gence. The fact that it was dark, or that there was no light near the crossing, under the allegations made, might have been proved as a circumstance in the case, explanatory of the acts of both the parties, but not to show that it was the duty of defendant to keep the place lighted, or that it was negligent not to have the light there. This could not be done, in the absence of averment of the fact. The admission of the testimony under the pleading was violative of another familiar rule, that the proof must conform to the allegations. Plaintiff in his petition particularly specified the facts constituting negligence,—failing to ring the bell, to whistle, to give signals to stop the train, and in running too fast, etc. The evidence should have been restricted to the allegations. It was good pleading on the part of plaintiff to set up every material fact upon which he relied for a recovery, but he would not be allowed to prove other material facts, upon which the petition did not rely. Before we dismiss the subject, it would be proper to add that evidence of improvement made in the appliances and mode of operating a railroad after an accident should not be received as evidence of former negligence. For this reason, the evidence that defendant, two or three days after the injury to plaintiff, put up a light at the crossing, was inadmissible. It would be a bad rule that would discourage improvements on and in the use of a road. Railroad Co. v. McGowan, 11 S. W. Rep. 336; Patt. Ry. Accident Law, 421, 422. Under the circumstances, we think other assignments need not be noticed. For the error in admitting improper evidence prejudicial to defendant, as herein pointed out, we conclude the judgment of the court below should be reversed and remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed and remanded.

LYTLE *et al. v.* HALFF *et al.*

(*Supreme Court of Texas.* Nov. 15, 1889.)

JUDICIAL DISTRICTS—CONSTITUTIONAL LAW.

1. Const. Tex. art. 5, § 1, vests the judicial power in certain courts, including district courts. Section 7 provides that the state shall be divided into 26 judicial districts, which may be increased or diminished by the legislature, and that the district judges shall be elected by the qualified voters of the district. Section 14 fixes the judicial districts, and the time of holding the court therein, until otherwise provided by law. Section 7 further provides that a district judge shall hold the regular terms of court at one place in each county in the district twice a year, in such manner as shall be prescribed by law, and that the legislature may increase the number of terms, when necessary for the dispatch of business; and section 9 provides for a clerk of the district court of each county. *Held*, that they do not show an intention to forbid the creation of more than one judicial district in a county, or the sitting of two district courts, with a single clerk, at one place, the county-seat.

2. As the leading purpose of Gen. Laws Tex. 1889, p. 165, was to establish two judicial districts, and to secure the holding of two district courts, in Bexar county, provisions of the act declaring that grand juries shall be impaneled in only one of the districts, and that criminal cases shall reach the other only when transferred from the first, as to the legality of which there may be question, are not so inseparably connected with the leading purpose of the act as to require the entire act to fall, nor are they such as to induce the belief that the legislature would not have passed the act with them omitted.

Appeal from district court, Bexar county; W. W. KING, Judge.

Barnard & Green and *Geo. C. Altgelt*, for appellants. *Simpson & James*, *J. A. & H. O. Green*, and *J. H. McLeavy*, for appellees.

STAYTON, C. J. The legislature at its last session passed an act whereby the county of Bexar was divided into two parts, by a line running through the court-house, and that part of the county on the north and west of that line was declared to constitute a new judicial district, to be known as the "Forty-Fifth District," while all that part of the county south and east of that line was declared to constitute the "Thirty-Seventh Judicial District." Bexar county before the act composed the thirty-seventh judicial district, and the judge and district attorney in office in that district were continued in office in the new district bearing the same number, but provision was made for the appointment of a judge for the forty-fifth district, his successor to be elected by the electors resident in that part of the county which was declared to constitute the new district. The act provided that the courts in both districts should have concurrent jurisdiction throughout the limits of Bexar county of all matters, civil and criminal, to the extent this is conferred on district courts by the constitution, and that grand and petit juries should be selected and drawn from the body of the county, providing, however, that no grand jury should be organized in the forty-fifth district. The judge of the thirty-seventh district, however, is required at each term of his court to organize a grand jury, empowered to inquire into all offenses committed within the entire county, whose indictments, together with all appeals in criminal cases from inferior courts in the county, are made returnable to the district court for the thirty-seventh judicial district. Civil actions brought in the county or appealed to the district court from inferior tribunals, in any part of the county, may be filed in either court, at the option of the plaintiff or appellant. The act authorizes the judge of either district, at his discretion, to transfer any cause, civil or criminal, which may be pending in his court, to the other court, and upon the taking effect of the act the clerk of the district court for Bexar county is directed to enter on the docket of the court for the thirty-seventh district all causes then pending in that court, or to be filed therein subsequently, under the provisions of the act, and to place on the docket of the court for the forty-fifth judicial district all causes that may be transferred to that court by the judge for the thirty-seventh district, or filed in that court under the provisions of

the act. The act further declared all laws and parts of laws in conflict with it repealed. Gen. Laws 1889, p. 165.

In accordance with the act, a judge was appointed for the forty-fifth judicial district, and, the act having become operative, appellee brought an action in the district court of that district against appellants on a promissory note for more than $500. Citations were duly issued and served on appellants, who failed to answer, and a judgment by default was entered against them. Before the adjournment of the court, appellants filed a motion to set aside the judgment and dismiss the cause, upon the ground that the act creating the district was unconstitutional, but the motion was overruled, and from the judgment this appeal is prosecuted. It is agreed by the parties that there is no question involved other than the validity of the act before referred to, and that if the act be held constitutional the judgment shall be affirmed, but if it be held otherwise the judgment shall be reversed and the cause dismissed.

It is contended on the one side, while there is no provision in the constitutition which expressly prohibits the creation of two judicial districts in one county, an implied prohibition arises from the various provisions of that instrument, and that some parts of the act are in violation of article 3, § 56, of the constitution, which forbids the passage of local or special laws therein enumerated. On the other hand, it is claimed that none of the provisions of the act are in conflict with the section of the constitution referred to, or with any other, and that so much of the act as creates two judicial districts in one county is not so repugnant to any express provision of the constitution as to justify a holding that such legislation is impliedly forbidden. There is no pretense that the act in question in any way conflicts with any superior law other than the constitution of this state, and if it be not forbidden by that it must be sustained. It has frequently been said that an act of a state legislature must be held valid unless some superior law, in express terms or by necessary implication, forbade its passage. A prohibition of the exercise of a power cannot be said to be necessarily implied unless, looking to the language and purpose of the constitution, it is evident that without such implication the will of the people, as illustrated by a careful consideration of all its provisions, cannot be given effect. The prohibition which it is claimed ought to be implied in this case is not one affecting any private or personal right, nor is it one that can arise because the power to do the act has been conferred on some department of the government other than the legislature, from which an implied prohibition to the legislature will arise. The implication sought to be raised relates to a mere matter of expediency, which there is a manifest propriety in leaving to the determination of the legislature from time to time, and which it is seldom the purpose of a constitution to determine. It affects neither a public nor a private right. An intention to restrict the power of a state legislature, and especially in reference to such a matter, further than this is done by express limitations, is not to be presumed; and, when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the constitution which require such implication, to give effect to the will of the people evidenced by the entire instrument. That necessary implications exist, under the provisions of the constitution of this state, we do not question; and one of them is found in article 5, which establishes certain courts and fixes their several jurisdictions. In absence of an express prohibition, the legislature would have no power to declare that the several courts thus created should not exercise the powers conferred on them, or to create other courts, and transfer those powers to them, except as the constitution may provide for such change of jurisdiction. Here there is an implied limitation placed on the legislature, resulting from the fact that the people, acting in their sovereign capacity, have declared that certain courts, with defined powers, shall exist, and constitute one of the three departments of the government, which the people never could have intended might be destroyed in whole or in part by another department, or all the other departments. The declaration is that the executive, legislative, and judicial departments shall exist,—this is the fiat of the people,—and neither one nor all of the departments so created can enlarge, restrict, or destroy the powers of any one of these, except as the power to do so may be expressly given by the constitution.

It is contended that article 5, §§ 1, 7–9, of the constitution, impliedly prohibit the creation of two judicial districts in one county. Article 5, § 1, of the constitution, provides: "The judicial power of this state shall be vested in one supreme court, in a court of appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be established by law." So much of this section has no bearing on the question before us, for it does not attempt to determine what territory may be made a judicial district; but simply, among other things, provides for district courts as a part of the judiciary department, on which, by succeeding sections, a given jurisdiction is conferred. It may be said that all the courts named in this section are created by it. It is true that this section of the constitution expressly recognizes the power of the legislature to establish "criminal district courts," which illustrates the fact that the people desired that such courts should be established as would meet the demand resulting from growth of population and other causes; but it is most likely true that this recognition of power was made in order to prevent any doubt as to the power of the legislature to confer on

them, if created, a jurisdiction by the constitution itself conferred on the district and inferior courts; and, further, in connection with the recognition of the power, to declare its limitations. In the one case, it is the establishment, creation, of a court, which, when brought into existence, will exercise a jurisdiction conferred by the constitution on other courts; while in the other, the power exercised is but that of fixing the territory within which an established court shall be held. The express grant or recognition of the one power ought not to be held impliedly to prohibit the exercise of the other, and especially so in view of the provisions of the constitution next to be considered.

Article 5, § 7, provides: "The state shall be divided into twenty-six judicial districts, which may be increased or diminished by the legislature." And section 14 of the same article provides that "the judicial districts in this state, and the time of holding the courts therein, are fixed by ordinance forming part of this constitution, until otherwise provided by law." Both of these sections evidence the fact that it was intended the legislature, the only body empowered to make laws, should have power to increase or diminish the number of judicial districts, and to determine what territory should be embraced in a given district; and, in the absence of some limitation in these respects, nothing further appearing to illustrate the intention, the presumption would be that it was the intention to confer on the legislature the power to create a judicial district out of a territory, however small, if the business within it so required. Section 7 provides that the district judges shall be elected by the qualified voters of the district, but there is nothing in this which evidences an intention that a judicial district might not embrace less territory than a county. It further provides a district judge "shall hold the regular terms of court at one place in each county in the district, twice in each year, in such manner as may be prescribed by law. The legislature shall have power by general act to authorize the holding of special terms when necessary, and to provide for holding more than two terms of the court in any county for the dispatch of business." These provisions evidence an intention to leave with the legislature full power to require district courts to be had as frequently as may be necessary to dispose of the business of any county with reasonable dispatch, but absolutely to require that at least two terms of court shall be held every year in each county. There is nothing in these considerations to induce the belief that it was intended no judicial district should be composed of less territory than an entire county. Prior to the adoption of the present constitution, it may be true that the business of no county in the state was so large that it could not be transacted by one district court with reasonable promptitude, and that no consideration was given to the question whether a time would come when the increase of population and wealth, and consequent increase of litigation, would render it impossible for one court to do this; but, if it be true, we could not conceive it possible that the people intended to deny to the legislature the power to do that to which no thought was given, and so, in the face of the manifest intention, to give to the legislature full power to compel such courts to be held so long and so often as might be necessary for the prompt trial of all causes which might be brought before them.

In reference to counties, article 9 of the constitution expressly confers on the legislature "power to create counties for the convenience of the people, subject to the following provisions." Then follows a provision that no new county should be formed from territory not then within existing counties, with a less area than 900 square miles, in a square form, unless prevented by pre-existing boundary lines; and still the further provision that, "within the territory of any county or counties now existing, no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles." We have here an instance in which the people thought it necessary expressly to impose a limitation on the power of the legislature to create a subdivision of the state whose purpose is kindred to that for which judicial districts are created, and, if it had been intended that a like limitation should be imposed on the power to create judicial districts, the inference is fair that such intention would have been expressed in language as explicit. We have another instance in which it was deemed necessary expressly to declare that a subdivision of the state, for purpose of representation, should not be severed, in that article 3, § 25, after providing for the division of the state into senatorial districts, to be composed of contiguous territory, declares that "no single county shall be entitled to more than one senator." When the constitution was adopted it is reasonable to suppose that it was expected to continue in force for a considerable period, and it cannot be presumed that the people did not expect some of the counties and towns and cities then existing to become populous, and the business in the courts greatly to increase, while it remained in force; and it would be hard to believe, in view of the solicitude shown to furnish courts sufficient for the prompt disposition of business, if a specific intention existed that there should not be more than one district court held in a county, that the legislature should have been denied power to organize counties so small that the litigation pertaining to the jurisdiction of a district court might be disposed of by one court. It must be presumed, in view of the action of the legislature, that one district court cannot dispose of the business of that jurisdiction in Bexar county, and that another is necessary to that end; and, before a prohibition against the ex-

er ise of the power to create two judicial districts within that territory can be implied, the language of the constitution should very clearly evidence the intention of the people to deny power to the legislature so to organize the districts as to give more than one district court to a county, if necessary to accomplish the purpose for which courts are created. It seems to be insisted that the declaration that district judges "shall hold the regular terms of court at one place in each county in the district in each year" shows an intention to forbid the creation of more than one judicial district in a county; but we do not think such an implication necessary to give effect to the intention of the people as manifested by the entire constitution. The purpose of this provision was to secure the holding of such courts, and to deprive the legislature of the power to make any law which would deprive the people of any county of at least two terms of court during each year. Without this declaration, the legislature would have had such power; and it would not necessarily follow, because the legislature was deprived of the power to diminish the number of terms to be held in a county, by a provision intended to secure to the people at least that number of terms in each year, that an intention existed to withhold from it the power to provide for the holding of terms, as many as might be found necessary, by more than one district court in a county. The denial of the power to deprive each county of two terms in each year ought not to be construed into a denial of the power to give more terms during the year, even though held by more than one court, created by the constitution, whose jurisdiction, territorially, must, in the nature of things, be determined by the legislature; and, especially so, in the face of the provision which expressly declares the power of the legislature "to provide for holding more than two terms of the court in any county for the dispatch of business," which clearly evidences that the former provision was a limitation on the power to reduce the number of terms in each year, and nothing more.

The terms of court are required to be held at one place in each county in the district, twice in each year. By the words "one place" we do not understand to be meant one town or one house; for, if this was the meaning, in the case of removal of a county-seat, which is provided for by the constitution, it might be necessary to hold a court at a place other than the county-seat. The constitution does not declare at what place in each county the district courts shall be held, but leaves that to be determined by the legislature, which has declared that such courts shall be held at the county-seats of the several counties. By the words "one place" we understand to be meant the place prescribed by law,—the county-seat. Two district courts may sit therein as well as one, and we see nothing in the act in question which contravenes either the letter or spirit of the constitution, in so far as that instrument provides where district courts shall be held.

It is urged that article 5, § 9, of the constitution, which provides for a clerk of the district court for each county, for his election, and for his appointment in case of a vacancy, evidences an intention that but one district court should be permitted to be held in any one county. This section may tend to show that the people may not have considered whether it ever would become necessary to create more than one judicial district in a county, and that they determined that one clerk of the district court would be enough in any county. But, if this be admitted, it does not meet the question before us; for power of the legislature to enact a given law cannot be held to be impliedly denied merely because it may appear, from an examination of the constitution, that it was not foreseen at the time of its adoption that a necessity for the exercise of such a power would ever arise. If the constitution were the source from which springs the power of the legislature, there would be force in the proposition that the people did not intend to confer a power the necessity for the exercise of which was not foreseen; but no force can be given to such a fact when all legislative power, except in so far as this power is restricted by constitutional limitations, rests with the department of government to which the law-making power is confided. The act in question provides that the clerk of the district court for Bexar county shall perform, in two courts, the duties which the law imposes on such clerks in every county in the state, and neither enlarges nor restricts the powers and duties imposed by law on that officer. Difficulties in the way of appointment to that office in case of vacancy are suggested, but these are not insuperable, and arise on a supposed state of facts which cannot exist without failure of duty on the part of the judges. Such considerations ought not to be given a controlling influence in determining a question of legislative power.

We do not see that section 8, art. 1, of the constitution, has any bearing on the immediate question under consideration, though it may have on the validity of so much of the act as declares that no grand jury shall be impaneled in the forty-fifth judicial district, and that criminal cases shall reach that court only when the judge in the thirty-seventh judicial district may see proper to transfer criminal causes to it. Courts are not authorized to hold that a legislature has exceeded its power, unless able to point to some part of the constitution which denies to that body the right to exercise the given power. As said in Orr v. Rhine, 45 Tex. 354, uncertain and doubtful inferences and deductions are not sufficient to authorize a court to hold that the legislature exceeded its power in the passage of a statute; and finding no provision of the constitution which, expressly or by necessary implication, denies to the legislature the power to create more than one ju-

dicial district in a county, we are not authorized to hold that it had not such power.

It is suggested that so much of the act as assumes to deny to the district court to be held in the forty-fifth judicial district the power to impanel and have the services of a grand jury, and in so far as it assumes to deny the power of that court to try criminal cases other than such as may be transferred to it by the court to be held in the thirty-seventh district, is contrary to the constitution. It is clear that the legislature has no power to withdraw from any district court any part of the jurisdiction conferred on such courts by the constitution, unless this may be done in cases contemplated by section 1, art. 5, of that instrument. No person can be held to answer for a felony unless on the indictment of a grand jury, (Const. art. 1, § 10;) and it may be true that an act which denies to a district court the power to have inquisition and accusation by a grand jury denies, in an essential matter, the full exercise of that jurisdiction conferred on such courts; for if the court has no power to have an accusation made, as required by the constitution, the basis for its power to hear and determine is taken away, except in so far as indictments may be sent to it by another court for trial. It may be further true that the legislature has no power to make the jurisdiction of a district court to try any criminal cause, of which it is given jurisdiction by the constitution, based on a crime committed within the territory over which it is given jurisdiction, dependent on the volition and act of another district court. It is contended that the act is in conflict with the paragraphs of article 3, § 56, which prohibit the passage of local or special laws regulating the affairs of counties, regulating the practice or jurisdiction of courts, and the summoning or impaneling of grand or petit juries. Every law fixing the territory which shall constitute a judicial district is necessarily local in its character, but the power of the legislature to do this is expressly recognized. The creation of two judicial districts in a county operates no further towards the regulation of the affairs of the county than does the establishment of one, and it seems to us that the act in question is not within the meaning of the constitution on regulating the affairs of a county; for that paragraph of the section referred to has application to such affairs as are common to all the subdivisions of the state referred to in it. That the legislature is denied the power to pass local or special laws regulating the practice or jurisdiction of courts is true, and there may be some provisions of the act in question which contravene that provision, and this may be true of so much of the act as provides that no grand jury shall be summoned or impaneled in the court to be held in the forty-fifth judicial district; but it is unnecessary for us to pass upon these matters, or others that have been referred to, for it does not follow, if this be so, that the court sitting in either of the districts established in the county is not a legal court, having jurisdiction to try the cause before us on appeal. The leading purpose of the act was to establish two judicial districts, and thus secure the holding of two district courts in the county; and the parts of the act claimed to be in conflict with the constitution are not so inseparably connected with that part of the act we hold valid as to require a holding that the entire act must fall, did we hold some of its provisions in conflict with the constitution. Nor are the provisions, as to legality of which there may be question, such as to induce the belief that the legislature would not have passed the act with those omitted. At the same session at which the act in question was passed the legislature created two judicial districts in the county of Dallas, and in the act doing this some of the provisions in that before us claimed to be invalid are not found. It may be that some of the provisions of the act are not in harmony with existing legislation, but it cannot be held, because there may be conflict between statutes, that either for this reason is unconstitutional; and, if there be conflicts or want of harmony between the act in question and other laws, it will be the duty of the legislature to correct this, as will it be to pass such general laws as may be found necessary in order to the harmonious and efficient working of two district courts within one county. We do not wish to be understood to decide that all the provisions of the act before us are in harmony with the constitution, nor that they are not, but simply to decide that the courts sitting in the two judicial districts organized in Bexar county are legal courts, entitled to exercise the jurisdiction conferred on district courts by the constitution, from which it follows there is no error in the judgment in this cause appealed from. We deem it proper further to say, if there be provisions in the act inconsistent with other laws and in conflict with the constitution, then the repealing clause in the act cannot be held to repeal the former law inconsistent with such provisions. The judgment of the court below will be affirmed.

TAYLOR *v.* THURMAN.

(*Supreme Court of Texas.* Oct. 29, 1889.)

ATTACHMENT—LEVY AND LIEN—PROCEEDS OF SALE—ACTION TO RECOVER—EVIDENCE.

1. Where property is held under the levy of an attachment sued out by plaintiff, and also by sequestration in proceedings to foreclose a mortgage thereon, plaintiff has no interest in the proceeds of the sale of whatever interest other persons may have acquired by the levy of a subsequent attachment, it appearing that the sheriff did not part with the property after such sale, but holds it still under such prior levies.

2. In an action against the sheriff to recover the proceeds of such sale, evidence that the sheriff held the property until it was sold to satisfy plaintiff's claims, and that plaintiff received the proceeds of the latter sale, is relevant.

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.