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is no more likely to promote dangerous conduct again than is any ordinarily prudent and mentally alert individual. Without observing the subjective attitude of the offender towards his act and its consequences, a distinction cannot be made between the intentional and the negligent wrongdoing, making it equally as difficult to distinguish between conduct justifying a conviction of murder and that justifying a conviction of manslaughter. It is submitted that regardless of the increasing inclination of the courts to place emphasis upon societal harm rather than upon the subjective attitude of the offender, the subjective attitude must continue to play an important role in the formulation of a definition of criminal negligence.

J. WIRT TURNER, JR.

### THE CONTROL OF INFERIOR JURISDICTIONS BY THE KENTUCKY COURT OF APPEALS

The superintending control over inferior tribunals possessed by the Kentucky Court of Appeals is of ancient inception, and relates back to and has its origin in the power exercised by the King's Bench in England.<sup>1</sup> It has been said that the exercise of this supervisory power is recognized by the common law, apart from constitutional and statutory provisions. However, in most of the recent cases which have discussed the power *eo nomine*, its existence has been based on a constitutional or statutory grant.

Thus, we find the Kentucky Court of Appeals receiving its power by a constitutional grant which states, "The Court of Appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."<sup>2</sup>

The writs which have been used by the court have been those of mandamus, certiorari, and prohibition. The use of the writ of prohibition greatly predominates.<sup>3</sup> It would seem that the writ of mandamus could not be granted in Kentucky, since the code states that the writ of mandamus shall be granted by courts having original jurisdiction and the Court of Appeals is one of appellate jurisdiction. However, the court has stated in effect, that whenever the necessity for such writ shall arise, the jurisdiction to grant it shall be theirs, as it was before the adoption of the Civil Code.<sup>4</sup>

From time to time controversies have arisen as to whether the Court of Appeals has such supervisory power and jurisdiction over

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<sup>1</sup>Arnold v. Shields, 5 Dana. 18, 30 Am. Dec. 669 (Ky. 1837).

<sup>2</sup>Kentucky Constitution, Section 110 (1892).

<sup>3</sup>Rush v. Denhart, 138 Ky. 238, 127 S. W. 785 (1910); Patterson v. Davis, 152 Ky. 530, 153 S. W. 780 (1913); Ohio River Contract Co. v. Gordon, 170 Ky. 412, 186 S. W. 178 (1916); Smith v. Ward, 256 Ky. 213, 75 S. W. (2d) 538 (1934).

<sup>4</sup>Vance v. Field, 89 Ky. 178, 12 S. W. 190 (1889).

various tribunals and boards. From such legal arguments have arisen much settled law in regard thereto. By numerous decisions of the court we can readily see that the Court of Appeals has general control over circuit courts.<sup>5</sup> In one of the most recent cases on the question the court stated, "The original jurisdiction of the Court of Appeals to issue a writ of prohibition is conferred by section 110 of the Constitution, which confers upon it the power to issue such writs as may be necessary to give it a general control of inferior courts."<sup>6</sup> By other decisions the Court of Appeals has been held to have a general control over a county judge,<sup>7</sup> a quarterly court,<sup>8</sup> a city police judge,<sup>9</sup> and a justice of the peace.<sup>10</sup>

We find the court in numerous instances denying its jurisdiction over boards and commissions. In a late case the court said that it had no authority, under its constitutional control over inferior tribunals, to undertake to control the individual actions of a circuit judge, "but only his official and judicial ones."<sup>11</sup> In another case the court denied a writ of prohibition against the commissioner of a circuit court to prevent him from enforcing a sale bond, saying that it had power to control only judicial tribunals, and that the commissioner was not a judicial officer.<sup>12</sup> The court has refused to exercise its supervisory power over the Governor of the State when he was doing an act of a judicial nature.<sup>13</sup> By another late case the court refused to issue a writ of mandamus against the Workmen's Compensation Board where it stated that "inferior jurisdictions" meant inferior courts, and not "administrative agencies."<sup>14</sup> Likewise, a writ of mandamus was refused against the Railroad Commission.<sup>15</sup>

From the above one would naturally wonder just what circumstances would justify the exercise of the power. Where the party seeking to invoke the exercise of the court's superintending control has an adequate remedy by appeal or otherwise in the court whose power is invoked, the power will not be exercised, since the power will be exercised only where there is no other adequate remedy, and the court will strain itself to find another remedy.<sup>16</sup> The Court of Appeals

<sup>5</sup> *Patterson v. Davis*, 152 Ky. 530, 153 S. W. 780 (1913); *Equitable Life Assur. Soc. v. Hardin*, 166 Ky. 51, 178 S. W. 1155 (1915); *Natural Gas Products Co. v. Thurman*, 205 Ky. 100, 265 S. W. 475 (1924); *Allen v. Bach*, 233 Ky. 501, 26 S. W. (2d) 43 (1930).

<sup>6</sup> *Smith v. Ward*, 256 Ky. 13, 75 S. W. (2d) 538 (1934).

<sup>7</sup> *Rush v. Denhart*, 138 Ky. 238, 127 S. W. 785 (1910).

<sup>8</sup> *Illinois C. R. Co. v. Rice*, 154 Ky. 198, 156 S. W. 1075 (1913).

<sup>9</sup> *Prison Comrs. v. Crumbaugh*, 161 Ky. 540, 170 S. W. 1187 (1914).

<sup>10</sup> *Barth v. McCann*, 123 Ky. 247, 94 S. W. 645 (1906).

<sup>11</sup> *Ledford v. Lewis*, 238 Ky. 124, 36 S. W. (2d) 852 (1931).

<sup>12</sup> *Morgan v. Clements*, 153 Ky. 33, 154 S. W. 370 (1913).

<sup>13</sup> *Holliday v. Fields*, 207 Ky. 462, 269 S. W. 539 (1925).

<sup>14</sup> *Maynard v. Workmen's Comp. Bd.*, 210 Ky. 708, 276 S. W. 812 (1925).

<sup>15</sup> *Payne v. Kentucky R. Commission*, 216 Ky. 188, 287 S. W. 560 (1926).

<sup>16</sup> *Tompkins v. Manning*, 205 Ky. 327, 265 S. W. 830 (1924); *Osborn v. Wolford*, 239 Ky. 470, 39 S. W. (2d) 672 (1931).

has briefly in two cases given to us the instances when it will exercise its power of control:<sup>27</sup>

"We will prohibit inferior courts in all cases where (1) they are threatening to proceed, or are proceeding, in a matter of which they have no jurisdiction, and there is no remedy through an application to an intermediate court; and (2) where they, although possessing jurisdiction, are exercising or about to exercise it erroneously, and great injustice and irreparable injury would result to the applicant if they should do so and there exists no other adequate remedy by appeal or otherwise."

The court stated in the second case, "that without the element of 'great injustice', 'great and irreparable injury', or some other expression embodying the same idea, our original jurisdiction would not be exercised." This statement was later upheld by the court when it denied relief to one against a judgment rendered in a circuit court, although there was no appeal from the judgment because of the small amount involved, on the ground that no great and irreparable injury was shown, although it was alleged that other similar suits were threatened.<sup>28</sup>

The power of supervisory control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, the Court of Appeals will be found able to cope with them. And if required, it is the writer's belief that the Court of Appeals possesses the power to invent, frame, and formulate new and additional means, writs and processes whereby it may exert its power of control over the inferior courts in Kentucky.

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<sup>27</sup>Duffin v. Field, 208 Ky. 543, 271 S. W. 596 (1925); Litteral v. Woods, 223 Ky. 582, 4 S. W. (2d) 395 (1928).

<sup>28</sup>Union Trading Co. v. Hubbard, 252 Ky. 518, 67 S. W. (2d) 693 (1934).