"Control of Inferior by Superior Jurisdictions by Proper Writs"

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"CONTROL OF INFERIOR BY SUPERIOR JURISDICTIONS BY PROPER WRITS."

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In discussing this question it seems unnecessary to make any comment upon appeals, writs of error, writs of certiorari, or writs of false judgment, by means of which the judgments of inferior courts are affirmed, modified, reversed, and frequently annulled, as these writs are regulated entirely by statute both as to the mode of taking appeals and as to the case in which and the circumstances under which litigants can avail themselves of the remedy.

The writ of injunction has a purely personal effect, is directed to parties to litigation, actual or threatened, and has been well described as "a judicial process operating in personam."

Under writs of habeas corpus want of jurisdiction and excess of jurisdiction are legitimate and necessary subjects of inquiry, and by the issuance of this writ superior courts frequently review the decisions of inferior courts, and annul judgments rendered, thereby controlling inferior courts.

The two writs of most interest to the profession are the writs of prohibition and mandamus, though the Court of Appeals by section 110 of the Constitution is not limited to these two writs by name in issuing such writs under its original jurisdiction, "as may be necessary to give it general control of inferior jurisdictions."

The first clause of section 110 of the present Constitution of Kentucky provides that:

"The Court of Appeals shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law."

This clause is practically the same in substance as the provisions relating to the jurisdictions of the Court of Appeals, which are found in the Constitutions of 1792, 1799 and 1850.

Editor's Note.—This paper was read by Mr. Hunt before the Kentucky State Bar Association in 1916. No attempt has been made to collect or comment upon the decisions rendered by the Court of Appeals of Kentucky since 1916.

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Under this provision the Court of Appeals of Kentucky in *Morgan v. The Register*, Hardin's Rep., page 619, decided 1808; *Daniel v. The County of Warren*, 1st Bib. 496, decided 1809; *Arnold, &c. v. Shields, &c.*, 5th Dana 18, decided in 1837, and *Sasseen v. Hammond*, 18 Ben Monroe, 672, decided in 1857; held that it could not issue a writ of mandamus, as the writ of mandamus involved original instead of appellate jurisdiction, and that it could not issue a writ of prohibition for the purpose of interfering with the action of a circuit court, unless it had appellate jurisdiction and revisory power by appeal over the controversy.

In the case of *Hindman v. Toney*, 97 Ky. 413, the Court of Appeals in explaining the provisions of the Constitutions of 1792, 1799 and 1850, and in commenting upon its previous decisions rendered prior to 1891, made this statement:

"It was held prior to the adoption of the present Constitution that there could be a proceeding in this court for prohibition only in a case in which in the exercise of appellate jurisdiction it had the power of controlling the inferior court by a direct revision of its judicial acts. And it was further held that a writ of prohibition is not an appropriate proceeding in a court of merely appellate jurisdiction, inasmuch as the revisory power of such a court can afford adequate relief without a resort to a proceeding of that character."

In the present Constitution, adopted in 1891, a new clause has been added, which was not in our previous Constitutions, which is as follows:

"Said court (referring to the Court of Appeals) shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions."

Under this clause of the Constitution, the Court of Appeals has full power to issue writs in all cases where it is necessary to give it general control of inferior jurisdictions. Such writs are issued in pursuance of and under an original jurisdiction and not an appellate jurisdiction. The writs of prohibition and mandamus are frequently referred to as counterparts of each other, the one being negative in its character, the other affirmative. Each of these writs was a common law writ, and each was early recognized in this State as an existing legal
remedy by which courts of inferior jurisdiction could be controlled under proper limitations by courts of superior jurisdiction.

"The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law,"

as defined by one of the text writers.

Chief Justice Robertson in the case of *Arnold, &c. v. Shield*, says that:

"According to the common law superior courts are entitled to a general supervision over all subordinate courts for the purpose of keeping them in their prescribed sphere and of preventing usurpation, and therefore, in England the King's Bench and the Common Pleas have a general, and the chancellor a qualified authority to restrain by prohibition all other courts inferior to them from exercising any arrogated jurisdiction."

While the power of the Court of Appeals prior to the adoption of the present Constitution was limited to a control of inferior courts by the writ of prohibition, to matters and controversies over which it could exercise a revisory power under its appellate jurisdiction, there has never been any question in this State about the right of circuit courts to issue such writs for the purpose of controlling jurisdictions inferior to it. This right existed in the circuit courts under the common law and independently of any statute, but under the first Civil Code prepared by M. C. Johnson, James Harlan, and J. W. Stevenson, finally completed and adopted in 1854, the right of a circuit court to issue writs of prohibition was provided for by statute. Section 528 of the Code of 1854 is the same as section 479 of the present Civil Code, which is as follows:

"The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction."

The principles of law which regulate the issuing of writs of prohibition in the circuit court and in the Court of Appeals are the same. Circuit courts in issuing such writs, therefore, follow the decisions of the highest appellate courts, and when the grounds for issuing such writs are finally stated they will be found equally applicable to the issuing of such writs both in the circuit court and in the Court of Appeals.
In the cases of *Montgomery v. Viers, Judge*, 130 Ky. 694; *Commonwealth v. Peter, Judge*, 136 Ky. 689, and *Megee v. Weisenger*, 147 Ky. 371, the Court of Appeals held that, although section 110 of the Constitution may confer ample authority upon this court to issue a writ (referring in the cases both to the writ of mandamus and writ of prohibition), in such a case the rule here is that, if the applicant has an adequate remedy elsewhere, we refrain from acting under our original jurisdiction. The Court of Appeals, however, in these cases recognized the existence of its original jurisdiction to control courts inferior to the circuit court under section 110 of the Constitution, but refused to interfere on the ground that the petitioners had an adequate remedy in that an application could have been made to the circuit court for the issuance of the writs restraining a court inferior to it from acting in excess of its jurisdiction.

In the case of *Rush v. Denhart, Judge*, 138 Ky. 238, the Court of Appeals, however, granted a writ of prohibition restraining the county judge of Warren County from hearing an application to revoke a license after the county judge had refused to vacate the bench, upon the filing of affidavits showing bias, on the ground that the petitioner had no adequate remedy, but in this case an application had previously been made to the circuit court for a writ of prohibition, which was refused by the circuit court.

In the case of *Rush v. Denhart*, no appeal was taken from the judgment of the circuit court to the Court of Appeals from the judgment refusing the writ of prohibition, so that this case seems to be in conflict with the cases of *Montgomery v. Viers, Megee v. Weisenger*, and *Commonwealth v. Peter*, above referred to. As these last cases, however, have been frequently cited by the Court of Appeals, it seems to be the settled doctrine of the Court of Appeals that a writ of prohibition will not be issued upon original application to it to restrain courts inferior to the circuit court under its original jurisdiction, but that it is the safer and better practice to apply to the circuit court for such a writ for the purpose of controlling jurisdictions inferior to the circuit court.

Writs of prohibition can be issued to restrain judicial tribunals, and cannot be issued to restrain ministerial officers or private individuals.
In the case of *Campbellsville Telephone Company v. Pat-teson, Judge*, 69 S. W. 1070, 114 Ky. 52, the court declined to issue a writ of prohibition restraining the Campbellsville Telephone Company from installing its plant under what was alleged to be a void ordinance, on the ground that such writs were issued to restrain judicial tribunals from unauthorized judicial acts and could not be issued against individuals.

In the recent case of *Equitable Life Assurance Society v. Hardin*, 166 Ky. 51, the court declined to issue a writ of prohibition against the master commissioner, restraining him from proceeding with a hearing under an order of reference, and stated the conclusion reached, as follows:

"No writ of prohibition will be issued against ministerial officers, such as commissioners of courts, because section 110 of the Constitution confines the powers of this court to issuing writs of prohibition against judicial tribunals."

In the case of *Morgan v. Clements, Circuit Court Commissioner*, 153 Ky. 33, an attempt was made by a writ of prohibition to restrain the master commissioner from collecting a sale bond, executed in an action, pending in the circuit court. The court declined to issue the writ on two grounds: first, because the writ could only be issued to control judicial tribunals, and second, because there was an adequate remedy in that application could be made for relief in the circuit court.

In the case of *Superintendent of Common Schools of Daviess County v. Taylor*, 105 Ky. 387, a teacher sought to restrain the superintendent of common schools from trying her or removing her for cause. The petitioner sought a writ of prohibition, if the superintendent was a judicial officer or an injunction if he was not a judicial officer. The restraining order was granted by the lower court and affirmed by the Court of Appeals. While there is no indication in the opinion as to which writ was given, it is clear under the other decisions of the Court of Appeals, that the issuance of a writ of prohibition would have been unauthorized, as the superintendent of common schools is not a judicial officer or tribunal under the Constitution. It seems to be settled, therefore, that writs of prohibition can be issued only to restrain judicial officers or tribunals.
AN ADEQUATE REMEDY A BAR TO THE WRIT

In the recent case of Ohio River Contract Co. v. Gordon, 170 Ky. 418, the court announced this doctrine as follows:

"Only in exceptional cases or where an unusual state of facts is presented, which makes it apparent, that injurious consequences will result, against which there is no other adequate remedy, will the writ of prohibition be used, and then for the purpose most often of restoring the administration of justice to its accustomed channel, that its ordinary course may be insured."

In the case of Jenkins v. Berry, 83 S. W. 594, 119 Ky. 350, the court used this language:

"Under the power granted by section 110 of the Constitution, the court has repeatedly exercised the power thus conferred, not only to prevent courts of inferior jurisdiction from acting in matters out of their jurisdiction, but also in cases where the right of appeal did not afford a plain, speedy and adequate remedy."

To the same effect are White v. Kirby, 147 Ky. 496; Weaver v. Toney, 107 Ky. 426; Morgan v. Clements, 153 Ky. 33; Fish v. Benton, 138 Ky. 644, and numerous other cases, which might be cited.

The remedy must be "plain, speedy and adequate." If the petitioner has such remedy by appeal, or by other writ, motion or proceeding, the writ will usually be refused.

In 32 Cyc., p. 617, the doctrine is thus stated:

"But the concurrent remedy is not regarded as adequate, so as to prevent the issuance of the writ, if it does not afford the particular right to the party aggrieved, or if its slowness is likely to produce immediate injury or mischief."

There is no better illustration of the doctrine stated in Cyc. than the decision of the Court of Appeals in the recent case of Equitable Life Assurance Society v. Hardin, 166 Ky. 51. In that case an order was entered, requiring the company to produce before the commissioner all of the books and papers, which were in New York, or copies of same, which were pertinent to the case. The court held that the remedy by appeal was wholly inadequate, and it might have been added that the remedy by appeal on account of "its slowness would have caused immediate injury and mischief, if resorted to." This case will be more fully discussed later on.
In the case of *Rush v. Denhart*, 138 Ky. 245, the court said:

"If we should once lay down the rule that application by original proceeding might be made to us to stay the hand of the inferior jurisdiction whenever in the opinion of counsel, the ruling was prejudicial, although it might not leave a plaintiff without adequate remedy, we would have much of our time occupied in the settlement of questions that could be brought before us in the regular way by appeal. Inferior courts would be obstructed in the hearing and disposal of cases, and much confusion and uncertainty would follow."

The right of appeal is not necessary to give an adequate remedy.

The right of appeal is regulated entirely by statute both as to time, manner and circumstances, under which it may be exercised, and is a matter of legislative discretion.

In the case of *Standard Oil Co. v. Linn*, 17 R. 832, a motion for a writ of prohibition to restrain the judge of the circuit court from trying sixty-five separate indictments returned against the company, which was based on the sole ground that there might be an adverse decision, which which there would be no appeal, was refused by the court. The court said:

"The fact that no appeal is given cannot affect the question, because the legislative department of the State has the power of limiting the jurisdiction of this court as to appeals."

In the case of *Bank Lick Turnpike Company v. Phelps*, 81 Ky. 613, the court expressed the same doctrine as follows:

"That no provision has been made for an appeal from erroneous orders of the court in this case, does not authorize a perversion of the purpose for which by law a writ of prohibition may be granted, or its extension to cases in which it does not lie."

To the same effect is the case of *Carey v. Sampson*, 150 Ky. 460. It does not follow, however, that the writ cannot be issued, when there is no right of appeal. The last clause of section 110 unquestionably gives to the Court of Appeals original jurisdiction to control inferior courts even when it has no appellate jurisdiction. The clause in question was added for that purpose. The right to restrain the inferior court from acting does not exist, merely because the judgment of the lower court is or may be erroneous.

In the case of *Rush v. Denhardt*, 138 Ky. 238, the court upon original application, and not by way of appeal from the circuit court, which had refused the writ, granted a writ of prohibition,
restraining the county judge from proceeding with a trial, after he had refused to vacate the bench upon the filing of affidavits, showing bias. The court in this case, said:

"But we have the power, whenever justice and the right of the matter seem to demand it, to interfere in behalf of a petitioner, who has no adequate remedy or means of obtaining relief except to invoke the extraordinary power conferred on this court by the Constitution. And a case might present itself in which the ends of justice would require us to issue the writ to restrain an inferior jurisdiction from doing an act or rendering a judgment, that the complaining party in the ordinary course of judicial procedure would have no relief against."

In the case of Board of Prison Commissioners v. Crumbaugh, Police Judge, 161 Ky. 540, the court granted a writ of prohibition upon original application, though no application was made to the circuit court, restraining the police judge of Eddyville from hearing a writ of habeas corpus, and from which no appeal could have been taken from the order made, and in rendering its opinion, said:

"Under section 110 of the Constitution this court has power to issue such writs as may be necessary to give it general control of inferior jurisdictions, and it is well settled that a writ of prohibition may issue in a case like this, whenever the inferior court is proceeding out of its jurisdiction, but an appeal will not furnish an adequate remedy, or there is no remedy."

The mere fact that the petitioner has no appeal from an adverse decision, which he regards as erroneous, does not give him the right to a writ of prohibition; but the issuing of the writ in such case is addressed to the sound judicial discretion of the superior court, and if the judge of the lower court is biased, or refuses to vacate the bench upon the filing of an affidavit in proper form, or if for any other reason the superior court is convinced, even though the lower court has jurisdiction to act, that its powers are being abused, the decisions of the Court of Appeals seem to indicate, that the writ will be issued, or its issuance by a lower court approved.

**Objection Must First Be Made in Lower Court**

Ordinarily application must first be made to the lower court to pass upon the question of jurisdiction, or usurpation of its powers, before such court can be restrained by the writ of prohibition issued by a superior court. This was the proceeding
adopted in the courts under the common law, and has been almost universally followed in the cases reported in Kentucky. Exceptional cases may arise, where such procedure is not feasible or possible.

In the case of *Hargis v. Parker*, 85 S. W., p. 706, the court in discussing this question, said:

"Ordinarily, this court might well refuse to issue the writ before the question of jurisdiction had been made in the lower court, for it might be presumed that until that court had proceeded out of its jurisdiction, or had evinced by an order of court that it proposed doing so, it would not, or, at any rate, that the complainant was not injured, nor threatened with injury till then. But this is not necessarily so in all cases. If the situation disclosed be such as that to take the ordinary course would be of itself to subject the complainant to irreparable loss, the writ should issue without the objections having been made below. The matter of judicial courtesy should yield to substantial personal rights of litigants, such as a sacrifice of their liberty. If it be true that the Fayette court is proceeding without jurisdiction, it is not substantial justice that it should be allowed to take the bodies of the complainants, confine them in jail without bail, as it might do at its discretion, subject the parties to enormous expense in defending the case, even if it went no further than a trial of the question of jurisdiction, and say to them, 'Your remedy is solely by appeal if you have been wronged.' We think the section of the Constitution, though it be deemed only declaratory of the common law on the subject, confers the power and jurisdiction on this court to intervene by the writ of prohibition to stay the inferior courts of the State from proceeding out of their jurisdiction. It may issue whether or not there is an appeal. Whether it ought to issue in advance of the decision of the lower court, or whether the party will be left to his remedy by appeal, will depend on whether that remedy is given and whether it is adequate or not. This court will be slow to use the writ where there is an appeal, but its valuable office to the citizen who is being oppressed by unlawful assumption of judicial authority will not be limited by set rules."

**Defect or Excess of Jurisdiction**

The Court of Appeals under section 110 of the Constitution has the power to issue such writs as may be necessary to give it general control over inferior jurisdictions.

Section 949, Kentucky Statutes, contains a similar provision, putting the Constitution into effect, if legislation was necessary for that purpose.

Section 479 of the Civil Code defines a writ of prohibition, as an order "prohibiting it (an inferior court) from proceeding in a matter out of its jurisdiction."

Section 25 of the Criminal Code, provides that:

"The circuit court of any county may by writ of prohibition, restrain all other courts of inferior jurisdiction of the county from exceeding their criminal jurisdiction."
CONTROL OF INFERIOR JURISDICTIONS

If the inferior tribunal has no jurisdiction of the subject matter, there is a defect of jurisdiction, and it can be restrained in the proper tribunal from usurpation of judicial authority by a writ of prohibition. It is frequently said, "that the issuing of such a writ is not a matter of right, but of sound judicial discretion," but the courts of superior jurisdiction uniformly grant the writ, where there is no jurisdiction of the subject matter in the lower court. Where the court has jurisdiction of the subject matter, and the question of the jurisdiction of the person turns upon some fact to be determined by the court, on account of invalidity of service or improper service or misjoinder of parties, our Court of Appeals has held, that the lower court has jurisdiction, and that it will not interfere by writ of prohibition, even though the lower court is wrong, but that the remedy is by appeal. This question would be an exceedingly interesting one, to discuss in this connection, if time permitted. The remedy by appeal is wholly inadequate in such case, because while the court will correct the error by reversal of the judgment of the lower court, the penalty is the waiver of a right, given by the law, as a condition of the reversal. If a legal right must be waived without fault on the part of a litigant as a condition precedent to the right of appeal, then either by judicial construction or by legislation the right of the litigant ought to be preserved.

The question of excess of jurisdiction, or abuse of judicial power given is much more difficult. Every departure from judicial power cannot be corrected by writ of prohibition, because every error made by a lower court, whether it be declaring an invalid law valid, or giving a jury an erroneous instruction as a basis of determining the rights of parties, or incorrectly determining any question of law, is illegal. In cases of usurpation of judicial power or the abuse of judicial functions, or the failure of lower courts to keep within their prescribed sphere, the issuance of a writ of prohibition does not go as a matter of right, but is addressed to the sound judicial discretion of the superior court. The issuance of the writ depends upon the method of procedure in the lower court, the right of appeal, the existence of an adequate remedy, which is plain and speedy, the wrongs to be corrected and the real justice of the situation.

Some of the cases will be referred to in which the writ has been issued by the Court of Appeals, which will show the general trend of judicial decisions in this State.
In the recent case of Ohio River Contract Co. v. Gordon, 170 Ky. 418, the court used certain expressions, which indicate under what circumstances the writ will be issued.

"... it is manifest that it was not intended by the lawmakers as a general principle, that this court, by the use of any extraordinary writs or processes, should interfere with the jurisdiction of the inferior courts, or with their discretion in the hearing or decision of questions of either law or fact, of which they have original jurisdiction or with the course of justice in the inferior courts when it is proceeding in the ordinary and usual way. Only in exceptional cases or when an unusual state of facts is presented, which makes it apparent that injurious consequences will result, against which there is no other adequate remedy, will the writ of prohibition be used, and then for the purpose most often of restoring the administration of justice to its accustomed channel, that its ordinary course may be insured. The writ of prohibition is not a writ which can be demanded as a matter of right and of course, but its granting or refusal is a matter which lies within the discretion of this court. For the reasons above stated, it has exercised its discretion to grant such a writ very sparingly, and then only as a matter of necessity to shield from injustice, against which there was no other adequate remedy and to preserve the orderly administration of the laws."

"A review of all the cases decided by this court upon application for writ of prohibition under section 110, supra, sustains the view, that the writ is granted as a matter of sound discretion, determined upon the facts of the particular case, which make it apparent, that an injury or violation of one's rights is threatened, and against the results of which he has no adequate remedy, other than the writ of prohibition."

The case of Equitable Life Assurance Society v. Hardin, 156 Ky. 51, above referred to presents a very interesting case of the exercise of a jurisdiction by the lower court in excess of its powers, for which a remedy by appeal would have been wholly inadequate. The principal facts have already been stated. The court granted the writ directing the judge of the Lincoln Circuit Court to set aside the order requiring the company to produce all of its books, records, papers, and documents at Standford, Kentucky. The court refers to numerous decisions rendered and uses this language:

"Under section 110 of the Constitution, which provides that this court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions it has been frequently determined what power this court has in regard to the issuance of a writ of prohibition and when it will interfere with inferior jurisdictions by the issuance of such a writ. The well established doctrine is that this court has the power to issue such a writ when the inferior court is proceeding out of its jurisdiction or is proceeding erroneously within its jurisdiction and the remedy for the error by appeal is not adequate."
In the case of *Bank Lick Turnpike Co. v. Phelps, County Judge*, 81 Ky. 613, the petitioner sought by writ of prohibition filed in the circuit court to restrain the county judge of Kenton County from reducing tolls on roads, under an act, which authorized such action, whenever a road paid more than ten per centum on its capital stock. The court held, that the county court had jurisdiction, and that a writ of prohibition could not be granted to prevent an inferior tribunal from deciding erroneously, or from enforcing an erroneous judgment, the remedy being by appeal.

In *Weaver v. Toney*, 107 Ky. 419, the lower court issued a mandatory injunction without notice about noon on election day, commanding the admission of inspectors of a branch of the Democratic party into the voting booths at the close of the polls. Certain election officers, who failed to obey the order, were cited for contempt, and filed in the Court of Appeals an action for a writ of prohibition to restrain the lower court from proceeding with the trials. The appellate court held, that the relief granted by the temporary injunction was final in its character, conclusive of the rights of the parties without notice or opportunity to be heard, and in effect void. The court granted the writ, and in the course of its opinion, stated:

"... it must be regarded as settled law that in proper cases, when the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem in certain cases, that even where the inferior tribunal has jurisdiction this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary powers, shall deem it necessary to so interfere."

In the case of *Scott v. Tully*, 106 Ky. 69, and the case of *Arnold v. Shields*, 5 Dana 18, a writ of prohibition was sought to restrain a lower court from proceeding under an unconstitutional act. The court in each case held, that, if the jurisdiction of the lower court depended exclusively upon the unconstitutional statute, such statute could not confer jurisdiction, but if the court, independently of the statute, the constitutionality of which was in question, had jurisdiction, then the writ could not be issued, because an erroneous judgment might be rendered. As stated, the writ

"Can be sustained only for preventing usurpation of judicial power by a court, which has no authority to decide the case in which it assumes the right to act judicially."
In the case of *Pennington v. Woolfolk*, 79 Ky. 13, the writ was granted, restraining the lower court from proceeding under an unconstitutional act, but the lower court did not have jurisdiction independent of the act.

In *L. & N. R. Co. v. Miller*, 112 Ky. 464, the court held that it had the right to issue the writ to restrain the lower court from punishing a party for contempt, when the act complained of was not fairly within the order of injunction issued, when fairly construed.

In the case of *Hindman v. Toney*, 97 Ky. 413, the writ was issued to restrain the lower court from proceeding to prevent a conflict between concurrent jurisdictions, in order that the course of justice might proceed in an orderly manner in the accustomed channels.

To the same effect is the case of *Clark County Court v. Warner*, 76 S. W. 828, in which a controversy arose over the jurisdiction of the courts of Clark and Madison County on application for a ferry privilege.

In *McCann v. City of Louisville*, 63 S. W. 446, a similar question arose, and the lower court was restrained from proceeding in matters within its jurisdiction, on the ground that the circuit court had assumed jurisdiction of the entire controversy, and the conflict would be unseemly.

In the case of *Commonwealth v. Jones*, 118 Ky. 889, when a controversy arose over the proper venue of the crime of murder, the court held that when the jurisdiction was concurrent, the jurisdiction of the court, first assuming jurisdiction, was exclusive.

In the case of *Morris v. Randall*, 129 Ky. 720, the court granted a writ of prohibition, restraining Morris, who claimed to be police judge, from proceeding to enforce a judgment rendered on the ground, that the office and court had no legal existence. The court said:

“We are clearly of opinion, that a writ of prohibition was the proper remedy in this case. It is preventive, rather than a corrective remedy, its office being to prevent the usurpation or excess of jurisdiction by judicial tribunals, and to keep the courts within the limits to which the law confines them; and we do not doubt that, in the absence of any other adequate remedy, it lies to prevent unauthorized individuals from usurping judicial power.”

In the case of *White v. Kirby*, 147 Ky. 496, the court refused a writ of prohibition, by which it was sought to restrain
the lower court from proceeding on the ground, that it had no jurisdiction over the person of the petitioner, and that his remedy by appeal was inadequate, in that by exercising his right of appeal, he would waive the question of jurisdiction of his person.

In the case of Cullins v. Williams, 156 Ky. 57, involving proceedings under the juvenile court law, and from the judgment rendered, there was no remedy by appeal, the circuit court granted a writ of prohibition, restraining the judge of the county court from proceeding with the trial, and the case was affirmed by the Court of Appeals. A part of the opinion is as follows:

"For a greater reason should the writ be granted by the circuit court where, as in the case at bar, it is made to appear that the judge of the county court will not grant the party applying for the writ a fair hearing, and that he has, in fact, in advance of said hearing, declared his intention to decide the case against her."

The case of Rush v. Denhardt, 138 Ky. 235, above referred to, was cited with approval.

In the case of Fitzpatrick v. Young, 160 Ky. 5, the court said:

"And this court, in pursuing the authority granted to it by section 110 of the Constitution 'to issue such writ as may be necessary to give it general control of inferior jurisdictions,' has, with few exceptions, been controlled in the issuance of the writ by the Code provision limiting it to cases in which the court against which the writ was sought was proceeding out of its jurisdiction. Save in a few exceptional cases when the lower court had jurisdiction of the subject matter and the parties and there was an adequate remedy by appeal, this court has refused to issue a writ. But we know of no instance in which the writ has been denied, when it appeared that the circuit court was proceeding without authority, and the parties had not waived their right to raise the question."

In the case of Commonwealth v. Davis, 184 S. W. 1122, an attempt was made to control the action of the circuit judge upon a motion to dismiss an indictment, and the writ was denied. The court said:

"A writ of prohibition may be granted by this court only to prevent an inferior court from exceeding its jurisdiction, but not for the purpose of controlling a discretion vested in the court."

It is clear, therefore, that an inferior court can be prevented from acting out of or in excess of its jurisdiction by
writ of prohibition; that whenever a court is acting in excess of its jurisdiction the issuing of the writ is addressed to the sound discretion of the court, and depends largely upon the question of adequate remedy by appeal or otherwise and the serious consequences, that might be caused in the orderly administration of justice by the failure of the superior court to interfere.

In practically all of the charters of cities and towns in this State, there is a provision for testing the validity of ordinances by writs of prohibition, but the remedy as applied to ordinances is purely statutory and no discussion of the opinions in such cases is deemed essential in this connection.

Article III, section 2 of the Constitution of the United States provides as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Under the Judicial Code, section 234, section 1211 U. S. Statutes of 1913, passed by the Congress pursuant to the provisions of the Constitution the power of the Supreme Court to issue writs of prohibition and mandamus is limited.

The section referred to is as follows:

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as Courts of Admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, or to persons holding office under the authority of the United States, when a state, or an ambassador, or other public minister, or a consul, or vice consul is a party."

WRIT OF MANDAMUS

"The modern writ of mandamus," as defined in High's Extraordinary Legal Remedies, "is a command issuing from a common law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."
The writ is administered upon more clearly defined principles, than the writ of prohibition, yet much that has been said in regard to the writ of prohibition applies with equal force to the writ of mandamus.

The granting of the writ is the exercise of an original jurisdiction, and not of an appellate jurisdiction as held in the case of Morgan v. The Register, Hardin 618, and in the case of Daniel v. County Court of Warren, 1 Bibb 496, so that prior to the adoption of the Constitution of 1891, the Court of Appeals had no right to grant the writ upon original application. Section 110 of the present Constitution gives to the Court of Appeals original jurisdiction to grant the writ when necessary to control inferior jurisdictions. The circuit courts had such power under the common law prior to the adoption of the Code in 1854, and now have such power under the Code, though the Code does not mention the writ as one to be used to compel the performance of a judicial act.

From an historical point of view it would be interesting to trace the writ of mandamus from the period of the first use down to the present time, but the same principles govern the courts in issuing this writ now as formerly, and as there is now no question about the right of our court to issue it, the more modern cases can be relied on for a statement of the doctrines, controlling and regulating its use.

In the recent case of Speckert v. Ray, 166 Ky. 622, a petition was filed for a mandamus to compel a judicial officer to decide that service of process, which had been adjudged insufficient by the lower court, was good and brought the defendant before the court, and that the court be required to take jurisdiction of the person of the defendant and proceed with the hearing of the case. This case was elaborately argued, and the court's opinion is exceedingly clear, and gives an excellent statement of the doctrines which control the issuing of writs of mandamus.

The court said:

"Section 110 of the Constitution provides that the Court of Appeals shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions. We have never held that the above provision of the Constitution authorizes this court to exercise the power of determining questions that necessarily belong to courts of original jurisdiction and over which they have complete control, subject to an appeal to this court, where an appeal is allowed."
The writ of mandamus cannot be issued to compel an inferior court to decide a matter in any particular manner. The chief office of the writ, as applied to courts, is to compel action by them; but when, as in the instant case, the petition of the plaintiff alleges that the court acted, but acted in a way different from what the plaintiff desired, this court is without power to interfere to the extent of compelling by mandamus, such action or decision on the part of the circuit court as will deprive it of the discretion conferred upon it by law."

The court also announced the following doctrines:

"In most of the states, however, the doctrine is as held in this jurisdiction, that if an inferior tribunal has a discretion and proceeds to exercise it, its discretion cannot be controlled by mandamus; but if it has a discretion and refuses to exercise it, it can be compelled to do so, though not in any particular direction."

"If, as claimed by the plaintiff, the circuit judge erred in the decision rendered, that fact would not authorize the granting of the mandamus; or if, as further claimed by her, she were without right of appeal from the decision, or other adequate remedy, the granting of the mandamus would be equally unauthorized; as in either event we would be confronted with the fact, that the circuit judge had a discretion over the subject matter involved in the question decided, and that, in making the decision he exercised such discretion, for which reasons no power exists in this court to compel by mandamus, a different decision."

In the case of Commonwealth v. McCrone, 153 Ky. 296, an action was brought by the county judge and road engineer to compel the fiscal court to consent to the appointment of the plaintiff, as road engineer, made by the county judge. The court refused the mandamus and said:

"It may be issued to compel the performance of a ministerial act, but not to control discretion. It may also issue against a tribunal, or one who acts in a judicial capacity, to require it or him to proceed, but the manner of proceeding must be left to his or its discretion."

In the case of City of Louisville v. Kean, 18 B. Monroe 9, the same principle was announced, as follows:

"But the doctrine seems to be well settled that when the inferior tribunal, or the subordinate public agents have a discretion over the subject matter, that discretion cannot be controlled by mandamus, although it may have been improperly exercised. If there be a refusal to act upon the subject, or to pass upon the question on which such discretion is to be exercised, then the writ may be used to enforce obedience to the law; but when the question has been passed upon, it will not be used for the purpose of correcting the decision."

In the case of Carter County v. Mobley, 150 Ky. 482, the court said:

"It may be conceded that, if an inferior tribunal or subordinate body has a discretion and proceeds to exercise it, its discretion cannot be controlled by mandamus; but, if it has a discretion and refuses to
exercise it, it can be compelled to do so, though not in a particular direction. But, when the inferior tribunal has certain duties to perform which are clearly and preemptorily enjoined by law, mandamus will lie to compel their performance."

In the case of *Houston v. Boltz*, 185 S. W. 80, the court used this language:

"It is well settled that mandamus will not lie to control or review the exercise of the discretion of any court, board or officer, when the act complained of is either judicial, or quasi judicial; but, when a duty is mandatory, and no discretion is vested, its performance and manner of performance both may be compelled by mandamus. In other words, mandamus lies to compel the performance of a merely ministerial duty. And, while there is some conflict of opinion as to what constitutes a ministerial duty as distinguished from a discretionary duty, the distinction between merely ministerial and judicial and other official acts seems to be that, when the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; and the fact that certain incidents and details of the duty are discretionary is no objection to starting performance of the duty itself."

In the case of *Shine v. Ky. Central Railroad Company*, 85 Ky. 182, the court said:

"The inferior court must be left free to exercise its own judgment; and the opinion of another tribunal cannot be substituted for it."

In the same case the court, quoting from High on Extraordinary Remedies, says:

"In all cases where full and ample relief may be had, either by appeal, writ of error or otherwise, from the judgment, decree or order of a subordinate court, mandamus will not lie, since the courts will not permit the functions of an appeal or writ of error to be usurped by the writ of mandamus. Indeed, the interference in such cases would, if tolerated, speedily absorb the entire time of appellate tribunals, in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable, were the jurisdiction by mandamus sustained in cases properly falling within the appellate powers of the higher court. It may, therefore, be laid down as the universal rule prevailing in both England and America, that the existence of another remedy adequate to correct the action of the inferior court will prevent relief by mandamus."

In the case of *Shoemaker v. Hodge*, 111 Ky. 436, the court issued a mandamus to compel a lower court to make a final order in case, which was ready for decision, and which, had precedence of other business, where action has been unnecessarily delayed.

In *Carter County &c v. Mobley*, 150 Ky. 482, the fiscal court of Carter County was required by mandamus to provide an in-
inspection of weights with weights, measures, balances and other apparatus necessary to perform his duties in accordance with act of General Assembly.

In the case of Morgan v. Champion, 150 Ky. 396, the court indicated, that the fiscal court of Anderson County might be compelled by mandamus to fill the office of county road engineer, on the ground that the appointment was made imperative on the county judge with the consent of the fiscal court, and that they would not be permitted to avoid the operation of the statute "for whimsical or arbitrary reasons."

In Hardison v. Pace, 121 S. W. 671, the court affirmed the judgment of the circuit court, refusing a mandamus to require the judge of the quarterly court to permit an amended pleading to be filed, so that an appeal might be taken, on the ground that the writ of mandamus could not be used to require an inferior court to decide a matter in any particular way.

In the case of Alexander, &c. v. Moss, 89 S. W. 118, the court refused a mandamus to compel the judge of the lower court to enter a judgment, dismissing the answer, after a demurrer had been sustained to same and the defendant declined to plead further. The court said in this case, "certainty still takes rank of celerity," but recognized the right to a mandamus under proper circumstances in such case. The court said:

"Though we have no doubt that if the trial judge unduly delayed taking any step in the case, so as to amount to a denial of justice in refusing a trial, when one was due, the power rests in this court, under the Constitution to compel action; not that this court could order in advance of any trial any specific judgment to be entered, but the lower court would be compelled to proceed with the case."

In the case of Montgomery v. Viers, 130 Ky. 694, an original application was made in the Court of Appeals to require the judge of the quarterly court to sign a judgment, which had been rendered by a predecessor in office, and not signed by him. The writ was denied primarily on the ground, that the plaintiff had an adequate remedy in that application ought to have been made in the circuit court. The court admitted, however, the original jurisdiction under the Constitution.

In the case of Com. v. Peter, 136 Ky. 689, the court held, that a county judge might be required by mandamus to compel a personal representative to file an inventory of an estate, but
the writ of mandamus was refused upon original application, on the ground that the circuit court had general jurisdiction, and the application should have been made to that court.

In the case of Com. v. Berry, 92 S. W. 936, the court granted a mandamus requiring the judge of the lower court to set aside an order, appointing a stenographer to take down testimony before the grand jury, on the grounds, that no one other than the witness and the Commonwealth's attorney was permitted to be present when the grand jury was sitting, and that the remedy by appeal was not adequate.

In Monroe v. Berry, 94 S. W. 38, it was held that mandamus could not be issued to require the lower court to reduce the amount of bail, as no application had been made to the lower court for that purpose.

In the case of Kelly v. Toney, 95 Ky. 338, the court granted the mandamus, requiring the judge of the lower court to give to the petitioner an appeal. The court said:

"The complainant cannot obtain an appeal from this court until after sixty days from the date of the judgment complained of and if denied an appeal below he would be without remedy."

To the same effect is the case of Louisville Industrial School v. City of Louisville, 88 Ky. 584.

Cases might be multiplied, showing under what circumstances the writ has been issued and refused, but the general principles are so well settled, they may be briefly summarized as follows:

1. The writ will not be issued to review or control the discretion of a lower court but to compel action and prevent unnecessary delay.
2. Application for relief should first be made to the court sought to be controlled.
3. Application must be made to circuit court to control courts inferior to it and not to the Court of Appeals for exercise of the original jurisdiction in the first instance.
4. The writ will not be issued, when there is an adequate remedy, and whether the remedy is adequate and appropriate is determined in each case by the court in the exercise of a sound judicial discretion.
5. The writ is not used in lieu of or as a substitute for an appeal, but may be issued to require the lower court to grant an appeal, improperly refused.
6. The applicant or relator must have a clear, legal right to the performance of a particular act or duty, the performance of which has been refused, and the writ will not be issued, when it would prove unavailing.
7. "Mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of
discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and discretion, on the part of the officer or body at whose hands their performance is required, mandamus will not lie."

(High's Extraordinary Relief, Sec. 24.)

In the case of *Marbury v. Madison*, 1 Cranch, in speaking of the power of the Supreme Court to issue the writ of mandamus, the Chief Justice says:

"To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction."

To review the decisions of the Federal courts would prolong this paper beyond the time limited.

**CONCLUSION**

There is a tendency upon the part of appellate courts to use the writs of prohibition and mandamus sparingly and only upon clear grounds.

In the case of *Morgan v. The Register*, Hardin 619, decided in 1808, at a time when the Court of Appeals of Kentucky had only appellate jurisdiction, the court gave expression to the apprehension, that the appellate court might be used to annoy, harass and embarrass inferior courts and that it might be burdened with actions in the first instance in the following terms:

"And so it was wisely established by the framers of the Constitution, otherwise that court which is to give light and direction to all other tribunals of justice might from the multiplicity of suits become only the grave instead of being the soul of justice."


In the case of *Illinois Central Railroad Company v. Baker*, 155 Ky. 512, a suit in equity was brought by the plaintiff to require one person having an interest common to many to prosecute an action for the common benefit of about 1,600 persons and to enjoin these persons from prosecuting separate actions
in the quarterly court growing out of a common cause. The lower court refused a temporary injunction, sustained a demurrer to the petition and the plaintiff declined to plead further and prayed an appeal to the Court of Appeals. The court held that, where a large number of persons had claims arising out of the same transaction or resting upon the same grounds, which were not legally enforceable or meritorious, a court of equity had jurisdiction to require the hearing and determination of all such cases in one action for the purpose of preventing a multiplicity of suits.

After the temporary injunction was refused by the lower court, the Illinois Central Railroad Company filed a petition for a writ of prohibition against Rice, the judge of the quarterly court, which case is reported in 154 Ky. 198, to restrain him from trying the numerous cases, the prosecution of which was sought to be enjoined in the case of Illinois Central Railroad Company v. Baker.

The Court of Appeals in the Rice case granted a preliminary writ resembling a writ of prohibition restraining the judge of the quarterly court from further proceeding with the trial of the cases, until the appeal in the equity case involved in the Baker case was heard and determined, and stipulated the time within which the record in the Baker case should be filed in the Court of Appeals. This action was based upon the statement heretofore quoted from the decision of Rush v. Denhardt, in which it was said:

"But we have the power whenever justice and the right of the matter seem to demand it, to interfere in behalf of a petitioner who has no adequate remedy or means of obtaining relief, except to invoke the extraordinary power conferred on this court by the Constitution, and a case might present itself in which the ends of justice would require us to issue the writ to restrain an inferior jurisdiction from doing any act or rendering a judgment that the complaining party in the ordinary course of judicial procedure would have no relief against. As courts are established to administer justice, why should not the highest court in the State, when there is no other adequate remedy in the exercise of the ample and unquestioned power conferred upon it, lay its superintending hand upon any inferior jurisdiction that is about to commit a judicial wrong, and compel it to administer justice according to the right of the case?"

The writ issued in the case of Illinois Central Railroad Company v. Rice, resembles a writ of prohibition in its effect, but in form and meaning is a temporary restraining order against a judicial tribunal. The doctrine announced in Rush v.
Denhardt, as applied in the Rice case, suggests what is clearly true, that the Court of Appeals is not limited to writs of prohibition and mandamus in controlling inferior jurisdictions. The power of the Court of Appeals under section 110 of the Constitution is unlimited, and embraces the right and authority to control inferior jurisdictions in the exercise of a sound judicial discretion when there is no adequate remedy, so that absolute justice shall be done in an orderly manner.

There is no better statement of the breadth and scope of the power of the Court of Appeals under section 110 of the Constitution, than is found in the editor's note, to the case of State, ex rel. Fourth National Bank v. Johnson, 51 L. R. A., p. 111, where it is said:

"As is so often stated in the decisions, the power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur it will be found able to cope with them. And, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame and formulate new and additional means, writs, and processes whereby it may be exerted."