and before offering any evidence or defense, pray the court to instruct the jury that the plaintiff in such action has offered no evidence legally sufficient to entitle the plaintiff to a verdict on any one or more counts or issues, or offer a prayer to the same effect, and the court shall reject such prayer, the defendant shall not be precluded from offering evidence of defense, but such defendant may offer evidence of defense as fully and to the same extent as though such prayer had not been offered.

This section has no application where court grants defendant's prayer to take case from the jury at end of plaintiff's case. Object of this section. Schwanteck *v.* Berner, 96 Md. 143.

Where a defendant's prayer to take case from jury offered at close of plaintiff's testimony is refused, and defendant proceeds to put in his case, the ruling of court on such prayer is not open for review upon appeal. This section distinguished from sec. 10. Barabasz *v.* Kabat, 91 Md. 55; New York, etc., Co. *v.* Jones, 94 Md. 35; United Rys. Co. *v.* Deane, 93 Md. 624; Wilkin Mfg. Co. *v.* Melvin, 116 Md. 108.

As to the burden of proof in suits against a railroad company for injury to live stock and from fire, see art. 23, sec. 244.

See art. 5, secs. 10 and 11.

An. Code, sec. 91A. 1914, ch. 109.

97. In the trial of all actions at law in the courts of this State no question as to the sufficiency of the pleadings, as stating a cause of action or a defense, as the case may be, which might have been raised by demurrer, shall be raised by prayer or instruction at the trial; provided, however, that nothing in this Section shall be held to prevent the court from passing on the question of the legal sufficiency of the evidence to establish a cause of action or defense, although the determination of such question may involve the decision of questions of law which might be raised by demurrer.

Even if it could be said that a *narr.* in a replevin suit was defective because it was in *detinuit* instead of *detinet,* or on ground of a variance, neither question was presented by defendant's prayers. Burrier *v.* Cunningham Co., 135 Md. 142.

A prayer held not sufficient to raise the question of misjoinder or variance, in view of art. 5, sec. 11. This section does not relieve the defect. Rasst *v.* Morris, 135 Md. 256; Fulton Bldg. Co. *v.* Stichel, 135 Md. 544.

Cited but not construed in Conowingo Land Co. *v.* McGaw, 124 Md. 652.

See sec. 7, *et seq.*

Measure of Damages for Abstracting Minerals from Plaintiff's Land.

An. Code, sec. 92. 1904, sec. 92. 1894, ch. 287, sec. 87A.

98. In the absence of fraud, negligence or wilful trespass, the measure of damages for the wrongful working and abstracting of another's minerals is the value of the minerals in their native state, before severance, to the person from whose property they were taken at the time of the taking; but if one furtively or in bad faith works and abstracts minerals from the land of another, the party so offending may be charged with the whole value of the minerals taken and allowed no deduction in respect of his labor and expenses in getting them.

Measure of damages prior to this section for wrongful trespass upon plaintiff's lands, and mining and carrying away his coal. This section does not relieve parties guilty of negligence from measure of damages fixed by prior decisions. Measure of damages not affected by proceeding being in equity. Evidence shows negligence on part of defendant. Bill and answer in equity. Mt. Savage George's Creek Coal Co. *v.* Monahan, 132 Md. 660. Strathmore Mining Co. *v.* Bayard C. & C. Co., 139 Md. 371. (Action of ejectment; prayers, see notes to sec. 76.)

Cited but not construed in Castleman *v.* Du Val, 89 Md. 659.