sale by any one of intoxicating liquor in local option territory. It does not limit such sale to the use of the person purchasing, but it proscribes all sales, save the exceptions provided by the statute itself. Code Cr. Proc. 1895, art. 25, provides that "the provision of this Code shall be liberally construed, so as to attain the objects intended by the legislature: the prevention, suppression and punishment of crime." Under this rule it occurs to us that the term "sale," as used in the statute, is not to be construed according to its strict contractual sense; but that the statute has reference to the actual sale to the person buying at the counter, whether he purchase for the use of some other person or as an agent. The sale is consummated by him. He is the buyer. The sale is to him, although it may be for the use of some other person, and with some other person's money. Any other construction, it seems to us, would subject the law to confusion, subterfuges, and evasions. As stated before, it is not a question of contract or obligation; it is simply a question of whether or not there is a variance between the allegations in the indictment and the proof. We hold there is no variance; that the proof shows that the sale was made to Brock, the party as alleged; and it does not matter for whom he purchased. The sale was made to him; and the allegation in the indictment is proven, although he may have purchased it for some one else. Accordingly, the court did not err in refusing to give the requested charge. See Yakel v. State, 30 Tex. App. 391, 17 S. W. 943, and 20 S. W. 205.

Appellant set up certain matters in his motion for a new trial charging the jury with misconduct while deliberating about the case. We have examined the same, and do not consider the matters therein set up as of a material character, and the court did not err in overruling the motion for a new trial upon that ground. We have examined the record carefully, and, in our opinion, the evidence sustains the verdict. The judgment is affirmed.

HURT, P. J., dissents from the last proposition. If Brock tells the truth, the whisky was sold to Jensen, and not to him, as alleged.

(38 Tex. Cr. R. 648)

COOMBS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 23, 1898.)

CONSTITUTIONAL LAW—MUNICIPAL COURTS—JURISDICTION—VIOLATION OF PENAL LAW.

1. Under Const. 1876, art. 5, § 1, declaring that the judicial power of the state shall be vested in certain specified courts, "and in such other courts as may be established by law," the legislature can neither invest municipal courts with jurisdiction exclusive of or concurrent with the state courts to try violations of the penal laws, nor invest municipal corporations with power to suspend any penal law of the state within the limits of such corporation.

2. Municipal courts are authorized only as incidental to municipal charters, under Const. art. 11, relating to such corporations, and can be created only under such charters, but can form no part of "the judicial power of the state" provided for by article 5.

Hurt, P. J., dissenting.

Appeal from Dallas county court; T. F. Nash, Judge.

Julia A. Coombs, alias Maud Shirley, was convicted in the county court of Dallas county, under an indictment charging her with keeping a disorderly house, and fined $200, from which judgment she appeals. Affirmed.

Stillwell H. Russell, A. P. Wozencraft, and T. A. Work, for appellant. W. E. Hawkins, R. L. Henry, and Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted in the county court of Dallas county, under an indictment charging her with keeping a disorderly house, her punishment being assessed at a fine of $200; hence this appeal.

When the case was called for trial, she filed a plea to the jurisdiction, alleging, in substance, that the county court could not exercise concurrent original jurisdiction with the justice of the peace over said offense, and that said county court could only exercise jurisdiction in such cases when appealed from said justice's court. It was also asserted in said plea that the city court of Dallas had jurisdiction over houses of prostitution, to the exclusion of the state courts; and, if it did not, then its jurisdiction was concurrent with that of the justice of the peace.

With reference to the first proposition, the question has been settled adversely to the appellant, and we do not care to further discuss it. See Woodward v. State, 5 Tex. App. 296; Jennings v. State, Id. 298; Solon v. State, Id. 301; Leatherwood v. State, 6 Tex. App. 244; Chaplain v. State, 7 Tex. App. 87; Ballew v. State, 26 Tex. App. 483, 9 S. W. 765. These decisions construe the provisions of the constitution of 1876 with reference to the concurrent original jurisdiction of county and justices of the peace courts in finable misdemeanors. The amended constitution of 1891 did not alter or change this jurisdiction.

The remaining questions suggested by said plea to the jurisdiction, with reference to the authority of the legislature to confer jurisdiction upon municipal courts, exclusive of or concurrent with the state courts, over violations of state laws, will be treated in a general way, without taking up said propositions separately.

The city charter of Dallas, in force at the time of the trial of this case in the court below, provides as follows (section 25): "The judicial power of the city of Dallas shall be, and the same is hereby, vested in a court to be known as the 'Dallas City Court,' to be presided over by a judge, to be known as the

'City Judge'; which court is hereby created and established with criminal jurisdiction as follows: To hear, determine and punish all misdemeanors over which the recorder's court of Dallas now has jurisdiction; to try, hear and determine and punish all misdemeanors arising under the provisions of this charter; to have concurrent jurisdiction with state courts over all misdemeanors against the state laws, committed within the city limits, except theft, swindling, aggravated assaults, and aggravated assaults and batteries; keeping or exhibiting such games as are prohibited by law, and those involving official misconduct; and to have exclusive jurisdiction over disorderly houses and female vagrants." In Leach's Case, 36 Tex. Cr. R. 248, 36 S. W. 471, we held that the legislature did not have authority to confer jurisdiction upon city courts to try violations of the Penal Code of the state. The same proposition was reaffirmed in Ex parte Knox (Tex. Cr. App.) 39 S. W. 670; and in the latter case it was further held that the legislature had no authority to confer upon corporation courts ex officio jurisdiction as justices of the peace. Since the rendition of those decisions, our supreme court seem to have taken a different view of the matter, and arrived at a different conclusion. It is to be regretted that courts of last resort, whose adjudications are final in matters coming before them, should disagree as to what the law is, or should be in the same character of cases or upon the same legal propositions. Were this a matter of personal discretion instead of one of high public duty, we might perhaps be justified in yielding our views; but, under our constitution, this court was created with final appellate jurisdiction in all criminal appeals; hence we cannot, if we felt inclined to do so, shirk the responsibility imposed by the constitution and laws of this state. In the consideration of a constitution, our supreme court said, in Mellinger v. City of Houston, 68 Tex. 44, 3 S. W. 252: "In the construction of a constitution, it is to be presumed that the language in which it was written was carefully selected, and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions." See, also, Gibbons v. Ogden, 9 Wheat. 188. The general proposition is well settled that, in creating the constitution, words were carefully used to convey the meaning of its framers. Where that language is plain and unambiguous, that meaning should be given to the words which the words themselves import, without recourse to extrinsic matters. But should such meaning and intent be involved in doubt, or there should be uncertainty about it, then recourse may be had to extraneous matters. And in this connection the history of the constitution itself, or those particular portions of it under investigation, may be taken into consideration. Every constitution has a history of its own, and ours is not an exception to this rule. Chief Justice Cooley said, in People v. Harding, 53 Mich. 485, 19 N. W. 156: "Every constitution has a history of its own, which is likely to be more or less peculiar, and, unless interpreted in the light of this history, is liable to express purposes which were never within the minds of the people when agreeing to it. This the court must keep in mind when called upon to interpret it; for it is their duty to enforce the law which the people have made, not some other law, which the words of the constitution may possibly be made to express." This rule applies with peculiar cogency to amended constitutions, or at least to the particular portions of such constitutions which may have been amended. In his work on Constitutional Limitations (page 75), Judge Cooley uses this language: "When a constitution is revised or amended, the new provisions come into operation at the same moment that those they take the place of cease to be in force; and if the new instrument re-enacts, in the same words, provisions which it supersedes, it is a reasonable presumption that the purpose was not to change the law in these particulars, but to continue it in uninterrupted operation. This is the rule in the case of statutes, and it sometimes becomes important where the rights had accrued before the amendment or revision took place. Its application to cases of an amended or revised constitution would seem to be unquestionable." This doctrine was fully concurred in by our supreme court in Muench v. Oppenheimer, 86 Tex. 568, 26 S. W. 496, and the rule was there indorsed that the interpretation of a constitution in this respect would be the same as that of statutory law. The authorities upon this proposition might be amplified indefinitely, but we deem it unnecessary.

Referring to the various constitutions of Texas with reference to our judicial system, we find that the constitution of the republic of Texas, made in 1836 (article 4, § 1), provides: "The judicial power of the government shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain and establish." Section 10 provided: "There shall be in each county, county courts, and such justices of the peace courts as the congress may from time to time establish." Section 12 provided: "There shall be appointed for each county a convenient number of justices of the peace," etc. Section 13 provided: "The congress shall as early as practicable introduce by statute the common law of England with such modifications as our circumstances in their judgment may require; and in all criminal cases, the common law shall be the rule of decision." It will be observed that this constitution marked out a judicial system, and did not grant power to congress to confer jurisdiction of violations of general laws upon the judicial officers of municipal corporations.

In this connection it may be stated that in England the authority of municipal corporations to make by-laws did "not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the realm." 1 Dill. Mun. Corp. § 426. So, it would seem that the framers of the constitution of the republic of Texas did not intend to authorize congress to confer such jurisdiction upon municipal corporations. In fact, the entire constitution is silent upon the question of municipal courts or corporations. The above remarks are based upon the theory that the congress of the republic of Texas had the inherent power to create municipal corporations, and grant them charters, if such existed at common law. This may be taken, then, as an expression of the will of the framers of said constitution that violations of the penal laws of the republic should not be tried in municipal courts.

Looking to the provisions of the constitution of 1845, we find that article 4, § 1, provides: "The judicial power in this state shall be vested in one supreme court, in district courts, and in such inferior courts as the legislature may from time to time ordain and establish, and such jurisdiction may be vested in corporation courts as may be deemed necessary and be directed by law." Article 4, § 13, provides: "There shall be appointed in each county a convenient number of justices of the peace, who shall hold their offices for two years," etc. Now, it is apparent that said section 1 of article 4, above quoted, authorizes the legislature to confer jurisdiction upon corporation courts within the terms and meaning of said constitution, and that, under section 13, discretion was lodged with the legislature to provide a convenient number of justices of the peace, without fixing the limit or providing the exact number. We find the same language used in the constitution of 1861, in article 4, § 1, of said instrument; and the same is true as to justices of the peace.

In the amended constitution of 1866 (article 4, § 1) it was provided: "The judicial power of this state shall be vested in one supreme court, in district courts, in county courts, and such corporation courts and inferior courts or tribunals as the legislature may from time to time ordain and establish. The legislature may establish criminal courts in the principal cities within the state, with such criminal jurisdiction co-extensive with the limits of the county wherein said city may be situated, and under such regulations, as may be prescribed by law; and the judge thereof may preside over the courts of one or more cities, as the legislature may direct." Section 19 provided for the election of a convenient number of justices of the peace, who shall have such civil and criminal jurisdiction as shall be provided by law, where the matter in controversy shall not exceed $100, exclusive of interest. Now, we note here that for the first time corporation courts were ingrafted into the judicial power of this state by express constitutional provision. Theretofore the legislature had only been authorized to confer jurisdiction upon corporation courts. In the constitution of 1866 they became a part and parcel of the "judicial power" of Texas, and formed a part of its judicial system.

Turning to the constitution of 1869, we find that article 5, § 1, uses this language: "The judicial power of this state shall be vested in one supreme court, in district courts, and in such inferior courts and magistrates as may be created by this constitution, or by the legislature under its authority. The legislature may establish criminal courts in the principal cities within the state, with such criminal jurisdiction co-extensive with the limits of the county wherein such city may be situated, and under such regulations as may be prescribed by law. And the judge thereof may preside over the courts of one or more cities as the legislature may direct." Section 21 provides: "Each county shall be divided into five justice precincts." Compare section 1, art. 5, of the constitution of 1869, with those already quoted, and we find that this provision with reference to corporation courts set forth in the constitutions of 1845, 1861, and 1866 is omitted. We find now for the first time that the number of justices of the peace has become fixed, definite, and limited to five.

The constitution of 1876 (article 5, § 1) reads: "The judicial power of this state shall be vested in one supreme court, in court of appeals, in district courts, in county courts, in commissioners' courts, in courts of the justices of the peace, and in such other courts as may be established by law. The legislature may establish criminal district courts, with such jurisdiction as it may prescribe, but no such court shall be established unless the district includes a city containing at least 30,000 inhabitants as ascertained in the census of the United States, or other official census, provided such town or city shall support said criminal district courts when established." It further provided for the continuance of the criminal district court of Galveston and Harris counties. Section 18 of said article ordained that "each county in the state, now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four nor more than eight." It may be noted here that the authority of the legislature to create criminal district courts had been limited, except in Galveston and Harris counties, to counties which contained cities of 30,000 or more inhabitants; and even in that case no such court could be created unless the city would assume the charges incident to such court. And it may be further noted that the system with reference to justices of the peace courts was made elastic, fixing a minimum number, with per-

mission for the legislature to enlarge that number to eight in each county.

By the amended constitution of 1891, article 5, § 1, was made to read as follows: "The judicial power of this state shall be vested in one supreme court, in courts of civil appeals, in courts of criminal appeals, in district courts, in county courts, in commissioners' courts, in courts of justice of the peace, and in such other courts as may be provided by law. The legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto." It also provides for the election of, and defines the power and jurisdiction of, justices of the peace, and fixes their number at not less than four nor more than eight, "except in any precinct in which there may be a city of 8,000 or more inhabitants, in which there shall be elected two justices of the peace." So, it will be seen that this constitution, by amendment, made very material changes in the judicial system of the state; and that portion of the system with reference to justices of the peace was made still more elastic than heretofore, by requiring two justices of the peace, in addition to the eight theretofore provided for, in precincts where there is a city of 8,000 or more inhabitants.

We have referred to these matters in the various constitutions, which are deemed illustrative of the history of the matter under investigation, and the effect and changes these amendments may have had upon the authority of the legislature with reference to our judicial system; we have traced the history of these acts of the framers of the constitution, and of the people of the state in making these constitutions,—not because we think there is any doubt as to the certainty or accuracy of the opinions of this court in the Leach, Knox, and Fagg Cases (36 S. W. 471; 39 S. W. 670; 44 S. W. 294), and the propositions asserted in those cases with reference to the want of power of the legislature to confer jurisdiction upon corporation courts, but in deference to the opinion of our supreme court wherein they have thought it necessary to differ from the views expressed by this court in those opinions. The framers of the constitution of 1845 appear to have deemed it necessary to ingraft by express provision in that instrument authority upon the legislature to confer jurisdiction upon corporation courts. We have not had access to the records of the convention which framed the constitution of 1845 to aid us in this investigation as to why they did ingraft such a provision. But, when we look to the adjudications of our sister states, it may be that the framers of our constitution of 1845 were induced to insert said clause because of the fact that the law was different in those different states, and at variance with each other, and a diversity of opinion existed in the different states in regard to the authority of the legislature to confer jurisdiction upon corporation courts over violations of state laws. In some of the states it was held that such corporation courts could not exercise jurisdiction over criminal offenses of a general nature; and in others, that the legislature could confer jurisdiction upon such courts of violations of the grade of misdemeanors. It may therefore be concluded, with more or less accuracy, that, with these variant decisions and contradictory policies and laws prevailing in the other states, the framers of the constitution of 1845 thought it better to settle that question by providing against such contingencies in the constitution itself, and thus set at rest that much vexed question so far as the policy of this state was concerned, and, by so doing, relieve the courts in this state of these much vexed questions. It may be stated with confidence that corporation courts in the state of Texas have not been a part of the judicial system of our state judiciary, except by virtue of express constitutional provisions. By a casual inspection of the provisions of all the constitutions of the state of Texas, it will be seen that the same language is used with reference to the judicial power of this state, to wit, "The judicial power of this state shall be vested," etc., and that this provision uses the same language with reference to the authority of the legislature to create inferior courts. And, by an examination of the constitutions from 1869 on, it will be noticed that corporation courts were omitted from said judicial system. Then, it may be asserted that the jurisdiction conferred upon municipal courts as a part of the judicial power of the state finds its right of existence, as such, in the express provisions in the constitutions of 1845, 1861, and 1866, and that such right or power was, by omission, abolished by the constitution of 1869, and has never been incorporated into the judicial system since that time. Being omitted from the constitutions of 1869, 1876, and 1891, such corporation courts ceased to exist as a part of said judicial power, and this omission indicates an entire change of policy in this state in regard to the attitude of corporation courts. This omission of corporation courts in the re-enactment of the provisions of the constitution with reference to the judicial power of this state, repealed said courts, and they ceased to exist as a part and parcel of the judicial power of Texas. This being true, it left the jurisdiction attached to such corporation courts only such as might pertain to them as incidents to municipal charters, and withdrew from the legislature all authority to confer jurisdiction upon said courts of general laws of this state, and thus, by amendment and substitution, repealed corporation courts as a part of the judicial system of the state. Where provisions of a prior con-

stitution have been omitted in subsequent amendments, such amendments would operate as a repeal of such omitted provisions, and the same rule would apply here as in the construction of statutes. We are not without authority in this state to support this proposition. Speaking of this matter our supreme court, in Muench v. Oppenheimer, 86 Tex. 568, 26 S. W. 496, said: "Section 36 of article 3 provides that 'no law shall be revived or amended by reference to its title; but in such case the act revived or section or sections amended shall be re-enacted and published at length.' Whether this applied to an amendment to the constitution or not, we need not inquire. It has been the custom of our legislature to follow this provision in submitting amendments to the constitution; and we think that the construction should be the same whether the amendment be effected by an entire substitution or by a mere declaration that the law or section named should be amended in one or more particulars. The purpose to keep in force, as continuing the law, the provisions that are not amended, are as clearly evinced in the one case as in the other. Judge Cooley lays down the rule upon this subject in the following language: 'When a constitution is revised or amended, the new provisions come into operation at the same moment that those they take the place of cease to be of force; and if the new instrument re-enacts, in the same words, provisions which it supersedes, it is a reasonable presumption that the purpose was not to change the law in these particulars, but to continue it in uninterrupted operation. This is the rule in the case of statutes, and it sometimes becomes important where rights had accrued before the amendment or revision took place. Its application to the case of an amended or revised constitution would seem to be unquestionable.' Cooley, Const. Lim. 75. In the propositions thus announced, we fully concur." This opinion was rendered by the present chief justice of our supreme court, and in that conclusion the court was unanimous.

It may be asserted with equal confidence that a repeal may be had by amendment and substitution. So, when a subsequent statute reviews the subject-matter of a former one, and is evidently intended as a substitute for it, though it contain no express words to that effect it must be held to operate as a repeal of the former to the extent to which its provisions are revised and supplied. And a new statute which comprehends the entire subject-matter of the previous one, and enacts a new and independent system respecting it, repeals and supersedes all prior systems and laws upon the same subject-matter. See Stebbins v. State, 22 Tex. App. 32, 2 S. W. 617; Rogers v. Watrous, 8 Tex. 63; Goodenow v. Buttrick, 7 Mass. 140; Stirman v. State, 21 Tex. 734; Ex parte Valasquez, 26 Tex. 178; Holden v. State, 1 Tex. App. 226; Harold v. State, 16 Tex. App. 157; Bartlet v. King, 12 Mass. 545; In re Ashley, 4 Pick. 21, 23; Com. v. Cooley, 10 Pick. 39; Ellis v. Paige, 1 Pick. 43, 45; Inhabitants of Rutland v. Inhabitants of Mendon, Id. 154; Blackburn v. Inhabitants of Walpole, 9 Pick. 97; Suth. St. Const. §§ 133, 154, and note, for collated supporting authorities. Sedg. St. Const. p. 19, says: "The general rules of interpretation are the same whether applied to statutes or constitutions." The same doctrine is announced in End. Interp. St. §§ 506, 517. See also, Stewart v. Kahn, 11 Wall. 493. That omissions of courts from subsequent constitutions which have been named in prior constitutions will operate as a repeal of said courts is settled in this state, so far as we are aware, by an unbroken line of decisions. If there is an opposing opinion to this rule, it has escaped our observation. In Bigby v. City of Tyler, 44 Tex. 351, this rule was followed: so it was in Holmes v. State, Id. 631. These decisions were rendered under the constitution of 1869. Under the constitution of 1869 and those prior thereto, as before stated, corporation courts entered into and became a part of the judicial power of this state in one form or another. Under the constitution of 1869, this provision of former constitutions was repealed. Section 1 of article 5 of the constitution of 1869, having taken the place of section 1 of the judiciary article of the previous constitution, repealed the provisions of said prior constitution with reference to corporation courts by omitting the same. By the act of 1856, which came into operation under the provisions of the constitution of 1845, authority was granted mayors and recorders the same as justices of the peace. When the provisions of the constitutions of 1845, 1861, and 1866 were omitted from the constitution of 1869, the supreme court held that, inasmuch as the constitution of 1869 had limited the number of justices of the peace in each county to five, therefore mayors and recorders could no longer exercise the judicial authority of justices of the peace: that, by reason of said limitation of the number of said justices of the peace, the legislature could not create an additional number, either directly or indirectly. Holmes v. State, 44 Tex. 631. Again, under the constitution of 1869 the legislature was authorized to create certain character of criminal district courts. This provision was omitted from the constitution of 1876. Among the earlier questions submitted to the court of appeals was the effect of this omission; and in Long v. State, 1 Tex. App. 709, it was held that, by reason of said omission, said provision was repealed, and said court abrogated, and could no longer form a part of the judicial system of this state. This rule has been adhered to in an unbroken line of decisions in this state; and in fact, so far as we are aware, this has never been questioned, unless by the case of Harris Co. v. Stewart (Tex. Sup.) 41 S. W. 650.

In support of the proposition that the provisions of the constitution of 1869 were repealed by the constitution of 1876, omitting the criminal district courts referred to, see, also, Hunt v. State, 7 Tex. App. 212; Doran v. State, Id. 385; McInturf v. State, 20 Tex. App. 335; Muench v. Oppenheimer, 86 Tex. 568, 26 S. W. 496. While all of these cases do not deal directly with the question of the repeal of said criminal district court by said omission, yet they do deal directly with the principle involved. And to the same effect is Blessing v. City of Galveston, 42 Tex. 641, as we understand that opinion. The latter case asserts, as we understand it, in this respect, two propositions: First, that if the legislature, by its inherent power, could create a municipal corporation for the purpose of local government, it could also invest it with such powers as are necessary and essential for the purposes of its creation, and therefore it could create a municipal court to adjudicate matters of its own internal municipal policy; and, second, that judicial power of a general character, such as is conferred upon the constitutional tribunals or officers clothed with judicial functions for the general administration of laws, in contradistinction to local or municipal ordinances or regulations, cannot be conferred upon mere corporation courts created to enforce the police powers delegated to such corporations. The point at issue in that case was whether, under the charter of Galveston, the city court of that city could entertain jurisdiction of a violation of its legitimate municipal ordinances; and the court held, as we understand that decision, that this jurisdiction could be maintained, but it could not entertain jurisdiction of offenses defined by statute. And when we consider this, with the subsequent decisions of that court in the Cases of Holmes and Bigby, above referred to, in 44 Tex., it will be discovered that the main reason for the holding in those cases was that, the constitution of 1869 having limited the number of justices of the peace in the county, the legislature could not confer such jurisdiction upon city courts as is exercised by justices of peace, or confer such jurisdiction upon such corporation courts to act as ex officio justices of the peace. Then, when we look to the provisions of the act of 1856, we see that the legislature limited the power of municipal courts to petty offenses of a character of which justices of the peace only had jurisdiction. The conclusion, then, would seem to be inevitable, that, the constitution of 1869 having repealed the provisions of the former constitution authorizing the legislature to confer jurisdiction of state offenses upon municipal courts, these decisions are conclusive that the authority of municipal courts to try violations of the state law was withdrawn, and the act of 1856 repealed, by reason of the repeal of the provisions of the constitution in existence prior to 1869 with reference to corporation courts. So, in either event, whether we look at it from the standpoint of the omission of the granted powers to corporation courts in the constitution of 1869, or by reason of the limitation of the number of justices of the peace in the same constitution, we will see that the authority to confer on municipal courts jurisdiction of violations of state laws passed out of the judicial system of Texas. Now, when we look to the provisions of the constitution of 1876, and the amended constitution of 1891, authority was not granted the legislature to confer jurisdiction upon municipal courts; nor did any of these constitutions create said municipal courts a part and parcel "of the judicial power of this state." In other words, this power was not reinvested in constitutions subsequent to that of 1869.

Now, with reference to the question of the power of the legislature to grant authority to municipal corporations under charter to set aside or vacate the statutes of this state, we find the question to be largely in the same condition as that with reference to municipal courts, and that that power cannot be exercised, nor does it exist, under our present constitution. We are aware that there is a decision by the court of appeals which holds that the legislature had that power, to wit, Davis v. State, 2 Tex. App. 425. In that case the charter which was held to authorize the licensing of bawdy houses, and thus set aside the state penal law prohibiting bawdy houses, was created in 1871, under the constitution of 1869; and this decision may have been correct as the constitution then stood. In Ex parte Garza, 28 Tex. App. 381, 13 S. W. 779, the authority of the city of San Antonio to license bawdy houses, under its charter, was not sustained. That decision in effect holds that the legislature might grant, by express authority for that purpose, power to said corporation to license bawdy houses in violation of the state law. If it be conceded that said decision goes to that extent, it was not correct. And in this connection it may be observed that the provision of the constitution of 1876 with reference to the constitutional inhibition of suspending laws in this state was not called to the attention of the court, nor was that phase of the law discussed.

Now, with reference to the power of the legislature to delegate authority to suspend laws in this state, we find the history of the matter, as shown by the various constitutions, to be as follows: The constitutions of 1845, 1861, 1866, and 1869 (section 20 of article 1 of each) provided: "No power of suspending the laws in this state shall be exercised, except by the legislature or its authority." Hence it will be seen by these provisions that the suspension of laws in this state could be exercised by the legislature "or its authority." By the terms of section 28 of article 1 of the present constitution, this was changed, and said section amended so as to read as follows, "No power of suspending

laws in this state, shall be exercised, except by the legislature," omitting the expression in the former constitutions "or its authority." By such omission the authority of the legislature to delegate its power to suspend laws was repealed, and that body was inhibited from delegating authority to suspend laws in whole or in part. If, under former constitutions, the legislature could delegate authority to municipal corporations to suspend articles of the Penal Code, it would hardly be denied that such authority was withdrawn by not carrying the provision "or its authority" forward in our present constitution. The fact that the legislature may have sought to confer authority, under municipal charters, to suspend the general laws of this state, within corporate territory, does not accumulate strength or become correct by reason of the lapse of time in which they may have sought to so exercise that authority; the constitution inhibiting such delegation of power. In Titus v. Latimer, 5 Tex. 433, the supreme court, speaking of this phase of legislative action, says: "If, however, they are repugnant to the constitution, and could not give jurisdiction, neither the lapse of time nor the practice of the court can vindicate the exercise of such jurisdiction." Cooley, Const. Lim. (4th Ed.) p. 85. Whenever and wherever that rule has come pointedly before the courts in this state for adjudication, it has been adhered to with peculiar tenacity. This is the same rule we have heretofore discussed in regard to the abrogation of courts by omitting them from subsequent constitutions, and the authorities there cited are in point upon this proposition, and we again refer to them.

If the legislature cannot confer jurisdiction upon city courts to try violations of state laws, and cannot grant municipal corporations authority to suspend state laws, it would follow that city councils cannot pass ordinances covering the same acts which are made criminal offenses against the state. See Ex parte Fagg (decided at present term) 44 S. W. 294. The legislature cannot do indirectly what it cannot do directly; for, if they can authorize the city council to pass an ordinance suspending, within its corporate jurisdiction one state law, it would follow that this power could be conferred to thus suspend all such laws; and if the legislature can confer jurisdiction upon the city court to try one violation of the Penal Code, either to the exclusion of state courts or concurrently with such courts, then it would follow that this could be done with respect to all violations of state laws. The corporation could as well pass an ordinance suspending the state law in regard to murder, treason, arson, rape, or robbery as it could with reference to carrying arms, prohibiting bawdy houses, or any other misdemeanor. There is no constitutional inhibition applying to one that does not with equal certainty apply to all of said laws. If the corporation courts form a part of the "judicial power of this state," under section 1 of article 5 of the amended constitution of 1891, the legislature would be authorized to confer the same jurisdiction upon said corporation courts as the constitution confers upon district courts, county courts, or justices of the peace courts.

Now, it may be asked, what was the intention, object, and purpose of the people of this state in formulating the amended constitution of 1891? In Harris Co. v. Stewart (Tex. Sup.) 41 S. W. 650, Judge Brown, speaking for the court, and of section 1 of article 5 of said constitution of 1891, says: "The language 'and such other courts as may be established by law' was nullified by the decisions of the supreme court in the cases mentioned. The courts and lawyers were in constant trouble as to the jurisdiction of courts, which greatly embarrassed the administration of justice. In fact, there were some subjects of which no court had jurisdiction." We do not so understand the object of the amendment to section 1 of article 5 of the constitution. Under said section, jurisdiction was not conferred upon the district and other courts. It simply enumerates courts, and does not attempt to confer jurisdiction upon them. Section 3 of said article 5, as amended, provides for the jurisdiction of the supreme court. Section 5 prescribes the jurisdiction of the court of criminal appeals, and section 6, that of the courts of civil appeals. So, section 1 of said article, then, does not undertake to confer jurisdiction. If we understand the object and purpose of said amendments, they are to some extent at variance with the views expressed in Harris Co. v. Stewart, supra. Section 8 of said amended article enlarges the jurisdiction of the district court in regard to certain matters wherein the supreme court had held under the constitution of 1876 that district courts had no jurisdiction, particularly in regard to contests for office and contests over the removal of county seats. In the amended constitution said court was made one of general jurisdiction, and without regard to the character of the litigation, to avoid the very limitation held to exist by the supreme court. Theretofore the jurisdiction of said court had in these respects been limited. There were other objects to be attained by this amendment. It was said in Muench v. Oppenheimer, supra: "The main purpose was to remodel our appeal system so as to relieve the dockets of the court of appeals and the supreme court, and to secure a prompt disposition of cases on appeal. Incidentally, the jurisdiction of the district court was enlarged, but that of the county court was in no respect changed. That provision which authorized the legislature to take away the jurisdiction of county courts, and to confer it upon district courts, as we have seen, was left unaffected in any manner by the amendment. It is evident that it was not the purpose to change the former policy in this particular, and it was not intended to abolish all previous legislation which had been enacted

under the authority of that provision,—a result which would have subserved no useful end, but which would have led to great inconvenience, as well as unnecessary confusion and delay in many pending cases." It may be added that it was also the purpose of said amendment to change the appellate jurisdiction of the supreme court, and to create courts of civil appeals, as appellate tribunals in civil cases. Theretofore the appellate jurisdiction of the supreme court extended to district courts in civil causes, but since the amendment the appellate jurisdiction of that court only extends by writ of error to the courts of civil appeals, and thus the appellate jurisdiction of the supreme court is limited. No one would contend for a moment that an appeal would lie from the district court, to the supreme court under the present constitution. This renders certain that its former appellate jurisdiction was repealed by the amended constitution. Another purpose of the amendment was to abolish the court of appeals. It would hardly be maintained now that such a court as the "court of appeals" has an existence in Texas, or that one could be created by legislative enactment. That court was repealed by the amended constitution of 1891, as were corporation courts by the constitution of 1869. Another object of the amendment of 1891 was to create the present court of criminal appeals, with jurisdiction only of appeals in criminal causes. Before the amendment the court of appeals had appellate jurisdiction as well in civil as in criminal cases. The legislature now certainly would not have authority to confer jurisdiction upon the court of criminal appeals to entertain appeals in civil cases. But in Harris Co. v. Stewart, supra, it is said, as to this provision of article 5, § 1, that "the legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto," changed the whole system with reference to the power of the legislature to create other courts; and thus enabled that body to confer upon them such jurisdiction as it saw proper, co-extensive with the named constitutional courts, and conform the jurisdiction of these respective courts to each other. If there is any force in this contention, it applies, as we have heretofore seen, only to the creation of state courts; and that it could not change the jurisdiction of the district court is evident from the fact that one of the principal reasons for amending the present constitution was to make that court one of unlimited general jurisdiction as a trial court, except as to those matters which were reserved to inferior courts. These added powers were placed within the jurisdiction of the district court, to avoid the limitation placed upon its jurisdiction in the constitution of 1876. This idea is further borne out by the fact that the county court is the only trial court mentioned in article 5 of the constitution, whose jurisdiction is authorized to be changed by the legislature. If it be conceded that, under the latter clause of section 1 of article 5 of the present constitution, the legislature may create other courts and adjust the jurisdiction of inferior courts thereto, it does not follow, nor do we believe it a sound proposition in the face of what has been said, that the legislature can deprive the district court of its general powers conferred upon it by section 8 of the constitution. This does not militate against the idea that, under said article or section, the legislature may create such other courts as are not named in the constitution, in the nature of assistant or adjunct courts to assist in the disposition of the litigation in this state, especially in regard to criminal cases. That this may be done does not authorize the legislature to devest the district court of its constitutional authority. See Ex parte Towles, 48 Tex. 414; Ex parte Ginnochio, 30 Tex. App. 584, 18 S. W. 82, and authorities there cited; State v. Noble (Ind. Sup.) 21 N. E. 245. We would call especial attention to the last case cited. It deals with the subject under discussion in the most forcible manner, and, we believe, with unanswerable reasoning.

In connection with the proposition that the constitution did not intend to revive the authority of municipal courts as a part of the judicial power of this state, we would revert to the terms of the amended constitution of 1891 for a moment. In that instrument the number of justices of the peace are increased, so that in cities or towns of 8,000 inhabitants or more it is required "there shall be two justices of the peace." This is evidence of the policy and intent of the framers of that instrument to provide a sufficient number of such justices for the transaction of all litigation of a general nature in said cities, without recourse to city courts, and without conferring upon such courts such jurisdiction as is exercised by state courts. This would seem also to indicate that the framers of the amended constitution of 1891 had in mind the same idea that pervaded the minds of the framers of the constitution of 1869 when corporation courts were omitted from that instrument, and were following the construction placed upon the same by the supreme court in the Bigby and Holmes Cases, supra, and that it was intended thereby to keep the city courts eliminated from the "judicial power of this state." There is no purpose manifested anywhere in article 5 to reinvest corporation courts with judicial authority, or to constitute them a part of the judicial system of our state. On the contrary, it seems to have been the intention of the framers of all the constitutions from 1869 to 1891, inclusive, to prevent the legislature from conferring jurisdiction upon such corporation courts to try violations of the Penal Code. Wherever the constitution vests judicial power, it must so remain, and the legislature has no right to invade it or suspend it, unless express au-

thority is given in that instrument. The legislature has no authority to change the organization of the judicial system, nor can that body, under the guise of creating "other courts," devest the district court or the justices of the peace courts of their constitutional jurisdiction. It is true, the legislature may establish other courts; but this has been so under all the constitutions in the state of Texas, since 1845, but at no time has it ever been held that the legislature could destroy constitutional courts under and by virtue of this general authority to create "such other courts," unless we find such a decision in Harris Co. v. Stewart, supra. The judicial power has been distributed by the organic law, and is beyond legislative control. Article 2 of the constitution has expressly provided that our government shall consist of three departments,—the executive, the judicial, and the legislative; and it is further provided therein that neither of the departments shall invade the prerogatives of the others; and neither the courts themselves, nor the executive, nor the legislature, have authority to devest themselves of the high trusts and prerogatives and duties imposed by the constitution. The courts are as much bound to maintain their jurisdiction and power as they are to maintain the authority of the co-ordinate branches of the government, and to protect its authority from invasion from the other two, as it is to protect the executive from the legislative, and the legislative from the executive. The bounds of the authority of each co-ordinate department of the government have been set and fixed by the terms of the constitution, and, as they are there written, they must be maintained. If the legislature can confer exclusive jurisdiction upon a court of its own creation, to the exclusion of the constitutional court, then that would be but an indirect means of abolishing the court itself, because it could, by devesting the constitutional court of its power at one time or another, leave it without any jurisdiction whatever; and, while it might not abolish the court in name, it would do so in fact. So, if the legislature has the power to confer the jurisdiction of the district court upon some other tribunal, then it follows that it can not only emasculate, but actually destroy, said court, as well as the judicial system itself.

In Whitener v. Belknap, 89 Tex. 273, 34 S. W. 594, the supreme court seem to have taken this view of the matter. In that case the supreme court held unconstitutional and void the act of the 24th legislature wherein it sought to create a civil and criminal court, and prescribe its jurisdiction and organization, and conform its jurisdiction to other courts. Said act conferred upon said civil and criminal court "all the jurisdiction, power and authority in both civil and criminal cases which is now or may hereafter be vested by the constitution and laws of this state in the district courts of this state, except such jurisdiction, power and authority as are specially withheld from said court by this chapter," etc. And it further gives it exclusive original jurisdiction of all criminal cases, both felonies and misdemeanors, where the offense was committed in Bowie county, over which justices of the peace have not jurisdiction, etc. The supreme court in this connection uses this language: "Thus, all of the jurisdiction which might have been conferred under the constitution upon the district court of Bowie county, except in probate matters, has been conferred upon this court; and all of the jurisdiction of the county court, except in probate matters, has likewise been conferred upon it. It also provides that it should have and exercise all jurisdiction thereafter conferred upon district courts by the constitution or law." It also provides that the district judge of the Fifth judicial district should preside over said court, and other provisions which are unnecessary to notice. Our supreme court held that this act was unconstitutional, and, of course, invalidated it by their decision. They reached this conclusion by first holding that said court was a district court, and then nullified the act creating it under that provision of the constitution which provided that the district court should be held at no point in the county other than the county seat. Now, if this rule be correct, we do not understand how it would harmonize with the ruling in Harris Co. v. Stewart; for if the legislature, as asserted in Harris Co. v. Stewart, has all authority to create courts, and confer jurisdiction upon them not inhibited by the constitution, then the legislature would have the right to confer jurisdiction co-extensive with the district court upon municipal courts, if said constitution does not prohibit it. That seems to be the main proposition in Harris Co. v. Stewart. Now, if the legislature could not confer jurisdiction co-extensive with the district court upon a mayor's court, outside the limits of municipal corporation territory, wherein is situated the county seat, then there seems to be an inhibition somewhere in the constitution which does control this question. This inhibition has not been pointed out in Harris Co. v. Stewart. If the legislature has the authority to confer jurisdiction upon municipal corporations, co-extensive with the district or county or justices courts, then, under Whitener v. Belknap, that matter will be controlled by the territorial location of the mayor's court, and not by its jurisdiction; that is, the power to create such court would exist only within municipal corporations constituting county seats. It could hardly be held that the legislature could not create a district court to sit at any point in the county outside of the county seat, and yet confer upon a municipal court the same jurisdiction, and maintain it in said court, when it was located at another point than

the county seat. As we understand Harris Co. v. Stewart, the supreme court held the legislature can confer jurisdiction upon corporation courts, such as it deems proper, not to exceed that of the district court, because there is no constitutional inhibition. If so, then it would follow that such jurisdiction can be conferred on all of said corporation courts wherever situated, because the constitution makes no difference as to its locality. Then we would find, by comparing the two cases of Harris Co. v. Stewart and Whitener v. Belknap, supra, that the legislature could confer jurisdiction on the corporation court co-extensive with that of the district court wherever situated and at the same time could not confer jurisdiction upon a district court situated at any other point of the county than the county seat. This court said in the Leach Case, supra, "that, if the legislature may delegate authority to one municipal court in one town to enforce the general laws of the state, it may do so in every town; and, if it can confer authority upon said courts to take jurisdiction of a misdemeanor, then it may do so as to all these classes of offenses; if as to misdemeanors, then the reasoning would be equally as cogent that it could do so as to all felonies, for there is no constitutional objection in the way of one class of offense that does not obtain as to all classes of offenses. If this power can be delegated to a municipal court in matters pertaining to criminal cases, then it can be so delegated with equal propriety to all cases of civil actions; and we should have the anomalous condition of a municipal court exercising concurrent original jurisdiction in civil and criminal cases throughout the state at the same time with district courts, county courts, and justices' courts, and also at the same time could be made to exercise appellate jurisdiction co-extensive with the district and county courts. Hence such jurisdiction would be original with district, county, and justices' courts, and at the same time appellate, without conforming the jurisdiction of the constitutional courts with that conferred upon the municipal courts." This was quoted in the case of Harris Co. v. Stewart, supra, and thus criticised: "This argument implies an apprehension that the legislature might abuse the power to create other courts, and especially to combine the administration of the general laws of the state and the local laws of a municipal government in one court to such an extent as to greatly imperil or destroy the judicial system of the state." And it is met in the same opinion with this argument: "It may be said that, pursuing this course of reasoning to an extreme, a jurisdiction might be thus created treading so closely on the heels of the courts of session and common pleas as to render difficult to distinguish their footsteps; but so long as there is a jurisdiction possessing a controlling power over it, the judges of which are appointed in the manner prescribed by the constitution, the citizen has all the security which is deemed necessary, and which is provided by the constitution," etc. In this connection the constitutional appellate jurisdiction of this court is cited as being co-extensive with the limits of Texas, as a corrective of this contemplated abuse by the legislature. If it be a fact that the evils deprecated in that opinion can be avoided by reason of the fact that this court has appellate jurisdiction coextensive with the limits of Texas, then the very emergency mentioned had arisen in the Ft. Worth city charter, which was under consideration in the Leach Case, because the legislature had limited the right of appeal from the city court of Ft. Worth to this court, and had deprived this court of the very appellate jurisdiction which that case (Harris Co. v. Stewart) asserts the constitution gives it, and which the constitution did in fact give it; and here was the act of the legislature seeking to deprive the right of the citizen to appeal to this court, or any court where the fine imposed was $20 or less, and had sought to infringe, not only the right of appeal from such conviction, but had sought further to deprive this court of such appellate jurisdiction. So, the very emergency spoken of in that opinion as prospective in the mind of this court had become a realization and a fact under the act of the legislature granting the charter to the city of Ft. Worth; for if that act was constitutional, and the legislature had the right to limit the right of appeal in said charter, then, so far as that limitation to an appeal is concerned, this court ceased to exercise its appellate jurisdiction. In that connection the following language is also found in Harris Co. v. Stewart: "If the people choose to trust the legislature with power to enlarge the judicial system in this state, or to destroy it, the courts cannot interfere on the ground that such authority might be carried to an extreme, which would be destructive of the system itself." This, to our minds, is carrying that doctrine too far. It had just been announced in that decision that the constitution had conferred appellate jurisdiction upon this court coextensive with the limits of the state, and no injury could result; and now the proposition is asserted that the legislature may destroy the power of this court, and this court would be powerless, under the act of the legislature, to exercise its constitutional appellate jurisdiction. We do not believe that any authority can be found to sustain such proposition. As before stated, the powers of this government are divided into three departments,—the executive, judicial, and legislative; and, by express command of the constitution, each of these departments is prohibited from in any manner invading the powers, duties, and obligations of the other departments; and the legislature has no

more authority to curtail the jurisdiction of this court or the supreme court than said courts have to abolish the office of governor. And the same court, in Whitener v. Belknap, supra, held the reverse of the proposition in Harris Co. v. Stewart, because there it was held that the legislature could not create a district court, and locate it at any point other than the county seat, because the constitution had so proclaimed.

If it were necessary, or the time ample, to cull from the reports of the supreme courts of this state, as well as from the reports of the court of appeals, and the court of criminal appeals, a great many decisions could be found wherein the acts of the legislature have been set aside because of their unconstitutionality. Several of the acts of the recent legislature have been held unconstitutional since its adjournment last June; and it has been but recently that the supreme court held that the act of a city council in levying an assessment tax or sum of money, and creating a lien on the homestead for the payment thereof, for the improvement of streets in front of said homestead, was violative of the constitution of Texas. See Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803. And see, also, Light Co. v. Keenan, 88 Tex. 197, 30 S. W. 868, where another act of the legislature was held unconstitutional. So, if this court, in the Leach Case, expressed any apprehension of the fact that the legislature might abuse its power in passing unconstitutional acts, that fear, to say the least of it, is fully justified by the decisions of all the courts of last resort in this state. And more than that, by the same decisions, it can be maintained that that fear had matured into an actual realization prior to the Leach decision. And if it be correct, as was said in Harris Co. v. Stewart, that "the legislature may destroy the judicial system of this state," then it would be useless to urge the proposition that the appellate jurisdiction of this court could cure those evils. It is also asserted in Harris Co. v. Stewart that, if the Leach Case is correct, "it would seriously affect the administration of the civil laws of this state, of which this court has final jurisdiction." We do not so understand the law. How this could affect the jurisdiction of the supreme court is not stated in that opinion. If the legislature has conferred, or can confer civil jurisdiction upon these city courts of matters outside and beyond their own municipal affairs, whether exclusive of or concurrent with state courts, then it is certain that such jurisdiction could be exercised by the state courts, if not conferred upon the corporation courts; and, if the supreme court could obtain jurisdiction of it from the city courts by reason of its lodgment in the corporation court, it certainly would not be deprived of such jurisdiction, if the same jurisdiction is lodged in the state court. So far as the supreme court's jurisdiction is concerned, we do not understand how the Leach Case has any effect; for certainly that court would not hold that because these civil matters were tried in the state court, and not in the corporation court, it would therefore be deprived of its appellate jurisdiction. We are not deciding the supreme court's appellate jurisdiction over the trial courts, but have been under the impression that such jurisdiction was limited to writs of error from the courts of civil appeals. So, in view of the whole matter, we have seen no reason to change our views as expressed in Leach v. State, Ex parte Knox, and Ex parte Fagg, supra; and, upon further examination of the questions involved in those cases, we are still of the same opinion. We are also of opinion that corporation courts cannot be invested with jurisdiction exclusive of or concurrent with state courts to try violations of our penal laws; nor can the legislature invest municipal corporations with power to suspend any penal law of the state within the limits of such corporation; and, further, that corporation courts are only authorized in this state as incidental to municipal charters, and can only be brought into existence under such charters; that such courts are not, and cannot be, created under article 5 of our state constitution; and that they cannot form a part of "the judicial power of the state," provided for by said article, but are incidental only to corporate charters, under article 11 of said constitution.

The remaining questions, we think, are without merit, and are not therefore discussed. The judgment is affirmed.

HENDERSON, J. I agree to the result reached; that is, that the city court of Dallas did not have jurisdiction to try said case. I will file my views on the questions discussed.

HURT, P. J., dissents.

BALLARD v. CITY OF DALLAS.

(Court of Criminal Appeals of Texas. Feb. 23, 1898.)

VALIDITY OF ORDINANCE.

A city council has no authority, and cannot be authorized by the legislature, to pass an ordinance punishing an act which is made an offense, and punished by statute.

Hurt, P. J., dissenting.

Appeal from city court of Dallas; C. P. Smith, Judge.

Annie Ballard was convicted of keeping a disorderly house, under an ordinance of the city of Dallas, and she appeals. Reversed, and prosecution dismissed.

Miller & Williams, for appellant. A. P. Wozencraft and T. A. Work, for appellee.

DAVIDSON, J. Appellant was convicted for keeping a disorderly house under an or-