

ministrative decision.⁴⁶ This is true where the relief is sought to compel a speedy trial.⁴⁷ Certainly, a claim cannot be enforced by mandamus when a statute provides some other and exclusive remedy.⁴⁸ Mandamus is not available where a judicial determination of the extent of an officer's duty can be had in an ordinary action defended by him.⁴⁹

§ 84.40. Nonavailability for purpose of review.

The remedy of mandamus cannot be used to perform the office of an appeal,⁵⁰ except to prevent manifest injustice,⁵¹

ion Tel. Co., 171 F2d 1 (action under 47 USC 406 to compel restoration of telegraphic service without first resorting to Federal Communication Commission); *Macon, D. & S. R. Co. v. General Reduction Co.*, 44 F2d 499 (mandamus by shipper to enforce carriage of goods at rate fixed by Interstate Commerce Commission); *Burnham Chemical Co. v. Krug*, 81 F Supp 911; *Globe Restaurant v. Payne*, 72 F Supp 677 (exhaustion of remedy by means of administrative procedure).

Trial court was directed to enter declaratory judgment as to nature of employee's right to notice of hearing before discharge, with specification mandamus would not issue unless employee was not restored to office or review was not asked and granted by Supreme Court. *Borak v. Biddle*, 141 F2d 278.

⁴⁶ Mandamus to Federal Trade Commission to compel issuance of subpoena duces tecum in proceeding before commission would not issue from Supreme Court of District of Columbia, in view of ample remedy by review of commission's decision by court of appeals under Federal Trade Commission Act, § 5. *Macfadden Publications Inc. v. Federal Trade Commission*, 37 F2d 822.

⁴⁷ *United States v. Chapman*, 86 F2d 205; *United States ex rel. Coleman v. Cox*, 47 F2d 988; *McCarthy v. United States Dist. Court for Western Dist. of Arkansas*, 19 F2d 462.

⁴⁸ *Tyer v. Hines*, 117 F2d 782.

⁴⁹ *United States ex rel. Girard Trust Co. v. Helvering*, 301 US 540, 81 L Ed 1272, 57 S Ct 855.

⁵⁰ *Interstate Commerce Commission v. United States ex rel. Campbell* 289 US 385, 77 L Ed 1273, 53 S Ct 607; *Panhandle Eastern Pipe Line Co. v. Thornton*, 267 F2d 459; *Allstate Ins. Co. v. United States Dist. Court for Eastern Dist. of Michigan*, 264 F2d 38.

See also *Roche v. Evaporated Milk Ass'n*, 319 US 21, 87 L Ed 1185, 63 S Ct 938, revg 130 F2d 843 and 126 F2d 467; *Anderson v. McLaughlin*, 263 F2d 723 (rule against piecemeal appeals generally not to be circumvented by resort to mandamus); *Abrams v. McGohery*, 260 F2d 892 (power to grant writ of mandamus ordinarily not useable as method of appealing from otherwise unappealable interlocutory order); *American Airlines, Inc. v. Forman*, 204 F2d 230 (statutory restrictions upon review by court of appeals not circumventable by resort to mandamus); *Tennessee v. Taylor*, 169 F2d 626; *Hyman v. McLendon*, 103 F2d 294.

The extraordinary writs under 28 USC 1651(a), such as mandamus, cannot be used as substitute for appeal even though hardship may result from delay and perhaps unnecessary trial. *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *Regee v. Thornton*, 275 F2d 801.

⁵¹ This rule applies not only to

where special circumstances exist.⁵² A fortiori, mandamus will be denied where it would frustrate an appeal.⁵³ While an appeal ordinarily will not be accepted as a substitute for a petition for mandamus even when that remedy is applicable, under special circumstances an appeal from a non-appealable order may be treated as a petition for mandamus, such as an appeal from an order transferring the action to another district.⁵⁴

petitioner, but also to respondent, who may not by his answer substitute mandamus for appeal. Drainage Dist. No. 4 of Dunklin County, Mo. v. Murphy, 119 F2d 390, 393.

⁵² Fink v. Igoe, 279 F2d 544; United States v. Hall, 274 F2d 856; Black v. Boyd, 248 F2d 156.

Court of appeals has discretionary power under 28 USC 1651(a) in proper and exceptional circumstances to issue writs of mandamus to compel district court or judge to vacate orders of reference to a master which are in excess or abuse of power under Rule 53(b). La Buy v. Howes Leather Co., Inc., 352 US 249, 1 L Ed2d 290, 77 S Ct 309; In re Narragansett Pier Amusement Corp., 224 F2d 231; Burgess v. Williams, 302 F2d 91.

The prerogative writs, such as writ of mandamus, may properly be utilized to review interlocutory order determining mode and sequence of trial in situation justifying immediate review where postponement until appeal from final judgment might be prejudicial. Goldblatt v. Inch, 203 F2d 79.

⁵³ Icyclair, Inc. v. McCormick, 145 F2d 691.

See also Fred Benioff Co. v. McCulloch, 133 F2d 900.

⁵⁴ Magnetic Engineering & Manufacturing Co. v. Dings Mfg. Co., 178 F2d 866.

Mandamus was not appropriate remedy to vacate severance and transfer order granted by district court on ground of improper venue under 28 USC 1406(a), since, even if erroneous, no abuse of judicial

power was involved. Bankers Life & Casualty Co. v. Holland, 346 US 379, 98 L Ed 106, 74 S Ct 145.

Petition for mandamus in transfer cases should not be filed in court of appeals unless petitioner can make out a strong and clear case of abuse of discretion. Sybert v. Miner, 266 F2d 196; Panhandle Eastern Pipe Line Co. v. Thornton, 267 F2d 459.

Transfer orders may be reviewed by mandamus in criminal as well as civil cases to determine whether district court's power, as distinguished from its discretion, has been erroneously exercised. United States v. Cashin, 281 F2d 669.

Where district judge declined to either dismiss or transfer patent infringement action which could not be maintained in district under 28 USC 1400(b), and refused to make certification requisite to interlocutory appeal pursuant to 28 USC 1292(b), mandamus would issue to compel judge to enter order either dismissing action or transferring it to proper district. Fink v. Igoe, 279 F2d 544.

As to when appeal from order denying motion for change of venue for convenience of witnesses may be treated as petition for a writ of mandamus, see Shapiro v. Bonanza Hotel Co., Inc., 185 F2d 777.

Mandamus or prohibition as appropriate remedy with regard to transfer of civil actions for improper venue or convenience under 28 USC 1404(a) or 1406(a), see §§ 4.44-4.46, ante.

§ 84.41. Relation to injunctive relief.

A mandatory injunction cannot be granted as a substitute for a mandamus, where there is no jurisdiction to grant mandamus or relief in the nature of mandamus.⁵⁵ Also, a prayer for a mandatory injunction may be in effect one for the issuance of mandamus to compel an officer to act, within the rule that what the court is without power to do directly cannot be done indirectly.⁵⁶ Nevertheless, a desired result often can be obtained, particularly in a district court, by a mandatory injunction rather than by relief in the nature of mandamus.⁵⁷

Mandamus to require an official to take certain action is to be distinguished from an injunction to restrain his refusal on some particular ground which he sets up as a consideration legally controlling.⁵⁸

§ 84.42. Duties and acts that may be compelled.

Relief in the nature of mandamus is available only to enforce rights and compel duties that are clear.⁵⁹ The relief

⁵⁵ *Johnson v. Interstate Power Co.*, 187 F Supp 36 (reviewing cases); *United States v. Rollnick*, 33 F Supp 863, 867; *Mills v. Lowndes*, 26 F Supp 792, 804.

The Supreme Court has held that it is improper for lower courts to issue mandatory injunctions in place of an unavailable writ of mandamus. *Smith v. Bourbon County*, 127 US 105, 32 L Ed 73, 8 S Ct 1043. It has been said that this decision has seldom been followed. See cases collected in notes in 38 *Columbia L Rev* 903, 907-912.

⁵⁶ *Fineran v. Bailey*, 2 F2d 363.

See *Creager v. Bryan*, 287 F 362; *Alley v. Craig*, 97 F Supp 576 (reinstatement of dismissed government employee).

⁵⁷ *United States v. White County Bridge Commission*, 275 F2d 529 (injunctive relief rather than mandamus as to official misconduct).

Insofar as the federal district courts are concerned, it has been said that "in general the probabilities are that in at least three out

of four cases the mandatory injunction can be successfully called upon as a substitute for the writ of mandamus," but "these probabilities will to some extent depend upon the particular circuit in which suit is brought." 38 *Columbia L Rev* 903, 911.

⁵⁸ *Wilson v. Bowers*, 14 F2d 976.

⁵⁹ *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *United States ex rel. Girard Trust Co. v. Helvering*, 301 US 540, 81 L Ed 1272, 57 S Ct 855; *Kay Ferer, Inc. v. Hulén*, 160 F2d 146.

It must be made to appear that petitioner has an unquestioned legal right to have performance of the particular duties sought to be enforced. *Sound Investment & Realty Co. v. Harper*, 178 F2d 274 (before court of appeals will grant mandamus or similar relief).

A duty only gathered by doubtful inference from statutes of uncertain meaning will not be enforced. *Interstate Commerce Commission v.*

will not be granted⁶⁰ to require an act by one who has no power to act;⁶¹ to compel an act that has not been refused;⁶² to compel a useless act;⁶³ or to enforce a mere abstract duty.⁶⁴

§ 84.43. — Ministerial acts.

Mandamus is an appropriate remedy to compel the performance of purely ministerial acts or duties,⁶⁵ whether of

New York, N. H. & H. R. Co., 287 US 178, 77 L Ed 248, 53 S Ct 106.

Where duty is not clear beyond peradventure, mandamus will be refused even though question of duty is one of law as to extent of statutory power of administrative officer or body. So absence of another remedy does not authorize mandamus where duty to be performed is not clear beyond doubt. *United States ex rel. Chicago G. W. R. Co. v. Interstate Commerce Commission*, 294 US 50, 79 L Ed 752, 55 S Ct 326.

Mandamus does not lie to compel officer to pay over money the right to which is in dispute and must be established by appropriate action. *United States ex rel. Collier v. Hill*, 9 F Supp 422.

Relief in nature of mandamus was properly denied where petitioner's claim was based on alleged improper striking of Indian's name from tribal roll which determined right to allotment of tribal lands, but where there was neither allegation nor proof that Indian was alive on day when presence of his name on roll was essential to his right to allotment. *United States ex rel. Jump v. Ickes*, 73 App DC 141, 117 F2d 708.

⁶⁰ Remedy is not available to creditor to obtain preference over another creditor by compelling officer to pay sum from funds to be thereafter received by officer. *Ernest M. Loeb Co., Inc. v. Avoyelles*

Drain. Dist. No. 8 of Parish of Avoyelles, La., 60 F Supp 296.

The duty to be enforced by mandamus must not only be merely ministerial but must also be a duty which exists at time when application for mandamus is made. *Frankel v. Woodrough*, 7 F2d 796, 797.

⁶¹ *Laycock v. Hidalgo County Water Control and Improvement Dist. No. 12*, 142 F2d 789; *Drainage Dist. No. 4 of Dunklin County, Mo. v. Murphy*, 119 F2d 390, 391.

⁶² *United States ex rel. Coleman v. Cox*, 47 F2d 988.

See *Petition of Buscaglia*, 145 F 2d 428, where it was presumed Puerto Rico Supreme Court would enter appropriate order in due course.

⁶³ *Phillips v. McCauley*, 92 F2d 790.

Matter as moot, see *William Goldman Theatres, Inc. v. Kirkpatrick*, 154 F2d 66.

Mandamus will not be granted during service of sentence to command release of federal prisoner when sentence, with good time allowance, will expire before writ is effective. *Tinkoff v. Ryan*, 21 F Supp 185.

Relief does not lie against officer after he has resigned. *United States v. Oswald*, 141 F2d 921.

⁶⁴ *United States v. Nordbye*, 75 F2d 744.

⁶⁵ *Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 US 200, 67 L Ed 949, 43 S Ct 580; *Marbury v. Madison*, 1 Cranch

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⁶¹ *Laycock v. Hidalgo County Water Control and Improvement Dist. No. 12*, 142 F2d 789; *Drainage Dist. No. 4 of Dunklin County, Mo. v. Murphy*, 119 F2d 390, 391.

⁶² *United States ex rel. Coleman v. Cox*, 47 F2d 988.

See *Petition of Buseaglia*, 145 F 2d 428, where it was presumed Puerto Rico Supreme Court would enter appropriate order in due course.

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⁶⁴ *United States v. Nordbye*, 75 F2d 744.

⁶⁵ *Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 US 200, 67 L Ed 949, 43 S Ct 580; *Marbury v. Madison*, 1 Cranch

cabinet members,⁶⁶ of other officers, or of boards, commissions and agencies.⁶⁷ A ministerial act within the rule is one with regard to which no degree of judgment or discretion in the performance of his duties is left to the officer.⁶⁸ Indeed, relief in the nature of mandamus lies only where the duty to be performed is ministerial or where the obligation to act is peremptory and plainly defined.⁶⁹

§ 84.44. — Administrative discretion.

Relief in the nature of mandamus lies in a proper case to compel the exercise of discretion by a federal officer or

(5 US) 137, 2 L Ed 60; *Clackamas County, Ore. v. McKay*, 94 App DC 108, 219 F2d 479.

⁶⁶ *Of Secretary of the Interior. Wilbur v. United States ex rel. Krushnic*, 280 US 306, 74 L Ed 445, 50 S Ct 103, affg with modification 30 F2d 742 on appeal from supreme court of the District of Columbia; *Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 US 200, 67 L Ed 949, 43 S Ct 580; *Ickes v. Ledbetter*, 77 App DC 358, 135 F2d 658.

Relief in nature of mandamus is proper against Secretary of the Interior upon proof that he has arbitrarily and without authority of law removed name of an Indian from the tribal roll determinative of right to allotment of certain tribal lands. *United States ex rel. Jump v. Ickes*, 73 App DC 141, 117 F2d 769.

Of Secretary of the Treasury. United States v. MacVeagh, 214 US 124, 53 L Ed 936, 29 S Ct 556; *Roberts v. United States*, 176 US 221, 44 L Ed 443, 20 S Ct 376.

See also *Morgenthau v. Barrett*, 103 F2d 481.

Of Postmaster General. In Kendall v. United States, 12 Pet (37 US) 524, 9 L Ed 1181, Postmaster General was directed to make certain credit entries in account found to be just by Solicitor of the Treasury. See also *Levine v. Farley*, 107 F2d 186.

⁶⁷ *Of Commissioner of Patents. Ex parte Frasch*, 192 US 566, 48 L Ed 564, 24 S Ct 424; *United States ex rel. Steinmetz v. Allen*, 192 US 543, 48 L Ed 555, 24 S Ct 416.

Executive officer of federal government may be compelled by mandamus to comply with a congressional mandate which specifically imposes a ministerial duty devoid of exercise of judgment or discretion. *Clackamas County, Ore. v. McKay*, 94 App DC 108, 219 F2d 479 (rule applied as to Secretary of Interior).

Mandamus lies to compel director of Veterans' Bureau to pay compensation if compensation has been awarded, but not otherwise. *Smith v. United States*, 57 F2d 998.

⁶⁸ *Campbell v. Deviny*, 81 F Supp 657.

If law directs officer to perform act in regard to which no discretion is committed to him, and which, upon facts existing, he is bound to perform, then that act is ministerial and enforceable by mandamus, although depending upon a statute which requires, in some degree, a construction of its language by officer. *Roberts v. United States ex rel. Valentine*, 176 US 221, 44 L Ed 443, 20 S Ct 376.

⁶⁹ *United States ex rel. McLennan v. Wilbur*, 283 US 414, 420, 75 L Ed 1148, 51 S Ct 502; *Clackamas County, Ore. v. McKay*, 94 App DC 108, 219 F2d 479.

agency,⁷⁰ but not to compel, control or review the way that it is exercised.⁷¹ The remedy may not be employed with the result of interfering with the internal management of an executive department.⁷² It is not available to control or re-

⁷⁰ *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 US 638, 62 L Ed 914, 38 S Ct 408; *Edgerton v. Kingsland*, 168 F2d 128; *Ward Baking Co. v. Holtzoff*, 164 F2d 34.

See also *McNally v. Hill*, 293 US 131, 140, 79 L Ed 238, 55 S Ct 24 (mandamus to compel parole board to entertain petition for parole); *Interstate Commerce Commission v. United States ex rel. Humboldt S.S. Co.*, 224 US 474, 56 L Ed 849, 32 S Ct 556 (mandamus to compel Interstate Commerce Commission to take jurisdiction of petition alleging violation of Interstate Commerce Act).

Administrative officer may not successfully contend in resisting mandamus that he has exercised his discretion by determining that a statute does not give him discretion. *Cotonificio Bustese, S. A. v. Morgenthau*, 121 F2d 884.

For administrative tribunal to receive and hear a complaint and then grant motion to dismiss on ground that it has no power to act, is refusal of jurisdiction as much as refusal to hear in first instance, and mandamus would lie to compel it to proceed if its duty to do so were clear but not otherwise. *United States ex rel. Chicago G. W. R. Co. v. Interstate Commerce Commission*, 294 US 50, 79 L Ed 752, 55 S Ct 326; *Diamond Tank Transport, Inc. v. United States*, 23 F Supp 497, affd 305 US 567, 83 L Ed 357, 59 S Ct 149.

⁷¹ *United States ex rel. Girard Trust Co. v. Helvering*, 301 US 540, 81 L Ed 1272, 57 S Ct 855; *United States ex rel. Chicago G. W. R. Co. v. Interstate Commerce Commission*,

294 US 50, 79 L Ed 752, 55 S Ct 326; *Edgerton v. Kingsland*, 168 F 2d 128.

Mandamus is restricted, in the main, to situations where ministerial duties of a nondiscretionary nature are involved. *Panama Canal Co. v. Grace Line, Inc.*, 356 US 309, 2 L Ed2d 788, 78 S Ct 752.

No power or jurisdiction is vested in court to control by writ of mandamus or otherwise discretion of United States Attorney. *Howell v. Brown*, 85 F Supp 537.

A decision of Comptroller General under statutory discretion to deny pay allowance is not controllable by mandamus by Supreme Court of District of Columbia, even though it might be reviewed by Court of Claims. *McCarl v. Walters*, 38 F2d 942.

Mandamus will not lie where effect would be court's supervision of treatment of prisoner in federal penitentiary. *In re Taylor*, 187 F2d 852.

Administrative discretion of warden of prison. *Rothstein v. Hiatt*, 70 F Supp 867.

Resident physician at public hospital cannot be compelled to perform surgical operation on petitioner. *Prince v. Klune*, 80 App DC 31, 148 F2d 18.

⁷² *Siskind v. Morgenthau*, 80 App DC 249, 152 F2d 286 (Secretary of Treasury).

Federal district court had no jurisdiction of mandamus proceeding to order establishment of new position or retention of plaintiff in old position or otherwise to unduly interfere with administrative process so long as it conformed to applicable statutory commands and limitations. *Farrell v. Moomau*, 85 F

view discretionary acts or decisions of the President, his cabinet officers,⁷³ or other executive departments, boards, agencies or officers.⁷⁴

§ 84.45. — Judicial acts and duties.

Mandamus is an appropriate remedy in a proper case to compel judges, courts⁷⁵ and quasi-judicial bodies⁷⁶ to act,

Supp 125 (action for injunctive relief to prevent removal from civil service position with Veterans' Administration).

⁷³ *United States ex rel. Great-house v. Dern*, 289 US 352, 77 L Ed 1250, 53 S Ct 614; *Wilbur v. United States ex rel. Kadrie*, 281 US 206, 74 L Ed 809, 50 S Ct 320; *Reeside v. Walker*, 11 How (52 US) 272, 13 L Ed 693; *Clackamas County, Ore. v. McKay*, 94 App DC 108, 219 F2d 479 (as to Secretary of Interior).

See also *Work v. United States ex rel. Chestatee Pyrites & Chemical Corp.*, 267 US 185, 69 L Ed 566, 45 S Ct 256; *Work v. United States ex rel. Rives*, 267 US 175, 69 L Ed 561, 45 S Ct 252 (Secretary of Interior); *Decatur v. Paulding*, 14 Pet (39 US) 497, 10 L Ed 559 (Secretary of Navy); *United States ex rel. Endicott v. Mellon*, 39 F2d 505 (Secretary of Treasury).

The courts cannot control by mandamus discretion given to President by statute, to approve recommendation of Secretary of Navy that hearing be granted an incapacitated naval officer before Naval Retiring Board. *Denby v. Berry*, 279 F 317, *revd on other grounds* 263 US 29, 68 L Ed 148, 44 S Ct 74.

The courts will not review findings of fact of administrative officer, or his exercise of judgment with respect to discharged postal clerk against whom charges had been made in writing and who was given opportunity to answer, statutory requirements concerning dismissal having been observed. *Levine v. Farley*, 70 App DC 381, 107 F2d 186.

⁷⁴ *Panama Canal Co. v. Grace Line, Inc.*, 356 US 309, 2 L Ed2d 788, 78 S Ct 752; *Campbell v. Deviny*, 90 App DC 176, 194 F2d 881; *Losieau v. Hunter*, 90 App DC 85, 193 F2d 41.

See also *Interstate Commerce Commission v. New York, N. H. & H. R. Co.*, 287 US 178, 77 L Ed 248, 53 S Ct 106 (Interstate Commerce Commission); *United States ex rel. Creary v. Weeks*, 259 US 336, 66 L Ed 973, 42 S Ct 509 (discretionary acts of federal military boards or tribunals); *Sleeth v. Dairy Products Co. of Uniontown*, 228 F2d 165 (state or county officers); *Edgerton v. Kingsland*, 168 F2d 128 (Commissioner of Patents).

An erroneous decision of Interstate Commerce Commission, acting within its jurisdiction, could only be reviewed by proceedings in error, not by mandamus. *Donnor Steel Co. v. Interstate Commerce Commission*, 285 F 955.

Mandamus lies to compel Interstate Commerce Commission to adjudicate cause or make order in accordance with its findings, but not to compel adjudication of cause in any particular way, such as to compel finding of damage where commission, perhaps erroneously, has reached different conclusion. *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 US 385, 77 L Ed 1273, 53 S Ct 607.

⁷⁵ *La Buy v. Howes Leather Co.*, 352 US 249, 1 L Ed2d 290, 77 S Ct 309; *Fink v. Igoo*, 279 F2d 544.

See also *Ex parte Kowato*, 317 US 69, 87 L Ed 58, 63 S Ct 115 (mandamus from Supreme Court to compel correction of erroneous

or perform legal duties.⁷⁷ It lies to compel a court or judge to assume jurisdiction as required by law,⁷⁸ or not to as-

district court order abating action); *Biggs v. Ward*, 212 F2d 209 (petition for mandamus against state court judge not within district court's jurisdiction); *Steecone v. Morse-Starrett Products Co.*, 191 F 2d 197 (appeal treated as petition for mandamus to compel entry of judgment); *Smith Engineering Co. v. Pray*, 58 F2d 926, 928 (power of court of appeals to compel segregation of issues by mandamus).

Mandamus would issue to compel a federal district judge to show cause why the court of appeals should not direct him to dissolve an injunction, granted without jurisdiction in a railroad reorganization proceeding, restraining a state from proceeding in a quo warranto suit in the state court, and to dismiss the reorganization proceeding for lack of jurisdiction. *Tennessee v. Taylor*, 169 F2d 626.

⁷⁶ *American Chain & Cable Co. v. Federal Trade Commission*, 142 F2d 909 (directing writ to Federal Trade Commission to modify order previously affirmed by court).

⁷⁷ Mandamus is available under the All Writs Act (28 USC 1651) to require jury trial where it has been improperly denied. *Beacon Theatres, Inc. v. Westover*, 359 US 500, 3 L Ed2d 988, 79 S Ct 948; *Dairy Queen, Inc. v. Wood*, 369 US 469, 8 L Ed2d 44, 82 S Ct 894 (mandamus by court of appeals where demand for jury trial erroneously stricken).

See also *Ex parte United States*, 287 US 241, 249, 77 L Ed 283, 53 S Ct 129 (mandamus to compel issuance of bench warrant after indictment); *United States v. Hall*, 274 F2d 856 (mandamus to vacate order referring issue of just compensation in eminent domain case to commissioners); *Ore Navigation Corp. v. Thomsen*, 256 F2d 447 (mandamus to review order trans-

ferring case from admiralty to law side of court); *Manguran v. McClintic*, 43 F2d 290.

Nonappealable order denying or striking demand for jury trial under Rule 38(b) could be reviewed on petition for writ of mandamus, at least Court of Appeals, 2nd Circuit would entertain such a petition. *Goldblatt v. Inch*, 203 F2d 79. To the same effect is the Sixth Circuit. *Black v. Boyd*, 248 F2d 156.

Nonappealable order denying motion to strike demand for jury trial and to transfer case to nonjury calendar was not reviewable by mandamus under 28 USC 1651(a), at least in absence of extraordinary or compelling situation. *In re Chappell & Co., Inc.*, 201 F2d 343; *In re Previn*, 204 F2d 417.

In *United States v. Malmin*, 272 F 785, at instance of United States, without any private relator, a judge was commanded to return to his post and there to resume his duties to the end that he might hear and determine cases and thus permit usual course of appeals to bring before particular court of appeals cases proper for exercise of their jurisdiction.

⁷⁸ *Mach-Tronics, Inc. v. Zirpoli*, 316 F2d 820 (granting relief as to improper stay pending state action); *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F2d 514; *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F2d 378.

See also *In re Petition of Gregory*, 286 F2d 717 (mandamus to obtain relief from improper stay order); *Prater v. Boyd*, 263 F2d 788 (mandamus to compel district court or judge having jurisdiction to proceed in exercise thereof); *United States v. Hall*, 145 F2d 781 (mandamus by court of appeals to compel district judge to assume jurisdiction of condemnation proceeding); *Woolf v. Reeves*, 65 F2d 80 (mandamus to compel district judge

sume jurisdiction contrary to law.⁷⁹ It may issue to compel a district court to proceed to the determination of a pending action where it is under a legal duty to so proceed.⁸⁰ A high

to exercise jurisdiction wrongfully refused).

⁷⁹ See *Ex parte Bransford*, 310 US 354, 84 L Ed 1249, 60 S Ct 947 (mandamus where petitioner claims right to have cause heard by three judges under statute and district judge rules that he will hear cause sitting alone); *Maryland v. Soper*, 270 US 36, 70 L Ed 459, 46 S Ct 192; *Ex parte Wisner*, 203 US 449, 51 L Ed 264, 27 S Ct 150 (mandamus from Supreme Court or court of appeals where federal court refuses to remand case over which it has no jurisdiction); *Kentucky v. Powers*, 201 US 1, 50 L Ed 633, 26 S Ct 397 (mandamus to test legality of removals of prosecutions against revenue officers); *In re United States*, 257 F2d 844 (mandamus for relief from order granting defendant's motion to vacate declaration of taking in condemnation proceeding); *Butcher & Sherrard v. Welsh*, 206 F2d 259 (mandamus to prevent district court from exceeding jurisdiction by granting new trial after affirmance of judgment); *In re Lisman*, 89 F2d 898 (mandamus to enforce duty of recused judge who has held affidavit of bias and prejudice insufficient).

Mandamus appropriate remedy where district court did not have jurisdiction over foreign corporate defendant in patent infringement action in which venue requirements of 28 USC 1400(b) not met. *Fink v. Igoe*, 279 F2d 544; *Johnson & Johnson v. Picard*, 282 F2d 386; *Holub Industries, Inc. v. Wyche*, 290 F2d 852.

⁸⁰ *Schwab v. Coleman*, 145 F2d 672, 156 ALR 355; *In re United States*, 140 F2d 19; *Frankel v. Woodrough*, 7 F2d 796, 797.

See also *Lutes v. United States*

Dist. Court for Western Dist. of Oklahoma, 306 F2d 948 (mandamus available where stay on ground of abstention abuse of discretion); *Anderson v. McLaughlin*, 263 F2d 732 (denying mandamus to compel district judge to postpone trial of pending cases until disposition of appeal in another case); *Lyons v. Westinghouse Elec. Corp.*, 222 F2d 184; *P. Beiersdorf & Co., Inc. v. McGohey*, 187 F2d 14 (mandamus by court of appeals to compel district court to vacate order staying action pending determination of state court action).

Where federal district court has antecedently acquired jurisdiction over cause of action, subject-matter of which is also involved in action commenced in state court, federal court may not abdicate its jurisdiction, and mandamus will lie to compel it to proceed notwithstanding action in state court. *Armour & Co. v. Miller*, 91 F2d 521.

But where district judge had merely denied a motion to expedite a hearing and with leave to renew the motion in six months, mandamus to compel holding of final hearing was denied, with expression of opinion that at end of the six-months period the district court would not permit further delay. *Czuczka v. Rifkind*, 160 F2d 308.

Mandamus would not issue to compel district court to proceed with action for money judgment on increased natural gas rates and to vacate its order staying the action pending review of Federal Power Commission's decision relative to such increased rates. *United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 247 F2d 681.

While order granting stay of pending proceeding may be tested

function of mandamus is to keep a lower court from interposing unauthorized obstructions to the enforcement of a judgment of a higher court.⁸¹

But mandamus to compel a court or judge to act or perform a duty will be denied, of course, where recognized grounds for the relief are not present.⁸² It has been broadly ruled that the use of the writ by an appellate court in aid of its appellate jurisdiction is restricted to situations in which it is necessary to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.⁸³ Furthermore,

in court of appeals by way of mandamus, relief will not be granted in absence of strong showing that district court abused its discretion in that petitioner would suffer irreparable damage and miscarriage of justice. *Cmax, Inc. v. Hall*, 300 F2d 265 (applied in denying petition to vacate stay order pending completion of administrative proceeding).

⁸¹ *United States v. United States Dist. Court for Southern Dist. of New York*, 334 US 253, 92 L Ed 1351, 68 S Ct 1035.

⁸² *Hazeltine Corp. v. Kirkpatrick*, 165 F2d 683.

See also *Green v. Murphy*, 259 F2d 591 (mandamus not appropriate to compel disqualification of district judge for bias and prejudice); *Gottlieb v. Rubenstein*, 252 F2d 779 (mandamus not issued to compel district court to set aside order granting new trial unless petitioner made remittitur).

Mandamus will not issue to compel district court to enter a remittitur in favor of defendant where case has been appealed and remanded, and reviewing court's opinion and mandate require a trial de novo and submission of issues to a jury. *In re Mutual Life Ins. Co. of New York*, 188 F2d 424.

Mandamus does not lie to compel trial court to transfer to another district a proceeding in rem against specific property which is local in character and necessarily brought

where property is subject to seizure under process. *Clinton Foods, Inc. v. United States*, 188 F2d 239.

⁸³ *Roche v. Evaporated Milk Ass'n*, 319 US 21, 87 L Ed 1185, 63 S Ct 938.

See also *Madison-Lewis, Inc. v. MacMahon*, 299 F2d 256 (mandamus directing district judge to expunge unauthorized condition from order granting defendants' motion to take deposition of Danish corporation in criminal case); *Regee v. Thornton*, 275 F2d 801 (interlocutory order relative to third-party practice under Rule 14 not reviewable by mandamus); *Hullom v. Kent*, 262 F2d 862 (district judge's ruling denying application to proceed in forma pauperis not reviewable by mandamus); *Loum v. Underwood*, 262 F2d 866; *Frost v. Yankwich*, 254 F2d 633 (mandamus directing lower court to do some act properly issued only where court acts in excess of jurisdiction, abuses it, or refuses to exercise it); *United States v. United States Dist. Court for Southern Dist. of West Virginia*, 238 F2d 713 (mandamus by court of appeals to correct errors or abuses of discretion by district court in dealing with grand jury investigations); *Johnston v. Marsh*, 227 F2d 528 (mandamus against district judge under 28 USC 1651(a)); *In re Sylvania Elec. Products Inc.*, 220 F2d 423 (denying petition for writ to compel district court to va-

it has been adjudged that mandamus should issue only where, on the face of the record, the lower court to which it is directed is without jurisdiction to take the action of which complaint is made.⁸⁴

§ 84.46. — Judicial discretion.

Mandamus does not lie to control or direct acts within judicial discretion.⁸⁵ The same rule governs as to quasi-judicial acts of boards and commissions.⁸⁶

cate unappealable interlocutory order).

Supplementary review power conferred on the courts by 28 USC 1651(a) is to be used only in exceptional case where there is clear abuse of discretion or usurpation of judicial power. *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *Lemon v. Druffel*, 253 F2d 680; *Hvass v. Graven*, 257 F2d 1.

Supreme Court will deny leave to file original petition for writs of mandamus or prohibition where it is merely claimed that district court has erred in ruling on matters within its jurisdiction and where case is not one in which district court has exceeded or refused to exercise its jurisdiction or in which appellate review will be defeated if a writ does not issue. *Paar v. United States*, 351 US 513, 100 L Ed 1377, 76 S Ct 912.

In absence of extraordinary circumstances and where petitioner had failed to seek relief under 28 USC 1292(b) permitting interlocutory appeals, mandamus would not issue to compel district court to vacate order denying motion to dismiss cross-complaint as not authorized by Rule 13(g) of Rules of Civil Procedure and hence not within jurisdiction of district court. *Allstate Ins. Co. v. United States Dist. Court for Eastern Dist. of Michigan*, 264 F2d 33.

⁸⁴ *Massey-Harris-Ferguson, Ltd. v. Boyd*, 242 F2d 800; *Hydraulic*

Press Mfg. Co. v. Moore, 185 F2d 800 (denial of motion to dismiss or quash return of process).

See also *Pennsylvania R. Co. v. Transport Workers Union of America*, 278 F2d 693 (denying mandamus where temporary restraining order was not void nor nonjurisdictional); *American Airlines, Inc. v. Forman*, 204 F2d 230.

⁸⁵ *Bankers Life & Casualty Co. v. Holland*, 346 US 379, 98 L Ed 106, 74 S Ct 145; *Gottlieb v. Rubenstein*, 252 F2d 779; *Great Northern R. Co. v. Hyde*, 238 F2d 852.

See also *Walker v. Brooks*, 251 F2d 555 (mandamus not issued to direct district court to rule in a specific way); *Black v. Boyd*, 251 F2d 843; *In re Turpentine & Rosin Factors, Inc.*, 238 F2d 458 (issuance of mandamus denied where, on record presented, matter under scrutiny is, or may be, use, nonuse or misuse of discretionary power); *Clayton v. Warlick*, 232 F2d 699 (mandamus not available to review trial judge's exercise of power conferred upon him by law); *Aspinook Corp. v. Bright*, 165 F2d 294 (denying mandamus to compel court to order cost bond); *Dilling v. United States*, 79 App DC 47, 142 F2d 473 (denying mandamus to compel judge to disqualify himself for bias).

Where order denying defendants' motion to transfer cause for convenience of parties and witnesses, pursuant to 28 USC 1404(a), constitutes abuse of discretion, sufficiently "extraordinary cause" to em-

§ 84.47. — Duties and acts of court officials.

Mandamus lies in a proper case to compel the performance of a duty by officials of a court.⁸⁷

§ 84.48. — Vacation of acts.

Mandamus is ordinarily a remedy for official inaction, and not to compel the undoing of acts already done, or to correct wrongs already perpetrated.⁸⁸ But orders and decisions of cabinet officers or other federal officers or boards made without authority of law and therefore void, may be undone by mandamus to vacate them.⁸⁹ The same is true with respect to an order or decision of a court or judge.⁹⁰

power court of appeals to grant writ of mandamus is presented. *Ford Motor Co. v. Ryan*, 182 F2d 329. See also *Torres v. Walsh*, 221 F2d 319 (denying petition where no extraordinary case presented); *Chicago, R. I. & P. R. Co. v. Igoo*, 220 F2d 299.

Whether answers to interrogatories in garnishment proceedings are sufficient as against contention that garnishee has defaulted is matter for judicial discretion, which may be reviewed, but judge may not be directed as to how he shall exercise his discretion. *Security Savings & Commercial Bank v. Aukam*, 120 F2d 722.

⁸⁶ The Veterans' Bureau or Administrator of Veterans' Affairs, in passing upon application for disability compensation performs quasi-judicial act involving exercise of discretion, and mandamus will not lie to compel allowance of such claim. *Smith v. United States*, 83 F2d 631.

"Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 US 385, 77 L Ed 1273, 53 S Ct 607.

⁸⁷ Mandamus to United States commissioner, rather than habeas corpus, was proper mode for securing

release of poor convict after 30 days' imprisonment. *Grier v. Kennan*, 64 F2d 605, 608.

Mandamus in court of appeals against official reporter of district court of Hawaii requiring him to furnish United States with a transcript for appeal in an action to which United States was a party, see *United States v. Metzger*, 133 F2d 82. The reporter in this case was, unlike the reporters in other district courts, an officer appointed pursuant to former 48 USC 644. Cf. *Miller v. United States*, 317 US 192, 87 L Ed 179, 63 S Ct 187.

⁸⁸ *Larsen v. Switzer*, 183 F2d 850; *United States v. Nordbye*, 75 F2d 74.

Proper remedy for taxpayer to enforce against Treasurer of Puerto Rico the right to credit for overpayment of income tax. *Sancho v. Serralles*, 106 F2d 125.

Mandamus as remedy of certificate holder or bondholder to compel city officials to assess or reassess and enforce collection, see *Gray v. City of Santa Fe, N. M.*, 89 F2d 406.

⁸⁹ *United States ex rel. Turner v. Fisher*, 222 US 204, 56 L Ed 165, 32 S Ct 37; *Garfield v. United States*, 211 US 249, 53 L Ed 168, 29 S Ct 62.

⁹⁰ In re National Labor Relations Board, 304 US 486, 82 L Ed 1482, 58 S Ct 1001; In re United

D. *Practice and Procedure*

1. In District Courts

§ 84.49. Generally.

Relief in the district courts, obtainable by writs of mandamus before their abolition, is now obtainable by provision of Rule 81(b) in an appropriate action or on an appropriate motion under the practice prescribed by the Rules of Civil Procedure.⁹¹ The Rule has substituted a simpler procedure for affording the relief.⁹² The Rules would appear to supersede acts of Congress relating to mandamus and in conflict with the Rules.⁹³ The Rules, moreover, insofar as applicable, rather than state law or practice, govern proceedings in the nature of mandamus in the district courts.⁹⁴

§ 84.50. Venue.

Formerly, because of the rule that actions against executive officers of the government, including cabinet officers, were required to be brought in the district of their official residence, which is the District of Columbia, mandamus actions in a federal court against such officers might be dismissed for improper venue if brought outside the District

States, 286 F2d 556 (mandamus to vacate unauthorized judgment of acquittal in criminal case).

Compelling federal district judge to vacate order staying proceedings in action of which court had jurisdiction by reason of diversity and jurisdictional amount, although determination as to state law necessary, see *In re President and Fellows of Harvard College*, 149 F2d 69.

Denial of mandamus to require trial judge to vacate order overruling motion to dismiss complaint for lack of jurisdiction. *Ward Baking Co. v. Holtzoff*, 164 F2d 34.

⁹¹ Rule 81(b), Rules Civ Proc.

Practice in mandamus prior to Rules of Civil Procedure, see *West Virginia Northern R. Co. v. United States*, 134 F 198 (mandamus under Interstate Commerce Law); *Cleveland v. United States*, 127 F 667.

Application of Rules in District of Columbia, see *Globe Restaurant v. Payne*, 72 F Supp 677.

The procedure to obtain mandamus is provided for more or less in detail in the District of Columbia Code. DC Code 1961, §§ 16-1001 to 16-1010. See also *United States ex rel. Arant v. Lane*, 249 US 367, 371, 63 L Ed 650, 39 S Ct 293 (antecedating Rules of Civil Procedure).

⁹² *McBride v. Western Union Tel. Co.*, 171 F2d 1.

⁹³ "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 USC 2072.

⁹⁴ Federal courts are not restricted by the methods prescribed by state practice. See *Evans v. Yost*, 255 F 726 (antecedating Rules of Civil Procedure).

of Columbia, although the officer might, of course, waive his right to be sued in the District of Columbia.⁹⁵ However, under the Judicial Code as amended in 1962, an action in the nature of mandamus against an official or agency of the United States⁹⁶ may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved.⁹⁷

In other instances venue of proceedings in the nature of mandamus in the district courts would appear to be governed by the usual rules of venue.⁹⁸

§ 84.51. Parties; plaintiffs or petitioners.

Parties in proceedings in the nature of mandamus in the district courts are governed by the Rules of Civil Procedure pertaining to parties, since Rule 81(b) provides that such proceedings shall be under the practice prescribed in the Rules.⁹⁹ It may be required by statute that mandamus proceedings be instituted by the Attorney General or some other officer.¹ Otherwise, the proceeding may be instituted and maintained by a private person specifically injured by the failure of performance of the duty in question.² Of course, the plaintiff must have sufficient legal interest in order to

⁹⁵ See § 4.11, ante.

⁹⁶ Jurisdiction of such actions is granted by 28 USC 1361, added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744.

⁹⁷ 28 USC 1391(e), added by Act of Oct 5, 1962, PL 87-748, 76 Stat 744 (which also authorized extraterritorial service of process).

⁹⁸ Venue generally, see ch 4, ante.

⁹⁹ Parties, see ch 21, ante.

Parties in mandamus proceedings to enforce a judgment, see § 84.71, post.

Abatement of action and substitution of new party on death or cessation of office-holding, see ch 27, ante.

¹ Mandamus to compel carriers to perform duties imposed by Inter-

state Commerce Act issues upon application of Attorney General of United States at request of Interstate Commerce Commission. 49 USC 19a(1), 20(9).

Mandamus to compel removal of bridges as obstructions from navigable waters or to enforce orders of Secretary of War respecting same is instituted under direction of the Attorney General of the United States at request of Secretary of War. 33 USC 495.

² Private persons may apply for mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer. *Union Pac. R. Co. v. Hall*, 91 US 343, 23 L Ed 428.

maintain the proceeding.³ A direct,⁴ but not an indirect or remote, financial benefit is sufficient.⁵

§ 84.52. — Relators.

Rule 81(b) in abolishing the writ and substituting a suitable action or motion provides a simpler process and makes unnecessary the formality of pleading in the relator form in an action by a private person.⁶

§ 84.53. — Defendants or respondents.

Formerly the party against whom the writ was directed was called the respondent. Under the present practice in district courts, he should be referred to as the defendant. In the absence of governing statute, the only proper defendants are those upon whom the duty is imposed by law.⁷

³ *Ex parte Humes*, 149 US 192, 37 L Ed 698, 13 S Ct 836; *United States ex rel. American Silver Producers' Ass'n v. Mellon*, 32 F2d 415.

In a state case removed where a private person petitions for mandamus "on behalf of the people of the state," he must show in his petition that he is a citizen of state, and that his interests as such citizen are injuriously affected by acts complained of. *People ex rel. Van Dyke v. Colorado Cent. R. Co.*, 42 F 638.

⁴ Plaintiff must financially benefit from the mandamus, in order to maintain proceeding. *United States ex rel. American Silver Producers' Ass'n v. Mellon*, 32 F2d 415.

⁵ *United States ex rel. American Silver Producers' Ass'n v. Mellon*, 32 F2d 415.

⁶ *McBride v. Western Union Tel. Co.*, 171 F2d 1 (action to compel restoration of telegraphic service under 47 USC 406, authorizing the district courts to issue a writ of mandamus upon the relation of any person alleging violation of the Communications Act).

Ordinarily, a relator is not required. *United States v. Malmin*, 272 F 785. See also *Northern Pac.*

R. Co. v. Territory of Washington, 142 US 492, 35 L Ed 1092, 12 S Ct 283.

The right of a state to be a relator, if a case were made, appears not to have been doubted, but rather, affirmed. *Ex parte Dennison*, 24 How (65 US) 66, 16 L Ed 717.

⁷ Where command requiring performance of particular duty, if granted, would necessarily be directed to Administrator of Veterans' Affairs and not to United States, the Administrator was indispensable party defendant without whom the action could not proceed. *Hospoder v. United States*, 209 F2d 427.

In absence of statute, parties only incidentally interested are not entitled to defend. *Normandy Beach Development Co. v. United States ex rel. Brown-Crummer Inv. Co.*, 69 F2d 105.

Convict is not entitled to appear in person and act as own attorney, see *De Cloux v. Johnston*, 70 F Supp 718.

Objection that petitioner was also disbursing officer and as such made respondent was held to be technical one. *Alexander v. Mare*, 5 F2d 964.

§ 84.54. — Joinder.

Joinder of parties⁸ in mandamus as in other proceedings in the district courts may be permissive⁹ or necessary.¹⁰ Under Rule 19 persons having a joint interest must be made parties and be joined on the same side as plaintiffs or defendants, subject to provisions of the Rule.¹¹

§ 84.55. Pleading.

Since Rule 81(b), of the Rules of Civil Procedure provides that relief heretofore obtainable by mandamus may be obtained by appropriate action or motion under the practice prescribed in the Rules, the provisions contained in the Rules as to pleading and complaints are applicable.¹² The complaint must state facts constituting grounds for the extraordinary remedy,¹³ show the legal right or interest of the plaintiff in having the duty or act compelled,¹⁴ and show the

⁸ In mandamus to compel corporate acts, officers of the corporation whose duty it is as such to do the things sought to be coerced, or to cause them to be done, are proper defendants. *United States v. West Virginia N. R. Co.*, 125 F 252, affd 134 F 198.

Secretary of corporation, in suit to enforce inspection of books. *Greenough v. Independence Lead Mines Co.*, 45 F2d 659.

Individual members of a county board, and not county, should be named defendants. *First Nat. Bank of Woodbine, Iowa v. Harrison County, Iowa*, 57 F2d 56.

⁹ Rule 20, Rules Civ Proc.

¹⁰ Rule 19, Rules Civ Proc.

In mandamus to compel Director of Veterans' Bureau to place petitioner upon and continue him on emergency officers' retired list of army and to cause him to be paid retirement pay, it was not necessary to make disbursing officer of bureau a party, since he was subject to control of director. *Hines v. United States ex rel. Cavanaugh*, 39 F2d 517.

Strangers to relief sought and against whom no command will be

directed need not be made parties. *United States v. Malmin*, 272 F 785.

¹¹ Rule 19(a), Rules Civ Proc.

It is not necessary that all persons in the same right join, but any one of them may bring the action. *Thompson v. Perris Irr. Dist.*, 116 F 769 (antedating Rules).

¹² Pleadings and motions, see ch 14, ante.

¹³ *Clearwater County v. Pfeffer*, 236 F 183; *United States ex rel. Harshman v. Brown*, 41 F 481.

And see *In re Dennett*, 215 F 673.

¹⁴ *Mayor of City of Helena v. United States*, 104 F 113; *People ex rel. Van Dyke v. Colorado Cent. R. Co.*, 42 F 638 (in removed case plaintiff suing on behalf of people of state must show his interest as citizen injuriously affected).

The complaint must show that plaintiff is financially in a position to benefit from the mandamus. *United States ex rel. American Silver Producers' Ass'n v. Mellon*, 32 F2d 415.

nature of defendant's duty and his failure or refusal to perform it as required by law.¹⁵

If demand upon defendant to perform the duty sought to be enforced is necessary, the making of such demand and its refusal should be pleaded or failure to make it explained or excused.¹⁶ But it is sufficient if the allegations show that such demand is unnecessary, or would have been vain or useless.¹⁷ Moreover, plaintiff need not deny or negative the existence of facts which would justify defendant in refusing to comply with the demand made upon him.¹⁸ The objection that the complaint does not show a demand upon defendant to do his duty in respect to the acts sought to be compelled, and a refusal or failure to comply with such demand, must be taken promptly, or it will be waived.¹⁹

The demand for judgment should be for the relief to which plaintiff deems himself entitled, but relief in the alternative or of several different types may be demanded the same as in other actions.²⁰ A party may state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both.²¹

§ 84.56. Trial or hearing.

Trials in actions or hearings on motions to obtain relief in the nature of mandamus in district courts are governed by the Rules of Civil Procedure pertaining to trials, since Rule 81(b) provides that such proceedings shall be under the practice prescribed by the Rules.²² While mandamus is a legal proceeding, it is not one in which a right to jury trial is preserved by the Seventh Amendment.²³ Leastwise,

¹⁵ An amended petition against municipality to require assessment and collection of taxes in year succeeding tax year first designated, which had expired, was not insufficient because not expressly setting forth recurrent failure and refusal to levy required taxes in succeeding year, that being fairly implied. *City of Hialeah v. United States ex rel. Harris*, 87 F2d 953.

¹⁶ *United States ex rel. St. Louis Southwestern Ry. Co. v. Interstate Commerce Commission*, 290 F 264, affd 264 US 64, 68 L Ed 565, 44 S Ct 294; *United States v. Indian Grave Drain. Dist.*, 85 F 923.

¹⁷ *Board of County Com'rs of Santa Fe County v. Territory of New Mexico*, 215 US 296, 54 L Ed 202, 30 S Ct 111; *City of Port Townsend, Wash. v. First Nat. Bank*, 241 F 32.

¹⁸ *United States ex rel. Harshman v. Brown*, 41 F 481.

¹⁹ *Board of Sup'rs of Presque Isle County v. Thompson*, 61 F 914.

²⁰ Rule 8(a), Rules Civ Proc.

²¹ Rule 8(e)(2), Rules Civ Proc.

²² Trials and hearings, see ch 31, ante.

²³ In *Delgado v. Chavez*, 140 US 586, 35 L Ed 578, 11 S Ct 874, concerning mandamus under terri-

there is no right to trial by jury in the proceeding where only legal and not factual issues are in dispute, as is often the case.²⁴

§ 84.57. Dismissal or discontinuance.

In actions for relief in the nature of mandamus there may be voluntary dismissals, without a court order or with such an order, or involuntary dismissals, subject to the rules pertaining to dismissals in civil actions generally.²⁵ A motion to dismiss the complaint is proper.²⁶ It has been held good ground for dismissal of the complaint that it was prematurely filed,²⁷ or that there was delay in filing it amounting to laches.²⁸ Dismissal should be ordered where it becomes apparent that there is no longer any occasion for the relief or any subject matter involved upon which the judgment can operate.²⁹

§ 84.58. Judgment or order.

Judgments or orders in proceedings in the nature of mandamus in the district courts are subject to the Rules of Civil Procedure pertaining to judgments in civil actions, since Rule 81(b) provides that such actions shall be under the

torial laws of New Mexico, it was stated that "the determination of the facts by a jury in a mandamus case is not a necessary preliminary to a valid judgment." This was upon a collateral attack by habeas corpus to discharge from commitment for contempt of the writ.

²⁴ *Marion County v. Coler*, 75 F 352.

²⁵ Rule 41, Rules Civ Proc.

For practice respecting dismissals prior to adoption of Rules of Civil Procedure, see *Reeside v. Waller*, 11 How (52 US) 272, 13 L Ed 693; *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 56 App DC 52, 8 F2d 1011, affd 275 US 1, 72 L Ed 131, 48 S Ct 12 (dismissal in view of previously acquired jurisdiction of same controversy by court of co-ordinate authority); *In re Old Colony Trust Co.*, 2 F2d 407 (involuntary dismissals); *United States ex rel. Coffman v. Norfolk & W. Ry. Co.*, 118 F 554.

Dismissal and nonsuit, see ch 29, ante.

²⁶ Motion to dismiss instead of answer permitted under Rules of Civil Procedure 12(b). *International Trading Corp. v. Edison*, 109 F2d 825.

But every defense except those that may be made by motion must be asserted in a responsive pleading if one is required. Rule 12(b), Rules Civ Proc.

²⁷ *United States ex rel. Western Union Tel. Co. v. Interstate Commerce Commission*, 279 F 316.

²⁸ *United States ex rel. Arant v. Lane*, 249 US 367, 63 L Ed 650, 39 S Ct 293.

²⁹ *United States ex rel. Norwegian Nitrogen Products Co., Inc. v. United States Tariff Commission*, 274 US 106, 71 L Ed 949, 47 S Ct 499; *United States ex rel. Coffman v. Norfolk & W. R. Co.*, 118 F 554.

practice prescribed by the Rules.³⁰ The judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.³¹ Relief from the judgment may be had in accordance with Rule 60,³² and stay of proceedings to enforce the judgment may be granted in a proper case and in accordance with Rule 62.³³

§ 84.59. — Enforcement, operation and effect.

A positive duty of obeying a writ, judgment or order of or in the nature of mandamus rests upon those to whom it is directed.³⁴ The court has power to compel such obedience, usually by citation and punishment for contempt,³⁵ unless defendant shows a sufficient excuse for disobedience.³⁶

³⁰ See Rules 54 et seq. and 81(b), Rules Civ Proc.

Judgments in general, see ch 35, ante.

³¹ Under authorization of Rule 54(c) of Rules of Civil Procedure, court may enter judgment for proper relief in circumstances. *Snyder v. Buck*, 75 F Supp 902 (relief by way of mandatory injunction).

Petition or complaint broad enough to warrant giving relief which facts show plaintiff entitled to, where mandamus itself not proper. *Truth Seeker Co. v. Durning*, 147 F2d 54.

³² Relief from judgment or order, see Rule 60, Rules Civ Proc.

Motion to alter or amend a judgment, see Rule 59(e), Rules Civ Proc.

It was within power of court to vacate or set aside the judgment upon a proper showing for such relief. *Fairbanks v. Amoskeag Nat. Bank*, 30 F 602.

An order in nature of a writ of mandamus may be modified where in the light of subsequent events its commands have become improper. *DeFoe v. Town of Rutherfordton*, 122 F2d 342, 345.

But one not a necessary party to the mandamus proceedings was not entitled to have the judgment set

aside on petition with leave to re-argue the case. *United States v. Malmin*, 272 F 785.

Opening, amending and vacating judgments, see ch 37, ante.

³³ Rule 62, Rules Civ Proc.

Exceptional conditions of case may induce court, in exercise of its discretion, temporarily to suspend or stay the judgment. *Ex parte United States*, 242 US 27, 61 L Ed 129, 37 S Ct 72.

Stay of enforcement of judgments, see § 36.03, ante.

³⁴ *United States ex rel. Jones v. City of West Palm Beach*, 94 F2d 320, 114 ALR 1282; *United States v. Macon County Court*, 45 F 400.

³⁵ *In re Copenhaver*, 54 F 660; *United States v. Green*, 53 F 769; *President ex rel. Moran v. City of Elizabeth*, 40 F 799.

Statute providing for imposition of fine for disobedience of mandamus did not affect power of court to punish for contempt. *In re Delgado*, 140 US 586, 35 L Ed 578, 11 S Ct 874 (involving mandamus in territorial court).

³⁶ *United States ex rel. Interstate Commerce Commission v. Seaboard Ry. Co. of Alabama*, 85 F 955; *President ex rel. Moran v. City of Elizabeth*, 40 F 799.

But an officer of a municipality cannot be punished for disobedience of a judgment which does not bind him as a successor in office,³⁷ or where he is without power under the law to comply with the command of the judgment.³⁸ Nor is an officer who has a right of resignation guilty of contempt if he resigns rather than obey a mandamus.³⁹

§ 84.60. Costs.

In civil actions in the federal district courts, costs against officers and agencies of the United States shall be imposed only to the extent permitted by law.⁴⁰

2. In Appellate Courts

§ 84.61. Generally; leave to file petition.

Mandamus proceedings in the Supreme Court and in courts of appeals are to some extent similar. The initial step is a petition,⁴¹ or it is a motion⁴² or application⁴³ addressed to the court,⁴⁴ in the form required by applicable practice and rules of court,⁴⁵ for leave to file a petition for the writ.⁴⁶

³⁷ *United States v. Labette County*, 7 F 318, 2 McCrary 27.

³⁸ *United States v. Green*, 53 F 769; *President ex rel. Moran v. City of Elizabeth*, 40 F 799.

³⁹ *United States v. Justices of Lauderdale County*, 10 F 460.

⁴⁰ Rule 54(d), Rules Civ Proc.

Cases antedating Rules and permitting costs against defendant officer, plaintiff prevailing, unless Congress had absolved defendant: *United States ex rel. McBride v. Schurz*, 102 US 378, 407, 26 L Ed 167, 219; *United States ex rel. Lewis v. Boutwell*, 17 Wall (84 US) 604, 21 L Ed 721.

Award of costs against federal officers and agencies, see § 38.13, ante.

⁴¹ For example, see Sup Ct Rule 31; Third Circuit Rule 19.

⁴² Sup Ct Rule 31(1) requires petition to be prefaced by a motion for leave to file petition. See also *Ex parte Texas*, 315 US 8, 86 L Ed 579, 62 S Ct 418; *Ex parte Northern Pac. Ry. Co.*, 280 US 513, 74 L Ed

585, 50 S Ct 14; *In re Peterson*, 253 US 300, 64 L Ed 919, 40 S Ct 543.

⁴³ "The orderly course of presenting a petition for mandamus to this court is to present a petition to the court for leave to file the petition for a mandamus." *Hosey v. Kennamer*, 21 F2d 64.

⁴⁴ *Hosey v. Kennamer*, 21 F2d 64.

⁴⁵ See Sup Ct Rule 31; Third Circuit Rule 19; Sixth Circuit Rule 29 and Seventh Circuit Rule 19 set out in Vol 16.

Court of appeals may, if it sees fit, treat informal papers as sufficient application for leave to file mandamus petition. This was done in *Hosey v. Kennamer*, 21 F2d 64, where counsel's brief and authorities were treated as sufficient application.

⁴⁶ Sup Ct Rule 31 provides that petition in any proceeding seeking issuance of writ by Supreme Court authorized by 28 USC 1651(a) shall