

The grounds of a motion to set aside a judgment and quash the execution thereon, must appear in the record. *Cockey v. Ensor*, 43 Md. 266.

If a demurrer to an indictment is not set out in the record, it is not properly before the court of appeals for review. *Broll v. State*, 45 Md. 359.

Cited but not construed in *Havre de Grace v. Harlow*, 129 Md. 267; *Weber v. Zimmerman*, 22 Md. 168; *Warner v. Fowler*, 8 Md. 30; *Gittings v. Mayhew*, 6 Md. 130; *Pierson v. Trail*, 1 Md. 144; *Medley v. Williams*, 7 G. & J. 70; *Shilknecht v. Eastburne*, 2 G. & J. 126.

For cases now apparently inapplicable to this section by reason of changes in the law, see *Dunham v. Clogg*, 30 Md. 292; *Baltimore v. Poultney*, 25 Md. 34 (distinguishing between the assumption of a fact in a prayer and an insufficiency of evidence to support a prayer).

As to appeals in equity, see secs. 40 and 41.

See art. 33, sec. 29, and notes, and art. 75, sec. 96.

This section applied in *Cohen v. Fink Piano Co., Inc.*, 160 Md. 443.

Cited but not construed in *Kroh v. Rosenberg*, 158 Md. 280; *Fid. & Dep. Co. v. Sanford & Brooks Co.*, 158 Md. 540; *Parks v. Skipper*, 164 Md. 396; *Loan Service v. Grossman*, 165 Md. 480.

Cited in *Fidelity & Casualty Co. v. Mahon*, 170 Md. 577; *Cohen v. State*, 173 Md. 234; *Distilleries v. Machine Works*, 174 Md. 21; *Callahan v. State*, 174 Md. 50; *Parks & Hull Apphance Corp. v. Reimsnyder*, *Daily Record*, Jan. 6, 1940.

An. Code, 1924, sec. 11. 1912, sec. 9a. 1914, ch. 110.

11. The fact that a prayer or instruction which refers in general terms to the pleadings, was granted or refused by the Court below, shall not be sufficient to show that the point or question of a variance between the pleadings and the evidence was tried and decided in the Court below, as required by section 10; and the question of such variance shall not be considered as having been raised by any prayer or instruction below, unless such prayer or instruction shall state specifically the points wherein it is claimed that such variance exist.

This section grew out of the decisions to the effect that notwithstanding sec. 10, if a prayer referred to the pleadings, the appellate court was called upon to examine them, and if there was a variance, it could be thus taken advantage of; hence judgments were sometimes reversed when the lower court had not really passed on the question. This section should be liberally construed to accomplish its purposes; a prayer held not sufficiently specific. *Western Union Tel. Co. v. Bloede*, 127 Md. 352.

Where a prayer does not specifically designate the points of variance between the pleadings and proof, the court of appeals may not consider such variance. *B. & O. R. Co. v. Walsh*, 142 Md. 237. See also *Western Md. Ry. Co. v. Shatzer*, 142 Md. 282; *Caltrider v. Weant*, 147 Md. 344; *Kahn v. Carl Schoen Silk Corp.*, 147 Md. 519; *De-Crette v. Mohler*, 147 Md. 113; *Baltimore v. Terio*, 147 Md. 334; *Kent County v. Pardee*, 151 Md. 73; *Askin v. Moulton*, 149 Md. 145; *Cohen v. Herbert*, 145 Md. 205; *Taxicab Co. v. Hamburger*, 146 Md. 129; *Kelso v. Rice*, 146 Md. 275; *Washington Ry. & Elec. Co. v. Anderson*, 168 Md. 227.

A prayer held not sufficient to raise the question of misjoinder or variance. Art. 75, sec. 97, does not relieve the defect. *Rosst v. Morris*, 135 Md. 256; *Fulton Bldg. Co. v. Stichel*, 135 Md. 544.

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 the ground of a variance, neither question was presented by defendant's prayers. *Burrier v. Cunningham Piano Co.*, 135 Md. 142.

The failure to file a replication may not be raised by reference in the prayers to the pleadings, unless such reference is specific. See notes to sec. 10. *Jenkins v. Spedden*, 136 Md. 644.

This section has no effect on right of appellant to test ruling on demurrer. This section applies to prayers. Omissions of prayers, testimony and exceptions from record. *Victory Sparkler Co. v. Francks*, 147 Md. 371.

Variance prayer is defective unless it states in what the variance consists. *Nat. Real Estate Dev. Corp. v. Water Co.*, 167 Md. 194.

A variance prayer, though defective under this section for failing to state in what the variance consists, may be treated as a demurrer. *Roycroft v. Nellis*, 171 Md. 141.

Cited in *Piper v. Wells*, 175 Md. 333; *Lawson et al. v. Clawson*, *Daily Record*, Dec. 12, 1939.

Cited but not construed in *Tippett v. Myers*, 127 Md. 539; *May Co. v. Drury*, 160 Md. 150.

As to powers of Court of Appeals *re* forms of process, writs, pleadings, etc., see art. 26, sec. 35.

As to appeals in Workmen's Compensation claims, see art. 101, sec. 70.

As to Board of Zoning Appeals, see Art. 66B, sec. 7.

See art. 75, sec. 96, and art. 5, sec. 20.

See notes to sec. 10.