DETROIT REVOLUTIONARY MOVEMENT RECORDS

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FOLDER 18

REFERENCE MATERIAL LABOR LAW

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The relief formerly obtainable by writ of mandamus is still available in federal courts, and substantive rights are governed by the rules formerly applied in mandamus cases. Ferer, Inc. v. Hulen, (CCA 8), 160 F(2d) Petrowski v. Nutt, (CCA 9), 161 F(2d) Tennessee ex rel. Atchley v. Taylor, (CA 169 F(2d) 626.

Although the writ of mandamus has been abolished by this rule, federal district court may, when appropriate, by order, direct the national railroad adjustment board to hear a case. Patterson v. Chicago & E. I. R. Co., (DC-), 50 FSupp 334.

Since the remedy, which, before the adoption of the new rules, was known as mandamus, was available under the new rules and is governed by the same principles as formerly governed its administration, in action in nature of petition for writ of mandamus by restaurant corporation against members of alcoholic beverage control board, to require the board to issue a retailer's license to the corporation on the ground that there was insufficient evidence before the board to justify its refusal to grant the license, question before the court was whether the action of the board was based upon substantial evidence. If it was, mandamus would not lie. If it was not, the next question was whether the action of the board could be said to be arbitrary or capricious. Clore Restaurant, Inc. v. Payne, (DC-DC), 72 FSupp 77.

Suit to require corporation to issue certificates of stock to plaintiff registered in name of another was a suit in the nature of mandamus; hence, relief could be granted though formal writ of mandamus had been abolished. Hertz v. Record Pub. Co., (DC-Pa), 105 FSupp 90.

The federal district court for the District of Columbia had jurisdiction of the subject matter of an action for relief in the nature of a mandatory injunction to compel the secretary of the interior to approve the selection of and issue a patent to a tract of land in California; and, where the plaintiff asserted that such officer was acting beyond or without power and that, consequently, his acts were invalid in rejecting the selection and application for patent, such would be accepted as true for preliminary jurisdictional purposes; thus the action was against the secretary, not the United States, and he, not the United States, was a necessary party defendant; and the district court, having before it both the plaintiff and the secretary, had jurisdiction of the parties as well as the subject matter. West Coast Exploration Co. v. McKay, 93 AppDC 307, 213 F(2d) 582.

16. —Limitations.

Mandamus against collector of customs to compel defendant to reinstate relator as a customs guard was not justiciable before the courts, or, at least, the relator's grievance was not remediable by an order of reinstatement; judgment was wrong for dismissing the complaint upon the merits, but it should have been dismissed for lack of jurisdiction. U. S. ex rel. Vassel v. Durning, (CCA 2), 152 F(2d) 455.

The district courts have no jurisdiction to grant relief by way of mandamus except as ancillary to the exercise of some independently conferred jurisdiction. U. S. ex rel. Vassel v. Durning, (CCA 2), 152 F(2d) 455; Marshall v. Crotty, (DC-Mass), 88 FSupp 30. Aff'd 185 F(2d) 622.

Mandamus should be issued only where, on the face of the record, the lower court to which it is directed was without jurisdiction to take the action of which complaint is made. Tennessee ex rel. Atchley v. Taylor, (CCA 6), 169 F(2d) 626.

Writ of mandamus may not be invoked, as a substitute for appeal and generally will not lie if there is a remedy by appeal, even though appeal will involve inconvenience, delay, or expense to the petitioner. Sound Investment & Realty Co. v. Harper, (CA 8), 178 F(2d) 274.

Writ of mandamus will not be issued unless it appears that the petitioner has the unquestioned legal right to have the performance of the particular duty sought to be enforced. Sound Investment & Realty Co. v. Harper, (CA 8), 178 F(2d) 274.

Where tenant filed suit to collect treble damages under Housing and Rent Act of 1947 [F. C. A. 50 Appx. § 1881 et seq.], and defendants filed motion to dismiss on ground that district court did not have jurisdiction, and district court denied the motion and set the case for trial, court of appeals did not grant a writ of mandamus merely because appeal would involve expense, inconvenience, and delay to petitioners. Sound Investment & Realty Co. v. Harper, (CA 8), 178 F(2d) 274.

Plaintiff was not entitled to writ of mandamus to require district court to dismiss her complaint without prejudice, since matter was discretionary with the district court. Larsen v. Switzer, (CA 8), 183 F(2d) 850.

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17. Removed actions.

Removal procedure is governed by federal statutes, and after the cause has been removed the procedure is governed by the federal rules. Texas Employers Ins. Ass'n v. Felt, (CCA 5), 150 F(2d) 227, 160 ALR 931.

These rules govern all procedure after removal in civil actions removed to the district court from a state court. Moore v. Illinois Cent. R. Co., (DC-Miss), 24 FSupp 731. Aff'd 312 US 630, 85 LEd 1089, 61 SCR 754; Borton v. Connecticut General Life Ins. Co., (DC-Neb), 25 FSupp 579; Shell Petroleum Corp. v. Stueve, (DC-Minn), 25 FSupp 879.

These rules should be applied to removed actions pending on the effective date of the rules, unless their application would not be feasible or would work an injustice. Gay v. Moore, (DC-Okla), 26 FSupp 749.

Questions as to state jurisdiction and venue, both of subject matter and person, may be raised after removal of a case from the state court to federal court. Griffith v. Enochs, (DC-La), 43 FSupp 352.

The appearance by a defendant for the purpose of obtaining the removal of a case from a state court to a federal court does not operate as a general appearance and all questions that can be made before a state court can be made in the court in which the case has been removed. Harrison v. Steffen, (DC-Ky), 51 FSupp 225.

10. —Habeas corpus.

Under these rules, the court of appeals cannot set aside findings of fact made by a district court in a habeas corpus proceeding unless, given due regard to the opportunity had by the trial court to judge the credibility of the witnesses, its finding is clearly erroneous. Albert ex rel. Buice v. Patterson, (CCA 1), 155 F(2d) 429.

In action to vacate sentences under § 2255 of F. C. A. Title 28, time of appeal is sixty days, since section provides that an appeal may be taken as from a final judgment in application for a writ of habeas corpus; hence, this rule applying Rule 73 to writs of habeas corpus applies. Mercado v. U. S., (CA 1), 183 F(2d) 486.

Rule 52 does not require findings by the court in habeas corpus proceedings to obtain release from custody. U. S. ex rel. McCann v. Adams, (DC-NY), 3 FedRDec 396.

11. —Probate, adoption, or lunacy matters.

Failure to demand a jury trial in a will contest in the district court of the United States for the District of Columbia is not a waiver of the right to a jury trial since these rules do not apply to probate proceedings in that court except as to appeals. In re Estate of Cottrill, (DC-DC), 39 FSupp 689.

The district court for the District of Columbia having adopted a local rule that these rules shall govern probate proceedings, the court may properly grant a new trial in a probate proceeding, on the single issue of undue influence. Ecker v. Potts, 72 AppDC 174, 112 F(2d) 581.

12. —Proceedings to compel giving of testimony or production of documents.

Proceedings in the district court to compel compliance with subpenas duces tecum issued by the national labor relations board are not suits of a civil nature governed by these rules. Goodyear Tire & Rubber Co. v. National Labor Relations Board, (CCA 6), 122 F(2d) 450, 136 ALR 883.

Proceedings by federal petroleum board to compel defendants to appear and show cause why they should not produce the records called for in subpena duces tecum and give testimony in reference thereto in connection with an investigation under the Connally "Hot Oil" Act [F. C. A. 15 § 715 et seq.] was an investigation and not a hearing, and no good purpose could be served by complying with the request of the defendant for findings of facts and conclusions of law where they had before them every fact and the laws touching the Connally Act [F. C. A. 15 § 715 et seq.]; subdiv. (a)(4) of this rule has no application. Genecov v. Federal Petroleum Board, (CCA 5), 146 F(2d) 596.

Appeal by wage and hour administrator from dismissal of an order to show cause in proceeding for an order requiring documentary evidence pursuant to a subpenas duces tecum was governed by these rules insofar as appropriate. Walling v. News Printing Co., Inc., (CCA 3), 148 F(2d) 57, rev'g 49 FSupp 659. Aff'd 327 US 186, 90 LEd 614, 66 SCR 494.

the Longshoremen's and Harbor Workers' Compensation Act [F. C. A. 33 § 901 et seq.] was properly brought on the civil side of the district court. J. E. Haddock, Ltd. v. Pillsbury, (CCA 9), 155 F(2d) 820, 1946 AMC 1413.

To the extent that matters of procedure are provided for in the Longshoremen's and Harbor Workers' Compensation Act [F. C. A. 33 § 901 et seq.], such supplants these rules by express provision in the rules. Lacomostic Corp. v. Parker, (DC-Md), 54 FSupp 138.

14. Scire facias and mandamus.

A writ of mandamus must not be permitted to usurp the functions of an appeal, or of a writ of error, or take the place of such, where an adequate remedy to the aggrieved party is afforded. Tennessee ex rel. Atchley v. Taylor, (CCA 6), 169 F(2d) 626.

This rule makes it unnecessary to plead in the relator form under § 406 of F. C. A. Title 47. McBride v. Western Union Tel. Co., (CA 9), 171 F(2d) 1.

Despite the statutory restrictions upon judicial review of decisions by administrative officials of the veterans' administration, if a veteran had been denied a rehearing on a disability claim in spite of a showing that the denial of his claim resulted from a mechanical error in an entry of the administration's official records, mandamus would lie. Hospodar v. U. S., (CA 3), 209 F(2d) 427.

A motion to quash a writ of scire facias previously issued to revive and continue the lien of a judgment was dismissed and the judgment creditor was directed to file a complaint to enforce his rights. Brooks v. Caruthers, (DC-Pa), 25 FSupp 413.

Although the writ of mandamus was abolished by these rules, a mandamus proceeding instituted before the effective date of the rules will nevertheless be considered on its merits. [illegible] & Co. v. Interstate Commerce Commission, [illegible] AppDC 375, 107 F(2d) 180; Levine v. Farley, [illegible] AppDC 381, 107 F(2d) 186.

15. —Relief in the nature of scire facias and mandamus preserved.

Proceedings in the nature of mandamus for the collection of judgments are "proceedings supplementary to and in aid of a judgment," as to which the practice and procedure of the state is required to be followed. Defoe v. Rutherfordton, (CA 4), 122 F(2d) 343; [illegible] v. Villa Rica, (DC-Ga), 203 FSupp 897.

District court was not without jurisdiction to issue general order of attachment at instance of the price administrator because the price administrator was without statutory authority to maintain a suit for mandamus against the clerk of the court, since the district court had ample statutory power, before the adoption of subdiv. (b) of this rule abolishing the writ of mandamus, to issue the writ in aid of its jurisdiction over the original cause, and while the rule abolished the writ it did not abolish the remedy still available through appropriate action of the court. Brown v. Beckham, (CCA 6), 137 F(2d) 644, rev'g 50 FSupp 313.

Although the writ of mandamus was abolished by these rules, relief theretofore available by mandamus may be obtained by an appropriate

The relief formerly obtainable by writ of mandamus is still available in federal courts, and substantive rights are governed by the rules formerly applied in mandamus cases. Kay Ferer, Inc. v. Hulen, (CCA 8), 160 F(2d) 46; Petrowski v. Nutt, (CCA 9), 161 F(2d) 938; Tennessee ex rel. Atchley v. Taylor, (CA 6), 169 F(2d) 626.

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which has been made effective in the manner prescribed by these rules and which is reviewable by the court of appeals; if no judgment had been docketed there is no judgment from which to appeal, and the appeal is premature; consequently, a statement in an opinion of the conclusion reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court, but it is necessary that a definitive order or judgment be made and entered in the court's docket in due form. St. Louis Amusement Co. v. Paramount Film Distributing Corp., (CCA 8), 156 F(2d) 400.

Rule 80. Stenographer—Stenographic report or transcript as evidence.—(a) Stenographer. (Abrogated.)

(b) Official stenographer. (Abrogated.)

(c) Stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony. (As amended Dec. 27, 1946.)

Note of advisory committee.—Note to Subdivision (a). This follows substantially Equity Rule 50 (Stenographer—Appointment—Fees).

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

Note of advisory committee—1946 Amendment.—Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., c. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. [former] § 9a [F. C. A. 28 §§ 550, 604, 753, 1915, 1920], providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs, and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

Amendment note.—Prior to the 1946 Amendment subdiv. (a) and (b) provided:

(a) Stenographer. A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.

(b) Official stenographers. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

Proof of official record, see Rule 44.

NOTES TO DECISIONS PRIOR TO AMENDMENT

In patent infringement suit, expenditures [illegible] taking and certifying depositions and for [illegible] tary's per diem, in excess of fees specified [illegible] statute, may be taxed ultimately as costs, in the discretion of the court. W. F. & John Barnes Co. v. International Harvester Co., (CCA 7), 145 F(2d) 915, 63 USPQ 317, aff'g 51 FSupp 254, 58 USPQ 131.

Where, in patent infringement suit, the depositions were not taken in court, but at other places and before other officers and by different stenographers, whose pay for services was [illegible] governed by federal statute, they nevertheless were allowable as costs of the proceeding, [illegible] in such reasonable amounts as the trial court in the exercise of its sound discretion, [illegible] determine, if it thought they were reasonably necessary. W. F. & John Barnes Co. v. International Harvester Co., (CCA 7), 145 F(2d) [illegible] aff'g 51 FSupp 254, 58 USPQ 131.

A party proceeding in forma pauperis [illegible] desires a transcript of the evidence for use [illegible] motion for new trial must pay the stenographer's fee for taking the notes as well as for transcribing the notes, even though the evidence was stenographically reported at the request of the opposing party. Cheek v. Thompson, (DC-La), 33 FSupp 497.

The party who orders the original transcript must pay for the same. In re Realty Associates Securities Corp., (DC-NY), 53 FSupp 1013, [illegible] AmB(NS) 837.

The litigation being protracted and the defendants having been put to enormous expense and great loss of time in meeting the unjustified and unbelievable claims of the plaintiff, the court ordered the taxation of stenographers fees as costs against the plaintiff. Neely [illegible] Merchants Trust Co., (DC-NJ), 2 FedRDec [illegible]

Discretionary powers of the trial court [illegible] ferred to in this rule, may be exercised by the court after the court of appeals has disposed of all matters pertaining to the original trial, [illegible] in this instance, including the fixing of costs. Perrone v. Pennsylvania R. Co., (DC-NY), [illegible] FedRDec 280.

GENERAL PROVISIONS

Rule 81. Applicability in general—[illegible] To what proceedings applicable. [illegible] These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings [illegible] copyright under Title 17, U. S. C. [F. C. A. 17 § 1 et seq.] except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court [illegible] the District of Columbia except to appeals therein.

(2) In the following proceedings [illegible] peals are governed by these rules, [illegible] they are not applicable otherwise [illegible] on appeal except to the extent that [illegible]

actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of Title 28, U. S. C., § 2253 [F. C. A. 28 § 2253], relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under Title 9, U. S. C. [F. C. A. 9 § 1 et seq.], relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159 [F. C. A. 45 § 159], relating to boards of arbitration of railway labor disputes, these rules apply to appeals but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292 [F. C. A. 7 § 292]; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c) [F. C. A. 7 § 499g(c)], for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522 [F. C. A. 15 § 522], for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c) [F. C. A. 15 § 715d(c)], as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), as amended, U. S. C., Title 29, §§ 159 and 160 [F. C. A. 29 §§ 159, 160] for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921 [F. C. A. 33 §§ 918, 921], except to the extent that matters of procedure are provided for in that Act [F. C. A. 33 § 901 et seq.]. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451 [F. C. A. 8 § 1451], remain in effect.

(7) [Abrogated.]

(b) Scire facias and mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) Removed actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleadings setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(d) District of Columbia—Courts and judges. [Abrogated.]

(e) Law applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District

[10]—No Change in Subdivision (b).

Subdivision (b) abolishing the writs of scire facias and mandamus stands as originally promulgated in 1937.

[11]—Original Committee Note of 1937 to Subdivision (b).

Note to Subdivision (b). Some statutes which will be affected by this subdivision are:

USC, Title 7:

§ 222 (Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49)

USC, Title 15:

§ 49 (Enforcement of Federal Trade Commission orders and anti-trust laws)

§ 77t(c) (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)

§ 78u(f) (Same; Securities Exchange Act of 1934)

§ 79r(g) (Same; Public Utility Holding Company Act of 1935)

USC, Title 16:

§ 820 (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)

§ 825m(b) (Mandamus to compel compliance with Federal Water Power Act, etc.)

USC, Title 19:

§ 1333(c) (Mandamus to compel compliance with orders of Tariff Commission, etc.)

USC, Title 28:

§ 377 (Power to issue writs)[1]

§ 572 (Fees, attorneys, solicitors and proctors)[2]

§ 778 (Death of parties; substitution of executor or administrator)[3] Compare Rule 25(a) (Substitution of parties; death), and the note thereto[4]

USC, Title 33:

§ 495 (Removal of bridges over navigable waters)

USC, Title 45:

§ 88 (Mandamus against Union Pacific Railroad Company)

§ 153(p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)

[1] 28 USC § 377 (1940) is now covered by 28 USC § 1651, which is discussed in ¶54.10, *supra*.

[2] 28 USC § 572 (1940) is now covered by 28 USC § 1923, which is set out in ¶54.71[2], *supra*.

[3] 28 USC § 778 (1940) was repealed by the Judicial Code Revision Act of 1948 for the stated reason that it was superseded by Rules 25 and 81 of the Rules of Civil Procedure. H Rep No 308 to accompany HR 3214 (80th Cong., 1st Sess., 1947) p A239. See ¶25.01[4], *supra*.

[4] The 1937 Committee Note to Rule 25(a) is set out in ¶25.01[2], *supra*.

§ 185 (Same; National Air Transport Adjustment Board) (Cross reference to § 153)

USC, Title 47:

§ 11 (Powers of Federal Communications Commission)

§ 401(a) (Enforcement of Federal Communications Act and orders of Commission)

§ 406 (Same; compelling furnishing of facilities; mandamus)

USC, Title 49:

§ 19a(l) (Mandamus to compel compliance with Interstate Commerce Act)

§ 20(9) (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

§ 49 (Mandamus to obtain equal facilities for shippers)

For comparable provisions in state practice see Ill. Rev. Stat. (1937), ch 110, § 179; Calif. Code Civ. Proc. (Deering, 1937) § 802.

Moore

Rule 81(b)

74 (b) SCIRE FACIAS AND MANDAMUS. The writs of scire
75 facias and mandamus are abolished. Relief heretofore
76 available by mandamus or scire facias may be
77 obtained by appropriate action or by appropriate
78 motion under the practice prescribed in these
79 rules.

¶ 81.07. Scire Facias and Mandamus.

Although Rule 81(b) abolishes the writs of scire facias and mandamus, it provides that relief previously available by such writs may now be obtained by appropriate action or motion under the practice prescribed in the Rules of Civil Procedure.[1] Man-

[1] DeFoe v. Rhea County, Tenn. (ED Tenn 1945) 8 FR Serv 81b.22, Case 1 (citing Treatise); Brooks v. Caruthers (WD Pa 1938) 25 F Supp 413, 1 FR Serv 81b.12, Case 1 and White v. O. R. Evans & Bros., Inc. (App DC 1946) 81 App DC 272, 157 F2d F2d 857 (scire facias); Matter of Stewart (ND Cal 1938) 1 FR Serv 81b.21, Case 1, 1 FRD 105; DeCloux v. Johnston (ND Cal 1947) 70 F Supp 718; Petrowski v. Nutt (CCA9th, 1947) 161 F2d 938 (mandamus), cert den (1948) 333 US 842, 68 S Ct 659, 92 L ed 1126; George Allison & Co., Inc. v. ICC (App DC 1939) 70 App DC 375, [illegible] F2d 180, 1 FR Serv 81b.22, Case 1 (mandamus), cert den (1940) 309 US 656, 60 S Ct 470, 84 L ed 1005; Levine v. Farley (App DC 1939) 70 App DC 381, 107 F2d 186, 1 FR Serv 81b.22, Case 2 (mandamus), cert den (1940) 308 US 622, 60 S Ct 377, 84 L ed 519; Defoe v. Town of Rutherfordton (CCA4th, 1941) 122 F2d 342, 5 FR Serv 69a.11, Case 1 (mandamus; see ¶69.04 [3], *supra*); Hammond v. Hull (App DC 1942) 76 App DC 301, 131 F2d 23, 6 FR Serv [illegible], Case 2 (rem-
(1943) 318 US 777, 63 S Ct 830, 87 L ed 1145; Connett v. City of Jerseyville (CCA7th, 1941) 125 F2d 121 (mandamus); State of Tennessee ex rel Atchley v. Taylor (CCA6th, 1948) 169 F2d 626, 11 FR Serv 81b.21, Case 1, pet for mandamus dism'd (CA6th, 1949) 174 F2d 1023 (mandamus); Delaware & Hudson R. Corp. v. Williams (CCA 7th, 1942) 129 F2d 11, 6 FR Serv 81b.22, Case 1, cert granted and judgment vacated without consideration of merits (1942) 317 US 600, 63 S Ct 256, 87 L ed 490 (mandamus); Brown v. Beckham (CCA 6th, 1943) 137 F2d 644, 7 FR Serv 64.1, Case 2, cert den (1943) 320 US 803, 64 S Ct 430, 88 L ed 485; Paley v. Solomon (D DC 1945) 59 F Supp 887 (scire facias); Feyerchak v. Hiatt (MD Pa 1948) 11 FR Serv 81b.22, Case 1, 7 FRD 727; Larsen v. Switzer (CA8th, 1950) 183 F2d 850, 14 FR Serv 41a.22, Case 3, cert den (1951) 340 US 911, 71 S Ct 291, 95 L ed 658; West Coast Exploration Co. v. McKay (CA DC 1954) 213 F2d 582, cert den (1954) 347 US 989, 74 S Ct 850, 98 L ed 1123; SEC v. Morgan,

damus, apart from statute, was an ancillary proceeding employed in the district court when it had already acquired proper jurisdiction of a cause.[2] Relief by mandamus could be used as an extraordinary substitute for execution.[3] Mandamus would not

1, aff'd on other grounds (CA3d, 1953) 209 F2d 44; Hospoder v. United States (CA3d, 1953) 209 F2d 427, 19 FR Serv 19a.1, Case 5. *Cf.* Hicks v. DeBardeleben Coal Corp. (ED La 1950) 92 F Supp 289, 14 FR Serv 73g.13, Case 2, aff'd (CA5th, 1951) 188 F2d 574.

The following rules have been laid down as to mandamus: "that mandamus is a discretionary writ; that it will not be used to promote a wrong; and that it will not be used to require action by one who has no power to take such action." Drainage District No. 4, etc. v. Murphy (CCA8th, 1941) 119 F2d 390, in which the court sustained mandamus requiring the Drainage District to levy assessments to pay a judgment. For similar cases, see Huddleston v. Dwyer (1944) 322 US 232, 64 S Ct 1015, 88 L ed 1246 (see ¶69.04[3], *supra*); Defoe v. Town *of Rutherfordton, supra; cf* DeFoe v. Rhea County, Tenn, *supra.*

Remedy of mandamus in the District of Columbia as affected by Rule 7.—See ¶7.01, *supra.*

For statutes relative to mandamus, see Committee Note, ¶81.01[11], *supra.*

For substitution by motion in lieu of scire facias, see ¶25.06, *supra.*

Setting aside judgment.—Since Rule 81(b) favors the use of motions in substitution for the old remedial writs, the validity of a money judgment in favor of the United States, alleged to be void for want of any service on the defendants, can be tested by a motion to quash, the old

1944) 142 F2d 575, 163 ALR 240 (discussed in ¶¶60.13, 60.28[3], 60.38[1], *supra*), cert den (1944) 323 US 787, 65 S Ct 310, 89 L ed 628.

[2] DeFoe v Rhea County, Tenn. (ED Tenn 1945) 8 FR Serv 81b.22, Case 1 (citing Treatise); Hertz v. Record Publishing Co. of Erie (CA 3d, 1955) 219 F2d 397, 20 FR Serv 19a.1, Case 8 (holding that while federal district courts generally do not have original jurisdiction to issue the writ of mandamus, the writ may be issued in aid of the jurisdiction of the court to determine other issues for related discussion, see ¶54.10[5], *supra*); Also see Rosenbaum v. Bauer (1887) 120 US 450, 7 S Ct 633, 30 L ed 743; In re Winn (1909) 213 US 458, 29 S Ct 515, 53 L ed 873; Fineran v. Bailey (CCA5th, 1924) 2 F2d 363; Barber v. Hetfield (CCA9th, 1925) 4 F2d 245; Brown-Crummer Inv. Co. v. Burbank (SD Cal 1936) 17 F Supp 469, app dism'd (CCA9th, 1938) 97 F2d 993; Dick v. Tevlin (SD NY 1941) 37 F Supp 836 (no power to command draft board to permit registrant to change date of birth as stated on registration card).

Requisite jurisdictional amount of $3,000 not present. Marshall v. Crotty (D Mass 1950) 88 F Supp 30, aff'd (CA1st, 1950) 185 F2d 622.

For writs by the district court in aid of its jurisdiction, see ¶54.10[5], *supra.*

[3] See Davenport v. Dodge County (1881) 105 US 237, 27 L ed 1018; Rosenbaum v. Bauer, n 2, *supra;* Huddleston v. Dwyer (1944) 322 US

issue to compel the performance of discretionary acts,[4] or where there was another adequate remedy.[5]

In *Hammond v. Hull*, an action to obtain mandatory relief against a federal official, Justice Miller pointed out that:

> "The remedy which, before adoption of the new Rules of Civil Procedure, was known as mandamus, is available under the new rules and is governed by the same principles as formerly governed its administration. Those principles may be briefly summarized as follows: (1) The writ should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. (2) The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action. (3) Courts have no general supervisory powers over the executive branches or over their officers, which may be invoked by writ of mandamus. Interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief. (4) When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. (5) For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies. (6) Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise."[6]

of Rutherfordton (CCA4th, 1941) 122 F2d 342, 5 FR Serv 69a.11, Case 1 (see ¶69.04[3], *supra*); Evans v. Yost (CCA8th, 1919) 255 F 726; Blair v. United States ex rel. U. P. R. R. (1925) 6 F2d 484; Hair v. Burnell (CC SD La 1900) 106 F 280; Pac. Tel. & Tel. Co. v. Cushman (CCA9th, 1923) 292 F 930, pet for cert dism on motion of petitioner (1924) 263 US 729, 44 S Ct 181, 68 L ed 529; Hialeah v. United States ex rel. Harris (CCA5th, 1937) 87 F2d 53. See also ¶69.04[3], *supra*.

Cf. DeFoe v. Rhea County, Tenn. (ED Tenn 1945) 8 FR Serv 81b.22, Case 1.

[4] United States ex rel. Ness v. Fisher (1912) 223 US 683, 32 S Ct 356, 56 L ed 610; I. C. C. v. United States ex rel. Humbolt Steamship Co. [illegible] 556, 56 L ed 849; In re Wagner (1919) 249 US 465, 39 S Ct 317, 63 L ed 709; Shreve v. United States (CCA9th, 1934) 73 F2d 543.

[5] Ex parte Pa. Co. (1890) 137 US 451, 11 S Ct 141, 34 L ed 738; In re Atlantic City R. Co. (1897) 164 US 633, 17 S Ct 208, 41 L ed 579; United States ex rel. Carroll Electric Co. v. McCarl (App DC 1925) 8 F2d 910; United States ex rel. Crow v. Mitchell (App DC 1937) 89 F2d 805.

Mandamus does not lie to compel payment of war risk policy, the action prescribed by statute being the exclusive remedy on rejection of the claim. Morgan v. Hines (App DC 1940) 72 App DC 331, 113 F2d 849, cert den (1940) 311 US 706, 61 S Ct 174, 85 L ed 458.

[6] Hammond v. Hull (App DC 1942) 76 App DC 301, 303, 131 F2d [illegible]

The same principles now apply in determining whether relief by mandamus should be granted as prevailed under former practice before the promulgation of the Rules.[7] An order now in the nature of mandamus will not be granted to compel performance of discretionary acts, such as the issuance of an oil lease by the Secretary of Interior, or prompt action on an application for such lease in the absence of showing that the delay may not be reasonable and prudent.[8] Relief in the nature of mandamus, under Rule 81(b), as formerly by the writ of mandamus, is not granted as of right and may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to refuse issuance of a writ.[9]

Original writs of mandamus in the courts of appeals were not abolished by the Federal Rules.[10] And while we have urged a greater use by the courts of appeals of mandamus to afford a supplementary remedy to the final judgment rule,[11] mandamus will not lie as a mere substitute for appeal even though a postponed remedy of appeal may result in some inconvenience, delay or expense to the petitioner.[12]

cert den (1943) 318 US 777, 63 S Ct 830, 87 L ed 1145. To the same effect, see also Kay Ferer, Inc. v. Hullen (CCA8th, 1947) 160 F2d 146.

[7] Hertz v. Record Pub. Co. of Erie (WD Pa 1952) 105 F Supp 200, 17 FR Serv 81b.22, Case 1, aff'd (CA3d, 1955) 219 F2d 397, 20 FR Serv 19a.1, Case 8 (see n 2, *supra*); Hospoder v. United States (CA3d, 1953) 209 F2d 427, 19 FR Serv 19a.1, Case 5. See also SEC v. Morgan, Lewis & Bockius (ED Pa 1953) 113 F Supp 85, 18 FR Serv 81b.21, Case 1, aff'd on other grounds (CA3d, 1953) 209 F2d 44; Feyerchak v. Hiatt (MD Pa 1948) 11 FR Serv 81b.22, Case 1, 7 FRD 727.

[8] Dunn v. Ickes (App DC 1940) 72 App DC 325, 115 F2d 36, cert den (1940) 311 US 698, 61 S Ct 137, 85 L ed 452.

[9] United States v. Ickes (App DC cert den (1941) 313 US 575, 61 S Ct 1088, 85 L ed 1533.

See also ¶54.10[5], *supra*.

[10] Armour & Co. v. Kloeb (CCA 6th, 1939) 109 F2d 72, 2 FR Serv 81b.21, Case 1, rev'd on other grounds (1940) 311 US 199, 61 S Ct 213, 85 L ed 124.

For extensive discussion of grant or denial of prerogative writs by courts of appeals, see ¶54.10[4], *supra*.

[11] ¶54.10[6], *supra*.

[12] Roche v. Evaporated Milk Ass'n (1943) 319 US 21, 63 S Ct 938, 87 L ed 1185 (set out and discussed in ¶54.10[4], *supra*).

For extensive discussion, see ¶54.10[4], *supra*.

Under 28 USC § 377 (1940), now covered by 28 USC § 1651, see ¶54.10 [1], [2], *supra*, a court of appeals was empowered to issue the writ only when it was (1) necessary for the exercise of the court's jurisdiction, and (2) agreeable to the usages and

Scire facias proved useful to revive judgments,[13] to enforce liability for costs,[14] and to recover on bail[15] or attachment bonds.[16] Such a proceeding may be or[illegible][17] or ancillary.[18]

not be issued to perform the office of an appeal or writ of error, and therefore could not be issued to compel a district judge to vacate an order which was appealable, such as an order quashing service on all defendants and, in effect, dismissing the action. In re Melekov (CCA9th, 1940) 1[illegible] F2d 727. See also ¶54.10 [4], *su[illegible]*.

Appellate court may entertain petition for writ of mandamus to compel court reporter to furnish transcript for use on appeal. United States v. Metzger (CCA9th, 1943) 133 F2d 82, cert den *sub nom.* Oswald v. United States (1943) 320 US 741, 64 S Ct 41, 88 L ed 439.

Writ of mandamus will not issue to compel court to decide questions of law, no final judgment having been entered. United States v. Fee (CCA9th, 1943) 138 F2d 158.

Appellate court could not issue writ of mandamus to compel district court to set aside order of remand, since there was no appeal from such an order. Mutual Life Ins. Co. of New York v. Holly (CCA7th, 1943) 135 F2d 675 (see ¶54.10[4], *supra*).

Mandamus is proper to enforce compliance with mandate of appellate court. Favour v. Hill (CCA9th, 1943) 136 F2d 489; and see ¶54.10 [2], [3], [4], *supra*.

Mandamus may issue to compel exercise of jurisdiction where lower court h[illegible]correctly held that jurisdiction [illegible]e defendant has not been [illegible]ot be secured, since an app[illegible] not lie. In re Gayle (CCA[illegible]43) 136 F2d 973, pet for cert dism'd (1943) 320 US 806, 64 S Ct [illegible]7, 88 L ed 487; and see ¶54.10[4], *supra*.

[illegible] may issue under certain circumstances to compel a judicial tribunal to exercise an existing jurisdiction but it is not to be extended so as to control the discretion and judgment of a court acting within the scope of its jurisdiction. Hence, mandamus would not lie to compel federal district court to dismiss action under Federal Employers' Liability Act without prejudice. Larsen v. Switzer (CA8th, 1950) 183 F2d 850, 14 FR Serv 41a.22, Case 3, cert den (1951) 340 US 911, 71 S Ct 291, 95 L ed 658.

[13] Collin County Nat. Bank v. Hughes (CCA8th, 1907) 152 F 414; Egan v. Chicago & Great Western Ry. Co. (CC ND Ia 1908) 163 F 344.

[14] Pullman's Palace Car Co. v. Washburn (CC D Mass 1895) 66 F 790, aff'd (CCA1st, 1896) 76 F 1005.

[15] Rheiner v. United States (CCA 5th, 1921) 276 F 803; Kirk v. United States (CC ND NY 1904) 131 F 331, aff'd (CCA2d, 1905) 137 F 753; Western Surety Co. v. United States (CCA9th, 1931) 51 F2d 470; Detroit F. & S. Co. v. United States (CCA8th, 1932) 59 F2d 565, cert den (1932) 287 US 633, 53 S Ct 84, 77 L ed 549.

[16] Damages under a plaintiff's attachment bond could be enforced by summary p[illegible]dure analagous to the writ of scire facias, ancillary to the actio[illegible] in which [illegible]h bond was filed and following [illegible] course of a non-jury civil action. Kehaya v. Axton (SD NY 1940) 32 F Supp 273, 3 FR Serv 81b.12, Case 1.

[17] See Ki[illegible] v. United States, n 15, *supra;* United States v. Ewing (ND Miss 1927) 19 F2d 378; Green v. Langnes (CCA9th, 1936) 82 F2d 926.

[18] See Collin County Nat. Bank

v. Hughes, n 13, *supra;* United States v. Ewing, n 17, *supra.*

A proceeding by way of motion in lieu of scire facias to revive a judgment will often be desirable instead of maintaining an original action thereon, because (1) the motion may be served beyond the territorial limits of the court, and (2) no independent jurisdictional grounds are needed. Collin County Nat. Bank v. Hughes, n 13, *supra;* An original action based on a federal judgment does, however, require independent jurisdictional grounds. ¶1.0[illegible][2], *supra.*