MARYLAND'S ANTIQUE CONSTITUTIONAL THORN

By SAMUEL K. DENNIS

"In the trial of all criminal cases the jury shall be the judge of the law as well as the facts", Art. 15, Sec. 5, Constitution of Maryland.

The twenty-one words quoted sum up to this: that in the Federal Court Building, on one side of Calvert Street, Baltimore, a jury panel sworn in a criminal case takes its instructions on the law from the Judge, who may also sum up and comment fairly upon the proof. A jury panel functioning in the Criminal Court of Baltimore on the other side of Calvert Street, decides both questions of law and fact, while the presiding Judge preserves order, watches the ventilation, and controls the mechanics of the trial. A wit long dead said the Constitution made jurymen judges, and judges cyphers. At any rate it has embarrassed the Court of Appeals, the nisi prius courts, produced confusion and occasional injustice for nearly a century.

In preparing this article on the above subject, the author "is but a gatherer and disposer of other men's stuff;" or, as Robert Burton said of other plagiarists: "They lard their lean books with the fat of other's works." For the subject is not new; has been discussed pro and con by intellectually honest, able lawyers for nearly 91 years with the sole and impersonal aim of giving to Maryland the best type of criminal justice. Unfortunately, debate has not yet sufficed to pluck that particular Constitutional thorn from the flesh of Maryland's body of Criminal Law; and until then it is worthwhile for new men to persist in plying old pincers in the hope some day of accomplishing a painless extraction.

ITS ORIGIN AND BACKGROUND

Maryland has had four Constitutions, effective as of 1776, 1851, 1864 and 1867.

The provision making juries in criminal cases judges of the law as well as of the facts was first incorporated in the Constitution of 1851. The provision is almost unique; only Georgia and Indiana have similar Constitutional provisions.

The short and potent provision quoted was inserted in the Constitution of 1851, it seems, under the following circumstances: The

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original Declaration of Rights adopted by Maryland in 1776, and all its successors, guaranteed to the people of Maryland "the common law of England, and the trial by jury according to the course of that law." Thus we find (Art. 5) "That in all criminal cases every man hath a right . . . to a speedy trial by an impartial jury without whose unanimous consent he ought not to be found guilty"; (Art. 21) "That no man ought to be taken or imprisoned or dissized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers, or by the law of the land."

In a case decided in 1858 Chief Judge LeGrand said:

"The language is: 'In the Trial of all criminal cases the jury shall be the judges of law as well as fact.'

"It was argued, that the true interpretation of these words authorized the jury to judge of the constitutionality of the act of Assembly. In this opinion I do not concur. The debates which took place in the Convention [of 1850] that framed the Constitution show what were the reasons that induced the adoption of the section. It is apparent from these debates, that opposing views as to the powers of a jury in a criminal case, prevailed in different parts of the State, and, that to guard in the future against such conflict, the provision was inserted in the constitution. It was well known that some members, both of the judiciary and the profession, held, that juries in criminal cases were the judges of law as well as fact, whilst others held a directly contrary opinion."

Judge Bartol speaking for the court stated:

"In our opinion the constitutional provision . . . is merely declaratory, and has not altered the pre-existing law regulating the powers of court and jury in criminal cases."

The official report of the debates in the Convention of 1850, referred to by LeGrand, Chief Judge, is:

"The subject does not appear from the official report of the proceedings of the Convention to have been considered by the Committee on the Judiciary, but when that committee made its report, an amendment was offered on the floor of the convention that 'in the trial of all criminal cases the Jury shall be judges of law as well as of fact.' Mr. Spencer in offering the amendment said he was informed there had recently been a decision that the jury were bound by the opinion of the Judge in matters of law. Mr. Brent, remarking that in a civil case there could be a bill of exceptions, but in a criminal case there was only a writ of error, said it seemed better that the principle should be adopted in Mary-

land which had been brought about in England by the eloquence of Lord Erskine, that the Jury should be the judges in the last resort of law and fact. Mr. Spencer said he understood the practice to be that the Court would give its opinion, but that the Jury were told it was an opinion and not an instruction. Mr. Bowie is reported as saying it was his understanding the Jury were judges not only of law and fact, but also of the admissibility of evidence, and that in his district Judge Stephen always maintained that the Jury were to decide even in question of evidence. He denied that the Court had the right to instruct the Jury upon points of evidence, and claimed that if the Jury did not obey the instructions, the Judge would set aside the verdict; that all verdicts were under the control of the Court; that no harm could be done by leaving the law precisely in its present form; and if the Judge was to be the exclusive Judge of the admissibility of evidence, the Jury might as well be discharged and leave the Court to settle the whole question; he thought the rights of the Jury had been invaded by modern construction, and he wished to see them brought back to the common law of England making them Judges of law and fact.

Mr. Dorsey suggested that would let in hearsay testimony, and said his intercourse with Judge Stephen was irreconcilable with the principles ascribed to him. Mr. Constable asked how a trial could proceed unless there was some tribunal to regulate the admission of evidence. Mr. Brent said he had never before heard that the Court was not the exclusive judge in criminal cases of the admissibility of evidence, and he differed with Mr. Bowie as to the right of the Court to set aside a verdict of acquittal. If acquitted once the party could plead that acquittal a second time. When the question was taken, the amendment was sustained."

It is clear that the Court of Appeals was in error when it stated in 1858 that Art. 15, Sec. 5, then seven years old, was merely declaratory; meaning, it is inferred, of either the traditional Maryland system, or of the English common law.

As to the traditional system: The first murder case to be tried in Maryland was of one Smith, in 1638. The Province had no grand or petty jury as we now conceive them; no jail. The Proprietor, Lord Baltimore, was empowered under the original charter for the Province or Palatinate to provide for the administration of justice. He, in turn, confided that power and duty to the Governor and Council. Until 1649 the Legislative Assembly acted as a law court.

The plan adopted for Smith's trial was as follows: Twenty-four members of the Assembly were selected to compose a Grand Inquest, and presently returned an elaborate indictment. The Assembly then resolved itself into a High Court of Justice. Smith was arraigned, given a public trial, was accorded the right of challenge, to have his
witnesses produced, sworn and testified freely; and, with one member dissenting, was convicted and condemned to death. Later, when a judicial system was set up, it included machinery for indictment and trial by jury, with convictions only had upon unanimous verdict, etc., substantially as now.

Chief Judge Bond in his valuable book, The Court of Appeals of Maryland (1928), page 9, observes:

"A provincial statute passed in 1638 allowed trial by jury 'by twelve freemen at the least' only in cases of crimes affecting life or member; and in 1642 the right was extended to all cases, etc."

So much for the Maryland tradition.

In re the Common Law: The members of the Convention responsible for the Constitution of 1851 were doubtless misled by Fox's Libel Act, which was adopted under the influence of Thomas Erskine, counsel for the defendant in the famous Dean of St. Asaph's Case tried in 1783. Therein the defendant was tried and convicted of criminal libel. The Court decided against the contention made for the Dean to the effect that it was for the jury to determine whether the words written were libelous. The jurors were allowed to decide questions of fact only. Thereupon Parliament enacted the Fox Libel Act; which never was in force in Maryland. It undertook "to give the jury a jurisdiction to give their verdict upon the whole matter in issue." The scope of the act was expressly narrowed to libel cases.

In the scanty records of the brief debate on the subject of Art. 15, Sec. 5, Mr. Brent, a member of the Convention of 1850, said:

"It seemed better that the principal should be adopted in Maryland, which has been brought about in England by the eloquence of Erskine and other eminent jurists, that the jury should be judges in the last resort, both of law and fact."

Fox's Libel Act exercised a strong influence in America. Eighteen or twenty States incorporated its fundamental provisions in some form in their Constitutions, since they felt it necessary that freedom of speech be safeguarded.

The English authorities, certainly in the main, negative the idea that under the common law juries had jurisdiction to decide questions of law; and presuppose the jurisdiction of the Court to bind the jury by instructions on the law. The Federal System is based upon the Fifth and Seventh Amendments. They guarantee that no person shall be deprived of life, liberty or property without due process of law, and

3. 21 Howell's State Trials 847 (Case No. 566) (1783).
that no fact in civil cases tried by jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. Thus, the Maryland Bill of Rights and the Constitution of the United States commit the courts within their respective jurisdictions to the trial of both criminal and civil cases according to the rules of the common law. Therefore, the Federal decisions asserting what the common law was in reference to jury trials in 1776 are in point.

Naturally, we turn to the opinion, never reversed, never modified and often cited with approval, in United States v. Battiste. The indictment was for a capital offense. It charged that Battiste, mate on the American ship "America", engaged in the transportation of slaves contrary to the 4th section of the Act of May 15, 1820, Ch. 113. Mr. Justice Story, in summing up to the jury, said:

"My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the Court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court. . . . If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error there would be no remedy or redress by the injured party; for the Court would not have any right to review the law as it had been settled by the jury. . . . Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as the jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake to interpret it."

Hence, Art. 15, Sec. 5, was adopted for reasons which were groundless, to perpetuate a system which did not exist. On the other hand, the Maryland Constitutional Convention with little exertion wrote an Iliad of woes, which will be presently examined in some detail.

4. 2 Sumner's Reports 240, 243 (U. S. Cir. Ct. 1835).
CONCI SELY STATED, WHERE A CRIMINAL CASE IS TRIED BEFORE THE JURY, SINCE IT IS THE SOLE JUDGE OF THE LAW AND THE FACT, OR BEFORE A JUDGE OR JUDGES SITTING AS A JURY, AN ACQUITTAL IS FINAL, HOWEVER REACHED OR WHY, EVEN IF CORRUPTLY REACHED; AND LIKewise A CONVICTION, EVEN IF UNJUST, IS FINAL, WITHOUT REMEDY OF APPEAL FROM THE ERRORS, ACTS OR OMISSIONS OF THE JURY. ONLY THE MAN PRESIDING AS JUDGE IS SUBJECT TO REVERSAL BY THE COURT OF APPEALS FOR ERRORS COMMITTED TO THE PREJUDICE OF THE CONVICTED APPELLANT. THE STATE HAS NO RIGHT OF APPEAL UPON ACQUITTAL TO CORRECT ERRORS OCCURRING IN THE COURSE OF THE TRIAL.

ON THAT STATEMENT OF THE CASE MARYLAND'S NEIGHBORS MUST CONCLUDE THAT THE SYSTEM IS UNWORKABLE, THAT MARYLAND'S CRIMINAL JURISPRUDENCE REVOLVES IN A STATE OF CHAOS. STRANGLY ENOUGH SUCH IS NOT THE CASE. CRIMINAL TRIALS GO ON WITH FAIR SUCCESS AND JUSTICE. THAT IS DUE TO THE EXCELLENT QUALITY OF MARYLAND JURIES, AND TO THE FACT THAT THE SCOPE OF ART. 15, SEC. 5, IS MUCH NARROWER THAN THE DRY TEXT INDICATES; BUT PRINCIPALLY TO THE FACT THAT THE OVERWHELMING MAJORITY OF CRIMINAL CASES ARE TRIED BY TRAINED JUDGES WITHOUT JURIES.

AS TO THE NARROWED SCOPE: IT HAS BEEN DECIDED THAT JURIES HAVE NO JURISDICTION TO HEAR OR ACT UPON DEMURRS, TO PASS UPON THE CONSTITUTIONALITY OF STATUTES,\(^5\) TO PASS UPON PRE-TRIAL MOTIONS OR PLEADINGS, SUCH AS MOTIONS TO QUASH, SEVERANCE, ETC.\(^6\) NOR HAVE JURIES, AFTER BEING SWORN, ANY JURISDICTION TO CONTROL THE ADMISSION OF PROOF, OR TO DETERMINE WHAT WITNESSES ARE COMPETENT.\(^7\)


THE RIGHT TO A JURY TRIAL IS NOT UNRESTRICTED. THERE ARE MANY MISDEMEANORS AND MINOR OFFENSES WHICH MAY BE DEALT WITH SUMMARILY

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\(^5\) Franklin v. State, 12 Md. 236 (1858).
\(^7\) McCleary v. State, 122 Md. 394, 89 Atl. 1100 (1914).
\(^8\) Biscoe v. State, 67 Md. 6, 6 Atl. 571 (1887).
by police justices, or disposed of in the Criminal Courts without benefit of a jury.\textsuperscript{10}

The table found below relating to Baltimore City (no statistics are available for the counties), lifted from the 1940 Report of the Criminal Justice Commission, illustrates the relatively trivial number of cases tried before juries:

In the total of 4,978 cases tried during the period, the following were Court and Jury trials:

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<thead>
<tr>
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<th>Non-jury trials</th>
<th>Jury trials</th>
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<tbody>
<tr>
<td>Total cases tried</td>
<td>4,835</td>
<td>143</td>
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The disposition of the 4,978 cases was as follows:

\textit{By Court alone}:

- on pleas of guilty: 2,060 (41.7%)
- on pleas of not guilty, found guilty: 1,672 (33.4%)
- on pleas of not guilty, found not guilty: 907 (18.2%)
- Stets and nolle pros: 196 (3.9%)

\textit{By Court and Jury}:

- on pleas not guilty, found guilty: 64 (1.3%)
- on pleas not guilty, found not guilty: 79 (1.5%)

Total cases tried: 4,978 (100%)

Of the persons convicted above—1,672 by the Court and 64 by the jury—forty-four filed motions for new trials with the results shown below:

\textit{After conviction by Jury}:

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<tbody>
<tr>
<td>Motions granted</td>
<td>7</td>
<td>46.7%</td>
</tr>
<tr>
<td>Motions overruled</td>
<td>6</td>
<td>40%</td>
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<tr>
<td>Motions dismissed before hearing</td>
<td>2</td>
<td>13.3%</td>
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</tbody>
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\textit{After conviction by Court}:

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</thead>
<tbody>
<tr>
<td>Motions granted</td>
<td>6</td>
<td>20.7%</td>
</tr>
<tr>
<td>Motions overruled</td>
<td>19</td>
<td>65.5%</td>
</tr>
<tr>
<td>Motions dismissed before hearing</td>
<td>3</td>
<td>10.3%</td>
</tr>
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*One motion granted as to one defendant; overruled as to other defendant.

The apologists for the system are reduced to the pitiful position that the provision does so little harm because it is so little used.

\textsuperscript{10} State v. Glenn, 54 Md. 572 (1880); Maryland ex rel. Baum v. Warden of Baltimore City Jail, 110 Md. 579, 73 Atl. 294 (1909); Lancaster v. State, 90 Md. 211, 44 Atl. 1039 (1899); State ex rel. Ebert v. Loden, 117 Md. 373, 83 Atl. 564 (1912); State v. Ward, 95 Md. 118, 51 Atl. 848 (1902).
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Respective Powers of the Court and the Jury

It is the duty of the judge to decide all questions raised before trial by demurrer or otherwise as to the sufficiency of the indictment and other pleadings; to pass upon the constitutionality of any statutes involved; determine the admissibility of evidence offered, and if witnesses are competent and should be sworn.

The presiding judge may give advisory instructions to the jury, and must, when giving such instructions, be careful to tell the jury it is at liberty to disregard them. He can not be required to give any instructions. If he gives advisory instructions and they are not objected to, they become the law of the case—a further inconsistency. In practice the judge seldom gives advisory, or any other, instructions. The risk is too great. As to him, it is a case of heads you win, tails I lose. If his instructions are objected to, and on appeal are pronounced erroneous, almost invariably they are presumed on appeal to have been harmful, notwithstanding the jury was told it might disregard them; probably did. He risks much to accomplish little. The less the judge says the safer he is. A spontaneous or chance remark, or pleasantry may be construed to have been an injurious comment upon the veracity of witnesses or the weight or sufficiency of the evidence; a hint to the jury. The Court of Appeals is vigilant to repress any loose talk, to subdue any urge at nisi prius to deviate from the orthodox.


13. Expert accountant, Gillespie, defense witness, made an egregious if innocent mistake in figures; trial court, with indulgent good humor, used this huckster language: "You know better than that, Mr. Gillespie"; objection and exception. On appeal, the remark was held to be prejudicial error. In the same case, defense counsel in arguing his objection to a question asked by the State on cross-examination, said: "Not only does he [the witness] call notes securities, but there are three decisions of the Court of Appeals that decide they may be called securities." Trial judge: "I would be very sorry to think the Court of Appeals would make any such foolish decision as that, sir." Held, to be reversible error. Newton v. State, 147 Md. 71, 86, 127 Atl. 123, 130 (1924).

U, indicted for murder, first degree. Traverser's witness, an alienist, testified traverser was mentally incompetent, not according to the conventional formula, "was definitely schizoid, narcissistic; had an Oedipus complex," but because he was a congenital deficient. On cross, he said his opinion, apparently a non sequitur, was based upon the proof that traverser was habitually at war with his wife, had periods of extreme depression, drank, and suffered from chronic constipation. The incautious Court asked if the same was not true of Abraham Lincoln. Exception. On appeal the Court was evenly divided. Utey v. State, 179 Atl. 608 (Md. 1935).

A slight counter-trend: A judge, exasperated by the persistence of defendant's counsel in making specious arguments touching the admissibility of a question after the Court had ruled, roared: "You may tell that to the Court of Appeals. I do not want to hear it." Upon appeal it was held that the subtle implication of the Court's remark was harmless. Niemoth v. State, 160 Md. 544, 553, 154 Atl. 66, 70 (1931).
for the ultimate result of the trial; and almost uniformly judges are relieved when traversers are tried by a jury, which must then hear the brunt of the burden of ascertaining the law and the truth; but without accountability for mistakes. After keeping as silent as possible and correctly determining what evidence the jury shall see and hear, the trial judge is safe; and it is no part of his duty to see to what use the jury puts the proof they do see and hear.

It must not be understood that the constitutional provision quoted places the jurors, or a judge sitting as substitute for a jury, above the law, or confers upon them either a moral or legal right to decide as they see fit regardless of established law. They are as firmly bound by their oath to observe the law as is the trial judge, functioning as judge.

Jurors do not know the law. Judicial notice is taken of that.14 They must get it from somewhere; and they learn it as best they may, usually from the State's Attorney and defendant's counsel; rarely from the presiding judge. Respective counsel harangue them; ponderously and at length read books, reports of decisions, statutes, text books to them.

If the State's Attorney makes a misstatement of law to the jury and traverser objects, it is the duty of the judge to rule, and switch the State's Attorney back to paths of accuracy. If the defendant's attorney misstates the law, or goes so far as to argue to the jury that the Court's advisory instructions (unless conceded or not objected to) are wrong, propounds original and strange propositions of law, the Court is powerless to correct him, notwithstanding he is an officer of the Court.

Until 1932 the law was thought to be otherwise. The Court of Appeals held in at least four earlier cases15 that defense counsel could not argue to the jury that the court's advisory instructions when granted were wrong; that lawyers were officers of the court and amenable to the court's rulings without benefit of the constitution, notwithstanding the jury might disregard the judge's expressed views.

In 1932 the lower Court granted an advisory instruction, then stopped defendant's counsel from urging the contrary view upon the jury. The Court of Appeals in its opinion said: 16

"The problem to be solved in the present case is difficult, as the considerations which affect the solution are conflicting. It is

15. Wheeler v. State, 42 Md. 583, 570 (1875); Dick v. State, 107 Md. 11, 68 Atl. 286 (1907); Garlitz v. State, 71 Md. 293, 18 Atl. 39 (1889); Simond v. State, 127 Md. 29, 95 Atl. 1073 (1915).
consistent with the right of the jury to exercise their independent judgment as to the law, in a criminal case, that they should be informed of legal theories of the prosecution or defense which may be at variance with the court's advisory instruction. On the other hand, it seems hardly compatible with the relationship of members of the bar to the court of which they are officers, to permit them to combat its formal rulings in their arguments to the jury. No such privilege was recognized in any of the cases to which we have referred, though none of them involved the precise question here presented. For the first time it becomes the duty of this court to determine whether an advisory instruction that the legal effect of evidence is to bring the defendant within the operation of a penal statute precludes an argument before the jury to the contrary. If no suggestion can be made to them as to a different interpretation of the law, which may be the only defense, the right assured to the jury to disregard the court's instruction and form an independent judgment might have no real opportunity for its exercise. . . . The effect of the court's action in submitting its advisory instruction before the argument to the jury, and then refusing to permit counsel for the defendant to argue for a different interpretation of the law, was to prevent the presentation of the legal theory which was the ground of defense. In giving instruction under circumstances, in regard to time and restrictions, which produced that result, we must hold that the trial court committed an injurious error."

It is still believed to be the law that counsel at the trial can not argue contrary to decisions of the court on demurrers holding that statutes were repealed, that statutes were constitutional, or in passing upon the admissibility of evidence.17

It is the exclusive duty of the jury to determine the elements of the offense charged, and the legal effect of the evidence.18

Hence, the jurors, all laymen, must, without special preparation, absorb, distinguish and apply the law, and correctly decide, all without disinterested advice, such intricate questions, for example, as these:

The elements of the common law offense of conspiracy to do an unlawful act, or to do a lawful act in an unlawful manner by diverse false pretenses, etc.19

Whether the accused under the particular facts was guilty of larceny or receiving stolen goods.20

Whether money received by the accused was received by him as agent of the borrower or the lender.21

17. Franklin v. State, 12 Md. 236 (1858); Nolan v. State, 157 Md. 332, 146 Atl. 268 (1929); Kelly v. State, 151 Md. 87, 332, 146 Atl. 889 (1926).
Whether a collection attorney was an agent of the prosecuting witness within the meaning of the embezzlement statute.  

Whether the facts proved the accused guilty of larceny or false pretenses.  

Whether a movie parlor is an opera house within the meaning of the statute.  

Whether a student teletype operator was an agent of his employer corporation within the meaning of Art. 23, Sec. 121, of the Code, making it a misdemeanor for the agent of a foreign corporation which has not complied with the statutory requirements to transact business for it in this State.  

To interpret and apply the law of insolvency in charges of conspiracy to defraud by accepting deposits, knowing the company to be insolvent.  

To construe ambiguous contracts to determine whether or not at a given time a blind pool brokerage firm was solvent.  

**HOW FARE THE INNOCENT?**

If there is a conviction, where lies the remedy for an injustice done by the jury? The trial judge is helpless to avert such a catastrophe. He has no jurisdiction to direct a verdict of “not guilty.” Nor can he do what might produce the same result; strike out all the testimony if insufficient to make out a case; nor can he grant any motion looking to the traverser’s exoneration. To do so is to trespass upon the exclusive prerogative of the jury. As the courts have often said, the law of the crime and the weight and legal sufficiency of the evidence are jury questions; and from their decision thereon is no right of appeal. That leaves to the innocent person, wrongfully convicted, no relief save the infirm remedy of addressing a petition to the Governor for Executive clemency, or filing a motion for a new trial.

New trials are not granted unless manifest injustice is reflected in the verdict. The dilemma of an innocent victim is illustrated in the words of the Court of Appeals itself:

29. Foxwell v. State, 146 Md. 90, 125 Atl. 893 (1924); Jessup v. State, 117 Md. 119, 83 Atl. 140 (1912).
"The fact that in spite of the absolute failure of legal evidence...appellant was convicted by a jury, which was the judge of the law as well as of the facts emphasizes the importance of the testimony which was excluded...

"True, there was no burden on the defendant to offer this proof, as he was entitled to acquittal on the case made out by the State." (Italics supplied.)

He was convicted. 31 Again the Court of last resort said, in effect:

"The sufficiency of the evidence can not be considered on appeal." 32

"The question of the sufficiency of the corroboration of the testimony of an accomplice to sustain a conviction is for the determination of a jury as judges of the law and fact, or for the judgment of the Court, when substituted for the jury, by the defendant's election." 33

The State bears hardships in getting the law settled.

After an acquittal upon a regular trial, the verdict cannot, on the application of the prosecutor in any form of proceeding be set aside, and a new trial granted. The Court of Appeals notices exceptions by the State only upon the State's cross appeal where the accused has been convicted, has also taken exceptions, and appeals, so that in the new trial, if granted, the court below can be guided by the judgment of the Court of Appeals on all such questions as well as those raised by the accused. 34

The State may appeal from a judgment sustaining demurrers to one or all counts of an indictment (whereon the traverser of course was not tried) regardless of the result of the trial had under the remaining counts. 35

The escape by way of New Trial: At best a new trial, if granted, means just that; a second trial, with attendant expense and hardship, unless the State abandons further prosecution.

With the jury omnipotent within its field to determine all matters of law and fact at the hearing, and the Court of Appeals impotent to reform, correct or reverse the jury's methods and conclusion in the case, how is a new trial by any nisi prius tribunal possible without voiding the guarantee afforded by Art. 15, Sec. 5?

34. State v. King, 124 Md. 491, 92 Atl. 1041 (1915); Birkenfeld v. State, 104 Md. 253, 65 Atl. 1 (1906).
35. State v. Floto, 81 Md. 600, 32 Atl. 315 (1895); State v. Coblentz, 167 Md. 523, 175 Atl. 340 (1934); State v. Camper, 91 Md. 672, 47 Atl. 1027 (1900); State v. Vincent, 91 Md. 718, 47 Atl. 1036 (1900); State v. King, 124 Md. 491, 92 Atl. 1041 (1915).
Maryland, as is to be recalled, in her first, and in every subsequent Bill of Rights, guaranteed the Common Law system in criminal and civil procedure. That provision of the Bill of Rights is in harmony, and of equal force, with Art. 15, Sec. 5. At Common Law the trial judge had jurisdiction to grant new trials in his sound discretion when, and if, injustice or error manifestly had been done either by the jury, or by himself, in the conduct of the cause. The nisi prius judges in Maryland automatically became endowed with the like jurisdiction. In the counties, the Common Law system stands unimpaired and controls; and trial judges grant or refuse new trials in both civil and criminal cases tried in the Circuit Courts of the counties. Therefore, the job confronting the petitioner is to convince the trial judge that he was clearly wrong or that the jury serving under him was clearly wrong; an appeal from Caesar to Caesar, and difficult.

As to Baltimore City, the Common Law rule was changed by the Constitution (Art. 4, Sec. 33). The power to hear, and grant or refuse, motions for new trials in criminal cases (but in criminal cases only) was taken from the trial judge and conferred upon the Supreme Bench of Baltimore. For practical purposes (though technically the statement is incorrect) the Supreme Bench means the eleven judges of the Baltimore courts sitting in banc; or a quorum of the Bench. Decisions granting or refusing new trials are not reviewable on appeal; save for abuse of the Court’s discretion.

The conventional grounds for new trial motions are: that the verdict is against the evidence; against the weight of the evidence; for errors in rulings of the Court; for newly discovered evidence, etc.

The power to grant new trials, in the sound discretion of the nisi prius court, is recognized to be a salutary if incomplete remedy. As was said by the Court of Appeals:

"It is undoubtedly true that the power of the trial court to grant a new trial to correct what is clearly an unjust and unwarranted verdict is a useful, indeed an essential, adjunct of the common law system of jury trial, and that the failure of such a court to exercise that power wisely and fearlessly in appropriate cases impairs the usefulness of that system and tends to bring it into disrepute."
In civil cases, the judge's errors of law may be cured on appeal. In criminal cases, errors of law embodied in the verdict of jury or judge sitting as jury cannot be so corrected. This affords an additional potent reason for exercising the power of granting new trials in criminal cases "wisely and fearlessly."

TRIALS BEFORE THE COURT SITTING AS JUDGE AND JURY.

The practice of trying criminal cases without juries began almost with the founding of the Province. While Art. 15, Sec. 5, gives the accused the right to a trial by jury, it does not mean that he must be tried by a jury if he prefers to be tried by the Court. Judge Eli Frank, of the Supreme Bench of Baltimore, has this to say:

"The right to elect belongs solely to the accused. He may at his option elect to be tried with or without a jury. The State has no choice. It must abide by the determination of the prisoners. League v. State, 36 Md. 257 (1872). By this procedure, the traverser has, therefore, a dual uncontrolled choice. He may elect a jury trial and his election is unassailable. He may choose to be tried by the Court and his choice is binding on the prosecution. His right to a jury trial is inviolably preserved. This does not mean that he must have jury trial whether he wants it or not. His right is not transformed into an obligation. He may waive it in favor of another right, the right to a Court trial without a jury and no man may say him, nay.

"This until recently seems to have been a practice peculiar to Maryland. It has been evolved in the face of constitutional provisions which in other jurisdictions would likely have been held to impose the necessity of jury trial in spite of the accused's desire for a Court trial." 39

As is to be noted from statistics quoted above, the overwhelming preponderance of traversers waive their right to jury trials for the equally inalienable right to elect a trial by the Court. The practice finds statutory sanction. Sec. 549, Art. 27, Code of Public General Laws.

Where a traverser elects to be tried by a court without a jury, as stated by Judge Frank, the judge is substituted for the jury. Forthwith, as Elisha took up the mantle of Elijah (the uninitiated are referred to II Kings, Ch. 11) if not "with a double portion" of the jury's spirit upon him, the trial judge is the actor in a miracle when he falls heir, and is subrogated to the irrebuttable constitutional pre-

sumption of infallibility. He collects all other immunities and plenary powers conferred upon juries by Art. 15, Sec. 5.\textsuperscript{40}

Hence, the Court of Appeals cannot reverse or correct his errors if committed within the scope of his jury function as judge of the law and also of the facts. He assumes pro tem a dual office; a duality which on the one side is prone to err, which on the other is incapable of error. For example, if as a fallible judge, subject to reversal, he gives himself as an infallible jury an advisory instruction which is in error and prejudicial, he will be reversed. If he arrives at the same unjust verdict uninstructed he is exempt. If as judge he examines a document offered in evidence to determine if it is admissible and admits it in error, he may be reversed. If he refuses to admit it, and convicts the accused, though knowing its contents, he is not reversed. That seems to press legal fiction to an extreme.

The illusion indulged by the makers of the Constitutions of 1851, '64 and '67 is curious. It is, of course, incredible that the same judges who are freely reversed for errors of judgment upon either matters of law or fact in the trial of equity causes and non-jury causes at law, when sitting as jurors in criminal cases are never wrong.

An instance:—in a recent case\textsuperscript{41} three judges sat as jurors to try a group of murderers, jointly indicted, who upon any aspect of the facts were totally and irretrievably guilty. As judges they permitted themselves to listen to unfair opening statements by the State, and admitted irrelevant, prejudicial testimony over traverser's objection offered by the State. At most the evidence was cumulative. The verdict returned by the three judges was guilty of murder in the first degree. In reversing them for their errors in their judicial capacity (the impropriety of the verdict, if on the whole it was improper, otherwise was untouchable), Judge Offutt said:

"It is constantly being held that courts err in their judgment of law and fact in civil cases; in law courts where they occupy the dual function of court and jury and in equity courts where they pass both upon the law and the facts; and I see no reason why a degree of infallibility which is not given to their conclusions in those cases should be given to them in criminal cases."

Nor does anyone.

Nevertheless, had the State's Attorney spoken advisedly and the three officiating judges sustained objections to the irrelevant testimony,

\textsuperscript{40} Snowden v. State, 133 Md. 624, 106 Atl. 5 (1919); League v. State, 36 Md. 257 (1872); Folb v. State, 160 Md. 209, 181 Atl. 225 (1935); Berger v. State, 179 Md. 410, 20 A. (2d) 146 (1941).

\textsuperscript{41} Dobbs, etc. v. State, 148 Md. 34, 62, 63, 129 Atl. 275, 286 (1925).
the traversers most likely would have suffered death by hanging; and the Court of Appeals would have been left powerless to save them. It is scarcely consonant with wisdom and justice to vest power so vast and uncontrollable in any individual however conscientious and learned.

If two judges sit as a jury, and can not agree, there is a new trial. If three sit, and split two to one, the majority may render a verdict.\textsuperscript{42}

**The Arguments Generally Made in Favor of the Provision; and One Against.**

For over 90 years the waves of controversy have lashed the foundations of this unique and evil-producing constitutional provision. There is small chance it will be repealed or modified. Whatever its faults, a majority of the profession profess to appraise it as well nigh priceless; though inconsistently enough they seldom use it. Its defenders rest heavily upon:

John Milton, who in his *Defense of the People of England*, after speaking of the King's power in his Courts and through his judges, adds:

> "Ney, all the ordinary power is rather the people's, who determine all controversies themselves by juries of twelve men. And hence it is that when a malefactor is asked at his arraignment, 'How will you be tried?' he answers always according to the law and custom, 'By God and my country'; not 'by God and the King, or the King's Deputy';"

and Alexander Hamilton who, in *Croswell's* case in New York in 1803, advances three propositions on this subject:

> "That in the general distribution of powers in our system of jurisprudence, the cognizance of law belongs to the Court, of fact to the Jury; that court is absolute, and exclusive. . . . That in criminal cases, the law and fact being always blended, the Jury, for reasons of a political and peculiar nature, for the security of life and liberty, is intrusted with the power of deciding both law and fact. . . .

That this distinction results: 1. From the ancient forms of pleading in civil cases, none but special pleas being allowed in matters of law; in criminal, none but the general issue; 2. From the liability of the jury to attaint in civil cases, and the general power of the Court as its substitute in granting new trials, and from the exemption of the jury from attaint in criminal cases, and the defect of power to control their verdict by new trials, the test of every legal power being its capacity to produce a definite effect, liable neither to punishment nor control. . . .

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\textsuperscript{42} League v. State, 36 Md. 257 (1872).
That in criminal cases, nevertheless, the Court are the constitutional advisers of the jury in matter of law; who may compromise their consciences by lightly or rashly disregarding that advice, but may still more compromise their consciences by following it, if exercising their judgments with discretion and honesty they have a clear conviction that the charge of the Court is wrong;” 43

and, Dillon’s Law and Jurisprudence (1895), at page 124:

“I find: ‘In criminal cases there is no substitute for the Jury that would be acceptable to the profession or endured by the people. In the solemn act of passing upon the guilt of those charged with offenses against the public, the Jury represent the Majesty of the people as a whole; and when acting under the guidance of a capable Judge, their verdicts are almost always right. In the occasional cases where the offender has been almost more sinned against than sinning, but which cannot be anticipated or excepted from the criminal code, and where the offender is consequently technically guilty and a judge would feel bound so to decide, the Jury administer an irregular equity, not capable of being defined and formulated, nor of a nature to be expressly sanctioned by the lawgiver, but which satisfies the judgment and conscience of the community, without overturning the criminal statute, which still stands intact.’”

and John Adams, writing in 1771, said:

“The General rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the Constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse’s milk and first air. Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally according to the direction, or even to find the fact specially, and submit the law to the Court? Every man of any feeling or conscience will answer, No. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the Court.” 44

They say with truth that Art. 15, Sec. 5, brings the administration of criminal justice in closer touch with the popular will—that juries will not convict when left untrammeled by nisi prius and appellate judges for violations of obsolete, oppressive or freakish laws; that they

44. Address of former Attorney-General, now Governor, Herbert R. O’Conor, Md. State Bar, 1934.
treat such statutes in a common sense manner, whereas judges use “no India rubber,” no “irregular equity” in their judicial processes. Perhaps that is one of the weaknesses of the system. Neither are judges so easily affected by popular clamor adverse to traversers.

The truth in Maryland, public and professional opinion is conservative. There is a strong sentiment at the Maryland Bar against a more potent participation by the courts in the conduct of either civil or criminal cases before juries. They do not want the judges to summarize or comment on the proof, or even in civil cases to charge the jury orally on the law; though they submit with alacrity to the ministrations of judges alone in other matters of gravest import. Until the civil rules of procedure were recently amended, Maryland judges seldom went further than to grant or refuse dry, unenlightening written instructions, called prayers; withheld comment and explanations.45

Mr. Charles Markell of the Baltimore Bar stated the counter argument in vigorous and luminous fashion: 46

“"The functions of the trial judge and the jury in this Federal system have repeatedly been stated by the Supreme Court by words of Sir Matthew Hale almost three hundred years ago and in words of Chief Justice Hughes less than five years ago:

"'Trial by jury' in the primary and usual sense of the term at common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and to issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the supervision of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence..."

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. Herron v. Southern Pacific Co., 283 U. S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by ex-

45. At a meeting of a committee to suggest revisions of the Maryland procedure, the excellence of the Federal system was cited as an argument for, and an earnest of the modifications proposed, it was asserted that in order to cancel the effect of properly balanced oral instructions which went into the record, that the U. S. judges “make faces at the jury.”

plaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion on the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by rules of the common law are maintained in the federal courts.

“Fox's Libel Act, after reciting doubts whether upon the trial of a charge of criminal libel the jury might 'give their verdict upon the whole matter put in issue', declared and enacted that the jury 'may give a general verdict of guilty or not guilty upon the whole matter put in issue' and 'shall not be required or directed by the court . . . to find the defendant or defendants guilty, merely on the proof of the publication.' The Act provides that the judge shall at his discretion, give 'his opinion and directions to the jury on the matter at issue . . . in like manner as in other criminal cases.' The Sedition Act also provided, somewhat more cryptically, that 'the jury . . . shall have a right to determine the law and the fact, under the direction of the court, as in other cases.'

“Thus in England in the contests between judge and jury which culminated in Fox's Libel Act, and likewise in the similar contests a century earlier which had culminated in the trial of the seven bishops and the 'Glorious Revolution' of 1688, the jury was vindicated only by establishing its own power to give a general verdict regardless of the judge's views, and not by muzzling the judge, balancing the jury's ignorance against the judge's impotence, and delivering over both judge and jury to the domination of counsel in the conduct of trials. Except that the jury's ultimate power to give a verdict necessarily excludes like power on the judge's part, the function of the jury in England and in the federal courts has always been added to, not subtracted from the judge's functions. The judge has always dominated the conduct of trials; the jury has always had the benefit of the judge's experience, guidance and advice.

“The difference, then, between the systems of trial administered on opposite sides of Calvert street comes to this: On the one side is the historic 'trial by jury', comprising two indispensable agencies, (1) the jury to decide the facts, (2) the judge, to instruct the jury on the law and advise them on the facts. On the other side of the street by a Solomonic operation, these two inseparables have been separated and each functions alone, (1) a judge without a jury and (2) a jury without a judge. The juryless judge is the special refuge of those accused of crime, who increasingly shun their special constitutional boon, the judgeless jury.”