

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. 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.

Case remanded under this section in order that by proper amendment, it may be tried upon its merits. *McCurdy v. Jessop*, 126 Md. 327.

Case remanded under this section, so that *narr.* may be amended; appellant to pay costs. *Rieger & Co. v. Knight*, 128 Md. 201.

Where the lower court has not awarded the writ of mandamus but merely a judgment for costs, the appellate court has the power under this section to award the writ without remanding the case. *Weber v. Zimmerman*, 23 Md. 55.

This section vests the court with discretionary power to remand a case to the lower court for trial upon its merits. *Creager v. Hooper*, 83 Md. 504; *Milske v. Steiner, etc., Co.*, 103 Md. 251.

This section indicates a design to give to the appellate court more extended control. *Lester v. Hardesty*, 29 Md. 57 (dissenting opinion).

This section gives the appellate court no power to modify criminal sentences, or to direct inferior courts to modify them. *McDonald v. State*, 45 Md. 97. (See, however, sec. 87, passed to give the court such power.)

For a case holding that the defendant had been given ample notice of a trial following the remanding of a case under this section, see *Weber v. Fickey*, 52 Md. 511.

Cited but not construed in *Stewart Taxi Co. v. Getz*, 118 Md. 176; *United Rys. Co. v. Corbin*, 109 Md. 56; *State v. B. & O. R. R. Co.*, 48 Md. 81.

Cited in *Holler v. Miller*, Daily Record, Dec. 11, 1939.

Case remanded to correct misjoinder; if declaration contains several counts, joint participation of all defendants must be averred in each. *Tong v. Feldman*, 152 Md. 407.

An. Code, 1924, sec. 25. 1912, sec. 22A. 1914, chs. 149 and 248.

25. If it appears to the Court of Appeals that a reversible error affects a severable item or part only of the matters in controversy, the Court may