TRIAL BY JURY.

SPEECH

DELIVERED BY

THE CHIEF JUSTICE OF MALTA,

ON THE

18TH JANUARY 1831.

TRIAL BY JURY.

AN

ADDRESS

DELIVERED ON THE 18TH JANUARY 1831,

BY

THE HONORABLE

THE CHIEF JUSTICE OF MALTA,

SIR JOHN STODDART, KNT.

ON THE

OPENING OF THE COMMISSION FOR THAT YEAR,

ISSUED UNDER THE LAW FOR ESTABLISHING AT MALTA
A MODIFIED

TRIAL BY JURY

IN CERTAIN CRIMINAL CASES.

TRANSLATED FROM THE ITALIAN.

London:
PRINTED BY JAMES & LUKE G. HANSARD & SONS,
NEAR LINCOLN'S-INN FIELDS.

1831.

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THE Law for establishing TRIAL BY JURY at *Malta* was promulgated in the latter part of the year 1829; and the First Commission issued under it expired, without having had occasion to be carried into effect. A Commission for the year 1830, was opened in the month of February following; when the CHIEF JUSTICE pronounced a Speech on the origin and spirit of the Law, and the means of its execution.

Three Sessions having since been held, it became of great importance to the Legal Profession and Public in general at *Malta*, to learn what success had attended this great experiment to reform the administration of the Maltese Criminal Law. The CHIEF JUSTICE, therefore, felt himself bound, at the opening of the Commission for 1831, to examine this question fully and impartially; which is done in the ADDRESS contained in the following pages.

ADDRESS

TO

The MALTESE BAR, and the PUBLIC present in Court,

AT THE

OPENING OF THE THIRD COMMISSION FOR

TRIAL BY JURY.

GENTLEMEN,

1.—IT was an ancient custom in England, that every Royal Commission to the King's Judges "should be openly "read in the hearing of *the People;* and that the Judge "first named in the Commission should explain to all pre- "sent it's contents, and the beneficial objects which it was "intended to promote." (Note [1])

2.—This custom is recorded in the English Lawbooks of the Thirteenth Century; and it seems to have given origin to those *Charges,* which the Judges in England deliver, at the present day, to Grand Juries, on the ordinary Circuits, and on those extraordinary occasions which require the issuing of Special Commissions.

3.—For the genuine spirit of English Jurisprudence has been well described by an eminent person lately raised to the highest honours of the legal profession, who says, with equal eloquence and truth, "it is not only requisite to make "the laws better, in order to render them more beloved, "but it is also requisite *to satisfy the minds of the People,* "with respect to the Institutions under which they live." ([2])

4.—I feel it my duty therefore, to endeavour, first to explain the Law, which my learned Colleagues and I have to administer; and then to conciliate the public mind, so far as lies in my power, to the substantial benefits of that Law.

5.—Under these impressions, I last year addressed you, Gentlemen, on the opening of the Commission, which first called Trial by Jury into exercise, as part of the Law of

Malta. I stated my views of the origin and spirit of the Proclamation which established that mode of trial. I pointed out the chief means of carrying it successfully into effect: and I concluded with expressing a confident hope and belief, that they who should labor in the duties of the Commission, would faithfully exert themselves to fulfil it's important objects; that the Public would gain an increased confidence in the administration of Justice; and that Trial by Jury would thus be gradually established on a firm basis, and occupy an extended sphere in the jurisprudence of Malta.

6.—A new Commission, exactly similar to the preceding, has been issued, after the lapse of a Twelvemonth, during which period Three Sessions were held, *six* Juries were impanelled, *thirteen* Prisoners were tried, and *four* Accusations were annulled for defects of form.

7.—The general result of these proceedings is a matter of deep interest to us all, and should be examined with the utmost impartiality. The question is, whether they have wholly disappointed the hope of establishing Trial by Jury beneficially at Malta; or whether on the contrary they do not furnish reasonable ground of satisfaction at what has already been done, and of increased confidence in the future progress of the Institution.

8.—Trial by Jury, as to it's form, consists of several elements, the Jurors, the Judges, the ministerial Officers of the Court, and the Advocates or Legal Procurators of the parties. It is self-evident that of these elements, the most important are the *Jurors*, by whose function this mode of Trial is distinguished from all others. It was this element, too, of which the greatest doubts were entertained, before the Law had been carried into effect. Many persons thought that the Maltese were incapable of discharging a duty so important in itself, so new to the individuals, and so contrary to many of their habits and prejudices. Nor were these apprehensions entertained only by the ignorant or inexperienced; but they were shared even by men of sound judgment, who had examined into the subject on the spot, with the utmost calmness, and the most benevolent feelings.

9.—For my own part, although my estimate of the Maltese character, formed from eight years residence here, at two different periods, was more favorable than that entertained by some Gentlemen who had less accurate means of knowledge; yet I must candidly confess, that I anticipated,

on the part of the Native Inhabitants, considerable difficulty in their early attempts to perform the functions even of Common Jurors, and much more of Foremen.

10.—It happened, however, by chance, that in *Five* out of the Six Cases tried during the year, the Foremen were Maltese. Now, it is my conscientious opinion, that every one of the Verdicts in those five cases was as correct, as just, and as legal, as could have been given by any Tribunal in the world.

11.—I speak from no inconsiderable experience as to Jury Trials; for my inclinations led me, in very early youth, to attend Courts of that description as a Spectator; I have since been present at many such proceedings, not only in London and other parts of England, but in Scotland and in France: and during a space of nearly twenty years I was a member of the Commission at the Admiralty Sessions, and frequently sate there as a Judge Surrogate.

12.—I solemnly declare, that at no period of my life, and in no part of the world, did I ever see Jurors discharge their duties more punctually, more intelligently, or more impartially, than the Maltese Foremen, and the Common Jurors under their direction in this Court.

13.—On every one of the five trials to which I have alluded (and I limit my present observations to them for a reason which will hereafter appear) both the Foremen and Common Jurors confined themselves strictly within the line of their duties. When Evidence was given, they attended to it patiently. When they thought it necessary to put questions to the Witnesses, they did so under the authority of the Court; and those questions were generally pertinent, and sometimes of great importance. When the evidence was summed up, they carefully attended to the remarks of the Judge. They generally retired to deliberate upon their verdict by themselves: they drew it up in writing, as the Proclamation directs; and they delivered it in by their Foreman, being themselves all present in open Court, and assenting to it when recorded.

14.—In framing these verdicts, they carefully attended to that most material part of their duty, the considering separately the separate facts alleged in the Indictment. Where some of those facts were proved, and some not proved, they did not confound them together in a general verdict of "Proved" or "Not Proved," but suited the verdict, in every particular, to the Evidence: and where several Prisoners were included in one Accusation, the Jurors

carefully distinguished not only whether a Prisoner was entirely innocent or guilty, but whether more or fewer facts were proved against him than his companions.

15.—To make all these distinctions correctly requires great good sense, and what is perhaps a more rare quality, great patience. The Court, in summing up the evidence, endeavoured, to the best of it's ability, to facilitate this part of the Jurors' task; but unless it's efforts had been seconded by the Jurors themselves—unless they had readily followed the suggestions given for their assistance—in a word, unless they had constantly kept in view the sacred obligation contracted by their oath, and had laboured to discharge it to the satisfaction of their Country, their Sovereign, and their own Consciences, it would have been impossible for them to have framed verdicts so correct, so just, and so legal, as those which they actually delivered.

16.—One very satisfactory consequence resulted from their dispassionate examination of the Evidence, and that was, that it led in every case to an *unanimous* verdict; for differences of opinion among mankind on matters of fact result far more frequently from prejudice or passion, than from the real difficulty of the question at issue. On the trials, of which I am now speaking, the unanimous decisions of the Jurors were in every particular confirmed by the *unanimous* approval of the Judges who tried the Causes; and this was in one instance formally established by a Decree of the Court, rejecting a motion for a new trial.

17.—I do not mean to assert that Justice was done *better*, by these Verdicts, than it would have been done, had the same Judges tried the Causes without a Jury; but it was done more *satisfactorily*, and therefore more constitutionally, more in the spirit of that liberal jurisprudence described by Lord Brougham, and which I trust will eventually be common to all parts of His Majesty's Dominions.

18.—From what I have said of the five trials, it is manifest that as to the facts of each cause, the decision rested not only on the *unanimous judgment of Ten persons*, but of tempers of very different origin, habits and stations; viz. three Maltese and three English Common Jurors, a Maltese Foreman, two Maltese Judges, and an English Judge. Looking at all reasonable calculations of moral probability, it is hardly possible to conceive a rational doubt of the accuracy of such Verdicts.

19.—The Public must have been fully convinced, that the Trials were fair. Neither Prosecutor nor Prisoner could

rationally impeach any one Verdict. And however confident a Judge may at any time be in the accuracy of his own opinion, his mind must be much more tranquil when he finds that opinion confirmed by seven impartial and intelligent Individuals, taken indiscriminately from the great body of the Community.

20.—I must not omit to observe that the case in which the three Judges unanimously refused a New Trial, and consequently put upon record the formal unanimity of Ten opinions in favor of the verdict, was a case, where the legal consequence of that verdict was a sentence of *Death*. And indeed, according to the spirit of the Proclamation, it is hardly possible, morally speaking, that that awful sentence can ever be pronounced in this Court on a less number of concurrent opinions.

21.—Upon the whole, the Jurors who served upon these Trials, have, by their conduct, triumphantly refuted the false and injurious notion that the Maltese are unfit for Trial by Jury: they have shown that Malta is worthy of that great boon conferred on her by the ever memorable Proclamation of the 15th of October 1829; and they have honorably to themselves and to their country fulfilled the confidence reposed in them by a liberal and enlightened Government; and have fully justified, so far as they are concerned, the wisdom of the Law.

22.—With regard to those Jurors who were summoned, but were not chosen by lot to serve, there is one circumstance which I cannot but notice greatly to their commendation: I mean the punctuality of their attendance in Court. During the whole Twelvemonth the Commissioners have not had occasion to impose a single fine on any Juror for non-attendance.

23.—I must also say generally of the Maltese Jurors, that whether serving or not serving, whether as Foremen or as Common Jurors, they have uniformly conducted themselves with a regularity, a decorum, and a respectful deference to the Court, which are not only becoming and creditable, but conduce in no mean degree to facilitate the right administration of Justice.

24.—The first element in the composition of a Jury Trial, then, exists at Malta, namely, the Jurors, who are Judges of Fact, and have exercised that function during Three Sessions with the best possible effect.

25.—The next great element in this System are the Judges of Law. These have hitherto been the four senior Maltese

Judges, and myself. I presided (as I was bound to do) at all the Three Sessions. During the first and third, I was supported by the two venerable members of the Supreme Council of Justice; and during the second, by the two Judges next to them in seniority.

26.—For my own deficiencies in the high trust which I have borne, I can only offer pleas of extenuation and apology; but those pleas, in some measure, arise out of the circumstances in which I have been placed. I have acted in a sphere certainly much narrower than that filled by the *Lord High Commissioner of the Jury Court in Scotland,* and with abilities infinitely inferior to those of that very distinguished person; but in other respects my situation during the last year cannot be better described than in the words which he used in 1823.

27.—" By the creation of the Jury Court (said His Lord-" ship) there has been introduced a mode of trial totally " new to the Country, and to all the branches of the legal " Profession, requiring a new set of forms to put it in " motion, and to carry on the business, and officers with " new functions to be performed in a new Court."—" The " prejudices entertained and expressed against the intro-" duction of the measure presented obstacles which could " not but be deeply felt by the person on whom a chief " responsibility was made to rest. He must have ill under-" stood his duty, however, if he had not seen that his func-" tions were not to be confined (like those of Judges ap-" pointed to carry into effect established Law by known " and long established institutions) to the mere care of each " case, as it came before the Court. He must have per-" ceived that he had so to act, as to endeavour to win the " favor of the Public and the Profession, to the Institution " over which he was called to preside; and to be attentive " to all those considerations, which might further the object " of the Legislature."(4)

28.—If I have failed in any of the particulars pointed out as Duties by Lord Commissioner Adam, I can only say, that it has not been for want of zeal or of laborious exertion on my own part; and still less for want of able support by my learned Colleagues.

29.—It might perhaps have been expected, that they would have adhered too closely to the *forms,* and been too much actuated by the *spirit* of that procedure, to which they have been so many years accustomed; but on the contrary, they have never once deviated from the enactments of

the Proclamation; and have adopted, with extraordinary prompitude and accuracy, the legal principles on which those enactments are founded.

30.—In Court, they have maintained the dignity of their station: they have watched alike over the interests of Justice and the protection of Innocence: they have laboured to establish correct forms of criminal pleading, and to preserve inviolable the great rules of evidence, those rules "which are of such vast importance to all orders and degrees of men; in the support of which our lives, our "liberty, and our property are all concerned; which have "been matured by the wisdom of ages; and which are re-"vered for their antiquity, and the good sense in which they "are founded."(5)

31.—In superintending the *vivâ voce* examination of witnesses in open court, my learned Colleagues have shown great ability; and in one instance, a question put to a Witness by one of them (Judge Randon) at once decided the whole merit of the case. Another of them (Judge Debono) suggested to the Public Prosecutor certain difficulties, the solution of which was extremely essential to Justice; and all my Colleagues have aided me greatly in summing up the evidence by their valuable suggestions.

32.—Out of Court, their assistance has been to me invaluable, in consultation not only on the sentences to be pronounced, but on numerous other points of Law and Practice: and it has been my happiness and satisfaction that no question has yet been decided by us, in which my Colleagues and myself have not been entirely unanimous.

33.—So far then as my testimony may be deemed admissible on a point so nearly affecting my personal feelings, I must say, that Malta possesses, in the Judges who have hitherto sate on Trials in the Court of Special Commission, the second great element of Trial by Jury. The Judges, who are to assist me on the approaching Trial, will, I have no doubt, be found equally competent to the discharge of their new duties; but I have at present to speak only of the experience afforded by the Three preceding Sessions.

34.—Another element in Jury Trial is formed by the Ministerial Officers of the Court—the Registrar and Marshal; for their labours, though less prominent than those of the Jurors or Judges, are no less essential to the success of the system.

35.—What I said in my former Address, of the zeal, care and industry evinced by those Officers in the performance

of their preparatory and highly important functions, will be found no less applicable to their subsequent conduct; with this only exception, that the Marshal being personally absent from the Island during the Third Session, his place was supplied by a very able and intelligent Deputy, skilled, as well as the principal, in the English, Italian, and Maltese languages.

36.—The only remaining element in a system of Jury Trial are the Advocates and Legal Procurators. These Gentlemen form in Malta a numerous and well-informed body; and it would be doing them great injustice to suppose that they are generally incompetent to the task required of them in this Court. One or two errors in the outset of their practice may be easily accounted for, and easily excused; but these can surely form no solid objection to the system itself.

37.—Hitherto I have considered only the Five Trials in which the Foreman was a Maltese: the other Trial, and the cases in which the Indictments were quashed, will come better under consideration in a future part of this Address.

38.—But these Five Trials have demonstrated that Malta possesses all the elements of a Jury system; that those elements can be and have been put into complete and effectual operation under His Excellency's Proclamation of the 15th October 1829; that the Jurors, the Judges, and the Ministerial Officers (of course I do not mean to speak of myself) have done their duty beyond all praise; and that Justice has been administered in this Court as faithfully and correctly as it can be in any Tribunal whatever; and in a manner, which, when fully understood, must be satisfactory to the public mind.

39.—Such has been the remarkable, and, I may add, the unprecedented success of this great legal experiment, in it's most essential points, during the Twelvemonth in which it has been tried.

40.—But it would be vain to suppose, that, at it's very establishment in Malta, Jury Trial had suddenly attained perfection; and still more vain to conceive that before it could have been thoroughly comprehended by the Public, it had satisfied every doubt, and silenced all objection.

41.—There is nothing perfect in human nature: there is no human beauty without a blemish; no human character without a failing; no human institution without defects, which time, and observation, and patient reform can alone remove.

42.—Let us therefore look at *this* Institution candidly. Let us listen calmly to all objections which can with any show of reason be urged against it, either in theory, or in practice; not so much regarding the motives of the objector, or the form in which the remarks are conveyed, as the real weight and force of the assertions and arguments employed; for even an enemy may give a salutary lesson, while a friend may labour under errors, which it is important to remove.

43.—From the first moment that the Proclamation began to be put into effect, I carefully noted down every particular which appeared to me defective either in the Law or it's Practice; and I anxiously sought to learn the opinions of others, whether favorable or adverse, and whether proceeding from those distinguished Individuals to whom I look up with unfeigned respect, or from persons obviously speaking under the influence of prejudice or imperfect information.

44.—I shall first consider the objections against this Institution, in theory: and these, I think, may be reduced to three classes.

45.—There are some persons who object against Trial by Jury *altogether*, as unfit for any Country, or at least for Malta at any time, and for any purpose.

46.—A second class of Objectors admit, that in Criminal cases it may, and indeed must, at some future period, be adopted as the Law of these Islands; but they say, that at present it is *premature*; because the Maltese themselves do not desire it; and because the actual state of their penal Laws presents an insuperable obstacle to it's effectual administration.

47.—A third class limit their objections to the peculiar provisions of the Proclamation of the 15th October 1829.

48.—They say, that if Trial by Jury is to be established at all in Malta, it should be established according to the English forms, without any modification;

49.—More particularly, that there should be a Grand, as well as a Petit Jury;

50.—That the Petit Jury should be Twelve in number, and should deliver an unanimous Verdict;

51.—And that the Verdict should pronounce at once upon the Law and the Fact:

52.—But whatever is to be the form of Trial (say they,) it should be exercised in the Ordinary Criminal Court already existing, and not in a Court of Special Commission,

with a separate jurisdiction, which only tends to create confusion.

53.—Such are the objections, which have been made to this measure in theory, by different persons, and on grounds very often inconsistent with each other. There is indeed one general answer to them all, which to most persons will appear conclusive; and that is, that they are opposed to the deliberate wisdom of His Majesty's Government, long employed on the consideration of this very measure, in all it's details.

54.—In order fully to understand this matter, Gentlemen, you will please to recollect what I mentioned in my former Address, namely, that the Proclamation of the 15th October 1829 was long meditated and carefully examined, by the first legal authorities both here and in England, before it's promulgation. (6) In fact, it grew up, by those slow degrees, and with that watchful attention, which, as one of His Majesty's present Ministers has justly said, are necessary to the introduction of any amendments into the Law on safe and intelligible grounds. (7)

55.—Sir Thomas Maitland, Gentlemen, had in view the extension of Trial by Jury to the Law of Malta. This he declared in his memorable Charge of 1815 in the Piracy Court. (8) He did more: he paved the way for it's introduction, by establishing the publicity of Trials, the *vivâ voce* examination of Witnesses, and the other measures of the Judicial Constitution of 1814, which perhaps may be deemed far from improvements, where the same Judge determines on the Law and the Fact, but are necessary preparatives to a Jury system.

56.—Some of you, Gentlemen, may have had the happiness to know that great and good man, Sir John Richardson, whom a dispensation of Providence, lamentable indeed to all his friends, but most fortunate to these Islands, brought, about seven years ago, to Malta. As one of the Twelve Judges of England, and as a sincere well-wisher to his Maltese fellow-subjects, he could not but feel anxious that they should enjoy what he deemed a great political benefit, the *Trial by Jury*. He felt, that it would be impossible to transplant the English system at once to Malta; but he suggested, that Jury Trial might be introduced here under certain modifications adapted to the local circumstances of these Islands.

57.—It was the lot, Gentlemen, of the Individual who now addresses you, to be called to follow in the path traced

out by Sir John Richardson, for improving the administration of the Law in Malta; and I am proud to say, that as I have on every possible occasion consulted him as my oracle, so I have received under his own hand, and up to a very late period, his most flattering approbation of my labours.

58.—Those labours, indeed, were of a very subordinate kind. They required patient investigation and research; but they required little more. It was my duty to examine, and I did examine, all the discussions which took place in the *French Legislature* from 1790 to 1821, on the subject of Juries, and all the opinions collected by the Commissioners in *Scotland*, on the establishment of a Civil Jury Court in that Country. I had to trace, as well as I could, the growth of Jury Trial in *England;* and to apply the whole to what I had observed (during two separate residences in this Island) of the customs, habits and institutions of the Inhabitants.

59.—My imperfect views were submitted, at every step, to the judgment and correction of much higher authorities. One of the earliest cares of our enlightened and liberal LIEUTENANT GOVERNOR was the improvement of the Law: and for full three years and a half, His Excellency had under his consideration the different plans, which he at length embodied in the Proclamation of the 15th October 1829.

60.—During that interval, His Excellency naturally communicated his views on so important a subject to the successive SECRETARIES OF STATE for the Colonial Department: and those high officers would of course not take His Majesty's pleasure upon any plan, until they had consulted the eminent Judge, with whom the first idea of it originated. They did so; and that excellent person, though suffering under bodily disease, applied to the measure the unbroken powers of his great mind, and, after many revisions and important alterations, at length gave it his full and entire approval, as did also His Majesty's Government.

61.—Still this was not all. His Excellency the Lieutenant Governor, with that wise caution which has marked his Government throughout, delayed to promulgate the Law, until he had first called together all the MALTESE JUDGES, and adopted, in several matters of detail, their valuable suggestions.

62.—I said, Gentlemen, on a former occasion, that a more convincing proof could not be given of the wisdom of His Majesty's Government, than that afforded by the cau-

tion with which it proceeded in this great work of Legal Reform. ([9]) But another inference is also to be drawn from these facts. It must be inferred, that so many eminent persons cannot have greatly erred in a measure which they examined so long and so attentively. Perhaps, when this reflection is duly considered, most Gentlemen will hesitate to oppose their private opinions to so great a weight of legal and official authority.

63.—My wish, however, is not so much to silence opposition, as to satisfy doubt, and therefore I shall proceed to examine, one by one, the particular objections alleged against this Institution.

64.—The absolute enemies to Trial by Jury in Criminal cases, must necessarily, in the present day, be few indeed: and they themselves will probably begin to doubt their own judgment, when they consider the testimony of so many great nations in its favour. "It has long been deemed one "of the most valued privileges of the People of *Great Bri-* "*tain*, and inseparably interwoven with the principles of "their political Constitution." ([10]) It is termed by their greatest writers, "the Glory of the *English* Law." ([11]) "In "the Criminal Jurisprudence of *Scotland* it has existed for "several ages:" ([12]) and a learned Lawyer has declared it's recent extension there to Civil Causes "the greatest boon "conferred on that country since the abolition of heritable "jurisdictions." ([13]) When it was first established in *France*, the benevolent Louis XVI. pronounced it to be "one of "the finest presents ever made by Reason to Humanity;" ([14]) and a French Legislator in 1821 termed it, "the best gua- "rantee of their most precious liberties." ([15]) Filangieri has eloquently recommended it to *Italy*: and in the recent revolution, it was one of the first demands of the People of *Belgium*.

65.—They who say, that Trial by Jury is indeed an admirable institution for France, or Scotland, or England, but that the Maltese are incapable of performing its functions, have been answered, as the Philosopher was of old, who denied the existence of motion. His antagonist rose, and walked across the room. What it was said the Maltese could not do, they have done. Nay, they have done it well.

66.—Those objectors are certainly much more reasonable, who admit that we must at some time or other come to Trial by Jury at Malta, but conceive that it would have been advisable to wait till the Maltese themselves had asked for it. One answer to this is, that they have asked for it. So

long ago as 1810, a Petition (of which I possess a copy) soliciting that, among other institutions, was forwarded by a number of respectable Inhabitants to His Majesty's Ministers. A wise Government, however, will neither grant a boon simply because it is demanded, nor withhold it because it is not. It will grant it when the People are prepared to make a good use of the benefit. The determining of the proper time for such a measure certainly requires no small share of wisdom; but in the present case, I am fully satisfied that the opinion of the learned Judge to whom I have so often alluded was correct. Previously to the month of May 1827, he had doubted whether Malta was in a fit state for Jury Trial; but in that month he declared himself quite ready to concur in making the attempt on a limited scale.

67.—The objection founded on the state of the Penal Laws is, at first sight, a specious one; for there is certainly a connexion between that branch of the Law which defines Crimes and Punishment, and that which regulates the mode of applying the Punishment to the Crime. The former is the Penal Law; the latter the Law of Criminal Procedure. Now, in Malta, the Penal Law is composed of the Roman and the Municipal; and both of these being deficient in clearness, it is desirable that they should be reformed. Of this circumstance no man could be more fully aware than Sir John Richardson was; but he did not consider it as a reason for postponing the introduction of Trial by Jury. On the contrary, it seems rather to lead to an opposite conclusion. Generally speaking, it has been found more convenient, in practice, to begin by correcting the Procedure, and then to proceed to the Penal Enactments. Thus the French Code of Criminal Procedure was promulgated in 1808, and the Penal Code in 1810; so Sir Thomas Maitland began his legal reforms in 1814 with the new Constitution of the Courts; and so Sir Robert Peel's Jury Bill in 1825, and his Bill for improving the administration of the Law in 1826 preceded the consolidation of the Laws against Larceny, and malicious Injury to property, which did not take place till 1827.—I may add, that the first measure of Legal Reform proposed by Lord Brougham is a Law for regulating the Courts.

68.—But where the proceeding is by Jury, there is a more entire separation between the Penal Law and the Law of Procedure; for Jurors, generally speaking, have only to find facts: and by the Proclamation they are strictly confined to this duty. To them it is absolutely immaterial what is the

consequence of the facts so found; and whether that consequence is to be determined by the Roman Law, the *Codice di Rohan*, or the English Law; Common or Statute: they therefore can have no motive for wishing the reform of the Penal Code to precede that of the Procedure.

69.—The Judges, on the other hand, as they have the main direction of the Procedure, should be well acquainted with *that*, before they are called on to apply new rules of Penal Law. The form of Trial is the mechanical part of their duty: and until the mechanical habits are well established, it is in vain to attempt to make a progress in the higher branches of any practical science, such as the Law is.

70.—It may perhaps be supposed, that the Prosecutor is placed under peculiar difficulties by the new arrangement; but on the contrary, it is much easier for him to draw up an Indictment founded on a Penal Law with which he is well acquainted, than on one which is new to him.

71.—The real difficulty which he feels, under the present arrangement, is one which he would have to encounter under any system of Penal Law whatsoever, if the Trial were by Jury, in the manner directed by the Proclamation; for that difficulty is simply that as he must separate his Law from his Facts, he must of course be more careful in drawing up his Indictments than he was when both the Facts and the Law were to be determined by the Judge. ([16])

72.—I come now to that class of objectors who agree that Trial by Jury is well suited to Malta, at the present time; but they ask, Why is it not established here under the English system, simply and without any modification?

73.—To this question there are several answers. The first, and perhaps the most satisfactory is, that His Majesty, in his wisdom, thought otherwise; for His Excellency, in his Proclamation, informs us, that "His Majesty com-
"manded, that the benefits of this invaluable mode of
"Trial should be communicated to His Maltese subjects,
"under such modifications, as the general principles of
"the Maltese Law, and the peculiar state of these Islands
"might require." ([17])

74.—We have here, Gentlemen, the great line of distinction between a Constitutional Monarch and a Despot. "The Monarch knows every one of his Provinces, and may "establish in them different Laws, or tolerate different "customs; but the Despot knows nothing but the stern "will by which he governs, and levels all things beneath "his feet." ([18])

75.—Another answer is, that the English system has been tried at Malta, and has failed; or at least has had so bad a success as to afford little ground for imitation. I allude to the Proceedings under the Piracy Commission. Those proceedings are required to be according to the common course of the Law of England. A literal obedience to this requisition is physically impossible at Malta. We, however, came as near to it as circumstances would permit; and what was the consequence? A Jury was in one case chosen, consisting of Three Englishmen, Three Maltese, Four Sicilians, One Spaniard, and One Frenchman. They had to try Nine Persons for their lives, and they were out above Ninety hours, deliberating on their Verdict, which, after all, was unanimous only in name.

76.—Born and educated, Gentlemen, under the English Law, I look up to it with a filial reverence. I regard it altogether as a great monument of human wisdom, and I should rejoice to see it's free spirit diffused through all parts of His Majesty's extended Empire; but a voluntary and gradual approximation to it's excellence is much more to be desired, than a forced, and therefore imperfect submission to it's authority: let us beware that we do not lose the spirit, in a vain and impracticable attempt to preserve the forms.

77.—The excellence of every human institution is relative to the time of its establishment and to the people by whom it is adopted. ([19]) This principle is admirably developed by FILANGIERI, in a passage which one of my learned Colleagues (JUDGE BONAVITA) has applied with great justice to the general question of meliorating the Legislation of Malta. "Laws (says the eloquent Writer) ought to be "suited to the Nations which they are destined to govern:

" and whosoever is invested with the honorable charge of " their dictation, ought, before he undertakes his task, to " study and fully to comprehend the nature of their Govern- " ment, and consequently the springs which give it motion, " the disposition and genius of the People, the ever acting " but still hidden force of Climate, the nature of the Soil, " the local situation, the greater or less extent of the " country, the infancy or maturity of the People, and above " all their Religion, that divine power whose influence on " the character of the inhabitants demands the first atten- " tion of the Legislator." ([20])

78.—In the particulars here enumerated, England and Scotland resemble each other much more than Malta resembles either of them. Yet the Scottish forms of proceeding on a Criminal Jury Trial are widely different from the English. What wonder, then, that in Malta the forms of the same Institution should be accommodated, as has been done by the Proclamation, to the peculiar circumstances of the country, and of its Inhabitants? " True " greatness of genius is best shown, in knowing when it " is desirable for things to be uniform, and when they " admit of difference." ([21])

79.—But let us examine the particular differences objected to: and first the want of a *Grand Jury*. This is not a matter of choice, but of necessity, as I stated to you in my last year's Address; but the necessity is one which, I hope and trust, will be but temporary. My valued friend thus expressed his opinion on this point in 1828:—" I agree " that the experiment of a modified Trial by Jury may, in " the first instance, be made without a Grand Jury; but " I hope that the time is not remote, when this valuable " part of our Institutions may also be introduced. As the " system at Malta now stands, and as it will stand with " the amendments now proposed, the Criminal Law cannot, " I think, be put in operation without the concurrence of " the Crown Advocate, an officer wholly dependent on the " Executive Government." And again in 1830,—" Among " further improvements may hereafter be the introduction " of a Grand Jury, or of some such Institution; so as at " least to afford to a private Prosecutor the means of bring- " ing forward an Accusation, in the possible, though I hope " always highly improbable event of the Officers of Govern- " ment declining to prosecute, in a proper case."

80.—The next important difference is, that our Jury does not consist, like the Petit Jury in England, of *Twelve* members,

obliged to give an *unanimous* Verdict. I advert to these two circumstances of *number* and *unanimity* together; because, when combined, they are entirely peculiar to the English system. Possibly, it may hereafter be found advisable to adopt them in the Law of Malta; but at present we have only to consider whether either of them is so essential to Trial by Jury, that the want of it renders that mode of Trial useless, or of trifling value.

81.—If this question were to be referred to *popular opinion*, it might perhaps be answered differently in different countries; for the great body of the People, every where, form their opinions more on habit than on reflection; and are apt to think that things which they have always seen or heard of in connexion, must be necessarily connected together. Thus in England, Petit Juries have for several centuries consisted of Twelve members, and therefore many Englishmen would find it as difficult to conceive the idea of a Petit Jury of Seven or Fifteen members, as to conceive the idea of a year of Seven or Fifteen months. Whereas in Scotland, previously to 1810, the usual Juries having always had Fifteen members, the Commissioners who in that year recommended a new form of Trial for Civil Causes, did not venture to propose a Jury of Twelve.

82.—Legal Institutions, however, should rather be tried by the judgment of Legal Writers than by Popular Opinion. Now, it must be confessed, that some of the arguments to be found in English Law books in favour of Juries of Twelve are far from satisfactory. For example, the celebrated Lord Chief Justice Coke, who wrote about two hundred years ago, considered that this number of Jurors was preferable to any other, on account of it's *Mystery*. ([22])

83.—It was a favorite doctrine of Pythagoras, and his followers, that some hidden mysteries were contained in numbers. ([23]) It seems indeed strange, that doctrines of so absurd a nature should ever have found a place in Jurisprudence, and yet many of you, Gentlemen, are doubtless aware, that PAULUS, one of the five great Roman Jurists, whose opinions, by an Imperial Edict, received the force of Law, alleges "*a Pythagorean number*" as the ground of a rule of natural Equity. ([24])

84.—You may therefore learn with the less surprise, that SIR EDWARD COKE had the weakness to fancy that he had discovered Mystery, where there was merely accidental coincidence. It is true that we read in the Holy Scriptures of *Twelve* Patriarchs and *Twelve* Apostles: it is equally true

that we are told in Heathen Mythology of *Twelve* Deities who sate, as a Jury, on the trial of *Mars*, for murder: and perhaps a curious research into History and Science might discover many other *Twelves* equally remarkable.

85.—But arguments of this kind are just as applicable to one Jury as to another. Much has been said of the wonders contained in the number *Seven:* and as much perhaps may be said of any other simple, and of several compound numbers.

86.—The fact is, that certain ideas of uniformity sometimes produce an effect even on great minds, but infallibly strike little minds with wonder. ([25])

87.—I need not tell you, Gentlemen, that Paulus and Coke were men of powerful intellect; but each of them shared the errors of the age in which he lived. We, who exist in times when those errors have been generally exploded, should be unpardonable if we were to deem a Jury the better on account of any supposed mystery in the number of its members.

88.—Another argument frequently urged by English Law-Writers, in favor of Juries of Twelve, is their *Antiquity;* and this argument is certainly more reasonable than the preceding; for ancient usage carries with it great weight in the Law, and without a knowledge of legal antiquities, no man can be a sound Lawyer. ([26])

89.—But it is necessary to reduce this argument to its true value; for there is none more apt to be pushed to an extreme; and on this particular question it has been employed with great exaggeration. Some Writers have gone so far as to ascribe the establishment of Trial by Jury to Woden, the fabulous Divinity and Chieftain of all the Teutonic Nations; ([27]) and many have imputed the invention to the legislative genius of Alfred, the celebrated Anglo-Saxon Monarch of the Ninth Century. ([28])

90.—Sir William Blackstone leaves this point in obscurity; and I regret that I have not here the means of consulting two valuable works, which perhaps might throw on it a clearer light: I mean Reeves's *History of the English Law*, and the *Inquiry into the Laws and Institutions of Modern Europe*, by my learned friend Mr. Spence. English Law Books are as yet scarce in Malta; but I fortunately possess the Saxon Laws, from the time of King Ina, A. D. 720, to the Norman Conquest in 1066, and also the observations made on them by Spelman, Lambard, Whelock, Selden, Duck, Houard and Burke; a

careful perusal of which induces me to adopt the conclusion of the last mentioned Writer, that " this Institution did " certainly never prevail among the Anglo-Saxons." ([29])

91.—It is not without diffidence, that I proceed to lay before you my further conjectures on a subject confessedly so obscure; but after much reflection, I am inclined to think, that what my learned friend LORD CHIEF JUSTICE TINDAL said (in his able argument in Thornton's case) of *Trial by Battle*, may with equal truth be said of *Trial by Jury*, namely, " that it was of Norman origin, and unknown " in England before the Conquest," ([30]) a Doctrine indeed distinctly maintained by POLYDORE VIRGIL, a writer of the sixteenth Century. ([31])

92.—The Norman Laws, as they existed about the time of the Conquest, are ably illustrated by HOUARD (himself a Lawyer of Normandy); ([32]) but in order to trace them higher towards their source, it is necessary to consult such Authors as BRISSON, PITHOU, GOLDAST, LINDENBROG, SIRMOND, BIGNON, DUCANGE, BALUZE, and above all MURATORI; whose valuable collections are to be found in the Public Library of Malta.

93.—HOUARD has clearly shown, that the Norman Laws were, in great part, of Frankish origin: and it is to be remembered that the Franks, the Normans, the Saxons, and the other Northern nations in general were originally in that state of barbarism pourtrayed by CÆSAR and TACITUS, of which the two great features are *Valour* and *Superstition*. Among such people, where a wrong is obvious, the remedy is simple and summary; but where the case is obscure, the brave decide it by arms, the superstitious resort to their Priests, who pretend to discover the truth by magical ceremonies and incantations. Hence arise on the one hand *Judicial Combats*, and on the other the *Ordeals* of Fire and Water, and the numberless other follies of a like kind, which mark the natural weakness of the human intellect.

94.—The conversion of the Northern Barbarians to Christianity, in the sixth, seventh and eighth Centuries, was very imperfect. They retained their old Trials by Battle and Ordeal. The wiser part of the Clergy, indeed, proscribed such customs; but the less enlightened thought it sufficient to change the Heathen Incantations into Christian prayers. Hence among the Christian Normans Trial by Battle was allowed by Law, as Trial by Ordeal was among the Christian Saxons. In dark and ignorant ages this circumstance

is not very surprising; but it is equally a subject of astonishment and regret, that Trial by Battle continued to disgrace the English Code until the year 1819! ([33])

95.—The Clergy, among other endeavours to put a stop to these barbarous modes of judicial enquiry, invented the methods of *Sacramental Purgation*, well known to most of you, Gentlemen, from your having studied the Canon Law. The simple *Purgation* (or *Plein Serment*, as the old Anglo-Norman Laws call it) was by the mere Oath of the Party accused, denying the charge brought against him. The *Compurgation* was by the additional oaths of other persons, that they believed him innocent. This mode of Trial was allowed, more or less generally by the Municipal laws of Europe, and particularly by those of England; where, though seldom or never practised in the present day, it is found in our Law-books under the name of *Wager of Law*. ([34])

96.—Now the Compurgators agreed, in so many particulars, with the Jurors of more recent times, that in default of clear historical evidence to the contrary, I think the origin of the latter can only be ascribed to the former.

97.—First, they bore the same *name;* for they are not only termed, in ancient records, *Compurgatores*, *Consacramentales*, and *Sacramentales*, but JURATORES. ([35])

98.—Secondly, "they were rather a sort of *Evidence* "than Judges; and from hence is derived that singularity "in our English Laws, that most of our judgments are "given upon *Verdict*, and not upon evidence, contrary to "the laws of most other countries." ([36])

99.—Thirdly, the Compurgators, like the modern Jurors, were required to be *lawful* men, ("*homes leals*" ([37]) not challengeable *propter defectum;* and credible "*credibiles, accusationibus non infamati,*" ([38]) not challengeable *propter delictum.*

100.—Fourthly, they came necessarily from the *Vicinage* of the party accused, being required to be either his relations, or at least his neighbours; for if these would not attest his innocence, the oaths of strangers could be of little avail. And this circumstance proves clearly, that the Jurors could not have been originally intended to perform the functions of mere Judges; for if they had, their acquaintance with the party, and still more their relationship to him would have formed a reason for their exclusion.

101.—Fifthly, it was, above all, a rule that Compurgators should be of the same rank and condition with the party by

whom they were produced, ([39]) they were therefore to be not challengeable *propter honoris respectum;* and consequently a Trial by their Oaths was really a *Judicium Parium,* which description our Lawyers ordinarily give to Trial by Jury.

102.—Sixthly, although at first the Compurgators were all produced by the party accused, yet as experience showed this rule to be an unsafe one, therefore, by the laws of some countries, they were in part named (*Nominati*) by the accuser, and in part called upon (*Advocati*) by the party accused. ([40]) In other countries, they were named by the Accuser, with a power of *challenging* by the party accused, ([41]) and in others again, they were chosen by *lot* out of a larger number, ([42]) each of which measures brings a Compurgator so much the nearer in function to a modern Juror.

103.—Seventhly, when Compurgators were chosen in any of the modes last mentioned, and were lawful and credible men of the vicinage of the accused and were his equals, the person putting himself upon such a trial may well have been said "to put himself upon his *country,*" *ponere se super patriam,* by which expression our most ancient Law-Writers are understood to mean a Trial by Jury.

104.—Eighthly, Compurgation will account for the *Unanimity* required in English Verdicts; since it is manifest that all the Compurgators produced in a cause must have sworn to the same belief.

105.—And lastly, from Compurgation was probably derived the number *Twelve,* of which no other rational account has ever been given. It is true that Compurgators are found to have been used in all numbers, from One ([43]) to a Hundred, ([44]) and even more; but the rule of the Canon Law was, that though a Priest might be cleared by Seven, Five, or even Three Ecclesiastical Compurgators, ([45]) yet a noble or free Layman required Twelve of his own condition. ([46]) And this number Twelve was taken from the example of Pope Leo III. ([47]) who probably thought it becoming his sacred character, that his innocence should be attested by Twelve Bishops, as our Saviour's was by Twelve Apostles.

106.—Trial by Jury, as distinct from Compurgation, is never once mentioned in the Anglo-Saxon Laws, nor in those of William I. and Henry I., which are now extant. But these laws give an option, in many cases, to the Defendant, either to swear with Compurgators or to undergo Trial by Ordeal if a Saxon, or by Battle if a Norman, both which latter modes were termed "judgments of God," "manifest

law," and " law of the land." Now it is remarkable that Bracton who wrote in the reign of Henry III., shortly after the abolition of Trial by Ordeal, states the option in his time to be between the Defendant's " defending himself by " his body," ([48]) (in battle) and " *putting himself upon the* " *country.*" I infer from this, that between the reigns of Henry I. and Henry III. either a perfectly *new* mode of Trial called " putting one's self on the Country," was introduced, (of which event we find no trace in history) or else (what is much more probable) Compurgation, under the name of " Trial by the Country," was *gradually* and silently passing into that system which we now call " Trial by Jury."

107.—One circumstance, which seems to have formed a step in the transition, is not to be overlooked. In the time of Bracton, the Judges did not in all cases allow the accused person either to defend himself by his body, or to put himself upon the Country; for if they thought the proof of guilt clear, they proceeded at once to judgment, ([49]) and if the fact was one of a very secret kind, they only allowed the accused to defend himself by his body, but not to put himself upon the Country. ([50]) In this early period of Jury Trial, therefore, the judicial functions of the Jurors were, at all events, considerably limited.

108.—The result of this examination of the argument drawn from Antiquity is, that so far as we are at present able to determine, Trial by Jury was not established by the deliberate wisdom either of Alfred, or of any other Saxon Legislator, but arose gradually, long after the Saxon times, out of the practice of Compurgation, or from other sources which still remain in obscurity.

109.—But to whatsoever origin the English system of Trial by Twelve unanimous Jurors is to be ascribed, the only true and solid reason in it's favor is it's *practical utility.* Now Utility is a thing altogether relative: it depends on times, and places, and persons. Possibly there may be something in the natural dispositions of the People of England, which renders them more capable of uniting Twelve opinions in one Verdict, than the natives of some other countries are; but at all events, it is certain that they have been more habituated to consider such unanimity to be practicable. Neither do they see in it that unreasonableness, nor that moral unfitness, which it is elsewhere supposed to imply; because they have known so many wise and good men by whom it has been approved. The contrary of all this takes place at Malta. We have here seen only difficulties occurring in

the attempt to carry the system of compulsory unanimity into effect: we here perceive it to be in opposition to the general laws and customs of the country: we hear it condemned as unreasonable by the wisest and most venerable persons amongst us: and we observe that the most honorable individuals feel a conscientious repugnance (when they are under the obligation of an oath) to submit their opinions, in any degree, to the influence of those with whom they are associated. Even in England it often happens, that an Individual cannot conscientiously join with his fellow Jurors in a Verdict, and consequently that they must either resign the decision entirely to him, or else that no Verdict at all can be returned: and in either way the interests of justice are sacrificed. Much more likely would this be to happen at Malta; as I have already shown by reference to the proceedings of the Piracy Court.

110.—In regard to number, the population of Malta are very differently situated from those of England. It is more difficult to assemble here a Jury of Seven competent persons, than it is there to assemble one of Twelve; and it is to be remembered, that the number of votes is less important than the moral probability of ascertaining the truth of a question. Now, I have already shown, that in five, out of six trials had during the last year, under the Proclamation, the moral probability that truth was correctly ascertained, was such as to admit of very little doubt. For these reasons, I think that at the first introduction of Trial by Jury into Malta, it was wise to adopt the suggestion of the eminent Judge to whom I have so often alluded, by forming a Jury of Seven persons, who should decide by a majority.

111.—I have next to consider, whether it was advisable to separate the Law entirely from the Fact, in the Verdict. Now, the Verdict must be founded on the Indictment: and on this point I have the satisfaction of being able to state the distinct opinion of my valued friend. "I agree with you," said he, in 1827, "that the English form of Indictment will "be quite inapplicable to Malta." And again, in 1830, after he had had an opportunity of judging of the practical effect, he spoke with decided approbation of the new form of Indictment, "by which," as he remarked, "a clear ques-"tion is to be proposed to the Jury, for their affirmance or "disaffirmance of certain matters of fact, disembarrassed, "as much as possible, from all considerations of Law or "consequence."

112.—Undoubtedly the English form is different: and I am not prepared to say, that in England it may not be more convenient; but then the English Procedure, in this respect, as well as in the number of Jurors and mode of deciding the Verdict, has grown up from an accidental combination of circumstances, which has formed habits of thinking peculiar to the People of that country. When we are to introduce a new procedure into a country not so prepared for it's reception, the only mode of ensuring it's success is to reduce it to it's simplest principles, and to exhibit those principles in their most elementary shape.

113.—The great leading principle in Trial by Jury (as I stated to you in my former Address) is the separation of the question of *Law* entirely from the question of *Fact.* ([51]) And subordinate to this is another principle, namely, that of separating, in the question of Fact, the *Overt Act* from the *Intention.* All this is sufficiently provided for in the Proclamation of 1829, more especially if considered in conjunction with the Speech, in which I endeavoured to explain the general purport and intent of that Proclamation. The misfortune has been, that Gentlemen have not always taken the trouble of studying the Proclamation in the Proclamation itself, and still less in the commentary offered to their consideration, but have consulted English Books of Practice as their guides on those very points, in which the Proclamation necessarily and unavoidably deviated from the English system.

114.—First then, I say, the Fact must be separated from the Law. "To separate the Fact from the Law (said "a French Legislator in 1790) is often very difficult; but "to judge well without that separation is impossible." ([52]) To effect this separation in civil matters is thought to be sometimes beyond the power of a mere Juror; but in Crimes, the line is generally so plain, that no one can mistake, unless a confusion be wilfully made in the terms in which the question is proposed.

115.—The Jurors are exclusive Judges of Fact, and of nothing else. This principle, and the constitutional grounds on which it stands, are so well and so distinctly stated by Sir Thomas Maitland, that no man can possibly make them clearer. ([53]) I have only to add, that the maxim *De facto respondeant Juratores, de Lege Judices,* is one of the most ancient known to the English Jury Law: and the same has been uniformly maintained in France by Orators of all political opinions, from 1790 to the present day. ([54])

Nay, it is even consecrated as a principle in one of the existing Codes. ([55])

116.—According to the Proclamation of 1829, the Jurors are to try the *Facts* stated in the Allegation of Facts read over and given in charge to them; and if those facts are alleged in plain and popular language, they will be able to do so; but they will not be able to do so, if the facts are alleged in technical language, in words which mean one thing to a Lawyer, and another thing to a man that is no Lawyer. In English Indictments, indeed, many technical words are introduced; but then the Jury are bound to take the lawful meaning of those words from the Judge. Use and practice has rendered this familiar to most persons in England; but even there a confusion sometimes arises between the functions of Judge and Juror. Sometimes the Jury decide the Law of the case erroneously, and contrary to the direction of the Judge; and sometimes they leave matter of Fact to the Judge, by the manner in which they draw up a Special Verdict. It was foreseen that this confusion would be much greater at Malta, if the English form of Indictment were adopted; and therefore, with the full approbation of a most experienced English Judge, that form was altered, by separating altogether the Facts from the Law.

117.—The object of a Criminal Trial is to find out the Truth; and the most certain way to find out the truth in such a trial is, to begin by stating, as plainly and distinctly as possible, the Facts constituting the Offence. I said, in my former Address to you, that every Criminal Fact cognizable by a temporal Tribunal consists of two parts, the *Overt Act*, and the Intention; ([56]) but the plainest and most distinct way to state any fact consisting of two parts is to state those two parts *separately:* and therefore, in the form of Indictment drawn up, with the first sketch of the Proclamation, and considered and approved in England, in 1827, the Overt Act and the Intention were stated separately. This form was adopted in two or three of the first Indictments here preferred, and was approved by the Court, and became the proper form and style of the Court, from which the Practitioners are not at liberty to vary. I am glad to observe, that the Indictment now before the Court is (in that respect) drawn up regularly, and I trust that such regularity will continue to be observed in all future instruments of the same sort.

118.—Some persons erroneously suppose, that the word *Fact*, used in the Proclamation, means only a *material fact*,

that is, an outward bodily movement, and not any inward movement of the mind; but this error may be corrected by reference to Authors well known in the Maltese Courts. The celebrated RAYNALDUS, citing CALDERO (*Decis. Cathalon.* 39. n. 11) says "this quality of deliberate intention is matter of fact, and separate from the killing." (57)

119.—A question of Law may doubtless arise upon an intention, as well as upon an overt act; but *ex facto oritur Jus*, the fact must first be established before the question of Law arises. Thus, if two men stop another with intent to rob him, and one of them repent and abandon his purpose, it is a question of Fact, whether he repented before the robbery was completed; but it is a question of Law, whether such repentance shall excuse him from any and what penalty. (58)

120.—The only remaining objection to the Proclamation is, that it establishes a *separate Court* for the introduction of Trial by Jury. The same objection was made against the new Civil Jury Court in Scotland; but it was repelled by all who knew the real difficulty of introducing a new system of procedure into any country. My lamented friend, Lord ALLOWAY, said, "I am quite satisfied that so great "a change in our present form of procedure, and one so "inimical to the prejudices of a great body of the practitioners of the Law, however popular with the public in "general, could not have taken place without a *separate* "*Court* being instituted for introducing the principles and "practice of this new system." (59) After the Court had existed eight years, a near and dear relative of my own, now raised to the Scottish Bench, stated his opinion, "that "it should be still exclusively employed for some time "longer, in the trial of all questions of Fact." (60) And upon the suggestion that its business might be transferred to the Court of Session, the present SOLICITOR-GENERAL for Scotland observed, "Nothing, certainly, could be more "useful than such an union; but the problem is, if it be "likely to be promoted by the instant demolition of the "Jury Court, and the sudden transference of its peculiar "duties on the Court of Session, before any general code "of rules and of principles has been capable of being matured for the administration of Jury trial? It humbly "appears to me, not only that it would not, but that the "attempt would prove altogether delusive. We may "change the name; but I do not think that at present it is "in our power, *if we are to have Jury Trial vested in a*

" *Court at all*, to make that Court materially different from " the one that we have, after this one shall have been im- " proved as it ought: and this being the case, I can see " no reason for any change in the constitution of the ex- " isting judicatory, which has a much better prospect of " maturing a proper system than any other Tribunal." (61) Lastly, LORD COMMISSIONER ADAM himself said, " It " seemed to be generally agreed, when the Statute of 1815 " was under consideration, that the benefit of Trial by Jury " in Civil Causes could not have been easily accomplished by " imposing at once the direction and superintendence of " trials on the Judges of the Court of Session." And after stating various impediments to such a course of proceeding, he continued—" It seems, from all this, as if a gradual " and delicate line of proceeding, not likely to interfere " with the usual course of justice, and calculated by suf- " ficient guards, to protect the Law of Scotland from any " risk of injury, had been necessary, to familiarize the " professional and public mind of the country to the intro- " duction of the measure into its judicial system." (62) And again, " We must, in all this, look forward to the " time when the Court for trial of Civil Causes by Jury will " cease to partake of the character given to it by the " Statutes of 1815 and 1819, namely, that of being a " *separate Court*, aiding and auxiliary, as it were, to the " Court of Session. It ought never to be absent, therefore, " from the mind of whoever may have the superintendence " of the Jury Court, in its present form, that the utmost " foresight should be exercised to make provision for in- " corporating the presiding Tribunal in matters of Civil Right " by Jury, with the ancient judicature of Scotland." (63)

121.—I have cited at length, Gentlemen, the opinions of these eminent persons, because few or none of you will dispute the wisdom of what comes recommended with such a weight of authority: and every one of you must see, that the arguments apply *à multò fortiori* to the establishment of *this Court*. My learned friends, who sit in the Criminal Court, would certainly have hesitated to try the experiment of Jury Trial without any assistance. They would have desired at least the aid of their Seniors of the Maltese Bench, and probably also that of the only English Judge who happens to be in the Island: and this is precisely the aid that they now have. With or without this aid, if Jury Trial be introduced into the Maltese Criminal Court, it must either apply to all the cases, or only to a part of them. It

cannot apply to all, without entirely annihilating the present Constitution and procedure of the Court, which, if attempted at once, would surely be a very violent mode of introducing Trial by Jury, and not likely to be attended with any great success. It must therefore be attempted partially, if at all; and that cannot be done without drawing a line of jurisdiction, to determine what causes shall, and what shall not be tried by a Jury: and probably all persons will agree with SIR JOHN RICHARDSON, that the experiment should first be tried on those cases, which, as being of the gravest description, are of rarest occurrence.—But this is exactly *what has been done;* and therefore the only dispute is, whether this Court shall be *called* a branch of the Criminal Court, or a Court of Special Commission: and if it were worth while to dispute about a name, I should say, that the latter is certainly the more appropriate title; because as the line of jurisdiction must be drawn by a Commission, openly read in Court, and subject to periodical revision, it seems natural that the Court should be designated from that Instrument.

122.—There is indeed one point in which we differ greatly from the Scottish Tribunal, and that is in the point of *expense,* a matter certainly not to be overlooked in the present day. For the Scottish Jury Court there was allotted, by the Statute of 1815, an annual sum of *Seven Thousand Pounds* to pay the salaries of the Judges and Officers; ([64]) and to this, I believe, an addition was made in 1819, besides a discretionary allowance for the erection of a Court and other buildings. Far be it from me to say, that the great boon of Civil Jury Trial was purchased too dearly by the People of Scotland, or that the distinguished talents of the Judges, and the industry and experience of the subordinate Officers, were too highly paid; but I cannot help observing, that the Court established by the Proclamation of 1829 in these Islands has cost the Board of Public Works, as I am informed, somewhere about *Four Pounds Sterling,* for chairs and other accommodations to the Gentlemen of the Jury; that the Commissioners have hitherto had no addition to their previous Salaries as Judges; and that the only Officers to be paid are a Registrar and Marshal, both of whom together would, I apprehend, be more than satisfied with the Salary of the Fourth Clerk to the Scottish Jury Court. Nor can even the Salaries of the Registrar and Marshal be properly set down to the account of the Court of Special Commission; for, if Jury Trial had been originally introduced into the Criminal Court, some such Officers must have

been there appointed; since nobody can suppose, that the present Officers of that Court would have been competent to the discharge of all those arduous and delicate duties, which the first establishment of a Jury Court in any country demands, and which the Registrar and Marshal of this Court have so ably, so diligently, and so meritoriously performed.

123.—I have done, Gentlemen, with the objections to the Proclamation itself—objections which I consider to be merely theoretical, and all of which I hope I have satisfactorily answered. The remaining objections are of a different nature, as they regard the manner in which the Proclamation has been carried into effect.

124.—The first is, that the Court has not *condemned* all the Prisoners brought before it for trial! God forbid, Gentlemen, that I should ever sit in any Court, whose merits are to be estimated by the number of its *Condemnations!* God forbid that I, or any other Judge, or any Juror, should ever forget the lesson which I learnt in my very first professional studies, and inculcated in my last year's Address to you, and shall never cease to inculcate on every becoming occasion; that "the Impartiality, which is required by Jus-"tice, is far from excluding the Humanity which interests "us on behalf of Innocence."([65]) God forbid, that when a Fellow Creature stands before any one of us, on his life and death, we should for a moment forget that he is a Fellow Creature, and that we ourselves shall hereafter stand before an infinitely more awful seat of judgment!

125.—I say more: Every man is presumed innocent, until he is *proved* to be guilty; and therefore the Tribunal which condemns on any thing short of *legal proof* of guilt, violates a duty of the utmost importance to society. The Judges violate that duty, if they send illegal proof to the Jury; and the Jury violate it, if they declare a fact proved, which is not proved by the evidence before them. Proof *direct* or *circumstantial* is legal proof in this Court, if the Jurors conscientiously believe it to be true, but not otherwise: and it might not be amiss, if we were to adopt, with a slight alteration, the rule contained in the French Code of Criminal Procedure, (No. 342.) which is to this effect:

"Before the Jury begin their deliberation (on the evi-"dence) their Foreman shall read to them the following "Instruction, which shall moreover be written in large cha-"racters, and fixed up in the most conspicuous part of the "room to which they retire:—The Law demands of the "Jurors no explanation of the means by which they are

" convinced; it prescribes to them no rules on which they " must make the fulness and sufficiency of the proof de- " pend: it directs them to examine their own minds in " silence and meditation, and to ask themselves, in the sin- " cerity of their conscience, what impression has been made " on their reason by the proofs adduced against the Pri- " soner, and the means used for his defence. The Law " does not say to them, You shall hold a fact to be true, " if it be attested by such or such a number of Witnesses: " neither does it say to them, You shall not hold a proof to " be sufficient, unless it be established on such or such a " judicial act, or on such or such documents, such a num- " ber of Witnesses, or such sort of presumptions: it only " asks them this simple question, which includes the whole " measure of their duties—*Are you internally convinced?*

" What it is very essential for them never to lose sight " of, is, that the whole deliberation of the Jury turns on the " Act of Accusation; that they must pay attention solely to " the facts alleged in it, or depending on it; and that they " will fail in their chief duty, if, thinking on the dispositions " of the Penal Laws, they take into consideration the con- " sequences which their verdict may produce to the Pri- " soner. The object of their function is not to punish " crimes: they are only called upon to say whether the " facts alleged against the Prisoner are proved, or not " proved."

126.—In the Five Trials, to which I have already alluded, the Jurors did punctually and honorably fulfil the duties pointed out in this Instruction. Some of those cases indeed ought not to have been brought before them at all; but that was certainly not their fault. I have heretofore offered an apology for the early failures of the Public Prosecutor in this respect, owing to an inexperience which must be allowed for in all first attempts; but both the Court and the Public will expect that in future no charge shall be here preferred which is not clearly within the jurisdiction of the Court, and which the Public Prosecutor is not prepared to support with reasonable and legal evidence. As to the jurisdiction, it is marked, in the Commissions hitherto issued, with a line so plain and so clear, that no Lawyer can possibly mistake it; for it is limited wholly by written and positive Law: and though no man can precisely say, in all cases, what proof of fact will satisfy the mind of another person, yet most men of ordinary understanding can discern whether or not a particular proof is reasonable, and fit to be

offered to the consideration of a Court; and more than that ought not to be expected.

127.—The verdict in the remaining Trial has been more particularly censured. It was a charge of Infanticide; and under all the circumstances, I think it was a fit one to be brought before the Court, but not in the manner in which it was brought. The Indictment contained four articles of Fact, and on three of them there was not an iota of rational evidence; but several Witnesses were examined, and many hours consumed, so that the Gentlemen of the Jury were unnecessarily kept away from their business and domestic comforts for a whole night, which I am sorry to say rendered them, towards the end of the Trial, rather impatient. From this cause, as I am inclined to apprehend (but I speak it with great deference) they omitted to examine the evidence on the Second Article of the Allegation with that minute and scrupulous attention which all preceding Juries had given to every part of the cases before them, and which these Gentlemen themselves appear to have bestowed on the First, Third, and Fourth Articles. The Seven Jurors and the Three Judges were unanimously of opinion, that the facts constituting the capital part of the charge were neither proved, nor upon the evidence at all probable; so that this verdict also, so far as it negatived a capital crime, may be considered, like the others, to have been the unanimous opinion of Ten persons, upon oath, after a careful and deliberate Trial of many hours; and it is needless to add, that up to this point, the verdict is entitled to quite as much respect as any other. If the question, whether a minor delinquency was proved, had been one which could be submitted to the Three Judges who tried the cause, they probably would have unanimously answered it in the affirmative, whereas it was negatived by the verdict; and therefore I cannot speak of this verdict in terms of such unqualified praise as I have felt it my duty to bestow on the others. Still, if this had been the only Trial held under the Proclamation, I should have been disposed to augur extremely well of the result of the Institution in general at Malta, and I much doubt whether a first attempt of the kind, in any other country, was ever conducted, upon the whole, with more propriety. Sitting here, however, as I now do, to explain the Law, and to show how it has been administered, I am bound fairly to notice even a slight degree of failure.

128.—It has been thought extraordinary, that so many as *Four Indictments* out of Ten should have been quashed; but

this also has been the consequence of bringing causes before the Court without a sufficient degree of previous consideration. The Judges, in rejecting these Indictments, were perfectly unanimous. My learned Colleagues know, better than I can instruct them, the strict obligation they are under, to see that every Indictment is so drawn up as to state an offence within the jurisdiction, and to state it with such clearness, that the Prisoner may know the charge against which he is to defend himself, the Jurors may know what facts they are to declare proved or not proved, and the Court may see from the Verdict what sentence they have legally to pronounce. The four Indictments in question could not be received, because they did not come within these rules.

129.—It has been alleged, that the obscure state of the Penal Law renders the drawing up of an Indictment under it difficult; but the Penal Law is the same in both Courts, and the only difference is, that the practice of the Criminal Court allows both Law and Fact to be alleged with less precision than is required in this Court. It has been well observed by a learned Judge, with whom I have the honor of a distant connexion, that "Jury Trial in England has been an "important instrument in the progressive improvement and "systematising of the Law."([66]) The same consequence will result from it here, if due attention be paid to the correction of failures in necessary precision.

130.—No doubt, the reducing of the procedure to system may be facilitated by the Court itself in framing Rules and Orders for the guidance of the Practitioners. And "it seems "to be incident to the nature of a new Institution, that a "discretionary power of improving the forms should to "some extent exist."([67]) But on this subject the remarks of my learned Colleague, JUDGE BONNICI, are extremely worthy of attention. "The best method," says he, "of "bringing these proceedings to perfection seems to be, that "the Commissioners who preside should observe in the "progress of a cause, whether any delay, confusion, or dis-"order arises from the imperfection of any existing regula-"tion, or from the want of any new regulation; and should "in such case adopt the proper remedy, either by an Order "of Court, if the Court should possess an adequate autho-"rity, or by reporting to the Government the necessity for "promulgating a new Law. In this manner provision has "already been made, by the temporary Regulations of the "31st May last, against the inconvenience complained of on

" the part of the Jurors, in regard to the length of time " during which they were detained every Session. And in " like manner, by the Proclamation of the 2d August sub- " sequent, the regulation of Indictments, and other parts " of the Procedure were provided for." To the like effect wrote my learned Colleague, DR. SATARIANO, when I consulted him on the same subject; and I have accordingly, with the aid of all my Colleagues, made some progress in the preparation of Regulations, which, I trust, will be ready for publication before the opening of another Session. In these, I propose to provide for the preparing, the presenting, the amending, or quashing of Indictments, the conduct of the Trial, the proper means to secure evidence, to protect persons in attendance on this Court, and in the discharge of its duties, and to punish Contempts; and especially, I hope, by an alteration in the Sessional Lists, and in the mode of ballotting for Juries, to lighten that duty which, as I last year observed, bears with unequal pressure upon the Jurors and Foremen of the English Class.

131.—I have thus, Gentlemen, I hope, satisfied you that the theoretical objections raised against the introduction of Trial by Jury into Malta, in the form in which it has been established, originate in error and misconception; I have shown that a legislative enactment so long and so deeply considered by the local Government here, and by His Majesty's Ministers in England, by a distinguished ornament of the British Bench, and by all His Majesty's Judges in these Islands, is founded upon sound legal principles, and calculated to improve the administration of Justice. I have shown that the Maltese Jurors and Judges have carried into effect His Majesty's gracious intentions with honor to themselves, and with credit to their country: and if some deficiencies have occurred in one particular department, they can in no degree be laid to the charge of the Institution, and may be easily remedied by a careful study of the principles of the Proclamation in the Proclamation itself, and in those Regulations which will, from time to time, be issued for ensuring its due execution.

132.—Having thus humbly endeavoured to discharge a laborious public duty imposed on me by superior authority; it now becomes me to return my sincere and heartfelt thanks to all those Gentlemen, whose valuable assistance has lightened my burden. I have to thank, above all, my honored friends Judges DEBONO and RANDON, from whose great learning, experience and ability I derived most

valuable support during the First and Third Sessions of this Court. I have greatly to thank Judges BONNICI and BONAVITA, for their co-operation with me on the Second Session, and Judges VELLA and SATARIANO for their consultations with me preliminary to the Session which is now about to open.

133.—To the BARON GIUSEPPE MARIA DE PIRO, and to Messrs. GIORGIO METROVICH, FRANCESCO SAVERIO FARRUGIA, GIUSEPPE BUTIGIEG, and GIUSEPPE DE MICHELE CAMILLERI, I beg to return thanks, in my own name, and in that of the Public, for the exemplary care and punctuality with which they performed the functions of Foremen of Juries, in a manner which cannot be surpassed by those who may follow them in that honorable charge.

The Marshal will excuse my expressing those sentiments which I feel towards him; but I cannot refrain from acknowledging the indefatigable labours of Mr. GIUSEPPE ONOFRIO, the Registrar of the Court, without whose able and strenuous aid I should have found it utterly impossible to get through my arduous task. I fear, the exertions of this Gentleman (than whom a more meritorious public servant does not exist in Malta) have been injurious to his health: and therefore, in the approaching Trial, although I know no individual who can supply his place, yet I hope some means will be found to relieve his personal fatigue.

134.—Finally, Gentlemen, let us all, as Inhabitants of these Islands, join in thanks and acknowledgments to our excellent LIEUTENANT-GOVERNOR, whose name will ever be recorded in the annals of Malta, as one of it's most enlightened Benefactors, for having established TRIAL BY JURY, an Institution so congenial to the spirit of the age in which we live, so conducive to the political and moral advancement of the People, and so secure a protection to the fair administration of Criminal Justice.

NOTES.

(1) Et quant à la venue de nos Justices, volons nous, que come ils serrount venus là, ou ils deyvent eyrer, que ilz monstrent le poer, qui ils averount de nous par nos lettres patentes, et en audience del people les facent lire; et puis celuy, que primes serra nosmé en celes lettres, monstre et die al people les enchesons et les profites de lour venue en cel counté.

(BRITTON, c. 2.)

(2) LORD CHANCELLOR BROUGHAM, 2 December 1830.

(3) H. COCKBURN, Esq. Scottish Commissioners' Report, 1824. Appendix, p. 80.

(4) LORD CHIEF COMMISSIONER ADAM, Sc. Com. Rep. 1824. Appendix, p. 266.

(5) LORD KENYON, 3 Term Reports, 721.

(6) Speech, 15 Feb. 1830. § 28.

(7) MARQUESS LANSDOWNE, 18 March 1828.

(8) SIR T. MAITLAND'S Charge, 15 November 1815.

(9) Speech, 15 Feb. 1830. § 29.

(10) SIR T. MAITLAND'S Charge, 18 November 1815.

(11) BLACKSTONE'S *Commentaries*, 379.

(12) LORD CHIEF COMMISSIONER ADAM, Sc. Com. Rep. 1824. Appendix, 267.

(13) JAMES IVORY, Esq. Sc. Com. Rep. Appendix, 154.

(14) *Proclamation du Roi*, 15 Janvier 1792.

(15) M. MESTADIER, 7 May 1821.

(16) H. COCKBURN, Esq. Sc. Com. Rep. Appendix, 81.

(17) Proclamation, 15 October 1829; Preamble.

(18) MONTESQUIEU, *Esprit des Loix*, L. 6. c. 1.

(19) DUC DE LEVIS, 31 March 1821.

(20) FILANGIERI, *Scienza della Legislazione*, v. 1. p. 16.

(21) La Grandeur du Genie ne consisterait elle pas mieux à sçavoir dans quels cas il faut l'uniformité, et dans quels cas il faut des différences? (MONTESQ. *Esp. des Loix*, Lib. 29. c. 18.)

(22) COKE'S *Institutes*, V. 1. p. 155.

(23) SIR T. BROWN, *Vulgar Errors*, L. 4. c. 12.

(24) *Septimo mense* natus Matri prodest. *Ratio enim Pythagorei numeri hoc videtur admittere.* (PAULUS, Recept. Sent. L. 4. t. 9.)

(25) Il y a de certaines idées d'uniformité, qui saisissent quelquefois les grands Esprits, mais qui frappent infalliblement les petits. (MONTESQUIEU, *Esp. des Loix*, Lib. 29. c. 18.)

(26) Præter corpus ipsum Juris, juvabit etiam antiquitates Legum invisere. (BACON, *Aug. Sci. de Fonte Jur.* Aph. 86.) In causis gravioribus non abs refuerit Legum præteritarum mutationes & series consulere & inspicere. (Ibid.)

(27) BISHOP NICHOLSON, *de Jur. Sax.* p. 12.

(28) 3 BLACKSTONE'S *Commentaries*, 350.

(29) BURKE'S Works, Vol. 10, p. 294.

(30) *Ashford* v. *Thornton*, 1 Barnwell & Alderson's Reports, 441.

(31) POLYD. VIRG. *Hist. Ang.* c. 9.

(32) HOUARD *Anciennes Loix des Français*, 2 tom. Rouen 4° 1766.

(33) Statute 59 Geo. 3. entitled, *An Act to abolish Appeals of Murder, Treason, Felony or other Offences, and Wager of Battel, or joining Issue and Trial by Battel in Writs of Right.* 22 June 1819.

(34) 3 BLACKSTONE'S *Commentaries*, 341.

(35) DUCANGE ad voces *Juramentum* et *Juratores.*

(36) BURKE'S Works, V. 10, p. 361.

(37) Leis et Coustumes que li Reis William grantut a tut le peuple de Engleterre, c. 16.

(38) Leges Henrici I. c. 10.

(39) Maximé ejusdem Conditionis et Ordinis quibus Reus vel Actor primarius *Sacramentale* esse jubebantur. (DUCANGE, voc. *Juramentum.*)

(40) Et cum duodecim Sacramentalibus juret, quinque *nominatis* et *septem advocatis.* (*Lex. Alaman.* tit. 53.)

(41) Et cum duodecim viri fuerint nominati, licebit Reo tantùm Tres viros inimicitiæ causâ *recusare* de nominatis duodecim: in quorum locum actor statim tres alios nominabit. (ANDREAS SUENO. *Leg. Scan.* L. 7. c. 8.)

(42) In Denelaga 48 electi, et *sorte* potiùs quàm electione juraturi. (Leg. Henrici I. c. 66.)

(43) Aut cum *uno sacramentali* juret, quòd nescivit furtum quando comparavit. (*Lex Baiuvar.* t. 8. c. 14. § 2.)

(44) Ita quòd prædictus Eliensis Episcopus jurabit cum *Centesimâ manu sacerdotum*, quòd ipse nec præcepit, nec voluit ut Archiepiscopus Eboracensis caperetur. (ROG. HOVEDEN, Ann. 1194.)

(45) Sacerdos—cum *Tribus* aut *quinque*, vel *septem* bonis ac vicinis sacerdotibus se purgatum Ecclesiæ reddat. (circ. A. D. 800. *Decretum*, Par. 2. caus. 2. qu. 5. c. 19.)

(46) Nobilis homo, vel ingenuus si eum constiterit fidelem esse, cum *duodecim* ingenuis se expurget. (A. D. 895. Ibid. c. 15.)

(47) Exemplo Leonis Papæ, qui *duodecim* Episcopos in suâ purgatione habuit. (Ibid. c. 19.)

(48) Habebit electionem, utrùm se ponere velit *super patriam* (utrùm culpabilis sit de crimine ei imposito, vel non) vel defendendi se per corpus suum. (BRACTON.)

([49]) Nisi aliqua violenta præsumptio faciat contra ipsum, quæ probationem non admittit in contrarium—in quo casu *non* est necesse probare *per corpus, nec per patriam.* (BRACTON.)

([50]) Item poterit factum esse tam occultum, quòd secta sit nulla, vel minùs ritè facta, quo casu non habebit Appellatus electionem utrùm se ponere velit *super patriam*, vel defendere se per corpus suum; sed oportet quòd defendat se per corpus suum. (Ibid.)

([51]) Speech, 15 Feb. 1830. § 33.

([52]) ADRIEN DUPORT, 30 April 1790.

([53]) SIR THOMAS MAITLAND'S Charge, 1815.

([54]) See particularly the Speech of M. ADRIEN DUPORT, 29 March 1790; the Circular of M. MERLIN, 25 Fructidor, year 4; and the Speeches of MM. FAURE, 29 November 1808, DE MARBOIS, 27 March 1821, CORNUDET & DESEZE, 30 March 1821, DE BARENTE & LALLY TOLENDAL, 31 March 1821, MESTADIER and CHIFFLET, 7 May 1821, &c. &c.

([55]) Les fonctions de *Juré* sont incompatibles avec celles de *Juge*. (*Code Inst. Crim.* Art. 384.)

([56]) Speech, 15 Feb. 1830. § 37.

([57]) Ista qualitas animi de deliberati est facti, et separata ab homicidio. (RAYNALDUS, *Observ. Crim.* cap. VII. Suppl. 3. n. 19.)

([58]) See 1 Leach, 387.

([59]) LORD ALLOWAY, Sc. Com. Rep. 1824. Appendix, 40.

([60]) LORD MONCREIFF, ibid. p. 199.

([61]) H. COCKBURN, Esq. ibid. p. 84.

([62]) & ([63]) LORD CHIEF COMMISSIONER ADAM, ibid. pp.267–68.

([64]) Stat. 55 Geo. 3. c. 42. § 12. and Stat. 49 Geo. 3. c. 35. ss. 31, 32, 40.

([65]) Speech, 15 Feb. 1830. § 42.

([66]) LORD MEADOWBANK, Sc. Com. Rep. Appendix, 193.

([67]) LORD MONCREIFF, ibid. p. 200.

Printed by James & Luke G. Hansard & Sons,
near Lincoln's-Inn Fields, London.

TRIAL BY JURY.

SPEECH

DELIVERED BY

THE CHIEF JUSTICE OF MALTA,

ON THE

18TH JANUARY 1831.