

An. Code, sec. 22. 1904, sec. 22. 1888, sec. 20. 1790, ch. 42, sec. 1. 1826, ch. 200, sec. 10. 1830, ch. 186, sec. 1. 1849, ch. 88, sec. 1. Rule 8.

**24.** In all cases where judgments shall be reversed or affirmed by the court of appeals, and it shall appear to the court that a new trial ought to be had, such new trial shall be awarded, and a certified copy of the opinion and judgment of the court of appeals shall be transmitted forthwith to the court from which the appeal was taken, to the end that said cause may be again tried as if it had never been tried; and no writ of *procedendo*, with transcript of record, shall be transmitted, as heretofore practised.<sup>1</sup>

**Application of this section.**

This section has no application where the record does not disclose a legal cause of action. *Lester v. Hardesty*, 29 Md. 55.

Where the court reverses the order of the court below in a mandamus case, but the judgment of reversal is not necessarily final, this section is applicable. *Harwood v. Marshall*, 9 Md. 107.

This section has no application where the judgment is in favor of the plaintiff and that judgment is affirmed, the defendant not having availed himself of evidence which he might have produced at the trial. *McKee v. McKee*, 16 Md. 521. And see *Manning v. Hays*, 6 Md. 10.

For a full discussion of when this section operates, see *Archer v. State*, 74 Md. 432; *Farmers' Bank v. Bowie*, 4 Md. 295; *Kennerly v. Wilson*, 2 Md. 259.

This section applied. *Canton Bank v. American Bonding Co.*, 111 Md. 53; *State v. Baltimore, etc., R. R. Co.*, 77 Md. 493; *Lucke v. Clothing Cutters, etc.*, 77 Md. 411; *Earnshaw v. Sun Mutual, etc., Society*, 68 Md. 477; *Worthington v. Cooke*, 52 Md. 310; *Farmers' Bank v. Thomas*, 37 Md. 258; *Howard v. Carpenter*, 22 Md. 256; *Richardson v. Hall*, 21 Md. 405; *Beall v. Beall*, 7 Gill, 237; *Parker v. Sedwick*, 4 Gill, 325.

**Generally.**

The propriety of the new trial must appear from the record. *McCann v. Sloan*, 26 Md. 82; *B. & O. R. R. Co. v. Black*, 107 Md. 668.

A demurrer to a plea having been overruled, and the plaintiff having declined to reply after leave, the case will not be remanded. *Wiley v. Heaps*, 89 Md. 47.

Instead of granting a new trial as this section authorizes, the court of appeals may merely grant leave to the appellants to file an application for a new trial. *State v. Wilson*, 107 Md. 137.

Where a count in a declaration was technically bad, but an instruction that there was no evidence legally sufficient under the pleadings to entitle the plaintiff to recover was apparently based on grounds which the court of appeals did not concur in, the case was affirmed but remanded for a new trial under this section. *Tyng v. Woodward*, 121 Md. 438.

The court of appeals may award a new trial, if it appears that a new trial should be had, although it affirms the judgment; this power is not limited to cases disposed of on the pleadings; proviso that affirmance is without prejudice to claim of plaintiff for certain work. Purpose of this section. Cases reviewed. Md. Cas. Co. v. West Constr. Co., 139 Md. 178.

Judgment affirmed and new trial awarded under this section in order that plaintiff may prove actual value of stock. *Schneider v. Brewing Co.*, 136 Md. 156.

This section does not authorize the court of appeals to review the action of the lower court upon a motion for a new trial. *Produce Exchange v. N. Y., P. & N. R. Co.*, 130 Md. 113.

Judgment reversed without awarding a new trial but with leave to appellees to apply for a new trial; such application to be then determined. *Nat. Life Ins. Co. of U. S. v. Fleming*, 127 Md. 188.

<sup>1</sup> Sec. 2 of Rule 8 is as follows: When an appeal is dismissed or a judgment or decree is affirmed or reversed without being remanded, the clerk of this court shall transmit a copy of the docket entries, under the seal of the court, to the court from which the appeal is taken, or writ of error granted, as soon as practicable, not later than thirty days after the case is disposed of by this court.