Prayer assuming facts—Submitting question of law to jury—Or based on insufficient evidence.—Another fruitful source of discussion and decision in the Court of Appeals formerly was, whether or not a prayer assumed a particular question of fact, or submitted a question of law to the jury. But now by the Act of 1862, ch. 154,[49] it is provided that no prayer shall be deemed defective on either of these accounts, unless it appear from the record that the objection was taken at the trial. With regard to the latter objection, it was decided in Higgins v. Carlton, 28 Md. 115, that a ruling would not be reversed because a question of law was submitted to the jury, unless it appeared affirmatively from the record, and not as matter of inference, that the objection was taken in the Court below. In Doe v. Strickland, 8 C. B. 724, it was held that if the Judge at the trial leaves as a fact for the jury to determine any matter which he should decide as a point of law, the counsel should interpose and tender a bill of exceptions, otherwise, if in the opinion of the Court the jury decide the question left to them correctly in point of law, the judge's misdirection is no ground for a new trial. With respect to assumption of questions of fact, the Court of Appeals observed in Mayor, &c., v. Poultney, 25 Md. 18, "the assumption of a fact is very different from giving instructions to the jury without any evidence to support them. To assume a fact is to state as proved that which is to be proved, as 'if the jury find that after the sale' assumes the fact of the sale, and was therefore erroneous. But to instruct the jury upon an hypothesis, of which there was no evidence, is to leave them to assume or find that for which there was no foundation. The errors though closely similar are by no means

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v. Weller, 52 Md. 15; Bullock v. Hunter, 44 Md. 416; Blair v. Blair, 39 Md. 556. Cf. Meyer v. Frenkil, 113 Md. 46; Sumwalt Co. v. Knickerbocker Co., 114 Md. 413. But even where a prayer is too general, there will be no reversal if the Court of Appeals is satisfied that there is no ground on which the plaintiff can obtain judgment in a second trial. Weihenmayer v. Bitner, 88 Md. 325; Newbold v. Bradstreet, 57 Md. 38.

As to the effect of a view of the premises by the jury on a prayer asking the court to take the case from the jury, see Md. Ry. Co. v. Hammond, 110 Md. 124; Kurrle v. Baltimore, 113 Md. 63; Code 1911, Art. 75, sec. 98. Cf. Arnold v. Green, 95 Md. 217.

Where defendant at the close of the plaintiff's evidence offers a prayer asking the court to take the case from the jury on the ground that the evidence is legally insufficient to entitle him to recover, and, although excepting to the action of the court in refusing it, proceeds to offer evidence in defense, he thereby waives the exception. Goodman v. Saperstein, 116 Md.—; B. & O. R. R. Co. v. Welch, 114 Md. 544; Penn. R. R. Co. v. Cecil, 111 Md. 288; Bernheimer v. Becker, 102 Md. 250; B. & O. R. R. Co. v. Logsdon, 101 Md. 359; New York R. R. Co. v. Jones, 94 Md. 35; United Rys. Co. v. Deane, 93 Md. 624; Cowen v. Watson, 91 Md. 344; Barabasz v. Kabat, 91 Md. 54. See Code 1911, Art. 75. sec. 91.

As to other grounds on which exceptions may be held to be waived, see Iron Co. v. Stanfield, 112 Md. 360; Colonial Park v. Massart, 112 Md. 658; United Rys Co. v. Corbin, 109 Md. 442; Mackintosh v. Corner, 33 Md. 598.

[49] Code 1911, Art 5, sec. 9.