by the same petitioner. The petitioner may plead to or traverse all the *material* averments in the answer (consequently a traverse of an immaterial allegation would seem to be bad, though *quære*, as the defendant, for his own protection, must set out his whole case), and the defendant must then take issue or demur to the plea or traverse within five days, and such further proceedings shall thereupon be had as if the petitioner had brought an action on the case for a false return. If issue be joined, it must be tried by a jury, unless by the agreement of parties, appearing upon the record, that it may be tried by the Court, Eichelberger v. Sifford, 27 Md. 321,[4] and in case of a verdict for the petitioner or a determination in his favor by the Court, or judgment for him upon demurrer or for want of plea, he shall recover his damages and costs as he might have done in an action on the case for a false return, to be levied by attachment or execution, and thereupon a *peremptory mandamus* shall issue. If the judgment be the other way, the defendant recovers his costs. If the defendant do not file his answer in time, the Court is to hear the application *ex parte* at a short day, and if it be of opinion that the facts and law of the case authorize the granting of a *mandamus*, a *peremptory mandamus* shall be ordered to issue, with costs. Otherwise the petition is to be dismissed with costs.

It is held, in construction of these provisions, that the essential nature of the writ or the remedy is not altered by them. *Mandamus* is still a prerogative writ, not demandable *ex debito justitiæ*, but granted, at all times, in the sound discretion of the Court.[5] Hence the provision of the Code that upon verdict, &c., for the petitioner a peremptory *mandamus shall* issue, &c., is not to be understood as taking away the discretion of the Court still to refuse the writ, if, for sufficient legal cause, it shall appear to the Court that it ought not to issue. On the other hand, it has, when issued, the same force and effect as the peremptory writ at common law. The defendant cannot disobey it for any cause or reason which might have been urged in resisting the application for it. It cannot be stayed by injunction. And, ordinarily, no return except a certificate of obedience will be accepted. However, it may be quashed or set aside if bad in substance on its face, or if it have prematurely, or improperly, or unnecessarily issued, or if it be impossible or illegal to obey it, Weber v. Zimmerman, 23 Md. 45; see S. C. 22 Md. 156. The answer of the defendant may rely upon matter of fact and matter of law together, and it is held that the petitioner *must* take issue or demur to such defences, Eichelberger v. Sifford *supra;* but it will be observed that the language of the Code, like that of the Stat. of Anne, does not authorize the petitioner

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[4] Upshur v. Baltimore, 94 Md. 760; Wailes v. Smith, 76 Md. 484; 157 U. S. 271. As to the defense of limitations in a *mandamus* proceeding, see Georges Creek Co. v. Alleghany Co., 59 Md. 255.

[5] Hardcastle v. R. R. Co., 32 Md. 35; Pumphrey v. Baltimore, 47 Md. 145; Gross v. Baltimore, 111 Md. 543. But where the question involved concerns the passage or existence of a municipal ordinance, it should be tried by the court alone. Creager v. Hooper, 83 Md. 504.