

It is incumbent upon the petitioner either to take issue or demur. *Eichelberger v. Sifford*, 27 Md. 328; *Barney v. State*, 42 Md. 490.

For a traverse held to be defective, see *Harwood v. Marshall*, 10 Md. 465.

Cited but not construed in *Weber v. Zimmerman*, 23 Md. 53.

An. Code, 1924, sec. 6. 1912, sec. 6. 1904, sec. 6. 1888, sec. 6. 1858, ch. 285, sec. 4.

6. If issue shall be joined on such proceedings, the same shall stand for trial on the second day of the next succeeding term of such court (in case such issue shall be joined in the recess of such court); and if such issue shall be joined during the session, then the same shall stand for trial during such term, unless sufficient cause shall be shown to the court by the party defendant for the continuance thereof, in which case such issue shall be heard on the second day of the next succeeding term of such court, unless the parties shall agree upon an earlier day.

An. Code, 1924, sec. 7. 1912, sec. 7. 1904, sec. 7. 1888, sec. 7. 1858, ch. 285, sec. 4.

7. Such issue shall be tried by a jury if either party desire it; but they may be heard or determined by the court if both parties agree; and in case a verdict shall be found for the petitioner, or if the court upon hearing determine in favor of the petitioner, or judgment be given for him upon demurrer or for want of a plea, such petitioner shall thereupon recover his damages and costs as he might have done in an action on the case for a false return, to be levied by execution or attachment and a peremptory writ of mandamus shall be granted thereupon without delay against the defendant.

In absence of an agreement of parties, issues of fact must be passed upon by a jury. *Eichelberger v. Sifford*, 27 Md. 329; *Upshur v. Baltimore*, 94 Md. 760. Cf. *Creager v. Hooper*, 83 Md. 504.

The passage and existence or non-existence of a statute or ordinance are questions of law and though framed as issues of fact, must be passed on by court without a jury. *Creager v. Hooper*, 83 Md. 504.

A claim for costs and damages is *inchoate*, and cannot be considered as personal assets until judgment is entered. *Booze v. Humbird*, 27 Md. 4.

Cited but not construed in *Weber v. Zimmerman*, 23 Md. 53; *Baltimore v. Libowitz*, 159 Md. 34.

See sec. 11.

An. Code, 1924, sec. 8. 1912, sec. 8. 1904, sec. 8. 1888, sec. 8. 1858, ch. 285, sec. 4.

8. If judgment shall be given for the defendant, he shall recover his costs of suit to be levied in manner aforesaid.

An. Code, 1924, sec. 9. 1912, sec. 9. 1904, sec. 9. 1888, sec. 9. 1858, ch. 285, sec. 5.

9. If the defendant shall neglect to file his answer to the petition by the day named in the order of the judge after being served with notice thereof, the said judge shall thereupon proceed to hear the said petition *ex parte* within five days thereafter, and if he shall be of the opinion that the facts and law of the case authorize the granting of a mandamus as prayed, he shall thereupon without delay order a peremptory mandamus to issue and shall also adjudge to the petitioner his costs of suit.

When defendant fails to answer, the writ cannot issue without due proof of facts and judge's being satisfied on law. *Sudler v. Lankford*, 82 Md. 148; *Legg v. Annapolis*, 42 Md. 222; *Upshur v. Baltimore*, 94 Md. 760; *Beasley v. Ridout*, 94 Md. 648.

A statement in opinion of lower court that "at the hearing the questions at issue were waived or admitted" is equivalent to full proof. *Beasley v. Ridout*, 94 Md. 640.

This section does not take away the discretion of the court to refuse the writ—see notes to sec. 1. *Weber v. Zimmerman*, 23 Md. 53.

Cited but not construed in *Baltimore v. Libowitz*, 159 Md. 34.