bouvier's Law Dictonary, 3376. If so used, practices in harmony with the legislative will would necessarily come without the scope of "unjust discrimination." Article 6670 of the Revised Statutes, being paragraph H of section 15 of the original Railroad Commission Act, expressly declares that the statutory definition of, and prohibition against, "unjust discrimination," shall not prevent railroads from giving free or reduced transportation under such circumstances and to such persons as may be permitted by law.

But, whatever meaning should be ascribed to the word unjust, two things seem perfectly plain in construing section 2 of article 10 of the Constitution, to wit: First, that all discrimination in passenger fares was not forbidden, but only such as would operate unjustly. H. & T. C. Ry. Co. v. Rust & Dinkins, 58 Tex. 110 and Interstate Commerce Commission v. B. & O. Railroad, 145 U. S. 276, 277, 12 Sup. Ct. 844, 36 L. Ed. 699. And, second, that the people confided to the discretion of the Legislature the classification of passengers for the purpose of determining those who should pay full fare, reduced fare, or no fare; and, the classification adopted by the Legislature, in the exercise of its discretion, must be regarded as beyond judicial review, unless wholly without reasonable basis. Lewright v. Love, Comptroller, 95 Tex. 157, 65 S. W. 1089; Middleton v. Texas Power & Light Co., 108 Tex. 110, 185 S. W. 556.

[5] The contention of the state, sustained by the decree on appeal, is that the Legislature's classification is arbitrary in part only, because, to that extent, resting on no basis in reason. The decree recognizes as lawful the discriminations allowed to the extent of more than 95 per cent. of the free transportation of passengers by railroad. The condemned portions of the statute may be conveniently divided into provisions favoring public officers and provisions favoring individuals performing no governmental duty.

The public officers to whom grants of free passes are authorized by the statute are certain national, state, county, and municipal officials, whose duty it is to protect the members of society in person or property from harm or disaster occasioned by disease, fire, fraud, negligence, or crime. It is of the highest concern to the state to secure efficiency in the performance of such duties. The conscientious legislator might reasonably conclude that higher efficiency on the part of these officers in the discharge of their duties would follow the grant of free railroad transportation. Such considerations fully warranted the exercise of legislative discretion in such way as to withdraw these officers from the classes required to pay passenger tariffs.

[6, 7] We consider even less subject to attack the condemned portions of the statute favoring certain classes holding no official positions. The statute authorizes favored treatment of persons engaged in religious or charitable work. The Supreme Court of the United States evidently concluded, in determining the case of Interstate Commerce Commission v. B. & O. Railroad, supra, that the nature of the service rendered by religious and charitable workers and the resultant benefits in which all share would prevent an extension to them of free transportation from necessarily constituting unjust discrimination, even though not expressly sanctioned by statute. The conclusion seems inescapable that this particular exemption from passenger charges may be highly promotive of the public weal in lifting far more of burdens from the public than are imposed through any increase thus occasioned in the cost of passenger transportation. Much the same may be said of the grant of special consideration to delegates to farmers' institutes and congresses and firemen's meetings and to agents of industrial fairs. It is common knowledge that the public interest is subserved by such meetings and fairs. It is as well known that many in the greatest need of the service rendered by these meetings could not attend if payment had to be made of full passenger fares. It was for the Legislature and not for this court to weigh the public advantage or detriment in putting those attending these meetings and conducting these fairs in the class required to pay full fares or in the class required to pay less or nothing. On the whole, it is enough to forbid judicial destruction of any portion of the legislative classification, in performing a duty clearly laid upon the Legislature by the people through the Constitution, that we find ourselves unable to declare that the statute anywhere goes beyond the bounds of reason.

In reaching a conclusion as to the reasonableness of the classification made by the Legislature, it matters not what might be the opinion of the members of this court as to the wisdom or expediency of the statute. As said by the Supreme Court of the United States, through Justice Harlan:

> "The fundamental law of the state committed these matters to the determination of the Legislature. If the lawmaking power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the Legislature." Hennington v. Georgia, 163 U. S. 304, 16 Sup. Ct. 1088, 41 L. Ed. 166.

[8] There being reasonable ground for the legislative classification of persons with respect to payment and nonpayment of pas-

senger fares, and the law affecting equally all persons similarly situated under similar circumstances, the statute is not invalid under the provisions of article 1 of the state Constitution or of the Fourteenth Amendment to the Constitution of the United States. Supreme Lodge, U. B. A., v. Johnson, 98 Tex. 5, 81 S. W. 18; Ft. Worth & D. C. Ry. Co. v. Frazier (Tex. Civ. App.) 191 S. W. 813; Marchant v. Pennsylvania Railroad, 153 U. S. 390, 14 Sup. Ct. 894, 38 L. Ed. 751.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court, which is in accord with this opinion, be affirmed.

CURETON, C. J., took no part in this decision.

SOVEREIGN CAMP, W. O. W., v. AYERS. (No. 3031.)

(Supreme Court of Texas. April 25, 1924. Motion for Rehearing Overruled June 12, 1924.)

1. Courts ⟸247(5)—Supreme Court has no jurisdiction to answer certified question of mixed law and fact.

Jurisdiction of Supreme Court being limited to questions of law only, it cannot answer certified question of mixed law and fact.

2. Insurance ⟸720—What necessary for recovery on fraternal benefit certificate never delivered stated.

To recover on fraternal benefit certificate which local camp clerk had failed to deliver because of insured's health, it was incumbent upon plaintiff to show that certificate had been made out and was ready for delivery, that insured had applied for it, and had done all he was required to do to obtain it.

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Suit by W. A. Ayres, as next friend, against the Sovereign Camp, Woodmen of the World. Judgment for plaintiff, defendant appealed, and question certified. Question answered.

A. H. Burnett, of Omaha, Neb., and Lewis Rogers, of Houston, for appellant.

J. W. Chancellor, of Bowie, for appellee.

The members of the Supreme Court being disqualified to sit herein, a special court, consisting of Special Chief Justice I. W. STEPHENS, of Fort Worth, Special Associate Justice H. C. GEDDIE, of Kerrville, and Special Associate Justice S. W. BLOUNT, of Nacogdoches, sat for the consideration of this case, wherein the following opinion was handed down:

The Court of Civil Appeals has certified to this court for determination a question of the sufficiency of the evidence to sustain the trial court's finding as to the state of H. W. Ayers' health on the 8th and 9th days of October, 1915.

Before stating the precise question certified, we quote from the certificate of the Court of Civil Appeals the following statement:

"The suit was instituted in the district court of Montague county by W. A. Ayers, as next friend for Bertie, Emma May, S. Ray, Grady, Iva Belle, and Cecil Ayres, minor children of H. W. Ayres and wife, Dora M. Ayres, both deceased. The suit is based upon a policy or certificate of insurance issued by the appellant, a fraternal beneficiary association organized under the laws of Nebraska and doing business by and through a local lodge system under a permit to do business in this state. The beneficiary certificate was issued on the 6th day of October, A. D. 1915, and duly signed by W. A. Frazier, the Sovereign Commander, and J. T. Yates, the Sovereign Clerk, attested by the corporate seal of the order named. It was thereby provided, among other things, that in the event of the death of 'Sovereign H. W. Ayres, a member of Salona Camp No. 1324, located at Salona, state of Texas,' during the first year of his membership, the minors above named would be entitled to participate in the beneficiary fund of the order to the amount of $500, payable at the time of the death of said H. W. Ayres, together with a further sum of $100 for the erection of a monument to the memory of the said H. W. Ayres.

"The certificate further recites, so far as necessary to notice, that 'this certificate is issued and accepted subject to all the conditions on the back hereof, the articles of incorporation, the constitution and laws of the Sovereign Camp of the Woodmen of the World * * * the application for membership, and the medical examination of the member herein named, as approved by the Sovereign Physician of this society, and this certificate shall constitute an agreement between the society and the member.'

"Among the conditions referred to and made part of the certificate, we quote the following: 'If the entrance fees, dues, and Sovereign Camp fund assessments are not paid by the person named in the certificate to the clerk of the camp, as required by the constitution and laws of this society, which are now in force, or which may hereafter be adopted, this certificate shall be null and void. There shall be no liability of the Sovereign Camp of the Woodmen of the World under this certificate until the member named herein shall have paid all entrance fees, one advance assessment or installment of assessment of Sovereign Camp fund, and camp fund dues for the month, signed his beneficiary certificate and the acceptance slip attached thereto, paid the physician's fee for examination, been obligated and introduced by the camp clerk or authorized deputy, in due form, and had manually delivered into his hands in person this beneficiary certificate while in good health. The foregoing provisions are hereby made a part of the consideration for, and are conditions precedent to, the payment of benefits under this certificate.'