Volume 72
Issue 3 *Dickinson Law Review - Volume 72, 1967-1968*

3-1-1968

# Mandamus in the Federal Courts as an Original Action

# MANDAMUS IN THE FEDERAL COURTS AS AN ORIGINAL ACTION

In *Stern v. South Chester Tube Co.*[1] the United States Court of Appeals for the Third Circuit held that, notwithstanding diversity, the federal district courts have no jurisdiction to grant relief in the nature of mandamus to compel inspection of the records of a private corporation when it is the only relief sought. A Pennsylvania statute[2] which gives a stockholder of a corporation the right to inspect the corporation's books and records and which is enforceable in Pennsylvania courts by a writ of mandamus[3] does not alter the limitation on the district court's jurisdiction as imposed by the All Writs Act.[4]

Contrary views of the district court's jurisdiction were advanced by the majority and dissenting opinions in *Stern*. The majority could find no basis for mandamus jurisdiction in federal district courts. Mandamus was not a "civil action" within section 1332, the general diversity jurisdiction statute[5] of the Federal Judicial Code. Nor was the mandamus action sought in *Stern in aid of jurisdiction already obtained* as required by the All Writs Act. The dissent would find a basis for an original action for mandamus by giving full effect to the doctrine announced in *Erie R.R. v. Tompkins*.[6] Under the dissent's analysis of *Erie*, a plaintiff should be able to obtain relief in the nature of mandamus in the district court since he could obtain the same relief in a Pennsylvania court.

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1. 378 F.2d 205 (3d Cir. 1967), *cert. granted*, 88 S. Ct. 243 (1967).
2. PA. STAT. ANN. tit. 15, § 1308 (1967). This statute reads in part:
   B. Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, for any reasonable purpose, the share register, books or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom.
3. *See, e.g.*, Hagy v. Premier Mfg. Corp., 404 Pa. 330, 172 A.2d 283 (1961); Spang v. Wertz Eng'r. Co., 382 Pa. 48, 114 A.2d 143 (1955); Taylor v. Eden Cemetery Co., 337 Pa. 203, 10 A.2d 573 (1940).
4. 28 U.S.C. § 1651 (1964). This statute reads in part: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
5. 28 U.S.C. § 1332 (1964). This statute states in part that:
   (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—
   (1) citizens of different States. . . .
   . . . .
   (c) For purposes of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .
6. 304 U.S. 64 (1938).

After examining the All Writs Act and section 1332, this Note will analyze the *Stern* case in light of the two conflicting theories advanced therein. An effort will be made to determine if either theory is a sound solution to the problem of the district courts' lack of jurisdiction to grant relief in the nature of mandamus when such relief can be obtained in the state courts. An examination will be made of the true nature of the relief sought in *Stern* to determine whethher the district courts should recognize that relief as a civil action.

## FACTS

Plaintiff was a resident of the State of New York and owned stock valued in excess of $10,000 in the defendant corporation. The plaintiff brought suit in the Eastern District of Pennsylvania,[7] where the defendant was incorporated, requesting the court to issue an order permitting him to inspect the corporate records of the defendant. The right of a shareholder to inspect the corporate books and records is granted by statute in Pennsylvania.[8] Pennsylvania courts enforce the statute by a writ of mandamus.[9] The district court dismissed the complaint on the ground that it did not have any jurisdiction to issue mandamus because it was not in aid of jurisdiction already obtained as required by the All Writs Act. The circuit court, one justice dissenting, affirmed the opinion of the district court.[10] Petition for certiorari to the Supreme Court of the United States has been granted.[11]

## PRELIMINARY ANALYSIS

A writ of mandamus is a summary order of a court of competent jurisdiction commanding the defendant to do or not to do an act the performance or omission of which is a duty which the petitioner is entitled to have performed.[12] The writ of mandamus as such has been abolished in the federal courts, but relief may still be granted by way of an order in the nature of mandamus.[13] Such an order may be granted, however, only when the writ of mandamus would have issued before its abolishment.[14]

It has been held in a long line of cases that the federal district courts have no jurisdiction to issue a writ of mandamus when it is not ancillary to another cause of action.[15] Most of these

7. Stern v. South Chester Tube Co., 252 F. Supp. 329 (E.D. Pa. 1966).
8. PA. STAT. ANN. tit. 15, § 1308 (1967).
9. *See, e.g.*, cases cited note 4 *supra*.
10. 378 F.2d 205 (3d Cir. 1967).
11. 88 S. Ct. 242 (1967).
12. BLACK'S LAW DICTIONARY 1113 (4th ed. 1958).
13. FED. R. CIV. P. 81(b).
14. *E.g.*, Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813 (D. Mass. 1960).
15. Knapp v. Lake Shore and Michigan Ry. Co., 197 U.S. 536 (1904);

cases have reached this conclusion by a two step method of reasoning. First, it is advanced that an action for mandamus is not a "civil action" within the meaning of section 1332.[16] That statute gives the federal district courts original jurisdiction over all "civil actions" where there is diversity of citizenship and $10,000 in controversy.[17] An original proceeding in mandamus is not a civil action; it is a proceeding in which a court exercises its prerogative power.[18] Since mandamus is not a "civil action" within the meaning of section 1332, the district courts gain no jurisdiction over an action for mandamus by virtue of that statute.[19]

Secondly, since the district courts have no mandamus jurisdiction under section 1332, the only mandamus jurisdiction possessed by them is that granted by the All Writs Act.[20] This Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions*. . . ."[21] The All Writs Act does not confer independent mandamus jurisdiction in the district courts, but merely prescribes the scope of mandamus relief once jurisdiction has been otherwise obtained.[22]

> [T]he purpose of § 1651 [the All Writs Act] is to effectuate the established jurisdiction. . . . Section 1651 there-

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Rosenbaum v. Bauer, 120 U.S. 450 (1887); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813); Marshall v. Crotty, 185 F.2d 622 (1st Cir. 1950); Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813 (D. Mass. 1960); Selman v. Colborn, 143 F. Supp. 112 (S.D.N.Y. 1956); Rosen v. Allegheny Corp., 133 F. Supp. 858 (S.D.N.Y. 1955); Wilder v. Brace, 218 F. Supp. 860 (D. Me. 1963) (dictum).

16. *E.g.*, Rosenbaum v. Bauer, 120 U.S. 450 (1887); Rosen v. Allegheny Corp., 133 F. Supp. 858 (S.D.N.Y. 1955).

17. 28 U.S.C. § 1332 (1964). Diversity jurisdiction was originally vested in the district courts by the Eleventh Section of the Judiciary Act of 1789, which gave district courts original jurisdiction over "all suits of a civil nature at common law or in equity" where there was diversity of citizenship and $500 or more in dispute. It was well settled that proceedings in mandamus were not "suits of a civil nature at common law or in equity" within the meaning of Section Eleven. *E.g.*, Rosenbaum v. Bauer, 120 U.S. 450 (1887).

The 1948 revision of the statute substituted the words "civil actions" for the words "suits of a civil nature at common law or in equity," but it was held that this change did not enlarge the district courts' jurisdiction over original actions for mandamus. E.g., Rosen v. Allegheny Corp., 133 F. Supp. 858 (S.D.N.Y. 1955).

18. Stern v. South Chester Tube Co., 378 F.2d 205 (3d Cir. 1967).

19. *E.g.*, Knapp v. Lake Shore and Michigan Ry. Co., 197 U.S. 536 (1904); Rosenbaum v. Bauer, 120 U.S. 450 (1887); Insular Police Commission v. Lopez, 160 F.2d 673 (C.C.A. Puerto Rico), *cert. denied*, 331 U.S. 855 (1947).

20. *E.g.*, Rosenbaum v. Bauer, 120 U.S. 450 (1887); Rosen v. Allegheny Corp., 133 F. Supp. 858 (S.D.N.Y. 1955).

21. 28 U.S.C. § 1651 (1964) (emphasis added). The All Writs Act was originally section 14 of the Judiciary Act of 1789.

22. Application of James, 241 F. Supp. 858 (D.C.N.Y. 1965).

> fore authorizes writs to be issued by: the Supreme Court in aid of both its original and appellate jurisdiction; the courts of appeals in aid of their appellate jurisdiction; and the district courts in aid of their original jurisdiction.[23]

Thus the federal courts are limited in that they can only issue mandamus in aid of jurisdiction already obtained.

What does this limitation, "in aid of jurisdiction already obtained," mean? Essentially it means that mandamus may only be issued when it is ancillary to an action over which the court has already obtained jurisdiction.[24] An illustration of this rule may be found by comparing *Hertz v. Record Publishing Co.*[25] and *Newark Morning Ledger Co. v. Republican Co.*[26] Both were diversity actions involving facts similar to *Stern*.

In *Hertz*, the plaintiffs, citizens of Ohio, brought an action in the United States District Court for the Western District of Pennsylvania against the Record Publishing Company of Erie, a Pennsylvania corporation.[27] Plaintiffs alleged that Hertz was the owner of 150 shares of the defendant corporation's stock which Hertz had agreed to sell to one Horvitz, and that the corporation had refused to cancel Hertz's stock certificate and issue a new one to Horvitz. The complaint asked for an order directing the corporation to issue the new certificate to Horvitz. The defendant had refused to issue the new certificate on the ground that the plaintiff-vendor was not the owner of the stock in question and could not transfer any ownership rights to the plaintiff-vendee. The corporation challenged the district court's jurisdiction to hear the suit contending that the relief sought by the plaintiff was an original action for mandamus which the district court lacked authority to grant because of the limitations of the All Writs Act.[28] The circuit court held, however, that the action was really one in equity to determine title to stock. Such an action was a proper ground for the court's jurisdiction; any issuance of mandamus would only be an aid to the adjudication of that matter. Thus in *Hertz*, the issuance of mandamus was ancillary to the court's equity jurisdiction and consequently, "in aid of jurisdiction already obtained."

In *Newark*, the plaintiff, a New Jersey corporation and a minority stockholder of the defendant, a Massachusetts corporation, brought a diversity action for an order directing the defendant to permit the plaintiff to examine the property, books of account, and records of the defendant corporation and to make

23. 6 MOORE'S FEDERAL PRACTICE 64, 65 (2d ed. 1966).
24. Wisconsin v. First Fed. Savings & Loan Assn., 248 F.2d 804 (7th Cir. 1957).
25. 219 F.2d 397 (3d Cir.), *cert. denied*, 349 U.S. 912 (1955).
26. 188 F. Supp. 813 (D. Mass. 1960).
27. 105 F. Supp. 200 (W.D. Pa. 1952).
28. *Id.* at 200.

copies therefrom. Defendant's motion to dismiss was granted. The court held that it had no jurisdiction to issue orders in the nature of mandamus where that is the only relief sought. A district court's power to issue mandamus is confined to cases where it is ancillary to another cause of action.[29]

### MAJORITY OPINION

The majority in *Stern* followed the reasoning of prior cases by affirming the judgment of the district court which denied mandamus to the plaintiff stockholders.[30] The majority reiterated the rule that the district courts gain no jurisdiction over an action for mandamus under section 1332 since an action for mandamus was not a "civil action" within the meaning of that statute. The only power to issue mandamus held by the federal courts is that granted by the All Writs Act and the authority granted therein is only of an auxiliary nature.

The majority found that although a mandamus action to compel inspection of corporate records was a statutory right in Pennsylvania[31] and although a federal court may enforce a state-created substantive right with an appropriate remedy, the question before the court was not one of remedy but one of jurisdiction. The strict limitations of the All Writs Acts could not be extended by local statute.[32]

As a preliminary statement regarding the majority's analysis it is submitted that the court did not consider the true nature of the action before them. Mandamus was originally a high prerogative writ by which high levels of government and the judiciary controlled the conduct of the officials under them.[33] The action in *Stern* is one between private parties to enforce private rights; it is not an action for the high prerogative writ of mandamus. When the majority states that an action for mandamus is not a civil action but a "special proceeding in which a court is called upon to exercise its prerogative power"[34] they probably were thinking in terms of the high prerogative writ of mandamus and not in terms of a suit between private parties for the enforcement of private rights.[35] The majority may have overlooked the true nature of the action in *Stern* because it is simply labeled "mandamus."

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29. Cases cited note 15 *supra.*

30. 378 F.2d at 206.

31. PA. STAT. ANN. tit. 15, § 1308 (1967). For text of this statute see note 3 *supra. See, e.g.*, cases cited note 3 *supra.*

32. 378 F.2d at 206.

33. Kendall v. United States, 37 U.S. (12 Pet.) 524, 621 (1838).

34. 378 F.2d at 206.

35. Petitioner's Brief for Certiorari at 10, 11 Stern v. South Chester Tube Co., 378 F.2d 205 (3d Cir. 1967).

DISSENT AND THE ERIE DOCTRINE

The dissent in *Stern* argued that a proper basis for allowing the issuance of the writ of mandamus by the district court would be to give *Erie R.R. v. Tompkins*[36] its full authority in diversity situations such as *Stern*.[37] Pennsylvania has given a substantive civil right to a shareholder of a corporation to examine that corporation's books and records,[38] and that right is properly enforceable in Pennsylvania by an action for mandamus.[39] *Erie* stated that:

> Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. . . . Congress has no power to declare substantive rules of common law applicable in a state. . . .[40]

Applying this rule, the dissent was of the opinion that the district court sits merely as another state court and the granting of mandamus in the *Stern* setting

> exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for *irrespective* of it, the court has full power to give effect to a substantial right given by a state and to give it the enforcement thereof granted by the highest decisional court in that state and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in *state* law and thereby merely follows *state* procedure.[41]

The dissent concluded that under the *Erie* doctrine, if inspection of corporate records were a substantive state right enforced by mandamus, as in Pennsylvania, the district court in a diversity suit would be bound to apply the state law and recognize an original suit for mandamus to enforce the same right.

Support for the dissent's view may be found in prior cases of the Third Circuit. In *Susquehanna Corporation v. General Refractories Company*[42] the court stated that "it is by no means certain that the federal diversity court could not grant mandamus when that remedy would be granted by a state court as a matter of state law."[43] In support of this statement the court relied on the doctrine of the *Erie* case and the "outcome-determinative" test of

36. 304 U.S. 64 (1938).
37. 378 F.2d at 208.
38. PA. STAT. ANN. tit. 15, § 1308 (1967).
39. *See, e.g.*, cases cited note 4 *supra*.
40. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
41. 378 F.2d at 208 (emphasis added).
42. 250 F. Supp. 797 (E.D. Pa.), *aff'd*, 356 F.2d 985 (3d Cir. 1966) (dictum).
43. 250 F. Supp. at 802.

*Guaranty Trust Company v. York*.[44] The "outcome-determinative" test provided that in diversity cases the federal courts must use state law if failure to do so would substantially affect the outcome of the litigation. The Third Circuit case of *Hertz v. Record Publishing Co*.[45] relied on the *York* test in saying that perhaps the court would have jurisdiction to issue mandamus even if it were not ancillary to another action. In *Susquehanna* the court held that mandamus was inadequate and therefore they did not grant it; and in *Hertz* the issuance of mandamus was anciliary within the All Writs Act. Both of these Third Circuit cases therefore, constitute only dicta as they did not directly confront the question of primary mandamus jurisdiction in the federal district courts.

This was the precise issue, however, which was presented to the court in *Stern* and where the dicta of prior cases had a proper factual setting to become controlling case law. But it is submitted that the *Erie* doctrine, as interpreted by the dissent, has been seriously eroded by later court pronouncements which destroy the dissent's reliance on that case.

The cases of *Erie* and *York* appeared to give the federal courts a hard and fast rule in deciding whether state or federal law was to be applied in a diversity suit: unless governed by the Constitution or Acts of Congress, the state law was controlling if the use of federal law would work a different outcome. Later interpretations of the *Erie* doctrine, however, have made it clear that no hard and fast rule was intended, but rather the courts are free to consider the consequences and policies involved in choosing between federal and state law. This is a tightening of the *Erie* doctrine and is illustrated by the recent case of *Hanna v. Plumber*.[46] The question in *Hanna* was whether, in a civil action in a federal court basing its jurisdiction on diversity, service of process should follow the manner set forth in the Federal Rules of Civil Procedure 4(d)(1) or in the manner prescribed by state law. Under the *York* test the state law had to be used if the failure to do so would have substantially affected the outcome of the case. But the *Hanna* court retreated from a strict application of the "outcome-determinative" test finding that *York* "cannot be read without reference to the twin aims of the *Erie* rule."

According to *Hanna* the "twin aims" of *Erie* were to remedy

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44. 326 U.S. 99 (1945). The *York* case states that:

> [S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of a right as given by the State.

*Id.* at 108, 109. This has been paraphrased as the outcome-determinative test.

45. 219 F.2d 397 (3d Cir. 1955) (dictum).

46. 380 U.S. 460 (1965).

two undesirable practices. First, *Erie* was intended to prevent the practice of forum-shopping which had followed the decision in *Swift v. Tyson*.[47] In that case the Supreme Court said that federal courts exercising diversity jurisdiction need not, in matters of general jurisprudence, apply the decisional law of the state as declared by its highest court; the federal courts may exercise their own judgment as to what is the common law of the state. As a result of the *Swift* decision it was possible for a state and federal court to reach a different conclusion as to what was the state law, thereby encouraging plaintiff to seek the more favorable forum. *Hanna* saw the *Erie* court as correcting the inequity of forum-shopping by requiring the federal courts to apply the state's interpretation of its common law.

Secondly, *Erie* sought to remedy discrimination against in-state plaintiffs who, unable to meet diversity requirements, could not avail themselves of the more favorable result that may obtain in an alternative federal forum which was free to apply its own judgment as to a state's common-law.

The *Hanna* interpretation of *Erie* has this result: the important question is not whether the use of a federal remedy or rule would result in a different outcome than if the state rule were used, but whether the use of the federal remedy would violate either aim of *Erie*. If neither forum-shopping nor discrimination is encouraged, then the fact that the use of the federal rule would work a different outcome is unimportant. In the *Hanna* case, however, the court found that the test of *Erie* and its progeny was not directly applicable to the question before them. The federal procedural rule was held controlling over the state rule on other grounds not now relevant. The importance of *Hanna*, however, lies in its statement of how the *Erie* doctrine is to be applied to disputes between the use of federal or state law.

If the rule of *Erie* and its progeny were properly applied to the *Stern* setting, the question would be: whether the court in denying the remedy of mandamus to enforce a state right violated either of the twin aims of *Erie*. Clearly, the forum-shopping and discrimination envisaged by the *Hanna* court would more likely occur when the federal remedy or rule was broader and more favorable than that of a state. The inverse inference recognizes that when the federal remedy is more narrow, or as in *Stern*, nonexistent, with respect to the state remedy, there would be no forum-shopping and discrimination. For example, suppose the situation in *Stern* were reversed and the federal district court had jurisdiction over an original proceeding for mandamus, but Pennsylvania had in force an equivalent of the All Writs Act. In this instance, the federal court would be bound, under *Hanna*, to enforce the limitations found in the Pennsylvania equivalent of the All

47. 41 U.S. (16 Pet.) 1 (1842).

Writs Act. If not, the federal courts would be a much more favorable forum for a diversity plaintiff seeking mandamus, and the vice of forum-shopping would result. But under the realities of *Stern*, the plaintiff has no incentive to choose the federal courts over the state courts. Certainly the All Writs Act will influence his "choice" of a forum in that the only court with jurisdiction to issue mandamus as an original action is the state court, but this type of "choice" is not forum-shopping.

It would seem then that neither aim of *Erie*, as discerned by *Hanna*, would be violated in the *Stern* setting by refusing to apply the Pennsylvania law concerning mandamus. Accordingly, applying the rationale of *Hanna* to the dissent's analysis of *Stern*, there would be no objection to the enforcement of the All Writs Act.

It can well be argued that the *Erie* doctrine need not have been invoked at all in order to reach the same result. *Erie* explicitly states that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state."[48] Since the All Writs Act is an Act of Congress, the dissent must have felt that the type of mandamus sought in *Stern* was not within the scope of that act. If this is true then the dissent in *Stern* must have impliedly considered the mandamus remedy sought a "civil action," while the All Writs Act limited the federal courts' authority only over the high prerogative writ of mandamus. Consequently, authority to issue the relief sought in *Stern* could be based upon the general diversity jurisdiction of section 1332. Once jurisdiction was obtained in this manner then the *Erie* doctrine might be applicable to determine whether the state or federal nuances of the relief sought were to be applied.

It is submitted that the best approach to the problem would be a realization by the federal court that the issuance of mandamus can be an effective and necessary means to enforce rights between private parties and should be available in diversity cases. Recognition of the role of mandamus in enforcing private rights emerges when one analyzes the type of relief sought in the private party setting.

### Analysis Of Mandamus Relief

The federal courts have uniformly held that an original action for mandamus is not a "civil action" within the meaning of section 1332.[49] As the majority in *Stern* stated: it is a "special proceeding in which a court is called upon to exercise its prerogative power."[50] This position seems to be the result of the historical nature of mandamus rather than a realistic appraisal of the type of relief sought.

48. 304 U.S. at 78.
49. *E.g.*, cases cited note 18 *supra*.
50. 378 F.2d at 206.

Mandamus was originally a high prerogative writ which evolved from the prerogative power of the English Crown. The writ was issued by the Crown to control the conduct of lesser officials.[51] Many suits today which seek a remedy termed "mandamus" do not involve an action against a public official. They are suits between private parties to enforce private rights. This is also true in *Stern*. All that is sought is an order permitting the plaintiff to examine the defendant corporation's books and records. This resembles the high prerogative writ of mandamus only in that it requires an order from the court to the defendant corporation. It is submitted that "mandamus" of the type sought in *Stern*, which does not pertain to public matters, should be regarded as an ordinary proceeding between private parties in which one party seeks to enforce a duty of the other party. The Supreme Court has stated:

> The writ of mandamus does not issue from or by any prerogative power and is nothing more than the ordinary process of a Court of Justice to which everyone is entitled when it is the appropriate process for asserting a claim.[52]

Many states now recognize mandamus as merely another civil action.[53] Recognition of the distinction between the high prerogative writ of mandamus and the type of relief sought in *Stern* is found in *City of Brandenton v. State ex rel. Perry*[54] in which the court said:

> Mandamus anciently was a high prerogative writ, and it still preserves its character as such when not used for the redress of private wrongs, but only in matters relating to the public. When authorized to be used for redress of private wrongs a proceeding in mandamus is in all essential particulars a civil action at law.[55]

An examination of the purpose of the All Writs Act reveals that the district courts' jurisdiction over the type of remedy that plaintiffs sought in *Stern* was probably not intended to be limited by the provisions of that Act. There seems to be no clear statement of the purpose of the All Writs Act, but it is reasonable to assume that it was enacted in order to minimize the risk of colli-

51. Kendall v. United States, 37 U.S. (12 Pet.) 524, 621 (1838).

52. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

53. *See, e.g.*, Shirey v. City Bd. of Educ. of Ft. Payne, 266 Ala. 185, 94 So. 2d 758 (1957); People *ex rel.* Rollins v. Bd. of Comm'rs of Rio Grande County, 7 Colo. App. 229, 42 P. 1032 (1895); City of Brandenton v. State *ex rel.* Perry, 118 Fla. 838, 160 So. 506 (1935); People *ex rel.* McPherson v. W. Life Indem. Co., 261 Ill. 513, 104 N.E. 219 (1914); State *ex rel.* Watts v. Cain, 78 S.C. 348, 58 S.E. 937 (1907); State *ex rel.* Macri v. City of Bremerton, 8 Wash. 2d 93, 111 P.2d 612 (1941); State *ex rel.* Dame v. LeFevre, 251 Wis. 146, 28 N.W.2d 349 (1947). *Contra*, Bath v. Dumas, 108 Okla. 260, 236 P. 1 (1925); State *ex rel.* Venn v. Reid, 207 Ore. 617, 298 P.2d 990 (1956).

54. 118 Fla. 838, 160 So. 506 (1935).

55. *Id.* at 840-41, 160 So. at 507.

sion between state and federal authorities.[56] If this were the purpose of the All Writs Act, it would appear that its framers were envisioning the high prerogative writ of mandamus issued from the federal to the state level; this is the more probable reason original mandamus jurisdiction was withheld from the federal district courts. The framers of the All Writs Act were attempting to preserve the very essence of federalism in placing this limitation on the ability of the federal courts to interfere with state and municipal authorities. The framers of the All Writs Act wished to restrict the federal courts' authority to issue an order, for example, against a state official charged with a duty and ordering him to perform that official duty. But the relief sought in *Stern*, which is termed "mandamus," is not the high prerogative writ of mandamus which the All Writs Act was intended to regulate. The suit between private parties to enforce private rights found in *Stern* would not involve a collision between state and federal authorities. The district court would simply be directing an order to a private party.

The federal courts should treat the relief sought in *Stern* as what it actually is—merely another form of civil action—and assume original jurisdiction over it by virtue of the general diversity jurisdiction grant of section 1332. At the same time, the high prerogative writ of mandamus issued from the federal to the state level of government should be left within the limitations of the All Writs Act in accordance with the probable purpose of the Act.

This position was first taken by three dissenting justices in *Rosenbaum v. Bauer*.[57] *Rosenbaum* was a suit by the plaintiff for mandamus ordering the treasurer of the board of supervisors of a city to take action in accordance with a statute of the state and pay the interest or principal of bonds issued by the city. A majority of the court would not allow the issuance of mandamus as it was not a "civil action" within their jurisdictional powers. The dissent found that the language of the general diversity statute[58] which gave the district courts original jurisdiction over "all suits of a civil nature at common law or in equity" where there was five hundred dollars in dispute and diversity of citizenship among the parties was most general in nature and should be liberally construed.[59] This language was not meant to confine jurisdiction to the old technical actions of trespass, trover, trespass on the case, debt, detinue, assumpsit, et cetera, but it was meant to embrace all civil actions by whatever name the proceeding may be called.[60] The dissent continued:

> Now a mandamus, which was originally a prerogative

56. ROSE, FEDERAL JURISDICTION AND PROCEDURE § 192 (4th ed. 1931).
57. 120 U.S. 450 (1887).
58. See note 17 *supra* for text.
59. 120 U.S. at 460.
60. *Id.*

> writ only, has become in many cases, and in most states, a private suit, brought for the purpose of enforcing a private right. This is true of the two cases now before us. . . . It is essentially a civil action at law. . . .[61]

The rule that the All Writs Act denies original mandamus jurisdiction should be limited to the particular writ of mandamus which alone was contemplated: "that is, the prerogative writ of mandamus as known to the practice of the King's Bench in England."[62]

> But the section [All Writs Act] had no reference to mandamus as a form of civil action, as it has become in modern times, having a definite purpose and scope, and as distinct in its use, for the purpose of enforcing private rights of a particular description, as are the forms of action known to the common law, such as assumpsit, debt, or trespass.[63]

The dissent in *Rosenbaum* concluded that, viewed as a civil action, mandamus could be granted without running counter to the All Writs Act by giving effect to the general diversity jurisdiction of the court.[64]

Courts in the past have recognized changes in the nature of actions. The writ of *quo warranto* is an example. *Quo warranto*, like mandamus, was a high prerogative writ issuing from the King.[65] Mandamus and *quo warranto* are both extraordinary legal remedies. Mandamus was designed to enforce the performance of ministerial or non-discretionary duties. *Quo warranto*, on the other hand, when used in connection with a public office, was designed to try the title to that office and to oust the usurper.[66] *Quo warranto* may also be used to try title to a private office such as a corporate director.[67] The original writ of *quo warranto* was a civil writ and not a criminal prosecution. The writ fell into disuse in England and was replaced by an information in the nature of *quo warranto*, which, in its origin, was a criminal prosecution to punish the usurper by fine and to oust him from the usurped office or franchise.[68] The proceeding had lost its criminal character in everythng except form before our Revolution and has been used merely to try the title, seize the office, and oust the intruder; the

61. *Id.* at 461.

62. *Id.* at 463. The prerogative writ of mandamus as known to the practice of the King's Bench in England was a writ by which the King and the high levels of the judiciary controlled the conduct of the lesser officials under them. Kendall v. United States, 37 U.S. (12 Pet.) 524, 621 (1838).

63. 120 U.S. at 463.

64. *Id.* at 464.

65. *See, e.g.*, Meehan v. Bachelder, 73 N.H. 113, 59 A. 620 (1904).

66. *See, e.g.*, People *ex rel.* Fleming v. Shorb, 100 Cal. 537, 35 P. 163 (1893); People v. Purdy, 154 N.Y. 439, 48 N.E. 821 (1897); Commonwealth *ex rel.* Davis v. Blume, 307 Pa. 406, 161 A. 551 (1932).

67. *See, e.g.*, Wilder v. Brace, 218 F. Supp. 860 (D. Mass. 1963).

68. *E.g.*, Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 460 (1884).

fine being only nominal.[69] Consequently, in some states, a proceeding in *quo warranto* has been declared civil in form since the remedy is basically civil.[70] This has been done so that the parties are not driven to the necessity of using the form of a criminal proceeding to determine a civil right.[71] The United States Supreme Court recognized this change in the nature of *quo warranto* as early as 1884 in *Ames v. Kansas ex rel. Johnston.*[72] In that case the Court stated that where *quo warranto* was a civil action under state law, it would be a "suit of a civil nature" within the meaning of the federal removal statute.

However, the limitation on the federal district courts' jurisdiction over an original *quo warranto* proceeding still remained because it was held that *quo warranto*, like mandamus, could only be issued in aid of jurisdiction already obtained.[73] Then, in *Wilder v. Brace*,[74] it was held that where *quo warranto* proceedings are civil actions under state law, they are "civil actions" within the meaning of the general grant of diversity jurisdiction in section 1332. *Wilder* was a diversity action by the shareholders and alleged directors of the defendant corporation for a declaration that they, rather than the individual defendants, were the directors of the corporation. The plaintiffs sought to have the defendants removed from the offices and to have themselves placed in said offices. The remedy for the removal of the defendants was *quo warranto*, and the remedy for placing the plaintiffs in the offices was mandamus. The defendants contended that the district court lacked jurisdiction to grant either remedy as an original action because neither were "civil actions" within the meaning of section 1332. The court returned to the *Ames* case and stated that since *quo warranto* was a civil action in Maine, it was a civil action in the federal courts and that section 1332 then gave the court jurisdiction over the *quo warranto* remedy. Having obtained jurisdiction over the *quo warranto* remedy, the court used it as the domina to which the ancillary action for mandamus could attach, and so never considered the possibility that the same reasoning would give it jurisdiction over mandamus as an original action.

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69. *Id.*

70. *See, e.g.*, State *ex rel.* Weatherly v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23 (1913); People *ex rel.* Atty. Gen. v. Dashaway Ass'n., 84 Cal. 114, 24 P. 277 (1890); People *ex rel.* Brown v. Burnham, 35 Idaho 522, 207 P. 589 (1922); State *ex rel.* Dawson v. City of Harper, 94 Kan. 478, 146 P. 1169 (1915); State *ex rel.* Clapp v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N.W. 1020 (1889); State *ex rel.* Anderson v. Port of Tillamook, 62 Ore. 332, 124 P. 637 (1912).

71. Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 461 (1884).

72. 111 U.S. 449 (1884).

73. *E.g.*, United States *ex rel.* Wisconsin v. First Federal Savings and Loan Ass'n., 248 F.2d 804 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

74. 218 F. Supp. 860 (D. Mass. 1963).

The *Wilder* case should illustrate that the distinction between the two writs is artificial, especially when the results of the two remedies sought in *Wilder* are compared. *Quo warranto* ousts the defendants from their corporate offices, and mandamus places the plaintiffs in these offices. Neither is a greater interference with the corporate structure than the other. Nor does it seem that mandamus is any more a special proceeding calling upon the court to exercise its prerogative power than *quo warranto* is. Yet the distinction is drawn; *quo warranto* is a "civil action," but mandamus remains a "special proceeding."

Further, in some cases there is a split of authority whether *quo warranto* or mandamus should issue when the title to an office is at issue. Mandamus is the proper remedy for a person who has been illegally removed from office, but if a party presently holds the office in question under color of title and the plaintiff has no *prima facie* title, *quo warranto* is the proper remedy.[75] It is difficult to understand why, in this situation, only one of the remedies should be called a civil action. If the federal courts would apply the rationale of the *Ames* and *Wilder* cases to the type of relief sought in *Stern*, then they would gain original jurisdiction to issue "mandamus" where it is a suit between private parties for the enforcement of private rights under section 1332. Its issuance would exercise no involvement of the All Writs Act.

## CONCLUSION

The inability of the federal courts to grant the relief sought in *Stern* simply because it is termed "mandamus" is an unrealistic situation. There seems to be no objection to the federal courts having original jurisdiction over such actions. To so hold would not violate the probable purpose of the All Writs Act of minimizing the risk of collision between federal and state authorities since only private parties are involved. On the contrary, the growing complexities of modern business involving corporations which spread over many states would mitigate in favor of the federal courts having jurisdiction to grant relief to a stockholder seeking to examine the corporate books and records.[76] This would give the federal courts a means of control over these interstate corporations.

The best solution to the present problem, however, is not to invoke the *Erie* doctrine; that is, if mandamus is available in a state court, it would be available in the federal district court. The tightening up of the *Erie* doctrine as expressed by *Hanna* makes the application of *Erie* to *Stern* difficult. It is submitted that a better reasoned solution to the problem is for the federal courts to recognize that the type of action found in *Stern* is a "civil

75. 1961 WIS. L. REV. 636, at 637.
76. 378 F.2d at 208.

action" within the meaning of section 1332. It is true that the relief sought in *Stern* is called "mandamus," but "[i]t is the nature of the rights to be asserted and maintained to which we should look, rather than the form in which the party may be obliged to proceed to assert those rights. . . ."[77] Such a holding would give the district courts jurisdiction over actions such as *Stern* in spite of the limitations of the All Writs Act. This solution would also leave the high prerogative writ of mandamus within the limitations of that Act in accord with its purpose of preventing federal-state conflicts among public officials.

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## EPILOGUE

During the publication stages of this issue, the Supreme Court of the United States rendered a decision in the principal case.[1] The judgment of the circuit court was reversed, and the cause was remanded to that court for further proceedings. The Supreme Court, in accordance with this writer's views, found a possible distinction between a private suit as in *Stern* and a suit to compel action by public officials but did not base its decision on this distinction. The court noted that the case of *Knapp v. Lake Shore Ry. Co.*[2] held that a federal district court was without jurisdiction to issue mandamus against a private party but said that it was not necessary to decide whether *Knapp* properly extended the All Writs Act to private parties. The court stated that even the broadest possible reading of *Knapp* would not prevent a federal court from issuing the relief sought in *Stern*. Petitioner had a substantive right under Pennsylvania law to inspect the corporate books and records, and since he had no remedy at law, the Supreme Court held that a federal court has jurisdiction to grant the relief sought under its traditional equity power.

77. Illinois *ex rel.* Hunt v. Illinois Cen. Rd., 33 F. 721, 727 (C.C.N.D. Ill. 1888).

1. Stern v. South Chester Tube Co., 88 S. Ct. 1332 (1968).
2. 197 U.S. 536 (1904).