

CHAPTER XX.

Public Anticipation of the Trial—Appearance of Burke and M'Dougal in the Dock—Opening of the Court—The Debate on the Relevancy of the Indictment.

As the day fixed for the trial drew near, the public excitement became more and more intense. The feeling against the culprits was very strong, and while the statement that Hare and his wife were to be accepted as informers was received with a notion of displeasure, it was thought that the revelations they would make would fully compensate for the loss to justice by their escape from punishment. This displeasure was not as yet very definite, for the people were unaware of the real facts of the case, and had only a very hazy and general idea of what was likely to be brought out in court. The public feeling, however, ran so high that the authorities deemed it necessary to take every precaution to prevent a disturbance, and on the evening before the trial the High Constables of Edinburgh were ordered to muster; the police were reinforced by upwards of three hundred men; and the infantry in the Castle and the cavalry at Piershill were held in readiness for any emergency. The trial and its possible outcome was all the talk, and the revelations about to be made were eagerly anticipated.

Early on the morning of Wednesday the 24th December, Burke and M'Dougal were conveyed from the Calton Hill Jail, where they had been confined, and were placed in the cells beneath the High Court of Justiciary in Parliament Square until the time for the hearing of the case should come. The inhabitants of the city were also early afoot, and crowded to the square anxious to gain admittance to the court-room. "No trial," said the *Edinburgh Evening Courant* of the following day, "that has taken place for a number of years past has excited such an unusual and intense interest; all the doors and passages to the court were accordingly besieged at an early hour, even before daylight; and it was with the utmost difficulty, and by the utmost exertions of a large body of

police, that admission could be procured for those who were connected with the proceedings. At nine o'clock the courtroom was completely filled by members of the faculty and by the jury. Lord Macdonald and another noble lord were seated on the bench." At twenty minutes to ten o'clock the prisoners were placed in the dock, and this is the description of them given by the *Courant*:—"Burke is of a short and rather stout figure, and was dressed in a shabby blue surtout. There is nothing in his physiognomy, except perhaps the dark lowering of the brow, to indicate any peculiar harshness or cruelty of disposition. His features appeared to be firm and determined; yet in his haggard and wandering eye, there was at times a deep expression of trouble, as he unconsciously surveyed the preparations which were going forward. The female prisoner appeared to be more disturbed; every now and then her breast heaved with a deep-drawn sigh, and her looks were desponding. She was dressed in a dark gown, checked apron, cotton shawl, and a much worn brown silk bonnet." The audience eagerly scanned the features of the prisoners, and watched their every movement, during the half-hour that elapsed between their being placed in the dock and the judges ascending the bench. At ten minutes past ten o'clock their lordships took their seats. These were—the Right Hon. David Boyle, Lord Justice-Clerk; and Lords Pitmelly, Meadowbank, and MacKenzie. The Crown was represented by Sir William Rae, Bart., Lord Advocate; and Messrs. Archibald Alison, Robert Dundas, and Alexander Wood, Advocates-depute; with Mr. James Tytler, W.S., agent; while the counsel for Burke were the Dean of Faculty, and Messrs. Patrick Robertson, Duncan M'Neill, and David Milne; and for M'Dougal, Messrs. Henry Cockburn, Mark Napier, Hugh Bruce, and George Paton, with Mr. James Beveridge, W.S., one of the agents for the poor. There were thus the best men of the Scottish bar engaged in the trial. The defence, of course, had been undertaken gratuitously by these eminent counsel, but the sequel showed that it suffered nothing at their hands on that account.

The court was fenced in the usual form, and the Lord Justice-Clerk, as the presiding judge, called upon the prisoners

to pay attention to the indictment to be read against them. Mr. Robertson, however, interposed by stating that there was an objection to the relevancy of the libel, and he submitted it was proper to make such an objection at this stage of the proceedings. The Lord Justice-Clerk did not see that this was the proper time, but Mr. Cockburn urged that the reading of the document would prejudice the prisoners in respect of certain particulars which he was certain the court would ultimately find were no legal part of the libel. On Lord Meadowbank hinting that an objection at that stage was interfering with the discretion of the court, Mr. Robertson intimated he would not press the matter further, and the indictment was accordingly read.

When this was done, the following special defences were submitted to the court:—For Burke—“The pannel pleads that he is not bound to plead to, or to be tried upon, a libel which not only charges him with three unconnected murders, committed each at a different time, and at a different place, but also combines his trial with that of another pannel, who is not even alleged to have had any concern with two of the offences with which he is accused. Such an accumulation of offences and pannels is contrary to the general and better practice of the court; it is inconsistent with the right principle; and, indeed, so far as the pannel can discover, is altogether unprecedented; it is totally unnecessary for the ends of public justice, and greatly distracts and prejudices the accused in their defence. It is therefore submitted, that the libel is completely vitiated by this accumulation, and cannot be maintained as containing a proper criminal charge. On the merits of the case, the pannel has only to state, that he is not guilty, and that he rests his defence on a denial of the facts set forth in the libel.” For M'Dougal the defence was—“If it shall be decided that the prisoner is obliged to answer to this indictment at all, her answer to it is, that she is not guilty, and that the Prosecutor cannot prove the facts on which his charge rests. But she humbly submits that she is not bound to plead to it. She is accused of one murder committed in October 1828, in a house in Portsburgh, and of no other offence. Yet she is placed in an indictment along with a different person,

who is accused of other two murders, each of them committed at a different time, and at a different place,—it not being alleged that she had any connection with either of these crimes. This accumulation of pannels and of offences is not necessary for public justice, and exposes the accused to intolerable prejudice, and is not warranted, so far as can be ascertained, even by a single precedent.”

Mr. Robertson then went into a long and learned argument in support of these defences. He submitted that both prisoners were prejudiced by being charged together in the same indictment, for they were both put off their guard as to the evidence and productions to be brought against them, and he further pointed out that in respect of the choice of a jury the accused were deprived of advantages given them by the law. If the charges had been separated they would have been able to make a more complete defence, and they would have had twenty challenges at the calling of the jury; but as it was, by the accumulation of pannels and offences, their defence was hampered and their number of challenges limited. He quoted in his favour both Scotch and English authorities—apologising, however, for bringing forward the latter—and in concluding said—“When your lordships look, then, at this case, in all the aspects I have set before you—when you see that there are accumulated and combined charges against different prisoners—when you see the atrocious nature of these charges, the number of the witnesses, the declarations, and the number of the articles libelled—and when you see the humane and salutary principles of our law, and the practice of this court,—your lordships will not be inclined to form a precedent, which, in the *first* place, would be injurious to the law of the country; and, in the *next* place, would be injurious to the unhappy persons now brought to this bar.”

This speech caused a feeling of admiration in the court, for the advocate had put forward his arguments in a most able manner; but there was also something akin to dismay in the minds of many present lest the culprits should escape because of any flaw in the indictment.

The Lord Advocate had a difficult task before him, but he confidently rose up to reply to the arguments adduced from the

other side of the bar, and attacked them in a most spirited manner. He thought he could completely defend his method of bringing the prisoners to trial, and show that it was not only sanctioned by the law of the country, but also by numerous precedents, even by those quoted by his learned friend. But his object in placing the female prisoner in this indictment was that she might derive benefit rather than prejudice. Had he tried the man first, and afterwards the woman, adducing against her the same, or nearly the same, evidence brought against Burke, she would have had good reason to complain of prejudice. However, since the objection had been raised he would not then proceed against her, but would do so ten days hence. "But if she should suffer prejudice," said he, "from the evidence in Burke's trial going abroad, let it be remembered it is not my fault. She and her counsel must look to that—it is their proceeding, not mine." Turning to the objections in Burke's case, he said:—"As to the second objection, whether or not I am entitled now to go to proof on the three charges here exhibited, or shall proceed *seriatim*, I am aware that this is matter of discretion with the court. In so far, however, as depends upon me, I declare that I will not consent to this being dealt with in the last of these modes. No motive will induce me, for one moment, to listen to any attempt to smother this case; to tie me down to try one single charge, instead of all the three. If I had confined myself to one of those charges; if I had served the prisoner with three indictments, and put the pannel to the hardship of appearing three times at that bar, I would have done one of the severest acts that the annals of this court can show. I am told that the mind of the public is excited; if so, are they not entitled to know, from the first to the last of this case; and is it not my duty to go through the whole of these charges? I would be condemned by the country if I did not, and what to me is worse, I should deserve it." His lordship then went over the authorities cited by Mr. Robertson, and contended that they all bore against the arguments brought forward by the counsel for the defence.

Replying for the defence, the Dean of Faculty very learnedly examined the authorities quoted, with the object of showing

that the action of the public prosecutor, in framing the libel as he had done, was illegal, and without precedent.

The pleadings finished, Lord Pitmilley delivered the leading judgment. He reviewed the arguments urged from both sides of the bar, and signified his approval of the course the Lord Advocate intimated he would take with M'Dougal. As for Burke, he had stated through his counsel that he would suffer prejudice by going to trial on an indictment which charged him with three acts of murder, unconnected with each other, and his lordship therefore thought the prisoner should be tried for each of the acts separately. Lords Meadowbank and Mackenzie, and the Lord Justice Clerk, concurred in the opinion given expression to by Lord Pitmilley, and supported it by elaborate reasonings.

The Lord Advocate, thus tied down, intimated that he would proceed with the third charge libelled—the murder of Docherty—and that he would also proceed against M'Dougal as well as Burke, for she could suffer no prejudice in being brought to trial for this single act, on which she was charged as act and part guilty along with Burke. This decision rather surprised the Dean of Faculty, who thought the diet against the woman had been deserted *pro loco et tempore*, but the prosecutor claimed to proceed as he had indicated. Their lordships then pronounced an interlocutor of relevancy:—"Find the indictment relevant to infer the pains of law; but are of opinion, that in the circumstances of this case, and in consequence of the motion of the pannel's counsel, the charges ought to be separately proceeded in: and that the Lord Advocate is entitled to select which charge shall be first brought to trial, and His Majesty's Advocate having thereupon stated that he means to proceed at present with the third charge in the indictment against both pannels—therefore remit the pannels with that charge, as found relevant, to the knowledge of an assize, and allow the pannels, and each of them, a proof in exculpation and alleviation," &c.

The prisoners were then asked to plead to the indictment as amended, and they both offered the plea of "Not Guilty." A jury was empanelled—fifteen men, as required by the law of Scotland. The preliminary objections were thus got over,

and the trial could be proceeded with; but the result of the discussion was that the public were deprived of the satisfaction of knowing in an authoritative manner the mystery connected with the deaths of Mary Paterson and Daft Jamie.

CHAPTER XXI.

*The Trial of Burke and M'Dougal—Circumstantial Evidence—
Hare's Account of the Murder of Docherty—What he
Declined to Answer—Mrs. Hare and her Child.*

THE first witness called for the Crown was James Braidwood, a builder, and master of the Edinburgh fire brigade, who attested the correctness of the plan of the houses in Wester Portsburgh prepared for use in the trial, and which has been reproduced in this volume. He was followed by Mary Stewart, in whose house, in the Pleasance, Mrs. Docherty's son resided, and in which that unfortunate woman had slept the night before the murder. She remembered the circumstances well. The old woman was in good health when she last saw her in life, but she had no difficulty in recognising the body in the Police Office on the Sunday following. Further, she identified the clothing found in Burke's house, and produced in court, as having belonged to the deceased. Charles M'Lachlan, a lodger, corroborated this testimony. The shop-boy of Rymer, the grocer in the West Port, in whose premises Burke met Docherty, described what took place between them on the memorable Friday morning, and also mentioned the purchase by Burke on the Saturday of a tea-chest similar to the one in which the body had been conveyed to Knox's rooms. But the relationship between the prisoners and Docherty was brought out by a neighbour, Mrs. Connaway, who related that she had seen the old woman in their house during the day, and that it had been explained to her by M'Dougal that the stranger was a friend

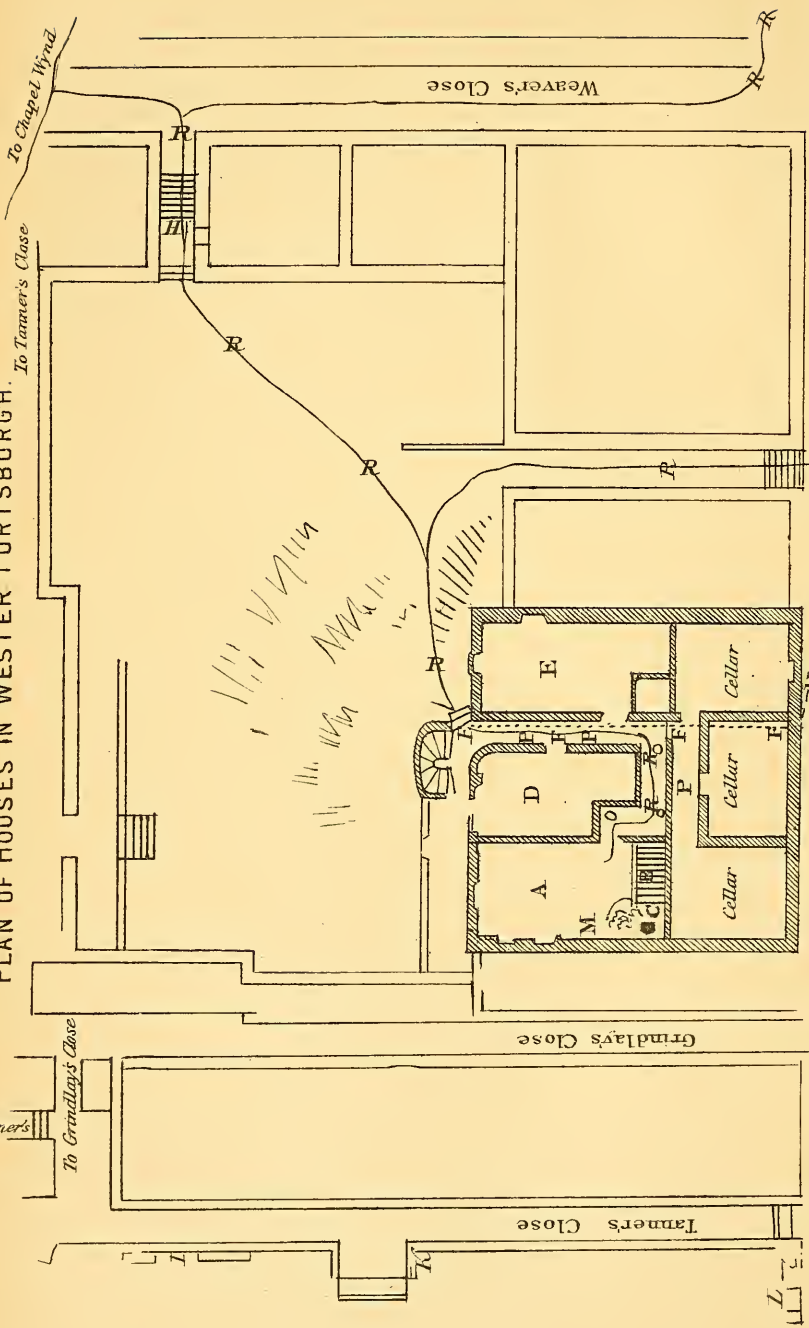
of Burke. Later in the evening the old woman was in her house, when they were joined by Hare and his wife and the two prisoners. A dram was going round, and they began to be merry, until at last some of them took to dancing. In the course of this Docherty hurt her feet. The company afterwards returned to Burke's house, and Mrs. Connaway went to bed, but heard no noise or disturbance during the night. Next day she went in to see M'Dougal, and, missing the stranger, she asked what had become of her, when she was told that "Burke and her had been *ower* friendly together, and she [M'Dougal] had turned her out of doors: that she had kicked her out of the house." The evidence of Mrs. Law, another neighbour, was similar in effect, with the addition that in the course of the night she had heard the noise of "shuffling or fighting" proceed from the house of the prisoners. More to the point, however, was the testimony of Hugh Alston, a grocer, residing in the same property. Between eleven and twelve o'clock on the night of Friday, the 31st October, while going along the passage that led from his house to the street, he heard a noise proceeding from Burke's house. The sound was as if two men were quarrelling, but what most attracted his attention was a woman's voice calling "murder." He went towards the door and listened, and he heard the two men making a great noise as if wrangling or quarreling. This continued for a few minutes, and then he heard something give a cry—a sound which seemed to proceed from a person or animal being strangled. After this remarkable sound had ceased he again heard a female voice cry "murder," and there was a knocking on the floor of the house. As he was afraid of fire, Alston went to look for a policeman. Not finding one he returned to his old stance, but the noise by this time had ceased. When he heard next night of the body having been found in the house the whole incident of the previous evening came back to him.

Interesting as all this evidence was, the testimony of David Paterson, "keeper of the museum belonging to Dr. Knox," as bearing on what was termed "the complicity of the doctors," attracted more attention. This witness gave an account of

how, about midnight, Burke called on him and took him to his house in Portsburgh, to point out that he had a subject for him. He identified Burke, M'Dougal, and Hare and his wife as being in the house while he was there, and he further stated that he had seen them the night after, when he paid the two men an instalment of the price of the body. He was examined at some length as to the appearance of the body when he gave it up to the police, and said the marks and the look of the face indicated that death had been caused by suffocation or strangulation, while the general appearance showed that the corpse had never been interred. He knew Burke and Hare, and had often had dealings with them for bodies. There were, he knew, people in the town who sold bodies that had never been interred; and he had known gentlemen who had attended poor patients, and who, on their death, gave a note of their place of abode, and this in turn was handed to men such as he supposed Burke and Hare to be, to get the bodies. This was startling information to the bulk of the people of Scotland, but, as has been shown in some of the early chapters of this work, it was nothing new to a certain class of the population of Edinburgh and other towns. The succeeding witnesses were Broggan, Mr. and Mrs. Gray, and Fisher the detective, but as their evidence has been embodied in the account of the murder itself, it need not be repeated here.

William Hare was next brought forward, and his appearance caused quite a sensation in court. It was known that on his evidence and that of his wife the case for the Crown principally rested, and "expectation stood on tiptoe" to hear the account he would give of the foul transaction in which he was a prominent actor. His position as an informer was peculiar, and Lord Meadowbank cautioned him "that whatever share you may have had in the transaction, if you now speak the truth, you can never afterwards be questioned in a court of justice," but if he should prevaricate he might be assured that the result would be condign punishment. The Lord Justice Clerk further informed him that he was called as a witness regarding the death of Docherty, and in reply to this he asked—"T'ould woman, sir?" He was then put on oath, being sworn on a New

PLAN OF HOUSES IN WESTER PORTSBURGH.



Portsburgh

Portsburgh

PREPARED FOR USE AT THE TRIAL OF BURKE & M^C DOUGAL. S - - - S
 For Explanatory Key See Page XII.

Testament having on it a representation of the cross, a mode only adopted in Scotland when the witness belongs to the Roman Catholic Church. In answer to the Lord Advocate he said he had known Burke for about a year. On the 31st October he had a gill with Burke, and the latter then told him that in his house there was an old woman whom he had taken off the street, and who would be a good *shot* to take to the doctors. From this word *shot* he understood that Burke intended murdering her. His evidence of the events up to the time of the quarrel about eleven o'clock was quite consistent with all that has already been related, but his account of the actual murder is worthy of reproduction. Having described the fight, during which the woman tumbled over the stool, he said, in answer to the Lord Advocate :—

He [Burke] stood on the floor;—he then got stride-legs on the top of the woman on the floor, and she cried out a little, and he kept in her breath.

Did he lay himself down upon her? Yes; he pressed down her head with his breast.

She gave a kind of a cry, did she? Yes.

Did she give that more than once? She moaned a little after the first cry.

How did he apply his hand towards her? He put one hand under the nose, and the other under her chin, under her mouth.

He stopped her breath, do you mean? Yes.

Did he continue this for any length of time? I could not exactly say the time; ten or fifteen minutes.

Did he say anything to you when this was going on? No, he said nothing.

Did he then come off her? Yes; he got up off her.

Did she appear dead then? Yes; she appeared dead *a wee*.

Did she appear to be quite dead? She was not moving; I could not say whether she was dead or not.

What did he do then? He put his hand across her mouth.

Did he keep it there for any length of time? He kept it two or three minutes.

What were you doing all this time? I was sitting on the chair.

What did he do with the body? He stripped off the clothes.

He took it and threw it at the foot of the bed, doubled her up, and threw a sheet over her ; he tied her head to her feet.

While this was going on, Hare continued, the two women had run into the passage, and they did not return until all was over. He then detailed the proceedings of the Saturday, as already described.

Hare's cross-examination, however, gave rise to an animated discussion. Mr. Cockburn, senior counsel for M'Dougal, asked him—"Have you been connected in supplying the doctors with subjects upon other occasions than those you have not spoken to yet?" The answer was—"No,—than what I have mentioned"; but the Lord Advocate objected to this line of examination. Mr. Cockburn appealed to the bench, and the witness was withdrawn while the question was being discussed. He insisted he was within his right in putting such a question, though the witness might answer it or not as he chose, but it would be for the jury to judge of the credit due to his evidence after it was seen how he treated the question. The Lord Advocate, on the other hand, contended that the caution given the witness when he entered the box precluded examination on any subject other than what was involved in the case they were trying. Authorities were again cited by both sides, and after considerable discussion, the judges pronounced an interlocutor declaring that the question might be put, but that the witness must be warned by the court that he was not bound to answer any question that might criminate himself.

Hare was recalled, and Mr. Cockburn resumed his cross-examination.

"Were you," said the counsel, "ever concerned in carrying any other body to any surgeon?"

"I never was concerned about any but the one that I have mentioned," replied Hare.

"Now, were you concerned in furnishing that one?" asked Mr. Cockburn.

"No," responded the witness, "but I saw them doing it."

"It is now my duty," interposed the Lord Justice Clerk, addressing Hare, "to state to you, in reference to a question in writing, to be put to you, that you are not bound to make any answer to it so as to criminate yourself. If you do answer

it, and if you criminate yourself, you are not under the protection of the court. If you have been concerned in raising dead bodies, it is illegal; and you are not bound to answer that question."

"Now, Hare," said Mr. Cockburn, after he had repeated the judge's warning, "you told me a little ago that you had been concerned in furnishing one subject to the doctors, and you had seen them doing it—how often have you seen them doing it?"

The witness thought a moment, and then declined to answer the question.

"Was this of the old woman the first murder that you had been concerned in? Do you choose to answer or not?"

"Not to answer," replied Hare, after a minute's consideration.

"Was there murder committed in your house in the last October?" persisted Mr. Cockburn.

"Not to answer that," was all the reply Hare would give.

The rest of the cross-examination was confined chiefly to the murder of Docherty, but Hare's original evidence was in no way shaken by it, and he was removed from court still in custody.

If Hare's appearance created interest in court, that of his wife caused quite as much. She was ushered into the witness-box carrying her infant child in her arms. The poor creature was suffering from whooping-cough, and every now and then its "kinks" interrupted the examination, sometimes very opportunely, when the questions put required a little consideration on the part of the witness. Mrs. Hare's evidence contained only one point calling for special notice. That was when, after relating how she ran out of the house when she saw Burke get upon Docherty, and returned to the house and did not see the woman, she was asked—"Seeing nothing of her, what did you suppose?" Her answer was—"I had a supposition that she had been murdered. *I have seen such tricks before.*" This hint was not followed up. But the remarkable fact about her whole testimony was that it corroborated, with exception of one or two points, that of her husband. There can be no doubt that they had conned their story together

before they were apprehended—for it was not likely they would have an opportunity of making it up while they were in custody. Be that as it may, their evidence was wonderfully alike.

The evidence of the police surgeon and of the medical men who made an examination of the body, was next taken up, and it all tended to show that death had been caused by suffocation or strangulation, the result of violence and not of intoxication. The reading of the prisoners' declarations concluded the case for the prosecution, and no evidence was brought forward for the defence.

CHAPTER XXII.

The Trial—Speeches of Counsel—Mr. Cockburn's Opinion of Hare—The Verdict of the Jury.

WITHOUT any delay, on the reading of the declarations, the Lord Advocate at once commenced his address to the jury, and the public feeling is fully reflected in the following remarks made by him at the outset:—"This is one of the most extraordinary and novel subjects of trial that has ever been brought before this or any other court, and has created in the public mind the greatest anxiety and alarm. I am not surprised at this excitement, because the offences charged are of so atrocious a description, that human nature shudders and revolts at it; and the belief that such crimes as are here charged have been committed among us, even in a single instance, is calculated to produce terror and dismay. This excitement naturally arises from the detestation of the assassins' deeds, and from veneration of the ashes of the dead. But I am bound to say, that whatever may have occasioned this general excitement, or raised it to the degree which exists, it has not originated in any improper disclosures, on the part of those