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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.

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).

Does this absolute dependency for existence place the city at the legislature's mercy as to all rights? An examination of the State Constitution reveals that, while there is no "home rule" provision in the Constitution, there are at least three provisions which impose certain constitutional limitations on the powers of the legislature as against the cities.³ This observation is confirmed by a recent Kentucky case where the court said:

"The general rule is that in the absence of a constitutional provision safeguarding it to them, municipalities have no right to self-government which is beyond the legislative control of the state. There are states in the Union wherein the right of home rule is established or recognized in their Constitutions."

These express provisions protecting the rights of the city are obviously limited, and it remains to be determined whether, and, if so, on what grounds, the Court of Appeals has recognized any implied "inherent rights" of a city to act free from legislative control.

The apparent beginning of the inherent rights doctrine in Kentucky was in 1902 in the case of *City of Lexington v. Thompson*.⁴ A state statute provided a salary range for the members of the fire departments of second class cities. The city of Lexington refused to pay according to the new scale, and a member of the Lexington Fire Department brought an action against the city to recover the difference between his actual pay and that prescribed by the legislature. No express constitutional prohibition was involved, but, nevertheless, the statute was held to be unconstitutional. The court relied heavily upon the case of *People v. Hurlbut*.⁵ The following passage from the *Thompson* case is a concise statement of the inherent rights doctrine:

"The legislature can not take away from the community rights or property which existed or were acquired without the aid of legislation. A municipality has a dual character. In its character as a State agency it exercises governmental, political, public and administrative powers and duties. In its capacity as a private corporation it exercises rights and powers inherent in the people of the community, which have never been surrendered to any department of the government, and which are property rights within the protection of the Constitution."

It should be noted that the language used indicates that the doctrine is based upon an analogy to the delegation and reservation of power theory as it exists between the States and the Federal government. Such a basis is probably unsound because a state constitution, unlike the Federal Constitution, is not a delegation of power to the state government, but rather is a limitation upon a power which would other-

³ Sec. 59 prohibiting the General Assembly from passing local or special legislation dealing with certain subjects. Sec. 156 classifying all cities into six classes. Sec. 181 prohibiting the General Assembly from taxing for local purposes.

⁴ *Callis v. Brown*, 283 Ky. 759, 766, 142 S.W. 2d 675, 678 (1940). To the same effect is *Allen v. Hollingsworth*, 246 Ky. 812, 816, 56 S.W. 2d 530, 531 (1933). "Apart from restraints of the organic law, the Legislature has plenary powers in respect to the establishment and regulation of the government of municipalities."

113 Ky. 540, 68 S.W. 477 (1902).

⁵ See note 1 *supra*.

113 Ky. at 548, 68 S.W. at 479.

wise be absolute.⁸ The language further implies that these inherent rights of the city which have not been surrendered are property rights entitled to protection under the due process clause of the Federal Constitution. It is probably too late to argue that the phrase in the Tenth Amendment, "powers reserved to the States respectively or to the people," gives to the people as a whole, as distinguished from the States as such, any separate powers, except perhaps the power to adopt and amend the state constitutions. But the argument that the people of a community, individually or collectively, may have rights which they have delegated to their city, and thereby clothed the city with the protection of the due process clause, is more intriguing. By way of analogy, one might also say that private corporations are creatures of the legislature and derive their powers from it; yet it cannot be denied that once created such corporations are entitled to the protection of the due process clause.

Three years after the *Thompson* case its authority was questioned in *City of Paducah v. Evitts*.⁹ In this case a statute provided for the election and compensation of jailors in cities of the second class. An ordinance of the city of Paducah set the jailor's salary at a rate less than that established by the statute. It was held that the ordinance was in conflict with the statute and was therefore invalid. The *Thompson* case had been cited by counsel in support of the validity of the ordinance, but the court in expressing doubt as to the correctness of that opinion stated that even if it were followed the same result would be reached because the regulation of police systems is a governmental or public matter subject to the control of the legislature.

In *Schmitt v. Dooling*,¹⁰ decided in 1911, the authority of the *Thompson* case was again shaken, at least to the extent of changing the classification of a fireman. The court, in holding an assignment of a city fireman's salary void, classified him as a public officer "engaged in the discharge of a governmental function."¹¹ This opinion apparently overruled the holding in the *Thompson* case that the regulation of a city fire department is a matter of local and not of governmental concern.

The doctrine of inherent local self-government was again seemingly repudiated by the Kentucky Court in 1928. In that year it was held, in the case of *Board of Trustees of Policemen's Pension Fund v. Schupp*,¹² that a statute providing for doubling the existing pensions paid to the policemen of Louisville was valid. The court expressed its disapproval of the inherent rights doctrine in the following language:

"The theory that the right of local self-government inheres in the municipalities of this state is essentially unsound, and is based upon the now discarded doctrine that the Constitution of this state is a grant or delegation of power by the people of the state to the state government, and is not, as is now generally recognized, a limitation upon a power which, merely by virtue of its sovereignty, would otherwise be absolute."¹³

⁸ *Board of Trustees of Policemen's Pension Fund v. Schupp*, 223 Ky. 269, 3 S.W. 2d 606 (1928). In this case the court criticized the basis of the theory, but still held that under Sec. 181 of the Constitution there was a distinction between matters purely local in nature and matters of state wide concern, and that the maintenance of order falls in the latter group.

⁹ 120 Ky. 444, 86 S.W. 1123 (1905).

¹⁰ 145 Ky. 240, 140 S.W. 197 (1911).

¹¹ *Id.* at 244, 140 S.W. at 198.

¹² 223 Ky. 269, 3 S.W. 2d 606 (1928).

¹³ *Id.* at 274, 3 S.W. 2d at 609. The prevailing view even in those states hav-

However, the decision was based primarily on the finding that the police function of cities is not a local matter and therefore Section 181 of the Kentucky Constitution, which prohibits the General Assembly from imposing taxes for local purposes, did not invalidate the statute in question. This being so, the statement relative to inherent rights was only strong dictum, because that doctrine has never been applied except as to matters that are considered local. In fact, the court's language quoted above as to inherent rights was rather remarkable in view of a later statement in the same opinion to the effect that from reading Section 181 of the Constitution it was apparent that the makers provided for the twofold character of cities—one purely local and the other governmental in nature affecting the state at large. This distinction would appear to be meaningless unless there were some kind of inherent rights relating at least to local affairs. Apparently, however, the court in this particular case limited the scope of the distinction to questions arising under Section 181 of the Constitution.

In *Warley v. Board of Park Commissioners*¹⁴ decided in 1930, the authority of the *Thompson* case was relied on by counsel in an effort to have a statute declared invalid which gave the Board of Park Commissioners of Louisville the power to designate certain parks for whites and certain ones for the colored. The statute was nevertheless held valid and the theory of inherent local government as espoused by the *Thompson* case was again criticized. The court did say that the General Assembly could not legislate on fiscal matters and other things of purely local concern, and this statement might seem to indicate that the inherent rights doctrine was still recognized, but considering it in conjunction with the criticism of the doctrine elsewhere in the opinion it is probable that the court was referring only to express constitutional provisions.¹⁵ Authority for this conclusion is the 1930 case of *Campbell v. Board of Trustees of Fireman's Pension Fund of Louisville*.¹⁶ A statute had made it mandatory that cities of the first class levy a prescribed ad valorem tax to create a pension fund for retired fireman. The statute was held to contravene Section 181 of the Constitution. At the same time, the court attempted to rescue the *Thompson* case, stating that it had been followed by later cases, at least to the extent that the maintenance of a fire department is a municipal purpose, apparently overlooking or limiting the effect of the holding in *Schmitt v. Dooling*. But it was admitted that on the point of inherent rights of a city the *Thompson* case had been questioned by later decisions. Since the *Campbell* case was decided on the basis of the violation of an express constitutional provision, whatever was said in reference to the inherent rights doctrine, must be taken as dictum.

The foregoing cases would seem to indicate that the status of the inherent rights doctrine in Kentucky is uncertain at best. But the doctrine was given new life in two later cases. The first is *Covington Bridge Commission v. City of Covington*,¹⁷ where the court by the following language reaffirmed the rights doctrine of the *Thompson* case:

“ in matters purely governmental in character, a municipality is under the absolute control of the Legislature; but, as to its proprietary or private functions, the Legislature is under the

ing home rule provisions in the constitution is that the conduct of a fire department is a state concern. See Note, 141 A.L.R. 903 (1942).

¹⁴ 233 Ky. 688, 26 S.W. 2d 550 (1930).

¹⁵ See CONSTITUTION OF KENTUCKY, secs. 59 and 181.

¹⁶ 235 Ky. 383, 31 S.W. 2d 620 (1930).

¹⁷ 257 Ky. 813, 79 S.W. 2d 216 (1934).

same constitutional restraints that are placed upon it in respect to private corporations."¹⁸

Again this was dictum, because the court held that the purchase of an interstate bridge by a city was not a matter of purely local concern but was clearly of state concern.

However, in an even more recent case,¹⁹ a statute fixing the minimum salary for city waterworks commissioners was held invalid solely on the authority of the *Thompson* case, as relating to a matter of purely local concern.

Prior to these two cases it would no doubt have been safe to conclude, on the basis of the cases subsequent to the *Thompson* case, that the inherent rights doctrine had been abandoned by the Kentucky Court. Such a conclusion is now impossible. It seems that the doctrine has been rejuvenated with all the vitality which it possessed when first advanced in the *Thompson* case. However, the scope of the doctrine in Kentucky, as far as the writer is able to discern, has never been extended specifically to include anything as being of purely municipal concern except the functions of a city fire department and a city waterworks commission.

The according of limited recognition to the concept of the inherent rights doctrine of local government in Kentucky need not mean that very far-reaching results will follow. The separation of powers doctrine will not disintegrate because the court invalidates a few acts of the legislature without any express constitutional authorization. But technically, the theory that a state legislature is restricted by implied extra-constitutional limitations in connection with the cities which it has created is unsound. Furthermore, the inherent rights doctrine would seem to need a stronger basis than the changing attitude of the Court of Appeals. Perhaps a "home rule" constitutional amendment is the solution.

HOLLIS E. EDMONDS

CIVIL LIABILITY OF CHILD TO SUPPORT INDIGENT PARENT IN KENTUCKY

The support of the aged has become a problem of great magnitude in recent years. Nearly every state⁴ has passed laws concerning the well being of indigent parents of adult children who either cannot or will not provide for their parents support. Many children, who are supported from birth, abandoned their aged parents and these persons are left without proper support and become charges of an already overburdened state. How does the law cope with this problem? Is there a civil liability imposed upon adult children in Kentucky to support their parents?

First, let it be understood that there is no common law duty to support one's parent. One of the earlier English cases made this clear when it was said in *Rex v. Munden*, "By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by Act of Parliament." A Con-

¹⁸ *Id.* at 820, 79 S.W. 2d at 219.

¹⁹ *Board of Aldermen of City of Ashland v. Hunt*, 284 Ky. 720, 145 S.W. 2d 814 (1940).

⁴ 4 VERNIER, *AMERICAN FAMILY LAWS* sec. 235 (1st ed. 1936).

1 Strange 190, 93 Eng. Rep. 465 (1719).