Kentucky Law Journal

Volume 39 | Issue 4 Article 5

1951

The Writ of Error Coram Nobis--Kentucky's Answer to the Expanding Federal Concept of Procedural Due Process in Criminal Cases

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Comments

THE WRIT OF ERROR CORAM NOBIS—KENTUCKY'S ANSWER TO THE EXPANDING FEDERAL CONCEPT OF PROCEDURAL DUE PROCESS IN CRIMINAL CASES

In recent years there has been an increasing number of applications to the federal courts by prisoners seeking release on petitions of habeas corpus.[1] Many of these petitions have come from prisoners after affirmance of their convictions by the highest courts of the states. A number of these petitions have been granted and prisoners released. This would seem to indicate that the state courts have failed or refused to provide the type of protection which the Supreme Court of the United States has held must be provided in order to conform to the due process clause of the Federal Constitution. This is borne out by the fact that many of these cases have scrutinized and criticized the various processes and procedures of the state courts.[2] This broadening by the Supreme Court of the concept of due process on the criminal side of the law has put pressure on the state courts and legislatures to liberalize existing remedies, and provide new procedures and safeguards to citizens being tried on a criminal charge. The reluctance by the states to effect these changes has thrown a mass of habeas corpus litigation into the lower federal courts[3] which should properly be handled by the state courts.

The subjective test of fairness and justice which the Supreme Court has adopted in interpreting the due process clause has not only opened up a fertile field in constitutional law, but has had a marked effect upon the criminal law. Primarily, this effect has manifested itself in the increased resort to the federal courts with crudely drawn habeas corpus petitions by prisoners,[4] and in the actions of the various states, either by the legislature, or by judicial decision, in hastily attempting to plug holes in the wall of their criminal procedure, as fast as a gap has been exposed by an allowance of habeas corpus in the Federal Court.[5]

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[1] Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

[2] Young v. Ragen, 337 U.S. 235, 69 Sup. Ct. 1073, 93 L. Ed. 1333 (1949); Marino v. Ragen, 332 U.S. 561, 68 Sup. Ct. 240, 92 L. Ed. 170 (1947).

[3] See note 1 *supra*.

[4] Pyle v. Kansas, 317 U.S. 213, 63 Sup. Ct. 177, 87 L. Ed. 214 (1942).

[5] Oklahoma provides for trial of due process issues under its general habeas corpus statute, stating simply that habeas corpus may be brought to relieve from detentions in violation of due process of law. OKLA. STAT. ANN. tit. 12, sec. 1331 (1941). California has found it expeditious to expand habeas corpus. Ex parte McGonigle, Cal. 188 P. 2d 7 (1948). Illinois procedure provides for either habeas corpus or writ of error coram nobis or, if the facts do not fall into one, then both. Carter v. Illinois, 329 U.S. 173, 67 Sup. Ct. 216, 91 L. Ed. 172 (1946); Woods v. Nierstheimer, 328 U.S. 211, 66 Sup. Ct. 996, 90 L. Ed. 1177 (1943). However, in Marino v. Ragen, 332 U.S. 561, 68 Sup. Ct. 240, 92 L. Ed. 170 (1947) the situation in Illinois is considered deplorably confusing both to the Supreme Court and the person seeking relief. The selection of one of the remedies is almost sure to lead to advice to try the other. Comment, *Collateral Relief from Convictions in Violation of Due Process in Illinois*, 42 ILL. L. REV. 329 (1947); Florida utilizes the writ of error coram nobis which has been approved by the Supreme Court. Hysler v. Florida, 315 U.S. 411, 62 Sup. Ct. 688, 86 L. Ed. 932 (1942). Alabama has adopted the same procedure for trying due process issues. Taylor v. Alabama, 335 U.S. 252, 68 Sup. Ct. 1415, 92 L. Ed. 1144 (1948).

Kentucky is one of those states that has felt the effect of the "freedom writ" cases in the Supreme Court on its procedure. The pattern of the Kentucky cases is illustrative of the problem faced in most of the states. An unusual case will arise which looks harsh to almost everyone, even to the court, but applying the law as it exists in cases and statutes no relief can be given. After habeas corpus to the federal court the prisoner is released, with an opinion which states that the prisoner was deprived of his constitutional guaranty of due process of law. The next time this problem arises some precedent is overturned and that particular hole in the wall is plugged. The change has been effected as the defects have been exposed.[6]

The ancient writ of *coram nobis* has been found by many states to be peculiarly adaptable to filling these gaps. The writ is flexible enough to cover due process questions. Kentucky has resurrected it and the writ seems to fit the urgent need.

At the common law the writ of error *coram nobis* was used in both civil and criminal actions. Its purpose was to correct errors of fact not appearing on the record, and not attributable to petitioner s negligence, which if known would have prevented the entry of judgment;' as opposed to the ordinary writ of error which was used to correct errors of law.[8] The former was addressed to the judge of the court wherein the judgment was entered and revested that court with jurisdiction to reopen the case in its discretion; the latter was addressed to the appellate court for a review of the errors of law appearing on the record for affirmance or reversal. The writ of error lay as a matter of right and was a continuation of the proceedings below and only errors assigned could be reviewed.[9] The writ of error *coram nobis*, unlike the writ of error, was a new action civil in nature.[10] The petition cast no aspersions on the trial court's judgment because it went only to matters dehors the record which were unknown to the trial judge and hence not passed upon.[11]

The expanding concept of due process in the Federal Courts has resulted in the situation in many code states, of which Kentucky is one, where no procedural remedy is available to have an issue litigated in certain unusual criminal cases involving hardship.[12] The Kentucky Court, sensitive of its procedural deficiencies, has utilized this ancient writ to augment the Code remedies and to fill in this due process gap. Although this is a remedy in its comparative infancy in this state, it promises to offer new possibilities as the concept of procedural due process crystalizes.

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[6] *See* Anderson v. Buchanan, 292 Ky. 810, 168 S.W 2d 48 (1943) for a history of *coram nobis* cases in Kentucky and the experiences of other states with the same problem.

[7] Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882), 31 AM. JUR., 323, 325, 24 C. J. S. 145.

[8] 3 AM. JUR. 766.

[9] 3 AM. JUR. 152, 155.

[10] A proceeding on statutory petition in nature of writ of error coram nobis is civil in nature and the state is entitled to an appeal. People v. Fiegen, 291 Ill. App. 615, 10 N.E. 2d 684 (.....); State ex rel. Meyer v. Youngblood, 221 Ind. 408, 48 N.E. 2d 55 (1943). Since coram nobis is civil in nature the prisoner need not be present at the hearing. Elliot v. Commonwealth, 292 Ky. 614, 167 S.W 2d 703 (1942).

[11] 31 AM. JUR. 323; Comment, 2 ARK. L. REV. at page 427 (1947-48); Note, 37 HARV. L. REV. 744 (1923-24).

[12] Nickels v. State, 86 Fla. 208, 98 So. 502 (1923) (Plea of guilty entered under fear of bodily harm); State v. Ray, 111 Kan. 350, 207 Pac. 192 (1922) (Confession obtained by duress).

Though there is some evidence of its use in pre-Code practice,[13] the writ of *coram nobis* was never sought in Kentucky after adoption of the Code until the year 1937· it being commonly understood that the remedies of the Code were exclusive. Apparently, the provisions for appeal and the writ of habeas corpus had provided an adequate procedural remedy in criminal cases until this time.

In the case of *Jones* v. *Commonwealth*[14] a deplorable defect in the criminal remedial processes in this state was exposed. Jones was convicted and sentenced to death for murder. After affirmance of his conviction on appeal[15] and after expiration of the term in which the judgment was rendered, which under the applicable Criminal Code provisions precluded motion for a new trial,[16] the two chief prosecuting witnesses admitted they had given false and perjured testimony in the trial which led to his conviction. Jones petitioned the trial court for a writ of habeas corpus on the ground of newly discovered evidence. The writ was denied and on appeal the Court refused to expand habeas corpus further than to cover a defect in jurisdiction which would render the judgment void.[17] However, the Court indicated in the opinion that *coram nobis* might lie. Subsequently, Jones petitioned the trial court for a writ of error *coram nobis*. The writ was denied. On appeal[18] the Court acknowledged that the writ was not entirely superseded by the Code and that it might be available in a "proper case." On the merits of the case the writ was denied, however, as the Court held that *coram nobis* would not lie to reopen a judgment after a conviction had been affirmed by the appellate court.[19] In the opinion the Court also stated that Kentucky Civil Code provisions[20] pertaining to motion and grounds for a new trial in a civil case after expiration of the term for newly discovered evidence did not apply to criminal cases.[21] In refusing to allow *coram nobis* to lie for newly discovered evidence the Court indicated that it was the intent of the framers of the Criminal Code that the provisions provided therein were to be exclusive and the only remedy available to a defendant in such a predicament was an appeal to the governor for executive clemency. The opinion expressed sympathy for Jones, but indicated that no process to have the case reopened was available to him under Kentucky criminal procedure. Jones stood to be sacrificed on "the altar of legal formalism."

The end was not yet, however, for Jones. He petitioned the Federal District Court for a writ of habeas corpus. The questions were certified to the Circuit Court of Appeals and the writ was allowed.[22] The crux of the decision was that the failure of the State of Kentucky to provide a remedial process whereby the prisoner could raise the issue of perjured evidence after expiration of the term was denial of due process within the meaning of the Federal Constitution. Further-

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[13] Meredith v. Sanders, 5 Ky. (2 Bibb.) 101 (1810).
[14] 269 Ky. 772, 108 S.W 2d 812 (1937).
[15] Jones v. Commonwealth, 267 Ky. 465 102 S.W 2d 345 (1936).
[16] KY. CODE CRIM. PROC. ANN. sec. 273 (1948).
[17] Tageman v. Kirkpatrick, 283 Ky 798, 143 S.W 2d 506 (1940).
[18] See note 14 *supra.*
[19] It seems that the general basis for refusing to allow criminal cases to be reopened after affirmance on appeal was the resulting instability which such practice would have on conviction of crime in the state. *See,* Bigham v. Brewer, 4 Sneed 432 (Tenn. 1856); Humphreys v. State, 129 Wash. 309, 224 Pac. 937, 33 A. L. R. 78 (1924).
[20] KY. CODE, CIV. PROC. ANN. sec. 340 (7), 344, 518.
[21] Coldiron v. Commonwealth, 205 Ky 729, 266 S.W 374 (1924); Wellington v. Commonwealth, 159 Ky. 462, 167 S.W 427 (1914).
[22] Jones v. Kentucky, 97 F 2d 335 (C.C.A. 6th 1938).

more, the Court held that leaving a condemned man to his chances of obtaining an executive pardon was not a satisfaction of the requirement of due process of law. The Circuit Court was no doubt influenced by the opinion filed in the case on the behalf of the Attorney General of Kentucky which confessed that it would be an injustice to execute the man under the circumstances.

The *Jones* case exposed a gap in the Kentucky criminal procedure which the Federal Courts had indicated could not be satisfied by the dubious remedy of executive pardon. Hence, some element of Kentucky procedure had to be expanded or a new procedure adopted to supplement the existing remedial processes.

It is not surprising then that in *Smith* v. *Buchanan*,[23] where it was subsequently discovered that counsel appointed to defend Smith was not a member of the bar, the Kentucky Court by dictum indicated that the writ of *coram nobis* was the proper remedy and expressed disapproval of prior decisions[24] to the effect that *coram nobis* would not lie after affirmance on appeal. Habeas corpus would not reach the error complained of because the defect was not apparent in the record and was unknown to the trial court at the time judgment was rendered. There was dictum in the case, adhering to the rule enunciated in previous cases indicating that *coram nobis* would still not lie for newly discovered evidence. This seems to be the majority rule in those jurisdictions which have considered the question.[25]

The strict logic for allowing *coram nobis* after affirmance on appeal is probably best expressed in the Indiana case of *Stephenson* v. *State*.[26] This case contains a discussion of the distinctions between the common law appeal, the common law writ of error, and the writ of error *coram nobis*. The common law appeal provided for a re-examination of both law and fact by the appellate court and a decision by that court as if no decree had been rendered. The judgment if affirmed became the judgment of the appellate court. The writ of error provided for an examination of alleged errors of law committed by the trial court and the case was not open to a re-examination on the merits. An affirmance on appeal meant only that no error of law was found in the trial of the case in the inferior court. No error appearing, the judgment of the trial court stood as a judgment of the case. In other words the finality of the judgment lay in the trial court, since the review by writ of error indicated only that there had been no errors of *law* committed in the handling of the case in the trial court. Therefore, since the trial court had jurisdiction over its own judgments, it might properly reopen a case even after affirmance on appeal to consider new matters of *fact* not previously passed upon. The writ of error *Coram nobis* goes to errors of *fact* not appearing on the record and unknown to the court at the time of the trial. Since affirmance on appeal by way of writ of error examined only the questions of *law* decided by the trial court, and was not an examination of the *facts*, there is no logical reason why the trial court could not reopen the case on a writ of *coram nobis* after affirmance on appeal. In the *Stephenson* case the Court decided that the code of Indiana had not adopted the common law appeal method of review, and hence there was no valid reason why the writ of *coram nobis* could not lie after afirmance on appeal.[27]

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[23] 291 Ky. 44, 163 S.W 2d 5, 145 A.L.R. 813 (1942).

[24] Robertson v. Commonwealth, 279 Ky. 762, 132 S.W 2d 69 (1939); Jones v. Commonwealth, 269 Ky. 779, 108 S.W 2d 816 (1937).

[25] See Anno. 33 A.L.R. 84; Note, 31 KY L. J. 86 (1942).

[26] 205 Ind. 194, 186 N.E. 293, 145 A.L.R. 813 (1933).

[27] The rule set out in the Stephenson case is now the majority rule and all the

Although the *Stephenson* case was not cited in *Smith* v. *Buchanan* it might well be argued that the reasoning employed therein could be used to justify the use of *coram nobis* after affirmance on appeal in Kentucky The Kentucky Civil Code provides that the method of review in this state shall be an *appeal.*[28] The Kentucky Criminal Code provides that only errors of law committed in the trial court which are included in the motion and grounds for a new trial and assigned as error in the bill of exceptions will be reviewed on appeal.[29] A reasonable interpretation of both sections would seem to be that the method of review adopted by the Code was the common law writ of error. If this assumption is sound there is no valid reason why the writ of error *coram nobis* should not lie after affirmance on appeal in Kentucky. This method of rationalizing also allows the writ of *coram nobis* to be adopted into our procedural structure without doing violence to the existing procedural remedies as defined in the Code and case law.

Further evolution of *coram nobis* brings us to the case of *Sharpe* v. *Commonwealth.*[30] This case presented a procedural pattern that eventually forced the Kentucky Court of Appeals to face directly the problem of providing a remedial process in cases involving newly discovered evidence. Sharpe was convicted of murder and sentenced to the penitentiary. Sharpe then petitioned the trial court to reopen the case on a writ of *coram nobis,* alleging that newly discovered evidence had been obtained. The writ was denied and on appeal the Court reiterated its former position that the writ would not lie for newly discovered evidence.[31] Sharpe then petitioned the Federal District Court for a writ of habeas corpus.[32] Relief was denied on the ground that he had not exhausted all available remedial processes (habeas corpus) under Kentucky procedure. During the interim Sharpe unsuccessfully petitioned the Kentucky Court of Appeals for a writ of habeas corpus. In denying the petition the Court stated:

> "This court has consistently held the Civil Code provisions for obtaining new trials are not applicable in criminal cases and that a new trial on the ground of newly discovered evidence cannot be granted in criminal cases after the expiration of the term at which judgment was rendered. We have also consistently held that no such relief may be had by petition for writ of error *coram nobis.*
>
> " *if it be finally determined by the Federal Courts that due process of law demands that judicial process be available to one seeking relief on this ground, it seems advisable that judicial process other than habeas corpus be made available.*
>
> "While it may be necessary and proper for the Federal Courts to extend the scope of habeas corpus in order to give full effect to the due process clause of the 14th Amendment to the Federal Constitution, and this seems to be the tendency, we deem it advisable to confine the scope of such proceedings within rather narrow limits."[33] (Italics writer s)

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cases holding to the contrary in the United States, except in North Carolina, have been overruled. See 145 A.L.R. at 820.

[28] KY. CODE, CIV. PROC. ANN. sec. 515.

[29] KY. CODE, CRIM. PROC. ANN. secs. 282, 340.

[30] 284 Ky. 88, 143 S.W 2d 857 (1940).

[31] *Ibid.*

[32] Ex Parte Sharpe, 36 F Supp. 386 (W D. Ky. 1941), aff. Sharpe v. Buchanan, 121 F 2d 448.

[33] Sharpe v. Commonwealth, 292 Ky. 86, 88, 165 S.W 2d 993, 994 (1942).

A summation of Sharpe's position thus showed that the Civil Code provisions for obtaining a new trial on the ground of newly discovered evidence did not apply to criminal cases. Such relief could not be obtained through the writ of *coram nobis*, and the Court refused to extend habeas corpus to meet the exigencies of the situation. Therefore, the only avenue left open to Sharpe under Kentucky procedure was an appeal for executive clemency.

While the habeas corpus appeal before the Kentucky Court of Appeals was pending, Sharpe filed a petition for certiorari in the Supreme Court of the United States appealing from the denial of habeas corpus by the Circuit Court of Appeals. After the decision of the Kentucky Court denying habeas corpus certiorari was granted and the Supreme Court reversed the Circuit Court of Appeals remanding the case.[34] Since the Circuit Court of Appeals had denied Sharpe's application for a writ of habeas corpus on the ground that he had not exhausted all the remedial processes of the state, this obstacle was removed with the decision of the Kentucky Court of Appeals on the application there for a writ of habeas corpus. Sharpe's later application to the District Court was denied on the merits.[35]

With this reversal by the Supreme Court, the Kentucky Court was squarely faced with the problem of either providing additional remedial processes for cases involving such a problem as presented in *Sharpe* v. *Commonwealth* or leaving defendants the resort of seeking relief from the Federal Courts.[36]

The language of the *Sharpe* case in denying habeas corpus is indicative of the realization by the Kentucky Court, that if due process demanded additional remedial process to augment existing Kentucky procedure, that Kentucky would conform and that *coram nobis* would be the remedy.

The question next arose in the case of *Anderson* v. *Buchanan*.[37] Petitioner sought a new trial based on newly discovered evidence that his conviction had been obtained by the use of false and perjured evidence and *coram nobis* was allowed. The Court's well considered opinion thoroughly reviewed all prior *coram nobis* cases. The problem of newly discovered evidence after affirmance on appeal was presented squarely, and the effect of the case was the overruling of precedent which had held that there was no remedy to one seeking a new trial on that basis in criminal cases.[38]

The Court admitted that it was much impressed by the tendency of the Supreme Court to entertain crudely drawn petitions by prisoners on application for habeas corpus. In the course of the opinion, in which two judges dissented, the majority believed that the *"arm of justice ought not to be any weaker or any shorter than it is in the Federal Courts."* [Italics writer's]

The dissent in the *Anderson* case labeled *coram nobis* the "wild ass" of the law, and that the confusion of prior decisions had set the criminal law of Kentucky asail without a mast on the dangerous sea of indefiniteness. But weighting the

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[34] Sharpe v. Buchanan, 317 U.S. 238, 63 Sup. Ct. 245, 87 L. Ed. 338 (1942).

[35] Sharpe v. Commonwealth, 142 F 2d 213 (C.C.A. Ky. 1944), cert. denied, 64 Sup. Ct. 67, 320 U.S. 767, 88 L. Ed. 458 (1944).

[36] Other states have found themselves in a similar predicament because of outmoded procedural processes which failed to conform to the federal requirement of due process. These states have employed *coram nobis* to meet that demand. See cases cited note 5 *supra; note,* 39 MICH. L. REV. 963 (1941).

[37] 292 Ky. 810, 168 S.W 2d 48 (1943).

[38] In Hysler v. Florida, note 5 *supra,* the Supreme Court stated that the writ of *coram nobis,* which had only recently been adopted into the Florida procedure was sufficient to meet the due process requirements of the Federal Constitution.

exigencies of the need on the one side, coupled with the strong decisions of the Federal Courts, the majority believed that it was still within the power of the courts to sufficiently harness and control this antiquated judicial demon, and to protect themselves against undue imposition by this newly found remedy.

The urgency of the need in cases involving a death sentence demonstrates the necessity of leaving open a procedural door to allow the issue of newly discovered evidence to be litigated, when the evidence be of such conclusive nature as to satisfy the court that the judgment was wrong, and the trial as conducted was tantamount to no trial at all. Opposed to this admittedly urgent need is the problem of removing the stability of judgments in criminal cases. The latter fear had heretofore been the haunting specter which seemed to overcome the Court when the question was raised.[39]

This is not to give the reader the impression that the writ of *coram nobis* is a panacea; that it is a substitute for appeal, or an alternate remedy to habeas corpus. It was born in Kentucky law in an atmosphere of urgency· it will continue to survive only within the confines of extreme need.[40]

The purpose of *coram nobis* is to supplement the existing criminal procedure in Kentucky and not to supplant it. The exact scope of the remedy as it exists in Kentucky law may best be illustrated by a quote from the *Anderson* case:

> "[the real purpose of the writ is] to revest the court with jurisdiction in an *extreme emergency* and permit inquiry into the important question of whether the judgment of conviction should be vacated because the defendant was unknowingly deprived of a defense which would have probably disproved his guilt and prevented his conviction, and if that probability be established to grant the defendant a new trial of the accusation."[41] (Italics writer s)

As *coram nobis* stands in Kentucky law, questions of Federal due process, and Kentucky "due course" may be brought to the attention of the court through its office. The writ "possesses germs of growth and flexibility sufficient to make it a valuable remedy in raising due process questions."[42] Caution, however, should be employed even in raising a due process issue. The scope of the writ is relatively narrow· it must be an error of *fact;* errors of law are to be properly litigated by *appeal,* or by *habeas corpus.* The *fact* must have been unknown to the trial court and not due to any lack of diligence on the part of the defendant, and not appearing on the record. In other words in an ordinary case the remedy of appeal and habeas corpus would suffice.

It is primarily in extraordinary situations that its utility will be appreciated, but in a proper case, the urgency of the need will demonstrate its usefulness. The antiquity of its origin has not attenuated its vitality.

There should be nothing shocking in the realization that new remedies and methods are constantly being provided to relieve from the unforseen difficulties of an oppressive vacuum; *i.e.,* the otherwise total absence of a remedy in some particular situation. Aspersions of illegitimacy should not be cast upon *coram nobis* in this state because it had its birth in the judiciary It is notorious that the legis-

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[39] Cases cited note 24, *supra.*
[40] Anderson v. Buchanan *supra* note 37.
[41] Id. at 819, 168 S.W 2d 53.
[42] Note, 37 HARV. L. REV. 744 (1923-24).

lature looks with disfavor upon any suggested change in the criminal procedure.[43] So long as the concept can be traced to the legitimate parentage of public morals, opinions, and ideals which collectively is the womb for the embryonic formulation of our sense of right and justice, our principles are being preserved. In short, this is the inductive process of how the question of "what is due process of law" in a given situation is determined. As this elastic test of subjectivity extends, the need for corresponding remedies becomes manifest. *Coram nobis* is the answer.

JOHN W SUBLETT

DO KENTUCKY CITIES HAVE ANY INHERENT RIGHTS AS TO LOCAL FUNCTIONS FREE FROM LEGISLATIVE CONTROL?

Under the Tenth Amendment to the United States Constitution all powers not delegated to the United States are reserved to the States and to the people. This came about because of the nature of the Federal government which was created by a compact between sovereign states. Such a relationship does not exist between a city and a state. In fact the reverse is true, since cities have ordinarily been created by the state in the first instance and derive all their governmental powers from the state. Therefore, it would seem that a state legislature, except as limited by express provisions in the state constitution, would have plenary power in respect to cities within the boundaries of the state as to governmental functions. This is the view generally accepted and is often extended to include even local functions. However, in a few jurisdictions it is recognized that a city has certain inherent rights in regard to local functions without the aid of any express state constitutional provision. This doctrine originated in *People* v *Hurlbut*,[1] an early Michigan case, where Judge Cooley conceived and advanced the theory that a city has certain inherent rights, irrespective of constitutional provisions, which cannot be abrogated by the legislature. An attempt will be made to ascertain the position of the Kentucky Court of Appeals in relation to this doctrine.

In order to determine whether a Kentucky city has any inherent rights free from legislative control, such as those afforded to an individual, it is of prime importance to consider the Court's view of the nature and source of the city s right to exist. The status of the city in relation to the legislature is described in an early Kentucky case as follows:

> "Cities and towns are mere creatures of the legislature, and the power exists in that department of the state government not only to abolish the courts but to destroy the existence of the corporation by a repeal of its charter."[2]

From this statement it is apparent that the legislature is deemed to be the creator and the city a mere creature or agent; therefore, the only conclusion is that the city has no right to exist except with the consent of the legislature.

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[43] Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947). Comment. 50 YALE L. J. 107 (1940).

[1] 24 Mich. 44, 93 (1871). For conflicting positions as to the soundness of the doctrine see McQuillin, *Constitutional Right of Local Self Government of Municipalities*, 35 AM. L. REV. 510 (1901) and McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COL. L. REV. 190, 299 (1916).

[2] Boyd v. Chambers, 78 Ky. 140, 143 (1879).