

to demur⁶ to the answer; and *in construction of the Stat. of Anne **697** it was determined that the prosecutor could not demur to the return. It seems from the same case, that an answer relying upon matter of law will be treated as in the nature of a demurrer to the petition;⁷ and the Court there actually assumed a matter of fact, as not being denied, and gave judgment accordingly.

⁶ But the established practice in Maryland is that a demurrer may be filed to the answer, or any subsequent pleading, or any part of them. *Hardcastle v. R. R. Co.*, 32 Md. 32; *Barney v. State*, 42 Md. 489; *Frederick Co. v. Fout*, 110 Md. 169; *Anne Arundel Co. v. Sugar Co.*, 99 Md. 481; *Hooper v. New*, 85 Md. 565; *Creager v. Hooper*, 83 Md. 490; *Field v. Malster*, 88 Md. 694; *Devin v. Belt*, 70 Md. 352; *Jackson v. Hopkins*, 113 Md. 557; *Hummelshime v. Hirsch*, 114 Md. 39; *Cull v. Wheltie*, 114 Md. 77; *Semmes v. Rowland*, 114 Md. 266, 267.

⁷ *Curlander v. King*, 112 Md. 523; *Upshur v. Baltimore*, 94 Md. 760; *Prince George's Co. v. Bladensburg*, 51 Md. 467.

And a demurrer may be filed directly to the petition. *Gross v. Baltimore*, 111 Md. 543; *Wight v. Heublein*, 111 Md. 652; *Agricultural College v. Atkinson*, 102 Md. 557; *Beasley v. Ridout*, 94 Md. 641; *Duvall v. Swann*, 94 Md. 620; *Pumphrey v. Baltimore*, 47 Md. 147.

Before ordering a *mandamus*, however, the court must be satisfied of the truth of the allegations of the petition, whether the hearing is on general demurrer to the petition, or on petition and answer, or merely *ex parte*. The facts may be established by an answer admitting them, but they cannot be established by an answer which neither admits nor denies them, or by a demurrer to the petition, since a demurrer has no such effect in a *mandamus* proceeding. *Worcester Co. v. School Comrs.*, 113 Md. 314; *Upshur v. Baltimore*, 94 Md. 760; *Beasley v. Ridout*, 94 Md. 641; *Hooper v. New*, 85 Md. 586; *Creager v. Hooper*, 83 Md. 504; *Sudler v. Lankford*, 82 Md. 142; *Legg v. Annapolis*, 42 Md. 222.

The writ of *mandamus* abates when performance by the defendant of the personal duty ordered becomes impossible by his death, or retirement from office. *U. S. v. Boutwell*, 17 Wall. 604.