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coram nobis in Kentucky

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make use of such mental defects as feeble-mindedness, forgetfulness,[12] and what not, would only provide him with numerous avenues of escape from the consquences of his act.

ROY VANCE, JR.

CORAM NOBIS IN KENTUCKY

Defendant, Tom Jones, was convicted of murder in the Bell Circuit Court and on appeal his conviction was affirmed. While awaiting execution the defendant filed a petition for a writ of habeas corpus in the federal district court upon the ground of newly discovered evidence. A temporary stay of execution was granted to allow the defendant to exhaust all remedies he might have in the state courts. The defendant's application for a writ of coram nobis in the circuit court of conviction upon the same grounds used before the federal court for a writ of habeas corpus was denied. Held: Denial affirmed. The writ of coram nobis will not lie on the ground of newly discovered evidence. *Jones* v. *Commonwealth,* 269 Ky. 779, 108 S. W (2d) 816 (1937).

The writ of coram nobis has been recognized as constituting a part of Kentucky law.[1] It will lie in any instance when it would have lain at common law in so far as it has not been supplanted by statutory action.[2] In civil actions the writ has been largely supplanted because additional grounds for a new trial have been specified.[3] However, in criminal cases the code sections specifying additional grounds for a new trial in civil actions have no application.[4] Therefore, the writ is still available in criminal cases.[5]

The function of the writ "is to bring to the attention of the court, for correction, an error of fact—one not appearing on the face of the record, unknown to the court or the party affected and which, if known in season, would have prevented the rendition of the judgment challenged."[6]

There is a paucity of authority in Kentucky concerning the situations falling within the purview of this general purpose. Thus,

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[12] Forgetfulness is another defect which has been mentioned as offering no defense to crime. Comm. v Mangrum, 19 Ky Law Rep. 94, 39 S. W 703 (1897)

[1] Combs et al. v Carter, 1 Dana 178 (1833), Meredith v. Sanders, 2 Bibb 101 (1810)

[2] Jones v. Commonwealth, 269 Ky 779, 108 S. W (2d) 816 (1937)

[3] See Code Section 518, which provided for a new trial because of clerical misprison, fraud of successful party, erroneous proceeding against person under disability, death of party before judgment, casualty or misfortune, errors in judgment against infant and discovery of later will.

[4] Coldiron v Commonwealth, 205 Ky 729 (1924), Greer v. Commonwealth, 165 Ky 715, 178 S. W 1027 (1915), Wellington v. Commonwealth, 159 Ky 462, 167 S. W 427 (1914).

[5] Jones v. Commonwealth, *supra* n. 2.

[6] Asbell v. State, 62 Kan. 209, 61 Pac. 691 (1900).

a resort to other jurisdictions wherein the writ has been granted is necessary in order to ascertain the general scope of the writ. It has been held that where a defendant pleaded guilty to a charge of murder because of mob violence the writ will lie.[7] Also, the writ was held proper where the accused was sane when he committed the offense but was insane during the trial and judgment was rendered without the attention of the court being called to the fact while it still retained power over the case.[8]

From the cases concerning the point in issue it seems clear that newly discovered evidence is an insufficient ground on which to base the writ.[9] Logically, this view is well supported because to hold otherwise would render the validity of the judgments of the courts too uncertain to comport with social policy, safety, or public convenience.[10]

It is submitted that the writ of coram nobis in Kentucky, though largely supplanted in civil actions, is still available in criminal cases; that the writ will lie only for mistake of fact which if known at the time of the trial, would have prevented the rendition of the judgment; and, that the writ will not lie upon the ground of newly discovered evidence because of the effect on the security of judgment.

GRANT F KNUCKLES

CIVIL ASSAULT—INTENT AND NEGLIGENCE

There is a difference of opinion among both courts and text-writers as to the definition of civil assault. It has been defined on the one hand as an attempt, with unlawful force, to inflict injury upon another.[1] This definition classifies assault as an inchoate battery. On the other hand, the definition given by more recent cases and text-writers is that an assault is an act which is the legal cause of putting another in apprehension of an immediate harmful or offensive contact provided that the actor either intends to inflict

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[7] Sanders v State, 85 Ind. 318, 44 Am. Rep. 29, 4 Criminal Law Magazine (1882).

[8] Adler v. State, 35 Ark. 514, 37 Am. Rep. 48 (1880)

[9] Howard v State, 58 Ark. 229, 24 S. W 8 (1893), Hamlin v. State, 67 Kan. 724, 74 Pac. 242 (1903), Fugate v State, 85 Miss. 94, 107 Am. St. Rep. 268, 37 So. 554, 3 Am. Cas. 326 (1904), Humphreys v. State, 129 Wash. 309, 224 Pac. 937, 33 A. L. R. 78 (1924)

[10] Bigham v Brewer, 4 Sneed (Tenn.) 432 (1856).

[1] In Degenhart v. Heller, 93 Wis. 662, 68 N. W 411 (1896), where defendant discharged a revolver intending to frighten the plaintiff but without intending to do any bodily harm it was held for the defendant. The court said the intent to inflict bodily harm was essential to the maintenance of a civil action for assault. *See* Perkins v. Stein et al., 94 Ky 433, 436, 22 S. W 649, 650, (1893), Raefeldt v. Koenig, 152 Wis. 459, 461, 140 N. W 56, 57 (1913) "The intention to do harm is of the essence of an assault." 2 Greenleaf, Evidence (15th ed. 1892) § 83. 2 Ruling Case Law 527 and cases there cited.